

# CHAPTER 4

## MAGISTRATES

### INTRODUCTION

- 1 No country in the world relies on lay magistrates as we do, sitting usually in panels of three, to administer the bulk of criminal justice. I have already mentioned that magistrates' courts deal with 95% of all prosecuted crime. Lay magistrates – about 30,400 of them – handle 91% of that work. Our system is also unique in giving exactly the same jurisdiction to a small cadre of about 100 full-time professional judges, now called District Judges (Magistrates' Courts), supported by about 150 part-time Deputies, sitting singly, who deal with the remaining 9%. And, unlike in other countries where both lay and professional judges exercise the same jurisdiction, magistrates and District Judges in England and Wales rarely sit together as a mixed tribunal. It is matter of chance, so far as defendants are concerned, whether a lay or a professional bench deals with them. As one academic commentator of great experience in this field has observed, this major contribution of the magistracy to the criminal justice system has until recently been largely disregarded by the Judiciary, many academics, review bodies, law-makers and others.<sup>1</sup>
- 2 As I have indicated in Chapter 1, I am confident that magistrates should continue to exercise their established jurisdiction alongside District Judges. I have also given a brief description of the history and current jurisdiction of the magistracy and District Judges in Chapter 3. In this Chapter, I consider the future for their summary jurisdiction and their respective roles in the exercise of it. In doing so, I have had the advantage of submissions from many knowledgeable contributors to the Review, including the Magistrates' Association, the Central Council of Magistrates' Courts' Committees, the Joint Council of Her Majesty's Stipendiary Magistrates,<sup>2</sup> the Justices' Clerks' Society, the Association of Justices' Chief Executives, the Association of Magisterial Officers and many individual magistrates. I have also drawn heavily on two pieces of research published during the currency of the

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<sup>1</sup> Dr. Penny Darbyshire, *An Essay on the Importance and Neglect of the Magistracy* [1997] Crim LR 627, at 634-640

<sup>2</sup> now the National Council of Her Majesty's District Judges (Magistrates' Courts)

Review. The first is an article by Peter Seago, Clive Walker and David Wall, *The Development of the Professional Magistracy in England and Wales*, published in August 2000.<sup>3</sup> The second is the Report of Professor Rod Morgan and Neil Russell, *The judiciary in the magistrates' courts*, published in December 2000, on their research into the balance of lay and stipendiary magistrates and on the effectiveness of their respective deployment. The latter research, which was commissioned by the Lord Chancellor's Department and the Home Office, was undertaken during the first nine months of 2000 and of this Review. It drew on data collected nationally and locally, but concentrated on ten magistrates' courts in London and the provinces, with and without District Judges. In addition, it sought the views of regular court users of the ten courts and also of the general public through a nationally representative sample of about 1,750 people, and took into account comparative material drawn from European jurisdictions.

- 3 Morgan and Russell's main findings were that the magistracy is not wholly representative of the community, but that in most respects magistrates' courts, whether constituted by magistrates or District Judges, work well and command general confidence. They concluded that to eliminate or greatly diminish the work of magistrates would not be widely understood or supported.
- 4 Their findings, in a little more detail, were as follows. District Judges, because of their legal knowledge and experience and because they sit full-time and alone, are significantly faster and otherwise more efficient than magistrates who need to confer with each other and often take the advice of their court clerk. District Judges achieve this edge in speed whilst being more interventionist than magistrates and without loss of judicial fairness, efficiency or general courtesy.<sup>4</sup> When indirect costs, i.e. of premises and administration etc.,<sup>5</sup> are taken into account, they are still moderately more expensive than magistrates.<sup>6</sup> When allowance is made for the savings (unestimated by Morgan and Russell) to other court users from the increased use of District Judges and for lay magistrates 'opportunity costs', i.e. the loss to their employers of their donated time, they would be moderately less expensive.<sup>7</sup> They also found evidence that District Judges are more likely to remand in custody and to sentence more heavily than their lay colleagues.

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<sup>3</sup> Seago, Walker and Wall, [2000] *Crim. Law Review* 631

<sup>4</sup> See Morgan and Russell, *The judiciary in the magistrates' courts*, RDS Occasional Paper No 66 (Home Office, 2000), pp ix and 34-43 which suggests that District Judges can deal with 30% more than magistrates of the latter's normal case load; and Seago, Walker and Wall, who suggest that a District Judge can equal the work of anything between 24 and 32 magistrates in metropolitan and provincial areas respectively; [2000] *Crim L R*, p 638.

<sup>5</sup> by far the biggest components in the costs of running magistrates' courts; *ibid*, pp xii and 97

<sup>6</sup> ie costing just over £52 against magistrates' nearly £62 per appearance when indirect costs such as premises and administration staff were brought into the equation; *ibid*, p xi and p 89

<sup>7</sup> *ibid*, pp 90-91

- 5 Morgan and Russell concluded that most court users had confidence in both, but more in District Judges. Those unfamiliar with the system – “the overwhelming majority of the public” – after it had been explained to them, regarded magistrates as more representative of the community. Nevertheless, they thought that the work should be divided equally between them or that the type of tribunal did not matter. As the researchers commented, these and other findings were “not entirely consistent nor ... [were] their implications entirely clear”.<sup>8</sup> As uninformed opinion, it seems to me, that even if those thoughts were consistent and their implications clear, they are valueless as an aid to determining the relative strengths of District Judges and lay magistrates.
- 6 Unsurprisingly, Morgan and Russell felt unable to recommend any change in policy direction. Broadly, they confined themselves to concluding that those familiar with the system, in the main criminal justice practitioners, have greater confidence in District Judges and that the uninformed general public think that panels of magistrates should make the more serious judicial decisions. Their last words, in the light of all these findings and conclusions, were delphic. They suggested that:
- “...the nature and balance of the contribution made by lay and stipendiary magistrates could be altered so as better to satisfy these different considerations without prejudicing the integrity of a system founded on strong traditions and widely supported”.<sup>9</sup>
- 7 On the question of relative cost, my view, contrary to that of the Magistrates’ Association,<sup>10</sup> is that Morgan and Russell were correct to take into account the ‘opportunity costs’ of magistrates to society as a whole in their donation of time to this public service, rather than confining the analysis to one of cost to the criminal justice system. However, their calculations are necessarily somewhat theoretical and speculative and are open to criticism in a number of respects.
- 8 First, Morgan and Russell concluded that such savings as might be achieved, say, by doubling the numbers of District Judges, would, in any event, be offset by additional Prison Service costs of over £30 million resulting from their greater tendency than magistrates to remand more accused persons in custody and to impose custodial sentences.<sup>11</sup> Putting aside the question of accuracy of these estimates and the assumptions on which they are made, about which the authors are suitably cautious, there is a point of principle in their putting into

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<sup>8</sup> *ibid*, p 117

<sup>9</sup> *ibid* p

<sup>10</sup> Press Release of 14<sup>th</sup> December 2000

<sup>11</sup> *The judiciary in the magistrates’ courts*, pp xii, 49 - 50 and 92 – 94

the balance increased custodial costs. If there is a difference between District Judges and magistrates in this way when dealing with like cases, one or other must be getting it wrong, just as in the case of the perceived difference between sentencing in the Crown Court and in magistrates' courts in 'either-way' offences.<sup>12</sup> Save as a cynical measure of expediency, it would be wrong to consider whether to change the present sharing of summary jurisdiction on the basis that District Judges are too hard or that magistrates are too soft in their decisions as to custody. As it happens, I believe that District Judges are more likely to follow national practice and sentencing policy guide-lines in this respect than magistrates, with their individual traditions and training, and history of disparate sentencing.

- 9 Second, there are other more detailed criticisms that can be made of Morgan and Russell's analysis of potential savings on various hypotheses.<sup>13</sup> These include their failure: to allow, when calculating relative costs per session, for the greater complexity of cases heard by District Judges; sufficiently to recognise magistrates' greater call than District Judges on legal support and court overheads; and to give sufficient consideration to the 'knock-on' savings to all other criminal justice agencies resulting from the undoubted efficiency savings that would flow from an increase in the use of District Judges.
- 10 As to the future, the cost comparison could be significantly affected to the disadvantage of magistrates by implementation of some of the recommendations that I make below for more systematic investment in recruitment of applicants for selection, appointment, training and allowances for loss of earnings etc. And, as Morgan and Russell acknowledge,<sup>14</sup> much of their analysis would be irrelevant, and there would be greater scope for savings than they have identified, if the present courts structure were to be replaced by a unified court in which judges and magistrates could be deployed flexibly according to work needs in busy urban centres.
- 11 It is enough to note for the purpose of this Report, Morgan and Russell's conclusion that District Judges are more efficient than magistrates, and that, assuming little change in their respective numbers and the present system of summary justice, there may not be much to choose between them as to cost.<sup>15</sup> As they observe, though one District Judge can handle the work presently handled by about 30 magistrates, it would need a significant increase in the use of District Judges to achieve reductions on any scale in administrative staff and courtroom costs.<sup>16</sup>

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<sup>12</sup> see Chapter 5, paras 161 - 163

<sup>13</sup> drawn to the Review's and their attention by Robert McFarland, a member of the Glidewell Committee

<sup>14</sup> *The judiciary in the magistrates' courts*, p 115

<sup>15</sup> *ibid*, pp 111-112

<sup>16</sup> *ibid*, pp xii and 85-86

12 Many magistrates believe that there is a national policy or ‘agenda’ gradually to enable District Judges and justices’ clerks to squeeze them out of the system. I know of no such agenda and no hint of it has appeared in the course of the Review. Nevertheless, it has been a constant theme in the many submissions that I have received from benches and individual magistrates all over the country. It has persisted despite the Lord Chancellor’s publicly expressed commitment to the principle of the lay magistracy continuing to play a significant part in our system of justice<sup>17</sup> and my publicly expressed interim view<sup>18</sup> that I was satisfied that there was a sound case for their retention. District Judges too feel uneasy about their precise role in the system of summary justice, believing, with some justification that their greater legal expertise, as well as their speed, could be put to better use than sometimes is the case. This is a long-standing concern. The Runciman Royal Commission, reporting over 10 years ago,<sup>19</sup> noted that stipendiary magistrates were sometimes not always given work that made the best use of their skills and qualifications, and recommended correction. Morgan and Russell neatly sum up the dilemma for policy makers on this issue in the following words:

“... many lay magistrates are wary of what they see as the asset-stripping consequences of employing stipendiaries. Why, they ask, should they volunteer to give so much of their unpaid time to this public office if they are deprived of the opportunity to hear interesting cases likely to engage their intelligence? By the same token, stipendiary magistrates think it odd if their legal expertise is not exploited by allocating to them the most legally and procedurally demanding cases in which serious decisions must be made”.<sup>20</sup>

13 As with juries, magistrates are not wholly reflective of the communities from which they are drawn, but nevertheless they have an important symbolic effect of lay participation in the system which should not be under-valued. Unlike juries, they are volunteers who bring to their work public spirited commitment and ever increasing legal and procedural knowledge and experience. Their vulnerability to case-hardening - in a way that juries are not - is off-set by a number of factors, namely: the relative infrequency of their sittings; the discipline that comes from their training; their sitting in ever changing panels; the advantage of a clerk to advise them on the law; and their obligation to explain their decisions. However, there is scope for improvement, particularly in the manner of their recruitment, so as to achieve a better reflection, nationally and locally, of the community, and in their training, so as to develop fairer, more efficient and more consistent procedures and sentencing patterns.

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<sup>17</sup> in a speech to the Annual Dinner of Stipendiary Magistrates on 13<sup>th</sup> April 2000

<sup>18</sup> my third interim report published on the Review's web-site on 14<sup>th</sup> October 2000

<sup>19</sup> Report of *Royal Commission on Criminal Justice*, Ch 8, para 103.

<sup>20</sup> *The judiciary in the magistrates' courts*, p 31

- 14 The evidence in the Review as to the value of District Judges in complementing the work of magistrates at a summary level is also of a piece with the findings of the Morgan and Russell Report. There are undoubted advantages in the legal expertise, authority, speed, continuity and consistency that they can bring to the conduct of the longer and more complex cases, to case management and to the increasing sophistication and variety of sentencing options. They are also of value in their speed in dealing efficiently with the long lists of more straightforward work that is the staple diet of magistrates' courts, particularly in large metropolitan centres. Now, too, that magistrates' courts are in the front judicial line for Human Rights challenges,<sup>21</sup> it is important to have the benefit of their legal and judicial skills in that potentially difficult field. In my view, District Judges are too important to the administration of criminal justice at a summary level to consider - as some contributors to the Review have suggested - removing them from it.

**Accordingly, I confirm the indication I have already given in my interim reports and recommend that magistrates and District Judges should continue to exercise summary jurisdiction.**

### **Present working patterns**

- 15 District Judges were given national jurisdiction when the Stipendiary Bench was unified by the Access to Justice Act 1999, in order to enable them to deal more flexibly with the work wherever and whenever it arises. The official policy of the Lord Chancellor's Department for them is that they should normally sit in the area to which they have been assigned and should deal with the same range of cases as magistrates. But the Senior District Judge, acting on behalf of the Lord Chancellor, may also direct their deployment anywhere in the country to deal with fluctuations in workload or particularly complex cases.<sup>22</sup>
- 16 Magistrates, on the other hand, are appointed to and sit only in a particular commission area, though in each area their numbers provide the necessary flexibility. However, whilst I do not advocate that magistrates should normally sit outside or far outside the area to which they have been appointed, I have considered two candidates for improvement in their territorial jurisdiction. First, there should be a ready means of transfer from one bench to another. Until recently this was cumbersome, resulting sometimes in

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<sup>21</sup> which, so far, have not been as numerous as some expected

<sup>22</sup> see para 275 of the explanatory notes to the Access to Justice Act 1999, s 78; and para 35 of the memorandum on conditions and terms of service of District Judges

magistrates of great experience being lost to, or excluded for some time, from the system. However, there is now developing<sup>23</sup> a simple procedure of ‘active transfer’, that is, without a break in service, between commission areas. Such procedure, which preserves magistrates’ continuity of experience, is becoming the norm for those seeking transfer providing they have the support of the chairman of their transferor bench and acceptable MNTI reports, and there is a suitable<sup>24</sup> vacancy. Second, in the event of there being a new unified Criminal Court, although I would expect magistrates to sit mainly in their local courthouses, there is no reason why their jurisdiction should be restricted to one particular locality when they could be usefully deployed from time to time in adjoining areas, especially for longer cases and if they live in the boundary area spanning them.

- 17 The terms of District Judges’ appointment are that they should sit five days a week. However, there are some local variations, mainly in London, to allow for out of hours on call and emergency duties. And, as always, the unpredictability of lists or the need to give more time to preparation of cases or decisions, may mean that they do not always sit in court every day of the week. Like magistrates, they too have other commitments, including training sessions of the Judicial Studies Board, attending various meetings and assisting with the training of Deputy District Judges and magistrates. Although one or two provincial District Judges are members of MCCs, it is unusual.
  
- 18 Magistrates are required, as a minimum, to sit 26 half-days a year, but are normally expected to sit between 35 and 45 and not more than 70 a year. In addition, they are expected to undertake training for their general jurisdiction as ‘wingers’ and, in time, as chairmen and for any specialist panels, such as youth or family on which they seek to sit. They are also expected to involve themselves in different ways in the affairs of their bench and local community, by attending meetings, sitting on local committees and participating in various activities to educate the public about the work of the courts. These activities include participation in court open days, in presentations to schools and community and employer groups and in mock trial competitions. There have been some suggestions in the Review for relaxation of the Lord Chancellor’s sitting constraints, mainly to raise the maximum to beyond 70 sittings a year to allow those who can give more time to it to do so. However, I could not recommend that for two reasons: first, it would be likely to be taken up in large part by the retired or financially independent, swelling the already over-represented older and well-to-do members of the community on the magistracy. Second, to sit regularly for some two days or more a week would not be consonant with the notion of part-time lay justice and would attract perceptions of case-hardening.

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<sup>23</sup> in anticipation of a proposed amendment to the Lord Chancellor's Directions to take effect in the autumn of this year

<sup>24</sup> bearing in mind that the transferee bench should continue broadly to reflect the community it serves

**Accordingly, I recommend that, whilst magistrates should continue to be appointed to one commission area, there should be a ready mechanism for enabling them, when required, to sit in adjoining areas.**

## **FUTURE SHAPE OF SUMMARY JUSTICE**

19 There are five main issues. They over-lap, one with another, and must also be considered in the context of the reforms that I recommend for the court system as a whole. They are:

- the extent of summary jurisdiction;
- the deployment of and allocation of work between District Judges and magistrates;
- the role of the justices' clerks;
- the composition of the magistracy; and
- the training of the magistracy.

## **THE EXTENT OF SUMMARY JURISDICTION**

20 There have been some suggestions in the Review for a general increase or decrease in summary jurisdiction, but I can discern no wide or well-based support for a change in the general limit of six month's custody or £5,000 fine now applicable to District Judges and magistrates alike.<sup>25</sup> Whilst magistrates have a generally higher jurisdiction than that given to lay tribunals in other jurisdictions, they are increasingly well-trained for their task and have their legal advisers to assist them, where necessary, on points of law or procedure. A notable feature of their handling of their jurisdiction to date is the very low level of appeal from their decisions. But, as the division between summary jurisdiction and that of trial on indictment turns on the maximum severity of sentence – currently defined in terms of length of custody or amount of fine – implementation of the recommendations in the recent Sentencing Review, for combined custody and community service orders for up to 12 months<sup>26</sup> could require reconsideration of the dividing line.

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<sup>25</sup> the one seeming anomaly is the extension of their powers in the Youth Court to make detention and training orders for a maximum two years; see Powers of Criminal Courts (Sentencing) Act 2000, ss100-107

<sup>26</sup> *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office May 2001), p iv, para 0.11, recommendations 15-18

**I recommend that there should be no general change in the level of summary jurisdiction, as it is presently defined, of District Judges or magistrates, though the matter may need review in the light of the Halliday recommendations for the introduction of a new sentencing framework including combined custody and community sentence orders.**

## **DEPLOYMENT AND ALLOCATION OF WORK**

- 21 According to Morgan and Russell<sup>27</sup> and information provided in the Review, District Judges deal routinely in London and in some other major metropolitan areas with the whole range of summary matters as well as the heavier work. Elsewhere, their caseload, while covering much of the range, is slanted towards the heavier work. As I have said, the Morgan and Russell research indicated that District Judges rarely sit with magistrates. This finding is of a piece with the indications of most District Judges and magistrates in the Review that neither wanted to sit routinely with the other in summary matters. District Judges feel that they do not need the assistance of magistrates. And magistrates do not wish to lose the opportunity of chairing their own courts, though the Magistrates' Association and many individual magistrates have expressed appreciation of the experience to be gained from sitting with District Judges from time to time. However, the indications in the Review are that magistrates, at least, might take a different view - and different considerations would arise - if they were to be given an enhanced jurisdiction sitting with a District Judge in a new unified Criminal Court.
- 22 The allocation of work between lay and professional magistrates has been the subject of much examination, professional and academic, over the years. Any attempt at a logical and tidy solution to the question is impeded by the way in which summary justice in this country has evolved over the centuries to its present mix of a small number of professional judges exercising singly the same jurisdiction as a large number of lay magistrates sitting in panels. The question is not just of the efficient and effective use of judicial resources, though that is important. There are more fundamental concerns that also bear on it, namely fairness and involvement of the community in decision-making. Those two concerns in turn invite consideration whether there should always be a number of lay fact-finders in a summary criminal tribunal and whether that tribunal, in whatever form, should reflect the local community. The debate as to primacy between lay and professional justice in these matters invariably ranges over a whole range of broad, overlapping and elusive notions claimed to support the former. They include public confidence, lay justice, people's or citizens' justice, 'participative democracy', 'locality' or community justice, magistrates as 'surrogate jurors', judicial independence

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<sup>27</sup> *The judiciary in the magistrates' courts*, pp 26-31, 99 and 109

and, the right to a ‘fair’ trial. On the other side, usually prayed in aid as favouring District Judges, are the more tangible qualities of legality, consistency, speed and other efficiency and effectiveness.

- 23 The debate, whatever notions or concepts are in play, largely consists of the deployment of ideologies to support unsound or out-dated comparisons and rival caricatures. The reality is that District Judges and magistrates today are closer in their social and legal culture than many give them credit for. If the reforms that I recommend in this and other chapters of the Report are implemented, the scope for this arid debate will be further reduced. Nevertheless, out of deference to the many who feel strongly about these considerations and who have made submissions to the Review, I consider each of them below.
- 24 I should add that, just as it is impossible for outside researchers and reviewers to evaluate the relative ‘correctness’ of juries’ verdicts and magistrates’ courts’ decisions, so also is it impossible to evaluate the relative justice of the decision-making of District Judges and magistrates, for example, as to perceptions of over-ready conviction or over heavy sentencing by one or the other. Morgan and Russell disclaimed any attempt to assess the appropriateness or justice of their respective decisions or to recommend how better to balance the work of District Judges and magistrates at summary level.<sup>28</sup> They construed their remit as being more concerned with the mechanics of the present court process and how each form of summary tribunal performs, or is perceived to perform. As I have said, they were generally favourable to both.

### **Quality of hearing**

- 25 As to court manner and general sensitivity to the parties, District Judges and magistrates both came well out of the Morgan and Russell research. There was not much to choose between them in such matters as attentiveness, clarity, courtesy and so on. But they concluded that District Judges had the edge in their control of proceedings, in moving them on and in resisting delaying adjournments, so that the more District Judges the less court appearances there were likely to be over-all. However, as I have indicated, they also found that District Judges are more likely than magistrates to refuse bail, to issue arrest warrants for failure to attend court and to impose immediate custodial sentences.<sup>29</sup>

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<sup>28</sup> *ibid*, p 5, para 1.3

<sup>29</sup> *ibid*, pp ix, x, and 48-50, paras 3.4.2 - 3.4.4

## People's justice and public confidence

- 26 One contributor to the Review<sup>30</sup> has drawn attention to the dichotomy in people's attitudes towards the magistracy, according to whether they are considering the elective right to trial by jury in 'either-way' cases or the relative advantages of lay and professional judges in summary cases. On the former issue magistrates are often portrayed as part of the establishment, being used to deny defendants a basic human right; on the latter they are depicted as the near equivalent of a jury - the peers of people who appear before them, ordinary people with experience of the real world, bringing common sense to bear etc.
- 27 Some see magistrates as 'surrogate jurors' or as a manifestation of democracy in the administration of criminal justice. A recent example of many contributions over decades to this topic has been that developed during the course of the Review, and published in January 2001, by Professor Andrew Sanders under the auspices of the Institute for Public Policy Research.<sup>31</sup> He takes as his starting point the low level of public confidence in magistrates' courts based largely on the recent British Crime Survey,<sup>32</sup> a MORI poll and focus groups with the public and with offenders. He then argues: that 'participative democracy', along with fairness and efficiency, are the principles by which the summary system should be judged; that trial by judge and jury in the Crown Court is assumed to be 'the best' system and one which commands more public confidence than trial by magistrates; and that, therefore, the aim should be "to make magistrates proceedings more like Crown Court trials".<sup>33</sup> By that route he concludes that a District Judge sitting alone should deal with simple cases, "requiring legal rather than social skills", and that a District Judge should sit with magistrates in all cases where social as well as legal skills are required. In practical terms he proposes that District Judges should sit on their own only when dealing with bail, remands, mode of trial determinations and pleas of guilty and that, in all other cases, they should sit with magistrates, who would need less legal expertise, training and experience and would sit less frequently than now - "more jury-like". He suggests that the greater costs of requiring a mixed tribunal for all trial work would be off-set by the savings in District Judges dealing on their own with long remand and guilty plea lists and the removal of the need for legal advice from justices' clerks or legal advisers.
- 28 Accordingly, under Professor Sanders' proposals, District Judges, despite their legal knowledge and expertise, would when sitting alone, deal with

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<sup>30</sup> Robert McFarland

<sup>31</sup> *Community Justice: Modernising The Magistracy In England and Wales*, Andrew Sanders. Criminal Justice Forum, IPPR, p1

<sup>32</sup> Home Office Research Study *Attitudes to Crime and Criminal Justice: Findings from the 1998 British Crime Survey*, (2000) (Joanna Mattinson and Catriona Mirrlees-Black), pp 3-8 and 47-49

<sup>33</sup> *Community Justice*, pp 8 and 9

mainly routine interlocutory work and uncontested cases, and magistrates would be relegated to sitting, and then only infrequently, as ‘wingers’ with little, if any, training or experience for the work. I believe that such a ‘half-way jury system’, if introduced, would deprive summary justice of the best features of professional and lay judges sitting separately. It would encumber and slow all its trial procedures and, for that reason and because of the many more District Judge appointments it would require, would be prohibitively expensive.

- 29 Like many arguments of this sort, it takes as its starting point, public confidence. Morgan and Russell found that those with some knowledge of the system - court practitioners - though generally confident in both District Judges and magistrates, had more confidence in the former.<sup>34</sup> However, their assessment of public opinion, on the strength of their poll of under 2,000 people - nearly 75% of whom did not know, until told, that there were two types of summary judge - was that magistrates reflected the community better and were more likely to sympathise with defendants’ circumstances. They were of the view that District Judges were better at making correct judgments of guilt or innocence, considered on balance that single magistrates should deal with motoring offences, and, by a large majority, that panels of magistrates should deal with the more serious questions of guilt or innocence and sending people to prison. To cap it all, most of the respondents thought that the work of magistrates’ courts should be divided equally between District Judges and magistrates or that it did not matter which.<sup>35</sup> It is not surprising that Morgan and Russell were, as I have indicated, baffled by the seeming conflicts in some of these expressions of ‘public opinion’.
- 30 The Sanders MORI poll and focus group research, like that of Morgan and Russell, revealed a similar picture of public ignorance of the system:
- “The public know little about how the magistracy works. One third of IPPR’s MORI poll did not know that the majority of magistrates are lay people. They also hugely underestimated the proportion of cases heard in the lower courts. The role of the Magistracy is not visible to the public”.<sup>36</sup>
- 31 Despite this dismal picture, the authors of these research projects, and others who set store by what they perceive to be public opinion, rely significantly on public confidence as a factor, or at least something on which a value judgment may be made, as to one or other aspect of the system. Thus, Morgan and Russell, after identifying the level of public ignorance about

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<sup>34</sup> *The judiciary in the magistrates’ courts*, pp x, 59, 62 and 67

<sup>35</sup> *ibid*, pp x, xi, 69-82, 116

<sup>36</sup> *Community Justice*, p 2

magistrates' courts, observed<sup>37</sup> “[i]t would be a mistake to construe lack of public knowledge with lack of opinion or public indifference” and went on to rely on the uninformed opinions they had identified as among a number of factors to be satisfied in some unspecified way. Similarly, Sanders clearly regards safeguarding and increasing of public confidence as an argument in favour of fashioning the system to meet the largely uninformed view of those whom his researchers had approached as representative of the larger public.

- 32 As I have said in Chapter 1, it is one thing to rely on uninformed views of the public as a guide to what may be necessary to engender public confidence, and another to rely on such views as an argument for fashioning the system to meet them. Public confidence is not an end in itself; it is or should be an outcome of a fair and efficient system. The proper approach is to make the system fair and efficient and, if public ignorance stands in the way of public confidence, take steps adequately to demonstrate to the public that it is so.

### **Magistrates as ‘surrogate jurors’**

- 33 This argument implicitly includes, or is sometimes expressly coupled with, the notion that, as compared with District Judges, magistrates are less case-hardened and, therefore, approach their task with fresher or more open minds. To regard magistrates as ‘surrogate jurors’ is a tenuous comparison between trained and largely experienced lay judges sitting as judges of law and fact up to about once a week for, on average, between 10 and 20 years, and those who mostly know little or nothing of the system, and probably only serve as finders of fact for a fortnight or so once or twice in a lifetime. It is also an insecure comparison to the extent that it suggests that jury trial is the ideal model for all criminal trials whatever the level of seriousness. As to fresh and case-hardened minds, Morgan and Russell put magistrates in a continuum for case-hardening closer to professional judges than juries, noting the frequent argument used against them of higher conviction rate in magistrates’ courts than in the Crown Court.<sup>38</sup> Such a comparison also ignores the contribution of the respective training and courtroom experience of both District Judges and magistrates to maintaining an objective and judicial approach to their task.

### **‘Participative democracy’**

- 34 As to the argument based on democracy, it is doubtful, even if benches of magistrates were representative of the community, what that quality would

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<sup>37</sup> *The judiciary in the magistrates’ courts*, p 116

<sup>38</sup> *ibid*, p 9, para 1.4.3

bring to the judicial role if not heavily overlain by the objectivity and skills that should come with courtroom training and experience. Moreover, as Morgan and Russell have observed by reference to other jurisdictions:

“... there is no straightforward relationship between the degree to which democracy is embedded and lay involvement in judicial decision-making. Many longstanding democracies involve lay persons while others do not. The re-establishment of democracy in a country does not necessarily stimulate the introduction of lay involvement in judicial decision-making, sometimes the reverse occurs, depending on the cultural and political tradition”.<sup>39</sup>

And, as they also note,<sup>40</sup> although the lay magistracy are a sign of the active engagement of the citizen in the administration of justice, the distinction between them and District Judges in this and other respects is, in practice, diminishing. Their social position is likely to be much the same, though, if my recommendations for securing a more widely diverse magistracy are adopted, this should change. However, both are, and will continue to be trained for and experienced in their respective roles and familiar with the extensive ‘locality’ over which they exercise the same jurisdiction.

### **‘Locality’ of justice**

- 35 As I have mentioned in Chapter 1, ‘locality’ of justice is an issue for the criminal justice system as a whole. It is, however, most commonly voiced in relation to the role of magistrates. There is a widely and firmly based instinct that lay and ‘local’ justice is “a bridge between the public and the court system which might otherwise appear remote”.<sup>41</sup> Although magistrates must normally still live in or within 15 miles of their commission area, closures of courts in rural areas have led to some sitting well outside the area in which they live and work. They cannot know or, in any normal sense of the term, be regarded as representative of, the whole locality or community for which they administer justice. District Judges, most of whom will spend all or most of their time in their assigned area, will acquire as much or little ‘local’ knowledge as magistrates, and many will also live there as part of the broad community. And, like it or not, justice has been and is becoming less geographically localised as larger and better equipped full-time courts replace old, small, inadequate and insecure courthouses in part-time use in rural areas. With the loosening of small community ties resulting from increasing mobility and wider use of information technology, ‘locality’ of justice, like locality of shops and other community facilities now has a wider connotation.

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<sup>39</sup> *ibid*, p xii and pp 100-101

<sup>40</sup> *ibid*, pp 6-7

<sup>41</sup> Home Affairs Committee Report, *Judicial Appointments (1995-96)*, HC 52-1, para 198 and see Seago, Walker and Wall, *The Development of the Professional Magistracy in England and Wales*, Crim L R [2000], pp 649-651

As Seago, Walker and Wall have commented, touching on the wider question of court structure to which I turn in Chapter 7:

“The logical next step would be to rationalise further in terms of the provision of judicial administration. In this way, as justice becomes less localised, why should magistrates’ courts buildings be distinct from Crown Court buildings? Why should there be a separation of the staff working within them? And most controversial of all, in the absence of any practical need for, as opposed to abstract ideology of, localism, why is there a need for lay justices to reflect local connections?”<sup>42</sup>

- 36 ‘Locality’ of justice also has its downside in the wide inconsistencies to which it leads between MCC areas and between individual benches in their patterns of decision-making, particularly as to bail and sentencing. Such inconsistencies, often branded by the media and civil rights groups as ‘post-code justice’, do great damage to public confidence in the system.<sup>43</sup> They result, not in the main from magistrates responding to the prevalence in their areas of particular types of crime or other local community needs. They owe more to the culture of individualism of benches themselves, often inculcated by their justices’ clerk and sometimes aggravated by the independence of their MCCs in the training that they provide. The presence and, I hope, increasing involvement of District Judges in the life of magistrates’ courts and in magistrates’ training, coupled with a greater role for the Judicial Studies Board in the training of both District Judges and their lay colleagues, can only be beneficial in reducing this unfortunate aspect of ‘locality’ of justice and improving public confidence in magistrates’ embodiment of it.
- 37 Another disadvantage of ‘locality’ of justice, whether in the form of magistrates or a District Judge, is that the tribunal may, on occasion, know too much about accused persons, whose guilt or sentence they should determine only on the material put before them in court.

### **A ‘fair’ trial and the ‘hybrid court’**

- 38 There is much to be said for the contention that two or more heads are better than one in determining important questions, such as the issue of guilt or the appropriate sentence, even if the one is a professional judge. Its supporters draw on the wider experience of life that a panel of lay magistrates bring collectively to the task, their independence, the greater chance of their

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<sup>42</sup> *ibid*, p 649

<sup>43</sup> see eg *Unequal Before The Law*, Liberty (1992); also a Report by NACRO for the Youth Justice Board, *Factors Associated with Differential Rates of Youth Custodial Sentencing* (September 2000)

collegiate decision being fair because of the inter-action between them and their relative lack of case-hardening. Glanville Williams was an early protagonist of collegiate decision-making both as to guilt and as to sentence because he saw it as a better protection against “the vagaries of the individual”.<sup>44</sup>

- 39 There have from time to time been suggestions that professional judges should not sit on their own to determine the issue of guilt and/or that they should not sentence on their own, especially in both cases where the possible outcome for a defendant is loss of his liberty. In addition to the proposal of Professor Sanders, there have been a number of submissions in the Review to like effect, also praying in aid the Article 6 concept of a fair trial. However, I can see nothing in Article 6 or in any Strasbourg jurisprudence to suggest that trial by a professional judge sitting on his own violates it.<sup>45</sup> Single fact-finders and sentencers are commonplace in Convention countries<sup>46</sup> and in common law jurisdictions with a statutory declaration of rights containing a similar provision, and they have not been singled out for such attack.
- 40 Like Morgan and Russell, I would tread warily, certainly with the level of cases now dealt with by magistrates’ courts and where lay and professional judges sitting separately from each other are well established, before suggesting, on the ground of fairness or otherwise, that either should be routinely submerged in some form of hybrid court. As I have said, the overwhelming evidence in the Review is that they each do a good job in their separate ways. And neither magistrates nor District Judges would welcome such a general transformation and diminution of their respective roles at that level. It would undoubtedly make recruitment of both difficult. And relegating the role of magistrates to untrained, short-term ‘jury-like wingers’, as in the Sanders model, would have the further disadvantage of producing a tribunal two of whose members would, in the main, be unlikely to make an effective contribution to the process. Different considerations arise, however, when considering the conferment of an enhanced jurisdiction on a mixed tribunal of, say a District Judge and suitably trained magistrates, for certain types of more serious case, a matter with which I deal in Chapter 7.

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<sup>44</sup> *The Proof of Guilt*, The Hamlyn Lectures, 7<sup>th</sup> Series (Stevens, 1955) pp 233 and 273-281

<sup>45</sup> see eg *Murray v. U.K.* (1996) 22.EHRR 22

<sup>46</sup> eg in Holland where there are two types of ‘first instance’ courts. The ‘kantongerechten’ (magistrates’ courts) deal with less serious offences – misdemeanours or contraventions; also appeals against fines imposed by the police for traffic offences. These proceedings are dealt with by a single judge. More serious offences are dealt with by the district courts, where single judges (politiechters, who may sentence up to six months of imprisonment) and chambers of three judges sit. Economic offences are tried by single economic judges or by chambers of three economic judges. In Germany there are four types of ‘first instance’ courts. A single judge (Einzelrichter) at the District Court (Amtsgericht) has jurisdiction in the less serious criminal offences, including the majority of road traffic offences and may sentence up to two years of imprisonment

## Independence

- 41 As to independence, where it is often suggested magistrates have the edge over District Judges, it is difficult to see why the latter, whose appointment is subject to essentially the same criteria and procedures as other professional judges, should today be regarded as likely to favour the executive at the expense of the citizen. If anything, experience over recent decades has tended to show the reverse at all judicial levels. The implementation as part of our domestic law of the European Convention of Human Rights is likely to accentuate that instinct of independence. Moreover, the scope for District Judges sitting singly to act as ‘government placemen’, favouring the executive at the expense of the citizen, is likely to be limited. Most of their time is spent, not on cases of general public interest or of sensitivity to central government, but on general lists involving, in the main, pre-trial work, sentencing and run of the mill trials.<sup>47</sup> Seago, Walker and Wall, commenting on their fieldwork supporting that general picture, said:

“... stipendiary magistrates do not emerge as markedly specialised or compliant judicial figures who are willing to adopt whatever central government desideratum that comes their way. There is also no evidence to date, for example, in regard to sentencing, that stipendiaries have a greater deterrent impact, nor have they been more liberal when policy has so required it. So, an outside observer who believed, however fancifully, that the explicit purpose of the magistrates’ courts is ‘the maintenance and reproduction of existing forms of structural dominance’ or even of ‘conveyor belt’ justice would find little to choose between the zeal of lay or professional magistrates.”<sup>48</sup>

## Conclusion as to deployment and allocation of work

- 42 As I have said, the pace of increase in the number of stipendiary magistrates in proportion to that of lay magistrates has been modest. Their role, despite their recent change of title and status to District Judges, was and is to support and complement the work of magistrates where necessary. Given the current structure and jurisdiction of magistrates’ courts, I can see no justification, whether of justice or efficiency, for a move to District Judges and magistrates routinely sitting as mixed tribunals to deal with the general range or any

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<sup>47</sup> see eg Seago, Walker and Wall, p 637; Morgan and Russell, pp26-29; Sanders and Young, *Criminal Justice* 2<sup>nd</sup> Edition, 2000, pp 488-489

<sup>48</sup> Seago, Walker and Wall, pp. 637-638

particular type of case or form of proceeding, though there may be training and local ‘cultural’ advantages in their doing so from time to time depending on their respective availability and caseloads. Nor can I see any basis for recommending any significant change in their respective numbers. The position may be different if my recommendation in Chapter 7 for the creation of a unified Criminal Court with an intermediate tier is adopted. In either case, our strong tradition of lay justice and the availability of a vast body of increasingly trained, experienced volunteer judges are compelling reasons for retaining a sizeable lay magistracy. Even if a move to all or significantly more District Judges were considered desirable and achievable, it would require a major programme of change to reduce and otherwise rationalise the present apparatus of summary justice. A move the other way would throw away the value of professional judges in the fair and efficient disposal of summary work of all levels of importance, and would require thousands of newly recruited magistrates to replace them and to train for the purpose.

- 43 As to allocation of work between the two forms of tribunal, I consider that it would be a mistake to be too prescriptive. Nevertheless, there are obvious strengths of District Judges of which advantage should be taken in the interests of both justice and efficiency, namely their knowledge of law and procedure, their authority borne of that knowledge and its daily use and, because they normally sit alone, their speed. As Morgan and Russell have observed,

“It scarcely makes sense for the well-rewarded skills of stipendiaries not to be employed on court business which will benefit most from the application of those skills”.<sup>49</sup>

- 44 In September 1994 the Lord Chancellor, with the agreement of the Lord Chief Justice, established a committee which was charged with identifying more clearly the respective roles of the stipendiary magistracy and the lay bench in the administration of justice in magistrates’ courts. The Committee, chaired by Roger Venne of the Lord Chancellor’s Department, was composed of metropolitan and provincial stipendiary magistrates, lay magistrates and justices’ clerks. The resulting report<sup>50</sup> spoke of the particular strengths and value of stipendiaries to the system in cases involving complex points of law or evidence, some mode of trial decisions, cases involving complex procedural issues, long and/or inter-linked cases, cases involving considerations of public safety, public interest immunity applications and extradition cases. The Committee recommended that, in such cases, there should be a presumption that where a stipendiary was available he should undertake such work.<sup>51</sup> In so recommending, the Committee did not ignore their important contribution to the system, and benefit to all those involved in

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<sup>49</sup> *The judiciary in the magistrates’ courts*, p 109

<sup>50</sup> *The Role of the Stipendiary Magistracy* (the Venne Report) (1996), pp 15-18, para 5.3

<sup>51</sup> The Venne Report, page 14, para 5.3

it, in the speed with which they can dispose of a general list of pre-trial work and pleas of guilty.

- 45 At first, I balked at the Venne Committee's use of the word 'presumption' in recommending that, where a stipendiary magistrate was available, he should undertake the heavier work. However, when dealing with cases involving complex points of law or evidence, it made what I consider to be a strong general case for it. It spoke of the increasing legal complexity of work in magistrates' courts "in an evolving system of justice which will always endeavour to refine the requirements of due process". But, importantly, it qualified its recommendation by a reminder of the value to the system of stipendiaries taking a fair share of routine work because of: their speed and its contribution to the efficient administration of justice; a need for exposing them to and giving them experience of every aspect of the work of a magistrates' court; the salutary effect that their customary presence in court in such cases can have on those who habitually prosecute and defend in them; and so as not exclude or give magistrates the impression of excluding them from the more interesting work of the court.<sup>52</sup>
- 46 I cannot improve on the approach of the Venne Committee. District Judges, while making themselves available to do the whole range of summary work, should concentrate on case allocation and management, cases of legal or factual complexity, cases of priority, such as those involving young offenders or offences of a sexual nature, and long cases that most magistrates could not undertake, at any rate under their present patterns of sitting.
- 47 The following conclusion of the Venne Committee as to how such a system of allocation can and does work in most places is well supported by many submissions to the Review and by my experience from visits and talking to District Judges, magistrates and justices' clerks all over the country:
- "The balance to be struck is a fine one, but we are satisfied from our own visits to magistrates' courts where Stipendiary Magistrates sit, that it can be achieved where the Stipendiary, the Justices' Clerks and the lay justices are alive to the need to achieve such an appropriate balance of work."<sup>53</sup>
- 48 Who should allocate summary work as between magistrates and District Judges under the present court structure or the new one that I recommend in Chapter 7? Is it a 'scheduling' responsibility of the justices' chief executive (court manager) or, in individual cases at any rate, a listing exercise for the chairman of the bench and the justices' clerk? The view of the Venne

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<sup>52</sup> The Venne Report, para 5.4

<sup>53</sup> The Venne Report, see p 18, para 5.4

Committee, with which I agree, is that in most cases listing decisions of this sort are for the justices' clerk, who should have regard to its general guidance. Though, as the Committee also observed, there may be some cases in which it would be appropriate for him to consult the District Judge and/or Chairman of the Bench, for example, where there are issues of legal difficulty or local sensitivity. The allocation of the heavier and more interesting work can be contentious. Justices' clerks may find themselves in the middle of a tug of war between District Judges and magistrates, both staking their claim to it. A frequent complaint of magistrates in the Review was that they were losing, or would lose, much of this work to District Judges. I learned of instances where the local Chairman of the Bench heavily influenced what work should be given to the District Judge. Equally, there were accounts of District Judges insisting on being given work that they considered their status merited. As Morgan and Russell indicate,<sup>54</sup> local listing practices or policies of this sort raise questions of accountability or, in plain terms, of knowing who is in charge.

- 49 Under our present system, where do the Lord Chancellor's Department, the newly created Senior District Judge and the local MCC fit into all this? To whom is the justices' clerk, and for that matter, the District Judge and chairman of the bench, responsible for such decisions? In the Crown Court, listing has always been regarded as a judicial, not an administrative, function in the sense that the judges are the ultimate arbiters of listing practices at their court and of their own lists, albeit in close consultation with administrators. In my view, whether or not the present structure of the courts changes, there is an urgent need to establish lines of accountability and ultimate responsibility for listing and its manner of exercise in summary proceedings. If District Judges and magistrates become judges of a new unified Criminal Court, it seems to me that the immediate responsibility should be with the equivalent of the present justices' clerk after consultation with the District Judge, chairman of the bench and court manager. But, in the event of disagreement the Resident Judge should have the ultimate decision. I make a recommendation to that effect in Chapter 7.<sup>55</sup>

**I recommend that in the exercise of their summary jurisdiction:**

- **District Judges and magistrates should not routinely sit as mixed tribunals to deal with the general range or any particular type of case or form of proceeding, though there may be training and local 'cultural' advantages in their doing so from time to time**

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<sup>54</sup> *The judiciary in the magistrates' courts*, pp 27-30 and 109-110

<sup>55</sup> para 81

**depending on their respective availability and case loads;**

- **subject to changing workloads resulting from implementation of any of my recommendations or otherwise, there should be no significant change in the balance of numbers of District Judges and magistrates, or in the relative volumes or nature of summary work assigned to each of them; and**
- **summary work should continue to be allocated between District Judges and magistrates in accordance with the recommendations of the Venne Committee, namely that each, normally sitting separately, should be available to deal with the whole range, but that District Judges should concentrate on case allocation and management, cases of legal or factual complexity, cases of priority, such as those involving young offenders or offences of a sexual nature, and long cases.**

## **JUSTICES' CLERKS**

50 The office of the justices' clerk has developed piecemeal over the centuries. Originating as the personal servant to the local justice of the peace in mediaeval times, its subsequent history is of steady accretion, diversification and professionalism as the business of the summary courts has increased and the law has become more complex. Traditionally, each bench had its own justices' clerk who was normally a solicitor, sometimes a full-time employee but, often in the more rural areas, a part-time appointment from among the local practitioners. The Justices of the Peace Act 1949, in introducing Magistrates' Courts Committees, provided that they should appoint justices' clerks. The trend was then towards full-time posts, with some clerks serving more than one bench. At that stage, most clerks managed all the legal and administrative staff within their petty sessional divisions – collectively known as their 'clerkship'. As a result of recent legislation,<sup>56</sup> Government policy<sup>57</sup> and the current programme of amalgamations of MCCs and benches, their numbers are depleting, their territorial responsibilities widening, their former broad administrative responsibilities diminishing and their legal role concentrating primarily on the provision, mostly through other members of

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<sup>56</sup> The Police & Magistrates' Courts Act, 1994, brought into existence the role of Justices' Chief Executive. The Justices of the Peace Act 1997, ss 41 and 45, as substituted by the Access to Justice Act 1999, ss 88 and 89, confirm the role of the JCE in being responsible for the efficient and effective administration of the courts within the area of their MCC and the independence of justices' clerks in the exercise of their legal and judicial functions. Section 90 of the Access to Justice Act enabled the transfer of responsibility for administrative functions to JCEs, allowing justices' clerks to concentrate on their key functions as legal adviser to magistrates

<sup>57</sup> *The future role of the Justices' Clerk: A Strategic Steer* (January 2000)

staff, of legal advice to magistrates, together with certain case management functions. The Government has indicated that their core job description should be that of “a professional legal adviser to justices ... rather than based on the model of ‘clerkship’”,<sup>58</sup> and has transferred most of their statutory administrative and accounting functions to justices’ chief executives.<sup>59</sup> However, it remains for MCCs to determine individually how to and to what extent justices’ clerks in their area should continue to exercise management responsibility for administrative and accounting matters. Arrangements vary considerably across the country. Justices’ clerks only have total independence in respect of their responsibilities for advising magistrates on the law, which includes procedure and practice, and for any function also exercisable by magistrates.<sup>60</sup>

- 51 The amalgamations have significantly reduced the number of posts of justices’ clerk, encouraging some of them to seek appointment as justices’ chief executives or appointment as Deputy District Judges as a stage in the process of becoming District Judges. Some MCCs now only have one Justices’ Clerk, often responsible for several benches of hundreds of magistrates, spread over a very wide area.<sup>61</sup> For example, the justices’ clerk in Lancashire and Dyfed Powys each serves ten benches sitting in 11 and 15 courthouses respectively; in Hampshire and the Isle of Wight the tally is seven benches and ten courthouses. There are considerable benefits to be gained from one person having responsibility for the legal function across a large geographical area; the chances of neighbouring courts making conflicting decisions or adopting different procedures are considerably reduced; and the various criminal justice agencies are able to discuss their needs and concerns with a single individual. However, such broad territorial responsibilities can create tensions between justices’ clerks and the benches they serve. Magistrates who have been used to regular contact with their clerk are understandably resistant to organisational changes which place him or her in a geographically distant location overseeing several teams of legal advisers, as court clerks are now known. A number of MCCs have responded to these concerns by identifying senior legal staff to liaise with individual benches. In this way, the justices’ clerk can assume responsibility for the consistency and quality of legal advice provided to magistrates across a wide area, whilst at the same time devolving responsibility for day-to-day communication with the bench to a suitably experienced and qualified colleague. In the new unified Criminal Court that I recommend in Chapter 7 the justices’ clerk and the legal advisers responsible to him should have essentially the same role and independence, albeit as part of a different court structure.

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<sup>58</sup> *A Strategic Steer*, pp 3 and 13

<sup>59</sup> Access to Justice Act, s.90 and Sch 13

<sup>60</sup> Access to Justice Act 1999, s 89, substituting a new section 48 of the Justices of the Peace Act 1997

<sup>61</sup> in a diminishing number of instances, he combines the post with that of the Justices’ Chief Executive, “though such combination of posts is being phased out”

52 The daily work of advising magistrates in court is the immediate responsibility of legal advisers only some of whom are professionally legally qualified, that is, as barristers or solicitors. Also qualified to act as legal advisers are those who have obtained a Diploma in Magisterial Law, those who have passed a preliminary professional examination coupled with two years experience, or staff of a certain age and experience who hold a certificate of competence.<sup>62</sup> The increasing focus on legal advice and case management, and its delegation in large part to legal advisers, led Government to conclude, as the Roche Committee had recommended over 50 years ago,<sup>63</sup> that all legal advisers should be professionally qualified. It resolved that, from 1<sup>st</sup> January 1999, all legal advisers would be required to qualify as a barrister or solicitor within 10 years; and it provided funding to MCCs for a training programme in conjunction with joint guidance from representative bodies in the magistrates' courts system.<sup>64</sup> It subsequently excluded from that requirement all court clerks who were 40 or over on 1<sup>st</sup> January 1999. Following considerable opposition, including legal action from a minority of younger legal advisers who felt that the requirement for them to qualify was unreasonable, the Government agreed to make a further change to the rules exempting all staff in post on 31 December 1998. Since 1 January 1999 it has been a requirement that all *new* appointees are professionally qualified. At the end of March 2001 there were around 1,800 legal advisers in England and Wales, two thirds of whom were professionally qualified. Given the increasingly testing jurisdiction of magistrates, particularly in case management, disclosure, human rights and sentencing, and the introduction of non-lawyers to prosecute in some uncontested cases,<sup>65</sup> it is vital that they should have the support of high quality lawyers with specialist training in their jurisdiction.<sup>66</sup>

53 District Judges, like magistrates, are assisted in court by legal advisers. District Judges value their presence, but rather for the smooth process of the court's work than requiring their legal advice. As Morgan and Russell have observed,<sup>67</sup> there is a question whether they need legally qualified court advisers. While there may be occasions when District Judges would welcome the assistance of a legally qualified clerk with experience of a particular area of work, they should normally be able to cope with the assistance of a member of the court's administrative staff.

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<sup>62</sup> see the Qualification of Assistants Rules, 1979, as amended by the Justices' Clerks (Qualifications of Assistants) (Amendment) Rules, 2001.

<sup>63</sup> *Report of the Departmental Committee on Justices' Clerks, 1944*, Cmnd 6507, Chapter VI, see, in particular, paras 117-119 and 126

<sup>64</sup> *Guidance for the Professional Qualification of Legal Advisers*, 3 July 2001

<sup>65</sup> Crime and Disorder Act 1998, s 53

<sup>66</sup> *For the New Lord Chancellor – Some Causes for Concern about Magistrates*, Dr. Penny Darbyshire, Crim LR at pp 872-4

<sup>67</sup> *The judiciary in the magistrates' courts*, pp. x and 54

**I recommend that District Judges should normally sit without a legal adviser.**

- 54 The Lord Chief Justice, on 2nd October 2000, issued a practice direction<sup>68</sup> setting out the responsibilities and powers of justices' clerks and legal advisers, taking into account the provisions of the Human Rights Act 1998 which came into force on the same day. The main responsibilities are: the giving of legal advice to magistrates in and out of court; case management; the reduction of unnecessary delay; assisting unrepresented parties to present their case; and, in enforcement cases, with the agreement of the court, to assist it to discover the facts by impartial questioning of the defaulter. Legal advice includes advice on questions of law and of mixed law and fact, matters of practice and procedure, the range of available sentencing penalties, any other relevant issues and how to structure and formulate decisions. Any legal advice given in the magistrates' retiring room should be provisional and repeated in open court to enable the parties, if they wish, to make submissions on it; following which the advice, in original or varied form should be stated in open court.<sup>69</sup> The Practice Direction also acknowledges the well established exclusion of the court clerk from participation in magistrates' fact-finding, save by questioning witnesses and/or the parties to clarify the evidence and, if requested, by reminding the magistrates of the evidence, ordinarily in open court.
- 55 Under the Narey recommendations implemented in the Crime and Disorder Act 1998,<sup>70</sup> some case management powers previously exercisable only by two or more magistrates can now be exercised by a single magistrate. These include 'early administrative hearings' in which a justices' clerk, or a legal adviser whom the former has deputed for the task, has also been given some case management jurisdiction. This includes: the power to remand the accused on bail subject to existing conditions or, with the consent of the parties, to varied conditions (but not to remand him in custody); marking an information as withdrawn or dismissing an information where the prosecution offer no evidence; power to request a pre-sentence and/or medical report; power to remit an offender to another court for sentence; and to give certain directions for the conduct of a trial, namely the timetable of the proceedings, the attendance of the parties, the service of documents, including summaries of legal arguments and the manner in which evidence is to be given. Justices' clerks are specifically excluded from exercising some of the powers available to a single magistrate, including: the imposition of new bail conditions without the consent of the parties, giving an indication of the

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<sup>68</sup> Practice Direction (Justices: Clerk to Court) 2000, [2000] All ER 895, replacing and revoking Practice Direction (Justices: Clerk To Court) [1981] 1 WLR 1163

<sup>69</sup> this has been recognised as best practice for years, but it had proved difficult to persuade magistrates and legal advisers to change established routines

<sup>70</sup> Crime and Disorder Act 1998, ss 49 and 50

seriousness of an offence for the purpose of a pre-sentence report and remanding in custody for the purpose of a medical report.

- 56 Benches have varied in the extent to and manner in which a justices' clerk rather than a single magistrate exercises these powers. Courts in two thirds of all MCC areas hold at least some early administrative hearings presided over by a single magistrate or a justices' clerk or legal adviser.<sup>71</sup> Some sit in the normal way with a bench of magistrates and a clerk, but the clerk deals with the directions and the magistrates deal with matters reserved to them. Some sit in split session, starting with the clerk alone and then bring in the magistrates to deal with anything outside the clerk's jurisdiction. And some sit as they always have, as a full directions court, consisting of a bench of magistrates and the clerk, with the magistrates dealing both with matters reserved to them and otherwise exercisable by the clerk.
- 57 Detailed evaluation of the relative effectiveness of the different types of early administrative hearings is not yet available. An initial assessment of the Narey pilots<sup>72</sup> provided some evidence that where the hearing was conducted by a clerk, the case took fewer days to complete over-all than where a bench of magistrates or a single lay magistrate dealt with case management. The assessment also noted conflicting views as to the extent of case management powers exercisable by a justices' clerk under these new provisions.
- 58 As Morgan and Russell have observed,<sup>73</sup> quoting the Narey Report, this is the latest in a long line of extension of powers to justices' clerks previously reserved to magistrates, "thereby arguably blurring the line" between their respective judicial and administrative roles. Justices' clerks have argued for further extension. The majority of them are frustrated by the limitations of their newly acquired jurisdiction. They suggest that they should be empowered to grant or refuse bail, to make mode of trial decisions, to give indications of the seriousness of the offence, to enable them to order a specific sentence report and to rule on matters of law. Similar views were expressed by many others - though not all - of those who commented on the issue in the Review. In my view, whilst the line between judicial and advisory functions has been blurred as I have described, there is no justification, so long as magistrates continue to play the central role that they do in summary justice, for blurring it further. Moreover, in cases of complexity or particular difficulty where robust case management is required, the matter should normally, and wherever practicable, be put before a District Judge. That is what he is there for.

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<sup>71</sup> *Reducing Delays in the Magistrates' Courts*, D. Brown, Research Findings No. 131, Home Office Research, Development and Statistics Directorate

<sup>72</sup> *Reducing Delays in the Criminal Justice System; evaluation of the pilot schemes* (1999) Ernst and Young

<sup>73</sup> *The judiciary in the magistrates' courts*, p 4, para 1.2

**Accordingly, I recommend that there should be no extension of justices' clerks' case management jurisdiction.**

## **COMPOSITION OF THE BENCH**

- 59 The fact that the magistracy is not a true reflection of the population nationally or of communities locally is confirmed by a number of studies, of which the Morgan and Russell research is only the latest.<sup>74</sup> The main problem is in the recruitment and identification of a sufficient and appropriate range of candidates for appointment, not in the criteria for or mechanics of appointment. If the magistracy is both 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.
- 60 The Morgan and Russell Report, based mainly on their inquiry questionnaires and, to a lesser extent, on out of date and inadequate<sup>75</sup> data provided by the Lord Chancellor's Department, shows that the magistracy is gender balanced, in marked contrast to the overwhelmingly male ranks of professional judges. It is approaching ethnic representativeness of the population at a national level, that is, 2% black, 2% from the Indian sub-continent or Asian origin and 1% other.<sup>76</sup> However, there are substantial local variations and, as the authors say, "more importantly, the fit between local benches and the make-up of the local communities they serve is in several instances wide". This is particularly the case in London where minority ethnic communities are not represented amongst the lay magistracy in anything like the proportion in which they are found within the general population. As to status or class, the magistracy is overwhelmingly drawn from professional and managerial ranks, that is, "disproportionately middle class, and almost certainly financially well-off, compared to the population at large". Finally, a high proportion of it, about two-fifths, is comprised of persons who have retired from full-time employment,<sup>77</sup> which imbalance is exacerbated by their ability to sit more often than those in work.<sup>78</sup> Although the Lord Chancellor requires local benches also to reflect the political affiliation of the community they serve and makes appointments with that in mind, his assessment is based largely on political turnout at the most recent election and cannot practically take into account changes in political affiliation of existing members of local benches

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<sup>74</sup> *ibid*, pp. viii and 13-31; see also House of Commons - Home Affairs Committee, Third Report (1996), "Judicial Appointments Procedures, Vol. I, Session 1995-96", p 1 xi, para. 205; Seago, Walker and Wall, *The Development of the Professional Magistracy in England and Wales*, Crim LR 2000, p 646 and the earlier studies there cited; see also Dr. Penny Darbyshire, *For the New Lord Chancellor - Some Causes for Concern about Magistrates* [1997] Crim LR 861, at 863-868

<sup>75</sup> ie different from those in National Statistics and without reference to the wide range of data provided by the Advisory Committees in their annual reports – inadequacies that the Lord Chancellor's Department is now remedying

<sup>76</sup> in the years 1994-1999/2000 there has been a steady annual improvement in recruitment of members of ethnic minorities from 5% to 8.6% of the total annual recruitment figures; see *Annual Report on Judicial Appointments 1999-2000*, Cmnd 4783, para 5.10

<sup>77</sup> *The judiciary in the magistrates' courts*, p viii and pp 13-17, paras 2.2-1-4

<sup>78</sup> see Dr Penny Darbyshire, *For the New Lord Chancellor...*, at p 865

or of the communities from which they are drawn. Not surprisingly, there are no firm indications of the national or local political balances of magistrates.

- 61 Morgan and Russell's findings, if representative of the picture country-wide, are worrying insofar as they relate, particularly, to the ethnic and social make-up of benches. The reason for the disproportionate representation in both of those respects, especially in large metropolitan areas with high minority ethnic populations, may be the same. Morgan and Russell have referred to it in relation to social mix:

“If the duties of lay magistrates are relatively onerous as well as being unpaid, it is not surprising that the composition of benches consists overwhelmingly of persons with the time and personal resources to bear that burden”.<sup>79</sup>

- 62 The Lord Chancellor appoints all magistrates, save for those in the Duchy of Lancaster, on the advice of local Advisory Committees, also appointed by him. In the Duchy, which includes Lancashire, Greater Manchester and Merseyside, the appointments are made by the Chancellor of the Duchy<sup>80</sup> on behalf of The Queen, acting on the advice of similarly constituted local Advisory Committees appointed by her. The criteria for appointment, the composition and manner of working of local Advisory Committees are the same in the two systems. And, since May 2001, the Lord Chancellor's Department trains new members as they do appointees to local Advisory Committees elsewhere. There is thus little, if any, difference in the patterns of appointment between the Duchy and the rest of the country.

- 63 This anomaly of a 'fourth' criminal justice Minister with no formal role in the system other than to appoint magistrates for this relatively small part of the country is one of the interesting relics of the acquisition by Henry IV in 1399 of the estates and jurisdiction of the Duchy of Lancaster. Consideration has recently been given to removing it. That would no doubt be tidy. But local traditions matter and if, as appears to be the case, this one creates no harmful inconsistencies as between the Duchy and the country as a whole, I can see no reason for changing it so long as the magistrates' courts remain separate from the Crown Court. But, if, as I recommend in Chapter 7, they become part of a unified Criminal Court, there would be little justification or practical sense in preserving the anomaly.

- 64 Local Advisory Committees are chaired by the Lord Lieutenant or by a Circuit Judge. There are at present 90 Advisory Committees and 117 Sub-Committees in England Wales outside the Duchy of Lancaster, and 17

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<sup>79</sup> *The judiciary in the magistrates' courts*, p 16, para 2.2.4

<sup>80</sup> the present holder of the office is the Right Hon. Lord MacDonald of Tradeston, CBE, Minister of State for the Cabinet Office

Advisory Committees and 5 Sub-Committees in the Duchy. They are made up, for the most part, of magistrates,<sup>81</sup> but the Lord Chancellor now requires at least a third of the membership to consist of local people who are not magistrates. They have no budget of their own and are supported by a part-time secretary provided either by the local authority or a justices' clerk.

65 The Lord Chancellor appoints members of local Advisory Committees and sub-committees following interview and recommendation by an Advisory Committee Appointments Panel. They are appointed for a term of nine years. The Committees vary in size according to their Commission Areas. In addition to his requirement of a ratio of two thirds magistrates and at least one third non-magistrates,<sup>82</sup> the Lord Chancellor requires each Committee to have at least one supporter of each of the main political parties and at least one who is politically uncommitted. Beyond that, so far as practicable, the composition of each Committee should broadly reflect the political balance of the area that it covers and in the same other respects as required for the appointment of magistrates.<sup>83</sup> All newly appointed Committee members are required to attend a standard training seminar provided and funded by the Lord Chancellor's Department.

66 Although selection procedures for magistrates are laid down in Directions issued by the Lord Chancellor, local Advisory Committees are left to devise their own methods of recruitment of magistrates in their area,<sup>84</sup> including the provision of information to the public and the prompting of applications for appointment. Their proposals are subject to authorisation by the Lord Chancellor's Department and paid for by it. The result, as one commentator has noted,<sup>85</sup> is that there are considerable differences between them in the way they go about it. Often this might be a proper reflection of local conditions. Some leaflet households. Others circulate information to local community organisations. Many rely largely on the network and overlapping memberships of local bodies, with the result that there is an undue draw towards the local 'great and good' - local councillors, members of health authorities and school governing bodies and the like. The Magistrates' Association, through its Magistrates in the Community project, undertakes a wide-range of initiatives aimed at increasing confidence in and knowledge of the magistracy amongst the general public. Although this project clearly produces benefits in respect of the recruitment of magistrates, that is not its primary purpose; it is not, nor does it pretend to be, a national recruitment drive.

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<sup>81</sup> in order to avoid a perception or the reality that benches select their own members, bench chairmen are not permitted to chair or sit on local Advisory Committees or their sub-committees

<sup>82</sup> on the recommendation of the Public Appointments Unit at 10 Downing Street

<sup>83</sup> see paras 80 - 86 below

<sup>84</sup> *The Lord Chancellor's Directions for Advisory Committees on Justices of the Peace* include suggestions as to the types of promotion and advertising that they can undertake

<sup>85</sup> Dr Penny Darbyshire, *For the New Lord Chancellor – some causes of concern about magistrates*, at 867

- 67 It is interesting to note the modest level of national resources devoted to encouraging members of the public to serve in this vital area when compared with that, for example, to attracting them to serve in the Territorial Army - £35,000 as against £4.7 million. In March/April 1999 the Lord Chancellor's Department, for the first time, undertook a national publicity campaign at the cost of £1/2 million to raise awareness of the magistracy and to emphasise that ordinary people could apply. This was, however, something of a one-off, the results of which have yet fully to be evaluated.<sup>86</sup> Notwithstanding the need to maintain a strong local focus among magistrates, there seems to me to be a clear need for a stronger sense of national direction in both their recruitment and their training. Looking at the arrangements for recruitment, I am concerned at the low level of financial assistance given to Advisory Committees, the *ad hoc* nature of their secretarial support and the lack of co-ordination between them in determining their policies for appointment.
- 68 As I mention in more detail below, the Lord Chancellor requires that each bench should broadly reflect the community it serves in terms of gender, ethnic origin, geographical spread, occupation and political affiliation. It is for the Advisory Committees to obtain their own information on the make-up of their local community in each of these respects. They are required to report to the Lord Chancellor's Department the information on which they rely, enabling the latter to assess how successful they have been, and to advise or give directions if necessary, on the social and ethnic make-up of their benches. However, so far as I can tell, the Committees' main sources of information in this respect, if they seek it, are the local authorities. It is unclear to me – and I believe to the Lord Chancellor's Department - what statistics or other information local authorities have of the balance at any time of the make-up of their local community which would assist local Advisory Committees. Without reliable information of this nature, the Committees are not equipped to identify the necessary balances or the sections of the community at whom their recruitment activities should be particularly directed.
- 69 There are also the deficiencies found by Morgan and Russell in the Lord Chancellor's Department's records of the characteristics of magistrates in post. In particular, the Department should establish and keep up to date information about the composition of the magistracy in terms of gender, age, ethnic, current occupational and other status, using the same classification as that in the national census.<sup>87</sup> Such a move would be a valuable tool for securing a magistracy which is broadly reflective of the community in the

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<sup>86</sup> The Lord Chancellor's Department in its *Annual Report on Judicial Appointments for 1999-2000*, para 5.11, said that it "was too soon to see whether it [had] had a significant impact in encouraging applications for appointment from a wider cross-section of the community".

<sup>87</sup> I understand that the Lord Chancellor's Department is already developing a database using the national census classification; see its *Annual Report on Judicial Appointments for 1999-2000*, para 5.21

area from which it is drawn and also for ready demonstration of that fact in the event of public perceptions to the contrary.

- 70 Even if the tools for improvement of the ‘geo-demographic’ selection process are provided, there is still not a wide enough range of potential appointees from which to choose.<sup>88</sup> Part of the problem stems from the increasing demands of the workplace. This is not to say that major employers are unsympathetic to or unappreciative of the magistracy. On the contrary, the Magistrates’ Association has been able to work closely and constructively with a wide range of leading companies, at least at board level. The problem lies in translating statements of intent given by top management into practical action in local offices, where more junior staff often find it difficult to secure the support of their managers when considering applying to become a magistrate. It has also been suggested that the limited circumstances in which a financial loss allowance can be claimed can be a deterrent to self-employed people, particularly those on a relatively low income.
- 71 This is a worrying picture, especially given the present imbalances in the make-up of the magistracy. It is precisely those who work in more junior positions, or who are self-employed, whom it is important to attract to the lay bench in greater numbers. There are also important benefits to be reaped by organisations, both in terms of the wide range of skills and competences magistrates now acquire through their training, and in the commitment which an employer can demonstrate to the local community through supporting participation by its employees in the criminal justice system. It is also worth remarking that the increasing variation in working patterns (particularly in the retailing and technology sectors) may present employees with a wider range of possibilities for court sittings, provided that the courts themselves are prepared to be flexible in their listing and rostering arrangements. In short, I think there is considerable room for improvement on both sides.
- 72 A number of alternatives have been suggested for securing a more representative magistracy: first, to make the role and terms of service of a magistrate more attractive to and manageable for a wider range of the community than it is at present, while maintaining its ‘volunteer’ ethos; second, the introduction of a system of short-term conscription akin to that of jury service;<sup>89</sup> third, co-option of citizens “on a rotating basis, each serving, say, a specified number of sittings for one year”;<sup>90</sup> and, fourth, election, perhaps along the lines adopted, in the main, at similar levels in the United States. Just to list those four main alternatives drives one back to the first. Conscription of the sort suggested would radically change and diminish the respective roles and strengths of District Judges and magistrates - all in the

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<sup>88</sup> see *The Development of the Professional Magistracy in England and Wales*, p 647

<sup>89</sup> *Community Justice – Modernising the Magistracy in England and Wales*, p 43

<sup>90</sup> *The Development of the Professional Magistracy in England and Wales*, p 647

name of jury trial as the supposed ‘gold standard’ for all alleged offences, however minor. The co-option system might be more workable than conscription or election, but it would involve considerably more work and costs on administration and training. The notion of election might be a gesture to democracy, but, as experience of its operation in the United States demonstrates only too well, this use of democracy would be less rather than more likely to produce a tribunal reflective of the community as a whole.

- 73 In my view, the first of the four alternatives is the way ahead, starting with a review of how the role and terms of service of a magistrate might be adapted to attract a wider range of persons than it does at present. This could include development of the present community relations and educational initiatives of benches with a view better to inform the public of their work and to attract more and suitable candidates for appointment. In general, I consider that the review should proceed on the basis of the present average number and length of sittings as a norm, but not as a strait-jacket. There may be scope for magistrates to sit more or less often, for longer or shorter periods at a time and more flexibly, according to their individual circumstances.<sup>91</sup> This might increase the pool of candidates for appointment and ease the task of justices’ clerks in finding members of their benches to commit themselves to continuous hearings of cases lasting several days. And if magistrates were given an opportunity to hear more serious and interesting trials in the District Division, as I recommend in Chapter 7, there would be an additional attraction in the role. The fact that these trials would tend to be longer than those currently dealt with in magistrates courts, would make a review of sitting patterns all the more necessary.
- 74 Also, I believe that, whilst maintaining as far as possible the essentially voluntary nature of the role, consideration should be given to providing greater financial assistance than at present to those who might need it. For this purpose, I support Morgan’s and Russell’s useful suggestion of occasional surveys of serving magistrates to see how and at what cost they manage to continue to serve.<sup>92</sup> However, as they point out,<sup>93</sup> such an initiative to encourage a more socially representative magistracy would inevitably increase its cost.
- 75 Any new recruitment strategy, to be effective in attracting magistrates in sufficient numbers, must be directed not only at potential candidates, but also, if they are employed, at their employers and employers’ organisations generally. The Lord Chancellor is considering what action he could take to ease the difficulties magistrates are increasingly finding in securing time off

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<sup>91</sup> e.g. to allow for school half-terms and holidays

<sup>92</sup> *The judiciary in the magistrates’ courts*, p 17, para 2.2.4

<sup>93</sup> *ibid*, p 112

to sit on the bench.<sup>94</sup> One suggestion is for a scheme for accreditation or other public recognition for those employers who adopt best practice standards in this respect. A scheme of this kind has been operating for over two years in Gwent where a 'Justice in the Community Award' is presented to employers nominated by their employees as being particularly supportive and flexible in responding to requests for time off to undertake magisterial duties. Some Advisory Committees have involved local employers in their recruitment drives and in the work their employees undertake in the courts. But they do not all do so and, in any event, the initiatives so far taken suffer from a lack of central co-ordination and support.

- 76 Also, as part of a general exercise to outlaw ethnic and other discrimination in the system, there should be a standing review, monitoring and correcting any aspect of the circumstances of service as a magistrate that may directly or indirectly discriminate against any section of society that might otherwise produce worthy candidates for the magistracy.
- 77 As a matter of practical implementation of most of these suggestions, there should be a nationally directed and adequately funded strategy to assist local Advisory Committees in their task of identifying and encouraging a sufficient and broad range of candidates for appointment as magistrates. I understand that the Lord Chancellor's Department is in the process of planning "a more co-ordinated approach throughout England and Wales to the recruitment strategy for the appointment of lay magistrates".<sup>95</sup> I believe that each Advisory Committee should be provided with a professional and dedicated secretariat, accountable not only to the Committee, but to the Lord Chancellor (and/or the Chancellor of the Duchy) for local implementation of the National Strategy. Advisory Committees should be able to draw upon expert consultancy support where necessary.
- 78 As well as determining the community balance of the benches for which they are responsible, local Advisory Committees have the task of determining the numbers of magistrates needed to deal with the caseload of their courts. The Lord Chancellor's direction is that they should consult the MCC, Bench Chairmen and the justices' clerk(s), but they do not always do so. In my view, responsibility for determining the number of magistrates required should pass from Advisory Committees to the court. If a unified Criminal Court is established, I consider that local managers (in consultation with their Resident Judges, Bench Chairmen and justices' clerks) should assume the responsibility. In doing so, they would also need to take account of requirements for magistrates to sit in the family court and in what remains of

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<sup>94</sup> *Judicial Appointments Annual Report for 1999-2000*, para 5.23; note the provision in S.50(4)(c) of the Employment Rights Act 1996

<sup>95</sup> see the *Annual Report on Judicial Appointments for 1999-2000*, p.64, paras 5.18 and 5.19 and the Government's recent policy paper, *Criminal Justice: The Way Ahead*, Cmnd 5074, p 64

their other civil jurisdiction. Advisory Committees could then focus on their most essential task, the recruitment of and recommendation of candidates for appointment.

- 79 While the system for appointment of magistrates must for constitutional reasons be kept independent of the administration of the courts themselves, I believe that any move to a unified Criminal Court should be accompanied by a review of the structure and functions of Advisory Committees, to ensure appropriate geographical divisions of responsibility, improve support, remove responsibility for determining need for magistrates etc. Such examination should also include the continued role of the Duchy of Lancaster.<sup>96</sup>

### **Selection and appointment of magistrates**

- 80 This section is comparatively short because, as I have said, the main problem is in the recruitment and identification of a sufficient and appropriate range of candidates for appointment, not in the criteria for or mechanics of their appointment.
- 81 Candidates are interviewed twice by members of the local Advisory Committee. The first interview is general in nature; the second more focused on assessing judicial aptitude. The only legislative restriction on the Lord Chancellor's and Chancellor of the Duchy's powers of appointment is that normally the magistrate should live in or within 15 miles of the commission area to which he is appointed.<sup>97</sup> There are no formal qualifications, exclusions or disqualifications for appointment, as is the case for jurors.
- 82 Advisory Committees generally make their recommendations to the Lord Chancellor once a year during a given month. In doing so, they consider, in addition to the personal suitability of each candidate, the number of vacancies and, as I have said, the need to ensure that the composition of each bench broadly reflects the community which it serves. As to personal suitability, the Lord Chancellor, in his current notes for guidance to candidates, indicates that:
- the six 'key qualities' for appointment are good character, understanding and communication, social awareness, maturity and sound temperament, sound

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<sup>96</sup> there is legislative machinery for this, allowing MCCs to submit to the Lord Chancellor proposals for the alteration of any commission area within their boundaries; see s 32A Justices of the Peace Act 1997, inserted by s 74 of the Access to Justice Act 1999

<sup>97</sup> Justices of the Peace Act 1997, ss 5 and 6; special provision is made for the Lord Mayor and Aldermen who are appointed to sit in the City of London (s 6 (1A)) and, more generally, for the Lord Chancellor to dispense with the residence condition elsewhere, if he considers it in the public interest to do so (s 6(2))

judgement and commitment, and reliability. He will not normally appoint anyone under 27 or over 65. Magistrates must retire at 70, which accords with the provisions for jurors who are entitled to sit until the age of 70, but may be excused, if they wish, when aged 65 or over;

- they should have reasonable knowledge of the area to which they seek appointment and, generally, have lived in it for a minimum of a year;
- they should be in sufficient good health to enable them to carry out all the duties of a magistrate;<sup>98</sup>
- though British nationality is not a requirement, they must be willing to take the Oath of Allegiance; (cf. the position of jurors who, under present provisions, are effectively required to be of British nationality);
- he will consider their personal suitability for appointment regardless of ethnic origin, gender, marital status, sexual orientation, political affiliation, religion or, subject to the requirements of the office, disability;<sup>99</sup>
- there are a number of categories of person whom he will not normally appoint (some of which correspond to present categories of ineligibility or excusal as of right for jurors); these include present and past police officers and traffic wardens and their families, others involved in various ways in the criminal justice system, full-time members of the armed forces, persons who, or whose spouse or partner, have previous convictions and/or are undischarged bankrupts.

83 Although the Lord Chancellor requires that each bench should broadly reflect the community it serves, he has not achieved that nationally in respect of occupation (or ‘class’) or, in respect of various of the criteria, in many localities. Formerly, he also required that benches should be balanced in terms of age. But because of difficulties in achieving some of the other balances, he has suspended that requirement in order to attract a wider choice of candidates.<sup>100</sup> The result, as I have said, is a disproportionately middle class and middle aged bench. If the difficulties in recruitment to which I have referred can be overcome, the Lord Chancellor should, in time, be able to reinstate the age balance requirement.

84 There are two concerns about the criteria for appointment: first that of reflecting the political balance of the community; second, the need for the Lord Chancellor regularly to review the categories of person whom he will not appoint to ensure its consistency with the overriding obligation to provide defendants with a fair trial.

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<sup>98</sup> as a result of a successful two year experiment with nine visually impaired magistrates, the Lord Chancellor has recently announced that people with visual disabilities who fulfil all the normal criteria for appointment may be considered for appointment

<sup>99</sup> for example, he will not normally appoint members of the Magistrates' Courts Service. If he were to do so, the appointment would be to a different commission area from that in which they work. There could be Article 6 difficulties in perception of bias if they were to sit in their own area.

<sup>100</sup> *Judicial Appointments Annual Report, 1999-2000*, paras 5.14 and 5.22

85 The first is, on the face of it, an unusual criterion for judicial appointments in this country. The question was considered by the Lord Chancellor following a consultation exercise in 1998.<sup>101</sup> He concluded, though reluctantly, that for the time being the requirement for political balance should remain, but that work should continue on searching for a more appropriate measure of social balance, possibly using occupational groupings, either alone or with social groupings based on the National Statistics classification. It seems to me that that is the right approach. I believe that the only basis for the use to date of political balance can have been that it was regarded as a crude proxy for occupational and/or social groupings. Political views, balanced or otherwise, are hardly relevant to the fairness and ability of a tribunal. And, as – true to the intention of a democratic system – political views or preferences change; so may the make-up of a bench or the community from which it is drawn over a period of time regardless of attempts to reflect the latter in the appointments process.

86 As to the second, it seems to me that the long-term and regular commitment of magistrates to the criminal justice process requires a more rigorous approach to the question of bias or perceived bias than in the case of jurors in respect of whom I recommend, in Chapter 5,<sup>102</sup> removal of nearly all categories of ineligibility, including all those that have their root in bias or perceived bias. It is right that there should be differences in this respect between those who can be appointed as magistrates and those eligible to serve as jurors. For example, if a police officer were to serve as a magistrate he would be likely to sit regularly in cases involving police officers from his own force requiring him equally regularly to withdraw. Also, sitting as one of a bench of three with wide judicial responsibilities, he would be more likely to raise a perception or fear of effective bias than he would engender as one of a jury of 12 with a narrower, though important, role. As a further example, and in the event of the creation of a unified Criminal Court,<sup>103</sup> court staff should not sit as magistrates, at least not in the criminal justice area in which they are so employed.

**I recommend that steps should be taken to provide benches of magistrates that reflect more broadly than at present the communities they serve by:**

- **reviewing the number, role and support given to them, including, in the event of the establishment of a unified Criminal Court, the present division of responsibility for them between the Lord Chancellor's Department and the Duchy of Lancaster;**

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<sup>101</sup> *Political Balance in the Lay Magistracy*, LCD (1998), para 7

<sup>102</sup> paras 27 - 34

<sup>103</sup> see Chapter 7, paras 50 - 73

- **passing responsibility for determining the number of magistrates required for each commission area from local Advisory Committees to court staff in consultation with the Chairman of each Bench, the justices' clerks and, in the event of the establishment of a unified Criminal Court, also the Resident Judge;**
- **reviewing the community relations and educational initiatives of benches with a view better to inform the public of their work and to attract more suitable candidates for appointment;**
- **in support of the local Advisory Committees, establishing a properly resourced National Recruitment Strategy aimed, not only at candidates for the magistracy, but also at their employers;**
- **equipping local Advisory Committees with the information to enable them to submit for consideration for appointment, candidates that will produce and maintain benches broadly reflective of the communities they serve, including the establishment and maintenance of national and local data-bases of information on the make-up of the local community and on the composition of the local magistracy;**
- **instituting a review of the ways in which the role and terms of service of a magistrate might be made more attractive and manageable to a wider range of the community than is presently the case; and**
- **persisting with the current search for occupational and/or social groupings as a substitute for political affiliations as a measure of local balance.**

**I also recommend that the Lord Chancellor should continue with – but keep under careful review – his present policy of not normally appointing certain persons who are close to the criminal justice system or who, by the nature of their occupation, could not commit themselves to sitting regularly, or whose character or association would make them undesirable for appointment.**

### **District Judges**

- 87 Although stipendiary magistrates are now called District Judges, it is convenient to deal here with their selection and appointment to sit alongside lay magistrates in magistrates' courts. As I have already noted in Chapter 3, only barristers or solicitors of at least seven years' standing may be appointed

as District Judges. There are more solicitors than barristers on the District Bench and about a quarter of all of them were formerly justices' clerks. Appointments are based solely on merit and regardless of ethnic origin, gender, marital status, sexual orientation, political affiliation, religion or disability, except where the disability prevents the fulfilment of the physical requirements of the office. District Judges tend to be mostly male (about 84%), white (about 98%) and middle-aged (more than 50% aged 45-54), though in the main they are younger than magistrates.<sup>104</sup> The Lord Chancellor appoints them in annual open competition, first, to sit part-time as a Deputy District Judge. After selection they attend an induction course provided by the Judicial Studies Board and are each then assigned to a District Judge as pupil master. The same procedure applies, after they have undertaken about 40 sitting days or two years' service, to full-time appointment of District Judges. They are then assigned to a particular MCC area.

- 88 District Judges sitting in the magistrates' courts, unlike their counterparts in the county court, are paid out of the Consolidated Fund. Their salaries and other employment costs are about £90,000 a year. They are not, therefore, a burden on the MCC in whose area they sit and, the MCC's revenue grant is not adjusted to take account of the savings in magistrates' allowances etc. or in sitting time that they bring. Some District Judges also sit as Recorders in the Crown Court, normally for about three weeks a year, and the appointment is emerging as the first step on a judicial rung that may lead to permanent appointment as a Circuit Judge and, possibly, beyond.
- 89 Outside London, assignment of a District Judge is normally at the request of an MCC; it is not the Lord Chancellor's policy to foist a new or replace a retiring full-time appointment on an unwilling MCC. However, he may encourage it, perhaps prompted by a recommendation from the Magistrates Courts' Service Inspectorate, where he considers it appropriate.<sup>105</sup> He makes the appointment in consultation with the Senior District Judge. Unhappily, there have been instances when local benches have, by their opposition, successfully delayed the appointment of a stipendiary to their area when such an appointment was sorely needed. In my view, such parochialism demeans the otherwise worthy contribution that magistrates make to the running of the criminal justice system, and it should no longer hold sway. If, as I have recommended, the Government's policy is to continue with magistrates and District Judges sitting in roughly their present proportions and sharing the work between them much as they do now, the cause of such opposition should diminish. And if, as I recommend in Chapter 7, magistrates join with District Judges in exercising an enhanced jurisdiction in an intermediate tier of a unified Criminal Court, there will be even less cause for it.

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<sup>104</sup> *The judiciary in the magistrates' courts*, pp viii and 24, para 2.7

<sup>105</sup> see LCD Consultation Paper, *Unification of the Stipendiary Bench*, (1998) p 7, para 26

90 In my view, the decision whether to appoint a District Judge should no longer turn primarily on, or be impeded by, the views of magistrates, whether expressed through their local bench or the MCC. I share the view of the Runciman Royal Commission that there should be a more systematic approach to the role of professional judges in the summary system to make the best use of their special skills and qualifications,<sup>106</sup> and this applies to their appointment as well as to their deployment. In my view, the Lord Chancellor should take the initiative rather more than he has been minded to do in the past, after consulting the local bench or benches, acting through their chairman or chairmen, the justices' clerk and all relevant local criminal justice interests. If my recommendations for a unified Criminal Court are adopted, these should include the Presiding Judges, the Resident Judge and the local group or court manager.

**I recommend that the Lord Chancellor should be more ready to take the initiative to assign a District Judge to an area where, having consulted as appropriate, he is of the view that local justice in the area requires it.**

## **Training**

91 Each MCC has a statutory duty to establish and administer schemes providing for training courses for magistrates in its area.<sup>107</sup> The Lord Chancellor requires the training to satisfy standards set by the Judicial Studies Board. These are, in practice: the Magistrates' New Training Initiative (MNTI), a 'competence'-based training and appraisal scheme that it established in 1999; occasional national guidance on specific matters for local provision, for example, the recent project on implementation of the Human Rights Act 1998; advice and residential national training courses for chairmen of benches when they are elected; and the establishment and maintenance of a database on its web-site of approved training materials produced by MCCs and others.

92 All that sounds better than it is. MNTI was the product of extensive consultation with magistrates and justices' clerks and is an improvement on what went before. But the scheme has been much criticised for its complexity; for example, there are 104 different 'competences' even for those who sit only as 'a winger' in the adult courts. And, some two years after the scheme's introduction, no national standards have been set in respect of these competences. The first priority was to arrange for the mentoring and appraisal of new magistrates, and MCCs by now should be ensuring that all magistrates are appraised against the relevant competences at least once every

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<sup>106</sup> Report of *Royal Commission on Criminal Justice*, Ch 8, para 103 and recommendation 255

<sup>107</sup> Justices of the Peace Act 1997, s 64

three years. Although the Judicial Studies Board is not systematically monitoring the coverage and effectiveness of MNTI nationally, it is clear that a number of MCCs are not meeting this requirement. The Board has recently published an evaluation of MNTI,<sup>108</sup> in which it concluded that its basic concepts and principles were sound, but that there was too great a variation in the manner of its implementation. It recommended the introduction of national performance standards, the weighting of competences and simplification of documents.

- 93 The problem of lack of consistency extends beyond the core training provided under the MNTI framework. Some MCCs do not distribute the Judicial Studies Board's material to individual magistrates. And some have produced their own training material, which they do not always copy to the Board. With the exception of the Human Rights Act programme, all training for magistrates has been essentially voluntary, and has been criticised by those making submissions to the Review as haphazard and lacking in structure.
- 94 Even if those defects can be overcome, the system of MCCs training their magistrates under the loose oversight of the Judicial Studies Board, sometimes using its training materials and sometimes not, is deficient. The Board has a trivial budget for the purpose: £175,000 out of a total of over £5 million. That pays for the equivalent of only two full-time professional staff, very limited external consultancy support and the production and provision of a limited range of guidance and training material of various sorts. And it lacks the means to ensure that MCCs use its training materials to best effect or, in some cases, at all. It can only advise the Lord Chancellor to make alternative training arrangements for, and withdraw funding from, an MCC that chooses to ignore its guidance. The Board has not, so far, taken such a drastic and potentially counter-productive a step.
- 95 The Magistrates' Association does a great deal to make up for the patchy nature and lack of consistency in training provided by some MCCs. It has a Training Unit which, with the assistance of an annual grant of £130,000 provided by the Judicial Studies Board, issues guidance and provides training on specific matters from time to time. Three recent examples are its 'Can We Get On Please' training pack to assist court chairmen in taking more control over the progress of cases, its Sentencing Guidelines (issued with the approval of the Lord Chancellor and the Lord Chief Justice) and a training programme for mentors.
- 96 The lack of consistency in the training of magistrates from one MCC area to another is a source of legitimate concern, particularly in its contribution to wide variations in the effectiveness of case management and in sentencing

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<sup>108</sup> *Magistrates' New Training Initiative: Evaluation of Implementation, Final Report*, (December 2000) pp 4-5

patterns. Although responsiveness to local circumstances, particularly in sentencing, is one of the strengths of the magistracy, they should not receive varying accounts of what the law requires or differing criteria for the exercise of their discretion. In my view, there is an urgent need for clearer and simpler national standards in the training of magistrates and for more consistency in and monitoring of its provision than are now the case.

97 The establishment of a unified Criminal Court would, of itself, require a new training structure. MCCs would cease to exist and, in addition to training magistrates for their summary jurisdiction, it would be necessary to provide joint training of District Judges and some magistrates for sitting as ‘mixed tribunals’ in the District Division. I believe that the Judicial Studies Board should be given a strengthened responsibility for formulating and overseeing the content and manner of training of all magistrates whilst, in the main, retaining locality of its provision. It would not be realistic or fair to magistrates, other than bench chairmen, to require them to travel long distances to attend residential training courses, as in the case of the professional judiciary. If more consistency in the provision of training and, consequently, in the handling of cases between different areas is to be achieved, it will require a significant increase in resources to prepare national training materials, to select and train local trainers and to ensure the use everywhere of the same materials.

98 This is also a field in which District Judges, with their professional skills and their own more generous training by the Judicial Studies Board,<sup>109</sup> could be further developed to advantage both as local trainers and in occasional sittings where appropriate with magistrates.<sup>110</sup> A beneficial by-product of such participation of District Judges in the broader life of magistrates’ courts would be the removal of the ‘wall’ that exists between them and magistrates in many areas. However, the mainstay of local training of magistrates should, in my view, continue to be the justices’ clerks (in whatever their manifestation, depending on the court structure). They have unrivalled knowledge of the practices and procedures of the jurisdiction and of the forensic needs of magistrates of all levels of experience.

99 I should not leave this subject without mentioning the potential of information technology to facilitate greater use of distance learning through CD-ROMs and website based courses and sources of the sort the Board is already providing for the professional Judiciary.<sup>111</sup>

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<sup>109</sup> one day's national training a year provided by the Judicial Studies Board

<sup>110</sup> as many already do; see *The Development of the Professional Magistracy in England and Wales*, p 641; cf. the training provided by Liaison (Circuit) Judges; see protocol *Guidance for Liaison Judges* (1995) HHJ Francis Allen

<sup>111</sup> for example, as part of the Board's recent training in preparation for implementation of the Human Rights Act 1998

100 All this would call for a significant increase in resources for the Judicial Studies Board to enable it to devise and ensure consistent provision, in the main at a local level, of training for magistrates. I realise that this would be a significant extension of the Board's responsibilities, but with its excellent record of training of professional judges and, more selectively, of magistrates, it is well fitted for it.

**Accordingly, I recommend that:**

- **the Judicial Studies Board should be made responsible, and be adequately resourced, for devising and securing the content and manner of training of all magistrates;**
- **such training should, in the main, be provided at local level through trainers, ideally justices' clerks and/or legal advisers, appropriately trained for the purpose by the Board;**
- **District Judges should also be involved in the training of magistrates in the area or at the court centre at which they are normally based;**
- **the MNTI scheme should be refined in order to provide a less complex, weighted set of competences for magistrates, supported by clear national standards; and**
- **the Judicial Studies Board should establish systems to ensure that appraisal of magistrates takes place in a timely and effective manner across the country and that training programmes take account of the training needs identified during that process.**