JURY RESEARCH AND IMPROPRIETY

A RESPONSE TO THE DEPARTMENT OF CONSTITUTIONAL AFFAIRS’ CONSULTATION PAPER (CP 04/05)
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BY

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PART 1 - RESEARCH

Introduction

1. I write these comments on the issues raised and the questions posed in the Consultation Paper (CP) from the perspective of an academic researcher who was responsible for the Crown Court Study (1993) conducted for the Runciman Royal Commission on Criminal Justice which included the largest study of jury trials ever conducted in this country.  

Surprisingly, the CP does not even mention the Crown Court Study and there is no sign that its authors were aware of its existence. Since many of the issues canvassed by the CP were extensively covered in the study it seems bizarre that there is no reference to it. It presumably is not suggested that juries today are different from juries a little more than a decade ago.

2. As a member of the Royal Commission I was also party to its unanimous recommendation, noted in the CP (para.4.4), that properly authorised research into jury decision-making, including decision-making in the jury room, should be permitted. (I expressed the same view in an article published in 1998 and again in 2002 in my response to Lord Justice Auld’s Report.)

3. That is still my view in regard to research after the case is over. However, in regard to research in the jury room itself, I have changed my mind - I now believe that the ban on research should remain, at least for the present. There are two main reasons. Having looked at the issue afresh, I now take a much more sceptical view as to the likely practical benefits of such research. Secondly, I am more concerned about the possible downside of such research - in part, it has to be said, because of the way in which the issue is presented in the CP.

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1 M.Zander and P.Henderson, The Crown Court Study, Royal Commission on Criminal Justice, Research Study No.19, 1993. (I was responsible for conceiving, conducting and writing up the study. Paul Henderson, of the Home Office Research Unit, was responsible for the computer analysis and for the statistical work.) For further details about the study see paras.12-14 below.

4. One asks at the outset what is the Government’s reason for posing the question of research into jury decision-making? Where is the momentum for such an initiative? There has been no call for it from interest groups (lawyers, the police, judges), from the media or the public. The last significant call for such research was that of the Runciman Royal Commission twelve years ago. Lord Borrie raised the issue in 1998 and was told by the Lord Chancellor that the Government would listen to proposals for forms of jury research but that led to nothing. Lord Justice Auld in his Report (2001) was categorically against it. So it is not the case that in issuing the Consultation Paper the Government is responding to a head of steam in favour of reform. Prior to the publication of the CP the issue seemed to be dead.

5. There is no suggestion in the CP that trial by jury is in question or that the purpose of such research would be to test whether trial by jury is a good system. That could be the purpose of such research. Indeed, critics of jury trial might urge research in the hope that it be shown not to be a good system which then should be scrapped. Far from this, the CP repeatedly states that the system is good and that the only aim is to make it better.\(^3\)

6. When undertaking research it is sensible, however, to have regard to the possibility that the results may be unexpected or unwelcome. I am a strong believer in trial by jury. I have always regarded it as greatly preferable to any other system of trial for serious criminal cases. My assumption is that research would show that, whatever its shortcomings, the system is sound. But it is possible that, contrary to this assumption, the research might show that there is what any reasonable person would say is an intolerably high degree of irrationality, prejudice, stupidity and other forms of undesirable conduct in the jury retiring room. This could predictably lead to a lowering of confidence in the jury system and probably even to calls for it to be scrapped. The Government should not allow jury research unless it was prepared to contemplate that as a possible result - with all its consequences. If, contrary to expectations, it turned out that the system actually works badly, the effect of the research could be the destruction of a functioning institution that enjoys full public confidence.

7. A major part of the legal system that is shown to work badly should normally either be reformed or scrapped. But what if there is no way of reforming it so as to make it work better and no better system to put in its place? Would it then be in the public interest to demonstrate that confidence in a system that has been working to general satisfaction for hundreds of years was misplaced?

\(^3\) Thus the Foreword concludes, “We fully appreciate that any change in the existing arrangements must [emphasis in the original] have as a key principle maintaining the confidence of jurors and the public in the fairness of the criminal justice system” (p.4). Para.4.6 starts: “Any change in the law must be intended and designed to improve the support that can be provided to jurors in undertaking this important public duty so enhancing the jury system.” The Conclusion states that the Government’s purpose in issuing the CP on the research issue is to consider whether it can enhance the jury system and the support given to jurors. “Any change must be for the better.” (p.56).
8. Risking the lowering of public confidence in the jury system would only be justified if the potential gains from the research outweighed the potential dangers. In my view the potential benefits of research in the jury room are speculative and are likely to be marginal in their value. To the extent that they are real, I believe that they could mainly be achieved by other kinds of jury research. I do not believe that the potential gains are great enough to justify the risks.

9. The main risk I see is not that it would be shown to be working badly, but rather that demonstration of how the jury works, “warts and all”, could lead to a damaging loss of confidence in the system through the mistaken impression that it was working badly when actually it was working perfectly well.

**What research is permitted under the Contempt of Court Act?**

10. I start by considering what the CP says as to what research can and cannot be conducted under the provisions of s.8 of the Contempt of Court Act, which makes it contempt “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 in any legal proceedings”. The CP correctly states (para.4.1) that research is permitted, inter alia, as to jurors’ perceptions and attitudes toward jury service, jurors’ confidence as a result of their contact with the court system (though it is not clear whether this means confidence in themselves or in the system) and their satisfaction with the process in general. It states that research is also permissible as to jurors’ understanding of the information they have received. The word “information” here is ambiguous. It could mean general information about the trial system and the role of the jury (provided in leaflets or by way of the introductory video), or it could mean information in the form of evidence. From the context, I infer that it means the former.

11. The paragraph continues: “in terms of speaking to jurors themselves it [research] is limited to the PROCESSES of selecting, informing and supporting jurors during their service”. This is seriously incorrect - as is shown by the Crown Court Study.

12. The Crown Court Study was based on a survey of cases in every Crown Crown in the country, save for three courts that were used for the pre-pilot study. The survey covered every case that was completed in those 73 court centres in a two-week period in February 1992. It was therefore a huge national sample including over 800 jury trials. The survey consisted of questionnaires completed by the judge, the barristers for the prosecution and defence, the CPS, the defence solicitor, the police, the court clerk, the defendant - and the jurors.

13. The questionnaire for jurors was 14 pages long and consisted of 81 questions. The questionnaire was handed to the jurors at the end of the case by a court clerk or jury bailiff and was completed before they left the precincts of the court. The response rate was the highest of that for any of the respondent groups - a remarkable 93 per cent, an average of over 10 jurors per case, with a total of 8,338 completed returns.
14. The questionnaire was vetted for compliance with the Contempt of Court Act, and generally, not only by the Attorney General, but by the Lord Chief Justice and by the Lord Chancellor’s Department. The questionnaire bore a notice on the first page warning respondents of the terms of section 8 of the Contempt of Court Act and that replies must not breach these provisions.

15. The questions it asked included the following:

- How difficult was it for you - and for the jury as a whole- to understand the evidence in the case?
- In the cases in which expert evidence was given, How difficult was it for you - and for other members of the jury - to understand the expert evidence?
- How difficult was it for you - and for the rest of the jury - to remember the evidence when you retired to the jury room?
- Did you - or other members of the jury - take any notes during the trial?
- Was your understanding of the case - and that of other jurors - made difficult by lawyers’ technical language?
- Was the jury told that they could ask questions? Were there occasions when you wanted to ask a question? If so, did you ask the question? Did other jurors ask questions?
- Would it have been harder for you - and other jurors - if the judge had not summed up on the facts?
- Did you - or other jurors - find it difficult to follow the judge’s directions about the law?
- Did the judge’s summing up point toward acquitting or towards convicting the defendant? If so, in your view was that supported by the weight of the evidence or was it against the weight of the evidence?
- How well did the barristers in the case do their job in terms of “knowing the facts”, “putting the case across” and “dealing with the points in the opponent’s case”?
- How well did the judge do in terms of “keeping the proceedings under control”, “keeping a fair balance between defence and prosecution during trial” and “explaining things to the jury”?
- In cases where the jury was present for the sentencing, Was the sentence broadly what you expected, based on the evidence in the case?
- How long did the jury deliberate?
- Was this the first case in your present jury service? If no, how many cases had you already sat on during this period of jury service? Were any members of the jury from your previous case kept for the present case?
- For those who had served on a jury before, Do you think that your view about the evidence was affected by having been on a jury before? If so, in what respect?
- How important do you think any of the following (nine) possible improvements in the system to be (more leg room or more comfortable seating in the jury box, TV in the waiting room, separate non-smoking areas, etc.)?
• How do you feel about jury service (this time) in terms of a) your work and b) your private life?
• How interesting did you find being on jury service?
• On a five point scale from Very Good to Very Poor, How did you rate the jury system?

We asked questions to establish the juror’s sex, age, work status, occupation, education, race or ethnic background, whether English was the juror’s first language and if not, whether they had any difficulty with the language in following the case? We also asked all jurors, “Do you think there were any members of the jury who could not really cope with the case?” We asked the foreman of the jury to evaluate the performance of the other members of the jury.

16. I have set out this long list of the questions in order to give a sense of the range of matters that were canvassed, going far beyond what the CP incorrectly states is the limit of what is permissible under the 1981 Act.

17. From a researcher’s point view, the Crown Court Study had the advantage that it was conducted under the auspices (not to speak of the unlimited resources) of a Royal Commission and with the full support and indeed the active cooperation of all the relevant authorities. This no doubt greatly helped in regard to the response rate. But the study was as much subject to the Contempt of Court Act as any other. Thus, for example, whereas the other survey questionnaires in the study arising from any particular case could be linked and therefore contrasted, the authorities did not permit the juror questionnaires to be linked to the questionnaires of the other respondent participants. It was therefore not possible to contrast what the jurors said, say, about the judge’s summing up with what the barristers in the same case said about it. Equally, the authorities did not allow us to distinguish between juror returns from different parts of the country, thus preventing any attempt to investigate regional differences. And there were questions about the trial that we would have wished to ask that were not permitted because of the 1981 Act.

18. The CP (para.4.2) sets out certain issues that it says are currently precluded from research. With my comments they are:

• “The factors that most benefit jurors when considering the evidence presented to them” It is not clear what this means or to what it refers.

• “Whether all jurors participate equally in the deliberations” It would be extraordinary if all jurors participated equally any more than in any other group whether social or professional. However, research of the kind conducted in the Crown Court Study as to this would in fact be possible if it were thought to make any sense (as to which see para. 31 below) or to be of any value.

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4 I would argue that these restrictions were not in fact required by s.8 of the 1981 Act but that is irrelevant to the point - that the study was not exempt from the Act.
• “Whether there is any evidence of racial or other prejudices” Since jurors are human beings it would be remarkable if there was no evidence of racial or other prejudices.

• “Whether other information/support would aid jurors in the decision-making process” Studies aimed at assisting jurors with their task are not necessarily prevented by the Contempt of Court Act. Such studies exist and more could be undertaken.

This list therefore hardly advances matters.

Testing whether the jury understood

19. Paragraph 4.2 concludes by referring to the fact that the Roskill Committee was hampered by not being able to determine whether jurors could understand the technical evidence and complex issues in fraud trials “because they were prohibited from discussing this issue with jurors in such trials”. The Crown Court Study shows that this statement too is incorrect. If the resources were available, the 1981 Act would not prevent the same questions that were posed in our study about the jurors’ ability to understand technical evidence from being asked in long fraud cases.

20. One may note in passing, that the fact that jurors say they understood the evidence does not establish that they did understand it. That is so whether the evidence is technical or non-technical. In order to find out whether they did, one needs to test their understanding - a far from simple matter.

21. The recent New Zealand Law Commission jury research project, which is referred to in the CP, attempted to arrive at an answer through a variety of methods. Judges, prosecutors and defence counsel were asked to provide information about the 48 cases in the sample. The researchers observed the initial stages of the trial, the closing addresses of counsel and observed and tape-recorded the judge’s summing up. After the jury retired to consider its verdict the researchers interviewed the judge about his view of the case and what his own verdict would have been. Jurors who agreed to take part were interviewed after the trial (some immediately, some later), on the basis of a semi-structured interview schedule designed to explore what factual issues each individual juror regarded as important and how he identified those issues; what the juror understood the law to be and how or she applied it to the factual issues; the way in which the jury’s deliberations were

5 The same error was made in the study “Jurors’ Perceptions, Understanding, Confidence and Satisfaction in the Jury System” 2004, published by the Home Office. Discussing the preparation of the questionnaire administered to jurors in light of s.8 of the 1981 Act, the authors stated (at p.25), “Discussions about actual cases or what was said or done either by respondents or their fellow jurors in the jury room were strictly prohibited.” The 1981 Act undoubtedly prohibits discussions about “what was said or done” by jurors. But the Crown Court Study shows that questions can be framed that ask jurors about many aspects of the actual case including even about the jury’s deliberations.


7 312 jurors were interviewed - an average of 6.5 (54%) per case. (Ibid, para.1.7.)
structured; and how each juror’s view of the evidence and the law was affected by the deliberation process. The interview schedule asked, for instance, “What was your understanding of the evidence of Witness A?” The interviewer was then supposed to prompt the juror by selecting bits of evidence of that witness and to ask what were the most important points to emerge from this evidence.

22. If the juror answers such question in a way that shows convincingly that he remembers the evidence, fine. But if he answers in a way that suggests that his recollection of the evidence is hazy or he is unable to answer coherently, it does not follow that he did not have a sufficient recollection or understanding in the jury room. For one thing, questions addressed to individual jurors after the trial leaves out of the equation the effect of the jury’s collective recollection. The fact that the individuals might find it difficult to reconstruct the evidence or the judge’s direction on the law in interviews after the trial does not establish that they failed to “get it together” collectively in the jury room. (The researchers in the New Zealand study found that, “misunderstandings about the law were fairly widespread, they did affect the way in which individual jurors, and sometimes the jury as a whole approached the decision-making task; they undoubtedly prolonged jury deliberations and they sometimes led individual jurors to agree to a verdict on an erroneous basis. However, by and large, errors were addressed by the collective deliberations of the jury and did not influence the verdict of the majority of cases.”

23. If one had a transcript of the jury’s deliberations it might sometimes show that the jury apparently proceeded on a basically correct or a basically incorrect recollection of the crucial pieces of evidence. But it is all too probable that in many instances the transcript would not show this clearly or at all. For one thing, the basically correct or basically incorrect recollection would only be demonstrated by the jurors who gave it voice. One would not know whether other jurors had a different recollection.

Existing research

24. In para.4.3 the CP rightly draws attention to the fact that worldwide there has in fact been a great deal of jury related research. The paper prepared for the Auld Review by Dr Penny Darbyshire and her colleagues (What Can the English Legal System Learn from Jury Research published up to 2001?) is a very valuable introduction to this material. It goes without saying that, rather than reinventing the wheel, it is sensible to make full use of any existing research that seems relevant to our concerns. I would recommend that an official committee ad hoc be set up with the specific remit of looking at jury research and jury reform projects here and elsewhere with a view to identifying the recommendations that might be worth introducing here. I would suggest that special attention be given to the recent work of the New Zealand Law Commission which came up with a raft of

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8 Their assessment was that legal errors resulted in either hung juries or questionable verdicts in only four of the 48 trials in the sample - and in two of those, the questionable verdicts were acquittals on only some of a large number of counts. (Ibid, p.55, para.7.25.)
9 A copy is available on the website of Lord Justice Auld’s Criminal Courts Review homepage www.criminal-courts-review.org.uk.
valuable ideas for reforms and improvements based on the empirical research it sponsored on a sample of 48 trials.  

Runciman and Auld on jury research

25. In para.4.4, the CP refers to the recommendation of the Runciman Royal Commission that s.8 of the 1981 Act be amended so as to permit properly authorised research into the way in which juries reach their verdicts. It does not mention that the government gave a rather positive response to this recommendation. It was said that the fact that nothing was done to implement the recommendation at the time was due to the adamant opposition (for whatever reasons) of the Lord Chief Justice, Lord Taylor.

26. In para. 4.4.1. the CP sets out Lord Justice Auld’s views regarding jury research - concluding that s.8 should not be amended. He gave two reasons. One was that the very undertaking of jury research might undermine public confidence “by sowing doubt as to the integrity of verdicts” (ch.5, para.80). He was referring there not to the results of the research - which he said could be “a clean bill of health” - but to the mere knowledge that the research was being undertaken. For what it is worth, I regard this as very unlikely. Even if the fact of the research were widely publicised and discussed I do not believe that the general public’s attitude to jury decisions would be affected one way or the other. For one thing, even matters that are widely publicised and discussed do not necessarily get the attention of the ordinary citizen. Nor do I believe that mere knowledge that jury research was being undertaken with official backing either could or would shake the public’s deep-seated belief in the jury system.

27. The second reason given by Sir Robin Auld for opposing any amendment of s.8 to permit jury research was that knowledge of the research could deter jurors from expressing their views frankly, “for fear of exposure to intimidation or acts of revenge from disgruntled parties” (ch.5, para.79). Again I find this unconvincing. It would obviously be made clear to them that the research was completely confidential and that the identity of the jurors would not be revealed, let alone published, in any way as a consequence of, or in connection with the research. With such assurances I do not believe that jurors would be inhibited in performing their duties.

28. Any suggestion of “bugging the jury room” would of course be likely to excite a good deal of discussion in the media, in the legal profession, the judiciary and parliament. Whilst I accept that such debate could affect public confidence in the government which proposed to allow such research (as to which see below), I do not

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10 For the study see n.6 above. For the recommendations see the Commission’s final report on the project, *Juries in Criminal Trials*, Report No.69, 2001. The recommendations were summarised at pp.199-208.

11 The Interim Government Response to the Report of the Royal Commission said: “The government is sympathetic to the Commission’s recommendation that the law should be amended to allow research to be conducted into the reasons for jury verdicts; but it is still considering the precise scope of the research that the law might allow and the rules under which it might be carried out.” (1994, para.12, p.3.)
believe that such discussion would affect the way in which either individual jurors or juries collectively performed their task.

29. Sir Robin Auld was not against all forms of jury research. He recommended that research be undertaken by way of enquiry “as to their general views on the conditions and manner of their service and on the assistance that they are given by court staff, the judge and advocates”. This would not require any amendment of s.8 of the 1981 Act. As the CP points out, research of this kind has been, and is being, conducted by the Court Service and the Home Office.

30. The CP gives no attention to what sort of research might be permitted if s.8 were amended to permit research. The kinds that are relevant are questionnaires addressed to, or interviews with, jurors after the case is over to include questions that cannot now be asked because of s.8, and recording of the deliberations in the jury room by video and/or audio recording. The former kind of research has been undertaken in various countries. The latter has hardly ever been attempted anywhere. The issues concerning the amendment of s.8 to permit jury research mainly relate to “bugging” the jury room.

The alleged benefits of jury research

31. In para.4.5 the CP sets out what it suggests are the potential benefits of allowing research into how juries reach their verdicts. With my comments they are:

- **An understanding of the factors that jurors find most/least important when considering guilt or innocence** In my view such research would show that the factors (insofar as they emerge) are many and entirely predictable. I would be greatly surprised if they told us anything that would be of any assistance in improving the system. I say

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12 Jury deliberations were once recorded in Wichita, Kansas with the consent of the trial judges but without the knowledge of the jury. Word got out and it resulted in a scandal that caused hearings before a Senate Sub-committee and federal legislation and statutes in more than 30 States prohibiting “jury-tapping”. J.Katz, “Experimentation with Human Beings: the Authority of the Investigator; Subject, Professions and State in the Human Experimentation Process” (1972, Russell Sage Foundation).

The only study known to the writer involving recording of the jury’s deliberations is S.Diamond et al, “Juror Discussions During Civil Trials: Studying an Arizona Innovation”, 45 Arizona L.R.,2003, 1. The study involved video and audio recording of 50 jury trials in civil cases. Its aim was to evaluate a new civil procedure rule in Arizona permitting the jury to discuss the case amongst themselves during breaks in the proceedings providing they were all present at the time. The video and audio recording was on whenever there were two or more jurors in the jury room. The researchers also had a full transcript of the trials and administered questionnaires to the judges, the lawyers, the jurors and the parties after the case was completed. Eligibility for the sample was dependent on 1) the judge being willing to take part in the experiment; 2) the availability of the video technician; 3) the court room and the jury room being wired; and 4) the case was one not expected to last more than 12 days. In addition, the researchers were required to get the consent not merely of the judge but also of the parties, their lawyers and of the jurors. Jurors who did not wish to take part were assigned to other cases. 95% of jurors agreed to participate. Lawyers and litigants were less accommodating. Only 22% of otherwise eligible cases took part in the study.) (p.17) The authors reported that, “Consistent with other research on the effects of recording on behavior, in both discussions and deliberations, once the jurors were on the trial tasks before them, the cameras appeared to be forgotten.” (at p.23)
“insofar as they emerge” because questionnaires and interviews can only reflect the responses that the juror chooses to give - which may or may not be the factors that actually influenced him, and which, even if accurate, are very unlikely to capture the full range of factors that influenced him. Audio research captures more insofar as it enables the researcher to work with the actual words spoken in the jury room, but again, even for those who speak, there will likely have been many other, unspoken, factors at work. Video research adds the dimension of body language, for what that is worth. Obviously the transcript and video tape will not reveal the factors influencing jurors who said nothing to indicate those factors. The best would be a combination of video and/or audio tapes and post-trial questionnaires and/or interviews. But I find it difficult to believe that the research would tell us anything beyond the obvious regarding “the factors that jurors find most/least important when considering guilt or innocence”. (What do the authors of the CP think such novel factors might be?)

- **Improving the information, guidance and directions given to jurors, particularly jury foremen** It is not clear whether this refers to information, guidance and directions given by the judge in the case or by the authorities to jurors and juries in general. The words “particularly jury foremen” suggests that what the CP has in mind here is general guidance on the court system and the way the jury should go about its business. We already have a good deal of existing research material on this subject and there are helpful leaflets and a video explaining jury duty. I am sceptical whether research in the jury room would throw much additional light on this topic.

- **Discovering what jurors think of the trial process which could be important in determining what factors affect confidence in the criminal justice system** As has been seen, the Crown Court Study asked a whole series of questions directed to this issue. (The results were overwhelmingly positive.\(^{13}\) No doubt, further questions could be formulated to throw more light on the matter but the Crown Court Study shows that s.8 of the 1981 Act is not a bar to the asking and answering of such questions. (It is unlikely though that any future research would have a virtually complete national sample consisting of over 800 completed jury trials to work with.)

- **Whether all jurors are able to participate actively in the process** By this is presumably meant whether they do all participate actively. (As has been seen, in para. 4.2, research that could not be undertaken at present was said to include whether all jurors participated equally.) It seems in the highest degree improbable that all jurors participate either equally or actively. In every jury there are likely to be the more active and the less active. (In the New Zealand study the researchers said, “There were inevitably different levels of juror participation in all cases. Generally this could be attributed to the natural blend of different personalities...” \(^{14}\) But what do the authors of the CP think could be the value of discovering that obvious fact? The same is true of any group, committee or social gathering. Is it thought that there is anything wrong

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\(^{13}\) For the details see Appendix below.

\(^{14}\) op.cit., n.6 above, p.47, para.6.35.
with that and if so, what do they imagine might be done to correct it? I regard this as a non-issue.\(^{15}\)

- **Whether there is any evidence of gender/racial or other bias?** Again, it would be surprising if the give-and-take in the jury room did not reveal the normal level of gender/racial or other bias present in the wider community. Political correctness may deplore this reality but it cannot magic it away. A better question would be not whether there is any evidence of such biases but whether there is any evidence that decisions of the jury are the result of such biases. Had there been jury research in the deep south of the USA in the pre-World War II era in jury trials involving black defendants with all-white juries, it might well have discovered that such an effect was so prevalent as to amount to systemic abuse. A different form of alleged systemic abuse (jury intimidation) led to the replacement of juries in terrorism cases in Northern Ireland by Diplock courts. But in that example, it is by no means certain that jury research would have revealed the abuse or its extent. The threat of intimidation was probably more implicit than explicit and it would probably not often have been actually referred to in the jury room. There is no evidence and no suggestion that there are systemic problems of that kind in the contemporary English jury system. Indeed there is striking evidence to the contrary.\(^{16}\) The most that could sensibly be argued is that there may be cases in which “improper” prejudice of one kind or another plays a significant role in the jury’s decision making. From all that we know about the operation of the jury system, such cases are probably rather rare. If that is right, research could only produce evidence of significant numbers of such cases for scrutiny if the sample size was large. Research involving detailed scrutiny of the deliberations of the jury (whether through “bugging” of the jury room or post-trial questionnaires or interviews) is complex and time consuming and is therefore likely to involve quite small samples. So, assuming that such cases occur at all, I would not expect jury research to produce a significant number of such cases for study. (That is quite apart from the fact that what is improper prejudice to one observer, for another might be perfectly understandable “jury equity”. An important feature of trial by jury is that the

\(^{15}\) The New Zealand study found that in a few cases some jurors dominated to the point where other jurors felt that the eventual verdict was affected. In a couple of cases they “totally overpowered the quieter ones to the point that ‘their decision was made for them’ by ‘four or five people in the room’. Forepersons lacked the skill to control these overly vocal jurors. (Ibid, para.6.39)

\(^{16}\) J.Baldwin and M.McConville in their 1979 study *Jury Trials* (Clarendon) based on 326 jury cases tried in Birmingham wrote: “We can confidently state that no single social factor (nor, so far as we can detect, any group of factors operating in combination produced any significant variation in the verdicts returned….. The truth of the matter is that most juries in Birmingham were extremely mixed, and it is to be expected that the amalgam of personal and social attributes that make up a jury will produce verdicts that reflect that unique social mix rather than the broad social characteristic of the individuals concerned.” (pp.104-05)

This finding was confirmed by an unpublished Home Office study which compared the national acquittal rate for three months before the major changes made in the composition of juries by the Juries Act 1974 with three months after the Act came into force. (The Act lowered the eligibility age from 21 to 18 and, more important, it abolished the property qualification which excluded most women.) No significant differences emerged. (Baldwin and McConville, op.cit., p.96, n.24.)
jury is not expected necessarily to decide the case in the same way as a judge. The phrase “jury equity” recognises that the jury may take into account factors that could not be taken into account by a judge. This measure of “give” in the system is generally regarded as positive.)

- **Other factors which would allow jurors to do their job better** The CP says, for example, Home Office research suggests that a third of people are not confident beforehand about taking part in jury service. It asks, “Does this impact on their ability to contribute to a jury’s discussion. If so, in what way, with what impact on their confidence in the system? What about in cases where there is complex technical evidence? Are there particular approaches that help jurors make sense of what may be very unfamiliar subjects?”

I am not persuaded that it matters that, before they start, a third of jurors lack confidence in their ability to take part in jury service. Jury trial has existed for centuries. Juries somehow manage to reach a verdict. It is difficult to believe that any evidence that some jurors might have some difficulties would in itself stimulate the system to produce improvements that would make a difference in that regard. (The Home Office study in question did not investigate how the jurors who expressed these worries about how they would cope thought they had acquitted themselves. But it did state, “Jurors may have had some anxieties about engaging in jury service but the overwhelming majority indicated that they felt positive about performing this role and virtually all took their civic responsibility seriously.”)

**The “loss of confidence” issue**

32. The CP then lists four risks of jury research identified by Lord Justice Auld:

*Inhibiting the frankness of jury discussions* As indicated above, I am not persuaded that this is much of a risk

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17 H. Kalven and H. Zeisel’s famous study *The American Jury*, 1966, aimed to discover the difference between the decisions of judges and juries by asking more than 500 judges about over 3,600 jury criminal trial verdicts. Their principal finding was that judges agreed with the jury’s verdict in about three-fourths of all criminal trials. When they disagreed, the jury was seven times more likely to be lenient than the judge - either convicting of a lesser offence or acquitting. Cases more likely to produce jury disagreement in a lenient direction were those with a sympathetic defendant, a criminal charge with which the jury was not wholly in sympathy, and a superior defence counsel. Typically it was a combination of these jury equities that best predicted a divergent jury verdict. (Table 12) The authors concluded: “The jury thus represents an uniquely subtle distribution of official power, an unusual arrangement of checks and balances. It represents also an impressive way of building discretion, equity, and flexibility into a legal system. Not the least of the advantages is that the jury, relieved of the burden of creating precedent, can bend the law without breaking it.” (p.498).

18 The study referred to in n.5 above - at p.31.

19 Ibid.
Undermining the finality of verdicts I find this wholly unconvincing. (As will be seen in Part 2 below I do regard this as a serious issue in regard to inquiries into alleged jury impropriety.)

Where the research is not bona fide, or is slanted to proving a particular hypothesis, exposing jurors to intimidation or harassment I regard this an unrealistic concern. The vetting of proposals for jury research would obviously be very strict. Research that was not bona fide, that was slanted in approach, or that could lead to intimidation or harassment of jurors would not be authorised. In the unlikely event that it occurred, it would be stopped immediately any whiff of such scandal came to the notice of those running the system.

Damaging public confidence in the jury system This, I believe, is a real issue though not for the reasons generally advanced. The first aspect of this is the effect of the predictable public debate in the media and elsewhere when the government first announces an intention to amend s.8 so as to allow jury research. (One can just imagine the newspaper editorials and comment pieces on the subject of “bugging” the jury room.) I have already indicated that I regard the concerns generally voiced about such research as scaremongering - that it would inhibit the frankness of jury deliberations, that it would undermine the finality of verdicts, that it would expose jurors to harassment or intimidation, etc. The debate at that stage would be about the merits or otherwise of the government’s decision to permit such research and about its likely effect on jury decision-making. Such controversy might diminish public confidence in the government, but I cannot see any reason why it should have the slightest impact on public confidence in the jury system. It would be more likely to enhance such confidence since the row generated by the news of the proposed research would be fuelled by concern for the jury system. The government’s announcement of an intention to amend s.8 in order to permit jury research would also be bound to generate concerns that its real agenda was the undermining of the jury system with a view perhaps to its eventual abolition. Protestations that that was not its intention, however genuine, would be unlikely to placate passionate supporters of the jury system. That too would, if anything, tend to increase rather than decrease public confidence in and support for the jury system.

33. My concern over potential loss of confidence in the jury system relates not to the debates regarding the merits or likely effect of the research but to its results. As stated above, it is not that I fear that research would show that the jury system was working badly. My view, based both on impression and on what is known from existing research (including my own\(^{20}\)), is that the system works remarkably well and fully justifies public

\(^{20}\) Many years before the Crown Court Study, I conducted a study of 200 acquittals at the Old Bailey and the Inner London Crown Court. The study was based on questionnaires completed by the barristers for the prosecution and the defence. Strikingly, there was no great difference of view as to their explanation of the acquittals. In most instances, the reason seemed to be variations on the themes of the strength of the defence, the weakness of the prosecution or a combination of both. Few perverse verdicts were identified - and in those few cases defence barristers agreed with the prosecutors that the verdict was inexplicable. (“Are too many professional criminals avoiding conviction ?– A study in Britain’s two busiest courts”, 37 M.L.R.,1974, pp.28-61) See also n.24 below.
confidence. I believe it would confirm what seems to be a broad agreement amongst both regular participants such as judges and lawyers and amongst members of the general public that generally the jury either “gets it right” or at least reaches an understandable verdict. My concern is that because the research would show that jurors are ordinary human beings who display the failings of ordinary human beings, some might mistakenly conclude from the research that the system was working badly by confusing the possibly messy process with the generally accepted results of cases.

34. There is first the category of case, already referred to, where the jury’s verdict is against the weight of the evidence. (The assessment of whether a verdict is against the weight of the evidence is, of course, not a precise business and can be affected by the standpoint of the person making the assessment. Police officers and defence lawyers, for instance, may have a different view as to whether a conviction or an acquittal was justified by the evidence.) Maybe one or two such cases might be in the rare category of case, like that of Clive Ponting or of Pat Pottle and Michael Randall, where the jury plays its historic role of protecting the citizen against unjust laws or unfair prosecutions. (Green’s study of jury decision-making showed that over the centuries the jury has played this role by mitigating the harshness of the criminal law and its penalties on a very considerable scale.) But others would be cases where there was no such principled justification. Perhaps the jury was swayed by its reaction to the personality of the defendant, the victim, a witness or a lawyer in the case. Maybe the jury was affected by its revulsion at the crime or some form of prejudice. Maybe there had been intimidation or bribery. Perhaps, as in one notorious instance, the jury consulted a ouija board or did something equally outlandish. Sometimes there would be an explanation of a verdict against the weight of the evidence that made sense in terms of “jury equity”; sometimes not.

35. I believe that there would be many more cases in which, although the verdict was arguably consistent with the weight of the evidence, the rationality of the final result

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21 There are those who believe that for the jury to give a decision against the weight of the evidence is unacceptable. Lord Justice Auld expressed this view in his report (at p.176). Indeed, he went so far as to recommend that legislation erect the principle that it is wrong for the jury to reach a decision that is contrary to the evidence or contrary to the judge’s directions on the law. I believe, to the contrary, that the right and the power to give a verdict against the weight of the evidence or in defiance of the judge’s direction on the law is an essential ingredient in the value of the jury system. The essence of the matter was expressed eloquently by the writer E.P.Thompson: “The English common law rests upon a bargain between the Law and the People. The jury box is where the People come into the court. The judge watches them and the jury watches back. A jury is the place where the bargain is struck. The jury attends in judgment not only upon the accused, but also upon the justice and humanity of the law.” (Writing by Candlelight, 1980)

22 In the Crown Court Study the police thought that 8% of jury decisions were “inexplicable”, compared with 3% for defence barristers, 2% for judges and 4% for prosecution barristers. (Table 6.7)


24 In the Crown Court Study all categories of respondents thought that in the large majority of cases – ranging from 78% at its lowest (the police) to 87% at its highest (defence solicitors) - the jury’s verdict was “understandable in the light of the evidence”. Judges thought this in 85% of cases; prosecution barristers in
was not backed by a coherent discussion. The result would be rational in terms of the weight of the evidence, the details of the case and all relevant factors, but the process might not show this to be so. Such a finding would not necessarily be a commentary on the IQ of the jurors. The intelligent and the educated are as capable of meandering or illogical argument as anyone. Discussing issues in a sometimes vague or emotional or unfocused way is what human beings do. My fear is that the discovery that the jury is composed of ordinary human beings could for some create a sense of unease about jury decision-making. It might, for instance, lead some to argue that jury decision-making should be structured by a series of questions posed by the judge. (This view was put by Lord Justice Auld in his report, but, rightly in my view, was rejected by the Government.) It might lead some to argue that the jury should be required to give written reasons - a task which they would be inherently unable to perform. That could fuel the argument that, if the jury cannot give reasons, it should be scrapped.

36. There would be cases where the jury discussion was dominated by a few strong personalities, or where there was evidence of “inappropriate”, politically incorrect views and opinions. Again, for some this would reduce confidence in the jury system. It seems they would include the authors of the CP. To propose research, as it does, in order to discover whether all jurors are able to participate actively or equally in the process or whether there is any evidence of gender, racial or other bias, suggests that these are “problems” which could and should be eradicated.

37. I believe that anyone who supports the jury system has to be prepared to accept that such shortcomings (if that is what they are) exist. My fear is that many of those who place their confidence in the system have not given thought to the fact that such shortcomings are inevitable and would be upset if they came to realise it through research. My concern therefore is that some of the public’s confidence in the jury system as the best available system would be shaken if such “shortcomings” were exposed to view - because of unrealistically high expectations as to how it does work and should work. I do not believe that that would serve the public interest.

38. I take that view the more since I am very sceptical as to whether significant practical benefits are actually likely to flow from research in the jury room that could not be achieved by other forms of research - whether through mock juries, shadow juries, questionnaires addressed to, or interviews with, jurors after the case or studies conducted outside the justice system altogether. Obviously research in the jury room is the gold standard in the sense that only such research can tell us “what really happens”. But I am

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83% of cases; defence barristers in 84%. (Table 6.7) All five categories of respondents thought there were between 10-13% of jury decisions that, though against the weight of the evidence, were explicable. (ibid.)

25 Report, p.535. For the writer’s critique of Lord Justice Auld’s recommendation, see my Memorandum in Response to his report, arguing that a) it was unnecessary, b) that judges would find it difficult to formulate the questions, c) that jurors would find detailed questions more difficult to cope with than the broad brush question Guilty or Not Guilty and d) that it would lead not to greater simplification but to greater complication. (The Response is accessible on the Review’s website, www.criminal-courts-review.org.uk - at pp.71-73.)

26 See n. 14 above.
not persuaded that discovering “what really happens” will throw important new light on the process which could translate into worthwhile reforms or improvements that could not have been achieved otherwise. (Nor has it been convincingly explained what worthwhile reforms or improvements might be in contemplation.) I trust that no government would entertain the idea of authorising such research unless the potential benefits were convincingly demonstrated and hugely outweighed the disadvantages.

39. As indicated above, my concerns relate only to research in the jury room itself. I believe that all other forms of jury research should be permitted. I would therefore support amendment of the Contempt of Court Act to permit authorised research by questioning of jurors at the end of the case in regard to matters that are at present precluded by s.8. This would permit more detailed inquiry about the jury’s deliberations than is at present possible.

Controls on jury research

40. I agree with the proposition put forward in the CP (para.4.6.1) that jury research should require the consent of the Lord Chancellor under such conditions as are specified by him in consultation with the Lord Chief Justice. The statutory provision amending s.8 would state that publication of such authorised research was permitted and that actions taken in accordance with the conditions laid down for the research would not constitute contempt of court.

41. As suggested in para.4.6.2, any such research would be subject to a code of conduct or protocol guaranteeing:

- The confidentiality of the jurors and the parties
- That no individual or case should be capable of identification
- That participation in the study would be voluntary. When the research is conducted by interview or questionnaire that is obvious. If recording of the deliberations of the jury itself is to be permitted, it would be for consideration whether the principle of voluntary participation would apply to all or only some of the participants in the trial. In the Arizona study referred to in note12 above all the participants had to consent - the judge, the lawyers, the litigants and all the jurors. The jurors were told about the research on arrival for jury duty. If they expressed unwillingness to take part in a case that was in the research sample they were allocated to other cases. Application of that approach would be troublesome from the point of managing jury selection.

An alternative to getting the consent of the jurors in the case might be to make a general announcement that jury research was being undertaken under official auspices, including video and/or audio recording of the deliberations in the jury room, without any jury being informed that they were or were not included in the study. Whether that
is a viable approach would be a matter of judgment. Certainly, not making any announcement would be extremely unwise as the news of “secret bugging” of jury deliberations would inevitably leak to the press with a resulting hullabaloo. So effectively the choice would be between making a general announcement about the research without informing the jury whether that case was included in the sample, or getting their individual consent.

The requirement of getting consent would inevitably skew the drawing of a randomly selected sample since it would be unlikely that all concerned would consent in all the sample cases.

- That the trial judge would be consulted where research was being conducted on proceedings currently in progress. That should obviously be so where the research included recording of the jury’s deliberations - though it would be for consideration whether his consent should be a pre-requisite. But it should also be the case where the research was confined to questionnaires administered to, or interviews with, jurors after the case was over, if only to reassure the jurors that the study had official blessing. As the Crown Court Study showed, where the authorities back the study and the jurors can be persuaded to complete the questionnaire whilst they are still in the precincts of the court, a very high response rate can be obtained. Once the jurors disperse to their separate homes the response rate will plummet and the value of the study will correspondingly be reduced. This is so even if the questionnaires have been handed to the jurors before they leave the court precincts. It will be the more the case if they are later sent the questionnaires in the post.

42. The final question posed on p.33 of the CP is whether a breach of the conditions set for such research should be subject to a financial penalty. It is difficult to imagine a case where this would be appropriate. The assumption must be that officially authorised research was being carried out by reputable researchers, usually ones attached to a government department, a university, or a recognised research body. (Presumably permission to conduct research would not be given to a newspaper or radio or television programme.) Publication of the results of the research would be conditional on observation of the conditions. That would be a sufficient control. A financial penalty imposed on reputable researchers would be both unnecessary and inappropriate. The Attorney General would retain his power to initiate proceedings for contempt of court in an egregious case.
43. I favour the approach to the problem of jury impropriety put forward in para.5.8.1 of the CP as the Government’s present view: basically, leave the matter to be handled by the courts through the developing common law.

44. My main concerns are, first, that frank discussion in the jury room not be impeded and second, that the finality of verdicts not be disturbed by encouraging disgruntled jurors (or a convicted defendant) to raise issues after the case is over.

45. My approach is similar to that expressed by Lord Hope in his speech in R v Mirza:
“Full and frank discussion, in the course of which prejudices may indeed be aired but then rejected when it comes to the moment of decision-taking, would be inhibited if everything that might give rise to allegations of prejudice after the verdict is delivered were to be opened up to scrutiny.”

Jurors’ disagreements as they work to arrive at their verdict may generate powerful emotions even involving angry exchanges. That is not to be discouraged either directly or indirectly. The system must provide the necessary protection to enable them to hammer out their differences in private without fear that sharp disagreements will lead to judicial scrutiny of the jury’s deliberations. The system must be robust enough to allow for struggle in the jury room.

46. On balance, I prefer the traditional common law approach expressed in R v Young which applied s.8 of the Contempt of Court Act to the courts - as opposed to the approach of the Law Lords in Mirza holding that the courts are exempt from the Act. I believe that the decision in Mirza opens the door to undesirable inquiries as to what occurred in the jury room. But I do not feel strongly enough on this issue to urge that legislation be introduced to change the law back to what it was before the decision.

47. I would, however, be against any move to further widen the scope of inquiry into what happened in the jury room.

48. In para.5.7.1 the CP suggests that there are two key arguments in favour of change:

- “The transparency of the system may be increased from that presently in operation and it would be clear how far investigations into jury impropriety could go”

- “[I]t could contribute to a reduction in the risk of miscarriages of justice and thus to increased public confidence in the criminal justice system”

In this context I do not regard transparency as something to promote. On the contrary.

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Legislative clarification of the limits of inquiries into jury impropriety, though theoretically desirable, is in practice very difficult. As the CP says (para.5.7.1), it bears the risk of being either too broad and fundamentally undermining the principle of confidentiality within the jury room or too narrow and excluding a form of impropriety that had not previously been thought of. Wisest would be to leave it to the courts to develop the concept on a case by case basis, supervised, as it will be, by the European Court of Human Rights.

49. As to the argument that legislative clarification would reduce the risk of miscarriages of justice, I do not believe that there is reason for concern that jury impropriety of the kind under discussion here is a cause of miscarriages of justice. I have myself never come across a case where that was alleged. The Runciman Royal Commission on Criminal Justice was set up expressly to address the problem of miscarriages of justice. So far as I recall, this issue was not once brought to the Commission’s attention in any of the 900 or more submissions of evidence nor do I remember it ever being brought up in any of the innumerable meetings or discussions held by the Commission. I therefore do not consider this to be a reason for considering legislation. For one to imagine that it is a cause for concern one has to postulate that the juror(s) displaying unacceptable behaviour that could be the subject of legitimate complaint could, because of the unacceptable behaviour, be successful in persuading the other members of the jury to reach a verdict that they otherwise would not have reached. It seems to me that this is a far-fetched notion.

Possible non-legislative changes

50. I have no objection to jurors being told that they should bring to the attention of the trial judge any concerns about grossly improper conduct of other jurors that could affect the integrity of the verdict - presumably by means of a note given to the jury bailiff.

51. I would not describe this as a duty - rather as a power to be exercised with the greatest caution. I certainly would not want such information given to jurors to include a list, or even examples of improper conduct that might legitimately be the occasion for using the procedure. That would be likely only to stimulate such use.

52. If judges need guidance on what directions to give to juries, this could be achieved by Guideline Directions issued by the Judicial Studies Board. To undertake special training for judges on the matter seems disproportionate and unnecessary.

53. I would warn against giving either the trial court or the Court of Appeal the specific power to investigate allegations of discrimination on any of the long list of grounds suggested by the CP in para.5.8.2.2: sex, race, colour, language, religion, sexual orientation, political or other opinion, national or social origin, association with a national minority, property, birth or other status. I believe this would open a Pandora’s box of endless footling or misconceived allegations which would then need to be investigated.
APPENDIX

SOME FINDINGS OF THE CROWN COURT STUDY CONDUCTED FOR THE
RUNCIMAN ROYAL COMMISSION ON CRIMINAL JUSTICE

Understanding the evidence
Jurors were asked “How difficult was it for you to understand the evidence in this case?” Over 90% said “Not at all difficult” (50%), or “Not very difficult” (41%). (Table 8.3)

The prosecution and defence barristers were asked: “In this case do you think that the majority of the jury had difficulty in understanding the evidence?” 90% of prosecution barristers and 90% of defence barristers said No. The figures for the defence solicitors (83%) and the CPS (85%) were slightly lower. (para.6.2.7)

The jurors were asked: “Do you think the jury as a whole was able to understand the evidence?” Over 90% thought that “All understood” (56% of all jurors and 57% of the foremen) or that “Most of them understood” (41% of both all jurors and of the foremen). (Table 8.6)

There were however 143 juries (17% of the total of 821 juries) in which one or more jurors said “Only a few understood” or “None of them understood”. Twelve per cent had one such member; two per cent had two such members; six juries (0.7%) had three and one (0.1%) had four. (para.8.2.3)

In the cases involving scientific evidence presented by expert witnesses, the result was much the same: 90% said it was “Not at all difficult” (56%) or “Not very difficult” (34%). (Table 8.4)

The judges were asked: “In your view, was the scientific evidence in this case understandable to the jury?” In 93% of the 257 cases in which the judges gave a reply, they said the scientific evidence was “All understandable”. (para.6.2.7)

Remembering the evidence
Jurors were asked: “How difficult was it for you to remember the evidence when it was time for the jury to consider its verdict?” Again, over 90% said it was “Not at all difficult” (50%) or “Not very difficult” (41%). (Table 8.7)

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28 n.1 above.
29 Through an oversight in the preparation of the questionnaires, the judges were not asked whether they thought the jury would have been able to remember non-scientific evidence.
This was consistent with the lawyers’ view. They were asked: “Do you think that the length of the case meant that a majority of the jury would have had difficulty remembering the evidence. 97% of prosecution barristers and 96% of defence barristers thought the answer was No. The figures for the defence solicitors (86%) and the CPS (91%) were somewhat lower. (Table 6.16)

Unsurprisingly, the longer the case, the more likely that jurors reported difficulty in remembering the evidence. Only 2-4% of jurors said they had trouble remembering the evidence in the one-day cases, but a quarter said it in cases lasting more than a week. (para.8.2.5) Seven per cent of juries were in cases lasting more than a week. (para.8.9.1)

Jurors were asked: “Do you think that the rest of the jury found it difficult to remember the evidence?” Over 90% said “None found it difficult” (60% of jurors and 56% of foremen) or “A few found it difficult” (34% of jurors and 36% of foremen). There were virtually no jurors who said that “All found it difficult” and only a small number (5%) who said that “Most found it difficult”. (Table 8.9)

**Lawyers’ technical jargon**

Jurors were asked whether their understanding of the case was made difficult by lawyers’ technical jargon. In 91% they replied No. (para.8.4.1) When the same question was put about other jurors, almost three-quarters (73% of jurors and 70% of foremen) said that “None found it difficult”. But 22% of jurors and 26% of foremen thought there were some who had problems. (para.8.4.2)

When asked whether they found it difficult to follow the judge’s summing up on the law, over 90% of jurors said it was “Not at all difficult” (61% of jurors and 71% of foremen) or “Not very difficult” (33% of jurors and 25% of foremen). (Table 8.14)

**Length of cases**

A quarter of the cases (26%) lasted under a day; another third (33%) lasted from one to two days; a fifth (20%) lasted two to three days. So four-fifths of the cases lasted under three days. Fourteen per cent lasted 3-5 days; five per cent lasted between one and two weeks and two per cent lasted over two weeks. (para.8.9.1)

**How long was the jury out?**

When it came to the time the jury was out, in one third of cases (33%) they were out for under an hour; in 29% they were out for one to two hours; and in 25% they were out between two and four hours. So, in nearly 90 per cent of cases (87%) they were out for under four hours. (Table 8.23)

**Impressions of the system**

96% of jurors said they found being on a jury “Very interesting” (74%) or “Fairly interesting” (22%). Only 4% were negative. (para.8.11.8)
Again, most rated the jury system highly - 80% said it was a “Very good system” (33%), or a “Good system” (47%), 15% were neutral, “Neither good nor bad”. Only five per cent were negative. (Table 8.33)