

# 2025 Biennial Conference of District & County Court Judges: Australia & New Zealand

*Proportionally, we are the most incarcerated people on the planet. We are not innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.*

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The Uluru Statement From the Heart.

## A Contemporary History of Race Discrimination *THE AUSTRALIAN JURY*

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- Women and First Nations Australians continue to be filtered out of 21<sup>st</sup> century Australian juries
- Race discrimination (Indigeneity) cuts deeper and is likely to last longer ...

Even in an institution that is quintessentially representative of the community, discrimination based on race and gender is historically embedded & legitimated

**1936:** jury participation: ‘... one of the fundamental rights of citizenship ...’

**1985:** ‘... it allows for the ordinary experiences of ordinary people to be brought to bear ... from its collective experience of ordinary affairs’





# Our findings ... are based on

- Legislation

- 8 Jury Acts, Regulations, multiple schedules

- Historical Australian & England & Wales legislation

- Reported cases

- Indigenous defendants challenging unrepresentative juries – only one successfully

- HCA case on prisoners' political franchise the most useful statement of principle.

- Law reform

- NSW, Victoria, Queensland, Western Australia, ACT, NT – indirectly identifying issues, adding a light touch. No action taken.

- Statistics

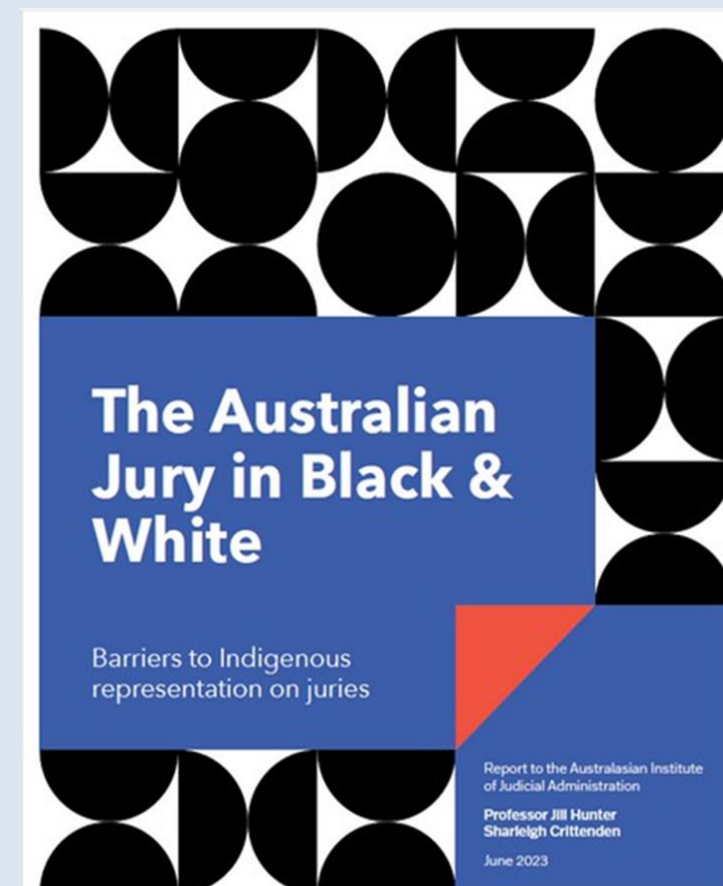
- Single instance jury statistics from case law, law reform,
- Australian Bureau of Statistics, Australian Institute of Health and Welfare, socio-economic disadvantage, health, life expectancy

- International sources

- Canada
- Arizona
- Argentina

- Journal articles, judicial speeches

- Mostly identifying the existence of unrepresentativeness &/or relying on some case law based on defendants' challenges



*Is there under-representation?*

All the statistics we could find ...

2020 (NT) ‘For various reasons ... <i>the jury pool will be unlikely to have many people of Aboriginal descent amongst their numbers</i> . In my experience, when an Aboriginal person is on trial, jury panel members who are connected with the Accused invariably seek to be excused. ... <i>R v Rolfe (No 1)</i> [2020], Mildren J
2011 Qld QLRC <i>extremely rare</i> to have an Indigenous juror in Mount Isa ‘despite the relatively high local Indigenous population’
2011 (WA) LRC, <i>Less than, or only 1%</i> of ATSI sat on juries in metropolitan areas
2010 (NT) <i>no Indigenous jurors</i> : <i>R v Woods &amp; William</i>
2009 (WA) Martin CJ: ‘... Aboriginal accused are <i>almost always</i> tried by juries made up entirely, or almost entirely of <i>non-Aboriginal persons</i> ’
2007 (NSW, SA, Vic) Goodman. Of 1,696 [1,048 non-empanelled eligible jurors and 628 empanelled] (mostly metro) - <i>only three empanelled jurors</i> self-identified as Indigenous ... <i>&lt;1%</i>
2004 (Vic) [The defendant ] ... <b>had not observed anyone that he identified as Indigenous.</b> <i>Badenoch</i> [2004] VSCA 95, [66].
1994 (NSW) Findlay Less than <i>0.5%</i>
1989 (WA, Perth) ‘over an <u>8-year period</u> that there were <i>only 3 or 4 Indigenous potential jurors</i> on the ‘selection roll’
1988 Qld <i>Binge v Bennett</i> : ‘ <i>I have never seen an Aboriginal person selected</i> to actually sit on a jury for a trial’ (prosecutor)
1986 (NSW) NSWLRC <i>0.4%</i> of jurors were Indigenous
1977-1999 (WA) ‘ <i>[In 23 years] 1 have never appeared before or addressed a jury with an Indigenous person</i> on it’ Quigley MP

# Selective aspects of Australian jury history

**1788**

- Invasion, convict colony  
**Population**  
convicts, military, justice

**1824**

- Juries emerge  
Emancipists free settlers seek 'respectability' in a 'tainted society'  
- push for juries to replace military justice

**1901**

- A Constitutional right  
Group of colonies -> with Federation -> states with separate legislatures & court systems  
**Right to trial by jury**  
inserted into the Constitution

**1964**

- The electoral roll  
Indigenous Australians gain opt in to register to vote.

**1984**

- Potentially equal enrolment on jury lists  
Political franchise on equal terms: mandatory registration →  
equal opportunity to be on jury lists, and to be summonsed



Criminal disqualifications  
disenfranchise too broadly



pervasive use of peremptory  
challenges

Jury districts NT, Qld, SA, WA have jury district that omit sparsely populated regional & remote residents

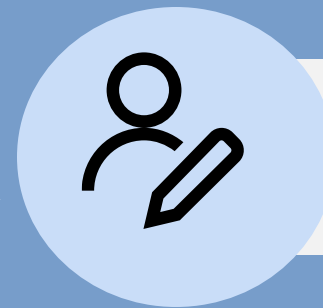
Electoral enrolments Historically First Nations Austns  
electoral enrolment is poorly maintained in regional &  
remote areas

Jury summonses:

- drafted in legal language with a coercive tone
- in remote areas, Indigenous communities can have inadequate delivery

Excusals are common

- Kinship/community links
- Participating in a harsh, alien justice system
- Community fear/lack of cultural safety,
- Health issues; Carer roles, sorry business
- economic disadvantage & more



complex summons



Narrow jury districts



tacit/ explicit  
discouragement



Regional/remote: lack of  
logistical support



ignorance of rights  
& reliance on excusals



fear / discomfort, lack  
of cultural safety



Where is the notion of  
inclusion *cf* disability,  
child care support etc.?



Financial support,  
carer duties, flexibility



# Unprincipled & disproportionately extensive criminal history disqualifications

Table 4: Disqualification due to criminal convictions<sup>138</sup>

<b>FEDERAL</b>	If subject to a good behaviour bond or community service order, currently in custody, or has been charged and is on bail. <b>10 years</b> sentenced to a term of imprisonment. <b>Life disqu'f'n</b> imprisonment/detention is for more than 12 months: s 23DI.
<b>SA</b>	<b>5 years</b> for offence punishable by imprisonment or disqualified from holding or obtaining licence for > 6 mths; or at the relevant date, was subject to a good behaviour bond, or was charged with an offence punishable by imprisonment not yet finalised. <b>10 years</b> after serving sentence of imprisonment (including juvenile justice) or probation/parole. <b>Life disqu'f'n</b> if imprisonment exceeding 2 yrs (s12(1)(b)) <sup>139</sup>
<b>QLD</b>	<b>Life disqu'f'n</b> convicted of any indictable offence or sentenced to imprisonment. <sup>140</sup>
<b>NT</b>	<b>7 years</b> after serving sentence of imprisonment <sup>141</sup> <b>Life disqu'f'n</b> , sentenced to life imprisonment
<b>VIC</b>	<b>5 years</b> after serving <3mth, or other minor sentence. <sup>142</sup> <b>10 years</b> after serving >3mth. <sup>123F</sup> <b>Life disqu'f'n</b> Served sentence > 3 yrs (aggregate, indictable offence).
<b>WA</b>	<b>5 years</b> after serving sentence of imprisonment, or guilty of an offence and detained in juvenile justice institution, or probation or community order or has been convicted of 3 or more road traffic offences. <b>Otherwise, life disqu'f'n</b> Served sentence > 2 yrs. <sup>143</sup>

## New Zealand

Anyone sentenced to a term of **3 years or more** to preventative detention; or life imprisonment  
Anyone, within the **preceding 5 years** has been sentenced to imprisonment a term of **3 months or more**, or home detention for 3 months or more.

<b>NSW</b>	While disqualified holding a driver licence (>12 mth). <b>3 years</b> following detention in a correctional centre for offence committed when under 18. <b>7 years</b> after serving imprisonment <3 consecutive mths <b>10 years</b> after serving imprisonment > 3 consec've mths <b>Life disqu'f'n</b> for more serious offences. <sup>144</sup>
<b>ACT</b>	<b>3 years</b> after detention for offence when under 18, or given good behaviour order <b>5 years</b> after serving imprisonment <3 mths imprisonment <b>10 years</b> > 3 mths imprisonment. <b>Life disqu'f'n</b> for certain serious offences. <sup>145</sup>
<b>TAS</b>	<b>5 years</b> after serving sentence > 3 mths imprisonment (Sch 1, s1(3)) <b>Life disqu'f'n</b> conviction for indictable offence & sentenced >3 years: Sch 1, s 1(1)(a))

# Criminal history disqualifications

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## What is the rationale?

*Roach v Electoral Commissioner* [2007] HCA 43,

The prisoner voting case: Chief Justice Gleeson links an individual's serious offending to warranting temporary suspension of membership of the community, justifying their temporary loss of citizenship rights stating this severance, ... *breaks down at the level of short-term prisoners.*

- *They include a not insubstantial number of people who, by reason of their personal characteristics (such as poverty, homelessness, or mental problems), or geographical circumstances, do not qualify for, or, do not qualify for a full range of, non-custodial sentencing options. At this level, the method of discriminating between offences, for the purpose of deciding which are so serious as to warrant disenfranchisement and which are not, becomes arbitrary.*

In the  
late  
1980s

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**SA & NSW:** driving offences made a basis for jury disenfranchisement

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2011

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**WA, 2011:** Introduces driving offence-based disqualifications (3 strikes) despite the disproportionate impact this has on First Nations people in regional and remote areas.

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2011

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**Northern Territory, 2011:** Hansard (Gerry McCarthy, NT Leg Assembly): a quarter of the NT's entire prison population there for driving offences.



# A case about peremptory challenges & their intersection with criminal disqualifications

## Katsuno v The Queen [1999] HCA 50

- Police sent list of disqualified, ineligible and unsuitable summonsed jurors to the prosecutor.  
G was considered unsuitable, having a spent conviction + a non-disqualifying good behaviour bond.
- Prosecution used its peremptory challenges.
  - Court holds it is unlawful.
  - 2001 – Victoria expands its criminal history disqualifications.

The Court held that communications by police to prosecutors concerning non-disqualifying convictions and/or suspected criminal involvement is unlawful.

Justice Kirby noted this practice of communicating between police and prosecutors was, in 1999, practised in Western Australia, Tasmania and the Northern Territory. It was not practised in New South Wales, Queensland, South Australia or the Australian Capital Territory. A number of Victorian cases in the 1980s showed the police practice occurring. (& claims it would not re-occur)

Table 5: Australian peremptory challenges and stand asides<sup>192</sup>

see Hunter & Crittenden, p 32-41)

	No. challenges: accused	Peremptory single	Crown stand asides	More than 2 accused arraigned (if not in primary provision)
FEDERAL	4 defence challenges available: (a) <sup>193</sup>	peremptory available: s23DZ)	4 stand asides: s23DZA(5) <sup>199</sup>	
NT	'Crown and person arraigned... may each challenge peremptorily' 12 jurors 'in the case of a capital offence' (s44(1)(a)).		6 stand asides (s43)	
	6 jurors 'in any other case' (s44(1)(b)) <sup>194</sup>			
VIC	3 defence challenges available: s39(1)(a)	peremptory	3 stand asides if 1 person arraigned. <sup>200</sup>	Defence & Pros'n: 2 for each accused arraigned: s39(1)(b)
QLD	8 for Pros'n and defence (s42(3)) <sup>195</sup>		Nil provision	8 challenges per accused: s42(5)(a). Pros'n entitled to total available to accused persons (s42(5)(b))
WA	3 each for each accused (s104(4))		Nil provision	
	3 for the pros'n: s104(3)(a)			
NSW	3 for defence: s42(1)(a) & Pros'n s42(1)(b) <sup>196</sup>		3 Not permitted <sup>201</sup>	
ACT	8 for Pro'sn: s34(1) & accused: s34(2) <sup>197</sup>		Nil provision	
SA	3 peremptory challenges for each party, including prosecution (s61(1))		Nil provision	3 challenges each for jointly charged persons (s65).
TAS	6 for '[e]ach person arraigned' (s35(1)) <sup>198</sup>		Unlimited stand asides (s34(1))	See above: s35(1)
New Zealand	4 max of 8 if two or more defendants			

	Abuse concerns	Monitoring	Alter- natives	Peremptory challenges – stay, warn, educate or go?
NSW (2007)	Yes	Yes		<p><i>‘guesswork and dubious mythology’</i> for strategic party gain.</p> <p><i>‘... not necessarily conducive to securing a fair, impartial, or representative jury. It can ... have the opposite effect’ ...</i></p> <p>Reduced opportunity for <i>‘the perspective of Aboriginality to be understood by juries’</i></p>
WA (2010)	No	Yes		<p><b>Statistics: 3.9 peremptory challenges per trial</b></p> <ul style="list-style-type: none"> <li>- concern about logistical issues</li> <li>- Considered peremptory challenges remove the perception of bias</li> </ul>
Qld (2011)				<p>Similar to WA above.</p> <ul style="list-style-type: none"> <li>- <i>cf</i> ATSILS’ submission that Indigeneity-based stand asides in Brisbane might be continuing</li> </ul>
Vic (2014, 2023)			Yes (2023)	<ul style="list-style-type: none"> <li>➤ <b>2012-2013:</b> criminal trials <b>67%</b> of challenges against women.</li> <li>➤ <b>68%</b> against women in <b>2011-2012</b>.</li> <li>➤ <b>2018 &amp; 2019: 69.5%</b> against women; <ul style="list-style-type: none"> <li>▪ Juries were <b>46.6% women</b>;</li> <li>▪ <i>courts, representative legal bodies &amp; legal professionals: no support expressed to abolish/reduce challenges</i></li> </ul> </li> <li>1) Bar guidelines re ‘challenges should not be exercised solely on the basis of disability (the focus of the Report);</li> <li>2) a statement by the judge discouraging the use of challenges on discriminatory grounds</li> </ul>
NSW, Vic, SA				<p>Stakeholder <i>‘consensus ... that peremptory challenges hindered the representativeness in Australian juries primarily because lawyers use the challenges to try to mold or stack the jury’.</i></p>

**Law reform commissions – keep the challenges, but ...**

JUEVES, 25 DE ABRIL DE 2024

**ARGENTINA:** The world's first entirely indigenous jury rendered a guilty verdict on a murder case against two members of the Qom Indigenous People



The indigenous jury

## A JURY OF INDIGENOUS PEERS - ARGENTINA'S 1<sup>ST</sup> INDIGENOUS JURY

**25<sup>TH</sup> APRIL 2024**

- Homicide case involving Indigenous accused and victim.
- 80 potential jurors, 22 of whom were Indigenous
- A voir dire style jury selection process
  - trial judge ordered interpreters in Indigenous languages

The prosecution and the defence challenged for cause and used their peremptories to remove all the white potential jurors, leading to a jury of 12 Indigenous jurors, equally split between two Indigenous groups and men & women.

This fulfilled Argentina's jury 2015 legislation, not implemented due to failure to progress consultation with indigenous peoples, a Constitutional requirement). There appeared to be the necessary consultation to proceed.



# The end ...

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# Parallels in gender & race discrimination

A 21<sup>st</sup> century shift from juries of the elite (white, wealthy & male) to democratic notions of inclusion (disability, childcare support)

Australian Women	First Nations' Australians
<i>20<sup>th</sup> century (&amp; onwards)</i>	<i>21<sup>st</sup> century</i>
<p><i>The “wrong sort” of woman</i></p> <ul style="list-style-type: none"> <li>• don’t understand complex non-domestic or commercial matters</li> <li>• When women had to <b>opt-in</b>: women who opt in must have the “wrong” motives for serving as a juror</li> <li>• <b>Not impartial/too emotional</b></li> </ul> <p>An embedded culture of excusal <i>Excusal is a subterranean form of disenfranchisement, based on</i></p> <ul style="list-style-type: none"> <li>• carer obligations</li> <li>• <b>Removal</b> through subtle statutory and management filters (including peremptory challenges) &amp;</li> <li>• Intimidation due to pervasive sexism</li> </ul>	<p><i>The ‘wrong sort’ of citizen</i></p> <ul style="list-style-type: none"> <li>• don’t understand what is required to be a juror</li> <li>• They are unwilling</li> <li>• Recent/unjustified expansion of <b>criminal history disqualifications</b> disproportionately deeming Indigenous people as the wrong sort</li> <li>• <b>Not impartial</b>: Likely now too many Indigenous parties/defendants</li> </ul> <p><b>An embedded culture of excusal</b> – <i>a subterranean form of disenfranchisement</i></p> <ul style="list-style-type: none"> <li>• carer obligations</li> <li>• Socio-economic disadvantage</li> <li>• geography</li> <li>• <b>Removal</b> through subtle statutory and management filters (peremptory challenges, outside jury district).</li> </ul> <ul style="list-style-type: none"> <li>• Intimidation due to pervasive racism</li> </ul>