

CCRC Written Response to Research by Professor Rebecca Helm and Dr Emily Spearing

The Criminal Cases Review Commission ('CCRC') welcomes the publication of the research paper "Testimony Evaluation in Criminal Cases Review Commission Casework", which marks the conclusion of a detailed research project which was facilitated by the CCRC's Research Committee.

The CCRC recognises the importance of independent scrutiny of its performance and of the way that it discharges its vital public function, and we are grateful to Professor Helm and Professor Spearing for the detailed consideration which has gone into this research report. Professor Helm will present her research findings to CCRC staff and Commissioners shortly. The report makes 4 main recommendations on which the CCRC comments below.

Research conclusions and recommendations together with CCRC response:

1. CCRC case reviewers are limited by statutory provisions in referring cases for appeal where the prosecution case was weak at the time of trial. A greater willingness on the part of the CCRC to refer cases for appeal on the basis of 'lurking doubt', and more proactive CCRC investigation – including of issues not suggested by the applicants in question - could help to address likely miscarriages of justice.

- CCRC applications where there appears to have been a 'weak' prosecution case at trial.

The jury must have been sure of guilt in such a case in order to convict. If no jury properly directed could have been sure of guilt, the case should not have been left to the jury by the judge. If a submission of no case to answer has not been made at trial or later argued on appeal, it would be open to the CCRC to refer the conviction based on that, as a new legal argument. However, it is not part of the CCRC's role to second-guess the jury, who have had the benefit of seeing the witnesses give evidence. Accordingly, it would be an exceptional case where the CCRC could properly refer a conviction based merely on its own assessment – after the event - of the strength of the prosecution case.

- 'Lurking doubt'

The Court of Appeal has emphasised that it is only in the most exceptional case that a conviction may be ruled 'unsafe' on that basis (*Pope v R* [2012] EWCA Crim 2241 Judge LJ). It is a highly subjective test and the CCRC has reservations about whether more referrals would mean that more convictions would be ruled unsafe.

- More generally, the CCRC notes the current work of the Law Commission regarding the CCRC's statutory test and has submitted a detailed response to the Law Commission.
- Proactive investigations
The CCRC agrees that it is essential that all reasonable enquiries are pursued in the course of its reviews, including about issues which are not raised by CCRC applicants, and is clear that that is generally done, but has put in place changes to policy and internal training and guidance to cement it as best practice.
The CCRC agrees that non-disclosure and emerging science are important subjects and has redoubled its efforts in those areas in the last few years, including in pursuing forensic opportunities.

2. CCRC case reviewers sometimes relied on inaccurate assumptions about memory and honesty, and on general impressions. The CCRC should consider relevant resources produced by the American Psychology and Law Society and by the British Academy. The CCRC should be more willing to engage in a scientific analysis of witness testimony, rather than relying solely on legal precedent from the Court of Appeal.

The CCRC is grateful for the resources which have been highlighted, which will be considered in detail. The CCRC will explore whether scientific analysis of witness testimony might be helpful in its casework but, inevitably, currently relies on ordinary judgment about memory and honesty, exactly as juries do. However, 'scientific analysis of witness testimony' is not currently admissible in any criminal court.

3. Some cases require input from experts regarding memory issues, which has the potential to be highly informative. Such evidence can be important even where the CCRC would refer a case for appeal on other grounds in any event.

The CCRC commissions expert analysis, of many kinds, in numerous cases each year and is committed to ensuring that the best possible evidence is considered by the appeal courts on cases it refers. However, expert evidence as to memory, has been found inadmissible, specifically by the Court of Appeal, in a number of key decisions. The CCRC will consider whether expert evidence as to memory might be helpful in appropriate cases.

4. Training for reviewers and resources for applicants have the potential to improve assessments of witness evidence. This will assist reviewers in structuring interviews with new witnesses in ways that elicit the most reliable information and

draw reviewers away from reliance on general impressions that may be both inaccurate and biasing.

The CCRC has an experienced investigations team but is grateful to the researchers for their suggestions as to additional training and will give consideration to whether additional training for casework staff and Commissioners in the suggested areas might be helpful for improving the quality of CCRC case reviews and decision-making.