The Special Jury in Australia

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Melbourne shopworker Arthur Ayres was walking down Little Collins Street at midnight on 15 February 1913 when prostitutes Ray Lacey and Mary Bryant accosted him. Lacey, after failing to solicit Ayres' custom, grabbed his purse. She and Bryant dashed into a cab together. After securing the help of a police constable, Ayres chased them in another cab. The women were arrested.[1] Despite the seemingly straightforward facts of the case, three juries subsequently failed to reach a verdict on their guilt. As a result, on 28 April, the Crown Prosecutor submitted an application to have the matter tried by a special jury.[2]

Special juries, constituted in various forms, have a long history in the English legal system. By the 18th century, they were predominantly a feature of civil trials.[3] There is nevertheless an interesting, and largely unexplored, history behind the use of special juries in criminal trials in courts descended from the English system. In each of Australia's jurisdictions there were provisions allowing special juries to determine criminal matters during the 19th and well into the 20th century.

Historically, the term "special jury" was applied to a number of specially constituted bodies. From at least the 14th century, English courts allowed foreigners to be tried by special juries half-comprised of other aliens.[4] The use of such juries was rare in colonial Australia, but did occur. An Italian was tried for theft in this manner at Bendigo in 1858; despite the jury's inclusion of six foreigners, all Chinese, he was convicted.[5] Stephen Gray similarly describes a mixed jury of Chinese, Malays and Caucasians convicting a Chinese defendant of sodomy in the Northern Territory in 1875.[6] Another form of special jury was the "struck jury", composed of individuals that remained after the opposing parties in a matter had struck off names they objected to from a list of prospective jurors.[7] The right of peremptory challenge means that most modern juries could be considered special juries.

The term "special jury" was also used to denote jurors selected because their backgrounds gave them expertise on a particular issue. Sometimes these juries were empanelled to determine matters other than guilt. The earliest form of female jury service was the convocation of juries of matrons to determine whether female defendants were pregnant in cases where they "plead their belly" to avoid a death sentence.[8] Under the martial law system that initially operated in the New South Wales penal settlement, a jury of matrons became the first jury of any sort to be convened in the Australian colonies when 12 women pronounced that convict Ann Davis, on trial for breaking and entering, was not pregnant. She was consequently executed.[9] The practice was still in use a century later in 1882 when a jury of South Australian women found that Elizabeth Macgree, who had been convicted alongside her husband for the murder of labourer Christian Renderup, was *enceinte*.[10] They were supported in this decision by a doctor's testimony, signalling the gradual transference of such matters to medical experts.

In Australian jurisdictions, the term "special jury" was used specifically in regard to bodies called upon when a case was considered too taxing for the comprehension of a common jury. Statutory

[1] *R v Ray Lacey and Mary Bryant*, 128/1913, VPRS 30/P0, Public Records Office Victoria (hereafter PROV).

[2] Order for a special jury, 28 April 1913, 365, VPRS 469/P0, PROV.

[3] James C Oldham, "The Origins of the Special Jury" (1983) 50(1) *The University of Chicago Law Review* 137.

[4] Oldham, n 3, p 167.

[5] *Bendigo Advertiser* (31 August 1858) p 2.

[6] Stephen Gray, "'Far Too Little Flogging': Chinese and the Criminal Justice System in the Northern Territory" (2011) 22 *Journal of Northern Territory History* 1.

[7] Oldham, n 3, p 176.

[8] Oldham, n 3, p 171.

[9] Simon Bronitt and Wendy Kukulies-Smith, "Crime, Punishment, Family Violence, and the Cloak of Legal Invisibility" (2013) 37(3) *Journal of Australian Studies* 397.

[10] *Adelaide Observer* (23 December 1882) p 20.

legislation required sheriffs to keep lists of persons qualified to serve on such special juries. The qualifications necessary varied across time and jurisdiction. In England, special juries were constituted by those of elevated social status.[11] In the absence of a colonial aristocracy, Australian legislators instituted a property qualification for special jurors above that required for common ones. Under Victoria's *Juries Act 1890*, male householders with an annual value of over 20 pounds were entitled to serve on common juries, but required a yearly income of not less than 60 pounds to serve on special juries.[12] In other Australian jurisdictions the qualification to serve as a special juror was additionally limited to certain professions, such as bank directors, station-owners, engineers, merchants, architects, justices of the peace, brokers and accountants.[13]

In England, prior to the late 18th century, the special jury had typically been used in relation to crimes most threatening to the State, such as treason and murder.[14] Occasionally attempts were made to have such matters likewise heard by leading citizens in Australia. (However, in Tasmania and New South Wales, special juries were specifically precluded from trying treason and felonies.)[15] In 1854, the possibility of using special juries to try the defendants involved in the Eureka rebellion was raised, but was criticised and ultimately rejected.[16] In 1891, a special jury was used at Charters Towers to try unionist radical Frederick Vosper on a charge of seditious libel; Vosper unsuccessfully challenged the move on the grounds that the political views of those on the special jury list meant he was unlikely to receive a fair hearing. He was nevertheless acquitted.[17]

By the late 19th century, the special jury was being predominantly used in colonial criminal trials in relation to property offences. As men of substance or professional expertise, such jurors were seen as having an enhanced understanding of the issues raised in cases of embezzlement or conspiracy to defraud. In 1885, for instance, a special jury was ordered to try John Dumaresq at the Melbourne Supreme Court in relation to money Dumaresq had allegedly stolen while an employee of the Cranbourne Shire Council.[18] In the *Dumaresq* case and other matters, applications for special juries were typically made after one or more ordinary juries had failed to reach a verdict, supporting the contention that the complexities of the case called for special knowledge of financial matters.

It was in the context of this practice that a special jury was requested by the Crown in 1913 to try Lacey and Bryant. Defence counsel objected to the move, pointing out that there was nothing complicated in the evidence. Hood J, who had presided at the third trial, heard the application and agreed the case was a "perfectly clear one".[19] Nevertheless, the inability of a common jury to reach an agreement seemed to him to constitute reason enough for ordering a special jury. Hood J granted the order with little explanation of his reasoning. When the women were found guilty at their fourth trial, a'Beckett J took it upon himself to justify the use of a special jury. He blamed the previous jury disagreements on the ability of hardened criminals to impose on a jury's credulity by adopting a plausible manner while in the witness box, intimating that special jurors' greater worldly knowledge meant they were better judges of witness credibility.[20]

Hood J's decision to grant a special jury ostensibly on no other grounds than the failure of a common jury to reach a verdict nevertheless proved controversial. In 1927, the Commonwealth cited

[11] Douglas Hay, "The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century" in JS Cockburn and TA Green (eds), *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* (Princeton University Press, 1988) p 318.

[12] *Juries Act 1890* (Vic), ss 5-6.

[13] *Jury Trials Act 1832* (NSW), s 24; *Juries Act 1837* (SA), s 18; *Jury Act 1898* (WA), s 6; *Juries Act 1929* (Qld), s 12(b).

[14] Oldham, n 3, p 154.

[15] *Special Jury Act 1858* (Tas), s 5; *Jury Act 1901* (NSW), ss 29.

[16] *The Argus* (21 November 185) p 5; *The Age* (28 February 1855) p 4.

[17] *The Northern Mining Register* (29 August 1891) p 11.

[18] Affidavit of HW Macleod in support of application for special jury, 13 August 1885, 141, VPRS 469/P0, PROV.

[19] *R v Lacey and Bryant* [1913] VLR 242.

[20] *The Argus* (21 May 1913) p 5.

R v Lacey and Bryant in its application to the Victoria Supreme Court for a special jury to try Roy Ostberg on a charge of forging currency. A jury had again failed to agree three times. Prosecutor Dixon Hearder, seemingly borrowing from a'Beckett J's reading of the case rather than Hood J's actual judgment, argued that, as in *R v Lacey and Bryant*, these disagreements indicated the jury was having difficulty evaluating witness credibility. Lowe J rejected this interpretation, relying instead on the 1918 case of *R v Moore*, in which Irvine CJ had stated that discretion to empanel a special jury was to be reserved for "circumstances which differentiate the case from the ordinary run of criminal cases".[21] The *Lacey and Bryant* case had not been cited during the Moore appeal, but it seems unlikely that it would have passed the standard prescribed by Irvine CJ.[22]

A different estimation of *R v Lacey and Bryant* was delivered in 1948, when it was cited in *R v Young* in support of a special jury application in a case of larceny by a servant where there had again been three trials ending in jury disagreements. Fullagar J granted the application, stating his esteem for Hood J's decision, which he felt had been based not on the grounds that three juries had failed to agree, but that the three disagreements tended to show that, however simple a matter may appear to the judge presiding over it, the issue of witness credibility might prove a roadblock to justice for ordinary jurors.[23] By this time though, special juries were already passing into history.

The *Lacey and Bryant* decision could have been used to usher in an era where special juries became more commonly used. However, the more liberal interpretation of the circumstances requiring a special jury applied in the case were not in keeping with developing sentiments among either the judiciary or the public. The 20th century saw instead a declining use of special juries, as the rising standard of public education undermined claims that common juries did not have the competency to determine complex matters.[24] Queensland abolished special juries in 1923, but subsequently reintroduced them in 1929, before removing them again in 1934.[25] By this time, South Australia had abolished special juries in 1927.[26] The other Australian jurisdictions following suit in the subsequent decades.[27]

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[21] *R v Ostberg* [1927] VLR 469.

[22] *R v Moore* [1918] VLR 395.

[23] *R v Young* [1949] VLR 226.

[24] New South Wales Law Reform Commission, *Criminal Procedure: The Jury in Criminal Trial*, Discussion Paper 12 (1985) at [10.13]-[10.15].

[25] *Jury Act Amendment Act 1923* (Qld), s 3; *Jury Act 1929* (Qld), s 12; *Jury Act Amendment Act 1934* (Qld), s 3.

[26] *Juries Act 1927* (SA), s 5(2).

[27] *Jury Act Amendment Act 1934* (Qld), s 3; *Jury (Amendment) Act 1947* (NSW), s 4; *Juries Act 1956* (Vic), s 4; *Juries Act 1957* (WA), s 5; *Jury Amendment Act 1991* (Tas), ss 6-7.