

30 April 2021

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Tēnā koe Sarah,

**Re: Targeted updates to the Solicitor General’s Prosecution Guidelines**

The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on Crown Law’s targeted updates to the Solicitor General’s Prosecution Guidelines 2013 (**guidelines**).

The consultation document notes the purpose of the targeted updates is to “provide new and/or expanded guidance (**proposed guidance**) on specific issues arising out of recent cases, pending a full review of the Prosecution Guidelines.” The Law Society agrees it is important to provide updated guidance reflecting changes that have occurred through case law. However, we also consider that a full review of the guidelines is appropriate and will be necessary once pending legislation comes into force such as the Sexual Violence Legislation Bill. The Law Society looks forward to the opportunity to engage further at that point.

The Law Society sought feedback from members of its Criminal Law Committee which includes senior Crown prosecutors and advertised the consultation in our weekly e-newsletter LawPoints. Overall, members support the proposed guidance and the aim of bringing the guidelines in line with appellate developments.

The Law Society’s feedback is limited to brief comments on the jury selection section as outlined below. We welcome the decision to expressly state that prosecutors must not challenge a potential juror in reliance on a prohibited discriminatory ground.

**Jury Selection**

*Juror bias and challenges without cause*

The consultation document notes that “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”. Updates have been made to the guidance on jury vetting, providing more information from *R v Gordon-Smith (No 2)* [2009] 1 NZLR 725. A key change is the new proposed guidance on challenges without cause at paragraphs 9.9-9.11.

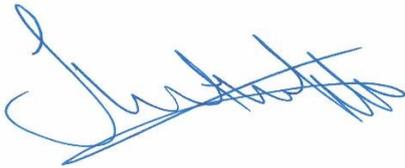
The consultation document focuses on providing commentary on Crown rights of challenge without cause during the jury selection process and provides a series of examples (at paragraph 9.10) including that the juror may be biased. In practice, however, it can be difficult to establish a juror has

a bias during the jury selection process. The issue of juror bias is often nuanced and may not show itself until after a jury has been empanelled.<sup>1</sup> It is therefore difficult to envisage a situation in which, during jury selection, a juror would demonstrate bias in one of the ways described at para 9.10 of the consultation document. Prosecutors have indicated that the examples highlighted are common (especially in smaller courts) and can result in challenges “with cause”. For example, if a juror actually expressed a bias (at 9.10.2), then it is likely that the resulting challenge to that juror would be “with cause”. Similarly, it is very likely that if a prospective juror is known or related to a participant in the trial then that would see him or her discharged with cause (at 9.10.1).

The Law Society suggests the proposed guidance could more clearly address these nuances and provide some commentary on issues of bias not arising until after the jury has been empanelled.

We hope these brief comments are helpful. If you have any questions or if further discussion would assist, please contact the Law Society’s Law Reform and Advocacy Adviser, Amanda Frank ([amanda.frank@lawsociety.org.nz](mailto:amanda.frank@lawsociety.org.nz)).

Nāku noa nā,



Jacquie Lethbridge  
**NZLS Vice-President**

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<sup>1</sup> This also occurs in other jurisdictions: see for example *R v Usman* [2021] EWCA 360 where a juror was discharged during the course of the trial after showing bias towards the defendant.