



Ministry of
JUSTICE



Diversity and Fairness in the Jury System

Cheryl Thomas
with Nigel Balmer

Ministry of Justice Research Series 2/07
June 2007

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The Research Unit, Ministry of Justice, was formed in April 1996. Its aim is to develop and focus the use of research so that it informs the various stages of policy-making and the implementation and evaluation of policy.

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First Published 2007

ISBN 978 1 84099 079 9

Acknowledgements

A study of this scale and nature required considerable cooperation and good will from many people over a number of years. Research with jurors inevitably carries with it concerns about possible interference with the secrecy of the jury process, and I am grateful to Sir Igor Judge, then Senior Presiding Judge, for his review of the research at the outset of the project, and to Her Majesty's Courts Service for facilitating my work with jurors over four years. I am particularly grateful to Gary Hopper, then Head of the Jury Central Summoning Bureau, for his invaluable advice throughout the project and for facilitating the two summoning surveys.

Four Crown Courts played key roles in the jury service and jury decision-making studies. At Blackfriars Crown Court, I am grateful to Court Managers, Marilyn Reed and Karl Liddle, for allowing me to conduct research there over four years, and to Jury Managers Siobhan Kendall-Morris, Alison Ward and John O'Brien for their assistance and patience. At Manchester Minshull Street Crown Court, Sandra Risby, Ian Jordan and Regional Director, Christine Mayer, kindly allowed me to survey jurors and pilot the decision-making study there. At Reading Crown Court, Sue Heath, Jane Burnham, John Schofield and Ros Weterhold provided valuable support with the juror survey. At Southwark Crown Court, I am grateful to Chris Harper, Maisie Wright and Colin Turner for helping to pilot the jury decision-making study.

Given the sensitivity of working with real jurors in the jury decision-making study, a special Advisory Group was established for this part of the research, and I am particularly grateful for the time and guidance provided by His Honour Judge John Samuels QC, His Honour Judge Nicholas Lorraine-Smith, Tony Apperley from the Home Office and Lawrence Gouldbourne from the Crown Prosecution Service. I am indebted to Miranda Hill from the Chambers of Roy Amlot QC, 6 King's Bench Walk, and Lydia Jonson from the Chambers of David Etherington QC, 18 Red Lion Court, who were instrumental in developing the case materials for this study. I am also grateful to Sgt. Andrew Ricketts of the Metropolitan Police and HMCS staff Tim Grigg, Lee Clark, Olu Adedeji, Hassan Noshib, Rahim Ahmed, Frank Ajoku, Yvonne Gayle, Lyn Stripling, Robert Palk, Sean Duke, Dave Togood as well as Kay Hernaman and Travers McNaught for their participation in the case reconstruction.

Nigel Balmer of the Legal Services Commission Research Centre played an important role in modelling the regression analysis for the summoning survey and jury decision-making study, and I am grateful to him for this. Professor John Baldwin deserves a special note of thanks for his support and advice during the writing of this report, and I am also grateful to Professor Michael Zander, Professor Hazel Genn, Pascoe Pleasence and the members of the Steering Group from DCA (now Ministry of Justice) and OCJR for their comments on earlier drafts. Electronic Data Services supplied juror and court databases and produced the summoning surveys, and I am grateful to Chris Wright, Linda Wilkinson, Barry Gate, Kay Sawyer and Valerie Bailey for facilitating this. I would also like to thank the Legal Services Commission for producing the juror catchment area maps in Chapters three and five, and Sally Lloyd-Bostock for her contribution to the original proposal for the research, which benefited from her work in law and psychology. At DCA's Research Unit, I am particularly grateful to Sohagini Shah for her management of the later stages of this project, as well as to Michelle Diver, Mavis Maclean and Sally Attwood.

Finally, I would like to thank all the jurors who agreed to participate in the studies and so generously gave their time to assist with the research.

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The views expressed are those of the author and are not necessarily shared by the Ministry of Justice.

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Executive Summary

The Jury Diversity Project

Based on continuing concerns about the under-representation of ethnic minorities on juries in this country, the Jury Diversity Project addressed two key questions:

How representative of the local community are those summoned for jury service, those serving as jurors and juries at each Crown Court in England and Wales?

Does ethnicity affect jury decision-making?

This four-year research project was unique in several respects.

It is the first study of the representative nature of jury service to compare the ethnic profile of jurors summoned and serving at each Crown Court in England and Wales to precise ethnic population profiles for each court, and to consider the relationship between juror ethnicity and other factors (gender, age, income, employment, religion, language) that may affect ability to serve.

Concern about ethnic minority under-representation on juries implicitly assumes that the ethnic composition of juries may affect jury verdicts, and this is the first research conducted in this country to examine whether ethnicity affects jury decision-making. The research used case simulation with real jurors, along with a study of jury verdicts in real cases.

Despite its scope and innovation, none of the research required exemption from section 8 of the Contempt of Court Act 1981, and illustrates just how much jury research can be conducted in this country within existing restrictions.

The report presents the findings of four separate but linked empirical studies:

a survey of the socio-economic background of all jurors summoned in England and Wales in one week in 2003 and one week in 2005 (15,746 jurors).

a survey of the socio-economic background of all jurors in jury pools, on jury panels and juries at three Crown Courts over a four-week period (640 jurors).

a case simulation study with real jurors exploring whether ethnicity affects jury verdicts or juror votes (27 juries with 319 jurors).

a study of the relationship between jury verdicts, the composition of juries and the ethnicity of defendants in actual cases at three Crown Courts (186 verdicts).

Myths of jury service

Various assumptions about the representative nature of jury service appear to have become entrenched in this country, influencing reviews of the jury system and policy development in this area. Most of these assumptions paint a picture of widespread jury service avoidance and unrepresentative jurors. However, no research has been conducted to prove or disprove any of these beliefs for over 15 years.

A key finding of the Jury Diversity Project is that most current thinking about jury service in this country is based on myth, not reality.

Myth: Black and minority ethnic (BME) groups are under-represented among those summoned for jury service in England and Wales.

Reality: The report found that there was no significant under-representation of BME groups among those summoned for jury service at virtually all Crown Courts in England and Wales (83 of the 84 courts covered in the survey).

Myth: Source lists for summoning jurors need to be changed in order to increase the proportion of ethnic minorities summoned.

Reality: The study found that, as ethnic minorities are summoned in proportion to their representation in the local population in virtually all Crown Courts in England and Wales, source lists do not need to be changed.

Myth: Ethnic minorities may be more likely than White jurors not to respond to summonses, reflecting a greater unwillingness to do jury service and a lack of belief in the fairness of the jury system.

Reality: The study found that the main factor affecting non-responses to summonses is high residential mobility, not ethnicity. A Mori survey conducted for the project found no significant differences between BME and White respondents in their willingness to do jury service or support for the jury system (which was high for both).

Jurors serving and not serving

The Criminal Justice Act 2003 removed ineligibility and the right of excusal from jury service for a number of groups (those aged 65 to 69, MPs, clergy, medical professionals and those involved in the administration of justice). But summoned jurors may still be disqualified or excused from jury service (due to age, residency, mental disability, criminal charges, language, medical or other reasons).

The study found that the most significant factors predicting whether a summoned juror will serve or not are income and employment status, not ethnicity. Summoned jurors in lower income brackets and those who are economically inactive are far less likely to serve than those in medium to high income brackets and those who are employed.

In 2005, of all those who replied their summonses, 64% of jurors served, 9% were disqualified or ineligible, 27% were excused. Of those excused, most were for medical reasons that prevented serving (34%), or child care (15%) and work reasons (12%). Fifteen percent of all the summonses in the survey were either returned to the JCSB as undeliverable (5%) or not responded to (10%), which occurred most often in areas of high residential mobility.

The report establishes that most current thinking about who does and does not do jury service is based on myth, not reality.

Myth: Ethnic minorities are under-represented among those doing jury service.

Reality: Analysis showed that, in almost all courts (81 of the 84 surveyed), there was no significant difference between the proportion of BME jurors serving and the BME population levels in the local juror catchment area for each court.

Myth: There is widespread avoidance of jury service by the British public in general, and Londoners (and, by implication, the BME community) in particular.

Reality: The report reveals that there is no mass avoidance of jury service by the British public: 85% of those summoned replied to their summonses and the vast majority served. The vast majority of Londoners also replied to their summons and served. Where ethnic minorities did not serve this was primarily due to ineligibility or disqualification (residency or language).

Myth: The middle classes and the important and clever avoid jury service. Juries are mostly made up of the retired and unemployed.

Reality: The study found no indication that the middle classes or the important and clever in society avoid jury service. Instead, it established that the highest rates of jury service are among middle to high-income earners and that those in higher status professions are fully

represented among serving jurors. The employed are over-represented among serving jurors, and the retired and unemployed are in fact under-represented,

Myth: Women and young people are under-represented among serving jurors, and the self-employed are virtually exempt from jury service.

Reality: The study establishes that jury pools at individual courts closely reflect the local population in terms of gender and age, and the self-employed are represented among serving jurors in direct proportion to their representation in the population.

Impact of juror eligibility rule changes

Surveys conducted both before and after the changes to juror eligibility came into effect in 2004 showed that the new rules increased the proportion of those summoned that served from 54% to 64%. Those serving on the date summoned increased by a third, disqualifications fell by a third and excusals fell by a quarter.

These changes did not affect any single socio-economic group, with one exception. The proportion of serving jurors that were 65 to 69 years of age doubled from 3% in 2003 to 6% in 2005, after their right of excusal was removed.

The in-depth study of the composition of jury pools at three Crown Courts conducted in 2003 showed that, even before the new rules were introduced, serving jurors were remarkably representative of the local community in terms of: ethnicity, gender, income, occupation, religion and age (except 65-69 years olds).

Composition of jury panels and juries

The study found that the local population dynamics in individual Crown Court juror catchment areas need to be taken into consideration in assessing how representative jury pools, jury panels and juries are at Crown Courts.

The study of jury pools, panels and juries at three Crown Courts found a substantial difference in the proportion of racially mixed jury panels and juries at the three courts, reflecting the different BME population levels for each court.

Virtually all jury panels and juries were racially mixed at Blackfriars (they contained at least one BME juror), while approximately half of all jury panels and juries were racially mixed at Reading and Manchester Minshull Street. Blackfriars' juror catchment area contains one of the highest BME population levels in the country (33%), while Reading and Manchester have BME populations of 10% and 11%.

The final stage of jury selection (empanelling) is the only stage that does not involve computerised random selection of jurors. There was some evidence that BME jurors on jury panels appeared to be selected to serve on juries less often than White jurors on jury panels, which may be the result of court clerks inadvertently avoiding reading out juror names that are difficult to pronounce.

There was no significant gender imbalance on juries at any of the three courts: 88% of all juries at all three courts had a male to female ratio of 6:6, 7:5 or 8:4.

The existing summoning process does not appear to produce sufficient numbers of Welsh speaking jurors to sustain bilingual trials in Wales.

High Ethnicity and Low Ethnicity Courts

The study determined that racially mixed juries are only likely to exist in courts where BME groups make up at least 10% of the entire juror catchment area. This does not reflect any failure in summoning. It is simply the consequence of BME population levels in these catchment areas and the process of random selection.

The report categorises the 94 Crown Courts in England and Wales as either High Ethnicity or Low Ethnicity Courts. Only 20 (or 21%) are High Ethnicity Courts, where there is a reasonable probability that BME jurors will be in jury pools and on juries. Most High Ethnicity Courts (12 or 60%) are London courts, where 45% of all ethnic minorities live and where a quarter of all jurors serve.

Most Crown Courts (74 of the 94 or 79%) are Low Ethnicity Courts, where there is little probability that ethnic minorities will be on a jury. Of these, 13 are Ethnicity Concentration Courts, where the overall BME population is below 10% but where there are high BME populations concentrated in some areas. In these courts, there is likely to be a public expectation that juries will be racially mixed, even though summoning will not usually produce this. This may be particularly problematic because a high proportion of BME defendants and racially-aggravated crimes are prosecuted at some of these courts.

Race and jury decision-making study

Concern about the possible under-representation of ethnic minorities on juries assumes that the ethnic composition of juries can affect jury outcomes. For the first time in this country, research was conducted on the impact of race on jury decision-making.

The research used case simulation with real jurors, supplemented by a study of jury verdicts in actual cases. Case simulation was used because it is the most reliable method of determining whether causal connections exist between race and jury decision-making, not because section 8 of the Contempt of Court Act 1981 prohibits interviewing jurors about their deliberations.

The success of case simulation depends on achieving a high level of authenticity. This study was based on a real case, filmed in a real courtroom, with a real judge, barristers, court staff, police and witnesses. Real jurors were the study participants, jury panels were selected by the Court Service random selection programme, all juries included enough jurors to constitute a valid jury (10-12 jurors) and they deliberated in a real deliberating room.

The study was conducted with dismissed jurors at Blackfriars Crown Court in London, a court with one of the most ethnically diverse catchment areas in the country and where virtually all juries are racially mixed juries. The study included 27 separate juries with 319 jurors (23 juries with 12 jurors, 3 with 11, 1 with 10).

All juries saw a film of an identical case where the defendant was charged with causing Actual Bodily Harm (ABH), but where specific case elements were altered for different juries (race of defendant, victim and charges).

Verdicts of racially mixed juries

The main finding of the case simulation study is that the verdicts of racially mixed juries did not discriminate against defendants based on the defendant's race. In the 27 separate jury verdicts, outcomes for the White, Black and Asian defendants were remarkably similar. Where the jury reached a verdict, in almost all instances (10 of 11 or 91%) the defendant was found not guilty, regardless of the race of the defendant.

There were more hung juries (16) than verdicts (11), but this reflected the divisive nature of the case. The possibility of reaching a majority verdict produced more jury verdicts (11) than if unanimity was required (1).

The study provides the first evidence to support a widely held belief: that racially mixed juries do not discriminate against defendants based on the defendant's ethnic background. While the assumption has been that racially mixed juries will not discriminate against ethnic minority defendants, this study showed that racially mixed juries also did not discriminate against White defendants.

Votes of individual jurors on racially mixed juries

Even though the defendant's ethnicity did not have an impact on jury verdicts, the research found that in certain cases ethnicity did have a significant impact on the individual votes of some jurors who sat on these juries. Statistical analysis of the individual votes of all 319 jurors who took part in the case simulation showed that in certain cases BME jurors were significantly less likely to vote to convict a BME defendant than a White defendant.

Same race leniency among BME jurors was only present when race was not an explicit element of the case (defendant charged with ABH only). When the same assault was prosecuted as Racially-aggravated ABH, BME jurors and White jurors had similar conviction rates for both the White and BME defendants.

Same race leniency among BME jurors appeared to reflect their belief that the courts treat ethnic minority defendants more harshly than White defendants.

In addition, the study found that same race leniency did not occur among all BME jurors for all BME defendants. Both Black and Asian jurors showed leniency for the Black defendant, but there was no evidence of leniency for the Asian defendant by either Asian or Black jurors.

Evidence was also found that White jurors showed some same race leniency towards White defendants, but again this was only present in cases where race was not an explicit element of the case. In non-race salient cases, White jurors had very low conviction rates for the White defendant, despite consistently stating that they did not believe his evidence and felt he was dishonest.

In the real world of criminal trials, ultimately the only relevant decision is the verdict of the jury. The crucial finding of the study was that these tendencies towards same race leniency by BME or White jurors did not have an impact on the verdicts of the juries on which they sat.

Despite the fact that BME jurors were significantly more likely to convict the White defendant than the BME defendant when the assault was not charged as racially-motivated, no juries convicted the White defendant in this version of the case.

The report concludes that this highlights the benefits of permitting majority verdicts and of having 12 member juries. The fact that 12 jurors must jointly try to reach a decision and that majority verdicts are possible meant that more verdicts were achieved and individual biases did not dictate the decision-making of these racially mixed juries. If juries were smaller or if unanimous verdicts were required, then individual juror bias might potentially have a greater impact on jury verdicts.

Impact of jury deliberation and victim ethnicity

The main effect of deliberation was to increase the proportion of jurors who felt completely confident in their votes. This is interesting in light of recent American research, which found that deliberating on a jury strengthens jurors' belief in the power of public decision-making and increases voting at subsequent elections.

Results showed that the probability of a BME juror voting to convict a White defendant fell following deliberation, suggesting that the process of deliberating on racially mixed juries may influence the decision-making of ethnic minority jurors.

Analysis of individual juror votes also indicated that White jurors on these racially mixed juries were sensitive to the plight of a Black victim. White jurors were most likely to convict a defendant when the victim was Black and defendant was White or Asian (but not when the defendant was Black).

Scope of findings

These findings relate to racially mixed juries (and jurors serving on these juries) in Crown Courts in a highly diverse local community, such as London.

Analysis of jury verdicts in actual trials at Blackfriars, Manchester Minshull Street and Reading Crown Courts indicated that there are likely to be court-based differences in jury verdicts. Juries at Blackfriars (which were all racially mixed juries) had low conviction rates, but juries at Manchester Minshull Street and Reading (which were both racially mixed and all-White juries) had high conviction rates regardless of the jury's racial composition.

Most juries in most Crown Courts in England and Wales are likely to be all-White juries, due simply to the demographics of juror catchment areas. It is important, therefore, that the Blackfriars' study be replicated in a different Crown Court outside London, where the local community is predominantly White, to examine whether all-White juries discriminate against defendants based on their race.

Conclusion

The Jury Diversity Project found that the juror summoning process does not discriminate, directly or indirectly, against BME groups: a representative section of the local BME community are summoned and serve as jurors in virtually all Crown Courts in England and Wales. It also exposed a number of widespread myths about jury service, which have clouded both public perceptions and policy discussions about the jury system for many years. There is no mass avoidance of jury service among the British public, and juries are also not made up of people who are not important or clever enough to get out of jury service. There is no evidence of any unwillingness to do jury service or any particular lack of trust in the fairness of the jury system among the BME community or the British public in general. This was the reality of jury service in England and Wales even before the introduction of new juror eligibility rules in 2004, which have nonetheless increased participation in the jury system. On the fundamental question of whether juries discriminate against defendants based on race, the case simulation research with real jurors showed that racially mixed juries in highly diverse communities did not discriminate against defendants based on the race of the defendant. This was despite the fact that race did influence the decisions of some individual jurors who sat on these juries in cases where race was not presented as an explicit element in the case. What remains to be answered is whether all-White juries, which decide cases in most Crown Courts, also do not discriminate against defendants based on race.

Chapter 1. Introduction¹

Background to the Jury Diversity Project

In 2000 a research programme to examine whether, and to what extent, the court system deals fairly and justly with the needs of a diverse and multicultural society was launched by the then Lord Chancellor, Lord Irvine. This programme was a response to the publication the year before of the Macpherson Report. The inquiry into the racially-motivated murder of black teenager, Stephen Lawrence, in 1993 most notably concluded that the police investigation and failed prosecution was marred by “institutional racism”². It also concluded more generally that it was essential for ethnic minority communities to feel confidence in the criminal justice system, and that it was incumbent on all government institutions to ensure that their policies and practices did not disadvantage any section of the community. In response to these general conclusions the Lord Chancellor’s research programme was aimed specifically at examining whether direct or indirect discrimination against ethnic minorities exists in the court system³. Three key questions were to be addressed by the Department’s research programme:

1. To what extent is there evidence of any direct discrimination? How do questions of ethnicity influence decisions?
2. To what extent is there evidence of any indirect discrimination? To what extent do processes have different impacts on people from different ethnic minority groups?
3. To what extent do different ethnic groups believe they are likely to be treated fairly?

The research programme had two phases. Phase one, initially entitled “Race and the Courts”, included four studies, three of which related to ethnic minority experiences with the courts. These included: black and minority ethnic (BME) defendants’ perception of fairness in criminal proceedings⁴; BME tenants’ perception of fairness in housing proceedings⁵; and the impact of

¹ Note on report terminology: There are no ideologically neutral terms that are universally accepted when it comes to analysing relations between people of different heritages. While social scientists in Britain and Europe believe there are problems with the concept of “race”, this is not the case in the United States where the term is widely used and accepted in social science. Because all previous research on “race” and jury decision-making has been conducted in the United States, where this American research is discussed, the report adheres to the “race”-based terminology in use in that field. In all other areas of the report, the “ethnicity”-based terminology currently used in this country has been adopted. As Ratcliffe notes, this lack of consensus over terminology has created a “quagmire of ambiguity”. P. Ratcliffe, “Race”, *Ethnicity and Difference: Imagining the Inclusive Society* (2004)

² W. Macpherson *The Stephen Lawrence Inquiry: Report of the Inquiry by Sir William Macpherson of Cluny* (1999)

³ Lord Chancellor’s Department Research Unit *Courts and Diversity Research Programme* (March 2003) p.1

⁴ R. Hood, S. Shute and F. Seemungal, *Ethnic Minorities in the Criminal Courts: Perception of Fairness and Equality of Treatment* DCA Research Series No. 2/03 (2003)

⁵ S. Blandy, C. Hunter, D. Lister and J. Nixon *Housing Possession Cases in the County Court: Perception and Experiences of Black and Minority Ethnic Defendants* DCA Research Series No.11/2002 (2002)

race, religion, language and culture in care proceedings⁶. A fourth study examined issues surrounding the introduction of ethnic monitoring in civil cases⁷. In 2002, the Department launched the second phase of the research programme under the umbrella of the “Courts and Diversity Research Programme”. Three of the four new research projects again focussed on ethnic minority experiences and perceptions of fairness in the court system, this time among judicial personnel and users of the wider judicial system, including: the experience of BME magistrates⁸, the experience of BME families in care proceedings⁹, and the experience of BME users of tribunals¹⁰.

The fourth and final project, on ethnic diversity and the jury system, differed from the other projects in both objectives and approach. Unlike the other studies, the main objective of the jury research project was not to examine ethnic minority *perceptions* of fairness in the judicial process (question 3); instead the main objective was to examine the *actual operation* of the jury system and the *impact* of the jury process on ethnic minorities (questions 1 and 2). The inclusion of juries in the research programme was considered important given continuing concerns about the possible under-representation of ethnic minorities on juries and recent racially-based legal challenges to jury verdicts. The research was conducted over a four-year period, and took into account changes to juror eligibility rules introduced by the government in 2004. This report presents the findings of a comprehensive investigation into ethnic minority representation in the jury summoning and serving process, as well as the impact of race on jury verdicts. This is the first time the representative nature of jury service in England and Wales has been examined on a court-by-court basis, and the first ever study of the impact of race on jury decision-making in this country.

The jury system

One of the most remarkable aspects of the jury system in England and Wales is that while juries now decide only a small fraction of all criminal cases and almost no civil cases, the right to trial by jury continues to be a highly charged subject. Most discussion of jury policy generates public attention, and virtually every proposal to restrict trial by jury in the last half century has provoked widespread and often impassioned opposition. There is an ancient right for an accused to be

⁶ J. Brophy, J. Jhutti-Johal and C. Owen *Significant Harm: Child Protection Litigation in a Multi-Cultural Setting* DCA Research Series No. 1/2003 (2003)

⁷ S. Candy and V. Stone *The Introduction of a Question on Ethnic Background into the Civil Justice System* LCD Research Series No.1/01 (2001)

⁸ J. Vennard, G. Davis, J. Baldwin and J. Pearce *Ethnic Minority Magistrates' Experience of the Role and of the Court Environment* DCA Research Series No.3/04 (2004)

⁹ J. Brophy, J. Jhutti-Johal and E. McDonald *Minority Ethnic Parents, Their Solicitors and Child Protection Litigation* DCA Research Series No.5/2005 (2005)

¹⁰ H. Genn, B. Lever and L. Gray *Tribunals for Diverse Users* DCA Research Series No.1/2006 (2006). This study also included quantitative analysis of tribunal decisions.

tried only “by the lawful judgement of his equals or by the law of the land”¹¹, and even though there is no modern constitutional right to trial by jury in England and Wales, governments have found the public extremely unwilling to sanction further restrictions to jury trials. Jury service is unique in being the only form of civic participation that is compulsory for almost all citizens (and many non-citizen residents) to perform today, and delivering justice by juries has overwhelming support among the public in England and Wales. Over 80% of the public trust a jury to come to the right decision, think that trial by jury is fairer than being tried by a judge and that juries produce better justice¹². This overwhelming public support and robust defence of legal provisions for jury trials demonstrates the special place juries have in the public mind.

Juries in some form have existed in England for at least eight centuries¹³, but the jury has fundamentally changed over time. Today, it is an institution in which twelve randomly selected members of the public are used to judge guilt or innocence in only a very small proportion of all criminal cases and, in exceptional circumstances, a few civil cases¹⁴. Over 98% of all criminal cases are non-jury trials heard by magistrates alone¹⁵. Only the most serious indictable criminal offences are necessarily tried by a jury in the Crown Court. The only other criminal cases that may be tried by a jury are either way offences, which may be tried either in the Crown Court with a jury or in Magistrates’ Court if both magistrates and defendant agree. There are just over 30,000 potential criminal jury trials in the Crown Courts a year, although juries reach a verdict by deliberation in only just over half of these cases¹⁶.

Despite this small number of jury trials, the issue of the right to trial by jury remains highly controversial. Juries have historically been seen as an important protection for the individual citizen against the power of the state, and are also seen today as a means of increasing public confidence in the courts by involving citizens directly in the administration of justice. It is also

¹¹ “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land”. Magna Carta Clause 39.

¹² Survey commissioned by the Bar Council, the Law Society and the Criminal Bar Association and published in January 2002. The Crown Court Study in the early 1990s also found that 80% of jurors who had served on a jury rated the jury system as either very good or good. M. Zander and P. Henderson, *Crown Court Study*, The Royal Commission on Criminal Justice Research Study No.19. HMSO (1993).

¹³ The abolition of the process of trial by ordeal in 1215 is widely cited as the origin of the use of juries in criminal cases, although the Normans had earlier used the practice of convening a group under oath to establish the truth. See *Smith, Bailey and Gunn on the Modern English Legal System* (2002) 17-084.

¹⁴ There is now only a qualified right to jury trial in four types of civil cases: defamation (libel and slander), fraud, malicious prosecutions and false imprisonment. See Supreme Court Act 1981 section 69.

¹⁵ In 2004, there were 2.02 million criminal cases committed for trial in the Magistrates’ Courts: *Criminal Statistics 2004 England and Wales* Home Office Statistical Bulletin 19/05 2nd edition (2005) Table 2A, paragraph 2.8. In the same year only 30,067 cases involving a not guilty plea by the defendant were disposed of in the Crown Courts: *Judicial Statistics 2004* Department for Constitutional Affairs Table 6.8 p.90.

¹⁶ There were 16,556 jury verdicts by deliberation in 2004. *Judicial Statistics 2004*. Table 6.10 (showing 7,123 total acquittals by jury deliberation) and Table 6.11 (showing 9,433 total convictions) p.91

possible that jury service may lead to wider public participation in the democratic process¹⁷. Weighed against this are claims that jury trials are more costly and time-consuming than trials in magistrates' courts, and an inadequate means of dealing with the complexity of legal cases. In every decade over the last 50 years, proposals to change the jury system have been made by government committees, royal commissions or reviews of the legal system. In the 1960s the Morris Committee conducted a major review of jury service¹⁸. This was followed in the 1970s by the Faulks Committee review of the use of jury trials in civil cases¹⁹, as well as the James Committee examination of the criminal defendant's right to elect trial by jury²⁰. In the 1980s the Roskill Committee reviewed the use of juries in fraud cases²¹, and in the 1990s the Runciman Royal Commission examined the role of juries in the criminal justice system²². Most recently, the Auld Review of the Criminal Courts reconsidered jury summoning and selection, offences triable by jury and support provided to jurors²³. Despite this plethora of reviews, very little is in fact known about juries in this country; there is no definitive research, for instance, on how representative juror selection is, whether jurors comprehend evidence and judicial directions, or how juries reach their verdicts.

The impetus for changing the jury system has more often than not come from high profile cases and anecdote instead of any systematic monitoring or substantive research²⁴, and those conducting reviews of the jury system have expressed frustration at the lack of reliable evidence on which to base their findings²⁵. Despite this lack of research evidence, a number of widespread beliefs about juries have become entrenched in this country. These unsubstantiated claims tend to paint a disparaging picture of juries and jurors, not least the belief that jury service is only for those not clever or important enough to get out of serving²⁶.

¹⁷ Recent research in the United States found that jury service appeared to increase voting among jurors at subsequent elections, especially if they had previous low levels of voting in the past. J. Gastil, E. Deess and P. Weiser "Civic Awakening in the Jury Room: A Test of the Connection between Jury Deliberation and Political Participation" *Journal of Politics* Vol. 64, No.2 (May 2002), 585-595; J. Gastil and P. Wieser "Jury Service as an Invitation to Citizenship: Assessing the Civic Value of Institutionalized Deliberation" Legal Studies Research Paper Number 06-32, University of Colorado Law School (October 2006)

¹⁸ *Departmental Committee on Jury Service Report*, Cmnd. 2627 (1965)

¹⁹ *Report of the Committee on Defamation*, Cmnd. 5909 (1975)

²⁰ *Report of the Interdepartmental Committee on the Distribution of Criminal Business Between the Crown Court and Magistrates' Courts*, Cmnd. 6323 (1975)

²¹ *Fraud Trials Committee, Report* (1986)

²² *Report of the Royal Commission on Criminal Justice*, Cm. 2263 (1993) (herein referred to as the Runciman Commission)

²³ *Report of the Review of the Criminal Courts* (2001) Chapter 5 (herein referred to as the Auld Review)

²⁴ There is no reliable evidence, for instance, that the right to silence was abused by professional criminals or that peremptory challenge was leading to acquittals by stacked juries, although these arguments were used in introducing restrictions on trial by jury. There have been persistent moves in last few decades to abolish juries in fraud cases, based initially on the argument that juries cannot understand complex evidence and more recently on the argument that these trials last too long and impose an unfair burden on jurors, although there is no research evidence to support either contention.

²⁵ Auld supra note 23, Chapter 5 paragraph 52; Runciman supra note 22; Roskill supra note 21.

²⁶ See Auld supra note 23.

The lack of knowledge about the working of the jury system is often attributed to the introduction of Section 8 of the Contempt of Court Act in 1981, which makes it a criminal offence to “obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced, or votes cast by members of a jury in the course of their deliberations”²⁷. Contrary to common assumption, however, this restriction does not in fact prevent most research about juries²⁸. It does not, for instance, prohibit research on the summoning process, the composition of juries, the types of cases tried by juries or jurors’ views of jury service. It does not even preclude research about jury deliberations so long as this involves case simulation, which is widely recognised as the most methodologically sound approach to understanding how and why jurors and juries reach their verdicts. However, the existence of section 8 has created great confusion about what research can and cannot be conducted with jurors, and the resulting hesitancy of academics to conduct research with jurors for fear of falling foul of the law has created an information vacuum about juries in this country in recent years.

Jury selection and composition

A key issue in jury policy is the question of how jurors are selected and its impact on the composition of juries. While there is no clear constitutional right to trial by jury in this country, the principle most often cited in relation to jury composition is that a defendant is entitled to be tried by a “jury of one’s peers”. Various meanings have attached to this concept over time²⁹, but these have generally included the judgement of:

- One’s equals or neighbours
- A body of fair-minded persons
- An independent or impartial body
- A randomly chosen body
- A representative body

These suggest that specific qualities (independence, impartiality, representation and random selection) are needed for a jury to perform effectively, yet these qualities are not always necessarily consistent with one another. For instance, a randomly selected jury will not automatically be a representative jury; it is in the nature of random selection that some juries will be unrepresentative. Today, a guiding principle in jury selection is that individuals are randomly selected for jury service, although random selection of jurors is a relatively recent invention and

²⁷ The government introduced this restriction following the unsuccessful attempt to prosecute the *New Statesman* for contempt for publishing an interview with a juror in the trial of former Liberal Party leader Jeremy Thorpe for conspiracy to murder.

²⁸ *Jury Research and Impropriety: Consultation Paper CP04/05* Department for Constitutional Affairs (2005)

²⁹ G. Marshall “The Judgement of One’s Peers: Some Aims and Ideal of Jury Trial” in N. Walker with A. Pearson (eds) *The British Jury System* (1975) p.5

was only introduced in England and Wales following recommendations made in the Morris Report in 1965³⁰. The view that currently underpins jury policy in this country is that a randomly selected jury is most likely to be representative and a representative jury is most likely to be impartial.

To qualify for jury service a person must be between 18 and 70 years of age, have lived in the United Kingdom, the Channel Islands or the Isle of Man for any period of at least 5 years since the age of 13 and be eligible to vote in parliamentary or local elections³¹. To vote in elections a person must be either a British citizen, a citizen of a member state of the European Union or a Commonwealth citizen. Selection for jury service is done on a court-by-court basis. Before 2001 each Crown Court Centre in England and Wales was responsible for summoning their own jurors, but in that year the process became centralised for all courts under the new Jury Central Summoning Bureau (JCSB) in order to standardise and ensure greater consistency in the summoning process. The list from which persons are randomly summoned for jury service is made up of electoral lists provided to the JCSB by local authorities. Jurors are summoned for each of the individual Crown Courts separately, and each court has a unique catchment area for jurors based on postcode districts that lie within a specified distance of the court.

Computerised random selection of all jurors in England and Wales was only introduced six years ago after the establishment of the JCSB. The Bureau began randomly selecting jurors by computer in October 1999 for 7 pilot courts, eventually covering every Crown Court Centre (as well as the High Court and county courts) by the beginning of 2001. The introduction of random selection was based on the belief that this method was the best way of achieving fairness in juror selection and representation in juries, but its impact on the representative nature of jurors in the individual Crown Courts has not been studied. **The Jury Diversity Project addresses a key question about juries: to what extent are randomly selected jurors representative of the local population for the courts where they are summoned?**

Ethnic representation on juries

Concerns over whether juries are representative or not have been raised in relation to gender, age and employment in the past, but in recent years the concern has focused particularly on ethnicity. For several decades it has been claimed that ethnic minority groups are under-represented on juries. However, no substantive research has been conducted in this country on any of these issues for at least 15 years, and what little earlier research exists is now likely to be out of date. The Contempt of Court Act restrictions on discussing deliberations with jurors

³⁰ *Report of the Departmental Committee on Jury Service Cmnd 2627 (1965)*

³¹ Qualification for jury service is governed by the Juries Act 1974, as amended by the Criminal Justice Act 2003 Chapter 44, Section 321, Schedule 33.

cannot be directly responsible for this lack of research, as it would not apply to examining jury representation. However, before the Jury Central Summoning Bureau centralised the jury summoning process for all courts in 2001, the logistics for conducting research on juror selection and jury composition in each of the 78 individual Crown Courts in England and Wales would have presented significant obstacles to such large-scale quantitative research. The dearth of research in this area has also been affected by concerns about the sensitivity of requesting ethnic background information from those summoned for jury service. The Department's study on the feasibility of ethnic monitoring in the civil courts found concerns among both court users and court staff that ethnic monitoring information could be used to the detriment of ethnic minorities using the civil courts³². However, under the Race Relations Act it is arguable that the JCSB or the Department for Constitutional Affairs (Ministry of Justice - from 9 May 2007) has an obligation to monitor ethnicity among those summoned for jury service as part of an obligation to monitor policies for any adverse impact on race equality³³. There are a number of distinct stages in juror summoning and the selection of jurors for actual juries:

- Crown Court juror catchment area

- Juror source lists

- Juror summoning process

- Juror eligibility

- Jury pool

- Selection of jury panel

- Empanelling of jury

At each stage there are factors at play that could ultimately affect ethnic minority representation on juries. For instance, ethnic minorities may be more likely than White people to be excluded from the juror summoning and selection process because: they may be more likely not to be on the local electoral lists from which the summoning lists are drawn. If they are on the lists, they may be more likely not to receive a summons. If they receive a summons, they may be more likely to request an excusal or be disqualified or they may be more likely not to respond to the summons. And if they are in the jury pool at court, they may be more likely not to be selected to serve on a jury. However, virtually nothing is known about whether ethnicity affects juror summoning at any of these stages.

³² Candy and Stone *supra* note 7, p.8

³³ *Commission for Racial Equality Assessment Template for Race Equality Scheme* CRE (February 2005)

The catchment area for summoning jurors for each Crown Court is the first important factor; a substantial proportion of ethnic minorities can only be summoned for jury service for a particular court if there is a substantial proportion of ethnic minorities living in the court's catchment area. If there are large numbers of ethnic minorities in the catchment area, the next factor is whether they are also on the summoning source lists (local electoral lists). It has been claimed that ethnic minorities comprise one of the largest categories of persons who may be qualified to serve on juries but are not summoned because they are not registered as electors. A Home Office report in 1999 claimed that 24% of the Black community, 15% of those from the Indian sub-continent, and 24% of other ethnic minorities are not registered to vote³⁴, but this claim was based on a study that did not distinguish between ethnic minorities who are qualified to vote in elections (and are therefore qualified to do jury service) and those who are not. At the actual juror summoning stage, the question is whether the process of random selection results in a representative group of local people being summoned for jury service, and whether the process of and grounds for excusal and disqualification (eligibility) may result in any loss in ethnic minority representation among those appearing at court for jury service (the jury pool). Among the jury pool, the issues are whether the creation of a jury panel (the group of 13 or more jurors from which a jury of 12 will be selected) for individual cases and the process of selecting the final 12 jurors from the panel (empanelling) in any way adversely affects ethnic minority representation on juries.

There have only been two substantive studies of ethnic representation in the jury system in the last 30 years in this country. In the 1970s, Baldwin and McConville examined ethnic representation on juries in Birmingham Crown Court as part of their wider study of the outcomes of jury trials³⁵. This study reported a significant under-representation of ethnic minorities on juries at Birmingham Crown Court in relation to estimates of the ethnic minority population in the Birmingham area. However, this study was conducted almost 30 years ago, and its scope was necessarily limited to only one Crown Court. In the early 1990s, Zander conducted a comprehensive survey of jurors serving in almost all Crown Courts in England and Wales during a two-week period in February 1992 (the Crown Court Study)³⁶, on behalf of the Runicman Commission. The study surveyed jurors about an extensive number of issues related to the experience of serving on a jury and also examined the composition of juries. It reported some limited under-representation of certain ethnic groups and some limited over-representation of other ethnic groups serving on juries. However, the official constraints imposed on this study meant that it was unable to relate ethnic minority representation on juries to ethnic minority

³⁴ J. Airs and A. Shaw "Jury Excusal and Deferral" *Home Office RDS Report No.102* (1999)

³⁵ J. Baldwin and M. McConville, *Jury Trials* (1979)

³⁶ Zander and Henderson *supra* note 12.

populations in each Crown Court area. It was only able to calculate ethnic minority representation on juries on a national aggregate basis. Yet because each Crown Court in England and Wales has its own individual local catchment area for jurors, ethnic minority representation on juries necessarily needs to be measured against the demographics of the local population for each Crown Court, not national population figures.

More recent accounts of ethnic representation of juries include observations of juries in Liverpool, Nottingham and Durham in 2000 made for the Auld Review. The observers reported a “noticeable lack of ethnic mix in jury trials”, yet as Auld himself acknowledged, these observations were both limited and unscientific³⁷. More recently, Her Majesty’s Inspectorate of Court Administration (HMICA) carried out an inspection at 20 Crown Court Centres in England and Wales, in which inspectors reported observing all-White juries or jury pools “in some areas where the ethnic mix of the local area would be expected to produce a greater representation of minority groups”³⁸. Although the report did list the 20 courts inspected, it did not indicate which of these courts it was referring to where greater BME representation on juries was expected, and it is therefore not possible to assess whether these were valid expectations.

While the Birmingham and Crown Court studies examined the representative nature of those serving on juries, they were not designed to examine the impact of the actual summoning and selection process on jury representation. In addition, since these two studies were carried out, major changes have occurred which may have significantly affected ethnic representation on juries. These include: the establishment of the Jury Central Summoning Bureau 2001 which standardised the entire juror summoning process; the introduction of computerised random selection of all jurors in 2001; the 2001 national census revealing changes in ethnic population demographics in England and Wales; and the introduction of new juror eligibility requirements which came into effect in 2004. In this period there have also been legal challenges to the lack of ethnic mix on juries, and recommendations to government to alter both the summoning process and the empanelling of juries in order to achieve greater ethnic representation. In addition, the Crime and Disorder Act 1998 introduced a new class of racially-aggravated offences³⁹, prompting an increase in the recording and prosecution of racially motivated crimes. Such prosecutions introduced an overt racial dimension to jury trials, and raised concerns about

³⁷ Auld supra note 23, Chapter 5, paragraph 52. An overview of jury research prepared for the Auld Review cites the following factors as possibly leading to jury panels being unrepresentative: employment, childcare, non-appearances, mobility and residential status, and called for more detailed examination of employment and occupational profiles of jurors. P. Darbyshire, A. Maughan and A. Stewart, “What Can the English Legal System Learn from Jury Research Published up to 2001” Appendix to *Review of the Criminal Courts* (2001) Auld supra note 23.

³⁸ *A Thematic Review of Quality of Service Provided by HMCS for Jurors in the Criminal Courts*, HMICA (December 2006) section 4.36.

³⁹ Section Part II Crime and Disorder Act 1998, Sections 28-32, 82

whether ethnic minorities should be represented on juries not just where the defendant but where the *victim* is from an ethnic minority group. Despite these developments, no new research has been conducted to determine whether ethnic minorities are in fact under-represented in the jury system, although there have continued to be claims that they are under-represented in both the summoning process and on juries⁴⁰.

While the under-representation of ethnic minorities on juries has been a cause for concern in a number of common law countries⁴¹, the one jurisdiction where the most research has been carried out on race and jury representation is the United States. The vast majority of the 50 states have established special race and ethnic fairness commissions since the early 1990s to address the issue of racial representation in the jury system. Many of these have focussed on the voter registration source lists used for juror summoning and whether the lists should be extended to include, for instance, vehicle licensing lists and telephone directories in order to encompass more ethnic minorities.⁴² In addition, empirical studies have been conducted in the United States on the extent to which the jury selection process may discriminate against ethnic minorities. One significant study of discrimination in jury service conducted in California found that social class exerted greater influence than race in explaining disproportionate jury representation. Ethnic minority jurors with low incomes and less prestigious occupations were under-represented, but African Americans and Hispanics with higher incomes and high prestige jobs were actually over-represented on juries⁴³.

The American experience and research on jury representation is extremely useful in terms of the methodologies used to examine this issue, although caution should always be exercised in drawing too many direct conclusions for the English jury from this research. Despite its substantial international influence, the American experience with race relations is unique in many respects⁴⁴. There are some fundamental differences between the American and British experience with race relations, and these need to be considered in assessing the relationship between ethnicity and jury representation in this country. Perhaps most fundamentally, the American experience is dominated by memories of unfair jury selection procedures that

⁴⁰ Auld *supra* note 23; Darbyshire et al *supra* note 37.

⁴¹ See for instance M. Israel "Ethnic Bias in Jury Selection in Australia and New Zealand" *International Journal of the Sociology of Law* 26, (1998); D. Pomerant *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases* Department of Justice Canada (1994); C. Petersen "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" *McGill Law Journal* 38 (April 1993).

⁴² A database of all state initiatives to increase ethnic minority representation on juries has been compiled by the National Center for State Courts. See www.ncsc.org

⁴³ H. Fukurai "Race, Social Class, and Jury Participation: New Dimensions for Evaluating Discrimination in Jury Service and Jury Selection" *Journal of Criminal Justice* Vol.24, No.1, pp.71-88 (1996)

⁴⁴ J. Stone and R. Dennis *Race and Ethnicity: Comparative and Theoretical Approaches* (2003)

systematically excluded African Americans from jury service in state courts⁴⁵. There has been no similar experience here. There are also several important structural and procedural differences between American and English juries which impact directly on the question of ethnic representation and jury decision-making. First, the use of peremptory challenges (either party's right to reject a limited number of prospective jurors without providing cause) has not been permitted in jury trials in England and Wales since 1988⁴⁶, but it is still widely used in the United States. Peremptory challenges occur at the *voir dire* stage of jury selection (the questioning of potential jurors to establish possible bias) in the United States and are controversially associated with attempts to prevent ethnic minority representation on juries⁴⁷. Second, while majority verdicts are possible in this country⁴⁸, in the United States unanimous jury verdicts are still required in all federal jury trials and in a number of states. In addition, there is no requirement in the United States that the jury be made up of 12 people, particularly in civil trials, and numerous states use juries with as few as 6 members. Both the number of votes required to reach a verdict and jury size can substantially affect the dynamics of jury decision-making. More generally, in the United States there is also a formal constitutional right to a jury trial in both criminal and civil cases⁴⁹, and while the Supreme Court has sanctioned some limitations to these rights, juries are still widely used for both criminal and civil cases at both the state and federal levels.

The American experience has often been considered in this country in reviews of the jury system, and the adoption of American approaches to expanding the summoning source list for jurors has been specifically advocated here on the grounds that it would increase ethnic minority representation in the jury system. The Auld Review, for instance, recommended widening the pool of potential jurors to improve ethnic minority representation, and specifically recommended amending the law to allow the Jury Central Summoning Bureau to combine a number of publicly maintained directories and lists (telephone directories, driver registration lists) to assist in identifying persons qualified for jury service⁵⁰. However, these recommendations for expanding the juror source lists assume that ethnic minorities are under-represented in the summoning process in England and Wales, yet there is no research evidence to substantiate this. The

⁴⁵ Challenged in the U.S. Supreme Court over a 30 year period from *Norris v Alabama*, 294 U.S. 587 (1935) to *Whitus v. Georgia*, 385 U.S. 545 (1967)

⁴⁶ While challenges for cause and the prosecution's right to "stand by" a juror remain, both are rarely used and are governed under restrictive provisions of the Juries Act 1974 and guidelines issued by the Attorney-General in November 1988, respectively.

⁴⁷ There is a large body of case law on this subject, see *Batson v. Kentucky* 476 U.S. 79 (1986), and *voir dire* is a major subject both of academic study and public commentary.

⁴⁸ In 2004, 23% of all jury verdicts were majority verdicts. *Judicial Statistics 2004* Table 6.11 p.91. Section 17 of the Juries Act 1974 governs the use of majority verdicts.

⁴⁹ See Article 111 Section 2 clause 3, Sixth Amendment and Seventh Amendment

⁵⁰ Auld Review *supra* note 23, Chapter 5, paragraph 60.

government did not adopt Auld's recommendation for expanding juror source lists, but in its 2002 White Paper, *Justice for All*, it did set out its intention to increase the proportion of the population eligible for jury service, in part as a means of ensuring that juries properly reflect the diversity of the communities they serve⁵¹. Under recent changes introduced in the Criminal Justice Act 2003, anyone summoned to do jury service is now required to serve unless they can show "good reason" to have their summons deferred or excused⁵². This means that some of those previously ineligible or excused as of right from jury service are now required to serve.

The Jury Diversity Project is designed to provide evidence of the extent to which jury pools in each of the individual Crown Courts reflect the ethnic make-up of the local population, and therefore whether there is in fact any need to alter the summoning source lists. In addition, the project conducted summoning surveys both before and after the new juror eligibility rules came into effect, and the findings illustrate what impact, if any, the new rules have had on the representative nature of jury service.

Ethnicity and jury impartiality

What underlies concern over the possible under-representation of ethnic minorities on juries is not just the desire for juries to *appear* fair, but the assumption that ethnic background may make a difference to jury decision-making. This is based primarily on concerns that all-White juries may not treat ethnic minority defendants impartially. While there is no research evidence in this country to support this concern, it reflects more general concerns about the low levels of confidence ethnic minorities appear to have in the criminal justice system. The British Crime Survey has reported that ethnic minorities are more likely to believe that they will be treated unfairly by the criminal justice system as a result of their race, although this attitude appears to be directed primarily at the police and not the courts⁵³, and the most recent British Crime Survey found that BME groups actually had higher levels of confidence in the police compared to White people surveyed⁵⁴. The CAD study of ethnic minority defendants' perceptions of fairness in the criminal courts found that the vast majority of defendants in the Crown Courts did not believe they received unfair treatment due to their race⁵⁵, and there is some evidence that ethnic minority defendants in contested trials are actually more likely to be acquitted than White

⁵¹ *Justice for All*, Cm. 5563 (2002), section 7.27.

⁵² New juror eligibility rules cover all registered electors between 18 and 70 years of age who have been resident in the United Kingdom for five years, unless they have a criminal record or mental illness. *Criminal Justice Act 2003* Chapter 44, Section 321, Schedule 33.

⁵³ *Crime, Policing and Justice: the Experience of Ethnic Minorities - Findings from the 2000 British Crime Survey* Home Office Research Study 223 (2001)

⁵⁴ *Black and Minority Ethnic groups' experiences and perceptions of crime, racially motivated crime and the police: findings from the 2004/05 British Crime Survey* Home Office Online Report 25/06 (2006)

⁵⁵ Hood et al supra note 4.

defendants⁵⁶. However, reports of racist remarks made during jury deliberations in recent years, although few, have fuelled concerns about the impartiality of juries towards ethnic minorities. The introduction of a new class of racially-aggravated offences also raises the issue of jury impartiality towards ethnic minority victims as well. Ultimately, however, there has been no systematic examination in this country of the relationship between jury verdicts and the composition of juries or the ethnicity of defendants or victims.

The relationship between juries and ethnic minority defendants has been the subject of a number of legal challenges since the late 1980s. The first of these concerned the legality of judicial actions to ensure racially mixed juries. For many years, it had been accepted that in exceptional circumstances a judge had the discretion to achieve a racially mixed jury⁵⁷, and judges had sanctioned the use of peremptory challenges⁵⁸, standby of jurors⁵⁹ or summoning from areas known to contain substantial numbers of ethnic minority residents⁶⁰ to achieve this. However, in 1989 the Court of Appeal in *R. v. Ford* ruled that there was no principle requiring that a jury be racially balanced, that race should not be taken into account in selecting jurors, and that a trial judge has no power to construct a multi-racial jury. To do so would, according to the Court, interfere with the element of randomness that currently underpins the conception of a fairly structured jury, interfere with the executive's (Lord Chancellor's) exclusive power over jury summoning and would have to be a power granted to the judiciary by statute⁶¹. This has not prevented challenges by ethnic minority defendants to verdicts of all-White juries. In *R. v Smith (Lance Percival)*⁶², a Black defendant convicted of assaulting a White victim appealed his conviction on the grounds that the jury selection procedures, which resulted in an all-White jury, were incompatible with his right to a fair hearing by an impartial tribunal required under Article 6 of the European Convention⁶³. However, the appeal was rejected on the grounds that no evidence was found of actual bias in the jury verdict. Stronger concerns about juries' ability to deal fairly with ethnic minority defendants arise out of cases in which racial bias among jurors has been revealed. In two cases appealed to the European Court, ethnic minority defendants appealed against convictions by juries where allegations had been made that racist remarks

⁵⁶ B. Mhlanga *Race and Crown Prosecution Service Decisions* Crown Prosecution Service (1999). The study also found that ethnic minorities appeared to receive more favourable treatment than their White counterparts in Crown Prosecution Service decisions on whether to prosecute or not. Also see G. Barclay and B. Mhlanga *Ethnic Differences in Decisions on Young Defendants Dealt with by the Crown Prosecution Service* Home Office Section 95 Findings No.1 (2000)

⁵⁷ *R v Thomas* [1989] 88 Cr. App. R. 370

⁵⁸ See for instance *R. v Broderick* [1970] Crim. L.R. 158.

⁵⁹ See for instance *R. V Christie* [1989] Crim. L.R. 830.

⁶⁰ See for instance *R v Bansal et al* [1985] Crim. L.R. 151.

⁶¹ *Royston Ford* (1989) 89 Cr. App. R 278.

⁶² "Judges cannot influence racial composition of juries" *The Times Law Report* 3 March 2003

⁶³ Article 6 §1 European Convention on Human Rights

were used in the course of the jury's deliberations⁶⁴. In the most recent case, *Sander v UK*⁶⁵, the European Court found that the trial judge's failure to discharge a jury after a juror admitted making racist remarks about the defendant during deliberations did violate the fair trial requirements of Article 6. More broadly, it ruled that sufficient guarantees must exist to exclude any objectively justified or legitimate doubts as to the impartiality of a tribunal, and stressed that a jury must be impartial from a subjective as well as an objective point of view.

Where the summoning process is found not to produce representative juries one possibility is to construct racially "balanced" juries. This approach has been used in this country in the past, and has also been recommended recently by both the Runciman and Auld reviews. There are three main models for constructing racially balanced juries at the final stage of jury selection: *the split jury, the proportional jury and the quarter jury*⁶⁶. The *split jury* was originally introduced in the thirteenth century in England granting Jewish defendants the right to a jury comprised half of Jewish jurors (known as the jury *de medietate linguae*⁶⁷). This right to a split jury was designed to provide protection against unfair verdicts based on prejudice against minority groups, and was used in England until 1870 for other ethnic groups as well and adopted in a number of British colonies⁶⁸. The *proportional jury* model provides for ethnic minority representation on juries not based on fixed representation but according to the proportion of ethnic minorities in the local population. Ethnic representation on juries will therefore vary by court and over time as local populations change. The *quarter jury* model provides for 25% or a minimum of three ethnic minority jurors on any jury of 12. This model is based on psychological studies suggesting that a minimum of three ethnic minority jurors is necessary to withstand group pressure from the majority on a jury⁶⁹. Constructed or "balanced" juries are controversial, in large part because they necessarily deviate from the principle of random selection. However, as Auld pointed out, random selection is a means not an end in itself; and it is intended as a means to creating representative juries that are impartial⁷⁰. The main argument for racially "balanced" juries is to avoid partiality. Public opinion research in the United States showed that the

⁶⁴ *Gregory v UK* Case no. 111/1995/617/707 European Court of Human Rights. In *Gregory* the European Court did not find a violation of Article 6 because there was no clear evidence that racist remarks had been made by any juror. For the current caselaw on the extent to which section 8 of the Contempt of Court Act limits judge's questioning of jurors about jury deliberations in the face of accusations of impropriety, see *R. v. Mirza* [2004] UKHL 2 [2004] 1 All ER 925

⁶⁵ *Sander v UK* Case no.34129/96 European Court of Human Rights.

⁶⁶ H. Fukurai and R. Krooth in *Race in the Jury Box: Affirmative Action in Jury Selection* (2003) refer to these three as the jury *de medietate linguae* model, the Hennepin County model and the Social Science model.

⁶⁷ Meaning "jury of the half-tongue".

⁶⁸ This system of constructing mixed juries was abolished in 1870 with the passage of the Naturalisation Act enabling many foreign residents to serve on juries.

⁶⁹ However, this assumes that unanimous verdicts are required, which is the case in most instances in the US but not in England and Wales. N. Kerr and R. MacCoun "The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberations" *Journal of Personality and Social Psychology* Vol.48, No.2 (1985) 349-363

⁷⁰ Auld *supra* note 23, Chapter 5, paragraph 58

proportional jury model is most likely to create the appearance of fairness in criminal jury trials, closely followed by the quarter jury model⁷¹.

Both recent reviews of the criminal justice system in England and Wales have proposed the introduction of quarter juries. In 1993, the Runciman Commission proposed that, in exceptional circumstances, a judge could order that three “ethnically similar” jurors to the victim or defendant be included on a jury if requested by the prosecution or defence. The example of “exceptional circumstances” given was one in which “black people [are] accused of violence against a member of an extremist organisation who they said had been making racial taunts against them and their friends.”⁷² More recently, the Auld Review recommended that a scheme be devised allowing the trial judge to construct a jury with up to three people from any ethnic minority group in cases where the court considers that race is likely to be a relevant issue⁷³. To facilitate this, Auld suggested that the Jury Central Summoning Bureau ask potential jurors to provide information on their ethnic origin when returning summonses. Both the Runciman and Auld proposals run counter to the current case law prohibiting a trial judge from becoming involved in the selection of jurors, and in *Justice for All* the Government rejected the idea of ethnic balancing of juries on the grounds that it contradicted the principle of random jury selection and could place ethnic minority jurors in a difficult position and create divisions within juries⁷⁴. The results of the jury project’s summoning survey indicate the feasibility of requesting ethnic background information from potential jurors and the practicality of any further proposals to empanel racially-mixed juries.

Despite these calls for juries to be racially balanced in certain cases, there has not been any empirical research in this country to show whether it is valid to assume that the race of jurors, defendants or victims affects jury impartiality. The only substantive studies of the role of race in jury decision-making have been conducted in the United States⁷⁵. Empirical research there has addressed questions such as: how does a defendant’s race influence a juror’s perception and judgement; how does the racial composition of the jury affect its decision-making process; and is the influence of race on jurors the same in all criminal cases? Case simulation (or “mock jury”) studies in that country have found that while White jurors are influenced by a defendant’s race, this influence is not consistent across cases, and contrary to common assumptions

⁷¹ Fukurai and Krooth *supra* note 66, Appendix A.

⁷² At the time this was a unanimous recommendation of the Commission. Runciman Commission *supra* note 22 at 133-4. However, one member of the Commission, Professor Michael Zander, later retracted his support for this recommendation. See “Lord Justice Auld’s Review of the Criminal Courts: A Response” available on www.criminal-courts-review.org.uk.

⁷³ Auld Review *supra* note 23, Chapter 5, paragraphs 60-61.

⁷⁴ *Justice for All supra* note 51, section 7.29.

⁷⁵ For a comprehensive review of research on race and juries in America see S. Sommers and P. Ellsworth “How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research” *Chicago-Kent Law Review* Vol.78 No.3 997 (2003).

racially-charged trials may not be the ones in which racial bias is most likely to occur⁷⁶. One limitation to the American research is that very few studies have been conducted with non-White participants. What little research there has been with non-White participants indicates that Black jurors appear to be influenced by a defendant's race regardless of the existence of any racial issue in a case⁷⁷. In addition, most of the American research has focussed only on the relationship between race and *individual juror* decisions and perceptions, not jury verdicts. Yet in any criminal trial, it is ultimately only the verdict of the jury that counts, not individual juror perceptions. One recent study did find that the racial composition of a jury can affect the *jury's* deliberations and final verdict. However, without similar research in this country, it is unclear to what extent American findings are relevant to juries in this country. **For the first time in this country, the Jury Diversity Project addresses this key question about juries: does race actually affect jury decision-making?**

Why is diversity necessary?

The strongest case for diversity in the justice system is based on research which indicates that diversity among legal decision-makers leads to both increased public confidence in the fairness of courts and an actual improvement in the quality of legal decision-making⁷⁸. A number of recent studies in England and Wales have addressed the relationship between ethnic diversity and confidence in the fairness of courts. The Department's CAD studies in Crown Courts, magistrates' courts and tribunals all found that the lack of diversity among those presiding over judicial proceedings had an effect on ethnic minorities' confidence in the fairness of those proceedings. The survey of defendants' perceptions of fairness in the Crown Courts found that ethnic minority defendants felt having more ethnic minority jurors would increase their confidence in the courts⁷⁹. The study of ethnic minority magistrates found that the most common proposal by magistrates themselves to increase confidence in the courts was that more magistrates and court staff from the local ethnic minority populations be recruited⁸⁰. The study of tribunal users found that even though a substantial proportion of South Asians perceived unfairness in the course of their tribunal hearing, this group was less likely to perceive unfairness when the tribunal was ethnically diverse⁸¹. These studies go some way to illustrating the positive effect ethnically mixed juries are likely to have on public perceptions of the fairness

⁷⁶ S. Sommers and P. Ellsworth "Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions" *Personality and Social Psychology Bulletin* No.26 (2000) 1367

⁷⁷ Sommers and Ellsworth (2003) *supra* note 75; D. Ugwuegbu "Racial and Evidential Factors in Jurors Attribution of Legal Responsibility" *Journal of Experimental Social Psychology* Vol. 15 (1979) 133

⁷⁸ See C. Thomas *Judicial Diversity in the United Kingdom and Other Jurisdictions* Commission for Judicial Appointments (2005)

⁷⁹ Hood et al *supra* note 4, p.116

⁸⁰ Vennard et al *supra* note 8.

⁸¹ Genn et al *supra* note 10.

of proceedings in Crown Courts, although no specific study of this issue has been undertaken in the past. In the United States, comprehensive surveys of the perception of courts across a number of states have demonstrated that jury diversity can have a powerful symbolic value in promoting public confidence in the courts⁸², and that the issue of the perception of the fairness of courts is a vitally important one in terms of both access to and delivery of justice.

The need for diversity on juries has also been substantially strengthened by recent research demonstrating that the actual quality of jury deliberations is improved when juries are comprised of individuals from different ethnic backgrounds. A study in the United States examining whether the racial composition of the jury influenced the content and scope of jury discussions found that, compared to all-White juries, racially mixed juries tended to deliberate longer, discuss more case facts and raise more questions about what important information may have been missing from the trial⁸³. This reflects similar findings of the effect of diversity on judicial decision-making, which have shown that increasing diversity on panels of judges substantially changed the voting behaviour of the judges and improved the quality of the panel's adjudication⁸⁴. In the United States the courts themselves have acknowledged that a connection exists between jury diversity and jury impartiality. In a series of cases establishing the right to a jury pool that is representative of a fair cross section of the community, the Supreme Court established that impartiality is best assured when diverse viewpoints have an opportunity to interact in juror deliberations, and that the exclusion of ethnic minorities imperils jury impartiality⁸⁵. In England and Wales the primacy of the principle of random selection of both jurors and juries is based in large part on the belief that this system is the fairest means of producing generally representative jury pools and juries in the Crown Courts. The underlying principle is that a representative jury pool is more likely to reflect a range of community values, or a jury of one's peers.

The research brief

The Department's original research specification for this study focussed on the juror summoning process. Its starting point was the continued concerns expressed about the under-representation of ethnic minorities on juries, and it set out three specific issues for the research to address:

⁸² *Perceptions of the Courts in Your Community: The Influence of Experience, Race and Ethnicity* National Center for State Courts (2003); F. Bennack *How the Public Views the State Courts: A 1999 National Survey* National Center for State Courts (1999)

⁸³ Such as physical evidence and witnesses. S. Sommers "On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations" *Journal of Personality and Social Psychology* Vol.90 No.4 597-612 (2006)

⁸⁴ C. Cameron and C. Cummings, "Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeal 1971-1999" *Columbia Law Review* (2003). C. Sunstein *Why Society Needs Dissent* (2003)

⁸⁵ *Witherspoon v Illinois* 391 U.S. 510 (1968), *Taylor v Louisiana* 419 U.S. 522, *Morgan v Illinois* 504 U.S. 719

Whether any imbalance exists in the representation of ethnic minorities on juries?

If so, whether there is a failure to approach potential jurors resulting from some aspect of the summoning procedure?

Whether there is any imbalance in the willingness to serve?

Concerns about the possible under-representation of ethnic minorities on juries implicitly assume that the ethnic make-up of juries will affect jury fairness, particularly towards members of BME groups. As a result, the project proposed, and the Department agreed, to significantly widen the scope of the research to address a much deeper underlying issue:

Does ethnicity actually affect jury verdicts?

The project also proposed, and the Department agreed, to broaden the scope of the research so that the definition of diversity in this study constituted far more than ethnicity. This extension in the scope of the research reflects findings of diversity research in other policy fields, which have demonstrated that a more complete understanding of the impact of processes and policies on ethnic groups requires an examination of the *relative* impact of ethnicity in relation to other background characteristics (such as gender, age, income and employment)⁸⁶. The use of such a multivariate approach to understanding diversity marks a departure from the other Courts and Diversity studies, and it is hoped that in this way the Jury Diversity Project will help fill to an important knowledge gap in both diversity and legal studies in Britain.

In order to address these questions the research project comprised several distinct but inter-connected studies, each utilising a range of approaches to data collection. The starting point for the research was a **juror summoning survey** of the socio-economic background of all individuals summoned for jury service for each Crown Court in England and Wales in one week. This large-scale quantitative study encompassed over 15,000 individuals summoned for jury service, and provided the basis for examining whether ethnic minorities were summoned in general proportion to their representation in the population in each court's juror catchment area; whether rules for excusal or disqualification for jury service resulted in any significant reduction in ethnic minorities doing jury service in each court; and factors affecting the response rates to juror summonses.

⁸⁶ For a discussion of this see C. Thomas *Judicial Diversity and the Appointment of Deputy District Judges* Commission for Judicial Appointments (2006)

The summoning survey was complimented by a **jury service study**, a longer-term quantitative study of the socio-economic background of only those jurors attending court for jury service (the jury pool). The study was conducted in three Crown Courts (Blackfriars, Manchester Minshull Street and Reading) where there is a substantial proportion of ethnic minorities in the local population. It examined the extent to which BME representation in the jury pool fluctuates on a weekly basis (helping to shed light on the reliability of the results of the one-week summoning survey), and how BME representation in the jury pool translates into BME representation on jury panels and actual juries in individual cases. This study also examined the extent to which jury pools in each court reflected the wider social profile of the local population in terms of age, gender, employment status, profession, income and religion.

To address the more complex, underlying issue of whether race affects jury decision-making, a **jury decision-making study** was conducted using case simulation with real jurors in Crown Courts. The use of case simulation enabled the project to examine both jury and juror decision-making under controlled conditions. A hypothetical case was filmed and edited so that selected factors (the race of the defendant, victim and the racial context of the case) were systematically varied. Different versions of the case were shown to large numbers of dismissed jurors sitting and deliberating as a jury, and the research explored not just the verdicts of these juries and the votes of individual jurors, but also the jurors' perceptions of witnesses and evidence and views of the criminal justice system. The jury decision-making study represents the first time the question of whether ethnicity affects jury decision-making has been examined in this country.

The project also carried out a limited **jury verdict study** based on actual cases, using data on jury verdicts, jury composition and the ethnicity of defendants in the three courts in the jury service study. This study provided useful background information to the jury decision-making study, by examining whether any correlation appeared to exist between jury verdicts in actual cases and the racial composition of the jury, the ethnicity of the defendant or the particular court where the case was tried. These four empirical studies addressed a number of specific questions.

Juror Summoning:

Do those summoned for jury service reflect the local population in each Crown Court in England and Wales?

Does the process of excusal and disqualification from jury service adversely affect ethnic minority representation?

What factors may account for summonses not being returned?

Jury Service:

To what extent does the jury pool at each Crown Court reflect the ethnic make up of the local population?

To what extent do individual jury panels and juries at each Crown Court reflect the ethnic make up of the local population?

Does the empanelling of individual juries adversely affect ethnic minority representation on juries?

Jury Decision-Making

To what extent does defendant ethnicity affect jury verdicts?

To what extent does defendant ethnicity affect individual juror decisions?

To what extent do other factors (ethnicity of victim, charges, jury deliberation, other juror characteristics) affect juror votes?

Jury Verdicts:

Is there any correlation between conviction rates in actual cases and jury ethnicity, defendant ethnicity or court?

Diversity and ethnicity

Diversity is a broad concept covered widely in a number of academic disciplines in this country, but generally not law. Most studies of diversity in Britain are studies of race and ethnicity⁸⁷, and some of these have encompassed issues in the legal system⁸⁸. However, as diversity studies in other fields and in law in other jurisdictions have demonstrated, caution should be exercised in defining diversity only in terms of ethnicity. These studies have found that a more complex picture often emerges when the significance of ethnicity is considered in relation to other socio-economic background factors⁸⁹. The study of discrimination in jury summoning and serving in California, for instance, revealed that social class actually exerted greater influence than race in explaining disproportionate jury representation among ethnic groups, and the two most important factors affecting jury representativeness overall were occupation and residential mobility⁹⁰. Unlike the other CAD research projects, one of the primary objectives of the jury project was to examine how significant ethnicity is in relation to other socio-economic characteristics of those summoned and serving on juries in this country.

⁸⁷ See Thomas (2005) supra note 78 for a review of diversity literature.

⁸⁸ B. Bowling and D. Phillips *Racism, Crime and Justice* (2002); D. Cook and B. Hudson (eds) *Racism and Criminology* (1993); L. Gelsthorpe (ed) *Minority Ethnic Groups in the Criminal Justice System* (1993); R. Hood *Race and Sentencing* (1992); S. Lewis et al (eds) *Race and Probation* (2006).

⁸⁹ See for instance S. Saggar *Race and Representation* (2000) and *Race and Political Recruitment* (2001); M. Hurwitz and D. Lanier "Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts" *State Politics and Policy Quarterly* volume 3, issue 4 (Winter 2003). Thomas (2006) supra note 86 is one study of diversity in the court system in this country to adopt a multivariate approach to analysing the significance of ethnicity in relation to a range of other socio-economic factors.

⁹⁰ Fukurai supra note 43.

Although the other CAD studies focussed primarily on ethnicity, most suggested that other background factors appear to influence BME groups' experience of the court system in this country. The demographic factors that are most closely associated with ethnicity are religion and language, and one or both of these were associated with court users' perceptions and experiences of fairness in care proceedings⁹¹, housing repossession cases⁹² and tribunal hearings⁹³. However, two of the CAD studies specifically noted that other factors beyond religion and language may have been more important than ethnicity in affecting experiences of fairness in the court system, although the scope of these studies did not allow for an in-depth examination of these factors. The study of BME magistrates' experience found that even though many BME magistrates felt themselves to be outsiders when they joined the lay magistracy, this was a reflection more of social class than race; all the magistrates, regardless of race, who conformed to the middle-class, educated norm of the magistracy appeared to be fully integrated into life on the bench.⁹⁴ Similarly, the study of housing repossession cases noted that economic factors, such as dependency on housing benefit, appeared to have as much if not more impact on the outcome of cases than ethnicity. In addition, a recent study of diversity in judicial appointments in England and Wales found that gender was more influential in appointment success than ethnicity, with women (not ethnic minorities) accounting for the increase in diversity among Deputy District Judges in recent years⁹⁵. The jury project specifically approaches the question of diversity and juries in terms of measuring the relative impact of ethnicity in comparison to other demographic factors, such as gender, age, income, employment status, religion and language.

Another issue highlighted by several of the Courts and Diversity studies is the need to disentangle the concept of "ethnic minorities". Most government and other official bodies have recently adopted the term "black and minority ethnic" group (or BME), which reflects the Commission for Racial Equality (CRE) guidelines for referring to non-White British ethnic minorities. The term recognises the sometimes shared experiences of the Black and Asian communities, although it is equally important to recognise that religious, cultural and linguistic differences exist between these groups.⁹⁶ Therefore, while such terminology can be helpful in discussing ethnicity issues in general terms, viewing all ethnic minorities as a unified group can create a misleading picture of the nature of bias in the legal system⁹⁷. For instance, the study of

⁹¹ Brophy et al supra note 6 and 9.

⁹² Blandy et al supra note 5.

⁹³ Genn et al supra note 10.

⁹⁴ Vennard et al supra note 8 p.85

⁹⁵ Thomas (2006) supra note 86.

⁹⁶ See T. Modood and R. Berthoud, *Changing Ethnic Identities in Britain* (1997); P. Weller *Multi-Faith Directory* (2001)

⁹⁷ Thomas (2005) supra note 78 reviews the literature on this issue.

tribunal users found that when “BME” was disaggregated, disparities in experiences and perceptions of fairness emerged; in that instance, South Asian and some non-European users were considerably more negative in their assessments of tribunal hearings and more likely to perceive unfairness than Black users⁹⁸.

There are also similar concerns about viewing “White” as a single unified ethnic group. The Office of National Statistics (ONS) classification of “White” includes three separate categories: British, Irish and any other White background. In terms of the jury, the two particular groups within the White category that may specifically need to be considered separately are the Irish and Welsh. Revelations of miscarriages of justice in the 1990s involving Irish defendants raised concerns about the ability of the criminal justice system to deal fairly with Irish defendants, and to extent to which this may have affected willingness to do jury service in the Irish community. For the Welsh, the recent consultation paper on the possibility of introducing bilingual jury trials in Wales⁹⁹ has raised questions about the level of Welsh speaking representation among those summoned for jury service in Wales. One of the difficulties in examining ethnicity among smaller ethnic groups (whether White or BME) is often the relatively small number of individuals on which to base reliable findings. The jury project set out to collect ethnicity data on a large scale, particularly in the summoning survey, and wherever sample sizes have allowed, the study has attempted to distinguish how the operation of the jury system impacts differently on different ethnic groups at a more detailed level than simply “White” and “BME”.

Finally, no consistent set of ethnic group classifications was used by all the CAD studies. Many of the studies focussed on “visible minorities,” a classification which defines ethnicity primarily in terms of skin tone. This was done in large part because these studies focused on ethnic minority perceptions of fairness in court proceedings, and the Department’s research programme was initially focussed on the legal system’s treatment of visible minorities, as highlighted by the Macpherson inquiry. The jury project adopted the ONS ethnic group classifications, which encompass both skin tone and country of origin, and adhered to the guidelines laid down by ONS for assessing ethnicity through participants’ self-identification of ethnic group. This was important given the project’s approach to data collection and its objective of carrying out a quantitative assessment of ethnic minority representation in the jury process, measured in terms of its relation to local population data from the 2001 Census. This approach was also important in light of the project’s more comprehensive analysis of diversity,

⁹⁸ Genn supra note 10, p.212

⁹⁹ *The Use of Bilingual (English and Welsh-speaking) Juries in Certain Criminal Trials in Wales: A Consultation Paper* Office for Criminal Justice Reform (December 2005)

which involved relating ethnicity data to other census demographics such as gender, age, income, employment and religion.

The report

This Report contains six substantive chapters and is structured around the three main stages of jury service: summoning, serving and jury decision-making. Chapter two outlines the scope of the research project and the methodologies used in examining each of these stages of jury service. Chapter three examines the first key stage in jury service, the summoning of jurors; it presents the first set of findings from the summoning survey and addresses the questions: are ethnic minorities under-represented among those summoned for jury service for each Crown Court in comparison to their representation in the local population, and do non-responses to summonses indicate any particular unwillingness to do jury service on the part of BME groups? Chapter four addresses the next stage of the summoning process by examining who does and who does not do service serve once summoned. It presents the second set of findings from the summoning survey and addresses the questions: at each Crown Court are ethnic minorities under-represented among those doing jury service in relation to the local population, how does the process of excusal and disqualification from jury service affect ethnic minorities, and are other factors more significant than ethnicity in terms of who does and who does not do jury service? Chapter five presents the findings of the jury service study, examining the representative nature of jury pools, jury panels and juries in three specific courts where ethnic minorities comprise a substantial proportion of the local population. Chapter six presents the findings of the jury decision-making study, examining whether in fact the ethnic background of jurors and the ethnic background of defendants affects jury verdicts and individual juror votes. This chapter also examines whether any correlation exists between jury verdicts and the ethnicity of defendants and juries in actual cases. Chapter seven draws together the main findings of the summoning, serving and decision-making studies, and discusses the implications of the research for ensuring a representative and impartial jury system in England and Wales.