CROWN LAW

SOLICITOR-GENERAL'S GUIDELINES FOR JURY SELECTION

As at 6 August 2021

Te Tari Ture o te Karauna

Crown Law

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1. APPLICATION

1.1 These Guidelines have been written for prosecutors, but other participants in the justice system may find them useful.

1.2 The purpose of these Guidelines is to expand the guidance to prosecutors concerning certain aspects of the jury selection process. It is important that the process by which a jury is selected is not exercised in a manner that subverts any part of the process, creates a perception of unfairness, or suggests bias.

1.3 These Guidelines should be read together with the *Solicitor-General's Prosecution Guidelines* 2013 (*Prosecution Guidelines*), along with any other guidelines issued by the Solicitor-General specific to prosecutions. If there is any inconsistency between these Guidelines and the *Prosecution Guidelines*, these Guidelines should be preferred.

2. COMPLIANCE

2.1 As these Guidelines form part of the *Prosecution Guidelines* once in effect, it is expected all public prosecutions, whether conducted by Crown prosecutors, government agencies or (instructed) counsel, should be conducted in accordance with the *Prosecution Guidelines*.

2.2 In addition, all law practitioners conducting a private prosecution must continue to adhere to the Law Society's general rules of professional conduct. The Solicitor-General expects that such prosecutors should also consider and apply all relevant principles in these Guidelines and the *Prosecution Guidelines*.

3. JURY SELECTION

Jury vetting

3.1 The Supreme Court judgment in *R v Gordon-Smith*[1] confirmed the lawfulness of the practice known as "jury vetting", whereby Crown prosecutors receive from the New Zealand Police information about previous criminal convictions of those whose names appear on the jury panel, to assist in determining whether or not to challenge those people from becoming jurors.

3.2 It is also lawful for Crown prosecutors to use information that is wider than just previous criminal convictions, including material from New Zealand Police databases such as the National Intelligence Application (NIA). The Supreme Court in *Gordon-Smith* observed that "it is not immediately apparent why such other information as is lawfully obtained for the purpose of assisting in the exercise by the Crown of its rights of peremptory challenge should be treated in any different way from information about previous convictions."[2]

3.3 The practice of jury vetting does not apply to persons whose criminal convictions are covered by the Criminal Records (Clean Slate) Act 2004.

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1 *R v Gordon-Smith (No 2)* [2009] 1 NZLR 725.

2 *Gordon-Smith* at [14].

3.4 Even though the lawfulness of "jury vetting" has been confirmed, Crown prosecutors may still choose not to undertake the practice - in which case there will be nothing to disclose.

3.5 In cases where the practice of "jury vetting" is undertaken, a Crown prosecutor should disclose to a defendant any previous convictions of a potential juror known to the Crown, if the previous convictions give rise to a real risk that the juror might be prejudiced against the defendant or in favour of the Crown. The same principle applies to NIA or other material used for jury vetting. Disclosure is otherwise not required. This test represents a balance struck between "fair trial considerations as well as the privacy interests of jurors."[3] The prosecutor would have to reach the view that the previous convictions and any other material gives rise to a real risk that the juror might be prejudiced against the defendant or in favour of the Crown and should therefore be disclosed despite the sensitive and private nature of the information. The assessment will apply a range of factors, including the number and nature of the previous convictions; how recently the offending or alleged conduct occurred; and the subject matter of the trial at hand. The privacy and security of jurors should be protected to the greatest extent consistent with fairness to the defence.[4]

3.6 An example where criminal histories might be disclosed are drug dealing convictions in a drugs trial. Examples of circumstances, where NIA material might be disclosed, are a juror's status as a victim of violence in an assault trial and gang associations where there are gang member defendants.

"Blind" vetting

3.7 Crown prosecutors should not use "blind" vetting.

3.8 This is the occasional practice of New Zealand Police striking out the names of potential jurors on the jury panel, after considering criminal convictions and material from databases such as NIA, but without any notation on the jury panel. In such circumstances, the Crown prosecutor is not informed of the reasons for the strike outs, with the consequence that disclosure to the defence cannot be considered.

3.9 The Court of Appeal in *Jolley v R*[5] observed that this "practice risks the disclosure obligation in *Gordon-Smith* being subverted and creates the perception of unfairness."[6]

Challenges without cause

3.10 The jury plays an important role in legitimising and maintaining public confidence in the criminal justice system. In order to maximise that confidence, juries should appear to be, and in fact be, impartial and representative of the community.[7]

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3 *Gordon-Smith* at [16].

4 *Gordon-Smith* at [20].

5 *Jolley v R* [2018] NZCA 484 ("CA *Jolley*").

6 Ibid.

7 New Zealand Law Commission *Juries in Criminal Trials* (NZLC PP32, July 1998) at [10].

3.11 In the course of selecting a jury, there are no statutory limits to the number of challenges for cause on the grounds set out in the Juries Act 1981, or challenges of jurors for want of qualification (if the court is satisfied of the fact). Each of the parties, though, is only entitled to challenge without cause four jurors (or eight jurors, if two or more defendants in a criminal case are charged together).[8]

3.12 Accordingly, Crown rights of challenge without cause should focus on potential jurors whose inclusion could undermine the integrity of the jury. Examples include if:

3.12.1 the potential juror is known or related to a participant in the trial, such as the complainant, counsel, the defendant, or any of the witnesses;

3.12.2 there is a reasonable basis for apprehending bias on the part of the potential juror, such as a biased remark;

3.12.3 there is behaviour demonstrating that the potential juror does not wish to participate, such as an expression of hostility towards the procedures; and/or

3.12.4 there is behaviour or some other circumstance that indicates the potential juror is unable to perform the role of a juror.

3.13 Crown rights of challenge without cause must never be exercised on the basis of factors such as sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origin, disability, age, political opinion, employment status, family status or sexual orientation unless seeking to address an apparent lack of diversity or representativeness in the composition of a jury.

[8] Per sections 23 to 25 of the Juries Act 1981 (as at 30 June 2021).