A Refreshing Change from the Royal Commission on Criminal Justice

Penny Darbyshire made recommendations and contributed research to Auld's criminal courts review. Here she summarises and welcomes the resulting report.

I consider *Auld's Review of the Criminal Courts of England and Wales* (2001) to be a really useful contribution to the everlasting debate on the criminal process. It is an erudite, educative document. There cannot be any reader with the depth of knowledge spanning the range of subjects Auld investigates. We, the receiving public, the academics, the pressure groups and the politicians should thank our lucky stars the right people were engaged on the job, in the sense that, whatever we think of Auld's recommendations, we cannot complain of a shallow or ill-informed view. Auld and all his team were open-minded and anxious to learn, such a refreshing change from the members of the Royal Commission on Criminal Justice 1991-3 who, at the outset of their investigation, set their faces against investigating summary justice and produced a warped report of limited value, which was heavily condemned by academics and others.

Auld had a thankless task. In suggesting reform of the criminal process, one annoys some of the people all of the time. Tragically, the report's publication was suffocated in the dust of the twin towers and its limited coverage in the newspapers and legal press was hi-jacked by the now tedious debate over the defendant's right to elect jury trial. In 1993, the Royal Commission recommended its abolition and this was repeated by Narey in 1997 and New Labour in their 1998 *Mode of Trial* consultation paper and of course the debate was at its height in 2000-2001 over the failed *Criminal Justice (Mode of Trial)* bills. The proposal raises serious issues about the real aims of the government, the accused's bargaining power and the function of the jury in participatory democracy and should be argued on this level, as I said in 1997. Irritatingly, however, defenders of the right, such as the Bar, have whipped up public sentiment with spurious and anachronistic defences of this 'ancient' and 'constitutional' right and Magna Carta, all of which are being trotted out again now.

Of all contributors to the criminal courts review, I have the least cause for complaint. On magistrates, I was invited, along with Kier Starmer, to lead an Auld seminar. Auld accepts my thesis in 'The Importance and Neglect of the Magistracy' by according the first two chapters to them. Good for him. At last, a review of the criminal process recognises that over 90 per cent of defendants are processed by magistrates. Equally, I'm delighted that he recommended that steps

Julie Grogan

Mock adjudication, segregation unit, HMP Wormwood Scrubs

should be taken to ensure that benches of magistrates should reflect the communities they serve, since I had urged, in 1997, that the ignorant public should be informed of their right to apply to be a magistrate and the advertising, recruitment and appointment process for magistrates should be reformed. Since I had expressed concern, in 1999, that justices' clerks and other legal advisers (some of whom are not legally qualified), had been given case management powers in the *Crime and Disorder Act* 1998, I was relieved that Auld accepted my thesis that their powers should not be extended. The Justices' Clerks' Society had argued that clerks should be given the power to rule on points of law, but I argued, in 1999, that this was wholly inappropriate for officials appointed as the justices' legal advisers who have not been selected or appointed as judges. I am similarly pleased to see that Auld recommended that the administration of magistrates' courts should be centralised. I had urged him to recommend this, pointing out that local administration by magistrates themselves in magistrates' courts committees was a relic of history which did more harm than good in the twentieth century, producing inconsistencies in magistrates' training and clerks' qualifications, not to mention the little known scandal that by 1998, magistrates' courts had all bought different computer systems which could not communicate with one another, let alone other criminal justice agencies.

On the jury, Auld instantly accepted my e-mailed suggestion he should commission me to review existing jury research and, as he acknowledges, his chapters on the jury and jury trial draw very heavily on my work and recommendations contained in our paper for him 'What Can the English Legal System Learn from Jury Research Published up to 2000?'. The 2001 version of that work was published in tandem with Auld's Review and appears via the Review website. We made suggestions on widening jury composition, on racially structuring juries, on pre-trial and written instructions for juries and re-structuring the trial. For the suggestion that juries be required to answer a series of structured questions, please blame me but Auld has to take the glory for extending this suggestion to the brilliant idea (which he acknowledges was not his) of sheltering the jury from the law. To those who object that this deprives the jury of their right to bring in an 'equitable' verdict, in the face of contrary evidence, I would remind them of my warnings in 1991 that jury 'equity' is unpredictable. It did not spare Tony Martin from a conviction for murder. It was the work of his new defence team and the receptiveness of the Court of Appeal, in 2001, which overturned what the public widely perceived to be a miscarriage of justice. Jury equity produces wrongful convictions and some morally indefensible acquittals. The day after the Auld Report was published, a business professor in my faculty came to recount to me the story of his distress at being part of an all-white jury in Kingston which he felt was racist in its decision not to convict a defendant, on clear evidence, of an unprovoked, racially motivated attack.

On Auld's mixed tribunal, as a middle tier to deal with cases of medium seriousness, I discussed this in 1997. It has always seemed to me illogical that summary work is now randomly distributed between three lay justices, deciding on fact and law, or a lone district judge deciding fact and law, and yet trial on indictment must be conducted before a judge deciding on law and twelve lay persons deciding on the verdict. If we want our criminal cases decided by lay people, or lay people and lawyers, following rulings on law by a lawyer, we should structure our courts according to that principle.

The one part of the report which was a nasty surprise for me was Auld's repetition of the Royal Commission's recommendation that the defendant should be offered a pre-trial sentencing canvass (although he does not use this phrase), with the temptation of a large discount for an early guilty plea. I am gratified that he did everything on my wish-list in my plea bargaining essay, such as visiting Philadelphia and Scotland and studying European systems. Nevertheless, he faces my 2000 arguments against sentencing rewards head-on and disagrees with me. This section of the Auld Report reads as if it were written by someone else. Suddenly, he is talking in terms of the sentencers as judges, forgetting what he acknowledged in chapters three and four, that magistrates do 95 per cent of all sentencing, and ignoring the fact that they were traditionally hostile to sentencing discounts. ■

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***Penny Darbyshire** is a Senior Lecturer, Kingston Law School.*

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