

**IN THE MATTER OF THE DUAL FUNCTION
OF THE MAGISTRATE IN JERSEY**

OPINION

Instructions

1. I am asked to advise the States of Jersey Education and Home Affairs Scrutiny Panel (the Panel) on the compatibility of the 'dual role' of the Magistrate in Jersey for compliance with the European Convention on Human Rights (ECHR) when presiding over cases involving the participation of Centeniers. That Convention forms part of the law of Jersey by way of the Human Rights (Jersey) Law 2000 (the Law), which entered into force in December 2006. In all important respects that Law is identical to the United Kingdom's (UK) Human Rights Act 1998 (HRA).
2. This Opinion will therefore address the question, whether it is possible to have a fair trial in Jersey under circumstances when only the Centenier is responsible for bringing a case against a defendant before the Magistrate and the Magistrate in these circumstances, and only these circumstances, then assumes a dual function in the process? That dual function requires the Magistrate to sit as a judge in the common law understanding of that function, as well as to probe the evidence for and against the defendant in a manner more associated with the prosecution.

Summary of conclusions

3. In my view the current functioning of the Magistrate Court system when dealing with low level crime, where the Magistrate assumes a dual function and presides over criminal matters in the absence of a legal adviser acting on behalf of the prosecution, is a violation of the right to a fair trial as guaranteed by Article 6, ECHR. Furthermore, I am of the opinion that defendants under such circumstances are being discriminated against in violation of Article 14, ECHR, freedom from discrimination, when read in conjunction with Article 6, ECHR.
4. Additionally, I am concerned that the system of prosecutions, in the absence of a legal adviser acting as prosecutor, does not adequately take into account the rights of victims of crime in violation of the right to respect for private life, provided for by Article 8, ECHR. Under these circumstances, Jersey is failing in its positive obligations to guarantee Article 8 rights for victims of crime, as well as ensure those that are victims of low-level crime are not discriminated against.
5. As a separate and discreet point, the current role played by Centeniers in the fixing and listing of trials and other matters before the Magistrate is a violation of the right to a fair trial.
6. Finally, additional to my instructions, I draw attention to the human rights implications of Parish Hall Enquiries and suggest that the Panel considers these in the near future.

Obligation to Act Compatibly with Convention Rights

7. Article 7(2)(a) of the Jersey Law makes clear that courts and tribunals are public authorities for the purposes of that Law. Therefore a court is required to act compatibly with the ECHR. Centeniers, in their capacity as Honorary Police, will also be considered a public authority for the purposes of the Jersey Law, and they will therefore have a similar duty to act compatibly with their Convention obligations. For the purpose of this Opinion, as far as I understand, neither the institution of Magistrate nor Centeniers are compelled

by principal legislation to act in a way which would be incompatible with their human rights obligations.

Sources of Law for this Opinion

8. The focus of this Opinion will be the approach taken by the European Court of Human Rights (the European Court and/or the Strasbourg Court) when interpreting and applying the ECHR. Further guidance from the Council of Europe on developing human rights standards will also be relied upon. Where relevant the approach taken within the jurisdictions of the UK and other Commonwealth and common law jurisdictions, will be considered. This is consistent with developing English caselaw concerning the application of international human rights standards.^[1]

The Relevant Articles of the European Convention on Human Rights

9. The Articles of the ECHR that are of most relevance to this Opinion are:

Article 6(1), ECHR

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair a public hearing within a reasonable time before an independent and impartial tribunal established by law. Judgment shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

10. Specific guarantees are provided in Article 6(2) and 6(3) in relation to criminal trials. These are:

Article 6(2), ECHR

'Everyone charged with a criminal offence shall be assumed innocent until proved guilty according to law.'

Article 6(3), ECHR

'Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly in a language which he understands and in detail, of the nature and cause of the accusation against him;*
- (b) to have adequate time and facilities for the preparation of his defence;*
- (c) to defend himself in person or through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'*

11. The freedom from discrimination contained in the ECHR will also be relevant.

Article 14, ECHR

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

12. Additionally, also of relevance will be the right to respect for private life.

Article 8, ECHR

(1) 'Everyone has the right to respect for his private and family life, his home and his correspondence';

(2) 'There shall be no interference with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

13. It may well be that on a case-by-case basis other Convention rights could also be applicable, such as the right to liberty (Article 5, ECHR) and the peaceful enjoyment of possessions (Article 1, First Protocol, ECHR), however, as this Opinion is more concerned with broad public policy considerations these Articles will not be examined in any detail.

The Role of the Centenier within the Jersey Criminal Justice System

14. Before assessing the compatibility of the current system of Magistrate Court hearings concerning cases not involving legal advisers, first the role of the Centenier within the criminal justice system must be understood.
15. Centeniers, in many respects, are the lynch-pin of the criminal justice system in Jersey. As that system is currently organised they play a crucial role in ensuring community and democratic participation in policing in general and the prosecution of offenders in particular. Their key functions include the power to charge people and grant bail pending appearance in a Magistrate's court. Centeniers, as honorary police, are the only authority vested with these powers on the Island. They also conduct Parish Hall Enquiries (PHE). While this Opinion will not address PHEs in any particular detail, certain observations will be made about them. In addition, Centeniers are responsible for presenting less serious cases before the Magistrate's court. Furthermore, within the court system Centeniers have assumed the central role in the organisation and management of the court's workload.
16. Centeniers are elected by their parish for a three-year term. They are not required to possess any qualification other than having the mandate of the people of the Parish which they represent. It would appear that a criminal records check is carried out on them and that a criminal conviction would be a bar to assuming the position of Centenier.^[2]
17. As a result of the method of selection of Centeniers, it is not controversial to point out that their quality can be variable. It can also be the case that individuals are actively encouraged to put themselves forward to be elected in the absence of other candidates. Failure to have elected Centeniers within a Parish will result in that Parish being fined. The turn-out for the election of Centeniers would appear to be low and it is rare, if ever, that such elections are contested.
18. Once elected Centeniers perform their duties on a voluntary basis, and the work can be onerous. In effect, Centeniers are on 24-hour call, and those within the urban areas of Jersey can have a significant workload, whereas those in rural Parishes may be called upon to act in their official capacity as Honorary Police less often, although it can be the case that residents may prefer to turn to the local Centenier than the 'paid' or professional police. Centeniers can, as Honorary Police, carry out their own investigations into crimes.
19. As has already been stated, it is only the Centenier who has the power to charge and the Centenier sets bail. As a result of this latter function, issues may arise on a case-by-case basis under Article 5, ECHR (the right to liberty). It is also possible for a Centenier to have carried out investigations into a case and also be responsible for bringing this case to court.

20. In principle it is the Centenier who must bring cases to court. The reality is that since the mid-'90s, following the recommendations of the Le Quesne Report, in relation to more serious crimes, professional legal advisors from within the Offices of the Attorney General prosecute these offences before the Magistrate. These legal advisors would appear to play a more or less similar function to that of the Crown Prosecution Service in England and Wales. They are professional prosecutors. It is worth pointing out that the Le Quesne Report recommendations concerning the need to appoint professional prosecutors that were adopted were done so because of concerns that trials were not being conducted to the standards expected in the late twentieth century for a criminal justice system.
21. For less serious crimes the Centenier still carries out this role. Their roles as prosecutors include guilty pleas within the Magistrate's court's jurisdiction (unless involving complicated legal argument) and dealing with not-guilty pleas in 'appropriate' cases; in other words taking the case to trial.
22. 'Appropriate' cases include minor public order offences, resisting or violently resisting arrest or minor assaults. Other 'appropriate' cases are possession of Class B drugs and minor road traffic offences. Centeniers can also prosecute other minor statutory offences.
[\[3\]](#) The Magistrate always retains the discretion to refer the matter to a legal advisor. Similarly the Centenier can also request the assistance of a legal adviser. At the same time, the legal adviser can offer his or her services to the Centenier.
23. In reality approximately 90% of all cases before the Magistrate's court involve a guilty plea. The remaining 10% will involve cases being presented by legal advisors and Centeniers.

The Role of the Centenier in the Magistrate's Court

24. With regard to guilty pleas, the Centenier will read out the charge against the defendant and give a summary of the facts according to him or her that led to the charge. It should be stressed that in relation to most matters the professional police are involved in the investigation of offences and the arrest of offenders and the Centenier is brought in at the point of charge and/or to settle the conditions of bail. That said, on the basis of the Centenier's report the Magistrate will carry out their sentencing function and/or otherwise dispose of the defendant.
25. Where a defendant is pleading not guilty, the Centenier will again read out the charge and present the facts, as they are understood, that led to the charge. At this point the Centenier to all intents and purposes withdraws from the process and the Magistrate assumes a dual function in relation to the rest of the trial.

The Dual Function of the Magistrate in Contested Cases

26. Once the charge has been read and the background facts have been explained, the Magistrate then seeks to elucidate the "truth" (as best any criminal process can) by way of examination in chief and cross-examination of prosecution witnesses (which could in theory include the Centenier) and defence witnesses.
27. In his 1990 report into judicial and legal services in Jersey, Sir Godfray Le Quesne QC highlighted the problems that arise when the Magistrate is required to assume these functions normally associated with the prosecutor. That report also clarified any misconception that the Magistrate at this stage was (or could be) acting as a juge d'instruction in the manner of continental (and notably French) criminal justice systems. As is made clear in that report, the Magistrate is still presiding over the court within the Anglo-Saxon, common law tradition and adversarial system. It just happens that at this stage in the proceedings the Magistrate has also been required to assume an investigative function. It is for this reason that it was recommended in that report that, for policy reasons,

it was necessary to institute some form of professional prosecutor. Although not mentioned in terms that policy change proposed by the Le Quesne Report was, and remains, completely consistent with Article 6, ECHR and the right to a fair trial. Nevertheless, whilst this policy was adopted it was not applied to all crimes.

28. There are clear concerns about the fairness of the trial when the Magistrate is sitting in this dual function. These have been rehearsed elsewhere and I need not repeat them in detail here, however two issues of unfairness, that go to the heart of a fair trial, need to be stressed. These include the fact that the Magistrate will have before him or her all the materials that would normally be in the possession of a prosecutor. This could include inadmissible evidence. The system itself would appear to acknowledge that it cannot guarantee the requirements of a fair trial or the appearance of a fair trial. The *Magistrate's Court Guidance Note* (17 January 2000) points out that:

'Once a legal advisor has conducted a case, the Magistrate's court Greffier will ensure the case papers are not put before the presiding Magistrate. Thus in such cases Magistrates will be able to revert to a judicial role rather than their traditional dual role.'

29. Secondly, where a witness gives evidence in court that is not as comprehensive as their written witness statement (which the Magistrate will have), the Magistrate may be required to cross-examine the witness in such a way as to draw out further evidence from them.
30. It is acknowledged that a Magistrate will be professionally adept at knowing what it is required of him or her to ensure they are not prejudiced by material that they become aware of, but can put out of their mind. It is, however, an altogether different proposition for them to have to tease out evidence, in the absence of a professional prosecutor. Even if this does not create any bias in the mind of the Magistrate, the perception for the defendant and the court as a whole is likely to be very different.
31. Concerns about the fairness of a dual function trial were also emphasised by the Nicholls Report (1998). Picking up on the Le Quesnes' findings, the 1998 report also emphasises that *'another consequence of the absence of a prosecutor is that there is nobody to make submissions to the Magistrate on behalf of the public on the issues of law and fact that arise'*.^[4] Again without mentioning Jersey's obligations under the ECHR, that report, as will be explained below, enunciates principle that is consistent with Jersey's human rights obligations. The 1998 Report continues, *'the defendant is often legally represented. There is therefore no one to counter any points, whether of fact or of law, made by the defendant's advocate. The Magistrate has to do his best without any assistance from the prosecution.'*
32. Both of these points are identifying concerns, if not violations, in relation to Article 6 and Article 8, ECHR. The report adds that a legally qualified prosecutor would also have duties towards the defence (again an Article 6 point). That report highlights the weaknesses of the dual function system in the following way:

'In particular it is up to the Magistrate to cross-examine the defendant and his witnesses. Inevitably he cannot do this as effectively as a prosecutor because he is performing a judicial role and is not in a position to test a defendant's evidence in the manner of a prosecutor. Weaknesses in the defendant's version of events are therefore often not exposed.'^[5]

33. As far as I am aware the Royal Court has on at least two occasions expressed their concern about the dual function of the Magistrate and the consequential fairness of particular trials.^[6]

34. The apprehension raised in Reports in 1990, 1998 and more recently 2002 clearly, in my view, establishes that the legal system governing procedure in criminal trials is significantly flawed as far as trials requiring the Magistrate to assume a dual function are concerned. When measured against the requirements of Article 6, it is my firmly held opinion that this system in Jersey is a violation of the right to a fair trial and the violation is systemic, i.e. not something just involving a one off violation.

The Right to a Fair Trial as Guaranteed by the European Convention on Human Rights

35. In this section of this Opinion I will explain why as a matter of human rights law, I have reached this view. I am however conscious that should this Opinion be accepted it will have a significant impact upon the criminal justice system in Jersey. Consequently, I have not reached this opinion lightly. In order to assist the Panel in understanding how I have come to this view, it is necessary to lay out some of the fundamental requirements for a fair trial as established by the Strasbourg Court. Once these have been explained, the Panel will have a better sense of why I feel so confident in being able to point emphatically to a violation of the right to a fair trial. Also, as the Panel is primarily focussed on the implementation of policy and may be less used to measuring policy against human rights standards, it is, also in my view, worth reflecting upon these fundamental human rights principles in detail before applying certain of them directly to the dual function role of the Magistrate in Jersey.
36. The Jersey Centenier system is, it should be acknowledged, in my experience, a unique phenomenon and one that, in theory, has much to commend it. Therefore, if one of the consequences of this system is that it causes a breach of the right to a fair trial, then it is important that the Panel fully understands the significance of the right to a fair trial in international human rights law before it adopts these conclusions.
37. Also, there are no cases before the Strasbourg Court exactly on point in relation to the dual function of the Magistrate which has merged as a consequence the Centenier system. As a result, my opinion that the system does cause a violation of the right to a fair trial is based upon the application and interpretation of established and emerging human rights principles in relation to a fair trial. For the Panel, therefore, to understand why I have formed this opinion, they need to understand the background and core principles of the right to fair trial.
38. Paragraphs 40 – 60 should be seen as additional material and their inclusion in this Opinion is to fully inform the Panel of the background to the right to a fair trial before there is an analysis of why core elements of the fair trial guarantee are violated by the dual function system. That analysis, which is central to this Opinion, takes place from paragraph 61.

Background to, and the importance of, the right to a fair trial

39. The closely related principles of “due process” (i.e. fair trial) and “the rule of law” are fundamental to the protection of human rights. Such rights can only be protected and enforced if an individual has recourse to independent and impartial courts, which can resolve disputes in accordance with fair procedures. The protection of procedural due process is not, in itself, sufficient to protect against human rights abuses but it is the foundation stone for “substantive protection” against violations of human rights. It is for this reason that the European Court takes fair trial rights so seriously. The protection of human rights, it can be argued, begins but does not end with fair trial rights. ^[7]
40. Fair trial rights are a fundamental safeguard to ensure that individuals are not unjustly punished under the criminal law. They are also indispensable for the protection of other human rights, including the right to freedom from torture and the right to life, and, especially in political cases, the right to freedom of expression and freedom of

association.

41. The implementation of the right to a fair trial therefore plays a crucial role in the maintenance of order, the rule of law and confidence in the State authorities. If there is a system of fair trial in place, before independent and impartial judges, there is an assurance, in principle;
- that convictions are well-founded;
 - that the executive arm of government can, if necessary, be held to account; and
 - there is an effective dispute resolution system between private parties.
42. As such, as well as being the corner stone of a democratic society, the right to a fair trial is also one of the main bulwarks against chaos and anarchy.

The Right to a Fair Trial and How it Works

43. As a general principle, whether dealing with criminal or civil law, the right to a fair trial is considered to be fundamental to the whole scheme of human rights. It needs therefore to be given a broad interpretation. To give it a restrictive interpretation would not correspond to the aim and purpose of the right to a fair trial.^[8]

44. The crucial aspect of the right to a fair trial is that it is not simply a matter for the State to respect the right to a fair trial. Governments must also put into place a legal and institutional framework to protect it. As such the right to a fair trial requires the State to provide, amongst other things:

- availability of legal assistance, including legal aid,
- a prosecution service and
- a trained and independent judiciary.

Is the Right to a Fair Trial an Absolute Right or can it be Lawfully Interfered with?

45. Taken as a whole, with the benefit of a review of the entire process, the right to a fair trial is an absolute right. In this respect, the right to a fair trial cannot be circumscribed in, for example, the public interest. That said, under certain limited circumstances, it is possible to derogate at a time of emergency from aspects of the right to a fair trial as long as that derogation does not undermine the whole notion of due process and the rule of law.
46. Constituent fair trial rights (but not a fair trial as a whole) are sometimes subject to interpretation in the public interest. This does not mean that they are qualified rights.
47. It is essential that any attempt to limit the constituent elements of the right to a fair trial is seen as a different exercise to the approach taken to qualify rights such as freedom of expression and privacy. Those rights are intended to be balanced between the right on the one hand and the community's interest on the other, or in relation to competing rights.
48. Whether there may be a need to limit certain elements of Article 6, the motivation for doing so, and the process in carrying out this exercise, is different. The aim is to ensure the fairness of the trial, whilst at the same time acknowledging that to ensure fairness to all involved, including the public interest, it may be necessary to adopt different procedures. Sexual abuse cases may be the most straightforward example. It may be necessary to ensure that alleged victims are not required to be directly confronted by the defendant. Therefore the methods and content of cross-examination can be limited to guarantee victim's rights. If this happens, this must be balanced out to ensure that the defence is still provided a fair trial. For example, the tribunal which decides the guilt or innocence of the defendant must take this into account and attach appropriate weight to the evidence.

The right to a fair trial in criminal proceedings

49. The starting point in relation to the right to a fair trial in criminal proceedings is as follows:

- the right to a fair trial requires the right to equal treatment by the courts;^[9]
- the defence and the prosecution are to be treated in a manner that ensures that both parties have an equal opportunity to present their cases during the course of the proceedings;
- the court or tribunal hearing the case is objective and subjectively independent and impartial; and
- that every accused person is entitled to be treated equally with other similarly placed accused people, without discrimination.

What is an independent and impartial tribunal?

50. A fundamental principle and prerequisite of a fair trial is that the tribunal charged with the responsibility of making decisions in a case must be established by law, and must be competent, independent and impartial and free from any interference by the State, the parties and external influences.^[10]

51. The right to an independent and impartial tribunal is now considered to be an absolute and non-derogable right in international human rights law. The right to trial by an independent and impartial tribunal is so central to the due process of law that a United Nation's specialist human rights committee has stated that it "is an absolute right that may suffer no exception".^[11]

Independence

52. An independent tribunal requires independence of the executive and the parties. In determining whether the requirement of independence has been met, regard must be had amongst other things to whether the body presents an appearance of independence.^[12]

53. Independence also requires that each judge and tribunal member be free from outside instructions or pressure, whether from the executive, legislature, parties to the case or other members of the court or tribunal.

Impartiality

54. The requirement for an impartial tribunal embodies the protection against actual and presumed bias. The European Court has adopted a dual test for impartiality.

The Court examines:

- the evidence of actual bias; and then
- making an objective assessment of the circumstances alleged to give rise to a risk of bias^[13].

55. The onus of establishing actual bias is a heavy one. The test adopted for bias is that members of a tribunal must be "subjectively free of personal prejudice or bias"^[14]. There is a presumption that the court has acted impartially which must be displaced by evidence to the contrary^[15]. The European Court will inquire whether the tribunal offered guarantees sufficient to exclude such a doubt,^[16] or whether there are ascertainable facts that may raise doubts as to a tribunal's impartiality.^[17]

56. In making an assessment of a tribunal's impartiality, "even appearances may be important."^[18] Where there is a legitimate doubt as to a judge's impartiality, either

objective or subjective, she or he must withdraw from the case.^[19] Any allegations of impartiality must be properly investigated by the tribunal itself, unless they are manifestly devoid of merit.^[20]

The principal of impartiality demands that:

- both judges and juries be unbiased;
- proceedings are conducted fairly; and
- decisions made solely on the evidence.^[21]

Equality of arms

57. The right to equality of arms is fundamental to the notion of a fair trial. This right has been read into fair trial rights. In essence, equality of arms guarantees that everyone who is party to the proceedings must have a reasonable opportunity of presenting their case to the court under conditions which do not place him or her at a substantial disadvantage vis-à-vis his or her opponent.^[22]

58. The principle imposes on prosecuting and investigating authorities an obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating him or herself or in obtaining a reduction in sentence, including material which might undermine the credibility of a prosecution witness.^[23]

59. This principle has been held to include access to all the materials that the judge sees, including the court's amicus brief.^[24]

Application of the Right to a Fair Trial to the Dual Function of the Magistrate in Jersey

60. The system that has evolved in Jersey whereby elected Centeniers commence the prosecution of accused persons before the Magistrate's court and then the Magistrate assumes the responsibility for drawing out the relevant facts within the legal framework before deciding upon the guilt or otherwise of a defendant will violate the right to a fair trial as guaranteed by Article 6, ECHR. I have two substantive reasons for reaching this conclusion. These are:

- the system as it now functions does not give the impression that it is independent and impartial; and
- Article 6, ECHR now requires there to be a professional prosecutorial system in place as part of the general obligation for fairness

61. In my view either is sufficient to establish a violation of Article 6, ECHR. In relation to both points, Jersey cannot seek to justify a violation, or continuing violation on the basis of lack of available resources or traditional practices. Neither of these grounds can justify a violation of the right to a fair trial. It is also worth pointing out that the obligation to fund a properly functioning fair trial system applies (for these purposes) across the Council of Europe which includes countries economically different from the islands making up the British Isles, such as Albania and Moldova. The cost of providing a fair trial cannot be used as a justification for not guaranteeing one.^[25]

Independence and Impartiality

62. First, I stress that by asserting that in my opinion there is a violation of Article 6, ECHR in that there are insufficient safeguards to protect the independence and impartiality of the Court is by no means to suggest that the Magistrates in Jersey are not individually independent and impartial. From having read their evidence to the Panel, I can only emphasise that they are clearly Magistrates of the highest professional calibre.

63. However, when presiding over a trial and carrying out their dual function, it is my opinion that under the requirements set out by Article 6, ECHR, a defendant could be left with the impression that as a result of this dual function, the Magistrate could appear to be not sufficiently independent and impartial (see paragraphs 51 – 57 above in relation to the Strasbourg approach to independence and impartiality of a court).^[26] As identified above, in relation to this appearance of independence and impartiality the applicable test is whether the public is reasonably entitled to entertain doubts as to the independence or impartiality of the tribunal.^[27] The test, therefore, under the ECHR is a more generous one than the previous test under English law of ‘real danger’ of bias being shown.^[28]
64. The High Court in Australia has developed the following test: ‘whether a fair-minded lay observer might have reasonably apprehended that the judge did not bring an impartial and unprejudiced mind to the resolution of the question he was required to decide.’^[29] This test, which is fully consistent with international human rights law, applies a vigilant approach to the possibility that the parties or the public might entertain a reasonable apprehension that a judge might not be impartial.
65. This dual function of the Magistrate will enable the public to entertain such reasonable doubts. The evidence already heard by the Panel has acknowledged that those responsible for the administration of the justice system in Jersey recognise that there is a problem of appearance of fair trial. HM Attorney General, Mr Bailhache, when giving evidence to the Panel, pointed out in relation to the current system for the prosecution of not guilty pleas that, ‘[O]f course theoretically that is very difficult to justify’.^[30] It is my view that for the purposes of Article 6, ECHR such an acknowledgement is sufficient to satisfy the test of reasonable doubt that the current system is not sufficiently independent and impartial. It must also be recognised that this opinion of the Attorney General was supported by the Magistrate, Mr Le Marquand.
66. Even though there is an opportunity to appeal to the Royal Court, this will be insufficient to cure the damage done by such a systemic weakness in the criminal justice process.^[31]

The Requirement for a Professional Prosecutor as part of the Right to a Fair Trial.

67. A further justification for reaching my conclusion that the current system in Jersey falls below the standard required by Article 6, ECHR is that as it presently functions the system does not fulfil the criteria demanded by the European consensus, as set out by the Council of Europe, for the necessary attributes of a prosecutor. As has already been mentioned, the right to a fair trial has to be examined as a whole. Within the criminal context this includes the quality of the prosecution.
68. European standards in relation to a prosecution service require a consistently professional prosecutorial arm of the executive branch of government to deal with all prosecutions, regardless of the seriousness of the offence. Guidelines for what is expected of a prosecutorial service produced by the Council of Europe are attached to this Opinion.^[32] These guidelines make clear that the highest professional integrity is required from the prosecutor. Whilst it is not disputed that the personal integrity of the Centeniers is not in doubt, they are not professional prosecutors.
69. Any attempt to draw a distinction between the role of the Centenier as the presenter of a case or the prosecutor of a case will be unsuccessful under European human rights law. It has already been firmly established by Mr Le Marquand, the Magistrate, that in his view Centeniers are prosecutors, and whilst the Centeniers Association may be of the view that its members should not become prosecutors, the approach of the Strasbourg Court will be to apply the doctrine of ‘autonomous concepts’. Under this doctrine a court, when

examining human rights issues, is able to give the real meaning to words despite the State's classification. In my view any court required to assess whether or not the Centenier was a prosecutor would adopt the approach taken by Mr Le Marquand who has pointed out, with regard to the functions of a Centenier, that 'they cannot possibly be doing that unless they are a prosecutor'.^[33]

70. A requirement for a professional prosecutorial service is in my view now an essential element of what is demanded for a fair trial under Article 6, ECHR. I get further support for this proposition from jurisdictions around the world which meld together different legal traditions with international human rights standards. For example, the Supreme Court of Zimbabwe has pointed out that the right to a fair trial embraces not only the impartiality of the court, but also the absolute impartiality of the prosecutor, whose function forms an indispensable part of the judicial process and whose conduct reflects on the impartiality or otherwise of the court.^[34]
71. The elected and, at the same time unpredictable, nature of the Centeniers as prosecutors, could not, in my opinion, be said to accord with these values. The provision of training to Centeniers, or the creation of a special pool of prosecuting Centeniers as they are currently elected, would not be sufficient to remedy their fundamental flaw as prosecutors. To satisfy their obligations under the ECHR Jersey is required to have in place a professional prosecutorial service which deals with all crimes. The fact that professional legal advisers can be available to provide support to Centeniers or that the Magistrate has a discretion to refer the case to a legal adviser is not sufficient to discharge this obligation.
72. It can now argued that, as a minimum requirement of international human rights law, a prosecutor, for the purpose of the right to a fair trial, regardless of the nature of the offence, must:
 - dedicate him/herself to the achievement of justice and pursue that aim impartially;
 - s/he must conduct the case against the accused with due regard to the traditional precepts of candour and absolute fairness;
 - since s/he represents the State, the community at large and the interests of justice in general the task of the prosecutor is more comprehensive and demanding than that of the defending practitioner;
 - s/he has a special duty to see that the truth emerges in court;
 - s/he must produce all relevant evidence to the court and ensure the veracity of such evidence;
 - s/he must state the facts dispassionately;
 - if s/he knows of a point in favour of the accused, that must be brought out;
 - if the accused is unrepresented and the prosecutor knows of a credible witness which goes to show the innocence of the accused, then the prosecutor must call that witness themselves;
 - if the defence is represented, then that witness must be tendered to the defence;
 - finally, if the prosecutor's own witness substantially departs from his/her written evidence the prosecutor should draw the attention of the court to this discrepancy or reveal the seriously contradictory passages to the defence.
73. If these principles are read alongside the Council of Europe guidelines it is in my view clear that the Centenier system as carried out in Jersey does not meet these standards. It is precisely because the Centenier cannot meet these standards that the judge is required to carry out their dual function in relation to cases brought by Centeniers, thereby compromising their own appearance of independence and impartiality. Therefore, the system of Centeniers in relation to the conduct of proceedings before the court needs to be replaced by a professional prosecutorial service.

74. Further reasons why fair trial standards are not currently being met can also be put forward. Firstly, there is not full “equality of arms” between the prosecution and the defence under the present system (see paragraph 58 above). Secondly, certain of the key safeguards contained in Article 6(3), ECHR in relation to criminal trials cannot be guaranteed under the present system. For example evidence has been given of the poor quality of some Centeniers, which poses the question, are they able to satisfy their obligations under Article 6(3)(a) (and for that matter Article 5(2), ECHR in the context of liberty) and inform the accused fully of the charge against him/her? Similarly, is the defence given all the appropriate information necessary in order for them to have the time to prepare their defence as guaranteed by Article 6(3)(b)? And finally, as a result of the dual function of the Magistrate, is the defence fully able to have their witnesses examined and cross-examined on the same basis as the prosecution’s witnesses?

Freedom from Discrimination

75. The system that has been functioning since the mid-1990s with the appointment of legal advisors to prosecute the more serious offences would seem to discriminate against those being prosecuted for less serious offences. This distinction is in violation of Article 14, ECHR. Human rights law does not draw such a distinction.
76. The right to a fair trial in the determination of a criminal charge, as guaranteed by Article 6, ECHR, is applicable to all criminal charges regardless of their severity. Article 14, which is the guarantee of freedom from discrimination in the enjoyment of Convention rights, can under certain circumstances permit a difference of treatment and thus, there is no violation of the Article. However, in the context of the absolute quality of the right to a fair trial, any attempts to justify treating people differently in relation to the fairness of their trial would inevitably fail, particularly if the justifications for treating people differently were cost and tradition.

The Role of the Centenier within the Court Service

77. A final point, which also goes to the fairness of a trial, is the emergence of the role that the Centenier plays in the fixing and listing of trials. As a prosecutor, it is wholly inappropriate that the Centenier should have any role in this core function of the court. By being permitted to carry out such a role, there is a further confusion over the Centenier’s role within the court process. The impression will be left that not only is the Centenier a prosecutor, but s/he is also part of the judicial administration process, thus again blurring the distinctions that are required to ensure a fair trial.

Positive Obligation to Protect Victims of Crime

78. I am also of the view that the failure to have in place an efficient and effective prosecutorial system raises issues in relation to Jersey’s positive obligations to protect the private life rights of those within the jurisdiction. Victims of a crime, which is not effectively investigated and prosecuted, will be able to argue that such a failure violates their right to respect for private life (Article 8, ECHR). That right, by guaranteeing physical and moral integrity, means that the State has to have in place proper systems to protect against crime and its consequences. If it fails to do so, the State will become liable for the interference with the physical and moral integrity of that victim of crime, which might even amount to subjecting them to inhuman and degrading treatment, contrary to Article 3, ECHR. ^[35] Part of this obligation will include a proper trial system which is fair to the defence, but also takes into account the needs of victims.
79. The prosecutorial system as it currently functions under the Centenier system would appear not to take into account adequately the rights of victims of crime. For example, one issue identified in the 1998 Report into the Magistrate’s court’s practice and procedures concerned the use of screens for vulnerable witnesses. Such an example is a classic circumstance whereby the Article 8 rights of victims and witnesses need to be taken into account in the context of the fair trial rights of the accused. As was highlighted in that

Report, because the Centenier system does not allow for a professional prosecution service in all cases, victims' rights may not be properly guaranteed, thus leading, potentially, to a violation of Article 8, ECHR.

Consequences of an Ongoing Violation of Article 6

80. A consequence of the systemic flaw within the Jersey criminal justice system, which in and of itself amounts to a violation of the right to a fair trial, will be that defendants before the Magistrate's court are able to argue successfully that unless they are prosecuted by professional legal advisors, with the Magistrate acting solely in their judicial capacity, they will not get a fair trial and/or will not have had a fair trial.
81. This could expose the Jersey authorities to a series of challenges. These will even include cases which on their individual facts may not be meritorious (i.e. for substantive reasons the conviction is justified), but the defendant concerned would nevertheless become a victim of a human rights violation. Should these type of cases end up before the Strasbourg Court, I am confident that the Court would offer no more to the victim than the just satisfaction of having established a violation, but the Council of Europe would require the UK government to ensure a change of law, practice and procedure in Jersey.
82. Altogether different considerations will apply, however, if it can be established that an individual was convicted (or even tried) in circumstances where s/he might not have been had s/he had access to a fair trial in conformity with Article 6. That said, I am confident that when the first challenge arises in connection with the dual function of the Magistrate, the Royal Court will find a violation of Article 6 and Article 14 for the reasons given above, and in an appropriate case, they will also find a breach of Article 8.

PANEL NOTE: The rôle of the Parish Hall Enquiry did not form part of our review. The following section was not commissioned by the Panel; we did not provide a detailed briefing on the subject. It is included only for the sake of completeness.

Parish Hall Enquiries

83. Whilst I am loath to stray into the issues arising out of the Rutherford Report, particularly as they concern the merits of PHEs, I would raise one issue of concern in relation to that process. If my understanding of PHEs is correct, those informal Enquiries can lead to the charging of an individual for various criminal offences. At the same time they can lead to a decision not to charge. To that extent they do not necessarily raise additional human rights issues that have not already been covered in this advice concerning the role of the Centeniers.
84. If, however, those Enquiries can also fine people or in any other capacity determine their civil rights and obligations, even if these fall short of determining a criminal charge, then Article 6(1), ECHR, the right to a fair trial, will apply and the necessity for fairness will have to be satisfied.
85. This in theory will also include a public hearing with access to it by the Media. It is worth reflecting upon PHEs in relation to the litigation that has been carried out in the United Kingdom concerning Anti-Social Behaviour Orders (ASBOs).^[36] Whilst that litigation has accepted that the imposition of an ASBO is not a determination of a criminal charge, the courts have had no doubts that the giving of an ASBO is a determination of a civil right with consequential obligations upon the authorities.
86. I raise this issue only as something upon which the Panel may wish to reflect in the future.

Conclusion

87. The three reports, since 1990, that have in any capacity looked at the dual function of the Magistrate, have all raised serious concerns in relation to the fairness of those proceedings. The professional expertise of the Jersey Magistrates notwithstanding, the evidence of the Attorney General and the Magistrate before the Panel has also raised similar concerns. From their evidence they are uneasy about the dual function process, they are, however, pragmatic professionals.
88. The Jersey authorities have chosen to retain the dual function role of the Magistrates in relation to minor crimes. As a matter of domestic law prior to December 2006, regardless of the merits of that decision, they were entitled to reach this conclusion (subject to the UK's obligations in relation to Jersey's compliance with the ECHR). They did so on the basis of cost and a commitment to retaining the traditions of the Jersey community.
89. Since the entry into force of the Human Rights (Jersey) Law 2000 the human rights implications of any ongoing laws, practice and procedures also need to be assessed for compliance with the ECHR. The Jersey authorities by requiring the Magistrate to carry out a dual function in certain trials are, in my view, clearly violating the right to a fair trial, as well as the obligation to ensure non-discrimination in the enjoyment of a fair trial. Additionally serious issues arise in relation to Jersey's positive obligations to protect respect for private life. The dual function practice must therefore be re-considered in this light.
90. The advantage of a constitutional measure such as the 2000 Law, which is, to all intents and purposes, a Bill of Rights for Jersey, means that peoples' rights^[37] are properly factored into the equation when policy matters are being decided. I have no doubt that the Le Quesne Report, as well as the other Reports, were asserting that the dual function role of the Magistrate rendered, systemically, trials to be unfair. However, in the absence of an enforceable right, Le Quesne's concerns were just policy considerations to be taken into account with a myriad of others. As such factors such as cost and tradition were able to trump the fair trial rights of those charged with minor offences. The 2000 law changes the nature of the approach to be taken. Once it is established that the right to a fair trial has been interfered with, taking into account that right's absolute qualities, those justifications cannot be lawful reasons for an interference with the right.
91. It would seem self-evident that once the dual function of the Magistrate is removed in all cases, a consequence will be the requirement for a professional prosecutor's involvement in all cases. The question therefore is where does this leave the Centenier? Within the constraints of this opinion, it is not possible for me to do justice to this question. However, the notion of civil society oversight of policing and the prosecutorial service is an essential aspect of human rights policy and protection. My advice would be to retain the position of Centenier, but to adapt the function to ensure that its purpose is fully consistent with human rights standards, and its objective is to ensure the guarantee of human rights to all within the Parish and particularly those who are caught up within the criminal justice system, either as victims or alleged perpetrators of crime. What this would mean in reality, I am afraid would require another Advice.
92. If the Panel have further questions arising from this Opinion, or require further clarification of any points within it, please do not hesitate to contact me.

Jonathan Cooper
Doughty Street Chambers

8 May 2007

**IN THE MATTER OF THE DUAL
FUNCTION
OF THE MAGISTRATE IN JERSEY**

OPINION

**Jonathan Cooper
Doughty Street Chambers**

8 May 2007

^[1] See for example, *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26

^[2] See Evidence of Mr I. Le Marquand (Magistrate) to the Social Affairs Scrutiny Panel, 19 September 2006

^[3] *Magistrate's Court Guidance Note, Procedure for the Progression of Cases presented by Centeniers and Legal Advisors*, 17 January 2000.

^[4] Para 5.1.

- [5] Para 5.3
- [6] *Tracy* 19 December 1996; *Reid* 21 March 1994.
- [7] Clayton, R. and Tomlinson H. *Fair Trial Rights* (2001)
- [8] *Delcourt v Belgium* (1970) A 11
- [9] Article 14(1) of the ICCPR.
- [10] *Findlay v UK* (1997) 24 E.H.R.R. 221; *Ocalan v Turkey* (2003) 37 E.H.R.R. 10; *McGonnell v UK* (2000) 30 E.H.R.R. 289
- [11] *Gonzalez del Rio v. Peru* (Human Rights Committee).
- [12] See for example, *Langborger v Sweden* (1990) 12 E.H.R.R. 416; *Campbell and Fell v UK* (1984) 7 EHRR 165; *Findlay v UK*; *Incal v Turkey* (2000) 29 E.H.R.R. 449.
- [13] *Piersack v Belgium* (1983) 5 E.H.R.R. 169
- [14] *Findlay v UK*
- [15] *Hauschildt v Denmark* (1989) App. no. 10486/83
- [16] *Piersack v Belgium*; *Incal v Turkey* (2000) 29 E.H.R.R. 449
- [17] *Hauschildt v Denmark*
- [18] *Piersack v Belgium*
- [19] *Hauschildt v Denmark*
- [20] *Remli v France* (1996) 22 E.H.R.R. 253
- [21] See the Human Rights Committee decisions: *Karttunen v. Finland (HRC)* and *Collins v. Jamaica (HRC)*, and *Fey v. Austria (HRC)*.
- [22] *Rowe and Davis v UK* (2000) 30 E.H.R.R. 1; *Jasper and Fitt v UK* (2000) 30 E.H.R.R. 441
- [23] *Jespers v Belgium* (1981) App. no. 8403/78
- [24] *Goc v Turkey* (2000) App. no. 36590/97
- [25] *Sander v UK* (2001) 31 E.H.R.R. 44
- [26] Further support for this proposition can be found in Recommendation No. R (94) 12, Council of Europe, Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies)
- [27] *Campbell & Fell v UK*
- [28] *R. v Gough* [1993] AC 646
- [29] *Johnson v Johnson* [2000] 5 LRC 223
- [30] Social Affairs Scrutiny Panel, 6 November 2006
- [31] *Findlay v UK*
- [32] The Role of Public Prosecution in the Criminal Justice System, Recommendation Rec (2000) 19, Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 (<https://wcd.coe.int/com.instranet.InstraServlet?Command=com.instranet.CmdBlobGet&DocId=366372&SecMode=1&Admin=0&Usage=4&InstranetImage=62157>)
- [33] Social Affairs Scrutiny Panel, 19 September 2006
- [34] *Smyth v Ushewokunze*, Supreme Court of Zimbabwe [1998] 4 LRC 120.
- [35] *MC v Bulgaria* (2005) 40 E.H.R.R. 20
- [36] *R (McCann and Others) v. Crown Court at Manchester; Clingham v Kensington and Chelsea Royal London Borough Council* [2002] UKHL 39.
- [37] Rights which have been accepted by the international and national communities as those providing the basic requirement for human dignity and accountability of government.