UNIVERSITY OF SOUTHAMPTON

THE MANAGED JUDICIAL DECISION

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ABSTRACT
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The principal thrust of this study is that, over the last twenty five years or so, following decades of relative stability, the managerial and administrative structures which support the magistracy have been largely swept away; virtually every level of the summary justice process, including judicial decision makers, rendered accountable to central government and its executive arm; and the independence of the summary justice process compromised.

The study explores the transformation of the courts of summary jurisdiction in England and Wales. Without pursuing courts of summary jurisdiction to their roots, the study nevertheless reveals the relative stability of those courts over many decades, albeit, within an ambiguous constitutional framework and muddled notions surrounding the performance of judicial, legal and administrative functions.

The emergence of principles associated with "new public management" in the public sector is subjected to analysis; and the study reveals how, by the imposition of a regime of cash limiting, a Scrutiny and three legislative measures in the Police and Magistrates' Courts Act, 1994, the Crime and Disorder Act, 1998 and the Access to Justice Act, 1999, all containing strong resonances with the "new public management" agenda, governments secured the accountability of the summary justice process.

The focus of the study, informed throughout by the opinions and observations of senior civil servants and leading practitioners in the criminal justice process, is a contextualised case study, which explores how Hampshire Magistrates' Courts Committee interpreted the agenda of central government in its area. At the heart of the issues explored in the case study is the extent to which, as a result of the legislative and other activities of government over the last twenty years or so, magistrates' courts committees have been compromised in the performance of their primary responsibility to provide a framework capable of supporting the summary justice process; and, thereby, placed at risk the fine checks and balances across the criminal justice process which seek to ensure the freedom of the individual under the law.

The study concludes that a corrosive element has been inserted within the courts of summary jurisdiction which suggests that the individual can no longer look with confidence to that forum for the independent adjudication of justiciable issues.

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PART ONE
CHAPTER 1
INTRODUCTION

1. Purpose of Study

Whilst Britain has no written constitution, the notion of trial by peers set out in Magna Carta, Justices administering justice as they travelled the country on "circuit" in the name of the Crown, and the development of the common law through the centuries and its adaptation to meet changing conditions, are well chronicled.[1] That justice should not only be done, but should be manifestly and openly be seen to be done,[2] has become enshrined on the heart of most, if not all, students of law. The notion that those who exercise judicial office do so independently of the Crown in Parliament is of such fundamental importance that those countries without an independent judiciary are considered to deprive their citizens of a fundamental human right, an approach mirrored in, for example, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[3]

Although, as this study seeks to demonstrate, there is no separation of powers in Britain that would satisfy, for example, Locke and Montesquieu,[4] nor a succession of constitutional lawyers,[5] Bingham, in re-inforcing the notion of the independent exercise of judicial office, was able to write as recently as 1996 that :-

> "... nor ... does our constitution provide for any rigid separation of powers ... But between the legislature and the executive on the one hand and the judiciary on the other, the separation is all but total." (Bingham 1996).

Bingham's "all but" caveat appears to make room for his agreement with the Chief Justice of British Columbia that an independent judiciary may have to give way to the right of the legislature to determine how public moneys are spent.[6] Nevertheless, there is little in Bingham's analysis which conflicts with views emerging in the

Commonwealth, particularly in Australia,[7] that the exercise of independent judicial power depends upon, among other things, public confidence in the courts ; which in turn depends upon the courts acting in accordance with the judicial process : and the reputation of the courts for acting in accordance with that process.

With such apparently well defined and settled parameters for the independent exercise of judicial office, it is perhaps surprising, therefore, that the argument at the core of this study is that, in pursuit of a "new public management" agenda, and harnessing legislative and procedural rule changes, governments in Britain have, in the last twenty years or so, tinkered with fine checks and balances which have evolved over the years, procedural in nature, designed to ensure the substantive law can be properly applied. Such has been the extent of tinkering that, taken together with other arguments set out herein, the study argues that the citizen can no longer look with confidence to courts of summary jurisdiction for the independent adjudication of any justiciable issue.

In this study, which charts, in particular, the decline of the independent exercise of judicial office in the magistrates' courts, a myriad of documents, papers and reports, largely inspired by senior civil servants, without much evidence of Parliamentary scrutiny, are considered at some length. Part Two, chapter 3, and Part Four, chapter 7, of the study provides an account of two critical working groups of civil servants, led by Julian Le Vay (*Report of a Scrutiny into the Magistrates' Courts Service*, Home Office 1989), (hereafter Le Vay), and Martin Narey (*Review of Delay in the Criminal Justice System – A Report*, Home Office 1997), (hereafter Narey), respectively. The Le Vay and Narey reports, written several years apart, along with opinions expressed by the Director, Magistrates' Courts Group, Lord Chancellor's Department (LCD), form a focus for the study and, building upon the earlier activities of governments and senior civil servants, traced throughout the study, demonstrate the centralising, bureaucratising tendency of senior civil servants to bring the Magistrates' Courts Service (MCS) under central control.

However, the study is not just an abstract review of the activities of central government at a critical stage in the development of and decline in the exercise of independent judicial office in the MCS. Key documents, which are not otherwise in the public domain, relating to Hampshire Magistrates' Courts Committee (HMCC), which has responsibility for the management of the MCS in its area, have been carefully scrutinised. The documents reveal the method by and extent to which senior civil servants, while insisting that central government had no responsibility for the management of the MCS at the local level, nevertheless acted to influence the change agenda.

The study also seeks to demonstrate the extent to which, in pursuing a managerialist agenda (considered in Part Two, chapter 3), Le Vay, Narey and the Director, Magistrates' Courts Group, LCD, sought to re-define judicial, legal and administrative functions in the MCS, which, in turn, has led to compromise in the administration of summary justice.

A subsidiary, but nevertheless important issue in this study, and linked to the re-definition of judicial, legal and administrative functions in the MCS, is the extent to which justices' clerks, the chief legal advisers to magistrates, perform judicial functions. While it will be argued the inherent quality of some of the functions performed by justices' clerks are judicial, the Director, Magistrates' Courts Group, LCD, finding strong support in the Le Vay and Narey reports, is revealed as denying justices' clerks perform judicial functions at all.[8] The significance of the issue to this study is its argument that if some of the functions performed by justices' clerks are judicial, the exercise of those functions should be carried out independently and beyond the reach of line managers; if it is otherwise, following, in particular, the Police and Magistrates' Courts Act, 1994, (considered in Part Two, chapter 4), justices' clerks can be managed in the exercise of those functions in hierarchical lines of accountability which, as the study will show, find their destination in the LCD. The argument in this study, which emerges in similar form in the reports of Le Vay and Narey, is that senior civil servants in the Home Office and the LCD had a strategy to

diminish the significance of the role of justices' clerk in the summary justice process in order that both (s)he and the judicial functions (s)he performed could be managed. The study examines throughout, but particularly in Part Two, chapter 4, and Part Four, chapter 7, the extent to which the strategy has been successful.

Of critical significance to the analysis which follows is an examination of whether magistrates and justices' clerks are members of the judiciary ; judicial independence ; and what it means to act judicially, and the next part of the study addresses these issues.

2. Magistrates and Justices' Clerks as members of the Judiciary - Judicial Independence

The judicial role of the magistracy appears not to have been questioned over the centuries,[9] but, as this study will demonstrate, there is a lack of clarity in the performance by justices' clerks of judicial functions.[10] As has been noted, it is a central theme of this study that the separation of the summary justice process from the legislature and the executive is being compromised. It is accordingly necessary to examine the notion of judicial independence and what it means to act judicially in order to gain some appreciation of the judicial role and the manner in which it is exercised. A useful starting point is the important lecture to the Judicial Studies Board in 1996, in which Bingham purposed that it is :-

> "... a truth universally acknowledged that the constitution of a modern democracy governed by rule of law must effectively guarantee judicial independence. So many eminent authorities have stated this principle and there has been so little challenge to it, that no extensive citation is called for. It is enough to recall that in 1994 the United Nations Commission for Human Rights recorded that it was :-

> "Convinced that an independent and impartial judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice." (Bingham 1996, p.3).

The Commission went on to appoint a Special Rapporteur to monitor and investigate alleged violations of judicial and legal professional independence world-wide, and to study topical questions central to a full understanding of the independence of the judiciary. The Special Rapporteur summarised the results of his world-wide investigation and with reference to the United Kingdom wrote :-

> "The Special Rapporteur notes with grave concern recent media reports in the United Kingdom of comments by ministers and/or highly placed government personalities of recent decisions of the courts on judicial review of administrative decisions of the Home Secretary. The Chairman of the House of Commons Home Affairs Select Committee was reported to have warned that if the Judges did not exercise self restraint, "it is inevitable that we shall statutorily have to restrict judicial review". The controversy continued and reportedly prompted the former Master of the Rolls, Lord Donaldson, who was said to have accused the government of launching a concerted attack on the independence of the judiciary, to have said "any government which seeks to make itself immune to an independent review of whether its actions are lawful or unlawful is potentially despotic". The Special Rapporteur would be monitoring developments in the United Kingdom concerning this controversy. That such controversy could arise over this very issue in a country which cradled the common law and judicial independence is hard to believe." (Bingham 1996, p.3).

Concerns expressed by the Special Rapporteur in connection with high profile decisions in the High Court, involving the then Home Secretary, obscure what this

study argues is a more fundamental undermining of the judiciary in England and Wales.

Bingham (1996, p.3) suggested that: "The need to guarantee judicial independence is … one which we should treat very seriously, not only for the health of our own country but because of the extent to which our own conduct is still seen by other countries, to an extent which may surprise us, as a model". A healthy democracy would then seem to Bingham to depend upon, among other things, judicial independence. Before examining, in further detail, the British perspective on judicial independence, it is intended to explore the somewhat romanticised notion of judicial independence which finds expression in the Commonwealth.

Judicial Independence – The Commonwealth Perspective

As has been noted, Bingham appears to discern a significant separation of powers in England and Wales, between legislature, executive and judiciary, all but suggesting the judiciary may act with some degree of autonomy. This view has been extensively explicated in Australia. In *Wilson –v- Minister for Aboriginal Torres Strait Islander Affairs,* (70 ALJR 743),[11] it was argued that the constitution of the Commonwealth was based upon a separation of the functions of government and the powers which it conferred were divided into legislative, executive and judicial. The constitution reflected, it was claimed, the broad principle that, subject to the Westminster system of responsible government, the powers in each category were determined according to traditional British conceptions and were vested in and to be exercised by separate organs of government. The separation of functions was designed to provide checks and balances on the exercise of power by the respective organs of government in which the powers were reposed. In a compelling analysis, the judgement continued, borrowing from Harrison Moore,[12] that in Australia, between legislative and executive power on the one hand and judicial power on the other, there was a great cleavage. The function of the federal judicial branch was the quelling of justiciable controversies, whether between citizens (individual or corporate), between citizens

and executive government (in civil and criminal matters) and between the various polities in the federation. The institutional separation of the judicial power assisted the public perception, central to the system of government as a whole, that justiciable controversies had been quelled by judges acting independently of either of the other branches of government. Furthermore, the separation advanced two further constitutional objectives: the guarantee of liberty and, to that end, the independence of judges.[13] In *Wilson*, the judgement examined the classic understanding of the separation of powers, drawing particularly upon Windeyer J's analysis in *Trades Practices Tribunal: ex parte Tasmanian Breweries Ltd.*[14] Tracing back the doctrine to Montesqueiu's proposition that "there is no liberty if the judicial power be not separated from the legislative and executive power", Windeyer J suggested that, drawing upon Vile,[15] Blackstone adopted Monstequeiu's proposition to the realities of the British constitution, especially the law making function of the judiciary. Blackstone commended as a protection of liberty the separate existence of the judicial power in a peculiar body of men, nominated, but not removable, at pleasure, by the Crown.[16] Blackstone perceived that the separation of the judiciary was no mere theoretical construct and that liberty was not secured by the creation of separate institutions, but by separating the judges who constitute the judicial institutions from those who perform legislative and executive functions.

The judgement in *Wilson* argued that the inherited tradition of judicial independence was rooted in and manifested by the Act of Settlement, 1700,[17] which provided for judges to hold their commission during good behaviour and for their salaries to be ascertained and established and which state that removal from office might lawfully be effected upon the address of the Lords and Commons. The Act of Settlement did not speak of judicial independence, but enhanced the security of tenure of judges as the means of buttressing judicial independence. Generally, primary legislation invested judges with jurisdiction to try certain cases. Other legislation had, over the years, specified the manner of appointment of judges at various levels of the judiciary, their qualifications and tenure of office. Secondary legislation often determined procedures; whilst guidance from the LCD was readily forthcoming on judicial

behaviour. Within the statutory parameters, and guidance from the LCD, other factors were at work.[18]

In a further, detailed, and important explication of the principle, in *Wilson*,[19] Gauldron J, considered that the effective resolution of controversies which called for the exercise of the judicial power of the Commonwealth depended upon public confidence in the courts in which that power was vested. Public confidence depended upon two things: the courts acting in accordance with judicial process. More precisely, it depended on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining a matter in issue by ascertaining the law and applying the law as it is to the facts as they are; just as importantly, it depended upon the reputation of the courts for acting in accordance with that process. He considered that so critical was the judicial process to the exercise of judicial power that it formed part of the exercise of that power. Thus judicial power was not simply a power to settle justiciable controversies, but a power which must be seen to be exercised in accordance with the judicial process. As will be demonstrated in the next following section, there is much academic support for Gauldron J's "procedural" approach and a number of principles which assist in the understanding of what it means to act judicially have emerged, which are crucial to an appreciation of the ease with which the judicial process can be influenced by tinkering with procedural rules, the issue at the core of this study.

Procedural Justice and Acting Judicially

In analysing links between the rule of law and notions of procedural justice, Lyons (1965, chapter 7) observed a distinction between the justice of laws and the justice of their application, a notion which Kamenka developed further:-

> "… Justice, it seems to me, is not so much an idea or an ideal as an activity and a tradition – a way of doing things, not an end state. To say this is not to say,

> narrowly, that justice is simply a set of procedures, a question of form and not of substance ..." (Kamenka 1979, p.14).

Kamenka draws important distinctions between the substance of the law and its application, pointing out that justice derives its special nature as a means of evaluating and resolving conflicts arising from the substance of the law and suggesting some of the means by which that evaluation and resolution is conducted. Lyons and Kamenka argue that procedures, (used to facilitate the application of the substantive law) are, to a significant extent, fundamental to a proper understanding of the notion of justice and what it means to act judicially, the point Gauldron J was making.

This same theme is developed by Rawls (1971, p.86), who having observed that just and unjust laws can be applied fairly or unfairly and so, as it were, having placed the notion of justice within the framework of substantive law and the way in which it might be applied, considered that the "intuitive idea" ought to be to design the social system in such a way that just outcomes result, within certain parameters. The "range" within which Rawls develops his "intuitive idea" is, amongst other things, an exploration of the distinctions which exist between "perfect", "imperfect" and "pure" procedural justice. Rawls suggests that pure procedural justice is a notion which obtains when there is no independent criterion for achieving the right result: a notion exemplified by gambling. Perfect procedural justice could be achieved where there was an independent standard for deciding which outcome was just and that a procedure existed which was guaranteed to lead to it. However, Rawls concedes that perfect procedural justice is rare, if not impossible, in cases of much practical utility, and that, accordingly, only imperfect procedural justice is possible. Rawls considers the criminal trial and its objective that the guilty should be convicted and punished and that the innocent should go free and that rules and procedures should be designed to that end, when seeking to explain this notion of imperfect procedural justice. He readily admits however that such an objective seems impossible and the "correct results" not always attainable. It is not difficult to concede the force of this argument and Lyons (1965, p.195) acknowledges that the failure of legal procedures to

guarantee desirable outcomes inevitably places them firmly within the notion of imperfect procedural justice.

If, however imperfect procedural justice is all that is possible, difficulties arise. Lyons observes that legal procedures need to be reliable and designed to promote authoritative and accurate outcomes, in order that legislators enacting substantive law may do so with confidence and make informed assessments as to its likely application and practical effect and, in the criminal justice process, that public confidence might be promoted. He suggests that the rule of law and the place of legal procedures within it implies that decisions should be reached according to the law and legal procedures should be designed so as to ensure that decisions follow the law. Furthermore, procedures should ensure scrupulous adherence to the law by requiring the collection of relevant information and by compensating for human fallibility, as far as that is feasible (Lyons 1965, p.200).

The significance of this analysis is to be found, for example, in an examination of provisions contained in the Crime and Disorder Act, 1998. It does not require much imagination to appreciate that if legislators enacting substantive law, prompted by the executive, wish to ensure its application and enforcement in a particular way, rather than as the judiciary might interpret it, some direct influence or control over legal procedures might be of advantage.

Relying on the development of English law over many centuries, Denning (1949, p.10) observed that every judge in England would see to it that every man before him had a fair trial. To this end there were many principles. The many "principles", procedural in nature, were neither static nor exhaustive and evolved with changing knowledge and attitudes. Of those regarded as fundamental are, for example, interest and bias. Lucas is of the view that, generally, judges in Britain are exceptionally good in putting matters of interest on one side and that: "The reason now is not that we actually suspect the judges of partiality, but that we recognise that somebody could, without irrationality, so suspect them ..." (1980, p.82). The general rule is simple to

state, but a little more difficult to apply. For example, a direct financial interest in the outcome of a case will always disqualify a judge from proceeding.[20] However, determining what is and is not a direct financial interest is capable of causing difficulty; and raises the interesting question of whether a judge hearing any cause of action is best placed to make a decision on whether (s)he should disqualify him/herself.

The issue of disqualification for interest is but one aspect of bias. In *Gough,* it was held that the test for deciding whether a tribunal was disqualified from dealing with a case was whether, having regard to the relevant circumstances ascertained by the tribunal, there was a real danger of bias on the part of the relevant members of the tribunal in question, in the sense that they might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of the party to the issue under consideration by them.[21] Illustrations of general bias are littered across English law.[22]

All courts in England and Wales apply the principle of *audi alteram partem* the essence of which is that the only fair way of arriving at correct decisions in respect of any dispute is for the tribunal to hear all that is said on each side. One commentator has observed that the rationale for this is: "... there is a requirement of logic that we should allow the putative agent to correct misinterpretations or disavow the intention imputed to him or otherwise disown the action ..." (Lucas 1980, p.86). As Lyons rightly points out, however, procedural fairness merely requires that an individual has a right to be heard: the right need not be exercised and can be waived (Lyons 1965, p.205).[23]

Bound up with the principle of *audi alteram partem* is that a judge should only act on evidence and arguments placed before him or her. In essence, the principle is designed to ensure that tribunals should not be influenced by external factors.

Another of the principles underpinning the notion of procedural justice is that the best way of ensuring that just decisions can be seen to have been reached justly is by the

provision of reasons for them (Lucas 1980, p.79). Sound and correct reasons ensure public confidence in a system of justice and enables any reasons given to be subjected to criticism, assessment and, where it is believed reasons betray fundamental misunderstanding or mistake, a right of appeal (assuming that such a right exists).

Generally, decisions should only be reached after *due deliberation.* A party to legal or judicial proceedings might well have cause to feel aggrieved if, after a cause of action has lasted several days, a final adjudication is reached in a matter of moments. However, as Lucas points out, there are many complaints about delays in the administration of justice, which are considered to be contrary to the public interest, as well as, in some instances, contrary to the interests of justice (1980, p.95). For example, in criminal and civil proceedings it is not unusual to expect witnesses to recall events which have occurred many weeks, if not months or years, previously. While police officers may refer to notes "made at the time", and witnesses may refresh memory, out of court, in respect of statements made at or near the time of the events the subject of enquiry,[24] it may be expecting too much of any person to have a clear recollection of incidents after the lapse of several weeks or months.

In an effort to mitigate the worst effects of delay, the incoming Labour Government of 1997 embarked upon a strategy of speeding up the summary justice process, which found its nemesis in the Narey proposals which have been embodied in the Crime and Disorder Act, 1998. The danger of injecting greater speed into any of the justice processes is, of course, in creating the very injustice it is hoped to defeat. As is argued below, the intentions of the Labour Government may have just such an unintended effect. Whilst important issues of principle arise in respect of due deliberation and conflict with the avoidance of delay, it is useful to weigh in the balance the extent to which some procedural rules devised either by Practice Direction in the higher courts or by statutory Rules and other procedures developed by, amongst others, the executive,[25] contribute towards delay, particularly in the criminal justice process.

Of crucial importance to an understanding of procedural justice issues is the suggestion by many distinguished lawyers that litigants should have the right to *legal representation* (Denning 1949, p.24). Beyond the issue of legal aid is the notion of an independent legal profession. In England and Wales, there remains a separation between the Bar (barristers) and the Law Society (solicitors). The Bar, with its strong emphasis upon advocacy in the courts, has found its "monopoly" on rights of audience in the higher courts seriously weakened in recent years. The Law Society has fought a strong case for solicitors to have rights of audience in the higher courts; and is now seeking a greater judicial role (these issues, generally, are beyond the scope of this study). However, the dispute emerging between the Bar and the Law Society over, among other things, rights of audience, has provided the Government with opportunities to legislate and regulate the professions in a manner that would neither have been embarked upon by previous governments, nor contemplated by the professions.[26]

In criminal justice, issues are obscured by the manner in which legal representation is secured. For example, in the prosecution of criminal offences, the Crown is represented by the Crown Prosecution Service (CPS) which has a team of lawyers of its own.[27] The CPS may turn to its own lawyers or civilian staff[28] to conduct prosecutions on its behalf, particularly in the magistrates' courts; or may instruct a barrister to represent its interests, more likely in the higher courts, although some Crown Prosecutors enjoy the right to appear in the Crown Court.[29] Unless a defendant has access to private means, he is more likely to be represented by a solicitor acting under (prior to 2001) a legal aid certificate which, depending upon the gravity of the allegation and the complexity of the issues, may entitle him or her to representation by a solicitor alone, solicitor and barrister (and less often Queen's Counsel).[30] The Legal Aid scheme was administered by the Legal Aid Board.[31] To meet social obligations in ensuring skilled and professional legal advice was available to the citizen, governments provided that, for example, in the criminal jurisdiction, legal aid was available to those accused of criminal offences, subject to them meeting an interests of justice and means test.[32] Rights, responsibilities and obligations seem likely to be

tightly circumscribed following enactment of Government's proposals for a new Criminal Defence Service, set out in sections 1–18 of the Access to Justice Act, 1999.

Without pursuing publicly funded legal representation before the courts any further, the centrality of the issue to this study is found in those who suggest that without effective legal representation and advocates willing to defend unworthy causes, freedom and the rule of law cannot be guaranteed. In an address to the Malaysian Bar in 1991, Lord Alexander of Weedon Q.C. observed: "Without a democratic society you cannot have an independent legal system and independent legal profession. But without such a system of law and such a profession to practice the law, you cannot have true democracy. So democracy and the law are true pillars of a free society".[33] Macmillan, a former Law Lord, made the same point: "... the experience of every civilised community has shown that it is indispensable to have a class of men skilled in advising the citizen in the vindication of rights before the courts to which the State delegates the task of dispensing justice in accordance with the law of the land" (Macmillan 1938, p.173).

The need for a strong, independent, legal profession was emphasised by Macmillan, for without it, he argued, an independent judiciary might cease to exist. He considered that it was only when the respective claims of each party to a cause had been thoroughly tested before an impartial third party that the chance of error in the ultimate decision making process was reduced to a minimum "... That is why it has been said that a strong Bar makes a strong bench. It is, then, a contributory and essential element to the process of the administration of justice that the profession of the advocate disciphers a public function of the highest utility and importance" (Macmillan 1938, p.175 – 176). The principled position of Macmillan finds echoes throughout the Commonwealth and finds expression particularly where the legal profession might find itself at odds with the State.[34]

For many years, governments have been concerned about the ever increasing cost of legal aid and the incoming Labour Government of 1997 introduced legislative reform

which is likely to have a significant impact in the years ahead, not least in the appearance of impartiality in the administration of justice.[35] Implementation of the Human Rights Act, 1998, incorporating Article 6 (3) (c) of the ECHR into English law, will strengthen the entitlement of the impecunious to free legal aid, if the interests of justice require it.[36] More generally, implementation of the Human Rights Act, 1998, buttresses case law which has developed the notion of procedural justice, and is considered in Part Four, chapter 8.

There are fine checks and balances here, easily disturbed, which demonstrate that not only do the impecunious merit legal assistance to protect fundamental rights, but that also those with the task of reaching judicial decisions are more likely to reach a well informed decision when a justiciable issue has been fully litigated on both sides. It may be that, in their drive for economy, and restricting the availability of legal aid, successive governments have disturbed those checks and balances in favour of the State.

There are many other principles which underpin the notion of procedural justice including, for example, those developed in the Court of Appeal; and statutorily under, for example, the Police and Criminal Evidence Act, 1984, and the Bail Act, 1976; as well as those related to the *burden and standard of proof*, which impact directly and influence thinking upon what it means to act judicially.

However much jurists emphasise the essential features of procedural justice and the way in which those features, individually or collectively, are essential to the application of substantive law, when exposed to criticism not all procedures are without difficulty. That is not to criticise the aim and intention of those procedures, but to acknowledge that, on closer examination, it would be naïve to assume that justice is an inevitable outcome when procedures are followed which are intended to

ensure that the substantive law is properly applied. As Lucas correctly observes :-

> "... Even if all procedural requirements are observed, it is still possible for the wrong decision to be reached, one that not merely disappoints a man's hopes, but is so far from being reasonable that he cannot be expected to accept it ... But justice is something we cannot guarantee in this imperfect world. The best we can do is to provide some guarantees against some sorts of injustice ..." (Lucas 1980, p.73).

Irrespective of the romanticised notion of judicial independence that may exist in the Commonwealth, Gauldron J is surely correct in his analysis that the reputation of the courts and the independence of the judicial process are bound up with the courts acting in accordance with the principles of procedural justice. However, with the increasing encroachment of British governments into the procedural justice arena, such guarantees as may remain against some sorts of injustice are being significantly eroded – the issue at the core of this study.

Judicial Independence – the British Perspective

With an exposition of the constitutional position regarding the separation of powers from Australia, drawn, it is claimed, from the Westminster system of responsible government, principles emerging which enable some assessment to be made of what it means to act judicially, and Bingham's ringing endorsement of the need to guarantee judicial independence, it might be considered the issue of judicial independence in Britain is relatively straightforward. However, standard works on constitutional law in Britain probably agree only that judicial independence means that High Court judges may not be dismissed without an address by both Houses of Parliament. When exposed to examination, what this means is not entirely clear (Jackson ed. Spencer 1989, p.369). Others have sought to define judicial independence, noting that it meant independence from improper pressure by the executive, litigants and pressure groups; and that such independence was a condition of impartiality and therefore of fair trials;

and that it made for a separation of powers which enabled the courts to check the activities of other branches of government (Bailey and Gunn 1991, p.225).

However, the extent to which Bingham is able to argue that there is separation between legislature and executive on the one hand, and the judiciary on the other, is by no means free from doubt. Stevens, reviewing the issue in the light of his examination of papers in the LCD, could go no further than suggest :-

> "... Perhaps the most acceptable way of characterising the role of judicial independence in England is to say that, while the independence of the judiciary is casual at best, the English have a strong commitment to the independence of individual judges." (Stevens 1993, p.5).

As has been noted,[37] Macmillan considered that the State delegated to the judiciary the task of dispensing justice in accordance with the law of the land. This notion of delegation, with its necessary implication of an element of a line of accountability, finds support in the work of Ashworth (1992, p.42–43). Ashworth argues that judicial independence insists that, in individual cases, members of the judiciary should be in a position to administer the law without fear or favour, affection or ill will, and that no pressures upon the court to decide one way or the other should be countenanced. From what Ashworth concedes is a minimalist conception of judicial independence, he argues the indefensibility of any proposition that if Parliament passes detailed legislation on, for example, sentencing matters, it is infringing the principle of judicial independence. Without minimising the achievements of the Court of Appeal in the development of a jurisprudence of sentencing, Ashworth nevertheless emphasises that the Court of Appeal's jurisprudence does not establish a constitutional entitlement to the sphere of, for example, sentencing policy; and that Parliament can legislate on such matters just as freely as on other major areas of social policy, such as taxation and unemployment benefit.

In examining the Criminal Justice Act, 1991, Ashworth suggests the idea behind the legislation is that sentencing policy should be developed by a partnership between the legislature and courts and that, in making such a proposal, the White Paper of 1990, which preceded the legislation, showed a much finer appreciation of the constitutional arguments. According to Ashworth, the White Paper (Home Office 1990, paragraph 2.1) demonstrated that the principle of judicial independence led to the proposition that there should be no interference with outcomes in individual cases, or other sources of bias; and that sentencing policy should be determined in the way and by the body that Parliament deems appropriate (1992, p.43).

There are difficulties arising here, not only in the extent to which the legislature might delegate to the judiciary any of its functions, implying an element of a line of accountability; but also that the legislature and courts should work in partnership, arguments which, between them, are surely the antithesis of any notion of separation developed in the Commonwealth. Ashworth also draws attention to what this study will argue is the reliance of the executive upon emerging "new public management" principles, not the least of which is accountability. Ashworth's argument that judicial independence extends little further than the notion that governments should not try to influence the decisions of the courts in individual cases might have found expression in the White Paper (Home Office 1990) which preceded the Criminal Justice Act, 1991, but it was to re-emerge with widespread ramifications for the independence of the judicial process in the Police and Magistrates' Courts Act, 1994. Whilst finding support among managerialists, made manifest in the Criminal Justice Act, 1991, and the Police and Magistrates' Courts Act, 1994, Ashworth's approach is not shared by all practitioners: Rutherford (1992, at p.100-101) finds at least one justices' clerk taking a much broader view, a view which, it will be argued, was ultimately accepted by Government when enacting s.89 of the Access to Justice Act, 1999, thereby diminishing the force of Ashworth's argument. These issues are more fully examined below.

That the constitutional position regarding any separation of powers in Britain remains obscured was highlighted by the Lord Chancellor in a seminar on criminal court procedure, delivered in Beijing, on 13th September, 1999, when, whilst arguing that in England and Wales the legal system is divided among a number of Government

Ministers and Departments and Agencies, he continued :-

> "This division of responsibilities means that Departments and agencies have to co-operate in what today we call "joined up government". This year we published a joint strategic plan for the criminal justice system…".[38]

Aside from what appears to be confusion about what the separation of powers in Britain means, there are significant issues here about the extent to which, if at all, it is appropriate for judges and magistrates to be part of a joint strategic approach which includes major prosecuting agencies, let alone the political aspirations of Government. The notion also seems to be at significant odds with jurisprudence in the Commonwealth based, it was claimed, on the Westminster model. There is, however, a correlation with Ashworth's argument (1992) that an analysis of the Criminal Justice Act, 1991, some six years before the arrival of a Labour administration, suggests that, for example, sentencing policy could be developed by a partnership, between the legislature and the courts. The notion of partnership is capable of causing further confusion, by its failure to elucidate whether the partners may be of equal status, or dependent upon each other in some other way. These points were recognised at least in part by Ian Burns, Director of Policy, LCD, in addressing the Justices' Clerks' Society's annual conference in 1998 :-

> "… the government does talk in terms of a criminal justice system. It expects certain things of the criminal justice system. It will do these things for or to the criminal justice system. It is a very useful tool to have a collective noun which describes the police, the CPS, the magistrates' court, the Crown Court, the legal aid apparatus and so on, without having to spend a paragraph on each

occasion explaining what they mean. We have to be very careful, however, not to allow that useful collective noun to delude us into thinking what we call a criminal justice system was ever designed to be one system or that we are all unthinking and insentient parts of a single mass …".[39]

Burns then explicates his understanding of the criminal justice system in this way :-

"… We are all organisations in the same cause and we ought to recognise the need for collaboration and co-operation in the same cause. We ought not to think that some of the elements of our separate organisations should be ignored in the interests of that cause …".[39]

It might come as something of a surprise to some judges and magistrates to learn that theirs is the same cause as the LCD, police and other prosecuting agencies; and they might well question their role, if any, within the Lord Chancellor's notion of "joined up government".

In his Beijing address, the Lord Chancellor did not hesitate to sweep aside the Australian notion of a distinct separation of powers. He asserted that, in Britain, the doctrine of the separation of powers had never been applied strictly, suggesting that pragmatism rather than dogma was the driving force. There is, as outlined herein, much evidence for his assertion.

Against the backcloth of what can be considered as, at best, something considerably less than the separation of powers explicated in *Wilson,* the Lord Chancellor was quick to emphasise the distinctive role of the judges :-

"Although judges are appointed by the executive and paid for by the State, they must be independent of the Government, with an absolute power to make decisions in their own courts, which can only be overturned by the equally absolute decisions of senior judges in higher courts. In return, the Government

expects the judiciary to carry out its duties impartially, without any bias. Judicial impartiality – the absolute recognition and application by the judges of an obligation of fidelity in law, is a counterpart – the quid pro quo – from the judiciary for the guarantee of the State of their judicial independence."[40]

There seems to be some recognition that at least some procedural justice issues are a matter for the judiciary; and that lines of accountability for judicial decisions is a matter for the higher courts acting in an appellate capacity. However, the major difficulty of the Lord Chancellor's comments were identified by the UN Special Rapporteur, in that there is evidence for suggesting that if government considered judges were trespassing too closely in its activities, it has not been slow to consider a statutory curtailment of it. Nor have senior politicians always been sensitive to trespassing into judicial territory. Stevens finds Mrs Margaret Thatcher MP when Prime Minister expressing the hope in the Ponting case that: "An appropriately severe member of the judiciary would be on hand to hear the case." (1993, p.173).[41] The study will show that concerns of the Special Rapporteur about the independence of the higher judiciary, (op. cit.), pale into insignificance when the summary justice process is examined.

The difficulties of what judicial independence actually means are compounded by the manner in which members of the judiciary, at various levels, hold their appointments. For example, under the Act of Settlement, 1700, High Court judges can only be removed from office on the petition of both Houses of Parliament. Magistrates, on the other hand, hold their office at pleasure following appointment by the Crown on the recommendation of the Lord Chancellor, and may be subject to disciplinary proceedings at the hands of the Lord Chancellor which might take the form of reprimand, suspension or dismissal.[42] The suggestion by Skyrme (1983, p.154) that, in taking action against a magistrate, the Lord Chancellor will only act for indisputably good cause nevertheless leaves much discretion in his hands which, bearing in mind the Lord Chancellor's constitutionally diffuse role as the most senior member of the judiciary, as well as a member of the Cabinet, does not suggest the

magistracy, in principle, can argue its independence from a position of strength; and places it, rather curiously, in a weaker position than other parts of the judiciary.

The extent to which appointments to the judiciary at every level are in the hands of the Lord Chancellor acting under, for example, the Courts Act, 1971, the Legal Services Act, 1988, the Courts and Legal Services Act, 1990, the Justices of the Peace Act, 1997, and the Access to Justice Act, 1999, further compounds the difficulty, if Stevens analysis of the extent to which judicial independence has been compromised by the notion of a career judiciary, striving for promotion at every rung of the judicial ladder, is to be followed (1993, p.169) : there is evidence in this study to support such a notion.[43]

Stevens draws the judiciary ever closer to the heart of the legislature, citing evidence of the extent to which members of the higher judiciary have become embroiled in the activities of government, as, for example, chair of the Law Commission, Chief Inspector of Prisons and chair of Tribunals (1993, p.169–173). Stevens' work, viewed as a whole, traces an uncomfortable history of a close relationship between the executive and the higher judiciary which gives no feeling of separation.

There is little room for doubt that, in Britain at least, tensions continue to exist between members of the judiciary and Parliament, which are unlikely to be resolved until judicial development following full implementation of the Human Rights Act, 1998. It is a striking paradox that the current Lord Chancellor should be found to be an apologist for his own high office, combining judicial, legislative and executive functions, at a time when the Government of which he is a senior member should be enacting legislation incorporating the ECHR, with its clear provision in Article 6 for a fair trial before an independent and impartial tribunal.[44]

Bingham, in dealing with the issue of judicial independence from the perspective of

the judiciary, has suggested that :-

> "What really matters, of course, is that judges should enjoy complete independence while serving as such. The protection accorded to the judges of the higher courts that they enjoy office during good behaviour and are removable only by an address of both Houses of Parliament, has over the centuries proved an executive constitutional guarantee, since no English judge has been so removed … But it has meant that no judge, when giving judgement or deciding what judgement to give, need concern himself with the acceptability of his decision to the powers that be." (Bingham 1996, p.6).

In considering whether the protection afforded to the judges of the higher courts should be extended to circuit judges, Bingham was on safe ground, suggesting there was no evidence to support the notion, and that he could see nothing in the present situation to give rise to practical grounds for concern. However, as is plain from the constitutional quagmire outlined herein, and the somewhat precarious manner in which magistrates hold their appointment, it is by no means clear that Bingham could have spoken with such confidence about magistrates; or justices' clerks performing judicial functions; or members of the professional judiciary operating at a lower level.

Judicial Independence – From What ?

It might be legitimately questioned what or who it is that the judiciary, magistrates and justices' clerks should be independent from. Bingham has dealt with this critical issue succinctly :-

> "The most obvious answer is, of course, independent from government. I find it impossible to think of any way in which judges, in their decision making role, should not be independent of government. But they should also be independent of the legislature, save in its law-making capacity …" (Bingham 1996, p.7).

There is an implicit endorsement here of the Lord Chancellor's observations in Beijing, and Ashworth's analysis (1992), suggesting that the judiciary sits in a line of accountability to the higher courts acting in an appellate capacity; and acknowledging the supremacy of Parliament in its legislative capacity. However, it is intended to show that the present regime, so far as magistrates' courts are concerned, does nothing to encourage a feeling of independence.

Bingham considered two approaches to the issue, the first concentrating on the independence of individual judges in their day to day work of judging. This approach summarised by the Lord Chancellor in a lecture on 6th March, 1991, referred to the function of judges as :-

> "... to decide cases and in so doing they must be given full independence of action, free from any influence. But in order to preserve their independence the judges must have some control or influence over the administrative penumbra immediately surrounding the judicial process. If judges were not, for example, in control of the listing of cases to be heard in the courts it might be open to an unscrupulous executive to seek to influence the outcome of cases (including those to which public authorities were a party) by ensuring that they were listed before judges thought to be sympathetic to a point of view, or simply by delaying the hearing of a case if that seemed to advantage the public authority concerned".[45]

However, in considering an alternative approach to judicial independence, Bingham pointed to the independence of the judge to decide individual cases free from any extraneous influence, and that to exercise control or influence over the administrative penumbra immediately surrounding the judicial process was no more than a part, albeit an important part, of what judicial independence meant. On this approach, according to Bingham, what mattered was not only the independence of individual judges but the independence of the judiciary as a separate arm of government. The judges should, with a large measure of independence, control not only the delivery of

the final judicial product, but also the administrative infrastructure on which the delivery and enforcement of that product depended. Such an approach was promoted by Sir Francis Purchas in September, 1994, when he wrote :-

> "Constitutional independence will not be achieved if the funding of the administration of justice remains subject to the influences of the political market place. Subject to the ultimate supervision of parliament, the judiciary should be allowed to advise what is and what is not an unnecessary expense to ensure that adequate justice is available to the citizen and to protect him from unwarranted intrusion into his liberty by the executive".[46]

In holding back from the views expressed by Purchas, Bingham doubted whether his requirement came anywhere close to being met and he doubted it should. He took the view that, as professional judges, it was right that a very high premium should be based on the provision of an efficient and adequately funded legal system, which was a prerequisite to administering justice. But that even the judges could not overlook the evidence of other pressing claims on finite national resources. Drawing on analogies in education and health, Bingham acknowledged that choices had to be made, under democratic control, and subscribed to the view expressed by the Chief Justice of British Columbia that :-

> "... there are other constitutional principles besides judicial independence, that must be recognised and respected. One principle, possibly equal in importance to judicial independence, is the right of the legislature to decide how public money is to be spent. Thus, I do not support the view that the judiciary should write its own cheque and I have come to realise that it is, in fact, salutary that the judiciary should not have that power. If mistakes are to be made in budgeting or funding operations, it is better that they be made by someone other than the judiciary".[47]

In endorsing this approach, Bingham concedes that, so far as the expenditure of public moneys are concerned, and within the overall parameters of social policy, the accountability of the judiciary to the legislature may be necessary. This study does not argue otherwise. However, the study will show that, in pursuit of greater accountability for the expenditure of public moneys, a driver of "new public management", Government and its civil servants have tinkered with the rules of procedural justice; and created new lines of accountability for members of the judiciary at the lower levels, which enable it to trespass into the judicial decision making process.

Ashworth, in endorsing, at least in part, Bingham's approach, would not take judicial independence to imply autonomy and, as has been noted herein, has suggested that, so far as sentencing matters are concerned, the concept of judicial independence has been given too wide a significance and too much deference (1992, p.43–46, 53–54). He pointed out that, as this study recognises, the constitutional issues have never been clearly or authoritatively settled, and argues that overall responsibility for public and social policy is a matter for the legislature. However, his suggestion that tradition during the twentieth century has been to delegate responsibility to the judiciary, and what Parliament has delegated, it could take back, runs to the core of this study. If Ashworth is correct in his understanding of the constitutional separation of powers, and that Parliament has delegated judicial responsibility to the judiciary, the judiciary must, to some extent at least, sit in a line of accountability to Parliament for the way in which its responsibilities are exercised. That line of accountability is significantly different for some members of the judiciary, for example, High Court Judges, as Blackstone recognised,[48] than for others, for example, the magistracy. It is not the argument of this study that the judiciary should act with complete autonomy. However, Ashworth (1992) and Bingham (1996) raise fine arguments here as to where the line might appropriately be drawn to ensure judicial independence in the application of procedures designed to ensure that substantive law is properly applied. The issues, and the fine lines to be drawn between accountability in a general sense, lines of accountability and responsibility, because of their centrality to the argument

set out herein, are examined throughout this study, but, in particular, in Part Two, chapter 3, and Part Four, chapter 8.

Irrespective of the force of Ashworth's argument (1992), this study identifies a wider agenda by governments than the retrieval of, for example, sentencing policy, from the courts. It is at the critical interface between, on the one hand, the aspirations of the judiciary to reach judicial decisions in individual cases independently, and the aspirations of governments to decide how public money is to be spent and how that expenditure is monitored and controlled, that gives cause for concern. By apparently preferring the approach of the Chief Justice of British Columbia, at a time when the "new public management" agenda was beginning to "bite" in the administration of summary justice and elsewhere, Bingham may have unintentionally exposed the judiciary, at least at the summary justice level, to the significant risk of interference with its independence by managerialists. This study argues that the apparent acceptance by Bingham that the high premium he would place on an efficient and adequately funded legal system might nevertheless be compromised, because of competing political aspirations, provides a rationale for the executive, under the guise of managing, monitoring and controlling public expenditure and exercising its responsibility for the development of social and public policy, to intrude into the judicial process. It also enables governments, at the interface of judicial, legal and administrative functions, to interfere with fine checks and balances which exist to ensure the substantive law is properly applied. This has been implemented at the summary justice level by overcoming what might have been judicial resistance by employing a managerialist strategy designed to restructure the MCS, leaving Magistrates' Courts Committees (MCCs), their staff and, to an extent that will be argued later, the magistracy, accountable to it.

Stevens records that :-

> "Political control through budgetary constraints was most clearly recognised by the Vice-Chancellor, Sir Nicholas Browne-Wilkinson, in his Mann lecture

> 'The Independence of the Judiciary in the 1980s' (1989 Public Law 44). In addition to the usual concerns about freedom from government pressure secured by payment out of the Consolidated Fund, there was "subtler threat" through the executive's control of finance and administration. The theme was the control of finances and administration of the legal system is capable of preventing the performance of those very functions which the independence of the judiciary is intended to preserve. In particular, the Vice-Chancellor saw the fact that ... having court administration reporting to the Civil Service rather than the judges threatened the independence of the judiciary ... Equally threatening was the allocation of funds for legal aid ... A number of judges think that there is some form of Civil Service conspiracy designed to erode the independence of the judiciary and their powers ..." (1993, p.182–3).

This study will argue that Sir Nicholas's prophetic concerns are now writ large, not just above the criminal justice process, generally, but more particularly, the summary justice process. Before exploring these issues, however, it is proposed to review the methods adopted in pursuing this study.

3. Methodology

The study acknowledges the managerialist flavour of criminal justice legislation since 1982, but identifies, in particular, emerging tensions in the magistrates' courts from the second World War to the 1980s, associated with fiscal prudence and probity, culminating in proposals to introduce cash limited funding, which many in the MCS considered intruded upon the judicial process. The study reviews these developments, informed by academic sources, few of which, save for, to some extent, Ashworth (1992) and Darbyshire (1984, 1997a, 1997b and 1999), address issues at the core of this study. Much of the scholarly work on magistrates' courts in the last forty years or so has focussed upon, primarily, the sentencing decisions of magistrates, and their treatment of young offenders (for example, Carlen (1976), Darbyshire (1984), Devlin (1970) and Hood (1962)).[49]

The early brush between administrators, anxious to contain and account for public expenditure, and justices' clerks, anxious to ensure the independence of the judicial process, re-inforced by cash limiting and publication of the Le Vay report,[50] was a portent of and seminal point for massive re-organisation for the MCS. Part Two, chapter 3, of the study contains an analysis of the rationale which underpinned these developments.

Part Two, chapter 4, of the study traces movement from Le Vay to the publication of Government's White Paper, "A New Framework for Local Justice" (Home Office 1992),[51] and examines in detail Parliamentary debate upon the Bill which followed the White Paper, together with an analysis of the subsequent legislation: the Police and Magistrates' Court Act, 1994.

Case Study

The centrepiece of the study, at Part Three, chapters 5 and 6, is a contextualised case study in respect of the county of Hampshire.

Hampshire was chosen as the principal focus for this study because it is one of the larger counties in England and Wales; but, more importantly, because of its significance and centrality to the change agenda. In approving, in 1998, re-organisation of the management and administration of magistrates' courts in Hampshire, the Director, Magistrates' Courts Group, LCD, wrote to the Chairman of HMCC advising that, in his view, the proposed re-organisation was consistent with the national framework for the MCS which was being developed.[52] The Justices' Clerks' Society (the professional, representational, Society of Justices' Clerks in England and Wales (hereafter, the Society)), was taken by surprise. At its annual conference in May, 1998, the Society asked its principal guest, the Lord Chancellor, when the MCS was going to be told of the national framework.[53]

In the face of criticism of provisions contained in the Police and Magistrates' Courts Bill, which it was claimed intruded upon the independence of the judiciary, the Lord Chancellor and his Parliamentary Secretary were at some pains to stress the message of the White Paper (Home Office 1992), that reforms contained in the Bill were intended to provide no more than a minimum level of accountability of the MCS to the Lord Chancellor so that he could fulfil his responsibilities to Parliament, but that, importantly, the MCS was to remain locally managed by MCCs.[54] The case study examines the scope and extent of the minimum level of accountability provided to the Lord Chancellor by the Police and Magistrates' Courts Act, 1994.

The case study also examines the extent to which both Ministers and senior civil servants in the LCD, despite Government assurances about the local management of the MCS, were prepared to influence decisions of HMCC as Government sought to effect significant change throughout the MCS. The case study demonstrates that Hampshire, once re-organised in a manner which accorded with the views of Ministers and officials in the LCD, was used as an example for other MCCs to follow.

The initial impact of the Police and Magistrates' Courts Act, 1994, upon the administration of justice in Hampshire is traced. The unfolding response of HMCC and implementation of the legislation in its area, together with its impact upon the summary justice process, is also examined.

The case study is informed by a large body of papers prepared by and correspondence of the justices' chief executive and justices' clerks in Hampshire, Minutes of meetings of HMCC, annual reports of HMCC, observations made by Her Majesty's Magistrates' Courts Service Inspectorate (HMMCSI) upon the activities of HMCC, confidential correspondence and notes passing between members of HMCC, and correspondence passing between magistrates in the HMCC area, most of which are not publicly available, but have been lodged in an archive in the Institute of Criminal Justice, Faculty of Law, University of Southampton.

Every attempt has been made to excise perceptions of subjectivity in the treatment of Hampshire.

Legislation

Further legislation followed hard upon the heels of the Police and Magistrates' Courts Act, 1994, and both the Crime and Disorder Act, 1998, and the Access to Justice Act, 1999, in so far as relevant to this study, are subjected to careful analysis in Part Three, chapter 7.

Procedural provisions contained in, and Rules made under, for example, the Justices' Clerks' Rules, 1970, (as amended), the Children Act, 1989, and the Crime and Disorder Act, 1998, have enabled a wide range of judicial functions which may be performed by a single magistrate, subject to various restrictions and conditions, to be done instead by a justices' clerk, now employed in, as will be shown, an hierarchical line of accountability which stretches to the LCD. These issues are similarly explored in Part Three, chapter 7, of the study.

Part Three, chapter 7, of the study also examines the unification of the metropolitan and provincial stipendiary magistrates' benches to form a District Bench. The increasing number and impact of the professional judiciary at the summary justice level is considered; as is their accountability to the Lord Chancellor, under the terms of their appointment; and those contained in the terms and conditions of appointment of the Senior District Judge (Chief Magistrate) and deputy, following implementation of the Access to Justice Act, 1999; and the potential for their influence upon the magistracy.

The study argues that, as a result of legislative and other changes during the last twenty years or so, hierarchical lines of accountability have been created for both professional and lay judiciary at the summary justice level, all of which find their destination in the Lord Chancellor and his Department ; and where the professional

judiciary sit in magistrates' courts, the range of judicial work undertaken by the magistracy is diminished.

Interviews

Throughout, the study is informed by a number of interviews.

Interviews were conducted with David Faulkner, a former Deputy Under-Secretary at the Home Office, and his successor. Both were interviewed because, in their key policy advisory role, they gained extensive knowledge of the rationale which underpinned the development of the criminal justice process in the last three or four decades of the twentieth century.

The interview with David Faulkner was particularly important, as he had significant influence upon the development of criminal policy at the Home Office from his appointment as director of operational policy within the prison department in 1980, and subsequently when, as Deputy Under-Secretary, he was responsible for the criminal, general and statistical departments, and for the research and planning units. The interview with David Faulkner was structured to elicit evidence, and his perceptions of it, directly related to the issues which prompted government interest in the magistrates' courts from about the late 1970s. The interview traced the emergence of the "new public management" political agenda, allied to the criminal justice process, and the political, as well as fiscal, "drivers" which were behind it.

The interview with David Faulkner's successor, who had extensive knowledge of the subsequent thinking of policy makers, including those of the incoming Labour administration of 1997, was designed to elicit evidence of the extent to which principles associated with "new public management" had genuinely "taken root" and influenced the thinking of, among others, Ministers in both present and former administrations, and senior civil servants.

Laurence Oates, Director, Magistrates' Courts Group, LCD, and Rosemary Melling, Chief Inspector of HMMCSI, were both interviewed. Bearing in mind the theoretical problem explored by this study, and the extent to which it is argued that principles associated with "new public management", particularly those relating to accountability and fiscal prudence, have intruded upon the judicial process, these interviews were structured to elicit evidence of the extent to which, if at all, issues related to the accountability of magistrates and justices' clerks were central to the thinking of senior civil servants; and whether the taking of independent judicial decisions in individual cases was necessarily incompatible with notions of accountability. The interviews explored, among other things, issues related to the judicial role, if any, of justices' clerks; and the extent to which, in the performance of their functions, justices' clerks could or should be managed. The interviews also explored the extent to which it was considered the magistracy was, should or could be, held accountable, and to whom.

An interview with Ann Fuller, Chairman of the Magistrates' Association (hereafter the Association), was structured to elicit evidence of the Association's perception of the significance of changes visited upon the MCS following implementation of the Police and Magistrates' Courts Act, 1994; the likely impact upon the magistracy of what was then the Crime and Disorder Bill; the judicial role, if any, of justices' clerks; the relevance, if any, of the work of the Advisory Group on Judicial/Legal/Administrative boundaries in the Magistrates' Courts (1997); proposals for the unification of the metropolitan and provincial stipendiary magistrates' benches and the impact of those proposals upon the magistracy; and, more generally, the future of the magistracy. The chairman drew upon her extensive knowledge of the Association and views expressed by its Council, committees and membership, as well as her own knowledge and experience as a magistrate.

Keith Clarke, a former justices' clerk, former clerk to HMCC and training officer for magistrates, was interviewed to elicit evidence relating to his perceptions, in office, of the developing role of justices' clerks in the 1960s and 1970s; and the role actually performed by HMCC during that period.

Interviews were conducted with six justices' clerks, five of whom were also justices' chief executives.

One of the justices' chief executives and justices' clerks, Alan Baldwin, was from the outer London area, formerly justices' clerk of the smallest petty sessional division in outer London (New Spelthorne), but latterly, following local government re-organisation in 1985, one of the larger outer London areas (Hounslow).

By way of contrast, an interview was conducted with the justices' clerk, Terence Moore, at Woodspring, Avon, a busy petty sessional division located at the heart of a popular rural and holiday area.

Two justices' chief executives and justices' clerks in Wiltshire and East Sussex, Paul Wilcox and David Allam, were interviewed to gain the perspectives of office holders in counties. Following the Police and Magistrates' Courts Act, 1994, both MCC areas were organised in a broadly similar manner, but with justices' chief executives with widely differing views.

An interview was conducted with the justices' clerk at Liverpool (now the justices' chief executive for Merseyside), Malcolm Marsh, who was, during a significant period during the 1990s, the Honorary Secretary to the Society. Malcolm Marsh was accordingly in a position to offer perceptions from both the perspective of one of the largest petty sessional divisions in England and Wales, as well as those of a senior office holder of the Society engaging in the change agenda at both national and local level.

The justices' chief executive and joint justices' clerk for West Sussex, and former President of the Society, Kevin McCormac was also interviewed. This office holder was able to offer a further national perspective, following implementation of the Police and Magistrates' Courts Act, 1994, and the Crime and Disorder Act, 1998. The

office holder was also able to offer a comparative reflection upon MCC re-organisation in an area which had contrived to retain justices' clerks against a backcloth of reductions in such posts elsewhere and, in particular, in significant contrast to the activities of the neighbouring East Sussex MCC area.

All interviews with justices' chief executives and justices' clerks were structured to elicit practitioner perceptions of the rationale underpinning governments' interest in the MCS from the late 1970s and responses to them; the impact of and effect upon the MCS following implementation of the Police and Magistrates' Courts Act, 1994; and a prognosis of likely impact and effect upon the MCS following implementation of the Crime and Disorder Act, 1998. Interviewees were also invited to comment upon the current and future role, if any, of justices' clerks and the magistracy.

An interview was conducted with Sue Wade the deputy chief probation officer for Hampshire and the Isle of Wight. Ms Wade not only had extensive knowledge of the jurisdiction which formed the case study, but enjoys a reputation for thinking reflectively about the criminal justice process. The interview was structured to elicit evidence from a practitioner in a related criminal justice agency, which had undergone and was continuing to undergo significant change, of perceptions of the emergence of the managerialist agenda in the public sector and, more particularly, the criminal justice process; issues related to accountability throughout the criminal justice process; and the extent to which re-organisation of the various agencies in the criminal justice process might be considered a prelude to regionalisation.

Less formal interviews were conducted with members of the professional judiciary in both criminal and civil justice fields, about the extent to which, at the lower levels, the professional judiciary considered itself accountable to governments, and LCD; and perceptions of the effect of judicial performance upon the development of a judicial career. Whilst some reference to these interviews is made in the text, perhaps unsurprisingly, most comments were made on the basis of non-attribution. Less

formal interviews were also conducted with magistrates more generally, particularly those at Southampton, and other criminal justice practitioners.

All persons approached, upon being informed of the nature of this study, readily agreed to assist. As is apparent from, in particular, evidence elicited from justices' chief executives and justices' clerks, it is not possible to claim those interviewed represent, necessarily, a general view of criminal justice practitioners. Nevertheless, the opinions expressed by all those interviewed inform and develop the central thrust of the theoretical question addressed in the study.

Conclusion

Whilst the purpose of the study is to demonstrate that the notion of a local independent summary justice process has been fundamentally compromised, it might be legitimately questioned why the issues are considered to be of such importance. It is also necessary to place magistrates' courts and their administration in context, prior to the publication of Le Vay's report in 1989. The next chapter therefore provides a brief historical review of the roles of magistrate, justices' clerk and MCC, together with a brief analysis of the functions performed by them; and an assessment of the extent to which, if at all, magistrates and justices' clerks can properly be considered members of the judiciary.

So far as possible, an attempt has been made to present the study in chronological order. However, the sequence of events and materials relied upon do not always ensure satisfactory achievement of that objective. The study embraces a period which strictly concludes at 31st December, 1999. However, for completeness, some cognisance is taken of events occurring up to 31st December, 2001, which necessarily includes implementation of the Access to Justice Act, 1999, and the publication of Lord Justice Auld's Review of the Criminal Courts in England and Wales, in 2001.

NOTES

1. For example. Holdsworth W.S. (1903-1966), *A History of English Law.* London. Pollock F. and Maitland F.W. (1898), *History of The English Law.* Cambridge. Blackstone W. (1876), *Commentaries on The Laws of England.* London. Stephen J.A. (1883), *History of The Criminal Law of England.* London. Radzinowicz L. (1948-1956), *A History of The Criminal Law* (5 Volumes). London.

2. *R -v- Sussex Justices, ex parte McCarthy* (1924) 88JP3.

3. European Convention for The Protection of Human Rights and Fundamental Freedoms (Rome 1950), Article 6 (1).

4. Locke J. (1794), *The Works of John Locke.* London. Montesquieu, *Esprit Des Lois,* Book XI, Ch. 6.

5. For example, Wade E.C.S. and Bradley A.W. (1931), *Constitutional Law* 8th Edition. London. Longman. At page 36.

6. McLeachern A. The Hon. Chief Justice. Judicial Independence, paper delivered to the Commonwealth Law Conference, Vancouver, 8/96.

7. *Wilson -v- Minister for Aboriginal Torres Strait Islander Affairs, 70 ALJR 743.*

8. Interview. Oates L. Director of the Magistrates' Courts Group, Lord Chancellor's Department, 16/4/98.

9. Skyrme T. (1983) *The Changing Image of the Magistracy.* MacMillan. 2nd ed. P.154. For the power of appointment and removal of magistrates, see section 1 (2) of the Administration of Justice Act, 1973, providing the Lord Chancellor with unqualified power to appoint and remove magistrates on behalf of the Crown.

10. Interview. Oates L. Op. cit.

11. *Wilson -v- Minister for Aboriginal Torres Strait Islander Affairs, 70 ALJR 743.*

12. Moore H. (1910) *The Constitution of the Commonwealth of Australia* 2nd edition, at page 101.

13. *R -v- Davidson (1954) 90 CLR353 at 380-381.*

14. *R -v- Trades Practices Tribunal : Ex Parte Tasmanian Breweries Ltd (1970) 123 CLR 361 at 390-393.*

15. Vile (1967) *Constitutionalism and the Separation of Powers,* at pages 104 - 105.

16. 1 Bl Comm 298.

17. Act of Settlement, 1700. 12 and 13 Will 3 c 2.

18. Hart H.L.A. (1961) *The Concept of Law.* Clarendon Law Services, at pages 29-33.

19. Op. cit., at pages 753-754.

20. *Dimes -v- Grand Junction Canal (1852) 3 HLC 759.*

21. *R -v- Gough (1993) 2 AER 724.* (As modified in *Re Medicaments Ltd. No.2 (2001) 1 WLR 7000* to accommodate the 1950 ECHR).

22. For example, *R -v- Altrincham Justices, ex parte Pennington (1975) 2 AER 78.*

23. And see, for example, the Criminal Evidence Act, 1898.

24. For example, *R -v- Richardson (1971) 2 AER 773.*

25. *A Report of the Pre-Trial Issues Working Group,* 1990 established under the auspices of the Ministerial Trilateral Group in November, 1989, examined, amongst other things, preliminary issues in the criminal justice process; and delays in processing cases in the criminal justice system.

26. The Access to Justice Act, 1999, sections 1-18.

27. The Prosecution of Offences Act, 1985.

28. The Crime and Disorder Act, 1998, section 53, inserts a new section 7A into the Prosecution of Offences Act, 1985.

29. The Prosecution of Offences Act, 1985, section 4; as amended by the Courts and Legal Services Act, 1990, section 125 (3), Schedule 18, paragraph 51; and the Access to Justice Act, 1999, section 106 and Schedule 15, Part 11.

30. The Legal Aid in Criminal and Care Proceedings (General) Amendment Regulations 1993.

31. Legal Aid Act, 1988, section 3.

32. Legal Aid Act, 1988, Part III.

33. Das Cyrus V. (1999) *Role of Non Judicial and Non Parliamentary Institutions:The Practising Legal Profession. Reported in Parliamentary Supremacy and Judicial Independence : A Commonwealth approach.* Ed. John Hatchard and Peter Slinn. Cavendish Publishing Limited, at page 83.

34. Muzaffar C. (1983) *2CLJ 231.*

35. Access to Justice Act, 1999, sections 1-18.

36. The Human Rights Act, 1998, was implemented on 2/10/2000.

37. Op. cit.

38. Irvine of Lairg (Lord). The Lord Chancellor. In an opening speech in a seminar on criminal court procedure to the People's Republic of China, in Beijing, on 13/9/99.

39. Burns I. Director of Policy, Lord Chancellor's Department, in an address to the Justices' Clerks Society's annual conference in May, 1998, reported in *The Justices' Clerk, the Journal of the Justices' Clerks' Society,* No. 166, September, 1998, at pages 156-164.

40. Irvine of Lairg (Lord). The Lord Chancellor. In an opening speech in a seminar on criminal court procedure to the People's Republic of China, in Beijing, on 13/9/99.

41. Oliver D. (1986) *Independence of the Judiciary, Current Legal Problems.* London. 1986. P.237-43.

42. Justices of the Peace Act, 1997, section 5.

43. Non-attributable evidence from District Judges (Magistrates' Court) and those operating at a similar level in other jurisdictions.

44. European Convention for The Protection of Human Rights and Fundamental Freedoms (Rome 1950), Article 6 (1). *Starrs -v- Procurator Fiscal, Linlithgow*, a decision of the High Court of Justiciary, *The Times, 17/11/99*, where it was held that a judge who had no security of tenure and whose appointment was subject to annual renewal was not "independent" within the meaning of Article 6.

45. Purchas F. What is happening to judicial independence? *New Law Journal.* 30/9/94 at 1306, 1308.

46. Ibid, at page 1324.

47. McLeachern A. The Hon. Chief Justice. *Judicial Independence*, paper delivered to the Commonwealth Law Conference, Vancouver, 8/96.

48. Op. cit.

49. For example, Carlen P. (1976) *Magistrates' Justice*. London. Martin Robertson. Devlin K. (1970) *Sentencing Offenders in Magistrates' Courts*. London. Sweet and Maxwell. Hood R. (1962) *Sentencing in Magistrates' Courts*. London. Stevens. Moxon D. (1983) *Fine Default, unemployment and the use of imprisonment*. London. Home Office Research and Planning Unit. Parker H., Jarvis G. and Sumner M. (1989) *Unmasking the Magistrates*. Open University Press. Streatfield. (1961) *Report of the Interdepartmental Committee on the Business of the Criminal Courts*. Cmnd 1289. London: HMSO. Tarling, R. (1979) *Sentencing Practice in Magistrates' Courts*. Home Office Research Unit Study. London: HMSO. Walker N. (1972) *Sentencing in a Rational Society*. Harmondsworth. Penguin. Et al.

50. Home Office (1989), *Report of a Scrutiny into the Magistrates' Courts Service*. London : HMSO.

51. Home Office (1992), *A New Framework for Local Justice*. Cm 1829. London: HMSO.

52. The private papers of the former justices' clerk for Southampton and the New Forest in Box 1, lodged in the Institute of Criminal Justice, Faculty of Law, University of Southampton.

53. *The Justices' Clerk. The Journal of the Justices' Clerks Society*. Issue 166. September, 1998, at page 137.

54. Home Office (1992), *A New Framework for Local Justice*. Cm 1829. London : HMSO.

PART ONE
CHAPTER 2
THE MAGISTRATES' COURTS SERVICE

Introduction

The history of the magistracy, stretching back more than six centuries, has been explored at some length by Skyrme (1994). It is not pursued further here. Prior to the Summary Jurisdiction Act, 1848, the procedure of magistrates was not generally formalised. However, that statute regularised the matter by providing that, among other things, magistrates had to sit in a courthouse, and that at least two had to be present at a hearing (there were some exceptions). While subsequent summary jurisdiction legislation has built upon the statute of 1848, vestiges of it remain today.[1] The modern MCS is very much a creature of statute.[2]

This study addresses, in particular, changes wrought in the MCS in the 1980s and 1990s and the reasons for that. To gain an appreciation of the significance of these changes to the magistracy, it is proposed to review, albeit briefly, the development of the MCS since about the middle of the twentieth century.

Magistrates

(i) Appointment

In 1945, it was possible to secure appointment as a magistrate through appointment to a commission of the peace by the Lord Chancellor (or the Chancellor of the Duchy of Lancaster), or by virtue of holding a public office: by 1973, the latter method of appointment had been eliminated. In 1945, there were 344 commissions of the peace for England and Wales and, by 1948, it was estimated the number of magistrates on the Active List of these commissions was about 16,800. The Lord Chancellor considered the number of magistrates too large and set about reducing

them. However, following an increase in workload between the 1950s and 1970s, numbers had risen by 1977 to 23,400 (Skyrme 1994, p.739).

Presently, there are 30,000 magistrates in England and Wales (Skyrme 1994, p.744), and new magistrates are appointed to a commission of the peace by the Crown, on the recommendation of the Lord Chancellor, who is advised by local advisory committees (which comprise, predominantly, local magistrates with some non magistrate involvement).[3] It is the function of the Lord Chancellor's advisory committees to select for the Lord Chancellor's consideration candidates for the magistracy with the necessary judicial qualities for appointment; to ensure that magistrates fulfil their obligations effectively; and to review and report annually to the Lord Chancellor on the magisterial position in their respective areas and to draw to his attention any need for additional appointments, including the need for the appointment of a stipendiary magistrate.[4]

The nature of appointment to the magistracy is of some significance to the general thrust of this study. The present advisory committee structure, which emerged after a recommendation by the Royal Commission on Justices of the Peace (1948, Cmd. 7463, paragraph 18), does not restrict in any way the Lord Chancellor's freedom of choice in selecting and appointing magistrates. Advisory committees are not statutory creations and exist merely to assist the Lord Chancellor in finding suitable candidates and in keeping him informed of the state of each bench. He was and remains under no obligation to accept any recommendation for appointment. The Lord Chancellor alone is responsible to the Crown and to Parliament for the effectiveness of the system and retains complete freedom to act as he thinks fit (Skyrme 1994, p.780). Only the Lord Chancellor has power to take disciplinary action against a magistrate, retaining power to reprimand, suspend from sitting for a period, or remove a magistrate from the commission, powers which he would only exercise for indisputably good cause (Skyrme 1983, p.154).

Magistrates, then, are identified as being suitable for appointment by advisory committees which are themselves appointed by the Lord Chancellor; appointed by the Crown on the unfettered recommendation of the Lord Chancellor to hold office at pleasure; and are subject to disciplinary proceedings or dismissal by the Lord Chancellor. As will be demonstrated shortly, the Lord Chancellor retains ultimate responsibility for the training of the magistracy, and retains a Training Officer for that purpose, and all those who advise or assist the magistracy in a professional capacity are employed in lines of accountability which run directly to the Lord Chancellor or his Department.

(ii) Jurisdiction

The magistracy, generally, is resistant to any notion that it is any less independent than the professional judiciary, a position which was, for example, in 1990, put unequivocally by one practitioner, the chairman of the Bristol magistrates, suggesting that :-

> "... From the moment of appointment and throughout their tenure, justices must be reminded that they are Her Majesty's judges in the full meaning of that expression – i.e. part of the judiciary, distinct and separate from the executive and legislature. In this context the separation of powers is not a constitutional abstraction, but one of the most powerful tools of control. The separation of the legislature is fully understood, in that justices know that they do not make laws but obey and enforce those made by parliament. However, because of the peculiar duopoly of the Home Office and the Lord Chancellor's Department the distinction between justices and executive agencies is not always fully understood and appreciated. Justices must be made aware that the priorities and aspirations of the executive are often at variance with those of the Court: the explicitly political priorities of the Home Office, the resource and career priorities of the police, the forensic services, the Vehicle Licensing Authority, the Crown Prosecution Service, the prison and probation services cannot and must not take precedence over

> those of the court, nor must the explicitly commercial aspirations of the legal profession be allowed to do so." (The Magistrate, The Journal of the Magistrates' Association, July/August, 1990).

It is legitimate to question the evidence upon which this author drew. That examination reveals little recent critical scholarship to support her contention is not wholly surprising when the history of the magistracy is reviewed.

An ill defined statute of 1195, issuing commissions to certain knights to preserve the peace in specified unruly areas, represents the first written reference to justices of the peace. Within a hundred years, in 1285, the Statute of Winchester appointed Keepers of the Peace whose task was, with the Sheriff, to arrest wrong-doers and assist in keeping the peace. A statute of 1327 provided for the assignation of good and lawful men to keep the peace. In 1329 the commission of the peace bestowed upon those with power to keep it further powers to arrest, try and punish offenders. Jurisdiction developed and Kiralfy (1958) records that by a Statute of 1345 "... two or three the best of reputation be assigned Keepers of the Peace by the King's Commission and with other wise men and learned in the law be assigned to hear and determine felonies and misdemeanours." A statute of 1361 introduced into each county a special commission to include one lord, three or four of the most worthy in the county, together with some learned in the law. The statute contained wide powers to hear and determine felonies and misdemeanours. By the following year, quarter sessions (the direct predecessor of the present Crown Court) had been established. Skyrme (1994) traces the development of the jurisdiction of magistrates, over the centuries, as they have embraced a criminal jurisdiction alongside a range of what were regarded as local government responsibilities. There can be little doubt that since their inception their "local government" and judicial role has been central to the governance of the country and in generating the perception, if not the reality, of local democracy. The Victorian reforms saw an end of most local government responsibilities, leaving magistrates with, primarily, a criminal and civil law jurisdiction.

Today the functions of magistrates are all but proscribed by statute. Jurisdiction is presently derived from the Justices of the Peace Act, 1997, which provides that the commission of the peace for any area shall be a commission under the Great Seal, addressed generally and not by name, to all such persons as may from time to time hold office as justices of the peace for the commission area (s.3). It is nevertheless significant to note that, in recent years, as attempts have been made by Parker, Sumner and Jarvis (1989) to 'unmask magistrates', by Darbyshire (1984) to examine the role of magistrates' clerks, and by, among others, Ashworth (1994) to describe the criminal process, no significant evaluative critique of the magistracy has emerged. Indeed, such academic writing as there has been has merely emphasised their importance (Darbyshire 1997a, 1997b and 1999).

Whilst it is not suggested here that magistrates do not perform a judicial function, (there is no other purpose in appointment), this study nevertheless questions the extent to which it can be maintained that, if at all, the magistracy is, as the chairman of the Bristol magistrates had it, part of the judiciary, distinct and separate from the executive and legislature.

(iii) Workload

The critical significance of magistrates in the criminal justice process is in their workload: about 95 per cent of all criminal offences prosecuted before the criminal courts in England and Wales commence before them. The vast majority of these cases are disposed of, to finality, being offences of predominantly a regulatory or otherwise relatively minor nature.[5] However, magistrates also hear, to finality, more serious offences, including thefts and assaults, and in the most serious cases, for example, murder, rape and serious sexual offences, have continued to exercise a committal for trial to the Crown Court jurisdiction, until implementation of the Crime and Disorder Act, 1998, when the significance of that jurisdiction reduced.[6] Primarily at Bow Street, London, cases of general public importance relating to extradition are heard.[7] Magistrates' sentencing powers are limited by Parliament:

for many regulatory and minor offences, maximum financial penalties are proscribed; whilst, for the more serious offences which can be disposed of to finality before magistrates, it is possible to impose a custodial sentence of up to 6 months, and/or a fine of up to £5,000. Powers to impose consecutive sentences of imprisonment and implement previously imposed suspended sentences of imprisonment enable magistrates in exceptional cases to imprison for up to 2 years.[8] It can be readily appreciated that in the exercise of their criminal jurisdiction, magistrates have a wide ranging role to play, the extent and importance of which was emphasised by Darbyshire (1997a) :-

> "... My point was that the jury has already been replaced ... the jury has been replaced for 99 per cent of the defendants and victims who pass through our criminal courts ... the decisions which matter are those of the police and prosecutor as to charge, the defendant's decision as to plea and the magistrates' decisions as to verdict and sentence, aided by their clerks ...".

Whilst acknowledging causes for concern, given the shift of criminal business from the jury to magistrates over the centuries since Blackstone warned against it, Darbyshire (1997b) contended, when responding to a suggestion that allegations of most criminal offences should attract the right to trial by jury :-

> "... it is as irresponsible as it is fatuous to suggest ... that the right to jury trial be restored for all but the most trivial offences ... if we have concerns about magistrates, we had better deal with them ...".

Whilst the pragmatism of Darbyshire is not disputed, nor her assessment of the importance of the magistracy to the disposal of criminal business, her analysis of the extent to which the jury has been replaced is, perhaps, a little distorted when consideration is given to the vast range of offences that can be tried only by magistrates (which include, for example, exceeding the speed limit, road traffic

document offences and other regulatory matters, all of which could as easily be disposed of by way of fixed penalty. The significance of a formal trial before magistrates for such matters has been much reduced for many years).

It is, nevertheless, argued here that such is the extent to which the magistracy is now accountable and its independence compromised in the disposal of all business, that its fundamental rationale needs to be re-visited as a matter of some urgency.

As will emerge in the course of this study, issues of accountability remain central to the change agenda. It is important to note, therefore, that magistrates also exercise a significant civil jurisdiction, exercising concurrent jurisdiction with the High Court and County Court under the Children Act, 1989; and retaining responsibility for, amongst other things, liquor, betting and gaming licensing.

Magistrates are accountable to the higher courts in respect of their judicial decision making, there being, for example, extensive rights of appeal in criminal cases against conviction and sentence to the Crown Court and, where it is alleged proceedings before them were wrong in law or in excess or jurisdiction, a right of appeal to the High Court by way of case stated. Where magistrates have failed to exercise their jurisdiction properly, or at all, or have made an error of law which is manifest on the face of the record, sections 29 and 31 of the Supreme Court Act, 1981, provide a remedy by way of judicial review.

Stipendiary Magistrates

(i) History

A full consideration of the historical development of stipendiary magistrates lies beyond the scope of this study and is explored elsewhere (e.g. Skyrme 1994, p.572). However, it is of note that, in 1792, a private Members Bill was introduced in Parliament, with government support, dealing with a deteriorating situation which had emerged in Middlesex, following the failure of men of integrity to serve

as magistrates; and an overwhelming increase in the volume and seriousness of crime. The Bill was opposed by the Whigs who, led by Fox and Sheridan, were fearful that it increased Crown patronage; and, importantly in the context of this study, they argued that as the existing magistrates were unpaid they were under no obligation to the Government and therefore would have no interest in perverting the law to oppression. It was with the enactment of the Metropolitan Police Act, 1839, that the Office of Chief Metropolitan Magistrate emerged, a salaried, full-time stipendiary magistrate.[9]

(ii) Jurisdiction

The important distinction between a lay and stipendiary magistrate, aside from professional qualification, is that a stipendiary magistrate has power to exercise alone any jurisdiction which can be exercised by two lay magistrates.[10]

Of importance to this study, particularly as it emerged some four years or so after Le Vay (Home Office 1989), a Royal Commission on Criminal Justice of 1993 proposed that :-

> "… there should be a more systematic approach to the role of stipendiary magistrates in the system to make best use of their special skills and qualifications …".[11]

The Association,[12] noting an increase in the number of stipendiary magistrates, both metropolitan and provincial, in discussions with the Permanent Secretary of the LCD, suggested that guidelines might be established to identify more clearly the role of stipendiary magistrates within the system of summary justice. The Working Party which was subsequently established by the LCD acknowledged that there were some members of the magistracy who were philosophically opposed to the appointment of stipendiary magistrates because they believed it was inimical to the interests of justice that one person should determine both issues of guilt and sentence. The report also picked up fears that were expressed of removing

interesting work from the magistracy; and that the Lord Chancellor harboured a secret intention to reduce the role and number of magistrates.[13]

It was evident from the report of the Working Party that its terms of reference did not have as their objectives :-

> "... the provision of interesting, varied or challenging work for the Stipendiary bench on the one hand, or the lay bench on the other; but rather what arrangements should obtain for the fair and efficient administration of summary justice ...".[14]

The Working Party made a number of recommendations with regard to the proper use of a stipendiary magistrate's special skills and qualities, and the type of case which should be listed before her/him. It was considered, however, that: "... the judicial function of listing must be the ultimate responsibility of the court alone ...".[15] This insistence by the Working Party, strongly represented by the LCD, that listing was a judicial function, is of significance and is explored elsewhere.

(iii) Stipendiaries and Justices' Clerks : working together

The Working Party further recommended that stipendiary magistrates and court clerks who advise the lay bench on individual sentencing decisions should maintain a consistency of approach which could be achieved if stipendiary magistrates, the justices' clerks and individual court clerks met regularly to discuss, in particular, sentencing issues. Furthermore, it was considered that stipendiary magistrates should participate with clerks in discussion on more general current legal issues, including new legislation and recent decisions of the superior courts.[16]

Following implementation of the Access to Justice Act, 1999, the LCD distributed a guide to prospective candidates for appointment as Senior District Judge (Chief Magistrate), (the successor post to Chief Metropolitan Magistrate) in January, 2000, which left no doubt that, (regardless of what was found in the legislation), it

was intended that the Senior District Judge (Chief Magistrate) was to have a supervisory role over District Judges (Magistrates' Court), (the successor post to metropolitan and provincial stipendiary magistrate), and was to be in a position to significantly influence their general approach to the resolution of judicial and legal issues. The guide also indicated the Senior District Judge (Chief Magistrate) was to be accountable, in a general sense, to the Lord Chancellor.

By exerting influence upon District Judges (Magistrates' Court), the Senior District Judge (Chief Magistrate) is, in turn, able to influence justices' clerks and court clerks, who, as this study will demonstrate, now sit in a line of accountability that stretches to the Lord Chancellor and his Department. There is here much scope for confusion of roles and, as a consequence, the intrusion of justices' clerks and court clerks into the courtroom judicial decision making process of the magistracy, however remote, cannot be ignored. It could be cogently argued that there is nothing new here and that recent legislation merely re-inforces perceptions and confusion of an earlier era. Skyrme found some evidence that, following the introduction of compulsory training in 1949, the magistracy felt less dependent upon the advice, pronouncements and influence of their justices' clerk (1994, p.829). Darbyshire (1984) nevertheless found evidence of significant influence by justices' clerks and court clerks in the judicial decision making process as late as the 1980s. As the study will demonstrate, confusion about the legitimate scope of the role of a justices' clerk in the judicial decision making process remains and continues to give cause for concern. As justices' clerks are now employed in lines of accountability which stretch to the Lord Chancellor and his Department, confusion over roles and responsibilities creates the potential for those to whom they sit in lines of accountability to influence the summary justice process.

(iv) Enhancing the role of the stipendiary magistrate

The Working Party recommended that where there was a stipendiary magistrate available there should be a presumption that he/she should undertake cases involving complex points of law or evidence; novel points arising perhaps from new legislation; points which may be the subject of further testing in the High Court; cases where the same point had arisen in a number of instances, perhaps under consumer legislation, where the economic consequences of the decision may be of more general application; some mode of trial decisions; cases involving complex procedural issues; long cases (where a case was likely to run for more than 3 days); some interlinked cases; cases involving considerations of public safety; allegations of terrorism; serious firearms offences; cases involving the intimidation of witnesses; public interest immunity applications; and extradition cases.[17] It was also considered that stipendiary magistrates should take a fair share of the more routine business of the court. Whilst it may not have been the explicit intention to reserve the more interesting cases for the stipendiary magistracy, that was the practical effect of the Working Party's recommendation.

It was also suggested that, where possible, and as an aid to the development of chairmanship skills, stipendiary magistrates should sit with lay magistrates; and that as a matter of course, court chairmen should do so as part of their chairmanship training; and that the stipendiary magistrates should be available to make a contribution to the training of lay magistrates, more generally.[18] Whatever criticisms there may be of such proposals, they do provide a further vehicle for influence upon the magistracy.

What emerges from the Working Party's report is a significantly enhanced role for the stipendiary magistracy vis a vis the lay magistracy. The report contains an early indication of what was to follow in the Access to Justice Act, 1999, discussed below.

Debate about the respective advantages and disadvantages of the lay and stipendiary magistracy is not new. As has been noted, Fox and Sheridan were among those to express strong views about the matter in Parliament. Radzinowicz (1956) traces that tension and the rationale which subsequently emerged for the creation of metropolitan stipendiary magistrates and the difficulties associated with such appointments at the time. It is a debate which continued throughout the twentieth century with contributions from, among others, Glanville Williams (1955, p.345-351) and Skyrme (1994). The extent to which that debate is beginning to find statutory definition is explored below.

Justices' Clerks

(i) History

The office of justices' clerk can be traced back to the fourteenth century to origins which are believed to be found in the clerk of the peace, who, in the courts of quarter session, was responsible for drafting writs, indictments and other documents before the court sat, and keeping records of the business transacted and decisions made. The office developed considerably following the Victorian reforms, which, along with historical development, has been traced by Skyrme (1994) and Darbyshire (1984).[19]

According to Skyrme it was a long time before the importance of the key position occupied by justices' clerks, and the duties they performed, was appreciated (1994, p.701). There was no comprehensive evaluation of their duties and responsibilities, or their conditions of service, until 1938, when the Home Secretary appointed a Departmental Committee on Justices' Clerks, under the chairmanship of Lord Roche, a Lord of Appeal, "to enquire into the conditions of service of clerks to justices and their assistants, including qualifications, appointment, remuneration and duties." It is not necessary here to look beyond the Justices of the Peace Act, 1949, which embraced many of the results of the Departmental Committee's recommendations. The legislation required justices' clerks to be qualified as either

barristers or solicitors or by experience and to hold office at the pleasure of appointing MCCs. The legislation made plain the primary duty of the justices' clerk to give magistrates advice, whether at their request or otherwise, about law, practice or procedure on questions arising in connection with their duties.[20]

(ii) Role and function

During the first part of the twentieth century, each petty sessional division and borough with a separate commission had a justices' clerk, usually a local solicitor, who served on a part time basis (Skyrme 1994, p.827). At the time the Justices of Peace Act, 1949, was implemented, Skyrme considered the quality of many justices' clerks left much to be desired. Nevertheless, in the thirty years which followed, while benches, because of improved training, were less likely to accept uncritically the advice of a justices' clerk, the importance of the office and the functions performed by office holders increased substantially. With increased professionalism, MCCs, under pressure from the Home Secretary to reduce the number of petty sessional divisions, reduced the number of part-time office holders. In 1944, there were 732 part-time and 19 whole-time justices' clerks (excluding the metropolitan area). By 1977, there were 62 part-time and 312 whole-time office holders. The process continued through the 1980s, the number of whole-time office holders between 1984 and 1989 reducing from 309 to 275, reflecting the amalgamation of smaller petty sessional divisions into larger clerkship areas, and a fall in the number of part-time office holders from 27 to 7.[21]

With increased professionalism, and an increasing number of whole-time office holders, justices' clerks operating through their Society gained influence and found themselves consulted by government departments on a range of issues. Having questioned the quality of individual justices' clerks, Skyrme notes paradoxically that :-

> "... The evidence which the Society submitted to the various commissions and committees of enquiry into matters relating to magistrates' courts was

usually among the most cogent received from any quarter ..." (1994, p.830).

The range of duties of justices' clerks continued to expand after implementation of the Justices of the Peace Act, 1949, including, by 1966, the addition of a training function on the introduction of compulsory training for the lay magistracy. Following the Courts Act, 1971, and the Local Government Act, 1972, the areas of MCCs were altered and some amalgamations were effected. As a consequence of the legislation, a number of justices' clerks found themselves assuming additional responsibilities as clerks to MCCs.

Justices' clerks assumed responsibility for a wide range of judicial, quasi-judicial and administrative functions, including the power to grant legal aid, collection of fines, fees, legal aid contributions, maintenance and compensation. Court registers had to be properly maintained and summonses and warrants properly prepared. Many justices' clerks also had primary responsibility for the local Lord Chancellor's advisory committees on the appointment of justices of the peace. From a very early time Radzinowicz, perhaps reflecting upon his perception of their importance, thought that Chief Clerks (the equivalent of justices' clerks) in the metropolitan area, were subordinate to only the magistrates (1958, vol.2, p.411).

(iii) Emerging conflicts

Unsurprisingly, with so many duties to perform, justices' clerks became more isolated from the magistrates they were appointed to serve, particularly in respect of legal advice in the courtroom, which eventually provoked a conflict for them: were they lawyers, solely committed to ensuring the bench or benches they served were properly advised ? Or managers, responsible for a complex criminal justice organisation, including staff and other resources ? Or were they some sort of hybrid office holder, between or embracing these two extremes ?

Skyrme (1994, p.836) formed the view that the diversion of justices' clerks to managerial duties, for which they had not been trained, and by creaming off the better office holders for judicial appointments, accompanied by relatively modest remuneration, eventually led to the delivery of a less efficient summary justice process.[22] He draws mostly upon his own extensive experience in forming such a view and while it is difficult to find empirical evidence, there is some support from Glanville Williams (1955, p.363).

(iv) Re-defining role and function

A former justices' clerk, in post between the 1960s and 1980s, was among many who were, towards the end of the 1960s, hoping that the role of justices' clerk would be formally re-defined.[23] He believed that such re-definition would be good for justices' clerks career prospects and, importantly at that time, would attract a cadre of high calibre lawyers into the magistrates' courts. He suggested that the key issues in any re-definition were: (a) the extent to which minor judicial functions might be performed by justices' clerks; (b) the role of the justices' clerk in the courtroom during both not guilty and guilty hearings, (it being, for example, considered advantageous that, during the conduct of a not guilty hearing, the justices' clerk should rule on points of law in open court. Although beyond the scope of this study, the Human Rights Act, 1998, deals with this issue); and that at the conclusion of any evidence given during the hearing, the justices' clerk might give, in open court, a summing up (not a "carbon copy" of judges directions to juries, as magistrates are not a jury).

So far as sentencing was concerned, justices' clerks also considered some re-definition might take place, so that magistrates would have access to important guidance on the development of sentencing principles and have criminological expertise readily available to them. (It is interesting to note the extent to which government has progressed by legislating for a Sentencing Advisory Panel : s.81 of the Crime and Disorder Act, 1998).

Seeking to re-define the role of the justices' clerk was not considered to be without its drawbacks. If, for example, justices' clerks were to absorb minor judicial functions and perform an enhanced role in the courtroom, Clarke considered it essential they should be very competent lawyers because, if it were otherwise, and they consistently reached decisions which were manifestly wrong, there would be an excessive number of appeals to both what was to become the Crown Court and the High Court, overloading jurisdictions already stretched to the limit.[24]

Issues "came to the boil" in the late 1960s, but in fact nothing developed; and the Association was never enthusiastic about the notion of justices' clerks assuming any judicial responsibilities, as it considered the assumption of a judicial role by them went significantly beyond the role they were trained and appointed to perform, and reflected poorly on the status of magistrates.[24] The evidence accumulated during this study suggests that the opinion of the Association has barely changed since. For broadly similar reasons, suggestions made by Lord Parker LCJ, in an address to their Society in 1966, that justices' clerks should be placed on the commission of the peace to perform minor judicial functions, met the same fate.[25]

In the event, the Justices' Clerks' Rules, 1970, were enacted. Responsibilities allocated to justices' clerks under the Justices' Clerks Rules, 1970, did not, nor were intended to, have much impact upon the more efficient despatch of business in the magistrates' courts.[26] However, Rule 3 importantly provided that the things specified in the schedule, being things authorised to be done by, to or before a single justice of the peace for a petty sessions area, might be done by, to or before the justices' clerk for that area. Included within the authorisation was the issue of any summons; the further adjournment of criminal proceedings with, among other things, the consent of the parties; the allowing of further time to pay any sum enforceable by a magistrates' court; and more besides. These were judicial functions. Hitherto, they had been performed by magistrates, appointed to perform judicial functions. For the future, the performance of the functions specified in the

schedule to the Rules was a matter for magistrates or their justices' clerks. This emerging power for justices' clerks to perform judicial functions was to provoke controversy in the years which followed.

The extent to which magistrates had turned their face against the developing role of the justices' clerk is captured by the views of the chairman of their Association, some thirty years later, when commenting upon a further raft of duties and responsibilities allocated to justices' clerks under the Crime and Disorder Act, 1998. She suggested that magistrates were very largely unaware of the manner in which justices' clerks exercised judicial powers and responsibilities. On learning of the proposals put forward by Narey (Home Office 1997), now enshrined in the Crime and Disorder Act, 1998, she suggested the magistracy had been taken by surprise. In some areas, for example, directions hearings (at which procedural directions for the proper conduct of a trial had been considered and given prior to trial) had been conducted by justices' clerks and their staff, which had never been the subject of discussion with local benches. In other areas, the magistracy alone had conducted directions hearings. In other areas still, the magistracy was largely unaware they could conduct direction hearings at all. It was the opinion of the magistracy that the judiciary, and the judiciary alone, ought to control the whole of the judicial process because of the legal and judicial implications which could arise from any decision made prior to trial.[27] The Association took the view that decisions on bail, the request by the defence for an adjournment, and the ordering of a pre-sentence report, were properly for the magistrates: they were not administrative functions. Pre trial reviews should take place before a bench of three lay magistrates or a stipendiary magistrate and held in open court.[28] However, the horse had to some significant extent already bolted; and, as this study will demonstrate, the somewhat naïve view it was claimed was held by the magistracy did not reflect legal and judicial development, as justices' clerks and their staff held early administrative hearings and pre trial reviews, exercising powers they already had under the Justices' Clerks' Rules, 1970, (subsequently amended). Nor was sufficient attention paid to the opinions of Le Vay (Home

Office 1989) and Narey (Home Office 1997), that many of what were believed to be judicial functions were considered by them to be administrative.

As noted, whatever the aspirations of some justices' clerks, by the 1970s the proposals for re-defining their role in the courtroom became obscured as their managerial role developed.[29] According to Clarke,[30] there remained, however, a view among many justices' clerks that they should perform a more clearly defined role in not guilty hearings and pre trial reviews. Those justices' clerks in favour of such re-definition considered that it was best for the ultimate decision maker, the magistrate, to be as much out of the arena as possible when pre trial issues were under consideration. Many things could be discussed by professionals in the absence of the tribunal of fact including, for example, important issues relating to admissibility of evidence, previous convictions and so on. Many justices' clerks at that time considered their role could be effectively re-defined as being analogous to that of judge advocate in court martial appeals. By acting in such a way, they would not be impinging upon the magistrates' decision making role, but enhancing and improving it. However, in busier courts a major draw-back to any proposed re-definition of the courtroom role was that justices' clerks were not available, in sufficient number, to perform it day by day in each courtroom. An army of competent professional assistants was required and it was concluded by many that such an army was simply not available. (It is significant that, as recently as the late 1990s, the Government introduced legislation providing that persons advising magistrates in the courtroom should hold a professional legal qualification,[31] but that such proposals be deferred to afford those already in post a measure of personal protection).[32]

As an alternative to re-defining the role of justices' clerk in the late 1960s, consideration was also given to the recruitment of more stipendiary magistrates. It was concluded that, however, there was probably not an adequate pool from which to draw the number of stipendiary magistrates that would be required. Accordingly, justices' clerks were convinced that it would be a better proposition

for magistrates to accept changes involving a more clearly re-defined judicial role for them, and to support the Society in its cause in seeking to recruit a wider pool of professionals into the magistrates' courts.[33]

There was a real difficulty in the late 1960s and 1970s with the proposals which were then under consideration. The most significant weakness of magistrates' courts at that time was the absence of professionals, of real quality, available to magistrates (Skyrme 1994, p.836). Clarke, apparently confirming Skyrme's view, considered that really outstanding justices' clerks had been very few and far between and he could: "... think of probably only two justices' clerks from 1956 to 1988 of quality ...".[34] It was his view that the MCS needed a blood transfusion, the whole function of the justices' clerk needed to be re-assessed, and there should be an infusion of "full blown" legally qualified and experienced assistants, with pay levels settled as necessary.

(v) Strengths and weaknesses

It is perhaps significant that, looking back to the 1960s, some justices' clerks had already seen the need for radical re-thinking if magistrates' courts were to survive. If, however, there was a lack of high calibre lawyers in the MCS in the 1960s and 1970s, there is no evidence for suggesting the issue was ever addressed. Of more significance, perhaps, is that there was an increase in the number of appointments of stipendiary magistrate,[35] there being some 95 District Judges (Magistrates' Court) in post as at 17th December, 2001: there were 63 metropolitan and provincial stipendiary magistrates in office when Le Vay reported (Home Office 1989, paragraphs 3.1-3.9). That, associated with the extent to which it is argued herein, Part Three, chapter 7, that the magistracy is being marginalised and their jurisdiction emasculated, and justices' clerks invested with further judicial functions, bodes ill for the magistracy's future, in the longer term.

Darbyshire (1984), Skyrme (1994) and Clarke trace, with consistency, the increasing importance to the magistracy, and the criminal justice process more

generally, of the office of justices' clerk. They also highlight, paradoxically, the significant weaknesses in holders of it, as the post developed to embrace a broad range of managerial and administrative functions for which office holders had not been trained; and the tendency among some to exceed their core, advisory role, trespassing into the magistrates' judicial decision making function.

Bearing in mind Government's responsibility for providing a MCS, irrespective of issues of accountability, it is small wonder that it took an increasing interest in those who had responsibility, at the local level, for managing it. More surprising, perhaps, is the criticism from Glanville Williams (1955), Darbyshire (1984), Skyrme (1994) and Clarke, that lack of high calibre competence was as evident among justices' clerks in their core legal and judicial role.

Reflecting on the changes in the role of the justices' clerk over thirty or forty years, Clarke readily acknowledged that one way in which to reduce or diminish the role of justices' clerk was to take away his or her management role which could very easily result in a trimming of salaries. In considering the loss of justices' clerks posts which have followed implementation of the Police and Magistrates' Courts Act, 1994, he noted that, as the legislation had been implemented, the role of justices' clerk had become little more than that of a senior court clerk. He is not alone.[36]

(vi) The judicial role

There is however a paradox here. As the role of the justices' clerk has diminished, his or her judicial functions as a result of, for example, the Justices' Clerks' Rules, 1970, (as amended) and the Crime and Disorder Act, 1998, appear to have increased. That said, for reasons which are explored below, the Government and its officials have doggedly resisted any notion that justices' clerks have or do perform a judicial function.

It has to be acknowledged that the judicial role of justices' clerks is not clear cut. It has however been recognised by two former Lords Chief Justice. Lord Parker LCJ was sufficiently convinced of the way in which the role of the justices' clerk was developing that he would have put them on the commission of the peace.[37] Lord Taylor of Gosforth LCJ, commenting upon this issue in the House of Lords, went so far as to define the judicial role, observing that :-

> "The first category of judicial functions ... is the provision by justices' clerks of advice to the bench on what the law is and how it should be applied to the facts of a particular case. This function is closely akin to that of a Judge in a criminal trial who directs a jury as to the law that it needs to know to decide the case ... In addition, Justices' Clerks exercise some judicial functions in their own right ... For example, in certain cases, they can grant adjournments, renew bail, extend the time allowed to pay fines and (very importantly) grant or refuse legal aid. They also have important responsibilities in family cases under the Children Act."[38]

A contrary view has long been expressed by the Association which, along with Skyrme (1994, p.832), saw the potential in such opinions to sow the seeds which might undermine and ultimately destroy the magistracy. Such arguments sidestep the issue.

However, whatever view may be taken about the judicial functions performed by justices' clerks, as is set out above, the LCD is of the opinion that justices' clerks are not members of the judiciary, having been neither identified as suitable for such a role, nor trained for it, and the Lord Chancellor has accordingly rejected a suggestion that justices' clerks should take the judicial oaths of office.[39] In principle, the opinion of the LCD is not conclusive: if the nature and quality of some of the functions performed by justices' clerks is judicial, a view expressed by the Lord Chancellor (unless sitting in his judicial capacity), or his officials, is neither here nor there. However, it must be conceded that, for practical purposes,

the opinion of the LCD on this issue poses some difficulty. Precisely where that places the status of the judicial functions justices' clerks undoubtedly perform, and the status of justices' clerks as judicial decision makers, remains unclear, a lack of clarity which, it is argued, many seem content to preserve in order to exploit.

Judicial Functions in the Magistrates' Courts – Resolving the Conflict – The Advisory Group on Judicial/Legal/Administrative Boundaries in the Magistrates' Courts

On any analysis, by the 1970s, confusion was emerging around the respective role and functions of magistrates and justices' clerks. That magistrates were appointed to and fulfilled a judicial role has already been explored. However, the justices' clerks performed a wide variety of functions, which seemed to embrace judicial (under the various statutes and Practice Directions), legal advisory, managerial (of resources) and administrative. If the range of functions was not confusing enough, it was not always easy to separate out where one function began and another ended. The judicial and legal role was causing particular difficulty, Darbyshire (1984) and Skyrme (1994) providing evidence that some justices' clerks in the provision of legal advice were capable of trespassing into the judicial decision making arena; while in the performance of functions under the Justices' Clerks' Rules, 1970, (as amended), justices' clerks were capable of making pre trial decisions which could influence the subsequent conduct of a trial. That the confusion and tension engendered was real, rather than illusory, is captured elsewhere in this study, in context. However, it is of note that such was the extent of the difficulty, exacerbated by a request made of the Parliamentary Secretary to the Lord Chancellor by a former Lord Chief Justice to spell out precisely what functions performed by justices' clerks were judicial, (and considered in detail in this study in context), that, by 1996, the LCD had established an Advisory Group to explore the judicial/legal/administrative boundaries in the magistrates' courts. The Advisory Group, chaired by the Director, Magistrates' Courts Group, LCD, comprised representatives of the Magistrates' Association, the Standing Conference

of Justices' Chief Executives and clerks to MCCs, the Justices' Clerks Society, the Association of Magisterial Officers, the Central Council of MCCs, the Chief Executive's Group and two further representatives of LCD.

The General Election was called during the deliberations of the Advisory Group and the incoming Labour Government had a rather different criminal justice agenda.

In a very brief report, containing six pages and twenty one paragraphs, the unidentified author of the report, published in February, 1998, by the LCD, suggested the Group recognised that many of the areas upon which it intended to provide guidance had been overtaken by events. The report reviewed the roles of magistrates recognising that some functions related to the judicial process were, under the Magistrates' Courts Act, 1980, capable of being performed by a single justice. Some of these judicial functions could, however, be exercised by justices' clerks or any member of staff appointed by a MCC to whom delegated power was given by the justices' clerk under rules made under s.144 of the Magistrates' Courts Act, 1980. (This acknowledgement of the judicial functions of justices' clerks, in a report published by the LCD and from a Group upon which the LCD was strongly represented, sat uneasily with the opinion of the Director, Magistrates' Courts Group, LCD, that justices' clerks did not perform judicial functions).[40]

Importantly, the report acknowledged that some functions performed in the magistrates' courts did not fall neatly into one of the three categories, judicial, legal and administrative, and might contain elements of more than one. Apart from the judicial powers of magistrates and the delegated powers of justices' clerks, which were specified in the Justices' Clerks Rules, 1970, (as amended), the report conceded that establishing the exact extent of magistrates', justices' chief executives' and justices' clerks' responsibilities was a matter of interpretation and at different times different views were reached by those considering a particular issue. Disputes could arise as to whether a particular decision was ultimately the

responsibility of the magistrate, the justices' chief executive, or the justices' clerk concerned. It was with a view to throwing light upon "grey" areas where such disputes arose that the Advisory Group was established. Rather than engage in the lengthy and, according to the report, possibly not particularly fruitful endeavour of attempting to categorise all the functions in order to determine who was ultimately responsible for them, the Advisory Group attempted to document some of the areas where responsibility was not clear. It focussed upon date, time and location of hearings (the listing of cases), legal aid, fine enforcement, pre trial reviews, dual appointments of justices' chief executives and justices' clerks, and delegated functions.

Other than identify the problem areas, the Advisory Group concluded nothing at all.

The practical significance of these issues to the change agenda in the 1990s is explored throughout this study, in context. The need to, however, establish an Advisory Group on these issues underlines the extent of the difficulties which had emerged over the preceding decades, and also illustrated muddled thinking at the heart of the LCD.

Magistrates' Courts Committees

With the role and function of magistrate, stipendiary magistrate and justices' clerk located in the MCS, it is now proposed to consider the role and function of Magistrates' Courts Committees (MCCs) and their core responsibility for the management and administration of the courts in which these key persons operated.

It is not necessary to look beyond the 1940s to trace the modern origins of MCCs (Skyrme 1994, p.895 et seq.). In the report of the Departmental Committee on Justices' Clerks (Home Office 1944),[41] it was recommended that MCCs should be established principally to deal with the appointment of justices' clerks and fix the

boundaries of petty sessional divisions. The recommendations of the Departmental Committee were implemented in sections 16 to 24 of the Justices of the Peace Act, 1949. Initially it was enacted there should be one MCC for each county borough and each non county borough with a population of 65,000 or more. Following implementation of the Local Government Act, 1962, there were elected separate MCCs for each district in a metropolitan county, the four outer London areas and the City of London. The Local Government Act, 1985, abolished metropolitan counties and the Greater London Council (and with it the four outer London MCCs). Thereafter, the number of MCCs increased with a separate MCC for each metropolitan district and London borough. By 1989, there were 105 MCCs in England and Wales, a significant reduction from the position in 1945 (Skyrme 1994, p.896).

In 1945, there were 997 petty sessional divisions in England and Wales and the MCCs established under the Justices of the Peace Act, 1949, were empowered and encouraged to submit proposals to the Home Secretary for their amalgamation or the alteration of their boundaries. In the forty years which followed, petty sessional divisions in England and Wales reduced in number to 625 (Skyrme 1994, p.821-822).

The Justices of the Peace Act, 1949, and Rules made thereunder, made provision for magistrates in each petty sessional division to elect one or more members of their respective benches to serve on MCCs. The duties of MCCs at that time included the appointment and removal of justices' clerks and their staff; the division of counties into petty sessional divisions; the provision of courses of instruction for justices of the peace; the general supervision of court administration; and the provision of court houses and other accommodation and furniture, books and other items required by the justices' clerk. These matters were determined by the MCC but there was a requirement for it to consult with the local authority. All resources provided by a MCC to a justices' clerk were, for all practical purposes, managed by him.[42]

It was to the local authority that responsibility lay for the payment of all expenses, including the salaries of justices' clerks and their staff. Any local authority aggrieved by a decision of the MCC on such matters might appeal to the Home Secretary, whose decision was binding.[43]

The rationale underpinning the 1949 Act,[44] was that if magistrates' courts were to be effective, they should be managed on a local basis. Not all members of the Departmental Committee agreed and in a dissenting contribution to the Report it was emphasised that it was fallacious to assume that because magistrates' courts, staffed by local magistrates, could operate to best advantage if organised locally, that necessarily involved resourcing by local authorities, and that there was a case for central administration.[45] Skyrme traces the consequences of the decision to leave funding and resourcing to be determined at the local level, which led in some cases to poor quality buildings and poor staffing arrangements, which in turn had an effect on the quality of justices' clerks. Among the resultant disadvantages were ineffective fine enforcement and an absence of accurate statistical data, all of which thereby reduced, overall, income available to defray expenditure in the criminal justice process (1994, p.896-898). Bearing in mind the fiscal strategies pursued by government, and, as will be demonstrated in the next part of this study, the emergence of "new public management" with its imperative of fiscal prudence in the public sector, this was a matter of concern. However, the notion that it was fallacious to assume that local management necessarily meant local funding did not disappear and, in the years which followed implementation of the 1949 Act, there were suggestions and proposals from a number of organisations for greater central management.[46]

MCC areas in England and Wales were affected by substantial increases in workload following implementation of the 1949 Act, although not necessarily attributable to it. Skyrme (1994, p.902) accounts for the causes of this increase in workload to a significant increase in the number of cases coming before the courts;

the growth in the level of crime; the introduction of more complex procedures; and the advent of legal aid, which was, in his view, also partly responsible for the larger number of pleas of not guilty. (As is evident from the Narey report (Home Office 1997), it is difficult not to conclude that governments and their executive arm find the notion of individuals denying allegations made against them by public officials rather inconvenient and, worse still, expensive). Skyrme traces, in particular, the doubling of the number of persons dealt with in magistrates' courts in the period 1947 – 1967 and a further doubling in the succeeding ten years. That, in itself, did not necessarily display the whole picture because, by the 1980s, cases tended to take much longer to try than they did forty years earlier. Furthermore, legislative activity continued throughout the period contributing, along with legal representation as a result of the advent and development of legal aid, in no small measure to procedural complexity, thereby lengthening the process.[47]

By the 1960s there were many organisations, including the Society, calling for improvements that might lead to a better career structure, training for staff, common standards and the replacement of part-time staff with fewer full-time officers. It was considered that such strategies would, despite significant start-up costs, lead to long term efficiencies in the use of resources (Skyrme 1994, p.897-902).

The Lord Chancellor's office, during the 1960s, was relatively small and there was little or no enthusiasm, at least politically, for expansion. The Lord Chancellor was apparently reluctant to increase his responsibilities; while the Home Secretary and his staff were reluctant to divest themselves of the magistrates' courts. During the 1960s many proposals were made for the centralisation of the administration of magistrates' courts under the Lord Chancellor. For reasons beyond the scope of this study, those representations were resisted. However :-

> "... The basic defects of the system remained, and many well informed people were convinced that it was only a matter of time before mounting

arrears, unnecessary costs, shortage of experienced staff and the need to improve general efficiency would force the Government into assuming overall control through an integrated system for all the courts ..." (Skyrme 1994, p.901).

Regrettably, Skyrme does not elaborate upon precisely whom he had in mind when referring to "... many well informed people ...". Nevertheless, in 1970 a further attempt at centralisation was made. Many of the representative organisations of the MCS were in favour and the Lord Chancellor did not seem to be opposed. However, the County Councils were opposed, whom Skyrme believed were motivated largely by self interest (1994, p.899); there was a moderating of position by the Society, which was concerned about likely terms and conditions of service, having viewed, adversely, those of former County Court staff joining the Court Service; there was a continuing reluctance on the part of the Home Secretary to cede responsibility; and two important political obstacles: a reluctance on the part of Government to embark upon further hostility with local authorities in the light of major reform embodied in the Local Government Act, 1972; and a significant reluctance by any government at that time to increase the number of civil servants.

In the areas, responsibility for servicing the needs of MCCs, whose membership was often as great as 35, varied. For the most part, the role of the clerk to a MCC fell to a justices' clerk who performed the task part-time, in addition to his/her other duties. In some areas the task fell to the chief executive or clerk to a local authority, who would then delegate the function to a member of his/her staff. In the very large areas, for example, the inner London area, a full-time post holder was appointed.[48]

In considering the changing role of MCCs, Clarke could not have foreseen an MCC adopting a formal management role. Prior to 1994, it was firmly understood that, for the most part, (there have always been some exceptions), a justices' clerk would

assume a managerial role in relation to the duties and responsibilities to be performed by a MCC. As he put it :-

> "... the idea that a magistrates' courts committee should manage was anathema."[49]

He always considered that, between justices' clerks and MCCs there was room for consultation. However, it never entered his mind that an MCC should manage anything. It was generally considered that, during the 1960s to 1980s, one person should be responsible for making decisions and should then get on with it.[50]

Approaching the Le Vay Report of a Scrutiny: The Magistrates' Courts Service 1949 – 1989

The brief survey of the developing role of magistrate, stipendiary magistrate, justices' clerk and MCC, reveals that, between the late 1930s and the 1980s, the need for continuing reform of the MCS was recognised and, in part, addressed. Nevertheless, significant issues remained. Workload in the MCS was increasing; the numbers of magistrates increased; the qualification to hold office as justices' clerk, was proscribed, but the duties and responsibilities of office holders increased to include those for which they had not been trained; MCCs evolved, with wide terms of reference; there were continuing expressions of concern about whether the MCS should be managed locally or centrally; and continuing expressions of concern about the legitimate reach of the functions performed by justices' clerks, whether those functions should be enhanced, and whether in any event justices' clerks were of sufficient quality for the task they had to perform.

Compounding uneasy tensions that were emerging about the role of the justices' clerk was the uncertainty surrounding what were properly regarded as judicial, legal and administrative functions.

By 1989, Le Vay reported that magistrates' courts were at the centre of the criminal process, dealing with 95 per cent of all criminal proceedings, and were the channel by which the remaining 5 per cent reached the Crown Court. They enforced fines, dealt with high volumes of domestic cases, applications for liquor and gaming and other licences and a range of miscellaneous other business. There were at that time, 28,000 magistrates; 63 stipendiary magistrates; 58 commission areas; 549 petty sessional divisions varying in size between 7 and 550 magistrates; and 285 clerkship areas. Each bench had a justices' clerk who was a qualified lawyer and whose duties encompassed advice on law and procedure, aspects of day to day management of courts and offices, and liaison with other agencies. There had been a steady reduction in the number of justices' clerks as petty sessional divisions were amalgamated and some justices' clerks appointed to serve several benches. The only organisational unit above the clerkship was the MCC, of which there were 105. There were special arrangements in inner London (Home Office 1989, paragraphs 3.1-3.9).

The radical proposals emerging from Le Vay are explored below, in context.

The factual analysis of Le Vay masked confusion and parochial territoriality at the heart of the summary justices process.

Whilst the magistracy insisted upon its judicial independence, upon any analysis that judicial independence did not attract the security of tenure available to, for example, judges of the High Court. Recruitment, recommendation for appointment, training, discipline and dismissal, all at the absolute discretion of the Lord Chancellor, exercised through, for the most part, his officials, implied something significantly less than the independence Blackstone considered appropriate for the higher judiciary.[51]

Justices' clerks, whatever the importance of the functions they performed, were themselves unclear as to whether they performed a legal advisory or managerial

role, or both. Following many attempts to re-define their role, they were authorised to perform some judicial functions, although the evidence of this study suggests that the magistracy never fully comprehended the range and extent of those functions, nor how they were exercised, and officials at the LCD seemed to harbour at least some confusion as to whether justices' clerks performed judicial functions at all. Irrespective of whatever functions fell to be performed by justices' clerks, the terms upon which they held their appointment, at the pleasure of appointing MCCs, seemed to create further difficulties. MCCs, invested with wide ranging responsibilities upon their creation, seemed to have become, on the evidence of Le Vay and confirmed by evidence in this study,[52] dependent entirely upon their justices' clerks for the management of the magistrates' courts in their respective areas. As has been noted, there were further criticisms from academics, civil servants, politicians and practitioners. All this, against a backcloth of significantly increasing workloads and procedural complexity. It might be cogently argued that, irrespective of any other consideration, some comprehensive review of the MCS was long overdue. However, as Part Two of this study suggests, other factors were at work in the post war years which were to impact upon the MCS and, more generally, the criminal justice process, and it is to those factors to which attention must be turned.

NOTES

1. In the Magistrates' Courts Act, 1980.

2. See, particularly, the Magistrates' Courts Act, 1980, the Justices of the Peace Act, 1997 and the Access to Justice Act, 1999.

3. Justice of the Peace Act, 1997, section 5. Guidance for advisory committees is set out by the Lord Chancellor, from time to time. Justice of the Peace Act, 1997, section 5.

4. (District Judge (Magistrates' Court) following implementation of the Access to Justice Act, 1999. For the purpose of this study, which concludes at 31st December, 1999, the term stipendiary magistrate is retained). Advisory committees fulfil their functions following a procedure that was proscribed by the Lord Chancellor's Department in 1998.

5. For example, a range of minor road traffic infringements, using a television without a licence, vagrancy, drunkenness, prostitution and so on.

6. Crime and Disorder Act, 1998, section 51.

7. Extradition Act, 1989, sections 8 and 9.

8. Magistrates' Courts Act, 1980, section 133 (2) and Powers of Criminal Courts Act, 1973, section 22 (4), (2) and (1).

9. Legislation has provided the Home Secretary and, subsequently, the Lord Chancellor, with power to increase the maximum number of appointments in the metropolitan and provincial areas, from time to time.

   Presently District Judges (Magistrates' Court) must be barristers or solicitors of not less than 7 years' standing. They are appointed by the Crown on the recommendation of the Lord Chancellor.

10. Justices of the Peace Act, 1997, section 14.

11. *The Royal Commission on Criminal Justice*, 1993. Cm. 2663, at paragraph 255. London: HMSO.

12. Lord Chancellor's Department, (1996) *The Role of the Stipendiary Magistracy*, a report presented by a Working Party established by the Lord Chancellor, in February, 1996, at paragraph 1.1.

13. Ibid, at paragraph 1.3.

14. Ibid, at paragraph 1.4.

15. Ibid, at paragraph 4.2.

16. Ibid, at paragraph 4.3.

17. Ibid, at paragraph 5.3.

18. Ibid, at paragraph 6.1

19. Op. cit., at, for example, pages 631-4, 699-704, 827-837.

20. Now to be found in Justices of the Peace Act, 1997, section 45.

21. Skyrme T. Op. cit., at page 830.

22. At least three justices' clerks were appointed Circuit Judges.

23. Interview. Clarke K.C. Hon LLD, FTCL, FRSA, of the Middle Temple and Lincoln's Inn, formerly clerk to the justices, Southampton, 1/5/98.

24. Interview. Clarke K.C. Op. cit.

25. Skyrme T. Op. cit., at page 832.

26. Interview. Clarke K.C. Op. cit.

27. Interview. Fuller A. Chairman of the Magistrates' Association, 20/4/98.

28. The Magistrates' Association Annual Report and Accounts, 1996- 1997, p.2.

29. Skyrme T. Op. cit., at page 832, 833; Interview. Clarke K.C. Op. cit.

30. Interview. Clarke K.C. Op. cit.

31. The Justices' Clerks (Qualifications of Assistants) Amendment Rules, 1999.

32. Since 31st December, 2000, there has been a softening of this position.

33. Interview. Clarke K.C. Op. cit.

34. Interview. Clarke K.C. Op. cit.

35. At 17th December, 2001, there were 95 District Judges (Magistrates' Court) in post: Lord Chancellor's Department Monitoring Judicial Statistics.

36. Interview. Wilcox P. Justices' chief executive, Wiltshire, 15/12/99.

37. Skryme T. Op. cit., at page 832.

38. HL Deb 18/1/94 col.476.

39. Interview. Oates L. Op. cit.

40. Interviews. Oates L. Director of the Magistrates' Courts Group, Lord Chancellor's Department, 16/4/98; and Melling R., Chief Inspector, Her Majesty's Magistrates' Courts Service Inspectorate, 16/4/98, Op. cit.

41. Home Office, (1944). *A Report of the Departmental Committee on Justices' Clerks.* (Cmd. 6507).

42. Interview. Clarke K.C. Op. cit.

43. For historical reasons, not relevant to this study, section 27 of the Justices of the Peace Act, 1949, was enacted to provide that all fines and fees collected in magistrates' courts should be paid to the Home Secretary, who would then return to the local authority an amount representing the proceeds of some fines, plus two thirds of the difference between these and actual expenditure, about 80% of total cost. The Criminal Justice Act, 1972, formalised the arrangement at a ratio of 20:80, (i.e. 20% local authority funding, the remainder coming from central government).

44. Op. cit.

45. Op. cit.

46. For example, the Justices' Clerks' Society: Skyrme T. Op. cit., at page 899.

47. For example, various Criminal Justice Acts.

48. Interview. Clarke K.C. Op. cit.; Home Office (1989) *Report of a Scrutiny with the Magistrates Courts Service.* Op. cit. paragraphs 3.1 to 3.9.

49. Interview. Clarke K.C. Op. cit.

50. Under provisions contained in the Access to Justice Act, 1999, sections 88 and 89, MCCs can delegate to the chairman or justices' chief executive responsibility for any aspect of their business.

51. Op. cit. Chapter 1.

52. Interview. Clarke K.C. Op. cit.

PART TWO

CHAPTER 3

LE VAY AND NEW PUBLIC MANAGEMENT

Introduction

Any review of the magistracy would be incomplete without comment upon its adaptability to meet changing circumstances and the relative stability of the structures which support it (Skyrme 1994). As the previous chapter has noted, however, following the second World War governments began to take an increasing interest in magistrates' courts and, by the end of the 1980s, storm clouds were gathering.

The last twenty years or so have seen fundamental change for the MCS, but underpinning much of it has been Le Vay's Report of a Scrutiny into the Magistrates' Courts Service (Home Office 1989); and the introduction of cash limiting, for which provision was made in the Criminal Justice Act, 1991. Cash limiting, with its focus upon the objectives and priorities of the MCS and the use of resources to achieve those objectives; and Le Vay, with his focus upon weaknesses in the management and administration of the MCS , have their provenance in the emergence and application of principles associated with "new public management", with its twin "drivers" of fiscal prudence and accountability. It is not possible to understand either cash limiting or Le Vay without some understanding of the underlying principles. This chapter will accordingly trace, albeit briefly, the emergence of "new public management" and its centrality to the change agenda in the MCS, before addressing cash limiting and Le Vay in more detail.

New Ideas

The processes of government have changed radically over the last quarter of the 20th century and the United Kingdom is not alone in this respect. Foster and Plowden (1996, p.1) suggest that the ideas behind change derive from two primary

sources: the economics literature on public choice, which sees politics as a market with its own entrepreneurs, rules and conventions; and a wave of business managerialism, mainly brought into the public sector by management consultants, emphasising the decentralisation of business management and outsourcing of as many of its activities as possible. Politicians seem to have uncritically accepted these primary sources.

"New public management" ideas emerged during the 1960s, but more significantly, during the 1970s and 1980s. There are some who argue that the emergence of these new ideas resulting in change were provoked by changes in the international economy in the 1970s.[1] Others have argued that developments, primarily in telecommunications and information technology, made new organisational forms possible and reduced the extent of differences between public and private sector management styles, giving "new public management" its opportunity.[2]

Underpinning such arguments, however, lie other issues, including the impact of the rapid growth in public expenditure from the second World War to the 1970s; growing awareness of the rising cost in taxation of that public expenditure; resistance to that growth from the mid-1970s; and the flattening of that growth that began at the end of the 1970s.[3] Whatever the rationale, the MCS appeared somewhat oblivious to its implications for the summary justice process.

Because of the fiscal crises of the early 1970s, government found it impossible to avoid increases in public spending. Whatever explanations were provided to the electorate, this was met largely through increased taxation of one sort or another and a contribution from the proceeds of privatising significant parts of what was then the public sector. It was only after the 1992 election that attention returned to serious cutbacks (Foster and Plowden 1996, p.16, 17).

From the 1960s, governments had attempted, with little success, to improve their control of public expenditure. The Plowden Committee (Home Office 1961, p.12)

observed that :-

> "... the central problem is how to bring the growth of public expenditure under control, and how to contain it ... different Governments will have different views about the proper size of public expenditure, but all have the same problem of how to keep it within this size".

Fiscal crises continued and during the 1980s and 1990s created pressure to reduce public expenditure. A new initiative to control expenditure throughout the public sector soon became known as the three Es, economy (reductions or cuts in expenditure), efficiency (the ability to get the same or increased output from fewer inputs) and effectiveness (an improvement in the quality of the output) (Foster and Plowden 1996, p.17).

In tracing the emergence of "new public management", Faulkner (1998, p.36) suggests :-

> "The Conservative Government which was elected in 1979 made a determined and single minded attempt to tackle the problems of economic weaknesses as they were perceived at that time. Central to its policies were the control of inflation; the reform of industrial relations including a reduction in the power of organised labour; and reductions or more rigorous control of public expenditure to be achieved by reducing the cost and increasing the efficiency of public services".

Co-incidentally, at about the same time as "new public management" was emerging, Hailsham had discerned, in Britain at least, a shift in political executive power (1978, p. 160-161), and by the late 1980s, Foster and Plowden considered that a significant change had emerged in the balance of power within the executive, reinforced by organisational change (1996, p.32).

Initiatives were taken in, primarily, New Zealand, Australia and the United States of America, as well as Britain. Systematic documentation of "new public

management" thinking emerged in New Zealand in 1987,[4] and by the early 1990s, Osborne and Gaebler's (1992) American study *Reinventing Government*, had captured the public policy audience, (being notably endorsed by the President and Vice President of the United States of America).

Underpinning the various principles of emerging thinking was the separation of purchasing public services, their provision from production, a policy pursued by the British Government in health and education, the creation of executive agencies, and the separation of service and production activities in local government. Foster and Plowden thought there appeared to be much cross-party support for such an approach (1996, p.45-46).

It may be thought that "new public management" principles would be of interest to those only on the right wing of politics.[5] However, left of centre parties, too, gain advantage from them. For example, they need the economies that "hollowing out" can achieve even more than right wing governments, if they are to achieve their traditional objectives of better public services, greater equality and help for those in need. Interestingly, Osborne and Gaebler do not shrink from improved public services as an objective of "new public management", believing that choice and competition can be used to increase equity in, amongst other things, the educational system (1992, p.58-59).

Not all observers of the initiatives were impressed. Kempe, who was first responsible for leading the British Government reform initiatives, went so far as to say that the British Government was: "... there long before Osborne and Gaebler re-invented Government..." (1993, p.21). The British Prime Minister, John Major, claimed :-

> "... when people want to learn something about re-inventing Governments, they come to Britain to do so" (1994, p.2).

Whatever advantages the "new public management" agenda may have, politically, it is not without its difficulty. For example, Foster and Plowden, whilst tracing the

emergence of executive agencies and notions of accountable management in the 1960s to their source (1996, p.63), [6] nevertheless considered the notion of separating out producing and service delivery activities in Government :-

> "... hides within itself all the principle questions of political philosophy, of sovereignty, rights and political obligation and the separation of powers, as well as difficulties raised by doctorings of parliamentary accountability and ministerial responsibility..." (1996, p.65).

Furthermore, Loveday thought it at least arguable that increasing "new public management" accountability had significantly replaced electoral accountability (1999, p.356).

Hood (1998), and Oliver and Drewry (1998), while providing a critique of the emergence of "new public management" and its application in the public sector, do not deal with the more fundamental issue which emerges from this study : the extent to which essential public services can be "contracted out", and the impact of that upon an independent judicial process. Nor do they deal with what amounts to an essential public service: is there, for example, an analogy with the separation of powers which cuts across ideas of separation, the main functions of government being separated to avoid despotic power being concentrated in one person. Or is there in some parts of government a move in the opposite direction under the euphemism of "joined up government". Foster and Plowden are of the view that separation in government is elusive, discerning ambiguities over the directions in which power may be expected to flow as a result of separation (1996, p.63).

Whatever Commonwealth jurists may make of the issue,[7] such separation of powers as there is in Britain is complicated by various other activities of the State, in, for example, settling strategy for domestic programmes, raising and allocating revenue, contract management, inspection, performance management and so on. A number of these functions are performed at a local as well as central government level. There are related processes concerning the provision of goods and services, and the promotion of primary and secondary legislation. In analysing this complex

web, and to prevent the abuse of power or corruption, a case can be made out for some separation within government of these and other activities. In practice, however, formal separation has been less important than have been less formal approaches. Foster and Plowden suggest there is a strengthening argument for more systematic arrangements adapted to meet new circumstances (1996, p.67); although the meaning ascribed to 'separation' might depend on how the relationship between provider and producer is defined.

New public management: general application in the public sector

Foster and Plowden outline the extent to which the Conservative Government of 1979 brought with it much of the "new public management" agenda, made manifest in notions of efficient, effective and economic management throughout the public sector, associated with a drive for value for money (1996, p.17). In pursuit of this policy the Cabinet Office's Efficiency Unit (under Lord Rayner) was established in 1979 with the objective of improving efficiency across Whitehall. Based largely upon the notion that there was waste in the public sector (drawing upon, at least in part, earlier reports on the civil service)[8] it was asserted that civil servants needed to adopt a more "business-like approach" and needed to show that the "product" they were delivering was inexpensive and cost effective, demonstrated by evidence that was tangible and measurable. This led at least one senior civil servant to reflect that financial initiatives adopted at this time affected civil service thinking, which was expected to replicate the approach adopted in the private sector.[9] Consistent with the thrust of the "new public management" agenda, Gray and Jenkins (1984)[10] argued that it was implicit in this approach that, if there was a "product", there must be a consumer. Lacey suggests, through initiatives such as citizens' charter, citizenship was reconstructed to the status of consumer (1994, p.534-535).

Through the notion that the public service was delivering a commodity to the citizen, government developed "new public management" in the public sector, with the infusion of "the market place" into all its thinking. Foster and Plowden chart

how "contracting out" and "market testing" for public services soon became the norm (1996, p.111-112).

Central government services were not immune from this process, but a different strategy was pursued for most of them, through the creation of agencies, a rather neat way of creating the illusion of a "contracted out" public service, with complex budgetary arrangements, performance targets, and business plans, established within a clear policy framework, operationally independent, but accountable, through a chief executive, to a Minister who, in turn, was accountable to Parliament. Ministers distanced themselves from what they regarded as operational matters for which they had no responsibility, but retained responsibility for policy.[11]

Within the context of the criminal justice process, "contracting out" and "market testing" were taken to new heights, with the early intrusion of the private sector into the custody and transport of prisoners; and the process of managing the punishment of individuals who were convicted of criminal offences.[12]

In tracing the emergence of this new managerialism, Lacey draws attention to the way in which, by replacing value laden concepts by "efficiency or value for money", measurable performance indicators become the ultimate test of democratic accountability (1994, p.534) : the point made by Loveday (1999, p.356). Furthermore, as Hood notes, public organisations are notorious for the ambiguity of their goals (1998, p.203). As a result, democratic accountability becomes an illusion.

In describing the effects of the "new public management" approach in the public sector, Gray and Jenkins were able to suggest that :-

> "... responsibility is to be de-centralised, lower level operatives made aware of and accountable for the costs of their operations, targets are to be established ... In brief we are offered a world where bureaucrats (and

ministers) are re-defined as accountable managers, public sector operations sub-divided into businesses, and the public seen as the customer" (1984).

It is difficult to disagree with Lacey's suggestion that :-

> "Once we reconstruct public administration as part of the market place, public officials and even politicians as managers and executives, and citizens as consumers, we are engaged in a forum of de-politicisation. We move away from the idea of rendering public life more open and substantial ... "value for money" and "efficiency of service" diverts attention away from contested political questions about what constitutes "value" in the relevant context, and from pressing questions about how those values should be debated and determined ..." (1994, p.553).

Jones (1993) argues that Rayner was responsible for effecting a shift away from the hierarchical decision-making of bureaucrats and professionals towards "consumer power", which was part of the Conservative Government's wider political agenda.

Foster and Plowden (1996) trace perceived public discontent with the public sector, fanned by the Government's ethos, which has persuaded one senior criminal justice practitioner to reflect that the Government was engaged upon a fiercely orchestrated campaign of destabilising local structures,[13] which in turn seemed to provide the necessary justification for making the radical changes which followed in public sector administration.

Next Steps Agencies

To a large extent, central government "delivered" its "new public management" agenda in the public sector through the establishment of Next Steps Agencies.[14]

The necessity of establishing Next Steps Agencies stemmed from, among other things, what was perceived to be tardiness in achieving real efficiency gains from the efficiency initiatives of the 1960s and the reforms of the early 1980s. Structural

change was recommended on the basis that the uniform design of departments was not necessarily appropriate for all government activities. A substantial effort was put into the creation of executive agencies, including the creation of a special unit in the Cabinet Office, headed by a permanent secretary, to facilitate change. Significant delegated authority, pay and other conditions of service were given to the new agencies. Initially, a proportion of the new chief executives to the agencies were appointed from outside the public sector.[15]

Foster and Plowden note that it was claimed that the creation of Next Steps Agencies recognised that civil service activities were diverse in nature and that the structure of a traditional department was not necessarily, if at all, the most appropriate organisational model (1996, p.153-154).

The purpose of dissolving complex departments was, as John Major, the Prime Minister put it in accepting the report :-

> "... to give much clearer roles for the units which become agencies, clearer roles both towards their departments and their customers, clearer and more demanding performance targets and accountabilities for the agencies, their executives and managers and all their staff - and crucially - a greater sense of corporate identity" (1994, p.5).

Foster and Plowden demonstrate that the effect of transferring departments, or parts of departments, or other bodies, to Next Steps Agency status was momentous for the British civil service and was said to be to subject them to the rigours of "market competition", leaving operations in the hands of staff of the agency, with Ministers distancing themselves and focusing upon policy (1996, p.159-167). However, the extent to which separating out Next Steps Agencies in this way was successful, at least so far as the criminal justice process was concerned, was demonstrated to some extent by the public review of the Prison Service Agency, conducted in 1995. That review found the Agency's management arrangements not greatly different

from those typical of the civil service before agencies were established :-

> "The Director General needs minimal political involvement in the day to day operation of the service ... The Prison Service is a politically sensitive area and ministerial involvement is bound to be relatively high. Such a level of upward-focussed activity needs to be carefully managed if it is not to interfere with the headquarter's proper downwards supervision and control of the organisation".[16]

As Foster and Plowden put it :-

> "... the Chief Executive was facing both ways at once, to the detriment of management of the operation" (1996, p.166).

There soon emerged fundamental disagreement between the Home Secretary and the chief executive of the Prison Service Agency as to their respective responsibilities with the former claiming to have responsibility for policy only, while the chief executive was responsible for operations. Bearing in mind that, in practice, the management of the Prison Service was an essentially operational activity and, at the time, the Home Secretary had no policy advisory capacity outside the Prison Service, it is difficult to understand what was actually meant. As the Chief Inspector of Prisons said :-

> "... if you are dividing policy and operations it means the Home Secretary is not responsible for anything at all".[17]

The eventually sacked chief executive had a different view :-

> "... you ... invented a new definition of the word 'operational' which meant 'difficult'".[18]

There is evidence that, in the MCS, where the language of managerialism seems to transcend the service to be provided, there remains much confusion and uncertainty

about what is or is not an operational or policy matter.[19] That confusion is compounded by obfuscation in differentiating between judicial, legal and administrative functions, further compounded by confusion and uncertainty on the part of those authorities dominated by lay members who are appointed for a purpose other than their managerial skill.[20]

"New Public Management", Next Steps Agencies and the Criminal Justice Process

Generalities

In distilling their analysis of the emergence of "new public management" and Next Steps Agencies, Foster and Plowden discern two dangers in the establishment of Next Steps Agencies, which are particularly pertinent to a consideration of this issue in the context of the criminal justice process (1996, p.178-79).

Firstly, detached from civil service advisors, Ministers are able to exercise more power, given their discretion within the law. The establishment of Next Steps Agencies are therefore less an instrument for improving Parliamentary accountability than an opportunity for Ministers to exploit the doctrine of Ministerial responsibility to their own advantage, delegating responsibility for everything in which they have no interest, and retaining the prerogative of intervention where they wish to use it.

Secondly, the executive agencies, most of which are monopolies, will learn to devise mechanisms to protect themselves from what they regard as excessive interference. Ministers and agencies would develop an agreed but often shifting split between policy and operations which means that agencies accommodate Ministers on the small things that concern Ministers, while running their internal affairs mostly as they determine given their budgets. As if to reinforce the point, the Next Steps Agency model is not one that gives confidence that efficiency savings will be realised which will reduce public expenditure requirements. As late as 1994, the new arrangements had achieved no further reduction in the size of

the central civil service, despite the fact that in 1991 it had been suggested the new arrangements ought to lead to a reduction of as much as twenty five per cent in central staff.[21]

Raine and Willson, in tracing the emergence of "new public management" in the criminal justice process and in discerning a stronger rather than weaker hierarchy argued that :-

> "The incoming Government of 1979 seemed to see criminal justice ... as spendthrift, idiosyncratic and unaccountable. Accordingly, a three pronged strategy was employed; cash limits and emphasis on efficiency to engender a more financially aware and prudent approach; greater standardisation in policies and practices to curb the autonomy of the professionals and reduce their idiosyncrasies; and re-organisation of the agencies into stronger hierarchies, supported by target setting and performance monitoring to effect greater control and to sharpen accountability" (1997, p.82).

The extent to which Raine and Willson are correct in their analysis turns much upon what they mean by hierarchy and within what framework. In so far as Government sought to impose upon the criminal justice process a hierarchy embracing, broadly, performance management techniques, its weaknesses have been exposed.[22] The "stronger" hierarchy that was eventually developed in the MCS, with central provision of all services to magistrates and their courts by a MCC and justices' chief executive ultimately accountable to the Lord Chancellor and his Department, has seen the progressive elimination of the office and function of justices' clerk and the virtual elimination of meaningful democratic local involvement in the management of the administration of justice (op. cit.). The resultant structure (in judicial and legal terms, although perhaps not so significantly managerially) is weaker, rendering all staff employed in magistrates' courts accountable, through a discernible line management hierarchy (op. cit.). In turn, by the creation of new lines of accountability for the magistracy and those who provide legal advice to it, there has been a weakening of independence in the performance of judicial functions. It is these issues which are explored below.

Early in the 1980s there were those outside the criminal justice process who argued they were being exposed to annual efficiency targets and that, while human care was beyond price, there was, nevertheless a cash limited budget for it. There was also a view that the criminal justice process was not integrated, particularly in the areas of administration and judicial services, and there developed an aim to bring the right pressures to bear upon administrative processes without, it was claimed, prejudicing the just outcomes the criminal justice process sought to promote.[23] It is to these issues, with their resonances of "joined up government", to which attention must now be turned.

The Crown Prosecution Service

The Royal Commission on Criminal Procedure (1981, chapter 7) recommended that police involvement in the prosecution process should be much reduced, and favoured the creation of an independent prosecution service to review decisions to prosecute which had been taken, formerly, by the police. Following the Government's White Paper (1983), the Prosecution of Offences Act, 1985, was enacted, creating the Crown Prosecution Service (CPS). The CPS was organised hierarchically, with local branches, regional areas and a headquarters. Lines of accountability led to the Director of Public Prosecutions, who was in turn answerable to the Attorney-General, who had ministerial responsibility for the general policies of the CPS, but not in respect of decisions taken in individual cases. Whilst the CPS was not intended to be accountable to Parliament for its decisions in individual cases, it is open to scrutiny by the Home Affairs Committee of the House of Commons and by the Audit Commission.[24] The Prosecution of Offences Act, 1985, imposes an obligation upon the Director of Public Prosecutions to report annually to Parliament.

Viewed in the context of the preceding discussion about "new public management" principles, it is not difficult to discern all the trappings of a Next Steps Agency surrounding the CPS. The identification of the CPS as, in all respects, similar to a Next Steps Agency, is not to criticise the need for its creation as an agency

accountable to Parliament. Ashworth (1994) has traced the need for that accountability, which is beyond the scope of this study.

The Legal Aid Board

The Legal Aid Board was transformed into a Next Steps Agency, and under proposals contained in the Access to Justice Act, 1999, is to be fundamentally re-organised, appearing under a different guise.

The Police Service

The Police Service has undergone continuous managerial change, with associated financial initiatives and, in addition, criminal justice performance management initiatives, which have led, in part, to the diversion of police resources to other than what many regard as core police duties.[25]

The Probation Service

The Probation Service, transformed by no more than Home Office Circular, without Parliamentary scrutiny, into a service managed by a less representative magistracy than had been the case, is the subject of national re-organisation, headed by a director-general, appointed by and accountable to the Home Secretary,[26] with regional and area management.

These issues, running concurrently with each other, illustrate that the criminal justice process is becoming more distinctively focused managerially and financially; and is increasingly accountable through a single head of service, to a Government Minister. The CPS, the Prison Service, and the Legal Aid Board, are the more obvious examples; as will be the Probation Service, which becomes a national service upon implementation of the Criminal Justice and Courts Services Act, 2000. This general drift towards central government control could see all criminal justice agencies more responsive to the demands of Parliament and, more

corrosively, to particular governments, within a very short timescale. This study argues that the summary justice process is all but in the same position.[27]

The Courts

With the exception of magistrates' courts and coroner's courts, all courts and tribunals in England and Wales are managed and administered through the Court Service, initially established under the Courts Act, 1971, and now an executive agency of the LCD.[28] Accordingly, responsibility for the day to day administration of most courts in England and Wales falls to civil servants. That tensions exist between civil servants responsible for day to day administration of the courts, and judges, is well documented and Sir Nicholas Browne-Wilkinson, in noting a shift in administrative control of the courts from judges to civil servants in the LCD, commented that the shift had :-

> "... given rise to stresses between the judiciary and the administrators as to their different functions ..." (1989, p.44).

In drawing comparisons here between the judiciary and medicine, and commenting upon an element of professional territoriality, given that "justice", alongside "health" and "education", have become caught up in the managerial revolution that has been so prominent a feature in the political agenda since the early 1980s, Oliver and Drewry pose what they describe as an extreme and democratically uncomfortable formulation of the core question :-

> "... can an institution that is constitutionally "independent" logically be "accountable" to anyone, apart from itself ? ..." (1998, p.34-35).

Much rests upon Oliver and Drewry's definition of constitutional independence and accountability.

The study has already examined the notion of judicial independence in England and Wales (Part One, chapter 1). Any suggestion that members of the judiciary are

wholly independent, enjoy complete autonomy, and are accordingly accountable to no one but themselves, finds little resonance in this study.[29] Indeed, so far as the magistracy is concerned, any suggestion of independence would be misplaced.[30]

Independence in judicial decision is not free from doubt. It is conceded that, following Galligan (1987), principled decision making can be secured through systems of accountability. However, whilst there is some force in Ashworth's argument (1994, p.43) that, in a democratic society, issues of public policy should be decided by the legislature, that is some way from his more contentious suggestion that Parliament does, in effect, delegate, for example, sentencing policy, to the courts, which retain independence only in the disposal of individual cases (1992). The notion that it is possible to exercise a judicial role limited to individual cases has been explored by Rutherford (1993, p.101), who found a justices' clerk who considered that judicial decision required the distillation of significantly more jurisprudence and other information than might be available in an individual case. In considering, for example, the sentencing of offenders, this must surely be right : various issues need to be considered, including decisions of the Court of Appeal, which are not always consistent (Rutherford 1993, p.101); and the variety of circumstances, some of a public policy nature, to which the Court of Appeal drew attention in *Sargeant (1974) 60 Cr. App. R. 74* .

It is at the summary justice level where cause for concern emerges. It is MCCs (accountable to the Lord Chancellor) and, through them, justices' chief executives, who retain, under the Police and Magistrates' Courts Act, 1994, responsibility for the training of their staff, including justices' clerks. It is they who are accordingly in a position to influence their thinking in these critical areas, how (and how much) wider knowledge of jurisprudence and other information is acquired, and how it should be applied. These issues run to the core of this study.

Issues relating to the notion of accountability are often confused by what is meant.

Mondy, Sharplin and Flippo have suggested that accountability is any means of ensuring that the person who is supposed to do a task actually performs it and does

so correctly (1988, p.249-250). There is resonance here with Drucker's insistence that accountability implies responsibility for results (1974, p.558).

Oliver and Drewry seek to distinguish accountability and responsibility, drawing upon Giddings (1995).[31] According to Oliver and Drewry, accountability involves the idea that a person or body should give an account or explanation and justification for its acts and should put things right, if it is in its power to do so; responsibility, by contrast, involves the idea that a body has a job to do and must take the blame if the job is not well done (1998, p.10).

In a further explication, Oliver and Drewry suggest the concepts of accountability and responsibility are relevant because they involve the idea that Parliament and its committees can and should hold Ministers and others who spend public money to account for their policies and general conduct of public affairs, and that the House of Commons collectively, and individual members, are accountable and responsible for their own conduct. However, lest the integrity and independence of the courts might be compromised, they suggest there has been a process of accommodation between the House of Commons, the LCD and the courts in the last 15 years or so which has increased the accountability to Parliament of the courts, without posing any credible threat to their independence (1998, p.11).

The distinctions Oliver and Drewry seek to draw are indeed fine, particularly when applied to the criminal justice process. The notion of courts accommodating the House of Commons and the LCD in governments' pursuit of accountability is novel, and there is little evidence for it unearthed by this study. What this study will show, however, is that the courts are accountable, through the appellate process, to higher courts and, ultimately, the House of Lords sitting in its judicial capacity. In drawing attention to other lines of accountability, the study will show that the "accommodation" to which Oliver and Drewry draw attention is one which has been imposed by Parliament and has resulted in it interfering with the rules of procedural justice to an extent it may not have fully appreciated ; and posing the threat which Oliver and Drewry so readily dismiss.

"New public management", Magistrates' Courts and cash limits - an emerging "threat"

That all was not well in the MCS was apparent in the early 1980s. Although there is a strongly held view by some, at least, at office holding level in the Society, that the magistrates' courts and justices' clerks were targeted by the Government for reorganisation following the miners' disturbances of 1984/85,[32] it is plain that, with the emergence of ideas associated with "new public management", significant change was discernible long before. There is reliable evidence to suggest that the origins of re-organisation of the MCS were to be found in the reports of the Rayner Efficiency Unit and the more general thrust of Government's managerialist agenda.[33] A circular issued by Home Office, addressed to justices' clerks and clerks to MCCs, suggested an interest in the improvement of efficiency in the magistrates' courts was under serious consideration as early as 1982, and the issues were discussed with magistrates in Croydon that year.[34]

In 1984, the Home Secretary, Leon Brittan,[35] proposed that the criminal justice process be re-defined as 'a criminal justice system', and at the heart of this strategy were to be three underlying themes: the maintenance and the encouragement of public confidence in the criminal justice system; the search for greater effectiveness; and the retention of the proper balance between the rights of the citizen and the needs of the community as a whole. The notion of an integrated criminal justice system had emerged.

Shortly afterwards a Home Office circular,[36] took forward the theme of efficiency and effectiveness, by suggesting that those responsible for the administrative operation of magistrates' courts (primarily MCCs) ought to have regard to the Home Secretary's strategy and review objectives and priorities; examine the use of resources to achieve those objectives; consider what improvements could be made in current practices and procedures; and put into operation arrangements for the collection of management information to assist in those tasks. The Home Secretary saw no difficulty in the compatibility of considerations of efficiency with the work of a court of justice. In his view efficiency was the servant of justice and that the

better the business of the courts was organised and carried out, the fairer and more effective would be the results of the cases with which it dealt : no rationale for such a correlation was forthcoming. Although a measured and broadly consistent approach had emerged, at least one public servant considered the emergence of the Home Secretary's strategy at that particular moment in time had at least as much to do with political expediency than any attempt to engage cohesively with the criminal justice agencies.[37] It also failed to acknowledge that at least some of the ways in which the business of the courts was organised, which went to the administrative penumbra or infrastructure, was a matter for judicial rather than managerial decision, for example, the listing and management of cases.[38]

In the years which followed, the Home Office introduced a Management Information System (MIS) in magistrates' courts, to obtain information which would enable an analysis to be made, among other things, about the effects of the workload falling on petty sessional divisions over areas and nationally; the resources allocated to deal with that workload; and comparability between the various petty sessional divisions. Measures were also introduced to analyse the extent to which waiting times in court proceedings were changing and the reasons for that; and the extent to which there were variations over time in numbers of fines outstanding.[39]

Green (1992), a justices' clerk, in a particularly trenchant paper, concluded that the Home Office had established systems to obtain information from the MCS with the deliberate intention of using that information to undermine the MCS at an appropriate moment. Few justices' clerks disagreed, at least privately, and in November, 1989, came the announcement of Government's intention, subject to necessary legislative provision, to introduce cash limits on current grant expenditure on the MCS from April, 1992. Grant was to be allocated according to a formula based on data provided by the MIS, reflecting the principle that resources should be allocated according to some criterion of need.[40] The formula for cash limited grant, and its implications for the independence of the magistrates' courts, was to be profound.

It might have been thought that the magistrates' courts could have escaped the major thrust of the Government's "new public management" agenda in the criminal justice process, not least because courts were not a criminal justice agency and, as the providers of "judicial services", could not be subjected to the same measures of control. As Lacey points out :-

> "Government is not, constitutionally speaking, in a straightforwardly managerial position vis a vis the judiciary. Ultimately, the judiciary is independent in the execution of its judicial functions: although ..., this argument does not apply to the institution of policy ... in a duty imposing statutory form ..." (1994, p.548-549).

Lacey's view finds expression in the view of some policy makers who believe that there is no reason why "new public management" should detract from judicial decision making and that it was good for judges and magistrates to know, for example, the costs of providing criminal justice including the cost of specific sentencing options.[41] Good for what purpose has never been readily forthcoming, although, presumably, it can only be for the purpose of judges and magistrates knowing how much particular actions and outcomes will absorb from the public purse - unless such information is intended to influence judicial thinking, it is difficult to fathom what other purpose it could have.

There were many at a senior level in the MCS who were convinced Government had identified magistrates' courts as being in need of improvement and modernisation. Furthermore, Rutherford and Gibson (1987), in examining the hearings which took place following the arrest of miners, found some indications from senior practitioners in the magistrates' courts of the fear of "creeping centralism", with the LCD wanting to know how the courts coped with significant increases in workload following the arrests of miners; and requesting weekly returns. The concern of a highly respected justices' clerk and his bench chairman was noted at the unusual degree of interest displayed by the LCD of the need for a stipendiary magistrate to ensure there was no delay in the disposal of cases. The strong belief is held by some in the MCS that central government became aware,

within the context of a politically uncomfortable dispute, of its inability to call to account the judicially independent magistrates' courts and their justices' clerks, who could not be directed to either act, or influence magistrates, by central government, senior civil servants, or anyone else.[42] As has been noted, there was, however, evidence of Home Office interest in issues of efficiency and effectiveness which pre dated the miners' disputes.[43] During the early and mid 1980s, magistrates' courts and their clerks, very much a small part of public service, absorbing little by way of resources,[44] occupied an increasing amount of the time of government and its executive arm. It may be that, at a time when government was looking for efficiency in the public sector, and pursuing, incidentally, an agenda which some considered to be directed at deriding those engaged professionally in providing public services,[45] the miners' strike with its attendant political difficulties came at a propitious moment.

In 1989, the Government's efficiency unit reported that, as a result of initiatives taken since it came to power in 1979, the management of its business was much improved, especially those parts where there were clear tasks to be performed and services to be delivered; however there was still considered to be a long way to go; and there was insufficient sense of urgency in the search for better value for money and steadily improving services. It was claimed the Government's initiatives had strong support among civil servants and that the notion of agencies should be established and developed to carry out the executive functions of Government within a policy and resources framework set by it.[46] There was a gathering momentum for agency status for disparate groups and organisations in the public sector and the focus of increasing attention was the criminal justice process generally, and the MCS in particular.

Cash limits: implementation

Against advice contained in Le Vay's report, cash limits for magistrates' courts were introduced on 1st April, 1992.[47] Reactions were not good.[48]

Clerks to some of the larger MCCs were firmly of the view that the cash limiting formula envisaged by the Home Office was defective in material respects and represented an unsatisfactory formula for the control of expenditure within the MCS.[49] In particular, it was pointed out that dependence on the MIS, which, it was suggested, was open to misinterpretation, error and manipulation and would be out of date at the time of its application, was an unsound base upon which to project resource allocation. The Society pointed out that the introduction of a cash limiting formula in advance of any structural adjustments to the MCS was ill advised and that the scheme, as proposed, retained significant shortcomings; and there was potential for uncertainty that could result from a changing formula thereby creating a climate which was unsuitable for the development of long-term planning in the MCS and would be characterised by examples of short-term fluctuations in service delivery. The notion that the cash limiting formula created incentives for the more effective and efficient management of court business, without interfering with the courts' independent judicial functions, was rejected. The Society pointed out that the threat of being subject to a reduction in budget unless, for example, cases were completed within a certain time, could amount to such an interference and be perceived as such. It was in no doubt the cash limiting formula would be seen as having a bearing on decision making and would interfere with the courts' independent judicial function, and went on to suggest that it could only assume that in the minds of Ministers they were intended to do so.[50]

The operation of the formula as a whole was heavily dependent upon the decisions taken by magistrates and whilst those decisions might be informed by advice given by the justices' clerk and his staff, they were nevertheless judicial decisions and, the Society suggested, outside the scope of the management role of a MCC.[51]

In an item appearing in a national newspaper on 25th October, 1991, the effect of cash limits on the MCS was reported under the headline "Should crime be made to pay ?" :-

> "... John Patten, the Home Office Minister, spoke of value for money, quality of work and improved management. He could have been talking

about the NHS, British Rail or ... about a meat packaging factory. And therein lies the problem. Critics, including lawyers, Magistrates and Clerks do not believe that rules that determine meat packaging can be applied to judicial decision making ...".[52]

It was and remains questionable whether any cash limits formula within the judicial process can be fair and just. If a MCC was, for example, to increase its share of grant, it had to increase its performance and, perhaps, its "market share". It was not explained how it should do so. Presumably, by increasing the number of cases disposed of, which assumed that an increasing number of cases were being prosecuted before magistrates, over which they had no control; reducing delay in collection of monetary penalties; reducing waiting times on the day, which implied increasing the speed of disposal of cases, without reference to issues of due process; and increasing quality of service to those who use magistrates' courts, whatever quality of service meant in that context. Performance targets in these areas were soon set by most MCCs (strongly influenced by HMMCSI after implementation of the Police and Magistrates' Courts Act, 1994, considered in Part Two, chapter 4). With an implicit, if not explicit, overall aim of improving the match between 'inputs' and 'outputs', what were to be the consequences of failing to "perform" in these areas ? Put simply, the fear was of a consequential loss of courthouses or staff or both.

These issues were and remain far from being academic. A justices' clerk and justices' chief executive[53] expressed particular concern about the way in which cash limited grant was distributed to MCC areas. He was convinced the MCS had, since implementation of cash limits, pursued its managerial agenda for the wrong reasons. The motivation for MCCs was how to increase their cash limited budget. There was far too much thinking about the need to dispose of cases quickly, because it was good for figures. Such an approach was beginning to permeate thinking throughout the MCS, to the extent that budgetary considerations were now considered to be paramount. Developments relating to performance management and performance targets had merely added to what he considered to be the wrong emphasis in the criminal justice process. The weaknesses of MIS, which were

translated into the formula for cash limits, exposed the formula as a "blunt instrument", which was unreliable and capable of causing injustice in the allocation of grant. His concern, expressed some five years or so after implementation of cash limited grant allocation for the MCS, suggested the fears expressed by the Society upon announcement of cash limited grant allocation and the formula for it, were not wholly misplaced.

Criticisms of the need, for example, to expedite the throughput of cases, were not, however, convincing. It is necessary to strike a balance between the need to avoid delay in the summary justice process, with its attendant epithet : "justice delayed is justice denied", and the need for due deliberation.[54] This study has drawn attention to Lucas' arguments (1980, p.95), that there are many complaints about delays in the administration of justice, which are considered to be contrary to the public interest and, more generally, to the interests of justice. However, some cases of complexity, perhaps involving the gathering of evidence on both sides, do require time for preparation; and a party to legal proceedings might well have cause to feel aggrieved if, after a cause of action has lasted several days, a final adjudication is reached in a matter of moments.[55]

The maintenance of this balance has become increasingly problematic as the measures introduced by the Crime and Disorder Act, 1998, to expedite the criminal justice process, have been implemented.[56] Article 6 of the 1950 ECHR offers a further degree of balance, with its provisions guaranteeing the right to a hearing within a reasonable time, regard being had to the particular circumstances of each case, including, in particular, the complexity or factual or legal issues raised by the case, the conduct of the applicant and of the competent administrative and judicial authorities, and what is at stake for the applicant.[57]

Nevertheless, an analysis of one aspect of the MIS formula demonstrated the potential of MIS and the ability of MCCs to compromise the administration of summary justice.[58] If there was to be an increase in the number of cases disposed of, police cautioning and discontinuance of proceedings needed to be discouraged; adjournments, for whatever reason, had to be resisted; the throughput of cases had

to be increased; and more cases had to be dealt with each hour. Moreover, long lists of guilty pleas were, in some areas, given preference over a not guilty hearing, which could take hours, if not days, to complete, without any or any sufficient financial "reward". All this, of course, impinges directly upon the judicial process, and the administrative penumbra or infrastructure. Provided each case is dealt with properly, on its merits, and according to the interests of justice, little difficulty should arise. However, with a high consciousness amongst bench and court legal advisers of the implications of low throughput, encouraged by MCCs and justices' chief executives, and for staff with an eye on the needs of their employer, there can be little doubt that subtle pressure exists to cut corners. There is obvious potential here for MCCs to exert influence and intrude upon the judicial process. In some MCC areas there has been strong discouragement to magistrates, through training programmes and in MCC annual reports and public meetings, to grant adjournments, with little or no consideration of due process or the interests of justice.[59]

Increasing the throughput of either way cases, reducing cost per case, required magistrates' courts to increase their pace - and assumed, necessarily, a constant or increasing workload arising from the activities of prosecuting agencies and a consistent approach to it. Despite fluctuating crime levels in the 1990s,[60] there was a significant reduction in cases prosecuted before magistrates because of, amongst other things, diversionary schemes run by the police with the encouragement of the Home Secretary;[61] the introduction of high technology equipment in the detection of road traffic offenders (cameras); the increasing use of fixed penalty tickets for the punishment of such offences;[62] and the belief in, for example, the inner London area, that with an increased devolvement of managerial responsibility to police divisional commanders, following the implementation of, in part, principles associated with "new public management", and the delegation of some budgetary responsibility, police priorities were focused upon the commission of serious offences, rather than the more minor offences likely to come before magistrates' courts.[63] Increasing the throughput of cases might of course be addressed in some other way by, perhaps, the encouragement provided to Lord Chancellor's advisory committees to seek appointments of stipendiary magistrates in provincial areas.[64]

Increasing workload is more problematic, but achievable if more serious offences are re-classified for trial only in the magistrates' courts: here, too, the danger of diminishing the gravity of offending, and the social policy implications which go with that, are seen to be as much dependant upon financial considerations as anything else.

However, there is another issue here, which perhaps betrays perceptions of the role of the courts in the Home Office, and which found expression in a report published in 1997 :-

> "In general, the main role of the Courts in the criminal process is not regarded as an instrumental or administrative one; rather they are seen as existing to do justice within the bounds of due process, regardless of for example, the costs of lengthy trials organised around a presumption of innocence and a burden of proof beyond reasonable doubt ..." (Narey, Home Office 1997).

Narey, a senior civil servant in the Home Office, whose report is examined in detail in Part Four, chapter 7, may of course be right, in principle. But his emphasis upon the "main role of the Courts" suggests there may be another role, which he does not define, but rather obliquely suggests may be instrumentalist or administrative. Such definition suited the overall tenor of his review, for, as is demonstrated below, Narey re-defined significant parts of the summary justice process as "administrative" rather than "judicial", without, apparently, drawing upon any jurisprudential resources, paving the way for the performance of judicial functions in the summary justice process by administrators.[65]

The emergence of cash limits in magistrates' courts can be traced to the increasing momentum of "new public management" throughout the public sector in the 1980s.[66] What came as a surprise to the magistrates' courts was the bluntness of the formula devised for the allocation of grant, bearing in mind that preparation, in the form of information gathering, had been a feature of magistrates' courts for some years[67]; and the extent to which a formerly benign Home Office, a later

significantly less so LCD, implemented a formula against advice from most quarters, including the Government's own scrutiny team,[68] and intruded into the judicial process, encountering little judicial opposition. It soon became plain that if Government and its executive arm wished to fashion tools to influence the administration of summary justice, they could do so without fear of much public attention, let alone criticism.

Le Vay's Report of a Scrutiny into the Magistrates' Courts Service

Concurrently with the emergence of initiatives surrounding the introduction of cash limiting, Le Vay's report into the MCS was conducted in 1989. In announcing the setting up of the Scrutiny, on 17th February, 1989, the Home Secretary said :-

> "I think it is timely to examine radically the management and organisational structure of magistrates' courts and the arrangements which govern their resource use, with a view to identifying how these might be improved".

The Scrutiny team was led by Julian Le Vay, a senior Home Office civil servant, with assistance from four members of Home Office staff. One of his team had previous experience in the Crown Court. None had practical experience of the magistrates' courts. The team was joined by a member of the LCD.

Le Vay's terms of reference were to review arrangements governing the distribution, management and control of resources in magistrates' courts; with due regard to the advantages of a locally based system of summary justice, to make recommendations to ensure that the mechanisms, at national and local level, for determining resource levels and resource management and control, were best suited to the efficient, economic and effective discharge of the responsibilities of the magistrates' courts; to make proposals for any changes in management structures in the MCS; to identify the potential for further action to reduce unit costs in magistrates' courts, shorten delays and improve fine enforcement; and ensure that recommendations were consistent with the legitimate interests of defendants, parties to civil proceedings, legal representatives, witnesses and the various

criminal justice agencies. Le Vay considered his terms of reference focussed upon an assessment of the existing systems for managing and funding magistrates' courts, and the prescription of such changes as were necessary to ensure that these systems delivered an effective, efficient and economic service. Le Vay claimed his team was not concerned with the appointment of magistrates, their judicial functions, or how they performed them. The concern was with administrative systems which supported the delivery of justice by the magistracy.

Le Vay began work on 13th February, 1989, and reported five months later on 3rd July. His team visited 19 magistrates' courts and court offices in 9 MCC areas and inner London. Interviews were conducted with chairmen or deputy chairmen of benches and justices' clerks; local authority officials who provided services to MCCs; visits were made to Crown and County Courts; discussions were held with the CPS, the Police and Probation Services, as well as solicitors in private practice, about delays in the disposal of cases; and discussions were held with officials in the LCD, CPS, the Office of the Minister for the Civil Service, the Treasury, and the Criminal Justice and Finance and Manpower Departments of the Home Office. All key criminal justice organisations and representative organisations responded to an invitation to submit written comments.

Le Vay's report contained a 160 page detailed analysis of the evolution of the MCS, its role at the time of the report, resource planning and control, a summary of MIS, reports of variations in cost and performance, use of staff, application of information technology, costs, surveys of waiting times and so on, without comment upon how such a small team, with limited experience, achieved so much in such a short space of time. Some justices' clerks were of the opinion that the production of such an extensive report, with numerous interviews and other research to undertake, and quantities of data to sift, aside from written representations to consider, within five months, was simply not possible, unless there had been preliminary, unpublished, briefings. Whatever the state of the MCS at the time, for those intent on engineering change in the MCS, the report was nothing less than a Godsend.

In many ways Le Vay's report was a seminal point for magistrates' courts as they were now, following the introduction of performance management and cash limiting, thoroughly embraced by the "new public management" initiatives which had emerged.

The report, which failed to differentiate between management and resourcing systems for magistrates' courts on the one hand and the difficulty in separating those matters from judicial functions on the other, was scathing of the general management and administration found in magistrates' courts.[69]

Having carefully analysed existing management structures throughout the MCS, Le Vay concluded :-

> "There is no coherent management structure for the service. At the national level, the role of the Home Office is so uncertain, and its powers so limited that it might be true to say there are 105 local services, each run by a committee of magistrates. But the local structure is just as confused, with 285 justices' clerks enjoying a semi-autonomous status, under committees which are fundamentally ill-suited to the task of management. It is impossible to locate clear management responsibility or accountability anywhere in the structure" (paragraph 4.22).

Le Vay continued :-

> "... It would be difficult to think of any arrangements less likely to deliver value for money than the present ones. The Home Office provides most of the funds but has no say in how resources are allocated or used, or even the total level of spending other than by operating detailed approvals which are themselves an obstacle to optimum value for money. ... the local authority, has too little stake in the service to provide an effective budgeting discipline, with MCCs too dependent on local authorities and their management capacity too under-developed to plan or manage resources effectively. There is little evidence of a planned relationship between work

and resources, or review of performance or scrutiny of efficiency. Most Justices' Clerks have little control over resources and little information about costs. Spending is not properly controlled and the audit arrangements, despite improvements, are still deficient ..." (paragraph 5.22).

Importantly, Le Vay identified the difficulties apparent at the local level where lawyers undertook routine clerical work, which he claimed was demoralising for them, undermined the initiative of administrative staff, obscured managerial responsibilities and perpetuated a fundamental misapprehension that work with a legal content had to be done or supervised by lawyers (paragraphs 6.12 and 6.23): but had nothing to say about work at the interface of judicial, legal and administrative decision making, in which respect he was less than helpful.

Le Vay found what he described as abundant evidence that the managerial arrangements then in place were not delivering value for money for the £200 million spent on the MCS. But in conclusions that were to be lost in subsequent debate on the Police and Magistrates' Courts Bill five years later, Le Vay stressed he was not saying the MCS was profligate, finding in many areas, evidence of under provision (paragraph 6.22); and that problems it identified were of system rather than individuals (paragraph 6.23).

Le Vay concluded that to improve the management of the MCS, an executive agency should be established. Bearing in mind movements towards Next Steps Agencies at that time, the recommendation was almost a foregone conclusion, as was the scathing criticism of magistrates' courts : what better way to engineer radical change than by heaping derision upon those currently engaged in a public service?[70]

In acknowledging criticism of his solution that the MCS should be centrally managed, Le Vay pointed to central management of the higher criminal courts,

achieved under the Courts Act, 1971. He continued :-

> "... The example of the higher courts demonstrates that a distinction can be maintained clearly enough in practice between managing the administrative resources needed to enable courts to do their business, and the judicial function itself ..." (paragraph 7.5).

However, Le Vay singularly failed to address distinctions between the professional judiciary in the higher courts and the magistracy; and criticisms made of the higher courts' administration by members of the professional judiciary, particularly Sir Nicholas Browne-Wilkinson (op. cit.). The distinctions are important because, in the higher courts, the professional judiciary is not dependent upon, for the delivery of the final judicial product, the advice or assistance of any member of the court administration. It is otherwise in the magistrates' courts, where the magistracy is statutorily advised and assisted throughout by its justices' clerk, or other member of staff of a MCC employed to assist a justices' clerk.[71] It is at the point of advice and assistance in the delivery of the final judicial product that lack of clarity in the judicial function and the management of resources is to be found,[72] and Sir Nicholas Browne-Wilkinson's criticisms of the intrusive nature of the administration which supports the higher courts, the Court Service, engenders little confidence that legitimate boundaries would be respected.[73]

Whilst acknowledging the delicate role of the justices' clerk as legal adviser to magistrates, Le Vay concluded, importantly for the way in which the MCS was to ultimately develop, local justice did not require the staff who supported the judicial function to be managed as an essential local service. He shared the conclusion reached in the Beeching Report two decades earlier that the administration of justice must be recognised as a central government responsibility; and that the continuation of a network of small local services would confuse responsibilities and impede delivery of the best service for the money (paragraph 7.14). Le Vay concluded that the best way forward was to ensure magistrates' courts were run as a national service, funded entirely by government, but with maximum delegation of managerial responsibility and control of resources at the local level (paragraph

7.23). He considered that each bench should continue to have a source of authoritative legal advice, in and out of court; and that the magistracy should be protected from undue influence by government, through the medium of court staff, in the exercise of their judicial functions (paragraph 7.24).

In urging the creation of an Agency, Le Vay recommended the appointment of court managers to conduct the day to day management and administration of magistrates' courts. He considered that court managers would be required to liaise closely with benches, but serving under chief executives and responsible to a director general of the new agency (not so dissimilar to arrangements for the Probation Service emerging a decade later).[74] The involvement of magistrates in the management of the service was to be minimal. Le Vay's proposals for area boards would have left some sixty magistrates involved across the country in the management of the MCS. Managers in the MCS, who were to be qualified lawyers, but selected, trained and managed as managers, were to be accountable not to magistrates, but to chief executives of the new agency, who in turn would be accountable to the director general, and through him/her, the Lord Chancellor. Regardless of considerations of operational effectiveness, this arrangement was of course capable of destroying the constitutional independence of magistrates and their role in the local management of their courts, as well as any relationship between magistrates and their legal adviser, the justices' clerk. Le Vay had some perception of the difficulty :-

> "A more problematic issue is the extent to which the reliance of the bench on advice and training given by staff could open judicial decisions and policy to external influence to an improper degree, if those staff were managed in certain ways - in particular managed directly by a Government department ... Home Office guidance is usually in general terms ... but it can be more specific, particularly in times of immediate pressure elsewhere in the criminal justice system ... at present the Home Office is so distant from managerial control of court staff that such guidance does not prejudice independence ... We think the position would be different if the court staff on whom benches relied both for advice in court and training were

> themselves managed directly by, and answerable to, the Home Office (or another department) ... *We do not think that some informal self-denying ordinance would meet the point adequately; the pressures would be too subtle and continuous for that to provide sufficient protection to sustain the confidence of the magistracy itself and the public generally in the impartiality of the courts"* (paragraph 7.9). (Emphasis added).

Le Vay rejected management by the LCD, as part of what was then the Circuit system, (the Court Service), because of his fears that, among other things, the fact that the Lord Chancellor appointed magistrates and largely determined their training would make it difficult to insulate the magistracy from departmental concerns (paragraph 8.5). Because of the role exercised by the LCD, embracing, for example, legal, judicial and political considerations (i.e. so far as legal aid was concerned, the Lord Chancellor was not only concerned with the statutory framework of its provision, but also the structures supporting that provision and the cost to the public purse (for which he was accountable to Parliament) for that provision), there was a fear that extraneous influences might be brought to bear upon what was supposed to be an independent summary justice process. Put more bluntly, there was a fear that the policy and managerial concerns of the LCD might intrude upon the judicial process. Le Vay's caution was soon swept aside by Government.

In an extraordinary comment about the judicial powers of justices' clerks, to be perpetuated by successive officials, Le Vay found nothing about these functions which, by their nature, required the person exercising them to be immune from supervision and management (paragraph 7.11). In going further, and laying significant ground for Narey (Home Office 1997), a decade on, Le Vay found that, in any event, the judicial powers were not exercised "judicially", being effectively delegated to junior, unqualified staff in many courts, and that similar decisions were taken by clerical grades in the Crown Court and County Courts, where he considered staff were far better trained and supervised. Critically, Le Vay concluded these powers needed to be re-defined as essentially administrative. Le Vay disclosed no jurisprudential nor any other rationale for his opinion. Aside from

the judicial quality of powers exercised by justices' clerks under, among others, the Justices' Clerks' Rules, 1970, (as amended), which leaves no doubt that they are judicial functions, not a shred of credible evidence emerged from Le Vay to suggest otherwise; less still was there credible evidence of the performance of similar functions of similar quality by clerical staff in the Crown and County Courts. As will be shown, this did not prevent Le Vay's opinion prevailing.

Importantly, Le Vay, noting Government consultation with representative bodies of the MCS about proposals to cash limit its 80% specific grant, expressed doubts about the value of MIS (paragraph 5.8); and rejected the suggestion that the MCS should be cash limited (paragraph 10.7). The Society for its part was particularly concerned about the notion of a continuing cash limiting formula that might create incentives for the more efficient and effective management of court business, pointing out that the threat of being subject to a reduction in budget unless, for example, cases were completed within a certain time, could amount to and be perceived as a direct interference in the judicial process.[75] Le Vay was not, however, so concerned in the short term with the effect of cash limiting on judicial decision making, as he was of the need not to buttress his own recommendations by ensuring the MCS was not deprived of resources if it was to embark upon the major change promoted by his recommendations. He was not persuaded that cash limiting within the existing structure would in fact deliver better value for money because of, primarily, reasons associated with accountability; the lack of a considered and informed view of the needs of the service and the level of performance to be achieved; an increase in the level of local authority pressure on MCCs; and the potential of cash limiting to freeze spending patterns, concealing large inefficiencies at one extreme, and possibly some under-funding (paragraph 10.6).

Le Vay's report contained much that resonated with other published documents. His suggestion that a national MCS would not be wholly dissimilar to staffing arrangements made for Quarter Sessions after enactment of the Courts Act, 1971, based upon arguments in the Beeching Report, whilst superficially attractive, failed wholly to address the significantly different roles and responsibilities of, for

example, a justices' clerk or court clerk, advising a bench of lay magistrates, rather than a professional judge (paragraph 7.5). His suggestion that there was nothing objectionable about bringing considerations of efficiency and effectiveness to bear on the running of courts, had striking similarities to comments made by Leon Brittan five years before, when advocating his notion of a 'criminal justice system' (paragraph 7.6). The rationale for and enthusiasm with which Le Vay suggested a Next Steps Agency solution was entirely consistent with the way in which the Government had been moving throughout the 1980s (paragraphs 8.10-8.12). Le Vay's report bore the hallmarks of "long game" strategy about it.

A surprising turn of events

After prolonged discussion about Le Vay's report there was an impasse, followed by a surprising turn of events. Rather than take up and implement the report, the Government decided instead that, with effect from 1st April, 1992, because of the nature of the changes that were to take place in the MCS, it would be appropriate that responsibilities for the finance, organisation and management of magistrates' courts should be transferred from the Home Secretary to the Lord Chancellor. Whether such a change properly reflected a well-considered policy decision of Government, a political expedient, or a hidden agenda to control the summary justice process and those working in it, is a moot point. There remain many, among them senior civil servants, who question the wisdom of this move.[76] The LCD had relatively little experience of dealing with the administration of justice at the local level, compared with the Home Office, which had experience of the Police and the Probation Services and the MCS. Skyrme detects reluctance on the part of the Lord Chancellor to assume responsibility, because he considered his Department was already fully stretched (1994, p.895-905). There were also the fears expressed by Le Vay, cautioning against a transfer of a responsibility to the LCD :-

> "... That department's responsibility for the higher courts and the administration of legal aid could lead it to wish to influence the way magistrates courts dispose of business ... while officials in the Lord

> Chancellor's Department are used to discussing aspects of the performance of courts, such as waiting times, with judges who have a highly developed sense of judicial independence, the relationship between lay people sitting on a bench and a departmental official who was also the source of the legal advice on which they depended would be another matter entirely. The fact that the Lord Chancellor also appoints magistrates and largely determines the content of their training, would make it even more difficult to insulate benches from other departmental concerns" (paragraph 8.5).

However, a senior civil servant in post[77] believed that the LCD was always a little ahead of many government departments in its managerialist intentions and, with political expediency still a feature of government decision making, the transfer was effected. There remains a strong view among many in the MCS that the transfer of responsibility was disastrous and the then Minister of State at the Home Office, the Rt. Hon. John Patten, M.P., informed senior officers of the Society that it might well turn out to be so for justices' clerks.[78] However, the report provided useful material for Ministers who frequently used its more critical passages, without consideration or mature reflection, to criticise justices' clerks at every turn (Part Two, chapter 4).

Following the transfer of responsibility of magistrates' courts to the LCD, there followed a White Paper (1992),[79] which set out the managerialist agenda of the LCD and which, after a period of consultation, led to the Police and Magistrates' Courts Bill. In setting out its aims, that the MCS should provide an efficient, high quality and expeditious system of local justice which commands public confidence (paragraph 1), the White Paper made plain Government's intention to secure its aim within a framework which provided clearer lines of accountability for the MCS, both locally and nationally; the guarantee of judicial independence of magistrates and their legal advisers; the yielding of improvements in efficiency and effectiveness; and the securing of maximum co-operation in the management of the MCS with other parts of the criminal justice system (paragraph 2). Accountability, judicial independence, the role of legal advisers and inter-agency co-operation ("joined up Government"), were to be found at the heart of the White Paper.

Effects of "new public management" upon the criminal justice process

Reflecting upon cash limiting and structural reform of the MCS and considering the effects of the "new public management" agenda upon the criminal justice process, some years later, Raine and Willson (1997) considered that :-

> "... Managerialism has accomplished a great deal, although it can be argued that a price has been paid in terms of neglect of other, more traditional, scenes of criminal justice, such as "protection of human rights", "reduction of crime and delinquency" and "promotion of due process".

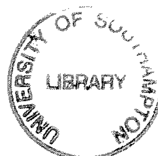
Whilst Raine and Willson's assertion that:-

> "... initiatives like cash-limited grant has inevitably put many criminal justice agencies under pressure to cut service standards by organisational rationalisation ..." (1997, p.86),

is readily conceded, their assertion that:-

> "... the extent to which "due process" has been thus compromised in the dispensation of justice remains a debatable point ..." (1997, p.86),

is not. Cash limited grant allocation has placed MCCs under significant pressure to, as is evidenced below, intrude upon the judicial process, close court houses and declare redundant justices' clerks. Many MCCs have responded to the effects of cash limiting by reducing the number of justices' clerks in their respective areas to one, serving anything upwards of 850 magistrates. It is at least arguable that a justices' clerk serving such a large number of magistrates cannot operate effectively in the way expected of such a post, having little or no contact with magistrates for day to day purposes, and that, to the extent that magistrates are deprived of the regular attendance upon them of their justices' clerk, they no longer have access to independent, experienced, legal advice.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Beyond the issue of court house closures and redundant justices' clerks, is the issue of due process, which Rawls (1972, p.239) suggests is : ".. reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances. For example, judges must be independent and impartial ... Trials must be fair and open ...". Rawls' analysis resonates with the rules of procedural justice discussed herein.[80]

Sanders traces the origins of due process which apply before powers of arrest and detention pending trial can be exercised (1994, p.775); and Gibson and Cavadino describe due process in relation to investigation, arrest, charge, decision to prosecute, proceedings in the court room and, where appropriate, sentence and rights of appeal (1995, p.47-100). It is in these key areas, some the product of evolution by the courts, others by legislation,[81] that this study argues governments have consistently tinkered, compromising the administration of summary justice.

Raine and Willson's further assertion that :-

> "... managerialism is on the wane and that other forms of organising work which better match contemporary concerns and conditions are coming to the fore ..." (1997, p.87),

may or may not be true of the public sector, more generally, but there is little evidence for that assertion in magistrates' courts, where the "noose" of "new public management" and its intrusion into the judicial process is tightening.

Raine and Willson (1997) acknowledge that the managerialist pre occupation with productivity, cost efficiency and consumerism are firmly located within criminal justice and its effects, readily apparent in all the constituent organisations, perceiving both advantages and disadvantages in those pre occupations. However, following Quinn (1988), Raine and Willson contend that there is a cycle to organisational life and, over time, the emphasis in the culture of an organisation changes and evolves. Relying upon the shifts in style of government from

bureaucracy to managerialism and then to the competitive market, Raine and Willson identify what they describe as the emergence of the quieter collaborative partnership model of management, a model which, they claim, predicts the eventual emergence of a 'new bureaucracy' in which stability and a slower pace of operation are deliberately sought and institutionalised, consolidating what has been learned in the technical and social arenas.

Collaborative partnership is the post-managerialist model which, according to Raine and Willson, is in greater harmony with the values and priorities traditionally associated with criminal justice, than managerialism, which never sat comfortably alongside the separation of powers and independence of the judiciary. They anticipated some re-definition of the role and function of criminal justice and a return to long termism; that greater attention would be paid to crime prevention; that there would be a stronger emphasis upon more collaboration and policy conformance between social policy agencies; and more of a focus upon long-term policy development, with a return to more fundamental empirical, research-based and less polemical forms of policy development, drawing upon the Police and Criminal Evidence Act, 1984, the establishment of an independent prosecution service, and the Criminal Justice Act, 1991, which they regarded as 'hangovers' into a managerial age from an earlier period when humanitarian and judicial considerations played a more significant part in shaping criminal justice.

Raine and Willson's (1997) attractive case for post-managerialism in the public sector is less than convincing when applied to the criminal justice process. Evidence suggests the criminal justice process is far from emerging from the grip of managerialism, and there seems to be an institutionalised framework within government that has an interest in ensuring that, in large measure, it remains so. There may be some grounds for arguing the emergence, during the 1990s, of a collaborative partnership method of working within the criminal justice process, but, exposed to close examination, what emerges are criminal justice agencies, including the courts, often with quite properly and 'constitutionally' different aims and objectives, directed by government to determine upon common aims and objectives, thereby prejudicing and compromising necessary independence, in

principle, and of decision making. A range of fears have been expressed by criminal justice practitioners (for example, Wade and McCormac, op. cit.) at the extent to which new methods of collaboration now see the criminal justice agencies vying for resources at annual 'cross cutting' budgetary discussions, leaving the more muscular criminal justice agencies somewhat better placed than others. Into such a process, the magistrates' courts have been fully embraced, now discussing, or, at least represented at discussion, which focuses upon the causes of criminal activity, as well as its detection and prosecution. Burns (1998) would no doubt defend the emergence of such a model as demonstrating his understanding of the criminal justice system as :-

> "... organisations in the same cause and we ought to recognise the need for collaboration and co-operation in the same cause ...".[82]

However, the extent to which the perception, if not the reality, is of a compromised summary justice process, is all too obvious.

Raine and Willson (1997) sidestep the impact of the Police and Magistrates' Courts Act, 1994, by which, this study argues, the independence of the administration of summary justice was dealt a significant blow. Since their study, the Crime and Disorder Act, 1998, and the Access to Justice Act, 1999, have, it is argued, continued the strong emphasis of criminal justice legislation throughout the 1990s, imposing lines of accountability in hierarchical structures upon the administration of the summary justice process. There is little indication, in the summary justice process, that managerialism is on the wane.

Conclusion

The emergence of "new public management" thinking in the MCS, evidence by, in particular, cash limiting and Le Vay's report, undoubtedly contributed towards the notion that the MCS was in need of fresh strategic direction which could more properly be provided by a managerial hierarchy which found its fulcrum in central government. There is no evidence to suggest that anything other than superficial

consideration was given to the effect that marginalising the magistracy from the management of its courts might have upon the administration of summary justice or of local democracy.

There can be no doubt that Le Vay lay at the heart of the developing management agenda for the MCS, which was, after publication of the White Paper 'A New Framework for Local Justice', (1992), to find expression in the Police and Magistrates' Courts Bill.

Lacey (1994) has argued that a reading of the Police and Magistrates' Courts Bill suggested that the managerial dynamic was firmly placed in the development of criminal justice policy and that measures which significantly increased the power of the central State, both in the administration of criminal justice and in the breadth of criminalising norms, were being introduced, many of them packaged in the anodyne discourse of efficiency. It is now proposed to analyse in more detail the emergence of the managerial dynamic in the MCS, before analysing its impact and application in Hampshire.

NOTES

1. See, for example, Peacock, A. (1979) *'Public expenditure in post-industrial society',* in B. Gustaffson, *Post Industrial Society.* London. Crown Helm.

2. Foster C.D. and Plowden F.J. (1996) *The State under Stress. Can the Hollow State be good Government.* Open University Press, at pages 2 - 3.

3. Major, J. (1989) *Public Service Management, the Revolution in Progress.* London: Audit Commission.

4. New Zealand Treasury (1987) *Government Management: brief to the incoming Government.* Wellington. Government printer.

5. Op. cit., at page 58, where reliance is placed upon Duncan, A. and Hobson, D. (1995) *Saturn's Children.* London: Sinclair-Stevenson; and Patten J. (1995) *Things to come.* London: Sinclair-Stevenson.

6. Foster C.D., Jackman R.A. and Plowman M. (1980) *Local Government Finance in a Unitary State.* London : Allen and Unwin. Ostrom V., Tiebout C.M. and Warren R. (1961) 'The organisation of government in metropolitan areas'. *American Political Science Review*, 55(4) : 831-842. Webb S. and Webb B. (1922) *Development of English Local Government.* Oxford. Fulton J.S. (1968) *The Civil Service, Vol.1. Report.* Cmnd. 3638. London : HMSO.

7. Op. cit. Part One, chapter 1.

8. For example, Home Office (1968) *The Civil Service.* (The Fulton Report). Cmnd. 3638. London. HMSO.

9. Interview. Senior Civil Servant, Home Office, 12/98.

10. Gray A. and Jenkins W.T. (1984) *Lasting Reforms in Civil Service Management. Political Quarterly 55/4:425.*

11. Ibid.

12. Following implementation of the Criminal Justice Act, 1988.

13. Interview. Assistant Chief Probation Officer, Hampshire and the Isle of Wight, 1/5/98.

14. Home Office (1988) *Improving Management in Government: The Next Steps.*London: HMSO. Foster C.D. and Plowden F.J. (1996), at pages 153-158.

15. Foster C.D. and Plowden F.J. (1996), at pages 147-167. Op. cit.

16. Home Office (1995) *Review of the Prison Service in England and Wales and the escape from Parkhurst Prison on 3.1.95.* Cm 3020. London: HMSO.

17. A BBC interview reported in the *Financial Times, 19/10/95.*

18. Foster C.D. and Plowden F.J. (1996), at page 167.

19. Minutes of meetings of Hampshire Magistrates' Courts Committee demonstrate the difficulty magistrates serving on MCCs encounter in making the necessary distinction, which has led Government to legislate on the issue in the Access to Justice Act, 1999, section 88.

20. Ibid.

21. Price and Waterhouse (1994). *Executive Agencies : Facts and Trends.*

22. Foster C.D. and Plowden F.J. (1996), at chapters 8 and 9.

23. Interview. Senior Civil Servant, Home Office, 12/98.

24. House of Commons Home Affairs Committee, *Crown Prosecution Service*, Fourth Report, Session 1989-1990; Audit Commission, *Review of the Crown Prosecution Service*, National Audit Office (1989).

25. For example, Home Office (1983) *An Independent Prosecution Service for England and Wales.* Cmnd. 90744. London : HMSO. Home Office (1993) *Report of the Inquiry into Police Responsibilities and Rewards.* Cm. 2280. London : HMSO.

26. The Criminal Justice and Court Services Act, 2000.

27. See, for example, Home Office (1993) *A Report of an Inquiry into PoliceResponsibilities and Rewards.* London. HMSO. Jones T. and Newburn T. *Home Office Consultation Paper: Prisons - Probation: Joining forces to protect the public.* Legal Aid Act, 1988. Access to Justice Act, 1999, sections 12-18.

28. Established as an Executive Agency in April, 1995.

29. Op. cit., Part One, chapter 1.

30. Skyrme T. (1983) Op. cit.

31. Giddings P. (1995) *Parliamentary Accountability : A Study of Parliament and Executive Agencies*, at pages 139-152. (ed) Macmillan.

32. Rutherford A. and Gibson B. (1987) *Special Hearings. Criminal Law Review,* at page 447. Interview. Moore T.G. Justices' Clerk, Woodspring, Weston super Mare, 1/5/98.

33. Interview. Faulkner D. Formerly Deputy Secretary, Home Office, Oxford, 3/11/98.

34. Ibid; and Home Office Circular 66/1984 taking forward the theme of efficiency and effectiveness in the MCS.

35. Evidence to the House of Commons Home Affairs Select Committee, 23 January, 1984, cited in Home Office (1984). *Criminal Justice: A Working Paper.* London : HMSO.

36. Home Office Circular 66/1984.

37. Interview. Faulkner D. Formerly Deputy Secretary, Home Office. Oxford, 3/11/98.

38. Op. cit., Part One, chapter 1.

39. Home Office Circular 66/1984.

40. Now to be found in the Justices of the Peace Act, 1997, Part VI.

41. Interview. A senior civil servant, Home Office, 12/98; and Criminal Justice Act 1991, section 95.

42. Interview. Marsh M. and Moore T.G. justices' clerks, Liverpool and Woodspring, 24/3/98 and 22/4/98

43. Interview. Faulkner D. Op. cit.

44. Skyrme T. (1994) Op. cit.

45. Interview. Assistant Chief Probation Officer, Hampshire and the Isle of Wight, 1/5/98, op. cit.

46.. Home Office (1988) *Improving Management in Government: The Next Steps.* London. HMSO.

47. On implementation of the Criminal Justice Act, 1991.

48. Correspondence between Clerks to MCCs and the Home Office.

49. Correspondence of 18/2/91 passing between the Chief Officer of Cheshire MCC (on behalf of himself and Bedfordshire, Hampshire, Hereford and Worcester, Kent, Lincolnshire and Surrey MCCs) and the Home Office.

50. Justices' Clerks Society Paper on cash limits:60.0151.

51. Walters K.F. (1993) 'Trading Justice'. Dissertation lodged in the Institute of Criminal Justice, Faculty of Law, University of Southampton.

52. *The Independent Newspaper. 25/10/91.*

53. Interview. Baldwin A.J.M. Justices' chief executive and justices' clerk, Hounslow, 17/4/98.

54. Op. cit. Part One, chapter 1.

55. Ibid.

56. Op. cit., Part Four, chapter 8.

57. European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950*). Katte Klitsche de la Grange -v- Italy (1994) 19 EHRR 368; Zimmerman and Steiner -v- Switzerland (1983) 6 EHRR 17.* More generally, op. cit. Part Four, chapter 9.

58. Walters K.F. (1993) op. cit., at pages 38 to 43.

59. For example, the annual public meetings of Hampshire Magistrates' Courts Committees on 8/9/97 and 7/9/98.

60. Home Office (1990-1999) Criminal Statistics. London : HMSO.

61. Sanders A. (1994) 'From Suspect to Trial'. *The Oxford Handbook of Criminology*. (ed. Maguire M., Morgan R. and Reiner R.) Oxford, at pages 798-800.

62. Road Traffic Offenders Act, 1988, sections 69 to 90.

63. In confidential conversation with two metropolitan stipendiary magistrates.

64. The former justices' clerk at Southampton and the New Forest between 1988 and 1998 reports such encouragement during 1997 and 1998.

65. Op. cit., Part Four, chapter 8.

66. Op. cit.

67. Op. cit.

68. Op. cit., at paragraph 10.7.

69. "... The arrangements for managing magistrates' courts and their resources date from 1949, but retain the local, part-time, almost amateur flavour of an

earlier age. The arrangements have never been systematically appraised, and have not adapted to take account of the enormous increase since 1949 in the volume of business and the number of permanent staff or the fact that central Government now foots most of the bill ...". Home Office (1989) *Report of a Scrutiny into the Magistrates' Courts Service.* London. HMSO.

70. Interview. Assistant Chief Probation Officer, Hampshire and the Isle of Wight, 1/5/98, op. cit.

71. Justices of the Peace Act, 1997, section 45.

72. Op. cit.

73. Op. cit., Part One, chapter 1.

74. When the Criminal Justice and Court Services Act, 2000, is implemented.

75. Walters K.F. (1993) Trading Justice. Op. cit.

76. Home Office (1992) *A New Framework for Local Justice.* Cm. 1829. London : HMSO; and Interview. Faulkner D. Op. cit.

77. Ibid.

78. Comments made to a President of the Justices' Clerks Society at that time, by a Minister of State at the Home Office – reported to the former justices' clerk at Southampton and the New Forest by the then President of the Justices' Clerks' Society.

79. Home Office (1992) *A New Framework for Local Justice.* Cm 1829. London. HMSO.

80. Op. cit., Part One, chapter 1.

81. Op. cit., Part One, chapter 1.

82. Op. cit., Part One, chapter 1.

PART TWO

CHAPTER 4

A BRIGHT NEW DAWN

A New Framework for Local Justice

In February, 1992, the Government published, under the auspices of the LCD, a White Paper, 'A New Framework for Local Justice' (Home Office, 1992).[1] As was soon to become apparent, although Government had not accepted Le Vay's report (Home Office 1989) in its entirety, it nevertheless set the scene for subsequent developments.

The White Paper suggested that the organisational structure established in magistrates' courts fifty years previously was no longer adequate and hampered efforts to achieve good value for money for the public. Since the 1940s, the volume of criminal and civil cases had more than trebled and the law itself had become more complex. Other criminal justice agencies had been modernised or restructured. Public expectations and mobility had increased whilst social attitudes had changed in a way which had made the task of providing summary justice increasingly demanding. It re-asserted the position of successive governments that the judicial role of the magistracy was not and never had been in question. The Government was wholeheartedly committed to the concept of summary justice provided by lay people drawn from their local communities. The problem lay rather with the way in which magistrates' courts were organised and managed. Drawing heavily upon Le Vay for its analysis of the ills of the MCS, and re-inforcing the view that Le Vay's analysis was widely accepted within the MCS, having costed implementation of Le Vay's preferred option, and having paid what it described as great attention to the views expressed by magistrates and court staff opposing the dilution of local justice they feared a national service would entail, the Government determined to build on the best features of the locally-based system and on the willingness of magistrates and court staff to participate actively in that process (1992, paragraph 13). The somewhat patronising tone of the White Paper and the suggestion that it was listening to the MCS was soon exposed when Government's

proposals revealed the lines of accountability and centralisation it had in mind; and its subsequent reluctance to engage in dialogue that might have resulted in any meaningful change to its proposals. It was apparent that if the MCS was opposed to the dilution of local justice they feared would result from Le Vay's preferred option, it was possible for Government to re-introduce the same agenda quite differently.

The managerialist agenda thus emerged. The White Paper suggested that faults found by Le Vay were not merely faults identified by management theory; they showed themselves in practice and that while the resources committed to magistrates' courts had more than matched increases in workload, the unit costs of dealing with cases and enforcing fines, together with delays, had continued to increase (1992, paragraph 9). These had a direct effect, for example, on the cost to the taxpayer of legal aid, the costs borne by defendants generally and the quality of service they received.

In setting out its objectives for change, the Government announced that it intended to provide clearer lines of accountability for the MCS, both locally and with central government; to guarantee the judicial independence of magistrates and their legal advisers in a framework of local justice; to yield improvements in the efficiency and effectiveness of the MCS, as measured by the time taken to complete cases coming before the magistrates' courts and the quality of service provided to the public and professional court users; and to secure maximum co-operation in the management of the service with other parts of the criminal justice system (1992, paragraph 9). (The notion of 'system' in criminal justice jargon was not going away and, in due course, was to be entrenched by a radical, reforming Government of a different hue). Moreover, the managerialist agenda of fiscal prudence and accountability was to the fore (1992, paragraph 14); with the ascendancy of the notion that the MCS had to secure maximum co-operation in the management of the service with other parts of the criminal justice system (1992, paragraph 2).

Government identified key elements in the process of modernising the management structure and organisation of the MCS by announcing that, from 1st April, 1992,

responsibility in relation to the finance, organisation and management of magistrates' courts, hitherto exercised by the Home Secretary, would be exercised by the Lord Chancellor (1992, Introduction and paragraph 1); MCCs would have a more clearly defined management role, with a wider range of membership and effective administrative support (1992, paragraphs 16-24); area services would be combined to produce a less fragmented system of local justice and one better able to achieve effective liaison with other criminal justice agencies (1992, paragraph 16); senior managers would have clearer personal accountability to MCCs for performance standards, as envisaged in the Citizens' Charter (1992, paragraphs 26, 29); there would be systematic planning and performance review and clearer consultative arrangements between benches and MCCs throughout the MCS within a new overall policy framework (1992, paragraphs 22, 24); and there would be a magistrates' courts inspectorate, to disperse best practice and supervise service standards, reflecting the principles of the Citizens' Charter (1992, paragraphs 30-32).

The three main objectives of the White Paper were first, to reduce the number of management areas (i.e. MCC areas), from 105 to about half that figure, whilst retaining local management; strengthen local management by enabling it to focus upon key management issues and support it with a single head of the service in the area; tighten accountability of central government by securing the Lord Chancellor's approval of appointments to management; introduce good planning throughout the service; second, to make the process of managing the courts more accessible to the local community; and third, to guarantee in legislation the judicial independence of magistrates and the duty of their legal advisers to give independent legal advice in each individual case (1992).

The overall effect of the proposals was intended to create 'new style' MCCs which were responsible for areas large enough to permit strategic planning and decision-making and constituted so as to encourage effective local management. It was claimed, that, by such arrangements, the MCS would be less fragmented and parochial (1992, paragraph 24). (Few could have envisaged that the less fragmented and parochial MCS which emerged would be accompanied by

wholesale court closures and significant numbers of redundant justices' clerks).[2] It was acknowledged that MCCs would need proper administrative support, which many lacked (1992, paragraph 24).[3] The Government was confident in the ability and willingness of the magistracy, supported by senior staff, to rise to these new challenges. Such optimistic rhetoric was to persist, in the face of entrenched opposition.

There was to be no new money to fund the changes.[4] The proposals were heavily weighted in favour of the managerialist agenda; and the White Paper signally failed to address areas of tension which could arise between securing the managerialist agenda on the one hand, and the exercise of judicial independence on the other. Notably, there was no explanation as to why (as emerged later) it was necessary to spell out the judicial independence of magistrates and the duty of legal advisers to give independent legal advice in individual cases, if there was not perceived to be, by policy makers, some risk in the proposals to that independence.

Fiscal prudence, in the form of cash limiting (Criminal Justice Act, 1991), new managerial responsibilities and accountability (1992, paragraph 2), the "drivers" of "new public management", were to the fore; legal and judicial implications, as opposed to their acknowledgment (1992, paragraph 34), were very much of secondary importance.

A raft of consultative documents followed publication of the White Paper, setting out a range of options which might form the structure of the MCS after the proposals had been enacted and implemented.[5] The consultative documents were followed by decision documents. The issues upon which opinions were sought included the role and priorities of MCCs; training for MCC members; communications within MCC areas; and interim provisions. The representative organisations of the MCS were consulted as were other criminal justice agencies.[6] For the MCS, representative organisations did not consult and agree among themselves and it was evident from some of the responses that opportunities were being taken to settle old scores. The Association's responses were directed at keeping justices' clerks firmly in their place;[7] whilst the Association of Magisterial

Officers seized the opportunity to promote the interests of the majority of its members in matters relating to management and administration. There had been a feeling among many court staff that, for too long, those members of staff who were lawyers, or had court legal adviser responsibilities, were regarded as an elite: others saw in these proposals a necessary corrective.[8]

In "selling" its proposals, under the banner of a "bright new dawn" for MCCs,[9] the LCD suggested that they built upon the best of what was already in place: for example, larger and more flexible areas (but which MCC or other areas it had in mind was not disclosed); an overall professional head of the service within each area (the paper failed to point out that in many areas, in a less formal manner, such a post already existed, for example, Dorset, Hampshire and Northamptonshire); and terms and conditions of service defined for the most senior managers, in fixed term contracts (but with no consideration of the impact upon judicial decision makers). It was suggested that the reforms were not change for the sake of change, but the replication throughout the MCS of new ideas and practices which had already been developed. However, as with so much that surrounded the emergence of this "bright new dawn" and, since, the ideas and practices, and any other rationale upon which the proposals were claimed to have been based, has never been disclosed. In the absence of evidence to the contrary, the suspicion is that no coherent justification for the proposals ever existed. (It is of note that, whilst in the Introduction to the White Paper (1992) the Lord Chancellor suggested that the purpose of change in ministerial responsibility for the MCS was to ensure a more coherent approach to management within Government, he did not pursue any other rationale underpinning the need for change, other than the need to : "... modernise the management structure to improve performance and accountability.").

It was suggested the changes would improve and modernise the MCS, enabling it better to face and conquer growing demands and challenges (1992, paragraph 2). Furthermore, and importantly, it was asserted that although the Lord Chancellor was responsible to Parliament for the administration of the magistrates' courts, he would not have direct management responsibility for them (1992, paragraphs 16-24). The reforms were intended to provide a minimum level of accountability to

the Lord Chancellor so that he could fulfil his responsibilities to Parliament.[10] The extent of that minimum level of accountability, and its implications, are explored below.

The Magistrates' Courts Service responds to the White Paper

The Government's proposals were met with dismay by many, although by no means all, in the MCS.[11] Skyrme (1994, p.904) suggests that many magistrates were prepared to accept some sort of Next Steps Agency management, so long as it came under the supervision of the Lord Chancellor - he did not disclose the sources upon which he relied in reaching this conclusion, or their extent. Whilst there were many who perceived a threat to judicial independence in the proposals, there were others, among them some magistrates, who saw in the proposals to establish a small MCC with managerial authority, a mechanism by which, justices' clerks, in particular, would be made more accountable.[12] There were resonances here with the criticisms of Glanville Williams (1955), Darbyshire (1984) and Skyrme (1994), of the intrusive way in which some justices' clerks performed their various functions.

Whatever overtures might have been made to the contrary, although the primary emphasis of Le Vay was upon structures and systems, it was plain that many considered that justices' clerks had been targeted as poor managers, and that whilst this criticism was not explicit in the White Paper, the inference was irresistible. Justices' clerks soon discovered that, with the jostling for position that was about to emerge, with the Association bent upon self preservation, the Association of Magisterial Officers determined to secure and improve the lot of its members by immediately warming to the managerialist agenda, and many MCCs and their chief officers seeing the opportunity for greater control and improved lines of accountability of their justices' clerks, they had few friends at what was to become a critical turning point for the MCS.

Criticism of the White Paper by justices' clerks was mostly scathing. Green (1992) wrote that those who had prepared the White Paper had benefited from the

reactions to Le Vay, learning that most magistrates seemed not to know that their independence was dependent upon that of the justices' clerk : the White Paper asserted that Le Vay's analysis was widely accepted within the MCS (1992, paragraph 10). Green (1992) considered that magistrates appeared not to realise that their independence would be lost if the executive controlled the careers of justices' clerks and the advice and training they gave to magistrates; there was probably nothing which the executive could suggest or do that would provoke a conjunction of magistrates and justices' clerks or their respective leaders and members; and that no one outside the judiciary understood either the constitutional significance of the magistracy or the relevance of the justices' clerk's independence of the executive.

Green (1992) suggested the Government had proposed 'new style' MCCs whose membership would not necessarily be representative of the magistrates' courts they organised, and which threatened to sever the link between MCCs and magistrates; the MCS and the staff they employed would be accountable to the executive and their lack of independence was emphasised by the reserve power of the Lord Chancellor to assume control from a MCC that was seriously or consistently underperforming; the conditions of the justices' clerk's employment, on a fixed term contract, would make him or her totally submissive to the will of the LCD, with renewal of contract depending upon whether (s)he measured up to the LCD's expectations; and that, taken in the round, the White Paper had provided the Lord Chancellor with the power over magistrates' professional advisers which Le Vay had warned would result in the loss of magistrates' independence from the executive (Home Office 1989, paragraphs 8.4 and 8.5). In its drive for improved managerial effectiveness, the White Paper placed accountability to central government above judicial independence; and in its thrust for improved communication with other criminal justice agencies, suggested the administration of justice had a commitment to other elements in the criminal justice system which were more properly the responsibility of the Home Secretary, thereby compromising further the independence of the summary justice process. It was suggested that, in destroying the justices' clerks independence of the executive,

Government purported to take control of the relationship through which it would subordinate the magistracy to the executive.

In August, 1993, the Society convened an extraordinary general meeting held on 21st September, 1993. In the covering letter accompanying the convening notice (Justices' Clerks' Society, LGCC/ACC, 11th August, 1993), the Honorary Secretary of the Society indicated that :-

> "... Council has a number of concerns, one of which is that government has refused to cost the decisions that it has taken. ... this approach fails to acknowledge that a re-organisation of this magnitude may increase costs in the short to medium term with a result that severe cuts in public services will occur if reforms of this nature have to be funded out of existing resources.
>
> Following on from the introduction of cash limits, Council is concerned that irreparable damage will be caused and the delivery of local services threatened ...".

Prior to this meeting, the Society distributed to its members a paper prepared by one of its former Presidents, John Jenkins, (Justices' Clerks' Society, LGC/ACC 15.0013, 9th September, 1993), in which he wrote that he felt the Society had :-

> "... made a fundamental, serious and sustained error of judgement in not detecting the sinister intentions of Central Government even as they became increasingly obvious ... in their anxiety to get the best deal possible from the Lord Chancellor's Department they have adopted a policy of appeasement. In doing so they have attempted to suppress voices raised in protest, not realising soon enough that the Lord Chancellor was ... pursuing relentlessly a policy that will ... destroy the independence of the Magistrates' Courts ...".

In commending Green's (1992) paper to members of the Society, Jenkins wrote :-

> "... Lord Lane, the former Lord Chief Justice, ... said "If things go on as they are and if we don't get some more J.D. Greens we can say goodbye to judicial independence at all levels. Then it will be too late ...".

Jenkins continued :-

> "... I first alerted the present Lord Chief Justice a week or so after he was appointed ... he made it clear he had read the paper in full ... would seek an early meeting with Lord Mackay to discuss it ... had his meeting and said: "I am worried about it (the looming threat to the independence of Magistrates' Courts). I have seen the Lord Chancellor about it and I am still worried". That I am afraid is the experience of everyone who tries to get reassurances from the Lord Chancellor. One faces an implacable, inflexible ruthlessness with an occasional leavening by a declaration that he has no designs on judicial independence. One is not reassured by these remarks whilst he is still pursuing measures to enable his department to manipulate Magistrates' Courts. Surely he cannot be so naive as to believe that powers are being created for the purpose of not using them ... ."

The Society made no formal response to Jenkins' observations.

On 15th September, 1993, the Society issued a press notice (Justices' Clerks' Society, LGC/ACC 15.0013/60.0154, 15th September, 1993) in connection with its forthcoming meeting. The notice drew attention to the observations of the President of the Society that :-

> "... Our employers, the Central Council of Magistrates' Courts Committees, the Criminal Law Committee of the Law Society and a majority of Magistrates' Association branches have all indicated their opposition to these proposals and we are hopeful that the Government will

listen to reason and work with us to introduce changes rather than trying to impose them in the face of strong opposition".

The robust statements from current and former Presidents of the Society concealed, or at least, did not fully expose, the weaknesses of opposition. There were some, a former President among them (Jenkins J. op. cit.), who doubted the integrity of the Society; while the Society was only able to call upon the support of the "majority" of the branches of the Association. Division among opponents of legislative change was not a firm foundation upon which to progress.

At the meeting, the membership, in its resolve to oppose the decisions of Government, expressed concerns that the proposals would increase public expenditure; require amalgamation of MCCs thus resulting in the management body of the MCS becoming too remote from the magistrates, court users and the general public at local level; cause a diminution or extinction of local services; not guarantee value for money; threaten the independence of the magistracy and the independence of the justices' clerks in giving advice to magistrates both in and out of court in accordance with his/her statutory duty and in the exercise of general duties under the law; and subject the management of the MCS to control by central government. In a bold and highly unusual move, at its Extraordinary General Meeting on 21st September, 1993, the Society called for the withdrawal of the proposals and for a new and detailed review of the organisation of the MCS.

The Consultative Documents

By November, 1993, the Government, still promoting its intentions and the support it had for them, announced it had established a Magistrates' Courts Consultative Council, (MCCC) which included members of the main representative organisations in the MCS, but, with strong representation from the LCD. The MCCC had commented on the eleven consultative documents and all decision documents before they were issued.[13] As a result of this consultation, changes had been made to Government's intentions[14] and that, for example, MCCs would now be appointed by a selection panel (the Government had originally proposed direct

election by magistrates which, in hindsight, would have led to the retention by MCCs of local interest in them and appointments made to them by the magistracy). (A selection panel, advised by a justices' chief executive, has led to the suggestion in one area of covert attempts to manipulate membership of MCCs)).[15] It seemed the Government was engaged in a public relations exercise, not without success, to demonstrate the extent to which its proposals were consistent with what magistrates' courts practitioners were demanding and that it was being responsive; and was entirely consistent with the position it had adopted in its White Paper (1992, paragraph 13, op. cit.).

The Justices' Clerks' Society : Briefing for opposition

The Society had, to some extent, anticipated the struggle it was to have with Government.

As early as February, 1992, the Outer London Branch had been considering how to deal with the White Paper and its consultative and decision documents. By July, 1993, a member of the Branch was co-ordinating the "London lobby", it being understood that the Secretary of the Society was liaising "north of Watford" and offering support for growing opposition to the worst excesses of the White Paper, ideas, options, proposals and decisions in related documents. Parliamentary Questions were being drafted (Justices' Clerks' Society - Outer London Branch, correspondence of 29th July, 1993). On 14th July, 1993, an Early Day Motion was tabled in the House of Commons, recording seventy seven signatures, noting with grave concern the White Paper and its consultative documents which threatened to alter fundamentally the relationship between the magistracy and their legally qualified clerks; and shared the view of magistrates all over the country that the proposals would undermine the independence of the magistracy by centralising power in the hands of the LCD and undermine the administration of justice.[16]

In the item contributed for discussion by members of the Society (circulated to its members on 9th September, 1993, under reference LGCC/ACC 15.0013), Jenkins indicated that Green's paper (Green 1992) had been circulated to all members at

his expense, and copies distributed to every secretary to branches of the Association and clerks to every MCC; and a selection of judges, Members of Parliament, journalists and others. He wrote that one Member of Parliament, Gerry Bermingham, had requested that additional copies be sent to all members of the Home Affairs Select Committee. Lord Lane had requested additional copies for members of the Judicial Studies Board, and a copy had also been read by his successor. In addition, Officers of the Society were engaged in frequent dialogue with members of the LCD. No decision maker was left in doubt about the issues, their implications, and the level of opposition.

The consultation exercise and resultant changes were not sufficient to assuage justices' clerks who doggedly tried to engage Government and Members of Parliament in dialogue about what they perceived to be the serious constitutional implications of the proposals. Many justices' clerks, armed with the briefing document prepared by the Society, lobbied their local Members of Parliament,[17] who, in turn, passed on the briefing documents to the Parliamentary Secretary to the Lord Chancellor, who replied in standard form.[18] In this correspondence the Parliamentary Secretary suggested the Lord Chancellor was :-

> "... convinced that there is nothing in the proposals that jeopardises ... independence; indeed, several of the proposals will strengthen the independence of justices' clerks in advising their benches, and therefore the judicial independence of the magistrates themselves ...".[19]

Furthermore, he suggested that, by MCCs employing justices' clerks, the justices' clerks would have the full protection of employment law which they would be able to use if dismissed for exercising their independence in advising their bench. He went on :-

> "... And to put beyond any doubt that the fears that have been expressed are unfounded, clause 71 of the Bill contains the new statutory declaration that was promised in the White Paper ... that clause provides that management may not direct justices' clerks in the advice given in individual cases ... It

will also be possible for clerks to gain extra protection by negotiating that the terms of clause 71 be reflected in their contracts ..".[20]

Any suggestion of interference by Government in the judicial process was rejected on the grounds that it was entirely proper for the LCD to issue guidance to the MCS in the way that it did and justices' clerks were not bound to follow that advice. Any justices' clerk who had experience of the administration of legal aid knew full well the consequences of not following the advice of the LCD.[21]

The Parliamentary Secretary defended on grounds of cost the decision to reduce the number of MCCs. In response to criticism of the Government's perceived lack of consultation on its policy considerations for modernising the magistrates' courts, he suggested, somewhat extraordinarily, that it was the nature of such documents that they were not open to consultation, but the views of justices' clerks were taken into account both before and after Le Vay and it was in the light of those responses, and others, that Government formulated its proposals.[22] In effect, every attempt made by justices' clerks to engage Government in debate about policy considerations underpinning the proposals was rejected.

The Society's further cause for concern

On 17th November, 1993, the Society rejected the responses given by the Lord Chancellor to their criticisms of his proposals (Justices' Clerks' Society. Police and Magistrates' Courts Bill. Second Reading Briefing).

As to the Government's suggestion that it would enshrine in law that nobody could direct the advice given by justices' clerks, the Society questioned why such legal provision should be necessary when it had never been in the past. Further, the Society suggested that Government assurances on this issue rang hollow in the face of attempts by the executive to improperly influence judicial processes, including: attempts to persuade courts to expedite hearings arising out of the miners' strikes; the circular issued to courts by the Lord Chancellor advising them that documentary evidence must be submitted in support of legal aid applications -

advice which was *ultra vires* the legislation and which he was subsequently compelled to withdraw; advice to courts to delay cases likely to result in custodial sentences, and to grant bail wherever possible, during a prison officers' strike; an agreement between the Home Secretary and the Association about how to fudge the unit fines system in the wake of political embarrassment about its operation; and a justices' clerk's statutory duty to interpret the extent of the provisions of a civil fees order and collect fees where appropriate, was challenged following the LCD's instruction not to collect fees in relation to the issue of warrants of entry. The Society considered that, for the future, justices' clerks, perhaps on fixed term contracts and performance related pay, with an Inspectorate watching over them, would feel less able to resist these pressures, with all the implications that might have for the loss of judicial independence.[23]

In response to Government's suggestion that justices' clerks had, until very late in the day, made a positive contribution to the development of reform, the Society was firm: it claimed it had always been implacably opposed to the main proposals for the introduction of fixed term contracts and the increased influence of the LCD. (It was a response that masked the extent to which the Society was, more generally, divided upon the proposals for reform. It also concealed that there was an emerging perception that the Council of the Society, its elected leadership, was not necessarily reflecting the views of its members (for example, Jenkins J., op. cit.). Whether or not that perception was justified, the Society's position became firm). Given that it became clear that the Government's mind was made up :-

> "... In the public interest the Society calls for the withdrawal of the proposals and for a new and speedy detailed independent review of the organisation of the Magistrates' Courts Service ...".[24]

Importantly, the Society observed that, for the first time, justices' clerks would be accountable to MCCs through a line manager both of whom would be subject to guidance and influence from a new Inspectorate, part of the LCD.[25] MCCs would also be accountable to central government, who would set national targets and performance measures for them to achieve.[26]

To the suggestion that there would be no influence by the Lord Chancellor over justices' clerks, the Society replied that Government's priorities of the day would become the Inspectorate's, whose priorities would filter down through MCCs and to justices' chief executives. Instancing examples, the Society questioned what would happen when the justices' chief executive was concerned about his/her budget. (S)he would be anxious not to allow expensive practices to develop, even those that justices' clerks might consider the law demanded. Where funding (or performance related pay) might depend on the speedy despatch of business, would the justices' clerk scrutinise an application for an adjournment impartially (this became a significant consideration once the power of adjournment and other pre trial issues were extended in the Crime and Disorder Act, 1998). Further, if a justices' clerk's continuing employment depended on how well (s)he collected fines, would (s)he dispassionately advise that all methods of enforcement must be considered, before imprisonment.[27]

To the suggestion by Government that the introduction of a new head of service would not establish a new tier of administration, the Society thought the response grossly misleading, as a secretariat, headed by a justices' chief executive, responsible for supervising and monitoring the performance of a justices' clerk and implementing policy and performance objectives, did not currently exist.[28] As has been noted (op. cit.), this assertion did not wholly reflect the position throughout England and Wales.

The Society concluded that nothing in the Lord Chancellor's recent speeches and responses had assuaged its fears about the defects of the proposals. If they were pushed through in the face of opposition from the majority of court users and the administration of justice, the Government would deal a severe blow, not only to the morale, but also to the credibility of the magisterial system.[29] On 2nd December, 1993, it informed its members that the Lord Chancellor and the Parliamentary Secretary were both issuing a standard four page letter in reply to correspondence received from Members of Parliament, which was misleading in a number of respects and needed an answer.[30]

Response by the magistracy to the White Paper

In July, 1993, correspondence[31] circulated to some magistrates' courts in England and Wales by the chairman of the St. Helens magistrates' court suggested that recent discussions had indicated there was little confidence in the effectiveness of communications from the Association about the White Paper. Support was elicited from other magistrates' courts to "petition" the Association, claiming that a number of distinguished judicial and administrative leaders had expressed doubts and concerns over key aspects of the White Paper, in particular, the potential threat to the independence of the magistracy. It was further suggested that magistrates' fears had been fuelled by the apparent indifference of the Lord Chancellor to legitimate expressions of concern that his proposals threatened their independence, principally by changing the status of the justices' clerk from an independent holder of a public office to a mere employee, accountable through a structure to the MCC, which in turn was directly accountable to the Lord Chancellor; and the serious lack of understanding and indifference exhibited by the Parliamentary Secretary to the Lord Chancellor when he revealed his ignorance of the key proposal that chairmen of MCCs would require the Lord Chancellor's approval of their appointment.

On 9th October, 1993 the Lord Chancellor attended the annual meting of the Association. *The Times*, under the line, "Magistrates jeer Lord Chancellor over court plans", reported that :-

> "... The unprecedented strength of feeling from the ranks of the normally restrained magistrates erupted as Lord Mackay attempted to defend the proposals to be contained in a bill next parliamentary session ... Afterward, Rosemary Thompson vice-chairman of the Magistrates' Association, said she had never witnessed such strength of feeling within the magistracy before. "Magistrates are feeling under enormous pressure - it has been quite unremitting in recent months," she said. There had been a succession of legislation: the Children Act, youth courts, the Criminal

Justice Act 1991 with means-related fines, and then the amended Criminal Justice Act. Magistrates now faced further criminal justice legislation.

> "If there had not been all this pressure, I doubt if the opposition to the white paper proposals would be so intense. Magistrates do feel they have been manipulated …".[32]

As already noted, the Chairman of the Association was not alone in thinking that magistrates, and the MCS more generally, was being manipulated (Jenkins J., op. cit.).

The chairman of the Teesside justices, Nan Bloom, summarised the feeling of the meeting, by saying :-

> "The Government's proposals will compromise our independence, and a fundamental constitutional principle will be lost - that of judicial independence. That is the right of any person to come before the magistrates' courts in the certain knowledge that right will be done … without external interference save for the professional advice of the justices' clerk. Lord Mackay's pledge that independence would be enshrined in statute meant absolutely nothing …".[32]

In defending his position, the Lord Chancellor indicated that it was not his aim to undermine judicial independence, a principle he unwaveringly held. He claimed that he would have no part in proposals which would undermine the independence of magistrates. He did not see what possible ground he could have for wishing to do that. However, having considered all the arguments put forward, nothing he had heard that day caused him to alter his view that the changes he had proposed would not interfere with judicial independence. However, in one concession he said the Government had agreed to review the much criticised formula for funding courts, which had been attacked for being based too much on results and throughput of cases. He could have gone further and referred to the criticism of justices' clerks

and others that the formula was capable of impinging upon the administration of justice.

A few days later, the Lord Chancellor claimed that the interests of justice and the judicial independence of the magistracy were not and would not be impaired by any proposed changes in administration. He could not agree there was any possibility that justices' clerks would be improperly influenced in the advice they gave magistrates and that, in coming to that conclusion, there were two safeguards. First, it was the magistracy which took decisions and responsibility for judging fellow citizens and if the magistracy considered the advice it was receiving from its clerk was wrong, they had a responsibility to reject it and he was certain they would (quite how magistrates would come to the conclusion that the legal advice they were receiving was incorrect, was not explained). Second, he would enshrine in law that nobody could direct the advice which clerks gave to the magistracy.[33] (He did, but confined it to advice in individual cases only, a formula which a justices' clerk interviewed by Rutherford (1993, p.101) conceded, when addressing a different issue, was defective; and was to be exploited by a senior civil servant in the LCD in a manner not apparently considered by Parliament, the magistracy nor justices' clerks).

The Police and Magistrates' Courts Bill

On 17th December, 1993,[34] the eve of the publication of the Police and Magistrates' Courts Bill, senior police officers and key figures in the legal establishment warned the Home Secretary that he faced damaging Parliamentary battles over his law and order package which contained fundamental changes to the constitution that would lead to the end of the traditional style of policing. Significantly, throughout the media coverage of the introduction of the Bill, scarcely any attention was paid to the proposed changes in magistrates' courts and the shift they were to effect in the administration of summary justice.

Vigorous opposition from the magistracy and the Society did not dissuade the Lord Chancellor from proceeding. In introducing the Police and Magistrates' Courts

Bill in the House of Lords on 16th December, 1993, he emphasised that under the Bill neither local management nor central government might properly influence the decision magistrates took, or the legal advice they received from their clerks, in individual cases. He claimed that he believed there was an impetus for reform within the MCS, and that many of the reforms had been adopted voluntarily by different areas of the MCS and were working well.[35] By no means all Peers were convinced, and Lord McIntosh of Harringay, opposition spokesperson, observed :-

> "The noble and learned Lord is himself a shining example of how the separation of powers is not always necessary for justice to be achieved. He represents a judicious blend of the executive and the judiciary which we all admire greatly. But to enshrine such an anomaly in legislation as is proposed here, and to have the magistrates' courts committees and their justices' clerks (and we must remember that the justices' clerks are the only source of legal advice to lay magistrates) under the control of chief justices' clerks appointed by the Lord Chancellor's Department - who will be, whatever the noble and learned Lord himself may be, purely part of the executive - is simply not acceptable."[36]

The Liberal Democrat Lord Harris of Greenwich was more withering :-

> "... Seldom, I believe, has a more objectionable Bill appeared in a Queen's Speech. The principal objective of both parts of the Bill is to give overwhelming power to Ministers and their nominees... ."[37]

An Alternative Framework for Local Justice

The Society, no doubt acknowledging that, in spite of strong support in the House of Lords, some form of legislation was inevitable, produced what it described as "An Alternative Framework for Local Justice"[38] (Justices' Clerks' Society, LGCC/BG 60.0154, 7th January, 1994) in an attempt to secure a way forward to which it might feel more readily committed. The Society contended that amalgamation of MCCs should only go forward with the consent of the parties and

that the Lord Chancellor should have no specific power of direction; the requirement of approval by the Lord Chancellor for the appointment of chairman of MCCs was opposed; the notion of a chief justices' clerk was opposed and that, instead, there should be a chief executive and a management team of justices' clerks and other appropriate senior officers; there were a range of features surrounding the proposal for a chief justices' clerk (as will be shown, subsequently re-titled justices' chief executive), including his duties and responsibilities, which would not involve any activity in connection with legal or judicial functions; the justices' clerk should be statutorily accountable to the MCC; and the Lord Chancellor should not be empowered by statute to require MCCs to impose fixed term contracts on justices' clerks and other senior staff or to approve or vary the terms of contracts, power to introduce such contracts being vested in MCCs only. The Society supported the introduction of an Inspectorate.

Within a few days, the Society (JCS News Sheet No. 94/1) was requesting further information from justices' clerks about actions taken locally in opposing the proposals; and enclosing a list of Conservative marginal seats, urging justices' clerks to ensure that respective Members of Parliament had been briefed and made aware of the extent of the opposition. Where mere acknowledgements had been received, justices' clerks were encouraged to request a response to the issues; and, in any event, to write to all Members questioning whether the Government's legislative proposals were in contradiction to its policy of de-regulation. The Council of the Society had sent letters and briefings to all County Council and Metropolitan District Council Chief Executives and leaders and shadow leaders of those authorities; letters and briefings to advisory committees; letters to Members of Parliament in response to the LCD's standard response; briefing papers and the alternative framework to the Lord Chancellor and to the libraries of the House of Lords and House of Commons. Meetings had been held with, among others, the Conservative Back Bench Legal Affairs Committee, Labour Party Home Affairs Committee, and Liberal Democrat spokesperson for Home Affairs.

Second Reading

There was widespread opposition to the Bill at Second Reading on 22nd February, 1994.

Lord McIntosh commented upon the unanimity of opposition and questioned the Lord Chancellor's stress upon the need for a greater strategic direction of magistrates' courts, claiming that he could not understand what strategic direction there could be for a magistrates' courts system which responded to the needs of cases brought before them.[39] He suggested the Bill was a denial of the principle that justice should not only be done but be seen to be done.[40] Lord Harris of Greenwich took a broadly similar line, noting that the measure gave Ministers powers over both the police and magistrates which would have been unthinkable a decade before.[41]

The Lord Chief Justice, Lord Taylor of Gosforth, directed his concerns at judicial independence, both of lay and professional magistrates and their clerks, who, whilst not strictly members of the judiciary, nevertheless had important judicial functions.

Lord Taylor continued :-

> "... In my view, those functions fall into two categories. I say "in my view" because, although I have asked the parliamentary secretary to the Lord Chancellor what he considers those judicial functions to be, he has written to me that he "doubts there is much to be gained from attempting to define which of the functions of justices' clerks are or are not judicial ones". I find that observation astonishing. Since the Lord Chancellor attaches significant importance to the principle of judicial independence to enshrine it in a specific clause in the bill one may have expected him and his department to have taken care to identify the traditional functions which need to be protected ...".[42]

The reticence of the Parliamentary Secretary to define which of the functions were or were not judicial raised at least some suspicion that it was preferred there should be no definition - a suspicion which finds some support in the reluctance of the Lord Chancellor, (or his Department), to agree that justices' clerks perform a judicial function at all.[43] The difficulties which ensued resonate throughout this study.

Lord Taylor directed attention to principles underpinning judicial independence, emphasising that it was absolutely fundamental that nobody providing legal directions or advice to a tribunal, or who was taking decisions which affected the rights or liabilities of parties to proceedings, should be or appear to be susceptible to outside influences of any kind.[44] He was also critical of proposals for a chief justices' clerk, whose responsibility would be to manage justices' clerks in his area and would also have a duty to promote discussion relating to law, practice and procedure among the justices' clerks for whom he or she was responsible. He observed :-

> "... The chief justices' clerk will also be on a fixed-term contract incorporating performance related pay. There are very real dangers here. I cannot overstress that to insert a clause proclaiming judicial independence, even if it were written in capital letters or red ink, will be no guarantee of such independence if specific provisions elsewhere in the Act, or in the Lord Chancellor's blueprint for clerks' contracts, in fact operate against judicial independence or appear to do so ...".[45]

Lord Lester of Herne Hill, was equally condemnatory considering that the Bill threatened the practical, if not the formal, independence of the magistrates' courts and the justices' clerks. He perceived no threat of Government interference with the judicial process in individual cases, but a more subtle threat, drawing attention to what he regarded as the prophetic lecture delivered by Lord Browne-Wilkinson on the independence of the judiciary and what he argued was an insidious threat to the independence of the legal system as opposed to the judges who operate it.[46]

Lord Ackner was particularly trenchant in his criticism reminding Peers of the attempts by Government and civil servants to pursue power, using as a yardstick for decision making, financial value for money, rather than the interests of justice.[47] He recalled that the Lord Chief Justice had warned that the growth in the powers of the executive and therefore of the Government over the administration of justice had steadily increased in recent years :-

> "The signs are that it will extend still further, and one asks whether we are now seeing tools being fashioned which by some future, perhaps less scrupulous, Government may be used to weaken the independent administration of justice".[48]

Lord Ackner considered the matters to which he referred demonstrated how strongly the tide towards executive domination was flowing, a tide which was eroding judicial independence which was so fundamental to democracy. He observed that :-

> "... What is in essence proposed in this Bill in relation to the magistrates, is to transfer the control of justices' clerks from the judiciary (that is the magistrates) to the Executive, (which is the Lord Chancellor's Department ...).[49]

Commenting on the special provision in Clause 71 to protect the independence of advice provided by justices' clerks to magistrates, Lord Ackner believed that the provision wrongly presupposed that a firm line could be drawn between legal and administrative matters. Importantly, and echoing the concerns of the Society (op. cit.), he considered that the mere fact that it was necessary in an Act of Parliament to provide a specific assurance that what the Act provided was to have an impact on the independence of the judiciary underlined the very danger of the provisions which necessitated that assurance.

In criticising the ability of the Lord Chancellor to intrude into the area of removal and appointment of MCC members, Lord Ackner advocated caution, suggesting the proposal distorted the proper constitutional balance between the LCD, the MCC and, ultimately, the courts. As he put it :-

> "... The new magistrates' courts committees will in future be chosen for their managerial competence and will be assisted, obviously very strongly where necessary, by the Inspectorate. As the past has shown, there is no need for these quasi-dictatorial powers ... this is an entirely unnecessary clause and we should restrict the ever centralising moves by which the Executive creeps nearer and nearer to running the administration of justice".[50]

The flavour of the debate in the House of Lords reflected a number of briefings by the Society, and comments made by Green (1992). However, whilst the briefings were persuading some members of the House of Lords, it remained otherwise with the Lord Chancellor.

The Lord Chancellor's response to the Second Reading of the Bill

On 1st February, 1994, the Deputy Secretary, LCD, advised the President of the Society that having considered carefully the points raised during the debate on the Second Reading of the Bill on 18th January, and at a subsequent meeting with representatives of the MCS, the Lord Chancellor continued to believe that his proposals embodied in the Bill were the best way of meeting the key objectives set out in the White Paper. To a large extent, those key objectives had been endorsed by the MCS in the "alternative framework". He remained anxious to ensure that nothing in the proposals would undermine the independence of the magistracy and also that control and management of the MCS remained locally based. He did not consider these principles were at risk through his proposals. Nevertheless, in the light of the views expressed in the debate, he proposed to bring forward amendments to the Bill which would have the effect that the chairman of a MCC would be appointed by its members without requiring the approval of the Lord

Chancellor; the terms of the contract of employment between chief justices' clerks or justices' clerks and their MCC would be left entirely to local discretion and the Lord Chancellor would therefore have no power to require that contracts be for a fixed term or that remuneration be related to performance; and the renewal of appointment as a chief justices' clerk or justices' clerk would not require the approval of the Lord Chancellor. The Lord Chancellor hoped these changes would make clear that there was no intention that the management of the MCS should be directed by the Lord Chancellor, and that judicial independence would not be undermined by management considerations.[51]

The Society, perhaps naively, welcomed these changes and considered that the concessions went a long way to meeting some of the major concerns that had been expressed about measures in the Bill, especially the question about imposition of fixed term contracts and performance related pay which would have, in the view of the Society, compromised judicial independence. The Society nevertheless remained opposed to the power the Lord Chancellor retained to force MCC areas to amalgamate, and claimed there was no support for the creation of chief justices' clerks and that if there was to be an overall manager of administration of the MCS in each area, the post should be held by a chief executive,[52]assuming, presumably, such a post holder would have only a managerial role, which would not impinge upon judicial decision making. The response of the LCD failed to address other key issues related to judicial independence.

The Parliamentary Secretary to the Lord Chancellor wrote to a constituency Member of Parliament on 17th February, 1994,[53] confirming the Lord Chancellor's approach and the rationale for the amendments. The tone of the correspondence endorsed the managerial message of accountability :-

> "... the chief justices' clerk will only be accountable, as the head of service, to the magistrates' courts committee ...
> In turn, the committee will be accountable ...
> ... the independent Magistrates' Courts Inspectorate will assist the Lord Chancellor in assessing the performance of committees ...".

Little comment was made about the justices' clerk's judicial or advisory functions and the necessary independence that went with them. In concluding the correspondence, the Parliamentary Secretary conceded he had received several similar letters from other Members of Parliament and had responded to them in like terms. It is not difficult to conclude that the Deputy Secretary in the LCD and the Parliamentary Secretary had been selective in their use of information. This correspondence dealt with, however, some specific concerns. For example, acknowledging that criticism had been made about the new post of chief justices' clerk and fears of its accountability to the LCD, and implying there was no cause for concern, it was nevertheless conceded that such a post would be accountable as the head of service to the MCC which employed him, and that the MCC would be accountable, "in a general sense", to the Lord Chancellor for the resources used in providing the MCS in its area and for the quality of service. This accountability would take the form of the Lord Chancellor's power to require a MCC to achieve particular performance standards in the administration of the MCS, which would be supported by a discretionary power in extreme circumstances to take emergency measures to remedy severe shortcomings in the management of the MCS at the local level. There was no explanation about what particular performance standards might be directed at, nor the extent to which performance standards set for the MCS might intrude upon the judicial process. It was contended that these two measures of accountability were necessary, because of the Lord Chancellor's accountability to Parliament for the provision of the MCS and what was then the £350m budget allocated to MCCs.

Accountability was the principal issue which seemed to underpin the rationale relied upon by the Parliamentary Secretary. This accountability made it necessary for the Lord Chancellor to have spending bodies either in some way accountable to him or under his direct managerial control. Subsequent amendments to the Bill did nothing to address the issue of lines of accountability which went to the heart of judicial independence, and to the core of this study.

Dealing with the issue of judicial independence, the Parliamentary Secretary claimed that the Lord Chancellor was sensitive to any possibility that the independence of the judiciary was in danger and it was because there could be such a perception that there was nothing in the Bill which threatened the judicial independence of magistrates.[54] However, the Government considered that it would be advantageous, in the context of legislation, to re-state the respective roles of MCCs, justices' clerks and Government, by re-affirming in statutory form the fundamental principle that judicial decision-making in the magistrates' courts was not subject to management direction. The insufficiency of this attempt at a limited form of "protection" to justices' clerks in the giving of legal advice, was marked by a further attempt by another government in the Access to Justice Act, 1999.[55]

Further amendment

In some MCC areas there was much resistance to the proposal by Government to create a new post of chief justices' clerk. Lord Taylor, who had, described the proposal as "chilling",[56] persisted in his opposition to it, describing it as "dangerous nonsense". Eventually, those objecting to the creation of a post of chief justices' clerk were successful, to the extent that the Lord Chancellor agreed, at Third Reading of the Bill, to the creation of a post of "justices' chief executive", to be employed by a MCC and responsible for the day-to-day management and administration of magistrates' courts in an area. Those opposing the creation of the post of chief justices' clerk considered they had achieved much by way of amendment, a view endorsed by the Lord Chancellor in correspondence with the Honorary Secretary of the Society on 16th December, 1993. Time was to show this optimism to have been misplaced.[57]

Committee Stage

At Committee Stage in the House of Lords on 22nd February, 1994, sustained assault was mounted upon proposals to reduce MCCs from 105 to what was then considered to be about 60 or so.[58] Lord Ackner suggested that all concerned wished to see effective utilisation of resources which occasionally necessitated a

combination of MCCs. But he considered a balance had to be struck between economies of scale and the maintenance of the local nature of the committees. He thought that the balance was for the committee to decide, subject to default powers, the Lord Chancellor having sufficient controls to ensure that committees did not act in any profligate way.[59] Lord Ackner dealt with the three methods by which the Lord Chancellor had sufficient controls, namely financial constraints, the work of the Inspectorate and the Audit Commission.[60] Other objections were made to the power of the Lord Chancellor to encourage amalgamations of MCCs where there was no willingness to do so. These concerns, deeply felt, were lost in Parliamentary Division.[61] They were not to be reflected in the subsequent legislation.

Third Reading

On 24th March, 1994, at Third Reading, the Lord Chancellor moved to amend the Bill by deleting the title "chief justices' clerk", replacing it with "justices' chief executive". Although the amendment was broadly welcomed,[62] the newly titled justices' chief executive's responsibility to promote discussion relating to law, practice and procedure among the justices' clerks in his area, prompted Lord Mackintosh of Harringay to express his concern that it was inappropriate for such a person to be taking an active part in promoting discussions on, in particular, law, where there was a line of accountability running to the MCC and beyond.[63]

Although Lord McIntosh received the support of Lord Ackner, (the Lord Chief Justice having already expressed his concern), having had the background to the proposal explained by the Lord Chancellor and that the consultation process revealed wide support in the MCS for the principle of a legal forum,[64] the amendment was withdrawn.[65] Whilst the MCS plainly supported the notion of a legal forum, as did the Lord Chancellor,[66] there is no evidence to suggest that had it any idea of the extent to which post holders would ultimately interpret the provision, it would have retained that support. There is a strong hint here of the extent to which some Peers had been mistakenly reliant upon the briefings they had

received, and, in particular, an alarming lack of perception by the Society of the implications of what was considered to be a relatively uncontroversial proposal.

A range of further amendments were tabled, primarily directed at ensuring justices' clerks and members of staff of a MCC offering advice to the magistracy should not be the subject of direction by the MCC, the justices' chief executive or any other person.[67]

During this debate, attention was drawn by the Lord Chancellor to the training function conferred on MCCs. The Lord Chancellor endorsed the view of Lord Tenby (a magistrate in Hampshire), that it was important to note that anyone whom the MCC thought proper could be used to instruct magistrates in the training programme.[68] But it did not seem to occur to Peers that, in the provision of training, magistrates could be just as subject to influence by the LCD as anywhere else in relation to their functions, more so as the Lord Chancellor had a Training Officer for magistrates employed by his Department, and that, accordingly, it would be possible for the executive to influence judicial thinking through the provision of courses of instruction.

Criticism in the House of Commons

The Bill did not pass through the House of Commons without criticism, and during Second Reading Gerry Bermingham raised the issue of fixed-term contracts for justices' clerks which, according to him, were the "death knell of independence".[69]

In refuting the claim that justices' clerks were on fixed term contracts, because the Bill had been amended to exclude such a provision, the Parliamentary Secretary nevertheless conceded that it would be open to a MCC to impose such a contract on a justices' clerk if it so wished. Until the issue was raised during discussion about the Bill, the possibility of the imposition of discretionary fixed-term contracts had not before been considered for those performing judicial duties and responsibilities[70] - if, of course, it was conceded justices' clerks performed a judicial role at all.

The Bill - concluding comments

Although the Bill had a lively passage through both Houses of Parliament, it attracted little public attention. It was only after enactment, when the Association and the Society had time to reflect, that it emerged the protection of judicial independence had been badly fudged.[71]

The failure of representative bodies to achieve significant amendment in the Bill to the protection afforded to justices' clerks offering independent legal advice in individual cases only, was particularly notable. The issue was the subject of sustained attack in the House of Lords, a "deeply alarmed" Earl Russell observing:-

> "... we believe that the restriction in the Bill to individual cases is entirely inadequate. Whitehall does not think in individual cases; it thinks in categories ...".[72]

(As is noted herein, such a distinction would not have, perhaps, persuaded Ashworth (1992) of the defects in the individual case approach; and the criticisms of it by Rutherford's (1993, p.101) interviewee justices' clerk do not address this particular point.) The suggestion that nothing was to be lost by including an appropriate amendment fell on deaf ears.

The importance and significance of the point Earl Russell was making was to emerge a little later, in the opinion of many justices' chief executives, following the advice of the Director, Magistrates' Courts Group, LCD, that it was lawful for them to provide policy guidance, generally, on matters relating to law, practice and procedure in magistrates' courts.[73] This advice from one of the Lord Chancellor's senior officials ran entirely counter to his own position.[74]

Significantly, while the Lord Chancellor held that all those offering legal advice to magistrates were subject to the directions of the justices' clerk,[75] the legislation did not say so and it does not appear to represent the law.[76]

The staff of a MCC, including, under the legislation, justices' clerks and others who advise the magistracy, were to be employed by and sit in a line of accountability (through the justices' chief executive) to the MCC, those lines of accountability finding their destination in the LCD. Because of the way in which the LCD intended to interpret, restrictively, the protection of the provision of advice to the magistracy in individual cases, MCCs and/or their justices' chief executives were free to instruct, more generally, their staff who delivered advice to the magistracy.

It is of critical significance to this study that, bearing in mind that the LCD did not consider justices' clerks, nor those to whom they delegated functions under the Justices' Clerks' Rules, 1970, (as amended), performed judicial functions (the subject of detailed later discussion), the accountability of all staff of a MCC, (whom this study argues were performing judicial functions and offering advice to the magistracy), seemed free from doubt.

A similar sustained attack was launched upon the role of a MCC in appointing a person it thought fit to be responsible for the training of the magistracy and justices' clerks; and in the ability, in hierarchical lines of accountability, created by the Bill, for an official from Whitehall to influence the judicial process.[77] The general thrust of this thinking was sufficient evidence for suggesting that perhaps Whitehall did (for example, the approach to issues associated with legal aid [78]) seek to influence magistrates' courts and their justices' clerks. Proposed amendments to the Bill were lost.[79] The relatively smooth passage of the Bill does much to confirm Darbyshire's view about the interest of Parliament in the summary justices process (1999, p.380). [80]

The main thrust of the Bill emerged unscathed and found expression in the Police and Magistrates' Courts Act, 1994.[81]

Major "players" in magistrates' courts were left in a state of disarray following enactment. Many, including the Association and the Society, had sought

significant amendment, through lobbying and detailed briefings. However, Government was in a strong position : Le Vay was constantly prayed in aid as justifying change to a MCS that was not capable of managing itself effectively (albeit, Le Vay's solution was side stepped, with no rational explanation save cost and the reluctance of the MCS to see the dilution of local justice - such representations as there were on both issues being largely ignored by Government during the passage of the Bill).[82]

Those promoting "new public management" initiatives had scored a significant victory. Not all agreed, however, the issues addressed by the Bill were about "new public management". A justices' clerk[83] in post in a county area, expressed his deep concern at the extent to which Government had demonstrated its intention to "control" justices' clerks. In his view, once justices' clerks were controlled, interference with the judicial process was inevitable. He was convinced Government was determined to control courts of summary jurisdiction and that its "new public management" agenda was no more than a screen for centralism. The Government's proposals for a reduction in the number of MCCs from what was then 105 to what was soon intended to become 42, co-terminous with criminal justice agencies, with a single head of service in each MCC area, was part of the Government's strategy in achieving centralisation. However, the reduction of MCC areas was no more than a start. He saw no reason why, in principle, the Government could not, in due course, propose further rationalisation, reducing MCC areas further, into regional units. Such a view finds resonance elsewhere in the criminal justice process.[84] Powers contained in the Access to Justice Act, 1999, authorising the Lord Chancellor to require MCCs to adopt common systems or services have a similar ring. It is difficult to escape the conclusion that further rationalisation of the management and administration of MCC areas is inevitable.

The Police and Magistrates' Courts Act, 1994

MCCs

The various changes introduced by the Police and Magistrates' Courts Act, 1994,[85] were radical and important.

In summary, the legislation provided for the introduction of MCCs which could comprise no more than 12 members, inclusive of any member co-opted or appointed by the Lord Chancellor, unless the Lord Chancellor otherwise directed.[86] Despite attempts to widen membership, most MCCs still comprise magistrates selected by magistrates : a significant weakness in the legislation and the rationale which underpinned it. The intention of Government was to, at least, reduce magistrates' involvement in the management of the MCS and, to a lesser extent, widen its membership to non magistrate members. By leaving selection in the hands of magistrates, the dangers of patronage remained; whilst, as eventually proved to be the case, few, if any, magistrates favoured the notion of non magistrate members joining MCCs.[87]

A MCC had to appoint one of its members to be chairman of the MCC (and that, in inner London, the chief metropolitan stipendiary magistrate, by virtue of his office, at the time of implementation of the legislation, had to be chairman of the inner London MCC);[88] was to be a body corporate;[89] had to, on at least one occasion in each calendar year, admit members of the public to its meeting;[90] the Minutes of proceedings of every meeting of a MCC had to be open to inspection by members of the public, except to the extent that the MCC determined that the Minutes disclosed information of a confidential nature,[91] and copies of any Minutes which were open to inspection had to be made available to the public on payment of such reasonable fee as the MCC may in each case determine.[92]

Rather than the resource provision role which existed prior to the implementation of the Act, the legislation provided that a MCC was responsible for the efficient and effective administration of the magistrates' courts for its area and that it might,

in particular, allocate administrative responsibilities among the justices' chief executive, the justices' clerks and the staff of the committee; and determine the administrative procedures to be followed by any of those persons. The legislation also provided that it was the duty of every MCC to provide training courses for magistrates, justices' clerks and staff of the MCC.[93]

Under the Act, the Lord Chancellor gained important new powers to direct MCCs in discharging their responsibilities, to meet specified standards of performance; and direct MCCs to take specified steps, at such intervals as may be specified, for the purpose of keeping magistrates for their area informed as to the activities of the MCC, or for the purpose of ascertaining the views of magistrates on particular matters related to the functions of MCCs.[94]

Significantly and in spite of the strong representations that had been made to the Lord Chancellor, the legislation provided for MCCs to make proposals at any time for the replacement of two or more MCCs with a single MCC, following appropriate consultation.[95] But whether or not proposals had been submitted to him under the legislation, the Lord Chancellor was provided with power to order by statutory instrument the replacement of two or more MCCs with a single MCC, or for the replacement of a MCC with two or more MCCs.[96] The only criterion for the Lord Chancellor to consider, in making an order to amalgamate MCCs, or the reverse, was whether the making of such an order was likely to contribute to an overall increase in the efficiency of the administration of the magistrates' courts for the MCC area or areas to which the order related. [97]

The legislation provided that if the Lord Chancellor decided that, without reasonable excuse, a MCC failed properly to discharge any duty imposed upon it, having given written warning to the MCC specifying the default or defaults to which the order related, he might make an order directing the chairman of the MCC to vacate office as chairman, or, on the making of the order, remove one or more specified members of the MCC (who may include the chairman, but may not consist of all members of the committee).[98] If after making such an order, the Lord Chancellor remained of the opinion that the MCC was still failing properly to

discharge any such duty he might make an order providing that all members of the MCC were to vacate their office and that for a specified period, not exceeding three months, beginning with the making of the order, the MCC was to consist of persons nominated by the Lord Chancellor (who need not be magistrates).[99] There was provision for a new MCC to be chosen, thereafter.[100] MCCs became accountable to the Lord Chancellor in every respect.

Justices' Chief Executive

The legislation required every MCC to appoint a justices' chief executive.[101] The qualifications for appointment to such office at that time required that the appointee should have a five year magistrates' courts qualification (within the meaning of s.71 of the Courts and Legal Services Act, 1990), or that he was a barrister or solicitor and had served for not less than five years as assistant to a justices' clerk, or he then was or had previously been a justices' clerk.[102] The legislation clarified that a person could not be appointed both as justices' chief executive and as justices' clerk for a petty sessions area, unless the Lord Chancellor had agreed that he may hold both appointments. Where such an agreement to the holding of dual posts was forthcoming, the post holder could not exercise any functions as justices' clerk for the petty sessions area, unless authorised to do so by the MCC for the area which included that petty sessions area.[103] However cautionary the legislation appeared to be, its practical implication caused consternation for both the Society and the Association :-

> "Since the passing of the 1994 Act ... a number of appointments have been announced where justices' chief executives have also been appointed as justices' clerks. Here a clear conflict of interest arises between administrative and legal issues, and there are several fundamental objections ... the independence of ... legal advice cannot be guaranteed ... Continuing such a post, although it may appear to be administratively convenient, fails to protect the lay judiciary from advice ... which may owe part of its origin to managerial/resource considerations rather than legal considerations...".[104]

Had the Society and the Association a clearer understanding of the way in which the legislation was to be interpreted by the LCD and justices' chief executives, they would have had greater cause for concern. As it was, both the Society and the Association perceived the real threat to the independent administration of justice where a justices' chief executive was in a position to influence the provision of legal advice to the magistracy.

Broadly, the legislation provided that the justices' chief executive, subject to any directions given by the MCC, had responsibility for carrying on the day to day administration of the magistrates' courts for the area to which the MCC related. The legislation made provision for the justices' chief executive to delegate any of his functions to any member of staff of the MCC.[105]

Continuing provision was made for the appointment of justices' clerks, the legislation spelling out that both justices' chief executives and justices' clerks were, on implementation of the Act, to be employed by the MCC on such terms as they might determine and hold and vacate office in accordance with the terms of any contract of service.[106] Further provision was made, setting out general powers and duties of justices' clerks and their functions as collecting officer.[107]

S.48 of the legislation contained the contentious provision that, when giving advice to magistrates in an individual case, and in exercising other legal and judicial functions specified in the Act, a justices' clerk should not be subject to the direction of the MCC, the justices' chief executive or any other person, and any member of staff of a MCC performing a similar function enjoyed the same protection. Interestingly, the legislation acknowledged the performance by justices' clerks of judicial functions, without actually spelling these out. The difficulties in interpretation of these provisions has already been noted (op. cit.).

Implementation I : A Bright New Dawn for the MCS

Once the Act took effect on 1st April, 1995, significant tensions emerged. There remained potential for great difficulty in the Government's drive for lines of accountability in the MCS. Among other things, while there were statutory safeguards provided by the Lord Chancellor in approving the appointment and removal of justices' clerks, provisions ensuring that, save when giving legal advice in individual cases, justices' clerks were to sit in hierarchical lines of accountability, were entirely new and, depending upon how the provisions were interpreted, capable of striking at the heart of the administration of justice.[108]

So far as the future role of justices' clerks and legal staff were concerned, much depended upon the way in which the role of the justices' clerk developed, if at all. If it was entirely separated from management and administration, a former President of the Society considered that, within a period of five years or so, it would be most effective for the administration of justice for post holders to be employed directly by the LCD as judicial officers.[108] If lawyers were intended to exercise more delegated powers, judicial duties and responsibilities, then independent status was desirable. Of course, such observations depended upon, at least in part, an acknowledgement by the LCD that such post holders performed judicial functions. Despite legislative provision, no such acknowledgement was forthcoming.

The former President also considered that MCCs probably had a very limited life and that, within five years or so, once MCC areas had been reduced to 42, there would be a further reduction. He noted that the Home Office had already expressed a view that police areas were not ideal and may not remain as they were, indefinitely. The incoming Labour Government of 1997 had proposals of its own for some form of regional government and the notion of regional or national structures was the subject of discussion. The police might not find national structures politically acceptable, but might be persuaded to consider regional structures further. As is noted herein (op. cit.), other criminal justice practitioners were of a similar view, and the Probation Service has now had such a model

imposed upon it statutorily (to be found in the Criminal Justice and Court Services Act, 2000).

The former President also drew attention to what he described as the "cross cutting spending review" of 1999/2000. Such a review would allocate a single budget for criminal justice areas, which would then be broken down into departmental units, depending on the outcome of negotiation. It was considered that, in such arrangements, poorly organised and rather weak MCCs, led by the magistracy, would be in a poor bargaining position when arguing with, amongst others, a "muscular" Police Service and professional CPS. Regionalisation might be the only way forward.

Fundamental to the difficulties emerging from implementation of the Act was the failure of the legislation, or any Parliamentary or other discussion about it, to properly articulate the distinctions to be drawn between judicial, legal and administrative functions. The Parliamentary Secretary to the Lord Chancellor was well aware of the difficulty, having been put on notice about it by the Lord Chief Justice (op. cit.), but persistently refused to address it. There were, of course, managerial advantages in not doing so.

The issue was picked up by a justices' chief executive,[109] who was particularly concerned about the manner in which attempts to make fine distinctions had been made by Government between what did and did not amount to judicial functions. He considered that, from Government's perspective, it was desirable that some judicial functions might be regarded as administrative, thereby leading to their management. This was entirely consistent with Le Vay, in which no principled argument was ever advanced for describing judicial functions in this way. Whatever the political rationale, administrative functions could be managed : it was more difficult if they were judicial. There was consistency here with the way in which judicial functions were re-labelled under Narey's proposals (Home Office 1997).

This justices' chief executive considered that the MCS was stumbling into executive control, with less professional legal advice, earlier administrative hearings and much greater administrative control. It would be safer, constitutionally, if a radical decision was made to abolish the magistracy and replace it with a professional judiciary.[109] (Such a radical approach would not necessarily resolve difficulties identified here which surround the notion of judicial independence. A full time, career judiciary, has weaknesses, not least those of patronage, identified by Fox and Sheridan in 1792.)[110] This justices' chief executive considered that the manner in which Government had legislated to separate management and administrative decision making from legal advice offered to magistrates in the court room in individual cases was merely a matter of semantics. There was no doubt at all that legal advice to members of the judiciary could and would be managed. So far as justices' chief executives were concerned, their continuation in post was dependent, to a very large extent, upon the patronage of the LCD.

Another justices' chief executive[111] in a smaller county suggested that, because of the number and influence of the magistracy, he would be surprised if MCCs were seriously under threat, or that anything dramatic to their future would arise in less than about 10 years.

He considered that two key issues facing the MCS arising from the Act were the separation of powers and accountability. In his opinion, few understood what was meant by the separation of powers in Britain, and fewer still really cared. (His view has some resonance with Darbyshire's (1999) opinion about the extent of interest in magistrates' courts shown by Parliament). However, issues relating to the separation of powers in magistrates' courts had now been overtaken by issues relating to accountability. MCCs were becoming accountable to, or being expected to interact with, on level terms, too many organisations. There seemed to be insufficient recognition of the need to regard magistrates' courts, managed by MCCs, as really independent from practitioners in the criminal justice process, many of whom had a partisan role.

An environment had been created in magistrates' courts where it had become too easy to criticise them for poor performance, however defined, and the need to ensure public moneys were properly protected. It was readily conceded, however, that tensions had emerged in the MCS between managers and lawyers. Managers in the MCS, particularly justices' chief executives, had a responsibility to account for the expenditure of public moneys and were insistent that the provision of resources to magistrates' courts was finite. Lawyers, on the other hand, were primarily concerned with legal and due process issues, arguing that, for example, the administration of justice took as long as it took.

As to the core of this study, this justices' chief executive considered that independence in the summary justice process had been preserved - to some extent. For example, whatever advice or guidance was given, magistrates were still free to sentence offenders as they saw fit, within the parameters of the law. (The extent to which this opinion is consonant with opinions expressed by, among others, Ashworth (1994), has already been explored.[112] It fails, however, to deal with government intrusion into the procedural justice arena.) With independence largely preserved, he questioned the extent to which concern had been expressed about the independence of legal advisers to magistrates.

Justices' chief executives are by no means agreed in their thinking on these issues or in their perceptions of the implications of change. This difference in perception is reflected in the views of a justices' clerk in one of the country's largest magistrates' courts, now a justices' chief executive[113] and a former Secretary to the Society, who traced his initial concerns about re-organisation of the MCS to the miners' strikes in the middle 1980s. However, he was placed on notice of pending significant change when he learned of a conversation between a senior civil servant at the Home Office and a justices' clerk at a Society conference in 1989/1990, that the Home Office would only be satisfied if the Society reduced by as much as half. Such comments caused him much concern, because he had not been a member of the Society long before he learned how much, in his opinion, government policy seemed to come from Ministers latching on to odd comments. He was also deeply concerned about the level of ignorance among members of the higher judiciary of

the role of justices' clerks, and particularly disappointed to learn that a new Lord Chief Justice had suggested he did not think justices' clerks performed a judicial function. The Lord Chief Justice seemed, for example, to be wholly unaware of justices' clerks judicial powers under the Children Act, 1989. Opposition against justices' clerks was led by such misconceptions. Concerns were compounded by conversations held with members of the incoming Labour Government, who had much to say about the conflicting aims and objectives of participants in the criminal justice system and the need for area co-ordination and management. However, the expressions of such opinions seemed to have no underpinning rationale and he soon formed the opinion that, implemented or otherwise, such opinions had more in common with the "knee jerk reactions" of the previous Government, to, for example, dangerous dogs and unit fines, than any considered view.

The Society was not anticipating the significant loss in clerkship posts which followed implementation of the Act. Because the Society had fought many of the proposals in the Bill on the grounds of judicial independence other issues remained largely submerged. However, there was undeniably a move towards one justices' clerk for each MCC area and fighting this simplistic logic was proving difficult. Arguments tended to be reliant upon the traditional role of the justices' clerk, the role of the personal adviser. More emphasis needed to be placed upon the role of the justices' clerk as set out in Practice Directions of the higher courts and the need of magistrates to have a personal relationship with their chief legal adviser. However, whatever the arguments for and against a single justices' clerk in each MCC area, and so far as the Society was concerned, the arguments against far outweighed those in favour, he expected one justices' clerk in each MCC area to be forced through. Although the Director, Magistrates' Courts Group, LCD, had insisted that each proposal to reduce to one justices' clerk for each MCC area would be considered on its merits, it was plain that was not happening, even where there was strong opposition. Part Three, chapter 6, of this study merely emphasised the point.

In the light of emerging difficulty, particularly having regard to conflicts which could arise between judicial, legal and administrative duties and responsibilities, the Society had submitted a paper to the LCD suggesting that justices' clerks should be appointed as judicial officers. Although the proposal was considered by the Society as essential to an independent system of summary justice, there was no doubt that, politically, the proposal was unworkable.

It was acknowledged that the Society had been most concerned about issues affecting the accountability of justices' clerks. That there was an issue to be addressed was beyond question. Justices' clerks had come in for much criticism from the LCD over one of their number who did not pass on to his Youth Panel chairman a letter addressed to Youth Panel chairmen in England and Wales by the Lord Chancellor, because the justices' clerk considered that it encroached upon the judicial independence of the magistracy. Accountability, never far away from government thinking, became a major issue. Regardless of the merits of their position, the Society knew that, at that stage, it had to address the issue of what to do when a justices' clerk acted autocratically.[114] Accordingly, they made a proposal for independent assessment of justices' clerks and the creation of an Institute which could provide a framework for that. It considered that, by proposing the creation of an Institute, those professionally accountable to it would have a fresh line of accountability that, along with a line of accountability to justices' chief executives, MCCs and, quite separately, to the higher courts, would impose sufficient constraints upon those justices' clerks who wished to ignore all the advice and guidance they were given.

The Society remained concerned that, under the Act, some powers of justices' clerks had been transferred to justices' chief executives and there were judicial and legal implications in that which had not been properly assessed. However, as serious were comments made by the Director, Magistrates' Courts Group, LCD, that he was questioning the accountability of the magistracy. Worryingly, such accountability was to find expression under the Access to Justice Act, 1999, of a unified stipendiary bench, with national jurisdiction throughout England and Wales, with a single head, a Senior District Judge (Chief Magistrate) (Part One,

chapter 2). With the creation of such a role, it seemed likely that, for the future, the role of the Association in giving advice to magistrates was likely to diminish, together with that of the Society.

It was with such issues, and many more besides, that the MCS embarked upon its "bright new dawn". The reflections and concerns of justices' chief executives and justices' clerks, suggest no consistent view, and demonstrate, to some extent, different agenda. The justices' chief executives and justices' clerks were, of course, only part of the consultative constituency : small wonder, with so many disparate views and opinions, some within the organisations that were consulted, Government was able to maintain it had some support for its proposals.

Perhaps surprisingly, however, although there remained disagreement among those interviewed, senior office holders in the Society discerned the very real possibility that the influence of the magistracy might not only diminish, but that the magistracy itself might disappear.

Implementation II : A Bright New Dawn for the Magistracy

A former President of the Society[115] considered that, following implementation of the Act, the future of the magistracy was particularly unclear : indeed, the former President felt it had no future. These concerns emerged from the weakening of the link between magistrates and their chief legal adviser, the justices' clerk, who was to become accountable to others for other than legal and judicial purposes; the likely loss of justices' clerks to the magistracy because of financial constraints; and the lack of suitably experienced lawyers likely to want to support the magistracy under the new structural arrangements. These concerns were compounded by the extent to which justices' clerks, and the staff to whom they delegated authority, were already performing judicial functions under the Justices' Clerks' Rules, 1970, (as amended), and proposals that were afoot for the extension of such powers (Narey, Home Office 1997).

The former Honorary Secretary to the Society[116] thought the Association was :-

> "... very uptight about ... Narey (*Home Office, 1997*) as the start towards the end of the lay bench ...".

He acknowledged that the Association had always been keen on some form of prohibition on justices' clerks doing certain things out of some sense of self-preservation; and a somewhat old fashioned sense of keeping the clerk in his place.

A "bright new dawn" had emerged. Because of an apparently benign approach to criticisms of their management of the MCS in Le Vay's report, the Association and the Society were unable to resist pressure for re-organisation, the only real issue being its nature and form.[117]

Although Government had acknowledged that the MCS was anxious not to dilute local justice, if it was to provide the Lord Chancellor with what he considered to be a minimum level of accountability to Parliament, some central management was inevitable.[118]

In the result, it is not difficult to trace in the legislation approved by Parliament all the trappings of a centrally managed MCS, all policy decisions being 'driven' by central government in lines of accountability that stretch into the court room.[119]

Both the Society and the Association saw a threat to judicial independence that was manifest in Government's proposals.[120] The rationale underpinning their failure to sufficiently join forces to successfully resist Government is not difficult to find. The Association continued in its pre occupation in seeking to suppress the judicial aspirations of its justices' clerks.[121] It resisted further attempts by the Society to effect improvement in the summary justice process, albeit, by an enhancement of their members' judicial role.[122] Those in the Association who saw, in these attempts, a wider agenda of seeking to wrest from them their judicial role, undoubtedly frustrated justices' clerks and created suspicion between the Association and the Society at both national and local level.[123]

Had the Association embraced the judicial aspirations of their justices' clerks, which never extended to the determination of guilt or in the sentencing of offenders, the role and status of justices' clerks might have been perceived as being of greater centrality and significance to the administration of summary justice than either the Government, Parliament or the Association acknowledged during the 1990s, perhaps securing their continuance in office, and importantly, securing the long term future of the magistracy. While there is evidence that both the Society and Association[124] appreciated the increasing judicial role of justices' clerks emerging under provisions contained in the Crime and Disorder Act, 1998, with which both seemed to have been pre occupied,[125] neither seemed to have fully perceived the more subtle threat to judicial independence, in tinkering with the rules of procedural justice, that were to be found in the 1998 legislation. Nor, perhaps more worryingly, was this tinkering considered alongside the propensity of the Lord Chancellor's officials to interpret legislation in a manner which more appropriately suited the managerialist agenda.[126]

The Police and Magistrates' Courts Act, 1994, was to have a profound impact upon the administration of summary justice and it is now proposed to review its implementation in Hampshire.

NOTES

1. Home Office (1992) *A New Framework for Local Justice.* Cm 1829. London. HMSO.

2. The issues are explored later in the study.

3. In Hampshire, at that time, there was a full time clerk (chief officer), full time chief administrative officer, full time personal assistant to the clerk, and other support staff, accommodated in an under-used magistrates' courthouse at Havant.

4. Home Office (1992) Op. cit., paragraph 14.

5. There were eleven Consultative Documents.

6. Those consulted included the Justices' Clerks' Society and the Magistrates' Association, nationally, but embraced local MCCs and benches.

7. See, for example, the Magistrates' Association's resistance to justices' clerks performing judicial functions, outlined in Part One, chapter 1.

8. Many administrative staff, particularly those having managerial and administrative responsibilities which embraced the supervision of large numbers of staff, and management of the building estate, felt undervalued.

9. A leaflet published by the Lord Chancellor's Department.

10. Correspondence of 17/2/94 passing between John M. Taylor MP, Parliamentary Secretary, Lord Chancellor's Department, and James Hill MP.

11. Many lay magistrates considered there was a need for significant change, without appreciating the constitutional significance of it; whilst many administrators in the MCS warmed to the language of and importance attached to the "new public management" agenda.

12. Between 1984 and 1985 The Magistrate, the journal of the Magistrates' Association, published a number of items, *"In lighter vein"*, intended as fictitious correspondence passing between a new magistrate and her friend (vols. 40, 41 at pages 21, 38, 61, 72, 93, 114, 125, 125, 150, 169, 185, 203; and 8, 20.) The fictitious author concluded her 1984 correspondence (vol.40, no.12, at page 203) with the comment that "... Bossy-Boots (*the justices' clerk*) is a greatly misunderstood, misrepresented and highly underrated member of his profession and deserves better of me than he receives...". The correspondence was briefly revived in 1988, when the fictitious author was less enthusiastic, writing that (vol.44, no.4, at page 72), "... there are some Bossy-Boots who get above themselves from time

to time ... (*they*) ... are a necessary evil in an imperfect world ..." ; and at vol. 44, no. 6, at page 114, " ... your very own Bossy-Boots...is a bit too brisk and remote to help you very much...the poor dears get paid on a population basis so the only way to be upwardly mobile is either to get the birth rate up a bit...or to get the powers that be to run several Divisions together to create mega populations. They then spend all their time behind their desks being super-efficient and feeling very powerful...". In lighter vein perhaps, but with the criticisms of, among others, Glanville Williams (1955), Darbyshire (1984), and Skyrme ((1994), who was in post as Secretary of Commissions, LCD), and Le Vay about to commence work on the Scrutiny, the timing of the items and their general tone was not propitious.

13. Membership included a representative of the Justices' Clerks' Society, Magistrates' Association and Association of Magisterial Officers.

14. HL Deb. 22/2/94. Cols 545-553.

15. Comments made to the justices' clerk in Southampton and the New Forest by magistrates across the Hampshire Commission of the Peace. The Lord Chancellor's approval for the MCC chairman appointment would be sought only after the chairman was chosen by the MCC; greater weight would be given to geographical factors and less to population in deciding MCC area amalgamations following the decision to reduce the number of MCC areas; MCCs would not be required to hold all their meetings in public, but at least one each year should be open to the public; MCC members would be required to undertake at least one day's training each year in connection with their duties; the requirement of the Lord Chancellor's approval to senior staff appointments would apply only to the single head of the service in the area, and justices' clerks; and the Lord Chancellor would always give reasons if, in any case, he declined to approve an appointment or a candidate.

16. EDM 2325 of Session 1992/93. Among supporters of this Early Day Motion were some who were to become Ministers of State in the LCD and at the Home Office, and who were to drive the proposals forward with greater vigour than had been anticipated. Among those who signed the Early Day Motion were Paul Boateng, Stephen Byers, Alistair Darling, Jane Kennedy, Alan Milburn, Mike O'Brien and Barbara Roche.

17. JCS News Sheet 93/29. Ref. 60.01.54. 2/12/93.

18. For example, correspondence to Sir Patrick McNair-Wilson MP from John Taylor MP, Parliamentary Secretary, Lord Chancellor's Department, of 28/1/94.

19. Ibid.

20. Ibid.

21. During the 1980s, there emerged from Government much criticism of the cost of legal aid and, in the years which followed, the criminal justice process was continually reminded that the cost of criminal (and other) legal aid was spiralling out of control. Justices' clerks who had, at least initially, and in part, responsibility for determining applications for legal aid in the magistrates' courts, (Legal Aid in Criminal and Care Proceedings (General) Regulations, 1989, Regulation 11), became the subject of widespread criticism by the Public Accounts Committee of the House of Commons for failing to apply, with sufficient rigour, the appropriate rules and regulations. As a result, civil servants issued directives to justices' clerks which were, initially, rejected outright as an overt attempt to influence the judicial process. Justices' clerks resistance was soon overcome by the introduction of secondary legislation. In 1996, the Permanent Secretary to the Lord Chancellor announced a change of approach. Following the implementation of a number of other proposals in connection with legal aid, the Lord Chancellor decided that criminal legal aid would no longer be administered in magistrates' courts. There was no suggestion there would be any legal or judicial involvement in any new arrangements and there were grounds for supposing that it was intended that criminal legal aid should be administered through the Legal Aid Board with the specific purpose of managing it and carefully controlling the expenditure relating to it. In August, 1997, the LCD issued a circular to justices' clerks, under the hand of the Permanent Secretary, inviting them to attend a conference on criminal legal aid means assessment. It was suggested that the conference would give justices' clerks, "as the accountable managers", the opportunity to share good practice in the issues involved in difficult areas of means assessment; obtain a departmental/audit view on the importance of propriety and accountability for the legal aid fund; identify any further ways the department could work with justices' clerks to improve performance; and receive and discuss new comprehensive guidance on dealing with legal aid applications. The invitation to attend the conference was accompanied by a leaflet bearing the legend:- "Legal Aid - Let's improve it". Le Vay had cautioned :- "That department's (i.e. the LCD) responsibilities for the higher courts and the administration of legal aid could lead it to wish to influence the way magistrates' courts dispose of business ...". (Home Office 1989).

22. Correspondence of 22/1/94 passing between John M Taylor MP, Parliamentary Secretary, Lord Chancellor's Department, and Sir. Patrick McNair-Wilson MP.

23. Justices' Clerks' Society. Police and Magistrates' Courts Bill. Second Reading Briefing.

24. Ibid, at page 4.

25. Ibid at page 2.

26. Ibid.

27. Ibid, appendix 1.

28. Ibid, page 3.

29. Ibid, pages 3 and 4.

30. Bearing in mind the Justices' Clerks' Society's briefing document, no real surprise.

31. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1, deposited in the Institute of Criminal Justice, University of Southampton. No doubt relying upon the advice of Green J.D., (1992) his justices' clerk.

32. *The Times.* 9/10/93.

33. Lord Mackay of Clashfern, Lord Chancellor, in a speech to the Northamptonshire Branch of the Magistrates' Association.

34. *The Guardian.* 18/12/93.

35. To a limited extent this was true. In Hampshire, for example, there was a full time clerk to the MCC, with a small secretariat; and the MCC was focusing sharply on its managerial responsibilities. There was, however, no central repository of legal advice to the lay magistracy either in general, or in individual cases. There were no fixed term contracts; and there was no strict line of accountability through the clerk to the MCC, to the MCC and, thereon, to the Lord Chancellor.

36. HL Deb. First Reading 16/12/93.

37. HL Deb. First Reading 16/12/93.

38. Proposals for an Alternative Framework. *A Response to the Government's White Paper 'A New Framework for Local Justice'*, November, 1993.

39. HL Deb. 22/2/94. Col 468.

40. Ibid, Col 470.

41. Ibid, Col 470.

42. Ibid, Col 475.

43. Interview. Oates L., op. cit.

44. HL Deb. 22/2/94. Col 476.

45. Ibid, Col 477.

46. Ibid, Col 488; and op. cit.

47. Ibid, Col 506.

48. Ibid, Col 507

49. Ibid, Col 508.

50. Ibid, Col 618.

51. Correspondence of 1/2/94 passing between the Deputy Secretary, Lord Chancellor's Department, and the President of the Justices' Clerks' Society.

52. Press release issued by the Justices' Clerks' Society, in the private papers of the former justices' clerk for Southampton and the New Forest.

53. Correspondence of 17/2/94 passing between J M Taylor MP, Parliamentary Secretary, Lord Chancellor's Department, and Sir Patrick McNair-Wilson MP.

54. In this, J M Taylor MP, Parliamentary Secretary, Lord Chancellor's Department, was merely endorsing views the Lord Chancellor had expressed on many occasions, for example, in correspondence of 16/12/93 to the Honorary Secretary of the Society - the private papers of the former justices' clerk for Southampton and the New Forest.

55. Discussed elsewhere.

56. HL Deb. 18/1/94. Col 477.

57. Many justices' chief executives considered the legislation did not preclude them from general legal policy advice and guidance, a view subsequently endorsed by the Director, Magistrates' Courts Group, LCD.

58. HL Deb. 22/2/94. Col 518.

59. Ibid, Col 519.

60. Ibid.

61. HL Deb. 22/2/94. Cols 518-536.

62. HL Deb. 24/3/94. Col 76.

63. Ibid, Col 763.

64. Ibid, Col 765.

65. Ibid. The proposal stemmed from an initiative taken by, among others, the justices' clerk at Basingstoke magistrates' court, none of whom could have anticipated the way in which the legislation was ultimately framed and its implications.

66. In correspondence of 16/12/93 with the Honorary Secretary of the Society - the private papers of the former justices' clerk for Southampton and the New Forest.

67. HL Deb. 24/3/94. Cols 765-768.

68. Ibid, Cols 772 and 773.

69. HC Deb, 2/4/94, Col 138.

70. Ibid.

71. The Magistrates' Association 77th Annual Report and Accounts 1996-97, page 2; Justices' Clerks' Society : Judicial Competence and Partnership Checklist. 60.0154.

72. HL Deb. 24/3/94. Col 774.

73. Interview. Wilcock P. Justices' chief executive, Wiltshire, when interviewed in Salisbury, on 15/12/99.

74. Op. cit.

75. HL Deb. 24/3/94. Col 777.

76. The staff of a MCC are accountable to a MCC for all purposes, save for legal functions, when they do not appear to be accountable to anybody at all: Sections 88 and 89 of the Access to Justice Act, 1999.

77. HL Deb. 24/3/94. Cols 772 and 773.

78. Op. cit.

79. Op. cit.

80. Darbyshire P. (1999) A Comment on the Powers of Magistrates' Clerks. *1999 Crim LR 377,* at page 380.

81. Op. cit.

82. Op. cit.

83. Interview. Moore T.G. Justices' Clerk, Woodspring, Weston super Mare, 1/5/98.

84. Interview. Wade S. Deputy Chief Probation Officer, Hampshire and the Isle of Wight, 1/5/98.

85. Its provisions are now contained in the Justices of the Peace Act, 1997, as amended. (The legislation has been the subject of significant amendment in the Access to Justice Act, 1999).

86. The MCC for the inner London area had slightly different arrangements, providing for, among other things, the co-option of the chief metropolitan stipendiary magistrate and two other metropolitan stipendiary magistrates appointed by the chief metropolitan stipendiary magistrate.

87. Justices of the Peace Act, 1997, section 28.

88. Ibid, section 30.

89. Ibid.

90. Ibid.

91. Ibid.

92. Ibid.

93. Ibid, section 31.

94. Ibid.

95. Ibid, section 32.

96. Ibid, section 32 (3).

97. Ibid, section 32 (5).

98. Ibid, section 38.

99. Ibid.

100. Ibid.

101. Ibid, section 40.

102. Ibid, sections 40 (5) and 43. There was some personal protection for about three non legally professionally qualified post holders.

103. Ibid, sections 40 (6) and (7).

104. *The Magistrate,(The Journal of the Magistrates' Association),* December 1996/January 1997.

105. Justices of the Peace Act, 1997, section 41.

106. Ibid, sections 43 and 44.

107. Ibid, section 45; section 45 (4) and (5).

108. Interview. McCormac K. Justices' chief executive, West Sussex, 20/3/98.

109. Interview. Allam D. Justices' chief executive, East Sussex, 17/4/98.

110. Some members of the judiciary, interviewed on the basis of non attribution in connection with this study, conceded there was a judicial hierarchy and hopes of preferment some would not wish to see damaged.

111. Interview. Wilcock P. Justices' chief executive, Wiltshire, 15/12/98.

112. In Part One, chapter 1.

113. Interview. Marsh M. Justices' chief executive Merseyside, formerly justices' clerk, Liverpool, 24/3/98.

114. This issue emerged in Wiltshire. Interview. Wilcock P. op. cit, who did not agree with the Justices' Clerk's Society's assessment of the issue.

115. Op. cit.

116. Op. cit.

117. Home Office (1992) op. cit., at paragraph 10; The Magistrates' Association 77th Annual Report and Accounts 1996-97, at page 2.

118. Home Office (1992) op. cit., at paragraph 13.

119. Justices of the Peace Act, 1997, section 41. All staff employed by MCCs which are accountable to them; MCCs are, in turn, accountable to the Lord Chancellor – Justices of the Peace Act, 1997, sections 28, 30, 31, 32, 38, 40, 41, 43, 44, and 45.

120. The Magistrates' Association 77th Annual Report and Accounts 1996-97, at page 2; Justices' Clerks' Society : Judicial Competence and Partnership Checklist. 60.0154.

121. Skyrme T. (1994) at page 832. Interview. Marsh M. op. cit..The Magistrates' Association 77th Annual Report and Accounts 1996-97, op. cit.

122. Interview. Marsh M. op. cit.

123. Skyrme T. (1994) at page 832. Interview. Marsh M. op. cit. The Magistrates' Association 77th Annual Report and Accounts 1996-97, op. cit.

124. Ibid.

125. Op. cit.

126. For example, the opinion of the Director, Magistrates' Courts Group, LCD, that MCCs and justices' chief executives had a role to play in the provision of general legal advice and legal policy to the magistracy, op. cit.

PART THREE
CHAPTER 5
THE LONG GAME : A CASE STUDY PART I

Introduction

With Le Vay's report (Home Office 1989), White Paper, "A New Framework for Local Justice" (1991) and the Police and Magistrates' Courts Act, 1994, the stage had been set for massive re-organisation of the MCS. Despite claims of widespread consultation, the direction of the MCS had been set many years before and representative organisations were deluding themselves if they thought consultation would deflect the executive arm of Government from the course it had set.

The Police and Magistrates' Courts Act, 1994, which delivered the "new public management" "drivers", fiscal prudence and accountability, took effect on 1st April, 1995. The MCS had travelled an uncomfortable journey, from Le Vay, cash limiting, transfer of departmental responsibility, White Paper, consultation documents, Bill and legislation. A national framework had been established, but, consonant with the Government's claim that the MCS should be managed locally, implementation of the national framework was to be left, apparently, to MCCs.

It is accordingly a MCC upon which the lens must be focussed to explore how such fundamental change was wrought at the local level.

This chapter, and that which follows, examines how Hampshire, one of the larger MCC areas, moved towards implementation of the legislation. As the account unfolds, HMCC emerges as an area which has addressed the increasing financial constraints imposed upon it throughout the 1980s, and has responded to government initiatives to effect improvement in its efficiency and effectiveness. It progressively reduced the number of justices' clerks in its area, while increasing clerkship areas. It also developed new ways of managing the affairs of the area.

The change in focus for this part of the study is reflected in the materials which are used. For example, rather than consultation documents, White Papers and so on, reliance is placed upon Minutes of meetings of HMCC, some of them confidential; reports submitted to meetings of HMCC; correspondence passing between members of HMCC and between members and officers, and officers and officers, much of it confidential; and personal notes and discussions with magistrates and former justices' clerks in the HMCC area which are contained in the personal papers of the former justices' clerk for Southampton and the New Forest, deposited in an archive in the Institute of Criminal Justice, University of Southampton. The documents, in the round, form part of a unique resource that would not otherwise be available for research.

It is not, however, solely because of its size as a MCC area, or the initiatives taken within it, that prompt a case study based upon the HMCC area. As the case study unfolds, and HMCC begins to address the implications of the Police and Magistrates' Courts Act, 1994, there is evidence that the Director, Magistrates' Courts Group, LCD, was prepared to lend his weight to influencing HMCC in its thinking on and how it might respond to the financial and managerial constraints that had emerged. There is also evidence that the chairman of HMCC was consulting the Parliamentary Secretary to the Lord Chancellor and the Director, Magistrates' Courts Group, LCD, to obtain, at worse, a view, but, from the evidence, agreement in principle, to a strategy which would see only one justices' clerk in the HMCC area, well before HMCC had agreed upon such a strategy, and long before magistrates in the county were statutorily consulted. The evidence suggests that, at a time before HMCC and magistrates in the HMCC area had agreed upon its future direction, LCD was already exercising influence upon the direction in which it should travel and was found to have its hands upon all the levers. Once HMCC had its strategy formally approved by the LCD, the Lord Chancellor very quickly announced to the MCS that all MCCs should travel in a similar direction. The importance of HMCC to the change agenda cannot be overemphasised.

The case study is separated into two chapters. The first opens by charting, in brief, the history of the MCC in Hampshire immediately preceding implementation of the Police and Magistrates' Courts Act, 1994; efforts made to 'accommodate' the legislation; the recognition by justice' clerks that fundamental and durable change had been effected to such an extent that it was questionable whether the office of justices' clerk would survive; the attitude of the holder of the newly created post of justices' chief executive; the creation of the 'new style' HMCC; and the attitude of the new members of HMCC. The second chapter examines the mechanisms by which HMCC, and, in particular, its chairman and justices' chief executive, elicited the support and influence of the LCD, both at Ministerial and senior civil servant level, to drive through the structural change they thought necessary.

Hampshire Magistrates' Courts Committee

HMCC is located in central southern England. It is responsible for the management of magistrates' courts in a large county comprising, in the central and northern part, a large swathe of London commuter housing and light industry/commerce; in southern central and to the south west, areas of outstanding natural beauty, but low population; and in the south, two major cities.

Prior to the Justices of the Peace Act, 1949, significant responsibilities in respect of magistrates' courts in Hampshire vested in the Old General Purposes Committees in some boroughs (Skyrme, 1994). For many years, the two cities in what is now the HMCC area, Portsmouth and Southampton, had their own MCCs.

HMCC had, since 1949, kept under review the number of petty sessional divisions for which it bore responsibility, and there had been reductions in petty sessional divisions and clerkships. In 1976, the clerk to HMCC submitted proposals for the future planning of the area. The proposals were controversial and would have led to a reduction in petty sessional divisions and clerkships. HMCC decided to defer consideration of the proposals for five years. By the end of the 1970s, HMCC commissioned the Institute of Judicial Administration at the University of Birmingham to undertake a further review.[1]

The subsequent review, conducted by Professors Ian Scott and John Baldwin, was extensive. The review was concluded by the early 1980s and recommended, broadly, a reduction of petty sessional divisions and clerkships, and suggested a formula for achieving that. Astutely, no timescale for implementation was proposed. Professor Scott, in submitting the report, suggested that how and when reductions might take place was largely outside his and HMCC's control.[2] The recommendations were accepted.[3]

By the mid 1980s, there were seventeen petty sessional divisions in eight clerkship areas, at Aldershot; Basingstoke; Eastleigh, Andover and Romsey; Fareham and Gosport; Hythe, Ringwood, Totton and Lymington; Portsmouth and Havant; Southampton; and Winchester, Droxford and Petersfield.[4] By 1st January, 1986, the number of clerkships had been reduced to six, petty sessional division areas being adjusted, but with no reduction in their number. At that time, initiatives were taken as clerkships reduced because of, primarily, retirement, premature retirement and justices' clerks' employment elsewhere. Aside from re-organisation of petty sessional divisions and reductions in clerkships, some magistrates' court houses also closed. Professor Scott's pragmatism prevailed.[5]

Following local government re-organisation in 1972, the clerk to HMCC, effectively its chief executive officer and training officer, was a justices' clerk who performed his area-wide functions, supported by one junior post holder, in addition to those relating to his bench.[6] Such a combination of posts was, at that time, typical in the MCS, although, in the outer London area which had been divided into four commission areas, the three posts of clerk to the MCC (two of the four areas were combined for administrative purposes) were held by full time office holders, two of whom did not possess a professional legal qualification.[7]

During the early 1980s, HMCC agreed the post of its clerk should be rotated between the justices' clerks in its area, from time to time. Such an arrangement had the advantage of ensuring that any one justices' clerk was not overburdened for an indefinite period, whilst all justices' clerks in the area eventually gained in-depth

experience of MCC activities. But it suffered from the significant disadvantage that a justices' clerk might hold additional responsibilities as clerk to the MCC and training officer without necessarily having the managerial or training competence required to perform the additional functions.[8]

By the mid-1980s, HMCC considered the demands placed upon its part-time clerk were becoming sufficiently onerous to require that the post be held full-time and, following public competition, one of the justices' clerks in its area was duly appointed. It was not the first county MCC to take such action, at least one, Northamptonshire, having set a precedent. All candidates short-listed for appointment were either justices' clerks and/or clerks to MCCs.[9] The full-time post holder was provided with support staff including a chief administrative officer and office accommodation.[10]

At that time, HMCC comprised 35 magistrate members, elected by their colleagues in each of the petty sessional divisions, and included, in addition, the Lord Lieutenant of the area. HMCC was, in every respect, representative of the benches in the area.[11] Its business was managed through its full committee and a number of sub-committees, those sub-committees only having power to recommend action, decision making power being retained by the full MCC.[12]

Following the appointment of a full-time clerk, tensions soon arose between the post holder and justices' clerks in the area. Those tensions related to, primarily, management and administration, as HMCC and its clerk sought to achieve a degree of consistency across the magistrates' courts in the area; and, in particular, a consistent approach to the recruitment, selection, training and development of its magistrates and staff.[13] The justices' clerks and clerk to HMCC met regularly when managerial and legal issues were discussed.[14]

Further tensions arose surrounding perceptions of the role of clerk to HMCC. So far as the justices' clerks were concerned, HMCC was primarily responsible for providing them with resources, including staff, to effectively perform the functions relating to their office, and, thereafter, day to day management and control was a

matter for them.[15] Whilst not necessarily disputing the issue of day to day management and control, the clerk to HMCC took the view that HMCC was the employer of staff and therefore retained responsibility for ensuring consistent approaches to recruitment, selection, training and development, in order that all staff were treated equitably. In addition, and as the provider of resources, HMCC had a voice in the way in which resources were used, or not, as the case may be.[16]

At meetings of justices' clerks and the clerk to HMCC, legal issues affecting the administration of justice in the area were discussed.[17] The clerk to HMCC, drawing upon his own experience, and as training officer for magistrates, played a full part in discussion, but was frequently rebuffed by justices' clerks who reminded him that, following his appointment to the full-time office of clerk to HMCC, there was no role for him to play in the performance of judicial functions or the provision of legal advice to magistrates and, accordingly, any view he had to offer was not always welcomed. His view, often expressed, was that his opinion was legitimate to the extent that any decision made by justices' clerks in respect of any matter, in so far as it impacted upon the use or allocation of resources, was of concern to HMCC and, therefore, to him; and that, whether welcome or not, in his role as training officer for magistrates and staff, he was bound to have some impact upon legal and judicial decision making.[18]

The position in which HMCC found itself, at that time, was entirely typical. Although one of the largest counties, HMCC had in post justices' clerks who were lawyers, but had to manage increasing workloads and resources without the managerial training or expertise which was increasingly accepted as necessary if diminishing public moneys were to be utilised effectively (Skyrme, 1994). If the justices' clerks in the HMCC area could not make up their minds if they were lawyers who should spend the majority of their time in the court room, or managers who should spend the majority of their time in the office, or a little of both, they were not alone : their Society could reach no consensus on the issue (Skyrme, 1994).

As it approached the end of the 1980s, as with so many other counties, Hampshire had in post (and its MCC had appointed) justices' clerks a number of whom had received little formal managerial training and who did not consider it a necessary pre-requisite to holding their appointment.[19] At that time, there were approximately 850 magistrates and one stipendiary magistrate.

Further re-organisation of the structure of magistrates' courts in the Hampshire Magistrates' Courts Committee area

For reasons traced elsewhere,[20] there was a sharpening of awareness in the public sector that financial resources were finite and that the administration of summary justice had to operate within budgetary constraints along with other publicly funded bodies.[21] With a full time clerk to the committee, HMCC became more sharply focused upon its role and, in anticipation that its budgetary requirement might not be met in coming years unless it could demonstrate it was performing responsibly, set about improving its structures.[22]

According to Skyrme (1994, p.902), by the end of the 1980s the annual cost of administering magistrates' courts in England and Wales amounted to about £200 million. About 80% of the annual cost was met by central government which, in turn, had little say in how it was expended, nor indeed whether such expenditure was necessary. With ten years of Conservative Government implementing a radical agenda in respect of the public service, the MCS at last awoke to the change which was about to be visited upon the magistrates' courts. There were many senior officials voicing, through Home Office circulars, meetings with the Council of the Society and elsewhere, concern about the overall cost of the MCS and its lack of accountability for the manner in which public moneys were spent. By 1988, in anticipation of cash limiting and Le Vay, HMCC adopted a further strategy of slimming down its central operations; progressively further reducing the number of petty sessional divisions and clerkships in its area; and considering, where appropriate to do so, the centralisation of some administrative functions.[23]

Slimming down further the number of petty sessional divisions in the HMCC area brought with it a number of advantages, not least, a reduction in the number of courtrooms needed in which to transact business; a resultant reduction in the need for some of the smaller courthouses; and a reduction in the number of meetings, statutory (for example, liquor, betting and gaming licensing) and non statutory (for example, bench meetings), that were required to be serviced.

Responsibility for developing HMCC's strategy and monitoring its progress was entrusted, by it, to a locally created Management Board, which comprised the justices' clerks in the area and an equal number of magistrate members of HMCC, all presided over by the chairman of HMCC and advised and serviced by its clerk. In order to assist HMCC in the delivery of its strategy, and without prejudice to differing opinions about the legal position, justices' clerks in the area agreed their accountability to HMCC for managerial purposes. Justices' clerks fiercely retained personal autonomy in respect of all legal and judicial issues, which, so far as the magistrate members were concerned, were of no moment to HMCC in its managerial capacity.[24]

The Management Board was primarily concerned with the management of HMCC's resources. Magistrate members, who included among their number those with extensive United Kingdom business interests, a senior administrator of a local University and senior officials of national banks, soon encountered frustration in seeking to impose upon justices' clerks common approaches and practices in the management of resources. Whilst some progress was made, it was not difficult for any one of the justices' clerks to frustrate any agreements reached. The Management Board was not a statutory creation and, for the most part, it needed the support of justices' clerks to operate effectively. For many years, justices' clerks had been left with much personal autonomy, developing local practices and procedures across the entire range of managerial and legal functions which would take much patience and care in dismantling if new area-wide practices and procedures were to evolve. Furthermore, with such a large measure of personal autonomy entrusted to them, justices' clerks needed some persuading that other practices and procedures, some drawn from outside the MCS, were better than

those they had devised themselves.[25] No disciplinary action followed the refusal of a justices' clerk to accommodate the Management Board (it was considered by some of the justices' clerks, probably erroneously, that HMCC might have been on very thin ground in seeking to impose upon a justices' clerk any function which he was not statutorily obliged to perform).[26] Informal meetings of the justices' clerks continued outside the Management Board, where issues of law, management and administration were discussed in an effort to reduce, to some extent, tensions and divisions which might otherwise have emerged before magistrate members of the Management Board.[27]

Following Le Vay's report and the early financial difficulties which cash limiting was intended to address, the Management Board recommended that HMCC embark upon further radical re-organisation in the area.[28] During the early 1990s, following statutory consultation and entrenched opposition, HMCC sought and obtained approval from the Lord Chancellor to close some court houses in its area and, if necessary, declare redundant justices' clerks. By 1990, the HMCC area had already been reduced, by premature retirement and resignation, and subsequent re-adjustment of groups of petty sessional divisions, from nine to six justices' clerks.[29] During the early 1990s, HMCC re-organised its groups of petty sessional divisions further.[30] As justices' clerks attained fifty years of age, voluntary redundancies were declared. Eventually, with some adjustments, HMCC reduced its petty sessional divisions to six and its clerkship areas to three. At that time, HMCC considered that three clerkship areas were the irreducible minimum, if the area was to be properly managed, and the administration of summary justice was to receive adequate support.[31]

During the course of its deliberations about the need to reduce to three clerkship areas, it became apparent to HMCC that the full-time post it had created for its clerk was not necessary to fulfil the functions under the proposals which were emerging for three very large clerkship areas. In particular, it was intended by HMCC that justices' clerks appointed to the three clerkship areas would have not only extensive legal experience, significantly beyond the minimum required by statute, but, in addition, would possess extensive managerial and administrative

experience with appropriate professional or other qualifications.[32] By the early 1990s, Government, too, had recognised the need for all justices' clerks and other senior post holders in the MCS to have attained a minimum level of senior management training and made arrangements for that training to be provided through a senior management training college. The provision of management training for the MCS was extensive, embracing the whole of England and Wales and those attending did so over a prolonged period.[33] Concurrently, the LCD encouraged middle managers to embark upon formal management training through, amongst other things, diplomas in management studies provided by, among others, colleges of higher education.

Anticipating further financial stringency despite its proposals for radical re-organisation, HMCC agreed that the provision of central services could and should be much reduced and, accordingly, declared redundant the post occupied by its full-time clerk.[34] Following the redundancy, a much reduced post was agreed, albeit, a post title of clerk to HMCC was retained. However, in a radical departure, HMCC agreed that, bearing in mind the post it was creating was of an entirely managerial and administrative nature, its clerk no longer needed to be qualified as a justices' clerk and, in the reduced role it now expected from the post holder, was content to appoint its former chief administrative officer, who did not hold a professional legal qualification.[35] It retained a training manager for the provision of training for the magistracy, who was accountable to, in line management terms, the full-time clerk to HMCC, but, for practical purposes, the justices' clerk in the north of the county, because of the need for direction in the provision of legal training for staff and judicial training for the magistracy, which was outside the knowledge and experience of the clerk to HMCC.[36]

The three justices' clerks and the clerk to HMCC attended all meetings of the Management Board, at which they were invited to make a full contribution, although having no voting rights, and all meetings of HMCC (so far as the justices' clerks were concerned, as observers). Each of the four senior post holders in the HMCC area took, so far as they were able, responsibility for the management of the affairs of the area, reaching decisions by consensus. The only significant areas

in which consensus was not always possible was in respect of judicial and legal matters, where there was, in any event, scope for different, if not conflicting, interpretations of the law; and where, in any event, the clerk to HMCC had no role to play.[37]

Hampshire Magistrates' Courts Committee and the Police and Magistrates' Courts Bill

It was with a Management Board, three justices' clerks and a full-time clerk to the committee, that HMCC had to grapple with further issues in the White Paper "A New Framework for Local Justice", and the various consultation documents which followed publication of the Police and Magistrates' Courts Bill, which all emerged to a greater or lesser extent between 1992 and 1993.

Much of the consultation process about the Police and Magistrates' Courts Bill was, at the local level, uneventful. With such a large membership, (HMCC was drawn from about 850 magistrates in its area), determining upon a single response to any of the consultation documents was bound to be difficult.[38] In that respect, at least, HMCC was not alone and, apart from the appearance of consultation, it is difficult to fathom how the Government would determine the effectiveness of any attempt to engage in consultation with 30,000 magistrates in England and Wales, along with other criminal justice agencies.

HMCC and its senior officers viewed the Bill with some concern.[39] The HMCC area had already undergone change to meet managerial demands and aspirations. Among proposals contained in the consultation documents was that a new post of chief justices' clerk (subsequently named justices' chief executive) be created as head of the paid service in each MCC area in England and Wales.[40] It was intended that the post holder, qualified as a justices' clerk, would be able to deliver the White Paper commitment of a clear line of command from each MCC to its staff. The new senior post holder, the head of all the MCC's paid staff, was intended to be the line manager, directly or indirectly, of all others employed by a MCC in respect of managerial and administrative matters. All debate and dialogue

which had preceded the proposed new post had directed attention solely at the managerial and administrative functions required of post holders. As already described, HMCC had no officer in post appropriately qualified. (A further clause of the Bill revealed that it was intended that, after implementation of the legislation, all newly appointed justices' clerks would be employed by MCCs, thereby ensuring their accountability to and their line management by the new post holder.[41] All HMCC's justices' clerks were office holders at that time and would, accordingly, be protected as such). It was anticipated that each MCC area would establish a central management unit which, amongst other things, would accommodate the new post holder and any staff to be managed directly, centrally. HMCC already had such a unit.[42]

Importantly, the LCD indicated that it recognised that management within the MCS necessitated a level of specialist legal knowledge as well as conventional management skills, a dual role which had, historically, been carried out by justices' clerks, who combined legal as well as managerial expertise.[43] Such recognition in consultation documents had a hollow ring when considered against the rationale of Government's proposals which relied heavily upon Le Vay, and the trenchant criticism contained in his report of justices' clerks in the performance of managerial and administrative functions.[44] This criticism was consistently relied upon by, among others, the Parliamentary Secretary to the Lord Chancellor, as he sought to justify the changes the Government was proposing.[45] There are a number of paradoxes here, not least of which was that having accepted criticism of justices' clerks in the performance of managerial and administrative functions, as set out by Le Vay, the LCD addressed, in part, those criticisms through, amongst other things, the senior management development programme. Whilst those issues were being addressed, the Parliamentary Secretary was to be found relying upon criticisms made by Le Vay, as he sought to justify the managerial and administrative changes proposed for the MCS. At the same time, at a practical level, the LCD was delivering the management and administration of the MCS into the hands of the very persons the Parliamentary Secretary was criticising, i.e. those justices' clerks who would secure appointment as head of a MCCs paid service.[46]

The Managerial Dilemma

HMCC had a dilemma. The thrust of the new legislation and the dialogue and debate which preceded it[47] suggested the new chief executive of MCCs was to be, effectively, a manager of resources and clerk to the MCC, but must be qualified as a justices' clerk.[48] Was Le Vay, the White Paper, Bill and voluminous correspondence, suggesting HMCC had the wrong persons in post? Or the right persons in the wrong posts? As the proposals stood, of its four senior officers, one was facing a very uncomfortable future. In the decision paper which followed the consultation document,[49] LCD agreed that a justices' chief executive would be the head of all a MCC's paid staff, (including justices' clerks), and employed by a MCC; the senior post holder would be responsible for carrying out decisions of the MCC; would have the same legal qualifications as a justices' clerk, although the extent to which he or she might perform any of the duties of a justices' clerk would be for each MCC to decide; would be required to promote consistency of legal advice throughout the MCC area (and, accordingly, the establishment of a legal forum consisting of the senior post holder and all justices' clerks was strongly recommended (it had been proposed by the Society)); and would have the right to stipulate general administrative policies which, where they might have legal implications, were to be discussed in the legal forum.

The creation of a new post of head of the paid service of the MCC posed a significant difficulty for HMCC. It had a central Secretariat with a full-time clerk and administrative support.[50] However, the clerk to HMCC did not hold a professional legal qualification. HMCC and the three justices' clerks lobbied hard for the retention of the clerk to HMCC, when it seemed that, as a result of the legislation, the post holder might be declared redundant, by operation of law. Whether the lobbying, particularly by HMCC's justices' clerks, was because of the intrinsic merits of the clerk to HMCC, the advantages of a consensual style of management, or a desire among the three justices' clerks to avoid the potential for a new, legally qualified, post holder to join them, with whom they may not work so comfortably, or, worse still, the avoidance of "blood on the carpet" as they

competed with each other for a newly created post, was never the subject of full discussion by either HMCC and/or the three justices' clerks in post at that time.[51]

The chairman of HMCC wrote to the Head of the Magistrates' Courts Group, LCD, on 17th October, 1994, drawing attention to the significant re-structuring undergone in the HMCC area, urging that the clerk to HMCC should be safe-guarded as to do otherwise would be "... harmful to us and unjust to him".[52]

HMCC argued strongly that it should not be precluded from appointing the person of its choice, whatever qualifications he or she may hold, as it was plain that the post of head of a MCC's paid service was intended to be of a purely managerial and administrative nature.[53] This latter argument had resonance with Government's decision paper which, whilst opting for the retention of a legal qualification, did not argue that the head of a MCC's paid service should have held office as a justices' clerk, which, in the round, it considered to be in line with principles set out in the Citizens' Charter, which recommended that all public services should be able to draw employees from a wide range of backgrounds.[54] HMCC's insistence on safeguarding its clerk did, in the event, perhaps obscure a more considered judgement about the general direction in which Government was moving and in which the MCS might eventually emerge. In the event, the Police and Magistrates' Courts Act, 1994, and subsequent statutory rules, provided an element of personal protection to the clerk to HMCC (along with three other clerks to MCCs in England and Wales who were similarly placed), by securing continued appointment as justices' chief executive, without possessing a professional legal qualification, albeit that personal protection was intended, at that time, to be of limited duration.[55]

Hampshire Magistrates' Courts Committee and the Police and Magistrates' Courts Act, 1994

It had been LCD's intention that the new statutory authority responsible for the management and administration of magistrates' courts in any area should comprise persons who had experience and competence to contribute to the effective work of

the MCC and could devote the necessary time for the purpose. Seniority on the bench was not considered to be an important factor, although it had relevance to the extent that it deepened knowledge and understanding of the administration of summary justice. The LCD suggested that magistrates who were able to bring to bear experience in the private or other parts of the public sector in the management of resources and the setting and monitoring of performance objectives could be especially well qualified to serve.[56]

The LCD announced that Government judged that it was not in the interests of the effective direction of the MCS for members of the newly created MCCs to be regarded as representing their benches. It was suggested that while the individual views of magistrates and staff should always be taken into account, they had to be balanced against the interests of the effective and efficient management of the MCS and of the criminal justice system as a whole. It was the MCCs responsibility to take decisions which best met the public interest. It was inherent in such an approach that there was to be a shift away from local management.[57]

Prior to the implementation of the Police and Magistrates' Courts Act, 1994, regulations provided that membership of MCCs should be restricted to magistrates, the Keeper of the Rolls and, through co-option, judges and recorders.[58] The Government now believed that these restrictions precluded MCCs benefiting from other persons who might be able to bring relevant experience and skills to deliberations and accordingly envisaged that each MCC should be able to co-opt up to two additional members. Total membership was not to exceed twelve. Where the Lord Chancellor considered that the contribution that other persons could make would be useful, but no co-option had been made, he intended to take power to make appointments himself. It was considered that those suitable for co-opted membership were unlikely to have court administration experience, but might include people with operational experience in private business, those who had demonstrated skills in public or private administration, and other criminal justice practitioners.[59] The intention of Government for membership of newly created MCCs was plain. Specific skills and abilities were being sought from members, which could be supplemented by co-options, where necessary.

HMCC agreed that its new membership would not exceed nine magistrates, and there would be no co-options, thereby defeating, in part, the purpose of the Government to include non-magistrate members.[60] There was a marked reluctance by HMCC to co-opt any person with a local political background as it was believed politics had no part to play in the administration of justice.[61] HMCC's reluctance, however, to seek co-options from the wider community was mystifying, as at the time of its creation, the 'new style' HMCC possessed less managerial expertise than did its predecessor, and little or no knowledge of the management and administration of a complex public service, at a senior, strategic level.[62]

In making its proposals for membership of the 'new style' MCCs, Government eventually agreed that membership should be chosen by a selection panel, rather than elected from each bench in the MCC area.[63] The selection panel was to be elected, one member from each bench in the MCC area, and the selection panel was to, thereafter, bear responsibility for selecting a MCC that was balanced in terms of skills and benches in the area.[64] Whatever arrangements were envisaged by Government, HMCC agreed, informally, that in order to preserve relationships among magistrates in the area, the new HMCC membership, albeit selected by a panel of selectors over whom it was intended it should have no control, (but which was serviced by its clerk/justices' chief executive), should include a magistrate from each of the petty sessional divisions in the HMCC area, which was suggestive that, where necessary, the need for skills or other qualities might be compromised. Such an approach by HMCC, eventually made manifest in appointments, suggested an influence over the selection of MCC members which was plainly *ultra vires* the legislation.[65] It was not an auspicious start.

Following the legislation, and the various agreements about its membership, the two city magistrates' courts in the HMCC area comprised three magistrates of the nine finally appointed.[66] The newly created HMCC agreed to meet monthly.[67] Training meetings were held in private (and in the absence of the three justices' clerks, whom it was considered had nothing to contribute, even at the legal level, to discussions), at which the justices' chief executive stressed to members the

importance of their realising that they were not acting on behalf of their colleagues in their respective petty sessional divisions, but in the interests of the HMCC area as a whole.[68] The three justices' clerks were then invited to attend MCC meetings. There was, perhaps not surprisingly, among the three justices' clerks, suspicion about meetings held in their absence, heightened by one report that the justices' chief executive had suggested, somewhat surprisingly, the Diploma in Magisterial Law that he had obtained many years before had placed him in a sufficient position to tender whatever legal advice HMCC might require.[69] If such a suggestion was made, it is unlikely that magistrate members of HMCC would have been in a position to question it.[70]

The three justices' clerks could, perhaps, be forgiven for the confusion which began to surround their role at HMCC level. Prior to the implementation of the new arrangements they had attended HMCC meetings as observers. They had participated to the full in meetings of the HMCC Management Board, which, effectively, "drove" all strategic and policy making decisions of HMCC. The three justices' clerks were regarded as the most senior office holders in the area, until they made representations to HMCC about its clerk who was then accorded equivalent status. Under the new arrangements, after 1st April, 1995, the justices' clerks were excluded from the preliminary HMCC training meetings; and although HMCC invited the three justices' clerks to its meetings, roles and relationships had changed.[71] Early interaction between justices' clerks and newly selected members of HMCC, following the training meetings, indicated, with perhaps only two exceptions, a 'distancing' by HMCC members from the three justices' clerks; and in respect of HMCC business, a 'distancing' by some HMCC members from their benches. For example, the newly elected vice-chairman of HMCC, a member of the Southampton bench, never discussed privately with the justices' clerk at Southampton and the New Forest, or the chairman of the Southampton bench, HMCC business and its likely impact on the bench of which he was a member.[72]

Judicial Independence

The 'new style' MCCs were to be responsible for the efficient and effective administration of the magistrates' courts for their area, including the efficient use of resources and budgetary responsibility.[73] Embraced within such a broad remit was responsibility for determining the number of court houses required in the area, and the number of staff required, their qualifications and remuneration. MCCs were required to appoint a justices' chief executive, who was responsible, subject to and in accordance with any directions given by the MCC, for the day to day administration of the magistrates' courts for the area to which the MCC related.[74] Throughout, it was considered by Government that each MCC and justices' chief executive, in exercising their respective responsibilities, ought to be mindful of the need to preserve the independence of the magistracy when acting in a judicial capacity.[75] It appeared from the legislation and all Parliamentary debate which preceded it, that MCCs were to have no responsibility for judicial matters;[76] nor was there any provision for them to interfere in advice offered by staff in their employ to magistrates, in individual cases.[77] Close examination of Parliamentary debates discloses that at no stage was it envisaged that MCCs would perform anything other than a managerial and administrative function.[78]

The creation of the post of justices' chief executive soon embraced supporting staff, which included personnel, finance and training officers, together with administrative and secretarial support, and office accommodation.[79] In the HMCC area, and in some other areas, part of this structure was already in place.[80] For other MCCs, the notion of a full-time justices' chief executive, together with supporting staff and accommodation, was entirely innovative.[81] However, by the creation of new style MCCs, with managerial and administrative responsibility for the MCS in an area, and the appointment of justices' chief executives, central management support, administration and accommodation was inevitable. The creation of central management units had to be financed and Government, having made no 'new money' available,[82] public moneys had to be diverted by MCCs from the magistrates' courts and staff working in them. There was bitter criticism from some magistrates in the HMCC area that service delivery was bound to be

compromised by the diversion of public moneys to central management units in such a large area, where there was already satisfaction, for the most part, with work undertaken by justices' clerks and their staff.[83]

The resulting approach to the creation of central management units proved to be the means by which the LCD re-structured. By charging MCCs with statutory responsibility for the management and administration of magistrates' courts in their respective areas, expecting them to appoint and support an additional layer of management (and introducing an Inspectorate to ensure its objectives were met), on pain of the exercise by the Lord Chancellor of default powers, and by then starving MCCs of sufficient public moneys to implement all that the Government had in mind, radical re-structuring was set in train. In the event, large numbers of court houses were closed across England and Wales, staff structures reviewed, and justices' clerks declared redundant in significant numbers.[84]

Enactment of the Police and Magistrates' Courts Act, 1994, effected a huge shift in the responsibility for the management and administration of magistrates' courts. Hitherto, MCCs, funded by central government and local authorities, acted in the role of a resource provider, having appointed justices' clerks not only as legal advisers to benches of magistrates, but also as day to day managers of MCC resources.[85] The local justices' clerk, appointed to hold office at the pleasure of a MCC (but rarely, if ever, removed) rapidly became an autonomous post holder, accountable to a large lay appointing authority, (at least in principle), for the resources provided to him, but, at the legal level, accountable to the higher courts.[86] One former justices' clerk is of the opinion that the notion that, at a time preceding the Police and Magistrates' Courts Act, 1994, MCCs should actually manage anything at all, was anathema.[87] The decision to transfer to MCCs responsibility for managerial and administrative matters was profound. Depending entirely upon how MCCs viewed the manner in which they intended to implement that responsibility, it was capable of placing at risk the rationale underpinning the appointment of some justices' clerks. That was particularly true of those appointed in, among others, the HMCC area, where justices' clerks had been expected to display, in addition to legal competence, experience and qualification in

management and administration.[88] Ominously, however, and as was to emerge a little later, following an interpretation of s.48 of the Police and Magistrates' Courts Act, 1994, by the Director, Magistrates' Courts Group, LCD, that was never envisaged nor debated by Parliament, MCCs, whilst precluded from interfering in judicial and legal matters in individual cases, retained a wider role.[89] The scope for interference with judicial independence, in a line of accountability from the court room to the LCD, began to emerge.

The Inspectorate

Lest any MCC sought to fudge its new responsibilities, the Police and Magistrates' Courts Act, 1994, made provision for the creation of a new Inspectorate (and default powers). Under what is now section 62 (3) of the Justices of the Peace Act, 1997, Her Majesty's Magistrates' Courts Service Inspectorate (HMMCSI), is required to inspect and report to the Lord Chancellor on the organisation and administration of magistrates' courts for each MCC area in England and Wales; and to discharge such other functions in connection with the organisation and administration of magistrates' courts as the Lord Chancellor might from time to time direct. In its first annual report (1995/6), its aims were described as being to assess whether a MCC was using its resources efficiently and effectively to deliver a high quality service to those who used its courts. HMMCSI could consider as being within its remit practices relating to the scheduling of cases before the courts and the practice of enforcing fines, areas which a former Lord Chief Justice thought were a matter for those entrusted with responsibility for making judicial decisions,[90] and areas in respect of which a subsequent Advisory Group on Judicial/Legal/Administrative Boundaries in the Magistrates' Courts commented, with perhaps more reservation than that expressed by HMMCSI.[91] The wide terms of activity of HMMCSI resulted in its making observations upon activities in magistrates' courts which some justices' clerks thought trespassed into the judicial arena and is the subject of further comment below. Such concerns were neither confined to justices' clerks nor the magistracy. There is evidence that HMMCSI considers the treatment of witnesses by members of the judiciary, in the court room, to be within its purview, a notion which is being challenged by some

members of the professional judiciary as an overt intrusion into the judicial arena and a possible contempt of court.[92]

The 1994 Act and Hampshire - implications

The 'new style' HMCC took little time to appreciate its new role and the powers it possessed. Rather than create a sub-committee structure, the practice of its predecessor, which would have been difficult with such a small committee, it allocated to members portfolios for certain aspects of its work, for example, training; performance, standards and administration; resources (staff and buildings); and finance, IT and MIS.[93]

It was readily apparent to those observing the activities of HMCC[94] that it was in something of a predicament. Whatever qualities its members possessed, they had no experience of managing magistrates' courts; no knowledge of the complex interface between judicial, legal and administrative activities (they were not alone in that); no knowledge of the complex professional and other relationships that existed in magistrates' courts other than through sitting as magistrates; and no professional knowledge of the fine checks and balances which needed to be maintained if judicial independence in magistrates' courts was to be protected. Furthermore, it could not look to a lawyer as justices' chief executive to fill the void in its knowledge. This lack of technical legal knowledge manifested itself regularly at meetings of HMCC and, where legal advice was offered by justices' clerks, it was not always welcome.[95]

Particular difficulties emerged at the interface between judicial/legal/administrative boundaries in the HMCC area. There was a desire on the part of some members of HMCC to secure economy by centralising certain of the managerial and administrative functions. However, as is explicated elsewhere, the boundaries between judicial/legal/administrative duties and responsibilities has not been clear.[96]

Of particular frustration and irritation to members of HMCC were those occasions, and there are many in the administration of justice, when justices' clerks reminded members that there was more than one legal view, all, some, or none of them correct, and that, accordingly, on occasion, difficult choices had to be made. Members of HMCC seemed unable to grasp the subtleties of this issue, indicating they would prefer a single legal opinion in respect of any issue upon which legal advice was sought, and, presumably, were prepared to risk whether or not that legal opinion was correct; and expressing criticism of justices' clerks where they disagreed.[97] Such disagreements soon led to criticism by some MCC members that justices' clerks could never agree about anything, which strengthened the resolve of some for greater central control.[98] The issue was exacerbated by the inability of HMCC's justices' chief executive to provide any legal opinion of his own. That did not prevent the tendering of a view, on occasion, supported by the comment that the justices' chief executive had taken legal advice and his view was .... The provenance of the justices' chief executive's legal advice was never disclosed to the justices' clerks. Lay members of HMCC were nevertheless prepared to act upon his un-sourced advice.[99]

The early desire by HMCC to demonstrate it was seeking a consistent approach to all issues in its area was exemplified by the action of its chairman who, in an early meeting with bench chairmen in the HMCC area,[100] designed to strengthen channels of communication (another objective of the LCD),[101] raised the issue of funding new sentencing guidelines for benches (guidelines are adopted by most benches in England and Wales for sentencing offenders).[102] The chairman indicated that his preferred approach was that adopted by his bench, in the north of Hampshire (and also in the south east of the area), and which he accordingly claimed was preferred by the majority of benches in the HMCC area.[103] The chairman was disappointed when his preferred approach was rejected by the Southampton and New Forest benches because they considered that sentencing of offenders was a judicial, rather than a managerial and administrative function, and that the chairman was trespassing into an area that was not HMCC's responsibility.[104] The discussion was tense and it was made plain to the Southampton and New Forest benches they were not being co-operative. In the

event, the chairman concluded he would propose to HMCC that while two thirds of the area would have their sentencing guidelines published and funded by it, the Southampton and New Forest Benches would not be so fortunate. Had the chairman had his way, the judicial implications for the Southampton and New Forest benches would have been far reaching. The north and south east of the area had retained an approach to the sentencing of offenders which had some resonance with unit fines introduced in the Criminal Justice Act, 1991, subsequently abolished in the Criminal Justice Act, 1993. The Southampton and New Forest benches had rejoiced at the abolition of unit fines and had no desire to see their re-introduction. This early skirmish between the chairman and two of the benches in the area demonstrated the extent to which the chairman considered the managerial and administrative role of MCCs could reach into the judicial process.[105] The issue was the subject of subsequent discussion between the justices' chief executive and the justices' clerk for the Southampton and New Forest benches, who agreed that a confrontational approach by HMCC to what seemed to be the judicial function of sentencing would not be helpful and that, in any event, with significant parts of budgets in the HMCC area delegated to the clerkship areas, funding bench sentencing guidelines could be achieved out of HMCC's overall budget, by the justices' clerk, in any event. The justices' chief executive ensured no difficulty arose.[106] Nevertheless, this early disagreement, which irritated the chairman, did not bode well for the future. (Had all the respective parties been aware, at that time, that the Director, Magistrates' Courts Group, LCD was interpreting issues related to the "protection" of legal advice in individual cases, under the Police and Magistrates' Courts Act, 1994, restrictively, and that, in his opinion, justices' chief executives and MCCs were not precluded from issuing advice or guidance more generally, the chairman might well have had his way and, had he done so, there would have been the clearest indication of the ability of MCCs to interfere in the judicial process, irrespective of political rhetoric about their limited role).[107]

It was never entirely clear how members of HMCC were to go about their portfolio work. However, in 1995, and shortly after being allocated the portfolio for performance, standards and administration, two members of HMCC visited the justices' clerk for Southampton and the New Forest and, having toured his office

for the first time, on their way to his personal offices, over a period of a few minutes, informed him that he was overstaffed and there was much scope for rationalisation. At that precise moment, the justices' clerk and his senior staff were in the process of preparing a report demonstrating that the staff in that group of petty sessional divisions were overburdened.[108]

Chief Officers' Group

The justices' chief executive and the three justices' clerks in the area attended, at that time, all meetings of HMCC. Whilst advice offered by the justices' chief executive was acted upon by HMCC, it did not always pass without comment by the justices' clerks.[109] There was, from time to time, dissension among all four post holders about the division of responsibilities at the interface of judicial, legal and administrative functions; conflict about line management responsibility, particularly having regard to long established line management relationships and loyalties in the clerkship areas; and some disagreement about the scope, nature and extent of HMCC's statutory functions.[110] These difficulties were exacerbated by the relative inexperience of most of the members of HMCC.[111] To address the difficulties and tensions that were emerging and in order that there should be a degree of consistency in the advice provided to HMCC and that issues were fully discussed by the justices' chief executive and justices' clerks before they were considered by HMCC, a chief officer's group (COG) was established.[112] COG comprised the justices' chief executive and justices' clerks, and considered matters referred to them by HMCC, as well as issues the group considered should be discussed by HMCC. Despite the search for a consistent view among chief officers, COG did not always 'deliver', creating further tensions between HMCC and the justices' clerks: the justices' chief executive appeared to be insulated from criticism for any failures of COG to reach consensus.[113]

Within a few months of its establishment, COG was invited by HMCC to review the role of the justices' chief executive and justices' clerks in the area.[114]

Conclusion

Within little more than six months of implementation, the Police and Magistrates' Courts Act, 1994, had effectively ruptured relationships between HMCC and its justices' clerks; and had provided a 'new style' MCC with the tools necessary to fashion a MCS with which Government might feel more comfortable, and able to influence. HMCC did not disappoint and moved ahead with plans for re-organisation. The role of the LCD in that re-organisation was to emerge a little later.

NOTES

1. Clarke. K.C., Hon LLD, FTCL, FRSA, Barrister, of the MiddleTemple and Lincoln's Inn, formerly clerk to HMCC.

2. Ibid.

3. Ibid.

4. Ibid.

5. Ibid.

6. Ibid.

7. In Middlesex (north west London) and south east and south west London, administrators held the posts of clerk to the MCC ; whilst in north east London the post holder was a barrister.

8. During the 1980s the clerk to HMCC came from Southampton, the New Forest and Portsmouth.

9. The field of candidates was restricted to those who held or had held office as justices' clerk.

10. Minutes of meetings of HMCC, 1984-1985. Offices were located in spare office accommodation at Havant Magistrates' Court.

11. Justices of the Peace Act, 1979, sections 19-24, and Rules made thereunder, (for example, the Magistrates' Courts Committee (Constitution) Regulations, 1973, SI 51 1973 No. 1522).

12. Ibid.

13. This comment and others that follow in this chapter are based upon Minutes of meetings of HMCC, personal notes, and discussions with former colleagues, many of which are contained in the personal papers of the former justices' clerk for Southampton and the New Forest, in box 1, deposited in an archive in the Institute of Criminal Justice, University of Southampton.

14. Ibid.

15. Justices of the Peace Act, 1979, section 27(3).

16. Justices of the Peace Act, 1979, section 19.

17. K. Barker LLB, Barrister. Formerly clerk to the justices for Portsmouth and Havant.

18. Op. cit. note 13.

19. By providing a senior management development programme, organised under the auspices of Ashridge College, Tring, Hertfordshire, the LCD subsequently encouraged all justices' clerks and senior managers to attend what was, in effect, a distance learning course, over several months.

20. Op. cit., chapter 3.

21. Ibid.

22. Op. cit. note 13.

23. Clarke. K.C., Hon LLD, FTCL, FRSA, Barrister of the Middle Temple and Lincoln's Inn, formerly clerk to Hampshire Magistrates' Courts Committee, had submitted proposals in 1976, reviewed in the late 1970s/early 1980s by the Institute of Judicial Administration University of Birmingham, and some reductions were already in place.

24. Op. cit. note 13.

25. Ibid.

26. Justices' clerks held their office at the pleasure of their respective MCCs (section 25 (1) of the Justices of the Peace Act, 1979) and there is nothing to suggest, either in statute or at common law, pleasure could not be withdrawn at any time for any reason.

27. Op. cit. note13.

28. Ibid.

29. Clerkship areas were the subject of constant change, particularly in the New Forest (where five separate petty sessional divisions eventually combined to form one) and in the north of the area.

30. At this stage, clerkship areas and petty sessional division boundaries changed again, some petty sessional divisions, for example, Eastleigh, being fully amalgamated with neighbouring petty sessional divisions.

31. The former chairman of HMCC was reluctant to reduce to three clerkship areas, but agreed, suggesting there could be no further reduction if the magistracy was to be properly served. Op. cit. note 13.

32. Op. cit. note 13.

33. Distance learning courses, including residential periods, were held over several months.

34. The redundancy was voluntary, the post holder moving to private practice at the Bar. Op. cit. note 13.

35. He held academic managerial qualifications, a Diploma in Management Studies and, eventually, a Master's degree in Business Administration; and the Diploma in Magisterial Law.

36. Op. cit. note 13.

37. Ibid.

38. The problem was compounded by, in the opinion of the former justices' clerk for Southampton and the New Forest, the inability of many magistrates to fully comprehend the implications of what was intended.

39. Op. cit. note 13.

40. Lord Chancellor's Decision Paper No. 11, of September, 1993.

41. This would leave the MCS in a potentially anomalous position, in that some justices' clerks would continue to hold Office, at pleasure, with no employment protection and little accountability; whilst others, appointed after implementation of the legislation, were employed in all respects, had the protection of employment law, and were accountable.

42. LCD Decision Paper No. 11, of September, 1993.

43. Ibid.

44. Home Office (1989). *Report of a Scrutiny into the Magistrates' Courts Service.* London. HMSO.

45. Correspondence passing between the then Parliamentary Secretary to the Lord Chancellor and Members of Parliament for Southampton (Test), Romsey and the Waterside and the New Forest, copies of which are in the private papers of the former justices' clerk for Southampton and the New Forest in box 1.

46. Following implementation of the Police and Magistrates' Courts Act, 1994, all but half a dozen justices' chief executives (there were about 105 appointments) were former justices' clerks.

47. Op. cit. note 13.

48. Ibid.

49. Lord Chancellor's Decision Paper No. 11 at paragraph 3, of September, 1993.

50. Op. cit. note 13.

51. Ibid.

52. Correspondence of 17/10/94 passing between the then chairman of HMCC and the then Head of the Magistrates' Courts Division, Lord Chancellor's Department, a copy of which is in the private papers of the former justices' clerk for Southampton and the New Forest in box 1.

53. Ibid.

54. LCD Decision Paper No. 11, op. cit.

55. Personal protection of post holders was eventually agreed by Government and special provision now to be found in paragraph 15 of Schedule 4 to the Justices of the Peace Act, 1997.

56. Lord Chancellor's Department Consultative Document No. 1, of July, 1992.

57. Ibid.

58. Op. cit.

59. LCD Consultative Document No. 1.

60. Op. cit. note 13.

61. Ibid.

62. Op. cit. note 13.Members had, for example, experience of owning and managing a small private company, previous military and civil service experience, and small business experience.

63. Lord Chancellor's Decision Paper No. 2.

64. Ibid.

65. Certainly the intention behind it expressed in Consultative Document No. 1, of July, 1992; and the Magistrates' Courts Committees (Constitution) Regulations, 1994.

66. One was appointed from the New Forest, two from Southampton, one from Fareham, one from Portsmouth, two from north west Hampshire and two from north east Hampshire.

67. Op. cit. note 13.

68. An intention expressed by the Lord Chancellor's Department in Consultative Document No. 1 of July, 1992; and a report by a member of HMCC to the former justices' clerk for Southampton and the New Forest, op. cit. note 13.

69. The Diploma in Magisterial Law remains a statutorily recognised qualification for those who assist a justices' clerk in the performance of duties and responsibilities in the courtroom (the Justices' Clerks' (Qualifications of Assistants) Rules, 1979). Holders of the Diploma are entitled to limited exemptions when pursuing a professional legal qualification. This report was conveyed to the then justices' clerk for Southampton and the New Forest.

70. No member of HMCC would have the necessary technical knowledge to appreciate the distinction.

71. Op. cit. note 13.

72. Ibid.

73. Justice of the Peace Act, 1997, section 31 (1).

74. Justice of the Peace Act, 1997, section 31 (2).

75. Lord Chancellor's Department Decision Paper No. 2.

76. Debates in the House of Lords on the Police and Magistrates' Courts Bill, op. cit.; and the Justice of the Peace Act, 1997, Part III.

77. Justice of the Peace Act, 1997, section 48.

78. Op. cit., and Lord Chancellor's Department Consultative Document No. 1.

79. Lord Chancellor's Department Consultative Documents anticipated such a structure emerging, as was consistent with those areas, for example, HMCC, where a full-time clerk to the committee was already in place. Decision Paper No. 11 at paragraphs 7-10, of September, 1993.

80. Op. cit.

81. For example, Wiltshire.

82. Home Office (1992). *A New Framework for Local Justice*, op. cit.

83. Correspondence addressed to the former justices' clerk for Southampton and the New Forest, op. cit. note 13.

84. It was not until the redundancy of the former justices' clerk at Southampton and the New Forest that the MCS first learned that Government preferred areas where there was only one justices' clerk. There are now fewer than 100 justices' clerks in England and Wales and, with only 42 criminal justice areas, the number is likely to decrease.

85. Op. cit.

86. A Scrutiny, op. cit. This aspect of accountability was never explicitly acknowledged by the LCD. To have done so would inevitably have invested justices' clerks with a greater legal/judicial role than some would have preferred.

87. Interview. K.C. Clarke.

88. Op. cit. note 13.

89. Op. cit.

90. Op. cit.

91. Report of the Advisory Group on Judicial/Legal/Administrative Boundaries in the Magistrates' Courts. Lord Chancellor's Department. February, 1998, at paragraphs 8 and 9.

92. A non attributable conversation with a metropolitan stipendiary magistrate.

93. Op. cit. note 13.

94. Ibid.

95. Ibid.

96. Op. cit.

97. It was never entirely clear to the former justices' clerk for Southampton and the New Forest whether criticism of justices' clerks for differing legal opinions originated in the exasperation of members of HMCC or were fomented elsewhere.

98. Op. cit. note 13.

99. Ibid.

100. Ibid.

101. Lord Chancellor's Department Decision Paper No. 7, of August, 1993.

102. Published and kept under regular review, nationally, by the Magistrates' Association. Local benches are not obliged to adopt the guidelines, but having the endorsement of the Lord Chancellor and Lord Chief Justice, are encouraged to do so. The practice of benches in the north and south east of the area was not consistent with national guidelines at that time.

103. Op. cit. note 13.

104. Ibid.

105. Ibid.

106. Ibid.

107. Op. cit.

108. In the early 1990s, the justices' clerk at Southampton had been appointed, additionally, justices' clerk to the New Forest; and had absorbed within the Southampton petty sessional division, Eastleigh petty sessional division. The structural changes were intended to yield financial savings, with a largely centralised administration based at Southampton.

109. Op. cit. note 13.

110. Ibid.

111. Op. cit.

112. Op. cit. note 13.

113. Ibid.

114. The paper was presented to HMCC on 23/11/95.

PART THREE

CHAPTER 6

THE LONG GAME : A CASE STUDY PART II

On 23rd November, 1995, HMCC's Chief Officers Group (COG) presented a paper examining the roles of the MCC, justices' chief executive and justices' clerks in respect of the administration of the magistrates' courts in the area.[1]

COG considered that the Police and Magistrates' Courts Act, 1994, provided an opportunity to develop the MCS in the area in a way that not only fulfilled the statutory responsibilities of the MCC and justices' chief executive, but also enabled a better service to be provided to magistrates at a local level and promoted flexibility in the administration of magistrates' courts both in dealing with workload and coping with any future reductions in resources. The paper suggested that justices' clerks should concentrate on their legal and judicial functions to the magistrates and the courts in their respective groups of petty sessional divisions, and that the justices' chief executive should carry out his statutory functions by providing administrative services to the magistrates and to each of the justices' clerks. The paper acknowledged that financial constraints anticipated in the future once the cash limiting formula began to 'bite' would require a high degree of flexibility in the administrative structure. COG was concerned that in its efforts, over the years, to restructure and reduce clerkships, HMCC had cut back on resources as far as it dared and further significant savings could only be made through rationalisation of administrative functions, by contributing, under a single administrative structure, administrative support to each of the clerkship areas. According to COG, such a rationalisation would not affect the level of services provided, at that time, to magistrates and court users, but could, among other things, lead to the removal of second and possibly third tiers of administrative management from the administrative structures across the area.

This approach, accepted, in principle by HMCC on 23rd November, 1995, at least retained what each of the justices' clerks understood to be their roles and responsibilities prior to 1st April, 1995, and reflected what they had understood

Parliament had in mind in separating out judicial, legal and administrative functions. However, HMCC asked COG to discuss the issue further, in order to establish line management and operational details.

On 19th February, 1996, HMCC considered a further paper from COG, which recommended that any further rationalisation of the MCS in the area should not be implemented without a wide ranging review carried out against the backcloth of HMCC's strategic plan,[2] which involved primarily, a review and identification of administrative functions that would benefit from being centrally managed; ensuring there was conformity with and a consistent approach to work practices, systems, procedures and standards throughout the area; the development of a corporate approach throughout the area; the reduction of staffing establishments and structures; and a review of the management structure in order that it might be satisfied that it provided the necessary support to enable HMCC to perform its new role.

On 18th November, 1996, HMCC was presented with a discussion paper by its justices' chief executive, on behalf of COG, dealing with the central management of administrative functions in the area,[3] set against the backcloth of HMCC's strategic objectives.

The justices' chief executive considered HMCC's strategic objectives would enable it to achieve optimum efficiency and effectiveness, whilst making a significant contribution to savings in response to cuts in budget and initiatives such as improving quality of service, facilities, resources and security. It is perhaps worthy of note that, so early in its new existence, the focus of attention for HMCC was directed at issues essentially peripheral to the administration of justice, per se.

However, the justices' chief executive now suggested that COG considered that :-

> "... neither 'centralisation' of functions nor a consistent approach to work practices etc can effectively be realised within the present structure ...".

COG was concerned that with three largely autonomous clerkship areas, which had, over many years, developed administrative practices at the local level to support the magistracy and the administration of summary justice, and with local committees of magistrates involved to a greater or lesser extent in the overall administration of petty sessional divisions,[4] the task to achieve HMCC's strategic objectives had not necessarily been set :-

> "... in the full realisation of the complexity and sensitivity of the issues at stake ...".

Just where responsibility for such a crucial omission, so early in HMCC's 'new life' lay, was not explained. The justices' chief executive suggested effective implementation of HMCC's strategy required :-

> "... co-operation and interaction between managers and functional teams both within and between the administrations as well as extensive planning and management of the various projects involved ...".

Importantly, and later given little discernible attention, was the justices' chief executive's observation that :-

> "... it will also require recognition of the way in which all administrative functions impinge upon, interact with and support the judicial process ...".

The justices' chief executive suggested there were a number of disadvantages in trying to effect centralisation within the structure which then existed in the HMCC area, illustrated by, for example, three autonomous (accounting) divisions in the area, each with its own finance manager and structure; and the need to ensure computer software in use in the three accounting divisions could be merged into one.

The discussion paper concluded with a recommendation that HMCC should determine that the three heads of administration and finance, then working in the

three groups of petty sessional divisions and accountable to each of the justices' clerks, should work under the justices' chief executive's direction and control, together with, initially, staff engaged upon care, maintenance and security of buildings; collection of fines, fees and compensation, fixed penalties and maintenance orders; the execution of enforcement process; IT and operations; court services; and reception duties. Inevitably, if such a fundamental change was agreed, it invited an examination of the future role of justices' clerks, their deputies and other legal managers and there was, accordingly, a further recommendation that if HMCC agreed, it should work with COG to examine the chief officer and management structure for the future. This proposal contained the seed of the massive re-organisation which was to follow. There is no evidence to suggest that, at that stage, all or any members of HMCC had a full appreciation of all they were being asked to consider, or any appreciation of the judicial implications which might ensue. It appears that HMCC was more concerned with matters of management and administration and delivering the managerialist agenda, than it was of the judicial implications of its decisions.

HMCC agreed both recommendations, (Minute MCC/96/133) :-

> "...The Justices' Chief Executive referred members to the paper, previously circulated *(copy appended to these minutes)*.
>
> Members discussed **recommendations 1.23**. The recommendation that the Committee determine that the three heads of administration and finance work under the direction of the Justices' Chief Executive, together with, initially, the following agreed administrative functions and the staff engaged in them:
>
> - care, maintenance and security of buildings
> - the collection of fines, fees and compensation, fixed penalties and maintenance orders
> - the execution of enforcement processes
> - IT and operations

- court services (pre-court)
- reception

was unanimously **AGREED.**

Members then discussed **recommendation 2.4**. The composition of the group mandated by the full MCC to work with the Chief Officers' Group in examining the chief officer and management structure was **AGREED** as follows:

... Performance, Standards and Administration
... Performance, Standards and Administration
... Resources (Staffing)
... Chairman

The above Working Group would produce proposals for the Committee to consider at its meeting on 17th February 1997.

In the interim, the Working Group was asked to make progress reports to each Committee meeting ...".

HMCC Minutes record no significant discussion of the issues involved, nor their consequences, nor any attempt by HMCC or its justices' chief executive to be mindful of the need to preserve the independence of the magistracy when acting in a judicial capacity by, for example, at that early stage, consulting representatives of the benches in its area, or co-opting a magistrate, solely focussing upon such issues, as part of the group deliberating upon the more general issues.[5] This omission made consciously or otherwise, was significant, in that, by transferring administration in the way proposed, the rationale underpinning the appointment of justices' clerks in the area was placed under pressure, directly putting justices' clerks and clerkship areas at risk.

The wide ranging review continued and the nature of that review is captured by a Minute, (MCC/97/27), in which the chairman reported to officers :-

> "…the conclusion reached by the magistrate members as a result of their private meeting, held that morning.
>
> 1. The Committee wished to strengthen the role of the Justices' Chief Executive.
> 2. The Committee did not wish to dispense with the services of any of the existing Justices' Clerks or make them redundant.
> 3. The Committee wished to reiterate its earlier policy decision to centralise the management of administration.
> 4. The Chairman would make appointments to speak, individually and in more detail to each member of the Chief Officer's Group …"

Such "private meetings" were to become an important feature of the work of HMCC, for which there was no statutory authority, and which contravened the intention of Parliament, when ensuring public scrutiny of MCC meetings by insisting that, save for confidential matters, Minutes were to be open to public inspection; and that there should be one public meeting each year.

HMCC expressed a wish to strengthen the role of the justices' chief executive, but did not wish to dispense with the services of any of the existing justices' clerks, or to make any of them redundant : by implication, it had obviously considered doing so.

Having decided to centralise management of its administration, placing, effectively, the entire administration of magistrates' courts in the area under his control, it is difficult to discern in precisely what way HMCC intended to further strengthen the role of its justices' chief executive. However, on 17th March, 1997, HMCC's position was clear: although the role of the three justices' clerks was significantly diminished by the decision to transfer the management of the area's

administration to the justices' chief executive, all three were to continue in post. Within a month, this situation had changed.

On 21st April, 1997 HMCC met at Lyndhurst magistrates' court, and was addressed by the Director, Magistrates' Courts Group, LCD.[6] The LCD role in respect of magistrates' courts is not straightforward. Whilst the Lord Chancellor is accountable to Parliament for their operation, the courts remain, as he insisted throughout debate on the Police and Magistrates' Courts Bill,[7] locally administered by MCCs. The influence exercised by him, through his Department, was intended to preserve for him no more than the minimum necessary to secure accountability to Parliament.[8] However, as shown here, at the policy making level in MCC areas, LCD's influence remained significant. A visit by the Director would not, accordingly, be without its importance to the local MCC. Along with the Chief Inspector of HMMCSI,[9] the Director had a primary concern about issues associated with accountability, which ran sufficiently deep as to not exclude judicial decision makers. In his view :-

> "... the justices' clerk was not seen by LCD as necessarily a judicial decision maker in the same category as justices or judges. Their core function was as legal adviser ... they had other quasi judicial functions. The justices' clerk was seen as a legal rather than a judicial officer ... the Lord Chancellor was not comfortable *(with the notion that)* the justices' clerk was a judicial officer. The justices' clerk had neither been trained nor identified as being judicially competent ...".[10]

Such was the strength of his view on this subject that he has insisted throughout that, despite the force of the argument the other way, and he acknowledged the Lord Chief Justice held a view different to his own, what others would describe as judicial functions falling upon justices' clerks as a result of Narey's proposals (Home Office, 1997), which were, at that time, being discussed, and which later found expression in the Crime and Disorder Act, 1998, were of an administrative nature only.

The Director considered that, so far as the management and structure of the MCS was concerned :-

> "... a single area wide head of the legal side had attraction. The management of lawyers through a hierarchical structure is O.K. ...".[11]

It was with a Director with firmly held views with whom HMCC engaged in dialogue.

The Minutes of HMCC of 21st April, 1997, (MCC/97/41), record that :-

> "... An address by ..., Director of the Magistrates' Courts Group at the Lord Chancellor's Department ... gave an interesting and informative talk covering a wide variety of topics. He was thanked by the Chairman and was invited to stay for the remainder of the meeting ...".[12]

The brevity of the Minute represented a significant understatement of all that occurred and gave no information about the issues addressed by the Director, or their likely significance.[13] During the course of his address, and in questions immediately following it, the Director dealt with, among other things, issues related to those areas in England and Wales where clerkship areas had been reduced, in one or two cases, to a single area wide clerkship and that, in his opinion, no damage to the administration of summary justice had resulted. At that time, Northamptonshire and Dorset were the only two areas in England and Wales that had made any step in this direction : both were relatively small counties, with relatively small workloads and resources. Neither had the full support of the magistracy for their endeavours and, in parts of Dorset, they were strongly opposed.[14] The address, and questions which followed, left no doubt in the mind of the justices' clerk for Southampton and the New Forest that the issue of a further reduction in clerkships in the HMCC area was not going away.[15]

At its meeting on 19th May, 1997, HMCC once again reviewed its position regarding the centralisation of management and administration and the senior management structure. The Minutes (MCC/97/45), record that :-

> "... Members noted that a Working Party had been set up comprising the three Heads of Administration and Finance Managers and Financial Service Managers, together with the Finance Manager, ... to examine the current systems operating in relation to the collection of fines, fees, compensation and enforcement of financial penalties. The Working Party would examine the process as a whole in order to identify one system that could operate from 1st October 1997.
>
> ... expressed concern about confidentiality and the circulation of rumours. The Justices' Chief Executive was also concerned about the lack of communication but could not issue any information to staff until after the Chairman had met the Bench Chairmen.
>
> ... stressed the need for communication from the Committee at some stage bearing in mind that centralisation and the review of the Senior Management Structure had been written in to the Inspectorate Report and the Strategic Plan which had been circulated to all staff ...".

That there were serious concerns about the extent to which, if at all, HMCC was communicating the nature and extent of its deliberations to magistrates and staff in its area is captured in the Minute. One member of HMCC expressed concern about confidentiality and the circulation of rumours, a concern which was mirrored by the justices' chief executive. The source of rumour was never identified, although HMCC assumed it was from staff.[16] One justices' clerk also expressed concern about the need for effective communication from HMCC bearing in mind that, at that time, and before any formal notification to staff, HMMCSI had produced its first inspection report on the HMCC area, which would be in the public domain, and which contained its observations of HMCC's review of the senior management structure. In addition, HMCC's strategic plan had been circulated to all staff. It

was suggested that if HMMCSI were commenting, publicly, about HMCC's strategic plan, which, in turn, had been distributed to staff, and which contained radical proposals, HMCC should not be surprised if staff read the documents and commented upon them.[17]

At the meeting of HMCC on 19th May, 1997, the Minutes, (MCC/97/59) record that :-

> "... The Justices' Chief Executive outlined the contents of his paper on the Review of the Senior Management Structures. In his preliminary remarks he said that he wished to make it clear that the contents of his paper had not been influenced by anyone else's opinion or situation. In response to ... assertion that he had already come to a decision on this matter the Justices' Chief Executive stated that although the Committee had come to some conclusions following its private meeting no formal decision had yet been made. The paper provided all the information that the Committee needed to make a decision.
>
> There was a comprehensive discussion on the recommendations, at the end of which the Chairman summarised his understanding of the views expressed by those present which indicated general agreement to support the four recommendations.
>
> The Committee AGREED that the Chairman of HMCC be authorised to arrange a meeting with the Bench Chairmen/authorised Bench representative to discuss these matters in confidence, together with the centralisation of management of administration ...".

One of the recommendations was for the creation of a single justices' clerk in the area. The Minute suggests there was not all round agreement, with one member expressing concern that the justices' chief executive had already come to a decision on the matter. The justices' chief executive rejected that assertion, claiming that, although HMCC had come to some conclusions following its "private meeting", no

formal decision had yet been made. The detail of the "private meeting" which preceded the full MCC meeting, its legal significance, if any, discussion at the meeting, or of the precise nature of "general agreement", bearing in mind the caveat of at least one member, is unclear.[18]

On 16th June, 1997, the Minutes (MCC/97/67), record that :-

> "... The Chairman reported that following the last meeting he, the Deputy Chairman and the Justices' Chief Executive had met with Bench Chairmen (or nominated representative) to discuss the recommendations of the Justices' Chief Executive's paper on the Review of the Senior Management Structures.
>
> At that meeting a presentation had been given which outlined the difficulties facing the Committee and those members present were given the opportunity of responding to the proposal. The proposal was generally supported and the Bench Chairmen understood the problems the Committee were facing and were grateful for being kept informed.
>
> At this point the Justices' Clerks were asked to leave the meeting.
>
> ... expressed concern that the Committee should not be swayed into accepting the proposal because of the personalities involved.
>
> In principle, the following was agreed subject to legal advice. The Committee propose to move to a 'one Justices' Clerk structure with three Magistrates' Clerks : the timescale for implementation to be 7 May 1998 when ... will be made redundant and three Magistrates' Clerks will be appointed across the three administrative groups: that ... and ... be appointed joint Justices' Clerks for the County until 23 December 2001 when ... will be made redundant and ... will be made Justices' Clerk for the County.

Members voted unanimously for the proposal, which would be subject to the approval of the Lord Chancellor's Department and following full consultation with staff, benches and court users.

Members AGREED that Bench Chairmen should be informed that following this meeting a vote had taken place and that the Committee had agreed in principle to the proposal but that the matter must remain confidential until it becomes public knowledge in September 1997.

The Committee agreed that consultations on the proposal would take the form of presentations to benches and staff at three "road shows" to be held in the County in September 1997 ... The Committee would make its final decision in the light of responses at its meeting in November 1997 ...".

Prior to discussion which led to this Minute, justices' clerks were requested to leave the meeting. One member then expressed concern that HMCC should not be swayed into accepting the proposal because of the personalities involved.[19] At least one other member of HMCC thought each of the justices' clerks and the justices' chief executive had "agendas" of their own and were promoting organisational change for personal advantage.[20] Irrespective of emerging concerns about the chief officers, following further discussion, it was agreed that, in principle, and subject to legal advice, HMCC would move to a structure comprising one justices' clerk, with three "magistrates' clerks" in each group of petty sessional divisions and that, to achieve that objective, the justices' clerk at Southampton and the New Forest would be made redundant in May, 1998, when three "magistrates' clerks" would be appointed across the three "administrative groups" (the clerkship areas); that the two justices' clerks who remained would be appointed joint justices' clerks for the area until December, 2001, when one would be made redundant, at which time the remaining justices' clerk would be appointed for the entire area.[21]

This decision having been taken, members of HMCC then agreed that bench chairmen should be informed it had agreed in principle the recommendation made

to it, but that the matter remain confidential until it became public knowledge in September, 1997. HMCC also agreed that consultations on its proposal would take the form of presentations to benches and staff at three "road shows". To await these "road shows" and the potential for rumour, criticism and, perhaps, delay, might have been a dangerous strategy. Whatever the motivating factors, on 25th June, 1997, the chairman of HMCC travelled to London to meet with the Director, Magistrates' Courts Group, LCD. According to the chairman's note :-

> "I took with me a formal letter addressed to the Minister and discussed in some detail with ... *(the Director)* the three main items ...".

He discussed with the Director, among other things, the proposal to reduce to a single justices' clerk; and the position of the justices' chief executive after April, 1999, when his protection in post, without a legal qualification, would expire.

The chairman of HMCC found the Director most supportive and he suggested what was being proposed was :-

> "... the ideal structure as measured against the current thinking within his department and the wishes of the Minister ...".[22]

The Director also expressed the wish that other MCCs should follow Hampshire's lead.

There was support for a legislative, or some other, (what 'other' was never explained) change to continue to "protect" in post the justices' chief executive for Hampshire, by removing the need for holders of such posts to be legally qualified.

Whatever consultation with the benches in Hampshire was to follow, through the activity of its chairman, HMCC was now in a strong position. It is pertinent to reflect upon the purpose of any subsequent consultation with the benches.

At its meeting on 21st July, 1997, HMCC discussed, in detail, the format for its presentations to benches and staff. The meeting, conducted in the absence of the chairman and deputy chairman of HMCC, agreed that separate "road shows" would be arranged for both magistrates and staff, as it was felt that each group would have very different views. Members expressed concern about the effect on staff morale and considered that reassurance should be given. The justices' chief executive informed members that he had met with HMCC's managers on 13th June, 1997, (the same day as the meeting with bench chairmen), and the same documentation was issued to all those present. Members felt it was imperative that HMCC should be fully confident and well prepared to answer questions which may be asked at the "road shows" and the justices' chief executive asked members to direct to him any questions they believed might be asked at the meetings, in order that appropriate answers be formulated. One member believed it would be of benefit to HMCC if two papers were drafted and circulated to members before the "road shows": one to be drafted by the justices' chief executive on the plans for administration; and a joint paper by the three justices' clerks on how they envisaged judicial administration during the different stages prior to the move towards a single clerkship. Members believed that such a paper could be produced and circulated within a relatively short timescale. However, the justices' chief executive considered it was not appropriate for a further paper to be drafted detailing the management of administration, as HMCC had already mandated him to undertake this function. He reminded members that centralisation of the management of administration involved incorporating good practice and adopting a more corporate approach to administrative functions; and he was concerned that the three administrative groups operated in a consistent manner. The justices' clerks were nevertheless asked to prepare a paper outlining the way they perceived the legal functions operating, following the implementation of the current proposals for a new senior management structure. It was plainly intended that presentations to benches and staff should be "tight" and it was also suggested that, at the presentations, contributions from members of HMCC should be limited - "loose canons" were plainly not to be countenanced.[23]

Hampshire Magistrates' Courts Committee - Dealing with Dissension

That all was not well with HMCC emerged during the late summer of 1997. Two days after his meeting with the Director, Magistrates' Courts Group, LCD, on 25th June, 1997, the chairman of HMCC tendered his resignation.[24] At that time, the justices' chief executive was out of the United Kingdom, on holiday. Aside from domestic circumstances, the chairman wrote :-

> "... I am also concerned that several members of HMCC have spoken with me since the last meeting (*presumably, 16th June, 1997*) expressing concern as to the strategic direction the Committee is now taking with regard to the senior officer structure ... As Chairman of the Committee I have consistently and perhaps incorrectly made clear my views on the subject and would accept ... that I have encouraged debate towards this end ... I am sorry if this has caused difficulties for some members and feel that with this background a new "leader" is required to resolve the current problems within the Committee ...".

On the justices' chief executive's return from holiday there was a flurry of activity, mainly directed at persuading the chairman of HMCC to re-consider his position.[25]

He did just this and in correspondence of 8th August, 1997,[26] he claims he was :-

> "... acutely embarrassed by the reaction of the members to my letter of resignation. I do not want to let people down ...".

After describing his domestic difficulties, the chairman reflected again upon his concerns :-

> "... within the H.M.C.C. and between H.M.C.C. and its Chief Officers...".

Perhaps the chairman was embarrassed. It seemed there was more than one voice of dissent. After all, following the meeting of HMCC in June, he had met with the

Director, Magistrates' Courts Group, LCD, and secured agreement, in principle, to HMCC's proposals, which now seemed to be in jeopardy.

The correspondence is notable for its reference to a meeting the chairman attended on 30th July, 1997, with the Parliamentary Secretary to the Lord Chancellor, who was :-

> "... both constructive and positive. Whilst no firm guarantees were given ... we were left in no doubt the three items we raised would be favourably considered ...".

Two of the items raised were progression to a single clerkship in Hampshire, and the "protection" afforded to the justices' chief executive.[27]

All this had been achieved ahead of statutory consultation with the benches and their justices' clerks. That was not, however, the end of the correspondence. Responding to requests for him to remain as chairman of HMCC, the chairman set out his terms (referred to below, in the subsequent meeting of HMCC on 8th September, 1997).[28]

He concluded the correspondence by suggesting that without the entire Committee's support in respect of each issue he had raised, he considered his position would have been untenable.

Lest there was any doubting the chairman's resolve, eight days later he wrote to a member of HMCC insisting that :-

> "... the issues are not negotiable for me and members either agree to all the points or they do not ...".[29]

On 20th August, 1997, the chairman wrote to all members of HMCC indicating that he had :-

> "… received some concerns from one or two members of the Committee to the point that I do not feel that I have a clear mandate to proceed from everyone, and yet I have support from the majority …".[30]

In a rapid modification of his earlier position, the chairman agreed to deal with issues of concern following the public meeting of HMCC on 8th September, 1997.

The relevant Minutes of the meeting of HMCC held on 8th September, 1997, are recorded at MCC/97/95 to MCC/97/101. This part of the meeting was conducted in the absence of the justices' clerks. In opening, the chairman indicated the meeting had been convened to discuss the contents of his letter circulated to all members and dated 8th August, 1997. Each point in his letter was to be discussed and put to the vote in order that each point could be formally minuted as a policy decision of HMCC.

The chairman proposed that :-

> "We alter the standing orders so that once a decision has been formally made by the Committee it cannot be re-considered for 12 months except by a vote with at least 6 members in favour, or at the specific request of the Chief Executive."

After discussion, members agreed that the Standing Orders of HMCC be amended so that no motion to rescind any resolution passed within the preceding twelve months and no motion of amendment to the same effect as one which had been rejected within the preceding twelve months, should be proposed; but that restriction should not apply to motions moved by a vote by at least five members, or at the specific request of the justices' chief executive.

The chairman proposed that :-

> "I would not wish to discourage democracy or debate but once a decision has been made then all members of the Committee must accept corporate responsibility and actively support that decision. If they cannot accept this principle then they should resign."

The proposal was agreed unanimously.

The chairman proposed that :-

> "With effect from 1st October, 1997 (transfer of administrative responsibility) justices' clerks do not attend MCC meetings on a regular basis, and all communication with them is via the justices' chief executive."

After discussion, the proposal was amended to read that :-

> "With effect from 1st October, 1997 justices' clerks will only attend MCC meetings by invitation. Normally one justices' clerk (chosen by the justices' clerks) will be invited to attend meetings of the committee."

Five members voted in favour of the amended proposal, with two against.

The chairman proposed that :-

> "All HMCC discussion whether within committee or elsewhere unless specified otherwise remain confidential and shall not be discussed with anyone outside the committee."

The proposal was agreed unanimously.

The chairman proposed that :-

> "In future the committee concentrates on strategic/policy matters, and performance monitoring, and delegates more, including all operational matters, to the chief executive."

The proposal was agreed.

The chairman proposed that :-

> "We accept the decisions already made by the committee to proceed to one justices' clerk and that in practice this means from April/May next year with the departure of ... and for ... as at his 50th birthday, (I can see no problem with ... continuing should we/he wish as a consultant specifically for and until the completion of ... (*a specific project*) if this is a concern to members)."

The chairman had raised this point as he had been concerned that he did not have the full support of HMCC to proceed to a single justices' clerk structure. Following discussion, members agreed the proposal should be amended to read :-

> "We accept the proposal already adopted by the committee to proceed to one Justices' Clerk ... concern to members."

It was plain that members of HMCC did not share the opinions of their chairman that a single justices' clerk for the area had already been agreed. Perhaps there was misunderstanding of the need to agree and consult bearing in mind the position of the LCD.

The justices' chief executive and his personal assistant were then asked to leave the meeting.

The chairman proposed that :-

> "We all accept and support wholeheartedly … as our JCE and accept that he will remain in post beyond April, 1999. If we are dissatisfied with his performance then we tell him via an appraisal process and give him an opportunity to correct the situation. His future as JCE should depend on future performance - it follows that if and only if he fails to meet specific performance targets after due warnings, that he should be asked to leave. I feel that the current attitude of certain members of the committee is unfair, unreasonable, and contrary to employment law in that his role in the past was as one of four equals and not that of Chief Executive, and should not be judged as such."

The justices' chief executive and his personal assistant were asked to return to the meeting and note the agreement of members that :-

> "We all accept and actively support … as our justices' chief executive and accept he will remain in post beyond 1999. His future as justices' chief executive will depend on future performance."

Dealing with dissension - implications

The validity of some of the resolutions was highly questionable.

The resolution that, without wishing to discourage democracy or debate, once a decision had been made then all members of HMCC had to accept corporate responsibility and actively support it, or resign, was plainly intended to place pressure upon any genuinely held dissident opinion. The resolution that all HMCC discussions, whether within committee or elsewhere, unless specified otherwise, remained confidential and would not be discussed with anyone outside the committee placed a significant restriction on the justices' chief executive to properly record and minute discussion, and was, again, bearing in mind Government's commitment to openness, and the intention of the Police and

Magistrates' Courts Act, 1994, that activities of MCCs should be open to public inspection and scrutiny,[31] probably unlawful and, in any event, surprising and contrary to any suggestion of openness amongst public authorities having responsibility for the expenditure of public moneys. That said, having regard to the way in which HMCC conducted non statutory, non minuted, "private meetings", it was, perhaps, not surprising.

It is evident from the proposal to move to a single justices' clerk in the area that, whatever else HMCC Minutes might disclose, there had been dissension with either the decision or the way it was reached. That discussion is not recorded elsewhere in the Minutes, although it might have been voiced at the "private meetings". The chairman had however made clear his intention to continue in post on the basis of a decision HMCC had made to proceed, when it remained no more than a proposal, subject to consultation.

The resolution relating to the justices' chief executive begs many more questions than it addresses, although, without the expression of uneasiness at some stage by some members of HMCC, such a resolution would have been unnecessary.

There is the implicit suggestion that the chairman was uncomfortable with the presence of justices' clerks at meetings of HMCC, or at least, some of them.

Although the chairman had insisted upon support from all members of HMCC, and for all his proposals, if he was to continue, he obtained neither. He continued in office.

Other business was discussed at the meeting of HMCC on 8th September, 1997, when justices' clerks presented a paper they had drafted which addressed the broad effects of re-organising the senior management structure in the area.[32] Justices' clerks reminded HMCC of the financial consequences of declaring redundant justices' clerks or justices' clerks' assistants. HMCC was left in no doubt about the financial impact its decision might have.

The justices' clerks considered that on the redundancy of the first justices' clerk in the area, in May, 1998, there seemed to be no reason why, for the transitional period thereafter, HMCC should not move immediately, in operational terms, as if there were a single justices' clerk. They suggested such a move would enable one post holder to submit to HMCC proposals for a single county legal structure to support the post. HMCC would need to address the interface between a centrally managed administration and the court centres providing judicial and legal advisory support. HMCC was reminded that the complexity of the issues affecting the interface between judicial, legal and administrative functions could not be overstated and care needed to be taken lest the fine checks and balances that were in place throughout the summary justice process were disturbed. It was considered that the second justices' clerk would assist in the creation of the new single clerkship and legal structure, in ensuring that all appropriate issues were thoroughly addressed and that the new arrangements were "tight" and effective; and that the post holder might also usefully "audit" and "test" all judicial and legal arrangements and frameworks put in place to ensure they "delivered".

The justices' clerks' report drew attention to the crucial significance of making adequate arrangements for advisory committees on the appointment of justices of the peace and that individual magistrates would need to be reassured that the new arrangements would not impact upon them for the worse.

Attention was drawn to what appeared to be an emerging national framework and that there were early indications that Government still believed there was "slack" in magistrates' courts in England and Wales and that further financial savings seemed inevitable. By such comments, the justices' clerks placed further pressure upon HMCC.

In concluding their report, but by far the most crucial feature of it, the justices' clerks reminded HMCC that :-

> "... It would not be possible, without a Paper running into many pages, to produce an analysis of all issues which are likely to emerge. This paper is

intended to highlight the most significant. It is suggested that the most vital component of all that is to be considered is the administration of summary justice. Whilst HMCC is charged with specific statutory duties and responsibilities, its primary purpose is to provide a framework which is capable of supporting the delivery of summary justice. If it fails to do that, it has no purpose at all. It should also be borne in mind that it has taken decades, some would say hundreds of years, to establish the appropriate checks and balances in the criminal justice process to ensure the freedom of the individual, under the law. Without wishing to engage in too much pomposity, those checks and balances can be easily dislodged by "quick fix" solutions which are capable of causing lasting, perhaps irreparable, damage. Where Justices' Clerks counsel caution, they do so with a professional appreciation of the complex issues which need to be addressed and resolved if satisfactory solutions are to be found ...".

The report, which had set out the issues and HMCC's responsibilities as clearly as possible, particularly those which underpinned the administration of justice, per se, met with little or no discussion. However, HMCC could not complain that it proceeded, thereafter, in ignorance of the issues.

The justices' chief executive reported that he had had a meeting with the three heads of administration in the area, where he had intimated that their number may reduce to two before the end of the financial year.[33] This would be achieved by making all three post holders redundant and leaving them to apply for the remaining two posts. It was anticipated that the structure would then "flatten out" resulting in more authority and responsibility further down the organisational line.

There was also discussion at the meeting about the format of "road shows" and it was noted that the chairman, deputy chairman and justices' chief executive would undertake a presentation which would be followed by a question and answer session.[34] A written paper would be distributed and circulated to all magistrates and staff who were unable to attend. The chairman emphasised that the "road shows" were for genuine consultation and that both he and the justices' chief

executive were prepared to meet benches and staff again should any further clarification be required.

Whatever the chairman of HMCC may have had to say about the nature of genuine consultation, there was already overwhelming evidence of the chairman's preferred way forward : he had staked his reputation by, in part, resigning on the point; and he had also been to London on two separate occasions to elicit the support of the Director, Magistrates' Courts Group, LCD, and the Parliamentary Secretary to the Lord Chancellor.[35]

Not all seemed to go well at the public part of the meeting of HMCC on 8th September, 1997, and in a subsequent interview with Radio Solent, when the justices' chief executive was invited to comment upon the meeting, some magistrates thought he trespassed beyond HMCC's legitimate interest when reflecting upon the increasing number of adjournments in the area. He deflected criticism, on the basis that :-

> "... Delays in Court are a complex subject ...".[36]

His response satisfied no one, but there was no real avenue of complaint.[37]

Process of future organisation - observations

As demonstrated by the difficulties emerging in the late summer of 1997, the decisions of HMCC, over a period of some months, indicated a measure of division amongst its membership.

Having agreed that a fundamental review of its structure was required, to reflect its enhanced role and functions, and having agreed at one meeting that rationalisation was inevitable, HMCC retrenched from that position to insist that no justices' clerk would be declared redundant. There seems to be inconsistency here with another of its decisions to centralise the management of administration, thereby significantly

changing the basis upon which each of the justices' clerks in the area had been appointed, arguably, de facto, declaring redundancies.

As if to strengthen the resolve of those who were doubtful, and to persuade those who were against reorganisation, the Director, Magistrates' Courts Group, LCD, was invited to attend a meeting of HMCC and assured it that significant reductions in clerkship areas elsewhere, including, a reduction to a single justices' clerk, had not resulted in damage to the administration of summary justice. That the Director should be voicing such an opinion in the HMCC area, at the time such a sensitive issue remained under discussion, is at least suggestive of a determination on the part of some members of HMCC to obtain an opinion from the LCD about the desirability or otherwise of moving to a single justices' clerk for the area, and to influence members, before minds were made up. It also suggests a willingness on the part of the LCD to become involved in and to influence what was, presumably, to be regarded as a matter for local management. The rationale underpinning such willingness was to emerge a little later.

The events of the summer of 1997, following the resignation of the chairman of HMCC, and his correspondence proposing a number of resolutions which he required to be considered separately by HMCC, were perhaps more surprising. Some of the resolutions put before HMCC, and carried by it, seemed to be at best questionable, and at worst unlawful, while others, by implication, merely underpinned the extent and depth of divisions that had emerged.

Statutory Consultation I – preparing the road shows

It was against this backcloth that HMCC embarked upon statutory consultation to reduce clerkship areas. In preparation for that consultation and for the benefit of those magistrates unable to attend presentations, the justices' chief executive prepared a detailed paper, designed to set out HMCC's position and the rationale which underpinned its proposals for the future.[38] The paper was relied upon at the presentations.

The paper explained HMCC's statutory responsibility to appoint a justices' chief executive and the functions that post holder had to perform. It confirmed that HMCC had reviewed the appointment of its justices' clerks and that each of them held office during the pleasure of HMCC. Accordingly, they were not employees and did not enjoy statutory employment protection rights. The Lord Chancellor had to approve the appointment of a justices' clerk and his/her removal if magistrates for his/her clerkship did not consent to it, which was regarded as a check on the MCC's power of summary dismissal.

A particular emphasis was placed upon the review conducted by HMCC following implementation of the Police and Magistrates' Courts Act, 1994. The paper explained that the Justices of the Peace Act, 1979, set out principal powers and duties of the office of justices' clerk, which included the statutory role of legal adviser and independence in that role, and the justices' clerk's duty as collecting officer. The paper outlined, in particular, the significant change brought about by the Police and Magistrates' Courts Act, 1994, in the management of resources. HMCC considered that the Police and Magistrates' Courts Act, 1994, had introduced a significant erosion of justices' clerks administrative and managerial autonomy and, in that respect, it was entirely correct.

The paper drew attention to the consensual form of management, at chief officer level, that had emerged in the HMCC area. However, it noted that consensual model was under considerable pressure following implementation of the Police and Magistrates' Courts Act, 1994. A further difficulty had emerged, in that the consensual approach to managing a MCC area did not sit happily with Government, HMMCSI, nor, it appears, HMCC. In its inspection of Hampshire earlier in 1997, HMMCSI pointed out to HMCC that :-

> "... the MCC may not be able to wholly fulfil its responsibilities under the Act so long as implementation of its decisions depends upon the agreement of members of a chief officer group operating through consensus".

The justices' chief executive considered that :-

> "... The perception of the Inspectors is that in Hampshire the line management structure from the MCC to operations is achieved somewhat differently to other MCC areas ...".

The report of HMMCSI, and decisions of HMCC already minuted herein, indicated that Government, HMMCSI and HMCC had a preference for "command and control", through a single head of the paid service.[39] The Chief Inspector of HMMCSI laid significant emphasis upon what she considered to be the need for accountability, sharing, with the Director, Magistrates' Courts Group, LCD distinctions between independence of judgement on the one hand, and accountability on the other. In interview, there seemed little of distinction between the views of the Chief Inspector and the Director. Such views were finding resonance with at least some members of HMCC.[40]

The paper emphasised that HMCC and its officers recognised that a consistent approach to work practices could not effectively be achieved within its present structure and although the consensual model of management had worked well, it militated against corporateness, consistency of work practices, policies and procedures. It was accordingly pointed out that, in November, 1996, HMCC had determined that the three heads of administration and finance, who were working under the day to day direction and control of justices' clerks would work, thereafter, under the direction and control of the justices' chief executive.

HMCC's funding position was reviewed. Its allocation of grant for 1997/98 predicated a reduction of approximately £190,000 in real terms on its budget. It seemed to be clear, claimed HMCC's justices' chief executive, that public funding would, at best, stand still in future years. HMCC foresaw further cuts.

Statutory Consultation II - and cash limits

The paper presented by HMCC's justices' chief executive masked the true extent of what had emerged as one of the most significant issues faced by MCCs in England and Wales for many years.[41] The cash limiting formula had remained a bone of contention with the MCS and HMCC. As is noted in Part Two, chapter 3, Ministers finally agreed a scheme for the allocation of grant to the MCS on 18th October, 1991. Despite strong resistance from the MCS and observations made by, among others, the Society, that the introduction of cash limiting would interfere with the administration of justice, Government persisted.[42]

If sufficient grant was to be maintained, assuming a constant workload, and in the HMCC area workload was, by this time, falling, pressure had to be maintained in order that courts could dispose of, to finality, the maximum number of cases as speedily as possible. More pleas of guilty, fewer not guilty; more motoring and television licence offences, fewer serious, contested, criminal cases, which might take longer to dispose of. Adjournments had to be resisted. Under the cash limiting formula throughput was essential, delay costly. Training in the HMCC area focused upon such issues and much strident comment was made in respect of them when the chairman and justices' chief executive presented HMCC's annual report.[43]

To take full advantage of the cash limiting process, more court sitting hours were necessary. Accordingly, HMCC introduced targets for court legal advisers which led to an increase in the number of hours each court legal adviser spent in the courtroom each day, thereby reducing their availability for other legal work. With court legal advisers spending more hours in the courtroom, fewer courtrooms were necessary and savings could be effected.

With a high level of consciousness amongst court legal advisers and magistrates, generated by, among others, HMCC, about the implications of low throughput and, increasingly, the likelihood of court house closure and redundancy, there could be little doubt that more than subtle pressure existed to cut corners. To compound

matters, there was a significant reduction in cases prosecuted before magistrates, in the HMCC area, an issue addressed by it in its report of September, 1997.[44]

Amongst the dilemmas for HMCC's justices' clerks was the manner in which many potential cases were being processed through the criminal justice process. Cash limited grant could be reduced if a significant number of cases did not reach the courtroom. For many justices' clerks, fundamental issues of natural justice sharply conflicted with the need to dispose of a weighted caseload capable of attracting sufficient grant.[45] Practical realities exploded any suggestion that the formula for cash limits could not interfere with the courts' independent judicial functions.[46]

It was at a time when HMCC had to face the reality of a cut in budget allocation, because of decreasing workload, when financial pressures were exerting an influence on the judicial process, that it was considering dispensing with the services of at least two of its justices' clerks, whose Society was so strongly opposed to the cash limiting initiative because of its implications for the administration of summary justice. HMCC pressed ahead.

HMCC's paper to the magistracy in September, 1997, claimed that the reduction of weighted caseload in its area would have an adverse effect on its cash limit. It decided that in order to meet the shortfall in 1997/98, it would make savings in the repair and maintenance budget; and building alterations. If, as predicted, savings needed to be made against its budget for 1998/99 and beyond, it would have to look at additional and perhaps more radical ways of making savings.

According to HMCC's vice-chairman, who addressed a "road show" meeting of magistrates at the University of Southampton in September, 1997, if HMCC did not take radical action, it would face financial "meltdown".[47]

Statutory Consultation III - roles and responsibilities

In addressing the meetings of magistrates in September, 1997, the chairman of HMCC and its justices' chief executive reviewed the scope of HMCC's responsibilities, and suggested that s.48 of the Justices of the Peace Act, 1997, provided a measure of autonomy for justices' clerks, in that, when exercising judicial functions or giving advice to magistrates in individual cases, justices' clerks could not be subject to direction by the MCC, a justices' chief executive or any other person; and that, when acting in a similar capacity, any member of the staff of a magistrates' court could not be subject to the direction of the MCC or the justices' chief executive.

However, and as if to put the magistracy in the area on notice of its intentions, HMCC pointed out that, in a report from HMMCSI and remarks made by the Director, Magistrates' Courts Group, LCD, it had learned there were expectations that case management was a matter for it and that general legal advice to benches was a matter that a justices' chief executive (and, presumably, the lay HMCC) could legitimately give, because in the legislation, the protection of "judicial independence" to justices' clerks and staff was confined to individual cases only. (This interpretation of the law from senior civil servants ran counter to the scheme of the Police and Magistrates' Courts Act, 1994, and the Parliamentary debate which preceded it (op. cit. Part Two, chapter 4). However, if it was lawful for a justices' chief executive and, presumably, a lay member MCC to case manage magistrates' courts and to provide general legal and policy guidance across the entire range of a magistrate's jurisdiction, the power existed for HMCC to intrude into the provision of general legal advice to all justices' clerks, staff and, indeed, magistrates in its area including, for example, sentencing policy, an objective of its chairman. However, if it intruded in these general areas, it would seem neither the LCD, nor HMMCSI, would level criticism. Such an interpretation of the law, buried away in the body of the paper, was never likely to attract the attention of the magistracy; less still were magistrates likely to fully appreciate its significance for them. When considered along with the diminution of the justices' clerk's managerial and administrative role, this interpretation of the law left justices'

clerks as little more than legal team leaders and, in Hampshire, for all practical purposes, redundant).

Statutory Consultation IV - the option (s)

Having conducted its review, the chairman of HMCC informed those magistrates attending the "road shows" that HMCC considered a number of options for its senior management structure for the future.

The paper, and the address by the chairman and justices' chief executive at meetings with magistrates in the area, concluded by recommending HMCC's preferred option of a structure comprising a single justices' clerk in the area, with all that flowed from that.

The awakening of magistrates to a "bright new dawn"

Issues raised by the justices' chief executive, particularly those related to the centralisation of administration and reduction in duties and responsibilities of justices' clerks, were not lost upon those magistrates in the HMCC area, particularly those in Southampton and the New Forest, who had been members of the former HMCC.[48] It was considered that, at the time HMCC reached its decisions, there was no evidence to suggest that its members had any, or sufficient knowledge of the administrative and financial responsibilities exercised in magistrates' courts, less still understood the complex issues that arose at the interface of judicial, legal and administrative work, which were still undefined.[49]

Disquiet was expressed about the considerations which had led HMCC to reach its decisions, particularly those relating to finance, and it was observed by many that if cuts in expenditure were necessary, those cuts could be achieved without denying to the magistracy the advice and support it received from its justices' clerks. Furthermore, these justices' clerks possessed both legal and managerial qualifications, had attended a Government funded senior management development programme and had been expected to consistently demonstrate managerial

competence. In transferring administrative functions to be managed centrally, HMCC was transferring managerial responsibility to its justices' chief executive, who had not undertaken any such function in a magistrates' court, (as opposed to HMCC's secretariat or its predecessor), for many years and had little or no knowledge of the impact of legislative activity during the 1980s and early 1990s upon the work of magistrates' courts.[50]

The magistrates in Southampton and the New Forest quickly recognised that, aside from issues relating to legal advice, with the loss of a significant part of respective workloads, justices' clerks were, de facto, redundant, rendering statutory consultation otiose. (At that stage, they did not know, nor were ever informed, of HMCC's chairman's consultations in London.) Magistrates in Southampton and the New Forest were particularly concerned that the decision to centralise parts of the management and administration in the area had been taken without consultation, significantly reducing the duties and responsibilities of their justices' clerk, thereby placing the clerkship at risk. If the clerkship was lost, the legal advice available to them would be diluted, thereby weakening their own judicial independence.

The response from HMCC was swift: the Police and Magistrates' Courts Act, 1994, placed responsibility for management and administration in its hands and there was no obligation upon it to consult upon the matter.[51] Those magistrates who raised this issue[52] expressed deep concern that HMCC had reached a decision rendering, *de facto*, clerkships in the area redundant, without the need for statutory consultation. Whilst, in principle, HMCC had agreed that, in reducing to a single clerkship, it would be bound by the statutory consultation process, (and subject to the activities of its chairman in London), by removing so many of the duties and responsibilities of justices' clerks it would be difficult in any event for it to justify continued public expenditure, at the same level, upon them.

In enacting the Police and Magistrates' Courts Act, 1994, and by placing the management and administration of MCC areas in the hands of magistrates, inspected by HMMCSI, with lines of accountability to the LCD, and with severe

financial constraints, Government had managed to set magistrate members of MCCs against magistrates in the petty sessional divisions and devised a framework whereby the redundancy of public office holders became a formality. It seemed members of HMCC (they were not alone among MCC members in England and Wales), in adopting an aggressive stance to the powers and duties entrusted to them, encouraged by LCD, were fast destroying the fabric of the organisation of which they were a part; and were taking decisions that would ultimately see clerkships declared redundant across England and Wales, inevitably weakening the independence and, perhaps, the existence of the magistracy. It was by no means clear members of HMCC had any idea of the implications of their decisions although they had been put on notice about them.

In all this, the strategy had been very clear, if not a little deceptive.

MCCs were cash limited.[53] They were statutorily obliged to establish posts of justices' chief executives, with supporting administrative and secretarial staff, and accommodation,[54] thereby placing further financial strain upon them. They were statutorily obliged to manage the magistrates' courts in their respective areas; and were encouraged by senior civil servants to accept responsibility for all legal and judicial advice in an area, save in individual cases.[55] Justices' clerks were, de facto, redundant. But, in the HMCC area, even if they or any number of magistrates took exception to that argument, or resisted HMCC's proposals for re-organisation because of it, HMCC had another message: it was facing, according to its vice-chairman, financial "meltdown".[56] Aside, however, from all this, HMCC's chairman had already sought and obtained concurrence for his proposals from the Parliamentary Secretary to the Lord Chancellor, to whom would fall ultimate responsibility if any of the local benches objected to what was being proposed.[57] Statutory consultation in the HMCC area was nothing more than an illusion. Whether all members of HMCC were aware of the extent to which they had been manipulated is not clear.

The decision to centralise the management of the administration in the HMCC area did not, when it was taken in November, 1996, meet with the full concurrence of

justices' clerks, although that lack of complete concurrence was not heralded in the paper presented as part of the consultation process in September, 1997.[58]

The justices' clerks had pointed out to members of HMCC that many of the functions it intended to manage centrally had judicial, legal and administrative implications and there was a risk of HMCC encountering difficulty neither it nor its justices' chief executive had the technical ability to comprehend, aside from the risk of intruding into areas for which it had no statutory responsibility.

HMCC was unmoved, concluding there was much confusion, in any event, nationally, as to what were judicial, legal and administrative functions. On that point, HMCC was correct.[59]

As has been noted herein,[60] a report published in February, 1998, by the Magistrates' Courts Group, LCD, reviewed the roles of magistrates recognising that some functions related to the judicial process were, under the Magistrates' Courts Act, 1980, capable of being performed by a single justice, whilst some of these judicial functions could be exercised by justices' clerks or any member of staff appointed by a MCC to whom delegated power was given. Some functions did not fall neatly into one of the three categories: judicial, legal and administrative, and might contain elements of more than one; and establishing the exact extent of magistrates', justices' chief executives' and justices' clerks' responsibilities was a matter of interpretation. The Advisory Group attempted to document some of the areas where responsibility was not clear. Other than identify the problem areas, the Advisory Group concluded nothing at all.

Tildesley (1997)[61] attempted to resolve the issues in a manner which would have favoured MCCs. These were, of course, the very issues upon which a former Lord Chief Justice had sought clarification from the Parliamentary Secretary to the Lord Chancellor, without success.[62] However, as is demonstrated by the activity of HMCC, without definition it is possible for those with a mind to do so to strike at the heart of the administration of justice.[63] It was clear that, during Second Reading of the Police and Magistrates' Courts Bill, Lord Taylor had identified an issue

which had, by that time, caused the senior judiciary much concern, but which the Parliamentary Secretary to the Lord Chancellor and, subsequently, an Advisory Group, had resisted all attempts to resolve.

That Lord Taylor's concerns were not new, is evidenced by warnings given some years before by Sir Nicholas Browne-Wilkinson, as he then was, about the dangers of executive intrusion into the judicial arena.[64] In 1989, in his Mann Lecture dealing with the independence of the judiciary, he suggested that in addition to the usual concerns about freedom from government pressure secured by payment out of the Consolidated Fund, there was "subtler threat" through the executive's control of finance and administration. He considered that the control of finances and administration of the legal system was capable of preventing the performance of those very functions which the independence of the judiciary was intended to preserve. In particular, he saw that having court administration reporting to the civil service rather than the judges threatened the independence of the judiciary. He claimed that a number of judges thought that there was some form of civil service conspiracy designed to erode the independence of the judiciary and their powers.

It is difficult not to conclude that there were and perhaps remain those who would prefer not to have judicial, legal and administrative functions defined in any part of the judicial process, lest it weakens the ability of managers, to control, centrally, the judicial process. Tildesley (1997) is more generous, suggesting that such distinctions could make the courts unworkable. In the alternative, he suggested that administrative and judicial considerations necessarily overlapped and that the interests of the MCC and magistrates, in their judicial capacity, were equally recognised. This recognition of interests could take the form of "Practice Directions" agreed locally by MCCs and bench chairmen. He claimed such an approach would re-inforce the clear message that the judicial and administrative arms of magistrates' courts were working together to provide an excellent service to the public and enhanced the relationship between the MCC and bench chairmen, magistrates retaining for themselves responsibility for safeguarding judicial independence. Tildesley (1997) opts for either a continuation of the fog which

surrounds judicial, legal and administrative functions; or their subjugation to the whim of the MCC, for his alternative solution vests ultimate responsibility in the employer and neatly sidesteps the issue of how magistrates, advised by an MCC employee, can recognise, let alone safeguard, their own independence. Such issues seemed far from the thoughts of HMCC at this time.

Statutory Consultation V - the outcome

Statutory consultation or not, the justices' clerks in the HMCC area were no longer performing the office to which they had been appointed. Managerial and administrative duties and responsibilities were being stripped away. Judicial, legal and advisory functions were restricted to individual cases.

Two thirds of the magistrates in the HMCC area appeared to be relatively sanguine about the proposals presented to them.[65] It is not possible to determine the reason for that. The chairman of HMCC and three other HMCC members came from the northern clerkship area, where they were relatively influential members of the benches, and, although there was no overt evidence for it, many in the Southampton and New Forest area considered that their influence was brought to bear in the north of the county upon, in particular, bench senior office holders.[66] It was also likely that the justices' clerk in the north of the county would remain in post, in some capacity, and, in that sense, there was no 'loss' of a justices' clerk. In the south eastern part of the area, the proposals seemed to have a quiet passage. The justices' clerk at Southampton and the New Forest considered there were many complex reasons for that, related to, among other things, the enthusiasm of the justices' clerk for the proposals, which he had supported from the outset, and the complex nature of relationships in the clerkship area.[67] (The justices' clerk relinquished the clerkship prior to his fiftieth birthday). The remaining one third of magistrates, in the Southampton and New Forest area, where they expressed a view at all, opposed the proposals, many complaining that the analysis of the various options was simply inaccurate; and that in the light of the paper, consultation was meaningless.[68] They were of course right so far as consultation was concerned, although for more reason than was then apparent.

Correspondence addressed to the chairman of the Southampton bench at that time emphasised the opinion of well informed magistrates that the impact of the centralisation of the management of administration did not seem to be fully understood, particularly at the interface of judicial, legal and administrative operations.[69]

It was considered that insufficient time was being given to examining likely difficulties and that the decision had been made, regardless of the consequences. It was conceded that, by centralising the management of administration, there might be a saving in staff and costs, but it was considered that the management expertise required to implement the proposals and manage the centralised administration would need to be of a very high quality and might result in increased costs for senior post holders.

The correspondence noted that the removal of a justices' clerk would not affect, to a great extent, the ability of an individual magistrate to sit in that capacity. There was concern however that the removal of a justices' clerk would remove from the magistracy more generally the expertise that was required, replacing it with a substitute, at a lesser salary than the justices' clerk. It was suggested decisions demonstrated a clear acknowledgement by decision makers that the quality of legal advice and experience provided to the magistracy would be diminished by being purchased at a significantly lower price.

It was considered that too narrow an approach had been adopted in respect of the duties and responsibilities undertaken by justices' clerks and there appeared to be no acknowledgement of the work performed by them relating to, among other things, the personal problems of magistrates, difficulties in the courtroom, implications for the administration of summary justice, which could lead to miscarriages of justice, re-trials, and so on. There was also complaint that little or no consideration had been given to the work associated with the Lord Chancellor's advisory committee on the appointment of justices of the peace.

Comparisons were made with neighbouring areas, it being noted that, in particular, the Southampton and New Forest clerkship area was, in terms of its workload, larger than at least one neighbouring county.

Turning to finance, it was considered that, by careful adjustments, some redundancies would be inevitable, but posts of justices' clerk could be retained. Addressing the issue of line management, it was suggested that any potential difficulty could be overcome.

There was deep concern that demoralisation and disillusionment in the MCS would be an obvious result from the proposals, so far as staff were concerned, and that same demoralisation and disillusionment would affect the magistracy in much the same way.

Whilst many magistrates in the Southampton and New Forest area expressed their opposition to the proposals of HMCC, that opposition was not unanimous.[70] The magistracy remained relatively fragmented, magistrates meeting each other, primarily, when they sat in court, but not otherwise. As a result, day to day contact with staff and managerial concerns tended to reside in relatively few magistrates occupying senior Office holding positions. Some magistrates, themselves the subject of re-organisation in the public and private sectors, leading to redundancies, considered the MCS both nationally and locally, merely suffering the same fate as many others. At the bench senior Office holding level at Southampton there appeared to be a measure of disarray, the chairman of the Southampton bench finding that she did not have the full support of those appointed to represent many of her colleagues.[71]

At its meeting on 17th November, 1997, and following the receipt of representations from the magistracy in its area to its proposals, HMCC agreed, formally, to move from three justices' clerks to two justices' clerks on or soon after May, 1998. It also agreed that, at that time, its justices' chief executive should write to the LCD, and that he should do so without delay. No indication was given

by HMCC that its decision would be subject to any further consultation. The bench chairmen were informed of the decision four days later.[72]

Implementing proposals for re-organisation

On 26th November 1997, the chairman of the New Forest bench wrote to the chairman of HMCC advising him that, having carefully considered HMCC's decision, the bench believed HMCC :-

> "... has not demonstrated the savings required, either for your Committee or for the Exchequer ...".[73]

The chairman of the New Forest bench indicated to the Lord Chancellor how the bench had, in recent years, enthusiastically embraced and successfully achieved local re-organisation; and had welcomed proposals to reduce to about 42 or 43 MCCs; but nevertheless sought to persuade the Lord Chancellor to delay any agreement to HMCCs plans until he was satisfied the proposed changes would demonstrably meet targets.[74]

On 2nd December, 1997, the chairman of HMCC met with the chairman of the Southampton bench.[75] The chairman of HMCC indicated that he had delayed the justices' chief executive transmitting HMCC's decision of 17th November, 1997, to the LCD. He was anxious to obtain agreement from the benches in the Southampton and New Forest area, if that was possible. He suggested that he had already reached some accord with the LCD that HMCC's proposals were likely to be acceptable, but thought agreement would speed up the process. (That observation came as no surprise to the justices' clerk for Southampton and the New Forest, who was present at the meeting, as it was plain to him that the Director, Magistrates' Courts Group, LCD had made his position clear at the meeting of HMCC on 21st April, 1997; as did, subsequently, the Parliamentary Secretary to the Lord Chancellor).[76] The comment from the chairman of HMCC, however, implied that whatever view the bench took, and its justices' clerk who was yet to be formally consulted by the LCD upon the matter, the decision, in principle, had

already been agreed by or on behalf of the Lord Chancellor and his Department. The chairman of the Southampton bench agreed to convene a meeting of senior colleagues so that they might reconsider the position. A meeting was convened, but those attending considered that it was essential to consult more widely with magistrates in the clerkship area, if any consent/consultation was to be realistic.[77]

On 16th December, 1997, the chairman of the Southampton bench wrote to the chairman of HMCC, advising him that the chairmen and deputy chairmen of the Southampton and New Forest benches had met on 5th December, 1997, and discussed again HMCCs proposals. It was noted, at the meeting, that, contrary to the point emphasised at the "road shows", the purpose of re-organisation was not purely financial; HMCCs proposals were in line with Government thinking and would almost certainly meet with approval; and that transfer to the justices' chief executive of the management of administration had, at a stroke, undermined the job of the justices' clerk. The bench chairman and deputy chairmen considered the position of their justices' clerk was untenable. It was conceded that co-operation with HMCC in its proposals was inevitable.[78]

The correspondence was not received by the chairman of HMCC, prior to the meeting of HMCC on 15th December, 1997.

At its 15th December, 1997, meeting, HMCC agreed to declare the justices' clerk for the Southampton and New Forest area redundant on 31st December, 1998. Bench chairmen were informed that HMCC had been advised by the LCD that :-

> "... in anticipation of certain objections being received by them it will take longer than we had hoped for the Lord Chancellor to process and consider our proposals ...".[79]

Importantly, the correspondence to bench chairmen continued :-

> "... One piece of good news is that as a result of Inner London MCC releasing a significant part of its cash budget for re-distribution we are now

looking at a standstill budget for next year rather than the significant cuts we had been led to believe ...".

There was no longer to be financial "meltdown", and a significant plank of the consultation process had been rendered meaningless.[80]

But not all was proceeding as smoothly as HMCC had anticipated.

Shortly before Christmas, 1997, the justices' clerk for Southampton and the New Forest was informed by the justices' chief executive that, with effect from 1st April, 1998, the pension fund administered on behalf of HMCC by its paying authority, the county council, was to require employers, including HMCC, to re-imburse the pension fund before benefits were paid from it in respect of any persons being declared redundant or subject to premature retirement.[81] The likelihood was that, with HMCC's strategy moving forward, in part, on the basis of the redundancy and premature retirement of the justices' clerk for Southampton and the New Forest, HMCC might have to find from within its cash limited budget more than £200,000.[82] The benches in the Southampton and New Forest area were unimpressed and assumed that, at that stage, proposals for reorganisation would be either subject to further consultation, deferred or dropped entirely. The justices' chief executive confirmed the pension position in correspondence of 11th January, 1998.[83]

Early in January, 1998, the justices' clerk for Southampton and the New Forest was informed by the justices' chief executive that the LCD was re-allocating moneys that had been returned to it by other MCCs and that HMCC expected to receive part of that re-allocation. It was, accordingly, no longer under pressure to save money at that time, as had been conveyed to the benches in the area.[84]

Magistrates in the Southampton and New Forest area considered that, having regard to the way in which HMCC's proposals had been explained to them, with an underpinning rationale of simplifying the senior management structure, and

financial "meltdown" no longer a reality, HMCC's proposals would be either subject to further consultation, deferred or dropped.

Furthermore, it was observed that with re-allocation of moneys, the administration of summary justice in the HMCC area could be considered without financial stringency determining available courses of action.

It was considered to be unthinkable that HMCC might use a "windfall" to implement its proposals which were so strongly opposed, bearing in mind that one of the two principal arguments underpinning its statutory consultation was no longer relevant, and which, however observed, appeared to suggest that a public office holder might be enriched.[85] (Subsequently, the Director, Magistrates' Courts Group, LCD, in correspondence of 24th March, 1998, confirming the decision to declare the justices' clerk at Southampton and the New Forest redundant, suggested there had been merely slightly higher grant allocation than had been projected and that HMCC was able to spend its cash limited budget as it saw fit.[86] The Director was more cautious in a meeting with the chairman of the Southampton bench and the former chairman of the New Forest bench on 12th March, 1998, when, in promoting the case for change, (Heads of Legal Services (formerly described by HMCC as "magistrates' clerks") could do the same job as justices' clerks but at £20,000 per annum less), he expressed concern at any suggestion of profligacy on the part of any MCC and that, in this instance, he believed the District Auditor had been consulted – he did not explain how he knew).[87]

On 30th January, 1998, the justices' chief executive of HMCC wrote to the justices' clerk for Southampton and the New Forest informing him that any subsequent decision by HMCC would be subject to the agreement of the justices' clerks and would not be finally agreed until this was known.[88]

In the light of the changing situation, HMCC met again on 2nd February, 1998. Shortly before that meeting, which no justices' clerk was invited to attend, the justices' clerk for Southampton and the New Forest was informed by the justices' chief executive that, at its meeting, HMCC would decide whether the justices'

clerk for Southampton and the New Forest should be declared redundant on 31st March, 1998, thereby avoiding the pension fund surcharge; or whether the whole strategy should be withdrawn. If the justices' clerk for Southampton and the New Forest agreed to redundancy on 31st March, 1998, arrangements could then be put in hand to "protect" his financial position, so far as pension entitlement was concerned, although the justices' clerk for Southampton and the New Forest would have to make a formal written request for a discretionary award by HMCC after his fiftieth birthday. Importantly, the justices' chief executive conceded that to proceed in any other way would have required a further full consultation with the benches and there was no time for that.[89] So far as the latter issue was concerned, he was right. Statutory consultation had proceeded on two limbs: the need to re-organise the structure; and financial "meltdown". With one of those limbs no longer relevant, and the financial drive for re-organisation no longer pressing, the original statutory consultation was rendered nugatory and there should have been further consultation.

At a meeting between the justices' clerk for Southampton and the New Forest and the chairman of the Southampton bench, on 1st February, 1998, it was agreed HMCC's proposals could not proceed.[90] At its meeting on 2nd February, 1998, HMCC agreed that it should proceed to move ahead with its proposals for re-organisation in accordance with its original time scales, i.e. those agreed at its December, 1997, meeting.[91] The precise detail of the meeting on 2nd February, 1998, has never been revealed.[93] However, on 18th March, 1998, the chairman of HMCC, responding to a further request by the chairman of the Southampton bench for HMCC to reconsider all issues, wrote :-

> "... that two factors only have changed since I wrote to all magistrates ...
> 1. That the Committee is in receipt of a relatively small one off windfall increase in its cash revenue budget next year ...
> 2. The unexpected increase in employer pension funding costs ...
> The Committee is convinced that investing the one off additional funding ...to achieve the long term objectives ... is an entirely appropriate use of these funds ... this has been checked with the District Auditor. This aspect

of the proposal has been thoroughly and systematically examined. On 2nd February 1998 for example members spent four hours discussing the issue …".[93]

Intriguingly, the chairman of HMCC continued :-

"… having taken further advice from our Chief Executive and those that advise him …".

No information has been unearthed in this study which reveals who was advising the justices' chief executive. The correspondence reminded the chairman of the Southampton bench of the important change to standing orders the chairman of HMCC had secured: it was necessary for five members to request that a previous decision be re-opened. They had not.

It seems the Parliamentary Secretary to the Lord Chancellor was informed of the discussions of HMCC because, on 23rd March, 1998, he wrote to three MPs in the New Forest area[94] that :-

" … On 16th March… (*HMCC*) considered and rejected the Southampton and New Forest Benches' request to consult … again. Votes were taken on the issues of value for money, role, duty and responsibility of the county justices' clerk and further consultation …Though the basis of some of the costs arising had changed, since the matter was first consulted upon, there is still a convincing case for the reduction in the number of clerkships … though the savings may not be as great as first anticipated …".

Aside from how the Parliamentary Secretary obtained confidential information that has not been disclosed to the Southampton and New Forest benches, the correspondence concedes that, whatever discussion had taken place in HMCC meetings, one of the fundamental reasons underpinning re-organisation, "financial meltdown", and financial savings, was no longer relevant. Further statutory consultation should have been the consequence.

Meanwhile, on 5th February, 1998, the justices' chief executive wrote to members of HMCC informing them that the justices' clerk for Southampton and the New Forest was no longer supportive of HMCCs proposals; and that he had been informed by the LCD that they had been put on notice that the Southampton and New Forest benches would be submitting objections to the removal of the clerkship. [95]

The Southampton and New Forest benches duly objected to the proposals concluding that HMCC was persisting in proposals which were financially discredited; and had no confidence at all in the financial arguments which underpinned them. Having made unpopular decisions on the grounds of fiscal propriety, it now seemed outrageous to the benches that sums in the region of £200,000 or more were now available to HMCC to fund unwanted redundancies.[96]

At a further meeting of HMCC in March, 1998, the justices' clerk for Southampton and the New Forest, on behalf of the benches in his clerkship area, sought to persuade HMCC to reconsider its position. In correspondence, subsequently, the justices' chief executive wrote that, after much debate, members of HMCC had decided they would not reconsider the proposals. Further consultation was unnecessary and inappropriate. The benches and staff had been fully consulted and HMCC had made its decisions in the light of all the observations and comments of the benches in the county and also the objections raised by the magistrates.[97]

The response signally failed to address the issue that consultation had taken place on a misconceived basis; that prior to its meeting on 2nd February, 1998 the justices' clerk for Southampton and the New Forest was left in no doubt the proposals would not be proceeding; and that whatever the final outcome may have been, the justices' chief executive had conceded there should, in point of law, have been a fresh round of consultation in the light of the changed circumstances.

The refusal to reconsider the decision should have come as no surprise. Following his proposed resignation from HMCC in the summer of 1997, the chairman of

HMCC was persuaded to consider withdrawing that resignation. At his next meeting he secured the agreement of members to a resolution that, amongst other things, it would not consider any motion to rescind any resolution passed within the preceding twelve months, save on the motion being moved by at least five members or at the specific request of the justices' chief executive. Having been persuaded by members of HMCC to withdraw his resignation, the chairman was in a strong position, and, as already noted, he did not hesitate to remind the chairman of the Southampton bench of that in correspondence of 18th March, 1998.[98]

Meanwhile, the justices' clerk for Southampton and the New Forest was consulted by the LCD, apparently in confidence, about the proposals.[99] As a consultation process, the issue was dead: the chairman of HMCC had already indicated at his meeting with the chairman of the Southampton bench on 2nd December, 1997, that he had reached agreement, in principle, to HMCC's proposals.[100] The views of the Director, Magistrates' Courts Group, LCD, who would advise the Parliamentary Secretary, were well known.[101] The chairman of HMCC had also obtained the preliminary opinion of the Parliamentary Secretary to the Lord Chancellor.[102] The formal, statutory, consultation was a sham.

Meanwhile, the chairmen of the benches in the Southampton and New Forest clerkship area endeavoured to meet the Parliamentary Secretary responsible for whatever decisions fell to be made, in an effort to point out to him not only what they perceived to be flaws in the proposals and a profligate use of public moneys, but what, in addition, they considered to be a consultation process which was, in the manner it was conducted, susceptible to judicial review.[103] The Parliamentary Secretary was too busy to see the chairmen, who were invited to see, in his place, the Director, Magistrates' Courts Group, LCD. The chairmen relied upon their note to LCD of 11/2/98 :-

> "The proposals now under consideration by HMCC are wholly different from those submitted in September, 1997. It has to be said, HMCCs proposals in respect of financial savings have consistently been challenged by Magistrates in this Group of petty sessional divisions, as have the

various financial calculations. It now seems, however, that whatever may have been said to Magistrates in September, 1997, HMCC is no longer seeking to make financial savings in this financial year: indeed, it seems content to embark on spending at least as much money as it first intended to save, to declare redundant a Justices' Clerk whom the benches wish to keep.

This Paper has been drawn up following the decision of HMCC on 2nd February, 1998 to persist with proposals which are now financially discredited. Before the Lord Chancellor makes a decision on these proposals we want him to know that we totally oppose them and that we view with the greatest concern and alarm what is happening to the Magistrates' Courts Service in our area. Furthermore, we have no confidence at all in the financial arguments which underpin the proposals. Having made these unpopular decisions on the grounds of fiscal propriety, it now seems outrageous to us (as indeed it would to the general public were this ever to be reported) that sums in the region of £200,000 or more are now available to HMCC to fund unwanted redundancies of a Justices' Clerk and other senior staff in Hampshire instead of using this money to assist in the running of the Magistrates' Courts Service in Hampshire for which it was presumably intended ...".[104]

Notes from that meeting, prepared by a former chairman of the New Forest bench, suggest minds were made up.[105] The Director considered there should be one, central, legal figure, alongside a justices' chief executive, which was: "the preferred model".

The dismay with which HMCC's decision was received, and the manner in which it was reached, was reflected in HMCC's annual report, to which the justices' clerk for Southampton and the New Forest was invited to make, along with his

colleagues, an annual contribution,[106] as follows :-

> "… Magistrates in the group, having been addressed by HMCC on its proposals in September, 1997, studied them with great care and concluded they were fundamentally flawed, financial arguments being wholly unconvincing and no case having been made for the redundancy of any clerkships in the county.
>
> The benches opposed HMCC's proposals.
>
> The dismay of the Benches was exacerbated at the turn of the year, when it was learned that the rationale which underpinned HMCC's proposals had changed significantly. It was considered that as a matter of equity and natural justice, HMCC should have consulted the Benches again. Even if there was reluctance to do so, it was considered by the Benches that a further round of consultation would not, in any event, significantly affect the timescale for implementation of the proposals which HMCC had in mind.
>
> Many members of the Benches were shocked to learn that what they considered to be the only fair and equitable way forward should be rejected by those appointed not only as members of the HMCC, but as members of the judiciary. The anger and frustration of some Magistrates was perhaps best exemplified by their considering to privately fund proceedings against HMCC to judicially review its decision making process. The Benches opposition to the proposals was conveyed to the Lord Chancellor's Department. The Chairman of the Bench and the former Chairman of the Bench visited the Lord Chancellor's Department to convey to it the strength of feeling of both Benches. Subsequently, HMCC's proposals were agreed by the Parliamentary Secretary to the Lord Chancellor.
>
> The Benches, whilst acknowledging the need to move forward, nevertheless remain wholly unconvinced by HMCC's proposals, and the manner in

which it has reached decisions. The Bench has expressed the opinion that HMCC's decisions remained fundamentally flawed and that, as a result, both the interests of justice, local democracy and local relationships between HMCC and the Benches have been seriously damaged."

Implications of re-organisation

On 24th March, 1998, the Director, Magistrates' Courts Group, LCD wrote to the Chairman of HMCC, informing him that the Parliamentary Secretary had decided to approve on the Lord Chancellor's behalf, the removal of the post of justices' clerk for Southampton and the New Forest.[107] In his view, the proposed re-organisation was consistent with the national framework for the MCS which was being developed. The chairman of HMCC: "... was delighted ...".[108] The Society was surprised to learn of any national framework being developed for the MCS. The Lord Chancellor who had already been invited to its annual conference in May, 1998 to deliver the distinguished guest's address, was asked when the MCS was going to know about it.[109] He replied that the Government did contemplate a national framework for the magistrates' courts :-

> "What that will do is ... promote the greatest amount of co-operation possible between all the criminal justice agencies."[110]

The Lord Chancellor did not develop what "the greatest amount of co-operation between all the criminal justice agencies" was intended to mean.

The national picture

Irrespective of the manner in which re-organisation had been effected, the MCS was on notice and, in the months which followed, many MCC areas reduced to one justices' clerk. In the inner and outer London areas, where proposals for re-organisation are likely to be radical, something in the order of twenty justices' clerk/justices' chief executive posts now seem to be at risk.[111] The means by which such radical national re-structuring was achieved bears close examination.

Prior to the decision to declare redundant the clerkship at Southampton and the New Forest, the Lord Chancellor had given the MCS no notice of how he considered it might develop after implementation of the Police and Magistrates' Courts Act, 1994. These were to be local matters for a locally managed MCS.[112] However, whether by chance, which seems unlikely, or by design, which seems more probable, senior officials came to exert influence.[113]

HMCC, along with other MCCs, was facing acute financial difficulty, (financial "meltdown" according to its vice-chairman[114]), prompted in no small measure by Government decisions on funding : consultations with the LCD were inevitable.

The Director, Magistrates' Courts Group, LCD, voiced his clear, favourable, opinions about single clerkship areas and the need for greater accountability in the summary justice process;[115] and HMMCSI were publicly critical of, among others, HMCC because of its consensual style of senior management, doubting it could deliver the MCS required by Government following implementation of the Police and Magistrates' Courts Act, 1994.[116] (Privately, in interview in connection with this study, the Chief Inspector of HMMCSI re-inforced her view about the need for a single line of accountability and greater accountability for both justices' clerks and, importantly, the administration of summary justice, a view shared by her colleagues in the LCD).[117]

HMCC was content to endorse, or to be led or influenced by, for, it thought, reasons of accountability and finance, the views of the LCD and HMMCSI.

The Government, for its part, was able to announce a major policy initiative, signalling a shift in the independence and accountability of the magistracy and the erosion of an important local democratic institution, claiming its provenance in local decisions from local magistrates.[118]

Costs of re-organisation

The costs of re-organising the MCS were felt both in terms of effects upon the administration of summary justice, and finance. Costs of declaring redundant justices' clerks and senior staff, with additional compensation, and, in all but one case, premature retirement benefits, will prove, in the longer term, to exceed millions of pounds. So far as the local administration of justice was concerned, it soon became plain that the magistracy no longer had a voice in the local management of their courts, all significant policy and strategic decisions being taken or influenced by LCD. Furthermore, the process starkly revealed the extent to which LCD had carefully analysed the Police and Magistrates' Courts Act, 1994, and interpreted it in a manner which was never considered by Parliament, but which nevertheless enabled it, in hierarchical lines of accountability, to influence the summary justice process.

As if to emphasise the uncertainty of the situation in which the principal actors were finding themselves, according to the Director, Magistrates' Courts Group, LCD, and its chairman, HMCC found it necessary to consult the District Auditor over its use of public moneys at that time. It is by no means clear how or why the Director should have learned of the reference to the District Auditor. It was not a policy matter; and he had already informed HMCC that it had received a slightly higher grant allocation than had been projected and that, presumably, HMCC could spend its money as it saw fit.[119] Nor is it clear how or why the Parliamentary Secretary to the Lord Chancellor came to know so much detail of HMCC's confidential Minutes of its meetings in February and March, 1998.[120]

Conclusion

It is difficult not to conclude that the LCD and HMCC were colluding. Major re-organisation had been achieved in Hampshire, and was to be replicated nationally. The number of justices' clerks posts soon rapidly declined, causing concern to both the Society and the Association.[121] Justices' clerks, where they continued to exist at

all, and to the extent, if at all, their office continued to exist, were to be managed in lines of accountability that stretched to the LCD.

Furthermore, Government had managed to, by overtly, through senior civil servants, intruding into local decision making, destabilise the structures which supported the magistracy, weakening their independence; and subjugated the management and administration of magistrates' courts into accountable, hierarchical, structures, with lines of accountability from the court room to the Lord Chancellor (but, for practical purposes, to his Department).[122]

Following the decisions made in respect of Hampshire, Government revealed its hand to the rest of the MCS. Having secured its preferred model in one of the largest MCC areas in the country, LCD was set to demonstrate that other MCCs should follow suit, which they did.

Implementation of the legislation in Hampshire exposed the local MCC as little more than an instrument of central government. As is noted elsewhere (op. cit.), as HMCC sought a way forward following enactment and implementation of the legislation, the chairman of HMCC, Parliamentary Secretary to the Lord Chancellor and the Director, Magistrates' Courts Group, LCD, were agreeing a strategy for a reduction to a single justices' clerk for the area, well before HMCC had agreed upon the matter. The determined means by which the strategy was pursued locally, in the face of opposition in both HMCC and among the magistracy in the HMCC area, is captured in the text. Some nine years after Le Vay (Home Office 1989), and three years after implementation of the legislation, a national structure was emerging that would enable LCD to exercise its influence upon, and call to account, the summary justice process through the hierarchical lines of accountability it had created in the legislation. The long game was bearing its reward.

Significant progress had been made in securing the provision of a more accountable public service at a reduced cost: the twin drivers of "new public management". The cost to the administration of summary justice in Hampshire

and more generally was and remains incalculable. There can be no doubt that HMCC bears significant responsibility for the way in which the independent administration of summary justice process in at least one county has been eroded. Lest, however, the MCS and the Association considered the "bright new dawn" had only delivered lines of accountability for justices' clerks; and that, through them, lines of accountability for magistrates was a little remote, Government tightened its grip with further legislation that included the Crime and Disorder Act, 1998, and the Access to Justice Act, 1999.

NOTES

1. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

2. Summarised in a Discussion Paper on Centrally Managing Administrative Functions, presented to HMCC on 18/11/96, and in the private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

3. Op. cit.

4. For example, at Southampton and the New Forest, there were bench executive committees, with formal consultations, which addressed all issues, legal and administrative, which directly affected magistrates in the respective areas.

5. An objective of the Lord Chancellor's Department Decision Paper No. 2.

6. MCC/97/27.

7 Op. cit., Part Two, chapter 4.

8. Ibid.

9. Interview. Oates L. Director of the Magistrates' Courts Group of the Lord Chancellor's Department, 16/4/98; and interview, Melling R. Chief Inspector, Her Majesty's Magistrates' Courts Service Inspectorate.

10. Ibid.

11. Ibid.

12. MCC/97/41.

13. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1; and the Justices of the Peace Act, 1997, section 30 (10).

14. Ibid.

15. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

16. Ibid.

17. Ibid.

18. MCC/97/59.

19. The Minute does not disclose precisely what was meant by the way in which this member expressed herself.

20. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

21. MCC/97/67.

22. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

23. Minute MCC/97/78. A careful analysis of the Minutes of HMCC, and correspondence passing between one member of HMCC and its chairman, retained with the private papers of the former justices' clerk for Southampton and the New Forest, reveals that that member of HMCC was a particular irritant to the chairman and justices chief executive.

24. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1. Correspondence was circulated by the justices' chief executive to, among others, justices' clerks.

25. The former justices' clerk for Southampton and the New Forest was among those consulted by the justices' chief executive, and he expressed the view that there was no suitable candidate, of sufficient experience, and likely to attract support, who could replace the outgoing chairman. The private papers of the former justices' clerk for Southampton and the New Forest, box 1.

26. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

27. Ibid.

28. Op. cit.

29. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

30. Ibid.

31. Op. cit.

32. MCC/97/102; and the private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

33. MCC/97/103.

34. There was no indication that any other persons would be called upon to contribute to the "road shows".

35. Op. cit.

36. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

37. Ibid.

38. Review of the Senior Management Structure. Hampshire Magistrates' Courts Committee. September, 1997. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

39. An irresistible inference from the Police and Magistrates' Courts Act, 1994.

40. The chairman of HMCC, three of his colleagues from the north of the area, and one from the south, seemed committed, early on, to greater accountability. Whether there was any significant understanding of the issues and implications is less clear : op. cit.

41. More fully discussed in Walters K.F. (1993) 'Trading Justice', dissertation submitted to the University of Southampton.

42. Ibid.; and the Criminal Justice Act, 1991.

43. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

44. Ibid.

45. Walters K.F. 'Trading Justice', op. cit., chapters 6 and 7.

46. Ibid.

47. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

48. A former chairman of HMCC was present at the "road shows", as were other former members.

49. Comments retained with the private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

50. The justices' chief executive had been a chief administrative officer in a magistrates' court in the area, but had not been employed, directly, in that way since the late 1980s, when the first full-time clerk to HMCC appointed him to serve HMCC full-time in its secretariat.

51. Justice of the Peace Act, 1997, sections 27 and 31.

52. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

53. Op. cit., Part Two, chapter 3.

54. Op. cit., Part Two, chapter 4.

55. Op. cit., Part Two, chapter 4.

56. Op. cit.

57. Op. cit.

58. Op. cit.

59. Op. cit.

60. Lord Chancellor's Department (1998). Report of an Advisory Group on Judicial/Legal/Administrative Boundaries, op. cit.

61. Tildesley W.M.S. (1997) Judicial/Administrative/ Legal Boundaries. *Justice of the Peace and Local Government Law, at page 503.*

62. HL Deb, 18/1/94, Col. 475.

63. For example, in the establishment of area-wide approaches to sentencing.

64. Browne-Wilkinson. N. 'The Independence of the Judiciary in the 1980s'. The Mann Lecture. *1989 Public Law 44.*

65. The papers of the former justices' clerk for Southampton and the New Forest, in box 1.

66. The chairman of HMCC had been a former chairman of at least one of the benches in north east Hampshire.

67. The south eastern clerkship area had a history of independence stretching beyond judicial decision making, a factor which led one distinguished justices' clerk to decline the offer of appointment to the former Portsmouth petty sessional division.

68. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

69. Ibid.

70. The chairman of the Southampton bench found that while two of her deputy chairmen strongly supported her, the remaining three were largely ambivalent.

71. Ibid.

72. The papers of the former justices' clerk for Southampton and the New Forest, in box 1.

73. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

74. Ibid.

75. Ibid.

76. Ibid.

77. Ibid.

78. Ibid.

79. Ibid.

80. Ibid.

81. Ibid.

82. Money had to be found for the premature retirement of the justices' clerk and his deputy, who was declared redundant on 31st March, 1998.

83. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

84. Ibid.

85. Ibid.

86. Ibid.

87. Ibid.

88. Ibid.

89. Ibid.

90. Ibid.

91. Ibid.

92. The Minute remains confidential. But see the private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

93. The private papers of the former justices' clerk for Southampton and the New Forest in box 1.

94. Ibid.

95. Ibid.

96. Ibid.

97. Ibid.

98. Ibid.

99. Ibid.

100. Ibid.

101. Ibid.

102. Ibid.

103. Ibid.

104. Ibid.

105. Ibid.

106. HMCC Annual Report 1998, presented at the annual meeting of HMCC to which members of the public were admitted, pursuant to section 30 (9) of the Justices of the Peace Act, 1997.

107. The private papers of the former justices' clerk for Southampton and the New Forest in box 1.

108. Ibid.

109. *The Justices' Clerk. The Journal of the Justices' Clerks' Society. Issue 166. September, 1998, at page 137.*

110. Ibid.

111. A Shadow Greater London Magistrates' Courts Authority took office on 1/4/2000, and has published a draft strategic plan suggesting a reduction to five justices' clerks, with the closure of some court houses.

112. Op. cit., Part Two, chapter 4.

113. Op. cit.

114. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

115. Op. cit., Part One, chapter 1.

116. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

117. Op. cit. Part One, chapter 1.

118. Correspondence passing between the Parliamentary Secretary to the Lord Chancellor and three MPs in the New Forest area of 23rd March, 1998 – the private papers of the former justices' clerk for Southampton and the New Forest, in box 1. Op. cit.

119. The private papers of the former justices' clerk for Southampton and the New Forest, in box 1.

120. Ibid.

121. Op. cit., Justices' Clerks' Society. (1997) *Judicial Competence and a Partnership Checklist.* 60.0154.

122. Op. cit.

PART FOUR

CHAPTER 7

NAREY AND "THE WASH"

Introduction

The Police and Magistrates' Courts Act, 1994, wrought fundamental change to the management and administration of magistrates' courts (Part Two, chapter 4);[1] and the manner and effect of its implementation caused considerable tension (Part Three, chapters 5 and 6). Discernible lines of accountability emerged, from the court legal adviser in the courtroom, through to the justices' clerk, justices' chief executive, MCC and, ultimately, the LCD, not only for the performance of administrative and managerial functions, but also for the performance of judicial and legal functions. Lines of accountability were also readily discernible for the way in which the magistracy was selected, trained and advised.[2]

Aside from tensions which emerged from the establishment of new lines of accountability, new posts, and new roles and responsibilities, were those encountered at the interface of judicial, legal and administrative decision making. Despite assurances from the Lord Chancellor that MCCs were to be restricted to matters of management and administration (Part Two, chapter 4), the Director, Magistrates' Courts Group, LCD, had, by his interpretation of the legislation, opened up the scope for MCC intrusion into the more general delivery of legal advice and assistance to the magistracy (for example, Part Three, chapters 5 and 6).

It might have been considered that the minimum level of accountability to Parliament the Lord Chancellor had been seeking for his relationship with the magistrates' courts had been achieved.[3] But those with lines of accountability at the forefront of their minds had already indicated that they could see no objection, in principle, why the magistracy should not become accountable (although to whom has never been articulated).[4] With momentum behind

change in the magistrates' courts, and the LCD in a powerful position in every respect so far as the MCS was concerned, legislative provisions which followed hard on the heels of the 1994 Police and Magistrates' Courts Act, the "wash", struck a further blow at what were considered to be judicial functions, who was capable of performing them, and the lines of accountability of those responsible for performing them.

The Crime and Disorder Act, 1998

The Crime and Disorder Act, 1998, was the first legislative attempt by the incoming Labour Government to deal with issues related to law and order. In an Introductory Guide to the legislation (Home Office 1998, p.1) it was suggested that the purpose of the Act was to tackle crime and disorder and help create safer communities. It reflected a number of underlying themes, identifying the purpose of the youth justice system as being to cut offending and to take action quickly to nip youth offending in the bud; proposing the establishment of local partnerships, including the police and local authorities, to cut crime; and insisting that local authorities and other public bodies had to consider the crime and disorder implications of all their decisions.

The legislation was intended to implement twelve of the Labour Party's manifesto commitments. In commenting upon the legislation and on the Labour Party's manifesto pledge to be "tough on crime; tough on the causes of crime", Rutherford observed that the emphasis of the Act was "tough on crime", by widening the reach of the law and strengthening the criminal justice process against juveniles.[5]

Card and Ward observed that :-

> "The Bill was not preceded by principled discussion or detailed analysis. This is true of the discussion paper prepared in 1996 when the Government was in opposition, of the consultation papers issued by the Government in 1997 (for which there were very short time limits for

consultation) and of the White Paper "No More Excuses - A New Approach to Tackling Youth Crime in England and Wales", published in November 1997 ..." (1998, p.3).

The legislation had six primary themes running through it: tackling youth crime; combating anti-social behaviour and promoting local action against crime and disorder; reducing delay in the criminal justice system; tackling racist crime; protecting the public from sexual, violent and drug misusing offenders; and providing greater consistency and clarity in sentencing.

There were significant managerialist features which underpinned the legislation, which created, in particular, a new framework for the development and management of crime and disorder strategies, directed at the youth justice system. Through this framework, Government set out its stall to develop an inter-agency approach to the prevention and management of crime.

Without in any way minimising the impact of those provisions, to be found in Part I, II and IV of the Crime and Disorder Act, 1998, it is nevertheless proposed to focus here upon the means by which the legislation was intended to improve the speed and efficiency of the criminal justice process and promote greater clarity and consistency in sentencing.

Part III of the Crime and Disorder Act, 1998: reducing delay

Part III of the Crime and Disorder Act, 1998 implemented, in part, recommendations made by Narey in his report "Review of Delay in the Criminal Justice System", (Home Office, 1997 a)[6] the White Paper "No More Excuses" (Home Office, 1997 b)[7] and the Consultation Paper "Tackling Delay in the Youth Justice System" (Home Office, 1997 c).[8]

(a) The background

On 15th October, 1996, Martin Narey, a Home Office civil servant, was briefed by his department to identify ways of expediting the progress of cases through the criminal justice system from initiation to resolution, consistent with the interests of justice and securing value for money.[9]

The scope of the review embraced the examination of key processes, practices, standards and structures which significantly affected the time taken to process a case from the point at which the police decided that the available information justified a caution or proceedings to the point at which the case was finally decided. The review focused initially upon cases dealt with summarily.

It was intended the review should identify: (a) the scope for improvements, within existing structures, which were not being pursued; and (b) any more fundamental changes to those existing structures, which offered a reasonable prospect of expediting the progress of cases.

Narey was not to be constrained within the then statutory framework and was tasked with identifying proposals which could be implemented within current statutory powers and responsibilities and any which would require new primary or secondary legislation.

The review took account of: (i) the report of and follow-up action to the Royal Commission on Criminal Justice (1993); (ii) the report of and the resultant action plan for the Masefield Scrutiny of the police (1993) and related reports; (iii) the work of the Trials Issues Group; (iv) any other relevant action by departments and agencies; (v) relevant research; (vi) technological developments and opportunities; and (viii) the resources likely to be available to the system as a whole.

Narey was free to consult any agencies, departments or individuals who might be able to inform the review and had to report progress at least once a month to

an inter-departmental steering group. He was directed to take account of any guidance given by the steering group but, unless directed by Ministers, he was to be personally responsible for the conduct of the review, for the report and its conclusions.

Narey was given three months to produce a report with recommendations. He was assisted by four Home Office officials, Jennifer Airs, Richard Chown, John MacGregor and Margaret Neal, under a steering group which comprised three senior civil servants, John Lyon from the Home Office, Jenny Rowe from the LCD and Graham Duff from the CPS. There was no judicial representation.

According to Narey, in pursuing his brief, he took views from a wide cross section of those who worked in the criminal justice system, including judges, chief constables, Crown Prosecutors, magistrates, court staff, prison governors, chief probation officers, solicitors and barristers and staff from the Court Service. He spent time in court, at police stations and in CPS offices. He found that the overwhelming majority of those to whom he spoke were enthusiastic about the review and anxious to offer creative ideas for tackling delay; but that a small minority of people suggested to him that justice should not be managed and that somehow management and justice were incompatible. Others asserted that delay could not be tackled without constitutional change. Perhaps unsurprisingly, Narey disagreed with this minority, concluding that each stage of the criminal justice process could be managed and that managing the process could help bring offenders to justice and acquit the innocent much more promptly (in terms consistent with the language of Mr Leon Brittan, a former Home Secretary, in 1984).[10] He had nothing to say about considerations of procedural justice and due process. The language was unmistakeably managerialist: the lack of judicial and legal reasoning obvious.

(b) The generality of the proposals

Narey made 33 recommendations to be found, largely, in the Crime and Disorder Act, 1998.

To the managerialist, Narey's approach was faultless. He concentrated on changes which had the potential to enable substantially more cases to be dealt with far more quickly and at lower cost. He considered that he had :-

> "... tackled issues of principle, without delving too much into the detail of implementation. But I am confident all my proposals can be made to work" (1997a).

He was concerned that, despite a large reduction in the number of cases coming to magistrates' courts, there had been a marked increase in the time taken to complete those cases and in the number of adjournments, both of which might have been expected to fall (1997a, p.3).

He considered that the greatest scope for bringing cases to court quickly was in respect of those which ended in a guilty plea (1997a, chapter 3). The timetable for such cases reflected the fact that they were subject to the same separate procedures of preparation by the police and review by the CPS as contested cases, and the first court appearance was seldom less than four weeks after charge even in the most straightforward of cases. By establishing a closer working relationship between the police and the CPS, including the permanent location of prosecutors in police stations, so that CPS staff on the spot would be involved in preparing cases for court, matters would improve (1997a, p.11). Two-thirds of cases were suitable, as likely guilty pleas, for abbreviated files which included only five documents (1997a, p.13). These new arrangements would mean that those files could be ready for court within 24 hours, and the defendant convicted the next day. Likely guilty plea cases would be listed for hearing the next sitting day after charge, and the abbreviated file would be made available to the duty solicitor, whose services those defendants needing legal advice would generally be expected to use (1997a, p.12).

Narey considered that granting to justices' clerks what he described as additional administrative powers to order and run early administrative hearings

and pre trial reviews would reduce adjournments, bring cases to completion more promptly and save on unnecessary witness attendance (1997a, p.25-28). It is the thrust of this study that what Narey described as administrative powers were in fact judicial, and that his description of them was designed for the advantage of those who sought to manage the procedural elements of the judicial process.

Turning to the Crown Court, Narey considered that a substantial proportion of elections for trial were little more than an expensive manipulation of the criminal justice system and were not concerned with any wish to establish innocence in front of a jury (1997a, p.35). The quality of the research relied upon for this conclusion is unclear. Narey considered that those defendants who had a valid reason for electing, such as potential damage to their reputation, should be able to make their case to magistrates who should be free to commit the case to the Crown Court. But the automatic defendant veto on the magistrates' decision on mode of trial (he noted there was no similar right in Scotland) should be removed. The most serious cases, those triable only on indictment, should be managed from the outset by the Crown Court rather than spending almost half their life in the magistrates' court (1997a, p.31-37).

Narey considered there needed to be a fundamental review of the system to address the uncertainty felt by many who worked in the youth court (1997a, p.43-46). In his opinion, seventeen year olds were too experienced as offenders to be suitable for the jurisdiction of the youth court, where they accounted for one third of cases. They should be returned to the jurisdiction of the adult court, enabling the youth court to concentrate on dealing more promptly with school-age offenders. A major cause of delay was that cases involving juveniles were often referred by the police to an inter-agency panel for advice, which usually took several weeks. This should, in Narey's view, only happen in exceptional circumstances. Unless it was clear that a caution was justified (in which case the police should administer it themselves without delay) they should charge the offender. It would then be for the youth court, which should be given the power to issue court cautions, where the offence was admitted, to decide whether a

caution was the right disposal, and whether advice should be sought from other agencies. The court caution could in appropriate cases be accompanied by a requirement for some form of reparation or compensation. This cavalier attitude to the prosecution of young offenders is remarkable and marks a significant diversion from any notion of procedural justice. The fact that 'court cautions', like police cautions, would not count as convictions for criminal record purposes should encourage juvenile offenders to admit their responsibility: an inducement to compromise criminal responsibility. But, as will be shown, Narey had scant regard to issues of due process.

In ninety days, the Home Office team led by Narey produced a report which impinged upon most aspects of the pre trial process in criminal courts. Its scope was broad and it is almost unimaginable to believe that such issues could have been addressed, without extensive consultation, by those without an apparent criminal justice or jurisprudential background of any significance, without a detailed briefing. Whether such a briefing was ever provided and, if so, by whom, was not disclosed. The imprint of managerialism upon the report is, however, unmistakeable, and it would be disingenuous to suggest otherwise : "... management of the process is the theme of this report..." (1997a, Note by the reviewer). Narey can at least be credited with acknowledging that, albeit obliquely, fundamental issues relating to procedural justice were not considered by him.

As has been noted above, a significant weakness in Narey's report was its tendency to accord managerial and administrative status to what were and plainly are legal and judicial decisions (for example, 1997a, p.28). That weakness is replicated in the approach of the then Director, Magistrates' Courts Group, LCD, who had an "agenda" of accountability for both magistrates and staff; and was not prepared to concede justices' clerks performed judicial functions at all, whatever the quality of those functions might be.[11] There is some evidence for suggesting that such opinions had their provenance in Le Vay's report, another senior civil servant at the Home Office.[12] Some proposals, for example, with regard to legal representation before the courts,

might yet fall foul of the Human Rights Act, 1998.[13] Lack of clarity in the separation of judicial, legal and administrative functions is now to be seen across the broad canvass of the criminal justice process, with confusing results.

In its annual report published in 2000, HMMCSI suggested that magistrates' courts were suffering from 'unhelpful tension' between legal and administrative staff, and there was often a 'reluctance to take responsibility' for issues that fell between the two. The Inspectorate suggests the cause of the tension is the distinction between justices' clerks and justices' chief executives. There is an irony here relating to the difficulties senior civil servants seem to have created for each other and the administration of summary justice more generally. That MCCs should not know where the boundaries lay between judicial, legal and administrative functions is regrettable, but bearing in mind the composition of them, the large measure of judicial and legal ignorance prevalent among them, and the reluctance of the Parliamentary Secretary to the Lord Chancellor to assist them, it is perhaps at least understandable.[14] However, there can be no excuse for Government and its executive arm to plead ignorance of constitutional niceties, or of failing to deal with them, and it is difficult not to conclude that the apparent indifference of the Parliamentary Secretary to identify what are and are not judicial, legal and administrative functions, the insistence of the Director, Magistrates' Courts Group, LCD, that justices' clerks do not perform judicial functions, and Le Vay and Narey's analysis that certain functions to be performed by justices' clerks are administrative, when they are plainly judicial, are all part of a deliberate strategy to ensure that some judicial functions, however minor, can be managed, and the performers of those judicial functions held accountable to managers.[15]

Significantly, one key proposal made by Narey, that those accused of either-way offences should lose their right to insist on being tried in the Crown Court and that the final decision about where such a person who intended to plead not guilty should be tried should rest with magistrates, has not been implemented and, subsequently, there have been efforts to act on that proposal, only to be rejected by the House of Lords (1997a, p.31-35). It remains to be seen whether

there is sufficient Parliamentary time and Government enthusiasm for its re-introduction.[16]

(c) Crown Prosecution Service: lay presenters

In conducting his review, Narey received a good deal of evidence that criminal justice practitioners considered that much of the responsibility for delay rested with the CPS (1997a, p.9). He considered the principal complaint could be best met by ensuring that lay staff completed many of the tasks performed by Crown Prosecutors, under proper direction and supervision by those who were legally qualified (1997a, p.14-15). Accordingly, he recommended that the Director of Public Prosecutions should have power to confer on lay staff the power of a Crown Prosecutor to review files; and that lay staff employed by the CPS should be able to present uncontested cases in magistrates' courts.[17]

The importance of this new provision in courts of summary jurisdiction cannot be overemphasised. The vast majority of cases in magistrates' courts are dealt with to finality by way of plea of guilty.[18] The variety and complexity of proceedings in the magistrates' courts is amply demonstrated by the need for all those providing legal advice to lay magistrates to possess a statutory qualification, whether as barrister, solicitor or otherwise qualified under the statutory rules.[19] In the magistrates' courts there are, from time to time, others who prosecute, for example, local authorities, customs and excise and the health and safety executive. The number of prosecutions conducted by these agencies, among others, falls into insignificance compared with those conducted by the CPS (Card and Ward, 1998, p. 145). In addition, not infrequently, other bodies prosecuting in the magistrates' courts are represented by a solicitor or a barrister, or by a person with professional experience in the discipline in which proceedings are being taken. However, before the magistrates' courts, where lay presenters, without professional or statutory training will be acting, there is every possibility that an unrepresented defendant (unable to obtain legal aid under provisions contained in the Access to Justice Act, 1999),[20] will appear before a lay bench, recruited, selected, appointed and trained by, and those who

sit in lines of accountability to, the Lord Chancellor, advised by a non legally professionally qualified legal adviser who sits in lines of accountability to the Lord Chancellor, prosecuted by a lay presenter. In the course of whatever proceedings might be taken, the unrepresented defendant may offer mitigation undermining the un-equivocality of, for example, a plea of guilty and it might well be questioned who would take the point, assuming anyone present during the course of the proceedings was aware of it.[21]

At the Third Reading of this provision in the House of Lords, it was suggested that Government intended that lay presenters should be used only in straightforward cases, where guilty pleas were entered and that an easily identifiable category would be those cases where, for example, a motorist pleaded guilty by post.[22] However, such an easily identifiable category is not without its difficulties : many thousands of motoring offenders are now dealt with by way of fixed penalty. It is just as possible for equivocality to arise in respect of offenders pleading guilty by post, as if they attended in person. The simplistic approach adopted by Government, entirely consonant with Narey's aim of enabling more cases to be dealt with far more quickly and at lower cost (1997a, p.1), masks the procedural and substantive law complexities that can arise in any case at any time.

The potential for injustice to arise as a result of the introduction of lay presenters is real, rather than fanciful and it is difficult not to agree with Card and Ward that :-

> "The potentiality to widen the powers of lay CPS staff is yet another resource-driven erosion of the quality of the administration of justice. Prosecutions involve a variety of matters which require a professional mind; there are obviously issues of independence of mind where any full-time prosecutor is involved but a professionally trained mind is liable to be more independent than one which is not" (1998, p.144).

They could have added that, as a consequence, lay presenters are more easily managed and held to account.

(d) Crown Prosecution Service and the Police

In his report, Narey considered that :-

> "The culprit behind the not infrequent breakdown in police/CPS co-operation is the division of the post-investigative process of preparing cases for prosecution into two distinct parts, police file preparation and CPS file review. At its most damaging this is illustrated in court by CPS prosecutors not infrequently citing police inadequacies as the reason for seeking an adjournment. Even in the best of cases, however, this two-part system seems inevitably to be combative and time-consuming. Until prosecution files can be sent electronically (still some time away) the simple process of transferring papers can take a number of days, is expensive, and seems to result in files sometimes being mislaid" (1997a, p.11).

Narey, accordingly, concluded that CPS staff should be based permanently at police stations, with administrative support units, in order to effect greater co-ordination between the CPS and the police (1997a, p.11-12). He intended that CPS staff should work with the police, who would remain responsible for the investigation of offences and for charging offenders, but that the CPS and the police would work together on the preparation of prosecution files and prosecute all cases where a guilty plea was anticipated. Preparation of cases would be shared, although the CPS and police would work independently of each other in the management of respective resources.

The full extent to which Narey considered the fundamental rationale underpinning the establishment of the CPS, set out in the Report of the Royal Commission on Criminal Procedure in 1981 and in the Prosecution of Offenders Act 1985,[23] is unclear. The independence of the CPS from the police was

considered to be a central feature of its creation, engaging its ability to bring an independent legal mind to bear upon those against whom the police wished to institute criminal proceedings (Ashworth, 1994, p.74). It seems that little consideration was given, in preparing Narey's report, to the public perception that might emerge from the police and CPS working so closely together in police stations. Interestingly, evidence is beginning to emerge of tensions arising between police officers and Crown Prosecutors over which cases should be prosecuted, some Crown Prosecutors observing that they are being called upon to offer advice to the police in many more cases than was ever anticipated and had actually been prosecuted, before the introduction of the new arrangements;[24] and one considering that the proposals had led some police officers to believe "the clock" had been effectively turned back and that some cases, with no realistic prospect of conviction, should nevertheless be prosecuted.[25] (That not all MPs considered total separation necessary is picked up by Ashworth (1994, p.74), where he notes that in an identifiable category of cases the Home Affairs Committee of the House of Commons thought the CPS should act co-operatively with the police).

Narey, in a view which bore a remarkable resemblance to that of Glidewell LJ, reporting later and quite separately into the CPS (1998), concluded that with a Crown Prosecutor located in each police station, it would be possible for police files to be reviewed expeditiously and for a decision to be made as to which of three types of hearing might be necessary : for an accused who was expected to plead guilty, a plea hearing before a full court at which he would plead (or, in an either way case, indicate his plea) and either be sentenced or committed to the Crown Court for sentence; for an accused who was expected to plead not guilty, an early administrative hearing conducted by the justices' clerk or a delegated member of his staff, after which the next stage would be a mode of trial hearing (in an either way case) or a pre-trial review; for an accused in an indictable-only custody case, a remand hearing from which he would be remanded direct to the Crown Court (1997a, p.12).

Narey envisaged the Crown Prosecutor notifying the magistrates' court by telephone or electronic mail of the type of hearing needed the next day, in each particular case. Magistrates' courts would then be organised accordingly (1997a, p.12).

Narey concluded these changes would lead to the more effective management and speedier completion of all cases, maintaining that expediting cases in this way would depend on there being a minimum amount of paperwork and that an abbreviated prosecution file might comprise no more than a key witness statement, the accused's details, a copy of the charge sheet, a short descriptive note of the police interview with the accused and a note of previous convictions and cautions (1997a, p.13). Such an abbreviated file is unlikely to provide enough information on which a solicitor, if engaged, could properly advise any accused person. The notion that the CPS should liaise with the magistrates' court, informing them of the type of proceeding it anticipates in respect of any particular offender, and the arrangements for that type of hearing the next day, was novel. It envisaged that Crown Prosecutors and staff in a magistrates' court were the sole arbiters of court listing, and would work co-operatively to achieve a satisfactory outcome, a notion which seems to run counter to the understanding of judges and a Working Party established by the Lord Chancellor.[26] It predicated a situation, particularly in busy magistrates' courts, where court lists could be arranged at very short notice. The provision appeared to be optimistic. One practitioner in a busy inner London magistrates' court considers the provision is unrealistic.[27]

The objection taken to the provisions in this study are their ability to obfuscate the lines between judicial, legal and administrative boundaries; by proscribing some pre trial processes, trampling upon procedural justice issues, for example the balance to be struck between due process and due deliberation (Part One, chapter 2); and by creating confusion in the role to be played by court and CPS administrators in the listing of cases (and bypassing the extent to which collaboration between court and CPS administrators in the listing of cases before the judiciary is legitimate), further obfuscating lines to be drawn between

the various actors in the criminal justice process and the lines between judicial, legal and administrative boundaries.

(e) Magistrates' Courts

Narey did not, however, confine himself to the way in which the police, the courts and CPS interacted in the management of criminal proceedings. He considered there was much scope for improved case management in magistrates' courts in order to reduce adjournments and lead to earlier completion of contested cases and accordingly made two important recommendations for (i) pre trial reviews, so that cases were ready for trial when they came before the bench; and (ii) early administrative hearings (1997a, p.25-28).

(f) Pre trial reviews and early administrative hearings : the magistracy

Pre trial reviews had become an increasing feature of magistrates' courts before Narey conducted his review. Narey considered that, properly conducted, pre trial reviews could make a significant contribution to case progress, providing an opportunity for the prosecution to amend charges and for the defence to enter different pleas from those already indicated, allowing issues in contention between the parties to be identified and to clarify, for example, which witnesses needed to attend (1997a, p.26-27). He also considered that pre trial reviews were useful in estimating the amount of time required to hear contested cases, allowing the time allocated to be used more productively and making other practical arrangements for the trial. Because of the variety of different practices, and their lack of statutory backing, Narey considered pre trial reviews were not as effective as they could be and, accordingly, he recommended they be put on a statutory footing, by providing legal advisers with necessary additional powers (1997a, p.28). Although, as will be shown, those powers have been extended to justices' clerks and those to whom they delegate the functions, the essential statutory backing, the ability to impose a sanction for non compliance, has not been included. That was regrettable. Had Narey made sufficient inquiry, he

would have discovered that some justices' clerks, at least one of whom introduced pre trial reviews in the early 1980s, soon abandoned them because of inability to ensure the parties were bound by decisions made at them.[28]

Narey also considered, sympathetically, the cause of early administrative hearings conducted by justices' clerks, which had been introduced in some areas so that, for example, the accused could hear what the court expected from him or her in terms of obtaining legal representation and supplying evidence to enable the court to consider a legal aid application. At such a hearing, the justices' clerk could also explain to an accused the nature of the forthcoming proceedings and the implications of the charges. It was claimed that, in those courts where such hearings were held, such explanations could sometimes "prompt" a guilty plea and that, where the case was likely to be contested, explanations about legal aid helped to reduce the number of adjournments (1997a, p. 28). It is seriously questionable whether it can ever be in the interests of justice for an early administrative hearing of this nature, often convened before an accused has had sight of any written statements or other evidence, and often before legal representation has been secured, to "prompt" an accused to enter a guilty plea. This is perhaps more so where, as this study argues, there are now discernible lines of accountability stretching from the court room to the Lord Chancellor, who has a corporate political commitment to take a tough stance on reducing crime and public expenditure.

Narey considered that, as with informal arrangements, both pre trial reviews and early administrative hearings were better operated by justices' clerks (1997a, p.25). He considered that a bench of three magistrates was not so well suited for a preliminary hearing, case management role, the need for agreement between members of the bench not being conducive to decisive action and pointed to the frequent difficulty of lack of continuity of different magistrates forming different benches at different stages of the proceedings. Although Narey conceded that his objections could be overcome by allowing, at least, a single magistrate to conduct pre trial reviews and early administrative hearings, he eventually came down against it on the grounds that magistrates did not

generally have the detailed background knowledge of law, procedure, or the confidence which enabled stipendiary magistrates or professionally qualified court legal advisers to take the type of robust decision necessary to drive the case forward. The conclusion sits uncomfortably with his uncritical comment that stipendiaries might have raised objections to the proposals because the powers to be exercised were regarded as, hitherto, judicial.

Interestingly, Narey considered, albeit briefly, the notion that the magistracy should be totally, or very substantially, replaced by stipendiaries, but decided against that, not for financial reasons, but because of the widely held belief that the magistracy was intrinsic to the legal system; because the Lord Chancellor had made his commitment to the magistracy abundantly clear; and because, in Narey's view, the magistracy is the key to the success of efforts to retain more business in the magistrates' courts. He considered that his proposals on removing the right of election for trial would be more difficult were the only alternative to Crown Court trial to be a hearing in front of a stipendiary. (In this latter respect, at least, Narey's view is a little prophetic, Zander (2001) reaching a similar conclusion in response to Lord Justice Auld's Review of the Criminal Courts (2001)).

Narey's argument for the retention of the magistracy is somewhat weak, based upon the managerialist criteria of fiscal prudence (a tacit acceptance that it is, vis a vis the professional judiciary at this level, cost neutral); the somewhat pragmatic observation that, by their retention, greater savings in the criminal justice process could be achieved by, for example, changes in the mode of trial provisions (there is no other juristic examination of the rationale for change); and the opinions of the Lord Chancellor and others, unexamined.

It was not Narey's intention to provide any detailed rationale for the continuance of the magistracy, and so it is perhaps unsurprising that he offers no historical or other justification for their continuance. Had he done so, he might have made reference to Skyrme's work (1983, 1994), tracing the evolution and development of the magistracy over 800 years with roots which lie deep in the

history of the people of England (1994, p.33); based upon voluntary, part-time, unpaid service (1994, p.34). He might have also drawn attention to their role, not only in the administration of justice, but, through the centuries, in the social and political history of the country (1994, p.35).

In terms of contemporary significance of the magistracy, Narey might have turned to Darbyshire (1997a), who offers a pragmatic critique, observing that juries are no longer the central fact finding forum in the criminal justice process, and that it is high time commentators, lawyers, judges and law makers, acknowledged that the most important fact finders, law finders and sentencers were magistrates, aided by their clerks (1997a, p.627-628). In accumulating evidence for her claim, Darbyshire draws attention to the criminal workload disposed of by magistrates : around 95 per cent of all sentences are imposed by magistrates, a figure which has remained steady for some years (1997a, p.628-629);[29] the growth of summary jurisdiction, with the downgrading of offences over many years (1997a, p.629-630); and the increasing gravity of offences disposed of to completion before magistrates (1997a, p.630).[30]

Whatever Narey's rationale, there is the emergence of paradox here, in that whilst arguing for the retention of the magistracy, he nevertheless recommends that many of the judicial functions performed by them, procedural in nature, should be transferred to justices' clerks and those who assist them. To some extent, Narey recommends marginalizing the magistracy from the exercise of significant judicial responsibilities.

Neither the magistracy nor Government was convinced by Narey's conclusion that pre trial reviews and early administrative hearings were better operated by justices' clerks, and on implementation of the provisions, single magistrates were to be found conducting them, advised by a court legal adviser.[31] In one area, some magistrates were persuaded, as part of their training for their new judicial role, to sit at the back of the court room and observe their court legal adviser conducting the proceedings in the required manner.[32] Narey's preferred model, of these hearings being conducted by a stipendiary magistrate or

professionally qualified court legal adviser, was bound to fail : there is no prospect of the MCS having only professionally qualified court clerks for many years to come; and with the numbers of justices' clerks reducing rapidly, there is little or no prospect of any justices' clerk conducting such hearings or exercising effective oversight of those to whom he/she delegates the function.[33] On the other hand, there is much strength in encouraging judicial decision makers, whether lay or stipendiary magistrate, to retain control of the proceedings before them, issuing necessary procedural directions, to ensure not only the timely but also the just disposal of a case. Procedural justice issues here are bound up with the notion of the performance of the judicial function by those specifically identified and trained to do so.[34]

(g) Pre trial reviews and early administrative hearings : justices' clerks

Following Narey's proposals, s.49 (1) of the Crime and Disorder Act, 1998, provided that a single magistrate might extend bail or impose or vary conditions of bail; confirm an information is withdrawn; dismiss an information or discharge an accused in respect of an information, where no evidence is offered by the prosecution; make an order for the payment of defence costs out of central funds; request a pre sentence report following a plea of guilty and, for that purpose, give an indication of the seriousness of the offence, to request a medical report, and for the purpose, remand the accused in custody or on bail; remit an offender to another court for sentence; where a person has been granted police bail to appear at a magistrates' court, to appoint an earlier time for his/her appearance; extend with the consent of the accused, a custody time limit or an overall time limit; where a case is to be tried on indictment, to grant representation for purposes of the proceedings in the Crown Court; where an accused has been convicted of an offence, to order him/her to produce his/her driving licence; give a direction prohibiting the publication of matters disclosed or exempted from disclosure in courts; give, vary or revoke directions for the conduct of a trial, including directions as to the timetable for the proceedings, the attendance of the parties, the service of documents (including summaries of any legal arguments relied on by the parties) and the manner in which the

evidence is to be given; and give vary or revoke orders for the separate or joint trials in the case of two or more accused or two or more informations.

S.45 (1) of the Justices of the Peace Act, 1997, provides that rules made in accordance with s.144 of the Magistrates' Court Act, 1980, may make provision enabling things authorised to be done by, to or before a single magistrate to be done instead by, to or before a justices' clerk. S.45 (2) of the Justices of the Peace Act, 1997, provides that such rules may also make provision enabling things authorised to be done, by to or before a justices' clerk (whether by virtue of s.45 (1) or otherwise) to be done instead by, to or before a person appointed by a MCC to assist him : that person is not required to be legally qualified.

The Justices' Clerks' Rules, 1970, (as amended), made under the Justice of the Peace Act, 1968, provide that a number of functions of a single magistrate specified in Part l of the Rules may be exercised by a justices' clerk or a person appointed by a MCC to assist him or her.

A persuasive view has emerged, which is more fully examined elsewhere,[35] that an MCC is empowered through its justices' chief executive, to direct a justices' clerk to delegate the statutory functions described herein, to a member of its staff. Whatever the legal position, for practical purposes such a power would seem essential, for if it were otherwise, a reluctant justices' clerk, supporting anything up to 850 magistrates, sitting in anything up to 30 or 40 courts each day, could nullify the provisions.[36] However, it must be emphasised that, in delegating such powers to the staff of a MCC, a justices' clerk may have had no responsibility for the appointment or training of the staff, who may lack professional qualification and experience. The notion of a MCC, or its justices' chief executive, requiring a justices' clerk to delegate judicial functions he is statutorily required to perform, to members of the MCCs staff who may not hold professional legal or any other qualifications and/or in whom the justices' clerk possesses no confidence, seems inimical to the interests of justice. It also runs counter to judicial precedent, but provides plain evidence of the extent to which

MCCs and justices' chief executives now seem able to interfere in the administration of justice.[37]

(h) A single justice, or by, to or before a justices' clerk

S.49 (2) of the Crime and Disorder Act, 1998 provides that any of the things which, by virtue of s.49 (1) are authorised to be done by a single magistrate for any area may, subject to any specified restrictions or conditions, be done by, to or before a justices' clerk for that petty sessions area.

There was much concern at Second Reading in the House of Lords, primarily expressed by Lord Bingham, about the need to preserve the distinct role of judicial decision maker, and justices' clerk as professional legal adviser and administrator. Accordingly, s.49 (3) of the Crime and Disorder Act, 1998, provided that there were some things falling within s.49 (1), which the Rules may not authorise a justices' clerk to perform. For example, a justices' clerk may not, without the consent of the prosecutor and the accused, extend bail on conditions other than those, if any, previously imposed, or impose or vary conditions of bail; give an indication of the seriousness of an offence for the purposes of a pre sentence report; remand the accused in custody for the purposes of a medical report or, without the consent of the prosecutor and the accused, remand the accused on bail for those purposes on conditions other than those, if any, previously imposed; give a direction prohibiting the publication of matters disclosed or exempted from disclosure in court; or, without the consent of the parties, give, vary or revoke orders for separate or joint trials in the case of two or more accused or two or more informations. Whilst restricting the powers of justices' clerks in this way might go some way to appeasing those who are fearful that justices' clerks might perform a full judicial role, it is difficult to satisfactorily explain its rationale; and to a significant extent, it nullifies part, at least, of Narey's conviction that the pre trial process could be expedited by investing justices' clerks with these necessary additional powers.

In respect of those matters contained in s.49 (1) and (2) of the Crime and Disorder Act, 1998, the Lord Chancellor is obliged, before making any rules, to consult magistrates and justices' clerks in respective petty sessions areas. The legislation provided for consultation rather than agreement and, subject to any decision by the Lord Chancellor being held to be Wednesbury unreasonable, it is unlikely that such a consultation will be problematic.[38]

Bingham raises again the interesting question, as to whether justices' clerks perform a judicial function. The statutory functions which nevertheless remain under the Justices' Clerks' Rules, 1970, (as amended), remain judicial functions and it is difficult to discern how the quality, as opposed to the range, of those judicial functions differs in any material respects from those justices' clerks are precluded from performing. Bingham's predecessors did not share his difficulty.[39]

Bingham, however, was not alone in his concern about the role of judicial decision maker and in a powerful comment on the powers of justices' clerks, Darbyshire observed :-

> "... justices' clerks are essentially legal advisors, hired and fired by the Magistrates' Courts Committee. They are not judges. They are meant to serve judges. The justices and stipendiaries are the judges. Justices have been appointed to the Commission, supposedly to represent the community over which they preside and should have been selected according to criteria now carefully set out in the Lord Chancellor's directions for advisory committees on justices of the peace. Stipendiary magistrates are lawyers selected in accordance with the procedures and criteria set out in judicial appointments from acting stipendiaries (barristers, solicitors and justices' clerks who sit part-time) who have manifested appropriate judicial qualities. Clerks, especially court clerks, have not been subjected to such screening ..." (1999, p.379).

Darbyshire finds support for her view that justices' clerks are not appointed to perform a judicial function in comments made by the LCD in the consultation paper *"The Future Role of the Justices' Clerk"* (1998). The paper was produced by LCD as a result of initial discussion on the nature of what it described as "this important post" between LCD and various interested stakeholders in the MCS. It aimed to produce responses to help Ministers provide a strategic steer for the future role of justices' clerks. In commenting upon increased powers for court clerks (sic), the paper acknowledged that the Crime and Disorder Act, 1998, extended the range of functions that could be exercised by a clerk (sic) but insisted :-

> "... It is important to remember that the powers to be exercised by clerks are delegated powers from single justices ..." (1998, p.6).

The paper created confusion. The range of functions that a justices' clerk could exercise as a result of the Crime and Disorder Act, 1998, were extended. There was no question of such powers being delegated to justices' clerks by single magistrates. Single magistrates had no power to delegate their judicial functions to court clerks – only justices' clerks had such a power of delegation, to members of staff of a MCC.[40] The paper suggested that it was not proposed that justices' clerks should take the judicial oath as they were not subject to the same extensive screening as those selected for their ability to be judges. Darbyshire argued as a matter of principle, clerks should be given no more judicial powers than were absolutely necessary, unless and until they were able to be recognised as judges (1999, p.379). Although Darbyshire's critique has more the feel of principle about it, than did the LCD observations, which reflected a broader agenda for the management of justices' clerks, and were, at best, confusing, there can be little doubt that justices' clerks were performing judicial functions, under the Justices' Clerks' Rules, 1970, (as amended), and the Children Act, 1989, long before Narey came along.

Darbyshire considered carefully Narey's rationale justifying the delegation of criminal trial management powers to the justices' clerk, concluding that Narey's

rationale was no more than a justification for giving all the magistrates' functions to the clerk (1999, p.380). So far as administrative case management was concerned, Darbyshire was emphatic: Narey was wrong. Case management was not an administrative activity but a judicial one. It was part of the judges' inherent common law power to control the proceedings before him/her which was, concluded Darbyshire, why the Woolf report (civil justice reforms are beyond the scope of this study) and contemporary civil reforms referred to "judicial case management" being conducted by judges and that was why, in the criminal process, plea and directions hearings in the Crown Court were conducted by a circuit judge, rather than a member of the court staff. Such an argument is entirely consistent with the notion that procedural justice lies at the heart of what it means to act judicially. (It is also a rational response to those at LCD, HMMCSI and MCCs, who consider that MCCs and justices' chief executives have a case management role).[41] The Society was never in any doubt that the powers delegated were judicial, having made much of that for many years.[42] Whether, of course, the LCD should have been so dogmatic in its view is very much a moot point, bearing in mind its difficulty in separating out distinctions between a justices' clerk's judicial, legal and administrative role.[43]

Darbyshire continued that :-

> "Delegation of judicial functions to clerks is, I suggest, an unprincipled, undesirable development of the clerk's role. Calling a judicial act "administrative" does not make it any less judicial ..." (1999, p.380).

So far as the labelling of judicial acts as administrative is concerned, Darbyshire is right. However, much the same can be said about the encroachment of "new public management" into all areas of criminal justice legislation. Court listing, cited throughout this study, and case management, are just such examples. The Lord Chancellor, judges and others have all concluded that, primarily, court listing and case management are judicial functions.[44] If, for example, a magistrate(s) adjourns criminal proceedings for trial, or part heard, irrespective of the views of administrators, the hearing will be resumed at the date and time

determined by the magistrate(s). However, closely associated with court listing is the use of court room time, the use of court legal adviser time, the utilisation of the time of magistrates and judges, case management and so on. It is obviously of advantage to managers and administrators that court listing and case management should be properly managed and it is now evident that, following the interest of HMMCSI and many MCCs, issues relating to court listing, pre-trial reviews and early administrative hearings are, at best, in the magistrates' courts at least, being fudged.[45] Narey's proposals assist that fudge, and it is difficult not to conclude they were intended to do so.

As has been noted, Darbyshire (1999) was not alone in her concern, and it was following the intervention of Bingham that some restraining influence was brought to bear upon the wide-ranging judicial power that might have been left in the hands of justices' clerks. Bingham objected :-

> "... to the possibility that some of these powers might by rule be exercised by the justices' clerk because such a rule would erode the fundamental distinction between the justices and the justices' legal adviser and in the longer term - as I fear - signal the demise of the lay magistracy, which would be an irreparable loss. If the justices' clerk were to be entrusted with these important decisions and judgements, judicial in character, the time would inevitably come when people would reasonably ask whether he or she should not be left to get on and try the whole case".[46]

Bingham expressed similar concerns when meeting the magistracy.[47] The comment failed to acknowledge that the principle had been surrendered many years before.

Darbyshire however, points to a further cause for concern, she describes it as "alarm". With the diminishing number of justices' clerks in England and Wales, many of the justices' clerks' judicial powers will be delegated to

employees of MCCs. As she puts it :-

> " ... Thus our primary criminal jurisdiction is rapidly deteriorating into a forum where not only can the legal advisory function be delegated to clerks who are not barristers or solicitors and who may be unqualified, but so, in law, may many of the judicial functions ..." (1999, p.382).

As Darbyshire points out, despite attempts to restrain justices' clerks in their ability to delegate, because of the need to retain local flexibility, a justices' clerk can delegate his judicial functions to any member of staff of a MCC. As has already been noted, there are some MCCs and justices' chief executives who believe justices' clerks can be required to delegate in this way.[48]

There are important issues here.

Prior to the implementation of the Police and Magistrates' Courts Act, 1994, justices' clerks held public office at the pleasure of their appointing MCC and staff employed by the MCC to assist the justices' clerk were accountable to him/her and worked under his/her day to day direction and control.[49]

Following implementation of the 1994 Act, justices' clerks appointed on and after 1st April, 1995, are employed by the MCC. They are accountable to the MCC, through the justices' chief executive. The MCC is, itself, accountable to the Lord Chancellor. All staff, including court legal advisers, are employed by the MCC.[50]

The current position appears to be, therefore, that justices' clerks, who themselves assert that, in acting under the Justices' Clerks Rules, 1970, (as amended), and s.49 of the Crime and Disorder Act, 1998, they are acting judicially, (about which there is overwhelming evidence and, in this study, there is no dispute), are doing so whilst employed directly by an employer, who is accountable to a Minister of the Crown. Because of the increasing scope of his/her work (there are a diminishing number of justices' clerks who may reduce

to no more than one in each MCC area),[51] justices' clerks may have to delegate these functions to other members of staff of the MCC (whose qualification is not spelled out in the legislation) if they are to be performed at all.[52] However, if a justices' clerk appears to be reluctant to delegate these functions in this way, MCCs and justices' chief executives would no doubt find support in the LCD for pointing to the legislation and reports which underpin it (Home Office 1997a), labelling the duties as administrative, rather than judicial or legal, enabling them to direct the justices' clerk not only in the performance of those functions, but if, and to whom, they should be delegated.

It is not difficult to conceive of arrangements whereby, if MCCs were abolished and the staff of the MCS employed centrally, the executive would employ civil servants, of varying ranks, to conduct these preliminary procedural issues in the manner it thinks fit.[53] Procedural justice, an intrinsic part of the administration of justice, and what it means to act judicially, has been brought under central direction and control.

(i) Early administrative hearings – further observations

S.50 of the Crime and Disorder Act, 1998, provides that where a person charged with an offence at a police station appears or is brought before a magistrates' court for the first time in relation to the charge, that court may consist of a single magistrate or a justices' clerk. At a hearing conducted before a single magistrate or a justices' clerk, the accused must be asked whether (s)he wishes to receive legal aid; and if (s)he indicates that (s)he does, his/her eligibility must be determined; and if it is determined that (s)he is eligible for legal aid, the necessary arrangements for grant must be made for him/her to obtain it. The single magistrate may also exercise any other power which he/she possesses by virtue of s.49 of the Crime and Disorder Act, 1998, or any other legislation. On adjourning the hearing, a single magistrate may remand the accused in custody or on bail for the first substantive appearance.

Despite the marginal note, many of the functions capable of being performed at an early administrative hearing would seem to be judicial, rather than administrative. Although a justices' clerk may exercise any of the powers he/she has by virtue of the Justices' Clerks Rules 1970, (as amended), or under rules made under s.49 of the Crime and Disorder Act, 1998, at an early administrative hearing, he/she is not authorised to remand an accused in custody or, without the consent of the prosecutor and the accused, to remand the accused on bail on conditions other than those previously imposed.

Early administrative hearings have the same objections as those which apply to pre trial reviews. That there is uncertainty as to how such hearings should be conducted, at the local level, is readily discerned from practice across England and Wales. In some areas, for example, Hampshire and Wiltshire, single magistrates have been nominated to conduct pre trial reviews and early administrative hearings, observing justices' clerks and their staff in order to train for the role.[54] In other areas, where single magistrates were to act in such a capacity, decisions have been taken to leave the matter with the justices' clerk and staff, on the basis that it is a more efficient and effective use of court time.[55]

It is perhaps trite to argue that it is a little late in the day to object to proposals which increase the judicial powers of justices' clerks and staff. Provisions introduced in the Justices' Clerks Rules, 1970, (as amended), were plainly of a judicial character and the Society's agenda for enhancing the range of duties and responsibilities conducted by them under the Justices' Clerks' Rules, 1970, (as amended), has been never ending. In an editorial in *The Justices' Clerk*,[56] the President of the Society welcomed confirmation provided by the Lord Chancellor, in giving a strategic steer on the future role of the justices' clerk in the paper issued by his Department in January, 2000,[57] recognising that justices' clerks were required to exercise a range of legal and judicial functions, and affirmed that the Society had long championed the cause of justices' clerks in assuming an increasing judicial role. The Society has consistently argued, for example, in its response to Narey (Home Office 1997a), that the exercise by a justices' clerk of the power of a single magistrate is a judicial act, and that it is

no less a judicial act when exercised by a justices' clerk, a proposition that must be logically correct. If it were otherwise, the exercise by a magistrate of the power of a single justice would be something less than a judicial act which, having regard to the purpose of judicial appointment, would be nonsense.

Whatever the muddled history to the current proposals and Bingham's and Darbyshire's argument,[58 59] the real damage in these proposals is arguably not in the functions which are to be performed, but, that by designating judicial functions as administrative, those who do or do not possess a professional legal qualification will perform them, in relationships and lines of accountability that have now been established between justices' clerks, staff of MCCs and central government.

(j) Pre trial reviews and early administrative hearings - a panacea

The extent to which the Narey proposals (as enacted in the Crime and Disorder Act, 1998), may effect any improvement in the criminal justice process has been seriously questioned. It has been suggested by one academic observer that there is a danger that defence lawyers, poorly remunerated for their involvement in early administrative hearings, will feel under pressure to finish a case on the day and may not, therefore, request an adjournment to listen to, for example, the tape of a police interview in which the client was alleged to make an admission.[60] Also questioned are the perceptions of magistrates and their clerks, which may emerge, in what are intended to be straightforward guilty plea lists and there is conjecture that, as a result, there may be a reluctance to grant an adjournment. One instance is cited of a CPS report on a pilot project, where a court legal adviser was observed reminding magistrates contemplating an adjournment that it was a Narey court and they should try to complete the case on the day.[61] Nothing is perceived as intrinsically wrong in the objective of reducing delay, that cases have to be listed separately, as straightforward guilty pleas. However, the research upon which these observations were based revealed that this was being done to facilitate the use of lay presenters by the CPS. Furthermore, it was found that many early administrative hearings were

scheduled too early and had to be adjourned for the case papers to be sorted. As a result, early administrative hearings became known as "early adjournment hearings".[62]

It is difficult not to conclude that, with the passage of time, those appearing before a magistrates' court will, on the first occasion, appear before a justices' clerk, or, more likely, a member of staff of a MCC, who will make a range of procedural, but nevertheless, judicial decisions relating to the conduct and progress of a case and who, for most purposes, will be perceived by the person appearing before him or her as "the judge", particularly where a plea is entered. The Association accepts :-

> "... the need to reduce delay, and have already identified training materials to help magistrates to improve their management of cases and so deliver justice more quickly. Council supported the recommendation that there should be an Early Administrative Hearing but proposed that these should be conducted by a magistrate and clerk together, not by a clerk alone. The suggestion that some very important judicial decisions should be transferred from magistrates to justices' clerks (or other clerks to whom they delegate their powers) goes to the very heart of the matter of judicial independence. Where Justices' Clerks are also Justices' Chief Executives these judicial decisions would be made by someone whose prime responsibility is to manage resources.
>
> Council took the view that decisions on bail, the request by the defence for an adjournment and the ordering of a pre-sentence report are properly for the magistrates; they are not administrative and must be retained by us. Pre-trial reviews must take place before a bench of three lay magistrates or a single stipendiary magistrate, and should be held in open court.
>
> The Association and the Stipendiary Magistrates are represented on a working party, chaired by the Lord Chancellor's Department, which is

studying the judicial/administrative boundary, together we are resisting moves to label functions administrative which are not".[63]

One stipendiary magistrate put the issues plainly :-

"The objection to this extension (of powers) is the blurring of the distinction between the functions of justices' clerks and those of the bench. Both sides have vital, but complementary roles to play in the administration of justice ...".[64]

The stipendiary magistrate was in no doubt the powers to be exercised were of a judicial or quasi judicial nature, the greatest of the powers being to commit for trial at the Crown Court of a defendant who was on bail, pursuant to s.6(2) of the Magistrates' Courts Act, 1980.[65]

The Lord Chief Justice, the Association, stipendiary magistrates and several leading academics, recognised the weaknesses in Narey's proposals, but failed to convince Government of the need for caution. It is not surprising Darbyshire comments that :-

"Parliament neither knows nor cares anything much about magistrates' courts" (1999, p.380).

It would seem the political drive for expedition and cost cutting far outweighed any considerations of due process and the interests of justice, a conclusion buttressed by the opinion of senior civil servants in the LCD.[66]

Access to Justice Act, 1999

Lest the magistracy felt that, with the passage of the Police and Magistrates' Courts Act, 1994, and the Crime and Disorder Act, 1998, they were to be spared further intrusion by Government into the judicial process, they were to be mistaken.

Criminal justice practitioners received the Government's next White Paper, "Modernising Justice", in December, 1998 (Home Office 1998).[67] It was accompanied by the Access to Justice Bill. The legislation was not long delayed. The issues raised provide strong evidence of the extent to which managerialists have criminal justice and its agencies firmly within their grasp.

The Lord Chancellor introduced the White Paper by suggesting that a fair and efficient justice system was a vital part of a free society. The criminal justice system existed to help protect from crime and to ensure that criminals were punished. The civil justice system was there to help people resolve their disputes fairly and peacefully. The Government had a radical programme of reform for the whole country. The justice system could not be left out. It was Government's intention to meet people's needs, by introducing a Community Legal Service which would ensure people's needs were properly targeted; introduce contracting for legal services, abolish restrictive practices, increase competition among lawyers and keep costs down; and by the introduction of a wide range of legal services, and the development of alternative ways of resolving disputes, outside the courts, create new avenues to justice. Government also intended to improve the management of the courts and simplify their procedures, so they provided a more effective, efficient and user friendly service. No doubt publication of the Bill alongside the White Paper was designed to demonstrate the urgency of the need for reform, rather than to limit the period of consultation. Efficiency and effectiveness had resonances with the language of a previous government, as did the need to reduce public expenditure (Part Two, chapter 4).

In setting out its aims in its White Paper, Government introduced a new raft of reform, strongly motivated by principles of "new public management".

(a) Generalities

It is wholly consistent with the "new public management" agenda that the White Paper should refer, at the outset, to the need to save money. It acknowledged there were many sources of legal information, advice, assistance and representation, much of it paid for by the tax payer. It suggested that about £150m a year was met by local government, central government, charities and businesses, or the voluntary advice sector, including citizens' advice bureaux, law centres and other advice centres. Government wanted to promote these sources of advice, so that people with legal problems were able to find the information and help they needed. Every community should have access to a comprehensive network of good quality legal advice providers. Accordingly, Government intended to take steps to set up a new body, the Legal Services Commission, to take the lead in establishing a Community Legal Service, to provide the necessary communication.

So far as the criminal justice system was concerned, Government announced its intention to modernise, by eliminating unnecessary delays; improving services to victims and witnesses; enabling the sentences of the courts to be enforced more effectively; and ensuring that the system worked as a coherent whole, and that its component parts were managed efficiently (1998, paragraphs 5.1-5.34). By managing component parts, and embracing the various organisations providing legal advice, assistance and representation, the Government was, in effect, seizing control of the entire justice system.

The Access to Justice Bill, which also contained provision to replace the Lord Chancellor's Advisory Committee on Legal Education and Conduct and rights of audience, came in for sustained attack, the Lord Chancellor being accused of taking to himself "almost untrammelled" powers.[68] The Select Committee of Peers considering the legislation, expressed concern that policy objectives and principles were not set out in the Bill, nor did it contain criteria as to how the Lord Chancellor should exercise his powers. The Lord Chancellor was also criticised for powers he proposed taking to himself to give directions over the

running of another central plank of the legislation, the Criminal Defence Service, which was to replace the Legal Aid Board, at least, in part. Bearing in mind the State was a party in criminal proceedings and a defendant's reputation and liberty were often at stake, the Peers concluded that it would be disturbing if a Minister had an undefined power to change arrangements for giving legal advice and assistance to the impecunious defendant.[69]

The Bill was also criticised by the legal profession, a spokesman for the Bar commenting :-

> "... As state control increases, lawyers fight shy of fearlessly asserting their client's care. The justice system becomes geared to administrative convenience and cost cutting. This leads to a second-rate system of justice, a culture of uncontested cases and plea bargaining where criminals are treated leniently, and the innocent are punished for fear of a more severe sentence. Worst of all, the justice system can become a tool of the state, capable of being used cynically by the authorities to control socially excluded communities at the margins of society".[70]

(b) Magistrates' Courts

In effecting change in the magistrates' courts, Government announced that it would uphold the principle of the provision of local justice, dispensed by local people, but within a modern framework (1998, paragraph 5.17). Accordingly, it intended to promote early hearings of cases in magistrates' courts, usually a day or two after someone had been charged (1998, paragraph 5.7); introduce a streamlined procedure for sending cases from the magistrates' court to the Crown Court (1998, paragraph 5.7); improve witness services in the magistrates' court (1998, paragraph 5.9-5.10) ; improve the management of magistrates' courts and the legal support given to magistrates, by separating the two functions more clearly (1998, paragraph 5.24); set targets for reducing delay in and improving the collection of fines (1998, paragraph 5.25); require courts to have charters covering waiting time, facilities for disabled court users and the

provision of separate waiting areas for victims, witnesses and defendants, and would have standard IT services and other modern facilities (1998, paragraph 5.25); and align the boundaries of MCCs more closely with those of other criminal justices agencies (1998, paragraph 5.19-5.22). Many of these provisions were plainly designed to build upon frameworks already set out in the Police and Magistrates' Courts Act, 1994, and the Crime and Disorder Act, 1998.

(c) Legal Aid

So far as legal aid was concerned, Government announced that it would maintain the fundamental principle that those facing a criminal trial should not be afraid that lack of resources and proper representation might lead to their wrongful conviction. But in a cautionary note, directed principally at finance, it pointed out that the criminal legal aid system had serious weaknesses (1998, paragraphs 6.6-6.8). Accordingly, the Government intended to replace the criminal legal aid scheme with a new Criminal Defence Service (1998, paragraph 6.10).

The Government had seized an opportunity. By claiming that the administration of legal aid was unwieldy and costly, (the ground was already well prepared),[71] and that some lawyers were abusing it, it managed, without any significant public debate, other than among the legal profession, to create an environment for bringing under central control the provision of criminal defence services. This was control indeed, for with it emerged the prospect of the State investigating, prosecuting, providing such defence services as it thought fit, and, it is argued, convicting and punishing.

According to an opposition spokesman, Government plans to introduce the Criminal Defence Service and salaried public defenders was :-

> "... unwanted, unconsulted, unnecessary, unfair, uncosted, unwise and frankly unbelievable ...".[72]

Garnier warned that restricting an offender's choice of representation would lead to litigation under Article 6 of the ECHR, which guarantees the right to a fair trial before an independent and impartial tribunal.[73] Garnier also expressed his concern, in somewhat colourful language, of the danger inherent in the State prosecuting, defending and sentencing offenders. As he put it :-

> "... The state prosecuting, the state defending and the state disposing. They don't even have that in Russia anymore".[74]

It would appear that the experience in Scotland and Canada was somewhat different to that envisaged by Garnier, with claims of independence.[75] Proposals for England and Wales do not have the appearance of independence, which is surely the point.

In a critique of the legal aid reforms, Zander (1999) observed that the Lord Chancellor and his junior ministers had been going about trying to boost the image of the seductively named Community Legal Service as the harbinger of "joined up legal services" :-

> "(A classic case of first create darkness and then whistle in it). But whatever modest benefits flow from better referral systems for the citizen seeking local advisors the gut of the reform is rationing. Not only will the budget be capped, but money for civil work is at risk if the budget for criminal cases is overspent".

It was proposed that, in the magistrates' courts, means testing for legal aid would come to an end. Accordingly, the only issue that would need to be considered in the provision of advice and assistance would be the interests of justice, a judicial, rather than administrative, decision (1998, paragraph 6.25). The Lord Chancellor proposed to reserve to himself the power to give extensive direction and guidance, and in a warning of what might lie ahead, the White Paper suggested the regulations would be more tightly drawn than was currently

the case (1998, paragraph 6.25). Bearing in mind successive governments' concerns about the cost of legal aid, further directions and guidance under the Access to Justice Act, 1999, can only be interpreted, having regard to the limited discretion it was proposed to vest in magistrates' courts, as direct intrusion by the Lord Chancellor, acting in his Ministerial capacity, in the judicial decision making process. Le Vay had warned of just such a danger.

(d) Magistrates' Courts Committees

Proposals concerning MCCs need to be read in the context of the Police and Magistrates' Courts Act, 1994 (op. cit. and now enshrined in the Justices of the Peace Act, 1997).

Government announced its intention to legislate to enable magistrates' courts to take over responsibility from the police for executing warrants against fine defaulters and people who breached community sentences, which involved extending and clarifying the kinds of warrants that civilians could execute and the circumstances in which they may do so (1998, paragraph 5.33).

The legislation was to give the Lord Chancellor power to make orders re-defining commission area boundaries. The Government intended to take power to transfer cases between commission areas in exceptional circumstances; and to re-define the basis for petty sessional areas and divisions, breaking the link with local authority boundaries, freeing MCCs to adopt any internal structure; and removing inconsistencies in the way that MCCs in different parts of the country were constituted (1998, paragraph 5.23). The ability to transfer cases between commission areas was capable of disposing of, once and for all, the notion that in the magistrates' courts offences were tried by local people with local knowledge; while the power to re-define petty sessional areas and divisions provided Government, no doubt acting through MCCs, with power to abolish petty sessional areas and divisions where they were considered to be, for example, too small to be a viable economic unit, or where perhaps the local bench was being too resistant to change. It also enabled those who saw the need

for consistency of practice both in the administration which supports the magistracy and in the administration of justice in the courtroom, to argue that local factors should not prevail and that greater consistency should emerge.[76]

(e) Stipendiary Magistrates

Metropolitan and provincial stipendiary magistrates' benches were to be replaced with a single, unified bench, with the title District Judge (Magistrates' Court), headed by a Senior District Judge (Chief Magistrate), who would have flexible powers to deploy the judges where they were needed (1998, paragraphs 5.23, 5.33).

The new Senior District Judge (Chief Magistrate) would be assisted by a deputy. Duties and responsibilities attaching to the post would include the hearing of the more sensitive, long and complex cases falling to be dealt with by District Judges (Magistrates' Court). However, significantly, in addition, the post holders would be expected to support and guide District Judge (Magistrates' Court) colleagues and secure their co-operation, whatever that was supposed to mean; promote good relations between the professional bench and the magistracy, however that was to be achieved and for whatever purpose; promote co-operation amongst members of the professional bench throughout England and Wales; conduct and participate in training events; and address the magistracy on matters of concern and interest, particularly where the appointment of a District Judge (Magistrates' Court) was being contemplated,[77] presumably to persuade the magistracy of the intrinsic merits of such an appointment.

Among other qualities these two senior judicial appointees were expected to display was the ability to take such steps as were necessary to ensure the best deployment of colleagues in the interests of the magistrates' courts, while remaining sensitive to their particular needs and requirements - an ability to, presumably, and however exceptionally, transfer colleagues to other areas when necessary. Post holders would be expected to fulfil a representational role and,

in addition, make themselves well known to the magistracy and command their respect - the rationale was not explained. Interestingly, the post holders would be expected to advise and assist the Lord Chancellor, Home Office and other Government departments on matters concerning magistrates' courts, as and when required; and to be available, at all times, to give advice to colleagues, when requested or when needed (presumably, when not requested), and to give advice to magistrates when requested.[78]

It is not difficult to detect the emergence of a two tier magistrates' court, with District Judges (Magistrates' Court) dealing with the more complex and weighty cases, (resonances here with an earlier report on the role of stipendiary magistrates[79]) and the magistracy disposing of what is left. That there should be an established hierarchy in the proposals, enabling the Senior District Judge (Chief Magistrate) and his/her deputy to deploy District Judges (Magistrates' Court) in the best interests of the magistrates' courts (presumably determined by them), suggests District Judges (Magistrates' Court), after consultation (rather than agreement) with them, will need to be mobile. Presumably, it is intended that some might find themselves deployed, or re-deployed, whenever it is considered necessary (a significant power which could, arguably, be exercised in a "disciplinary" fashion).

The requirement of the Senior District Judge (Chief Magistrate) and his/her deputy to give advice to professional colleagues, whether requested or not, is disturbing, particularly when read together with the requirement of the Senior District Judge (Chief Magistrate) and his/her deputy to assist the Lord Chancellor, the Home Office and other Government departments. It has the potential to strike a blow at the heart of the notion of an independent judiciary.

It will be interesting to see in what circumstances the magistracy will seek advice from the Senior District Judge (Chief Magistrate) and his/her deputy, and how any conflict between that advice and any legal advice properly provided by justices' clerks, who remain under a statutory obligation to provide it, is resolved.

It is not possible to leave the proposals about the establishment of a unified district bench without feeling that the magistracy is intended to be subjected to a cadre of District Judges (Magistrates' Court) who find themselves subjected to a hierarchy of senior judicial appointees, in discernible lines of accountability. The potential for compromising the independence of judicial decision making is obvious. Difficulties here are compounded by the LCD's practice of issuing job descriptions to those seeking judicial appointment, and where necessary, particularly in the inner London area and in respect of former metropolitan stipendiary magistrates, imposing conditions of service upon those taking up appointment at District Judge level.[80] Such a practice, whatever advantage there may be to the LCD, suggests the professional judiciary is employed by a Minister of the Crown, rather than appointed to independent Office by the Crown, and is open to the suggestion that judicial independence might be compromised if the needs of the employer are not complied with.

(f) Justices' Chief Executives : (i) proper officer of the court

The White Paper indicated that legislation would provide that a justices' chief executive would no longer need to be qualified as a justices' clerk (1998, paragraph 5.24,5.33). It was intended to increase the pool from which suitable candidates might be attracted. In bringing forward the proposal, Government paid attention to observations made by the Association, but seemed to have paid no attention to those few magistrates' courts which had experience, in a personally protected post holder, of a justices' chief executive who did not hold a professional legal qualification (for example, Part Three, chapters 5 and 6). The legislation, at the same time, made justices' chief executives responsible for certain administrative tasks, including, for example, collecting and accounting for fines and fees, which were the responsibility of justices' clerks, (which Government suggested helped to clarify the distinction between legal and administrative roles).

A new Schedule 13 was inserted into the Bill at a very late stage and was never the subject of Parliamentary debate. It transferred to justices' chief executives responsibility for a huge range of statutory tasks formerly the responsibility of justices' clerks. Amongst a raft of amendments, it was proposed that the justices' chief executive should assume responsibility under, for example, maintenance legislation; and should become the justices' chief executive for every youth court in the MCC area.

Importantly, so far as criminal procedure is concerned, the Schedule provided that in effect, the justices' chief executive was to become, for all practical purposes, the proper officer of the court for, amongst other things, the retention of all records, service of all notices and liaison with police custody officers over the listing of cases.

There are huge implications in all this for justices' clerks, and for the administration of justice more generally. Responsibilities to be transferred to the justices' chief executive under the maintenance, betting, gaming, licensing, road traffic and other legislation are extensive and impact directly upon the administration of justice. This is particularly so in the betting, gaming and liquor licensing area, where the fulfilment of procedural requirements are an essential part of the judicial process, but is no less so elsewhere.[81]

It is not entirely clear what was meant by appointing the justices' chief executive as the chief executive of the youth courts in the MCC area or whether, in that capacity, (s)he supports the justices' clerk. Whilst the justices' chief executive may have some interest in the management and administration of the youth courts, it is not clear what other interest (s)he may have; nor why it is necessary to separate out the youth courts in this way, which have always been regarded, in point of law, as part of the magistrates' court.[82]

There is in the proposals the potential for conflict between the justices' chief executive and the justices' clerk. The justices' chief executive is given responsibility as accounting officer for the collection of fines and fees; however,

responsibility for enforcement, the granting of time to pay, issue of summons and warrants and transfer of fine orders, has not been assigned, responsibility remaining with justices' clerks. The Schedule creates a situation in which the justices' chief executive, the line manager of the justices' clerk, is responsible for the collection of fines and fees, but the justices' clerk alone is responsible for enforcement and advising magistrates about enforcement. If, as some consider, justices' clerks can be required to delegate what are plainly judicial functions to either the justices' chief executive (for him to allocate thereafter) or to staff of the MCC, all pretence at a separation between judicial, legal and administrative decision making is lost. To suggest, as do some, that staff with delegated authority would still be working to the line management of the justices' chief executive, but not answerable to him for the exercise of the delegated power, particularly where there is disagreement as to the nature and quality of the delegated power to be exercised, may be technically correct, but fails to address the reality of the situation : an employee is most likely to do as (s)he is told by his employer, on whom (s)he depends for her/his livelihood.[83]

The proposals also set out an enhanced role for justices' chief executives, by substituting a new s.41 of the Justices of the Peace Act, 1997, which provides that the justices' chief executive should make all the arrangements for and determine administrative procedures, thus clarifying the responsibility for ensuring the effective and efficient administration of the magistrates' courts within the area of the MCC, and the lines of accountability between the MCC, justices' chief executive and other employees of the MCC. To that extent, powers given to MCCs in 1994 are cut down.

(g) Justices' Chief Executive: (ii) managing the area

A new clause (which was to become s.88(2) of the Act) effectively repealed the previous s.31(2) of the Justices of the Peace Act, 1997. The justices' chief executive was required to carry out his or her functions in accordance with any directions given by the MCC. Under the new proposals, it is intended that justices' chief executives should give directions to justices' clerks and other

staff about how they should carry out their administrative functions; but this power would not extend to legal functions. The difficulty, of course, is in discerning the difference.[84]

The dangers here are all too obvious. According to the LCD :-

> "New provisions in the Act about the qualifications and functions of justices' chief executives are intended to clarify both their role and the lines of accountability between the justices' chief executive, the MCC and the other staff of the MCC".[85]

The paper begs many questions, not least the lack of clarity throughout the administration of justice as to what are judicial, legal and administrative functions. Some activities of justices' clerk as "collecting officer" are legal and judicial. In transferring this swathe of powers to justices' chief executives, with a lack of clarity in what administrative functions actually are, to be determined by the justices' chief executive, who may not be a lawyer, Government has opened up the summary justice system to the potential for abuse.

Importantly, what was to become s.89 of the Act, removed the apparent line of accountability of justices' clerks to justices' chief executives for the performance by them of judicial functions that could be performed by a single magistrate, and the provision of legal advice. However, by the time the provision was implemented, much of it was unnecessary, Government having accepted Narey's recommendations (Home Office 1997a) and enacted the Crime and Disorder Act, 1998, with its implicit re-labelling of many of the functions, including judicial, performed by a justices' clerk, as administrative. There was to be no escaping the net of accountability. In any event, s.89 of the legislation does not preclude the MCC from training the magistracy, or its staff and providing legal advice and guidance, more generally : it is a moot point just how far an employee might ignore the training, advice and guidance of his or her employer.

Lest there was any doubt about the intentions of the LCD, in its paper issued on 10th January, 2000,[86] it suggested that the Access to Justice Act, 1999, had provided an opportunity to adopt an incremental approach to the giving of a strategic steer to the MCS. It considered that with the implementation of ss.88 and 89 of the Act, there would follow a greater separation of legal and administrative functions between justices' chief executives and justices' clerks. Ministers were convinced that justices' clerks should be the professional legal adviser to magistrates, with a core job description, that would leave little time for doing administrative and managerial duties. The core job description suggested that a justices' clerk was directly accountable to the justices' chief executive for the quality of the legal services provided in the area, although how the issue of quality was to be appraised, with its capacity to impact directly upon the provision of legal advice, particularly where the justices' chief executive was not a lawyer, was not addressed.

The justices' clerk is expected, under the core job description, to assume the role of principal legal adviser to the magistrates in her/his area, which is expressed to be a continued guarantee of independence in relation to legal functions in accordance with s.48 of the Justices of the Peace Act, 1997, as amended by s.89 of the Access to Justice Act, 1999, although independence is likely to prove illusory,[87] and the issue of precedence of advice where a Senior District Judge (Chief Magistrate) or a District Judge (Magistrates' Court) advises the magistracy is not addressed.[88]

The LCD paper of 10th January, 2000, suggests the justices' clerk should manage, to some extent at least, and appraise and mentor court clerks; and should be responsible for the training of court legal advisers and for advising the MCC when the magistrates require training, although in each instance, he/she would not necessarily be the trainer. Furthermore, there are duties in connection with the legal forum in an area, which include the development of a consistent listing policy for the entire MCC area, which are intended to be exercised in conjunction with the justices' chief executive.

The core job description, whilst identifying the justices' clerk's responsibility for the exercise of the powers of a single magistrate and statutory functions, curiously includes responsibility for further delegation where the MCC insists, even where the justices' clerk is not satisfied of the competence of the person to whom functions might be delegated.[89]

It is not clear what is meant in the core job description by justices' clerks having responsibility for support of benches in their wider role and legal responsibilities, nor responsibility for the selection of new justices' clerks or bench selection procedures (presumably, the Lord Chancellor's advisory committee on the appointment of justices of the peace).[90]

Quite how MCCs, magistrates advised perhaps by a non legally qualified justices' chief executive, are to set legal standards for the entire area and then hold justices' clerks accountable for ensuring the standards are met, is not spelled out, although surely the approach of one area, to measure effective decision making by the number of appeals to the Crown Court,[91] seems odd.

The Bill, suffering minor and, largely, inconsequential amendment, was enacted in the Access to Justice Act, 1999. So much attention was focused upon provisions relating to legal aid and legal education and rights of audience, that those provisions dealing with magistrates' courts (in particular, ss.78-81 dealing with, among other things, the unification of metropolitan and provincial stipendiary benches; s.85 enabling the Lord Chancellor to direct MCCs to implement recommendations of HMMCSI; s.88 proscribing the role of justices' chief executives; s.89 dealing with the performance by justices' clerks of judicial and legal functions; and s.90 and Schedule 13 transferring to justices' chief executives functions formerly performed by justices' clerks) and the Crown Court, passed largely unnoticed.

Having regard to the extent of the changes introduced by the Access to Justice Act, 1999, (and the strategic steer given by the LCD), it is small wonder that some justices' chief executives now believe the role of justices' clerk has

disappeared, the post now amounting to little more than a senior court legal adviser/team leader;[92] and, finding themselves consulting statutory provisions daily, consider the decision to open up posts of justices' chief executive to those without a professional legal qualification inexplicable.[93]

As noted above, the legislation also gave the Lord Chancellor power to require MCCs to adopt common systems or services.[94] This provision will enable the Lord Chancellor, through his Department, to effectively manage, at least at a strategic level, or give direction for the management of, resources, nationwide.

Conclusion

By means of the Crime and Disorder Act, 1998, and the Access to Justice Act, 1999, those promoting fiscal prudence and accountability, the "twin drivers" of the "new public management" agenda, crowned their achievement in the Police and Magistrates' Courts Act, 1994, bringing under control the summary justice process. Indicative of the approach adopted is the extent to which the legislation overtly describes judicial decision making powers as administrative; and reveals discernible lines of accountability for all judicial decision makers, professional and lay. Judicial decisions and judicial decision makers are held accountable and can be managed. An unremitting agenda of "new public management" has resulted in central control.

NOTES

1. Home Office (1991) *A New Framework for Local Justice.* Op. cit.

2. Op. cit., Part One, chapter 1.

3. Op. cit., Part Two, chapter 4.

4. For example, Interview. Oates L. Director of the Magistrates' Courts Group, Lord Chancellor's Department, 16/4/98.

5. A Bill to be tough on crime. 1998. *148 NLJ 13.*

6. Home Office (1997 a) *Review of Delay in the Criminal Justice System: A Report.* London: HMSO.

7. Home Office (1997 b) *No More Excuses - A New Approach to Tackling Youth Crime in England and Wales.* Cm 3809. London. HMSO.

8. Home Office (1997 c) *Tackling delay in the Youth Justice System: A Consultation Paper.* London. HMSO.

9. Home Office (1997a) Op. cit.

10. Home Office (1984) *Criminal Justice: A Working Paper.*

11. Interview. Oates L. Op. cit.

12. Op. cit., Part Two, chapter 4.

13. Which makes further provision for the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms into the domestic law of England and Wales, at Article 6.

14. The Magistrates' Association has similar difficulty. Interview. Fuller A. Chairman of the Magistrates' Association, 20/4/98.

15. Interview. Oates L. Op. cit., and report of the Advisory Group on Judicial/Legal/Administrative Boundaries in the Magistrates' Court. (1998) Magistrates' Courts Group. Lord Chancellor's Department.

16. Re-introduced in the House of Commons on 24/2/2000 as the Criminal Justice (Mode of Trial) Bill.

17. These two recommendations found statutory expression in section 53 of the Crime and Disorder Act, 1998, which substituted a new section 7A in the Prosecution of Offences Act, 1985. Card and Ward make the point that, in extending advocacy and criminal litigation rights to those who were not

Crown Prosecutors, Government did not choose to use the mechanism provided by the Courts and Legal Services Act, 1990, under whose procedures rights of audience or litigation could be given or extended by an "authorised body" (which the CPS is not) if its conduct, education and training rules are approved. As Card and Ward (page 144) observe, if the Government had wanted to do so, it could have amended the 1990 Act so as to make it applicable. Government chose not to use the Act's procedure because it thought that:-

"... It grinds extremely slowly and it would literally take years before any progress was made ... Resolving ... concerns should not have to await the extremely cumbersome process of the 1990 Act".

18. *Information on the Criminal Justice System in England and Wales.* 1999. London. HMSO.

19. Justices' Clerks (Qualifications of Assistants) Rules. 1979, SI 1979/570.

20. Op. cit.

21. Difficulties might also emerge during the course of, for example, a plea of guilty where a Newton hearing *(R -v- Newton, 77 Cr. App. R. 13)* may need to be considered. One metropolitan stipendiary magistrate has observed that the inability of a lay presenter to deal with all issues arising, whether foreseen or otherwise, has invariably led to difficulties in the due despatch of court business; whilst to expect magistrates' courts to arrange their work so that only those cases which can be dealt with by a lay presenter are listed in a court room, is proving to be hopelessly unrealistic. Could Narey, perhaps, have benefited from judicial input before presenting his final report?

22. Falconer of Thoroton. Lord. HL 3rd Reading. Col 229.

23. Home Office (1981) *Royal Commission on Criminal Procedure. Report.* London. HMSO. Home Office (1983) *Royal Commission on Criminal Justice. Report.* London. HMSO.

24. A non attributable conversation with a senior crown prosecutor.

25. Ibid.

26. *The Role of the Stipendiary Magistracy.* A report prepared by a working party established by the Lord Chancellor. 1996. At page 12.

27. A non attributable conversation with a metropolitan stipendiary magistrate (District Judge (Magistrates' Court)) in connection with this study.

28. The experience of the former justices' clerk of Southampton and New Forest Magistrates' Courts.

29. Op. cit., Part One, chapter 1.

30. Ibid. Darbyshire P. (1997) *Criminal Law Review, 629 – 632. Criminal Statistics, 1991 – 1992.*

31. For example, at Southampton Magistrates' Court, a non attributable conversation with a Southampton magistrate.

32. A non attributable report of the experience of a magistrate at Southampton Magistrates' Court; and in Wiltshire.

33. Op. cit. The issues are explored elsewhere, herein.

34. In one inner London magistrates' court, a metropolitan stipendiary magistrate (District Judge (Magistrates' Court)) provided by way of example, without attribution, an instance in which a legal aid application was refused by a member of the MCC staff on interests of justice grounds, only to be granted in court, where the same information about legal complexity and the number of witnesses was provided to the court. The result was irritation between magistrate and MCC staff, and delay.

35. Op. cit., and Part Four, chapter 8.

36. The position of some justices' clerks in large MCC areas, for example, Hampshire, the subject of the case study, op. cit., Part Three, chapters 5 and 6.

37. Justices of the Peace Act, 1997, section 41, as amended by the Access to Justice Act, 1999, section 88; and the opinion of the justices' chief executive for Wiltshire, interviewed on 15/12/99 in connection with this study.

38. *Associated Provincial Picture Houses Ltd. -v- Wednesbury Corporation (1947) 2 All ER 680.*

39. Op. cit., Part One, chapter 1.

40. Op. cit., Part Two, chapter 4.

41. Op. cit., chapter 3, Part Two, chapter 4 and Part Four, chapter 7.

42. See the discussion of this in Part One, chapter 2, dealing with the historical development of the role of justices' clerks.

43. Report of the Advisory Group on Judicial/Legal/Administrative Boundaries in the Magistrates' Courts. (1997). Magistrates' Courts Group, Lord Chancellor's Department.

44. *The Role of the Stipendiary Magistracy.* A report prepared by a working party established by the Lord Chancellor. 1996, at page 12.

45. For example, in the fourth Annual Report of Her Majesty's Chief Inspector of the Magistrates' Courts Service, 1996-1997, at paragraph 43, comment is made of court lists, pre-trial reviews and early administrative hearings, all of which, it is argued herein, are judicial functions.

46. Bingham of Cornhill. Lord. HL Second Readings col.562.

47. Bingham of Cornhill. Lord. Speech to the Gloucestershire Justice on 14/3/97.

48. Op. cit.

49. Op. cit., Part One, chapter 2; Justices of the Peace Act, 1997.

50. Op. cit., Part Two, chapter 4.

51. Op. cit., Part Three, chapter 6.

52. Op. cit., Part Two, chapter 4.

53. For example, management of the MCS by The Court Service.

54. A non attributable conversation with a Southampton magistrate.

55. A non attributable conversation with a former justices' clerk in Wiltshire.

56. *The Journal of the Justices' Clerks' Society* (January, 2000, page1).

57. Op. cit.

58. Op. cit.

59. Op. cit.

60. Bridges L. 'Narey may not be a force for the good'. *The Times*, 9/11/99.

61. Ibid.

62. Ibid.

63. *The Magistrates' Association. 77th Annual Report and Accounts.* 1996-97, at page 2-3.

64. Evans A. The Magistrate Debate. Clerks powers in *The Magistrate, The Journal of The Magistrates Association,* Vol. 54 No.3, April, 1998, at page 69.

65. Ibid.

66. Interview. Oates L. Op. cit.

67. Home Office (1998) *Modernising Justice.* London. HMSO.

68. House of Lords Select Committee Report on the Access to Justice Bill, published 14/1/99.

69. Ibid.

70. Hallett H. Q.C. (as she then was) (1999) Chairman of the Bar Council. Reported in *Bar News, issue no. 110,* February, 1999, at page 4.

71. Op. cit.

72. Garnier E. *Law Society Gazette 3/11/99, at page 13.*

73. Ibid.

74. Ibid.

75. Ibid.

76. Interview. Melling R., Chief Inspector of the Magistrates' Courts Service, on 16/4/98.

77. A guide to applicants distributed to prospective candidates for appointment as deputy to the Senior District Judge (Chief Magistrate) in 1/2000.

78. Ibid.

79. Op. cit., Part One, chapter 2.

80. As was the practice for the Senior District Judge (Chief Magistrate) and deputy; a practice being developed for all new appointees at this level in 1999/2000.

81. Under the various Licensing Acts.

82. Children and Young Persons Act, 1933, sections 44 to 46.

83. Op. cit. Lord Taylor of Gosforth, Part Two, chapter 4.

84. Op. cit.

85. Lord Chancellor's Department (2000) *The Future Role of the Justices' Clerk,* Magistrates' Courts Group.

86. Ibid.

87. Op. cit.

88. Op. cit.

89. Op. cit.

90. Op. cit.

91. Reported as the practice in Hampshire, in 1999.

92. Interview. Wilcock P. Justices' chief executive in Wiltshire, 15/12/99.

93. Ibid.

94. Section 84 of the Access to Justice Act, 1999.

PART FOUR
CHAPTER 8
CONCLUSIONS

Introduction

It has been argued here that over the last twenty years or so, in pursuit of a "new public management" agenda, governments have tinkered with the rules of procedural justice to such an extent that the summary justice process and its separation from the legislature and executive have been fundamentally compromised.

At the core of the study lies the issue of magistrates and justices' clerks as judicial decision makers, the range and extent of their judicial functions, what it means to act judicially, and the extent to which, by tinkering with the rules of procedural justice, governments and their executive arm have over-reached the reasonable limits of accountability, intruded into the judicial process and damaged the independent exercise of judicial office.

The study has demonstrated that there were expressions of concern about the development of the MCS after 1945; and that, so far as some politicians, senior civil servants and practitioners were concerned, there was a feeling of missed opportunity following enactment of the Courts Act, 1971, which brought under central control the management of most other courts in England and Wales (Skyrme 1994; Part One, chapter 2). However important the role of magistrates and justices' clerks may have been,[1] by the late 1980s there were serious expressions of concern about the framework within which their respective roles and responsibilities were exercised.[2] Development of the summary justice process had become muddled and confused.

Muddle and confusion was compounded by uncertainty at the interface of judicial, legal and administrative decision making, magistrates and justices' clerks being unable to conclude or agree upon who did what; justices' clerks, unable to agree between

themselves just what they were appointed to undertake, whether as lawyer, manager or something of both; and the LCD proving itself unable or unwilling to resolve the issues. The MCS was left exposed and vulnerable.

Part Two, chapter 3, of the study has described how, ripe for reform, the 1980s saw the emergence in the MCS of "new public management" thinking, evidenced by, in particular, fiscal prudence and accountability, masked as cash limiting and Le Vay (Home Office 1989). Le Vay left little room for doubt that the management and administration of magistrates' courts needed to be addressed as a matter of some urgency.[3] Both initiatives undoubtedly contributed towards the notion that the MCS was in need of fresh strategic direction, which could more properly be provided by a managerial hierarchy which found its fulcrum in central government.[4] However, Le Vay was to leave the MCS with a problematic legacy. The MCS was, at least at the managerial level, decisively exposed. The MCS and the Association, rather than attack criticisms of it by Le Vay, attacked his proposed solution of a Next Steps Agency.[5] Unsurprisingly, it was soon assumed by Government the extensive criticism of the MCS by Le Vay was well-founded.[6]

Whilst the solution favoured by Le Vay for the MCS was not ultimately implemented, and his reservations about management of the MCS by the LCD swept aside,[7] it is possible to discern the emergence of Le Vay's solution in the subsequent debates and proposals adopted by Parliament, which resulted in the Police and Magistrates' Courts Act, 1994, the Crime and Disorder Act, 1998, and the Access to Justice Act, 1999.[8] It was Le Vay's report which lay at the heart of the developing managerialist agenda for the MCS and which was prayed in aid by the Parliamentary Secretary to the Lord Chancellor when responding to criticisms of the Police and Magistrates' Courts Bill.[9] As Lacey (1994) has argued cogently, a reading of the Police and Magistrates' Courts Bill suggested that the managerial dynamic was firmly placed in the development of criminal justice policy, and measures which significantly increased the power of the central State, both in the administration of criminal justice and in the breadth of

criminalising norms, were being introduced, many of them packaged in the anodyne discourse of efficiency.

The Police and Magistrates' Courts Act, 1994, effected a significant shift in the management and administration of the MCS (Part Two, chapter 4); and the manner in which it was implemented in one area has been examined (Part Three, chapters 5 and 6). The crucial significance of the legislation, so far as this study is concerned, is the extent to which the legislation, despite the political rhetoric about the preservation of judicial independence,[10] secured a line of accountability for justices' chief executives, justices' clerks, staff of MCCs and MCCs themselves, to the Lord Chancellor and, ultimately, Parliament.[11] Stripped of political rhetoric, the study has sought to demonstrate that the magistracy, dependent upon justices' clerks and the staff of MCCs for legal advice, cannot be confident in the provision of independent legal advice; and that, in so far as justices' clerks and staff to whom they delegate perform judicial functions, they are performed within a framework of accountability which finds its destination in the Lord Chancellor.

The study has not been just, however, an abstract account of the activities of governments and senior civil servants. It is not possible to reach conclusions about the development of the MCS in the last twenty years or so without examining issues at the local level. Accordingly, materials relating to HMCC, not otherwise in the public domain, have been subjected to careful analysis. Part Three, chapters 5 and 6 of this study, reveal the scope of that analysis and have sought to demonstrate the means by which the LCD influenced the development of its "new public management" agenda in one large MCC area, using that area thereafter as an example for other MCCs to follow.

The case study in Part Three, chapters 5 and 6, is significant and important. Building upon years of criticism (Skyrme 1994; Part One, chapter 2), cash limiting and Le Vay left the MCS decisively exposed. The missed opportunities of 1971 were addressed in the Police and Magistrates' Courts Act, 1994. There is no evidence to suggest that,

upon implementation of the 1994 Act, in April, 1995, MCCs rushed to effect any significant or consistent change in their management and administration. Such evidence as there is, for example, in East and West Sussex (Part Two, chapter 4), suggests MCCs had adopted different approaches to implementation, no doubt reflecting Government's insistence that it was not intending to manage the MCS at the local level (Part Two, chapter 4). However, the case study reveals that, following the activity of the Director, Magistrates' Courts Group, LCD, and its chairman, HMCC was influenced to effect change to its managerial hierarchy, by declaring redundant two justices' clerks, and creating a post of a single justices' clerk for its area. Upon agreement to HMCCs proposals, Government quickly announced the proposals were consistent with the way in which the national framework for the MCS was being developed. As is clear from the study (Part Three, chapter 6), until Government's announcement, the MCS appeared to be wholly unaware of its intentions.

It remains a matter of conjecture whether decisions taken by the incoming Labour Government reflected its considered view about the development of the MCS; or whether the determination of senior civil servants in the Home Office and the LCD to see "new public management" principles implemented across the criminal justice process were merely rubber stamped. The evidence in this study suggests that Le Vay's report defined the 1980s for the MCS; while Narey's report set the agenda for the 1990s. The senior civil servant led agenda, supplemented by the opinions of the Director, Magistrates' Courts Group, LCD (which, in turn, found resonance in the opinions of the Chief Inspector, HMMCSI), was entirely consistent with "new public management" principles which had emerged over the preceding years. It is difficult not to conclude that it was almost immaterial which Government was in power.

Not satisfied with central control of the management and administration of magistrates' courts, Part Four, chapter 7, of the study reveals the extent to which those promoting the "new public management" agenda crowned their achievement in the Police and Magistrates' Courts Act, 1994, bringing under central control the independent exercise of judicial office in the summary justice process.[12] By overtly

describing many of the procedural justice rules in the summary justice process as administrative, judicial decisions and judicial decision makers were subjected to lines of accountability and could be managed.[13]

Lest there was any room for argument about issues related to lines of accountability and management, the Access to Justice Act, 1999, provided that, on amalgamation of the metropolitan and provincial magistrates' benches, the emerging District Judges (Magistrates' Court) were to be accountable to the Senior District Judge (Chief Magistrate) and his/her deputy, who were expected to support, guide and advise District Judges (Magistrates' Court), whether that support, guidance and advice was requested, or not.[14]

Fiscal prudence aside, the accountability of judicial decision makers has loomed large in this study, and some final comments about it are necessary.

Accountability and Judicial Independence

In re-formulating one of the key issues at the heart of this study (and discussed in Part Two, Chapter 3), Oliver and Drewry posed what they described as an extreme and democratically uncomfortable formulation of the core question, as to whether an institution that was constitutionally "independent" could logically be "accountable" to anyone, apart from itself (1998, p.34-35; Part Two, Chapter 3).

This key issue begs a number of questions in the MCS. For example, is the magistracy independent ? If not, is the magistracy accountable, and, if so, to what extent and to whom ? Do justices' clerks perform judicial functions, and, if so, what ? If justices' clerks perform judicial functions, do they enjoy independence in their performance, or are they accountable for the performance of those judicial functions, and, if so, to what extent and to whom ? Do justices' clerks enjoy independence in the provision of legal advice to the magistracy, or are they accountable for the provision of legal advice to the magistracy, whether in individual cases or otherwise, and, if so,

to what extent and to whom ? Do the staff of a MCC employed to assist a justices' clerk, to whom he/she may delegate judicial and legal functions, enjoy independence in the performance of these functions, or are they accountable for the performance of those functions, in an individual case or otherwise, and, if so, to whom ? These issues have been addressed throughout the study, with uncomfortable results.

Upon implementation of the Police and Magistrates' Courts Act, 1994, there was no doubt that, in the minds of senior civil servants at the LCD, justices' clerks and members of staff of a MCC to whom they might delegate their judicial functions, when making judicial decisions or giving legal advice, might only act independently and, in this sense, free of lines of accountability to their justices' chief executive and MCC, in individual cases. Accordingly, and as if to emphasise the dangers alluded to by Earl Russell (Part Two, chapter 4), there was scope for a MCC and those to whom it was accountable, the LCD, to direct justices' clerks and those members of staff of a MCC to whom they might delegate their functions, more generally. While s.89 of the Access to Justice Act, 1999, has sought to address this issue by deleting references to independence in individual cases, Narey (Home Office 1997), by labelling a number of the judicial functions performed by single magistrates and justices' clerks as administrative, has secured their performance within a hierarchy of lines of accountability by another route, and hence their management.

It is of note that s.89 of the Access to Justice Act, 1999, does not preclude the MCC, in its capacity as employer, from providing training and guidance to its staff in these crucial areas. Furthermore, the White Paper which preceded the Access to Justice Act, 1999 (Home Office 1998), proposed the transfer of a raft of functions formerly undertaken by justices' clerks, some embracing legal components in, for example, the collection and enforcement of monetary penalties and provisions relating to liquor, betting and gaming licensing, to justices' chief executives. The rationale of the proposals, which found expression in the Access to Justice Act, 1999, was that the functions were administrative and their transfer would clarify the distinction between legal and administrative tasks (Home Office 1998, paragraph 5.33). The argument

throughout this study has been that such changes merely obscure distinctions between judicial, legal and administrative functions, thereby facilitating their management by, ultimately, the executive.

It is pertinent to question whether that is how LCD perceives accountability, or whether, as with Oliver and Drewry (1998, p.10), it perceives issues related to accountability and responsibility as more diffuse. For the manager :-

> "Accountability is any means of ensuring that the person who is supposed to do a task actually performs it and does so correctly ...".[15]

There are various means by which managers secure accountability, including inspection; systems of reporting by a subordinate to a manager; systems of reporting through third parties (for example, quality control inspection); or, for example, accountability through customers who may report poor performance. This latter form of accountability has particular resonance for the judicial process, because it implies that one means by which accountability can be secured is for a disappointed customer, or, in the justice process, a litigant, to complain, or appeal, to a higher authority, or court.[16]

It is not the argument of this study that judicial decision makers should enjoy complete autonomy within the framework of the judicial process. As has been noted, following Galligan,[17] it is conceded that principled decision making can be secured through systems of accountability. Whilst there is force in Ashworth's argument that, in a democratic society, issues of public policy should be decided by the legislature (1994, p.43; op. cit. Part Two, Chapter 3), his suggestion that Parliament does, in effect, delegate, for example, the development of sentencing policy to the courts (1992), is capable of sowing the seed of confusion between the development of policy and the dispensation of justice according to law. If Ashworth is right, Parliament could, whenever it chose to do so, establish tightly proscribed sentencing principles, rather than parameters, of its own, opening up the scope for interference in individual cases :

a notion not so far removed from the way in which governments have proceeded with criminal justice legislation in the 1990s, and the LCD has interpreted it. [18] That is not to deny any general principle of delegation for, as Macmillan[19] has pointed out, the State does delegate to the judiciary the task of dispensing justice in accordance with the law of the land. The distinction, though fine, is important. Such a suggestion, once conceded, opens up the judicial process to political interference in particular as well as more general cases.

Bingham (1996) acknowledges that, nevertheless, along with Ashworth (1992), judicial independence not only does not, but should not, imply autonomy and that there are other constitutional principles besides judicial independence, which include the right of the legislature to decide how public money is to be spent, that must be recognised and respected - surely the point that Macmillan was making.

Importantly, however, as noted in Rutherford (1993),[20] not all practitioners would have, in any event, conceded Ashworth's notion that it was possible to exercise an advisory role, let alone a judicial role, limited to the individual case. The very nature of advice to be given, and of judicial decision to be taken, requires the distillation :-

> "... from the general background of *sentencing law and practice* those issues that relate to the decision which is about to be made. Things need to be opened up ...".[21]

However, by its insistence in, for example, the Police and Magistrates' Courts Act, 1994, that judicial decision makers retained independence in individual cases only, governments appeared to have created, for some practitioners at least, the illusion of an independent judicial process.

The illusion was exposed not only by Rutherford's interview with a justices' clerk (1993, at p.101), and lines of accountability for the performance of judicial functions at the summary justice level enacted in the Police and Magistrates' Courts Act, 1994,

but by the need of Government to rectify the matter five years later in s.89 of the Access to Justice Act, 1999, by deleting all references to the individual case, a change not heralded in its White Paper (Home Office 1998).

There is a need for certainty in the development of a constitutional framework of accountability for the judiciary to Parliament, in order that, for example, in a liberal democracy, liberally democratic controls can be maintained. The issue at the core of this study is whether such a framework of accountability has been imposed by Parliament upon the MCS, without sufficient scrutiny, so as to compromise the fine checks and balances that exist in the judicial process to ensure the substantive law is properly applied; and placed in the hands of Government and its executive tools of control which can be fashioned to influence most, if not all, judicial decisions in, in particular, the summary justice process.

Clarification of these issues in the MCS has not been easy, primarily, because of muddle and confusion at the heart of LCD, where some key senior civil servants have settled for asserting that independence of judgement in individual cases does not preclude notions of accountability.[22] Such an approach exposes the question, but does not address it. Importantly, s.89 of the Access to Justice Act, 1999, whilst not derogating from a justices' clerk's general accountability to an employing MCC, has nevertheless attempted to address the independent performance by them of the judicial functions of a single magistrate and the provision of legal advice, by deleting references to "individual cases". However, by labelling many of the judicial functions performed by single magistrates and justices' clerks as administrative, thereby securing their management, Narey has rendered much of what might have been achieved otiose. The Access to Justice Act, 1999, is continuing the practice. Le Vay, Narey and the Director, Magistrates' Courts Group, LCD, leave little room for doubt that the managerialist agenda, in their hands, was intended to wrest control of procedural justice from the judiciary.

The study has also noted that in addressing issues of accountability, some cognisance must be taken of the manner of appointment of members of the judiciary. Aside from historical evolution, this study has unearthed no distinctive rationale for distinguishing the manner of judicial appointment of, for example, judges of the High Court and Crown Court and the magistracy.[23]

Accountability for dispensing justice

The observations of a former Lord Chancellor, in a lecture of 6th March, 1991, that the function of the judiciary is to decide cases, free from any influence, have already been noted[24]. Macmillan considers that the State has delegated to the judiciary the task of dispensing justice in accordance with the law of the land and, so far as he is concerned, the judiciary is, presumably, accountable for that task.[25] The notion of dispensing justice, however, causes difficulty.

The rules of procedural justice have evolved over many years to ensure those entrusted with the performance of judicial functions have the tools with which to ensure the substantive law is properly applied.[26] Many of these rules of procedural justice have been evolved by the courts,[27] and they are part of the common law of England and Wales.[28] Acknowledging the weight of argument in favour of some framework of accountability for the judiciary to Parliament, this study has exposed the extent to which governments have sought to influence the dispensation of justice by tinkering with rules of procedural justice which are central to the notion of justice itself.[29] The most obvious examples of such intrusion are to be found in the Crime and Disorder Act, 1998, where many pre trial procedures designed to protect those alleged to have committed criminal offences have, although formerly confined to decision making by the judiciary, nevertheless been labelled administrative, ensuring the possibility of decision making by administrators, and, by necessary implication, the management of such functions in hierarchical lines of accountability.[30] Much the same can be said for the means by which the Access to Justice Act, 1999, has introduced an hierarchical

line of accountability between a District Judge (Magistrates' Court) and the Senior District Judge (Chief Magistrate).[31]

It is legitimate to question the stage at which, during any criminal process, rules of procedural justice evolved by the courts come into play. It is at that point, at least, that judicial decision makers should be free to dispense justice without influence from any quarter.[32] Whilst there is no English jurisprudence on this point, Article 6 (1) of the ECHR,[33] provides a useful starting point in its provision that :-

> "In the determination of … any criminal charge … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …".

A person is subject to a charge within the meaning of the Article when he is substantially affected by the proceedings taken against him.[34] Lester and Pannick (1999), relying upon European authority arising from the United Kingdom, suggest that a person will be substantially affected by the proceedings taken against him at the date of charge by the police,[35] but in a case where the charge is delayed or subsequent charges are added, it may be the date of a person's initial arrest or the date upon which he becomes aware that immediate consideration is being given to the possibility of a prosecution.[36]

The Article appears to extend only to proceedings by which a charge is finally determined and not to preliminary hearings concerning trial arrangements and matters of procedure.[37] However, this limitation has to be read in the light of the guarantees for which the Article makes provision; and the important decision of the European Court in *Imbrioscia –v- Switzerland (1994) 17 EHRR 441*, which lends considerable weight to the proposition that the Article applies to pre trial proceedings. For example, the right to a fair hearing, in the presence of the accused;[38] all parties to proceedings having a reasonable opportunity of presenting their case to the court under conditions which do not place them at a substantial disadvantage from their

opponent. The right also implies that rules of evidence are fair and that there is freedom from self incrimination;[39] and that a court should give reasons for its judgement.[40]

Provision is made by the Article that, generally, court hearings should be held in public, subject to express restrictions set out in the text of the Article;[41] and the right to public pronouncement of judgement.[42]

Importantly, the Article guarantees a right to a hearing within a reasonable time, to guard against excessive procedural delays and to preclude the possibility of a person charged with a criminal offence remaining too long in a state of uncertainty.[43] What is a reasonable time for the purposes of the Article depends upon the particular circumstances of each case, including the complexity of the factual or legal issues raised by the case; the conduct of the applicant and of the competent administrative and judicial authorities; and what is at stake for the applicant.[44]

In making provision for the right to an independent and impartial tribunal established by law, the ECHR characterizes a tribunal by its judicial function. The tribunal must have jurisdiction to examine all questions of fact and law relevant to the dispute before it;[45] and it must determine matters within its competence on the basis of rules of law.[46]

Impartiality for the purposes of the Article denotes an absence of prejudice or bias. Impartiality is examined on the basis of both a subjective test of the personal conviction of a particular judge in a given case, and an objective test of whether the judge offered guarantees sufficient to exclude legitimate doubt.[47] What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused - the point made by Gauldron J.[48]

The requirement that a tribunal be established by law is intended to ensure that the judicial organisation in a democratic society should not depend upon the discretion of

the executive, but should be regulated by law emanating from Parliament setting out the basic framework concerning the court's organisation.[49] Particular matters of detail may, however, be left to the executive acting by way of delegated legislation and subject to judicial review.[50]

The Article further provides for the presumption of innocence in criminal cases; and specific guarantees of the right to be informed of a charge; adequate time and facilities for the preparation of a defence; the right to legal representation and legal aid; the right to confront prosecution witnesses; and the right to free interpretation.[51]

As is evident from Part Two, chapter 7, dealing with the Crime and Disorder Act, 1998, and the Access to Justice Act, 1999, the British Government has enacted legislation which impinges upon guarantees provided by Article 6 of the ECHR, which, in turn, resonate with the rules of procedural justice evolved by the courts in England and Wales to ensure the substantive law is properly applied.[52]

To address this core issue is perhaps to say no more than that, during the criminal process, a time will come when judicial decisions fall to be made by judicial decision makers and, at that point, the judicial decision maker should be free from any extraneous influence. This study argues that, in the pursuit of its managerialist agenda, governments have consistently eroded the point at which judicial decisions fall to be made, in an attempt to limit the apparent freedom that might otherwise be available to judicial decision makers. By placing preliminary decisions in the hands of administrators, they can be managed and controlled. European jurisprudence suggests that the point at which judicial decision makers first become involved in proceedings is the point at which, following Article 6 of the ECHR, a person is subject to a charge and is summoned, bailed or detained to appear before the judiciary. At that point, it would be for the judiciary to not only deal with all matters thereafter, but also to review the means by which the charge was laid.[53]

Legitimate accountability and political control

So far as the magistracy is concerned, the study has traced, for judicial decisions, a line of accountability through the appellate process. In so far as those appearing before the magistracy could possibly be regarded as customers, with a complaint, such a line of accountability would seem to satisfy Mondy, Sharplin and Flippo's notion of managerial accountability, without more (1988).[54]

The study has, however, noted another line of accountability so far as the magistracy is concerned, in that it is selected for appointment by the Crown on the recommendation of the Lord Chancellor, who acts upon advice provided by his own advisory committees;[55] it is trained according to schemes of instruction approved by the Lord Chancellor;[56] at the local level, training is delivered by either justices' clerks or any other persons appointed by MCCs, but who remain accountable to MCCs in lines of accountability which run to the Lord Chancellor;[57] and, throughout appointment, the magistracy remains subject to reprimand, suspension or dismissal at the whim of the Lord Chancellor.[58]

Justices' clerks, in their judicial and legal decision making retain, under the Police and Magistrates' Courts Act, 1994, as subsequently amended, independence of legal advice and judicial decision.[59] As has been noted, at least one justices' clerk considers it almost impossible to separate out legal advice in individual cases, from legal advice more generally because, for example, in the area of sentencing, it is not possible to understand what sentencing is about unless it is placed within a dynamic overall context.[60] S.89 of the Access to Justice Act, 1999, suggests Government may have heard the point that was being made.

There is evidence to suggest that, as it proceeded to enact legislation in 1994, Government, if it did not fully appreciate, was nevertheless aware of the subtle

distinctions that might exist between the provision of legal advice in individual cases, and more generally. As has emerged, by restricting the independence of justices' clerks and those who assist them to individual cases, (which, depending upon interpretation, could amount to no independence at all,[60] the point Earl Russell was making in the House of Lords[61]), it remained possible to provide management and supervision, and ensure accountability, more generally.

The Government's attempt to address this issue in s.89 of the Access to Justice Act, 1999, has already been exposed: Narey (Home Office 1997), by labelling many of the judicial functions of a single magistrate and justices' clerk as administrative, and the White Paper (Home Office 1998), has secured accountability and management by another route.

Lines of accountability for both the magistracy and justices' clerks have to be considered in the context of the judicial decisions that fall to be made by them. The argument throughout this study has been that acting judicially, and taking judicial decisions, is not necessarily confined to the substantive law, but, more generally, embraces decision making in respect of the rules of procedural justice (for example, Part One, chapter 1). It is in this crucial area, which sometimes lacks the particularity of legislation, that managerialists in governments have sought and exploited opportunities. For example, limitations in the provision of legal aid can be viewed as fiscally prudent and, by reducing the likelihood of legal representation, speed up the criminal process. Skyrme (1994) can be found consistently complaining that the advent of legal aid added significantly to the length and complexity of the criminal process. Nevertheless,[62] there is abundant evidence to suggest that the provision of legal aid not only assists the individual alleged to have committed an offence, but also assists in the proper administration of justice.[63]

By apparently agreeing the re-labelling of a number of what were formerly believed to be judicial matters, as "administrative",[64] governments have over recent years injected further muddle into what are and are not judicial and administrative decisions,

facilitating the management of those decisions; and created further confusion in the roles of judicial decision maker : it is difficult to discern how magistrates, appointed to perform a judicial function, can properly engage in administrative decision making, which can be managed through a hierarchical line which runs through their colleagues serving on MCCs.[65] The preposterous conclusion is that magistrate members of MCCs are capable of managing administrative decisions taken by magistrates which they were never appointed to perform.

There is, however, potential for more insidious development here. If governments or their civil servants are capable of labelling judicial functions as administrative, without Parliamentary criticism, it is but a short step to removing further, core, judicial decisions from the magistracy, ensuring no judicial involvement in such decision making thereafter. Such a development would present, ultimately, a criminal justice process which is capable of management by administrators, up to and including the point at which a trial commences in the court room, enabling governments to determine the process, and the means by which it is implemented and managed, prior thereto and perhaps, thereafter. So far as the magistracy is concerned, appointed by and in a line of accountability which runs to the Lord Chancellor, from the point of trial onwards, it would then be advised by a person employed in lines of accountability which, in turn, run to the Lord Chancellor. In unscrupulous hands, the criminal justice process is demonstrably open to political manipulation and control.

The means by which such a position has been reached bears close examination. This study reveals that a Home Office led report by Le Vay (Part Two, chapter 4) argued that some of the judicial functions of a justices' clerk were performed by clerical grades in the Crown Court, and that such functions needed to be re-defined as administrative (Home Office 1989, paragraph 7.11). The argument was ill defined and the analogies it sought to draw not explained. Nevertheless, eight years later, another Home Office led report by Narey (Home Office 1997, p.28; Part Three, chapter 7) similarly sought to re-define legal and judicial functions as administrative, although, from the introduction to his report, there was never any doubt Narey was intent upon

pursuing a "new public management" agenda, with expedition and value for money at the heart of it. A year later, the Home Office, in its report which preceded the Access to Justice Act, 1999, was pursuing much the same agenda. Concurrently, the Director, Magistrates' Courts Group, LCD, was insisting that justices' clerks did not perform judicial functions (Part One, chapter 1). The jurisprudence, if any, which underpins the opinions of senior civil servants in the Home Office and the LCD has never been disclosed. The issue has not been explored to any extent in Parliamentary debate. The evidence suggests that by insisting over a number of years that many justices' clerks' judicial and legal functions were administrative, senior civil servants have re-defined some important procedural justice safeguards, designed to protect the liberty of the citizen, in order that they can be managed.

The Preservation of Judicial Independence

Lines of accountability now traverse the summary justice process. It is at least arguable whether many of them are necessary.

So far as most members of the judiciary are concerned, they are appointed by and hold their appointment in lines of accountability which run to the Lord Chancellor. The Lord Chancellor, apart from being head of the judiciary, is a member of the Cabinet. Whilst the Government has taken steps to ensure that, so far as it is able, it complies with Article 6 of the ECHR,[66] based upon any analysis, the present constitutional arrangements in the United Kingdom lack clarity and are very far from what Locke and Montesquieu, subsequent generations of constitutional lawyers, and jurists in Australia, would describe as separation of government, legislature and judiciary.[67]

Other than historical accident, it is difficult to discern any principled argument for different methods, terms and conditions of appointment of members of the judiciary; and difficult to sustain any argument for the retention of involvement by the Lord Chancellor in judicial appointments, unless that role is separated from that of government.[68] The establishment of an appointments commission, with all the

paraphernalia which goes with it, including responsibility for recruitment, selection, and discipline thereafter, on consistent terms and conditions of appointment, with direct accountability to Parliament, would encourage a greater feeling of independence of appointment than exists at present.[69]

If the magistracy is to receive independent advice and guidance from its justices' clerks and those who assist them, those performing that advisory role need to do so independently of their employer. A former President of the Society[70] has suggested the necessary degree of independence can be achieved by the appointment of justices' clerks as members of the judiciary, a proposition favoured by a former Lord Chief Justice,[71] and by taking the judicial oaths. Acknowledging the concerns of the magistracy about such a development, bearing in mind judicial functions already undertaken by justices' clerks and those who assist them, arguments against the taking of judicial oaths are difficult to sustain. It requires no great creativity of thought to develop the notion of independent office holders, appointed by, say, a judicial appointments commission, providing independent advice and guidance to the magistracy. A framework of accountability would be provided through the higher courts, professional organisations and any judicial appointments commission. Of course, such appointments would be more difficult to manage by administrators.

Conclusion

Through fiscal crises and disenchantment with the way in which magistrates' courts were managed and administered, and exercised judicial functions, buttressed by the emergence of "new public management", Government carried forward, during the 1980s and 1990s, policies which have significantly compromised the effective independent exercise of judicial office in the summary justice process.

The overall thrust of recent legislation affecting magistrates' courts is, it is argued, free from doubt. Whilst acknowledging that, constitutionally, notions of independence of the judiciary and distinctions between judicial, legal and administrative functions,

remain somewhat fuzzier than might have first been thought possible, significantly muddied by the range of functions performed by justices' clerks and the way in which they are performed, there have nevertheless been established clear lines of accountability.

The study reveals a strong link between "new public management" and change in the MCS. That governments need to save public moneys in order to deliver public services without increasing, to any significant extent, taxation, has been delivered through all public services by adopting "new public management" principles. In the public sector, generally, there have been advantages and disadvantages in that approach. Much the same can be said for the criminal justice agencies. However, so far as the judiciary is concerned, the infusion of "new public management" principles has served to impinge upon and significantly erode the independence of judicial decision makers. The issue emerges at its rawest in the performance of judicial functions by justices' clerks and magistrates. Principles associated with "new public management", introduced into the MCS by, primarily, government officials, have brushed aside any potential conflicts and, through initiatives in the Police and Magistrates' Courts Act, 1994, Crime and Disorder Act, 1998 and Access to Justice Act, 1999, have imposed upon the MCS a managerial framework which has ensured that every part of the MCS, including those responsible for judicial functions, is accountable, through a line of accountability which finds its destination in the Lord Chancellor; and, incidentally, without apparent Parliamentary criticism, have sought to re-define what are and are not judicial functions.

Of particular importance to the study has been the Police and Magistrates' Courts Act, 1994, the Crime and Disorder Act, 1998, and the Access to Justice Act, 1999. The potential of the legislation to adversely impact upon the independence of the magistracy, their justices' clerks, and the judicial process more generally, has been argued throughout. So far as the Police and Magistrates' Courts Act, 1994, is concerned, its potential to adversely impact upon the exercise of independent judicial office was the subject of significant debate during its passage through Parliament by,

in particular, Peers. It was claimed by Government that appropriate action was taken to allay concerns.[72] Evidence, however, reveals otherwise.[73] There can be no doubt that it was the intention of Parliament that MCCs and justices' chief executives were to have responsibility for only the management and administration of the MCS in their respective areas;[74] and that they should not trespass into the judicial decision making process, specific statutory provision being enacted for the protection of legal advice tendered to magistrates in individual cases.[75] Further statutory provision was enacted protecting the performance by justices' clerks of judicial functions, in individual cases.[76] Little or no attention was given to the need to enact protection preventing MCCs and their justices' chief executives from encroaching into the exercise of judicial functions and the provision of legal advice.[77] Nevertheless, MCCs and justices' chief executives were encouraged to consider this wider role.[78] With the performance of judicial functions and the provision of legal advice heavily dependent upon general guidance, the point made by Rutherford's justices' clerk (1993, p.101), subject, always, to the facts of any particular case, such an interpretation of the law, contrary to the spirit of what was intended by Parliament, placed MCCs and justices' chief executives and, more particularly, the LCD, in a strong position to influence the outcome of decisions reached in magistrates' courts. It is difficult to conceive of any situation where legislative provision has been interpreted in a manner quite so obviously contrary and more corrosively to the detriment of the independence of the summary justice process. Read in conjunction with the manner in which the LCD sought to re-organise the MCS, (Part Two and Part Three), it was in a position of some influence.

Despite overwhelming jurisprudential evidence to the contrary, government officials have, since 1989, insisted upon labelling an increasing number of justices' clerks' judicial functions as quasi judicial or administrative, in order that they might be managed : the evidence leads to no other conclusion.[79] Furthermore, by initially leaving in the hands of MCCs and justices' chief executives responsibility for general guidance in respect of judicial and legal matters, save in individual cases, where that general advice is to be applied, Parliament strengthened the ability of MCCs and

justices' chief executives and, ultimately, the LCD, to manage the delivery of judicial functions and the provision of legal advice.[80] Evidence contained within the study reveals that, for all practical purposes, the discrete office of justices' clerk, as the provider of independent, authoritative, experienced, legal advice was rendered, as a result,[81] de facto, redundant. The role, where it is performed at all, is now performed by a justices' chief executive, invested with all other powers, duties and responsibilities of "proper officer of the court" and other legal responsibilities of justices' clerks, under Schedule 13 to the Access to Justice Act, 1999.

Although the broad intention of most of the legislation of the 1980s and 1990s, was to effect financial savings and inject new lines of accountability into the summary justice process, a moment's reflection discloses the lines of accountability which have now emerged. Justices' clerks as employees, are accountable, in almost every respect, to justices' chief executives, through them, to MCCs and, thereon, to the Lord Chancellor and his Department.[82] Furthermore, in the exercise of any judicial or legal functions, justices' clerks are accountable to the Crown Court and/or the High Court of Justice.[83] Following recent initiatives taken by the Society, justices' clerks are also to become accountable to a new Institute.[84] They are, more loosely, accountable to their professions, either the Bar Council or The Law Society.[85] The magistracy, for its part, is accountable in the performance of its judicial functions to the Crown Court and the High Court of Justice.[86] However, the Access to Justice Act, 1999, has injected new lines of accountability, albeit more loosely, to the Senior District Judge (Chief Magistrate), who has, in addition, a liaison role with Government departments and something significantly more than an advisory role in respect of all other District Judges (Magistrates' Court).[87] In addition, the magistracy is subject to less transparent levels of accountability to the LCD.[88] For example, magistrates are recruited, selected and trained according to procedures proscribed by the LCD.[89,90] Lines of accountability now traverse the summary justice process, in respect of justices' clerks, the magistracy and all summary justice judicial decision making, all those lines finding their destination in the LCD.

To compound issues of lines of accountability, "new style" MCCs, created under the Police and Magistrates' Courts Act, 1994, are also accountable to the LCD and subject to inspection by HMMCSI, which is itself accountable to the LCD.[91] In turn, MCCs are employers of all staff in magistrates' courts, including justices' chief executives and justices' clerks, in lines of accountability which reach into every magistrates' court in England and Wales.[92] Although Parliament intended that MCCs and justices' chief executives should have no power to intrude into the judicial process, the legislation, as subsequently interpreted, enabled them to intrude to the extent of providing general policy guidance to all staff who discharged judicial functions or advised the magistracy.[93] (Challenging that interpretation of the law would have posed discrete difficulties for the magistracy and justices' clerks, not least in resolving who would proceed against whom, and its implications, aside from funding issues).[94] Those lines of accountability are strengthened by the insistence (without Parliamentary or any other criticism) of senior civil servants in the Home Office and LCD that judicial functions performed by justices' clerks and the staff to whom such functions are delegated should be more properly labelled quasi judicial or administrative.[95] The "new public management" "driver" of accountability has been delivered to such an extent in the summary justice process that it is now, taken together with Government's notion of "joined up Government", collaboration and partnership, difficult to fathom whether there is room for any independent thinking anywhere in the process, never mind any time for the delivery of the public service the process is designed to support.

Ashworth (1992) has suggested that :-

> "... so far as sentencing matters in England are concerned, the concept of judicial independence had, until recently, been given too wide a signification and too much deference. The constitutional issues have never been clearly or authoritatively settled ...".

As is noted herein (and in Part One, chapter 1, and Part Two, chapter 3), Ashworth, in conceding a minimalist conception of judicial independence, nevertheless argues that the overall responsibility for, for example, sentencing, as a sphere of public and social policy, is that of the legislature which has, over the last hundred years or so, been largely delegated to the judiciary, and that what Parliament has delegated it can take back. He points to the Criminal Justice Act, 1991, as evidence for suggesting Parliament has done just that and, following the White Paper (Home Office 1990), there was an argument for suggesting the legislature and the courts should work in partnership in developing, for example, sentencing policy. Part One, chapter 1, p. 17, of this study have exposed weaknesses in that argument; and, in any event, there is no evidence revealed by this study to suggest Parliament ever intended to impose upon courts of summary jurisdiction lines of accountability that would enable any government, should it so wish, to intrude into the judicial decision making process to whatever extent it wished.

Writing in the Spring of 2001, Slapper wrote that :-

> "... during the last three years, there have been significant moves towards a national and centralised criminal justice system ... In short, the magistrates' courts and Crown Prosecution Service organisational districts have been made the same as those of the 42 police forces of England and Wales ... with this latest law (*The Criminal Justice and Court Services Act, 2000)* the probation service, which had strong local traditions, becomes both a national service and directly accountable to a Cabinet Minister. Historically, the police, the magistrates' courts and the probation service were all local institutions with local accountability. There was a marked constitutional resistance to running things any other way lest the State used the apparatus to exercise unfair control over the population. States where the government controlled the criminal justice system (like the old USSR or China) were regarded as following an undesirable practice". [96]

Slapper suggests that, undoubtedly, in England and Wales there is still a judiciary independent from the Government, but that recent changes permitting central government greater control over the criminal justice system might well be seen by some as moving in an alarming direction.

This study argues that the last twenty years or so have seen the erosion of a judiciary independent of Government; and that, through the various mechanisms described is, at the summary justice level, not merely accountable to Government and its executive arm, but subject to its control. The scope for the Government to influence the courts of summary jurisdiction now looms large indeed, and is particularly worrying when governments have issues of law and order high on their political agenda.

Writing of her concerns about the implementation of the Crime and Disorder Act, 1998, Darbyshire (1999) observed that Parliament neither knew or cared anything much about magistrates' courts. She may of course be right, so far as Parliament is concerned. It is, however, deeply worrying that, having regard to the extensive Parliamentary debate about the Police and Magistrates' Courts Bill, few in Government at least, could not have been aware of the acute issues that were emerging around the independence of the judiciary at the summary justice level. More worrying still, was the ease with which such concerns were to be swept aside.[97] That further legislation should ensue, compromising not just the administration of the summary justice process, but those responsible for the delivery of the judicial product, without significant further public debate, is deeply depressing, but reflects, in part at least, the different agenda the various consultative organisations were pursuing. In the result, it seems that all criminal justice agencies, including the MCS, now share the same strategic objectives, and prosecutions of alleged offenders can be brought in that knowledge. In the magistrates' courts, an alleged offender will find him/herself probably brought, in the first instance, before a justices' clerk or member of staff of a MCC performing judicial functions the LCD has described as administrative (there seems to be little doubt that if a MCC determined that in his pre trial responsibilities the justices' clerk did not perform judicial functions, and that, accordingly, he or she

could be managed in their performance, it would attract the support of LCD); prosecuted before a District Judge (Magistrates' Court) appointed by the Crown on the recommendation of the Lord Chancellor, accountable to a Senior District Judge (Chief Magistrate), and dependent upon the LCD for progression;[98] or three magistrates, selected, appointed at pleasure and trained under schemes approved by the Lord Chancellor, and advised by a justices' clerk or court clerk whose line of accountability runs to the Lord Chancellor and his Department.[99]

It is difficult not to conclude that a corrosive element has entered the courts of summary jurisdiction to the extent that citizens can no longer look with confidence to that forum for the independent adjudication of any justiciable issue.

NOTES

1. Skyrme T. Op. cit. Part One, chapter 2 of this study at pages 2-24.
2. Home Office (1989) *Report of a Scrutiny.* Op. cit.
3. Ibid.
4. Ibid.
5. Ibid.
6. To be found in, for example, Home Office (1992) *A New Framework for Local Justice.* Op. cit.
7. Home Office (1989) *Report of a Scrutiny.* Op. cit. at paragraph 8.5.
8. The Scrutiny's preferred way forward, with a national director for the MCS, and chief executives in the areas, is replicated, to some extent at least, in the organisation of the MCS after implementation of the Police and Magistrates' Courts Act, 1994, into larger areas, headed by a justices' chief executive, accountable to, eventually, the Lord Chancellor and his Department.
9. For example, correspondence passing between J.M. Taylor MP, Parliamentary Secretary, Lord Chancellor's Department, and Sir Patrick McNair-Wilson MP, of 28/1/94 and 17/2/94.
10. Ibid.
11. Police and Magistrates' Courts Act, 1994.
12. Through the Crime and Disorder Act, 1998, and the Access to Justice Act, 1999.
13. Op. cit.
14. Op. cit.
15. Wayne Mondy R., Sharplin A. and Flippo E.B. (1988) *Management Concepts and Practices.* Allyn and Bacon Inc. 4th edition, at pages 249-250.
16. Ibid.
17. Op. cit. Part Two, chapter 3; Galligan D.J. (1987) Regulating Pre Trial Decisions. *Criminal Law and Criminal Justice*. I. Dennis (ed).

18. Ashworth A. (1992) *Sentencing and Criminal Justice*. Weidenfeld and Nicholson. London, at pages 43-36, 53-54.

19. Op. cit., Part One, chapter 1.

20. Rutherford A. (1993) *Criminal Justice and the Pursuit of Decency*. Oxford, at pages 100-101.

21. Ibid, at page 101.

22. Interview. Melling R. Op. cit.

23. As has been noted, the appointment of High Court judges is buttressed by the Act of Settlement, 1700, securing their tenure, subject to an address by both Houses of Parliament; while magistrates are appointed to hold office "at pleasure", by the Crown on the recommendation of the Lord Chancellor, op. cit., Part One, chapter 1.

24. Purchas F. What is happening to judicial independence? *New Law Journal. 30/9/94* at 1306, 1308, op. cit., Part One, chapter 1.

25. Op. cit., Part One, chapter 1.

26. Op. cit., Part One, chapter 1.

27. For example, interest and bias, audi alteram partem, due deliberation.

28. Op. cit., Part One, chapter 1. (And see, more generally, Halsbury's Laws of England (1973) Fourth Edition. London).

29. For example, provisions found in the Crime and Disorder Act, 1998, discussed herein, Part Four, chapter 7, which, while designed to expedite the criminal justice process, label many judicial functions as administrative, enabling their performance by administrators.

30. Op. cit., Part Four, chapter 7.

31. Ibid.

32. Following Gauldron J., in *Wilson -v- Minister for Aboriginal Torres Strait Islander Affairs, 70 ALJR 743*; and Denning A. (op. cit., Part One, chapter 1).

33. European Convention for The Protection of Human Rights and Fundamental Freedoms (Rome, 1950).

34. *Deweer -v- Belgium (1980) 2 EHRR 439 at para 46; Eckle -v- Federal Republic of Germany (1982) 5 EHRR 1.*

35. *Ewing -v- United Kingdom (1986) 10 EHRR 141.*

36. *X -v- United Kingdom 14 DR 26 (1978).*

37. *X -v- United Kingdom (1982) 5 EHRR 273.*

38. *Ekbatani -v- Sweeden (1988) 13 EHRR 504.*

39. *Funke -v- France (1993) 16 EHRR 297.*

40. *Hiro Balani -v- Spain (1995) 19 EHRR 566.*

41. *Pretto -v- Italy (1984) 6EHRR 182.*

42. *Ibid.*

43. *Stogmuller -v- Austria (1969) 1 EHRR 155.*

44. *Katte Klitsche de la Grange –v- Italy (1994) 19 EHRR 368; Zimmerman and Steiner -v- Switzerland (1983) 6 EHRR 17.*

45. *Terra Woningen -v- Netherlands (1996) 24 EHRR.*

46. *Belios -v- Switzerland (1988) 10 EHRR 466.*

47. *Piersack -v- Belgium (1982) 5 EHRR 169.*

48. *Fey -v- Austria (1993) 16 EHRR 387;* and op. cit., Part One, chapter 1.

49. *Zand -v- Austria 15 DR 70.*

50. *Campbell and Fell -v- United Kingdom (1984) 7 EHRR 165.*

51. Article 6 (1) of the European Convention for The Protection of Human Rights and Fundamental Freedoms (Rome, 1950).

52. Op. cit., Part One, chapter 1.

53. Op. cit., Article 6 (1) of the European Convention for The Protection of Human Rights and Fundamental Freedoms (Rome, 1950).

54. Op. cit.

55. Op. cit., Part One, chapter 1.

56. Ibid.

57. Part Two, chapter 4; Police and Magistrates' Courts Act, 1994.

58. Skyrme T. (1983) Op. cit., Part One, chapter 1.

59. Police and Magistrates' Courts Act, 1994, as amended by section 89 of the Access to Justice Act, 1999.

60. Rutherford A. (1992) Op. cit.

61. HL Deb 24/3/94, Col 774.

62. Op. cit., Part One, chapter 1.

63. Macmillan (1938) op. cit., Part One, chapter 1.

64. Home Office (1997) *Review of Delay in the Criminal Justice System: A Report.* London. HMSO; and Crime and Disorder Act, 1998.

65. Under the area wide management arrangements set out in the Police and Magistrates' Courts Act, 1994, discussed in Part Two, chapter 4.

66. Op. cit., with its provision for the right to have justiciable issues determined by an independent and impartial tribunal established by law. Following Starrs -v- Procurator Fiscal, Linlithgow, The Times, 17/11/99, the Lord Chancellor amended the terms of appointment of all part-time holders of judicial appointments, in an attempt to secure independence.

67. Op. cit., Part One, chapter 1.

68. It was concern about such issues, but particularly the decision in Starrs -v- Procurator Fiscal, Linlithgow, The Times, 17/11/99, that prompted a Report on the Scrutiny of Judicial Appointments and Queen's Counsel Selection Procedures, by Sir Leonard Peach, in December, 1999.

69. Ibid.

70. Kevin McCormac, formerly justices' chief executive, West Sussex.

71. Parker LCJ. Op. cit., Part One, chapter 1.

72. Correspondence passing between J.M. Taylor MP, Parliamentary Secretary, Lord Chancellor's Department, and Sir Patrick McNair-Wilson MP, 28/1/94 and 17/2/94.

73. Op. cit.

74. Op. cit., Part Two, chapter 4.

75. Section 45 (4) and (5) of the Justices' of the Peace Act, 1997.

76. Now to be found in section 89 of the Access to Justice Act, 1999.

77. HL Deb 24/3/94, Col 774.

78. Op. cit., Part Two, chapter 4.

79. Home Office (1997) *Review of Delay in the Criminal Justice System: A Report.* London. HMSO; and the Crime and Disorder Act, 1998.

80. It was only upon implementation of section 89 of the Access to Justice Act, 1999, some five years after implementation of the Police and Magistrates' Courts Act, 1994, that the position changed, at least, on the face of the statute.

81. The practical effect of the Police and Magistrates' Courts Act, 1994; the Crime and Disorder Act, 1998; and the Access to Justice Act, 1999. Consider also the opinions of Clarke K.C. and Wilcox P., op. cit.

82. The practical effect of the Police and Magistrates' Courts Act, 1994.

83. Magistrates' Courts Act, 1980, and, more generally, judicial review.

84. Justices' Clerk's Society's Strategic Plan 1999/2000.

85. Which retain disciplinary powers for professional misconduct.

86. Sections 108 and 111, Magistrates' Courts Act, 1980, and, more generally, judicial review.

87. Access to Justice Act, 1999, Op. cit., Part Four, chapter 8.

88. Op. cit., Part One, chapter 2.

89. Ibid.

90. Op. cit., Part Two, chapter 4; Police and Magistrates' Courts Act, 1994.

91. Ibid.

92. Ibid.

93. Op. cit.

94. Bearing in mind lines of accountability and responsibility for funding, the Lord Chancellor's Department could have been perceived as proceeding against itself.

95. Home Office (1997) *Review of Delay in the Criminal Justice System: A Report.* London. HMSO; and the Crime and Disorder Act, 1998.

96. Slapper G. (2001) *Student Law Review.* Spring 2001. Vol. 32, at page 33.

97. The private papers of the justices' clerk for Southampton and the New Forest, retained in box 1, and deposited in an archive in the Institute of Criminal Justice, University of Southampton, suggests MP's in the Southampton and New Forest area took no action other than to pass on comments made by the Parliamentary Secretary, Lord Chancellor's Department.

98. Op. cit., Part Four, chapter 7.

99. Op. cit., Part One, chapter 2; and Part Two, chapter 4.

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THE MAGISTRATES' ASSOCIATION, Justices' Clerks' Society, the Central Council of Magistrates' Courts Committees, the Association of Magisterial Officers and the Standing Conference of Clerks to Magistrates' Courts Committees. In responding, the various representative bodies of the Magistrates' Courts Service presented an alternative framework for local justice which would see Government's proposals implemented at little or no cost, but in a more moderate way which would not impact at all on the constitutional independence of the judiciary.

The Magistrates' Courts Service Training Review and Competencies for Court Clerks - circulated by the Lord Chancellor's Department

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