

The Work that Inquiry Core Participants Do

A Review of Alistair Stark, *Public Inquiries, Policy Learning, and the Threat of Future Crises*, Oxford University Press, 2018. 200pp. £60.00 (HB) ISBN:978-0-19-883199-0

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In *Daniels v May* [2018] and *Da Silva & Ors v Secretary of State for the Home Department* [2018] the High Court in London had to determine whether challenges to decisions not to appoint additional panel members to sit with the chairs of the inquiry into the Grenfell Tower Fire (*Daniels*) and the inquiry into undercover policing (*Da Silva*) should proceed to full judicial review hearings.

In both cases it was concluded that arguments as to the unlawfulness, in public law terms, of a failure to appoint panels that were diverse in terms of gender, faith and race had no reasonable prospect of success, and so the permission applications were refused.

The detailed reasoning behind the decisions in *Daniels* and *Da Silva* is not of concern here. What is of interest is the fact that the attempts to unsettle the norm by which inquiries are overseen by a single person, usually a judge, were made by individuals who were designated as core participants (non-state) under section 5 (2) of the Inquiry Rules 2006 because they were directly affected by the events which the inquiries were set up to investigate.

The judicial review challenges are accorded importance in this book review because they represent just one of the ways in which non-state core participants have worked to ensure that the inquiry provides as effective a response to crisis or widespread misconduct among public servants as possible. Perhaps more pertinently, the high-profile cases identify non-state core participants as possibly the most significant category among the “...range of potentially important actors...who are rarely acknowledged, much less analysed, as part of an inquiry process” (Stark, 2018: p.37).

Drawing on official reports and other records produced from four prominent post-crisis inquiries (which were held in four different jurisdictions, including the UK, Stark, 2018: chapter 4), Stark seeks to present to the reader “...a firmer idea of what inquiries look like, what they do, and what the learning process looks like in the twenty-first century” (Stark, 2018: p. 176). A recurrent theme of the eight chapters, which marry theoretical insights with empirical findings covering the full span of the inquiry process, is the need to “...uncover...’unforeseen’ actors playing important roles...” (Stark, 2018: p. 42) so as to enable inquiries to realise their full potential in helping to reduce risks associated with crises

or other forms of social ill. I would go further and suggest an urgent need to interrogate the distinction between so-called inquiry ‘insiders’ and ‘outsiders’ (Stark, 2018: p. 8 & p. 33). For, as Stark persuasively argues, it is not only “...the “usual suspects (the sponsoring minister, the chair, and perhaps the implementing policy officials)... (Stark, 2018: p. 7) who “...have the capacity to cause things to happen...” (Stark, 2018: p. 37).

The fact that the judicial review challenges in the *Daniels* and *Da Silva* cases were unsuccessful should not be allowed to disguise the fact that inquiry non-state core participants have been instrumental in encouraging “...context-specific adaptations to the typical legal model...” (Stark: p. 182) to both the Grenfell Tower fire and undercover policing inquiries. Moreover, it is arguably non-state core participants who have performed the important task of keeping the personal histories of the individuals and groups caught up in the events which form the subject matter of these inquiries alive and in the media spotlight - thereby increasing public awareness of acts and omissions of public servants which have caused or contributed to serious physical and psychological suffering.

According to Stark, an important first step in the process of reconceptualising the public inquiry is to recognise that it offers to participants and to the wider public “...many more possibilities over and above the...rhetorical acceptance of recommendations and basic organisational change as a consequence” (Stark, 2018: p. 26). All of the four inquiries studied by him had demonstrated awareness that “...attempting to tick off ‘implemented’ versus ‘not implemented’ recommendations does not take us very far at all in terms of an evaluation of an inquiry” (Stark, 2018: p. 67).

Of the four - all of which are considered by the author to exemplify “...best practice...because they all recognised the strength and the weaknesses of the typical legal model and sought to amend their evidence gathering processes accordingly” (Stark,2018: p. 182) - two stand out. The Pitt Review into the UK summer floods of 2007 (summarised by Stark at p. 63-67) was noted for its “...informality and inclusiveness...” (Stark, 2018: p. 160), and for its willing acknowledgement that the inquiry process cannot end with the publication of the report. Thus, the Pitt Review was praised for its preparedness “...to broker and fight for its recommendations...” Stark, 2018: p. 157). The Victorian Bushfires Royal Commission (summarised by Stark at p.67-73) was seen to be distinguished in the way its working practices “...reflected a genuine concern for community engagement, participation, and the representation of the affected families” (Stark, 2018: p. 68).

Throughout the text Stark demonstrates that he is fully alive to the possibility that his empirical findings and theoretical propositions may have limited relevance beyond those inquiries which are set up to investigate and evaluate the causes, consequences and learning opportunities of events of a comparable nature to those examined in the book, which also includes the outbreak of Severe Acute Respiratory Syndrome (SARS) in Canada in 2003 (outlined by Stark at p. 58-63) and the New Zealand Earthquakes of 2010 (outlined by Stark at p.73-78). He explains that “...post-crisis inquiries...are ...different from others, not least because they follow crises

which opened up a permissive climate for policy change...” (Stark, 2018: p. 103). It is certainly the case that, on a first reading, Stark’s account is likely to resonate more soundly with those following the inquiry into the Grenfell Tower fire than it will with the undercover policing inquiry participants and commentators. For example, although not directly comparable to the Grenfell tragedy and its inquiry’s terms of reference, the Victorian Bushfires Royal Commission and the Canterbury Earthquakes Royal Commission were tasked to investigate matters of obvious relevance to Grenfell. In the Victorian case, advice given by state agents to individuals exposed to the fires - the so-called “stay or go” policy - was in issue (Stark, 2018: p. 68-69). In the Canterbury case, the adequacy of building regulations was under examination. However, closer scrutiny of the book’s exploration of the four inquiries’ methodologies and the assumptions underpinning them indicate far greater purchase to the work than even its author concedes.

Whilst the *Daniels* and *Da Silva* challenges show a common concern among non-state core participants about the constitution of inquiries, non-state core participants in the undercover policing inquiry have been much more vocal in their criticisms of other aspects of that particular inquiry’s design. Stark’s valuable analysis may help observers to take a balanced assessment of the more controversial aspects of the undercover policing inquiry’s developing processes.

The most trenchant criticisms from non-state core participants have been levelled at the number of times the inquiry Chair has had recourse to section 19 of the Inquiries Act 2005, which authorises the grant of restriction orders. Of particular concern is the fact that many of the applications for anonymity orders made by police/state core participants were determined on the basis of evidence that was offered in closed court sessions at which neither non-state core participants nor their representatives were admitted.

Readers of Stark’s book may be surprised to learn that not only is the inquiry’s approach in this regard not unprecedented but, for Stark, is evidence of an appropriate adaptation of the inquiry model, which he sees as too often adopting a rigid adversarial form (see Stark, 2018: p. 164-172 for detailed assessment of the traditional legal form). Noting that the SARS Commission adopted “...a method of information acquisition which relies upon private interviews and anonymised testimony” (Stark, 2018: p. 61), Stark explains this seemingly unusual choice in form on the basis of the justification “...that was emphasised most strongly...allowing witnesses to testify in a completely confidential setting would get the Commission closer to the truth *via* fuller forms of disclosure” (Stark, 2018: p. 61). He further argued that the approach to evidence gathering was perceived by participants as indicative of an “...inquiry...more interested in policy learning than public blaming” (Stark, 2018: p. 161).

It is worth pausing to note that the one UK inquiry explored in the book (the Pitt Review into the summer floods of 2007) did not structure any part of its processes substantially upon anonymised testimony. It is just conceivable that inquiry participants in other jurisdictions are culturally more attuned to the closed hearing process which has proved so divisive in the

context of the undercover policing inquiry. So, whilst the inquiry's approach to deciding anonymity applications may gain some measure of support from Stark's research, a general approach premised on the idea that "...the easiest way to minimise conflict is to abandon public hearings and cross-examination" (Stark, 2018: p. 168) may prove dangerous.

The Grenfell inquiry has completed stage one of its proceedings in which its fact finding was largely facilitated by the oral testimony of lay and expert witnesses. The undercover policing inquiry plans to begin this stage in June (Undercover Policing Inquiry, *Strategic Review*, 2018: p. 7), and, notwithstanding Stark's seeming approval of the method of anonymised testimony adopted during the SARS inquiry, the undercover policing inquiry leads would do well to heed his broader caution to the effect that "...perceptions about the validity of an inquiry's lessons are profoundly influenced by the ways in which it goes about generating evidence and crafting its lessons in the first instance. In other words, the process used to generate lessons is just as important as the content of the lessons when it comes to facilitating support for implementation" (Stark, 2018: p. 106).

Based on his analysis of the four sample post-conflict inquiries, Stark opines that "...the most successful...either co-opted stakeholders into the inquiry process so that they could co-constitute lessons together ...or designed policy implementation, budgeting guidelines or oversight mechanisms into their lessons in order to 'help' policy officials accept their recommendations" (Stark, 2018: p. 11). The point about stakeholder engagement is one which should be emphasised, not least because it needs to be recognised that inquiries are not always able to command access to the intelligence sources they require. A recent consultative document published by the inquiry into undercover policing indicates that it has come to realise that specialist monitoring organisations like the UK based *Undercover Research* group will almost certainly have superior access to up to date information about undercover officers and their various deployments (Inquiry into Undercover Policing, Annex to Explanatory Note on Privacy).

All inquiries, whether they be into crises or other troubling events, are vulnerable to what Stark alludes to as the problem of institutional and/or social amnesia. The work that inquiry non-state core participants do is perhaps best described as developing "...systematic means for remembering or encoding..." (Stark, 2018: p. 127) the stories of affected individuals and communities. Again, the undercover policing inquiry process offers practical evidence of Stark's observation that "...there is more to the contemporary inquiry than the standard judge, counsel and administrative set-up" (Stark, 2018: p. 151). At the initiative of the campaigning group, *Police Spies Out of Lives*, (which, among other things, provides support to individuals who seek legal redress against undercover police officers who, in order to facilitate their covert deployments, deceived the individuals into intimate relations), the handmade cosmetics chain, LUSH, produced a series of powerful podcasts "about people who unknowingly developed intimate relationships with undercover police" (LUSH website podcasts).

The extent to which the publicity campaign exposed the issue of sexual misconduct of undercover police officers during deployments to a largely ill-informed public cannot be underestimated. Whilst Stark considers that the inquiry itself is capable of providing “...forms of memorialization through which affected citizens can remember their trauma” (Stark, 2018: p.55), offering as an example the decision of the Victorian Bushfires Royal Commission to devote an entire volume of its final report “...exclusively to memorializing the fires, and the people who suffered...” (Stark, 2018: p. 71), it is doubtful that the direct transmission of the narratives of affected persons, which the LUSH podcasts engineered, can find its equal in the more formal dimensions of the inquiry process. Stark’s observation that “[r]ecalling the lessons of the past in an institutional context...requires a structure and agency combination in which organizational routine is reinforced by the narratives of those who will not forget” (Stark, 2018: p. 177) is one of many important insights which the book offers to readers who wish to understand the nature of the contributions made by the “...many different agents...” (Stark, 2018: p. 177) associated with the contemporary public inquiry.

For Stark, the Victorian Bushfires Commission illustrates just why proper representation of the individuals and groups affected by a crisis throughout the inquiry process is crucial to policy learning. It is surely no mere coincidence that the inquiry which most embraced the input of affected families (Stark, 2018: p. 68) was also the one which, in a “rare” instance (Stark, 2018: p. 86), did not confine itself to merely recommending “...amendments to pre-existing policy systems...” (Stark, 2018: p. 99) but instead interrogated and eventually caused to be erased the aforementioned “stay or go” policy, which “...was said to place the defence of property on an equal footing with human life” (Stark, 2018: p. 69).

Despite the more radical orientation of the Victorian Bushfires Commission, Stark concludes that the outcome of even the best practice model of inquiry is likely to be recommendations of “...very specific changes within the boundaries of pre-existing policy systems rather than more holistic reforms that fundamentally change or replace those systems” (Stark, 2018: p. 82).

If Stark is correct, it may be too much to expect the undercover policing inquiry to deconstruct the underlying philosophy of the state which permits the covert surveillance of political campaigners who pose no threat to the wider public. However, if we follow Stark, a more modest outcome in 2023 when the inquiry is due to deliver its final report (Inquiry into Undercover Policing, *Strategic Review*, 2018: p. 7) will not, without more, signal the inquiry’s failure. More certain is the view that an inquiry which fails to recognise that “[g]overnance in the 21st century is a crowded affair...” (Stark, 2018: p. 7) and so fails to give due regard to the important potential contribution of “advocacy coalitions” (Stark, 2018: p. 41-42) and other non-state actors; or an inquiry that is “...wedded to a ..static constitutional-legal view ...” (Stark, 2018: p. 9) is likely to prove “...inimical to policy learning in the twenty-first ...” century (Stark, 2018: p.2).

References

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