

# Representing applicants to the CCRC

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‘It is not necessary to use a solicitor when applying to the Commission (CCRC), but some applicants find that there are benefits to having a legal representative. He or she may be able to help to identify the key issues in your case, and advise you before, during and after the review.’

(CCRC page on the MoJ website)

- Are there benefits from legal representation? (CCRC staff have different views)
  - How many applicants are represented by lawyers?
  - What is the role of the lawyer in the application and what problems do they face?
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# Our research

- Independent research by Warwick University, funded by the Legal Services Commission
  - We looked at 300 CCRC cases:
    - Detailed analysis of 10% of cases decided in a two year period
    - Plus detailed analysis of all cases considered by a committee in that period (whether referred or rejected)
  - We also extracted data on legal representation and case outcome for all cases in a 7 year period
  - We conducted 15 CCRC interviews, 7 solicitor interviews, 13 solicitor questionnaires
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## Answering the big question: Do lawyers make a difference?

- Yes! Cases are more likely to be reviewed more thoroughly and more likely ultimately to be referred to the Court of Appeal
  - Issues raised by lawyers were crucial in half of the referrals where the applicant was legally represented
  - Lawyers are responsible for changing PSORs to referrals in 15% of referred cases
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# Background – The statutory framework

## **Criminal Appeal Act 1995 s13 – CCRC test for referral**

- There must be a ‘real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made’
- AND
  - This real possibility must be based on new evidence or argument AND
  - The applicant must have already appealed the decision or had leave to appeal refused.
  - UNLESS there are exceptional circumstances.

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# Background: The CCRC process

- The application
  - Screening – eligibility, no appeal and no reviewable grounds
  - The case review
  - Investigative powers
  - The decision-making stage
  - Post-decision issues
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# Do applicants need lawyers?

- The CCRC aspires to be independent and impartial
- In 15% of referrals the CCRC was solely responsible for identifying the grounds for referral
- The review process is more inquisitorial, but this does not exclude a role for lawyers
- In a similar proportion of referred cases lawyers persuaded the CCRC to reverse their decision and obtained a referral
- The RCCJ's view was that lawyers would be needed
- Views within the CCRC have changed over time – and are complex and conflicting
- Solicitors are firmly decided!

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“the vast majority of lawyers add no value whatsoever to the application, we act as better lawyers for them than their lawyers ever do”

Commissioner

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“you cannot be both judge and advocate, and the Commission is in the role of being both judge and advocate. I know they are not judges, it's not a judicial body, but they are making a judgment at the end of something, and every wrongfully convicted person deserves an advocate, if not 10 legal advocates and [...] I just see that there is an absolute inherent conflict [of] interests.”

Solicitor

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# The extent of legal representation

- One third of applicants were legally represented
  - This is lower than had been estimated
  - 64% of cases referred to the Court of Appeal had legal representation
  - 29% of no review cases had legal representation
  - Visible involvement from counsel was rare (but generally highly effective)
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# The lawyer's role: *The theory*

- This is a predominantly inquisitorial process – should the lawyer provide assistance, counterbalance or challenge?
- How should an adversarial trial lawyer engage with an inquisitorial post-conviction review body?
- The need for cross-checking decisions – does the committee structure provide this?
- Importance of the 'real possibility'; must guard against non-referral simply because believe CA might well uphold the conviction (reversing the test)

# The lawyer's role: *in practice*

- the application is crucial

- 54% of applications were rejected at the screening stage as ineligible, no appeal or as revealing 'no reviewable grounds.' This is the most important hurdle to get over
- A significant proportion (17%) of lawyers were failing to prepare an adequate application
- Clearly lawyers are also screening out cases prior to application (by advising clients that there are no grounds to apply)
- Little consensus on how to approach an application (do as much work as possible, or just point the CCRC in the right direction?) Funding likely to be an issue

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‘They [*the issues raised in the application*] are not determinative in that we should pick up things that aren’t raised by the solicitor which make the case referable but if I’m honest they are key to determining the question of how hard we look.’

Case Review Manager

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...we've just had a case which is a third application to the Commission and I've just written it up as a referral. The point that's now been raised has been raised by a solicitor... this point has never been raised in either of the two applications or on appeal...it's to do with the defence case not being properly put in the summing up. And solicitors have got advice from counsel...So I mean, there I'm sort of sitting wondering, 'Well has no one read the summing up before?' but then I'm thinking perhaps if I had that case before, if you're not sort of looking for a specific point you might not see it which is a little worrying. (CRM)

## Discussion: Preparing the application

- ▣ What materials would you need to see in order to advise on an application to the CCRC?
- ▣ If your client was in prison, would you go to interview him/her?
- ▣ If you identified a potential new witness, would you interview him/her yourself before applying to the CCRC?
- ▣ If you saw a need for a new expert report, would you instruct an expert before applying to the CCRC?
- ▣ In what circumstances would you need to discuss the case with the trial lawyers?
- ▣ As a solicitor, in what circumstances would you obtain advice from counsel before applying to the CCRC?



Coffee break



# Contents of the application: 1

- There is little formal guidance but a good application is likely to mirror the CCRC's statement of reasons
  - Basic details of conviction, co-defendants etc
  - Outline key issues at trial
  - Outline nature of the defence case at trial
  - If guilty plea, give detailed account of basis of plea, circumstances and reasons for going behind plea)
  - Outline details of appeal or application for leave, including grounds
  - If no appeal, then you must argue exceptional circumstances – see FM 'Exceptional Circumstances'
  - Submissions

# Contents of the application: 2

- Submissions
  - Why might this conviction be unsafe?
  - How much of this is new (not used at trial or appeal stage)?
  - If it is new evidence then how will it satisfy section 23 CAA 1968
    - In particular, is it capable of belief and is there a reasonable explanation for the failure to adduce it earlier?
    - If it was available at trial but not used then the CCRC will want a waiver so that they can contact defence lawyers – you may want to look into this
    - If s23 is problematic, you may want advice from counsel
  - Significance of CCRC case planning

# Contents of the application: 3

- If you have no new evidence or argument:
  - What lines of enquiry should the CCRC pursue?
  - What might this lead to and how could that impact on 'safety'?
  - Is the material sought likely to satisfy s23?
  - Is the CCRC uniquely placed to conduct these enquiries? (this lessens the risk of the case being screened out)
- If there is no new evidence or argument and you can not suggest any lines of enquiry then see FM 'Exceptional Circumstances' – there is a high risk of being screened out unless someone gets 'a feeling' about the case

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*Getting 'a feeling' about a case:*

'You can't do that with 1000 applications but occasionally you think, let's just spend a bit more time thinking about this, where could we take this, so to that extent you campaign, if you like, in the investigative sense, in a small number of cases.'

Commissioner

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# Discussion: during the review:

## ■ Questions:

- What do you think is the lawyer's role *during* the CCRC review?
- How much information would you like the CCRC to share with you about its review during the review (as opposed to after the referral or provisional decision)?
- Would you expect to comment on instructions to experts and questions for witness interviews before the CCRC undertook the line of enquiry?

# During the review

- The importance of the trial lawyer – knowledge of the case
- The investigation is organic – defence input as new issues arise
- The value of good representation
- ‘Disclosure will not be made prior to a provisional decision not to refer, or on a piecemeal basis throughout the review, unless the Commission considers that to do so would assist in the exercise of its functions or is required in the interests of fairness to the applicant.’

Formal Memo. ‘Disclosure by the Commission’

## Myth: 'Lawyers delay and even obstruct the review'

- There was no evidence that lawyers caused significant delays.
- Where there were delays in the lawyer responding to CCRC requests, these were in parallel with other outstanding queries.
- CCRC showed frustration about delays in responding to provisional decisions – but lawyers face great difficulties in responding to a complex decision in 28 days with little notice.
- In fact, lawyers can reduce the CCRC caseload.

“The amount of effort it takes on a complex case where you’ve got an applicant who is unrepresented, to unravel the issues and what the potential areas might be that might reveal a miscarriage of justice is huge, and if we were called upon to do it in relation to every case, without having some representation of applications at least in...a significant number of cases, I don’t think we could do our jobs at all, to be perfectly honest...without our finances spiralling out of control and us overlooking miscarriages of justice...a good representative who understands how the appellate system works will identify properly the issues at trial, will know the difference between a point that that applicant raises which will not give rise to a miscarriage of justice or a referral and one which will, will be able to make appropriate pre-application inquiries”

(Commissioner)



# Discussion - the decision-making stage

- In practical terms, how do you think the CCRC makes its decisions?
- e.g.
  - Who makes the decision to refer/not to refer?
  - What is the format/style of the meeting? Who is present?
  - What material do they consider?
  - Who drafts the statement of reasons?
  - What is the role of the case review manager in decision making?
  - What record is made of the discussion?
  - Do decisions need to be unanimous?
  - If there is a 'real possibility', must the CCRC refer?
- As the applicant's representative, is this how you would *want* it to make its decisions?

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# The decision-making stage

- Single commissioner OR committee – depending on likelihood of referral or on complexity
  - It is likely that the CRM will have made a recommendation to refer or not refer
  - Referral is discretionary – even if there is a real possibility, the CCRC can decline to refer
  - Disclosure at the decision-making stage
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## Responding to a provisional decision not to refer

- Our research shows the importance of ‘pushing back’ and arguing the applicant’s case
  - Counsel’s advice may be very useful
  - Judicial review – but this risks delay whereas re-application could also be effective.
  - Unrepresented applicants are at a significant disadvantage in responding to a provisional decision
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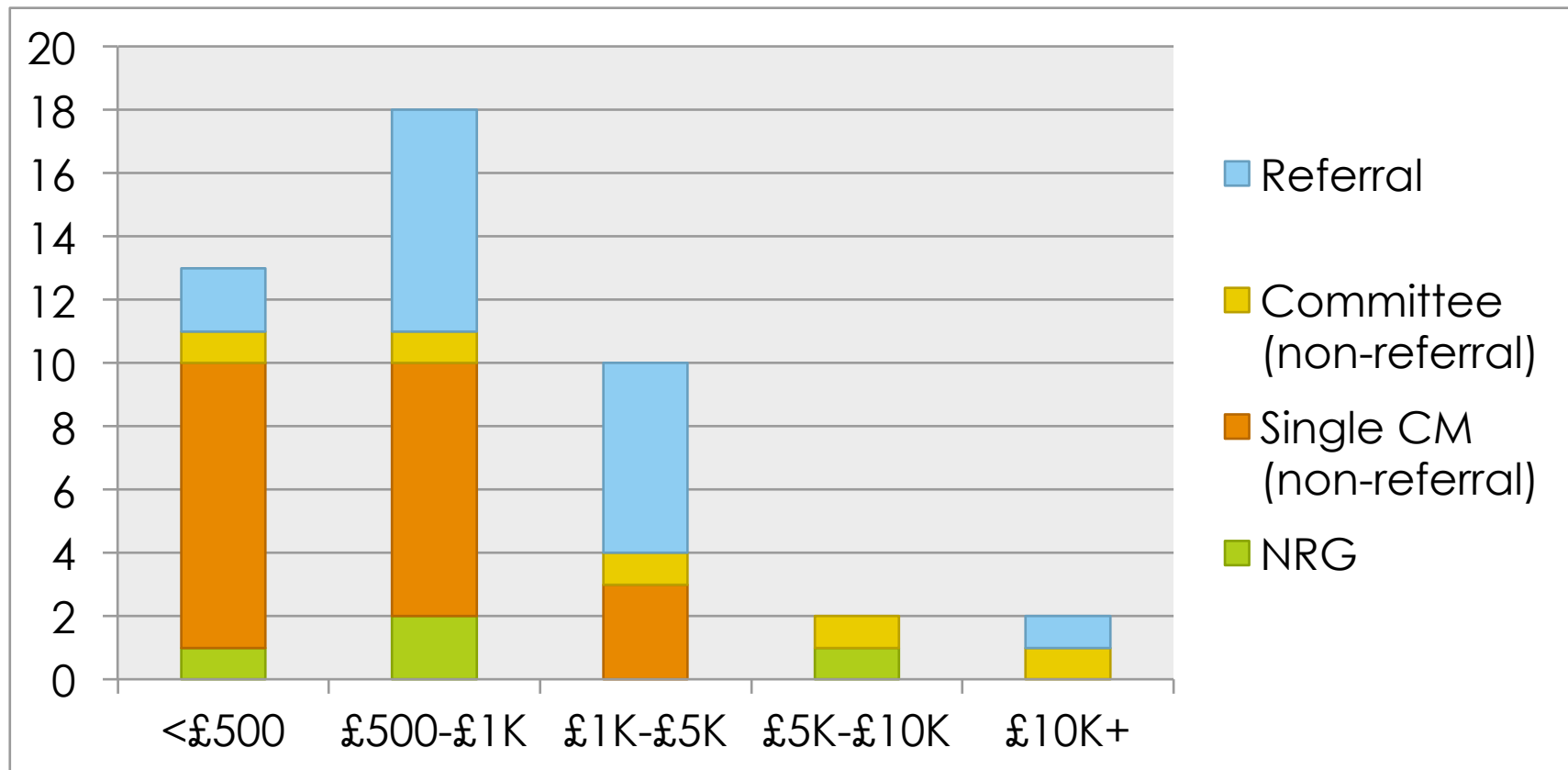
“...the solicitor can be very useful to assist an applicant in seeing their way through, seeing...how the Commission has come to its decision, its provisional view and putting their side's best case back to us in doing that. Writing a statement of reasons is a difficult art in terms of balancing the tension between wanting to write something that is going to be comprehensible to an applicant who may well be unrepresented and may well have poor standards of English, and little understanding of the criminal law and writing a document that is legally correct and therefore invulnerable to challenge and...that tension often means you can't write something which is both of those things and in the end it has to be right. It is more important that it is right than that it is understandable.”

(Case Review Manager)

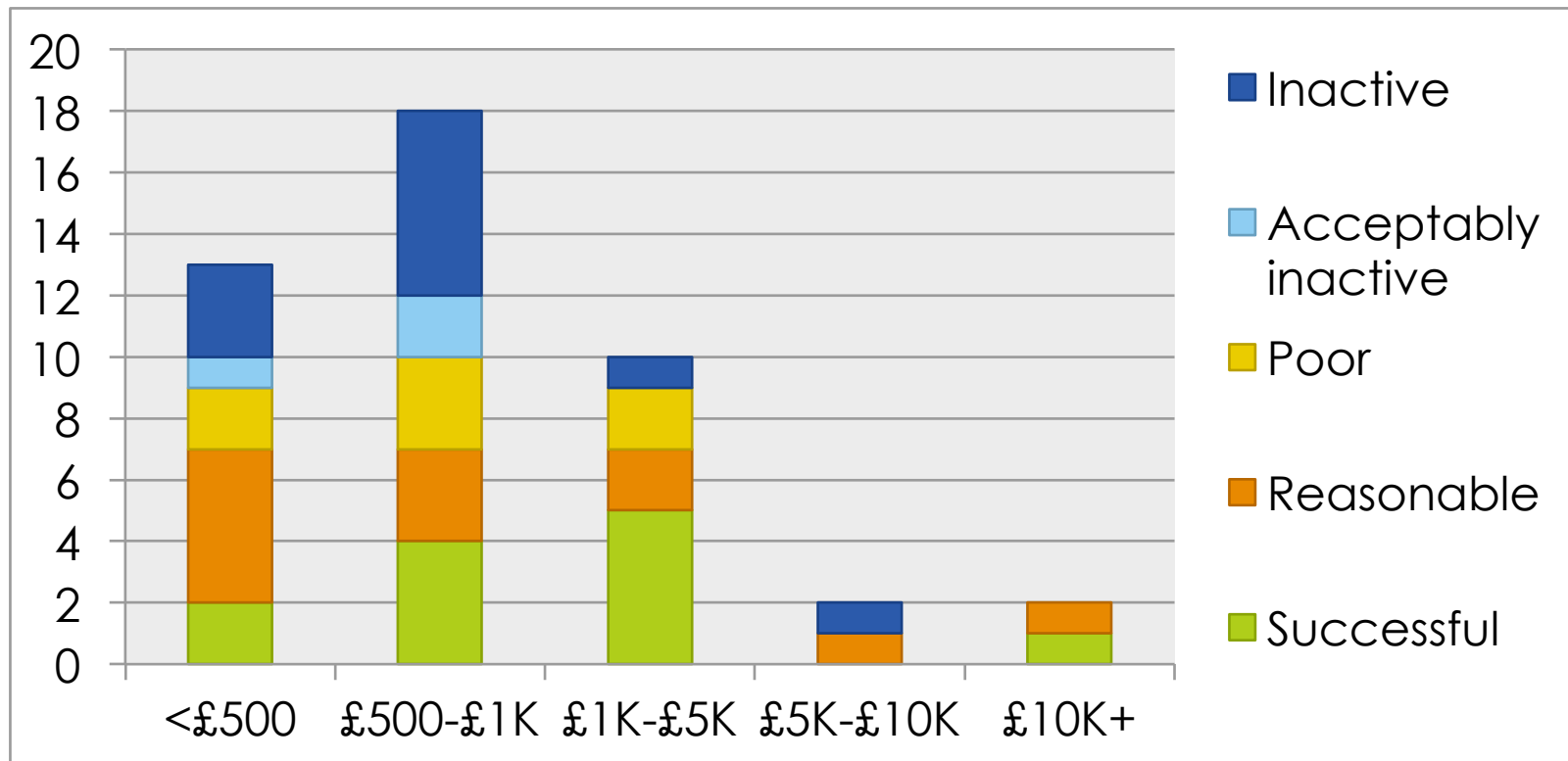
# Funding

- 'You must reject a case following initial screening if there is no reasonable prospect that it will meet the CCRC referral criteria' – Standard Crime Contract 2010
- But lawyers told us that they can get funding to do the necessary work (the problem was the rate of pay)
- Paragraph 11.19 also states that there can be no application to the CCRC unless there has been an appeal or leave has been refused – this is incorrect

## Funding: LSC claims - claim level and outcome



## Funding: LSC claims - claim level and quality



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# Following a referral

- The case reverts to the adversarial process and the CCRC has no official role
  - Impact of section 315 CJA 2003
    - The CCRC may now determine whether to refer AND on what grounds the appeal may be argued
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“I can’t say I’ve noticed any particular change. I know that we were worried at the time that it came in whether it would change the way [in] which we operate, whether we might feel obliged to bottom out every ground that an applicant has raised because they might not be able to pursue it themselves, but I think we quickly came to the conclusion that if we got what we think is a good reference point, then there’s almost a duty on us to refer it on that basis and as the applicant can still seek leave and as there have been cases where leave has been given to argue additional points then they’re not completely disadvantaged”

(Commissioner)

# Legal representation: Improving quality and access

- The research demonstrates that:
  - good representation can be crucial
  - there is scope to improve the quality of representation
- Unlike other areas of work, it is hard for lawyers to 'pick up' how CCRC work is done. Highly specialised and diverse. No standard template – for lawyers or the CCRC (at first anyway!)
- Availability and level of funding
- Specialist panels
- Materials for lawyers