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THE DEFENDANT'S RETENTION OF THE ULTIMATE RIGHT TO EXERCISE PEREMPTORY CHALLENGES FOLLOWING *LIU V R*

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Abstract

During the jury selection process at his trial in the District Court, Mr Lei Dai found himself in a worrying situation; he felt that three jurors were hostile towards him, but his lawyer did not exercise peremptory challenges against them. The three were empanelled to his jury which ultimately found him guilty. Mr Dai appealed his conviction on the ground that that there was a miscarriage of justice resulting from his inability to challenge the three empanelled jurors. The Court of Appeal were split 2:1, with the majority concluding that when Mr Dai delegated his right to exercise peremptory challenge to counsel, he still retained an ultimate right to exercise these challenges personally. Justice Collins, with a strong dissent, concluded that delegation was exclusive of any such residual right. This paper examines the judgment of Collins J and considers his reasoning. Overall, it argues that if Collins J's decision were to have effect it would cause a dangerous restriction on the rights of a defendant as it is inconsistent with the reasons for retention of peremptory challenges in New Zealand. His decision would prohibit the defendant from retaining confidence and accepting the jury's verdict as fair if the ability they have to affect the make-up of the jury were to be deprived from them.

Key terms: 'peremptory challenges', 'challenges without cause', 'jury selection', '*Liu v R*'.

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I. Introduction

Peremptory challenges in jury trials provide parties the opportunity to eliminate jurors by a simple singular word; "challenge."[1] Parties need not give a reason for this challenge, making it a powerful institution in the criminal justice process.[2]

There has been wide-spread abolition of these challenges throughout the world following many studies revealing the failings of these challenges to meet their rationales. Despite this, New Zealand has retained the right to exercise four peremptory challenges by each party in a criminal trial.[3] The current practice for defendants is to delegate this right to counsel who exercise it on their behalf.[4] Counsel will base these challenges on their access to jury lists and their role as an objective advocate.

In his trial by jury in the District Court, Mr Lei Dai found himself in an awkward situation; he was made to feel uncomfortable by the hostile demeanour of three prospective jurors as they approached the jury box, however his lawyer did not challenge any of them. One of them became the jury foreperson.[5]

Mr Dai appealed to the Court of Appeal on the ground that there was a miscarriage of justice resulting from his inability to challenge three empanelled jurors.[6] As at 2017 the issue had never fallen for appeal in New Zealand. Over a panel of three the Court of Appeal was split, with Harrison and Brown JJ agreeing that after delegation to counsel, the ultimate right to exercise peremptory challenges remains with the defendant.[7] The dissent of Collins J was a strong opposition to the majority decision with him firmly asserting

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[1] Law Commission *Juries in Criminal Trials* (NZLC R69, 2001) at [210].

[2] Stephen A. Dunstan, Judy Paulin and Kelly-anne Atkinson *Trial by Peers?: The composition of New Zealand juries* (Department of Justice, Wellington, 1995) [*Trial by Peers?*] at [13.2].

[3] Juries Act 1981, s 24.

[4] *R v Davis & Haines* (1910) 12 GLR 700, at 705.

[5] *Liu v R* [2017] NZCA 573, [2018] 2 NZLR 697 at [20].

[6] At [8].

[7] At [36] per Harrison and Brown JJ.

once delegated to counsel the right to exercise peremptory challenge excludes the ability of the defendant to make any ultimate challenge.[8]

This paper begins by detailing the relevant law of peremptory challenges in New Zealand, and explaining the case of *Liu v R (Liu)*.[9] It then considers the reasoning of the minority judgment of Collins J in that case. Adopting the structure of Collins J's main arguments, this paper will assess his judgment and conclude that if his judgment were to be followed it would be a dangerous restriction on the right to exercise peremptory challenges by defendants in New Zealand. Throughout this consideration a key critique of Collins J's conclusion emerges. Justice Collins' conclusion would prohibit the defendant from retaining confidence and accepting the jury's verdict as fair if the ability they have to affect the make-up of the jury is deprived from them. This is a fundamental rationale of the peremptory challenge in New Zealand and Collins J's arguments would impede it from serving this purpose.

II. Peremptory challenges in jury trials

A. Peremptory challenges in New Zealand

The use of jury trials in the criminal justice system is "a powerful symbol of democracy."[10] The function of the jury is to determine the facts of a case and reach a verdict of guilty or not-guilty.[11] It represents the community conscience in doing so by facilitating members of the community to decide criminal cases using their morals, views and personal knowledge.[12] The process of jury selection aims to obtain a jury which is "competent, independent, impartial, and representative of the community."[13]

Cases tried before a jury in New Zealand comprise twelve jurors.[14] Subject to powers of a Judge to discharge a juror, a jury will comprise the first twelve persons selected who

[8] At [51] per Collins J.

[9] *Liu v R*, above n 5.

[10] Law Commission *Juries in Criminal Trials: Part One* (NZLC PP32, 1998) at [60].

[11] At [8].

[12] At [7]–[9].

[13] At [232].

[14] Juries Act, s 17.

remain after all challenges have been allowed.[15] Following the balloting of jurors in the courtroom, each called juror moves forward to take their seat in the jury box.[16] The parties may then challenge called jurors before they take their seat.[17] In New Zealand three types of challenges may be exercised: challenge for want of qualification, challenges for cause and challenges without cause (peremptory challenge).

Challenge for want of qualification may occur if a called juror is not qualified for, disqualified from, or cannot serve on any jury for the reasons listed in ss 6, 7, 8 of the Juries Act 1981.[18]

Challenges for cause may occur on the ground that a juror is not indifferent between the parties or that they are not capable of acting effectively as a juror in the proceedings because of disability.[19] Each party is entitled to any number of these challenges. Such challenges will be determined by the Judge in private, in such manner and on such evidence as he or she thinks fit.[20]

Each of the parties to a case to be tried before a jury are entitled to challenge without cause (peremptory challenge) four jurors.[21] However, if two or more defendants in a criminal case are charged together, the Crown or other prosecutor is entitled to challenge without cause eight jurors only.[22] Peremptory challenges therefore provide parties with a mechanism to challenge potential jurors to prevent them from serving on the jury without giving a reason.[23]

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[15] Juries Act , s 19.

[16] Jury Rules 1990, r 17.

[17] Juries Act, s 26; and Jury Rules, r 19.

[18] Juries Act, s 23.

[19] Juries Act, s 25(1).

[20] Juries Act, s 25(3).

[21] Juries Act, s 24.

[22] Juries Act, s 24(2).

[23] Law Commission *Juries in Criminal Trials: Part One*, above n 10, at xii.

Basic information about the prospective jurors from the jury panel list may be requested up to seven days before the trial date by an eligible person for inspection.[24] This does not include a represented defendant personally, but it can be requested by their lawyer.[25] The lists are provided by the Electoral Commission and include basic information about each person including their name, address, occupation and date of birth.[26] The Police can lawfully provide vetted jury lists to the Crown recording previous criminal convictions of jurors.[27] The Crown should disclose any of this information to the defence, if the previous conviction gives rise to a real risk that a juror may be prejudiced against the defendant or in favour of the Crown.[28]

In criminal proceedings, although counsel are permitted to show the document to a defendant, it must not be left in the possession of the defendant, any witness or any victim. The effect of this is that at empanelment, the defendant does not have a copy of the list to observe, so typically relies on the appearance of jurors for indicating their wishes as to peremptory challenges to counsel.[29]

The only New Zealand study focused on the use of peremptory challenges in jury trials is the 1993 Department of Justice report *Trial by Peers*?. It revealed that throughout the period studied prosecution challenged 12.8% of called jurors and defence challenged 23.7% of called jurors. The total amount of challenges were 36.5% of all called jurors. No challenges for want of qualification or challenges for cause were recorded.[30]

B. The practice of delegating to counsel a defendant's right to exercise peremptory challenge

[24] Juries Act, s 14(1).

[25] Juries Act, s 14(1A).

[26] Jury Rules, r 4.

[27] *R v Gordon-Smith (No 2)* [2009] NZSC 20, [2009] 2 NZLR 725 at [10]; See also Christopher White "Unspecified Juror Occupations Create Risk of Unfairness" (2017) NZLJ 288.

[28] *R v Gordon-Smith (No 2)*, above n 27, at [24].

[29] *Liu v R*, above n 5, at [53].

[30] Dunstan, Paulin and Atkinson, above n 2, at 56; and Law Commission *Juries in Criminal Trials Part 1*, above n 10, at [368] and [372].

In New Zealand there is a long-standing practice whereby a defendant delegates their right to exercise peremptory challenge to counsel.[31] It was approved in 1910 by Stout CJ in the case of *R v Davis & Haines*.[32] Until *Liu*, however, the exclusivity of this delegation had not been questioned.[33]

The practice of counsel exercising a defendant's right of peremptory challenge will see counsel either challenging on their own determination as an advocate, or on the indication by the defendant from the dock.[34] The latter exercise supposedly operates "crudely but effectively".[35] Prior to jury empanelment counsel and the defendant will typically plan for a mechanism for the defendant to communicate with counsel in-court.[36] This may involve shaking and nodding of the head, or some other signal, to indicate an intention to challenge by the defendant during the time between the potential juror walking from the courtroom seating to the jury box when their name is called.[37]

C. The function of peremptory challenges

The Law Commission (in the words of Vennard and Reily) asserted that peremptory challenges are "effectively the only means of removing jurors about whose impartiality the defendant is in doubt but for whom such doubts fall short of justifying challenge for cause."[38]

Many agree that where the peremptory challenge is used to eliminate partiality, it can also be used to manipulate a jury favourable to a party's case by constructing a jury with a favourable bias towards them.[39] Because these challenges are based primarily on

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[31] *Liu v R*, above n 5, at [34].

[32] *R v Davis & Haines*, above n 4, at 705.

[33] *Liu v R*, above n 5, at [34].

[34] Colin Nicholson J *Laws of New Zealand* Juries (online ed.) at [30].

[35] *Liu v* R, above n 5, at [38] per Harrison and Brown JJ.

[36] At [38] and [55].

[37] At [56].

[38] Law Commission *Juries in Criminal Trials*, above n 1, at [220]; and David Reily and Julie Vennard "The Use of Peremptory Challenge and Stand By of Jurors and Their Relationship to Trial Outcome" (1988) Nov CLR 731 at 731 and 732.

[39] Law Commission *Juries in Criminal Trials: Part One*, above n 10, at [392].

appearance with regard to stereotypes about age, ethnicity, apparent class and very little information from the jury list, the jury can be skewed unfairly.[40] Peremptory challenges can therefore operate to resist the random selection process and the representativeness of the jury.[41]

Notwithstanding these criticisms, the Law Commission supported their retention due to the value they served in the criminal justice process.[42] The New Zealand government accepted this and in 2008 peremptory challenges were retained but the number available was reduced to four per side. They considered that four for each party was adequate to achieve their value, while reducing the opportunity for counsel to use them in an inappropriate way.[43]

III. The case of Liu v R

A. Facts

In 2014 Lei Dai and Liang Liu were involved in a scheme to move a large amount of ephedrine from China to Auckland. They both worked as courier drivers in New Zealand and were instructed by associates from China to collect the package from DHL in Auckland.[44] Following a trial by jury in the District Court they were each found guilty on different charges of drug dealing. They were each convicted and sentenced to terms of imprisonment.[45]

Prior to the trial, Mr Dai's lawyer, Mr Kan, spoke with Mr Dai in mandarin and explained the trial procedure. They discussed the jury selection process, with Mr Kan explaining to Mr Dai his right to challenge four jurors without cause, and the appropriate time to do so.

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[40] Stephen Dunstan "The State of New Zealand Juries" (1996) NZLJ 231.

[41] Phil Goff "Legislation to change rules for Juries in Criminal Trials 2/2" (press release, 4 August 2001).

[42] Law Commission *Juries in Criminal Trials,* above n 1, at [234].

[43] Phil Goff "Legislation to change rules for Juries in Criminal Trials 2/2" (press release, 4 August 2001); and Memorandum for Cabinet Social Equity Committee "Law Commission Report: Juries in Criminal Trials" (2001) CAB at [17]–[19] (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

[44] *Liu v R*, above n 5, at [4]–[6].

[45] *R v Dai* [2016] NZDC 16661.

They discussed the Mandarin word for challenge, "xuan". They agreed Mr Kan would exercise these peremptory challenges on Mr Dai's behalf, but never spoke about who would be ultimately responsible for the final decision on who was to be challenged. They did discuss Mr Dai's cultural preferences in empanelling jurors of Asian descent.[46]

On the day of empanelment, Mr Kan obtained the jury list but did not share it with Mr Dai. Mr Kan accepted that he and Mr Dai did not agree on a procedure for peremptory challenges, however upon calling of jurors to the jury box Mr Kan would turn to face Mr Dai for any signals of disapproval before challenging.[47]

During this process, Mr Dai alleged that he was concerned by the demeanour of three jurors and was nervous that they were hostile towards him. These three were not challenged and were empanelled, with one of them becoming the foreman of the jury. After the trial Mr Dai explained that he had wished to challenge those three members, but did not know how to, and refrained from mentioning anything during the trial as he was afraid of being rude and attracting unwanted attention. He thought after the jury had taken their seats he would have a chance to speak to Mr Kan about changing them. After jury selection the trial went ahead.[48]

Mr Dai appealed his conviction on the ground that his trial counsel's failure to advise him adequately of the process for exercising peremptory jury challenges meant a miscarriage of justice resulted.[49] Mr Liu also appealed his conviction, but on a different ground.[50]

The appeal was heard by the Court of Appeal with Harrison and Brown JJ agreeing as majority, and Collins J dissenting.

B. Decision

[46] *Liu v R*, above n 5, at [13]–[16].

[47] At [18]–[19].

[48] At [19]–[20].

[49] At [2].

[50] At [43].

Whether delegation to counsel of a defendant's right to peremptory challenge is exclusive or ultimately retained by the defendant despite delegation, had not been considered by any New Zealand court before.[51] However, the High Court of Australia 1979 in *Johns v R* had decided that the ultimate right remained with the defendant despite delegation to counsel.[52] In that case the appellant, Mr Johns, was tried by jury in the Supreme Court of Western Australia. His lawyer advised the Judge that he would be exercising Mr John's right to challenge on his behalf. After the third juror was called, Mr Johns personally called out to challenge her. An immediate altercation between Mr Johns and his counsel broke-out with counsel ultimately saying to the Judge "the last witness is not challenged".[53] The Judge then apparently accepted this statement and the empanelment of that juror proceeded. The High Court of Australia considered whether Mr Johns, despite delegation to counsel of his right to peremptory challenge, retained the ultimate right to challenge and therefore made an effective challenge personally. Chief Justice Barwick (majority) held that despite arguments in favour of the practice of delegation to counsel, the ultimate right to challenge should rest with the defendant.[54]

In *Liu* the majority of the Court of Appeal were satisfied that Mr Dai actually never wished to challenge these jurors and was unable to challenge them.[55] However they still analysed the issue. They based most of their decision on the decision of the High Court of Australia in *Johns v R*.[56] They discussed the advantages of the practice of delegation to counsel of a defendant's right to peremptory challenge, and the effectiveness of the current practice in the courtroom. However they concluded that the ultimate right to peremptory challenge must remain with the defendant for it is a right of "fundamental constitutional importance",[57] and that the defendant should remain "personally entitled throughout to exercise his or her right to challenge whomever he or she does not want to sit in judgment on guilt."[58]

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[51] At [25].

[52] *Johns v R* (1979) 141 CLR 409.

[53] At 577.

[54] At 578.

[55] *Liu v R*, above n 5, at [41].

[56] *Johns v R*, above n 52.

[57] *Liu v R*, above n 5, at [37] per Harrison and Brown JJ.

[58] *Liu v R*, above n 5, at [36] per Harrison and Brown JJ.

Justice Collins, on the other hand, held that delegation was exclusive and not subject to any overriding retention of such a right by the defendant.[59]

IV. The decision of Collins J in Liu v R

Justice Collins categorised his judgment by grouping his arguments under four headings. This paper will analyse each argument as categorised in his judgment as follows (the order has been rearranged):

a. The theory of peremptory challenges
b. Context
c. The integrity of jury trials
d. Maintaining confidence in defence lawyers

A. The theory of peremptory challenges

Justice Collins acknowledged that in New Zealand peremptory challenges have widely been retained due to the theory that by giving the defendant this control over the jury selection process he or she will have more confidence in accepting the jury's verdict as fair.[60] He proceeded to criticise this theory on two bases: firstly, because of the trend in many overseas jurisdictions to abolish the peremptory challenge, secondly, because the Supreme Court asserted that peremptory challenges are exercised on a reasoned basis, rather than intuitively.

Justice Collins' first difficulty with this theory was the trend in many overseas jurisdictions, such as England and Canada, to abolish the peremptory challenge.[61] He noted its limitation in New Zealand to now four per side. He considered that this reflected policymakers seeing "little merit…in the theory that peremptory challenges enhance a defendant's confidence in the fairness of jury verdicts."[62]

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[59] *Liu v R,* above n 5, at [51] per Collins J.

[60] *Liu v R*, above n 5, at [58] per Collins J.

[61] Criminal Justice Act 1988 (UK), s 188(1); and the Criminal Code of Canada s 634 was repealed by Bill C-75 which came into effect on September 19, 2019.

[62] *Liu v R*, above n 5, at [59].

The other difficulty Collins J had was based on his view that the Supreme Court had asserted that peremptory challenges are exercised on a reasoned basis, rather than intuitively. In his judgment, Collins J recalled the words of Barwick CJ in *Johns v R* in the High Court of Australia where he concluded that defendants should retain the ultimate right to exercise peremptory challenge as their exercise of intuition is key, "he may prefer his own instinctive reaction to the person he sees to the experience or theories of the advocate."[63] Justice Collins then explained that this was rejected by the Supreme Court in *R v Gordon-Smith (No 2)* when it said:[64]

> …we cannot accept [appellate counsel's] submission that peremptory challenges are meant to be exercised on an intuitive rather than a reasoned basis. If that were so there would be little, if any, reason for jury panel lists to be made available to the parties.

This view, he suggested, was inconsistent with the idea of a defendant delegating the exercise of peremptory challenges but retaining a residual right to exercise them. This was because he argued defendants are restricted from exercising reason, unlike counsel with their expertise and physical access to the jury list.

1. *The rationales of peremptory challenges*

One of the significant rationales of peremptory challenges is that they provide the defendant with confidence to accept the verdict of a jury as fair where they have affected the construction of the jury by removing jurors in accordance with their preferences. This paper does not seek to consider the values or detriments of peremptory challenges, it instead proceeds on the basis that despite criticisms, the legislative retention of them indicates that they remain a fundamental part of the criminal justice procedure for this reason. If the judgment of Collins J was to be upheld, and the right of peremptory challenge was delegated to counsel exclusively, defendants would be deprived of retaining any opportunity to affect the makeup of the jury. His judgment is therefore contrary to the role and purpose of these challenges in New Zealand today.

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[63] *Johns v R*, above n 52, at 579.

[64] *R v Gordon-Smith (No 2)*, above n 27, at [11].

The Law Commission noted that there are three rationales for peremptory challenges in New Zealand. They asserted that two of those rationales, removing biased jurors and positively influencing representation of different community groups, have not been demonstrated to have been met. The third rationale was that peremptory challenges allow the parties, particularly the defendant, to have some control over the composition of the jury, enabling greater acceptance of the jury's verdict as fair. In the same paper they indicated later in summary that it could not be demonstrated that the use of peremptory challenges have met any of these purported rationales.[65] However, they discussed this third rationale and noted that confidence is a tricky thing to measure and without specific input it is difficult to measure if it has been met. They indicated this rationale operated as a perception of the criminal justice process, providing to defendants a tool to accept the verdict of the jury as fair where they have affected the make-up of the panel.[66] They concluded: [67]

> (It) gives the accused person some measure of control over the composition of the tribunal who will sit in judgment on him. If that measure were lost, the accused would be likely to feel a considerable degree of injustice upon conviction.

The idea that this rationale underpins the value of peremptory challenge is further supported by overseas and New Zealand authorities and academic commentary. Stephen Dunstan explained that due to the imprecise exercise of judgement in peremptory challenges, part of their "useful function" is that they are symbolic in making defendants feel their ability to influence the construction of their jury.[68] In Australia it was noted that the peremptory challenge process was supported widely for it is a mechanism for defendants which provided them confidence to accept the jury verdict.[69] James Gobert stated that "a defendant is more likely to be accepting of the verdict of a jury which he had a hand in choosing than that of one thrust upon him."[70]

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[65] Law Commission, *Juries in Criminal Trials: Part One,* above n 10, at [397].

[66] At [393].

[67] Law Commission *Juries in Criminal Trials*, above n 1, at [229].

[68] Dunstan, above n 40.

[69] Jacqueline Horan and Jane Goodman-Delahunty "Challenging the Peremptory Challenge System in Australia" (2010) 34 Crim LJ 167 at [174].

[70] James J. Gobert "The peremptory challenge – an obituary" (1989) Crim LR 528 at 528.

Despite the revelations concerning the failure to meet rationales, the Law Commission recommended peremptory challenges should not be abolished.[71] This was followed by legislative retention of them during the criminal justice process reform beginning 2004.[72] The 2001 Cabinet paper to the then Cabinet Social Equity Committee responded to the Law Commission's report and ultimately proposed the reduction from six to four peremptory challenges per side. The Hon Phil Goff stated:[73]

> I agree that peremptory challenges should be retained in order to eliminate the occasional potential juror who might be perceived by the accused or others as lacking impartiality or who is otherwise seen to be unsuitable for jury service.

The Cabinet paper did not comment specifically on the rationale as asserted above, however it must be considered in light of the report of the Law Commission. The paper was a direct response to the revelations of the Law Commission focussing on the necessary reduction of challenges needed, rather than the reasons for retention. This direct link with the 2001 report in his policy proposal indicates a tacit acceptance, by the author as Minister of Justice, of the stated rationales in that report. The failings of the other two rationales are significant in comparison with the aforementioned lack of information available to measure accurately the third recorded rationale. Therefore this third rationale- the idea that peremptory challenges function to provide parties with confidence in the verdict of the jury due to their enabling of the party to influence the make-up of the jury- should be taken as being the best satisfied rationale and as having a considerable influence on their retention and value in New Zealand.

It follows that the decision of Collins J in Liu cannot be reconciled with this fundamental rationale of peremptory challenges in New Zealand. After delegation to counsel, if the ultimate right to peremptory challenge is not retained by the defendant, counsel may override a defendant's challenge (or intentions to challenge). This would immediately

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[71] At [229].

[72] Phil Goff "Legislation to change rules for Juries in Criminal Trials 2/2" (press release, 4 August 2001).

[73] Memorandum for Cabinet Social Equity Committee "Law Commission Report: Juries in Criminal Trials" (2001) CAB at [18] (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

invalidate the defendant's provision of confidence in the verdict of the jury for they would be denied the ability to personally affect the make-up of the jury. If Mr Dai had vocalised his intentions to challenge in the courtroom, and Mr Kan could have validly overridden these challenges as Collins J argued, Mr Dai's ability to affect the make-up of the jury would be removed, and his acceptance of the jury verdict as fair would likely be diminished. Therefore, the decision of Collins J that the right to peremptory challenge is delegated exclusively to counsel with no retention of any ultimate right by the defendant, is inconsistent with the significant rationale for peremptory challenges in New Zealand today. Conversely, the decision of the majority, that delegation is not exclusive, is consistent with and gives effect to the third rationale by resting this ultimate decision in the hands of the defendant.

2. Abolition of peremptory challenge overseas and their retention in New Zealand

In conjunction with the analysis concerning the legislative retention of challenges above, the legislative history (of retention and infrequent amendment) of peremptory challenges illustrates their considered value in the New Zealand criminal justice process. Despite some overseas jurisdictions abolishing peremptory challenges, New Zealand has retained them.[74]

In 1868 peremptory challenge was permitted by statute, and allocated twelve for those accused of a felony, treason or misdemeanour.[75] In 1880, twelve peremptory challenges were retained for the defendant, however for all criminal cases to which the Queen was a party, no challenges on behalf of the Queen were permitted except challenges for cause.[76] Then in 1898 the number of peremptory challenges in criminal cases reduced to six per side, and the Queen gained the same right of challenge as any defendant.[77] The law remained as so through the Juries Act 1981, until that act was amended in 2008 reducing the number of peremptory challenges to four per party.[78] This occurred following the revelations of the Law Commission regarding the demonstrated weaknesses of peremptory

[74] For example, England; see Criminal Justice Act 1988 (UK), s 118(1).

[75] Juries Act 1868, s 43.

[76] Juries Act 1880, ss 123 and 126.

[77] Juries Amendment Act 1898, ss 10 and 11.

[78] Juries Amendment Act 2008, s 17; See also Juries Act 1981, s 24.

challenges.[79] As at 2020, the only amendment reducing them to four per side is a clear indication that they are fundamental to jury trials.

Where Collins J concluded that the widespread disapproval of peremptory challenges from other jurisdictions illustrates their failing to meet their purported functions and rationales, he ignored the retention of them throughout New Zealand history. New Zealand has demonstrated that they are considered a key part of the criminal justice process, and that their functions and rationales hold value. Where Collins J argued that the ultimate exercise of peremptory challenge should not remain with the defendant after delegation to counsel, he disregarded the fundamental rationales of peremptory challenges which they have been retained to give effect to. In New Zealand peremptory challenges provide the defendant confidence to accept the verdict of the jury, and this ability should not be displaced because other jurisdictions do not see worth in retaining them.

3. A reasoned or intuitive basis?

The retention of peremptory challenges as at 2020 by the legislature reflects their tacit appreciation of the understood reality that they are exercised on *at least* an intuitive basis. This appreciation comes from the fact that legislative retention was in light of the findings of the Law Commission about their operation, and it reflects the accepted reality of peremptory challenges in New Zealand as detailed widely for many years.

The exercise of peremptory challenge in New Zealand is actioned by counsel upon delegation of this right from the defendant (who has representation). Counsel who obtain the jury list can show their clients but must not leave it in their possession or allow them to copy it. This is to help prevent names or other information disclosed in a copy of the panel from being used to facilitate actions (for example, actions prejudicing a juror's safety or security) to interfere with the performance of a juror's duties.[80] The defendant will typically go through the list with counsel to inform them both of the prospective jurors, and then couple that reason with their intuition inside the courtroom.[81]

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[79] Memorandum for Cabinet Social Equity Committee "Law Commission Report: Juries in Criminal Trials" (2001) CAB (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

[80] Juries Act 1981, s 14A(1).

[81] Dunstan, Paulin and Atkinson, above n 2, at [10.1].

In *Trial by Peers?* it was asserted that peremptory challenges are often exercised "on nothing more substantial than the appearance of the potential juror."[82] The researchers found that the following matters were important considerations in the exercise of peremptory challenge:[83]

> The need to have a balance of jurors (particularly in regard to gender); the type of offence; characteristics of the victim and defendant; the desire to empanel a jury that fitted their argument; and whether counsel thought that they could relate to the potential juror.

In order to effect these considerations in the makeup of the jury, the following were used to inform the exercise peremptory challenges: (the basic) information from the jury list,[84] ethnicity, general appearance and demeanour and the reputation that groups bring with them.[85] They noted specifically the visual, usually intuitive, factors counsel looked for in challenging prospective jurors which included the clothing they wore (whether dressed conservatively or roughly dressed), if they had tattoos, their hair and their facial expressions. They also noted the more informed, usually reasoned, factors obtained from the jury list including the prospective juror's address, the reputation of occupational groups, the similarities or differences of the juror to the victim, and explained that prosecution counsel used information about the previous convictions of potential jurors.[86]

The Law Commission detailed in their 2001 report that peremptory challenges operate with deficiencies, which has led to criticisms of them throughout the world. In that report they detailed that the often dubious nature of peremptory challenges, based on intuition of the appearance of jurors, ultimately produced less representation over the random jury selection process than desired.[87] The issues detailed in this report reflected widespread commentary on peremptory challenges.

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[82] At [1.3].

[83] At [10.1].

[84] Jury Rules, r 4.

[85] Dunstan, Paulin and Atkinson, above n 2, at [10.1].

[86] At [10.5].

[87] Law Commission *Juries in Criminal Trials: Part One*, above n 10, at [47].

Sources from New Zealand and elsewhere also acknowledge the intuitive operation of peremptory challenges. Stephen Dunstan explained that in New Zealand peremptory challenges may be exercised at times solely on the appearance of the prospective juror.[88] The Fraud Trials Committee in the UK noted they are often made on "superficial appearance."[89] In Australia it was found that these challenges were "an arbitrary exercise dependent upon guesswork and dubious mythology."[90] However, it has been explained that they are primarily informed by a combination of these visual indicators and the information obtained from the jury list.[91] The Parliament of Victoria Law Reform Committee explained that the lack of information from the jury list can sometimes "encourage the application of stereotypes".[92] A 1986 white paper explained the value of the peremptory challenge is that they are available for the defence to be exercised "in whatever ways will best serve its interests." Indeed it can be used in a multiplicity of ways due to its completely unquestioned nature; it may be used where challenge for cause cannot quite be met in respect of a suspicion of bias but difficult to specify, it can be used to construct a jury based on adjusting age, sex or race, or there may be jurors with a demeanour which is hostile towards the criminal justice system or the defence.[93]

All these sources acknowledge the negative impact the exercise of peremptory challenge in such an intuitive way have on the representation of the during jury selection.[94] However, two conclusions can be reached from these explanations of peremptory challenges. Firstly, by their nature (not requiring any reason) an intuitive approach is the reality and expectation of peremptory challenges and the legislature should be taken to have tacitly

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[88] Dunstan, above n 40; See also James O'Donovan *Courtroom Procedure in New Zealand: A Practitioner's Survival Kit* (4th ed, CCH New Zealand, Auckland, 1989).

[89] Lord Roskill's Fraud Trials Committee *Fraud Trials Committee Report* (Her Majesty's Stationary Office, 1986) at [7.22].

[90] NSW Law Reform Commission *Jury selection* (NSWLRC R117, 2007) at [10.28].

[91] Horan and Goodman-Delahunty, above n 69, at [177].

[92] Parliament of Victoria Law Reform Committee *Jury Service in Victoria* (Government Printer, Melbourne Australia, 1997) vol 2.

[93] *Criminal Justice: Plans for Legislation*. (Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, March 1986), at [33].

[94] At [34]; Lord Roskill's Fraud Trials Committee *Fraud Trials Committee Report* (Her Majesty's Stationary Office, 1986) at [7.24]; and Parliament of Victoria Law Reform Committee, above n 92, at [2.115].

accepted this fact upon the reforms to peremptory challenges since the Law Commission's report. Regardless of whether they are detrimental, until reform to alter their operation is actioned in New Zealand, this must be taken to reflect the accepted reality of their exercise. Secondly, the provision of jury lists in New Zealand do facilitate a reasoned approach to exercising peremptory challenges. Indeed counsel and the defendant have access to the information from these, limited by the defendant's inability to possess or copy the list. Ultimately this indicates the acceptance in New Zealand of peremptory challenge being exercised on a reasoned and/or intuitive basis by both counsel and a defendant. Where Collins J argued that delegation to counsel of the right of peremptory challenge should be exclusive because counsel have the expertise and knowledge to exercise reason, his argument was not consistent with this accepted reality of challenges being exercised practically using at least intuition. Therefore, prohibiting a defendant from intervening with a decision to challenge or not to challenge by counsel whom they have delegated this power to, would deny the practical function of these challenges.

Furthermore, there is difficulty in the conclusion by Collins J which was founded on the comments of the Supreme Court in *R v Gordon Smith (No 2)*,[95] which should be understood in the context of that case.[96] The reason for appellate counsel's submission that peremptory challenges are meant to be exercised on an intuitive rather than a reasoned basis, was directed to the lawfulness of the provision of the jury list to counsel.[97] His relevant argument was that this provision was unlawful, by virtue of their being exercised on an intuitive basis. The Supreme Court's comment that they are not meant to be exercised on an intuitive rather than a reasoned basis was in respect of an argument that they should be made on a purely intuitive basis.[98] Indeed they rejected that argument, but this should not inhibit the understanding that, as supported by significant authority, peremptory challenges are often exercised on an intuitive basis. This is one of the celebrated reasons of them as they are an easy and non-confrontational mechanism to eliminate a juror without giving a reason.[99] As the majority in *Liu* accept, indeed it is

[95] *R v Gordon Smith (No 2)*, above n 27.

[96] See pages 12–13 of this paper.

[97] *R v Gordon Smith (No 2)*, above n 27, at [2] and [5].

[98] At [11].

[99] *Johns v R*, above n 52, at 581.

foundational that jury lists are provided to both parties. Outside of the context of that argument made, an intuitive and a reasoned approach can be reconciled.

A further point to consider, is the role of the peremptory challenge compared to the role of challenges for cause. Due to the rarity of their exercise, there is little anecdotal information and lacking commentary on the distinct function of challenges for cause.[100] However when considering their respective roles in the jury selection process, it is difficult to accept that peremptory challenges are exercised on a reasoned (rather than intuitive) basis, as this seemingly contradicts these distinct methods of challenging. Peremptory challenge requires no cause so can be exercised quickly and easily with only one word. Conversely, challenges for cause are exercised on the ground that the potential juror is not indifferent between the parties (or are incapable of acting as a juror because of a disability).[101] A judge will determine these on such evidence as he or she thinks fit.[102] It is accepted that these are difficult to substantiate, having been noted as taking up to two days in New Zealand.[103] The peremptory challenge has been reportedly used as a mechanism of challenging where doubt falls short of justifying challenge for cause, or simply where the ease of the process is more attractive than attempting a challenge for cause.[104] Despite this practical overlap that exists, both methods of challenging remain in the jury selection process on two theoretically different bases; one is without cause and one requires cause. This is significant to consider when examining the relevant arguments of Collins J that peremptory challenges are exercised on a reasoned basis thus must be exclusively delegated to counsel.

4. The historical justifications for peremptory challenges

Justice Collins cited the report of the Fraud Trials Committee which explained that peremptory challenges were instituted in a time where defendants were undefended by counsel, and after representation was permitted they were not able to give evidence, all

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[100] Law Commission *Juries in Criminal Trials: Part One*, above n 10, at [409].

[101] Juries Act, s 25(1).

[102] Section 25(3).

[103] Law Commission *Juries in Criminal Trials*, above n 1, at [227] per the submission of Sir Graham Speight.

[104] At [220].

during a time when almost all offences were capital. It stated: "if a man were in danger of being hanged let him at least have some say in the choice of those who might send him to his death."[105] It appears that in doing so he intended to imply that the historical origins have now become outdated and inconsistent with modern challenges, meaning the argument that a defendant should retain the fundamental right to peremptory challenge after delegation has no standing.

In the early common law days of England, the specific date unknown, peremptory challenges developed in capital cases, with the Crown permitted an unlimited number.[106] As a response defendants were permitted some peremptory challenges in capital cases and by 1300 it was well settled that in all capital cases the Crown had an unlimited amount and a defendant had 35.[107] The purpose of these is not necessarily agreed upon amongst historians and academics. Hoffman considered the theories of many that peremptory challenges were useful in small English villages where all parties involved recognised the juror, and peremptorily challenged him or her as it was more convenient than challenging with cause.[108] Blackstone described the peremptory challenge as providing "tenderness and humanity" to defendants in criminal cases. He explained that traditionally they were grounded on two reasons: firstly, the importance of intuition upon the appearance and demeanour of a potential juror; and secondly, the importance of a defendant eliminating jurors with a perceived prejudice who are to decide the fate of the defendant's life.[109]

The English Parliament removed the Crown's right to peremptory challenge in 1305 (and replaced it with a similar option to 'stand aside' jurors) and upheld the common law right for a defendant to exercise 35.[110] Throughout the following centuries the number of

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[105] Lord Roskill's Fraud Trials Committee Fraud Trials Committee Report (Her Majesty's Stationary Office, 1986) at [7.18].

[106] Morris B. Hoffman "Peremptory Challenges Should be Abolished: A Trial Judge's Perspective" (1997) 64(3) U.Chi.L.Rev. 809 at 819.

[107] At 819; and John Profatt *A treatise on trial by jury including questions of law and fact: with an introductory chapter on the origin and history of jury trial* (S. Whitney, San Fransisco, 1877) at 207.

[108] Hoffman, above n 106, at 820.

[109] Blackstone *Commentaries on the Laws of England in four books* (4th ed, Callaghan, Chicago, 1899) vol 2 at [353].

[110] Hoffman, above n 106, at 821.

peremptory challenges available to the defendant decreased to twenty in 1530,[111] then to seven in 1948,[112] and then to three in 1977,[113] before finally being abolished in 1989.[114]

In the late 20th and early 21st century the purposes of peremptory challenge are broad ranging. *Trial by Peers?* asserted that it was instituted to broadly remove bias from jury panels.[115] As aforementioned the Law Commission identified several rationales. Curiously, Hoffman noted the significant rarity of use of the peremptory challenge by the defence in England.[116] This, when contrasted with the statistics obtained through *Trial By Peers?* is a powerful indication of the value of these challenges in the New Zealand jury trial.

The history of peremptory challenges illustrates that despite the changing contexts in which they have been used, they have consistently been retained and exercised. Where Collins J argued they have become inconsistent with today's trials due to their origin being in trials involving capital offences against unrepresented defendants, he ignored their consistent retention and exercise throughout history since those times. As the contexts in which they are used have changed and evolved over time, so has their function and value to defendants. As discussed earlier in this paper, today the resting of the ultimate right to peremptory challenge in the defendant despite delegation to counsel is fundamental and displacing this right because the role of the challenge is not the same as it once was ignores this.

B. Context

Justice Collins explained that in a courtroom it can take up to 25 seconds for a called juror to move forward and take their seat in the jury box. In that time counsel will gather the information about the juror from the jury list, and the defendant will assess the appearance

[111] Abjuration, etc. Act 1530 (Eng) 1509–1547 Hen VIII c 14, s 6.

[112] Criminal Justice Act 1948 (UK) 11 & 12 Geo VI c 58, s 35

[113] Criminal Justice Act 1977 (UK), chs 43 and 45; See also Hoffman, above n 106.

[114] Criminal Justice Act (UK) 1988, s 118.

[115] Dunstan, Paulin and Atkinson, above n 2, at [13.2].

[116] Hoffman, above n 106, at 822.

and demeanour of the juror.[117] Then peremptory challenge may be exercised either by counsel on their own view or by following an indication by the defendant, as is the practice in New Zealand.[118] He indicated that the exercise of reason by counsel in those moments should be able to override a decision made by the defendant based on intuition about appearance.[119]

Justice Collins asserted that the practice of delegating the right to peremptory challenge to counsel is reflective of the role and objectives of defence lawyers in jury selection as the exercisers of the right to peremptory challenge.[120] He explained that despite the in-court arrangement of a defendant subtly communicating their intentions to counsel, this delegation is exclusive so the ultimate authority to challenge a potential juror remains with counsel. "The defendant does not exercise any overriding control over the jury selection process when the authority to challenge a prospective juror has been delegated to the defendant's lawyer."[121]

1. The use and availability of jury lists

The use and availability of the jury list to counsel reflects their role in criminal trials as an experienced advocate.[122] They act in the best interests of the defendant and will typically exercise challenges on behalf of their client using the information they have gained.[123] Practically their access to the list adds to the various factors influencing and informing the exercise of peremptory challenges,[124] however this advantage over a defendant who cannot have the list in the dock during empanelment should not prevent that defendant from having a final say. As discussed earlier, this constitutional right of challenge must ultimately rest in the hands of the defendant after delegation to counsel, as if their genuine

[117] *Liu v R*, above n 5, at [56] per Collins J.

[118] Colin Nicholson J *Laws of New Zealand* Juries (online ed.) at [30].

[119] *Liu v R*, above n 5, at [56] per Collins J.

[120] At [55] per Collins J and fn 27.

[121] At [55] per Collins J.

[122] Law Commission *Juries in Criminal Trials: Part One*, above n 10, at [413].

[123] *Liu v R*, above n 5, at [35].

[124] Law Commission *Juries in Criminal Trials: Part One*, above n 10, at [383].

wishes to challenge and affect the construction of the jury in their own trial are prohibited, their confidence and acceptance of the verdict as fair can be diminished.[125]

2. The current practice of delegating

The practice in the situation of a represented defendant is to delegate to counsel their right to exercise peremptory challenge. As discussed earlier, this practice has apparently existed since 1910 when Stout CJ allowed counsel to exercise all six challenges on behalf of each defendant he represented.[126] In Australian criminal trials, the processes for peremptory challenges differ from state to state.[127] In Victoria, it is typically the accused who vocalises their own challenges, and this is only by departed from by "very good reason."[128] Conversely, the practice in Western Australia, as considered in *Johns v R*, is equivalent to that of New Zealand.[129]

The recalled facts in *Liu* roughly illustrate the reality of this practice; it may include crude signalling (such as nodding and shaking of the head) in the courtroom whereby counsel obtains the intention of the defendant as to challenging. The benefits of the New Zealand practice were noted by the majority in *Liu*. It assists the defendant where English is not their first language. It also removes the embarrassment and reluctance of defendants to confront potential jurors in a way that is often perceived as negative and causing alienation.[130] Surveys in Australia have shown that despite an absence of stating a reason for challenging peremptorily, many jurors find the process "upsetting and humiliating".[131] As the majority in *Liu* noted; "by delegating to counsel that power to speak on his or her behalf the defendant introduces an overtly objective element into the process."[132]

Delegation to counsel of the right to exercise peremptory challenge cannot be indicative of that right being passed exclusively. The benefits and efficiency of the practice are not so

[125] At [393].

[126] *R v Davis and Haines*, above n 4, at 705.

[127] Parliament of Victoria Law Reform Committee, above n 92, at [3.33].

[128] *Sonnet v R* [2010] 30 VR 519 (VCA) at [106].

[129] *Johns v R*, above n 52, at 577.

[130] *Liu v R*, above n 5, at [34] per Harrison and Brown JJ.

[131] Parliament of Victoria Law Reform Committee, above n 92, at [3.1114].

[132] *Liu v R*, above n 5, at [35] per Harrison and Brown JJ.

overwhelming as to displace the fundamental importance of the peremptory challenge to the defendant personally. While realistically the defendant often does not exercise any overriding control over the jury selection, to deprive them of that right to peremptory challenge in the rare circumstance that they disagree with the actions of counsel throughout challenging would be to deprive them of any confidence in the verdict of the jury they were not able to affect.

3. Duty of counsel to inform their client of their residual right

In his judgment, Collins J did not address the duty of counsel to inform the defendant of their right to exercise peremptory challenge. However, the majority did address an assertion of the prosecution who argued that in New Zealand because there is no duty to inform the defendant of the right to exercise peremptory challenge, the ultimate right to challenge must rest with counsel. Their submission was based on authority in New Zealand that there were limitations on the duty of counsel to advise defendants on aspects of conducting the defence.[133] However, as the majority explained, that authority did not address this unique issue of a defendant's right to peremptory challenge.[134]

The right to exercise peremptory challenge by a defendant is of constitutional importance.[135] The majority in the Court of Appeal explained that it is not a right that a defendant can be expected to understand and know about without the advice of a lawyer.[136] They concluded that Mr Dai's lawyer should have advised him that despite delegating his right of peremptory challenge, Mr Dai remained able to ultimately exercise the right himself.[137] A defendant should ultimately retain the right to peremptory challenge personally, notwithstanding delegation, as they have a right to challenge prospective jurors who may find them guilty.[138]

C. The integrity of jury trials

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[133] At [37].

[134] See *R v Hookaway* [2007] NZCA 567.

[135] At [39] per Harrison and Brown JJ.

[136] At [37] per Harrison and Brown JJ.

[137] At [37] and [39] per Harrison and Brown JJ.

[138] *Liu v R*, above n 5, at [36] per Harrison and Brown JJ.

Justice Collins worried that the ability of a defendant to override their lawyer in the exercise of peremptory challenge would "fuel discontent and appeals."[139]

1. *The ability to disagree with your lawyers decisions leading to discontent and appeals*

Over a century passed between the decision of Stout CJ in 1910 permitting the delegation of the right to exercise peremptory challenge to counsel by a defendant, and the unfortunate facts in *Liu* in New Zealand.[140] As the Court of Appeal noted, the ground of appeal in *Liu* has never arisen in New Zealand before.[141] However, perhaps this is due to a lacking in pre-trial advice from lawyers to their clients, as was accepted to have occurred in *Liu*.[142] Furthermore, the certainty of the law moving forward from the majority in *Liu* now will provide counsel with clarity as to when they may not override their defendant during the empanelment of a jury. Given the rarity, it seems unlikely that facts such as that in *Liu* or in *Johns* will arise following this decision, and where a defendant wishes to override a decision to challenge of their counsel the judge will appropriately give effect to the wishes of the defendant.[143]

D. *Maintaining confidence in defence lawyers*

The delegation of the right to exercise peremptory challenge by a defendant to counsel is due to the value of their role as an objective and knowledgeable advocate.[144] Justice Collins, in *Liu*, considered the unfortunate nature of open discord in court and concluded that once delegated the right to exercise peremptory challenge should be exclusively with counsel. He argued this was because of the expertise and ability of counsel to make decisions at trial as an advocate. He considered peremptory challenges to be within the collection of decisions counsel are responsible for making. He explained:[145]

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[139] At [62].

[140] *R v Davis & Haines*, above n 4.

[141] *Liu v R*, above n 5, at [25]; see *P v R* [2012] NZCA 325 at fn 7.

[142] *Liu v R*, above n 5, at [17].

[143] *Liu v R,* above n 5; and *Johns v R,* above n 52.

[144] *Liu v R*, above n 5, at [35].

[145] At [66].

> The indignity of a defendant undermining decisions made by their counsel during the selection of a jury is a burden that defence lawyers should not have to endure. A dispute between a defendant and their lawyer during the process of empanelling is also likely to undermine the standing of that lawyer in the eyes of the jury, and may undermine the defendant's case.

1. *Possibility of open discord in court*

In light of the facts, and the facts in *Johns*, the Court of Appeal in *Liu* considered the possibility of open discord in court occurring where a defendant disagreed with a challenge or lack of challenge by their lawyer. The ability to override the decision of one by the other is understandably worrying, especially where the nature of the jury selection process is so sensitive and judgemental, particularly from the perspective of the prospective jurors.[146]

The majority considered the practice of delegating the exercise of peremptory challenge to counsel often involving head shaking and nodding as operating well to stop open discord from occurring.[147] They noted, "we assume the apparent rarity in New Zealand of events such as occurred in Australia for Mr Johns reflects the fair and efficient operation of the practice here."[148] Whether this is true or not is not easily deducible as there is no research available on the operation of this practice. Perhaps this is because delegation of this right is accepted as a default in cases where a defendant has representation.

The High Court of Australia in *Johns* similarly considered the benefits of the delegation process, and overall concluded that counsel should be there to merely assist the defendant in challenging jurors to avoid the danger of restricting their rights, especially where they lack confidence to do it themselves. They considered the ultimate right to challenge must remain with the defendant who should not be dominated by counsel, because "the expression of objection to be tried by a person standing before him or her" is fundamental to them personally.[149]

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[146] Parliament of Victoria Law Reform Committee, above n 92, at [3.1114].

[147] *Liu v R*, above n 5, at [38] per Harrison and Brown JJ.

[148] At [38] per Harrison and Brown JJ.

[149] *Johns v R*, above n 52, at 581.

The Queensland Court of Appeal faced a case with similar facts to that of *Johns v R*.[150] In *R v Shambayati* the appellant argued that the jury at his trial was not empanelled according to law after he called out "challenge" during the jury selection process referring to a specific prospective juror which was either not heard or ignored by the judge.[151] Defence counsel requested to approach the dock and subsequently told the defendant to be quiet. Counsel admitted that despite hearing the defendant call out, he did not follow through with the challenge as he was the defendant's "mouthpiece" and intended to exercise challenges on his behalf.[152] The issue, after the precedent from *Johns*, was whether the appellant made an audible challenge, and then did not withdraw it. They ultimately decided that it was too quiet and therefore not an effective challenge.[153] This case illustrates the points raised by the Court of Appeal in *Liu v R* regarding the possibility of open discord in court. Indeed a disagreement in the courtroom is an unfortunate and upsetting situation.

The arguments made by Collins J are based on the responsibilities and dignity of counsel, and fail to recognise the importance of the peremptory challenge to the defendant in the criminal justice process. As discussed earlier,[154] a significant rationale for peremptory challenges in New Zealand is to provide the defendant with a mechanism to use to affect the make-up of the jury who may ultimately find him or her guilty. Where the responsibilities of lawyers are used to justify the exclusion of a fundamental right from a defendant, the exercise of peremptory challenge in New Zealand becomes inconsistent with this rationale. While the indignity of a defendant undermining decisions made by their counsel is a burden lawyers should not have to endure, the deprivation of such a fundamental right to defendants in order to have confidence in the fairness of their trial should not be something those accused of criminal offences should have to endure.

V. Conclusion

[150] *Johns v R*, above n 52.

[151] *R v Shambayati* [2017] Qd R 453 (QCA) at [9].

[152] At [7].

[153] At [19].

[154] See pages 13–16 of this paper.

The operation of delegation to counsel to exercise peremptory challenge on behalf of defendants has been smooth for over a century. Indeed *Liu* contained the first facts for the New Zealand courts to face concerning a disagreement about this practice. But is not outrageous to imagine a situation similar to those seen in Australia involving an open disagreement in the court room. The decision of *Liu* has clearly established the law relating to delegation of peremptory challenge

The judgment of Collins J would be damaging to the function of peremptory challenges in the New Zealand criminal justice process if counsel were able to override the wishes of a defendant facing a potentially guilty verdict. The right to peremptory challenge is constitutionally important to a defendant facing a judgment of guilt; it is important they have an impact on the empanelment of the jury. His judgment would remove confidence in defendants to accept the verdict of a jury as fair undermine the value in their exercise of intuition in their exercise of peremptory challenge to be able to do so.

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