

# How Should We Go About Jury Research in Scotland?

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☞ Juries; Jury deliberations; Legal research; Scotland; Verdicts

## Introduction

In September 2015, the Cabinet Secretary for Justice confirmed that the Scottish Government planned to carry out a programme of jury research.<sup>1</sup> This announcement was the latest development in the lengthy law reform process that started when Lord Carloway, in his review of the law post-*Cadder*,<sup>2</sup> recommended the abolition of the longstanding requirement for corroboration in Scottish criminal cases.<sup>3</sup> This led, in turn, to a second review—the Post-Corroboration Safeguards Review (PCSR), undertaken by Lord Bonomy—of the safeguards against wrongful conviction that might be necessary in the absence of a corroboration requirement. The PCSR concluded, among other things, that there is insufficient knowledge of how the Scottish criminal jury—which has 15 members, returns majority verdicts, and has a choice between two different verdicts of acquittal (not guilty and not proven)—operates and recommended that research into Scottish juries should be undertaken to rectify this gap in knowledge.<sup>4</sup>

In this paper we briefly trace the developments that have led to the need for jury research, before explaining why there is a need for such research specifically in the Scottish context, with reference to the unique features of Scottish criminal juries. We then consider the different methods that might be appropriate for addressing the research questions posed by the PCSR and discuss whether amendment of the Contempt of Court Act 1981, which prohibits enquiry into jury deliberations in Scotland, would be necessary or desirable in this context. We argue that the questions identified by the Review would best be addressed by research with real jurors rather than with mock jurors, and that amendment of the 1981 Act would be required.

\* We are grateful to Emma Ainsley for research assistance, and to the Leverhulme Trust for funding her work.

<sup>1</sup> Scottish Parliament, *Official Report: Justice Committee*, 8 September 2015, col.16. Jury research “ahead of any further proposals to reform the criminal justice system” was a manifesto commitment of the SNP prior to their victory in the 2016 Holyrood elections: SNP, *Manifesto 2016* (2016), p.39. At the time of writing, no decision on what form the research would take had been announced.

<sup>2</sup> *Cadder v HM Advocate* [2010] UKSC 43; [2010] 1 W.L.R. 2601; [2011] H.R.L.R. 1 led to the introduction of a right to legal assistance for detained suspects in Scotland. It is discussed in more detail in the next section.

<sup>3</sup> The Carloway Review, *Report and Recommendations* (2011), p.286.

<sup>4</sup> The Post-Corroboration Safeguards Review, *Final Report* (2015), para.12.24.

## The road to jury research in Scotland

The road that has led to jury research is a long one. The starting point for the current proposals was the decision in *Cadder v HM Advocate*<sup>5</sup> that the use at trial of admissions made by a suspect who had not been offered legal assistance would be incompatible with art.6 of the ECHR.<sup>6</sup> Prior to *Cadder*, Scots law did not recognise a right to legal assistance during detention, but following the judgment the Scottish Parliament passed emergency legislation that gave suspects this right and made a number of other changes to Scottish criminal procedure.<sup>7</sup> The Government also commissioned Lord Carloway to review “the law and practice of questioning suspects in a criminal investigation in Scotland”<sup>8</sup> in the light of *Cadder* and the ECHR jurisprudence. One of Lord Carloway’s (many) recommendations was to abolish the longstanding requirement for corroboration in criminal cases.<sup>9</sup> The Government accepted this recommendation<sup>10</sup> but in response to concerns that it might increase the risk of wrongful conviction<sup>11</sup> commissioned a second review, the Post-Corroborator Safeguards Review (PCSR),<sup>12</sup> to consider whether additional safeguards were needed.<sup>13</sup> A number of possible safeguards were included in the terms of reference, including jury majority and size.<sup>14</sup> The PCSR concluded that permitting simple majority verdicts was “untenable in a post-corroboration system”<sup>15</sup> and as an interim measure the required majority should be increased to 10 from 15, pending research into “jury reasoning and decision-making”.<sup>16</sup>

Following the PCSR, the Government announced that it would put on hold its proposal to abolish the requirement for corroboration.<sup>17</sup> The corroboration provisions in the Bill were removed and the Criminal Justice (Scotland) Act 2016, which contains most of Lord Carloway’s other recommendations<sup>18</sup> and also two of the PCSR’s<sup>19</sup> (alongside a number of other unrelated measures),<sup>20</sup> received Royal Assent on 13 January 2016.

At the time of writing, research into jury decision making and reasoning had yet to be commissioned by the Government. One might wonder, though, why such

<sup>5</sup> *Cadder* [2010] UKSC 43; [2010] 1 W.L.R. 2601; [2011] H.R.L.R. 1. See F. Leverick, “The Supreme Court Strikes Back” (2011) 15 Edin. L.R. 287.

<sup>6</sup> Although it might be traced back further still to *Salduz v Turkey* (2009) 49 E.H.R.R. 19; [2010] Crim. L.R. 419. For a detailed account of the process that led to *Cadder*, see F. Leverick, “The Right to Legal Assistance During Detention” (2011) 15 Edin. L.R. 352, 352–259.

<sup>7</sup> Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. See F. Stark, “The Consequences of *Cadder*” (2011) 15 Edin. L.R. 293.

<sup>8</sup> The Carloway Review, *Report and Recommendations* (2011), p.13

<sup>9</sup> The Carloway Review, *Report and Recommendations* (2011), p.286.

<sup>10</sup> Scottish Government, *Working for Scotland: The Government’s Programme for Scotland 2012–2013* (2012), p.67.

<sup>11</sup> See, e.g. J. Chalmers and F. Leverick, “Substantial and radical change: a new dawn for Scottish criminal procedure?” (2012) 75 M.L.R. 837, 863–864.

<sup>12</sup> The Post-Corroborator Safeguards Review, *Final Report* (2015).

<sup>13</sup> Scottish Government, *Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration* (2012), para.2.1.

<sup>14</sup> The Post-Corroborator Safeguards Review, *Final Report* (2015), para.2.1.

<sup>15</sup> The Post-Corroborator Safeguards Review, *Final Report* (2015), para.3.1.

<sup>16</sup> The Post-Corroborator Safeguards Review, *Final Report* (2015), para.12.24.

<sup>17</sup> Scottish Parliament, *Official Report* 21 April 2015, cols 11–12. No firm commitment on jury research was made at this stage, with the Cabinet Secretary stating that he was “open minded on the issue”: col.17.

<sup>18</sup> See ss.1–6, all of which relate to arrest.

<sup>19</sup> See s.57 (code of practice to be published for questioning and identification procedures); s.97 (prosecutorial test to be published).

<sup>20</sup> Such as police search powers (Pt 2) and sentencing for weapons offences (s.84).

research is thought to be necessary. A huge volume of literature already exists on jury decision making in a multitude of different contexts.<sup>21</sup> The answer to that question is that the conclusions drawn by this body of research are not easily transferrable to the Scottish jury, which has a number of unique features, each of which is discussed below.

## The Scottish jury

In Scotland, cases can be prosecuted under solemn or summary procedure, but only the former involves the use of a jury.<sup>22</sup> Of 66,963 cases in the financial year 2015–16, 4,618 were prosecuted under solemn procedure but of these only 1,058 proceeded to a trial, the rest concluding with a guilty plea.<sup>23</sup> As such, only 1.58 per cent of cases prosecuted in Scotland that year were determined by a jury. That might lead to the conclusion that the jury is insignificant in Scottish criminal procedure, but that would be unwarranted as the cases that the jury does determine are those that potentially have the most serious consequences for the accused if he or she is convicted.<sup>24</sup>

The Scottish jury is unusual in three respects.<sup>25</sup> It comprises 15 members; it can return a verdict of guilty by a simple majority (that is, eight votes); and the jury has the option of two different verdicts of acquittal—not guilty and not proven. The PCSR report suggested that

“the relationship among the various distinctive features of the Scottish jury system is perhaps the most complicated to unravel when trying to determine what additional safeguards may be required following the removal of the requirement for corroboration”.<sup>26</sup>

## Jury size

The size of the Scottish jury has received some attention before, with a 1975 review recommending it be reduced to twelve,<sup>27</sup> and a more recent consultation receiving mixed responses on the question of whether its size might be reduced.<sup>28</sup> While a significant body of research on jury size exists in the US, this is largely in response to case law on the question of the minimum jury size required to comply with the

<sup>21</sup> Two good overviews, although both are now a little dated, are P. Darbyshire, A. Maughan and A. Stewart, *What Can the English Legal System Learn from Jury Research Published up to 2001?* (2002); D.J. Devine, L.D. Clayton, B.B. Dunford, R.P. Seying and J. Pryce, “Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups” (2001) 7 *Psychology, Public Policy and Law* 622.

<sup>22</sup> In Scotland the accused has no say in whether his or her case is heard by a jury: this decision is taken by the procurator fiscal, except in respect of a very small number of offences (principally murder and rape) which can only be prosecuted under solemn procedure. For discussion, see P. Duff, “The Defendant’s Right to Trial by Jury: A Neighbour’s View” [2000] *Crim. L.R.* 85.

<sup>23</sup> Crown Office and Procurator Fiscal Service, *Case Processing Financial Year 2015/2016* (2016).

<sup>24</sup> The same point is made with reference to England and Wales by C. Thomas, *Are Juries Fair?* (2010), p.1. In Scotland, cases prosecuted under solemn procedure can be heard in the sheriff court (maximum penalty: five years’ imprisonment) or the High Court (maximum penalty: life imprisonment): s.3 of the Criminal Procedure (Scotland) Act 1995. The maximum sentence in summary procedure is 12 months’ imprisonment: s.5(2).

<sup>25</sup> See generally P. Duff, “The Scottish Criminal Jury: A Very Peculiar Institution” in N. Vidmar (ed.), *World Jury Systems* (2000), p.250; J. Chalmers, “Jury Majority, Size and Verdicts” in J. Chalmers, F. Leverick and A. Shaw (eds), *Post-Corroboration Safeguards Review: Report of the Academic Expert Group* (2014), p.140.

<sup>26</sup> The Post-Corroboration Safeguards Review, *Final Report* (2015), para.12.22.

<sup>27</sup> *Criminal Procedure in Scotland (Second Report)* (1975), Cmnd.6218, para.51.11.

<sup>28</sup> See L. Nicholson, *The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses* (2009), p.30.

Sixth Amendment right to jury trial, five jurors (unlike six) having been held to be too few.<sup>29</sup> That research has compared the six and the 12-member jury (and occasionally other sizes smaller than 12), and suggests that smaller juries are undesirable as being less likely to be properly representative of the community, likely to deliberate for less time and less well, and likely to recall evidence less accurately.<sup>30</sup>

This research, however, tells us nothing about whether a fifteen person jury has advantages or disadvantages over one consisting of 12 members. There is reason to be sceptical about the 15 person jury, given evidence about group decision-making which emphasises the advantages of relatively small groups,<sup>31</sup> and highlights the difficulties of achieving direct responsiveness between members in groups of larger than about eight or 10.<sup>32</sup> But this gives us reason only for doubt and no more: the available research is concerned with very different contexts and tells us nothing directly about juries.

### *The simple majority verdict*

Aside from courts-martial,<sup>33</sup> the Scottish system of simple majority verdicts appears highly exceptional if not unique in the common law world. Although some systems outside the common law world contemplate the possibility of verdict by simple majority,<sup>34</sup> they may counterbalance this by greater judicial supervision of the jury (e.g. through permitting an appeal on the facts, judicial involvement in the jury's decision-making process, or allowing the trial judge or judges to overrule the jury in certain cases), limiting the value of direct comparison. Most common law jury systems take unanimity as the starting point for jury decision-making but—with the principal exception of Canada<sup>35</sup>—allow juries to return a verdict despite the dissent of one or sometimes two jurors. Various justifications have been offered for permitting this, the best of which is probably that there may sometimes be “one member of the group who is simply unreasonable or unwilling to properly take into account the views of the others - the rogue juror”.<sup>36</sup>

The strongest objection to the Scottish rule is that it cannot readily be reconciled with the requirement of proof beyond reasonable doubt, the presumption of innocence, or the concept of the jury as a body which takes collective decisions. Fears have occasionally been expressed about the number of hung juries that might result from a change to the simple majority rule.<sup>37</sup> There may, however, be little

<sup>29</sup> *Ballew v Georgia* 435 U.S. 223 (1978); *Williams v Florida* 399 U.S. 78 (1970).

<sup>30</sup> See M.J. Saks and M.W. Marti, “A Meta-Analysis of the Effects of Jury Size” (1997) 21 *Law and Human Behavior* 451; V.P. Hans and N. Vidmar, *Judging the Jury* (New York: Plenum Press, 1986), Ch.11; A. Smith and M.J. Saks, “The Case for Overturning *Williams v Florida* and the Six-Person Jury: History, Law and Empirical Evidence” (2008) 60 *Florida L.R.* 441.

<sup>31</sup> See A.B. Kao and I.D. Couzin, “Decision Accuracy in Complex Environments is Often Maximised by Small Group Sizes” (2014) 281 *Proceedings of the Royal Society B* 2013305.

<sup>32</sup> I.D. Steiner, *Group Process and Productivity* (New York: Academic Press, 1971), p.101. See also G.C. Homans, *The Human Group* (London: Routledge and Kegan Paul, 1950), p.103.

<sup>33</sup> See *Twaite* [2010] EWCA Crim 2973; [2011] 1 W.L.R. 1125; [2011] 1 Cr. App. R. 19 (p.249); Chalmers, “Jury majority, size and verdicts” in Chalmers, Leverick and Shaw (eds), *Post-Corroborator Safeguards Review: Report of the Academic Expert Group* (2014), pp.140, 143–145.

<sup>34</sup> See E.J. Leib, “A Comparison of Criminal Jury Decision Rules in Democratic Countries” (2008) 5 *Ohio State J. of Criminal Law* 629.

<sup>35</sup> P. Sankoff, “Majority Jury Verdicts and the Charter of Rights and Freedoms” (2006) 39 *U.B.C. L.R.* 333; Law Reform Commission of Canada, *The Jury in Criminal Trials* (Working Paper No.27, 1980).

<sup>36</sup> New Zealand Law Reform Commission, *Juries in Criminal Trials* (Report 69, 2001), para.435.

<sup>37</sup> See, e.g. Scottish Office, *Juries and Verdicts* (1994), para.6.5.

difference in outcome between a jury system which permits simple majority verdicts and one which requires near-unanimity, as data from England and Wales shows. Thomas found, examining data from 2006–2008, that hung juries accounted for 0.6 per cent of all cases where juries deliberated and 0.08 per cent of all charges in the Crown Court,<sup>38</sup> and “in most cases these [were] juries that [had] reached verdicts on at least some charges put to them”.<sup>39</sup> If hung juries were to occur in Scotland at the same rate as in England and Wales, the number of retrials which would take place annually would be in single figures.<sup>40</sup> This does not, however, tell us anything about how the process of deliberation might be affected by the use of a simple majority rule rather than one of unanimity.

### *The three verdict system*

Scots law’s three-verdict system is largely a matter of historic accident, stemming from a period where juries did not return general verdicts but instead found particular facts proven or not proven.<sup>41</sup> While the not proven verdict was retained when juries returned to giving general verdicts, it has no distinct meaning or effect compared to the not guilty verdict, and judges are discouraged even from attempting to define it for juries.<sup>42</sup> Its existence is sometimes linked to the corroboration requirement, with the suggestion being made that it is appropriate where the acquittal results only from a formal insufficiency of evidence.<sup>43</sup> However, a formal insufficiency should result in the case being prevented from reaching the jury by a no case to answer submission,<sup>44</sup> and it is in any event unlikely that juries would consistently adopt this technical rationale without specific direction to that effect.

A better explanation of the verdict’s effect may be that it reinforces the requirement of proof beyond reasonable doubt by emphasising the possibility of an acquittal in cases where jurors are in a state of marginal uncertainty.<sup>45</sup> There is some limited support for this in a single research paper, which appears to be the only empirical study of the three verdict system.<sup>46</sup> While that study suggested that the not proven verdict might help to prevent wrongful convictions, because it appeared particularly attractive to jurors in cases of “moderately strong” evidence, it highlighted two potentially worrying aspects: first, 37 per cent of the mock jurors who had considered a case on the basis of three verdicts believed that a not proven verdict would permit the retrial of the accused at a later date, despite having received written instructions to the contrary, and secondly, the researchers noted

<sup>38</sup> C. Thomas, *Are Juries Fair?* (2010), p.27.

<sup>39</sup> Thomas, *Are Juries Fair?* (2010), p.46.

<sup>40</sup> See Chalmers, “Jury majority, size and verdicts” in Chalmers, Leverick and Shaw (eds), *Post-Corroboration Safeguards Review: Report of the Academic Expert Group* (2014), pp.140, 152.

<sup>41</sup> See G. Maher, “Jury Verdicts and the Presumption of Innocence” (1983) 3 L.S. 146, 148–149; I.D. Willock, *The Origins and Development of the Jury in Scotland* (Edinburgh: Stair Society, 1966), pp.218–222.

<sup>42</sup> The standard direction is simply “There are three verdicts you can return, not guilty, or not proven, or guilty. Not guilty and not proven have the same effect, acquittal. An accused acquitted of a charge can’t be prosecuted again on it.” See Judicial Institute, *Jury Manual: Some Notes for the Guidance of the Judiciary* (January 2015), section 61.2.

<sup>43</sup> D. Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, 4th edn by B.R. Bell (Edinburgh: Bell and Bradford, 1844), Vol.ii, p.440; T.B. Smith, *A Short Commentary on the Law of Scotland* (Edinburgh: W.Green, 1962), p.227.

<sup>44</sup> Introduced into Scots law by the Criminal Justice (Scotland) Act 1980 s.19. See now Criminal Procedure (Scotland) Act 1995 ss.97 and 160.

<sup>45</sup> See e.g. *McNicol v HM Advocate* 1964 J.C. 25 at 27; 1964 S.L.T. 151 at 152 (Lord Justice-General Clyde).

<sup>46</sup> L. Hope, E. Greene, A. Memon, M. Gavisk and K. Houston, “A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making” (2008) 32 *Law and Human Behavior* 241.

that deliberations appeared to “dry-up” once the possibility of a not proven verdict was raised, suggesting that the verdict could inhibit thorough deliberation by jurors.

The research paper drew on data from two small-scale studies which involved mock jurors reading trial summaries and either reaching individual decisions or deliberating in groups of four to eight members. While it is the best evidence available on the operation of the three verdict system, it raises questions for consideration rather than providing a firm basis on which to draw conclusions about how the three verdict system works in practice.

The difficulty, as Lord Bonyon expressed it in the PCSR report, was not simply that each of these features of the Scottish jury was poorly understood, but that their combined effect was equally obscure<sup>47</sup>:

“The unique features of Scottish juries ... form important parts of a balanced system which, until now, has included the corroboration requirement, a 15 person jury, 3 verdicts, and the possibility of conviction by simple majority. Insufficient is known at this stage about the relationship among them, and in particular about the use in practice of the Not Proven verdict, to enable any firm evidence-based conclusion to be drawn about the likely impact of reducing the size of the jury, changing from a system with three verdicts to one with two, and requiring unanimous or near unanimous verdicts.”

In recommending that research into “jury reasoning and decision-making”<sup>48</sup> should therefore be undertaken, he suggested<sup>49</sup>:

“That research would include asking jurors at least the following:

- What jurors understand to be the difference between Not Guilty and Not Proven [Q1]
- Why they choose one over the other [Q2]
- Why, and to what extent, do jurors alter their position as regards Not Proven and Not Guilty as a result of deliberations [Q3]
- The extent to which the members of a jury of 15 (as compared with a jury of 12) actually participate in deliberations [Q4]
- The differences in outcome (assuming an identical factual matrix) as between a 12 person jury with only 2 possible verdicts and a 15 person jury with 3 verdicts, and the reasons for those differences [Q5]; and
- Whether there are benefits in requiring the jury to attempt to reach a unanimous verdict [Q6].”

“Other questions could possibly be added, including whether the same majority should be required for acquittal as for conviction [Q7], and whether the votes for each verdict should be disclosed in court [Q8].”

<sup>47</sup> The Post-Corroboration Safeguards Review, *Final Report* (2015), para.12.22.

<sup>48</sup> The Post-Corroboration Safeguards Review, *Final Report* (2015), para.12.24.

<sup>49</sup> The Post-Corroboration Safeguards Review, *Final Report* (2015), para.12.25. The question numbers in square brackets have been inserted for ease of reference later in this paper.

## Jury research methods and their application

How then might these questions be researched? In the field of jury research a wide variety of research methods have been utilised. Some can immediately be discounted in the present context. All of the questions raised by the PCSR relate to understanding how juries reach decisions and the extent to which they comprehend legal concepts. This could, in theory, be investigated by asking legal professionals or others who have observed trials for their opinions about juror decision making and understanding,<sup>50</sup> but relying on an indirect method such as this would be far inferior to undertaking research with actual or potential jurors as participants.

This still leaves a number of different options in terms of the possible research methods. A key distinction is between undertaking research with “real” jurors (i.e. those who have sat on actual criminal trials) and “mock” jurors, and this distinction is discussed in the next section.<sup>51</sup>

### *Research with real jurors*

By research with real jurors, we mean jurors who have sat on real criminal trials and participated in deliberations that have determined the fate of an accused person. We exclude from this category research undertaken with jurors who have been cited to court but not selected to sit on a trial. Such research is sometimes referred to as research with real jurors (justifiably, given the use which it makes of existing jury selection processes),<sup>52</sup> but for the purposes of this article we have taken the fact of participating in the determination of an accused’s person’s fate to be the crucial dividing line between the two types of research, and we return to the importance of this in the next section.

Research with real jurors as subjects is far less common than research with mock jurors, especially in the UK jurisdictions where it is restricted by statute. In Scotland the relevant provision is s.8(1) of the Contempt of Court Act,<sup>53</sup> which provides that

“it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by

<sup>50</sup> There is a body of research whereby jury verdicts or other aspects of jury behaviour are evaluated by legal professionals: see, e.g. H. Kalven and H. Zeisel, *The American Jury* (Boston: Little, Brown, 1966); M. Zander, “Are Too Many Professional Criminals Avoiding Conviction? A Study of Britain’s Two Busiest Courts” (1974) 37 M.L.R. 28; J. Baldwin and M. McConville, *Jury Trials* (Oxford: Clarendon Press, 1979). This has led to some interesting findings, but it would not be the best way to address the PCSR questions.

<sup>51</sup> This does not tell the full story, as with either group of participants a number of different research methods could be used, such as surveys, observation or controlled experiments. For a matrix setting out these different options and some of the advantages and drawbacks of each, see M.J. Saks, “What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?” (1997) 6 *Southern California Interdisciplinary Law Journal* 1.

<sup>52</sup> See, e.g. Thomas, *Are Juries Fair?* (2010), p.45. Cf. M. Dann, V. Hans and D. Kaye, *Testing the Effects of Selected Jury Trial Innovations on Juror Comprehension of Contested mtDNA Evidence* (2005), p.24.

<sup>53</sup> The provision also applies to Northern Ireland. In England and Wales, a review of the Contempt of Court Act considered whether the prohibition on jury research should be lifted but concluded that it should not: see *Contempt of Court (1): Juror Misconduct and Internet Publications* (2013), Law. Com. No.340, para.4.54. The relevant prohibition in England and Wales is now contained in s.20D of the Juries Act 1974 (as inserted by s.74 of the Criminal Justice and Courts Act 2015), which makes it a criminal offence (rather than a contempt of court) subject to a maximum penalty of two years imprisonment to disclose, solicit or obtain “information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court”. There are a number of exceptions set out in ss.20E–20G, but none covers academic research.

members of a jury in the course of their deliberations in any legal proceedings.”

Within these terms, research with real jurors is still possible and a small number of research projects have been undertaken in the UK context (although never in Scotland)<sup>54</sup> that have worked within the terms of the Act and surveyed jurors. The Act does not rule out asking real jurors about aspects of their experience as jurors other than what went on in the course of deliberations or about their understanding of legal terms or concepts. So, for example, in a study undertaken in Northern Ireland, jurors who had sat on trials in Belfast Crown Court were asked about topics including their comprehension of the judge’s directions and the evidence given by witnesses and whether they took notes or used other memory aids.<sup>55</sup>

Moreover, the Act does not rule out asking jurors some limited questions about their deliberations, as illustrated by the survey of jurors undertaken for the Royal Commission on Criminal Justice.<sup>56</sup> Jurors in three Crown Courts in England were asked to complete a questionnaire after having sat on criminal trials. This included a number of questions about whether the individual juror felt that the jury *as a whole* understood the evidence in the case, whether they remembered the evidence when they retired to the jury room, whether they took notes during the trial, and whether they followed the judge’s directions on the law.<sup>57</sup> Jurors were also asked “how long did the jury deliberate?”<sup>58</sup> a question which clearly relates to deliberations, but which did not fall within the terms of the Act because it was not about “statements made, opinions expressed, arguments advanced or votes cast”. The questionnaire was vetted for compliance with the Contempt of Court Act by the Attorney General, the Lord Chief Justice and the Lord Chancellor’s Department.<sup>59</sup>

The Act would not automatically rule out undertaking field experiments with real juries either, although there are other reasons weighing against doing so. A field experiment is a controlled experiment where some aspects of the experiment are kept constant, while others are varied, so that the impact of a particular factor can be measured. This has never, as far as we are aware, been done in the UK, but in the US studies have been undertaken with real jurors using the field experiment technique. Heuer and Penrod, for example, secured the co-operation of judges in a mixture of criminal and civil trials in Wisconsin to test the impact of written directions on juror recall and comprehension of legal concepts.<sup>60</sup> In the study, 29

<sup>54</sup> Aside from a survey of persons cited for jury service, which was limited to questions on the process of jury selection and the length of the court day. See E. Samuel and I. Clark, *Improving Practice: A Summary of Responses to the Consultation on the 2002 Review of the Practices and Procedure of the High Court of Justiciary* (2003), pp.3–4 and annexes E–F.

<sup>55</sup> J. Jackson, “Juror Decision-Making and the Trial Process” in G. Davies et al. (eds), *Psychology, Law and Criminal Justice* (Berlin: De Gruyter, 1996), pp.327, 328–331. Similar surveys of jurors have been undertaken in other jurisdictions: see, e.g. M. Findlay, *Jury Management in New South Wales* (1994).

<sup>56</sup> M. Zander and P. Henderson, *The Crown Court Study* (Royal Commission on Criminal Justice, Research Study No.19, 1993). Zander was himself a member of the Royal Commission.

<sup>57</sup> M. Zander, “A Response to the Department of Constitutional Affairs’ Consultation Paper (CP 04/05)” (2005), para.15.

<sup>58</sup> Zander, “A Response to the Department of Constitutional Affairs’ Consultation Paper (CP 04/05)” (2005), para.15.

<sup>59</sup> Zander, “A Response to the Department of Constitutional Affairs’ Consultation Paper (CP 04/05)” (2005), para.14.

<sup>60</sup> L. Heuer and S.D. Penrod, “Instructing Jurors: A Field Experiment With Written and Preliminary Instructions” (1989) 13 *Law and Human Behavior* 409. The same authors have also undertaken field experiments in other contexts, such as the impact of allowing jurors to take notes and ask questions during criminal trials: see L. Heuer and S.D.



judges randomly assigned their trials so that some juries received written instructions and some did not. After the trial was over the jurors were asked to complete questionnaires aimed at testing their recall and comprehension of the instructions they received.<sup>61</sup> The extent to which field experiments can be utilised in real trials is, however, limited as the manipulation of any variables that might affect the fairness of the trial would clearly be out of the question.<sup>62</sup>

The statutory protection of jury secrecy in the UK does mean that jury deliberations could not be legitimately observed or recorded.<sup>63</sup> To date, these provisions have never been suspended in the UK jurisdictions to allow for such research, but this has not prevented research that would be prohibited here being undertaken in other jurisdictions, either because the same restrictions do not exist or because they have been lifted to allow for research to take place. That said, the recording or observing of deliberations in criminal trials has not to our knowledge ever been undertaken, although it has in civil proceedings.<sup>64</sup> The concern here would be that the presence of researchers or a recording device might affect behaviour and, possibly, the fairness of the accused's trial.<sup>65</sup> Jury members in other jurisdictions have, however, been asked about various aspects of their deliberations. Sandys and Dillehay,<sup>66</sup> for example, asked jurors in the US about their first ballot vote and how this changed following deliberation.<sup>67</sup> Another research project, in New South Wales, asked jurors about the impact media publicity had on deliberations.<sup>68</sup> Here, legislative amendment was not required, because the relevant legislation—the Jury Act 1977—contains a provision whereby permission can be granted by the Attorney General for the conduct of a research project into matters relating to juries or jury service.<sup>69</sup> This provision also enabled a wider research project to be undertaken in New South Wales, which surveyed jurors on multiple issues, including a number of questions about deliberations, such as whether any individual jurors changed their verdict during deliberations, whether all jurors felt able to express their opinion freely, how the foreman was chosen and the factors that influenced the jury's decision.<sup>70</sup>

Perhaps the most extensive project that has involved—among other things—asking jurors about their deliberations is that undertaken as part of the

Penrod, "Trial Complexity: A Field Investigation of its Meaning and its Effects" (1994) 18 *Law and Human Behavior* 29.

<sup>61</sup> Heuer and Penrod, "Instructing Jurors: A Field Experiment With Written and Preliminary Instructions" (1989) 13 *Law and Human Behavior* 409, 416.

<sup>62</sup> M. Chesterman, J. Chan and S. Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2002), para.84.

<sup>63</sup> Although see G. Mungham and Z. Bankowski, "The Jury in the Legal System" (1975) 23 *The Sociological Review* 202, where the researchers admit to agreeing that a student who was called for jury duty would illicitly record the deliberations in shorthand.

<sup>64</sup> See, e.g. S.S. Diamond et al., "Jury Discussions During Civil Trials: Studying an Arizonan Innovation" (2003) 45 *University of Arizona L.R.* 1.

<sup>65</sup> Diamond et al discuss (at 22–23) whether the camera made a difference to behaviour when they recorded deliberations in a civil trial and concluded that it probably did not. Another option would be to record deliberations without the knowledge of jurors but this is unlikely to receive ethical approval.

<sup>66</sup> M. Sandys and R. Dillehay, "First-Ballot Votes" (1995) 19 *Law and Human Behavior* 175.

<sup>67</sup> See similarly S.P. Garvey et al., "Juror First Votes in Criminal Trials" (2003) Cornell Law School Legal Studies Research Paper Series, Paper 3. See also N. Marder, "Juries, Justice, and Multiculturalism" (2002) 75 *Southern California Law Review* 659, which asked US jurors about their deliberations in a different context.

<sup>68</sup> M. Chesterman, J. Chan and S. Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2002).

<sup>69</sup> See s.68A(3).

<sup>70</sup> M. Findlay, *Jury Management in New South Wales* (1994), App.2 (where a copy of the questionnaire is provided).

New Zealand Law Commission's project on juries in criminal trials.<sup>71</sup> The researchers in this project sampled 48 criminal trials over a period of nine months in 1988 using a number of research methods, including interviews with jurors who had sat on criminal trials.<sup>72</sup> The interviews were semi-structured and addressed a wide variety of issues, ranging from the adequacy and clarity of pre-trial information and jurors' reactions to the trial process, as well as the jury's decision-making process and the nature of and basis for the jury's verdict.<sup>73</sup> Some of the questions relating to the last of these were highly specific, including how deliberations were opened; their structure; how focussed the jury remained on the issue; the use of previous conviction information; the role of the foreperson; whether dominant jurors emerged; and the methods used for resolving any disagreements.<sup>74</sup>

Research with real jurors does have one key advantage, which is its realism—the participants have sat on real trials in which they determined the fate of an accused person. It does though have a number of possible drawbacks. It is always going to require some time and effort on the part of the researchers to seek the permission and co-operation of the courts involved,<sup>75</sup> which may not be forthcoming, and in the UK jurisdictions there is the additional complexity of it potentially requiring a legislative amendment depending on the scope of the research enquiry. In addition, some research questions—most of those that seek to test the impact of a single factor on the outcome of the trial process—cannot be adequately answered by real juror research, as the potential for controlled experiments is limited.

Research with real jurors also raises some practical questions. Assuming that they cannot be directly observed, any information about deliberations obtained from real jurors is reliant on accurate self-reporting.<sup>76</sup> Problems may arise in terms of an individual's memory or perception of events or in terms of deliberate misrepresentation, perhaps because the individual concerned does not want to admit to any behaviour which presents him or her in a negative light.<sup>77</sup> These can be mitigated to a certain extent. Problems with deliberate misrepresentation can be minimised—although not avoided entirely—by asking several jurors about the same events.<sup>78</sup> Problems with recall can be addressed by surveying jurors as soon

<sup>71</sup> W. Young, N. Cameron and Y. Tinsley, *Juries In Criminal Trials Part Two: A Summary Of The Research Findings* (1999). The research informed the Law Commission's reports: New Zealand Law Commission, *Preliminary Paper on Juries in Criminal Trials: Part I* (1998), Law. Com. PP32 and New Zealand Law Commission, *Discussion Paper on Juries in Criminal Trials: Part II* (1999), Law. Com. PP37.

<sup>72</sup> Such research is not expressly prohibited in New Zealand, although it is necessary to obtain the consent of the court: see *Solicitor-General v Radio New Zealand Ltd* [1994] 1 N.Z.L.R. 48 at 58. For discussion, see J. Tunna, "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9 *Canterbury Law Review* 79, 106.

<sup>73</sup> New Zealand Law Commission, *Discussion Paper on Juries in Criminal Trials: Part II* (1999), Law. Com. PP37, para.1.6.

<sup>74</sup> New Zealand Law Commission, *Discussion Paper on Juries in Criminal Trials: Part II* (1999), Law. Com. PP37, Ch.6, especially paras.6.1, 6.7–6.17, 6.23, 6.34, 6.45.

<sup>75</sup> Although in terms at least of the time involved, this is likely to be far outweighed by the time involved in setting up a realistic mock jury experiment.

<sup>76</sup> S. Sommers and P. Ellsworth, "How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research" (2003) 78 *Chicago-Kent Law Review* 997, 1000–1001.

<sup>77</sup> R. Nisbett and T. DeCamp Wilson "Telling More Than We Can Know: Verbal Reports on Mental Processes" (1977) 84 *Psychological Review* 231; A. Greenwald and M. Banaji, "Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes" (1995) 102 *Psychological Review* 4.

<sup>78</sup> In the New Zealand research, an average of 6.5 of 12 jurors per trial were interviewed: see New Zealand Law Commission, *Discussion Paper on Juries in Criminal Trials: Part II* (1999), Law. Com. PP37, para.1.7.

as possible after the trial has concluded,<sup>79</sup> ideally before they have left the court.<sup>80</sup> Catching jurors before they leave court also means that if a questionnaire survey is used response rates are likely to be higher than giving jurors questionnaires to take away with them or sending questionnaires by post (or other methods such as email). It has been suggested that surveying jurors immediately after their case has concluded runs the risk of them racing to complete the questionnaire so that they can return home,<sup>81</sup> but this too might be mitigated by ensuring that any interview or questionnaire is relatively short.<sup>82</sup>

### *Research with mock juries*

The other broad option for undertaking jury research is to do so using mock jurors or juries and this is the method that has been used by the vast majority of jury studies undertaken in the UK jurisdictions—and indeed worldwide. Mock jury research involves attempting to simulate the trial experience with recruited participants acting as jurors. It does not generally require the permission of the courts (although this will depend on how the mock jurors are recruited)<sup>83</sup> and can be undertaken within the terms of the Contempt of Court Act. It also has two key advantages over research with real jurors, as it permits the manipulation of trial variables while leaving other factors constant and it also allows for the observation of “jury” deliberations rather than relying on self-reporting.

The one key disadvantage of mock jury research is that it can never replicate the trial process with 100 per cent authenticity and, as such, its external validity—the extent to which its findings are generalisable beyond the experimental setting—is open to question.<sup>84</sup> There are four main respects in which studies can diverge from reality, for understandable reasons of convenience or cost. The first is in terms of the study participants,<sup>85</sup> with some studies using university students as jurors rather than drawing participants from a more realistic pool. The second is the extent to which the trial itself is accurately recreated,<sup>86</sup> with some studies relying on trial transcripts or study packs instead of video or trial re-enactment. The third is in terms of including jury deliberation in the research design.<sup>87</sup> While

<sup>79</sup> As the New Zealand researchers did—see New Zealand Law Commission, *Discussion Paper on Juries in Criminal Trials: Part II* (1999), Law. Com. PP37, para.1.6.

<sup>80</sup> See the discussion in J.D. Lieberman and B.D. Sales, “What Social Science Teaches us About the Jury Instruction Process” (1997) 3 *Psychology, Public Policy, and Law* 589, 626–628.

<sup>81</sup> Findlay, *Jury Management in New South Wales* (1994), p.31, where he notes that jurors in his study became competitive with each other, racing to finish the questionnaire first, meaning that some questions were missed out. That said, Findlay stated that this was still his preferred method, due to the notoriously low response rates for postal questionnaires.

<sup>82</sup> In this context, it is worth noting that Findlay’s questionnaire was 11 pages long, and contained 104 numbered questions, many of which contained subsets of questions or were open-ended.

<sup>83</sup> As discussed below (see text attached to fn. 91), some studies have recruited jurors from the pool of individuals cited to court but not selected to sit on a jury. This would clearly require the permission of the court concerned.

<sup>84</sup> The classic discussion of the limitations of mock jury research is W. Weiten and S.S. Diamond, “A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics” (1979) 3 *Law and Human Behavior* 71. See also S.S. Diamond, “Illuminations and Shadows from Jury Simulations” (1997) 21 *Law and Human Behavior* 561.

<sup>85</sup> See W. Weiten and S.S. Diamond, “A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics” (1979) 3 *Law and Human Behavior* 71, 75.

<sup>86</sup> Weiten and Diamond, “A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics” (1979) 3 *Law and Human Behavior* 71, 77.

<sup>87</sup> Weiten and Diamond, “A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics” (1979) 3 *Law and Human Behavior* 71, 78.

the extent to which the first two factors affect generalisability is contested,<sup>88</sup> there is a broad consensus that studies that do not include an element of deliberation always lack external validity.<sup>89</sup> The fourth is in respect of participants' awareness that they are role playing and that their decision has no real life consequences.<sup>90</sup>

The extent to which studies are "realistic" in terms of the first three of these issues varies enormously. Some studies have addressed the first issue by undertaking research with mock jurors recruited from the pool of those cited to court but who have not been selected to sit on a real case.<sup>91</sup> The second issue can be addressed by asking mock jurors to follow a real trial,<sup>92</sup> although this rules out conducting any type of controlled experiment. Other studies have addressed it by creating relatively realistic trial simulations, using actors and/or criminal justice professionals. The third issue can be addressed by including deliberation in the research design, although the extent to which this truly recreates the deliberation process varies, with most studies limiting the time that mock jurors spend in "deliberations" or the size of the deliberating groups.<sup>93</sup> The most realistic studies attempt to address all three of these issues, with perhaps the best example of this in the UK context being the research Cheryl Thomas carried out in England for the Ministry of Justice,<sup>94</sup> in which she tested the extent to which race influenced jury decision making using jurors who were cited but not selected, a highly realistic filmed trial in which legal professionals participated and deliberated in groups of the same size as a legally valid jury.<sup>95</sup>

This shows that it is possible to undertake a relatively realistic mock jury study, although the complexity, time and cost of doing so is likely to be substantial, involving as it does the scripting, casting and filming of a full trial (or more than one trial if factors within the trial are to be manipulated). The one issue that mock jury studies can never adequately address,<sup>96</sup> however, is the issue of real world consequences and they will always be vulnerable to the criticism that participants

<sup>88</sup> Bornstein has argued that they make little difference: see B.H. Bornstein, "The Ecological Validity of Jury Simulations: Is the Jury Still Out?" (1999) 23 *Law and Human Behavior* 75, 78 (student jurors) and 84 (trial transcripts). Wiener et al disagree: see R.L. Wiener, D.A. Krauss and J.D. Lieberman, "Mock Jury Research: Where Do We Go From Here?" (2011) 29 *Behavioral Sciences and the Law* 467, 472.

<sup>89</sup> See, e.g. N. Nuñez, S.M. McCrea and S.E. Culhane, "Jury Decision Making Research: Are Researchers Focusing on the Mouse and Not the Elephant in the Room?" (2011) 29 *Behavioral Sciences and the Law* 439. For an explanation of why this might be the case, see F. Leverick, "Jury Instructions on Eyewitness Identification Evidence: A Re-Evaluation" (2016) 49 *Creighton L.R.* 555, 566–567.

<sup>90</sup> Weiten and Diamond, "A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics" (1979) 3 *Law and Human Behavior* 71, 81.

<sup>91</sup> See, e.g. Dann, Hans and Kaye, *Testing the Effects of Selected Jury Trial Innovations on Juror Comprehension of Contested mtDNA Evidence* (2005), p.24; Thomas, *Are Juries Fair?* (2010), p.8.

<sup>92</sup> Sometimes termed "shadow jury" research: see, e.g. S. McCabe and R. Purves, *The Shadow Jury at Work* (Oxford: Basil Blackwell, 1974).

<sup>93</sup> See, e.g. L. Ellison and V. Munro, "'Telling Tales': Exploring Narratives of Life and Law Within the (Mock) Jury Room" (2015) 35 *L.S.* 201 where the researchers (for understandable reasons) in an otherwise extremely realistic simulation used groups "with an average of eight members" (at 204) and limited deliberation time to 90 minutes (at 205).

<sup>94</sup> C. Thomas, *Are Juries Fair?* (2010).

<sup>95</sup> See Thomas, *Are Juries Fair?* (2010), Ch.2 for a detailed account of Thomas's research methods. For other examples of highly realistic mock jury studies, see, e.g. Dann, Hans and Kaye, *Testing the Effects of Selected Jury Trial Innovations on Juror Comprehension of Contested mtDNA Evidence* (2005); E. Finch and V. Munro, "Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxication" (2005) 45 *B.J. Crim.* 25; S. Sommers, "On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations" (2006) 90 *Journal of Personality and Social Psychology* 597; L. Ellison and V. Munro, "'Telling Tales': Exploring Narratives of Life and Law Within the (Mock) Jury Room" (2015) 35 *L.S.* 201.

<sup>96</sup> For a study that attempted to do so, see J. Lipton, "Racism in the Jury Box: The Hispanic Defendant" (1983) 5 *Hispanic Journal of Behavioural Sciences* 275 (although the study was very unrealistic in other respects).

might not act in the same way if they held the fate of a real accused person in their hands.

### *How might the PCSR's research questions be addressed?*

At the outset it should be said that there is no “perfect” method of undertaking jury research. All of the different options have advantages and drawbacks and it is not possible simultaneously to maximise realism and control—attention to one necessarily weakens the other.<sup>97</sup> Identifying an appropriate research method also depends very much on the research question(s) being asked as some will be answered most effectively by real jury research and others by mock jury research.

In terms of the questions identified by the PCSR (set out earlier in this paper), there are some that are not research questions as such, but are matters for consideration following the results of this research (and other relevant research projects and discussions). In this category are Q6 (whether there are benefits in requiring the jury to attempt to reach a unanimous verdict), Q7 (whether the same majority should be required for acquittal as for conviction) and Q8 (whether the votes for each verdict should be disclosed in court).

In terms of the choice of method for the remainder, there is one that could not be addressed with real jury research, Q5 (the differences in outcome, assuming an identical factual matrix, as between a 12 person jury with only two possible verdicts and a 15 person jury with three verdicts, and the reasons for those differences). This question lends itself to controlled experiments with juries of 12 and 15 persons,<sup>98</sup> although the scale of the study—especially to research all possible combinations using samples big enough to make the results meaningful—would need to be extremely large.

Q4 (the extent to which the members of a jury of 15 as compared with a jury of 12 actually participate in deliberations) could not be addressed with research into real Scottish juries alone, although research into the extent to which members of 15 person Scottish juries participate in deliberations might be compared with research into 12 person juries elsewhere.<sup>99</sup>

While the other research questions might be answered by either real jury research or mock jury research, the former has the advantage of being undertaken with real jurors in the context of them sitting on a real trial and is also likely to be substantially cheaper and less complex than undertaking a realistic mock jury study.

Q1 (what jurors understand to be the difference between Not Guilty and Not Proven) could be addressed by surveying real jurors after the conclusion of a number of trials—they would not necessarily need to be trials in which the jury

<sup>97</sup> N.L. Kerr and R.M. Bray “Simulation, Realism, and the Study of the Jury” in N. Brewer and K.D. Williams (eds), *Psychology and Law: An Empirical Perspective* (New York: Guilford Press, 2005), p.358; D.J. Devine at al., “Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups” (2001) 7 *Psychology, Public Policy and Law* 622, 626.

<sup>98</sup> Although some limited insight might be gained by undertaking a programme of research with real 15 person juries and comparing this with research on jury size elsewhere.

<sup>99</sup> Subject to the rather significant caveat that the research which exists in this area is limited in extent and concerned with civil rather than criminal juries: see J. Kessler, “An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes” (1973) 6 *University of Michigan Journal of Law Reform* 712. Answering this question via mock jury research would pose a different set of challenges: as it is possible that participation in discussions may vary with the nature of the case, any study would require a number of different trial simulations to be prepared in addition for these simulations to be run before 12 and 15 person juries.

actually returned a not proven verdict. Care would need to be taken here to avoid the dangers of jurors over-estimating their own understanding. Simply asking jurors whether they understood a particular legal term is insufficient on its own, as is illustrated by Thomas' research, in which 68 per cent of jurors claimed that they had understood a jury instruction on self-defence but when assessed objectively only 31 per cent actually had.<sup>100</sup> Asking jurors to explain a term in their own words (perhaps in addition to asking them to self-assess their understanding) is likely to be more valuable.<sup>101</sup> This question could also be researched with real jurors without requiring legislative amendment, as it need not involve asking jurors about anything that happened in the course of their deliberations.

Q2 (why the jury chose not proven over not guilty) and Q3 (why, and to what extent, do jurors alter their position as regards not proven and not guilty as a result of deliberations) could also be addressed by research with real jurors, although here the research questions could only be addressed by surveys of jurors following cases in which a not proven verdict was actually returned (or in relation to Q3 either of the two acquittal verdicts). Such cases cannot be predicted in advance, so either a very large sample of trials would need to be included in the research in order that sufficient not proven verdicts arose or questionnaires would need to be administered only in those trials where the verdict was returned. Meaningful research into these questions with real jurors would, however, require amending the Contempt of Court Act 1981.

## Analysis

Against this background, how should the Scottish Government proceed with a programme of jury research? The breadth of the questions identified by the PCSR, along with the possibility of significant legislative change following any research programme, suggests that research with real jurors would be preferable to mock jury research. A programme of mock jury research addressing all these questions, designed in as realistic a fashion as possible, would be extremely expensive and time-consuming. However well-designed the project, the results would be open to challenge as lacking external validity, which would make it difficult for the government to persuade the Scottish Parliament of the case for any legislative change which was felt necessary following the research. Suppose, for example, that the results of mock jury research supported the hypothesis that jurors did not understand the not proven verdict, and the Scottish Government proposed to remove the verdict as a result. If those defending the verdict objected that the research could not be relied upon because mock jurors may not have taken the process as seriously as real ones, or that a simulated trial process without consequence would not have focused the minds of jurors appropriately, it would be difficult if not impossible for the government convincingly to rebut these arguments. Any other proposals for legislative change, if based only on mock jury research, would be vulnerable to similar objections.

<sup>100</sup> C. Thomas, *Are Juries Fair?* (2010), p.36.

<sup>101</sup> See Lieberman and Sales, "What Social Science Teaches us About the Jury Instruction Process" (1997) 3 *Psychology, Public Policy, and Law* 589, 593–595 where the authors run through the advantages and disadvantages of a number of different methods of assessing juror comprehension of terminology.

In addition, it should be noted that the research questions proposed by the PCSR do not—with one exception—involve attempts to test the effect of a particular change to the jury system. Where that is proposed, mock jury simulations allow the researchers to undertake a controlled experiment, holding as many variables as possible constant and thus testing the effect of making a single systemic alteration. The PCSR's questions are instead focused on obtaining a broad range of information about the system as it presently operates, again suggesting that research with real jurors would be preferable to using mock juries.

The exception is Q5 (differences in outcome between differently constituted juries with identical factual matrices), which could not be addressed with real juries. Here, there are two options. First, this question could be addressed by a distinct programme of research involving controlled case simulations. The second option would be for the government to consider omitting this question from the programme of research altogether. While any research which adds to our stock of knowledge about jury decision-making is in principle valuable, the gains from this programme of research are likely to be marginal at best and come at significant cost given the scale of the research project required. At best, such research would tell us that juries constituted in a particular fashion were more or less likely (and to what extent) to convict than juries constituted in another fashion. But that is all. The research could not identify the “correct” level of propensity to convict in respect of any of the factual matrices used for the purposes of the research. If a sufficient variety of factual matrices were developed, we might discover that these differences were more pronounced in respect of some crimes than others—but again, while any such conclusions would be of interest, it is unclear how they could provide a basis for any legislative proposals (or a case for the status quo).

Although research with real jurors would be the preferable mode of inquiry, section 8 of the Contempt of Court Act 1981 does present a barrier to carrying out this research.<sup>102</sup> The legislative change required to permit such research, however, would be relatively straightforward.<sup>103</sup> A potential model is s.68A(3) of the Jury Act 1977 in New South Wales, which provides simply that the prohibition on soliciting information from jurors

“does not prohibit a person from soliciting information from a juror or former juror in accordance with an authority granted by the Attorney General for the conduct of a research project into matters relating to juries or jury service”.<sup>104</sup>

While any proposal to amend s.8 is likely (rightly) to attract critical scrutiny from the legal profession, judiciary and the Scottish Parliament, it should be possible to assuage concerns by pointing to the extensive body of research with

<sup>102</sup> Cf. C. Thomas, “Exposing the Myth of Jury Research” *Criminal Law & Justice Weekly*, 9 December 2014, arguing that it is a myth that s.8 prevents jury research. We agree entirely: our argument here is only that *the questions identified by the PCSR* are best answered via research which involves the amendment of s.8, not that jury research is rendered impossible by that provision.

<sup>103</sup> There is, of course, a broader debate regarding jury secrecy (see Department for Constitutional Affairs, *Jury Research and Impropriety* (Consultation Paper CP 04/05, 2005)). For reasons of space, we cannot enter into that debate more fully here: it is sufficient for our purposes to note that a number of questions have been identified by the PCSR as meriting inquiry, and that if such inquiry is meaningfully to be carried out, amendment of s.8 will be required.

<sup>104</sup> An amendment to the 1981 Act would require to be worded slightly differently, as the prohibition in s.8 applies not only to soliciting but also to disclosing and obtaining. One approach would be to insert a new para.(c) into subs.8(2) of the Act (which lists other disclosures to which the prohibition does not apply) reading “in the course of a research project into matters relating to juries or jury service carried out in accordance with an authority granted by the Lord Advocate [or the Lord Advocate and the Lord Justice General]”.

real jurors that has been carried out in comparable jurisdictions without apparent difficulty and the safeguard of the research requiring official approval (in Scotland, most likely either that of the Lord Advocate or Lord Justice General, or both jointly).<sup>105</sup> One of the most compelling arguments against any relaxation of jury secrecy rules for the purposes of research is that such research may simply be unnecessary given the vast body of research into the operation of the jury which already exists worldwide,<sup>106</sup> but the peculiarities of the Scottish system mean that this argument has little purchase here.

In addition to the general safeguard of approval being required for any research project, it should be possible to build a series of safeguards into the project itself. The most obvious model is the project carried out for the New Zealand Law Commission, which required in each case the consent of the presiding judge to jury research, had an Advisory Committee with judicial representation with the right to veto proposed methodology or questioning, and took a series of measures to ensure that data was recorded and held anonymously and non-identifiably.<sup>107</sup>

If the Scottish Government (or the Parliament) is unwilling to amend the 1981 Act, it would still be possible to carry out research with real jurors. This would, however, mean accepting that the questions identified by the PCSR could not be addressed in full, and some could not be meaningfully addressed at all. Similar safeguards to those already mentioned could be adopted, with the addition of very clear warnings to jurors not to breach the terms of s.8.<sup>108</sup>

## Conclusion

Given the lack of jury research in Scotland to date, the Scottish Government's decision to commission jury research provides an unprecedented opportunity. We have argued in this paper that the research questions identified by the Post-Corroboration Safeguards Review would best be investigated through a programme of research with real jurors rather than mock jurors. In respect of the single research question identified by the Review which cannot be addressed through real jury research, the Scottish Government should consider either a separate focused programme of mock jury research or choosing not to proceed with research into that question. A properly designed and executed research study<sup>109</sup> will allow scholars to learn more about the operation of a jury system which is both significantly distinct from the remainder of the common law world and

<sup>105</sup> The survey noted in E. Samuel and I. Clark, *Improving Practice: A Summary of Responses to the Consultation on the 2002 Review of the Practices and Procedure of the High Court of Justiciary* (2003) was done with the approval of the Lord Justice General.

<sup>106</sup> Auld LJ, *Report of the Review of the Criminal Courts* (2001), p.168.

<sup>107</sup> These are set out in New Zealand Law Commission, *Discussion Paper on Juries in Criminal Trials: Part II* (1999), Law. Com. PP37, p.x.

<sup>108</sup> As was done in M. Zander and P. Henderson, *The Crown Court Study* (1993). See M. Zander, "Jury Research and Impropriety: A Response to the Department of Constitutional Affairs' Consultation Paper (CP 04/05)" (2005), para.14. Cf. K. Warner et al., *Jury Sentencing Survey* (2010), p.2, noting that an exemption was granted under s.58 of the Juries Act 2003 (Tasmania) for the purposes of that research, because of the risk of jurors spontaneously commenting on deliberations even though they were not being asked about this.

<sup>109</sup> We have not sought to sketch out the methodology which should be employed, but it will be clear that there is an extensive body of work on which to draw in this respect. We would draw attention to the practical questions which we noted above (text attached to fnn.76–82) and note the importance of a pilot study and perhaps, if the questionnaire method is employed, the advantages of a series of interlinked projects employing different questionnaires rather than attempting to administer a single excessively long questionnaire to all jurors involved in the research.



under-researched, and should be of considerable interest both within the Scottish criminal justice system and elsewhere.