**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 32/2008**
**[2009] NZSC 20**

**DEBORAH GORDON-SMITH**

v

**THE QUEEN**

Hearing: 3 December 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: G J X McCoy and K H Cook for Appellant
D B Collins QC and C Brown for Crown
D J Boldt as Amicus Curiae

Judgment: 23 March 2009

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B The formal answer given by the Court of Appeal to question (iii) is amended to read:**

**The Crown should disclose to the defence any previous convictions of a potential juror known to it, if the previous conviction gives rise to a real risk that the juror might be prejudiced against the accused or in favour of the Crown. Disclosure should not otherwise be made.**

**REASONS**

**Para No**



**ELIAS CJ, BLANCHARD, TIPPING AND WILSON JJ**

(Given by Tipping J)

**Introduction**

[1] This appeal concerns the practice colloquially known as jury vetting.[1] Both the Crown and the defence have statutory rights on the empanelling of a jury to challenge prospective jurors on a peremptory basis (as well as for cause). They are supplied in advance by the Court with a list of prospective jurors. Both Crown and defence are able to make such inquiries as they think fit, and as are consistent with law, to obtain information upon which challenges may be exercised. In some parts of the country, in preparation for trial, the police examine the jury panel list to see whether any potential juror has a criminal conviction.[2] This case is concerned with that process. The police may also obtain other information about individual jurors but we are not concerned with the lawfulness of that kind of inquiry. Where jury vetting is undertaken by the police, they supply an annotated jury list to the Crown setting out the result of their inquiries. The Crown prosecutor uses the information supplied to assist in exercising the Crown's rights of peremptory challenge.

[2] The appeal raises two questions. The first is whether jury vetting by the police is lawful. It has two parts – whether the police may obtain information about the criminal history of prospective jurors from law enforcement information held by

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1 The expression "jury vetting" is somewhat loaded but, while recognising that fact, it is convenient to use it as shorthand for the process whereby the police ascertain whether potential jurors have previous non-disqualifying convictions.

2 At present this is not a universal practice throughout the country, largely on account of resourcing issues.

government agencies, and whether they may then pass it on to the Crown. The second question is whether and to what extent the Crown, on receiving such information, should supply it to the defence.

[3] In the High Court[3] Fogarty J ruled that the process of jury vetting by the police was unlawful because there was no sufficient statutory basis for it. The Court of Appeal[4] overruled that conclusion, holding that the process was lawful. The Court divided, however, on whether all the information obtained by the Crown should be made available to the defence in all circumstances. Robertson J favoured that course, whereas William Young P and Chambers J favoured limiting disclosure to cases where there was good cause for it.

[4] In this Court Mr McCoy, assisted by Mr Cook, mounted a vigorous challenge to the whole jury vetting process. The Solicitor-General defended the process, submitting it had legislative backing. Mr Boldt, as amicus, made submissions in support of the approach to disclosure taken by the majority of the Court of Appeal. He was appointed because the Crown supported the approach taken by Robertson J. We are grateful to him for undertaking this role and for his helpful submissions.

## Lawfulness

[5] The appropriate starting point is s 14 of the Juries Act 1981 which provided:[5]

> **14 Inspection of jury panel**
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> (1) If, at any time not earlier than 5 days before the commencement of the week for which the jurors on a panel are summoned to attend for jury service, any party to proceedings that are due to be heard during that week (or any other person acting on behalf of any such party) requests the Registrar to make available a copy of the panel for inspection and copying by or on behalf of that party, the Registrar shall comply with that request.

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3 *R v Boyce* (High Court, Christchurch, CRI 2005-009-013766, 9 February 2007, Fogarty J).

4 *R v King* [2008] 2 NZLR 460 (CA).

5 We set out the section as it stood before the 2008 Amendment referred to below. The amendment had not been enacted at the time of the trial in this case but is of obvious relevance to the issues arising, as counsel accepted and as will emerge below.

(2) The Court may allow any other person to inspect and copy a copy of the panel at any time during the period referred to in subsection (1) of this section.

(3) No copy of the panel that is made available to any person under this section shall disclose the date of birth of any of the persons whose names are on the panel.

(4) In this section the term days means days on which the office of the Court is open for business.

[6] This section was enacted in 1981. At that time the process of jury vetting was a recognised feature of the jury trial system. Although s 14, as first enacted, did not, in terms, authorise the process, it clearly provided that the Crown, and for that matter the defence, could inspect and copy the jury panel list with enough time to allow inquiries to be made. One purpose of this provision was no doubt to recognise the process now said to be unlawful and enable it to be carried out. Furthermore, during the course of the passage through Parliament of the Bill[6] which became the Juries Act 1981, an amendment was proposed which, had it been adopted, would have outlawed jury vetting altogether.[7] Parliament rejected the amendment, thereby confirming what was implicit in s 14.

[7] We do not consider that on the enactment of the New Zealand Bill of Rights Act 1990 it could fairly be said that trials had now become unfair on account of a perceived imbalance between Crown and defence in relation to their ability to obtain information about prospective jurors. For the reasons which follow later, it cannot reasonably be said that the practice of jury vetting became unlawful on that basis. Indeed Parliament had earlier endorsed the practice.

[8] Mr McCoy argued that the police were not entitled to gain access to jurors' previous convictions because doing so was not part of their law enforcement functions. Rather the process was one pertaining to the administration of justice with which the police were not concerned. We cannot accept this argument. There is no bright line distinction such as counsel suggested between law enforcement and

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6 The Juries Bill.

7 The amendment expressly prohibited the police from disclosing computer records of convictions to prosecutors (Hon G Palmer MP, 28 August 1981, NZPD 440, p 3044). In its submission to the Select Committee, the Department of Justice also favoured a statutory prohibition (30 June 1981, NZPD 438, p 995). The majority of the Select Committee rejected the amendment (12 June 1981, NZPD 437, p 395) and the Bill was enacted without the proposed amendment.

the administration of justice. But, in any event, the administration of justice, in the sense of conducting trials of people accused of crimes, is a part, and a significant part, of law enforcement. Although they do not themselves conduct trials on indictment, the conduct of which is entrusted to independent Crown counsel, the police are required by their law enforcement responsibilities to assist Crown counsel in their role.

[9] Police officers are entitled to gain access to the criminal records of prospective jurors under s 111 of the Privacy Act 1993 which provides:

> **111 Access by accessing agencies to law enforcement information**
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> An accessing agency may have access to law enforcement information held by a holder agency if such access is authorised by the provisions of Schedule 5 to this Act.

[10] By virtue of s 110 of the Act the police are an accessing agency in terms of this section. Criminal records are law enforcement information and access thereto is authorised by Sch 5.[8] Police officers may not gain access to law enforcement information such as records of criminal convictions except in the course of performing their duties or exercising their powers. But their power of law enforcement covers assisting the Crown in the prosecution of indictable crimes and that includes obtaining information about jurors' convictions that may be of use to Crown counsel in exercising the right to challenge prospective jurors. The Crown has a legitimate interest in this information for the purpose of exercising its rights of peremptory challenge and is entitled to call on the police to assist in gaining the information. Hence the police are entitled to supply the information to the Crown.

[11] We are not called on in this case to say anything about the basis upon which the Crown exercises its rights of peremptory challenge once the information is in the Crown prosecutor's hands. That subject is not within the scope of the present appeal. We must, however, say that we cannot accept Mr McCoy's submission that peremptory challenges are meant to be exercised on an intuitive rather than a

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[8] Within Sch 5 police records are referred to as "law enforcement information" and, by virtue of s 9 of the Policing Act 2008, law enforcement is a function of the police.

reasoned basis. If that were so there would be little, if any, reason for jury panel lists to be made available to the parties.

[12] Had there been any doubt about the legality of the jury vetting process under the 1981 Act, that doubt has now been put to rest by the Juries Amendment Act 2008 which came into force on 25 December 2008.[9] That Act amended s 14 of the principal Act by adding the police to the list of authorised recipients of the jury panel list. Mr McCoy argued that this addition was solely for the purpose of allowing the police to check whether anyone on the list was disqualified from serving. That, however, is the function of the Registrar. It is extremely unlikely that the amendment was intended to have the narrow scope suggested by counsel. If that had been its purpose, Parliament would surely have made that plain by appropriate limiting language. We are satisfied that the amendment should be viewed as a further endorsement by Parliament of the process now under challenge. The amending Act increased by two days the period within which inquiries could be made and that points away from the suggested limitation to statutory disqualification. So too does the fact that the amendment removed the earlier prohibition on jurors' dates of birth being referred to on the jury list. That change seems clearly to have been designed to make the jury vetting process more accurate and more reliable.

[13] Two further aspects of the 2008 Act support the view that Parliament approved the current jury vetting practice and did not intend to change it. First, peremptory challenges were maintained; albeit reduced to four.[10] Secondly, the Act was passed several months after the delivery of the decision of the Court of Appeal in the present case upholding the lawfulness of the practice. If Parliament had been concerned at that outcome it could easily have moved to change it. The fact that leave was given to bring the point to this Court would not have been any impediment because the appellant's position personally was not affected by the outcome.[11]

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9 Enacted following a report from the Law Commission which recommended there be no change in the current jury vetting practice (New Zealand Law Commission, *Juries in Criminal Trials*, NZLC 69, (2001), pp 92 – 96).

10 See s 24 of the Juries Act 1981, as amended by s 17 of the Juries Amendment Act 2008.

11 See this Court's leave judgment, *Gordon-Smith v R* (2008) 23 CRNZ 958, for the circumstances in which leave was granted despite that being so.

[14] For these various reasons we are satisfied that the process whereby the police ascertain whether prospective jurors have previous convictions and pass that information on to the Crown is lawful. We are not, in terms of the basis upon which leave was sought and obtained, required to consider other information which the police may obtain, or be able to obtain, about prospective jurors, such as whether any of them has been the victim of a criminal offence. We can, however, say 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.

**Disclosure**

[15] There are three possible approaches which could be taken to whether the Crown should pass on to the defence the information received from the police. The first would be to say that the Crown has no obligation to do so. The second would be to say, as Robertson J did, that the information should always be passed on in full. The third would be an intermediate position, such as that favoured by William Young P and Chambers J. On this intermediate basis the information is not passed on routinely but only if there is some feature of the forthcoming trial which requires that course to be taken, either as to the information generally or as regards certain aspects of the information.

[16] The choice is between the second and third approaches. It was not suggested in argument that the Crown should never have to pass the information on. That is understandable and appropriate. To take that view would leave matters wholly to the voluntary decision of the Crown. It would be inconsistent with the need to take account of fair trial considerations as well as the privacy interests of jurors.

[17] Before discussing the competing solutions, a general observation may be made. When one is speaking of fair trial in this context the issue is more whether there is a risk of unfairness rather than whether the trial actually was unfair. If the defence is not provided with information about a prospective juror, the most that can be said is that it has been deprived of the opportunity of using that information for

the purpose of deciding whether to challenge the juror. The defence may say that, had it known of the juror's previous conviction, the juror would undoubtedly have been challenged. But no one will ever know whether the juror was improperly influenced against the accused in joining in the verdict of guilty. The point would be entirely speculative.

[18] It is always important that there be no justified perception or real risk of unfairness in any respect, if that can be avoided consistently with other relevant features. The privacy and security of jurors is such a feature. When Parliament passed the Juries Amendment Act in 2008, careful attention was given to respecting jurors' privacy and hence their security. The amendment enacted a new s 14A which was specifically designed to that end:

> **14A Restrictions on use of jury panel**
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> (1) The purpose of this section is to help to prevent names or other information disclosed in a copy of the panel from being used to facilitate actions (for example, actions prejudicing a juror's safety or security) to interfere with the performance of a juror's duties.
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> (2) A barrister or solicitor to whom a copy of the panel is made available under section 14(1) because the barrister or solicitor is acting for a party to criminal proceedings, and any person acting on behalf of that barrister or solicitor,—
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> (a) may show the copy (the document) to a defendant in proceedings that are due to be heard during the week for which the jurors on the panel are summoned to attend for jury service; but
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> (b) must not leave the document in the defendant's possession; and
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> (c) must not leave the document in the possession of any witness for either party; and
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> (d) must not leave the document in the possession of any victim (within the meaning of section 4 of the Victims' Rights Act 2002); and
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> (e) must take all reasonable steps to ensure that the defendant, any witness, or any victim, as the case requires, does not copy the document.
>
> (3) A barrister or solicitor to whom a copy of the panel is made available under section 14(1) because the barrister or solicitor is acting for a party to civil proceedings, and any person acting on behalf of that barrister or solicitor,—

(a) may show the copy or any copies of it (the document) to a party in proceedings that are due to be heard during the week for which the jurors on the panel are summoned to attend for jury service; but

(b) must not leave the document in the party's possession; and

(c) must take all reasonable steps to ensure that the party does not copy the document.

(4) Every person who, in connection with proceedings that are due to be heard during the week for which the jurors on the panel are summoned to attend for jury service, receives, or makes a copy or copies of, a copy of the panel must return the copy or copies to the Registrar or a member of the Court registry staff as soon as practicable after the case is opened or the accused is given in charge.

(5) However, subsection (4) does not apply to—

(a) the Registrar or a member of the Court registry staff; and

(b) any other person if the Court or a Judge, in the Court's or Judge's discretion and on a written application for the purpose, orders that the other person need not return the copy or copies.

(6) A breach of subsection (2), (3), or (4) may be dealt with as contempt of Court.

[19] When determining the extent to which information the Crown has about jurors should be made available to the defence, the Courts should follow Parliament's lead and protect jurors' privacy and security to the greatest extent that is consistent with fairness to the defence. The steps taken by Parliament to protect the privacy and security of jurors reflect the legitimacy of jurors' concerns in those respects. Parliament understandably must have been sceptical about the suggestion that accused persons would be prepared to keep the information confidential and not act on it. We are equally sceptical about the suggested inability of accused persons to remember details supplied about prospective jurors.

[20] With these points in mind we do not consider it is necessary or desirable to go as far as Robertson J and require all information to be made available. That would unreasonably impact on jurors' legitimate concerns for their privacy and security, and for no sufficient reason. It is not necessary to go that far in order to deal adequately with fairness issues. Certain types of conviction may be genuinely relevant to whether a juror might reasonably be regarded as, potentially at least,

having some form of predisposition against the interests of the accused. That cannot reasonably be said about all types of conviction.

[21] The majority in the Court of Appeal was of the view that:[12]

> In usual circumstances the Crown is not required or permitted to disclose to the defence non-disqualifying criminal history information about potential jurors, but is required to do so where a defendant can point to a likelihood that, in the context of the particular case, jurors with criminal histories (or particular types of criminal histories) may have an adverse predisposition towards the defendant or the defence which is to be advanced.

We largely agree with that conclusion but would not limit the Crown's requirement to disclose in quite the way the majority favoured; that is, by reference to when the accused can point to the likelihood to which their Honours referred.

[22] We would simply say that the Crown should disclose any previous convictions of a potential juror known to it, if the previous conviction gives rise to a real risk that the juror might be prejudiced against the accused or in favour of the Crown. Disclosure should not otherwise be made. By this means the interests of accused persons are reconciled with the legitimate privacy and security concerns of jurors. The non-disclosure of a previous conviction which does not give rise to a real risk of prejudice cannot be said to jeopardise the accused's right to a fair trial.

[23] It would be helpful for the Solicitor-General, in accordance with his indicated willingness, to prepare guidelines for use by Crown prosecutors to assist in implementing this approach. He might also usefully provide up-to-date guidance about the use by the Crown of peremptory challenges.

**Result**

[24] For these reasons we uphold the unanimous view of the Court of Appeal that the process of jury vetting as described above is lawful. We also generally uphold the conclusion reached by the majority of the Court of Appeal on the subject of when previous non-disqualifying convictions of potential jurors should be disclosed to the

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[12] At para [148].

defence. However, the formal answer given by the majority of the Court of Appeal should be amended to read:

> The Crown should disclose to the defence any previous convictions of a potential juror known to it, if the previous conviction gives rise to a real risk that the juror might be prejudiced against the accused or in favour of the Crown. Disclosure should not otherwise be made.

The appeal should be dismissed on that basis.

**McGRATH J**

**Introduction**

[25] I agree with other members of the Court that the Juries Act 1981 permits the police to undertake jury vetting to assist the Crown Solicitor in deciding whether to challenge jurors at the outset of a criminal trial. I conclude, however, that information obtained by the Crown should be shared with the defence. I also consider direction should be given to prosecutors on the manner in which peremptory challenges may be made. Unless these steps are taken, in my view, the system for selection of the jury is not in accordance with the Bill of Rights guarantee of a fair trial by an independent and impartial court.[13]

[26] New Zealand legislation has for many years permitted the parties in every case going to a trial before a jury to challenge a limited number of balloted potential jurors without giving any reason. This right of challenge is known colloquially as a peremptory challenge.[14] It is additional to the right of the parties to challenge potential jurors for cause on specified grounds. The legislation has also long provided for the parties to receive from the registrar of the court, in advance of the week of trial, a list of those on the panel from which the jury is to be chosen, which includes their names, addresses and occupations and, now, their dates of birth.

[27] In this statutory context, the practice of inquiry by the parties into the background of potential jurors in advance of a criminal trial has developed. The

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13 Section 25(a) of the New Zealand Bill of Rights Act 1990.

14 In the Juries Act 1981 the practice is referred to as "challenges without cause": see s 24.

purpose is to obtain information on which peremptory challenges will be based. In criminal trials this vetting of those on the panel is undertaken by both the Crown and defence. In their vetting, however, the Crown Solicitor and other prosecutors are assisted by the police, who gather relevant information from official records and their own further inquiries. The defence are left to their own resources in supplementing the limited information available from the panel list. Defence counsel tend to rely heavily on their intuition, experience and judgment in making peremptory challenges.

[28] This appeal puts in issue whether there is a sound legal basis for the police to assist the Crown Solicitor, who is the prosecuting authority, by obtaining information to be used in challenging potential jurors. If this Court finds that there is such a basis for jury vetting, a further issue arises concerning the extent to which the Crown has an obligation to pass on information obtained which might be relevant to the defence in deciding to exercise their own right of peremptory challenge.

**Background to appeal**

[29] The appellant was charged with offences under the Misuse of Drugs Act 1975 on which she was to be tried by a jury in the High Court together with others jointly charged. On a pre-trial application by a number of accused, Fogarty J decided, on the basis of Australian authority,[15] that it would be contrary to the provisions of the Juries Act 1981 for the Crown to exercise its right of peremptory challenge of potential jurors on the basis of their criminal histories which were not disqualifying. The Judge directed that the Crown should not use information it possessed of that kind in deciding whether to make a peremptory challenge. The jury was selected on that basis. At her trial the appellant was convicted of certain charges. She is presently serving a term of imprisonment.

[30] The High Court's ruling had immediate material implications for jury vetting nationally. The police ceased to provide prosecutors with information derived for vetting to Crown Solicitors.

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15 *R v Katsuno* (1999) 199 CLR 40.

[31] Despite having obtained a conviction at trial, the Crown appealed to the Court of Appeal against the High Court's ruling on jury vetting. Because of the importance of the issue to the administration of criminal justice, that Court decided it should hear the appeal. In its judgment allowing the Crown's appeal, the Court of Appeal held that the police could lawfully access the official criminal records database to provide information that would inform the Crown Solicitor of any criminal history of those on the jury panel list and provide the information to the Crown Solicitor and other prosecutors for use in deciding whether to make a peremptory challenge. A majority of the Court of Appeal (William Young P and Chambers J) also held that, in general, the Crown was not permitted to disclose to the defence criminal history information concerning members of the panel that did not disqualify them from service as a juror. Exceptionally, however, that information had to be made available to the defence whenever it indicated that a potential juror with a criminal history might have an adverse predisposition towards an accused. The minority Judge (Robertson J) favoured disclosure to the defence of all criminal history information obtained by the prosecution.

[32] The appellant applied for leave to appeal to this Court against the Court of Appeal's judgment. We decided to grant her application, for reasons set out in full in our judgment granting leave,[16] and approved the following grounds of appeal:

> (i) Can the police supply so-called "vetted jury lists" to the Crown to assist the Crown in deciding whether or not to challenge a prospective juror? If yes:
>
> (ii) Should a vetted jury list that is supplied to the Crown also be made available to the accused?
>
> (iii) Can the Crown peremptorily challenge a prospective juror on the basis of information obtained from a vetted jury list?

**Jury vetting practices in New Zealand**

[33] It is necessary to discuss briefly the information available to this Court on how jury vetting for a criminal trial is undertaken in New Zealand. A 1995 departmental study of the composition of New Zealand juries reported that, in all but

[16] *Gordon-Smith v R* (2008) 23 CRNZ 958 (SC).

one police district, as a matter of general practice, the police were given a copy of the jury panel list by either the Crown Solicitor or the registrar of the trial court. The police vetted those listed by reference to their convictions as recorded on the national criminal database. They noted that information on the list and returned it to the Crown Solicitor. At times the officer in charge of the relevant police investigation would also note names of persons which the police recognised and who they did not want on the jury.[17]

[34] The 1995 report said that the Crown Solicitor and prosecuting counsel would consider whether the panel included persons who they considered might be pre-disposed either for or against the Crown. The study concluded that prosecution counsel made decisions on whether to challenge jurors according to what they perceived to be in the best interests of the case. Consistent with this, persons on the jury list were often challenged where they had convictions which, although not disqualifying the person from service, were thought to indicate possible bias against the police.

[35] Other information derived from the jury list itself which was used for challenging decisions included the address and occupation of the potential juror. This enabled the prosecution "to get a feel for where the potential juror fitted within the socio-economic pattern of the city".[18] Occupational information was also used by prosecutors to challenge those with occupations that they disliked having on a jury.

[36] Prosecutors also formed impressions on the day of selection, from their observations of the appearance and demeanour of those called, to decide on challenges.

[37] This Court also received affidavits made by Crown Solicitors in 2007 about jury vetting and information sharing practices in the districts for which they were

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17 Department of Justice, *Trial by Peers? The Composition of New Zealand Juries*, (Wellington, 1995), Chapter 9, pp 105 – 113.

18 "Trial by Peers", Chapter 10, pp 115 – 120.

responsible. They indicate that there are significant local variations. In Auckland, the largest district in New Zealand, the police had ceased the general practice of vetting juries in 1983. Since then, the only vetting that has taken place was at the specific request of the Crown Solicitor in a particular instance.

[38] In Napier, vetting by the police was of data held on a local police database. The information held went beyond that held on the national database. Information provided by the police to the Crown Solicitor included not only convictions and sentencing information, but other outcomes of the criminal justice process such as acquittals, charge withdrawals and diversion. Information concerning police attendances at the addresses of potential jurors was also provided covering domestic violence callouts and finding of drugs. It was not the Crown's practice to provide any information it received to the defence. The Crown Solicitor would only challenge jurors based on their criminal history or their involvement with the police.

[39] In Wellington, the scope of police vetting was restricted. The police annotated the panel list, recording those with a criminal record or who were otherwise considered by the police to be unsuitable for jury service (for instance where they had known gang connections). Again, it was not the general practice in Wellington to provide the information received to the defence. The Crown Solicitor said that the view taken in Wellington was that the right of peremptory challenge entitled the Crown Solicitor to challenge for any reason at all, including a criminal history. Challenges were based on the need to ensure the public can have confidence in jury verdicts.

[40] Vetting in the Christchurch district involved database inquiries concerning charge history, conviction history, and other information concerning the named person. This would include involvement in family violence or matters such as roadside licence suspension. One annotated list, said to be typical, had information in response to these queries about 46 of the 144 persons listed.

[41] The Christchurch Crown Solicitor's district includes Greymouth, where the police have for some years annotated the jury panel list with information as to what

are described as "known associates, criminal family connections, known drug use and anti-police sentiment."

[42] The Christchurch Crown Solicitor has required prosecutors responsible to him to exercise their judgment in making peremptory challenges. They were instructed to have regard to the nature and circumstances of the trial, and the relevance to that of the information received concerning the potential juror. In common with what was said over the practice elsewhere, challenges were used sparingly and usually in relation to those with a relevant conviction or history. A juror with an old conviction for cultivation of cannabis would not normally be challenged in a case involving alleged violence or dishonesty.

[43] The Solicitor-General issues guidelines for prosecutors but none have been given concerning the basis for making peremptory challenges of jurors. In these circumstances it is not surprising that a considerable regional variation has emerged in the extent of information concerning those called for jury service that is collected and provided to prosecutors by the police and consequently the basis on which decisions to challenge are made. This has obvious implications for the privacy interests of those summonsed for jury service. As well, in the adversarial context of a criminal trial, it has implications for the principle that in our democratic society accused persons will be tried by a jury that is impartial between them and the State.

[44] These issues are at the heart of this appeal.

**Proposals for reform**

[45] Issues arising from jury vetting practice, including whether peremptory challenges should continue to be part of the system of selection of juries, were addressed by the Law Commission as part of its review of criminal procedure, which commenced in 1989. In its final report on this aspect in 2001,[19] the Law Commission came down in favour of continuing to make provision in legislation for peremptory challenges of potential jurors by the Crown and defence. The

[19] New Zealand Law Commission, *Juries in Criminal Trials*, NZLC R69, (2001).

Commission recognised that the system for random selection of those who sit on juries has no formal procedures for assessing potential bias of persons called for jury service. The peremptory challenge enabled exclusion where there were concerns over a juror's impartiality in circumstances that would not justify a challenge for cause under the legislation. The Commission also saw it as desirable that the parties, and the accused in particular, should continue to have a limited measure of control over composition of the jury to address that situation. It concluded that if the removal of the right to make a peremptory challenge were lost, the accused would be likely to feel a degree of injustice on conviction. The ability of the defence to remove a limited number of jurors as a matter of free choice was also seen as promoting the state's interest in having the fairness of its criminal justice system accepted by those who were convicted, a factor relevant to rehabilitation.[20]

[46] The Commission also saw advantages in the Crown's use of the peremptory challenge as a means of exclusion from the jury of those who might have bias or prejudice against either side. Its form avoided the intrusiveness of procedures of challenges for cause which required the parties to establish why a person called was unsuitable. Finally, the peremptory challenge was seen as a convenient mechanism for either side to exclude from the jury those perceived on the day to be "misfits".[21]

[47] The Commission also decided that jury vetting by both sides was acceptable, because it served the interests that justified peremptory challenges. On account of the need to protect the privacy of those summonsed for jury service, however, the Commission thought it inappropriate for the prosecution or the defence to be generally required to disclose the information they had obtained in the course of vetting the panel. If the Crown decided to challenge the balloted juror, there was no need to share the information. But even if it did not, prosecution disclosure of information gathered by the police to the defence was unnecessary because the Crown had an obligation to remove jurors who might not be impartial.[22]

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20 At para [229].
21 At paras [226] and [229].
22 At para [244].

[48] The Law Commission's view that information obtained in the course of vetting of jurors by the police should not have to be disclosed to the defence by the Crown was not, however, absolute:[23]

> We would make two exceptions to this. The first is if the prosecution have information about the potential juror which may affect that jurors' ability to serve, but decide not to challenge on the basis of it. This should be revealed to the defence so that the defence can consider whether they wish to challenge on that basis. The second is if the prosecution are given a list of the jury panel's non-disqualifying convictions. This should be revealed because opinions may vary as to whether these convictions might cause bias and should therefore be the basis of a challenge, and the defence should have the opportunity to consider whether they will challenge the person if the prosecution do not.

[49] Because of public concern that the lists of those on the jury panel came into the hands of accused persons, the Law Commission also gave consideration to whether that access should be restricted. It decided that accused persons had to be able to see the list in order to be able to effectively exercise the right to challenge, with or without cause. The Commission did, however, accept that there was no reason why a defendant represented by counsel should keep a jury panel list once the jury had been selected and said that counsel should endeavour to avoid handing it over.[24]

**Subsequent legislation**

[50] The Law Commission's proposals were addressed as one of a number of amendments covering different aspects of criminal justice procedure in the Criminal Procedure Bill introduced in 2004. One of these adopted the Law Commission's proposal for juries to be permitted to give majority verdicts (11:1). In relation to access to jury panels and the jury selection procedure, there were a number of departures in the Bill from what the Law Commission had proposed. In relation to concerns over privacy and safety of jurors, a new regime of restrictions on distribution of the panel was included in the Bill. Counsel receiving the panel would be required to take precautions against inappropriate use. There was provision for peremptory challenges to continue (with the number available for each side reduced

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[23] At para [245].
[24] At paras [246] to [248].

to four from six). No provision was made, however, as proposed by the Commission, for any information obtained by the prosecution in the course of jury vetting to be provided to the defence.

[51] The Criminal Procedure Bill was considered by the Law and Order Committee of the House of Representatives which recommended some further amendments to jury selection provisions. The period during which the list was to be made available for examination was reinforced from five to seven days. Protection of those identified on the panel was extended by a requirement that the list not to be left in the possession of witnesses or victims, as well as accused persons. Breaches of the restrictions could be treated as a contempt of court.

[52] The Select Committee agreed that it was appropriate to continue to allow peremptory challenges of balloted jurors. It endorsed the Bill's provision for reducing the number available.[25] The Select Committee made no reference to the Law Commission's proposals that in certain situations the prosecution should be required to provide information that had been gathered in vetting jurors to the defence. The Bill was accordingly reported back to the House of Representatives without any such provision.

[53] The amended Bill was enacted on 25 June 2008,[26] the relevant provisions coming into force six months later. They are accordingly now incorporated in the Juries Act 1981.

**Statutory scheme**

[54] Under the Juries Act, subject to certain exceptions, every person who is currently registered as an elector is qualified and liable to serve as a juror.[27] The

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25 Law and Order Committee, *Criminal Procedure Bill*, (2005), pp 21 – 22.

26 This followed delivery of the Court of Appeal's judgment under appeal delivered on 10 April 2008. ([2008] NZCA 79, CA 207/2007, 10 April 2008 (William Young P, Chambers and Robertson JJ.)

27 Section 6 of the Juries Act 1981.

exceptions cover persons who are disqualified from jury service on account of having been sentenced to imprisonment for a specified term.[28] As well, the Act directs that certain persons are not to serve on any jury on account of their specified occupations or personal circumstances.[29]

[55] The process of jury selection commences with the preparation by the Chief Registrar of Electors of a jury list for each jury district containing a random selection of the names of those who are registered as electors who reside in the district concerned. The lists are provided to the registrars of the relevant courts, who are required to keep them confidential.[30]

[56] The registrar must compile from the list received, as required, a panel of those who are to be summonsed for jury service. In doing so the registrar must take reasonable steps to ensure those disqualified or directed not to serve are not on the panel.[31] The method of compilation, which is specified by jury rules, is otherwise one of random selection.[32] The centrality of the random nature of the process in jury selection is maintained on the day of the trial when those called to serve on the jury for a particular trial are determined by a ballot of those summonsed.[33]

[57] The registrar is required to make the jury panel available for inspection by parties to relevant trials on request. In this respect amendments enacted in 2008 are significant.[34] Previously, the parties were entitled to receive the panel five working days prior to the beginning of the week in which the trial was due to be heard. The 2008 amendment has increased that period to seven working days.[35]

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28 Section 7 of the 1981 Act disqualifies from jury service anyone who:
   (a) … at any time, has been sentenced to imprisonment for life or for a term of more than 3 years or to preventive detention;
   (b) At any time in the preceding 5 years has been sentenced to imprisonment for a term of 3 years or more or to corrective training.

29 Such as having an intellectual disability – s 8(k).

30 Section 12(2).

31 Sections 13(1) and 13(2).

32 Rules 6(3) and 7(2) of the Jury Rules 1990.

33 Rule 17 of the Jury Rules 1990.

34 The Juries Amendment Act 2008 was enacted on 25 June 2008. Under s 2, the provisions of relevance to this appeal came into force on 25 December 2008.

35 Section 14(1)(b) of the Juries Act 1981 (as amended).

[58] The 2008 amendment is also more explicit as to who is entitled to receive the panel. "Eligible persons", who are entitled to request a copy of the panel for the week, include a lawyer acting for a party to proceedings due to be heard in that week and an unrepresented party to such proceedings. The Crown, or other prosecutor in criminal proceedings due to be heard that week, and members of the police, are also "eligible persons" entitled to a copy of the panel.[36]

[59] The Juries Act provides for different forms of challenge by parties to prospective jurors. Jurors can be challenged for want of qualification.[37] There is also provision for challenge for cause, on the ground that the juror is not indifferent between the parties, or not capable by reason of disability of acting effectively as a juror. Section 27 of the Juries Act allows a judge to direct that a person "stand by" in certain circumstances. These need not further be considered.

[60] As indicated, the 1981 Act also provides for peremptory challenges, referring to them as "challenges without cause". Section 24 of the Act, as amended, now provides:

> **24 Challenges without cause**
>
> (1) In every case to be tried before a jury, each of the parties is entitled to challenge without cause 4 jurors only.
>
> (2) However, if 2 or more accused persons in a criminal case are indicted together, the Crown or other prosecutor is entitled to challenge without cause 8 jurors only.
>
> (3) If a juror is discharged and is to be replaced with another under section 22A(1)(b), each party is entitled in the selection of the new juror to exercise the number of challenges without cause that the party has not already exercised.

[61] As also indicated, the 2008 amendment has restricted the manner of use by eligible persons of the copies of the jury panel list they receive.[38] The purpose of those restrictions is to help to prevent names or other information about the panel

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36 Section 14(1A) of the Juries Act 1981 (as amended).

37 If they are not qualified as a registered elector under s 6, if they are disqualified from service under s 7 or if they have been directed not to serve under s 8 – see s 23.

38 Section 14A of the Juries Act 1981 (as amended).

from being used to prejudice a juror's safety or security or otherwise to interfere with the performance of a juror's duties.

[62] Lawyers representing parties to criminal proceedings to which the panel list relates may show a copy of the list to the defendant, but must not leave the document in the defendant's possession. Nor may the list be left in the possession of a victim or witness. The lawyer must also take all reasonable steps to ensure that the defendant, any witness, and any victim does not copy the list. As well, all those receiving copies of the list, including unrepresented defendants, must return them to the registrar as soon as possible after the trial commences. A breach of the statutory provisions restricting use of the panel list may be dealt with as a contempt of court.[39]

**Is jury vetting permitted?**

[63] The appellant submits that the police do not have legal authority to conduct inquiries into the background and characteristics of those on a jury panel, in order to provide prosecutors with relevant information on which to challenge. Mr McCoy argues that jury vetting is not within the statutory or common law functions of the police. He also argues it is prohibited implicitly by other legislation, in particular by the Juries Act. Parliament has recently stipulated certain police functions in legislation for the first time, including the function of law enforcement.[40] Although Mr McCoy strongly contended to the contrary, I am satisfied that the assistance that the police give Crown Solicitors in the prosecution of indictable crime is part of that law enforcement function. That is so even though particular assistance given may also facilitate the administration of justice. The Policing Act therefore provides sufficient legal authority for jury vetting by the police, subject only to restrictions imposed by other enactments.

[64] The Privacy Act 1993 does not prevent the police from accessing law enforcement information held by an agency if such access is authorised under s 110

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39 Sections 14A(2) and 14(4) of the Juries Act 1981.
40 Section 9 of the Policing Act 2008.

and Sch 5 of that Act.[41] Law enforcement information here is defined to include details of hearings of proceedings, including convictions, sentences and other matters ancillary and subject to a determination. Accordingly, I agree with the Court of Appeal that the police are not precluded by the Privacy Act from accessing the criminal records database maintained by the Ministry of Justice in the course of their jury vetting.[42] Beyond that, however, the authority given under the Act may be limited in its scope.

[65] I also agree with the Court of Appeal that the use of criminal history information in the course of jury vetting is permitted by way of exception to the general effect of the clear slate regime under the Criminal Records (Clean Slate) Act 2004. As a law enforcement agency having access to criminal records, the police may disclose the record if that is necessary for the exercise of prosecution functions of the Crown Solicitor who, for these purposes, in my view is also a law enforcement agency.[43]

[66] The appellant argues that it is implicit in the Juries Act that jury vetting by the police is not permitted. The Act does, however, continue to permit both Crown and defence to make peremptory challenges. Parliament's purpose in so providing must reflect its acceptance that there are sound reasons for the practice which relate to removal by the parties of jurors not believed to be impartial and perceptions of the fairness of the criminal justice system to accused persons.

[67] The Juries Act also provides for the jury panel to be made available, on request, to parties in advance of forthcoming trials. Indeed, the period during which the list is available was increased in 2008, so that the parties can have the list for seven working days before commencement of a trial when challenges are made. Parliament's apparent purpose in requiring that the list be made available in advance is to provide a reasonable opportunity for each side to consider the suitability of those on the panel and to gather further information than that which comes with the panel list.

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41 Section 111 of the Privacy Act 1993.
42 Court of Appeal judgment at para [46] per Robertson J.
43 Sections 19(2) and 19(3)(a)(i) of the Criminal Records (Clean Slate) Act 2004.

[68] The period prior to trial during which the list is available under the Juries Act differs from that under the Victorian state legislation considered by the High Court of Australia in *R v Katsuno*.[44] The judgment in that case was relied on by Fogarty J in holding that the Juries Act did not permit police vetting. That legislation, however, permitted the parties access to the jury list only on the morning of the trial. As well, that legislation permitted prior police access to the list but solely, the Court held, for the purpose of inquiry into whether any person on it was disqualified. It was because of those features that the Victorian legislation was interpreted as implicitly prohibiting any further inquiry into the background of jurors by the police. The differences between the two statutes are such that the judgment in *Katsuno* does not support the proposition that the New Zealand Act implicitly prohibits jury vetting. The provisions for advance receipt of the list by the parties point the other way.

[69] This reading is supported by the legislative history of the Juries Act. In the course of its passage through the House an amendment was moved by an opposition member which would have prohibited jury vetting.[45] It failed to pass. The speeches recorded in Hansard make it plain that Parliament was aware of jury vetting and its purpose was that it could continue.

[70] Another change to the jury selection regime made in the 2008 amendment reinforces this interpretation of the legislation. The right of the Crown and the police to receive the jury list in advance was made explicit. Both are now expressly within the category of "eligible persons", entitled to request the list. In passing, I note that information on the panel list received by the parties has, since 2000, included dates of birth of jurors, in addition to their names, addresses and occupations.[46] Part of the purpose in making this change to the Jury Rules must have been to assist jury vetting by reference to official records.

[71] Together, these aspects of context, structure and legislative amendment confirm that, on its ordinary meaning, the Juries Act does not prohibit jury vetting by

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44 (1999) 199 CLR 40.

45 Hon G Palmer MP, 28 August 1981, NZPD 440, p 3044.

46 Rule 4 of the Jury Rules 1990 was amended by the Jury Amendment Rules 2000 to require inclusion of this information.

the police or the provision of the information derived from inquiries to the Crown. Nor, on that meaning, does the Act require the Crown or the police to provide any information obtained from jury vetting to the defence. The proposals of the Law Commission, which would have required disclosure in particular circumstances, were not incorporated in the amending legislation.

**The fair trial right**

[72] The appellant, however, contends that this ordinary meaning of the Juries Act provisions is not consistent with fundamental rights of accused persons protected by the Bill of Rights Act. She invokes the criminal process right to a fair and public hearing by an independent and impartial court.[47] She also invokes the principle of equality of arms, which requires that there be a fair balance overall between the positions of the prosecutor and defendant so that the defendant is not placed in a position of significant disadvantage. In the present context it is encompassed by the fair trial right and need not be separately addressed. The appellant asks the Court to give a different meaning to the Juries Act provisions, which is consistent with her fair trial right, under the statutory direction to prefer rights consistent meanings in the Bill of Rights Act.[48]

[73] The fair trial right will be breached if the system for selection of a jury in a criminal trial gives rise to reasonable grounds for apprehension by a well-informed observer that the jury is not impartial between the Crown and the accused. In this case it comes down to whether the impact of vetting on the selection of juries, in association with the exercise of peremptory challenges by the Crown, is such that the perception of a reasonable observer will be that the Crown is able to obtain a jury that is favourable to its position rather than an unbiased jury.

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47 Section 25(a) of the Bill of Rights Act 1990.

48 Section 6 of the New Zealand Bill of Rights Act provides:

> **Interpretation consistent with Bill of Rights to be preferred**
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[74] Trial by jury itself, of course, is a fundamental right of those charged with serious criminal offending.[49] The principle of random selection from the community of the jury panel drives the system of jury selection and is an important aspect of ensuring the independence of the jury.[50] Random selection is also considered likely, in most cases, to produce a jury that is representative of a cross-section of the community. But, although this feature of the jury selection system is important, randomness of selection does not always achieve an impartial jury.

[75] The manner in which possible bias in jurors is addressed differs in common law jurisdictions. In New Zealand, the right of both sides to challenge a number of jurors without having demonstrable cause has been maintained in the legislation as a means of allowing removal of those not considered to be impartial by the parties.

[76] The peremptory challenge procedure is criticised, in part because it is an imprecise mechanism for removal of bias, but also because of the limited information available for the defence concerning jurors. I shall return later to this criticism. There is also concern that this form of challenge is not used by the parties for its intended purpose.[51] Termination of peremptory challenges in England in 1989 seems largely to have been because of a perception that defence counsel were removing from juries those whose known characteristics were thought to indicate a respect for the law that was unfavourable to the defence.[52] Conversely, it is said, in the adversarial context of a criminal trial prosecutors sometimes challenge to secure a jury that will favour the police, rather than simply look to exclude all persons whose impartiality might be impaired. The latter perception of the operation of the system in New Zealand is emphasised by the appellant in contending that peremptory challenges by the Crown compromise impartiality of jurors.

[77] The peremptory challenge system can be supportive of the fair trial right as a mechanism which enables removal of those who the parties see as possibly biased. I

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49 Section 24(e) of the New Zealand Bill of Rights Act 1990.

50 Although the removal of those disqualified, or directed not to sit, impacts on the random nature of the jury.

51 The reduction in 2008 in the number of challenges available to Crown and defence was proposed by the Select Committee in order to "ensure that they are in fact used as intended": The Law and Order Committee, "Criminal Procedure Bill" (2005), p 22.

52 Gobert, "The Peremptory Challenge – An Obituary" (1989) Crim LR 528, pp 530 – 531.

am satisfied that this end justifies interference with randomness in jury selection which is a means of securing independence. I am also satisfied that vetting of jurors by the police on behalf of the Crown will have a positive effect on the fairness of trials if operated in a principled way. That would require that prosecutors make peremptory challenges only for the purpose of removing those who appear to be biased in favour of either side, or those who were plainly unsuitable for the task. From the perspective of a reasonable observer, the problem is that peremptory challenges operate within an adversary system, in which any use of such challenges by the Crown for partisan purposes is hard to detect. Crown prosecutors are human and face pressures from the difficult circumstances they must address in discharging their public responsibilities. In these circumstances a reasonable observer of the process would, in my view, conclude that, in the absence of some regulation of its peremptory challenge decisions, the Crown must enjoy a significant advantage in the composition of juries in criminal trials.[53] It follows that at present, in my opinion, the system of peremptory challenges is in breach of the right of a person charged to be tried by an independent and impartial court.

[78] In order that the jury selection system is seen by a reasonable observer to be functioning in a manner that does not put the impartiality of the jury at risk, authoritative guidance and direction need to be given to prosecutors on the principles they are to apply in making peremptory challenges. One way of doing this is through the prosecution guidelines issued by the Law Officers, in New Zealand traditionally by the Solicitor-General. Guidelines on peremptory challenges would focus on the importance of the Crown only intervening in the random process of jury selection in order to exclude those reasonably believed to be possibly biased in favour of either side, or who otherwise are reasonably considered not to be fit to serve. In this respect I accept that it will often be appropriate for the Crown to challenge jurors who have previous convictions, even though they are not disqualified by the statute.

[79] One possible desirable impact from such guidelines may be the emergence of a more common approach to the scope of jury vetting in those areas of New Zealand in which it takes place. An approach which confines vetting to legitimate principles

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53 Compare *R v Bain* [1992] 1 SCR 91 at p 155 per Stevenson J.

for peremptory challenges is desirable. The present extent of vetting in some court centres in my opinion comes close to falling outside the spirit, if not the letter, of privacy legislation.

[80] I now turn to the present imbalance between prosecution and defence in relation to the availability of information about those on the jury panel. Limited resources, coupled with an inability to access the criminal record database, permits only superficial inquiries into jurors by the defence in most criminal trials. The Crown, by contrast, obtains much relevant information through the police, including the criminal history of jurors. The very considerable effort put into gathering information by the police rather suggests that they see the exercise as a valuable one from their perspective.

[81] The majority of the Court of Appeal recognised that the Crown enjoys this informational advantage but did not consider it gave rise to any unfairness or breach of rights. If the Crown challenged a juror with a prior conviction, the majority saw no need to pass that information on. If it did not, there was also no need to communicate what was known, as the information was not seen as generally of value to the defence. Only in exceptional cases involving particular defendants would fairness require such disclosure.

[82] The underlying premise that a potential juror's past convictions will in general only indicate a propensity to acquit is a debatable one. It is not a sound premise on which to conclude that there is no need for access to such information by the defence. As the Law Commission said, whether the defence would regard that information as indicating a jury might be favourably disposed to them is a matter on which opinion may vary.

[83] Both parties need to be informed if their right to challenge is to be meaningful. At present the Crown is much better informed. This imbalance is such that a reasonable observer would consider that the Crown is advantaged in an element of the process which is concerned with removal from the jury of those who it is felt may be biased. That leads to the conclusion that the Crown will be able to

obtain a jury that is favourable to its position. And, as Robertson J said, dissenting on this point in the Court of Appeal:[54]

> The more principled, informed and intelligent the use of a peremptory challenge is, the better the system will operate and the more confidence there will be in its integrity.

[84] There is a countervailing consideration, being the privacy interests of jurors. But Parliament in 2008 specified a regime for protection of privacy interests in the jury selection process through imposing duties of confidentiality and restrictions on continuing possession of the list. I am satisfied that regime could apply to all information provided to the Crown Solicitor by the police about panel jurors in a way that would permit it to be provided to the defence. It should also be remembered that the New Zealand system inherently gives more protection to jurors' privacy than those of overseas jurisdictions which adopt more intrusive systems of ascertaining the presence of bias.[55] Overall, and having regard to the importance of the right to a fair trial,[56] I see no reason why further protection to juror privacy should be given than that thought appropriate by Parliament.

[85] Accordingly, I consider that, on its ordinary meaning, the absence of regulation of jury vetting practices in the Juries Act produces advantages for the Crown in jury selection and disadvantages for the defence which are inconsistent with the right of a person charged with an offence to be tried by an independent and impartial tribunal. For the reason given, I do not regard this limit on the fair trial right as justified by the countervailing privacy interests of jurors. No other value is in point.

[86] That brings me to consider whether it is open to the Court to address these two elements in the present system by giving another available meaning to the Juries Act provisions. It is possible to read the 1981 Act, as amended, as implicitly giving the courts the power of supervision of jury selection practices, including by requiring

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54 Court of Appeal judgment at para [81].

55 The Court of Appeal, however, has recognised that, "in wholly exceptional cases a trial Judge may properly exercise the judicial discretion of allowing jurors, whose names have been called, to be cross-examined before taking their seats": *R v Sanders* [1995] 3 NZLR 545 at p 550 per Cooke P.

56 In *R v Condon* [2007] 1 NZLR 300, at para [77] this Court said that the right to a fair trial under s 25(a) of the New Zealand Bill of Rights Act 1990 is an absolute right.

the sharing of information obtained by police vetting and providing it to the defence. The omission from the legislation of the Law Commission proposals, on such a reading, was not intended to preclude court supervision of the jury selection process to ensure fair trial rights were met. I consider that this meaning should be given.

[87] On that reading of the 1981 Act, if guidelines were given to prosecutors, requiring the provision of all relevant information received from the police concerning jurors to the defence and as to principles for proper peremptory challenging of jurors, I would consider the provisions of the Juries Act were being administered consistently with the protected rights of those charged. I would read the Juries Act in this way under the direction given by s 6 of the Bill of Rights. The guidelines should make it clear that the Crown has to make disclosure within a reasonable time prior to trial of all information concerning convictions of those on the panel whenever that information is in the Crown's possession and a juror with a prior conviction is not to be challenged by the Crown. The guidelines would also require that the Crown must similarly disclose other information it receives from the police which may indicate a juror is possibly biased.

[88] The sharing of information would operate in conjunction with guidelines for peremptory challenges. The guidelines or principles would include directions that would recognise the Crown's obligation was to work towards selection of a jury that was not biased in favour of either side and otherwise not to interfere with the randomness of the selection process.

**Conclusion**

[89] I would allow the appeal and make a declaration that all information obtained by the Crown about a potential juror which might be relevant to the juror's suitability to serve, including all information about non-disqualifying convictions, should be provided to the defence prior to commencement of the trial unless the Crown itself challenges the juror concerned. If that were done, and directions along the lines indicated were given by the Solicitor-General, jury vetting by the police to assist the Crown in making peremptory challenges would be lawful.

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