Transform Justice

The role of the magistrate?

January 2016

About Transform Justice

Transform Justice is a national charity campaigning for a fairer, more humane, more open and effective justice system.

Transform Justice was set up in 2012 by Penelope Gibbs, a former magistrate who had worked for five years to reduce child and youth imprisonment in the UK. The charity will help create a better justice system in the UK, a system which is fairer, more open, more humane and more effective. Transform Justice will enhance the system through promoting change – by generating research and evidence to show how the system works and how it could be improved, and by persuading practitioners and politicians to make those changes. Transform Justice has produced reports on the centralisation of magistrates' courts, on criminal appeals against sentence, on justice reinvestment and on magistrates and diversity.

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About Penelope Gibbs

Penelope Gibbs worked in radio production and at the BBC before being inspired to move into the voluntary sector. She set up the Voluntary Action Media Unit at TimeBank before she joined the Prison Reform Trust to run the Out of Trouble campaign, to reduce child and youth imprisonment in the UK. Under her watch, the number of children in prison in the UK fell by a third. Penelope has also sat as a magistrate. Penelope set up Transform Justice in 2012 and it became a registered charity in 2013.

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Introduction

Some argue that the magistracy is in crisis. It has indeed suffered a number of setbacks in the last ten years – it has shrunk by a third, it is now in some ways less diverse, magistrates have lost their role in administering the courts, and at least a third of the courts in which they used to sit have closed.

But there are a few reasons to be more optimistic about their future. There is a huge response to every magistrate vacancy advertised, magistrates will be allocated more serious cases and they will be spending less time on the dullest cases. The criminal courts charge, which was driving magistrates to resign, has been abolished.

The task facing the government and the judiciary is to decide whether to let these trends continue, or to make some radical reforms to the way magistrates work.

This think-piece reflects evidence prepared for the Commons Justice Committee inquiry on the role of the magistracy.

The challenge of researching the magistracy

This submission has been hampered by difficulties in finding up to date data about the magistracy. Very little is in the public domain, particularly online. Diversity data is published, but it is not robust, and not extensive. There is no published data on the diversity of Youth and Family Court magistrates, or on chairs and bench chairs. There is also no data on class, sexual orientation and faith.

Two areas pose the greatest difficulties to citizens in finding out about the magistracy: advisory committees and training. There is virtually no information in the public domain about either subject.

A lot of the information in this submission has been obtained through requesting particular information (sometimes through FOIs), or through reading the responses to parliamentary questions. But important data is still unobtainable. The government has a commitment to open data and open justice, and we would recommend that more information about the magistracy should be gathered and placed in the public domain.

Some of the evidence in this submission derives from three previous reports by Transform Justice: "Managing magistrates' courts – has central control reduced local accountability?", "Magistrates: representatives of the people?" and "Fit for purpose: do magistrates get the training and development they need?"[1].

Why a lay magistracy is worth retaining

The criminal justice system is relatively closed to the public. Most courts are open, but very few members of the public observe. Unfortunately trust and confidence in the justice system is at a low ebb – according to a recent Citizens Advice report only 40% of people believe the justice system works well for citizens, and less than half believe that, if they went to court, the outcome would be fair [2]. The greater the involvement of citizens in the justice system, the greater the chance of improving understanding and, perhaps, confidence. Citizens can sit on juries and as magistrates. Both these offer roles of responsibility. Magistrates particularly have the potential both to offer judgment by peers, and provide a consistent link between the community and the court.

The size of the magistracy

The number of magistrates[3] has reduced by over a third from 29,841 in 2007 to 18,857 (September 2015). This reduction has been managed by Her Majesty's Courts and Tribunals Service (HMCTS), in order to match numbers with the work available in the courts. Very few magistrates have been recruited in the last four years. There are several reasons why demand for magistrates has reduced.

- Cases which used to be heard in magistrates' courts on licensing and anti-social behaviour have been transferred to other venues.

- The number of criminal cases prosecuted in the magistrates courts has been declining for most of the last four years, though it has increased slightly in the last year.

- Over the last ten years the amount of work handled by district judges has increased. While the number of magistrates has shrunk by a third, the number of district judges has remained more or less the same (see Appendix 1).

- Most recently, new legislation has provided for a single justice to preside over those "regulatory" cases which were formerly presided over by a bench. The MoJ in its impact assessment[4], did not state the potential effect of this measure on the number of magistrates required, but did estimate that it would save £11.6 million pa in court costs.

Two major issues have arisen as a result of the drop in numbers:

- The magistracy has become less diverse in age, because few new magistrates have been recruited, and sitting magistrates are getting older

01 http://www.transformjustice.org.uk/reports/
02 https://www.citizensadvice.org.uk/Global/CitizensAdvice/Crime%20and%20Justice%20Publications/Responsivejustice.pdf
03 Magistrate in this submission always refers to lay magistrate
04 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441655/overarching-enactment.pdf

- The morale of magistrates has gone down since they interpret their shrinking numbers as a sign of lack of governmental and judicial commitment to the magistracy

There is no point having more magistrates than we need, but some measures could be taken to increase numbers recruited even within the parameters of our current system.

1. Reduce the average number of sittings and the number of benches of two

There are a small minority of committed magistrates who sit very frequently – last year 210 magistrates sat for over 50 days. They are the ones called on when a last minute gap arises. But if all magistrates sat no more than 35 full days per year, magistrate numbers could be increased. In addition, it is legal for benches of two to preside over some cases, and this sometimes happens. A bench of three provides a better balance. A bigger pool of magistrates could prevent magistrates having to sit as two.

2. Freeze the recruitment of district judges

Work in the magistrates' courts is shared between district judges and magistrates. District judges work full time so any change in their numbers has a significant effect on numbers of magistrates needed.

Relationship of district judges to magistrates

When I sat as a magistrate at Highbury Corner Court from 2005, I never met or talked to a district judge in three years. At lunchtime, all the magistrates sitting that day would eat their bought in sandwiches in the dining room discussing court business, while the district judges sat in their individual offices eating theirs. I understand that this was not typical, but a lack of trust sometimes perpetuates in many courts.

District judges (full time) and deputy district judges (part-time) are paid, and preside over criminal and family cases in the magistrates' courts. They sit alone, with a legal advisor or legal assistant providing advice. District judges (DJs) preside for the most part over the same kind of cases as magistrates, though they alone are allowed to decide extradition cases and serious sexual crimes in the Youth Court. DJs are also often allocated longer multi-day trials, which would be difficult to rota for magistrates. District judges are recruited and trained entirely separately from magistrates. The numbers of new district judges required is calculated by HMCTS and any new recruitment is approved by the relevant MoJ minister. Most recently, 18 new district judges were recruited by the Judicial Appointments Commission (JAC) in 2015 to sit in magistrates' courts[5].

05 https://jac.judiciary.gov.uk/vacancies/887

Tensions have arisen amongst magistrates about district judges due to the numbers issue, a feeling that DJs may be allocated the best work, and a concern that DJs' skills may be more highly rated than those of magistrates. Some magistrates also feel that a bench of three offers greater fairness, particularly in trials, and "more balanced decisions by controlling for any potential individual prejudice"[6]. These longstanding tensions led to the commissioning of a major research project by MoJ: "The strengths and skills of the judiciary in the magistrates' courts" 2013. This study compared the speed and efficiency of magistrates and DJs, and the costs. The study did conclude that DJs (partly because they sat alone) were quicker in transacting business and more adept at case management. However, DJs were assessed as more expensive than magistrates "In strictly financial terms, because of their salaries, the hourly costs associated with district judges are substantially higher than the costs associated with a bench of three magistrates"[7]. The report also suggested that if volunteer time was monetised (a controversial approach) the cost gap could be reduced or even reversed. The study also looked at the difference in case outcome and found that there was evidence to suggest that "district judges were more likely to impose custodial sentences, disqualify defendants from driving or remand the defendant on either conditional or unconditional bail".

This MoJ research shows that there are differences between district judges and magistrates in the way they judge. But there is room for both types of judges in our magistrates' courts. DJs seek a better and closer relationship with magistrates. The relationship between the two "camps" could be improved through:

- Joint training on new legislation and court processes, and on CPD
- District judges to help train magistrates
- Appraisal of DJs by magistrates and vice versa
- Magistrates wingers to sit with a DJ chair on complex trials and serious Youth Court cases, as they already do on Crown Court appeals
- Open and transparent policy statements on the rationale for numbers of DJs

Sentencing powers of magistrates and district judges

Magistrates and DJs sitting in the adult court are restricted in their sentencing powers to a maximum of six months in prison for one offence. Judges sitting in the Youth Court have much greater powers - to sentence under 18 year olds to up to two years imprisonment.

06 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266024/strengths-skills-judiciary-2.pdf
07 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266024/strengths-skills-judiciary-2.pdf
Note this report was revised and reissued in 2013 to clarify the cost comparison

Magistrates have been lobbying for many years to increase their sentencing powers so that they can sentence someone for up to 12 months imprisonment for one offence. They want these extra powers so that they have jurisdiction over more serious, and potentially more interesting, crimes.

The situation is complicated by the fact that magistrates could deal with more serious crimes without any change to primary legislation – through sending fewer cases up to the Crown Court. Lord Justice Fulford, the Senior Presiding Judge, recently exhorted members of the Magistrates' Association: "Please do not be shy of making robust, common sense allocation decisions – keep as much work in the magistrates' court as possible. Historically a great many cases have been sent to the Crown Court which were entirely appropriate to be dealt with by you"[8]. It has been estimated that around 30% of Crown Court cases could be dealt with by magistrates or district judges, with no change to current legislation. New allocation guidance from the Sentencing Council[9] may help the process of keeping cases in the Magistrates' Courts.

The risk of giving magistrates greater sentencing powers (to imprison for 12 months for one offence) is that this may lead to an increase in those imprisoned. The MoJ has modelled the potential effects of extending magistrates and DJs sentencing powers. We asked for this information to inform our submission to the Committee. The department responded that they had the information, but could not disclose it since it relates to "the formulation or development of government policy"[10]. The Magistrates' Association does not agree that custodial sentences would increase if magistrates were given greater sentencing powers.

In the absence of this MoJ model of the potential effect of greater sentencing powers, we would suggest that the change may have negative effects. Damian Green, when minister, referred to "a risk that this could cause additional pressure on the prison population, because sentencing practices could change"[11]. The MoJ report on the skills and strengths of the judiciary in the magistrates' court questioned judges and practitioners about greater sentencing powers. "Some Justices' Clerks voiced concerns, anticipating an increase both in workload in the magistrates' courts and in the prison population, based on the belief that magistrates would impose harsher sentences than are imposed now in the Crown Court. A few defence solicitors also highlighted the need for appropriate magistrate training to cope with such powers"[12]. Some DJs quoted in the research felt that the extension of sentencing powers should be reserved to DJs.

Before magistrates are given greater sentencing powers, it makes sense to implement the new guidance on keeping more cases in the magistrates' courts, and to monitor carefully the effect both on workload, and on custodial sentences. Only once this evaluation is completed, and once the MoJ has published its model of the potential effect of increasing sentencing powers, can we make an informed decision as to whether they should be introduced. Should the evidence suggest that magistrates might sentence more punitively than Crown Court judges, Transform Justice would recommend the introduction of better training, development and a more accessible appeals process, before any change were introduced.

08 Lord Justice Fulford Speech to the Magistrates' Association Annual Conference November 2015
09 http://www.sentencingcouncil.org.uk/wp-content/uploads/Allocation_Guideline_2015.pdf
10 https://www.whatdotheyknow.com/request/impact_of_increasing_sentencing#incoming-748646
11 http://www.express.co.uk/news/uk/421875/Magistrates-may-get-sentences-boost
12 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266024/strengths-skills-judiciary-2.pdf chapter 10

Magistrates' recruitment and diversity

Magistrates are less diverse now than in 1999[13] and are less diverse in some characteristics than tribunal judges and deputy district judges. That some paid judges are now as diverse as magistrates suggests significant reform of recruitment is needed.

Magistrates are significantly older and less ethnically diverse than the population they serve[14]. 57% of magistrates are over 60, and 86% are over 50 (see appendix 2). 9% are from an ethnic minority, compared to 14% in the population. Gender balance is good for the magistracy. Availability of data on other dimensions of diversity is very poor. It has been estimated that 19% of the working age population is disabled[15], but only 4% of magistrates say they are disabled. Even if 4% is an underestimate, it seems likely that the magistracy is not representative of the disabled population. Class is no longer measured in any way, but recent data indicates that the magistracy is predominantly middle class[16]. Sexual orientation and faith have never been recorded.

It is crucial to the legitimacy of, and public confidence in, the magistracy that it is, and is seen to be representative of the people. People of any age, colour or class can be and are good magistrates, but the strength of any judiciary is in bringing a diversity of backgrounds and views to the task of judging members of the community.

The government under Lord Falconer made big efforts to diversify the judiciary and there are indications that their efforts in 2005-7 were beginning to succeed[17]. But since 2007 all attention on judicial diversity has been focussed on the professional judiciary. As a result of this and other factors, the diversity of the magistracy has slid back to pre 1999 levels. The age profile is probably as skewed as it has ever been. Little research has been done on this agenda for many years[18] but the main reasons why the magistracy has become less diverse are:

1. Recruitment is at very low levels and sitting magistrates are getting older. In y/e 2007 nearly 2500 magistrates were recruited[19]. In y/e 2015 only 403 magistrates were recruited. The new recruits are (slightly) more diverse than sitting magistrates (51% over 50, 17% BAME)[20] but, in such small numbers, they will make a negligible impact on the overall profile of the magistracy.

2. There is no budget for attracting under-represented communities and the whole application process is thought to be alienating to some communities.

3. The very communities who are least represented are least aware of the magistracy and are not persuaded of the value of applying, for them as individuals and/or for their communities.

13 The Judiciary in the Magistrates' Courts: R.Morgan and N.Russell 2000 (Home Office)
14 All stats from https://www.judiciary.gov.uk/publications/judicial-statistics-2015/
15 Disability Rights Commission, July 2008
16 http://www.theyworkforyou.com/wrans/?id=2013-02-01a.368.6&s=beecham+magistrates#g368.7
17 For more details of this diversity "push" see http://transformjustice.org.uk/main/wp-content/uploads/2014/03/Transform-Justice_Magistrates-Feb14-report2.pdf p6-9
18 Exceptions are work by Transform Justice and by Policy Exchange – both Future Courts 2014 and Reforming Public Appointments 2013
19 http://www.policyexchange.org.uk/images/publications/future%20courts.pdf figure 1.10
20 http://www.theyworkforyou.com/wrans/?id=2015-10-05.HL2386.h&s=faulks+magistrate#gHL2386.r0

4. The magistracy has been excluded from the drivers of diversity in the paid magistracy – the Judicial Appointments Commission, its budget and its expertise in furthering diversity; and intense scrutiny of the institution and the issue by parliament, ministers, media and civil society.

5. Employers' support for the magistracy appears to have diminished. The application and retention of younger magistrates is dependent on the support of employers. In previous decades public sector organisations like the NHS and schools were supportive of employees who wanted to be magistrates, but Transform Justice research suggests that few employers are actively supportive, and some are hostile.

6. Morale in the magistracy is low. This may be communicated to potential applicants.

7. The terms and conditions of the role no longer suit many potential applicants. Magistrates have to sit 13 days a year, but are under pressure to sit more; training and meetings are often also held in working time. The self-employed say they are not properly recompensed for income lost.

If the government wishes to have a magistracy which is truly representative of the people, we need to change the way magistrates are recruited and, maybe, boost the numbers recruited significantly.

Current method of recruitment

There are few vacancies, but those available are posted on a list online. Candidates have to observe their local court before applying, fill in a long form and line up three referees, at least one local. If they work, they also have to get their employer to agree to release them for thirteen days sitting and extra for training. They have to declare any criminal convictions or cautions and to declare their involvement in any of a long list of work/voluntary activities which may preclude them from being a magistrate, or affect their application in some way[21].

In many areas vacancies are only available every 2-3 years and the application process itself can take more than a year from start to finish. Anecdote suggests that areas are flooded with applications when the vacancies open, and only a fraction of those who apply are considered, since a "cut-off" is applied, whereby only three times the number of vacancies are considered. This means that if someone from an under-represented group applied on time, but after the cut-off they would not be considered.

Those who are considered suitable are interviewed by a panel with a mix of magistrates and non magistrates. If the panel approves, the candidate is invited to a second interview. Those who are successful in the second interview, and whose references are approved, are invited to sit.

21 https://www.judiciary.gov.uk/wp-content/uploads/2010/08/appendix-2b-guidance-on-eligibility-july2013.pdf

Advisory committee organise magistrate recruitment and discipline sitting magistrates. There are 48 in England and Wales and all are chaired by the local Lord Lieutenant. Despite being NDPBs (non-departmental public bodies), they are rather opaque. There is no record on the internet of who sits on them, how often they meet, minutes of meetings or accounts. NDPBs should be subject to triennial reviews, but there is no record of any triennial review to which an Advisory Committee has been subject. When I examined the diversity of members of Advisory Committees in 2013[22], they were on average older and less ethnically diverse than magistrates themselves

How to make the magistracy more representative

There are many different options for diversifying the magistracy. Each measure would facilitate diversity on its own, but many of the measures could be combined.

1) Promote the magistracy actively to under-represented groups

Currently there is no budget for promotion of the magistracy per se[23] and no written strategy. Lord Faulks recently stated in the House of Lords that advisory committees "target recruitment activity to ensure that, while we appoint on merit, local benches are representative of the communities they serve", and advisory committees are "seeking applications from previously underrepresented groups", though it is not clear which underrepresented groups are bring targeted. A recent FOI response suggests that advisory committees are holding open court events and setting out information stands in public spaces[24]. Evidence of how many were held, where and how many applications they inspired, would be useful.

If representatives of underrepresented groups are to be encouraged to apply, a national and local strategy needs to be developed, both identifying which groups are a priority, and designing the most effective means to reach them. Social media offers low cost opportunities for this, but a budget needs to be allocated to the task, and the communications strategy needs to be developed by experts in diverse recruitment.

2) Bring the recruitment process into the modern age

The application form is a 17 page word document[25] which cannot be filled in directly online. The guidance[26] on filling out the form is 34 pages long. Magistrates told Transform Justice that the application and interview process was best suited to professionals and/or graduates who were used to long application forms, formal interviews and debating. Magistrates also felt the requirement to get three written references would be off-putting to younger people, and those from working-class backgrounds.

The application process still needs to be rigorous, and essential information on background etc does need to be ascertained, but the current process is lengthy, old-fashioned and may be alienating to those from underrepresented communities.

22 There is no current data in the public domain
23 Transform Justice has tried to verify this with the department but not received a response
24 https://www.whatdotheyknow.com/request/budget_and_nature_of_magistrate#incoming-758180
25 https://www.gov.uk/government/publications/become-a-magistrate-application-form
26 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428901/magistrate-application-form-guidance-notes.pdf

The whole process needs to be analysed by a diversity recruitment expert, and reformed.

3) Cultivate employers

No research has been done on the attitude of employers to the magistracy in many years. Transform Justice's qualitative research with sitting magistrates suggested that many employers are opposed to their staff being magistrates. Magistrates spoke of their difficulties in negotiating time off, and felt that big employers such as the NHS had regressed in their attitude in the last ten years[27]. One option would be to change legislation so that employers cannot escape from their obligation to release staff to sit as magistrates. Another option would be to educate employers to see the benefits of having staff who are magistrates, and to encourage their staff to apply. Protocols could also be set up with major public sector, or public sector commissioned organisations, reflecting their commitment to supporting magistrate, and potential, magistrate staff.

4) Review the role of advisory committees

Advisory Committees are local, and involve magistrates in the recruitment process, but they are also un-transparent organisations with no expertise in promoting diversity. There are also questions about the efficiency of the system, in view of the drop in numbers recruited. Currently, each of the 48 Advisory Committees recruits just 8 magistrates on average per year, as well as dealing with a small number of disciplinary matters. Maintaining and administering 48 separate organisations for such a small workload does not seem sustainable.

When the Judicial Appointments Commission (JAC) was set up to recruit judges, magistrate recruitment was excluded from its remit. It is now established and, though subject to some criticism, it has succeeded in increasing the diversity of those recruited in many sectors of the judiciary – notably tribunal judges and district judges. The JAC has expertise in diversity recruitment practices and in promoting vacancies (including for lay members of tribunals) to underrepresented groups. The JAC would be a suitable body to take on the recruitment of magistrates, though it would need to develop in order to fulfil the role. If given the magistrate recruitment role, it should be tasked with retaining locally based interviews, and involving sitting and/or retired magistrates in the process.

5) Bring in the equal merit provision for magistrates

The equal merit provision was enacted in 2013. It enables those who recruit judges to favour a candidate who comes from an underrepresented group where two candidates are in other respects totally equal[28]. The two diversity characteristics covered by the legislation are gender and ethnicity. The magistracy was excluded from the legislation. The provision could be extended to magistrates, and to the charateristic of age. Enactment of the equal merit provision would mean that if two candidates, one 30 and the other 60, appeared to be equally qualified to fill one magistrate vacancy, the panel could legally choose the younger candidate.

27 http://transformjustice.org.uk/main/wp-content/uploads/2014/03/Transform-Justice_Magistrates-Feb14-report2.pdf p25-7
28 https://consult.justice.gov.uk/digital-communications/equal-merit-provision/results/equal-merit-provision-policy.pdf

6) Introduce fixed or renewable tenure

Currently a magistrate who starts sitting aged 30 can continue until they are 70, when all magistrates have to retire. People are allowed to apply to the magistracy up to the age of 65. Older magistrates have excellent experience and skills, but the age profile of the magistracy is heavily skewed towards older people. The imposition of either fixed tenure or re-application would shorten the average number of years sat by magistrates, and this would be likely to lead to a younger age profile.

It is best practice that trustees of charities should be subject to fixed tenure, so they step down after a set period eg 9 years. This ensures that the charity is subject to fresh eyes and ideas, and prevents group-think. Policy Exchange floated the idea of magistrates being subject to fixed tenure[29] and it is one option, though the tenure period for those who opted to serve as chairs would need to be longer than that of wingers.

Renewable tenure is used in Scotland for children's hearing panel members. All sitting panel members must apply to have their appointment renewed every three years. Each panel member has to fill in a re-appointment form, and have an interview where their appraisal records, training and development are discussed. This process encourages those who are not committed to step down, and prompts those who want to carry on sitting to invest time in their own training and development.

The training and development of the magistracy

Training

Magistrates are members of the community who may have no prior knowledge of the law before they start sitting. They may never have set foot in a courtroom before applying, and they may know no-one who has been sentenced for a crime. Yet we expect them to make decisions on guilt and innocence, on whether someone should be imprisoned on remand or sentence, and whether someone is too mentally ill to stand trial. Does the training and development magistrates receive equip them to judge? Wingers get three and a half days formal training before they start sitting, and chairs (who need to have sat for three years before applying) complete a two day induction course. The content, length and delivery of compulsory training has been subject to criticism from sitting magistrates and other court users. The latter cite the following gaps in compulsory training:

29 Policy Exchange: Future Courts

- Information on why people commit crime and what drives people to stop offending

- The diverse social, family and health profile of offenders in general and of particular groups eg young adults, women, those with mental health problems

- Input from practitioners, experienced magistrates and district judges. Currently national training is designed by the judicial college, organised by HMCTS and delivered locally by legal advisors, who are given some training in training

In comparison to other volunteers both in and outside the sector, the compulsory training of magistrates is also very short. Parole board members get a week's training, referral panel members are trained for six days and special constables for 23 days. Longer is not necessarily better but, in order to fill the gaps, the training of magistrates would need to be longer, which has resource implications.

Development

There is cultural pressure for magistrates to do training and development beyond the compulsory induction courses, but no compulsion. Magistrates are expected to do "essential" training eg a two day consolidation course a year after beginning to sit, but some do not attend any other courses, and few other nationally designed courses are offered. The budget for training has been cut severely. Spend per magistrate has fallen from £110 in 2009 to £36 in 2015 (see appendix 3). Part of this drop is accounted for by lower numbers of new recruits, but magistrates also say that the number of available training courses has reduced considerably or has been condensed into fewer hours

There is no formal CPD (continuous professional development) for magistrates. Some do lots of extra learning, often at their own expense, while other don't. Time is a problem. Formal training sessions are often held in working hours, and employed magistrates struggle to attend. In addition, local presentations may not be relevant to that individual's development needs, or their interests.

In contrast, other volunteer groups are offered an organised, rich CPD programme. In Scotland, all children's hearing panel members have to attend two half days training per year and evening presentations organised by their local Area Support Team.

Appraisal

Appraisal is a tool used by managers and organisations to gain a measure of an individual's skills and competence, and to help that individual develop. Most paid judges are not appraised, but magistrates have been appraised for many years. They are appraised by experienced, trained colleagues who sit with them on the bench, and observe their practice. The appraiser discusses his/her observations with the appraisee, and may recommend extra training to improve certain skills.

Many doubt that the current appraisal system is effective in assessing the competence of magistrates. The appraisee is appraised by only one person, for just half a day in three years. The appraiser (a sitting magistrate from the area) may know, or know of, their appraisee.

Sitting magistrates have had concerns about the system for many years, and reforms are currently being considered by the Judicial College and other stakeholders.

Recommendations for training, development and appraisal

- Take a step back and review (consulting all stakeholders, not just magistrates) what magistrates training and development needs are and design a system to meet those needs
- Ensure induction courses are fuller and broader.
- Consider involving experienced magistrates, DJs and practitioners as core deliverers of magistrates' training. And/or outsourcing magistrates' training to an independent training organisation (as happens with children's hearing panel training in Scotland)
- Support magistrates, financially and otherwise, to do continuous professional development and make it compulsory
- Reform the appraisal system, ideally with 360% appraisal, and/or more regular observation by those not connected to the bench (a role for retired magistrates from another area?)
- Promote more feedback and reflection – one of the most powerful tools for development, and free too
- Given that magistrates are not currently representative, make training and development in diversity a priority, and evaluate whether the programme delivered is effective

Management

The management of the magistracy is very complex and has changed radically in the last ten years.

Before the implementation of the Courts Act 2003, magistrates had considerable power over courts administration, and over their own conduct and training. Courts were run by Magistrates' Courts Committees (MCCs), so ordinary magistrates (bench chairs were excluded from the committee) were responsible for the budget, employment of staff, sittings policy etc. The Courts Act 2003 abolished MCCs, and introduced centralised administration of magistrates' courts, thus depriving local magistrates of any real power or influence over their local court's administration[30].

30 For more detail see: http://transformjustice.org.uk/main/wp-content/uploads/2013/05/Managing_magistrates_courts.pdf

Courts administration is now run nationally by Her Majesty's Courts and Tribunals Service, and locally by judicial business groups[31]. These are relatively new, and comprise a Crown Court judge, two district judges, four magistrates (of which 3 are bench chairs), the justice's clerk for the area and the cluster manager (an administrator from HMCTS). This group deals with the distribution of cases, sitting policy and court performance. Whether or not this is a more effective way of dealing with the administration of magistrates' courts, this system is undoubtedly less local (each JBG covers many benches) and gives ordinary magistrates less power over administration than the MCCs did.

Magistrate representatives used to attend court user group meetings - forums which enabled defence, prosecution, court staff and magistrates to discuss court business, including problems with administration and performance. Courts are now barred from holding court user meetings during the working day, and they no longer happen.

Magistrates are led locally by a bench chair. Since many benches have been merged, a bench chair often leads over 300 people. HMCTS staff help administer the bench, including organising regular bench meetings. Bench chairs attend relevant meetings, sort out "personnel" difficulties and liaise with court staff. Many bench chairs say the workload is now so overwhelming that few are willing to volunteer for the post – it can only be done by those who can afford to do a full time, unpaid job.

HMCTS nationally is run by a Board on which sits members of the executive, non-executives, and three members of the judiciary – the Senior Presiding Judge, the Senior President of Tribunals and a district judge. No magistrate sits on this board, nor have they ever done so.

The only official HR resource for the magistracy is a small team based in the Judicial Office.

Other organisations and charities which have large numbers of volunteers, use volunteer managers to manage those volunteers. Indeed, a charity which uses many volunteers will have a large team of volunteer managers and co-ordinators, since they perceive volunteers to need managing as much as employees, and to have particular needs. Currently no-one who is managing magistrates is trained in volunteer management, while the function is split between magistrates themselves, HMCTS staff and the small team in the judicial office.

Recommendations on the management by and of magistrates:

- Find a way of giving ordinary magistrates more influence over how their court runs

- Reserve a place on the HMCTS board for a magistrate, and open it up to all magistrates

31 https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Protocols/protocol-responsibilities-judicial-leadership-management-mcs.pdf

- Consider ways of lightening the workload of the bench chair, to widen the pool of those willing to take the role on

- Consider whether the needs of magistrates are being met by the current management set-up and whether a new role (volunteer manager/co-ordinator) is required.

Local justice

The closure of local courts has fundamentally changed the magistrate experience for many. In the last twenty years the court estate has shrunk. 143 magistrates' courts were closed 1995-2003, it was announced that 93 magistrates' courts would be closed in December 2010, and the government is currently consulting on the closure of a further 57 magistrates' courts[32]. This has impacted and will have a significant impact on all court users. Magistrates have objected vociferously to previous closures but have seldom been successful[33]. Another trend has been to list all cases of one type, such as traffic, in one court in a region, so that magistrates are forced to travel much further than their nearest court to sit on some cases.

Courts have been closed to save money, and to enable existing courts to be modernised. However magistrates perceive many negative effects from closures so far:

- Magistrates who live far from their court now sometimes have to travel over a hundred of miles there and back to sit eg someone living in Henley may be required to sit in Banbury, a round trip of at least two hours.

- Many people who do not have a car, or don't drive, are more-or-less precluded from sitting. Public transport expenses will be paid, but in many cases the distances involved prevent regular sitting being feasible, let alone an attractive prospect.

- Magistrates are no longer presiding over their own community, or able to bring their local knowledge to decision-making.

All the above effects are likely to be exacerbated by the impending closure programme. A particular challenge is to the recruitment and retention of magistrates who live far from the court. Representatives of under-represented groups are also less likely to have a car. The risk is that future benches will lose diversity of location, with swathes of rural England and Wales unrepresented on the bench. There is no easy solution but thoughts are

- Re-examine the policy of listing certain types of cases regionally thus forcing magistrates to travel even further than their nearest court

- Review ways of making it easier for those who live far from a court and/or don't have a car to sit. This many involve radical solutions like taxis or extra payments.

32 House of Commons Library briefing paper: Court and Tribunal closures Number CBP 7346, 22 October 2015
33 http://transformjustice.org.uk/main/wp-content/uploads/2013/05/Managing_magistrates_courts.pdf p11

Links with the community and the wider criminal justice world

"Judicial independence seems only ever to be defined in the negative (as a reason not to do things)"[34].

Compared to ten or fifteen years ago, magistrates are very circumscribed in what they can say, who they can meet and the roles they can take up outside the court-room. This leads to frustration, low morale, and a diminution of connections with criminal justice and community organisations. The risk cited is to judicial independence, but we question whether the restrictions do in fact threaten independence and suggest that magistrates, given their lay role, should be treated differently to paid judges.

Interaction with the media

Only leaders of the Magistrates' Association (MA) or of the National Bench Chairs Forum can speak to the media without gaining permission. All ordinary magistrates have to get permission via the judicial office, the MA or their bench chair, before they are allowed to speak to the media. The process of getting permission is daunting and lengthy, so lengthy that the media opportunity is frequently lost, and magistrates who would like to speak, vow not to try again.

Magistrates are also not allowed to speak as magistrates in public fora, without gaining formal permission. I suspect that few rank and file magistrates will submit their views to this consultation, for fear of being reprimanded.

Researchers cannot interview or survey magistrates without getting the permission of the Judicial Office.

This "system" has as many unwritten, as written, rules and means that the voice of the ordinary magistrate is seldom heard locally or nationally. It is one of the reasons why the magistracy has a low profile, and why the public do not understand what role magistrates play. It is also one of the barriers to diverse recruitment.

Participation on criminal justice boards and committees

There is a long list of roles which are regarded as having actual or potential conflicts with the role of magistrates[35]. Many of these roles were not considered risky in previous decades. Magistrates are not allowed to sit on a Restorative Justice Panel or a Youth Referral panel (even in a different area to where you sit), you cannot be an independent custody visitor. A magistrate can be a parole board member, on an IMB, or volunteer for the NSPCC, but in these and a number of other cases, they may have to volunteer in one role outside their local area and/or consult your local bench. Many of the restrictions also affect those whose partners are involved in such community work.

34 Policy Exchange: Future Courts
35 https://www.judiciary.gov.uk/wp-content/uploads/2010/08/appendix-2b-guidance-on-eligibility-july2013.pdf

No-one has fully researched this, but there is some evidence that these restrictions on what magistrates can do have become stricter. Magistrates used to sit on Community Safety Partnerships but were banned from doing so in 2012. Every probation board used to have two magistrate members. When these were disbanded and replaced by probation trusts in 2010, magistrates were banned from sitting on them[36]. They used to be able to be visitors of police custody suites and, when restorative justice started, they were keen to be involved. The application of guidance on conflicts in the law can be even stricter than what is written. replace with One magistrate has been prevented from sitting because she organises restorative justice in her area, and another was asked to stand down because he was organising talks at a university on the criminal justice system.

In the USA, the culture and guidance regarding how judges can interact with criminal justice agencies and organisations is completely different[37]. There, the criminal justice community deeply respect judicial independence, but judges are allowed to, and do, chair meetings of criminal justice practitioners and have discussions about the programmes they offer. Problem-solving courts only work well if the judges have close relationships with all the local practitioners working in the criminal justice sector.

Magistrates feel frustrated by the restrictions placed on their sitting on relevant criminal justice focussed committees, and on doing criminal justice volunteering. Through placing such limits on what magistrates can do, they are deprived of information on what is going on in criminal justice in their area, and of any ability to positively influence.

Relations with the community

Magistrates are of the community but, ironically, they feel curtailed in their interactions with the community. Greater engagement of magistrates in the community would promote awareness of and confidence in the justice system, as well as promote recruitment. There is only one official programme for magistrates to connect with the community – the Magistrates in the Community project - which in recent years has waned, as funds have reduced.

When anti-social behaviour legislation was designed, it was assumed that magistrates, instead of sitting in court waiting for cases to be prosecuted, would go out into the community to discover what issues were causing most difficulties for residents. Dr Jane Donoghue[38] found that in one area magistrates discontinued an existing practice of making visits within the community, because they were concerned not to be influenced by local residents. And in only one of the 17 areas she studied was it felt that magistrates had a high level of engagement with the community, and were willing to talk to residents, attend local meetings and become involved in the life of the community.

Recommendations

- An inquiry should be held on magisterial independence: whether it should be viewed in the same light as that of paid judges and whether the current

36 Though they were allowed to observe

37 http://transformjustice.org.uk/main/wp-content/uploads/2015/05/Gibbs-P-Report-2014.pdf

38 Donoghue, J. (2012). Anti-Social Behaviour, Community Engagement and the Judicial Role in England and Wales. British Journal of Criminology 52(3), 591-610

restrictions are so tight they threaten magistrates' ability to engage in the community, to get involved in local criminal justice policy and to speak to local media. This inquiry should be an exercise in open policy making, involving citizens, magistrates, judges and criminal justice practitioners.

- A full audit should be done of the national and local, written and unwritten, restrictions placed on magistrates' speech and action, to facilitate the inquiry

- Consider creating a public register of magisterial interests and getting magistrates themselves to declare a conflict of interest where they think one might arise. These mechanisms could make the current system more flexible.

Incremental change or radical reform?

The magistracy is an ancient institution much of whose structure and culture has not changed fundamentally in many decades. Lord Justice Auld suggested radical reform in 2001[39], but most of his proposals were not accepted. The steep decline in the size of the magistracy suggests radical reform may now be the best option.

New Zealand has experimented with a new model of paid part-time lay judges. The country used to have a system of lay magistrates similar to our own. But numbers of JPs allowed to preside over cases were dwindling in 1990s, as was diversity. So the government decided to pilot an entirely new kind of magistrate - Community Magistrates. These magistrates preside alone over lower level cases (they do not have power to imprison) and are paid a fee for their time[40], so they are not volunteers. The term community is key: "these new Community Magistrates were selected based on their experience and education, their involvement in the community, and their awareness of the rights of others and of the diversity of New Zealand's society."[41] Those who were previously Justices of the Peace are allowed to apply for the new posts, as are qualified (but not practising) lawyers. Community Magistrates sit 2-3 days a week so that they still have time for their community work and engagement. Little is in the public domain about the effectiveness of the New Zealand reforms, but it may be worth the Committee making their own enquiries.

An equally radical reform has been discussed by experienced JPs. Mindful both of the need to increase diversity, and to ensure magistrates receive sufficient training in an age of austerity, they suggest that wingers and Chairs could be managed in completely different ways. New magistrates would undergo a shorter recruitment process than now and sit as wingers for a fixed term of say ten years. They would only need to sit for a minimum of 10 days per year. chairs would be recruited from those who had sat for at least 45 days as a winger and would be subject to a rigorous application and training process. They would need to commit to sitting at least 25 days per year and to doing ongoing CPD. This concept is worth careful consideration given that it would enable scarce training resources to be targeted,

39 http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/
40 http://www.legislation.govt.nz/regulation/public/1998/0465/latest/DLM272273.html
41 http://www.beehive.govt.nz/release/six-community-magistrates-appointed

and for performance appraisal of chairs to be more rigorous. The introduction of fixed tenure for wingers, a quicker, more streamlined application process and a lower minimum sitting requirement would be likely to encourage younger, more diverse candidates into the magistracy.

Conclusion and recommendations

The magistracy has lost a third of its numbers in ten years and looks as though it may shrink further. Lack of resources have led to cuts in training. Damian Green, when justice minister in 2013, launched a consultation on the future of the magistracy[42], but nothing was ever published. Until recently magistracy policy appeared to be drifting. However this inquiry, and a new alignment of civil servant responsibility in the Ministry of Justice, indicate a new enthusiasm to consider where the magistracy is going, and to make some brave decisions.

If the magistracy continues to shrink, but everything else remains the same, it will take many decades to diversify the magistracy. But the magistracy needs radical reform so it can thrive for another 100 years. Its future does not necessarily lie in greater sentencing powers, but in being genuinely representative of the people, building skills, and developing expertise and in being advocates for and within the criminal justice system.

Ordinary magistrates are currently kept out of sight and out of touch. In many instances they have lost power to influence local court policy, or to be involved in local criminal justice activities. They are not allowed to speak out publicly without permission and then with restrictions. We cannot have a free for all where magistrates do whatever they want, but the current situation makes ordinary magistrates permanently nervous that they may put a foot wrong. This conservative culture may influence the kind of magistrates recruited. It certainly contributes to the current low morale amongst magistrates. The concept of magisterial independence needs to be re-examined, not just by the judiciary, but by all stakeholders in the criminal justice system.

There are myriad options for radically reforming the structure and operation of the magistracy. Two worth exploring are the New Zealand model of paid lay justices, and the idea of treating wingers and chairs completely differently. There are many incremental changes that, combined, would also make a big difference. Many of the following recommendations are contingent on the allocation of extra resources, but others are cost neutral.

42 https://www.gov.uk/government/news/damian-green-reforming-the-role-of-magistrates

Recruitment and diversity

1. Increase the numbers of vacancies for new magistrates through reducing two magistrate benches, limiting and enforcing the maximum number of sittings per year and by freezing the recruitment of district judges

2. Promote the magistracy actively to under-represented groups – BAME (particularly some communities like Roma), younger people, people from lower socio-economic groups

3. Modernise and shorten the recruitment process

4. Promote the benefit of having magistrate employees to employers

5. Assess the effectiveness and cost of advisory committees as the recruiting organisations

6. Bring in legislation so that the equal merit provision applies to magistrate recruitment, and to age as a characteristic

7. Introduce fixed or renewable tenure

Training and Development

1. Do a full independent assessment of the skills and knowledge needs of magistrates today, involving all court users and practitioners

2. Ensure induction courses are broader in what they cover

3. Consider whether the core deliverers of training should include experienced magistrates, DJs and practitioners

4. Support magistrates to do continuous professional development and make it compulsory

5. Reform the appraisal system so it better tests the competence and skills of magistrates.

6. Promote more feedback and reflective practice

7. Review whether current training and development is effective in ensuring all magistrates have a full understanding of diversity issues

Management

1. Review how ordinary magistrates might have a greater influence over how their court runs

2. Consider ways of lightening the workload of the bench chair, to prevent it becoming a five day a week voluntary post

3. Consider whether the HR and management needs of magistrates are being met by current arrangements and whether a new role – volunteer manager – is required

Local justice

1. Re-examine the policy of listing certain types of cases regionally thus forcing magistrates to travel even further than their nearest court

2. Review ways of making it easier for those who live far from a court and/or don't have a car to sit. This many involve radical solutions like taxis or extra payments.

Engagement with the wider criminal justice sector and with the community

1. Hold an inquiry into the concept and limits of judicial independence as it effects the magistracy, and whether current restrictions (written and unwritten) on magistrates ability to speak to the media, sit on criminal justice committees, volunteer in the criminal justice system and engage with the community are proportionate and necessary

2. Consider setting up a public register of magistrates' interests and task magistrates themselves with declaring and managing most potential conflicts of interest.

Relationship with district judges

1. Promote joint training and use experienced DJs to train magistrates

2. Have DJs and magistrates work together on recruitment and appraisal

3. Merge the top leadership of magistrates and DJs

4. Publish policy statements on the rationale for DJ and magistrate numbers recruited

5. Consider magistrate wingers sitting with a DJ chair on complex trials and serious Youth Court cases

Sentencing powers

1. Monitor the effect of the new allocation guidance on workload in magistrates' court and on custodial sentences

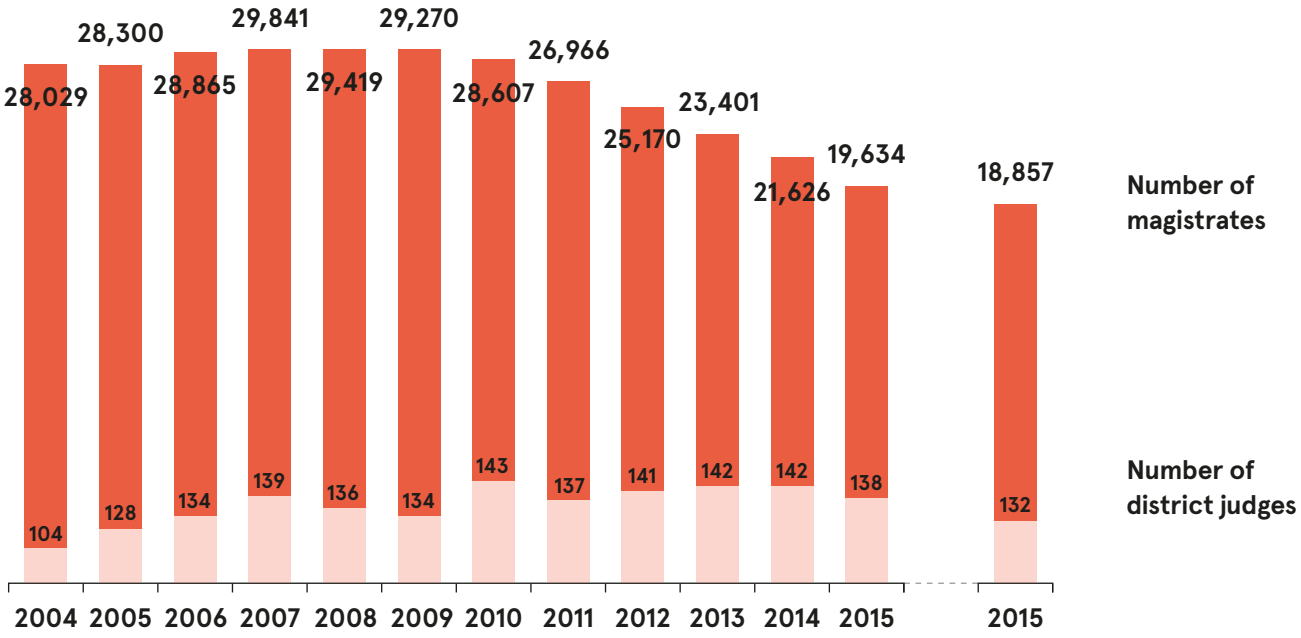
2. Publish all MoJ models on the effects on custodial sentences of any increase in magistrates' sentencing powers

3. If models indicate a potential increase in imprisonment, and the increased sentencing powers are enacted, introduce compulsory training for new chairs and DJs, delivered by experienced Crown Court judges in judging these more serious cases

Appendix 1

Number of magistrates and district judges over time

Source: Judicial Office



Appendix 2

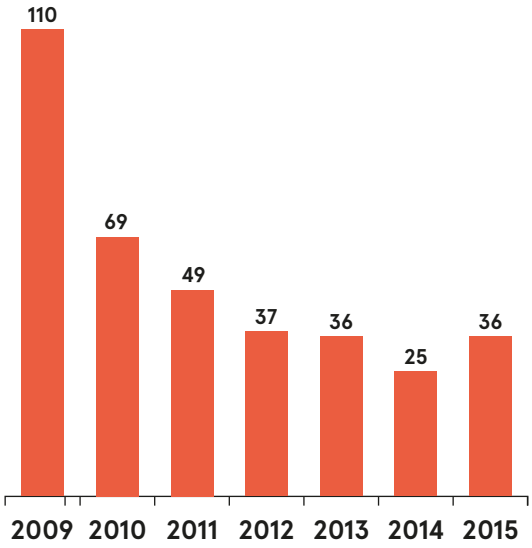
Magistrates by Age Band, as % of total since 2003

Source: Judicial Office

Appendix 3

Spend on training per magistrate (£)

Source: Judicial Office – spend is by HMCTS and the Judicial College but excludes in house staff costs



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