

## A QUESTION OF PUBLIC IMPORTANCE: HOW SHOULD THE COURT ADDRESS THE RISK OF JUROR BIAS DUE TO RACIAL PREJUDICE?

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It is an accepted societal fact that widespread prejudice and unconscious bias negatively affect Māori. Unconscious bias and implicit stereotypes associating Māori with the criminal justice system are similarly well-known. Despite this awareness, there has been little discussion on how this may impact fair trial processes, and particularly how juries may bring those widespread prejudices and biases into the courtroom. This article attempts to fill that gap.

This article critically analyses the current legal framework of jury selection. This article argues that the current legal framework fails to address the issue of juror bias against Māori defendants. Instead, the approach taken is to presume all jurors are inherently impartial. This article contends this reasoning is flawed and inconsistent with the approach taken in other jurisdictions. Consequently, reform to the current jury system is necessary. Different options for reform are assessed, ranging from placing guidelines on the existing jury selection processes to adopting the Canadian approach to questioning jurors, to even abolishing the jury system altogether. Benefits of and issues with all reform options are recognised. On balance, the jury selection processes must change to ensure that the jury system does not further alienate minorities.

### *1 Introduction*

A criminal jury trial has been a longstanding pillar of the criminal justice system (CJS) since the Magna Carta in 1215. A defendant's right to be heard by a jury of their peers has been described as a "cornerstone of our criminal justice system".<sup>1</sup> The jury system

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1 Stephen Dunstan "The state of New Zealand juries" [1996] NZLJ 231 at 231.

also serves a symbolic function of upholding the democratic integrity and conscience of the CJS.<sup>2</sup> Yet, the reality of Aotearoa's society challenges these lofty objectives.

It is an accepted fact that widespread prejudice and unconscious bias negatively affect Māori in the community.<sup>3</sup> Unconscious bias and implicit stereotypes associating Māori with the CJS are similarly well-known.<sup>4</sup> Despite awareness of such issues, there has been little discussion in the courts about how this may impact on fair trial processes, particularly on how juries may bring those widespread biases into the courtroom.

In 2001, the Law Commission released a report on juries in criminal trials highlighting the jury system's adverse effects on Māori.<sup>5</sup> The report found that jury selection processes contribute to the significant under-representation of Māori jurors.<sup>6</sup> Unfortunately, little attention has been directed to this issue following the Commission's report. The 2020 Supreme Court leave decision of *Borell v R* brought the issue back to the courts' attention.<sup>7</sup> However, the Court forwent an opportunity to engage with these issues. This article is a start to addressing the silence following the Commission's report.

This article proposes that the jury system fails to address the impact of widespread bias against minority groups, particularly Māori, on a defendant's right to a fair trial. Issues surrounding juror bias may apply to various ethnicities, genders, sexualities and backgrounds. The focus on potential prejudice against Māori defendants is for three reasons. First, and foremost, Māori as tangata whenua of Aotearoa share a special, yet complicated, relationship with the Crown; second, *Borell* specifically raised the issue of

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2 Thalia Anthony and Craig Longman "Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds" (2017) 6(3) IJCS&SD 25 at 27.

3 Te Uepū Hāpai i Te Ora Safe and Effective Justice Advisory Group *Turuki! Turuki! Move together!* (2nd report, December 2019) at 12.

4 See, for example, *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835; *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241; *Mika v R* [2013] NZCA 648; *R v Rakuraku* [2014] NZHC 3270; and *R v Eruera* [2016] NZHC 532.

5 Law Commission *Juries in Criminal Trials* (NZLC R69, 2001).

6 At 6. This also raised the issue of whether prospective jurors have a right not to be excluded from the jury based on their ethnicity. This issue has yet to be adequately discussed in the New Zealand legal system. Although it is acknowledged that this is an important issue, this article will focus specifically on the rights of defendants as opposed to the rights of prospective jurors.

7 *Borell v R* [2020] NZSC 101.

juror bias against Māori; and third, there is an array of evidence of the systemic and deeply ingrained stereotypes about Māori in the CJS that Aotearoa must address.

This article argues that addressing juror biases and prejudice, especially implicit stereotypes, is a very challenging task. All options for reform possess benefits, but also present significant weaknesses. What is clear is that something must be done. The issue of addressing the risk posed by juror bias should not be left in the “too hard” basket.

This article discusses racial discrimination in Aotearoa, and how prejudice filters into the CJS. Then it seeks to critique the current legal framework of jury selection through the Supreme Court decision of *Borell*. Last, avenues for jury selection reform will be analysed with reference to approaches taken in other jurisdictions, particularly Canada.

## ***II Racial Discrimination — From the Community to the Courtroom***

This article proposes conceptualising juries as a cross-section of society, who are not immune from societal biases and stereotypes that negatively affect Māori.

### ***A Racism in the Criminal Justice System Generally***

There is a long history of racial prejudice and discrimination against Māori in Aotearoa.<sup>8</sup> The effect of colonisation and discriminatory legislation have had significant and continuing impacts on Māori.<sup>9</sup> Discrimination against Māori in the CJS has been rampant.<sup>10</sup>

It is well known that the CJS disproportionately punishes Māori.<sup>11</sup> For example, Māori are significantly over-incarcerated — it was reported in 2019 that Māori comprise 55 per cent of the male prison population and a staggering 63 per cent of

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8 See generally, Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers and Te Wānanga o Raukawa, Wellington, 2011) at ch 7.

9 A helpful explanation of the history of Māori and colonial law can be found in the first section of Moana Jackson’s report: Moana Jackson *He Whaipanga Hou: Māori and the Criminal Justice System – A new Perspective* (Ministry of Justice, Study Series 18, 1988).

10 Kim Workman and Tracey MacIntosh “Crime, Imprisonment and Poverty” in Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (Bridget Williams Books, Wellington, 2013) 120 at 120.

11 Te Uepū Hāpai i te Ora Safe and Effective Justice Advisory Group *He Waka Roimata: Transforming Our Criminal Justice System* (1st report, June 2019).

the female prison population despite only representing 16 per cent of the general population.<sup>12</sup> The Human Rights Commission found that Māori are more likely than Pākehā to be arrested, prosecuted and convicted for the same behaviour.<sup>13</sup> These statistics reflect systemic discrimination in the community.

The Safe and Effective Justice Advisory Group's first report acknowledged that racism is common in Aotearoa. The Advisory Group reaffirmed that high rates of arrest and imprisonment of Māori reflect systemic discrimination both within the justice system and the wider community.<sup>14</sup> The Court of Appeal and High Court have also acknowledged the existence of systemic racism and unconscious bias against Māori.<sup>15</sup> In 2017 the Court of Appeal in *Kearns v R* noted that "[t]here is ample research which shows that unconscious bias exists, though (for those not negatively affected) it is rarely obvious and easily overlooked."<sup>16</sup> The Court admitted that racial bias exists within the New Zealand Police and in some respects racial prejudice against Māori "has become worse" since initial studies of bias within the Police were conducted in the 90s.<sup>17</sup>

### ***B Evidence of Racism in the Jury System***

Jurors as a cross-section of society bring to the courtroom the same prejudices that exist in the wider community.<sup>18</sup> Therefore, this article argues that the significant biases that exist against Māori in society, specifically with respect to stereotypes about the CJS, will exist in jury pools.

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12 At 23.

13 Human Rights Commission *A fair go for all? Addressing Structural Discrimination in Public Services* (July 2012) at 36.

14 See generally Te Uepū Hāpai i te Ora Safe and Effective Justice Advisory Group, above n 11. It is not surprising that many Māori see the CJS as a systematic tool of oppression: see Mikaere, above n 8, at ch 7.

15 See *Kearns v R*, above n 4; *Solicitor-General v Heta*, above n 4; *Mika v R*, above n 4; *R v Rakuraku*, above n 4; and *R v Eruera*, above n 4.

16 *Kearns v R*, above n 4, at [24].

17 At [24]–[25].

18 Anna Roberts "Implicit Jury Bias: Are Informational Interventions Effective?" in Cynthia J Najdowski and Margaret C Stevenson (eds) *Criminal Juries in the 21st Century: Psychological Science and the Law* (Oxford University Press, Oxford, 2018) 85 at 86.

Embedded racism within the jury system is not new. Moana Jackson highlighted how the jury system adopts a monocultural position that excludes Māori ways of doing and being.<sup>19</sup> As a result, when Māori defendants face non-Māori juries, the jury will not properly understand Māori defendants' lives and circumstances.<sup>20</sup> Consequently, Jackson argues that because the jury system exists within an inherently racist legal system, Māori defendants cannot receive a fair trial.<sup>21</sup> While it poses difficult to definitively prove whether juries ethnically representative of the defendant are fairer, having such representation reduces the risk of ethnic bias operating against the defendant.

## 1 Trial by Peers

Jackson's findings on the composition of juries spurred the development of New Zealand's first large scale study of jury trials in a report titled *Trial by Peers? The Composition of New Zealand Juries (Trial by Peers)*.<sup>22</sup> The object of the study was to determine whether juries were broadly representative of the districts from which they were drawn.<sup>23</sup> The authors found that juries were not representative of their jury districts.<sup>24</sup>

*Trial by Peers* identified myriad reasons why Māori were significantly underrepresented on juries, stemming from the selection process and the use of peremptory challenges.<sup>25</sup> Concerningly, prospective Māori jurors were disproportionately challenged through the use of peremptory challenges.<sup>26</sup> This article will discuss peremptory challenges at Part III.

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19 Jackson, above n 9, at 43–44.

20 At 138.

21 At 139–140.

22 Stephen Dunstan, Judy Paulin and Kelly-Anne Atkinson *Trial by Peers? The Composition of New Zealand Juries* (Department of Justice, 1995) [*Trial by Peers*].

23 At 231.

24 At 169.

25 This includes issues relating to the difficulties of having to attend jury service, the need to be enrolled to be within the jury pool and higher rates of previous convictions which excluded people from being eligible for jury service.

26 *Trial by Peers*, above n 22, at 66.

## 2 Law Commission report on juries in criminal trials

Responding to these challenges, the Law Commission reviewed juries in criminal trials from 1998–2001. The Commission identified similar drivers of Māori under-representation on juries as the authors of *Trial by Peers*.<sup>27</sup> The Commission presented various reforms of the jury system but failed to describe the relationship between the jury system and the over-representation of Māori in the CJS. Additionally, the Commission failed to address issues raised in Jackson’s paper about the monocultural attitude of the CJS. Canadian and Australian Indigenous jurists express similar frustrations. Despite significant issues with the over-incarceration of Indigenous peoples in Canada and Australia, policy has not focused on the contribution of the colonial jury system to this problem.<sup>28</sup> There is a missing link in the discussion of juries in Aotearoa, which begs the question: how does the jury system contribute to the over-incarceration of Māori?

## 3 Evidence of juror bias

Few studies in Aotearoa have assessed juror bias to understand what influences a jury’s decision-making process. This is on the basis that we value the “sanctity of the jury’s deliberations”, that jurors must feel confident to express their views without fear of judgment.<sup>29</sup>

However, various studies in the United States and Canada investigate influences on jury deliberations. Studies in the United States found that white jurors are more likely to find a defendant with dark skin guilty than a defendant with white skin.<sup>30</sup> Further, studies in both Canada and the United States found that jurors of any race tend to be harsher towards defendants of a different race to themselves, exhibiting an in-group,

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27 Law Commission, above n 5, at [213]–[216].

28 Richard Jochelson and others “Revisiting Representativeness in the Manitoban Criminal Jury” (2014) 37 *Man LJ* 365 at 367; and Anthony and Longman, above n 2, at 25.

29 See, for example, the view of the House of Lords in *Regina v Smith (Patrick)* [2005] UKHL 12, [2005] 1 *WLR* 704 at [7].

30 Linda A Foley and Minor H Chamblin “The Effect of Race and Personality on Mock Jurors’ Decisions” (1982) 112 *Journal of Psychology* 47 at 51.

out-group effect.<sup>31</sup> While this article draws comparisons cautiously, the significant number of studies in the United States and Canada provides (at least) a strong suggestion a similar bias is present in Aotearoa. Although, any biases that exist will be specific to the Aotearoa context. This article therefore assumes that systemic bias within the community and the CJS against Māori will not be left at the courtroom door.

### ***III The Current Legal Framework of Jury Selection and its Approach to Bias***

Accepting that juries possess the same systemic conscious and unconscious bias against Māori in society, the next question is how the legal system addresses the risk of bias to afford all defendants a fair trial.

The Aotearoa jury system was established in 1841, based on the common law jury system of the United Kingdom.<sup>32</sup> Jury trials are now primarily governed by the Juries Act 1981. Although, the courts maintain a strong role in determining jury processes. In this Part the article argues the current legal framework does not effectively address issues of potential bias in jury members. Instead, the law adopts a blanket presumption during jury selection that jurors will be impartial and independent. Unfortunately, this approach prevents meaningful reform to the traditional jury system.

The jury selection process illustrates the courts' struggle to address potential juror bias. This process can be analysed in two stages. First is the courts' ability to determine the composition of the jury pool through the principle of selecting a jury of one's peers. Second is how the initial jury pool is impacted by the use of challenges.

#### ***A The Right to a Fair and Impartial Jury***

The right to a fair trial by an impartial jury was first expressed in the Magna Carta 1215. The right is codified in s 25(a) of the New Zealand Bill of Rights Act 1990 (NZBORA).

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31 Markus Kimmelmeier "The Effects of Race and Social Dominance Orientation in Simulated Juror Decision Making" (2005) 35 Journal of Applied Social Psychology 1030 at 1042.

32 Michèle Powles "A Legal History of the New Zealand Jury Service – Introduction, Evolution and Equality?" (1999) 29 VUWLR 283 at 286.

This right is a “key component of the administration of justice in New Zealand”.<sup>33</sup> It is also enshrined in the four objectives of the modern jury: a jury should be competent, independent, impartial and broadly representative of the community.<sup>34</sup> Partiality refers not only to someone’s cognitive bias or “attitudinal prejudice” but the inability to set aside these biases and make determinations as a jury member without discrimination.<sup>35</sup> Therefore, whilst the presence of bias alone does not automatically mean a juror will be partial, it significantly increases the risk of partiality.

## 1 The presumption of juror competence in Aotearoa

The traditional jury system is based on the presumption that jurors are competent. Jurors are presumed to come to the court with an impartial mind and adhere to any instructions given to them.<sup>36</sup> The Law Commission has reinforced this presumption, rejecting the suggestion “that a particular ethnic group is predisposed to prejudice”.<sup>37</sup> There is increasing evidence of significant biases (implicit and explicit) in the community which contradict this presumption, rendering the courts’ reluctance to deviate from this position highly problematic. A clear example of the court upholding the presumption of juror competence is the decision of *R v Cornelius*. In *Cornelius*, the Court of Appeal found an error in compiling the jury list that had resulted in less Māori being summoned to the jury.<sup>38</sup> The Court accepted this error could result in a miscarriage of justice if it compromised the defendant’s right to a fair trial.<sup>39</sup> However, the Court ultimately declined the appeal on the basis that “[t]he accused was tried by a qualified and apparently impartial jury of his peers [that is, equals]”.<sup>40</sup> *Cornelius*

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33 *Trial by Peers*, above n 22, at 3.

34 Law Commission, above n 5, at [133]; and accepted by the Court of Appeal in *Ellis v R* [2011] NZCA 90, [2011] BCL 327 at [18].

35 Kent Roach “Challenges for Cause and Racial Discrimination” (1995) 37 CLQ 410 at 411.

36 Hannah Freeman “The Presumption of Jury Competence: Sarrazin’s New Acknowledgement of Cognitive Biases and its Implications for Counsel” (2013) 71(2) UT Fac L Rev 9 at 13; and R Blake Brown “Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century” (2000) 38 Osgoode Hall LJ 453 at 494.

37 Law Commission, above n 5, at [153].

38 *R v Cornelius* [1994] 2 NZLR 74 (CA) at 74–75.

39 At 79.

40 At 82.



illustrates the courts are unwilling to undermine the presumption of juror impartiality, even in the face of accepted errors in compiling a jury list.

## 2 A jury of your peers

The right to a fair and impartial jury originated from the entitlement to be tried by a jury of your peers.<sup>41</sup> The principle of being tried by a jury of your peers has become “a cornerstone of our criminal justice system”.<sup>42</sup> The proposition of being tried by a jury of your peers is said to be the underlying principle behind s 5(5) of the Juries Act, which prescribes boundaries for jury districts.<sup>43</sup> In line with this principle, “[t]he starting point is that ... ‘so far as practicable’ a jury should be drawn from the community in which the alleged offence occurred.”<sup>44</sup> The rationale for this rule “is the long-standing notion that one should be tried by a jury of one’s ‘peers’”.<sup>45</sup> Yet, the Court of Appeal in *Foreman* made it clear that “a jury of one’s peers” is a principle, not a right in and of itself. Therefore, the extent to which the courts are required to ensure a defendant is tried by a jury of their peers is unclear.

## 3 A jury of your “peers” and ethnic representation

The principle of being tried by a jury of your peers has generated significant debate as to whether it imposes a legal requirement ensuring the jury is representative of the community. For example, in the United States it is a legal requirement of a defendant’s right to a fair trial that the jury is composed of a fair and representative cross-section

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41 This principle has stemmed from various historical statutes: Magna Carta 1297 (Eng) 25 Edw I c 9, art 29; Statute of Westminster, The First 1275 (Eng) 3 Edw I c 5; and Treason Act 1351 (Eng) 25 Edw III c 2 (now named the Criminal and Civil Justice Statute 1351), art 4. All of these statutes apply in New Zealand pursuant to s 3 of the Imperial Laws Application Act 1988. Although these statutes remain in force, they merely inform the construction to be given to modern statutes: see *Ellis v R*, above n 34, at [70].

42 Dunstan, above n 1, at 231. The concept of a trial by peers is one that has existed since the birth of the jury system: John Baker *Introduction to English Legal History* (5th ed, Oxford University Press, Oxford, 2019) at 82.

43 *R v Foreman (No 2)* [2008] NZCA 55 at [10].

44 At [10].

45 At [10].

of the community.<sup>46</sup> Representative juries are seen as necessary to encourage a range of different perspectives that may have unexpected importance and relevance in a given case.<sup>47</sup>

There is widespread agreement in New Zealand that representative juries are beneficial in theory. For example, the Law Commission noted that:<sup>48</sup>

... the diversity of perspectives of a jury drawn from representative sources is likely to enhance the competence of the jury as fact-finder, as well as its ability to bring its common sense judgment to bear on the case.

The Court of Appeal has echoed the comments of the Law Commission, finding that a representative jury should be the standard for New Zealand juries.<sup>49</sup>

Despite this recognition, the Law Commission and the courts are unwilling to go any further. In *Ellis*, Mr Ellis argued his right to a fair trial was compromised because the jury pool at the Wellington High Court did not include people from rural districts.<sup>50</sup> The Court of Appeal rejected this argument.<sup>51</sup> The Law Commission also concluded that the right to fair trial does not require the jury to be representative of the community.<sup>52</sup> Specifically, the Law Commission rejected any suggestion that there must be one or more persons of the same ethnic identity as the defendant or victim serving on the jury.<sup>53</sup> All that is required is that everyone who is eligible to serve on a jury has an equal opportunity to do so.<sup>54</sup> The Law Commission further noted that the demographic

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46 See, for example, *Smith v Texas* 311 US 128 (1940); *Durren v Missouri* 439 US 357 (1979); and notably the comments of the United States Supreme Court in *Taylor v Louisiana* 419 US 522 (1975) at 530; and *Lockhart v McCree* 476 US 162 (1986) at 183.

47 As recognised by Justice Marshall of the US Supreme Court in *Peters v Kiff* 407 US 493 (1972) at [503]; and Toni Massaro “Preemptories or Peers? Rethinking Sixth Amendment Doctrine, Images and Procedures” (1986) 64 NCL Rev 501 at 517.

48 Law Commission *Juries in Criminal Trials: Part One* (NZLC PP32, 1998) at [249].

49 *Ellis v R*, above n 34, at [19].

50 At [10].

51 At [15].

52 Law Commission, above n 5, at [135].

53 At [135].

54 At [135].

composition of a jury “could only be relevant if it can be shown to be causally connected to actual prejudice”.<sup>55</sup>

The Law Commission’s position does not account for systemic bias and the difficult reality of establishing actual prejudice. Establishing a causal connection between demographic composition and actual prejudice sets an extremely high standard for a defendant to prove. In reality, juries’ decisions and discussions are deliberately kept secret, and for good reason.<sup>56</sup> Essentially, a finding of actual prejudice would require a juror to make an open and blatant prejudicial statement. This is unlikely.

The Court of Appeal in *Ellis* adopted the same position as the Law Commission.<sup>57</sup> All that is legally required of the courts is that there is a randomly selected jury.<sup>58</sup> However, the Court of Appeal did note that the right to a fair trial may be compromised where a group in the community “[was] systematically excluded from jury service by reason of one of the established grounds of discrimination”.<sup>59</sup> The Court did not comment on how the legal test for this proposition might be formulated.

The approach in *Ellis* is also consistent with the earlier position taken by the High Court in *R v Bailey*.<sup>60</sup> *Bailey* concerned the infamous trial of the Urerewa 8. The defendants opposed the Crown’s application to have the trial moved to the Auckland Registry of the High Court from the Rotorua Registry of the High Court. The defendants argued that they would not be tried by a jury of their peers in Auckland. This is because there was a significant “cultural dimension” to the offending that would be better understood by a Rotorua jury, compromising their right to a fair trial.<sup>61</sup> Hansen J rejected this

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55 At [153].

56 For an explanation of the sanctity of jury deliberations, see Jennifer Tunna “Contempt of Court: divulging the confidences of the jury room” (2003) 9 *Canta LR* 79.

57 *Ellis v R*, above n 34, at [61].

58 At [61].

59 At [63]. This comment also alludes to issues of a juror’s right to not be removed from a jury on the basis of a ground of discrimination, such as ethnicity.

60 *R v Bailey* HC Auckland CRI-2008-004-20749, 24 November 2011.

61 At [37].

argument, concluding that the accused would still be tried by a jury of their peers in Auckland.<sup>62</sup>

This conclusion is surprising. The context of the *Ururewa* 8 involved complicated historical tensions and injustices between tangata whenua and the Crown. Had the defendants been tried by a jury of their peers, this may have ensured that the jury properly understood the important and complicated context of the alleged offending. Yet, Hansen J was quick to dismiss their argument with little explanation.<sup>63</sup>

Ultimately, the overwhelming position in New Zealand is that the principle of a jury of your peers does not impose a right to a jury that is ethnically or otherwise representative of the community. The courts' approach to the principle of a jury of your peers in both *Ellis* and *Bailey* illustrates the judiciary is hesitant even to acknowledge the issue of potential juror bias. This stubborn refusal to accept the presence of bias and prejudice in the courtroom operates on the assumption of impartiality, an assumption disconnected from reality. Regardless of one's position on jury representation, issues of bias within jurors must be adequately addressed to ensure defendants receive a fair trial.

### ***B Processes for Selecting the Jury — The Use of Challenges***

Issues of potential juror bias against Māori defendants also arise through the use of challenges in jury selection.

#### **1 The peremptory challenge**

A peremptory challenge is a challenge to a juror that does not require the challenging party to give any reason for their objection.<sup>64</sup> Section 24 of the Juries Act entitles each party to challenge four jurors without cause. The original purpose of peremptory

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62 At [42].

63 At [38].

64 Brown, above n 36, at 457.

challenges was to allow a party to alter the composition of the jury. This was to exclude jurors who appear obviously biased in favour of either party.<sup>65</sup>

In reality, the use of peremptory challenges functions in the opposite way, resulting in a jury that is far less representative of the community. Studies in the United States found peremptory challenges were used by parties to exclude minorities from a jury where the defendant was a member of the same minority group.<sup>66</sup> The United States Supreme Court has consequently declared the use of peremptory challenges in this fashion unconstitutional.<sup>67</sup>

Where the size of the minority group is small, the impact of peremptory challenges can be greater, potentially excluding minority jurors completely. As Stephen Dunstan suggests, “it would be easier to obtain a jury with no Māori than a jury with no women”.<sup>68</sup> Such dangers exist in the New Zealand context as well. *Trial by Peers* found that prosecutors were three times as likely to challenge Māori prospective jurors compared to non-Māori in the District Court.<sup>69</sup> In the District Court, close to every second Māori male was challenged.<sup>70</sup> This proportion only increased where the accused was also Māori.<sup>71</sup> Further studies addressing these issues have not been conducted since *Trial by Peers* was published in 1995. Therefore, the effect of peremptory challenges within today’s social and legal landscape cannot be quantified. However, it is clear peremptory challenges have been used to disproportionately exclude minorities from juries.<sup>72</sup>

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65 Dunstan, above n 1, at 231.

66 At 232. See, for example, B Gurney “The Case for Abolishing Peremptory Challenges in Criminal Trials” (1986) 21 Harv CR-CL Law Rev 227 at 232 which referred to a study in Chicago in 1984 that found that when the defendant was black, prosecutors challenged blacks at more than double the rate they challenged whites.

67 *Batson v Kentucky* 476 US 79 (1986).

68 Dunstan, above n 1, at 232 (macron added).

69 *Trial by Peers*, above n 22, at 66.

70 At 66.

71 At 66.

72 The abuse of peremptory challenges also raises issues with respect to jurors’ rights under the New Zealand Bill of Rights Act 1990 [NZBORA]. The main issue is whether or not a juror has a right not to be struck from the jury on the basis of their gender, ethnicity, occupation or age. However, this article will focus on the rights of the defendant rather than the rights of jurors.

There are few New Zealand cases that address the potential abuse of peremptory challenges. The courts have tended to be dismissive of arguments where peremptory challenges are brought into question. In the case of *R v Kohu*, “every prospective Māori or Polynesian juror” was challenged, leaving the defendant Mr Kohu to be tried by an all-European jury.<sup>73</sup> The Court of Appeal squarely rejected the argument that the use of peremptory challenges to ensure Mr Kohu faced an all-white jury compromised his right to a fair trial.<sup>74</sup> The Court declined the appeal, refusing to engage with the substantive merits of the argument as it was of the view that these issues were political and not questions for the Court.<sup>75</sup> Despite evidence in *Trial by Peers* revealing the use of peremptory challenges to reduce representation of minority jurors, little has been done to prevent this practice.<sup>76</sup> Until August 2021, no guidance was provided for the use of the challenges. In August 2021, the Solicitor-General issued guidelines on the use of challenges in which it was stated that peremptory challenges should not be used by prosecutors to discriminate against jurors or reduce jury representation.<sup>77</sup>

## 2 Challenge for cause

Under s 25 of the Juries Act, both defence and prosecution are entitled to any number of challenges for cause on two grounds, that either the juror is not impartial or they are not capable of acting as a juror because of a disability. At common law, the primary ground for a challenge for cause is *proper affectum*, presumed or actual partiality.<sup>78</sup> The purpose of the challenge for cause is to prevent people who may not be able to act impartially from sitting as jurors.<sup>79</sup> A juror must be challenged for cause by counsel in

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73 *R v Kohu* CA107/90, 2 August 1990 at 3 (macron added).

74 At 3.

75 At 4.

76 *Trial by Peers*, above n 22, at 66. Further, the Supreme Court in *R v Gordon-Smith (No 2) (on appeal from R v King)* [2009] NZSC 20, [2009] 2 NZLR 725 has determined the practice known as “jury vetting” by the Crown is legal. This further illustrates the Court’s unwillingness to accept that peremptory challenges are used in a manner that can be not only discriminatory but also reduces the representative nature of the jury.

77 Crown Law *Solicitor-General’s Guidelines for Jury Selection* (6 August 2021) at [1.28] and [3.13]. The efficacy of and adherence to such guidelines across the different prosecution warrants in New Zealand is unknown.

78 Brown, above n 36, at 457.

79 V Gordan Rose and James Ogloff “Challenge for Cause in Canadian Criminal Jury Trials: Legal and Psychological Perspectives” (2002) 46 CLQ 210 at 211–213.

their short walk from the gallery to the jury panel.<sup>80</sup> The trial judge must then determine whether the challenge is substantiated based on evidence the judge deems sufficient.<sup>81</sup>

However, *Trial by Peers* found that no challenges for cause have been recorded in New Zealand, and are, therefore, effectively obsolete.<sup>82</sup> Challenge for cause is seen as redundant because there is little information available to counsel about the prospective jurors that would provide sufficient grounds to make a substantive challenge.<sup>83</sup> However, if the jury selection process were modified, this tool could provide a basis for challenges to ensure a more partial and representative jury. Challenges for cause have been used in other jurisdictions to question prospective jurors on their biases. These approaches are discussed at Part IV.

### 3 Questioning jurors as part of the challenge for cause

Voir dire, a procedure for questioning prospective jurors for jury selection, has been built into the challenge for cause in the United Kingdom legal system since the 17th century.<sup>84</sup> The United Kingdom voir dire involves questioning prospective jurors' views on the parties in the proceeding. New Zealand previously had a voir dire procedure legislatively built into the challenge for cause process.<sup>85</sup> However, there is no evidence that this procedure was ever used.<sup>86</sup> Consequently, the process was removed and the section repealed.<sup>87</sup> The current legislation does not specifically allow for a process by which jurors can be questioned about their prejudices before they are challenged for

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80 Juries Act 1981, s 26.

81 Section 25(3).

82 *Trial by Peers*, above n 22, at 70. See Emma Langlands "Media Prejudice and Jury Challenge" (2010) 2 NZLSJ 377 at 377–378, referring to the comments of the Court of Appeal in *R v Greening* [1957] NZLR 906 (CA).

83 Counsel are only given a prospective jurors name, date of birth, occupation, address and potentially some information regarding their previous criminal history; see Langlands, above n 82, at 379. The prosecution only needs to pass on information of a prospective juror's criminal history to the defence counsel 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"; see *R v Gordan-Smith (No 2)*, above n 76, at [22].

84 Brown, above n 36, at 461.

85 Crimes Act 1908, s 421 (now repealed).

86 *R v Greening*, above n 82. The Court of Appeal found that there was no reported case in New Zealand where a challenge for cause followed the process set out in s 421 of the Crimes Act 1908.

87 Crimes Act 1961, s 412(2).

cause. This is certainly not common practice in New Zealand. However, the legislation does not forbid such a process. Further, as analysed at Part IV, the common law position may in future allow for such questioning to occur.

#### 4 The current test for questioning jurors in New Zealand — *R v Sanders*

The Court of Appeal in *R v Sanders* addressed the ability of counsel to question jurors' prejudices.<sup>88</sup> The Court held that challenges for cause and cross-examination of potential jurors can only occur where judges use their discretion in "wholly exceptional cases".<sup>89</sup> This sets an impossibly high bar for such challenges. The Court found that adopting a form of voir dire procedure into the challenge for cause would be costly, intrusive, inconclusive and would result in little gain to anyone involved.<sup>90</sup> The Court of Appeal in *Sanders* agreed with the earlier decision of *R v Greening* that the voir dire procedure is "an imperfect instrument to secure a fair trial".<sup>91</sup>

The Court of Appeal's decision in *Sanders* did not entirely reject the ability of counsel to question jurors. However, the high threshold set by the Court of Appeal has resulted in no subsequent cases where jurors have been questioned or cross-examined. Therefore, whilst *Sanders* does not in theory rule out voir dire type procedures, it acts as a barrier to this occurring. The decision once again reinforces the general principle that the New Zealand legal system is hesitant to adopt intrusive measures of determining or dealing with potential juror bias.<sup>92</sup>

#### 5 A revisiting of the issue of juror bias and voir dire — *Borell v R*

The recent decision of *Borell* was a rare chance for the Supreme Court to address issues of potential juror bias against Māori.<sup>93</sup> Unfortunately, it declined leave to appeal the Court of Appeal decision and thereby did not substantively engage with the issue. The Supreme Court's approach — or lack thereof — mirrors previous jurisprudence on

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88 *R v Sanders* [1995] 3 NZLR 545 (CA).

89 At 548–550.

90 At 548–550.

91 *R v Greening*, above n 82, at 914.

92 *R v Sanders* [1995] 3 NZLR 545 (CA) at 550 as cited in *R v Gordon-Smith (No 2)*, above n 76, at [84].

93 *Borell v R*, above n 7.



the issue upholding the traditional assumption of juror impartiality. Given the Supreme Court declined leave from the Court of Appeal decision, much of the following analysis centres on that Court of Appeal decision.

Ms Borell appealed her murder conviction from the High Court on two grounds. First, that her trial was unfair as procedures were not in place to protect her from the prejudicial effects of racial bias on the jury.<sup>94</sup> Essentially, Ms Borell argued she did not receive a fair trial because: first, she is Māori; second, systemic prejudice exists against Māori in the CJS; and third, no measures were put in place to counteract the risk of prejudice.<sup>95</sup> Ms Borell proposed her right to be free from discrimination on the ground of ethnicity and her right to a fair trial before an impartial jury were breached as a result.<sup>96</sup>

At the Court of Appeal, Ms Borell relied on the principle in the Canadian decision of *R v Williams*.<sup>97</sup> *Williams* acknowledges widespread racism in Canada against Indigenous peoples and allows the questioning of jurors to reduce prejudice on the jury.<sup>98</sup> Counsel for Ms Borell argued the approach in *Williams* should be adopted in Aotearoa.<sup>99</sup>

The Court of Appeal rejected this argument and declined Ms Borell's appeal for three reasons.<sup>100</sup> First, it would be going too far to conclude that the absence of procedures to counteract prejudice against Ms Borell resulted in a miscarriage of justice.<sup>101</sup> The Court noted that in *Williams* the question was not whether there was a miscarriage of justice, but whether the trial judge should have allowed challenges for cause to occur.<sup>102</sup> Essentially, the Court concluded the issue should have been raised earlier. The Court of Appeal agreed with the Canadian decision of *R v Rollocks* that the

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94 *Borell v R* [2020] NZCA 235, [2020] 2 NZLR 757 [*Borell v R* (CA)] at [3].

95 *Borell v R*, above n 7, at [4].

96 At [4], referring to the rights codified in ss 19 and 25 of the NZBORA.

97 *R v Williams* [1998] 1 SCR 1128 at [11] as cited in *Borell v R* (CA), above n 94, at [38].

98 *Borell v R* (CA), above n 94, at [38].

99 At [38].

100 At [49].

101 At [50].

102 At [50].

defendant must use their right to challenge the composition of the jury at the appropriate time.<sup>103</sup>

Yet, the Court of Appeal admitted that considering the bar set in *Sanders* it was “not surprising” her counsel at trial failed to raise the issue earlier.<sup>104</sup> The Court in making this admission acknowledged that given the New Zealand jury process it would have been difficult to raise this issue, but still proceeded to decline the appeal on the basis that it should have been. Whilst it may be correct that the issue should have been raised at trial, the Court of Appeal’s approach adds to the current stalemate in the law on this area. Instead, the Court could have provided guidance on how the issue should have been raised or provided a critique of the high bar set in *Sanders*.

The second reason for declining the appeal was that in their view there was insufficient evidence to conclude there had been an unfair trial.<sup>105</sup> The Court noted that there was no specific evidence provided to the Court regarding racial bias in the community the jury pool was drawn from.<sup>106</sup> Further, the Court held that to allow the appeal based on the current evidence “would be to make an assumption about the potential state of mind of one or more members of this jury which might be completely unjustified”.<sup>107</sup>

With respect, this analysis is flawed. The Court in *Williams* (outlined at Part IV) takes judicial notice of systemic racism present in the community. The Court directs its assumption away from an individual juror’s state of mind but assumes that biases within the community at large will not be abandoned at the courtroom door. In contrast, the New Zealand Court of Appeal claims that making assumptions about a juror’s state of mind might be “completely unjustified”.<sup>108</sup> This position ignores the

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103 *R v Rollocks* (1994) 19 OR (3d) 448 (ONCA) as cited in *Borell v R* (CA), above n 94, at [51].

104 *Borell v R* (CA), above n 94, at [52].

105 At [53].

106 At [53].

107 At [53].

108 At [53].

compelling argument in *Williams* that bias and prejudice become apparent when viewed as a wider pattern of behaviour and can be assumed when accepting juries as a cross section of society.

The Court of Appeal's third reason for declining the appeal was that allowing the argument to succeed would constitute a fundamental change to criminal trial practices in New Zealand and therefore requires careful consideration.<sup>109</sup> The Court did suggest the comments in *Sanders* should potentially be revisited, "particularly in a case where the issue of racial prejudice might be thought to arise".<sup>110</sup> Unfortunately, the Court of Appeal declined to elaborate on this point. The Court is correct to suggest the appeal would create significant changes to the jury selection process. Essentially, it would see the New Zealand courts approach shift closer to that of Canada and the United States (as discussed at Part IV).

The Supreme Court declined Ms Borell's application for leave to appeal the Court of Appeal judgment. The Court was of the view that the issue of trial unfairness due to racial prejudice was not squarely raised by the proposed appeal.<sup>111</sup>

*Borell* makes clear that the issue of juror bias against Māori and the lack of procedures to ensure Māori have a fair trial is not new. In *Borell*, the Court of Appeal and the Supreme Court acknowledged that racial bias by jurors against Māori defendants is a "very large subject"<sup>112</sup> and a "question of general or public importance".<sup>113</sup> Despite these acknowledgments, the Supreme Court concluded that this was not the time to address the issue.<sup>114</sup> The Supreme Court in *Borell* failed to meaningfully engage with the issue, and as a result provided no pathway forward. The Court also forwent the opportunity to critique the judgement in *Sanders* and declined to offer guidance on

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109 At [55].

110 At [56].

111 *Borell v R*, above n 7, at [10].

112 *Borell v R* (CA), above n 94, at [49].

113 *Borell v R*, above n 7, at [10].

114 At [10].

situations that would give rise to racial prejudice by jurors. This leaves little room for future appeals on the same issue. Although, the Court's comment regarding the possibility of changing the *Sanders* standard may present an avenue for future appeals.

#### ***IV Avenues for Reform***

Changes to the jury selection process are necessary to protect Māori defendants' fair trial rights and to ensure trust in the CJS.

Reform avenues range from replacing the current jury system to placing further guidelines on existing jury processes. The article analyses these options through a cross-jurisdictional lens encompassing Canada, the United States and the United Kingdom.

##### ***A The Legal Basis for Reform***

Before discussing avenues for reform, the article determines the legal basis on which reform to the jury system is possible.

###### **1 Discretion within the bounds of the existing legal framework**

Whilst the current jury system does not expressly set out processes such as voir dire, or require a representative jury, it also does not exclude such possibilities. If the courts were willing, many reforms could be adopted without changes to the existing legislation. Despite *Sanders* and *Borell* not excluding the possibility of questioning jurors, in practice their application restricts voir dire type procedures to mere theory. Therefore, the legal basis for adopting voir dire type procedures would be borne out of the right to a fair trial and the common law principles of being tried by an impartial jury.

Similarly, the Juries Act does not expressly rule out the possibility of requiring particular representation on the jury. Arguably, the recognised principle of a jury of your peers requires an ethnically representative jury. However, the courts have maintained that

there is no right to an ethnically (or otherwise) representative jury.<sup>115</sup> It seems unlikely the courts will depart from their view and give effect to the principle of a jury of your peers in this way.

## 2 An approach for the courts or for Parliament?

In *Ellis v R*, while discussing potential changes to geographical jury districts, the Court of Appeal noted that large changes to the current jury system are essentially law reform issues “upon which it is not appropriate for us to comment”.<sup>116</sup> This reluctance is in part driven by a belief that Parliament should instigate such changes. The Court of Appeal in *Kohu* echoed this approach.<sup>117</sup>

The Supreme Court in *Borell* noted that whether New Zealand should adopt the Canadian voir dire procedure is a “question of general or public importance”.<sup>118</sup> The appeal in *Borell* was based on Ms Borell’s right to a fair and impartial jury under s 25(a) of the NZBORA and that the failure to question jurors resulted in a miscarriage of justice under s 232(4)(b) of the Criminal Procedure Act.<sup>119</sup> The legal basis for Ms Borell’s argument under s 25(a) of the NZBORA and under general common law principles of a fair trial was not rejected by the Supreme Court. Likewise, the Court did not defer the issue to Parliament but rather to another more appropriate case. This indicates that if there was another appeal with more substantial evidence, brought prior to trial, the Court may be willing to make changes to the current jury system.

## 3 A residual power of fairness?

The Law Commission has suggested the court has an inherent power to govern its own jury selection processes “to ensure overall fairness”.<sup>120</sup> The Commission proposed that the court may exercise its inherent power of fairness to supplement a statutory rule where it is in the interests of justice and consistent with the purpose of the

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115 See generally *R v Cornelius*, above n 38.

116 *Ellis v R*, above n 34, at [67].

117 *Kohu v R*, above n 74, at 4.

118 *Borell v R*, above n 7, at [10].

119 *Borell v R* (CA), above n 94, at [3].

120 Law Commission, above n 5, at [254].

statutory rule.<sup>121</sup> The Court of Appeal in *R v Turner* described this as an “inherent jurisdiction of the Court to govern its own processes to ensure the fairness of a trial”.<sup>122</sup> In *Turner*, the Court exercised their inherent jurisdiction to select another foreman of the jury where the existing foreman was found not to be independent.<sup>123</sup>

The Court’s comments in *Turner* were in the context of statutory powers to discharge jurors under s 21 of the Juries Act. However, this residual power could be extended to apply to a general inherent power of the court to ensure that juries are fair and impartial. The power could form part of the ability of a judge to discharge a juror on the basis that there is a considerable gender or ethnic imbalance which may prejudice the defendant. The New Zealand courts have not squarely addressed this issue. Although, there is some authority for such residual discretion in the United Kingdom, enabling judges to alter the ethnic composition of the jury.<sup>124</sup> The possibility of a recognised residual power to ensure overall fairness could be a legal basis on which reforms are proposed.

#### 4 The principles of “the Treaty”<sup>125</sup>

While the Treaty of Waitangi 1840 is not specifically referred to in the Juries Act, Renée Bayer argues that under-representation of Māori on juries and implicit bias against Māori by jurors engages art 3 of the Treaty of Waitangi.<sup>126</sup> Article 3 requires the Crown to ensure that Māori have the same rights and privileges as all other New Zealanders. This includes the principle of the guarantee of equal treatment under the law.<sup>127</sup> From art 3 stems a principle requiring the Crown to actively protect

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121 At [254].

122 *R v Ryder* HC Christchurch BC199462305, 26 September 1994; and *R v Moke and Lawrence* [1996] 1 NZLR 263 (CA) at 266–269 as cited in *R v Turner* CA439/95, 25 July 1996 at 2.

123 *R v Turner*, above n 122, at 3.

124 See above at 53–56.

125 The term “the Treaty” refers to the principles determined under the Treaty of Waitangi 1840 by the Waitangi Tribunal and as accepted and referred to by the courts. However, reference to the “Treaty” does not suggest that the Treaty of Waitangi is the only governing document. The author considers te Tiriti o Waitangi 1840 to be the true founding document of Aotearoa.

126 Renée Bayer “Rethinking Representation: the case for Māori juries in Contemporary New Zealand” (LLB (Hons) Dissertation, University of Auckland, 2016).

127 Waitangi Tribunal *Report on the Crown’s Foreshore and Seabed Policy* (Wai 1071, 2004).

Māori rights under the Treaty.<sup>128</sup> Bayer argues that the Treaty principles of partnership and active protection require the courts to guarantee Māori defendants' rights to a fair and impartial jury.<sup>129</sup>

The courts have previously been unwilling to accept that the principles of the Treaty create a legal obligation to alter the jury system. In *R v Pairama*, Mr Pairama argued that the Treaty principle of partnership requires a defendant to be heard before a jury of six Māori and six non-Māori.<sup>130</sup> Penlington J refused to engage with the merits of the claim, stating there was no authority for the Court to order a jury with a particular ethnic composition.<sup>131</sup>

However, in the 25 years since *Pairama*, the role of the Treaty and its legal standing has advanced significantly.<sup>132</sup> For example, it has been recognised that all statutes impacting Māori should be “coloured” and interpreted in light of the Treaty.<sup>133</sup> Consequently, the weight given to these types of arguments in courts has increased significantly.<sup>134</sup> Therefore, art 3 of the Treaty and the Treaty principles may provide another legal basis for reforms to the jury system.<sup>135</sup>

### ***B The First Step to Change — Moving Beyond the Presumption of Jury Impartiality***

To address the risk of juror bias, the starting point is for courts to reject the presumption that all jurors are inherently impartial. The presumption of juror

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128 *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 (PC).

129 Bayer, above n 126, at 41.

130 *R v Pairama* (1995) 13 CRNZ 496 (HC) at 503.

131 At 503.

132 Whilst the articles of the Treaty are not in and of themselves legally binding, there has been growing recognition of the Treaty and its principles in the New Zealand legal system. Modern changes in the law has reinforced the applicability and standing of the Treaty: Sam McMullan “Māori Self-Determination and the Pākehā Criminal Justice Process: The Missing Link” (2011) 10 *Indigenous Law Journal* 73 at 78. It is now widely accepted that the Treaty has legal standing.

133 *Barton-Prescott v Director General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; as discussed further in Jack Oliver-Hood “Our Significantly Indigenous Administrative Law: the Treaty of Waitangi and Judicial Review” (2013) 19 *Auckland U L Rev* 53 at 65.

134 See *R v Pairama*, above n 130.

135 I acknowledge that far more substantive analysis would be needed to advance such an argument, analysis that could form the basis of an entire paper.

competence and impartiality is inherent in the “deeply rooted tradition of juries”.<sup>136</sup> As discussed, the courts and Law Commission are reluctant to depart from this presumption. Those involved in the CJS, from lawyers to judges, have been led to believe and trust the jury system, to the point where any interference with it is met with skepticism.<sup>137</sup> The presumption of jury impartiality obscures the reality of the jury system and overestimates jurors’ ability to see beyond their biases.

In the landmark decision of *R v Sarrazin*, the Canadian Supreme Court accepted the proposition that unconscious, cognitive and motivational biases may affect the reasoning of a jury in a way that is inconsistent with the presumption of jury competence.<sup>138</sup> The New Zealand judiciary should follow suit.

## 1 A psychological perspective on juror partiality

Psychological literature contradicts the presumption of juror competence and impartiality.<sup>139</sup> Psychological research provides clear evidence that jurors retain their biases and prejudices upon entering the courtroom.<sup>140</sup> It suggests “law’s optimism, about jurors is misplaced”.<sup>141</sup>

Further, psychologists argue that individuals are so unaware of their own biases and prejudices it becomes almost impossible to act in an impartial manner.<sup>142</sup> This is due to implicit biases — less than fully conscious attitudes or stereotypes about a particular group of people.<sup>143</sup> Implicit biases impact a juror’s interpretation of evidence, evaluation and witness testimony, and ultimately impact their decisions of judgments of guilt. Implicit stereotypes affect a juror’s ability to imagine an individual

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136 Michelle Bertrand and others “‘We have centuries of work undone by a few bone-heads’: A Review of Jury History, a Present Snapshot of Crown and Defence Counsel Perspectives on Bill C-75’s Elimination of Peremptory Challenges, and Representativeness Issues” 43(1) MLJ 111 at 122.

137 At 122.

138 *R v Sarrazin* 2011 SCC 54, [2011] 3 SCR 505. This view is also shared by various psychologists and criminologists.

139 Rose and Ogloff, above n 79, at 235 and 237.

140 At 229 and 237–238.

141 At 235.

142 At 235 and 238.

143 Jennifer K Elek and Paula Hannaford-Agor “Implicit Bias and the American Juror” (2015) 51 Court Review: The Journal of the American Judges Association 116 at 116.



engaging or not engaging in particular behaviours.<sup>144</sup> Further, even where evidence suggests particular events have occurred, implicit biases and stereotypes influence how jurors perceive the cause and meaning of that incident.<sup>145</sup>

A study of Aotearoa's print media found a significant and consistent association between Māori and crime.<sup>146</sup> These associations in the media led people to frequently assume Māori are possible or actual perpetrators of crime.<sup>147</sup> Tim McCreanor and others argue that this practice embeds a perception of Māori against a background of crime.<sup>148</sup> This evidence suggests jurors may well be unable to act impartially from a psychological perspective when considering pervasive cognitive explicit and implicit biases held about Māori in New Zealand.

## 2 The effect of rejecting the presumption of juror impartiality

Acknowledging that implicit biases bleed into jury decision-making rejects the presumption of juror competence and questions the principles our jury system is built upon. Without an impartial jury, there may be a need to question jurors on their biases or have representation requirements. Additionally, undermining the presumption of juror competence may impact the laws of evidence and criminal procedure.<sup>149</sup> For example, it questions whether jury directions from the judge can ameliorate the risk of unfair prejudice in an evidential sense.

Freeman argues that rejecting the presumption of jury impartiality will not be compatible with the existing workings of the justice system. However, this rationale for maintaining the status quo should not be allowed to act as a barrier to necessary change.<sup>150</sup> When courts openly acknowledge jurors' inherent human flaws and

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144 At 86.

145 For example, implicit biases can have a considerable impact on claims of self-defence as it relies on the juror's interpretations of the defendant's subjective understanding of what occurred: see Roberts, above n 18, at 86.

146 Tim McCreanor and others "The Association of Crime Stories and Māori in Aotearoa New Zealand Print Media" (2014) 11(1) Sites 121.

147 At 129 and 135.

148 At 121.

149 Freeman, above n 36, at 24.

150 At 24.

prejudices, steps can be taken to prevent miscarriages of justice and ensure all defendants have a right to a fair trial.<sup>151</sup> Despite the difficulties rejecting this presumption presents, Aotearoa's courts must accept that jurors are not inherently impartial and acknowledge how widespread bias against Māori impacts juries.

### ***C Should Aotearoa Adopt the Canadian Voir Dire Approach?***

Once the Courts are willing to shift away from the presumption of juror impartiality, ways to counteract potential biases can be addressed. The Supreme Court in *Borell* alluded to the possibility of applying the Canadian voir dire approach in relation to challenge for cause in New Zealand.<sup>152</sup>

#### **1 The Canadian approach to challenge for cause**

In Canada, challenge for cause is primarily used to address concerns of potential racism or ethnic prejudice of prospective jurors.<sup>153</sup> The courts accept that the traditional safeguards of random juror selection and presuming juror competence may be inadequate.<sup>154</sup> In Canada, black and Indigenous defendants are generally automatically entitled to use the challenge for cause to examine racial biases of prospective jurors.<sup>155</sup> The Ontario district has extended this principle to defendants of any visible minority.<sup>156</sup> Whilst there must be some evidence of racism in the community, the court has been careful not to create an onerous standard for defendants. The Canadian Supreme Court has noted that “the better policy is to err on the side of caution and permit prejudices to be examined”.<sup>157</sup>

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151 At 24.

152 *Borell v R*, above n 7, at [10].

153 Rose and Ogloff, above n 79, at [2.2].

154 At [2.2].

155 At [2.2], referring to a significant body of Canadian jurisprudence which has allowed such challenges. See, for example, *R v Parks* (1993) 815 OR (2d) 324 (CA); *R v Glasgow* (1996) 110 CCC (3d) 57 (CA); *R v Wilson* (1996) 29 OR (3d) 97 (CA); *R v Jenson* [2000] OJ 4871 (QL) (Ont SCJ) where the Crown conceded the basis for the challenge; and *R v Williams*, above n 97.

156 See *R v Koh* (1998) 21 CR (5th) 188 (CA).

157 *R v Williams*, above n 97, at [22].

The Canadian test in *Williams* for allowing a prospective juror to be challenged is whether there is a realistic possibility that the juror is not impartial between the parties.<sup>158</sup> To meet the test the Canadian Supreme Court in *Find* required: first, evidence of widespread bias in the community; and second, the acceptance that some jurors may be unable to set aside these biases despite the traditional safeguards in place.<sup>159</sup> The first limb of the test requires evidence of widespread bias in the specific community from which the jury pool is selected.<sup>160</sup> Provided this evidence exists, the court must be confident that some jurors may be unable to set aside these biases. The Canadian Supreme Court in *Williams* noted that it is possible to infer from evidence of widespread racism in the community that some jurors may at least be influenced by such prejudices.<sup>161</sup> The Court also acknowledged that requiring the defendant to present clear evidence that jurors in fact will be impartial is an impossible and impracticable task.<sup>162</sup> Therefore, allowing the questioning of prospective jurors on challenges for cause is required to determine jurors' biases and partiality.<sup>163</sup>

The Canadian Supreme Court in *Find* held the second limb of the test can be proven by: the judge taking judicial notice, through evidence produced by the defendant or "by reasonable inference as to how bias might influence the decision-making process".<sup>164</sup> In Ontario, the Supreme Court has taken judicial notice of anti-Indigenous prejudice, specifically in relation to stereotypes in the CJS.<sup>165</sup>

## 2 Benefits of the Canadian approach

The approach in *Williams* and *Find* illustrates the Canadian judiciary's appreciation of how societal and systemic biases impact a defendant's right to a fair trial. Judicial notice of prejudice against Indigenous defendants' serves an important symbolic function.

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158 Rose and Ogloff, above n 79, at [3.0]; and *R v Williams*, above n 97.

159 *R v Find* [2001] 1 SCR 863 at [32].

160 At [36].

161 *R v Williams*, above n 97, at [35]–[37].

162 At [35]–[37].

163 At [35]–[37].

164 *R v Find*, above n 159, at [46]–[47]. Judicial notice can be taken of a fact in New Zealand pursuant to s 128 of the Evidence Act 2006.

165 *R v Rogers* (2000) 38 CR (5th) 331 (OntSC).

It demonstrates awareness of prejudice and attempts to counteract the alienation and oppression Indigenous people face in the CJS. There are clear benefits of having a voir dire procedure. In addition to eliminating potential bias, inclusion of the procedure acknowledges systemic bias that may prevent a defendant from receiving a fair trial.

### 3 Criticism of the Canadian approach

There has been significant criticism of the efficacy of questioning jurors in eliminating juror bias. The Canadian approach requires jurors to demonstrate an awareness of their own prejudices and a willingness to acknowledge those prejudices to others.<sup>166</sup> Research in the United States and Canada indicates that limited questioning of jurors by judges and lawyers does not readily identify whether prospective jurors are biased.<sup>167</sup> This is for two reasons: first, jurors are often reluctant to admit any biases; and second, people are often unaware of their own biases.<sup>168</sup> Rose and Ogloff argue that for the Canadian voir dire system to be effective it must include questioning that is fairly detailed and tailored to the present case.<sup>169</sup> Questioning must be nuanced, going beyond simply asking a juror whether they feel they can be impartial.<sup>170</sup> Psychologists and social scientists should be recruited to develop questioning methods and specific questions that can effectively identify prejudicial biases.<sup>171</sup>

Yet, even with such detailed questioning some suggest that a voir dire type process will never truly eliminate issues of implicit bias.<sup>172</sup> The most common tool for investigating implicit bias is the Implicit Association Test (IAT).<sup>173</sup> The IAT uses reaction times to assess the level of a person's automatic association between particular categories.<sup>174</sup> IATs have been developed in the United States to target the presence of specific biases

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166 Anthony and Longman, above n 2, at 34.

167 Rose and Ogloff, above n 79, at [4.0].

168 Richard E Nisbett and Timothy DeCamp Wilson "Telling More Than We Can Know: Verbal Reports on Mental Processes" (1977) 84 *Psychological Review* 231 at 239.

169 Rose and Ogloff, above n 79, at [4.0].

170 At [4.0].

171 At [5.2].

172 Roberts, above n 18, at 85–86.

173 At 86.

174 At 86.

in relation to racial groups, religious groups, and gender associations.<sup>175</sup> Data from IAT research found that ethnic minorities are typically the subject of negative bias from the dominant group in society.<sup>176</sup> Anton Blank, Carla Houkamau and Hautahi Kingi argue this research indicates Māori are particularly vulnerable to bias and negative out-group attitudes by non-Māori.<sup>177</sup>

#### 4 Practical issues

This research indicates jurors may need to take an implicit bias test to determine implicit biases. To introduce this tool as a component of jury questioning would require significant time and resources to implement. Moreover, research suggests we all have our own implicit biases<sup>178</sup> — it is likely impossible to find a jury truly absent of bias.

Introducing IAT testing of jurors is a step further than the voir dire procedure used in Canada. Even without IAT testing, adopting any form of voir dire questioning procedure presents a fundamental change to trial practices in New Zealand.

Once again, the practical difficulties to introducing new procedures should not be viewed as absolute barriers, when the reward is securing all defendants a fair trial. However, the realistic benefits for adopting the procedure must be weighed against the practical difficulties of implementation.

#### 5 The floodgates argument — how far will the principle extend?

Now, the floodgates. When adopting the Canadian approach, the courts must explore how far this practice should extend. There are countless ways counsel could argue jurors are potentially biased against their client. This issue troubled Canadian legal professionals following the decision in *Williams*.<sup>179</sup>

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175 At 86.

176 Anton Blank, Carla Houkamau and Hautahi Kingi *Unconscious Bias and Education: A comparative study of Māori and African American students* (Oranui, Auckland, 2016) at 13.

177 At 13.

178 Roberts, above n 18, at 87.

179 Steve Coughlan “*R v Find: Preserving the Presumption of Innocence*” (2001) 42 CR-ART 31 at 31.

The courts acknowledged the principle in *Williams* could be extended to enduring characteristics beyond ethnicity.<sup>180</sup> However, the Canadian Supreme Court in *Find* made it clear that the principle in *Williams* cannot be extended to stereotypes around the nature of the offence.<sup>181</sup> For example, jurors could not be challenged on their biases relating to sexual offenders. This is bias about the nature of the offence rather than the inherent characteristics of the defendant.

Further, the Canadian Supreme Court clarified that the principle in *Williams* would not allow Canada to go so far as the United States approach of cross-examining jurors on several different bases.<sup>182</sup> This would involve significant resources and slow down the courts in any already overwhelmed judicial system.

If Aotearoa were to adopt the Canadian approach, further jurisprudence would be required to test the boundaries of this principle. A distinction must be drawn between alleged bias due to widespread prejudice about an enduring quality personal to the defendant, and widespread prejudice surrounding the nature of an offence.

#### ***D Reforming the Use of Peremptory Challenges***

Given the finding in *Trial by Peers* that peremptory challenges were used to exclude Māori from juries, consideration should also be given to reforming the use of the peremptory challenge. Following *Trial by Peers*, the Solicitor-General issued a direction to Crown Solicitors around the country urging them to take any necessary steps to ensure Māori jurors are not disproportionately challenged.<sup>183</sup> To determine whether this made an impact in practice, the Law Commission merely contacted Crown solicitors “to seek their views”.<sup>184</sup> Perhaps unsurprisingly the solicitors noted that “they challenge only for good reason”.<sup>185</sup> Consequently, little is known about the current practices of peremptory challenges.

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180 *R v Williams*, above n 97, at [10].

181 Coughlan, above n 179, at 32.

182 At 32.

183 Law Commission, above n 5, at [215].

184 At [215].

185 At [215].

## 1 Abolishing the peremptory challenge

Concern about the abuse of the peremptory challenge has led the United Kingdom and Canada to abolish peremptory challenges.<sup>186</sup> In Canada, the removal of peremptory challenges occurred because of the controversial decision in *R v Stanley*, where all jurors who appeared to be Indigenous were removed from the jury.<sup>187</sup> Abolishing the peremptory challenge was supported by many Indigenous groups such as the Manitoba Aboriginal Justice Inquiry.<sup>188</sup>

However, the removal of the peremptory challenge has received mixed reception. Vennard and Riley argue that in the absence of a voir dire system similar to that in the United States, the peremptory challenge is the only means of removing jurors whose impartiality is in question.<sup>189</sup> Additionally, the Canadian Supreme Court has noted that peremptory challenges can actually serve to uphold the ideals of an impartial and representative jury if not exploited.<sup>190</sup> Many Canadian lawyers argue that despite the finding in *R v Stanley*, the challenge was primarily used to ensure that minority groups were represented on the jury rather than excluding minorities.<sup>191</sup>

To counteract these concerns, the Canadian justification for the removal of the peremptory is that it must occur in conjunction with a greater use of the challenge for cause.<sup>192</sup> This means that counsel retain a mechanism to alter the composition of the jury.

The Law Commission argued for retaining the peremptory challenge. It proposed that peremptory challenges allows the defence to eliminate jurors they perceived to be prejudiced against the defendant in a timely and cost-effective manner.<sup>193</sup> Further,

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186 Dunstan, above n 1, at 232. Peremptory challenges were abolished in the United Kingdom in 1988 under the Criminal Justice Act 1988 (UK). In Canada, the peremptory challenge was abolished in 2019 under Bill C-75. See Bertrand and others, above n 136.

187 Bertrand and others, above n 136, at 112, referring to the decision of *R v Stanley* (2018) SKQB 27.

188 Jochelson and others, above n 28, at 371.

189 *Trial by Peers*, above n 22, at 732.

190 Bertrand and others, above n 136, at 130.

191 At 133.

192 Law Commission, above n 5, at [225].

193 At [229].

the Commission disagreed that the use of peremptory challenges added to under-representation of Māori on juries.<sup>194</sup> Instead, the Commission claimed the peremptory is beneficial in that “[i]t allows either side to eliminate obvious misfits.”<sup>195</sup>

What the Law Commission intended from these comments is unclear. However, with respect, its support of peremptory challenges is misconceived. Whether the use of peremptory challenges is to exclude Māori explicitly or is because Māori men have a higher rate of previous convictions is moot. The reality is that Māori were disproportionately challenged. This obviously impacts the representative nature of juries in Aotearoa.

There is merit to the argument that there must be some mechanism to alter the composition of the jury. Without having a working system for challenges for cause, or the ability to determine some kind of ethnic representation on a jury, abolishing peremptory challenges would leave counsel with no ability to alter the jury composition.<sup>196</sup> Counsel would be unable to rectify situations where random selection leads to an overtly and significantly unrepresentative jury. If peremptory challenges were to be removed this should not be an isolated action. Abolishing the peremptory challenge would only be effective if it was also in conjunction with creating some form of voir dire procedure or having alternative mechanisms for ensuring representation on juries.

## 2 Guidelines on the use of the peremptory challenge

An alternative to removing peremptory challenges is providing guidelines on their use. As of August 2021, the Solicitor-General issued guidelines on the use of challenges and the practice of jury vetting by prosecutors.<sup>197</sup> The guidelines note that challenges “must never be used” on the basis of factors such as ethnicity, age and gender. Yet,

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194 At [228].

195 At [229].

196 Bertrand and others, above n 136, at 148.

197 Crown Law, above n 77, at 3.13.



the guidelines provide no practical solution as to how this can be monitored or enforced. Further, they apply only to Crown prosecutors.

The United States has barred the use of peremptory challenges to exclude jurors of an ethnic minority.<sup>198</sup> The Supreme Court in *Batson v Kentucky* determined that using peremptory challenges to ensure a certain ethnicity is excluded from the jury violates the United States Constitution.<sup>199</sup> The principle in *Batson* is centred not on the rights of the defendant but on the rights of a prospective juror not to be challenged on the basis of their race or ethnicity. The rule in *Batson* requires prosecutors who wish to challenge a non-white juror to demonstrate their reasoning based on non-racial reasons.<sup>200</sup> Unfortunately, the principle in *Batson* “is widely understood as failing to bring an end to discriminatory peremptory challenges”.<sup>201</sup> This is because prosecutors easily articulate a “race-neutral” reason for the challenge which has been readily accepted by the courts.<sup>202</sup> For example, a prosecutor may say they are removing a potential black juror because they have a minor criminal record. Consequently, there have been very few successful *Batson* cases. Given the *Batson* approach is widely accepted as ineffective, adopting such an approach in Aotearoa would be futile.

Yet, there are other ways in which guidelines or restrictions can be placed on the use of peremptory challenges. In Canada, the Manitoban Aboriginal Justice Inquiry recommended that where a member of an ethnic minority is challenged or exempted from service they must be replaced by a person who is of the same minority group.<sup>203</sup> This means that a prosecutor or defence counsel does not have to justify why they removed that particular person but merely has to ensure that their challenge does not

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198 See, for example, *United States of America v Carter* 528 F 2d 844 (8th Cir 1975) at 848; *United States of America v McDaniels* 379 F Supp 1243 (ED Lou 1974); and *McKinney v Walker* 394 F Supp 1015 (SC 1974).

199 *Batson v Kentucky*, above n 67; and United States Constitution, amend XIV, § 1.

200 Annie Sloan “What to do about *Batson*?”: Using a Court Rule to Address Implicit Bias in Jury Selection” (2020) 108 CLR 233 at 235.

201 At 235.

202 At 235.

203 Jochelson and others, above n 28, at 371 referring to ch 9 of the Aboriginal Justice Implementation Commission *Report of the Aboriginal Justice Inquiry of Manitoba* (1991).

overtly impact the representation of a minority group on the jury. This may be a more beneficial alternative to the United States' approach in *Batson*.

Overall, given the Law Commission was strongly opposed to the removal of the peremptory challenge, a more pragmatic and practical option would be to provide guidelines or limitations on their use. This could come as a set of guidelines from the court as to how peremptory challenges are to be used. There would also need to be a mechanism to manage and monitor the use of peremptory challenges in accordance with those guidelines.

### *E Dealing with Juror Bias in an Alternative Way — Through Representation*

Given the difficulties of eliminating unconscious and implicit biases in prospective jurors, an alternative way to reduce the risk of juror bias against ethnic minorities is to ensure juries are actually representative of the community. Thalia Anthony and Craig Longman argue that adopting the Canadian approach in Australia would not remedy the reality that just by random selection Indigenous defendants are often tried by all-white juries.<sup>204</sup> Consequently, they propose the only option is to ensure there is greater representation of Indigenous peoples on juries where the defendant is an Indigenous person.<sup>205</sup>

In Aotearoa, representation could be mandated through various mechanisms: a form of a judicial discretion, a specific requirement under the legislation, or even more radically, reinstating the option to elect trial by an all-Māori jury. Regardless of the specific mechanism through which representation may occur, there are recognised benefits of having greater representation on juries. Diversity of experience and therefore thought is beneficial to a jury trial.<sup>206</sup> Further, as recognised by the Law Commission, having greater representation on a jury may also increase the perception that justice is being fulfilled:<sup>207</sup>

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204 Anthony and Longman, above n 2, at 34.

205 At 34.

206 *Peters v Kiff* 407 US 493 (1972) at [503]; and Massaro, above n 47, at 517.

207 Law Commission, above n 48, at [251].

... regardless of the nature of the impact of different groups in the community participating in jury trials, representation further legitimises the jury system and the wider criminal justice system. The legitimacy of the jury system rests on concepts akin to those of democratic government. Public confidence in the fairness of the jury system may rest on all groups in the community participating in that system.

## 1 A judicial power to determine the composition of the jury?

In the United Kingdom during the 1970s and 1980s, a series of decisions emerged where judges used their discretionary power to alter the ethnic composition of the jury.<sup>208</sup> This ensured defendants from an ethnic minority were represented on the jury. Judges proposed they had a discretion to alter the jury to ensure it was “racially balanced” where the jury panel did not contain any jurors of the same ethnicity as the defendant.<sup>209</sup> The trial judge would discharge the panel and summon a new one. However, in 1980, the Court of Appeal stopped this practice, concluding that judges do not have any discretion to interfere with the composition of the jury.<sup>210</sup>

Despite the findings of the United Kingdom Court of Appeal, the Royal Commission on Criminal Justice in the United Kingdom recommended that there should be some residual power for judges to influence the ethnic makeup of a jury.<sup>211</sup> The Royal Commission stated that:<sup>212</sup>

It should be open to the defence or prosecution to argue the need for one or more of the three jurors to come from the same ethnic minority as the defendant or the victim. The judge should be able to order this in appropriate cases.

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208 See, for example, *Regina v Ford (Royston)* [1989] 1 QB 868 (CA); *Petty v The Queen* (1991) 173 CLR 95; and *Director of Public Prosecutions v Williams* [2016] 3 LRC 526 (Guyana CA).

209 Neil Cameron, Susan Potter and Warren Young “The New Zealand Jury: Towards Reform” in Neil Vidmar (ed) *World Jury Systems* (Oxford University Press, Oxford, 2000) 167.

210 *Regina v Ford (Royston)* [1989] QB 868 (CA) at 873.

211 Royal Commission on Criminal Justice *Report* (Cm 2263, 1993) at [222]–[223].

212 At [223].

Unfortunately, these recommendations have not been incorporated into the United Kingdom's legal system.<sup>213</sup> The United Kingdom courts have remained steadfast in the position that judges should not influence the ethnic makeup of the jury.

The Australian judiciary adopted a similar position. In an unreported decision of the New South Wales District Court *R v Smith*, the trial judge was of the view he had a discretion to discharge a jury where retaining it may give rise to the perception of prejudice.<sup>214</sup> In *Smith* the Crown used peremptory challenges to ensure that an Indigenous defendant faced an all-white jury.<sup>215</sup> The Judge allowed the discharging of the jury on the basis "that justice must not only be done, it must appear quite clearly to be done".<sup>216</sup> The United States have a similar approach to that in *Smith*: a judge may dissolve a jury when the prosecution uses its peremptory challenges to exclude jurors of a certain ethnic minority.<sup>217</sup>

However, as *Smith* was an unreported District Court decision, it by no means represents the established position in Australia. Further, the courts in Australia have made it clear that the inherent jurisdiction of a trial judge to secure a defendant's right to a fair trial does not extend to the discharging of the jury where, by random selection, an Indigenous defendant faces an all-white jury.<sup>218</sup> As is the position in the United Kingdom, trial judges in Australia do not have an inherent jurisdiction to ensure a jury is ethnically representative.<sup>219</sup>

As discussed, the New Zealand High Court in *R v Pairama* has previously rejected the possibility of a residual discretion to alter the composition of the jury.<sup>220</sup> Penlington J held there is no authority in the New Zealand legal system to order a jury with a

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213 Law Commission, above n 5, at [159].

214 *R v Smith* (1982) 1(3) ALB 11.

215 At 11.

216 At 11.

217 See, for example, *United States v Carter*, above n 198; and the principle established in *Batson v Kentucky*, above n 67.

218 See, for example, *R v Buzzacott* [2004] ACTSC 89, (2004) 154 ACTR 37; and *R v Woods* [2010] NTSC 69, (2010) 246 FLR 4.

219 See above n 218.

220 *R v Pairama*, above n 130.

particular composition.<sup>221</sup> Consistent with this conclusion, the Law Commission in their report strongly opposed the Royal Commission's recommendation that judges retain a discretion to alter the ethnic composition of a jury.<sup>222</sup>

It would certainly be a big step to require a jury to be composed of six non-Māori and six-Māori, in this respect Penlington J's rejection of the appeal is not surprising. Further, whilst the NZBORA requires a defendant to be tried by an impartial and independent jury, having a jury of six Māori and six non-Māori would not necessarily guarantee that. However, Penlington J's decision was disappointing in that he not only rejected Mr Pairama's specific suggestion, but also rejected the general proposition that there is any discretion of judges to alter the composition of the jury under any circumstances. However, this decision is over 25 years old. Perhaps if a new appeal was brought to the senior courts they may be willing to engage with this proposition.

## 2 Reinstating all-Māori juries

Another alternative mechanism could be to reinstate all-Māori juries. From 1862 to 1961 Māori defendants had a right to elect trial by an all-Māori jury.<sup>223</sup> The use of different juries for different groups of people is not novel. It has been in existence in the Commonwealth legal system since 1201 under the principle of *de medietate linguae*. For example, under John's Charter of 1201 a Jewish defendant was entitled to a judgment of a panel of other Jewish people.<sup>224</sup>

All-Māori juries were removed in 1961 as they were deemed by some to be discriminatory against Māori.<sup>225</sup> There was a call for a jury system that was "one for all".<sup>226</sup> However, many MPs raised concern at the removal of Māori juries.

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221 At 503.

222 Law Commission, above n 5, at [160].

223 Powels, above n 32, at 284.

224 Lewis LaRue "A Jury of One's Peers" (1976) 33 Wash & Lee L Rev 841 at 849.

225 Cameron, Potter and Young, above n 209, at 167.

226 At 167.

For example, Walter Nash argued that he “did not think that justice could be done to a Māori defendant all the time by a European jury”.<sup>227</sup>

Further, Peter Williams QC argues that the removal of all-Māori juries actually came as a result of political backlash from the decision in *R v Rau*.<sup>228</sup> In *Rau* an all-Māori jury found Mr Rau not guilty on all charges by reason of insanity.<sup>229</sup> This finding was not well received by the Crown.<sup>230</sup> Perhaps unsurprisingly, this was the year in which the first parliamentary proposal was put forward to remove all-Māori juries.

Bayer provides a detailed and compelling argument advocating for the reinstatement of all-Māori juries.<sup>231</sup> She argues that this is consistent with the requirements of equal partnership and active protection under the Treaty of Waitangi.<sup>232</sup> While this article does not engage with the arguments for reinstating all-Māori juries, this history serves to highlight that ethnically tailored juries are not an alien concept. Rather, they are a well-established practice that has existed almost since the birth of the jury system itself. Subsequently, whether reinstating all-Māori juries or adopting a mechanism to ensure adequate representation on juries, these propositions should not be controversial.

### 3 The practical difficulties of representation

Despite the recognised benefits of greater representation on juries, the courts and the Law Commission are unwilling to adopt any changes to the jury system to allow for specific representation on juries. Consequently, changes to the jury system to allow for increased representation of specific groups on juries is likely to require specific legislative amendment.<sup>233</sup>

Whilst the outright rejection of the proposition of representation is frustrating, it is not without cause. Cameron, Potter and Young propose that requiring representation on a

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227 (20 November 1962) 332 NZPD 2755; and (20 November 1962) 332 NZPRD 2758.

228 *R v Rau* CA46/61, 16 August 1961 as cited in Peter Williams *A Passion for Justice* (Shoal Bay Press, Christchurch, 1997) at 85–91.

229 Peter Williams *A Passion for Justice* (Shoal Bay Press, Christchurch, 1997) at 90.

230 At 90–91.

231 Bayer, above n 126.

232 At 41.

233 Cameron, Potter and Young, above n 209, at 126.

jury would be impracticable and unnecessary.<sup>234</sup> Having all-Māori juries or ensuring representation of minority groups on juries places a greater burden on members of those minority groups to serve on the jury. This is especially burdensome given that currently people are not properly compensated for jury service and legally do not have to be paid by their employers for doing so. The burden of jury service has been a topic of significant concern, with very few people actually serving on juries.<sup>235</sup> As a result of these practical considerations, the Canadian approach based around voir dire procedures is preferable to adopting representation requirements in that it may not unduly increase the burden for jurors from specific communities.<sup>236</sup> The Canadian courts found that making representation on juries a requirement is an impossible standard that is impracticable and unworkable.<sup>237</sup>

If Aotearoa were to require greater representation of minority groups on juries, or to reinstate all-Māori juries, significant discussion and reform of the current payment for jury service would need to occur. Therefore, adopting a mechanism for representation on juries would not only require legislative change but also a complete re-working of the current jury system.

### ***F A Radical Thought — Abolishing the Jury System Altogether***

Criticisms of the current model has led to calls for the jury system as we know it to be abolished.<sup>238</sup> Russell and Prasad suggest “[t]here is ample evidence to question the current jury system and the seeming complacency we ascribe to its sacrosanctity and its significance in the criminal process”.<sup>239</sup>

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234 At 126–127.

235 See, for example, various news articles discussing the financial burdens that jury service can have on working families: Catherine Masters “A Call to Duty” *The New Zealand Herald* (online ed, Auckland, 9 October 2010); Jimmy Ellingham “Low turnout for city jury duty stunts” (28 August 2013) Stuff New Zealand <[www.stuff.co.nz](http://www.stuff.co.nz)>; and Zizi Sparks “Jury Service ‘huge burden’ on Rotorua schools, principal says” *Rotorua Daily Post* (online ed, Rotorua, 18 August 2018).

236 Jochelson and others, above n 28, at 381.

237 At 383.

238 Mary-Rose Russell and Marnie Prasad “More criminal justice reform” [2012] NZLJ 157 at 158.

239 At 159.

The Law Commission considered this proposition but ultimately decided that jury trials as they currently function should remain a central feature of the CJS in Aotearoa.<sup>240</sup> However, 10 years later there has been some expression of serious concerns about retaining the current jury model. Russell and Prasad propose transitions to a new system where courts comprise one judge and two professional lay jurors who are paid for their services.<sup>241</sup> They would then operate with an inquisitorial method as opposed to the current adversarial trial process.<sup>242</sup> This model would relieve the pressure placed on lay people under the existing jury system but raises obvious representation issues. Consideration would need to be given to a requirement for the professional lay jurors to be ethnically or culturally similar to the defendant.

This constitutes a radical suggestion. Analysis of such a proposal would require an entire article in and of itself. However, such changes may not be as radical as first thought. The Chief District Court Judge Hemi Tauamaunu announced in late 2020 that the District Court would be undergoing transformative change and moving to a Te Ao Mārama model.<sup>243</sup> This model will be targeting lower level offending that may not reach the jury system threshold. However, it indicates that the possibility of transformative change to our existing legal systems is not as far off as we may expect. The system is already changing significantly, such as with the recent creation of other solution-focused courts like the Rangatahi Court, the Court of New Beginnings and specialist sexual violence courts. This article will not discuss the Te Ao Mārama reform in any depth. However, its mention in this article is merely to point out that perhaps it is time to deeply question the traditional justifications we have for the jury process and consider some radical alternatives.

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240 Law Commission, above n 5, at [5].

241 Law Commission *Alternative Pre-Trial and Trial Processes* (NZLC IP30, 2012) at 25.

242 At 159.

243 See Heemi Tauamaunu “Transformative Te Ao Mārama Model Announced for District Court” (press release, 11 November 2020).



## *V Conclusion*

There is extensive evidence of unconscious and conscious bias against Māori in society and the CJS.<sup>244</sup> Jurors represent a cross-section of society. Consequently, it can be assumed that biases existing in the community will be found in the jury panel. Unfortunately, the current legal system fails to acknowledge and account for the impact these biases can have on a jury's decision-making process and the perception of justice for a Māori defendant. Instead, the approach has been to adhere to the traditional assumption of jury impartiality. In light of the increasing evidence, from both within Aotearoa and overseas, of the impact of bias on jury decision-making, a new approach is required.

The issue of potential juror bias against minority groups can be addressed in a multitude of ways. Reform could include altering the current way challenges for cause are used, ensuring some form of representation on juries or completely abolishing the jury system altogether. It is evident from the analysis in this article that each alternative has significant pitfalls. Counteracting widespread implicit biases has no silver bullet solution.

The Canadian approach to voir dire and challenge for cause is beneficial in that it fulfils an important symbolic purpose. It acknowledges that there may be systemic or widespread biases that jurors should be questioned about. This provides an avenue to remove potential biases. Another practical benefit of the Canadian approach is that it operates within the parameters of the existing jury system. The fallacy of this approach is questioning jurors may not be truly effective in reducing bias from the jury.

In comparison, a mechanism for securing representation may move closer to eliminating the effect of widespread biases by ensuring greater diversity of experience and thought on the jury. Further, representation can also form an important symbolic function and is consistent with the notion of being tried by a jury of one's peers. Yet, the Law Commission and the judiciary remain resistant to mechanisms for

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244 Te Uepū Hāpai i te Ora Safe and Effective Justice Advisory Group, above n 3, at 12.

representation beyond the existing random selection of jurors. Such reform would likely require significant legislative change and guidance. There is also little evidence suggesting whether ethnic representation on juries actually materially reduces the risk of potential biases against Māori defendants. Adopting a mechanism for representation would be hasty without evidence to suggest benefits for Māori would exist.

Perhaps the jury system should be reformed altogether. Despite the radical undertones of this suggestion, it may be the only hope to expel bias from jury trials. What this utopic system looks like is anyone's guess.

There are substantial critiques to all suggestions for reform. Despite this, it is essential that something is done, by the courts or by Parliament. We must ensure that the jury system does not add to the colour-blindness of the CJS. The jury system should not further alienate Māori from a CJS that has come to operate as a form of ongoing colonial oppression. Adopting the Canadian voir dire approach in *Williams* in conjunction with providing guidelines on the use of peremptory challenges is the most realistic option in the short-term to address the issue of potential juror bias against Māori. This would require acknowledging racial bias present in juries as a cross section of society and provides an avenue to reduce the risk of bias. In the long term, more fundamental reforms such as reinstating all-Māori juries or abolishing the system altogether should be properly considered.