STATES OF JERSEY

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CRIMINAL JUSTICE POLICY: AUDIT OF THE NEED FOR A PROSECUTION SERVICE (P.161/2007) – COMMENTS

Presented to the States on 19th November 2007
by the Minister for Home Affairs

STATES GREFFE

COMMENTS

Introduction

The Report and Proposition by the Deputy of St. Martin gives the impression to anyone with little prior knowledge of the way our Magistrate's Court system works that Centeniers were the sole representatives of the prosecution role. The fact is that this is simply not the case, and particularly so for those contested cases where there is a trial following a 'not guilty' plea. In such cases, the prosecution role is performed, in the main, by professional prosecutors leaving the Magistrate to exercise a judicial role only.

The critical flaw in the proposition put forward by the Deputy of St. Martin is that it seeks to use a minor criticism, affecting only 1% of the total cases appearing in the Magistrate's Court in order to justify sweeping and unwarranted changes to the prosecution process.

The report is therefore misleading; moreover, only fleeting reference is given to the presence of professional prosecutors in our Magistrate's Court which the Island has had for the past 8 years.

The issue in perspective

The Magistrate exercised his dual role in only 1% of total cases appearing in the Magistrate's Court. In 2005 and 2006, the total numbers of cases in the Magistrate's Court were 2,010 and 1,684 respectively, excluding those appearing for parking offences. Approximately 90% of the cases dealt with in the Magistrate's Court result from guilty pleas, with no need for either a trial or for the Magistrate to have to exercise his dual role. Less than 10% of the cases result in a trial taking place following a not guilty plea. When those 10% are analysed, very substantially more are trials in which a Legal Adviser prosecuted, where the Magistrate has no dual role, and a small number are cases in which Centeniers were involved, where he has.

In 2005 and 2006, the Legal Advisers prosecuted 143 cases and 144 cases respectively. By contrast, there were approximately 22 non-parking cases involving Centeniers each year and a similar number of trials on parking offences. Thus in 2005, of the 2,010 people appearing before the Magistrate's Court, approximately 8.2% of cases went to trial and of those 86% were prosecuted by a Legal Adviser and 14% were cases in which a Centenier was involved and in which the Magistrate exercised his dual role. This latter category of case is therefore around 1% of the total cases appearing in the Court.

The sort of cases in which the dual role was exercised in 2006 and 2007 were for offences such as defective vehicles, careless driving, being drunk and disorderly, speeding, obstructing the police, breach of the peace, traffic light offences and parking infractions.

There is a lack of evidence for the wide-ranging assertions made by the Deputy of St. Martin. While his report refers to "the overwhelming evidence" of a longstanding problem, such overwhelming evidence would most likely manifest itself through a string of appeals to the Royal Court against the findings in the Magistrate's Court where the Magistrate had exercised his dual role. There are very few successful appeals against criminal convictions in the Magistrate's Court at trial. Nobody has, as yet, sought to raise the issue of fairness of the trial where a Centenier presented the case. Ultimately, this is the 'acid test' and would be a matter for a judicial decision.

The Deputy's proposal to set up a public prosecution service is clearly disproportionate. The vast majority of cases engage guilty pleas. One is left with a total of some 20 defended cases per annum, all of them minor offences, where the Magistrate is conducting a dual role. The underlying problem identified by Mr. Cooper is therefore, a relatively small one compared with the overall work of the Magistrate's Court. That is important not only so that one retains a sense of perspective on the role of the Centenier in trials, but also because the remedy suggested by the Proposition (if indeed one is required) is totally out of proportion to the perceived problem. It would be quite unnecessary to establish a Public Prosecution Service, with all the cost that that would involve.

The Human Rights considerations

P.161/2007 suggests that it is incumbent upon me to satisfy Members why I consider the present arrangements in the Magistrate's Court to be human rights compliant. In such matters – just as the Home Affairs Committee did in March 2003 when it decided not to pursue Recommendation 4 of the Rutherford Report; just as was done prior to lodging the original Criminal Justice Policy in 2005; and just as was done again in July this year when P.118/2007 was lodged – advice was taken from the Attorney General on the human rights compliance implications of the policy proposals.

Every aspect of the Cooper opinion, upon which the Proposition relies, can be challenged successfully but, essentially, it is the perception of fairness by the public which is at the heart of the Cooper opinion.

Following receipt of Mr. Cooper's opinion in June, the Attorney General did immediately introduce one change in the practice to be adopted in the Magistrate's Court, so as to improve perceptions of fairness and to address any suggestion by the impartial observer that the Magistrate could not fairly switch from adopting a prosecutorial rôle to a judicial rôle. Oddly, there could be more force in the criticism where the defendant is represented than where the defendant is unrepresented. Recognising that there could be a criticism of the dual rôle where there is defence counsel, the Attorney General gave instructions to his Legal Advisers in June to monitor those cases where defence counsel would be representing the accused, in order that they can take over the case from the Centenier.

Where the defendant is represented, the Magistrate does not have to worry about testing the prosecution evidence because he knows that defence counsel will do so. By contrast, he does have to test the defence evidence, because there is no prosecutor to do so. He is therefore seen to be cross-examining defence witnesses, including the defendant, but not cross-examining prosecution witnesses. Consequently, it is more likely to give an impression of bias or unfairness than in cases where there is no defence counsel.

Having looked into the process where there is a dual rôle function to be performed, in practice the Magistrates allow the police witnesses to provide their evidence without being questioned, albeit the witnesses are prevented from adducing hearsay and are asked questions for the purposes of clarification. When it comes to cross-examination by the defendant personally, it is usually the case that the accused is not able to formulate his questions properly. At that stage, the Magistrates will assist the accused in the cross-examination of the police witnesses, framing the questions for the accused where necessary. The Magistrate also has the ability to ask the Bâtonnier to appoint defence counsel and to call upon the Legal Advisers to prosecute if he considers that a fair trial is impossible. In other words, the process is flexible and the Magistrate can exercise judgement to ensure a fair trial takes place.

Against this background, the impartial observer might well take the view that where there is no defence counsel, the Magistrate is seen to be performing his functions entirely fairly because he is assisting the defence in formulating the defence case by way of questions to prosecution witnesses.

The monitoring and presentation by the Legal Advisers of cases has more recently been extended to cases where there is no defence counsel. I am advised that it is not thought that it was necessary in law to do this, but the Attorney General has taken the view that despite the additional pressure on his department it is appropriate to do so, given in particular what he perceives to be the potential damage caused to the reputation of the criminal justice system in the eyes of the public, arising out of the premature and unauthorised disclosure by the Deputy of material belonging to the Education and Home Affairs Scrutiny Panel, and the publicity which he has generated on the issue following his resignation from the Education and Home Affairs Scrutiny Panel earlier this year.

The next justification which Mr. Cooper advances for his views is the assertion that the Centeniers do not have the necessary attributes of a prosecutor and therefore do not fulfil the criteria demanded by the European Consensus as set out by the Council of Europe. Mr. Cooper gives no authority in terms of case law for the propositions which he makes other than a reference to the Supreme Court of Zimbabwe, which is required to operate in challenging circumstances rather different from our own. This is hardly convincing.

Secondly, the Council of Europe recommendation does not go so far as to say that only professional prosecutors can be used or that all cases must be prosecuted by such professional prosecutors. What the recommendation does is to put forward safeguards for the position of Public Prosecutors, for their independence and for an identification of what their rôle might be. A Centenier may not be regarded as a professional Public Prosecutor within the terms

of the recommendations, but that does not mean that all systems of criminal justice must employ a professional prosecutor. At paragraph 72 of his opinion, Mr. Cooper opens with "It can now [be] argued that …". The point is that this is just what it is – simply an argument, at present unsupported by any authority. It is accepted that the notion of an adversarial process is inherent in the European Convention, but that falls short of any conclusion that a professional prosecutor is essential for Convention purposes. Indeed, the United Kingdom's move to set up the Dedicated Case Worker System would seem to show that it is, in the U.K. view, not essential to have a professional prosecutor.

Finally, the Cooper opinion asserts that the right to a fair trial is compromised by what he perceives to be the role the Centenier plays in the fixing and listing of trials, although he does not say why. In this respect, the Centenier's role has been misinterpreted by Mr. Cooper. There are many factors that are brought to bear when fixing trial dates, not least the availability of court time, magistrates and defence counsel; the need to warn witnesses; the disclosure of witness statements, etc. The important factor is that the Magistrate's Court Greffe remains in charge of this process throughout. The Centenier is a vital link in organising trials, but it is simply not the case that the Centenier is part of the core function of the Court and that the distinction with the prosecution is blurred.

Conclusion

The Report and Proposition advanced by the Deputy of St. Martin has no sense of perspective, making as it does a false connection between questions about the dual rôle of the Magistrate and the need for a Public Prosecution Service. It is ostensibly about the dual rôle of the Magistrate, but the arguments are then deemed to apply to all prosecutions in the Magistrate's Court as a result of the Centeniers' rôle rather than the tiny number of cases where the dual rôle used to be a factor. His resultant conclusion, which is flawed, is that the rôle of the Centenier should cease and that this should be replaced by a Public Prosecution Service. It is wholly wrong, therefore, to suggest that there is a structural problem with the justice delivered in the Magistrate's Court.

As the Attorney General said in his answer to the Deputy's written question on 9th October, as with many human rights issues, it is possible for lawyers to advance different views – and the right place to adjudicate on those is in court. The Cooper opinion is just that – an opinion – and it does not provide a compelling enough or justifiable case to prompt an audit of the decision to reject Recommendation 4 of the Rutherford Report, namely that a Public Prosecution Service should be created and that the role of the Centenier in the Magistrate's Court should cease. Part (a) of the Proposition is therefore rejected. It follows that the debate on Part (b) of P.118/2007 – the Criminal Justice Policy – should proceed without delay.