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Judged by peers? The diversity of lay magistrates in England and Wales

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Abstract

The criminal justice system of England and Wales relies heavily on members of the public – ‘lay participants’ – in administering justice. The roots of lay participation lie in the notion of participatory democracy, specifically ‘judgement by one’s peers’ (Sanders, 2002; Crawford, 2004; Gibson and Cavadino, 2008). The use of juries and lay magistrates offers an inclusive form of justice involving people without legal education passing judgement on fellow members of society. Any member of the public aged between 18 and 65 can apply to become a lay magistrate, and as Crawford (2004) has highlighted, it is important that lay participants in criminal justice adequately reflect the communities which they serve. This paper questions the representativeness of lay magistrates in their locality, through analysing existing evidence on the lay magistracy’s composition and linking that to trends in the recruitment of magistrates. The paper argues that lay magistrates are in some ways less diverse than they were at the turn of the century; being older, less representative of England and Wales’ BAME population and possibly more middle class.

Introduction

Should justice be by the people and for the people? The criminal justice system of England and Wales relies heavily on members of the public – ‘lay participants’ – in administering justice. This takes the form of lay magistrates in the magistrates’ court and juries in the Crown Court. The roots of lay participation lie in the notion of participatory democracy, specifically ‘judgement by one’s peers’ (Sanders, 2002; Crawford, 2004; Gibson and Cavadino, 2008); the use of juries and lay magistrates offers an inclusive form of justice involving people without legal education in passing judgement on fellow members of society.

As Crawford (2004: 108) highlights, it is important that lay participants in criminal justice adequately reflect the communities which they serve:

If lay involvement is intended to reflect the parties “peers” or the general citizenry, then this accords a significant import to their representative composition. Such questions of representation also affect professionals who may be seen to be out of step with ordinary people because they are unrepresentative or whose legitimacy is undermined by their lack of representativeness. However, representation has a slightly different order of importance for lay people, whose primary justification for involvement may be their representativeness, as against professionals whose primary justification lies in their accountability and expertise.

Juries are randomly selected from those on the electoral register so, although one jury may not represent the local community, jurors as a whole do.¹ Any member of the public aged between 18 and 65 can apply to become a lay magistrate – but how representative are lay magistrates of their local population? Civil liberties charity Liberty (2002: 6) stated that representativeness is fundamental to the purpose of the magistracy: ‘if magistrates are genuinely to bring ‘common-sense values representative of society’ to their role, it is essential that they be as genuinely representative as possible.’ This paper will analyse existing evidence on the composition of the lay magistracy and link that composition to trends in the recruitment of magistrates.

The magistracy in the twentieth century and under New Labour

In Victorian times, magistrates were usually local gentry and had to own land to be appointed. But, in 1906, the Liberal government abolished the property qualification for county magistrates. A few years later the advisory committee system was set up for the appointment of magistrates, and an equal number of Liberal and Conservative members

¹ For an in-depth discussion of composition and diversity among the jury system see Darbyshire (2001); Thomas with Balmer (2007); Thomas (2008).

were represented on these committees. The Sex Disqualification (Removal) Act 1919 allowed women to become magistrates for the first time.²

Significant signs of disquiet about diversity

Lord Hailsham told the Magistrates' Association in 1984 "there is, I verily believe, no people's court...which is as representative of the responsible elements of society as the lay bench of England and Wales"³, but many disagreed with him. A year later Gifford (1985, cited in Darbyshire, 1997a) described lay justices as 'white, middle class, middle-aged people sitting in judgement over young, working class and often black defendants', and in 1995 Geoffrey Robertson referred to them as "ladies and gentlemen bountiful", politically unbalanced and unrepresentative of ethnic minorities and women.⁴

Data on the composition of the magistracy before 1997 are poor. Most information comes from an inquiry done by the Home Affairs Committee, chaired by Chris Mullin, 1995–96.⁵ This suggested that, of 875 new magistrates, only 22 per cent were under 40, and that in the 1990s only 4.4 per cent of annual appointees were from ethnic minorities. In those days, all applicants had to declare their political affiliation. In 1994–95, 27 per cent of appointees were Labour voters, and 41 per cent Conservative. The appointment of those over 60 was accepted (as it is today) and 'benches where the average age is over 55 are not uncommon' (Darbyshire, 1997a: 865).

A drive to increase diversity

Throughout the 1990s there were voices calling for the magistracy to become more diverse in age, ethnicity and other ways.⁶ The Home Affairs Select Committee⁷ investigated whether recruitment was in some areas biased in favour of freemasons⁸, while the Magistrates' Association called for legislative change to help create a more 'balanced' bench: outlawing discrimination against magistrates in employment, updating the loss of earning and repealing the loophole in the Employment Protection Act 1996 which allowed employers to avoid releasing employees to sit as magistrates.

² For a full exploration of the history of the magistracy see Hostettler (2012).

³ 1984 AGM of the Magistrates' Association, cited in Gifford, 1985, p.36; further cited in in Darbyshire (1997a).

⁴ House of Commons Home Affairs Committee third report 1995–96 Jap II, cited in Darbyshire (1997a).

⁵ Darbyshire (1997a) highlighted the key points of the inquiry in detail in her letter to the Lord Chancellor, published in the Criminal Law Review.

⁶ Others commentators, such as Darbyshire (1997b), argued that the magistracy had faced neglect from all angles and from many spheres, including successive governments, academia, the media and the public. See also Liberty (2002).

⁷ Home Affairs Committee Third Report, Session 1996–1997, *Freemasonry in the Police and the Judiciary*, Vol. II (1997).

⁸ For example, Darbyshire (1997a) notes that evidence to the Home Affairs Committee showed that 35 of the 96 male justices in Portsmouth in 1979 were freemasons.

When New Labour were elected into government they were interested in whole-scale reform of the criminal justice system, and the magistracy was in their sights. Reports commissioned early in their administration called for a more diverse magistracy. As part of the response to the Stephen Lawrence inquiry, the Lord Chancellor's Department (LCD) set up a working group which, among other things, looked at ways of making the magistracy more diverse in its ethnicity.⁹ The group reported to the Lord Chancellor in 2000 and recommended that a national recruitment programme would help attract applicants from under-represented groups.^{10,11} This initial work was closely followed by two key reports: *Criminal Justice: the Way Ahead* (Home Office, 2001) and Lord Justice Auld's (2001) *Review of the Criminal Courts in England and Wales*. Both reports used Morgan and Russell's (2000) government-commissioned review of the skills and make-up of lay magistrates and district judges to inform their findings. Morgan and Russell explained that the LCD records showed that 4 per cent of magistrates nationally were under 40, whilst 32 per cent were in their 60s. The ethnic diversity of the bench was particularly difficult to measure since 11 per cent were recorded as unknown, although they were assumed to be mainly white. On this basis, it was concluded that 'the composition of the lay magistracy nationally is now approaching ethnic representativeness, that is two per cent black, two per cent of Indian sub-continent or Asian origin and one per cent other' (ibid.: 14). Morgan and Russell also carried out a survey of the occupations of those sitting on eight benches; 40 per cent were retired and 69 per cent gave as their current or former occupation a professional or managerial position.

Drawing on these findings, *Criminal Justice: the Way Ahead* highlighted that while it was becoming more representative of Britain's ethnic communities, the magistracy was still insufficiently ethnically diverse in some areas and that there was an imbalance in the age range. Meanwhile Lord Justice Auld had been asked to judge whether the lay magistracy was fit for the twenty-first century justice system. He concluded that the lay magistracy should continue, but he was critical of their lack of diversity: 'the magistracy is not a true reflection of the population nationally or of communities locally', and 'urgent steps must be taken to remove its largely unrepresentative nature' (Auld, 2001: 119). Auld suggested increasing diversity through:

⁹ In addition to this the Department for Constitutional Affairs (DCA) sponsored a research programme that was designed to improve knowledge of the way the court system affects those from diverse social and ethnic backgrounds. This included research by Vennard et al. (2004) which focused on the experiences of magistrates from ethnic minority backgrounds.

¹⁰ Cf. National Strategy for the Recruitment of Lay Magistrates 2003 http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/magist/recruit/natstrat_magrecruit_full.pdf [accessed 24/03/2014].

¹¹ Liberty (2002) also suggested that an increase in both the number and breadth of selection of lay magistrates was required in order to make them more representative of society.

- reviewing the community relations and educational initiatives of benches with a view to better inform the public of their work and to attract more suitable candidates for appointment;
- supporting the local Advisory Committees by establishing a properly resourced National Recruitment Strategy aimed not only at candidates for the magistracy but also at their employers;
- equipping local Advisory Committees with the information to enable them to submit for consideration for appointment candidates that will produce and maintain benches broadly reflective of the communities they serve, including the establishment and maintenance of national and local databases of information on the make-up of the local community and the composition of the local magistracy;
- instituting a review of the ways in which the role and terms of service of a magistrate might be made more attractive and manageable to a wider range of the community than is presently the case; and persisting with the current search for a substitute for political affiliations as a measure of social balance.

The government took on many of Auld's recommendations including his exhortation to increase diversity.¹² When Lord Falconer became Lord Chancellor in 2003, this was one of the issues he championed, though new policies had already been initiated by Lord Irvine. The LCD predicted a large increase in workload for magistrates and determined that new recruits would be more diverse and recruited in a different way, and so in 2003 they published a *National Strategy for the Recruitment of Lay Magistrates*. The three main objectives were: to recruit and retain magistrates from a diverse spectrum of the population; to raise the profile of the magistracy and dispel generally held misconceptions about its make-up and the entry requirements; and to improve the appointment process. This strategy led to a research programme and to a considerable increase in the budget for recruitment. Research was conducted into the barriers to applying on the part of individuals, employers' attitudes to employees becoming magistrates and the experience of ethnic minority magistrates. The strategy also announced a lowering of the minimum age to be a magistrate from 27 to 18. This became law in 2004. In 2003 the government also ended the requirement for prospective magistrates to declare their political affiliation. Voting intentions had been used as a proxy measure of social class but Lord Falconer (following Lord Justice Auld) said there were better ways of measuring this. The application process now asked candidates to identify themselves in terms of occupational and industrial groupings.

¹² It is worth noting that several academics, including Morgan (2002) expressed concerns about some of Lord Auld's other recommendations, particularly those which may have precipitated a reduced role for lay magistrates.

Research and policy work by the LCD led to a new recruitment strategy which was published in March 2005: the *Magistrates' National Recruitment Strategy* (DCA, 2005). Lord Falconer announced “we need more magistrates. And in recruiting, we have the opportunity to raise the profile of the magistracy and to improve the diversity of the bench”. This strategy outlined some findings from the research about the barriers to recruitment:

- Lack of awareness as to who can apply and how
- A strong sense that applications from members of ethnic minorities would not be looked on favourably
- A perception among younger non-professional applicants that they would not be considered/appointed.

There followed a surge of recruitment activity, including an advertising campaign on buses.

In January 2007 the DCA introduced a recruitment toolkit, the last activity in the huge burst that started in 2000. This toolkit provided guidance on advertising, on targeting under-represented groups and on engaging with local employers. But in February 2007 the 0800 number which had been used for recruitment queries nationally was decommissioned and the decline in recruitment activity (and magistrate numbers) began. In 2007 Jack Straw became Lord Chancellor and magistrate policy was transferred from the DCA (which was replaced by the Ministry of Justice) to the newly established Judicial Office.

It is not clear that the drive to increase diversity 2003–2007 had much effect. Figures from the Judicial Office¹³ show that the proportion of new recruits under 40 did increase in the four years to 2008 but the proportion aged 40–49 decreased. In recent years there has been a significant increase in new recruits over 60. This has raised the average age of new recruits to 51.2 (from 49.2 in 2008–09).

The proportion of magistrates who are white has hardly changed at all, with no significant difference from 2004 to 2013. Trends can be seen in the recruitment of particular black and ethnic minority (BAME) groups, with mixed race increasing as a proportion of new recruits and those of Asian origin decreasing.

It is not clear why the recruitment campaign did not have a bigger impact on diversity and no systematic research has been conducted that could shed light on this. Possible

¹³ Unless otherwise stated, the Judicial Office is the source of all figures in this and the sections following: <http://www.judiciary.gov.uk/?s=MAGISTRATES+IN+POST+> [accessed June 2014].

explanations may be that the communications did not reach the under-represented groups, or that the campaign was not sufficiently motivating.

It is also worth thinking about retention when exploring diversity within the lay magistracy. In a study of the experiences of serving lay magistrates, Vennard et al. (2004) found that 28 per cent of the 128 BAME magistrates interviewed had experienced racist attitudes or behaviour when dealing with fellow magistrates. For example some felt marginalised by white chairmen when conferring in the courtroom or in the retiring room, which could leave them feeling as though their input was not valued. The research also found that BAME magistrates did not progress at the same rate as their white colleagues.

The composition of the magistracy in 2013

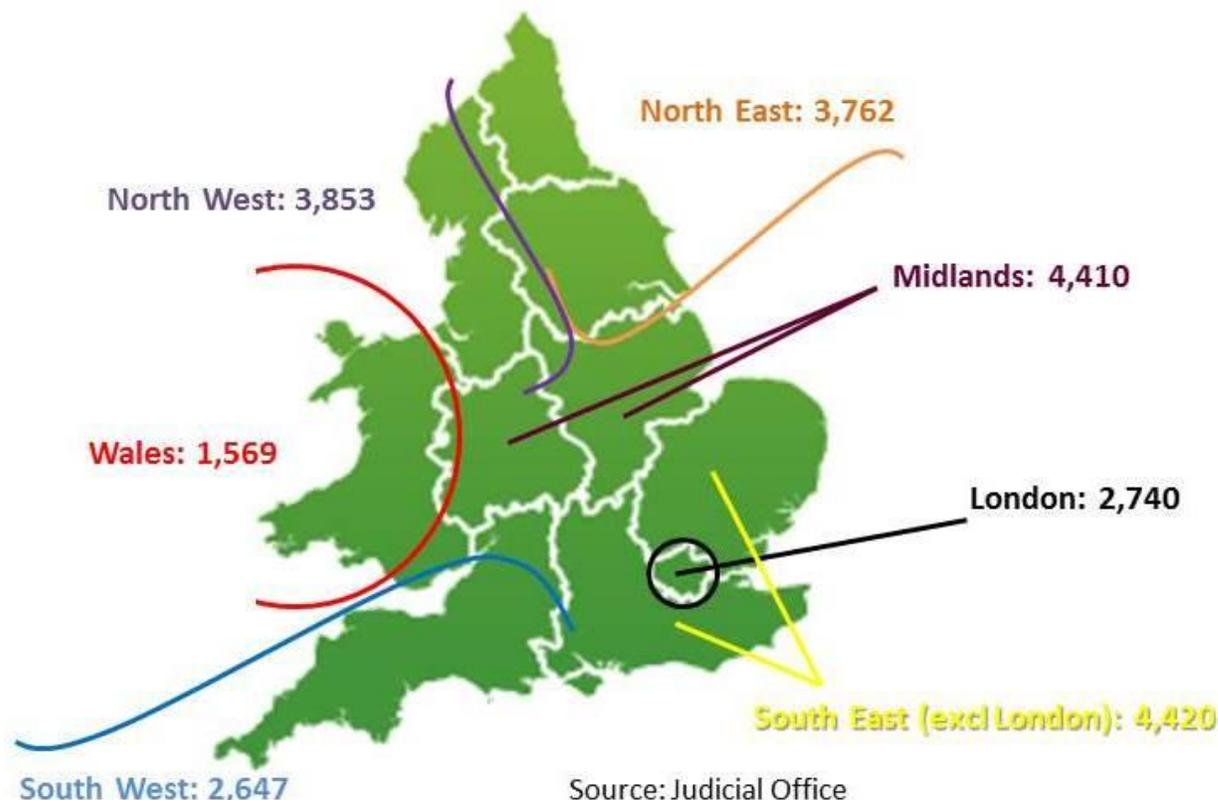
As of 31 March 2013, there are 23,401 lay magistrates, which represents a 22 per cent drop in numbers since 2007 (when there were 29,841).¹⁴ The main reason for the decline in magistrate numbers is the reduction in court work. Crime has decreased, and more offences are being dealt with by diversionary approaches and out of court disposals.¹⁵ This ties in with the current pressure on the government to ensure that the criminal justice system is more efficient and cost effective (Graef, 2012; Faulkner, 2012; Ministry of Justice, 2012). What is not clear is whether an increasing proportion of magistrates' court work is being carried out by district judges. District judge numbers have not declined in the same period¹⁶, so this seems possible. Interestingly, Morgan (2002: 318) voiced concern about increasing the use of district judges, partially out of fear that it would lead to lay magistrates being given less interesting and challenging cases: "if lay magistrates perceive their role to be marginalized, it is doubtful whether their continued and widened recruitment can be assured."

¹⁴ In addition to this, there are also approximately 140 district judges (and 170 deputy district judges) in England and Wales, all of whom are paid members of the judiciary and sit alone rather than in panels of three. See <http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/magistrates-court> [accessed 02/04/2014].

¹⁵ See Morgan (2002) Godfrey (2012) and Policy Exchange (Chambers et al. 2014) for a discussion of the increased use of out of court disposals and its impact on the magistracy.

¹⁶ <http://www.theyworkforyou.com/wrans/?id=2013-05-22a.80.4&s=%28district+judge%29+speaker%3A25009#g80.5> [accessed March 2014]

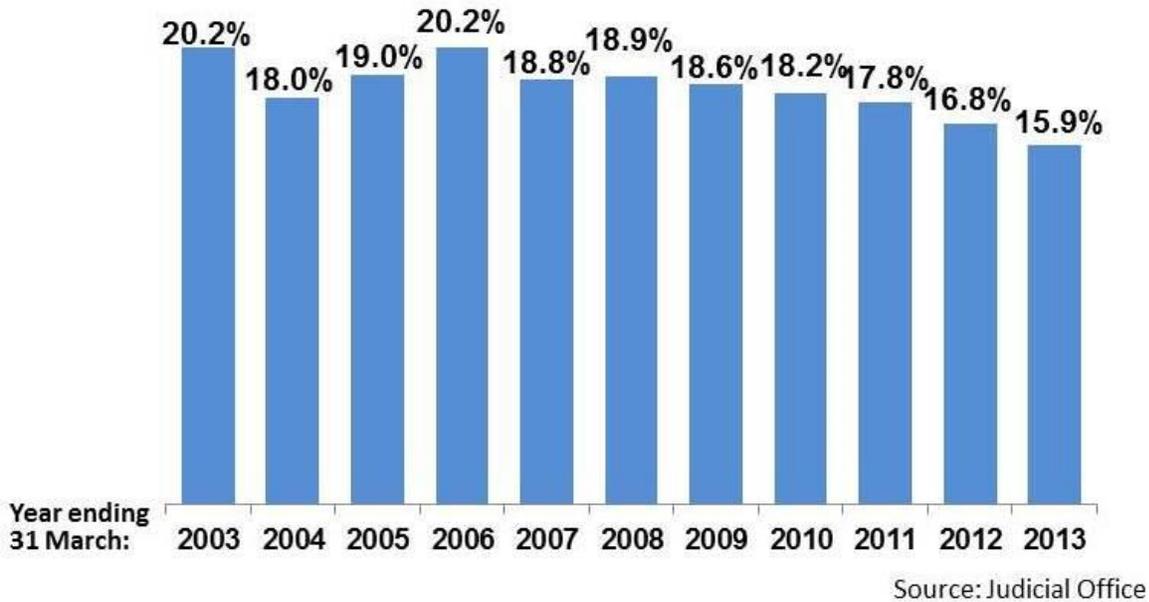
Number of magistrates by region, as at 31 March 2013



How diverse are magistrates now?

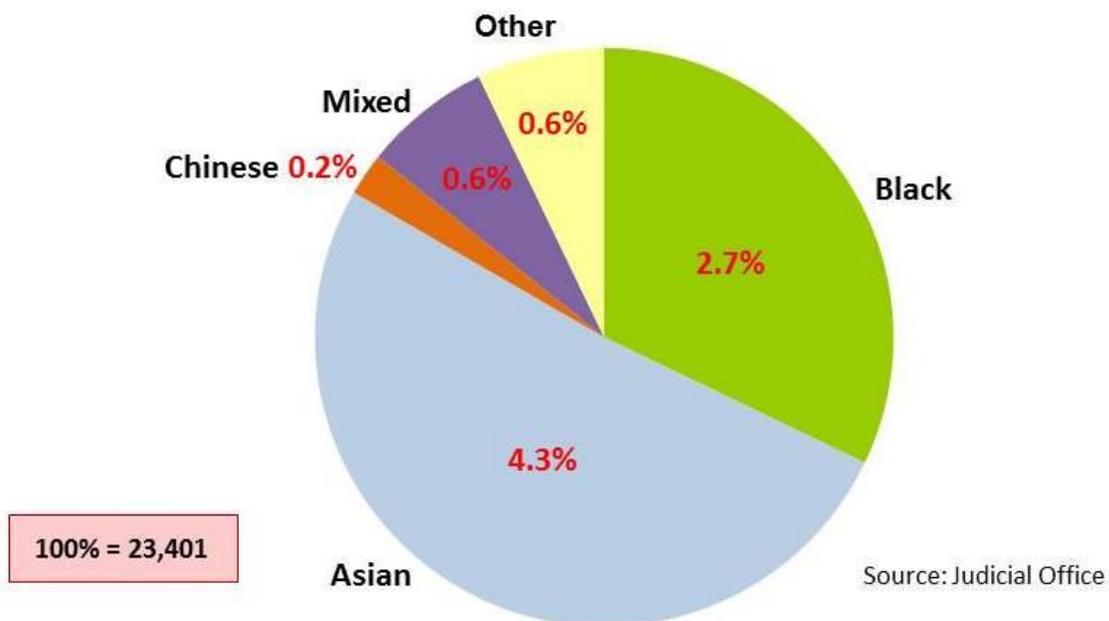
Magistrates in 2013 are considerably older, whiter and more middle class than the general population, meaning that the diversity profile has not significantly improved for a long time. In fact in the last year the magistracy became less diverse, partly because recruitment is more or less frozen. 55.5 per cent of magistrates are now 60 and over (up 1.6% vs a year before) and 15.9 per cent are under 50 (down 0.9% compared to the previous year). The real contrast is with magistrates in 2000. At that time a third were in their 60s, and a slightly higher percentage were under 40.

Magistrates aged <50 years, as per cent of total since 2003



Magistrates are not currently representative of their national nor, in most cases, their local BAME population – 91.7 per cent of magistrates are white compared to 85.9 per cent of the population. Magistrates of Asian origin are particularly under-represented, with 4.3 per cent of magistrates described as Asian compared to 6.8 per cent in the population. All BAME groups are under-represented, with some particularly worrying recent declines – in the year to April 2013, the number of black magistrates dropped by over a third.

Black & Minority Ethnic Magistrates, as per cent of total as at 31 March 2013



The socio-economic profile of magistrates is poorly measured since occupation is only asked when a magistrate is appointed and the information is not systematically updated. Moreover, the occupational groups do not match the census. This means that the occupation data for serving magistrates do not reflect the number who have retired since starting. However, the statistics we have suggest that magistrates are still disproportionately middle class, with over half in management, senior official or professional occupations and only 1.51 per cent from sales or customer service backgrounds¹⁷.

Green (2012: 103) argued that the impact of the current economic climate may be having an adverse effect on the recruitment and retention of magistrates. She stated that concerns about ambivalent or unsympathetic employers could make potential magistrates reluctant to apply and could also increase the likelihood that serving magistrates would step down. In turn, this could have negative consequences in terms of diversity within the magistracy: 'young people, women, the disabled, and those from minority ethnic communities, who already face the greatest economic and labour market disadvantage, would likely be the first to be shut out.'

Local differences

¹⁷ <http://www.theyworkforyou.com/wrans/?id=2013-02-01a.368.6&s=beecham+magistrates#g368.7> [accessed 25/03/2014].

There are considerable differences in the diversity profile of the magistracy across geographical areas, but comparisons with the population are difficult to make given that the census categorisation of ethnicity is different to that used by the judiciary and magistracy areas are not coterminous with local authorities or government regions.

London magistrates are undoubtedly the most diverse both in age and ethnicity. The only other area outside London with a (slightly) younger age profile is North Wales, where 47.6 per cent of magistrates are over 60. In 14 areas of England and Wales, over 60 per cent of magistrates are over 60. Thousands of magistrates across the country are nearing retirement, which is compulsory at 70. Indeed 60 per cent of all magistrates retire within ten years.

A comparison of two areas with the census data reveals how Lincolnshire, although one of the whitest benches in the country, is in line with its population, while Leicestershire and Rutland is not representative. The Leicestershire and Rutland bench is 85.5 per cent white while the local population is only 78.4 per cent. This discrepancy is for the most part accounted for by the under-representation of those of Asian origin – they make up 13.3 per cent of the population but 9.7 per cent of the bench.

A comparison of regions using the census and magistracy diversity data suggests that some areas have significantly greater challenges than others. London magistrates are more ethnically diverse than any other area, but they are in fact more divergent from the local population than any other region. There is a 16.8 per cent difference between the representation of the ethnic population in London and London magistrates, whereas that difference is only 0.6 per cent in Wales and 0.9 per cent in the South West. There is a similar pattern with age where the difference in the proportion of the 18–39 population between the area and magistrates is most pronounced in London (54.5% in area, 6.6% of magistrates) and least in the South West (39.9% vs 2.3%).

How lay magistrates differ from judges and from other volunteers in terms of diversity

Magistrates are clearly not representative of the general population, and even less so people who offend, a population which tends to be younger with a higher proportion of BAME residents.

An interesting comparison can be made between magistrates and other public sector volunteers working in the justice sphere. In Scotland, the children's panel – essentially a combination of a family court and a youth court – makes decisions with regard to children in relation to whom there are serious concerns about offending behaviour or welfare. It is presided over by volunteers, who apply to be children's panel members. The age profile of Scottish panel members is considerably younger than lay magistrates with 18.3 per cent under 40 compared to 3.2 per cent of magistrates in England and

Wales, and 28.5 per cent over 60 compared to 55.5 per cent of magistrates. In terms of gender, Scottish panels are less balanced than magistrates, since women make up 61 per cent of members. Comparisons with regard to socio-economic status and ethnicity are not possible since the data are incompatible.

District judges (DJs) are predominantly male (70%). They are younger than lay magistrates (41% of DJs and 29% of Deputy DJs are over 60) and, although less ethnically diverse than magistrates, this may change: 2.8 per cent of DJs and 7.6 per cent Deputy DJs are BAME. No robust data are available on the social background of district judges.

The most diverse among paid judges are tribunal judges. Their age profile is similar to magistrates and 44 per cent are female but they are more ethnically diverse, with 12.5 per cent BAME compared to 8 per cent of lay magistrates.

How could the diversity of the magistracy be increased?

The greatest current challenge is that the work to be done in magistrates' courts is contracting and, reflecting this, magistrate recruitment is frozen. Increasing diversity in the absence of recruitment is difficult; but possible solutions could be:

1. Freezing recruitment of district judges. The work of magistrates' courts is shared between magistrates and district judges. One way of increasing magistrate recruitment is by freezing district judge recruitment and allowing lay magistrates to be recruited instead.
2. Delegating more Crown Court work to magistrates' courts and ensuring the extra work is done by magistrates.
3. Restricting the number of sittings for each existing magistrate.
4. Introducing fixed tenure for magistrates of, for example, ten years to allow an increase in 'churn'.

These recommendations are broadly supported by the work of others in this field. A recent report by Policy Exchange (Chambers et al., 2014) advocated increasing the number of lay magistrates by 10,000 and introducing a tenure period of ten years; while Liberty (2002) recommended that more magistrates should be recruited and that the number of sittings required per magistrate should be reduced.

Another way of increasing magistrate diversity would be to encourage applications from and/or positively discriminate in favour of under-represented groups. At the moment there is very little active promotion of the magistracy to anyone, let alone more diverse candidates. It is therefore likely that the tiny number of applicants who are interviewed are 'the usual suspects'. However, the risk of any active promotion of opportunities in this climate is that, unless literally a tap on the shoulder, promotion may lead to advisory committees being flooded with applicants.

Positive action is an alternative – ensuring that, however many candidates are interviewed, a proportion are from under-represented groups. This would at least ensure that representatives of under-represented groups have a chance of becoming a magistrate.

It is also worth considering whether the current arrangements for magistrate recruitment is the best. All paid judiciary appointments are handled by the Judicial Appointments Commission (JAC), which has expertise in encouraging applications from under-represented groups and ensuring that the application process does not discriminate against them. However, this would need careful thought as concerns have been raised as to how effective the JAC has been in increasing diversity. These concerns were voiced by members of the Commons Justice Committee in a session they recently held on the JAC.¹⁸

Conclusion

Magistrate recruitment is facing a crisis. The amount of court work is falling and thus fewer magistrates are needed. The number of magistrates is in free-fall with a decline of 22 per cent since 2007, and the steepest fall ever in the last year (down 1769 in number, or 7%, 31/3/2013 vs 31/3/2012). Magistrates are both retiring and resigning, and not being replaced. Recruitment country-wide is more or less frozen with areas who do recruit using a first come, first served principle to limit the number of candidates considered. Lay magistrates are in some ways less diverse than in 2000 – certainly older, less representative of England and Wales' BAME population and possibly more middle class. In addition, thousands of magistrates are due to retire in the next few years.

If the magistracy is to remain a key part of the criminal justice system, it must become more representative of the communities it serves. This means thinking radically about who magistrates are, how they are recruited and what their commitment needs to be.

¹⁸ Justice Committee Oral evidence: [The work of the Judicial Appointments Commission](#) HC 1132
Wednesday 5 March 2014
<http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/7287>

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