

MAGISTRATES' COURTS AND THE 2003 REFORM OF THE CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

Magistrates' courts and Crown Courts are the two levels of first instance criminal courts in the English criminal justice system. While in the Crown Courts, judges and juries deal with the most serious offences (indictable), magistrates' courts try, within a locally based jurisdiction, lesser offences known as summary and "either way" offences.¹ Also, Crown Courts' judges are all professional judges whereas those sitting in magistrates' courts most frequently are lay people.

Magistrates' courts have been in existence in England and Wales since the 14th century. The Justices of the Peace Act 1361 is still the source of some of their powers. Until 2004 the main pieces of legislation which governed magistrates' courts, their organisation, jurisdiction, powers and procedure were the Domestic Proceedings and Magistrates' Courts Act 1978, the Magistrates' Courts Act 1980, the Police and Magistrates' Courts Act 1994, the Justices of the Peace Act 1997 and the Access to Justice Act 1999. Two recent pieces of legislation, the Criminal Justice Act 2003 and the Courts Act 2003 must now be added to that list.

As Sir Robin Auld, a senior Lord Justice in the Court of Appeal, pointed out in his Report on the Review of the Criminal Courts², "(n)o country in the world relies on lay magistrates³ as we do (...) to administer the bulk of criminal justice".⁴ This

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The authors would like to thank our colleague Professor Ed Cape, Director of the Centre of Legal Research and Head of the Criminal Law Research Unit, for his helpful comments on the draft of this article. All errors remain our own however.

¹ Listed in Schedule 1 of the Magistrates' Courts Act 1980 "either way" offences are triable by either court. See also footnotes 84 and 85, and Part 2 on the powers and jurisdiction of magistrates.

² The Auld Report was commissioned by the Lord Chancellor and was published in October 2001. The rather daunting (or optimistic) terms of reference for Sir Robin Auld were as follows: "to review... the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationship with others across the whole of the Criminal Justice system, and having regard to the interests of all parties including victims and witnesses, thereby promoting public confidence in the rule of law." The full report is available at <http://www.criminal-courts-review.org.uk/ccr-00.htm>.

For early commentaries on this report, see Lord Woolf, "Making sense of the Criminal Justice System", Lecture Paper, 9 October 2001, Criminal Bar Association, http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/lcj091001.htm; see also the special issue of the Criminal Law Review of April 2002. With particular regards to magistracy, see R. Morgan, "Magistrates: The Future According to Auld", [2002] 29 J. of Law and Society 308; and A. Sanders, "Core Values, the Magistracy, and the Auld Report", [2002] 29 J. of Law and Society 324.

³ There are about 30,400 of them serving for between 10 and 20 years. Unpaid but receiving a small allowance to cover costs and financial loss, they sit part-time in benches of three for a minimum of 26 half-day court sittings a year.

⁴ See the Report, chapter 4 para.1 at 94.

system is also unique⁵ in that lay magistrates and full-time professional judges⁶ rarely sit together as a mixed court. This singularly contrasts with other countries, like France or Germany, where lay and professional judges exercising the same jurisdiction sit together. This also contrasts with Northern Ireland where magistrates are all professional judges.

Whilst extremely important in the number of cases they hear⁷, and hence in the number of lives they affect, their work has seldom been the subject of research until relatively recently. As Penny Darbyshire has observed, the major contribution of the magistracy to the English criminal justice system, and its importance, has been largely neglected by most categories of lawyers ranging from superior judges and academics to law-makers, including the 1993 Royal Commission on Criminal Justice⁸. The Runciman Report merely stated that “magistrates’ courts conduct over 93%⁹ of all criminal cases and should be trusted to try cases fairly”¹⁰ without any supporting evidence to underpin this assertion. Darbyshire explains this disregard for the magistracy mainly by the fascination that most lawyers have for jury trials¹¹.

This neglect appears to be addressed by the current reforms of the criminal justice system and of the courts’ system undertaken by recent Labour Governments. Following the publication of the Auld Report and of the Government White Paper “*Justice for All*”, as presented to Parliament on July 2002¹², the Criminal Justice Bill¹³

⁵ However, Magistrates’ courts are not unique to the United Kingdom as such courts can be found in other Commonwealth countries such as New Zealand or South Africa. Justices of the Peace are also found in Scotland which has a separate legal system from that of England and Wales; however, plans to abolish lay justices of the peace were unveiled in a report on Scotland’s justice system: see *The Summary Justice Review Committee. Report to Ministers* (the McInnes Report) (Scottish Executive, 2004, Edinburgh) available at <http://www.scotland.gov.uk/library5/justice/sjrcrm-00.asp>. However, it has since been decided that the 400 year old system of lay justice will be retained. The courts’ administration will be unified and the sheriff’s jurisdiction increased to one year’s custody: see “Smarter justice, Safer Communities” (22 March 2005) <http://www.scotland.gov.uk/topics/justice/19008/16628> and the Criminal Proceedings etc (Reform) (Scotland) Bill introduced on 22 February 2006.

⁶ Called District Judges (Magistrates’ Courts), they handle only 9% of that criminal work sitting alone. These were referred to as stipendiary magistrates before the Access to Justice Act 1999, s. 78. Interestingly enough South Africa seems to move, under the Magistrates’ Courts Amendment Act, towards a system of lay assessors sitting with their professional magistrates; see G. Wilson, “A Legacy of the Empire: Lay Assessors in South Africa”, (Sept. 2003) *Magistrate*, 247. On the other hand, the New Zealand Law Commission is expected to recommend the creation of a new layer of courts to speed up criminal justice which would not involve justices of the peace; see P. Harkness, “Future of New Zealand Lay Magistracy Hangs in the Balance”, (May 2004) *Magistrate* 147.

⁷ 2,039,000 were proceeded against in the magistrates’ courts; 80,000 tried at the Crown Court: Criminal Statistics England and Wales 2004. In 2000, 1,911,600 defendants had proceedings completed there; Home Office 2000/1 Statistical Bulletin at 2. This contrasts with the corresponding figure of 95,300 for the Crown Court.

⁸ “An Essay on the Importance and Neglect of the Magistracy”, (1997) *Crim L.R.* 627, esp. at 637 in which the author wittily refers to the “...Royal “Omission” on Criminal Justice” in relation to the failure of the Royal Commission on Criminal Justice to commission any research into the operation of magistrates’ courts.

⁹ This figure seems to vary according to the source of information between 93 and 98 percent. For a discussion of this statistic, see Darbyshire, *op. cit.* at 628

¹⁰ Royal Commission on Criminal Justice report, Cm2263, London HMSO 1993 at 88.

¹¹ *Op. cit.* above at 634-640.

¹² Home Office, Cm 5563 (2003). See also “Analysis, Justice For All”, an interview with Lord Falconer, Home Office Minister of State for Criminal Justice and M. Smart, “Sentencing and Law Reform”, (October 2002) *Magistrate* 268, on the role of magistrates in the changes ahead.

¹³ For early analyses of the Bill, see M. Zander, “Lord Woolf’s criticisms of Mr Blunkett’s Criminal Justice – Pt I”, (8 Aug. 2003) *New Law Journal* 1228 and “Lord Woolf’s criticisms of Mr Blunkett’s

and the Courts Bill¹⁴ were tabled before, and debated in, Parliament in the course of 2002 and received Royal Assent on 20 November 2003. The Criminal Justice Bill was presented by the Home Office as the “most significant overhaul of the criminal justice system in a generation.”¹⁵ The Criminal Justice Act 2003¹⁶ is indeed, in the Government’s view¹⁷, designed to “modernise and rebalance the system in favour of victims, witnesses and communities” and “help tackle and reduce crime – from detection to rehabilitation of offenders – by bringing more offenders to justice...”¹⁸. The Act is aimed at introducing measures that will strengthen and extend police powers to fight crime, terrorism and organised crime¹⁹; make the whole justice system more efficient, modern and joined up²⁰; turn trials into a search for the truth²¹; re-define the principles and purposes of sentencing and rehabilitation²².

More modestly, the Courts Act²³ primarily implements the key recommendations relating to the courts made by Sir Robin Auld in his report as accepted by the Government in the White paper “Justice for All”. Its main purpose is to unify the administration of the court system²⁴. However, these two Acts combined,

Criminal Justice – Pt II”, (15 Aug. 2003) *New Law Journal* 1264; see also M. Zander, “Mr Blunkett’s Criminal Justice Bill”, (6 Dec. 2002) *New Law Journal* 1861; “The Criminal Justice Bill in the Lords” (24 Oct. 2003) *New Law Journal* 1577; and “The Criminal Justice Bill Gets Royal Assent”, (28 Nov. 2003) 1778; and with particular reference to magistracy, see G. Robson, “Time to Reflect: A Challenge for the lay Magistracy?”, (1 Nov. 2003) 167 *Justice of the Peace* 828.

¹⁴ For early comments, see Lord Woolf, “Achieving Criminal Justice”, (Feb. 2003) *Magistrate* 42.

¹⁵ See Home Office Press Release of 21 November 2003, see http://press.homeoffice.gov.uk/press-releases/Delivering_Justice_For_All_-Crim

¹⁶ See G. Robson, “Criminal Justice Act 2003: A Possible Prognosis”, (3-10 Jan. 2004) 168 *Justice of the Peace* 11 and B. Gibson, “The Criminal Justice Act 2003”, (6 March 2004) 168 *Justice of the Peace* 164 and “The Criminal Justice Act 2003- Part 2” (20 March 2004) 168 *Justice of the Peace* 207.

¹⁷ Some commentators would identify other motives and criticise the likely attainment of the aims: see A. Ashworth [2004] *Crim LR* 516-533 “*Criminal Justice Act 2003: Part 2: Criminal Justice Reform - Principles, Human Rights and Public Protection*”; M. Tonry, “*Punishment and Politics*”, 2004 *Willan Cullompton, passim*.

¹⁸ See footnote 14.

¹⁹ Notably by making significant changes to the Police and Criminal Justice Act 1984, restricting the right to bail, extending drug testing, extending the maximum period of detention in cases of alleged acts of terrorism and making ID fraud arrestable offences.

²⁰ Notably by improving joined up working, improving the preparation of cases, making trial more efficient in terms of speed and efficacy, using modern technology to give evidence in court and improving jury service.

²¹ Essentially by adopting an inclusionary approach to evidence, improving disclosure and limiting the application of the double jeopardy rule.

²² Primarily by enshrining for the first time those purposes and principles in a statute, establishing a new Sentencing Guidelines Council to avoid uncertainty and disparity in sentencing, extending magistrates’ sentencing powers and offering serious alternatives to custody.

²³ See A. Samuels, “Courts Act 2003: What is it all About?” (2003) 167 *Justice of the Peace* 913.

²⁴ Part 1 imposes on the Lord Chancellor a duty to maintain an efficient and effective court system. It paves the way for a new unified courts administration as it abolishes the Magistrates’ Courts Committees, which were responsible for the administration of the Magistrates’ Courts, and sets up local court boards. Part 2 and 3 contains provisions reforming lay justices and magistrates’ courts. Part 4 aims at improving court security in the Supreme Court, County Courts and Magistrates’ Courts. Part 5 extends the concept of an Inspectorate of Court Administration, until then limited to magistrates’ courts, to all the courts. Part 6 is mainly concerned with judicial titles while Part 7 covers court practice and provisions, including criminal procedure rules and family procedure rules which will be made respectively by the New Criminal Procedure Rules Committee and Family Procedure Rules Committee. Finally the miscellaneous Part 8 notably consolidates the existing powers of the Lord Chancellor to set court fees whilst for the first time making their exercise subject to parliamentary scrutiny. It also confers new powers to the courts in relation to fine enforcement and to allow them to order that some damages take the form of periodical payments in serious personal injury cases.

when they come into force and are fully implemented²⁵, will have a significant impact on the organisation and the powers of Magistrates' Courts.

The purpose of this article is to analyse the potential impact this reform of criminal justice and courts will have on magistrates and the operation of summary justice.

PART 1 ORGANISATION AND MANAGEMENT: LESS LOCAL, MORE NATIONAL?

The organisation and operation of the magistrates' courts have been little subject to academic enquiry or empirical research until relatively recently²⁶. The Le Vay Scrutiny of Magistrates' Courts, which reported in 1989²⁷ set out to look at the administration of these courts. The findings were that the system of summary justice was fairly haphazard, that courts often operated in isolation, and there was a distinct lack of accountability. It was recommended that the running of the magistrates' courts service should be undertaken by a government agency. This recommendation was not implemented, but it was nonetheless clear that the Conservative government of the time wished to exercise more control over the way the system was operating.

In 1992 the Lord Chancellors' Department²⁸ took over the executive responsibility for the magistrates' courts from the Home Office. In the same year, the government published a White Paper, *A New Framework for Local Justice*²⁹, which introduced measures such as cash limiting and performance related grants of resources to courts. More levers for central control were emerging, with reference being made to the managerial considerations of efficiency as well as quality of service.³⁰

The Police and Magistrates' Courts Act 1994³¹ was described by Wasik et al³² as "a significant example of the extent to which the demands of efficiency and managerialism have had an impact on the criminal justice system". This Act gave the Lord Chancellor increased control over the operation of local justice. Local Magistrates' Courts' Committees had the task of organising the administration of summary justice. By the 1994 Police and Magistrates' Courts Act, the Lord Chancellor was empowered to amalgamate Magistrates' Courts Committees³³, appoint non magistrate members³⁴, direct a Magistrates' Courts Committee to meet certain levels of performance, and even to dismiss its members and replace them for a period of three months with members chosen by him.³⁵

²⁵ An implementation schedule of criminal justice reforms can be found in Judicial Studies Board, "Criminal Justice Reforms Update (Magistrates)" available at <http://www.jsboard.co.uk/cjr/index.htm>.

²⁶ Some notable exceptions being works by P. Carlen, *Magistrates' Justice* (London: Martin Robertson, 1976); D. McBarnett *Conviction* (London: Macmillan, 1983) and P. Darbyshire, *The Magistrates' Clerk* (Chichester : Barry Rose 1984).

²⁷ Magistrates' Courts : Report of a Scrutiny, London 1989 HMSO

²⁸ Since June 2003 entitled the Department for Constitutional Affairs.

²⁹ Lord Chancellor's Department, Cm 1829 (London: HMSO 1992).

³⁰ See M. Wasik,, T. Gibbons, and M. Redmayne, *Criminal Justice. Text and Materials* (Longman, 1998) 359

³¹ A title criticised for juxtaposing magistrates with the police, an unfortunate resonance with the old "police courts".

³² *Op. cit.*, 357

³³ Now Section 32 of the Justices of the Peace Act 1997

³⁴ *Ibid*, Section 28

³⁵ *Ibid*, Section 38

A new post of Justices' Chief Executive was instituted by the 1994 Act. The new appointment was of a person to be in charge of the Magistrates' Courts Committee and to deal with the administrative functions of the courts locally. Before that time, the Clerk to the Justices, a qualified lawyer, would have performed this function. Section 87 of the Access to Justice Act 1999 removed the requirement that a Justices' Chief Executive be legally qualified. It is made clear in the legislation³⁶ that the judicial functions of the Clerk to the Justices are not subject to direction by the Justices' Chief Executive. In the appointment of Justices' Chief Executives we see the beginning of recent moves towards the separation of powers in the running of summary justice - administrative duties to be the province of the Magistrates' Courts Committee and Justices' Chief Executive, legal functions to be exercised by the Clerk to the Justices. Clerks to the Justices continue to exercise certain administrative functions, such as arranging the listing of cases. Greater separation of the legal and administrative roles was again stressed by the Lord Chancellor in 1997. In a Ministerial Statement to the House of Lords³⁷, he spoke of amalgamation of benches in the interests of efficiency, and stated that the Lord Chancellor's Department's objectives were to improve efficiency and reduce delay, and that local justice needed a national framework. He also added that there were "...no plans for a replacement of the lay magistracy with stipendiary magistrates".

In February 1997 a report was produced by a civil servant, Martin Narey, who later became Chief Executive of the National Offender Management Service. Entitled *Review of Delay in the Criminal Justice System*³⁸, widely known as The Narey Report, it made many recommendations to speed up criminal justice, notably controversial recommendations to remove a defendant's automatic right to jury trial for "either way" offences³⁹.

The Auld Review

The Auld Review recommended, *inter alia*, that there should be a centrally funded executive agency, part of the Lord Chancellor's Department, to replace the Court Service (which then was responsible for the operation of the Supreme Court⁴⁰, county courts and some tribunals) and the Magistrates' Courts Committees. The agency would be responsible for the administration of all criminal courts. Justices' Clerks and legal advisers would continue to be responsible for the legal advice given to magistrates, but there should be no growth in the justices' clerks case management jurisdiction⁴¹, and it is envisaged that the Judicial Studies Board⁴² should take over the responsibility for the content and manner of training of magistrates⁴³. The Lord Chancellor should be more ready to assign a District Judge to an area where, after

³⁶ *Ibid*, Section 89

³⁷ Made on 29 October 1997.

³⁸ (London: Home Office 1997).

³⁹ This aspect of the report was not implemented at the time

⁴⁰ By virtue of the Supreme Court Act 1875. This includes the Court of Appeal, High Court, and Crown Court sitting in its original capacity - as a court of trial. This is not to be confused with the projected new Supreme Court, proposed to replace the Judicial Committee of the House of Lords.

⁴¹ See Chapter 4, para 58. In cases of complexity, or where "robust case management is required", the matter should be put before a District Judge.

⁴² The Judicial Studies Board was established in 1979, and is concerned mainly in delivering judicial training, and judicial guidance in the Bench Books. It also sets the framework for the training of lay magistrates (see <http://www.jsboard.co.uk>).

⁴³ *Ibid*, para 100.

consultation, he considers local justice requires this⁴⁴. The Auld Review acknowledged problems concerning variations in the delivery of local justice⁴⁵, and variations in the training provision for the lay magistracy⁴⁶.

The Government White Paper *Justice for All*⁴⁷

The government accepted certain of Sir Robin Auld's proposals. The Auld review recommendation for a single courts organisation was adopted and it was stated that an agency would "deliver decentralised management and local accountability within a national framework of standards and strategy direction."⁴⁸ However, the management is going to be much more in central government than previously. The rhetoric is of devolution of power together with accountability, but the anticipated reality is of a tightening of national control. Sir Robin Auld's recommendations for mixed benches of lay and professional magistrates, and for an intermediate "middle tier" of courts between magistrates and Crown Court were not adopted.

The Courts Act 2003 and management of magistrates' courts

The Courts Act seeks further to increase central control over the management of the magistrates' courts. Under Section 1, the Lord Chancellor has the general duty of ensuring that there is an "efficient" and "effective"⁴⁹ system of criminal courts.⁵⁰

First, Magistrates' Courts Committees are abolished⁵¹. Instead the Lord Chancellor will appoint his local managing body to be known as "Courts Boards".⁵² These bodies may be based locally but the policy thrust is for government to achieve firmer control of the operation of criminal justice at a local as well as national level. The Courts Board would deal with matters concerning not only the magistrates' courts, but also the Crown Court. Thus the Court Boards will deal with all criminal courts in the area. There will no longer be a committee dealing exclusively with magistrates' courts' business. The Act also provides for the ending of the office of Justices' Chief Executive⁵³. Instead the role will belong to a civil servant, designated by the Lord Chancellor. The Lord Chancellor would also designate an office to be responsible for the collection of fines and fees. The Courts Boards will consider draft and final business plans for their area under the guidance of the Lord Chancellor, who may reject the final business plan, but would have to give reasons for so doing.⁵⁴

⁴⁴ *Ibid*, para 90 and see Morgan, *op. cit.* at 315.

⁴⁵ *Ibid*, paras 34-37.

⁴⁶ Paras 91-97.

⁴⁷ See footnote 12 above.

⁴⁸ See Explanatory Notes to Courts Act 2003, 2003 Chapter 39, para. 10, available at <http://www.opsi.gov.uk/acts/en2003/2003en39.htm>

⁴⁹ Both words are very much associated with a managerial approach.

⁵⁰ Which are defined in Section 68 as Court of Appeal (Criminal Division), and Crown Court and magistrates' court when dealing with any criminal cause or matter.

⁵¹ See Section 6 - including the Greater London Magistrates' Courts Authority, which is the Magistrates' Courts Committee for the Greater London area at present.

⁵² See Section 4. Under Schedule 1, each board must have one judge member, two lay magistrates (originally it was to be one only), two other members appearing to the Lord Chancellor to have knowledge or experience of the courts in the area, and two people representative of the people of the area. There may be other members.

⁵³ See Section 6(2)(b). The Justices' Chief Executive's role was to deal with the administrative side of the magistrates' courts' work. The post did not involve judicial responsibilities.

⁵⁴ Section 5(3).

Secondly, under Part 2 of the Act, magistrates will be appointed to a national, unified Bench rather than to a particular, local bench⁵⁵. Local involvement is acknowledged in terminology - what were Commission and Petty Session⁵⁶ areas are to be known as “local justice areas”⁵⁷. The Lord Chancellor is empowered to alter these areas⁵⁸. Under Section 10, the Lord Chancellor is responsible for the appointment of all lay magistrates. This follows hard on the heels of the legislation which gathered all stipendiary (professional) magistrates (now called District Judges (Magistrates’ Courts)) into a unified Bench⁵⁹. Under s 2(1), the Lord Chancellor will appoint Clerks to the Justices who were previously appointed by the MCC. Part 5 provides that a national Inspectorate of Court Administration will oversee both Crown and magistrates’ courts, thus ending the role of the Magistrates’ Courts’ Inspectorate, which had been established in 1994 by the Police and Magistrates’ Courts Act⁶⁰. By Part 6, District Judges (Magistrates’ Courts) would be allowed to sit in the Crown Court⁶¹. The Explanatory Notes to the Bill pointed out⁶² that this was designed to give increased flexibility in judicial deployment⁶³.

It is said that “he who pays the piper calls the tune”. Under the Act⁶⁴ the funding for the magistrates’ courts will in the future come entirely from central government. Previously, 80% came from central government, 20% from the local authority.

Sir Robin Auld’s review had suggested that the Judicial Studies Board oversee the training of magistrates. This idea was not taken up in the Courts Bill or in the Criminal Justice Bill. Instead, a recent initiative, the Strengthened Role Project Plan is being pursued by the Judicial Studies Board. This is to consider mechanisms for training “to achieve a greater consistency in the standards of training and of learning outcomes contributing to an increased public confidence in the magistracy.”⁶⁵

⁵⁵ Section 7(7).

⁵⁶ See C. Fairbairn and S. Broadbridge, *The Courts Bill [HL] Bill 112 of 2002-2003*, House of Commons Library Research Paper 03/52, 5 June 2003 p. 12-13. The Commission of the Peace is the authority under which Justices of the Peace exercise their jurisdiction. There used to be local commission areas overseen by the Magistrates’ Courts Committee subdivided into Petty Sessional Divisions. Since the Courts Act 2003, magistrates are assigned to a particular area but have national jurisdiction, there now being a single Commission of the Peace for England and Wales.

⁵⁷ Section 8.

⁵⁸ Section 8(4)

⁵⁹ Access to Justice Act 1999, section 78. This means that a District Judge may sit in any magistrates’ court throughout England and Wales. There used to be separate benches for Metropolitan (London) stipendiary magistrates and the provincial bench for the rest of England and Wales.

⁶⁰ However, this newly created Inspectorate might be short-lived. The recent Police and Justice Bill introduced in the House of Commons on 25 January 2006 provides for its abolition under Clause 29(1)(e) and for its replacement with a Chief Inspector for Justice, Community Safety and Custody, whose main role will be to inspect the operation of the courts system in England and Wales, the criminal justice system and the immigration enforcement system. This new Inspector will also replace the Chief Inspector of Prisons, the Inspectors of Constabulary, the Chief Inspector of the Crown Prosecution Service and the Inspectorate of the National Probation Service for England and Wales.

⁶¹ Section 65.

⁶² Para 5, p. 3.

⁶³ This might also evidence early signs of a judicial career ladder being established. See Clare Dyer, “Falconer opens doors to judges in their 30s”, *The Guardian* newspaper of 1st July 2003.

⁶⁴ Part 1 and Schedule 2.

⁶⁵ “JSB’s Strengthened Role Project Plan”, (Judicial Studies Board, March 2004) (see http://www.jsboard.co.uk/magistrates/strengthened_role/index.htm).

Promotion or demise of local justice?

The recent moves to streamline local justice have not been received uncritically. One view is that this is the beginning of the decline of the lay magistracy. Lord Justice Auld in his review acknowledged that many magistrates believed that there was an agenda to “squeeze” lay magistrates out of the system⁶⁶, but added that he knew of no such agenda⁶⁷. The Lord Chancellor has been at pains to state his support for the lay Bench at each recent Annual General Meeting of the Magistrates’ Association⁶⁸, but some doubt the truth of this. Writing in a national newspaper about amalgamation of benches and closure of some courts, one critic said: “The ‘efficient’, centralised anonymity which characterises and demoralises so much of modern Britain is increasingly the driver of modern justice. Since so many of those who call the shots in all this are part of the deracinated metropolitan class, who have themselves lost much of their sense of locale and of the virtues of community life, then prospects for local justice look bleak.”⁶⁹

Duncan Webster, JP and Chief Executive of the Central Council of Magistrates’ Courts Committees spoke of the government going “down the road of abandoning local accountability”. He envisaged “a huge, centrally run monolithic agency, lacking any local input and accountability, which takes decisions without reference to the local situation. It really would spell the end of local justice as we know it.”⁷⁰

Another retired lay justice, Glenna Robson⁷¹ pointed to the growth in the numbers of District Judges (Magistrates’ Courts) - in August 2002 stated to be 103 with 152 deputy District Judges - and the fact that District Judges (Magistrates’ Courts) are able to sit alone in the Youth Court. She suggested that local inertia and unjustified self-satisfaction on the part of the lay magistrates may prove fatal to the lay magistracy. She quoted an anonymous civil servant, reported in a national newspaper⁷² as saying, in relation to a research project⁷³ conducted by Morgan and Russell:

“What we expect this research to prove is that lay magistrates are at best inadequate and at worst appalling (...).we will probably achieve our goal by stealth rather than in a big bang reform but we must professionalise the magistrates’ courts or whatever replaces them.”

Morgan and Russell and Lord Justice Auld were in favour of retaining the lay magistracy. Professor John Raine has acknowledged the “decisive conclusion of Auld in favour of the retention of the lay magistracy”⁷⁴, but nonetheless suggested that some of Lord Justice Auld’s proposals, in particular a new unified court structure and

⁶⁶ Auld Review, Chapter 4, para. 12.

⁶⁷ See Morgan, *op. cit.* at 308.

⁶⁸ See *The Magistrate* (Winter edition) 2001 and 2002.

⁶⁹ Andrew Phillips (Lord Sudbury, Liberal Democratic peer), “We must hold on to local justice”, (2 December 2000), *The Observer*.

⁷⁰ “Fighting the Threat to Local Justice”, (May 2002) *The Magistrate* 140.

⁷¹ See “The Lay Magistracy: No Time for Complacency”, (2002) 166 *Justice of the Peace* 624.

⁷² *Sunday Telegraph*, of 30 July 2000.

⁷³ R. Morgan and N. Russell, *The Judiciary in the Magistrates’ Courts*, (Home Office and Lord Chancellor’s Department, 2000).

⁷⁴ See “The Lay Magistracy after Auld: Safe as the Rock of Gibraltar?” (2002) 166 *Justice of the Peace* 240.

a single supporting executive agency, would make the survival of the magistracy more difficult. He identified three concerns in particular:

- the recruitment of new magistrates being discouraged by terms and conditions of service because of greater remoteness from the local area and community;
- more central control following the end of Magistrates' Courts Committees; and
- difficulties flowing from the division of work between lay magistrates and District Judges.

The result he foresaw was that the quality of local democratic participation and the degree of community orientation would be diminished.

Rod Morgan, then Chief Inspector of Probation, spoke of the "intellectual asset stripping"⁷⁵ which would follow from the creation of a middle tier of courts as recommended by Sir Robin Auld. Although that proposal was not enacted, it is nonetheless arguable that the ending of committal proceedings, and the end of magistrates sitting in the Crown Court dealing with appeals and sentences, together with the prospect of Deputy District Judges dealing with the more complex cases in the Magistrates' Court could well contribute to the same effect. The lay bench may fear relegation to more routine, mundane cases. This could lead to fewer applications to join the lay bench, and hence possibly to a lesser recruitment rate. Resignations of existing magistrates were identified as another possibility by Lord Phillips of Sudbury:

"Unless good justices of the peace have a good cross-section of cases, including some of the most difficult in terms of law, fact and judgment, they will simply walk away, as many of them have already done because of workload, court closures and the like."⁷⁶

Andrew Rutherford⁷⁷ expressed concern about the threat to the independence of criminal justice agencies if too much joint working and joint inspecting took place. All six Chief Inspectors of Crown Prosecution Service, Constabulary, Magistrates' Courts Service, Prisons and Probation and Social Services have been persuaded to produce a joint report. At the same time Rutherford noted the irritation with which ministers had greeted critical reports by the Chief Inspector of Prisons, Sir David Ramsbottom. Professor Rutherford's fear was that 'joined up' working may result in a dilution of necessary independence of the various agencies.⁷⁸

The larger issues are twofold – simply stated, but difficult to answer: What does 'local' justice mean? And do we want it? Local justice can be criticised as "justice by geography". Why should two people be treated differently in relation to punishment for the same offence, or receive different chances of getting bail⁷⁹ or legal representation merely because of the court culture in that area? Recent research findings have indicated great differences of approach in different areas - or even in adjacent areas⁸⁰. The Home Secretary, speaking at the Justices' Clerks Conference in 2001 referred to figures of 20% sentenced to immediate custody for burglary in

⁷⁵ R. Morgan, *op. cit.* at 319.

⁷⁶ HL Deb 9 Dec 2002 c50

⁷⁷ See "The Limits to Joined-up Justice", (2000) *New Law Journal* 672.

⁷⁸ See Footnote 60, ante for current proposals for merging Inspectorates.

⁷⁹ A. Hucklesby, "Court Culture: An Explanation of Variations in the Use of Bail by Magistrates' Courts" 36 [1997] *Howard Journal of Criminal Justice* 129.

⁸⁰ See *Local Sentencing Patterns in Magistrates' Courts 2000*, Justices' Clerks Society, Magistrates' Association, Home Office 2002.

Teeside compared with 41% in Birmingham, and 3.5% receiving custodial sentences in Reading compared with 48% in Greenwich and Woolwich.⁸¹

How good is “local” and how good is “lay”? What might be the consequences of a more rational, national approach? Much will depend on how the tensions between managerialism and the main object of the courts’ work are resolved. In the Foreword to a Howard League Working Party report, Andrew Rutherford wrote that “resolving the tensions between the demands of managerialism and those of justice is the greatest challenge facing the criminal justice system today.”⁸² Those words are as true today as they were well over a decade ago.

The quality of summary justice as opposed to that relating to trial on indictment has not been the subject of research. It would be simplistic to attempt to compare the Crown Court with the magistrates’ courts too directly, since the workload of each is so very different, even though they overlap. Many offences dealt with in the magistrates’ courts are lesser offences, quite often being offences of strict liability, or regulatory offences. Nevertheless, as Darbyshire pointed out⁸³, the magistrates do still deal with quite serious offences, and offences involving not only the risk of custody for a considerable time but also convictions which may have lifelong repercussions for a defendant’s reputation in the community and his or her future employment prospects.

PART 2 JURISDICTION AND POWERS

Originally, in 1361, Justices of the Peace had police powers which gave them the authority to arrest suspects, investigate alleged crimes and punish offenders. Subsequently, in the absence of an adequate system of local government, they were given administrative responsibilities which they exercised for centuries. In the 19th century, with the exception of liquor and gaming licensing, their administrative responsibilities were transferred to local authorities. Equally, they lost their policing role to local police forces. Today, magistrates’ courts have jurisdiction and powers in criminal and civil matters.

Criminal jurisdiction and powers

Magistrates deal with about 95% of all prosecuted cases, the vast majority of which are dealt with without a trial by a guilty plea. Most offences are dealt with summarily. Magistrates have competence to try all⁸⁴ summary offences⁸⁵ some of which carry, at present, a penalty of up to six months’ imprisonment.

Despite suggestions in favour of a general increase or decrease in summary jurisdiction, Lord Justice Auld could “discern no wide or well-based support for a change in the general limit of six months’ custody or £5,000 fine now applicable to District judges and magistrates alike” and recommended that there should be no general change in the level of summary jurisdiction of District Judges or magistrates⁸⁶. However, Auld conceded that the “matter may need review in light of

⁸¹ Home Office Press Release 119/2002, 7 May 2002.

⁸² Howard League for Penal Reform, *The Dynamics of Justice*, a report of the Working Party on Criminal Justice Administration (London: Howard League, 1993).

⁸³ In “An Essay on the Importance and Neglect of the *Magistracy*”, [1997] Crim LR 627 at 630.

⁸⁴ This competence is not exclusive however as some summary offences may go to Crown Courts with either way offences under s. 40 of the Criminal Justice Act 1988

⁸⁵ Summary offences are created and defined by statute. There are thousands of different summary offences which include lesser road traffic offences, public order offences, common assault, etc.

⁸⁶ See the Report, para. 20 at 101 and 102.

the Halliday recommendations for the introduction of a new sentencing framework, including combined custody and community orders”⁸⁷. He also recommended the creation of an intermediate tier of the criminal court which would have jurisdiction to impose sentences of two years’ custody⁸⁸. Unconvinced that there was a strong case to justify introducing a new tier, the Government remained committed to “legislate to increase magistrates’ sentencing powers to 12 months and to allow (it) to increase them up to 18 months, depending on the results of evaluations, and taking account of any additional training requirements.”⁸⁹ Section 132 of the Magistrates’ Courts Act 1980 provides that magistrates shall not impose imprisonment for less than five days. This remains unchanged under Section 154(7) of the Criminal Justice Act.

Under Section 31(1) of the Magistrates’ Courts Act 1980, magistrates had no power to impose imprisonment (or youth custody) for more than six months. Under Section 154(1) of the Criminal Justice Act, this limit is brought up to twelve months⁹⁰. Moreover, clause 139 of the Criminal Justice Bill gave the Secretary of State the power to increase by way of order that maximum term of imprisonment to eighteen months but this clause was dropped in the Criminal Justice Act.

In the case of consecutive terms of imprisonments, i.e. where the defendant is convicted of two or more summary offences at the same hearing, under section 133(1) Magistrates’ Courts Act 1980, the magistrates cannot impose a sentence amounting to more than six months in custody. This sentence could rise to twelve months, however, in the case of offences triable “either way” (Section 133(2) Magistrates’ Courts Act). Under Section 155(2) of the Criminal Justice Act, this period of six month is extended to sixty-five weeks i.e. fifteen months⁹¹.

Committal proceedings and mode of trial

Magistrates sitting as examining magistrates traditionally determine whether the prosecution have established a *prima facie* case to be committed for trial at the Crown Court. This power was exercised in the case of “indictable only” and “either way” offences. However, proceedings for committal for trial for “indictable only” offences ceased in 2001. Such cases are now automatically sent to the Crown Court for trial.

Section 17 of the Magistrates’ Courts Act confers upon magistrates’ jurisdiction to try “either way” offences⁹². In the cases that are triable “either way”,

⁸⁷*Ibidem*. Auld here refers to John Halliday, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, (London: Home Office, May 2001), at iv, para. 0.11, recommendations 15-18. See also E. Baker & C.M.V. Clarkson, “Making Punishment Work? An Evaluation of the Halliday report on Sentencing in England and Wales”, [2002] Crim.LR. 81. For the background to the Halliday recommendations, see *The Criminal Justice Bill*, House of Commons Library Research Paper 02/72 (2 December 2002).

⁸⁸ See Chapter 7, paragraphs 21 to 37 of the Auld Report.

⁸⁹ See *Justice for All*, para. 4.19.

⁹⁰ However, the power of magistrates to impose a term of imprisonment for non-payment of a fine, or for want of sufficient distress to satisfy fine, is not limited by this provision.

⁹¹ Clause 139 of the Bill also provided that the Secretary of State could by order increase that term of imprisonment to twenty-four months. This Clause was dropped in the Criminal Justice Act.

⁹² These are listed in Schedule 1 of the Act. For instance, these are offences of public nuisance, threats to kill, inflicting bodily injury with or without a weapon, abandoning or exposing a child, assaulting a clergyman at a place of worship, bigamy, concealing the birth of a child, perjury in judicial proceedings, false statements with reference to marriage, to birth or to death, forgery of passports, destroying or damaging property, arson, threat to destroy or damage property, indecent assault upon a person whether male or female, the incitement to commit an offence triable either way, aiding, abetting, counselling or procuring the commission of any offence triable either way.

the procedure for determining the mode of trial – i.e. trial by magistrates or by judge and jury in the Crown Court - is provided for under Sections 18 – 26. This jurisdiction as a whole remains untouched by the Criminal Justice Act or the Courts Act. Section 41 of the Criminal Justice Act on allocation of offences triable “either way”, and sending cases to the Crown Court simply refers to Schedule 3, which amends those provisions of the Magistrates’ Courts Act. Notably, a new section 19 of the 1980 Act on decision as to allocation, requires the courts to give the prosecution an opportunity to inform the court of the defendant’s previous convictions, if any, and give the prosecution and the defendant an opportunity to make representations as to which mode of trial would be more suitable. Furthermore, in making a decision of allocation, the court must consider those representations, the adequacy of its sentencing powers and take account of the any allocation guidelines to be made under section 170 of the Criminal Justice Act by the new Sentencing Guidelines Council⁹³.

Under a replacement section 20 of the Magistrates’ Courts Act, when in force, if the court decides that summary trial is more suitable, it must explain to the defendant in ordinary language its decision and ask him whether he consents to such decision or prefers to be tried on indictment. It must also tell the defendant that, in the case of a section 224 specified offence⁹⁴, if tried summarily and convicted by the court, he may still be committed for sentence to the Crown Court (new section 20(2) Magistrates’ Courts Act). The defendant may also request an “indication of sentence” i.e. an indication of whether the court is more likely to impose a custodial or non-custodial sentence should the defendant be tried summarily on the basis of a guilty plea. The court has discretion to give or not give such indication. If the court gives an indication on request, it must give the defendant the opportunity to reconsider the defendant’s original plea (new section 20(5) & (6)).

There also exists the option for the defendant to choose to be tried by the Crown Court⁹⁵ or for the magistrates to transfer the case to the Crown Court if they are of the opinion that the offence is so serious that it requires greater punishment than they can impose, or in the case of a violent or sexual offence⁹⁶, that a term of imprisonment longer than they can impose is necessary to protect the public from serious harm from the offender⁹⁷.

Under section 19, as amended, of the Magistrates’ Courts Act, the courts could decide that trial on indictment appears more suitable in which case magistrates shall send the case to the Crown Court under section 51 of the Criminal and Disorder Act

⁹³ At present, in order to decide whether an offence is more suitable for summary trial or trial on indictment, the justices have to consider: (a) the nature of the case, (b) whether the offence is made one of serious character by circumstances, (c) whether the punishment imposable by them is adequate, and (d) the choice of trial made by the prosecution and the defence. Generally, under the guidelines contained in *Practice Note (Offences Triable Either Way: Mode of Trial)* (1990), “either way” offences are tried summarily unless a case has one or more aggravating characteristics and the court considers that its sentencing powers are inadequate.

⁹⁴ Under section 224 of the Criminal Justice Act, such offence is defined as a specified violent offence or a specified sexual offence.

⁹⁵ See J. Sprack in *The Trial Process in Criminal Justice under Stress* (E. Stockdale & S. Casale eds.), (Blackstone: London 1992) at 75.

Under new section 20(9) Magistrates’ Courts Act as amended by Schedule 3 of the Criminal Justice Act.

However, the Criminal Justice Act, in Part 7, sets out the circumstances in which criminal trials currently taking place on indictment in the Crown Court before a judge and jury will in future be conducted by a judge sitting alone.

⁹⁶ These are defined under Section 31 of the Criminal Justice Act 1991.

⁹⁷ See section 38 of the Magistrates’ Court Act 1980.

1998⁹⁸ as amended by paragraph 18 of Schedule 3 to the Criminal Justice Act⁹⁹. Under those new provisions, the case is simply “sent” rather than “transferred” as was previously the case. Proceedings for committal for trial for “either way” offences will no longer take place.

Regarding sending young offenders for trial¹⁰⁰, the replacement section 51 of the Crime and Disorder Act makes a clearer distinction between the defendant as an adult and the defendant as a child or a young person. The Criminal Justice Act 2003 also extends the circumstances under which young offenders are to be sent to the Crown Court for trial. It is no longer necessary for a young offender to have committed an offence jointly with an adult for his case to be sent to the Crown Court. Under the new section 51A, offences involving children and young persons will be sent for trial where: the offence is one of homicide or the offence is one under section 51A of the Firearms Act 1968¹⁰¹; the offence is a serious offence that attracts sentencing under section 91 of the Criminal Courts (Sentencing) Act 2000¹⁰²; the offence is a specified offence within the meaning of section 224¹⁰³ of the Criminal Justice Act 2003 and could meet the criteria for the imposition of a sentence laid down under section 226(3) (detention for life or detention for public prosecution for serious offences committed by those under 18) or 228(2) (extended sentence for certain violent or sexual offences committed by persons under 18) of this Act¹⁰⁴; the offence is a summary offence punishable with imprisonment or obligatory or discretionary disqualification from driving¹⁰⁵.

Committal for sentencing

The White Paper proposed that when magistrates heard a case and convicted the defendant, they should sentence him themselves and that committal for sentencing should be abolished¹⁰⁶ so that “the defendants will always know the maximum sentence they could incur if they enter a not guilty plea but do not exercise the right to

⁹⁸ For a commentary of this Act, see R. Leng, R. Taylor & M. Wasik, *Blackstone's Guide to the Crime & Disorder Act 1998*, (Blackstone: London, 1998). Section 51 of the Criminal and Disorder Act 1998 required the Magistrates to send directly to the Crown Court any adult defendant charged with an offence triable only on indictment; see Leng, Taylor and Wasik above at 91 – 95.

⁹⁹ When deciding that an offence triable either way should be tried in the Crown Court, the magistrates currently hold committal proceedings. Such decision may be made by a single magistrate and, according to the Justices' Clerks Rules 1970 (as amended) by a Justices' clerk. These proceedings were abolished by Section 44 and Schedule 4 of the Criminal Justice and Public Order Act 1994 and replaced with a new system of “transfers for trials”. This new system designed to expedite the process of deciding whether a defendant should stand trial was never brought into force owing to the difficulties in implementing it. As a result, Section 44 of the 1994 Act was repealed by Section 44 of the Criminal Procedure and Investigations Act 1996 which introduced a new streamlined system of committal proceedings with no oral evidence. Under Section 47 and Schedule 1 of the 1996 Act, the old style mini-trial committals and the right of the defendant to have witnesses called and cross-examined were abolished and replaced with a system in which only written evidence such as witness statements and depositions from the prosecution can be used.

¹⁰⁰ When exercising their criminal jurisdiction in relation to young people under the age of 18, magistrates' courts are known as youth courts, and, as such, are subject to special procedural rules.

¹⁰¹ See subsection 12.

¹⁰² See subsection (3)(b).

¹⁰³ See above footnote 35.

¹⁰⁴ See subsection (3)(d).

¹⁰⁵ See subsection (4)(b).

¹⁰⁶ For many years the Home Office has attempted in vain to reduce the number of cases sent by magistrates to the Crown Court. See M. Zander “Why Oh Why do Magistrates Commit so many Cases to the Crown Court?” (2003) NLJ 689.

elect trial by jury.”¹⁰⁷ Because experience tells that defendants will be expected to be less likely to choose trial on indictment in the Crown Court if they know they will get a lesser penalty in the magistrates’ court, the Government’s expectations from this change was a reduction “in the number of cases going to the Crown Court which can be dealt with more effectively and appropriately¹⁰⁸ in the magistrate’s courts, and in the abuse of the right to elect for jury trial.”¹⁰⁹

Under new sections 3 and 4 of the Powers of Criminal Courts (Sentencing) Act 2000 as amended by paragraphs 21- 28 of Schedule 3 of the Criminal Justice Act 2003, the powers of committal to the Crown Court for sentence of either-way offences are no longer available unless a guilty plea has been indicated.

Territorial jurisdiction

Under sections 1 and 2 of the Magistrates’ Courts Act 1980, the territorial criminal jurisdiction of magistrates was limited to offences committed in their commission area and offences committed by people who live in their commission area. They can also issue summonses and warrants in respect of offences committed in their commission area. In the White paper, the Government proposed that lay magistrates have national jurisdiction to “(...) allow the straightforward and speedy transfer of cases from one magistrates’ court to another, which will assist in conducting trials at the most convenient local site, and (...) deliver greater consistency in procedures between the magistrates’ courts and the Crown Court.”¹¹⁰; and that they be deployed more flexibly so as to, for example, allow a Circuit Judge sitting in a Crown Court “to hear a summary offence that became attached, without the case having to go back to a magistrates’ court.”¹¹¹. According to the Lord Chancellor, this change would “bring the magistrates’ courts and the Crown Court closer together. Closer integration will remove unnecessary geographical boundaries, allowing cases to be heard at the most convenient location, taking account of the needs of victims, witnesses and defendants, and helping to reduce delay. It will bring about greater consistency in practice and procedure between the criminal courts; and it will remove statutory restrictions, allowing for more flexible use of the court estate and more effective deployment of judges and magistrates.”¹¹² Under sections 43 and 44 of the Courts Act 2003, which amend sections 1 and 2 of the Magistrates’ Courts Act, magistrates can now issue summonses and warrants in respect of any offence and any offender, and try any summary offences. Section 46 of the 2003 Act, which adds a new section 27A to the Magistrates’ Courts Act¹¹³, also enables magistrates to transfer criminal cases to other magistrates’ courts, either on the application of a party or on their own motion. Such transfer can occur before or after the beginning of the trial of or inquiry into the offence, or after the court has begun to hear the evidence

¹⁰⁷ *Justice for All*, para. 4.24.

¹⁰⁸ However, it was very clear that the main reason for reducing the level of committals to the Crown Court has also been to reduce costs.

¹⁰⁹ *Justice for All*, para. 4.25.

¹¹⁰ *Justice for All*, para. 4.7.

¹¹¹ *Ibidem*.

¹¹² Speech made during the second reading debate in the House of Lords, HL Deb 9 Dec. 2002 c14.

¹¹³ Section 3B of the Magistrates’ Courts Act 1980 allowed either the prosecution or defence (but not the court itself) to apply to have a summary case transferred to another magistrates’ court. This provision never came into force however.

and the parties, in which case the court to which the matter has been transferred must hear the evidence and the parties again¹¹⁴.

Civil jurisdiction and powers

Although magistrates' courts are mostly known as criminal courts, they also have a significant civil jurisdiction. They sit as family proceedings courts and hear family cases under the Domestic Proceedings and Magistrates' Courts Act 1978 and the Children Act 1989. They also have powers of recovery in relation to community charges and council taxes. Furthermore, magistrates used to grant, renew and revoke licences for selling intoxicating liquor. This primary responsibility for liquor licensing has now passed to the local authority under the Licensing Act 2003.¹¹⁵ Under this new regime, magistrates are involved as sentencers and as an appellate tribunal against local authority decisions.

Finally, under the Crime and Disorder Act 1998 and the Anti-Social Behaviour Act 2003¹¹⁶, magistrates have powers to issue anti-social behaviour orders. Those orders are civil by nature under section 53 of the Magistrates' Courts Act 1980 but their breach is a criminal offence which could carry imprisonment.¹¹⁷

Section 52 of the Magistrates' Court Act 1980 restricted the magistrates' civil jurisdiction to matters arising in their commission area and did not allow them to transfer civil proceedings, other than family proceedings, from one court to another. As with criminal proceedings, the Courts Act 2003 now gives magistrates national jurisdiction to issue summonses and deal with complaints (s. 47), and power to transfer civil proceedings, with the exception of family proceedings (s. 48)¹¹⁸.

Family proceedings and criminal cases dealt with in youth courts can only be heard by magistrates specifically authorised by law and trained for that purpose. The Government has sought to reform this system and, in its White Paper, made the following proposal:

“We will reform the system by which lay magistrates are authorised to hear youth and family cases. We propose that the system of ‘panels’ will be replaced by a system of personal authorisation, so that a magistrate selected and trained for specialist work need no longer wait months to be elected to their new local panel. The system will continue to operate locally, with input from local magistrates, but the authorisation process will be more transparent and consistent, and based on competencies.”¹¹⁹

¹¹⁴ The powers to transfer criminal proceedings must be exercised in accordance with any directions given under section 30(3) of the Courts Act 2003 by the Lord Chancellor as to the distribution and transfer of the general business of Magistrates' Courts. This would, in particular, mean that when deciding whether to transfer a case or not, magistrates would have to take account of the witnesses' needs.

¹¹⁵ See A. Mimmack, “Licensing – The New Regime”, (Oct. 2003) *Magistrate* 283; R. Newman “Licensing for the 21st Century” (2005) *NLJ* 1802 and R. Light “The Licensing Act 2003: Liberal Constraint?” (2005) 68(2) *MLR* 268.

¹¹⁶ See S. Jones, “Taking a Stand” (2003) *NLJ* 1248; L. Casey, “Tackling Anti-Social Behaviour” (January 2004) *Magistrate* 12; P. Tain, “Curing Anti-Social Behaviour” (2004) *SJ* 715.

¹¹⁷ However, in *R (On the application of McCann) v Crown Court at Manchester* [2003] 1AC 787, the House of Lords held that the standard of proof should be the criminal standard, given the potential sanction of up to five years' imprisonment for breach of the order.

¹¹⁸ As with criminal proceedings, the powers to transfer civil proceedings must be exercised in accordance with any directions given under section 30(3) of the Courts Act 2003 by the Lord Chancellor as to the distribution and transfer of the general business of Magistrates' Courts (s. 48(4)).

¹¹⁹ *Justice For All*, para. 4.40

This proposed reform materialised in the Courts' Act 2003 which set out the framework whereby lay magistrates and district judges are authorised to hear family proceedings (s. 49) and youth cases (s. 50). A justice of the peace is not qualified to sit as a member of the family proceedings court (s. 49, which amends s. 67 of the 1980 Act) or as a member of a youth court (s. 50 which amends s. 45 of the Children and Young Persons Act 1933 on the constitution of youth courts), unless he has an authorisation granted by the Lord Chancellor or a person acting on his behalf.

However, as a consequence of section 66 of the Courts' Act, the members of the higher judiciary have also jurisdiction to hear such cases. It clearly provides that every holder of a judicial office, such as a High Court judge or deputy judge, a Circuit judge or deputy judge and a recorder, has the powers of a justice of the peace who is a District Judge (Magistrates' Courts) in relation to criminal causes and matters and family proceedings, and is qualified to sit as a member of a youth court (s. 66(3)) or a family proceedings court¹²⁰ (s. 66(4))¹²¹.

PART 3 ANTICIPATED EFFECTS OF THE CRIMINAL JUSTICE ACT AND THE COURTS' ACT ON SUMMARY JUSTICE

The crucial question now is whether increased centralisation of the administration of summary justice will attain the desired objectives of efficiency, homogeneity, and consistency. A further and broader question is what effect the striving for those aims may have on democratic involvement in the criminal justice system, and on the fundamental question of the quality of justice. The effects of the politicisation of criminal justice and the rise in the prison population are significant background issues.

Attainment of the desired objectives

Efficiency

It is hoped that the changes will lead to less delay in the system.¹²² The ending of committal proceedings should lead to swifter resolution of cases. District judges work more quickly than lay benches.¹²³ Changing the way appeals are dealt with should simplify practice, as will the ending (in most cases) of the procedure of committals for sentence, and the increasing of the magistrates' sentencing powers.

The proposed abolition of committal for sentence was generally welcomed. For instance the view of Liberty, an independent human rights organisation, was that they "support(ed) the proposal that magistrates should no longer be able to commit cases they have heard to the Crown Court for sentence. Once the magistrates have

¹²⁰ Circuit judges and deputy judges, and recorders must be nominated by the President of the Family Division, however (see s. 66(4)(b)).

¹²¹ The reason why the Government want to hand over the work to the higher judiciary is unclear and it had been suggested that they planned to phase out the lay magistracy in family proceedings and in youth cases (see Baroness Anelay of St Johns in the Committee debate in the House of Lords, HL Deb 11 February 2003 c581). However, according to the Explanatory Notes to Courts Bill and the Courts Act (at para. 136), the Government does not anticipate that extensive use of this facility would be made.

¹²² Lord Chancellor's speech to the Magistrates' Association October 26, 2004.

¹²³ Seago, P., Walker, C., D. Wall, "The Development of the Professional Magistracy in England and Wales" [2000] Crim LR 631 at 638.

accepted jurisdiction it is counterproductive to allow defendants who plead or are found guilty to be committed to the Crown Court to face longer sentences.”¹²⁴

Equally Justice, an all-party law reform and human rights organisation, was of the opinion that the White Paper’s aim (in extending the maximum custodial sentence available to magistrates and in abolishing the power to commit to the Crown Court for sentence) was to “reduce the number of cases going to the Crown Court which can be dealt ‘more effectively and appropriately in the magistrates’ courts’(...) (since) most either-way cases are dealt with by magistrates (...) (and), after the introduction of the plea before venue procedure and the case law which followed, the number of cases committed to the Crown Court has begun to fall.”¹²⁵

However, Justice has expressed concern at the idea of increasing magistrates’ sentencing powers up to 18 months on the ground that defendants do not have the same protection as in Crown Courts and that “there are fundamental problems with decision-making and the quality of the legal advice to the magistrates in the magistrates’ courts”.¹²⁶ Justice also fears that an increase in sentencing powers will lead to a general increase in all sentences given. This fear is echoed by the Bar Council which believes that “the lasting effect of such a change would be to increase prison population”.¹²⁷ As the Bar Council pointed out, the Halliday report ¹²⁸ have shown that “magistrates are the prime reason for an increase in the use of short sentences” despite the fact that these do not work.

What is more of a matter for concern is the existing substantial disparity between magistrates’ courts over sentencing. Increasing their sentencing powers will certainly not solve but rather accentuate this fundamental problem. Both the White Paper and the Auld Review failed to tackle these fundamental problems, which can only affect public confidence further. As suggested by the Bar Council, it would certainly have been more judicious to turn more effectively to real alternatives to sentencing¹²⁹.

In the meantime, it may be that the extension of the magistrates’ jurisdiction will keep cases down in the summary courts – only time will tell how the magistrates exercise their discretion to accept jurisdiction in particular cases. It will depend on how magistrates in fact react in terms of assuming jurisdiction.¹³⁰

Homogeneity

Crown Courts and magistrates’ courts are now managed together. As a result, magistrates will have less significant presence and hence potentially less influence in the new Court Boards than they used to have in the Magistrates’ Courts Committees. There will be less room for differences in practical approach between individual magistrates’ courts administration. The move towards conformity may already have begun as a result of:

¹²⁴ As quoted in S. Broadbridge, *The Criminal Justice Bill: Juries and Mode of Trial*, House of Commons Library Research Paper 02/73 (2 Dec. 2002) at 13.

¹²⁵ *Ibidem* at 13.

¹²⁶ *Ibidem* at 14.

¹²⁷ *Ibidem*.

¹²⁸ *Op.cit.*

¹²⁹ See the Bar Council’s submissions to the Home Affairs Committee as quoted in S. Broadbridge, *The Criminal Justice Bill: Juries and Mode of Trial*, House of Commons Library Research Paper 02/73 (2 Dec. 2002) at 14.

¹³⁰ See Andrew Herbert, “Mode of Trial and Magistrates’ Sentencing Powers: “Will increased powers inevitably lead to a reduction in the committal rate?” [2003] *Criminal Law Review*, 314.

- having fewer Justices' Clerks and by amalgamation of benches,¹³¹
- target setting and establishment of performance indicators,
- the institution of the Magistrates' Courts' Inspectorate with ability to go into any court, and gather information across the country and
- the strengthening of the role of Justices Chief Executive - especially when they no longer needed to be qualified as Justices' Clerks.

The ending of the role of the Justices' Chief Executive¹³² and arrival of new civil servants to replace this role must increase central control even more. Although the legislation still makes clear the judicial role of the Justices' Clerk is to be maintained¹³³, it is arguable that the position of a civil servant is capable of being viewed as less independent than that of a person who is not a civil servant.

One would expect the result to be more uniformity of practice, more monitoring, and more awareness in central government of how the system is operating. Consequently, one would expect a greater capacity for central government to control what happens in the courts. The notion of managerialism fits this picture well. However, as Zedner points out "the nature of managerialism has (...) withdrawn attention from the questions of larger purpose to focus instead on the minutiae of service delivery, market testing and auditable practices"¹³⁴

Consistency

As far as consistency is concerned, it may be expected that joint administration of Crown and magistrates' courts will lead to uniformity of approach. Presumably, consistency of provision will be promoted by the implementation of the new legislation. The drawback of seeking consistency of provision may be that accessibility of justice in localities (already lessened by closure of courts) will continue to decrease, if small courts are closed or amalgamated with other courts¹³⁵. This may be felt most acutely in rural areas, where poor (or no) public transport could further deny citizens practical access to the courts, and hence affect the 'local' nature of the availability of justice.

Consistency in quality of justice delivered is more elusive. However streamlined the organisation of the courts may be, the most critical issue - the quality of justice in the administration of summary justice – is an issue which is currently under-researched.¹³⁶

The effect of the criminal justice reform on the democratic involvement in the criminal justice system

Will the new arrangements lead to more locally accountable administration of justice?

The Criminal Justice Act dramatically increases the magistrates' powers of punishment, and hence their jurisdiction. Will this lead to the exercise of more power? Will the lay bench be strengthened or threatened by the operation of the new system?

¹³¹ There are "about" 80 Clerks to the Justices in February 2006, as opposed to 200 in 1996 (information from the Justices' Clerks' Society, February 2006).

¹³² By the Courts' Act 2003, section 6.

¹³³ By virtue of the Courts Act 2003 section 29.

¹³⁴ *Criminal Justice*, Oxford University Press, 2004 pp256-7

¹³⁵ It may be the case however that closure of courts may be avoided in some instances by joint use of court accommodation by magistrates and Crown Court. See Lord Woolf, "Achieving Criminal Justice", (February 2003) *The Magistrate* 42.

¹³⁶ A. Herbert., *op. cit.* at 325.

Certainly the local nature of summary justice will change since lay magistrates are to be appointed to a single Commission Area¹³⁷, and also as District Judges now belong to a single bench for England and Wales. Much will depend on what the magistrates do with their new powers to hear cases carrying greater potential sentences and how central government uses its new powers. Other factors include the success in recruiting new lay magistrates. The Lord Chancellor in his address to the Magistrates' Association in October 2004 admitted that the National Strategy for the Recruitment of Lay Magistrates had not been as successful as had been hoped: "I know in many courts, recruitment is a particularly sore issue. Courts where, despite the enthusiasm, dedication, and commitment of the magistrates' bench, they are struggling because there simply aren't enough magistrates."¹³⁸

This concern about recruitment of new magistrates was echoed by Rachel Lipscomb, JP and chairman of the Magistrates' Association Council, who acknowledged that "(l)ast May in 2004 (the magistracy) had reached a point on recruitment where (...it was...) facing serious risks in the future". However she was confident that the new Government strategy to increase recruitment might possibly turn the trend round.¹³⁹ Despite this spell of optimism, it is very unclear how this new strategy will effectively solve the problem of recruitment and retention of magistrates. In particular, the main problem facing the Government is to encourage applications from under-represented ethnic and lower socio-economic groups of the society. This has been a long-standing problem and no easy solution is likely to be reached in the near future. Besides, the public profile of being a magistrate is not particularly great among those groups. Attracting the younger generation might prove more problematic than it might seem at first glance, especially as the most educated section of it often will have to cope with high levels of debt incurred from expenditure in higher education. Equally, encouraging employers to release their employees for their magisterial duties through, notably, tax relief or payments to companies¹⁴⁰, might not

¹³⁷ See Section 7 and Sections 43 and 44 of the Courts Act 2003. In practice, most cases will continue to be tried in the court that serves the area where the offence was committed. See Peter Hungerford – Welch, *Criminal Litigation and Sentencing*, (Cavendish: 2004) at 180.

¹³⁸ The Magistrates' Association <http://www.dca.gov.uk/speeches/2004/lc261004.htm>

The Lord Chancellor announced a programme of work called "Supporting Magistrates' Courts To Provide Justice", the key areas of which he identifies as ensuring magistrates are respected, valued and their orders obeyed; public confidence increased; connecting courts with their communities – in a sound bite "Connected, Respected, Effective."

Regarding recruitment, it is suggested that more should be done to encourage applications for magisterial appointment, in particular from under-represented groups. To achieve this objective, many routes may be followed, notably: raising the public profile of magistrates; encouraging employers through legislation to release employees for the performance of their magisterial duties; making the process of becoming a magistrate easier and less daunting for citizens and speeding up their appointment process; increasing awareness of the role of magistrates in schools and universities; improving the allowance system and offering more incentives (e.g. in the form of daily rates or tax breaks) notably to appeal to lower socio-economic groups; approaching jury members to become magistrates. Equally, more should be done to encourage current magistrates to remain on the bench. Notably, a scheme offering reward or recognition for long service could be created; magistrates could be allowed to use their JP title more liberally with the view to giving them more recognition in society; ending forced retirement at 70 or use magistrates over 70 as mentors or to carry out appraisals; improving the payment of expenses; relieving magistrates of the administrative burdens so that they can concentrate on sittings; and creating a "Diploma in Criminal Law", on completion of which a magistrate could qualify for consideration for appointment as Deputy District Judge.

¹³⁹ Speech at the DCA Conference "Magistrates' Courts and Local Justice – Connected, Respected, Effective", (London: 14 March 2005), see <http://www.dca.gov.uk/speeches/2005/lc140305.htm>

¹⁴⁰ As suggested in the response paper to the Government Strategy (March 2005) at 20.

prove a sufficient incentive and might not lift employee's fears of being prejudiced in promotion or in appointment. Although being a brave effort to broaden the recruitment base, the proposal to leaflet jurors on completion of their jury service inviting them to consider applying to become a magistrate, may only address the problem in a very limited way.

It was acknowledged in 2005 that the magistrates' courts may have a problem of coping with an increasing workload:

"The Government estimates that over the coming three years, the courts can expect to see an increase in workload of over 20%. The Government's target is to bring 1.25 million offences to justice by 2007/8. Currently there are not enough magistrates to deal with all these additional cases. There is also a big 'cliff edge' coming: we will lose 11,181 magistrates within the next ten years to retirement alone."¹⁴¹

CONCLUSIONS

The operation of summary justice in England and Wales has been and will be significantly altered by the Criminal Justice Act 2003 and the Courts Act 2003. Certain changes are already apparent, in particular, with respect to the general organisation of the system, showing a clear move towards more central control by the Government. This is illustrated by the creation of a single commission area for England and Wales, replacing the old local commission areas; by the establishment of Her Majesty's Courts Service (HMCS) to administer *inter alia* Crown and magistrates' courts; by the abolition of the Magistrates' Courts' Committees and their replacement by local Courts' Boards; and the creation of a national Inspectorate of Court Administration overseeing both Crown and Magistrates' Courts. Even further amalgamation of Inspectorates is now being envisaged¹⁴². Furthermore, the financing of summary justice is now entirely a matter for central Government.

With regard to the magistrates' courts' jurisdiction, the emphasis has mainly been put on keeping the work in the magistrates' courts. Increasing their sentencing powers and reducing committals for trial and sentence will lead to a reduction in jury trials. As a consequence, it seems that the profile of magistrates' courts' workload will alter.

Efficiency, homogeneity and consistency were the major stated aims of this reform. As argued above, there is no doubt that the reforms are likely to have the desired effect in terms of streamlining summary justice and, consequently, reducing its financial burden. However doubts can be raised as to whether these reforms would equally lead to greater democratic involvement and greater public confidence in summary justice.

It is not surprising therefore that the Department for Constitutional Affairs had to devise further strategies, as developed in the paper "Supporting Magistrates' Courts to Provide Justice", to 'ensure that summary justice is better connected to the community, is more valued and respected and is more effective in dealing with cases'. As pointed out by Lord Falconer in "Doing Law Differently"¹⁴³, "(m)agistrates are often the vital link between the court and community, as magistrates are drawn from

¹⁴¹ Department for Constitutional Affairs, *Regulatory Impact Assessment, Supporting Magistrates to Provide Justice*, 7 November 2005. See <http://www.dca.gov.uk/speeches/2005/lc071105.htm>

¹⁴² See Footnote 59, ante.

¹⁴³ Department for Constitutional Affairs Paper, April 2006 at 6. See <http://www.dca.gov.uk/dept/doinglawdiff.htm>

the local area and are able to bring a wide range of experience and an understanding of local issues”. However this laudatory attitude of the Government towards magistrates has not stopped it from considering a fresh alternative approach to the delivery of summary justice, inspired by a “problem-solving approach” experimented and developed in New York. This new approach to community justice, which focuses more on sentencing rather than the trial process itself, has materialised in the piloting of a new Community Justice Centre in North Liverpool. The underlying idea of this scheme is to bring justice closer to the community by combining into one centre the sentencing powers of magistrates’ courts, youth courts and Crown Courts with a whole range of on-site services such as victim support, drug addiction services, debt counselling and housing services. According to the Department for Constitutional Affairs paper, the main purpose of the Centre is to “tackle anti-social behaviour and the crime associated with it”.¹⁴⁴ The Government is also applying this so-called “problem-solving approach” to other areas of summary justice such as domestic violence and drug cases by having specialist courts, sitting within the magistrates’ courts, to deal specifically with such cases in a more efficient way. The basic philosophy of this approach seems to be to bring together within those courts the necessary expertise to address the underlying problems in each case as part of the sentencing process.

This new approach sounds very appealing but it remains to be seen whether and how it will make summary justice speedier, simpler and more responsive to the community, and whether it will improve the quality of summary justice in general.

¹⁴⁴ *Ibidem* at 7.