

MAGISTRATES' COURTS AND PUBLIC CONFIDENCE

A PROPOSAL FOR FAIR AND EFFECTIVE
REFORM OF THE MAGISTRACY

The Civil Liberties Trust

LIBERTY

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1. INTRODUCTION & EXECUTIVE SUMMARY

1.1 WHY MAGISTRATES' COURTS MATTER – AND WHY THEY NEED REFORM

Magistrates' courts generally attract less attention than trial by jury in the Crown Court. Yet with over 95% of cases in England and Wales being dealt with by the magistrates' courts,¹ the quality of justice in these courts is key to the criminal justice system.

As the Government prepares to bring forward proposals for extensive reform of the criminal justice system, the magistrates' court system still looks in danger of being neglected – or considered only in the light of Lord Justice Auld's proposals for a third tier of 'intermediate' courts, not in its own right. Liberty's view that the intermediate court proposal constitutes an unacceptable attack on jury trial – the cornerstone of the British justice system – is well-known.

However, it is also a matter of grave concern if the debate over intermediate courts is allowed to obscure the real need for reform of the existing magistrates' court system.

1.2 REFORM: WHY AND HOW

Evidence shows that the public have less confidence in magistrates' courts than in trial by jury.² For instance, 54% of the public would have greater confidence in jury trial than in lay magistrates for medium-serious cases.³

Juries have achieved this status in large part because they are genuinely representative of the population and because they operate under more effective safeguards – notably the separation of powers. Reform of the magistrates' court system is needed to provide a fairer system for the majority of those who pass through the criminal justice system. Reforms should focus upon three principal requirements:

- The need to inspire public confidence in the criminal justice system
- The need for wider and more representative public participation in the system, by making access to the magistracy genuinely possible for a broader cross-section of society
- The need to create a clear separation between the fact-finding and law-finding functions of magistrates.

To achieve these aims we would recommend a significant reform to the nature and role of the lay magistracy:

- Magistrates should sit in mixed panels within a district. Panels should consist of three lay magistrates and one District Judge.
- The lay magistrates should deal with issues of fact only; the District Judge should have no role in fact-determining, and should consider issues of law and sentencing only. This should increase the consistency of sentencing (by professional District Judges), improve the quality of legal advice to the bench, while making the approach to fact-finding (in tandem with the changes outlined below) more comparable with that of a jury, more representative of the views of society and less subject to the risks of a 'case-hardened' approach to the evidence.
- The numbers of lay magistrates and the breadth of their selection should be increased to enable them to become more representative of society.
- A reduction in the legal training needed for lay magistrates and changes to the demands on their time should make recruitment from a far broader social range possible. This – and the result of a more socially representative lay magistracy – should be actively pursued.

Cases would be divided as follows:

- Uncontested bail/remand cases by a District Judge sitting alone
- Uncontested summary cases by a District Judge sitting alone
- Contested bail/remand and contested cases by the panel.

Our approach seeks to make best use of the different qualities that lay and professional magistrates can bring to the bench – and to create a practicable system that will inspire at least some of the public confidence enjoyed by the jury system.

¹ *Community Justice- Modernising the Magistracy in England and Wales*, Andrew Sanders, IPPR, 2001, page 8

² *Ibid*

³ *Ibid*

2. THE CURRENT SYSTEM

Criminal offences in England and Wales are classified in the following groups:

- non-indictable offences, which are relatively minor and can be dealt with by the lower courts
- indictable or grave offences, which are dealt with by the Crown Court
- Either way offences, a range of medium-serious cases which can be dealt with in either court.

The criminal courts system operates on a two-tier basis. In the Crown Court, the upper tier, trials are heard before a judge and jury. Whilst the judge determines sentencing and points of law, it is the role of the jury to decide issues of fact. The jury is a group of people representative of ordinary members of society, so trial by jury is essentially judgment by your peers.

In the lower tier, defendants appear either before a panel of lay magistrates, or a professional stipendiary. Either way, the absence of a jury means that the fact-finding and sentencing roles are not separated.

2.1 JURY TRIAL REFORM AND THE IMPACT ON MAGISTRATES

The Government unsuccessfully attempted on two occasions, in 1999 and 2000, to restrict further the right to jury trial through the Criminal Justice (Mode of Trial) Bill. This Bill would have allowed magistrates to determine whether certain categories of cases should go before a jury or not.

The structure of the courts system will be revisited in this Parliament, in a Criminal Courts Reform Bill in 2002 – as announced in the Queen’s Speech and following Lord Justice Auld’s report. The Bill was expected to propose a combined courts system, with possibly three tiers, and even fewer cases being eligible for trial by jury. There were indications that the number of cases tried by jury would be reduced by up to two-thirds; but as this paper went to press, there were reports that the Government may not, after all, seek to restrict jury trial.

If such reforms are still to come forward, it will inevitably mean more cases being heard by magistrates. This can only make the need for reform of the magistracy still more pressing.

2.2 THE LAY/STIPENDIARY DIVIDE

There are at present approximately 30, 500 lay magistrates and 100 full-time and 150 part-time stipendiaries in England and

Wales.⁴ All magistrates have the power to impose a maximum sentence of six months’ imprisonment, as well as community penalties and fines.

There has in recent years been a notable increase in the use of stipendiary or professional magistrates (known as District Judges) in the magistrates’ courts, perceived as a more efficient alternative to their lay colleagues. This has led to suggestions that the role of the lay magistrate is in sharp decline.

District Judges are paid professionals with legal backgrounds, who sit alone. Lay magistrates, on the other hand, are employed on a voluntary basis, with only their expenses being paid. Three sit on every case, with a Justice’s Clerk assisting. Most lay magistrates sit in court once a week.⁵

Lay magistrates rarely possess legal qualifications or backgrounds. In fact, the backgrounds of lay magistrates can vary widely. Rather than legal qualifications, lay magistrates are selected more for intelligence, common sense, integrity and the capacity to act fairly.⁶

An overwhelming 95% of all criminal cases are dealt with in the magistrates’ courts, rather than in the Crown Courts before a judge and jury.⁷ Of these, lay magistrates handle 91%. Lay magistrates also deal with civil cases and, as members of a specialist committee, also determine applications for liquor licences.

Whilst lay magistrates do receive some training, it is the responsibility of the Justices’ Clerks to provide them with legal guidance when deciding cases – so the Clerk’s role in the system is critical.

Analysis of the current role of court clerks illustrates that they already assume a quasi-judicial role, as legal advisors to the bench. They have two principal functions:

- They are responsible for proceedings in the court such as the identification of witnesses, the recording of pleas and conviction, and the reading out of charges
- As legal advisors to the bench, they advise on points of law, explain the ingredients necessary for a finding of guilt, and explain the existence of any binding precedent.

⁴ Sanders, 2001, page 6

⁵ Ibid, page 11

⁶ Magistrates Association web site

⁷ Sanders 2001, page 8; Auld 2001

3. STRENGTHS AND WEAKNESSES OF THE LAY MAGISTRACY

Both professional stipendiaries and lay magistrates bring different skills and benefits to the system: the value of neither should be underestimated. Also apparent, however, are a number of shortcomings and deficiencies. A rethink of the magistrates' courts needs to establish a system that makes the most of existing strengths, but also addresses current problems.

Issues that need to be addressed are:

- Public confidence
- Public participation
- Lay independence and professional expertise
- Division of law and fact finding functions

3.1 PUBLIC PERCEPTION OF LAY MAGISTRATES

Whilst there is general confidence in the lay magistracy, there is nevertheless confusion as to its exact nature and composition. For example, 60% of those questioned in a survey knew magistrates were lay, but there was confusion as to the exact meaning of this.⁸

Research undertaken by the Home Office reveals that whilst a clear majority know that magistrates hear a huge number of cases, only a bare majority are aware of their lack of legal qualifications.⁹ Sanders' research similarly found that 46% thought magistrates had full legal training, whilst over a third thought they were paid salaries.¹⁰

However, this lack of awareness should not be misinterpreted as a lack of opinion or as indifference. In fact, members of the public have firm views as to the role that they feel lay magistrates should have.¹¹

Sanders finds support for both lay and stipendiary magistrates, and for an amended balance between their roles. Stipendiaries are believed to understand the legal system better and to sentence consistently and with less personal bias. The option of stipendiaries sitting alone, however, is not generally supported.¹²

The Home Office report concluded that the public would neither understand nor support any moves to diminish the role of lay magistrates, who are seen as a manifestation of the concept of active citizenship within the criminal justice system.¹³

3.2 PUBLIC PARTICIPATION IN THE MAGISTRACY

At Crown Court level, defendants can be tried by a jury who are representative of ordinary members of society. The jury determines guilt or innocence; the judge then passes sentence. In the magistrates' courts system, however, defendants are both tried **and** sentenced by panels of lay magistrates.

Whilst the judiciary cannot be considered representative of ordinary society in the way a jury can, the lay magistracy arguably falls in-between. Can its members be considered as bringing into the system the everyday understanding and experience that many members of the judiciary apparently lack?

3.2.1 Are magistrates representative?

Surveys reveal that the magistracy fundamentally remains socially unrepresentative – disproportionately white, middle-class, professional and wealthy. But this situation has been improving.

Some 10% of new magistrates are from ethnic minority backgrounds, and the government has stated its aim that the proportion of the magistracy that is drawn from ethnic minorities should be in line with the population as a whole.¹⁴ By comparison, six out of the 568 current circuit judges are from ethnic minorities, whilst there are no judges from ethnic minorities at High Court level or above.¹⁵

If magistrates are genuinely to bring 'common-sense values representative of society' to their role, it is essential that they be as genuinely representative as possible.

The importance of increasing ethnic minority participation in the criminal justice system was highlighted by the Justice in Action report, which post-Lawrence recommended that the magistracy should be able to demonstrate 'an open, inclusive and participative culture which values diversity and to eliminate institutional barriers both formal and cultural to employment and selection...to promote mentoring and other support mechanisms'. In conjunction with Operation Black Vote, the Lord Chancellor has recently announced a shadowing scheme to improve awareness of the magistrates' court procedures.¹⁶

Following the Lawrence enquiry, the Metropolitan Police accepted as an organisation that it was institutionally racist. More recently, the CRE report into the CPS has found institutional racism in the CPS.¹⁷ The report concludes that institutional racism impacts on prosecution decisions: evidence

of higher acquittal rates for ethnic minority defendants than white (32% acquittal rate on average for white defendants, 42% acquittal rate on average for black)¹⁸, ‘prima facie suggests that the CPS may discriminate against ethnic minority defendants’.¹⁹ A University of Warwick report on ethnic minority defendants and magistrates’ and crown courts found an even more striking disparity²⁰. These findings illustrate the importance of participation of ethnic minorities in the criminal process, in particular the courts as the final check on police and CPS practices.

Even as ethnic minority participation in the system starts to improve, however, the magistracy remains unrepresentative by other measures. There is equal representation by gender, but the lay magistracy remains disproportionately middle-aged in comparison to the population at large and to a typical defendant likely to appear before it. For instance, only 4% of the magistracy are under 40 years old.²¹ As regards employment background and wealth, a recent survey found that in the area where the magistracy was most socially representative, 63% of the lay magistracy had a professional or managerial background, compared to 31% of the local population. In the most under-representative areas, these figures were 70% and 20% respectively.²²

Morgan and Russell (Home Office) found that four-fifths of the lay magistracy have managerial or professional backgrounds, whilst two-fifths are in fact retired.²³ Whilst the fact that less than a quarter claim loss of earnings and a significant minority don’t even claim expenses²⁴ does not necessarily signify wealth on their part, it does suggest that money is significantly less of a worry to them than it is to the average person.

The importance of background of decision makers is illustrated by Darbyshire’s research on juries.²⁵ This summarises international research showing broadly that individuals are more likely to empathise with those from a similar sex, race or age as themselves. In particular ethnic minority jurors are more likely to acquit ethnic minority defendants, or convict those charged with offences against ethnic minorities, and elder people are more likely to convict than younger people.

The element of social selection in the composition of the lay magistracy is not easy to overcome. Lay magistrates are required to sit for a minimum of 26 half day sessions per annum; and to be prepared to sit more frequently – generally 35–45 sittings per year. Many lay magistrates in practice sit even more often, up to a day a week,²⁶ in addition to attending training.

This requirement is too onerous for many individuals, in particular those in employment, to carry out. There is already widespread concern about the numbers of people avoiding two weeks’ jury service because of other commitments. The lay magistracy as currently structured is even more inaccessible. If Auld LJ’s proposals for a third tier are taken up, then demands on the lay magistracy are likely to increase – making the role even more onerous and therefore inaccessible to the vast majority of people.

3.3 LAY INDEPENDENCE, PROFESSIONAL EXPERTISE – STRIKING THE BALANCE

3.3.1. Fact-finding

The element of representation of normal society is by no means the only advantage in involving non-lawyers within the criminal justice system. However, the qualities of the existing lay magistracy have become the subject of considerable debate.

Sanders argues that whilst professional judges grow accustomed to applying a certain method of legal analysis and reasoning, magistrates from various disciplines and backgrounds can adopt a fresh angle. Furthermore, they are free of the professional cynicism or preconceptions that members of the judiciary may form over the years about bodies they deal with frequently, such as the Crown Prosecution Service.

⁸ Sanders, 2001, page 16

⁹ The Judiciary in the Magistrates’ Courts, Rod Morgan and Neil Russell, Research, Development and Statistics Directorate, Home Office, 2000, page 116

¹⁰ Ibid

¹¹ Ibid, page 116

¹² Ibid, page 24

¹³ Morgan and Russell, 2000, page 117

¹⁴ Lord Irvine, 24 July 2001, Lord Chancellor’s Department Press Office.

¹⁵ Statistics on Race and Criminal Justice System, Home Office, 2000

¹⁶ op cit. Fn(16)

¹⁷ Race Discrimination in the Crown Prosecution Service, Sylvia Denman, July 2001

¹⁸ Ethnic Differences in Decisions on Young Defendants dealt with by the Crown Prosecution Service, Gordon Barclay and Dr Bonny Mhalnga, Home Office 2000

¹⁹ Denman ibid

²⁰ Ethnic Minority Defendants and the Right to Elect Jury Trial, Professor Lee Bridges, Professor Mike McConville, Dr Satnam Choongh. The Warwick study found that of 20 black defendants who elected crown court trial, only one was convicted of all the original charges, whilst a further eight pleaded guilty to reduced charges. Eleven out of the twenty were acquitted. Details of the report and key statistics can be found at www.warwick.ac.uk/news/pr/law/206

²¹ Sanders 2001, page 11

²² Ibid

²³ Morgan and Russell, 2000, page 107

²⁴ Ibid, page 108

²⁵ What can the English legal system learn from research published up to 2001? Penny Darbyshire, Andy Maughan and Angus Stewart, Kingston Law School, 2001

²⁶ IPPR ibid

Since magistrates sit less frequently and have a smaller caseload, the risk of their becoming case-hardened is also reduced. They can retain an enthusiasm and freshness that many years in the judiciary can erode. For example, they are less likely to dismiss pleas of mitigation that professionals have heard repeatedly over time.²⁷

However Morgan and Russell²⁸ (Home Office) consider that, on a continuum, magistrates are closer to case-hardened judges than to juries – noting the number of sittings over a number of years, and the higher conviction rates from the magistrates' courts. Similarly it has been noted with juries that the longer they sit the more case-hardened they become, tending to convict more towards the end than the beginning of their period of service.²⁹

Auld goes further. He considers that to regard magistrates as surrogate jurors is tenuous – it ignores the amount magistrates sit, the training they receive, and the role of the District Judge. His view is that the distinction between lay magistrates and District Judges is less than others have suggested: his report proposes that the two should become closer in their expertise, training and 'judicial' qualities.³⁰

Auld questions what qualities the existing lay magistracy is able to bring to the judicial role that is not heavily overlain by the objectivity and skills that come with courtroom training and experience. Although lay magistrates sit less often than their stipendiary colleagues, their voluntary participation still takes up a considerable amount of their time – perhaps suggesting that they are not 'lay' in the true sense of the word.

Furthermore, the qualities discussed above could equally be interpreted as gullibility and naivety. In the absence of a legal background, they could be considered ill-equipped to deal with the complexities and technicalities of the law. Over-reliance on a clerk to advise on points of law might result in their complying with the opinion of the latter with little personal objectivity or insight. It has been noted that the fate of defendants appearing before magistrates ultimately rests on the luck of the draw³¹ – if the clerk advising is inexperienced, magistrates tend not to understand fully the questions of law at issue.

Auld proposes that a District Judge sit with lay magistrates and share the role of determining facts³²; but this would be likely to make the role of the lay magistrates less effective. Evidence from lay magistrates sitting in the Crown Court shows that the lay magistrates tended to defer to the professional expertise of the Crown Court judge, and be marginalised in the decision making process.

It is likely that in Auld's model, the District Judge would dominate, as the 'resident' expert in the law and the courts. Auld himself recognises that lay, untrained short-term 'jury like' wingers are unlikely to make an effective contribution to the process, although he does not accept the same holds for trained lay magistrates in the mixed tribunal. Darbyshire, in discussing mixed panels, notes that in continental systems lay members have deferred to expert opinion, a practice termed 'obedience'.³³ A study using a panel of eight lay members and a judge found that in almost every case the panel changed their verdict to correspond with that of the judge, regardless of its correctness.³⁴

This argues for district judges being separated from the fact-finding process, and leaves the question of the best composition for the lay panel charged with fact-finding. Research by Glasgow University into decision-making concluded that in criminal trials, juries numbering eight to nine people were best. This size of group gave a better chance of consensus emerging, with all views still being fully expressed. A group of that size was necessary to ensure that a broad spectrum of society was represented.³⁵

Darbyshire disagrees, maintaining that juries should be kept at a size of 12 to minimise risk of bias in proceedings. That risk of bias is clearly still very real for a panel of three lay magistrates, if the view of one or more members is extreme;³⁶ and the panel will obviously be less representative of society than a larger panel. This raises questions about safeguards, which are addressed later in this report.

3.3.2 Legal rulings and sentencing

One of the clear advantages that lay magistrates can bring to the court system is the element of local understanding. However, localisation appears to have disadvantages in terms of sentencing, as Home Office³⁷ statistics reveal. Analysis of the different sentences handed down in 1999 by magistrates' courts in England and Wales shows wide discrepancies in the sentencing patterns between different courts, suggesting that a localised approach can contribute to inconsistency in sentencing.

For instance, the statistics measure the proportion of defendants who were found guilty but received an absolute or conditional discharge. The average across England & Wales was 21.2%; but in one court 45.6% of those found guilty received a discharge; in another, only 8.2%.

Upon breakdown and analysis of different offences, similar inconsistencies are evident. For instance, the proportion of those tried for driving with excess alcohol who were

subsequently jailed is measured at 4.3% nationally. But in Corby, 15.1% were jailed in 1999; and no-one was jailed for this offence in South Somerset.

The national average for people discharged among those sentenced for common assault is 32.1%. By comparison, in South-east Northumberland, 74.4% were discharged, whereas in Newark and Southwell, only 9.5% were discharged.

Stipendiaries, on the other hand, due to their expertise in law, are able to deliver speedy and efficient judgments without the need for advice. Furthermore, they are aware of the various complexities and loopholes of the law to a far greater extent than lay magistrates, thus enabling them to challenge legal arguments more competently. They are more likely to be aware of and follow sentencing guidelines, and less likely to be aware of and influenced by local considerations that may give rise to sentencing variations.

The views of the Venne Committee on the division of work between lay and stipendiary magistrates broadly support the skills of the stipendiary, in particular in dealing with issues of law: it recommends, for example, that cases involving complex points of points of law or evidence, mode of trial and PII applications should be dealt with by stipendiaries, as well as a number of run-of-the-mill matters.³⁸

²⁷ Sanders 2001, page 21

²⁸ Ibid p9 para 1.4.3

²⁹ Darbyshire, *ibid*

³⁰ Ibid p 106

³¹ Law Society Gazette, 'Broadening the Bench', 10 April 2000

³² Auld *ibid* p113

³³ Darbyshire *ibid* p41

³⁴ R. Acre, 'Evidence evaluation in jury decision making' in Bull and Carson (eds) *handbook of psychology in legal contexts* (1995) p573

³⁵ Group discussion as Interactive Dialogue or as a Serial Monologue: The Influence of Group Size. Nicolas Fay, Simon Garrod, & Jean Carletta. Univ of Glasgow & Univ of Edinburgh. Sept 2001

³⁶ Statistics are taken from the 1999 Criminal Statistics Supplementary Tables available at www.homeoffice.gov.uk/rds/hocasvol4.html

³⁷ The role of the Stipendiary Magistracy (the Venne Report) (1996) pp15-18, para 5.3

³⁸ *Delcourt v Belgium* (1979-80) 1 EHRR 266 para 47

4. THE NEED FOR SEPARATION OF POWERS

As outlined above, there are good grounds for arguing that lay magistrates are best suited to dealing with the facts of a case (and the more ‘lay’ and less professionalised the better); and that stipendiaries are best equipped to rule on the law and sentencing.

There are also sound legal arguments for separating these two functions.

4.1 CURRENT PROBLEMS

As discussed above, Crown Courts separate the decision on facts (reached by the jury) from the legal issues (a matter for the judge). In the magistrates’ courts, both these functions are performed by the panel. This dual fact and law-finding function of the panel may give rise to issues under the Human Rights Act.

One specific issue relates to the admissibility of evidence. In the Crown Court, the Judge considers any challenges to the admissibility of evidence in a *voire dire*, in the absence of the jury. However in the magistrates’ court, the magistrates themselves determine whether evidence should be admissible. Should they decide the evidence is inadmissible, the same magistrates go on to try the case, formally putting the evidence that they have heard, and declared inadmissible, out of their minds.

The problem with such contortions is the fairness and impartiality of the trial procedure as a whole, as provided for by Article 6 of the European Convention on Human Rights. Article 6 does not prescribe the form a trial should take, or the rules for admissibility of evidence, taking these as matters primarily for domestic jurisdictions to regulate. However it does provide that the proceedings as a whole should be fair, and that the tribunal should be independent and impartial. In this context impartiality includes objective impartiality, on the basis that justice must not only be done, but must also be seen to be done.³⁹ The standpoint of the defendant, in determining whether there is objective impartiality, is important.⁴⁰

There have been no direct cases yet as to whether magistrates hearing evidence which they determine is inadmissible, and then subsequently trying the cases, infringes this test of objective impartiality and fairness of the trial proceedings. Pre-trial involvement in the case does not necessarily breach Article 6, especially where the involvement is limited to case management issues or different determination of facts.

However a decision involving a determination or near determination of merits (for example a bail application where the judge had found ‘a particularly confirmed suspicion of guilt’)⁴¹ would be vulnerable to challenge under Article 6.

Therefore it is likely that the current procedure, whereby magistrates are expected to put out of their minds evidence that they have ruled inadmissible, will at some stage be challenged under Article 6 of the European Convention on Human Rights.

A second issue is the current role of the court clerk in advising the lay bench. Article 6 requires generally that proceedings must be in public and that the defendant be able to participate effectively. Clearly the pre-Human Rights Act practice of the clerk advising the judges, in the absence of the defence, was likely to offend this principle, and this has largely been resolved now by clerks giving their advice in open court. However the advantage of a district judge determining legal questions is not only that the role of the clerk in giving advice ceases to exist, but also that judges are able to give reasoned, and in cases written rulings, which are then if necessary available for challenge on appeal. No such mechanism exists for rulings on law given by lay magistrates.

A system which separates the fact- and law-finding functions in the magistrates’ court, in a similar way to the crown court would solve this issue and any concerns about real or perceived bias and lack of impartiality and fairness in these procedures. The lay magistrates would deal only with facts. Questions of law such as admissibility of evidence would be dealt with by the District Judge.

³⁹ Hauschildt v Denmark (1990)12 EHRR 266 para 48

⁴⁰ *ibid*

⁴¹ Auld, *ibid*, p119 para 59

5. THE MIXED TRIBUNAL

In his Criminal Courts Review (2001), Lord Justice Auld supports the continued use of the lay magistracy – while proposing a new tier in the criminal courts system with a mixed tribunal of professional judges and lay magistrates.

The level at which he advocates this mixed tribunal approach represents a clear threat to jury trial for thousands of cases. Given the evidence in favour of jury trial over the alternatives, this seems unlikely to increase either the fairness of trials or public confidence in the justice system. Nor do his proposals for the form of the mixed tribunal appear likely to address the issues raised in this paper.

However, the broad principle of a mixed tribunal does have value at magistrates' court level – strictly as an improvement on the existing bench, not as a step-down from jury trial. We would propose that the current magistrates' court is replaced by a mixed tribunal of lay magistrates and a District Judge.

The lay magistrates would decide on issues of fact only. They would sit for far shorter periods than at present and receive minimal training, thus widening the potential pool they can be drawn from, and making them more genuinely lay.

The District Judge would deal with questions of law and admissibility of evidence, but have no role in determining guilt. Thus there would be a clear separation between the functions of the lay magistrates and District Judge, maximising the respective strengths of each.

6. REFORM IN PRACTICE

We strongly support the principles of local participation and active citizenship that the lay magistracy can represent. Whilst magistrates cannot be considered representative of society to the same extent as a jury, they come a great deal closer than the currently male-dominated, white judiciary.

But there is still room for improvement. The catchment of potential magistrates must be broadened to reach a wider cross-section of society and to ensure a more representative presence at the bench. As Auld notes, ‘if the magistracy is to survive and to earn public confidence as a lay element in the administration of criminal justice, urgent steps must be taken to remove its largely unrepresentative nature.’⁴²

The key issue is how best to utilise the positive attributes magistrates can bring to the system. In particular, this means enabling more people to join the lay magistracy, and make the lay magistracy more representative of society. At the same time, it means avoiding the pitfalls that make the lay magistracy less independent, more like district judges and more prone to expert dominance – issues identified by Auld, Morgan and Russell and others.

We would suggest a shift of focus in the selection process for lay magistrates: more magistrates should be recruited, to sit less frequently.

6.1 OPTIONS FOR A MORE ‘LAY’ MAGISTRACY’

Option 1: magistrate-jurors

We have considered an option to create a completely lay magistracy, with individuals drawn randomly from the population and required to sit for a specified period of time, in a similar manner to a jury.

The advantages of this would be considerable. There would be genuine local participation in justice; the lay magistracy would be truly lay – not trained, not ‘professionalised’ – and better reflect the make-up of society. The system should be cheaper to administer, in particular if the criminal courts operate under a combined courts administration, and practices are updated. Issues about part-heard trials, the difficulties of reconvening benches and the delays these currently cause, should decrease, with lay jurors in attendance for clear two-week blocks.

The difficulty with this model is the risk of bias in proceedings. The local nature of magistrates’ courts, and the larger number of cases they deal with, increase the likelihood that individuals

sitting on a case, if selected totally randomly, will have some connection with the defendant (for example live in the same road). With only three on a bench, bias or prejudice of any one individual is more likely to influence the outcome of the proceedings.

We consider that such problems could only be negated if the size of lay benches were increased to at least eight members (the optimum numbers for decision making suggested by the Glasgow research, see above). However the cost and administrative consequences of this are likely to be prohibitive.

The bias issue could, also be addressed by more rigorous screening of potential magistrate-jurors. Crown court jurors are already required to state if they have some connection with the case, for example knowledge of the defendant or prosecution witnesses.

It is not impossible to envisage a system of screening of potential jurors so that for example those who have a connection with the case, are racially prejudiced, or suffer from a mental disorder of a nature that would make it impossible for them to try the evidence fairly, would not be called to sit. The Runciman Commission and Auld have both made proposals for ensuring an equitable ethnic mix on juries where race is in issue in the case.⁴³ Consideration could be given to re-establishing a right to peremptory challenge, which is used in US and Canadian systems, with jury sizes as low as six, to ensure a balanced jury.

Option 2: expanding the lay magistracy

Alternatively, a significant expansion of the current lay magistracy could occur. The numbers of sittings should be substantially reduced, say to a fixed period of two weeks every year, to enable the pool of available people to increase. Positive initiatives to expand access could be developed, such as child-care facilities, and greater understanding with employers. This would increase the representativeness of the magistracy, while enabling them to maintain both their status and their freshness of perspective, with less risk of some of the negative attributes associated with stipendiaries, such as case-hardening.

Training would also be significantly less – concentrating on general issues of fairness and decision-making, rather than training in the law, which would be the role of the District Judge. Initiatives to increase public awareness of the role of the lay magistracy, and to broaden the range of people attracted to it, should be pursued.

6.2 ROLE OF THE DISTRICT JUDGE

The legal advisor to the tribunal is named the District Judge for our purposes. His/her task will be to determine questions of law only. The role of the panel is to be entirely distinct, a division being created between determiners of fact and of law. The role of the District Judge would be a hybrid of court clerk and professional stipendiary.

Analysis of the current role of court clerks illustrates that they already assume a quasi-judicial role, as legal advisors to the bench. This legal function has been further strengthened in two significant ways:

- As from 1st January 1999, all newly appointed court clerks must be qualified solicitors or barristers. Some existing court clerks will have to obtain necessary qualifications, but those of a certain age will be able to continue without these.
- Section 49 of the Crime and Disorder Act 1999 has increased the potential for case management to be handled by clerks. Powers which were previously exercised by a single justice sitting alone can now be delegated to single justices' clerks.

If, as widely predicted, the criminal courts are to come under a combined court administration then it is likely that the current administrative functions of the clerk, eg organising court listings, will come under review. Clearly, under our proposals, consideration would have to be given as to whether these functions could also be carried out by the District Judge, or the need for administrative support to the court.

6.3 DIVISION OF CASES

Our proposals are not alternatives to trial by jury, which still remains the fairest mechanism for the criminal process. Three or five lay magistrates cannot replace trial by twelve of one's peers, in terms either of representativeness of society, or of perceived fairness. Any proposals for reform of the magistrates' court should not be used to lessen the rights of defendants to be tried by jury.

In the reformed magistrates' courts, uncontested bail and remand cases could be dealt with by a single District Judge sitting alone. Such cases are not complex and are largely administrative: lay involvement therefore adds nothing to the process.

Contested bail or remand or summary cases, however, must go before a mixed panel. It will be the task of the three lay

members to decide issues of fact and for the District Judge to determine questions of law. Neither will influence the other in its decision-making.

The issue of sentencing needs also to be considered. As an aside, we see no justification for the current situation that magistrates be allowed to commit for sentence after trial, having previously accepted jurisdiction. Once the decision has been made where a case should be tried, then the case should remain in that forum throughout its lifetime.

There are some attractions in suggesting that lay benches should be involved in the sentencing process. A major issue in public perception of the criminal justice system is a lack of understanding of penalties imposed by courts, and in particular the stringent requirements of community penalties.

Increased public involvement in the sentencing process may well have the effect of increased understanding and acceptance of different types of criminal justice penalties. It is interesting to note that lay magistrates in fact consistently sentence at a lower level than District Judges⁴⁴, suggesting perhaps that where there is some form of community involvement in sentencing there is greater respect for alternative measures of punishment, and that lay magistrates are less case-hardened.

However this is outweighed by other issues. On a practical basis, reconvening lay benches for sentencing would be difficult and costly. A more lay magistracy, sitting on fewer cases and with little or no training in law, would be unlikely to be able to understand the complexities of sentencing law, and therefore would defer to the District Judge. Discrepancies in sentencing between different courts (as already occurs) would be still more likely, a concern noted by Auld.⁴⁵

We would recommend that sentencing be carried out by the District Judge alone, in a similar manner to the Crown Court, to ensure it is able to occur speedily and efficiently, and to minimise risk of local discrepancies and bias.

⁴² The Royal Commission on Criminal Justice, Auld *ibid* p159 para 63

⁴³ Morgan and Russell, 2000, *ibid* Ch 3

⁴⁴ Auld, 2001, *ibid*, p97

⁴⁵ Sanders *ibid*, Auld *ibid* p 105

7. CONCLUSION

The jury system in our Crown Courts inspires general public confidence and trust. Elements of that trust apply to the lay magistracy too, but to a limited extent only. Our proposals seek to maximise these positive elements.

Our proposals envisage the recruitment of a larger number of lay magistrates, who would sit less frequently and require less training. This would increase the potential for the presence of a wider cross-section of society at the bench. The risk of becoming case-hardened would be reduced, and lay magistrates would remain ‘lay’ in the true sense of the word.

We have not considered the question of costs in detail. Others who are more versed in issues of costs have expressed divergent views.⁴⁶ However we would question the assertion by Auld that a ‘half jury system’ would be prohibitively expensive. We would anticipate, as proposed by Sanders, that increased use of the lay magistracy, in tandem with redefining the role of District Judge and Justices’ Clerks and other reforms to the courts system and administration, should not increase costs and may offer scope for savings.

A distinction has also been created between the fact - and law - finding functions of the panel, with the lay magistrates determining facts and the District Judges questions of law. In the context of admissibility of evidence, therefore, the problems relating to *voire dire*s are solved. The different and unique skills of District Judges and of lay magistrates would be directly matched to their tasks.

This paper aims to lay out a better model for the future of magistrates’ courts. It is our sincere hope that the Government will take note of these proposals and reflect them in the mooted reforms to this element of the criminal justice system.

⁴⁶ Sanders *ibid*, Auld *ibid* page 105

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