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## 1. INTRODUCTION

Trial by jury has embedded in courts the principle of orality, shaped the law of evidence and demanded lawyers use language that speaks to the people, the community served by the law. At least two out of three of these elements of our justice system manifest even where no jury is in the courtroom. This article compares the 20th century evolution of English and Welsh women's jury franchise rights with the same history in Ireland, Australia, New Zealand, Canada and the United States.<sup>1</sup> It reveals that during this period, excepting some isolated and limited examples, chiefly in the United States, jury franchise—the 'lay acid' injected into the 'closed shop of the legal expert' (Bankowski, 1988: 20)—was far from democratic. Instead, particularly in common law courts beyond England and Wales, the law condemned women's voices to be unheard in the jury room and women witnesses and women defendants to be sized up and evaluated by all-male juries. Not infrequently these women testified to wrongs by men—to be judged only by men. This partial or complete exclusion of 50% of the population over a period far longer than juries have included women is a tale that has been told frequently about the United States, but infrequently beyond.

With this backdrop in mind, we explore the grand scale of the jury system's failure. This article has two major aims. It shows, first, the widespread and pervasive nature of gender discrimination on common law jury eligibility throughout much of the 20th century; and, secondly, distinctive patterns and practices of exclusion that operated across comparable common law countries, but not in England and Wales. To this end we detail the Australian experience as broadly representative of particular patterns of legislative practice and (to a lesser extent) of women's campaigning which, as we indicate, were repeated, sometimes with small variations, in the other countries surveyed. The geographic and temporal spread of this history is striking. It takes place over the first three quarters of the 20th century, extending on occasion nearly to the 21st century. For Indigenous women in Canada, the United States and Australia, substantive discrimination continues. Women's exclusion from juries took place despite extensive, persistent and insistent campaigning by women's groups, actions met by trenchant resistance. This dynamic spanned generations and sits oddly with women's gaining of the vote.

This article builds on a body of English<sup>2</sup> and United States<sup>3</sup> work describing aspects of jurywomen history, and also on more isolated scholarly commentary in the other jurisdictions. What follows is split into pre- and post-World War 2. This natural division enables concentration on the 1919 reforms that operated in England and Wales from the 1920s, on Irish reforms in the same period and on the widespread inertia that was more common elsewhere; and then on the most significant reform trends in Australia, New Zealand, Ireland, Canada and

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<sup>1</sup> It seems likely that casting the net wider merely restates what this account offers: see, for example, Law Reform Commission of Hong Kong, 2008: [1.5]. For beyond the common law, see Pastovic, 2016.

<sup>2</sup> See Cornish (1971); Logan (2008); Logan (2013); Crosby (2016); Crosby (2017).

<sup>3</sup> See note 58 below.

the United States, and the eventual realisation of formal gender equality in all these countries. We note that this formal equality was not in practice open to all women and we conclude with some observations on the contemporary relevance of this history.

## 2. BEFORE WORLD WAR 2

### 2.1 England and Wales

#### 2.1.1 Historical Development and Initial Reform<sup>4</sup>

While, in numerical terms, women and men are represented relatively equally on trial juries in England and Wales today,<sup>5</sup> just over two centuries ago Sir William Blackstone (1765: 348) was writing of the exclusion of women from juries on the basis of ‘defect of sex’ in the following terms:

[I]f a juryman be an alien born, this is defect of birth; if he be a slave or bondman, this is defect of liberty, and he cannot be *liber et legalis homo*. Under the word *homo* also, though a name common to both sexes, the female is however excluded, *propter defectum sexus*: except when a widow feigns herself with child, in order to exclude the next heir, and a suppositious birth is suspected to be intended; then upon the writ *de ventre inspiciendo*, a jury of women is to be impanelled to try the question, whether with child, or not.

Indeed, the presence of women on juries in England and Wales has been permitted for less than a century. Until 1919, section 1 of the Juries Act 1825<sup>6</sup> continued to stipulate that only *men* aged between 21 and 60, and satisfying a qualification in respect of property, were eligible to serve on juries. The introduction of the Representation of the People Act 1918 then gave certain women the right to vote in Parliamentary elections for the first time.<sup>7</sup> A prominent question applicable to England and Wales (and beyond) is the extent to which significant steps in the early 20th century towards women’s social and political emancipation created ‘the main catalyst for revolutionising the jury from ... an exclusive, male, privileged [preserve to] a representative voice within the criminal justice process’ (Parry, 2007: 192). What is clear is that the efforts of English women’s rights organisations prior to World War 1 played a pivotal role in achieving the subsequent reforms pertaining both to women’s voting rights and to the right of women to representation on juries (see Cornish, 1971: 29). It is striking that these changes to the jury franchise were not exported across the common law world within a similar time frame. Presumably this speaks to the massive impact of the English women’s movement, and women’s engagement in World War 1 support activities, features absent (at least in intensity) elsewhere. The legal basis for women’s jury franchise reform at this time was section 1 of the Sex Disqualification (Removal) Act 1919,<sup>8</sup> which created significant change to the

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<sup>4</sup> See further Thornton (2004); Logan (2013); Anwar, Bayer and Hjalmarsson (2016); Crosby (2017).

<sup>5</sup> See below.

<sup>6</sup> For a discussion of the background to the Act, see Cornish, 1971: 27–8.

<sup>7</sup> On women’s right to vote in other elections, and other aspects of women’s ‘citizenship’, prior to 1918, see Hollis (1987); Moore (2016).

<sup>8</sup> Available at [http://www.legislation.gov.uk/ukpga/1919/71/pdfs/ukpga\\_19190071\\_en.pdf](http://www.legislation.gov.uk/ukpga/1919/71/pdfs/ukpga_19190071_en.pdf) (accessed 1 April 2018). The introduction of the Act was followed by the promulgation in 1920 of the Rules of the Supreme Court (Women Jurors): see generally Logan, 2008: 87; Anwar, Bayer and Hjalmarsson, 2016: 9; Crosby, 2017: 704.

female jury franchise—at least in theory. It was remarked optimistically at the time that (Knight, 1921: 19)

[t]he present year (1920) will come to be regarded as an *annus mirabilis* in the chequered history of the women's movement in Great Britain. The passage of the Sex Disqualification (Removal) Act marks a turning-point in our social history. Its operative principle, substituting function for sex, betokens the reward which has come to workers in the women's cause after many weary years. As is usual when success has been attained, we find that our friends are more numerous than we had supposed.

Section 1 of the 1919 Act provided that '[a] person shall not be disqualified by sex ... from the exercise of any public function, ... and a person shall not be exempted by sex or marriage from the liability to serve as a juror'. The novelty of this development led to reporting in *The New York Times* of the fact that, on 28 July 1920, women jurors had been empanelled in England for the first time when six women formed part of the jury at the Bristol Quarter Sessions.<sup>9</sup> Women were summoned to sit on juries at the Old Bailey for the first time in January 1921.<sup>10</sup> Perhaps unsurprisingly, it was not long before women jurors came to be perceived to be 'exotic flowers'<sup>11</sup> who might be well suited to some cases but were particularly unsuited to others. A press report of February 1921 notes that, when a woman juror entered the box to be sworn at Devon Assizes, the judge remarked that 'had the cases to be dealt with been cases where men were charged with attacks on young girls he would have been very glad to have had the assistance of a woman on the jury, but the cases were of indecency among males, and of a filthy character'. So as 'not to expose any woman to the disgust of listening to cases of that nature', he ordered the cases to be tried without women, whereupon '[t]he woman juror at once left the box'.<sup>12</sup> These views were anticipated in the 1919 Act, with a proviso in section 1 specifying that

(b) *any judge [or equivalent] may, in his discretion, on an application made by or on behalf of the parties (including in criminal cases the prosecution and the accused) or any of them, or at his own instance, make an order that the jury shall be composed of men only or of women only ..., or may, on an application made by a woman to be*

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<sup>9</sup> 'First Women Appear on Jury in England', *The New York Times*, 29 July 1920. Prosecuting counsel's use of the 'new' phrase, 'ladies and gentlemen of the jury', is reported to have 'caused a murmur throughout the court'. He is further reported to have congratulated the women jurors in question for 'at last taking their proper place in the administration of justice in England', and also congratulated the cause of justice. An entertaining press report in October 1920 reads ('Women Jurors and the Dinner', *Cheltenham Chronicle*, 23 October 1920, 6): 'Women jurors acted a[t] Swansea Quarter Sessions for the first time on Monday, and there was an amusing sequel. After the "jury" had been empanelled, two workmen arrived at the court with an urgent request that their wives might be released to come home and cook their dinners. To the great discontent of the applicants, their plea did not succeed.'

<sup>10</sup> This culminated in one woman, Mrs Taylor Bumpstead, serving on the jury in the Crown of the Common Serjeant (Mr HF Dickens, KC, son of Charles Dickens) and, indeed, being selected to act as foreman: 'The Woman Juror's New Sphere', *The Manchester Guardian*, 12 January 1921. Stewart (2017: 5–6) describes a depiction of the new phenomenon in the contemporary fiction of the era: 'the relatively recent admission of women as jurors adds point to the fact that, when Harriet Vane is on trial in Dorothy L Sayers's *Strong Poison* (1930), Lord Peter Wimsey's assistant Miss Climpson, one of three women on the jury, stands firm in her resistance to a guilty verdict, and is joined in her objections by another female juror who draws on her experience as an observer at other trials'.

<sup>11</sup> J Morton, 'Exotic Flowers in the Jury Box', *Law Society's Gazette*, 22 May 2017. Available at <https://www.lawgazette.co.uk/obiter/exotic-flowers-in-the-jury-box/5061206.article> (accessed 1 April 2018).

<sup>12</sup> 'Woman Juror Excused', *Yorkshire Evening Post*, 9 February 1921, 6.

*exempted from service on a jury in respect of any case by reason of the nature of the evidence to be given or of the issues to be tried, grant such exemption.*<sup>13</sup>

There is evidence to suggest that judges, even where not technically invoking section 1(b) of the 1919 Act, ‘appeared to be attempting to bully women into withdrawing from jury service’.<sup>14</sup> It seemed that the potential presence of women jurors in murder trials was routinely challenged by defence counsel, on the basis that women would generally convict given their inability to evaluate exculpatory evidence as rationally as could men.<sup>15</sup> Emotional profiling of women was therefore common. If it was not their compassion standing in the way of clear judgment, it was their inclination to irrationality, to emotion over-riding reason, in the most general sense. Open public hostility to the use in principle of women jurors was also apparent, with, for example, a press report noting an incident involving

a woman juror’s momentary, but regrettable, weakness in giving way to hysteria at a crucial moment in a murder trial, causing the proceedings to be stayed. ... The woman in question may be possessed of an exceedingly strong character ordinarily, yet the ordeal in the jury box and the strain of her responsibility overcame her, even as it has overcome men. Women, however, are admittedly more susceptible to emotion than men ...<sup>16</sup>

Members of the appellate judiciary were not immune from such attitudes. In a judgment that ‘call[ed] forth a torrent of expostulation from the feminist societies’,<sup>17</sup> Lord Justice Scrutton

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<sup>13</sup> Emphasis added.

<sup>14</sup> Logan, 2008: 88. There is, however, some evidence of more enlightened judicial attitudes. See, for example, ‘Women Must Perform Their Duties’, *Gloucester Citizen*, 29 January 1921, 4 : ‘At Liverpool Assizes, before a charge of incest was begun, a counsel drew attention to the question of a mixed jury, it being stated that particularly revolting evidence would be given. Sir Alfred Tobin, the Commissioner of Assize, said that counsel for the defence had the right to challenge any juror. The case was very unpleasant either for men or for women. Women jurors’ experience, however, might be of great assistance. Therefore, however revolting the duties might be, they must perform them. It was then suggest[ed] that only married women should act. Sir Alfred repeated that counsel were at liberty to challenge any juror. Women had got their rights and privileges, and they must now perform their duties. The jury eventually included one woman.’

<sup>15</sup> ‘Judge and Women Jurors’, *Gloucester Citizen*, 5 March 1924: ‘Mr Justice Rowlatt, presiding at a lecture on Criminal Law by Sir Harry Stephen at University College, London, said that the practice of counsel for the defence in challenging the presence of women jurors in murder trials had become in his experience universal. The reason was that if a man had killed somebody else, a woman juror took the view that he (the killer) ought to be killed. His Lordship drew a picture of an imaginary case of the weeping widow and children gathered round the body of a murdered man and repeated that in such a case there was no doubt as a rule of a woman juror’s verdict. The men jurors, however, would take into account all the surrounding circumstances, and any fact that told in favour of the prisoner. He recalled a recent case in the West of England in which a woman was being tried on a charge of murder by arsenical poisoning, and in that case prisoner’s counsel objected to the presence of a woman on the jury. It was “thumbs down” every time, he added, if the facts were proved in the minds of women jurors.’ See also M Enright, “‘The Very Antithesis of Womanhood’: Edith Roberts and the Infanticide Acts”, available at <https://blog.bham.ac.uk/legalherstory/2018/03/20/the-very-antithesis-of-womanhood-edith-roberts-and-the-infanticide-acts/> (last accessed 15 April 2018) (bold font and emphasis in original): ‘[In 1921 Edith Roberts] was charged with [the] wilful murder [of her infant] ... Leicester Assizes controversially permitted female jurors. However, each one was challenged by Edith’s defence counsel, on the belief that women would be *less* sympathetic than men, and she was instead tried [and convicted] by an all-male jury.’

<sup>16</sup> ‘Women in the Law Courts’, *Hull Daily Mail*, 3 December 1926.

<sup>17</sup> ‘Ladies of the Jury’, *Western Daily Press*, 29 July 1932, 6.

noted in the Court of Appeal in 1932 that ‘[t]here was no woman on the jury, and that is an advantage where heavy business transactions have to be considered’.<sup>18</sup>

Of note, too, is Logan’s observation that

[p]eremptory challenge was most likely [to] be used to remove women in cases where the evidence comprised details of a sexual and/or violent nature, normally when the accused was male and the victim young and/or female. For example, in 1929 women jurors were challenged at the hearing of a case at the Old Bailey of a man charged with ‘an offence against a girl of eight’.<sup>19</sup>

This suggests that the right of peremptory challenge, available at the time,<sup>20</sup> might have been regularly used to remove potential women jurors.

### 2.1.2 The Immediate Consequences of Reform

In a study of the effect of the reform introduced by the 1919 Act on the composition of juries in the Old Bailey, Anwar, Bayer and Hjalmarsson (2016: 4, emphasis added) found that

more than half of seated juries in 1921 had at least one female juror and that more than 80 percent of cases in the following years had female jurors; there were no females *seated* prior to 1921. In addition, though males clearly still dominated the jury, more than 20 percent of the post-reform juries had at least three female jurors (25 percent of seated jurors).

These findings may be contrasted with those generated by research conducted by Crosby. First, it was found that, in England and Wales as a whole, the percentage of *summoned* jurors who were female *decreased* steadily between 1922 and 1929, both in those locations where jurors were summoned by sheriffs and in those locations where jurors were summoned by borough clerks (Crosby, 2017: 704–5 (table at 705)):

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<sup>18</sup> *Combined Pulp and Paper Mills Ltd v Oppenheimer*, unreported; case details available at <http://discovery.nationalarchives.gov.uk/details/r/C3517768> (accessed 1 April 2018), and discussed in *Western Daily Press*, 28 July 1932, 7.

<sup>19</sup> Logan, 2013: 705, quoting from *The Times*, 25 September 1929, 9. See also ‘Men Fairer?’, *Hartlepool Northern Daily Mail*, 2 October 1933, 2: “‘Would it be possible to be judged by an all-men jury? I think it is fairer.’” asked a prisoner at Bournemouth Quarter Sessions to-day when three women jurors were called to hear his case. He was told that he could challenge any juror. Eventually he secured his wish for an all-male jury by successfully challenging any woman called.’

<sup>20</sup> It has subsequently been abolished by the Criminal Justice Act 1988, s 118(1).

The average number of female jurors for every 12 jurors summoned, 1922–1929

	<b>Sheriffs</b>	<b>Borough clerks</b>
1922	3.2	4.4
1923	3.0	3.7
1924	2.9	3.5
1925	2.9	3.3
1926	2.8	3.2
1927	2.8	3.1
1928	2.7	3.1
1929	2.7	3.0

Secondly, Crosby’s study of the number of women who made it on to an actual jury in five assize circuits revealed considerable regional variation, as well, again, as a steady decline over time (Crosby, 2017: 704–5 (table at 705)):

The average number of female jurors per trial in the five circuits studied, 1921–1929

	<b>Midland</b>	<b>Oxford</b>	<b>South Eastern</b>	<b>South Wales</b>	<b>Western</b>
1921	3.3	2.9	2.0	2.0	1.3
1922	2.5	2.4	1.6	1.6	1.3
1923	2.8	2.3	1.6	1.6	1.5
1924	2.2	1.6	1.3	1.7	1.1
1925	1.9	1.8	1.5	1.5	1.2
1926	1.8	1.7	1.1	1.5	–
1927	1.7	1.9	1.1	1.3	–
1928	1.6	2.0	1.2	1.3	–
1929	2.0	2.4	1.3	0.8	–

It seems undeniable that such regional variations are attributable to particular local factors, with, for example, ‘women’s formal acceptance depend[ing] to a great extent on how they were viewed by those already working within a particular circuit’ (Crosby, 2017: 704). Thus, given the breadth of influence available under section 1(b) of the 1919 Act, the differing attitudes held by the various regional Bars might well have accounted for the variations in the extent to which women appeared on actual juries (Crosby, 2017: 717). More broadly, public perceptions ‘that women *should* be routinely removed from particular types of trial, and also that they *were* regularly removed ... might have discouraged local officials from summoning as many women as they might otherwise have done’ (Crosby, 2017: 713 (emphasis in original)).

In terms of the effect on conviction rates of the introduction of the 1919 Act, Anwar, Bayer and Hjalmarsson found that female representation on juries *increased* conviction rates in sexual offence cases by 16 percent, while *decreasing* conviction rates in cases of property crimes and cases of violent crimes by 10 percent and 13 percent respectively. They note that ‘[t]he magnitude of these effects is substantial, especially in light of the fact that males continued to constitute a large majority (more than 80 percent) of jurors post-reform’. It must further be borne in mind that ‘the decrease in conviction rates for violent crimes as a whole also conceals opposing results based on the gender of the victim’: while ‘prior to the reform the conviction

rate differential between male and female victim violent crime cases was essentially zero', after the reform a conviction in the case of a female *victim* was 20 percent more likely than in the case of a male victim (Anwar, Bayer and Hjalmarsson, 2016: 5).

As the authors acknowledge (Anwar, Bayer and Hjalmarsson, 2016: 26), it is impossible to distinguish between potential alternative explanations for these findings without knowing the precise nature of the evidence in the cases in question.

### 2.1.3 Women's Groups and Advocacy, and Other Drivers for Change

The reality of women's compromised engagement with the jury franchise notwithstanding the introduction of the 1919 Act, illustrated above, led to the Women's Freedom League (WFL), a suffrage organisation, observing in 1925 (Pierotti, 1925: 13 (emphasis in original)):

What the Women's Freedom League wants is to have women on *all* juries, in equal numbers with men and, as a first step towards this, we have urged the Government to introduce legislation to make it impossible for any Judge to exclude women from serving as jurors in any case in which women and children are concerned, and, further, that political enfranchisement should carry with it the liability to jury service.

When it is realised that women are an integral part of every Court of Justice, and that they cannot be requested to leave so that men should be left unembarrassed by their presence there will perhaps be a decrease in the kind of case which men object to hearing in the presence of women.

A 1920 press report of a case at Colchester Quarter Sessions, in which peremptory challenges led to the withdrawal of three women who had been empanelled as jurors, notes that 'Miss Underwood, of the Women's Freedom League, contended that if three women were withdrawn from a jury their places ought to have been taken by three other women'.<sup>21</sup>

Logan<sup>22</sup> identifies the late 1920s and early 1930s as a period characterised by concerted efforts by feminist organisations on the issue of female representation on juries. The WFL, the National Union of Societies for Equal Citizenship (NUSEC) and the National Council of Women (NCW) (principally through its Public Service and Magistrates' Committee) lobbied for the replacement of challenged women jurors by other women, and the deletion of section 1(b) of the 1919 Act.<sup>23</sup> While, however, the WFL campaigned for the abolition of the property qualification, the NCW concentrated its efforts (to which the WFL did lend its strong support) on promoting private members' bills designed to make the spouse of a qualified juror also eligible. Subsequently, following two decades of relative inactivity,<sup>24</sup> the period from the late 1950s onwards saw the NCW Public Service and Magistrates' Committee once again devoting its energies to the female jury franchise, with contributions also being made by the National Union of Townswomen's Guilds (NUTG), the Six Point Group (SPG) and the Status of Women

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<sup>21</sup> 'Sex Challenge in Trial by Jury: Women May Retaliate by Banning Males', *Dundee Evening Telegraph*, 29 April 1920, 2.

<sup>22</sup> Logan, 2013: 710–11, on which we have relied for the material in this paragraph.

<sup>23</sup> See, for example, HC Deb 20 June 1933 vol 279 cc647–9.

<sup>24</sup> Logan (2013: 710) speculates that concerns such as equal pay campaigns might have taken centre stage.



Committee (SWC). Collaboration between feminists and parliamentarians resulted in attempts to introduce private members' bills which sought to remove the property qualification.<sup>25</sup>

## 2.2 Beyond England and Wales

### 2.2.1 Ireland

The Sex Disqualification (Removal) Act 1919 applied to Ireland. As Quinn has noted, political turmoil and division within Irish society impacted uniquely upon the evolution of the common law jury in Ireland (Quinn, 2001: 201–2). Sectarian matters intersected with the imposition of property qualifications on jury eligibility. In 1922 the Irish Free State was created and it legislated in 1924 for women to have the choice to opt out of jury service.<sup>26</sup> Three years later the Juries Act 1927 exempted all women from jury participation. Women were eligible, but only upon their request.<sup>27</sup> This meant that the Irish property qualification now combined with an obligation for women to volunteer in writing. As illustrated below, this obligation heavily distorted gender equality on juries.<sup>28</sup>

The following discussion reveals that post-colonial experiences of female representation on juries in Canada, Australia or New Zealand have more in common with Ireland than with England and Wales, particularly with respect to law reform that created an appearance of action, but succeeded in achieving *de facto* inaction.

### 2.2.2 Australia and New Zealand

All New Zealand women gained the right to vote on equal terms to men early by English and by global standards—in 1893<sup>29</sup>—and, although the New Zealand National Council of Women (NZNCW) included women's jury franchise in its resolutions of 1896, women were compelled to wait until 1942 for the first signs of legislative action (see generally Powles, 1999: 309). Women maintained their advocacy prior to these first legislative steps for many decades and the topicality of the jurywomen issues is further evidenced by the numerous New Zealand newspaper accounts of the introduction of women jurors in England and in some states in the

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<sup>25</sup> HC Deb 20 March 1962 vol 656 cc210–20, 3.35 pm (Judith Hart, Member of Parliament for Lanark); HC Deb 19 February 1963 vol 672 cc249–58, 3.51 pm (Sir Barnett Janner, Member of Parliament for Leicester, North-West). It is notable that, in opposing Janner's motion for leave to introduce his bill, Joan Vickers (Member of Parliament for Plymouth, Devonport) stated: 'Speaking as the chairman of the Status of Women Committee, some members of which I have consulted, and which represents a great many women's organisations, we feel that this is not a matter to be dealt with only from the feminist point of view ... We would like to see the whole of the jury system looked into. Any alteration in the jury system should not be made in the form of piecemeal legislation.' Vickers drew attention to the recent announcement of the establishment of the Morris Committee (discussed below), remarking: 'I think that the House will agree that this is the kind of problem into which it is essential to have a full inquiry. All the various anomalies—there are many of them—will be clearly seen.'

<sup>26</sup> Jury Act 1924, s 3.

<sup>27</sup> Juries Act 1927, Schedule 1, Part 2; s 16. This form of voluntary service is described in this article as an 'opt in' requirement.

<sup>28</sup> See text to notes 75 et seq.

<sup>29</sup> Voting took place within a complex dual system with a Maori electoral roll and a general electoral roll. Degrees of descent defined the all-Maori electorate.

United States, and of agitation for change in both those countries. For example, the *New Zealand Herald* reported in 1916<sup>30</sup> that the Women's Political League of Auckland was promoting women juror law reform (and also the introduction of women Justices of the Peace). Again, in 1923 newspaper reports indicated that the NZNCW had resolved to advocate for women jurors in a context not uncommonly raised elsewhere, namely whenever women, children or girls were witnesses or defendants.<sup>31</sup> In 1934 the *Otago Daily Times* reported an event in which the call went out for women jurors and police officers, and barristers identified their unity of opposition to women jurors (without apparently intending any irony) as 'a unanimity ... probably based on impartial reasoning'.<sup>32</sup>

At the national level (rather than merely at the municipal level) Australian women,<sup>33</sup> like New Zealand women, gained political suffrage far earlier than their peers elsewhere. At both state and federal levels Australian women's right to vote was achieved over a period of a little more than a decade spanning either side of 1900 so that Australian states' status as colonies ended with universal suffrage already embedded for the vast majority of non-Indigenous Australian women. Jury franchise was also on some states' legislative agenda early in the 20th century, even in states that did not legislate for women's participation until much later. For example, Western Australia's parliament debated women's participation as jurors in 1924<sup>34</sup> and again in 1938<sup>35</sup>—and it appears that, even though no relevant legislation passed until 1957, this state considered jurywomen law reform even earlier. Correspondence<sup>36</sup> apparently initiated in late 1918 by the Western Australian Attorney-General between Attorney-Generals across Australia, and also directed to New Zealand and the United States, suggests consideration brewed for a number of years before the legislative debates. While the timing of this might have been influenced by the impending English legislation, it may also have been stimulated locally, for example by agitation from leading public figure Edith Cowan,<sup>37</sup> who shortly afterwards became Australia's first female parliamentarian. No bill passed, nor was there

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<sup>30</sup> *New Zealand Herald*, 10 April 1916.

<sup>31</sup> 'Women in Public Life', *New Zealand Herald*, 18 September 1923.

<sup>32</sup> *Otago Daily Times*, 12 May 1934.

<sup>33</sup> Excepting Indigenous women.

<sup>34</sup> Western Australia, Parliamentary Debates, Legislative Assembly, 4 September 1924, 626, 627.

<sup>35</sup> See Western Australia, Parliamentary Debates, Legislative Assembly, 26 August 1924, 493; and Walker, 2004: 32, n 3.

<sup>36</sup> See State archives, State Records Office of Western Australia, File No 4099/18, entitled 'Women on Juries: For Information re Practice in Australian States'. This file contains correspondence dated 30 October 1918 from the Crown Law Department (WA) to the jurisdictions mentioned below, stating inter alia: 'I shall be glad to know if there is any provision in Australia regarding the services of women for juries.' Replying correspondence is also included in the file. Replies are from relevant departments in other Australian states; from the Australian Federal government; and from Wellington, New Zealand. In addition, there are notations on correspondence implying that US law was also reviewed by the Crown Law Department (WA).

<sup>37</sup> See, for example, 'Women and Juries', *Daily News* (Perth), 9 June 1917, 4, expressing support for Edith Cowan's earlier call for women to be included on juries where trials concerned women or children. The issue was stimulated by an incident in the trial of a John King for gross indecency on a young boy where the juror foreman attached a rider to a guilty verdict implying a request for leniency. This article refers to the inclusion of women on jurors, noting that England was opening to women 'a larger share in the exercise of civic functions'. A similar debate is published in a Tasmanian newspaper in mid-1918: see, for example, *Mercury* (Hobart), 1 June 1918. Edith Cowan represented the Women's Service Guild and the National Council of Women (itself representing 25 societies including the Mothers' Union and the Girls' Friendly Society). See 'The Premier and the Legal Status of Women', *West Australian*, 8 September 1919.

success, until well after World War 2. Queensland was the first Australian jurisdiction to allow, from 1923,<sup>38</sup> women into the jury room. They were able to volunteer but by 1929 the state had seen only 13 women opting for jury service and none actually serving as jurors.<sup>39</sup> It took until 1995 for women to gain equal eligibility to jury franchise.<sup>40</sup>

Tasmania, the only other Australian state to offer women any form of jury participation prior to World War 2, permitted women to submit their names to the Supreme Court registrar for inclusion in the jury list with ‘necessary qualifications’ (namely, property) from 1939.<sup>41</sup> Like Queensland, there was no actual impact on the composition of juries.

### **2.2.2.1 Australian Women’s Groups and Advocacy**

No simple explanation is likely for Australian women’s inability to overcome opposition to women gaining jury franchise even of the type gained by English and Welsh women post-World War 1. That the vote should be gained so much earlier, yet significant jury franchise so much later, is curious. However, as we see below, it is a curiosity that was in fact the dominant trend, repeated in New Zealand, Canada and the majority of states in the United States. It is clear that Australian women’s campaigning was far more sedate than that of their early twentieth century English sisters, who included in their numbers members of the Women’s Social and Political Union (who engaged in violence, arson, smashing shop windows and other forms of property damage, graffiti leading to imprisonment and hunger strikes). In addition, claims for equal citizenship rights, including jury franchise, were influenced by major environmental differences arising from the Great War, which impacted in its various ways upon English women’s claims for social and political change. Perhaps Australian women lost some momentum after winning political suffrage. This explanation is supported by Caine’s observations that ‘Australian women ... grapp[ed] ... with the inevitable fragmentation [of attempting] ... to establish what a female vote or a woman citizen might mean’ (Caine, 2003). Caine (2003) observes that the English women’s movement went through a similar loss of momentum in the 1920s, but by this stage it had of course, in terms of the jury franchise movement, gained good ground.

However, it would be completely unfair to blame the Australian women’s movements for failing to overcome trenchant resistance. They were by no means indifferent to women’s jury participation. Newspaper reports indicate that the topic of women jurors was newsworthy in Australia as far back as the 1860s.<sup>42</sup> It appears likely that it was stimulated by women’s campaign for political suffrage and reports arising from English events, such as the widely

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<sup>38</sup> Jury Amendment Act 1923 (Qld).

<sup>39</sup> 15 November 1929, Legislative Assembly, Queensland, Attorney-General, Hansard, 1674.

<sup>40</sup> Jury Act 1995 (Qld). Queensland had granted women the right to vote in 1905, and to stand for political office in 1915.

<sup>41</sup> Jury Act 1939 (Tas).

<sup>42</sup> For example, see *The Ballarat Star*, 6 March 1865, 2; ‘My Notion of Women’s Rights’, *Evening News* (Sydney), 5 January 1870 (republished elsewhere several times, including interstate: see, for example, ‘The Future of English Women’, *Riverina Herald* (Victoria/NSW), 29 May 1872).

reported jury of matrons sitting in the Old Bailey in 1879.<sup>43</sup> In 1884 the *Adelaide Observer*<sup>44</sup> contained a detailed account of United States, European and English women's advances in public and professional spheres, with spirited responses to male criticism of women's capacities to sit on juries also beginning to appear in newspapers in the late 19th century,<sup>45</sup> and continuing at an exponential rate through to the 1970s. Newspaper accounts show women's activism beginning at least from the turn of the century, in 1901.<sup>46</sup> Sometimes public debate arose from a criminal prosecution where it was argued that justice, given the involvement of a woman as either a victim or defendant in the case, would have been better served had women jurors participated in the case. Repeated indications are found of the mobilisation of numerous Australian women's groups to demand jury participation for women.<sup>47</sup> Certainly the temperance movement and the related issues of child protection and women's rights were significant. Temperance was perceived as a women's issue because alcohol was seen to be associated with destroying families. Unlike the militancy of English suffragettes, or the mobilising of media and intense lobbying seen in the United States, Australian women's groups appear to have sought to execute their claim more sedately. Deputations and the acquisition of male patrons—and later women—in high places appear to have been common. For example, a 1913 report on a delegation of women to the New South Wales Attorney General notes that the jurywomen topic had 'agitated the minds of a bunch of Sydney women for a long time past'.<sup>48</sup> In South Australia,<sup>49</sup> the Women's Non-Party Political Association in Australia sought jury participation in late 1911. One presumes that, from the mid-1920s, the legislated inclusion of women as volunteers in Queensland focused the minds of women in other states. Women's groups' reliance on patrons with political clout to support their cause appears to have been the major method by which they escalated their arguments to the highest levels of government. Patronage was not sufficient, however, to create success. For example, even though legislative action to include women was mooted in New South Wales from at least 1915,<sup>50</sup> it came to naught, at least until after World War 2.

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<sup>43</sup> *Maryborough Chronicle*, 29 November 1879.

<sup>44</sup> 'Women at Work', *Adelaide Observer*, 28 June 1884.

<sup>45</sup> See, for example, M English, 'Do Women Read Newspapers', *Daily Telegraph*, 29 December 1893; 'The World of Woman', *The Champion* (Melbourne), 6 July 1895. From this point the articles become numerous throughout the early and mid-twentieth century.

<sup>46</sup> 'Premier of NSW, John See, responds to a question in Parliament and says he "fully believed in women acting as jurors"', *National Advocate* (Bathurst), 5 October 1901; *Molong Advertiser*, 22 April 1904 (reprinting a story from the *Home Journal*); *Daily Telegraph* (Launceston), 25 October 1909 (revealing also the attention given to women jurors internationally).

<sup>47</sup> Including the Medical Women's Association, Women Graduates Association, Woman's Christian Temperance Union, Soroptimists' Club, Country Women's Association and the Housewives Association.

<sup>48</sup> *The Sun* (Sydney), 14 December 1913.

<sup>49</sup> This information is taken from [http://www.slsa.sa.gov.au/women\\_and\\_politics/polit7.htm](http://www.slsa.sa.gov.au/women_and_politics/polit7.htm) (accessed 1 April 2018).

<sup>50</sup> *Woman Voter* (Melbourne), 4 November 1915.

### 2.2.3 Canada

Nationally, Canadian non-Indigenous<sup>51</sup> women gained voting rights later than their Australian and New Zealand counterparts—but ahead of English women. Political suffrage for most Canadian women was achieved federally between 1918 and 1920, but it was confined by provincial limitations, which included property qualifications. As Brent (1975: 364) observes, women from excluded groups, such as the Chinese, Japanese and Canadian Indians, gained the vote only as legislation became racially neutral.

All provinces granted women political suffrage between 1916 and 1919—excepting Prince Edward Island, Newfoundland and Quebec. Prince Edward Island followed in 1922 and Newfoundland in 1925.<sup>52</sup> Quebec, also a late-comer with jury franchise for women, took until 1940 to give women political suffrage rights. Canadian provinces created a set of controls and filters on women’s jury participation rights that were not dissimilar to those applying in Australia. The early instigators of women’s jury participation eligibility—Alberta, British Columbia and Nova Scotia—granted women eligibility for jury participation in the 1920s,<sup>53</sup> but (like the early Australian states of Queensland and later Tasmania) Alberta<sup>54</sup> and Nova Scotia<sup>55</sup> offered only an entitlement to ‘opt in’, and British Columbia<sup>56</sup> permitted women to ‘opt out’. These were the only provinces to take steps prior to World War 2.

### 2.2.4 United States<sup>57</sup>

There is quite extensive scholarly literature on the historical exclusion of women from juries in the United States.<sup>58</sup> The debate on women’s jury franchise began in the late nineteenth century.<sup>59</sup> Some states had provided women access to jury lists in the nineteenth century and early twentieth century (Ritter, 2002), and some permitted women to serve as jurors only to rescind the right subsequently.<sup>60</sup> However, at least nineteen states had women serving on juries by 1921<sup>61</sup> and just over half of these states provided full jury franchise automatically upon

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<sup>51</sup> Canadian ‘Indians’ (Inuit, Metis and other First Nations) were not necessarily treated as a single category. Most Canadian ‘Indians’ were removed from the electoral roll between 1875 and 1922 and political franchise took place post World War 2. See generally Israel, 2003: 39–43.

<sup>52</sup> For dates, see [https://lop.parl.ca/sites/ParlInfo/default/en\\_CA/ElectionsRidings/womenVote](https://lop.parl.ca/sites/ParlInfo/default/en_CA/ElectionsRidings/womenVote) (accessed 1 April 2018).

<sup>53</sup> This legislative action is detailed and discussed in Greenwood and Boissery, 2000: Ch 6.

<sup>54</sup> SA 1921, c 8, ss 3, 5, 17.

<sup>55</sup> Arising from *Edwards et al v AG Canada et al* [1930] AC 124 [the Persons case]; see Greenwood and Boissery, 2000: 129.

<sup>56</sup> SBC 1922, c 38.

<sup>57</sup> For Native Americans and under-representation see Gross, 2016.

<sup>58</sup> In addition to works cited below, see also Sheridan (1925); Copelon, Schneider and Stearns (1975); Abrahamson (1986); Weisbrod (1986); Rodríguez (1999); Rogers (2000); Davis (2007); McCammon (2009); Feeley and Aviram (2010); Eisenberg (2017); Eisenberg, Hritz, Royer and Blume (2017).

<sup>59</sup> See Hinchcliff, 1985–1986 (citing Howe, 1870).

<sup>60</sup> Wyoming permitted women to act as jurors briefly between 1870 and 1892, apparently because of a small male population, but then rescinded the right: see Matthews, 1927.

<sup>61</sup> Arkansas, Louisiana, Maine, Minnesota, New Jersey, North Dakota, Oregon and Wisconsin (all 1921, by specific enactment); Washington (1911); Kansas (1912); Nevada (1914); California (1917); Michigan (1918); Delaware (1920); Indiana (1920); Iowa (1920); Kentucky (1920); Ohio (1920); Pennsylvania (1920). See

women gaining political suffrage. These inroads into women's exclusion from the jury box added the tangibility of experience to women's groups' claims against obstruction (Matthews, 1927: 16). The tardiness of so many states in granting women formal jury franchise equality suggests such proof could not shift deeply embedded resistance. New York was prominent in its delay, particularly because women's groups' claims for jury participation were strong and vocal, involving lobbying state politicians, holding rallies and car tours, organising mass letter-writing campaigns and using local media to engage public attention (McCammon, Muse, Newman and Terrell, 2007: 727). The scale of this movement appears to dwarf comparable activity in Australia. For example, in 1925 the *New York Times* reported a 1,000-strong launch of support for the New York State Woman Jury Service Bill at the New York League of Women Voters.<sup>62</sup> Speeches from women from England, and from Ohio and New Jersey, extolled the virtues of women's engagement in the justice process as jurors. Despite the show of force, they were to wait over another decade, until 1937. As with Australia and Canada, success was typically relative to the alternative—no prospect of inclusion on a jury. McCammon, Muse, Newman and Terrell (2007: 746) note that 'in some states, the impact of a new jury law was tempered because [of] other new laws [that] provided exemptions for women if they chose to use them'. Not uncommonly, for example in Idaho, the courts barred women. For example:

The sections of our jury statutes, which we have quoted, show that the Legislature ordained that jurors shall be men, who are citizens and electors. Women are both citizens and electors. It is true that [a section of a particular statute] does not use the word 'men,' but it does use the pronoun 'he,' and that section, as well as [the following section of the statute], must be read and construed with the other sections. No other construction can be given to the foregoing sections of the statutes than that men, males, were distinctly specified as the class of citizens subject to the performance of jury duty. There is no question about the intention of the Legislature.<sup>63</sup>

For the United States, as one might expect, it was at the Constitutional level and in courts that the battle for formal jury franchise equality was often lost, but was ultimately won. As the next Part indicates, like England and Wales, Ireland, Australia, New Zealand and Canada, removing formal discrimination in accessing the jury box in the United States was to take until the last quarter of the twentieth century. It was fought out in the US Supreme Court.

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Matthews, 1927. Matthews indicates that Utah permitted women to serve, but exempted them, so none were actually called for service.

<sup>62</sup> 'Women Begin Drive to Serve on Juries: 1,000 at Luncheon of Voters' League Endorse Bill before Legislature', *New York Times*, 27 January 1925, 7.

<sup>63</sup> *State of Idaho v Kelley* 39 Idaho 668, 229 P 659 (1924) per WA Lee J, an appeal from a verdict of guilty from a jury of 12 women. This judgment lists eight authorities in support, and four contrary. See McCammon, Chaudhuri, Hewitt, Muse, Newman, Smith and Terrell, 2008: 1108.

### 3. POST WORLD WAR 2

As the preceding section has shown, despite decades of activism, the campaign for equality of jury franchise—and, in some jurisdictions, for any jury participation at all—was to last well into the second half of the twentieth century. McCammon, Chaudhuri, Hewitt, Muse, Newman, Smith and Terrell (2008: 1107) observed of the United States, where campaigning was broadly based and often robust, that enacting law to permit even token female participation on juries, let alone grant equality, was surprisingly contentious. McCammon and her co-authors repeat statements that could readily be applied beyond the US as well, first from an activist in 1930 likening jury franchise to ‘a second suffrage campaign’, and then from a woman senator in 1945 who declared that enabling women on to juries underpinned ‘one of the hardest fought bills ever passed by the Colorado Senate’. Like the pre-World War 2 period, the tardiness of states in granting equality to women was a matter neither of women’s indifference (as was regularly claimed) nor of their lack of persistence. Generations of women were active political agents, frustrated by resistance and obstacles, but dogged in taking the fight to generations of legislators.

#### 3.1 England and Wales

Writing extra-judicially in 1956, Lord Devlin described the typical juror as ‘not really representative of the nation as a whole’, being ‘predominantly male, middle-aged, middle-minded and middle-class’.<sup>64</sup> The property qualification restricted eligibility for jury duty, in essence, to ‘householders’ of premises of a certain value.<sup>65</sup> A change of gear occurred with the announcement of the establishment of the Departmental Committee on Jury Service, to be chaired by Lord Morris of Borth-y-Gest. At the Morris enquiry in the early 1960s, the SPG was represented by Hazel Hunkins Hallinan, Mary Stocks and Joan Vickers; and evidence to the committee was submitted by the NCW, NUTG, SWC, National Federation of Women’s Institutes (NFWI), National Women’s Citizens Association (NWCA), St Joan’s Alliance, Society of Women Writers and Journalists, Women’s Liberal Federation, Conservative Party’s Women’s Advisory Committee and Suffragette Fellowship (Logan, 2013: 711). Logan (2013: 711) observes that

[t]his roll call of organisations—most of which had originated either before, during or shortly after the First World War, and including both self-identifying feminist bodies and ostensibly non-feminist women’s organisations—suggests strongly that the demand for equality on juries was something that rallied support across the women’s movement. Contrary to accounts that liberal feminism had long since ceased to be a vibrant movement, it seems that the spirit of the suffrage struggle was still alive. The timing of this campaign is particularly interesting, as events in the early 1960s rarely feature in accounts of the women’s movement.

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<sup>64</sup> Devlin, 1956: 20. Devlin elaborated (at 20–1): ‘I have never seen more than four women on a jury and you are almost as likely to find none as three; two is the commonest number and one is quite usual.’

<sup>65</sup> See the discussion of the property qualification in the *Report of the Departmental Committee on Jury Service* (Cmnd 2627) (London: HMSO, 1965) Ch 4.

Cornish (1971: 29) noted that '[w]omen's organizations have continued to keep [the] imbalance [in gender representation on juries] in the public eye and the appointment of the Morris Committee to review the whole question of qualification for jury service was largely the result of their efforts'. Cornish's observations suggest that a consistent element across time and geography is that change occurred as a result of campaigning, and not for any other reason. By the 1960s, however, a practical problem had also emerged (one that has continued to be a feature of the criminal justice system in England and Wales and, arguably, explains to some degree subsequent moves to widen the pool from which jurors could be drawn<sup>66</sup>): the shortage of potential jurors (Logan, 2013: 711–12).

The effect of the property qualification, noted the Morris Committee in its report in 1965, 'is that women form only 11 per cent of the total number of available jurors, and we understand that—as indeed one would expect on this basis—it is rare to find more than two or three women on any particular jury. Most juries are composed entirely of men.'<sup>67</sup> Cornish (1971: 28) observed that 'jury service has remained the one public duty for which a property qualification is required, during a period in which other public rights and responsibilities have come to be shared by all adult citizens'. It is perhaps unsurprising that the Morris Committee, 'attracted by the notion of jury duty as a concomitant of the privilege of citizenship' (Cornish, 1971: 30), took the view that 'juries ought to represent the whole population to whom other rights of full citizenship are given: this is an essential part of the concept of a jury' (Cornish, 1971: 32). The Committee's recommendation that the property qualification be abolished was implemented, after significant delay, in 1972.<sup>68</sup>

Of relevance too is the fact that section 1(b) of the Sex Disqualification (Removal) Act 1919 was eventually deleted in 1971.<sup>69</sup> While it does not appear that section 1(b) had had any significant practical impact on the composition of juries, having been 'used far less frequently than peremptory challenge to purge a jury of women' (Logan, 2013: 705), there may well have been more occasions on which it was used than is generally acknowledged (Logan, 2013: 705–6). Similarly, while Anwar, Bayer and Hjalmarsson (2016: 12) identified only 11 cases involving the use of section 1(b) at the Old Bailey between 1921 and 1926, they considered 'it ... possible ... that such requests were not always noted in the records'. Crosby's research also demonstrates that it was 'unclear how frequently [this] judicial power to order a single-sex jury was actually used' (Crosby, 2017: 709).

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<sup>66</sup> See, recently, Criminal Justice and Courts Act 2015 (upper age limit for jury service raised from 70 to 75); Criminal Justice and Courts Act 2015 (Commencement No 5) Order 2016.

<sup>67</sup> *Report of the Departmental Committee on Jury Service* (Cmnd 2627) (London: HMSO, 1965) [49]. Note also the following comments by Sir Barnett Janner (Member of Parliament for Leicester, North-West) in the House of Commons (HC Deb 19 February 1963 vol 672 cc249–58, 3.51 pm): 'I made a check in the register of my constituency some time ago and found that of the 51,223 eligible to vote in Parliamentary or local elections only 2,847, in consequence of the archaic law as it stands in respect of juries, were eligible for jury service. The rest I describe as second-class citizens not entitled to sit on juries, but at least this applies to both men and women. The third class of citizens, according to our present system, is women and only 164 in the constituency, which has nearly 52,000 electors, are eligible to serve on juries. So only 2,863 men and 164 women in my constituency are credited by the law with gifted specialist talent. They being householders or property owners are designated as possessing mental and other faculties necessary to judge their fellow citizens in accordance with the definition in Halsbury.' In the *Report of the Departmental Committee on Jury Service* (Cmnd 2627) (London: HMSO, 1965), however, it was 'noted with interest that in Scotland there is a property qualification for jury service, but one which does not result in most women being excluded. ... [W]e were told that in the City of Edinburgh there were 15,963 men and 16,842 women in the jury book' ([56]).

<sup>68</sup> See Criminal Justice Act 1972, Schedule 2, Parts I and II. See now Juries Act 1974.

<sup>69</sup> Courts Act 1971, s 35(7).



Until it was abolished in 1988, the right of peremptory challenge continued throughout the decades to have impact on the composition of juries. A small-scale survey conducted in 1964 revealed that ‘the proportion of women jurors challenged is very much greater than the proportion of men jurors challenged’.<sup>70</sup> Specifically, it was found, first, that

[a]t the Central Criminal Court[,] between 7th January and 16th March 1964[,] 1,693 jurors were empanelled, of whom 167 were women. There were 118 juries sworn to try cases. In all but 14 cases there was no peremptory challenge by the defence, and in those 14 cases the defence exercised its right of peremptory challenge in respect of a total of 26 jurors, of whom 11 were men and 15 were women. The 15 women jurors were challenged in a total of seven cases, and in five of these it seemed likely that the intention was to obtain an all-male jury. In these five cases, the charges were grievous bodily harm; robbery of an elderly female with violence; shooting by a woman with intent to murder her lover; rape and sexual intercourse with a girl under 16; and drunk in charge and dangerous driving.

Secondly:

At London Sessions[,] between 7th January and 19th March[,] 648 jurors were empanelled, of whom 66 were women. There were 223 contested cases. In all but 10 cases there was no peremptory challenge by the defence, and in those 10 cases the defence exercised its right of peremptory challenge in respect of a total of 24 jurors, of whom 17 were men and seven were women. The seven women were challenged in a total of six cases, and in two of these it appeared likely that the intention was to obtain an all-male jury. In these two cases the charges against the accused were driving a motor vehicle when unfit to drive through drink and drugs, and receiving jewellery stolen from females.<sup>71</sup>

Notably, peremptory challenges resulted in an all-male jury in 1966 in the ‘Moors Murderers’ trial of Ian Brady and Myra Hindley (Logan, 2008: 91). Cornish (1971: 49) observed that the use of peremptory challenges to obtain an all-male jury ‘has for long been common in sex cases, and the practice is growing in drunken-driving cases’. Specifically of relevance to the second category of case identified by Cornish is the revelation in *Hansard* of Lord Chorley’s observation in the House of Lords in 1966 that ‘over the past year in my own court of quarter sessions every woman juror in cases of [driving motor vehicles while unfit through drink] has been challenged, and I have heard that the same practice exists in other courts of quarter sessions in the North of England’.<sup>72</sup> A three-month national survey conducted at the end of 1986 revealed that, in ‘cases in which there were only male defendants, 16 per cent of potential jurors challenged were women in cases involving sex offences compared with about 6 per cent of challenges in male defendant trials overall’ (Riley and Vennard, 1988: 736).

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<sup>70</sup> *Report of the Departmental Committee on Jury Service* (Cmnd 2627) (London: HMSO, 1965) [327].

<sup>71</sup> *Report of the Departmental Committee on Jury Service* (Cmnd 2627) (London: HMSO, 1965) [325]–[326]. See also ‘Women Excluded from Jury at Trial of Alderman on Driving Charge’, *Yorkshire Post and Leeds Intelligencer*, 12 November 1954: defence counsel ‘successfully challenged the admission of three women jurors on the grounds that “certain crude expressions” would have to be discussed during the case’.

<sup>72</sup> HL Deb 30 June 1966 vol 275 cc778–80, 3.16 pm.

Twenty first century research<sup>73</sup> suggests that women and men are represented relatively equally on juries. Indeed, by the time they wrote in 1978, Albie Sachs and Joan Hoff Wilson (1978: 175) felt able to note with optimism that '[t]he solitary area of judicial activity where gender equality has been achieved has been in relation to the jury'. If this observation is accurate, the abolition of the property qualification must have played a significant role, though, as Crosby's research indicates (Crosby, 2017), and as the other common law jurisdictions reveal, the perception of equality may be distorted by decisions made out of sight.<sup>74</sup>

### 3.2 Ireland

Returning to the Irish position, we find a strong illustration of how the 'opt in' basis for jury participation fell short of the pre-1920 position in a 1955 letter to the editor of *The Irish Times* from Beatrice Dixon, a member of the Irish Housewives Association, who began her correspondence by noting congratulatory comments she had received from readers for being included in the jury *panel*. After listing the onerous property requirements for acceptance on the jury list, and women's experiences of being invariably challenged when called to serve, Dixon noted that upon seeking an application form she was informed 'women don't serve on juries', a telling reference to the *de facto* total exclusion that persisted until the very first two women finally broke through in 1958.<sup>75</sup> Dixon's letter concluded by noting the layers of resistance a woman in 1955 faced when seeking to participate on a jury, culminating in a likely party challenge should it appear that she might make it beyond the panel to the jury box. Thus, remarked Dixon, the small number of women who bothered to volunteer was hardly surprising.<sup>76</sup> In a subsequent letter to the editor, Dixon reported being informed that the inadequacy of female toilets for jurors was 'one of the administrative difficulties of accepting women jurors'.<sup>77</sup> The 'not-enough-toilets' refrain played a similar role in persistently thwarting women's eligibility to serve on juries in at least two Australian states from the 1940s until the 1970s. That Dixon was exceptional as an activist appears likely, but she was by no means a lone voice. For example, below Dixon's 1955 letter, a representative of the Women's Social and Progressive League presented a passionate rallying cry for equality, noting the recommendation to this effect by the Joint Committee of Women's Societies, representing 16 associations.<sup>78</sup> However, some fifty years after the 1927 Act, much of this remained a faint symbol of optimism rather than any marker of progress. This is revealed in the watershed case

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<sup>73</sup> Thomas (with Balmer), 2007: 144: 'Among all those summoned who did jury service in all the Crown Courts combined, the proportion of women to men was exactly the same (51% to 49% respectively), and this was also the ratio of women to men in the jury pools at Blackfriars, Reading and Manchester Minshull Street. In addition, on individual juries in these three courts during the study, there were no all-male or all-female juries or even any juries with only one male or one female juror; 88% of all the juries had either a 6:6, 7:5 or 8:4 gender split. These findings strengthen the conclusion of the summoning survey that the under-representation of women among serving jurors is another myth of jury service.' See also Thomas, 2008.

<sup>74</sup> See also Conclusion below.

<sup>75</sup> Beatrice Dixon and Kathleen Swanton: see *Irish Times*, 10 August 2000. See also Quinn (2001: 203) regarding the considerable property qualification variations across Ireland.

<sup>76</sup> *Irish Times*, 18 October 1955. She was also politically active, seeking election as an Independent, unsuccessfully, in the general election of 1957: 'An Appreciation Beatrice Dixon', *Irish Times*, 28 March 2005.

<sup>77</sup> 'No Toilets', *Irish Times*, 24 February 2000.

<sup>78</sup> See 'Women Seek Jury Service', *Irish Times*, 14 October 1955.

of *De Burca and Anderson v The Attorney-General*, where Henchy J commented that ‘a consequence of the exemption of women ... is that women hardly ever serve on juries’:

Official records show that out of the hundreds of jury trials of criminal offences that took place in this State in the ten years prior to 1973, and out of the thousands of jurors who served in that period, only two women did jury service. For practical purposes, therefore, jury service is a male preserve and the plaintiffs are correct in saying that the operation of the statutory exemption of women virtually ensures that the jury before whom they will stand trial will be entirely male.<sup>79</sup>

Relying on these observations of gender discrimination, the Supreme Court in *De Burca* held the Juries Act 1927 to be unconstitutional because of its automatic exemption of women from jury participation. According to Quinn (2001: 203), work had begun to remove discrimination prior to *De Burca*’s case. It translated into the Juries Act 1976, where formal eligibility is unaffected by either gender or property ownership.

### 3.3 Australia and New Zealand

It took until 1942 for New Zealand non-Maori women between 25 and 60 years of age<sup>80</sup> to gain the right to opt in for inclusion on jury rolls.<sup>81</sup> Like other ‘opt in’ practices, the number of women’s names included on the jury rolls was token, with seemingly only a small handful of women proceeding unchallenged on to the jury up to 1960.<sup>82</sup> Maori women did not gain the right to jury participation outside the all-Maori jury system until 1962.<sup>83</sup> In 1963 New Zealand women, including Maori, gained the right to be on jury lists automatically, but could be excluded on request without reason.<sup>84</sup> It was not until 1976 that New Zealand women were eligible for the jury on equal terms to men (Powles, 1999).

Although South Australian women were the first to gain equal rights to vote in Australia—in 1895<sup>85</sup>—they did not gain equal jury franchise until 1976, creating, along with Queensland, the most extreme examples of disconnection between the grant of women’s political franchise and gender equality in jury franchise. South Australia’s resistance to *any* women having the possibility of engaging in jury service was maintained until late in 1965 despite lobbying.<sup>86</sup> Even then, the first law reforms gave a woman ‘opt out’ opportunities at two stages—first in the compilation of the jury list and later when she was summoned. South Australia might have

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<sup>79</sup> [1976] IR 38, 77 (SC).

<sup>80</sup> Men were eligible from 21 to 65 years of age.

<sup>81</sup> Women Jurors Act 1942 (NZ), s 5. See also Powles, 1999.

<sup>82</sup> Powles, 1999: 312. Powles (at 310) indicates, but notes as unconfirmed, that 25 women out of 8,000 names were included in the first year. On Auckland, newspaper reports refer to 15 women (‘Some are Called’, *Auckland Star*, 28 June 1943) and 20 women (‘Missed the Ballot’, *Auckland Star*, 23 July 1943). See also for Christchurch, ‘Women Jurors: Nine Applications in Christchurch’, *The Press*, 20 March 1943. All-Maori juries from 1862 until 1962 supposedly allowed the Maori to have justice administered in their own language and culture: Juries Amendment Act 1962, ss 1–2. See also New Zealand Law Commission, 2001: [150].

<sup>83</sup> Juries Amendment Act 1962 (NZ). They had been excluded by the Jury Amendment Ordinance 1844 (NZ).

<sup>84</sup> Juries Amendment Act 1963 (NZ), s 2.

<sup>85</sup> Including such Indigenous women as also gained the right to vote in 1895.

<sup>86</sup> Juries Act Amendment Act 1965 (SA), amending the Juries Act 1927 (SA), ss 23 and 32; and see also s 60A regarding single-sex juries ‘by reason of the nature of the evidence to be given or the issue to be tried’.

been the last Australian jurisdiction to grant women *some* access to jury participation, but it was not the last to remove gender discrimination completely.

The early signs that the inclusion of women for jury service, by the Jury Amendment Act 1923, would be merely token were confirmed in 1956 correspondence from the Attorney-General of Queensland to Victorian MP Turnbull. The letter reported quite extraordinary statistics on Queensland women's lack of acceptance since 1941, namely that 'only three (3) women have served on the Jury Panel, and in each instance their services were not availed of since they were either "stood by" by the Crown Prosecutor, or "challenged" by the defence. There are [in 1956] 29 women only enrolled only for Jury Service in [the] metropolitan area of Brisbane'.<sup>87</sup> Tasmania, the only Australian jurisdiction in addition to Queensland to have opened its jury lists to women prior to World War 1, does not appear to have summoned even a single woman to jury service until 1949,<sup>88</sup> and then, as in Queensland, it appears that she was not empanelled. Tasmania took until 1991 to legislate for gender equality.<sup>89</sup> Thus the appearances of Queensland and Tasmania as pre-World War 2 vanguard states for Australian women's jury rights were, in fact, no more than mirages.

In 1947 legislative reform in New South Wales gave women in that state their first opportunities to opt in for jury service. That it fell well short of the promise that was feted at the time is confirmed in reports in the Victorian Hansard debates of 1956 that nine jury districts in New South Wales had a total of 283 women on their Jury Lists.<sup>90</sup> Apart from experiences in Tasmania and Queensland fuelling doubt about New South Wales' women's actual engagement on a jury, there was the ominous element in the proclamation of the 1947 Act that it was to commence in Jury Districts according to the availability of 'accommodation for women jurors in the Courts'.<sup>91</sup> An archived 1960 Sydney Jury List reveals that only 1.5% were women<sup>92</sup> and, as parliamentary debates would reveal in years to come, it seems that it was common practice between 1947 and 1968 for administrators to refuse New South Wales women access to jury service because of 'accommodation difficulties', a 'delicate euphemism for no lavatories'.<sup>93</sup> Even by 1977, on the eve of New South Wales women gaining full jury franchise, the failure to provide women's toilets was still treated as an impediment to women in 8–10 New South Wales Jury Districts.<sup>94</sup> This was a particularly cruel twist, because, as experiences elsewhere show, even without claiming women's toilet facilities as a practical bar,

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<sup>87</sup> Parliamentary Debates, Legislative Assembly (Victoria), 29 August 1956, C Turnbull, 3797–3798. Turnbull added: 'Apparently women are not over-anxious for jury service'. At this time, the 'opt in' reform was rejected in Victoria. Women in that state remained ineligible.

<sup>88</sup> *Examiner* (Launceston), 29 June 1949. She was one of only five women registered.

<sup>89</sup> Jury Amendment Act 1991 (Tas).

<sup>90</sup> Parliamentary Debates, Legislative Assembly (Victoria), 29 August 1956, C Turnbull, 3798.

<sup>91</sup> Hon FJ Walker, Attorney General, New South Wales Parliament, 24 February 1977, Hansard, p 4477; Johns, 2005.

<sup>92</sup> Jury List, 1960, Sydney, State Archives, NSW. That is, 644 women out of 43,480 eligible citizens on the List.

<sup>93</sup> Hon FJ Walker, Attorney General, New South Wales Parliament, 24 February 1977, Hansard, p 4477; Johns, 2005. How extensive this refusal was, and whether it applied after women were added to the Jury List, or before, remains unclear.

<sup>94</sup> Hon FJ Walker, Attorney General, New South Wales Parliament, 24 February 1977, Hansard, p 4477. This was despite complaint: see, for example, 'Judicial Lack of Facilities', *Tribune*, 3 September 1974.

the 'opt in' system for women was a filter rather than a facilitator to women's engagement in the jury process.

The filtering by the absence of lavatories was similar in Victoria, the second most populous Australian state. Parliamentary debates in 1964 make reference to 'jury districts in the State where there are not adequate amenities', in which case 'women jurors will not be used'.<sup>95</sup> These are not the only examples of 'opt in' regimes with additional filters operating to exclude women. For example, clause 4 of the Victorian Juries (Women Jurors) Bill 1964 provided that the Chief Electoral Officer was not required to include a woman's name until he 'has been given notice in writing by the Minister that he is to include women in the next draft jury roll prepared for that district'.<sup>96</sup>

A compelling 1960s account of the layers of exclusion is provided by Norman MacKenzie from his observations in court when Western Australia's Juries Act 1957 came into force. Women were made eligible for jury service not merely as volunteers as in a number of other Australian states at this time, but still with the right to cancel their enrolment. MacKenzie observed that of the 5,912 women selected, all but 1,850 exercised this right to cancel, while 4,116 men remained on the list (from 4,808 selected). The potential jurors were in the ratio of 7:3 men to women. MacKenzie (1962: 254–55) adds:

On 3 August 1960 I was in the Perth criminal court when the first women were called: of 8 who were selected in the draw, 6 were challenged and 2 reached the jury box after defence counsel had exhausted his 6 challenges in barring the first women who came up.

In terms of numbers it is likely to be a considerable time before women take their place as equals on Australian juries; but in terms of principle the matter should be settled much sooner. In this I believe that the women's groups which regard their exclusion or second-class status as an undesirable privilege are right: until all states accept women jurors, and select them not as volunteers but on the same basis as men, in one important and symbolic respect formal discrimination against women on grounds of sex will remain.

This muted success for women was claimed as a victory by many. It was the culmination of women's jury franchise being rejected in 1953, 1954 and 1955.<sup>97</sup> However, equal jury service rights for Western Australian women took another quarter of a century. It followed a steady trail of states finally catching up with the role of the jury as a representative body—South Australia in 1976,<sup>98</sup> New South Wales and Victoria in 1977<sup>99</sup> and the Australian Capital

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<sup>95</sup> Victoria, Parliamentary Debates, Legislative Council, 26 November 1964, p 1857.

<sup>96</sup> Victoria, Parliamentary Debates, Legislative Council, 26 November 1964, p 1857.

<sup>97</sup> See Western Australia, Parliamentary Debates, Legislative Assembly, 14 October 1953 (pp 1060, 1061); 28 July 1954 (p 745); 15 September 1955 (p 614); 4 December 1956 (p 2845); and Walker, 2004: 32, n 3.

<sup>98</sup> Juries Act Amendment Act 1976 (SA).

<sup>99</sup> Jury Act 1977 (NSW). The Juries (Amendment) Act 1975 (Vic) removed the 'opt out' clause, but retained the discretionary element mentioned earlier, exercisable through the Chief Electoral Officer. This was removed in 1977. See also Law Reform Committee, Parliament of Victoria, 1997. The Committee compiled figures: of 23,948 persons summoned, 10,939 were women and 13,009 men. As at 30 June 1994, of a total Victorian population of 4,476,100, there were 2,216,500 males and 2,259,600 females. Females therefore represented 50.48% of the population.

Territory in 1979. Western Australia achieved formal equality for women in 1985, with Tasmania (1991) and Queensland (1995), the Australian front-runners, becoming the laggards. Post-World War 2 women's campaigning continued to be a story of lobbying in six separate states and two territories—Northern Territory and the Australian Capital Territory—and also with a national presence.<sup>100</sup> Women's modus operandi was through deputations<sup>101</sup> to government leaders, sometimes with a woman within politics. Premiers' and state Attorney-Generals' actions indicate that they held little compunction in rejecting women's inclusion, even on the basis that they 'simply did not favour women jurors'.<sup>102</sup>

The ongoing political disempowerment of Indigenous Australians, as well as the absence of Indigenous Australians from the electoral roll (from where the jury lists are created), feeds directly into jury disenfranchisement. Although some Indigenous Australians gained the right to vote early, even in the 19th century, it was not until 1949 that this was extended to more (but not all) for federal elections, and then in 1962 to all Indigenous people federally. However, enrolling to vote for Indigenous Australians remained optional. It was not until 1983 that all Indigenous as well as non-Indigenous Australians were compelled to enrol and to vote in all elections, thus creating—in theory at least—a base for Indigenous Australians to be fully included on jury lists. But this parade of dates belies the complexity of Indigenous political suffrage. The true picture of political suffrage, and hence the practical ability of an Indigenous Australian to be a juror, is beyond the legislation as well. As Chesterman and Galligan (1997: Ch 6) catalogue, at various times and in various Australian jurisdictions, and from 1949 federally, some Indigenous Australians had the right to vote, but their political suffrage was typically hedged with assimilation-inspired policies linked to 'degree' of Aboriginality, whether they had enlisted in the armed forces and various other matters. Only a small fraction of Aborigines enrolled and voted prior to 1983 because of confusing law, mixed with social, political and economic alienation, desire for autonomy<sup>103</sup> and widespread disinclination of electoral authorities to encourage enrolment. Even fewer were enrolled prior to 1962 (Chesterman and Galligan, 1997: Ch 6). Further, the contemporary situation gives a flavour of the extent to which Indigenous Australians have been excluded from having an adequate political voice. In 2016 the Australian Electoral Commission estimated that only 58% of Indigenous Australians were enrolled to vote. *The Guardian* (Australia) casts doubt on this estimate, suggesting

the real enrolment figure ... to be closer to 50%. More [important], however, is the private assessment by some Indigenous leaders, non-government and government

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<sup>100</sup> Including League of Women Voters and the National Council of Women, the Medical Women's Association, Women Graduates Association, Woman's Christian Temperance Union, Soroptimists' Club, Country Women's Association and the Housewives Association.

<sup>101</sup> Led by Dr Constance Davey and Phyllis Duguid: [http://www.slsa.sa.gov.au/women\\_and\\_politics/polit7.htm](http://www.slsa.sa.gov.au/women_and_politics/polit7.htm) (accessed 1 April 2018).

<sup>102</sup> Chief Secretary RJ Rudall, also acknowledging that women were 'competent, able and intelligent': [http://www.slsa.sa.gov.au/women\\_and\\_politics/polit7.htm](http://www.slsa.sa.gov.au/women_and_politics/polit7.htm) (accessed 1 April 2018).

<sup>103</sup> See <https://www.creativespirits.info/aboriginalculture/selfdetermination/voting-rights-for-aboriginal-people> (accessed 1 April 2018).

agencies, that only 25 to 30%—or about half—of Indigenous Australians who are enrolled actually cast a formal vote.<sup>104</sup>

The issues are ones that run deep—into Indigenous people’s cultural preferences, their lack of literacy, and the fact that a significant percentage are without fixed homes and many live in remote communities.<sup>105</sup>

### 3.4 Canada

The Canadian provinces’ experiences appear to be very similar to those of the Australian states, particularly in terms of the strong resistance to women’s claims and the belated political enfranchisement of Canadian First Peoples.<sup>106</sup> Debate and activism for women’s inclusion on juries took place in Ontario, Saskatchewan, Manitoba and New Brunswick at least from the 1940s and 1950s. Of the four provinces that permitted women to enter the jury box in the 1950s,<sup>107</sup> a combination of legislated ‘gaps’ and the practitioners’ challenges constructed a picture like that in the Antipodean nations—women remained almost entirely excluded. As the reporter from the *Quebec Chronicle Telegraph* observed of Manitoba in 1961, after a decade of formal rights to access the jury box only three women served as jurors—after 40 were summoned and 25 had claimed exemption.<sup>108</sup> This is reported as average. By 1962 jurywomen were still barred in three provinces, ‘never seen in two others and rarely in another four’.<sup>109</sup> This was four decades after the first three Canadian provinces formally permitted women access.<sup>110</sup> Despite Alberta being the very first of these, it could still be stated in 1962—over 40 years later—that the province ‘hasn’t seen a woman in the jury box for 10 years’. Similarly, in British Columbia, ‘the number of women who eventually serve is minimal’.<sup>111</sup> Nova Scotia, the third province to legislate permitting women to opt in for jury service, also illustrates the unyielding nature of resistance: ‘it was not until Halifax Alderman Abbie Lane headed a protest by women’s organizations three years ago [1959] that they ever reached the jury box. Even

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<sup>104</sup> P Daley, <https://www.theguardian.com/commentisfree/2016/jun/30/only-58-of-indigenous-australians-are-registered-to-vote-we-should-be-asking-why> (accessed 1 April 2018). Note also that ‘[t]he Australian Electoral Commission established the Indigenous Electoral Participation Program (IEPP) in 2010 to close the gap in Indigenous disadvantage in electoral participation. The objectives of the program are to increase enrolment, voter turnout, formality and knowledge of electoral processes for Indigenous Australians’: <http://www.aec.gov.au/indigenous/milestones.htm> (accessed 1 April 2018).

<sup>105</sup> None are presently addressed by the Australian Electoral Commission: see <https://www.creativespirits.info/aboriginalculture/selfdetermination/voting-rights-for-aboriginal-people> (accessed 1 April 2018).

<sup>106</sup> And political franchise for First Nations emerging post-war, between 1949 (in British Columbia) and 1969 (in Quebec).

<sup>107</sup> SS 1950, c 23, ss 3, 4 (Saskatchewan); SO 1951, c 41, ss 3, 4, 8 (Ontario); SM 1952, c 37, ss 2, 4 (Manitoba); SNB 1954, c 50, s 1 (New Brunswick). The Canadian legislative action is detailed and discussed in Greenwood and Boissery, 2000: Ch 6.

<sup>108</sup> ‘Jury Duty for Women Unpopular—Still Banned by Some Provinces’, *Quebec Chronicle Telegraph*, 7 May 1962. The figures are reported as being taken from a Cross-Canada Survey by The Canadian Press.

<sup>109</sup> ‘Jury Duty for Women Unpopular—Still Banned by Some Provinces’, *Quebec Chronicle Telegraph*, 7 May 1962. The figures are reported as being taken from a Cross-Canada Survey by The Canadian Press.

<sup>110</sup> Alberta (1921), British Columbia (1922) and Nova Scotia (1929).

<sup>111</sup> ‘Jury Duty for Women Unpopular—Still Banned by Some Provinces’, *Quebec Chronicle Telegraph*, 7 May 1962. Of Alberta, it was added that ‘[t]hey have the right to be chosen for civil juries but not criminal cases’.

now they serve only in Halifax'.<sup>112</sup> In all these provinces the underlying processes creating attrition or exclusion are simply not known.

North West Territories and Prince Edward Island women needed to wait until even later in the 1960s for the jury door to be held ajar for them.<sup>113</sup> Finally, in criminal cases jury franchise was provided to all Canadian women through the national Criminal Code in 1972.<sup>114</sup> This followed the 1970 recommendation from the Royal Commission on the Status of Women.<sup>115</sup>

The national Criminal Code finally gave formal equality to Canadian First Nations in 1972.<sup>116</sup> As with Indigenous Australians' ongoing and historical disenfranchisement, the apparent legislative openness towards eventual equality belies the lack of actual engagement. Legal complexity created misapprehension and confusion. Moss writes:<sup>117</sup>

In 1950, the federal franchise was extended to Indians only if they waived their tax exemptions under the *Indian Act* respecting personal property. Universal adult suffrage was not finally achieved federally until 1960, with the unqualified extension of voting rights to all Indians under the *Act to Amend the Canada Elections Act*, and provincially until 1969, when Quebec became the last province so to extend its provincial franchise ... Following the removal of these legal disabilities, there were reports that Indians hesitated to exercise their right to vote for fear of weakening their claims to treaty rights and tax exemptions.

The denial of the franchise to aboriginal people had meant that they were also prevented from serving on juries. *Even after extension of the federal and provincial franchise there was a practice of omitting Indians' names from voters' lists compiled for jury purposes. The first time Indians served on a Canadian jury is reported to have been 24 January 1972.*

The Canadian Charter of Rights and Freedoms (1982)<sup>118</sup> has been influential, at least at a formal level, requiring pro-active mechanisms to address First Nations' lack of representation on juries. These mechanisms have fallen well short of satisfactory, and have been the subject of comment and an unsuccessful Supreme Court challenge.<sup>119</sup> As with Indigenous Australians, the failure of Canada's criminal justice system to meet the needs of and to protect First Peoples

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<sup>112</sup> 'Jury Duty for Women Unpopular—Still Banned by Some Provinces', *Quebec Chronicle Telegraph*, 7 May 1962.

<sup>113</sup> ONWT 1965, c 6, s 1 (North West Territories); SPEI 1966, c 22, ss 1, 2 (Prince Edward Island).

<sup>114</sup> Criminal Code. Assented to 1972.

<sup>115</sup> *Report on the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970) 344, Recommendation 37. Despite the Royal Commission recommendations, the legislatures of Prince Edward Island and Newfoundland took until the 1980s to grant women full jury franchise in civil cases.

<sup>116</sup> The first Inuit served as jurors in 1957, with the Criminal Code removing the last piece of formal legislated discrimination in 1972. See generally Israel, 2003: 39–40.

<sup>117</sup> Moss and Gardner-O'Toole, 1987, rev 1991 (citations omitted, emphasis added). See also Bartlett, 1980.

<sup>118</sup> See Canadian Charter of Rights and Freedoms 1982, ss 7, 11(d) and 15(1).

<sup>119</sup> See, for example, Hamilton and Sinclair, 1991: Ch 1; Gora, 1993; Israel, 2003. See also <http://www.cbc.ca/news/canada/london/london-ontario-anthony-george-adam-kargus-jury-1.4309297> (accessed 1 April 2018); [https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First\\_Nations\\_Representation\\_Ontario\\_Juries.html](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html) (accessed 1 April 2018); *R v Kokopenace* [2015] 2 SCR 398, 2015 SCC 28 (re attempts to ensure representation for Canadian Indians).



is not centred merely on lack of jury franchise, though clearly disenfranchisement is at the very least symbolic of a system that falls short of ensuring that First Nations' share of justice is equal to that of others in society.

### 3.5 United States

In the United States the Supreme Court was ultimately the arbiter of when the door to the jury room would be flung open for women<sup>120</sup> in states that relied on 'opt in' or 'opt out' clauses modifying women's jury access rights. Gender equality on juries continued to be pursued through Constitutional rights arguments post-World War 2, with reliance centred on the Sixth Amendment's requirement of an impartial jury and the equal protection clause in the Fourteenth Amendment. The state case law is vast.

In 1961 the Supreme Court in *Hoyt v Florida*<sup>121</sup> maintained the stance it had established in 1947 in *Fay v New York*,<sup>122</sup> in which women's right to opt out from jury service was held to breach neither due process nor equal protection obligations. Maternalist arguments used to advocate women's potential contributions to public service in the late nineteenth and early twentieth century became embedded in the rationale for women's conditional eligibility. For example, in *Hoyt v Florida*, the Court upheld the 'opt in' regime for women's jury service, stating that women's centrality 'of home and family life' meant that it was not unconstitutional to relieve women from the civic duty of jury service 'unless she herself determines that such service is consistent with her own special responsibilities'.<sup>123</sup> This rationale—women's central place in domestic roles—hung long and hard in these recalcitrant states, following (or perhaps leading) the trend seen globally (Ritter, 2002: 510–511). Even by 1973, although all 50 states permitted women to be jurors, at least 19 states still maintained gender-based exemptions meaning their jury lists severely under-represented women. Administrative practices operating in Boston that intentionally reduced women's representation were revealed in *Brunson v Commonwealth*.<sup>124</sup> The Massachusetts Court observed of a snapshot of a particular court year (late 1973 to mid-1974) that women 'constituted 26.6% of the persons on Boston's 1973 annual jury list from which 88% of the [trial] ... jurors for Suffolk County were drawn'. These formal inequalities were not finally resolved until later in 1975 when the Supreme Court<sup>125</sup> ruled in *Taylor v Louisiana* that gender-based limitations on jury service were unconstitutional under the Sixth and Fourteenth Amendments. The Court held that an 'opt in' arrangement for women deprived the defendant of his right to an impartial jury by excluding a 'large, distinctive' group from the jury pool. As Fowler (2005: 8) notes, *Taylor* showed a 'shift in rhetoric about women and their contribution to jury deliberations' to women as 'equal contributors to the deliberation process'.

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<sup>120</sup> These changes leave scope for improvement in effectively protecting women's position, particularly with respect to 'a synthetic reading' of the Fourteenth and Nineteenth Amendments: Siegel, 2002: 949.

<sup>121</sup> *Hoyt v Florida* 368 US 57 (1961). No mention was made of the Nineteenth Amendment.

<sup>122</sup> *Fay v New York* 332 US 261 (1947).

<sup>123</sup> 368 US 57, 61–62 (1961).

<sup>124</sup> *Brunson v Commonwealth* 369 Mass 106, 111 (1975) per Quirico J.

<sup>125</sup> *Taylor v Louisiana* 419 US 522 (1975).

After *Taylor*, US Constitutional challenges to a non-discriminatory jury selection process moved to focus on the heavy use of attorneys' peremptory challenges. The extensive voir dire process in the United States has gained notoriety, as has parties' gender and race motivation to use peremptory strikes to distort the representativeness of juries.<sup>126</sup> The Supreme Court held in 1994 in *JEB v Alabama*<sup>127</sup> that peremptory challenges should not be used to influence the jury's gender ratio; and in 2016, in *Foster v Chatman*,<sup>128</sup> a watershed case, reversed the Georgia Supreme Court's rejection of Foster's appeal based on the prosecutor's discriminatory challenge of four black jurors when it received proof (through Georgia's Open Records Act) of race-coded notations on jury lists almost 20 years after the trial. Australia can point to similar practices, at least historically.<sup>129</sup>

#### 4. CONCLUSION

All the countries examined in this article share a strikingly lethargic approach to removing gender and race discrimination from their jury franchise. Indeed, the term 'lethargic' is undoubtedly too generous given the clear resistance to women's dogged claims. There is an unexpected pattern of exclusion in the United States, in Ireland and in the Commonwealth countries discussed here that differs from the English experience. Crosby's research indicates that the motivation to exclude women from English juries—whether for reasons embedded in notions of chivalry or patent misogyny—was broadly similar to that revealed elsewhere.

In Australia, New Zealand, Canada, the majority of states in the United States and Ireland, women's campaigning focused upon achieving legislative reform. Significantly, in Canada, the United States and Ireland formal discriminatory practices were brought to an end by constitutional enactment and/or determinations. It is significant that in Australia, New Zealand, Ireland and a number of US states, where women gained limited rights of inclusion (whether through opting in or opting out of jury rolls), local practices—often administrative and petty in nature—appeared to have kept women's *actual* representation very low. It is unlikely that coincidence explains these similarities. Newspapers in these countries contained numerous reports of English trials where women were jurors. It seems a reasonable inference from the information presented above that those campaigning for and against women's inclusion were informed of, and also sought information on, practices elsewhere.

This article offers a new lens through which to evaluate justice within the tradition of the common law jury trial, by presenting a history that in part speaks for itself but also leaves

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<sup>126</sup> See Hans and Jehle (2003); Price (2009); Eisenberg (2017); Eisenberg, Hritz, Royer and Blume (2017). Eisenberg (2017: 301) quotes the following observation from *Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (2010): 'Today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries' (at 4).

<sup>127</sup> 511 US 127, 130–31 (1994).

<sup>128</sup> 136 S Ct 290 (2016).

<sup>129</sup> See Anthony and Longman, 2017, referring to *R v White* in 1981, described in Rees, 1982; see also Scutt, 1982. Basten (1981: 155) describes the 1981 trial of Georgia Hill for murdering her husband, where the prosecutor was able to stand aside 19 women called from the panel to create a predominately male jury: see New South Wales Law Reform Commission, 1985.

hanging a number of questions—chiefly about ‘why?’. Why, in Canada, the United States, Australia and New Zealand, were the histories of change so different (and yet, also so much the same)? Why was the experience for English and Welsh women so different from that for women in Ireland, Canada, Australia, New Zealand and the United States? Why was jury suffrage almost invariably a bigger challenge (or threat) to male gate-keepers of power than political suffrage?

This history of women’s exclusion from juries is a graphic illustration of the observation made by Mary Beard (2017: 86–7) that ‘[y]ou cannot easily fit women into a structure that is already coded as male’. This in turn begs the question whether, with formal eligibility discrimination now removed, there remains an unfinished agenda lurking in the shadows of either discretionary removal of jurors, or within jury deliberation. English research has suggested that women in jury deliberation may enhance the effectiveness of the deliberative process because they exhibit pronounced willingness to set aside preconceptions or initially formed views in the course of deliberations. This appears to be a description of women’s willingness to change their mind after the airing of differing views.<sup>130</sup> This research sits interestingly, perhaps depressingly, with research from the United States that raises for consideration how women’s voices in the jury room are heard, even when they are numerically equal (Salerno and Peter-Hagene, 2015). There is also English, United States and Australian research spanning from the 1970s to 2010 indicating the tendency of a jury foreperson, the only juror who communicates with the judge, to be male (for example, see, respectively, Ellison and Munro, 2010: 89; Marder, 1987: 595; Wilkie, 1986: 192). Indeed, in a discussion of jury deliberations from a mock rape trial, Ellison and Munro observed (at 89) that ‘[m]en were significantly more likely to speak first, to volunteer to act as foreperson and to be nominated by their peers. In those juries in which a female did speak first, this was most often to raise the need for a foreperson and to nominate a male peer.’ Marder made her point succinctly when she observed in 1987 that ‘[t]he status that society at large assigns to men contributes to the difference in men’s and women’s participation rates in the jury room’.<sup>131</sup> Finally, when the topic of the jury tradition is so regularly framed in judgments, in judicial speeches<sup>132</sup> and elsewhere as of great common law pride, why is this recent history of trenchant resistance to women, and the consequent severe lack of representation on juries, the subject of so little contemporary reflection beyond comment in a small number of academic writings?

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<sup>130</sup> ‘Male jurors rarely changed their view; 64% of all jurors that changed their votes during deliberations were women. This pattern of decision-making occurred for all defendants, regardless of race, and at all courts’: Thomas, 2010: 19.

<sup>131</sup> Marder, 1987: 597, and see also the research cited by Marder at 594–98.

<sup>132</sup> See, most recently, Lady Justice Hallett, ‘Trial by Jury—Past and Present’, 35th Blackstone Lecture, 20 May 2017. Available at <https://www.judiciary.gov.uk/announcements/35th-blackstone-lecture-by-lady-justice-hallett-trial-by-jury-past-and-present/> (accessed 1 April 2018).

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