

By the skin of their teeth

JUSTICE VIRGINIA BELL AC, who was sworn in as a Supreme Court judge in 1999 and as a Justice of the High Court of Australia in 2009, explains the dicey history leading to the passing of the *Women's Legal Status Act* in 1918.



IN 1902, THE NEWLY FEDERATED COMMONWEALTH of Australia led the world by its provision for women to vote and to stand for election to the Commonwealth Parliament on a universal and equal basis with men. That year, Vida Goldstein, an Australian suffragist, was the Australian and New Zealand delegate to the International Women's Suffrage Conference in Washington.

Carrie Catt, the President of the American Suffrage League, with the disarming frankness of the Americans, told Goldstein that Americans associated Australia with being "the abode of strange beasts and barbarians". Catt thought it remarkable that this exotic land should have supplied a delegate who was so up to date and fully cognisant of the rights of her sex. Such was the novelty of Australia's treatment of women that Goldstein

The Womanhood Suffrage League with politicians Sir William Lyne and Sir John See after women won the right to vote in NSW via the *Female Suffrage Act*, passed in 1902.



was fêted as something of a celebrity throughout her trip to the US. Before leaving, she had an audience in the Oval Office with President Theodore Roosevelt who told her that Australia's experiment in equality was "a great object lesson".

Within a few years, Goldstein, like fellow pioneering feminist Rose Scott, had come to see the vote as, if not a hollow victory, certainly a victory that was far from securing women equality with men. Their economic dependence, exclusion from public office and subjugation by a double-standard in matters of sexual morality put women well behind the eight ball. The laws that perpetuated this inequality were largely those enacted by State legislatures and, while women could stand for election to the Commonwealth Parliament, they were ineligible to be returned to either house of the NSW Parliament.

In 1908, the NSW Government under Premier Charles Wade introduced the Contagious Diseases Bill. If enacted, its practical operation would have allowed the indefinite incarceration of prostitutes arrested for soliciting and found to have a venereal disease. Goldstein protested – what difference had women's suffrage achieved if the government felt safe to introduce a measure like it?

Edward O'Sullivan, the Minister for Lands, who was sympathetic to the suffrage cause, wrote to Scott asking what women wanted in the way of remedial legislation. She scrawled on the back of his letter a staccato manifesto:

"[O]wn their own children, family maintenance, Infants' Protection Bill, Equal Pay for equal work, offices of dignity and power in the State, juries, judges, Police matrons, economic independence for married women."

In 1912, Scott delivered a speech to the National Council of Women titled "Laws Women Need". [Among many things] she called for women to be eligible for appointment as magistrates, justices of the peace, jurors, judges, and members of parliament and councils.

An important centenary

This year marks the centenary of the enactment of the *Women's Legal Status Act 1918* (NSW), which largely addressed the last of Scott's agenda items. It provided that a person shall not by reason of sex be deemed to be under any disability or subject to any disqualification from being elected to act as a member of the Legislative Assembly, or as an elected member of a local council, or to be appointed a judge or magistrate, or to be admitted to practise as a barrister or solicitor.

What was the source of the disqualification of women from being elected to parliament or entering the legal profession? In the case of election to the Assembly, the answer was clear. The *Women's Franchise Act 1902* (NSW) gave women the right to vote, and by s 4 provided that nothing in that Act should be taken to "enable or qualify a woman to be nominated as a candidate at any election or to be elected as a member" of the Legislative Assembly.

The position was a little more nuanced under the *Legal Practitioners Act 1898* (NSW) ("the LPA"), which established a board comprising the judges of the Supreme Court, the Attorney-General and two barristers to approve "properly qualified persons" for

admission as barristers. In 1902, Ada Evans had qualified in law from the Law School of the University of Sydney. Despite being properly qualified, she was not admitted to practise because it was thought that a woman was not a "person" for the purposes of the LPA.

Between February 1904 and 1917, Evans wrote to successive Attorneys-General seeking change to the law. She was assisted by feminists who had been active in the Womanhood Suffrage League and who, after gaining the franchise, had made the removal of the disqualification high on their list of needed reforms. These were remarkable women.

In her day, Scott was one of Sydney's most well-connected and well-known women. For many years she conducted a salon from her home in Jersey Road, Woollahra, on Friday afternoons. It was attended by notable artists and writers



Below, the charge sheet for Ethel Herringe, a woman convicted of manslaughter of her employer who refused to marry her once he knew she was pregnant with twins. Above, Rose Scott who took on Herringe's case once her babies were taken from her. Sources: ancestry.com.au, State Library NSW



and by the leading politicians of the day, including men such as Bernard Wise and Charles Wade. Stella Miles Franklin said Scott had "a genius for making delight of association".

Famously, Scott considered life too short to waste it in the service of one man. She used her comparative wealth and connections to promote causes that would expand women's material options beyond either marriage or prostitution. One gesture in this direction was her gift in 1921 of 50 pounds to the University of Sydney as a prize for women law students.

Despite her circumstances of advantage, clear-eyed Scott had sympathy for women whose life experience was far from privileged. In 1903, she campaigned on behalf of Ethel Herringe, a young woman convicted of the manslaughter of her former employer who had seduced her and refused to marry her after learning of her pregnancy. Herringe gave birth to twins in Darlinghurst jail. They were immediately taken from her.

Scott viewed this as barbarous cruelty. She took up Herringe's cause, pressing Bernard Wise unsuccessfully for her release from custody. She argued that, just as the law acknowledged provocation in the case of a man killing his wife or her lover when caught in flagrante, there should be recognition of the provocation experienced by women at the hands of men in mitigation of the severity of the criminal law.

In Scott's view, Herringe was a political prisoner: a woman who had sought to retrieve her honour in a situation in which the law had failed to provide her with effective redress.

Wise may have frequented Scott's salon, but the gulf between them was unbridgeable. As Attorney-General, Wise had opposed the Crimes (Girls' Protection) Bill which sought to raise the age of consent for girls from 14 years. Scott was committed to this measure, having seen the exploitation of girls who

BEFORE THEIR TIME:
women pioneers of law



1921

ADA EVANS: FIRST WOMAN TO GRADUATE WITH A BACHELOR OF LAWS IN 1901 AND FIRST TO BE ADMITTED TO THE NSW BAR



1924

MARIE BYLES: FIRST WOMAN TO PRACTISE AS A SOLICITOR IN NSW AND FIRST WOMAN TO ATTEND AN INCORPORATED LAW INSTITUTE AGM



1955

ELIZABETH EVATT: FIRST WOMAN TO RECEIVE THE UNIVERSITY MEDAL IN LAW FROM SYDNEY UNIVERSITY



1972

ANN PLOTKE: FIRST WOMAN ELECTED TO THE LAW SOCIETY COUNCIL



1979

MAHLA PEARLMAN: FIRST WOMAN APPOINTED TO SOLICITORS ADMISSION BOARD, FIRST WOMAN PRESIDENT OF THE LAW SOCIETY IN 1981



1981

MARY GAUDRON: FIRST WOMAN APPOINTED SOLICITOR-GENERAL IN AUSTRALIA AND FIRST WOMAN APPOINTED TO THE HIGH COURT IN 1987



2008

JULIE WARD: FIRST WOMAN SOLICITOR APPOINTED DIRECTLY TO THE SUPREME COURT



2013

MARGARET BEAZLEY: FIRST WOMAN PRESIDENT OF THE NSW COURT OF APPEAL



2015

GABRIELLE UPTON: FIRST WOMAN NSW ATTORNEY-GENERAL

were too young to have much, if any, understanding of sexual intercourse or its consequences. Wise, for his part, was concerned with the risk of blackmail by promiscuous, precocious harlots. Among the arguments against the Bill was the view that in sub-tropical Australian conditions, girls ripened into womanhood earlier than in other climes.

The Women's Progressive Association under the leadership of Annie Golding was associated with the Labor Party and in 1916 the Labor Party Conference was persuaded to pass a motion urging the passing of legislation to redress women's legal status. On 18 August 1916, Attorney-General David Hall introduced the Women's Legal Status Bill to the Legislative Assembly. On its second reading, however, Thomas Waddell successfully raised a point of order and the Bill was ruled out.

Attorney-General Hall introduced a fresh Bill on 13 September 1916. Waddell excelled himself in his opposition on this occasion. He said he would have no objection to the Bill if the constituencies were divided into two and women elected their own representatives and men elected theirs.

When he settled down, Waddell asked how any women could "have as much knowledge as a man of the mining laws, the land laws, and the many other matters with which parliamentary representatives have to deal"? The Bill had its supporters with more than one member pointing to women's work in support of the war effort as giving the lie to the suggestion that they were not equipped to take their place in parliament.

A second Women's Legal Status Bill was introduced to the Parliament in

October 1918. In speaking for the Bill, Attorney-General Hall suggested NSW was lagging behind the other states in permitting women to enter the legal profession; he recalled one woman who had passed her examination for admission to the Bar at the same time as he had. He graciously acknowledged that her pass was better than his, and noted that she had occasionally communicated with his department, inquiring when she would be permitted to practise for the profession for which she had qualified herself 17 or 18 years earlier.

The Bill encountered an obstacle in the Legislative Council. It would have removed the disqualification on women sitting in the Legislative Council. Any measure to alter the Constitution of the Legislative Council had to originate in that chamber. The Bill as drafted was assessed to be an invasion of the privileges of the Council and was returned to the Legislative Assembly. There it was amended to confine its operation to the removal of the disqualification on the election of women to the Assembly. On its return to the Legislative Council, it received a warmer reception.

However, Dr Nash, one of the few members who had been in Parliament when the *Women's Franchise Act 1902* (NSW) was enacted, stated he looked upon the measure as a joke.

An undercurrent in the parliamentary debates, albeit generally expressed with more circumspection than by Nash, was the view that the enactment of the Women's Legal Status Bill would not disrupt the apple cart;

the electorate would not return women to parliament and the legal profession would not be overwhelmed by them. Unpalatable as this view may have been, there was an essential truth to it. The social and economic pressures which largely kept women in the home were not about to give way in the face of a change to their status at law.

Few women stood for Parliament and fewer were returned. The first woman elected to the NSW Legislative Assembly was Millicent Preston-Stanley. Preston-Stanley was one of the new generation of feminists. In 1919, she became President of the Feminist Club. Preston-Stanley was a powerful advocate for women, particularly on issues of infant and maternal mortality and the guardianship of children. One stimulus to her activism may have been her mother's struggle to fend for herself and raise her children after Preston-Stanley's father deserted the family.

Preston-Stanley was elected as a member of the Nationalist Party to the Legislative Assembly in May 1925. Her

maiden speech delivered on 26 August 1925 gives the measure of the woman. She pointed out to her fellow members that:

"Every turn of the political wheel touches [women]. As women tax payers and workers, they are subject to the laws you make, the inadequate wages you impose, the taxes you collect, the injustices you perpetuate, the anomalies you tolerate, and they suffer under the many vital and important matters you forget to handle".

As the banners currently adorning Parliament House in celebration of the centenary of the Women's Legal Status Act attest, women parliamentarians were thin on the ground in the years that followed its enactment. Things were not much brighter for women in the legal profession. Ada Evans commenced her apprenticeship as a student-at-law in May 1919. On 12 May 1921, 19 years after graduating in law, she was admitted as the first female barrister in NSW.

A change to jury service

There was one notable omission from the disqualifications which the *Women's Legal Status Act* removed, and that concerned jury service. This was not an accidental omission.

When the first Bill was introduced in 1916, the Attorney-General was asked whether it was proposed to permit women to act as jurors, to which he firmly responded "no". On 21 August 1918, when he met yet another delegation of women activists, the Attorney-General expressed his sympathy with many of their demands, but that did not extend to women serving on juries. He saw no indication that women would wish to be jurors.

The prospect of women jurors was threatening on two fronts: it would

take women away from their household responsibilities and, perhaps more troubling, it would empower them to sit in judgment of men.

While the *Women's Legal Status Act* permitted women to be appointed as judges, it can hardly be thought that anyone who supported it entertained the notion that a woman would be appointed as a judge. And they were right. No woman was appointed as a judge in NSW until the appointment of Jane Mathews to the District Court in 1980.

The incapacity of women to serve as jurors remained until the enactment of the *Jury (Amendment) Act 1947* (NSW), which made provision for women to serve on juries if they took the trouble to apply to be included on the jury roll. In moving the Bill, the Attorney-General stated that it was not his intention to compel women to serve on juries, noting it would be foolish to insist that the wives of certain Honourable Members and other public women who had so many public duties to attend to should be required to do so. In practice, the amendment had little effect because of the lack of suitable accommodation for women jurors. A further amendment in 1968 provided for the inclusion of women in the jury rolls for districts where facilities permitted.

A woman unlike a man was able to obtain exemption from jury service on notice to the officer responsible for the rolls. I had graduated in law before a fundamental obligation of citizenship, jury service, applied in NSW equally to women and men.

In 1939, NSW barrister Nerida Cohen described the impact of the *Women's Legal Status Act* in a paper

published on the Silver Jubilee of the Feminist Club. She bemoaned that 20 years had passed and yet few women were establishing themselves in professional and public life. While one sympathises with her frustration, it is fair to observe that before the changes in society associated with the 60s and early 70s, among which effective birth control must surely rank high, the forces limiting the practical achievement of equality in the public sphere were powerful.

One gets a sense of some of those forces in the way women lawyers were portrayed in the media. Following Ada Evans' admission to the Bar she was reported to have been pursued by "a flight of photographers and cinema-men". Much was made in the press of her attire and her "low and sweet" voice. When Sybil Morrison, the first practising barrister at the NSW Bar, turned up at the Water Police Court briefed by female solicitor Chris Jollie-Smith, the press reassured the public that they were both "entirely feminine".

The notion that as a woman lawyer you were at risk of losing your femininity if you did not take steps to keep a pretty steady grip on it still had currency when I started my law studies at the University of Queensland in 1969. I was one of two women in my year and the girls in the higher years were kind enough to hold a function for us at which, over glasses of Sparkling Blue Porphyry Pearl, we were given tips on how we could maintain our femininity despite being law students. If time permitted I would share them with you. **LSJ**

This is an edited extract from Justice Virginia Bell's address at the Francis Forbes Lecture on 30 May in Sydney.



The Womanhood Suffrage League of NSW by Freeman Bros Studio, 1892. Source: State Library of NSW