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Royal Commissions & criminal justice

Martin Rackstraw reflects on the role of Viscount Runciman & his colleagues in shaping the criminal justice landscape of today

This year sees the 30th anniversary of the establishment of the last Royal Commission on Criminal Justice. That commission was chaired by Viscount Runciman of Doxford, whose death was reported in December. As we wait for the establishment of the next Royal Commission, announced by the government in 2019, with a remit to 'review the efficiency and effectiveness of the criminal justice process' it may be a good moment to look back at Viscount Runciman and his colleagues' 'Report of the Royal Commission on Criminal Justice' (*bit.ly/3krfQlZ*) to reflect on how they changed and shaped the criminal justice system into the one we have today.

The 1991 commission was established in the aftermath of a number of appalling miscarriages that had come to light in previous years. Its remit was a wide one: '…to examine the criminal justice system from the stage at which the police are investigating …right through to the stage at which a defendant who has been found guilty of such an offence has exhausted his or her rights of appeal.' It was not asked to look at individual cases. However, revelations of serious police misconduct in some recent ones, and the inability or unwillingness of the courts to address such misconduct, ran through the report.

The commission's investigations were certainly comprehensive. It heard evidence and reported on the conduct of police investigations, safeguards for suspects in police detention, the right to silence under police questioning, the issue of disclosure in the defence pre-trial and pre-trial procedure generally, forensic science, the operation of the Court of Appeal and the correction of miscarriages of justice.

Long overdue

Some recommendations in the final report were long overdue. This was particularly the case regarding the treatment of suspects at police stations. For instance, the recommendation that custody suites should be video recorded throughout was unarguable, even if that then took some years to be implemented. The power of the police to bail with conditions has now been in force for some years, and the practice of judicial sentence indications is now well established. Other suggestions now sound startlingly radical, for example that defence or prosecution might, in exceptional cases, apply to a trial judge that a jury comprise a minimum number of members from 'ethnic communities'. Some were never adopted—the suggestion that training in forensic scientific methods be compulsory for criminal practitioners still sounds sensible and has, inexplicably, been ignored ever since, as far as I am aware.

On one key issue, the correction of miscarriages of justice, the commission's recommendations were immediately adopted in their entirety. The result remains a central component of the criminal justice system today. The Criminal Cases Review Commission (CCRC), established by the Criminal Appeal Act 1995, appears to operate now in essentially the way that the commission recommended—that is, as an independent review and investigatory body, with a power to refer convictions to the Court of Appeal. Its effectiveness or otherwise, throughout the near quarter century that it has existed, remains however a controversial subject among practitioners. Defence lawyers deplore its reluctance to refer what often appear to be egregious miscarriage cases. The commission responds that, since its statutory remit is to refer cases where there is a 'real possibility' that the Court of Appeal would not uphold the conviction, its discretion is pegged to the current Court of Appeal approach at any given time, which is not always easy to predict. And, in truth, that has been the in-built handicap on the CCRC's discretion; it can only be as bold as the Court of Appeal. The commission did go on to consider the performance of the Court of Appeal itself, and identified some specific circumstances where the court ought to be readier to quash convictions. 27 years later though, few defence lawyers would differ from the comment made in the report then: 'We are all of the opinion that the Court of Appeal should be readier to overturn jury verdicts than it has shown itself to be in the past.' The next Royal Commission should urgently examine the operation of the CCRC and Court of Appeal.

Key issue

A key issue where the commission was simply ignored was the right to silence, and its consequences, under police questioning. A majority of members recommended that where a suspect declined to answer questions, no adverse inference should be drawn at trial. This was not surprising, as the commission was anxiously investigating this issue in the context of concerns about unreliable confessions in recent high-profile cases. Regardless, the government of the day legislated to qualify the right to silence with the Criminal Justice and Public Order Act 1994, and the regime of adverse inferences from a failure to mention facts or explain incriminating evidence in police interview remains largely unchanged since its introduction. It is unlikely that this particular issue will be revisited now, but that would be a missed opportunity. The 1994 Act's curtailment to the long-established absolute right to silence was a landmark weakening of a basic protection for all suspects. It initiated a series of subsequent provisions that have further diluted the prosecution's burden of proof.

The commission's research had revealed an alarming picture of a system in need of urgent reform. It described often haphazard and chaotic litigation, poor communication, little adherence to what rules were in force and serious gaps in

skills and diligence among lawyers. So, it called for a different kind of criminal litigation. This would be driven (more swiftly and efficiently) by comprehensive procedural rules, enforced through judicial management and with sanctions for non-compliance. Among other changes, it recommended preparatory hearings to improve pre-trial case management. It recommended a requirement on the defence for disclosure of its case following service of the prosecution case with adverse inferences for failure to do so. It called for closer engagement between the parties throughout the process. It is this theme of procedural codification that is predominant in the report. It was hoped that imposing a more structured and enforceable set of case management rules would make the system more effective and reduce the scope for miscarriage—for instance by implementing a more transparent and focused regime for prosecution disclosure. And the criminal justice system that exists today is, to a very great extent, what the report envisages—in its ethos, if not in every detail.

Almost all substantial primary and secondary legislation since then has adopted this approach. The Criminal Procedure and Investigations Act 1996 introduced the requirement for defence disclosure to trigger prosecution disclosure. The Criminal Justice Act 2003 introduced the requirement for defence advance disclosure of witness details. And eventually the Criminal Procedure Rules codified the entire process. Year on year, criminal proceedings are becoming more 'civil' in nature. The consequences for the administration of criminal justice have been, I suggest, mixed.

The adoption of this more managed approach has brought considerable advantages. There is no question of it being reversed. However, I would argue that, in this process, there is a danger of losing sight of the fundamental principle of criminal justice—that is, that the prosecution must prove its case without assistance from the defence. The current preoccupation with managerialism is often, whether intended or not, dangerously eroding the safeguards for suspects and defendants that underpin that burden of proof. In the years since, the commission, government and judiciary have enthusiastically adopted the approach that more rigorous case management is the answer to delays and inefficiency. But improvement in efficiency has come at the cost of an incremental shifting in the balance of fairness in criminal proceedings in favour of the prosecution and against the defence. As this process has taken place, and somewhat paradoxically, Crown Court judges and the Court of Appeal have become far more indulgent regarding procedural failings by prosecutors that might once have resulted in decisions favourable to the defence at trial, or to the quashing of convictions on appeal. The rules of evidence and procedure constantly change in favour of the prosecution, but even significant breaches are less likely to result in a successful appeal.

Comment

I am not sure that this is quite what Viscount Runciman's commission anticipated. Its vision of a more ordered criminal justice system has been achieved. But the cost has been a relentless drive for convictions and a diminution of fundamental rights. The next commission would do well to start its work by considering the concluding observation of Professor Michael Zander in his Dissenting Note (pp 221-235) to the last commission's report: 'The integrity of the criminal justice system is a higher objective than the conviction of any individual.' **NLJ**

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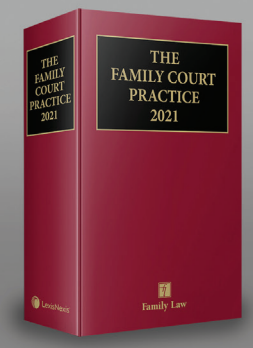

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