

**MAGISTRATE'S COURT - PRACTICE AND PROCEDURES:
WORKING PARTY REPORT**

*Kevin
Harris*

**Presented to the States on 17th March 1998
by the Legislation Committee**



STATES OF JERSEY

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Foreword

On 14th February 1997 the Legislation Committee appointed a Working Party to examine recommendations for improvements to the practice and procedures of the Magistrate's Court.

On 27th February 1998 the Legislation Committee received the report of the Working Party, and decided that it should be given wider distribution by presenting it to the States. The public is invited to comment on this report and its recommendations, and any comments should be forwarded no later than 30th April 1998 to Deputy I.S. Nicholls, President, Legislation Committee, c/o States Greffe, St. Helier.

The Legislation Committee will then consider the way forward, with a view to bringing its own recommendations to the States in the form of a report and proposition by the end of July 1998.

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REPORT

Introduction

1.1 The Jersey Judicial and Legal Services Review Committee ("the Review Committee") presented its Second Interim Report to the States on 23rd October 1990. This was a detailed report covering the constitution and working of both the Royal Court and the Police Court (re-named the Magistrate's Court on 1st April 1997), and the working of the Petty Debts Court. A total of 38 recommendations were made, 13 of which concerned the Magistrate's Court specifically. At its meeting on 14th February 1997, the Legislation Committee decided to establish a Working Party to consider certain recommendations of the Second Interim Report of the Review Committee. These recommendations concerned the role of the Magistrate, the presentation of the case and training and administration. The terms of reference were as follows -

"To consider the recommendations set out in paragraphs 9.19 to 9.23 to the Second Interim Report of the Jersey Judicial and Legal Services Review Committee and to produce recommendations to the Legislation Committee on improvement in the practice and procedure of the Magistrate's Court."

- 1.2** This report outlines the constitution of the Working Party, the specific recommendations to be considered, the strengths and weaknesses of present practice and procedure and an analysis of the options for change.
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- 1.3** The recommendation relating to training and administration is not considered in this interim report.
- 1.4** The relevant passages of the report of the Review Committee (paragraphs 7.1 to 7.20, 7.32 to 7.46 and 9.19 to 9.23) are included as the Appendix to this report.

Constitution

2.1 The Working Party was constituted as follows -

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|-----------------------------|---|
| Deputy I.S. Nicholls | Chairman |
| Mr. M.C. St. J. Birt, Q.C. | Attorney General |
| Mr. T.C. Sowden, Q.C. | Magistrate |
| Superintendent S. Le Breton | Representing States of Jersey Police |
| Dr. D. King, | Chief Probation Officer |
| Advocate S. Pearmain | Representing the Jersey Bar |
| Mr. I. Christmas | Legal Adviser to the Police |
| Centenier E. Gallichan | Representing Centenier's Association |
| Mr. S.W. Austin-Vautier | Magistrate's Court Greffier and Secretary |

Recommendations to be considered

3.1 The precise recommendations of the Review Committee to be considered were as follows -

"The role of the Magistrate

9.19 *The dual role of the Magistrate should be abandoned and he should not be required to adopt the inquisitorial role of examination and cross-examinations.*

The presentation of the case

9.20 *The duty of ensuring that the case On behalf of the public against the defendant is properly and fairly put should be placed upon the Centeniers. The Attorney General should give directions to the Centeniers as to the kinds of cases which the Centeniers should present themselves and those in which a legally qualified prosecutor should be instructed.*

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Training and administration

9.21 Assistance should be made available to the Centeniers in the performance of their enhanced duties in the Police Court.

9.22 It should be obligatory for a newly elected Centenier, before he presents any cases in Court, to receive some training in the presentation and prosecution of cases. The same obligation should attach to an existing Centenier on re-election.

9.23 A central advisory and clerical service, the staff of which would include the present Police Adviser, should be established. Parishes should be encouraged, but not obliged, to use the service. Parishes should, however, be required promptly to notify it of every charge brought by the Honorary Police of their Parish."

Role of the Magistrate/presentation of the case

4.1 Since any recommended change in the Magistrate's role could affect who was to present the case, the Working Party decided at the outset to discuss the recommendations at paragraphs 9.19 and 9.20 together. They are, in effect, inextricably linked. Furthermore, before reaching any conclusions on these two specific issues, we found it helpful to summarise both the strengths and weaknesses of the present practice and procedure in the Magistrate's Court as evinced from the individual perceptions of Working Party members..

Strengths of the present practice and procedure

4.2 The workload of the Magistrate's Court in 1997 amounted to 5,377 criminal cases which involved the presentation of 3,605 people before the Court. These cases are heard during 15 court sessions a week taking place in two courts, one located in the Town Hall and the other on the third floor of Cyril Le Marquand House. The Magistrate's Court is a court of summary jurisdiction where justice is administered with the minimum of

delay and at modest cost. Research by the Magistrate's Court Greffier showed that the average time taken between the first presentation of a case in the Court and its conclusions was 1.6 months for trials following a plea of 'not guilty' and 2.0 months for committals to the Royal Court.

- 4.3 Approximately 90 per cent of the Court's workload involves 'guilty plea' cases. Analysis of trial statistics for the period January to June 1997 showed that there were approximately three contested trials a week involving a total of 86 1/4 hours of Court time. This of course does not include the time taken by all concerned to prepare for these cases. The fact that presentation of cases has been by Centeniers acting on an honorary basis has led to a system which is economical to administer and is not subject to undue formality or technicality.

Weaknesses of the present practice and procedure

- 5.1 The principal criticism of the present system relates to the fact that the Magistrate has a dual role. This is summarised in paragraph 7.9 of the report of the Review Committee as follows -

"However, the absence of any public prosecutor in the Police Court to conduct the case against the defendant ... means that the Magistrate has to undertake some tasks which do not normally fall upon a Judge who is trying a criminal case. He has to examine the witnesses for the prosecution (for which purpose he is provided with copies of their written statements) in order to draw out the relevant facts, and, if the defendant elects to give evidence or calls witnesses, he has to question the defendant and the witnesses and, in effect, cross-examine them in order to test their evidence and form an opinion as to its reliability. Another consequence of the absence of a prosecutor is that there is nobody to make submissions to the Magistrate on behalf of the public on the issues of law and fact that arise."

- 5.2 The present system gives rise to many concerns, both from the point of view of the prosecution (representing the public in

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general and the victim) and the defence. The Centenier's role is confined to presenting the defendant to the Court. There is no-one in Court representing the prosecution. This task has to be undertaken to the best of his ability by the Magistrate. The defendant is often legally represented. There is therefore no-one to counter any points, whether of fact or of law, made by the defendant's advocate. The Magistrate has to do his best without any assistance from the prosecution. Defence advocates, acting under a legal aid certificate, also have to do their best without assistance from a legally qualified prosecutor.

5.3 In particular it is up to the Magistrate to cross-examine the defendant and his witnesses. Inevitably he cannot do this as effectively as a prosecutor because he is performing a judicial role and is not in a position to test the defendant's evidence in the manner of a prosecutor. Weaknesses in the defendant's version of events are therefore often not exposed.

5.4 The Royal Court has had occasion to comment on this lack of representation of the prosecution in appeals from the Magistrate's Court brought before it. In the case of Tracy (19th December 1996) the Court said -

'We wish first of all to repeat that which the Court has said on more than one occasion about the difficult, if not impossible, position in which the Magistrate is often placed when considering applications of the kind made in the context of the case under appeal. [The Magistrate] was faced with an application persuasively made by experienced counsel for the respondent. Who was there to put the other side of the argument and to place the relevant law before him? The answer is no-one. The reason of course is that the Magistrate in Jersey is a Juge d'Instruction. He is not a Juge d'Instruction in the sense that this term is understood in France. But equally he is not a Magistrate as that term is understood in England. He has a hybrid function which, although no doubt apt for the nineteenth century, has become for several reasons quite inappropriate for the process of criminal justice which has developed in recent years. The deficiencies were laid bare by the report of the Judicial and

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Legal Services Review Committee under the chairmanship of Sir Godfray Le Quesne, Q.C. as long ago as 1990. The system cries out for legislative reform."

In REID (21st March 1994) the Court said -

"... it is quite clear from the transcript that the case was one in which the process of justice would have been greatly enhanced had there been prosecuting counsel to present the case on behalf of the prosecution. As it was there was no prosecuting counsel, and nor in fact was there counsel appearing for Miss Reid, and we have some sympathy for the learned Magistrate in the exceedingly difficult task with which he had to deal in unravelling the confusing state of affairs which was laid before him in the Court."

5.5 A further example is the recent case concerning the question of whether child witnesses should give evidence behind screens. The Magistrate was subject to forceful submissions by the defendant's advocate on both the facts and the law as to why screens should not be used, but there was no-one to put the arguments on behalf of the children concerned as to why screens should have been used. It is hardly surprising in such cases if the balance sometimes comes down on behalf of the defendant rather than the victim.

5.6 From the defendant's point of view, the dual role of the Magistrate also causes difficulties. The written statements have to be supplied to the Magistrate so that, in the absence of a prosecutor, he is able to adduce the evidence. The evidence as given on oath may turn out to be different to that which is contained in the statements. It may be difficult for the Magistrate not to be influenced by his knowledge of such matters which he cannot completely dismiss from his mind.

5.7 The need for the Magistrate to adduce the prosecution evidence and to cross-examine the defendant and his witnesses may well give an appearance of the Magistrate having made up his mind or been prejudiced against the defendant.

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5.8 It is the unanimous view of the Working Party, in the light of the considerations referred to above, that the interests of justice, both to the public and victims of offences and to defendants, require changes to the present procedure. The preservation of the status quo is not an acceptable option.

The recommendation of the Review Committee that Centeniers should become prosecutors

6.1 The Review Committee recommended that the role of Centenier should be changed in all cases to that of a prosecutor although it envisaged that many cases would in future be presented by a legally qualified prosecutor. The Magistrate would therefore abandon his dual role in all cases.

6.2 The Working Party has considered this recommendation very carefully but we have concluded that it is impractical. The Centeniers' Association is firmly of the view that its members should not become prosecutors. We have every sympathy with this view. We believe that it would be unfair and unreasonable to expect Centeniers to undertake this role. To prosecute a case requires considerably more preparation than the mere presentation of a case as at present. The demands upon the time of a Centenier are already very considerable and any additional demand is likely to lead to even more difficulty in recruiting appropriate candidates. Furthermore many persons willing to put themselves forward for election as Centeniers would not be willing to undertake or consider themselves suited to the somewhat different task of acting as prosecutor in a criminal case.

The degree of training required would be very considerable and it is difficult to see how this would operate in the light of the turnover of Centeniers, particularly in the urban parishes, where the majority of crime occurs.

6.3 It follows from this decision that, in cases where a prosecutor is required, a legally qualified prosecutor will be necessary. References in the remainder of this report to "prosecutor" should be read in this light.

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Alternative options

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Having decided that the status quo was unacceptable and that Centeniers could not be expected to act as prosecutors, the Working Party concluded that there were three broad options for reform -

- (i) A prosecutor to present every case (whether guilty or not guilty plea).
- (ii) A prosecutor to present all not guilty pleas.
- (iii) A prosecutor to present selected cases (whether guilty or not guilty plea).

7.2 The significant advantage of the first option (that a prosecutor should present every case) was that it would lead to the introduction of a clear unambiguous adversarial system. The prosecution and the defence would each be represented before the Magistrate with the result that the Magistrate would undertake a purely judicial role. Such a course would be likely to lead to more accurate and appropriate charges being brought and the more effective screening out of charges where the evidence was insufficient. It is likely that the concerns of victims would be better represented, including those guilty pleas where it is important that the effect on the victim should be brought to the attention of the Magistrate. The weaknesses of the present system in respect of the prosecution and the defence would be satisfactorily dealt with.

7.3 As against this, the Working Party is of the view that, in the majority of guilty plea hearings, the present arrangements work satisfactorily. The Centenier is well able to present the facts adequately to the Magistrate and his knowledge of the background to the case may well be of assistance to the Court. There would be an additional cost and resource implications if the Attorney General's chambers were to be staffed up to a level necessary to provide a prosecutor for all cases which come before the Magistrate's Court. Furthermore such an approach would remove altogether the historical role of the Centenier in the Magistrate's Court and we believe that strong grounds have

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to be made out for such a dramatic change. Two members of the Working Party are in favour of this option but the majority feel that, in order to deal with the problems recited in section 4 and 5 above, it is not necessary to replace the Centenier in those cases where little difficulty is in practice experienced at present.

- 7.4 The second and third options have much in common. The most significant factor is that either option would mean that the Magistrate would retain his dual role in cases where a Centenier presents the case but not in those cases where a prosecutor appears. It is recognised that this is not ideal but the Working Party has concluded that it is feasible. The Magistrate is quite capable of varying his role according to the manner in which the case is brought before him.
- 7.5 The second option has the advantage that, in all not guilty pleas, the Magistrate would perform a purely judicial role thereby avoiding the difficulties summarised earlier in this report. However the Working Party believes that this would be an unduly restrictive proposal. Many not guilty pleas are straightforward. For example a person may be brought before the Court for being drunk and incapable. He chooses to plead not guilty, often for no better reason than that he cannot remember or is simply disinclined to co-operate. The sole witness may be a police officer. Such a case can be dealt with in a matter of minutes with the police officer giving brief evidence and the defendant giving his version of events. It seems to us undesirable to introduce a system which would have the effect of requiring such a case to be adjourned for a prosecutor to be instructed and for the matter then to be brought back at a later date.
- 7.6 Conversely it is felt that not all uncontested cases are straightforward. Some may involve several defendants facing a large number of charges, other may be factually complicated or involve points of law and some may require a particularly sensitive and legally admissible recitation of the facts. Applications for bail, procedural applications, old style committal proceedings, indeed all sorts of hearings may call for

responses or comments which the presiding Magistrate would expect from a legally qualified prosecutor.

- 7.7 A decision as to those cases in which a prosecutor should appear and those in which a Centenier should appear should, as recommended by the Review Committee, be taken by or under the authority of the Attorney General who could no doubt issue general guidelines to deal with the majority of cases. The expectation would be that envisaged by the Review Committee, namely that a prosecutor ought to be instructed in the majority of contested cases and a Centenier should continue to present the majority of guilty pleas.

Legally qualified prosecutors

- 8.1 We have also considered the qualification necessary for a prosecutor in the Magistrate's Court. It would be impracticable for prosecutors to be provided by the private sector other than on an occasional basis. In order that the business of the Court be conducted with despatch, the prosecutor must be readily available from day to day. We envisage therefore that a prosecutor should be in the employment of the Attorney General's chambers.
- 8.2 Advocate Pearmain is of the view that a prosecutor should be a qualified Jersey advocate because he or she will be appearing in a Jersey Court. It is the view of all the other members that, whilst it would undoubtedly be desirable to appoint a Jersey advocate where possible, this should not be a legal requirement. It has historically proved difficult to attract Jersey qualified lawyers in the Attorney General's chambers from the private sector and there would be no guarantee that persons with the necessary local legal qualifications could necessarily be found. Indeed the present Police Legal Adviser is an English solicitor experienced in prosecuting criminal cases in England. We are of the view that a prosecutor should be a person employed by the Attorney General's chambers approved by the Attorney General to appear on his behalf in the Magistrate's Court. We suggest that the qualifications are those contained in Article 4 of the Criminal Justice (Evidence and Procedures) (Jersey) Law 1997

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which permits a legally qualified prosecutor to appear in cases where the victim is a child. Those qualifications are that the person is an advocate or solicitor of the Royal Court or is an English barrister or solicitor in the employment of the Law Officers' Department.

Costs and resource implications

- 9.1 The Working Party has reviewed the need for additional resources in the Law Officers Department which would be necessary to put the recommendations into effect. It has concluded that one additional lawyer of appropriate experience would need to be appointed to work alongside the Legal Adviser to the Police. They would need to be supported by an additional secretary and part-time clerical assistant. [The total annual cost is estimated to be in the region of £85,000 to £95,000 depending upon the seniority of the lawyer appointed].
- 9.2 The Working Party is of the view that the presence of a prosecutor should lead to savings in terms of the number of trials, the length of cases, the number of adjournments and the occasions upon which witnesses are summoned unnecessarily (including police officers for which overtime is paid) and that this should be set against the above expenditure so as to reduce the net cost. The Working Party is firmly of the view that any net increase in expenditure is justified and, indeed, essential in the interests of the administration of the criminal justice system of the Island.

Legislative changes

- 10.1 It would be necessary to amend the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949, to confer a right of audience on a prosecutor and to alter the role of the Magistrate in cases where a prosecutor appears. The Working Party has been advised that the amendments should be short and comparatively straightforward.

Recommendations

11.1 The Working Party recommends that the Legislation Committee endorse the following conclusions. In making these recommendations the Magistrate's Court Working Party is aware of the work of the Working Party established to consider the report of the Committee chaired by Sir Cecil Clothier and that of the Crims Strategy Group.

- (i) The dual role of the Magistrate should be abolished in those cases where a legally qualified prosecutor presents the case.
- (ii) The dual role of the Magistrate should continue as at present in those cases presented by a Centenier.
- (iii) The decision as to which cases should be presented by a legally qualified prosecutor should be taken by, or on behalf of, the Attorney General.
- (iv) The Attorney General should issue general guidelines as to the sort of case which should be presented by a legally qualified prosecutor. The expectation would be that the majority of contested cases or committals would be presented by a legally qualified prosecutor and the majority of guilty pleas would be presented by a Centenier.
- (v) The Attorney General could give specific directions in any particular case.
- (vi) A prosecutor should be employed by the Law Officers' Department although advocates in private practice may be nominated by the Attorney General at his discretion. A prosecutor would be accepted as legally qualified if he were a Jersey advocate or solicitor or an English barrister or solicitor employed in the Law Officers' Department and nominated as a prosecutor in the Magistrate's Court by the Attorney General.

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(viii) The recommendation would require the appointment of one additional prosecutor and support staff to be employed in the Law Officers' Department.