

By the Skin of Our Teeth – The Passing of the *Women's Legal
Status Act 1918*

Francis Forbes Lecture 30 May 2018

Virginia Bell AC

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 men¹. That year, Vida Goldstein, an Australian suffragist, was the Australian and New Zealand delegate to the International Women's Suffrage Conference in Washington². Carrie Catt, the President of the American Suffrage League, with the disarming frankness of the Americans, told Vida 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 sex³. Such was the novelty of Australia's treatment of

¹ *Commonwealth Franchise Act 1902* (Cth), s 3; *Commonwealth Electoral Act 1902* (Cth); Constitution, ss 16 and 34; New Zealand was the first country to give women the right to vote under the *Electoral Act 1893* (NZ), however, provision was not made for women to be elected to the New Zealand House of Representative until 1919.

² Wright, "Birth of a Nation? Empowering women, teaching the world a lesson" (2015) 51 *Griffith Review* 204 at 204; Lees, *Votes for Women: The Australian Story* (1995) at 126.

³ Wright, "Birth of a Nation? Empowering women, teaching the world a lesson" (2015) 51 *Griffith Review* 204 at 204.

women that Vida Goldstein was fêted as something of a celebrity throughout her trip to the United States. 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"⁴.

Within a few years, Vida 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 New South Wales Parliament.

In 1908, the New South Wales Government under Premier Charles Wade introduced the Contagious Diseases Bill. If enacted, its practical operation would have allowed the indefinite incarceration of prostitutes who were arrested for soliciting and found to have a venereal disease⁵. Vida Goldstein protested, what

⁴ Wright, "Birth of a Nation? Empowering women, teaching the world a lesson" (2015) 51 *Griffith Review* 204 at 204.

⁵ New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 11 November 1908 at 2347.

difference had women's suffrage achieved if the Government of New South Wales felt safe to introduce a measure like it⁶?

Edward O'Sullivan, the Minister for Lands in the Waddell Ministry, who was sympathetic to the suffrage cause, wrote to Rose Scott asking what women wanted in the way of remedial legislation. She scrawled on the back his letter a staccato manifesto⁷:

"[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"⁸. It was a clarion call for women to account for their failure to use their vote to remedy the manifest injustices suffered by their sex. She addressed the economic position of married women; guardianship of children, which, in the case of legitimate children, was exclusively vested in the father; and equal pay for equal work⁹. A popular argument

⁶ Allen, *Rose Scott Vision and Revision in Feminism*, (1994) at 194-195.

⁷ Allen, *Rose Scott Vision and Revision in Feminism*, (1994) at 189.

⁸ Allen, *Rose Scott Vision and Revision in Feminism*, (1994) at 218.

⁹ Allen, *Rose Scott Vision and Revision in Feminism*, (1994) at 218.

against equal pay for women was that women did not remain in employment; all too quickly, they left to get married. Scott's clear-eyed riposte was that in such a case women gave up unequal pay for no pay. She argued that women should receive payment for bearing children and that mothers should have equal guardianship of their children. She urged the need for testator's family maintenance legislation so that men could be prevented from disinheriting their wives and children. Importantly she pointed out that the disadvantaged position of wives and mothers, the majority of women, was maintained through the exclusion of women from the practice of law and from positions of authority and dignity in the State¹⁰. She called for women to be eligible for appointment as magistrates, justices of the peace, jurors, judges, members of parliament and local councils¹¹.

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

¹⁰ Allen, *Rose Scott Vision and Revision in Feminism*, (1994) at 219.

¹¹ Allen, *Rose Scott Vision and Revision in Feminism*, (1994) at 219.

to be appointed a judge or magistrate, or to be admitted to practice 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 barristers¹². 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 practice because it was thought that a woman was not a "person" for the purposes of the LPA. That was so, notwithstanding that the *Acts Interpretation Act* 1897 (NSW) provided that "[w]ords importing the masculine gender shall include females"¹³. It appears that Evans was advised that an

¹² *Legal Practitioners Act*, s 4.

¹³ *Acts Interpretation Act*, s 21(a).

application to the Supreme Court for mandamus to compel the Board to admit her had no prospect of succeeding¹⁴.

In February 1904, the Women's Progressive Association, which was one of the groups into which Womanhood Suffrage League had split after the franchise was secured, sent a deputation to Attorney-General Bernard Wise KC to press for the admission of women to the legal profession. The delegation was led by Annie Golding who, with her sisters Belle and Kate Dwyer, was a notable champion of equality in women's status. Bernard Wise was not. He advised that women could not be admitted under the law as it stood. The Golding sisters, practised campaigners, ensured there was a full report of the delegation in the press the following day¹⁵. Ada Evans read the report and was prompted to write to Wise and press her case personally for reform of the law.

The following year, the Women's Progressive Association's deputation was received by the Attorney-General, Charles Wade, whose response to their demands showed no small degree of political acumen. There was no call, he told the women, for legislative amendment; it was a matter for the practice and rules of the Supreme Court. Annie Golding took him at his word and wrote

¹⁴ McPaul, "A Woman Pioneer", (1948) 22 *The Australian Law Journal* 1 at 2.

¹⁵ "Rights of Women", *Sydney Morning Herald*, 25 February 1904, p 5.

to the Chief Justice, Sir William Cullen, who lobbed the grenade back promptly stating that it was "most absolutely a matter for the Parliament"¹⁶.

Cullen CJ's response should not be taken as any indication that he was personally hostile to the cause of the advancement of women. As acting Dean of the Sydney Law School, it was William Cullen who permitted Ada Evans to enrol as a law student, much to the annoyance of Professor Pitt Cobbett who could not conceal his antipathy to her when he returned to his position as Dean from an overseas trip¹⁷. And Sir William had the discernment to marry Lady Cullen who was a leading figure in the women's movement of the day.

Sir William Cullen's view that legislation was necessary to remove the disqualification to women's admission to the bar was entirely orthodox. As Professor Enid Campbell has explained, the common law set its face against women discharging duties and functions thought to involve some degree of public trust¹⁸.

¹⁶ Atherton, "Early Women Barristers in NSW", in *No Mere Mouthpiece* (eds) Lindsay and Webster (2002) 113 at 118-119 and fn 39.

¹⁷ Kirk, "Portia's Place: Australia's First Women Lawyers" (1995) 1 *Australian Journal of Legal History* 75 at 76; Atherton, "Early Women Barristers in NSW", in *No Mere Mouthpiece* (eds) Lindsay and Webster (2002) 113 at 114.

¹⁸ Campbell, "Women and the Exercise of Public Functions", (1961) 1(2) *Adelaide Law Review* 190.

Professor Campbell, widely recognised as occupying a place among the first rank of legal academics, was herself something of a pioneer: the first woman to hold a chair in law at an Australian university¹⁹. While her field was Constitutional and Administrative law, perhaps it should not surprise that as a young academic she should have turned her attention to the juridical basis for the exclusion of women from public office. She explained that the status of women was not explored or defined with any certainty until the concerted efforts of the English feminists forced the courts to articulate a rationale for it.

In the first of the suffrage cases, Sir Charles Coleridge, leading Dr Richard Pankhurst, argued on behalf of the Manchester Society for Women's Suffrage that women possessed an ancient constitutional right to vote²⁰. In the alternative, they contended that the *Representation of the People Act 1867* (UK) read with Lord Brougham's Act established such a right. Lord Brougham's Act, passed in 1850, declared that words of the masculine gender should import words of the feminine gender. The Court constituted by eminent common lawyers, including Willes J, had little difficulty in holding that the effect of Lord Brougham's Act was not that the

¹⁹ Campbell was appointed to the Sir Isaac Isaacs Chair in Law at Monash University in 1967.

²⁰ *Chorlton v Lings* (1868) LR4CP 374.

word "man" imported the word "woman" when referring to privileges granted by the State.²¹

A more challenging issue of interpretation arose four years later in *The Queen v Harrald*²². The provisions of legislation stating that in the Municipal Corporation Acts, "words importing the masculine gender shall include females for all purposes connected with the right to vote at the election of councillors" was held not to confer a right on married women to vote in municipal elections. The Court accepted Mr Farrer Herschell's (later Lord Chancellor Herschell) economical submission that "[a] married woman is not a person in the eye of the law. She is not sui juris"²³.

Cockburn CJ considered it unthinkable that a law permitting women to vote in municipal council elections had been intended to effect an alteration to the status of married women. Nor was it to be supposed that the enactment of the *Married Women's Property Act* 1870 (UK), which conferred the right to hold property on married women, had by a side wind given married women political rights²⁴.

²¹ *Chorlton v Lings* (1868) LR4CP 374 at 388.

²² (1872) 7 QB 361.

²³ *The Queen v Harrald* (1872) 7 LR QB 361 at 362.

²⁴ *The Queen v Harrald* (1872) 7 LR QB 361 at 363.

The vexed issue of whether the word "person" included female persons when it came to the rights of citizenship came before the House of Lords in *Nairn v University of St Andrews*²⁵. The appellants, women graduates of the University of Edinburgh, brought the proceeding claiming a right as graduates to vote in the election of the parliamentary representative of the University of Edinburgh. The *Representation of the People (Scotland) Act* 1868 by s 27 provided that "[e]very person whose name is for the time being on the register ... shall ... be entitled to vote in the election of a member to serve in any future Parliament for such university".

For Lord Loreburn the question was a simple one and did not turn on statutory interpretation. His Lordship was prepared to allow that in the vast mass of venerable documents in public repositories one could find traces of women having taken some part in parliamentary elections. But his Lordship observed, that as students of history would know, at various periods members of the House of Commons had been summoned in "a very irregular way"²⁶. It was incomprehensible to anyone acquainted with the law, however, to think there was room for argument on this point: it was notorious that the right of voting had been confined to men²⁷. And so it followed that if the word "persons" in the Act was wide enough to

²⁵ [1909] AC 147.

²⁶ *Nairn v University of St Andrews* [1909] AC 147 at 160.

²⁷ *Nairn v University of St Andrews* [1909] AC 147 at 160.

include women, they were nonetheless shut out by the exception which limited the franchise to those "not subject to any legal incapacity"²⁸.

The English courts were no more sympathetic to women seeking to gain admission to the legal profession. In 1914, Gwyneth Bebb brought a suit against the Law Society seeking a declaration that she was a person within the meaning of the *Solicitor's Act* 1843 (UK)²⁹. Lord Robert Cecil KC, appearing for Bebb, argued that unmarried women were not disqualified and that, *prima facie*, an unmarried woman had the same legal rights as a man. He contended that it was not necessary to read the *Solicitor's Act* as excluding unmarried women given that solicitors do not discharge public functions. His argument accepted unquestioningly that married women did not enjoy equal rights with men. What Lord Robert's deft argument could not overcome was Sir Edward Coke's acceptance of the statement in the *Mirror of the Justices* that "*fems ne poient estre attorneyes*"³⁰.

The *Mirror of the Justices* described by Holdsworth as "that mysterious work"³¹, was once thought to have been written in the

²⁸ *Nairn v University of St Andrews* [1909] AC 147 at 156.

²⁹ *Bebb v Law Society* [1914] 1 Ch 286.

³⁰ *Bebb v Law Society* [1914] 1 Ch 286 at 296.

³¹ Holdsworth, *A History of English Law (Volume II)*, 4th ed (1936) at 327.

late 13th Century. Holdsworth dates it to the reign of Edward the Confessor for the plausible reason that its author treats the government of England as wholly Saxon and makes no reference to the Norman Conquest. Maitland wrote the introduction to the translation published by the Selden Society, which is considered the best edition of this curious text. He noted that the manuscript was full of mistakes but that nonetheless, Sir Edward Coke had "procured a copy and devoured its contents with uncritical voracity"³². That proved to be unfortunate for prospective women attorneys.

Cozens-Hardy MR held that Sir Edward Coke's opinion of what is, or what is not, the common law required no sanction from anyone else; it alone evidenced that at common law women were under a disability and could not be an attorney-at-law³³. Swinfen Eady LJ was of the same opinion; while the authority of the *Mirror of the Justices* could be impugned, the authority of Sir Edward Coke could not be. It sufficed to rest the decision in *Bebb* "upon the inveterate practice of the centuries" based on a text credibly considered by legal historians to be apocryphal³⁴. It has to be acknowledged that Lord Phillimore supported the reasoning with a

³² Holdsworth, *A History of English Law (Volume II)*, 4th ed (1936) at 328.

³³ *Bebb v Law Society* [1914] 1 Ch 286 at 294.

³⁴ *Bebb v Law Society* [1914] 1 Ch 286 at 297.

more contemporary analysis, at least insofar as it concerned married women: a married woman could not enter into a binding contract. How, his Lordship asked, was she to enter articles of clerkship much less a retainer with a client³⁵?

The disqualification on the practice of law by women in England was removed by statute in 1919³⁶. Gwyneth Bebb was admitted as a student by Lincoln's Inn in January 1920. She attended a banquet held in the Palace of Westminster on 8 March 1920 to celebrate the passing of the *Sex Disqualification (Removal) Act* 1919 (UK) at which she proposed the toast to the bar. She was expected to be the first woman to be called to the Bar but regrettably, at the age of 31, she died following childbirth from a condition which today is eminently treatable.³⁷

Ada Evans, like Bebb, was never to practice as a barrister. Hers was a long struggle, which took its own toll. Professor Pitt Cobbett's displeasure at having a woman studying law did not lessen with time and acquaintance. In its report of Ada Evans's graduation ceremony, the *Australasian* noted "Professor Pitt Cobbett, who is a bachelor, and not partial to women, could not

³⁵ *Bebb v Law Society* [1914] 1 Ch 286 at 299.

³⁶ *Sex Disqualification (Removal) Act* 1919 (UK).

³⁷ Auchmuty, "Whatever Happened to Miss Bebb - *Bebb v The Law Society* and Women's Legal History" (2011) 31 *Legal Studies* 199 at 227.

conceal his disapproval as he introduced the interesting-looking girl to the Chancellor, who smiled pleasantly"³⁸. The report went on to note that there was no Act in force which would permit a female holding a bachelor of laws to practice and that Ms Evans planned to agitate for a new Act. The report also noted that "at present every judge in Sydney is opposed to her admission".

Between February 1904 and 1917, Ada Evans wrote to successive Attorneys-General seeking change in the law. In this 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. As with any marginalised group there were internal divisions and tensions among them. As one historian describes it, the Newtown Branch of the Womanhood Suffrage League to which the Golding sisters belonged "offered something of a working woman's challenge to Rose Scott's presidential view of the suffrage question from Woollahra"³⁹.

In her day, Scott was one of Sydney's most socially well connected and well known women. The cousin of the bibliophile, David Scott Mitchell, Rose Scott was a financially comfortable,

³⁸ *Australasian*, 26 April 1902.

³⁹ Kingston, "Golding, Annie Mackenzie (1855 - 1934)" *Australian Dictionary of Biography* (1983), vol 9.

independent woman. For many years she conducted a salon from her home in Jersey Road on Friday afternoons. It was attended by notable artists and writers and by the leading politicians of the day, including men like Bernard Wise and Charles Wade. Stella Miles Franklin said Scott had "a genius for making delight of association"⁴⁰. 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 who 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 gaol. 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

⁴⁰ Franklin, "Miss Rose Scott: Some Aspects of Her Personality and Work" in *The Peaceful Army: Memoirs of Australia's Pioneer Women*, ed FBS Eldershaw (1988) 92 at 101.

recognition of the provocation experienced by women at the hands of men in mitigation of the severity of the criminal law⁴¹. In Scott's view, Ethel 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.

Bernard 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 years⁴². Scott was committed to this measure having seen the exploitation of girls who were too young to have much, if any, understanding of sexual intercourse or its consequences⁴³. 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 climes⁴⁴.

⁴¹ Allen, *Rose Scott Vision and Revision in Feminism*, (1994) at 184.

⁴² New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 July 1903 at 1157.

⁴³ Allen, *Rose Scott Vision and Revision in Feminism*, (1994) at 185.

⁴⁴ New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 July 1903 at 1154-1155.

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. As Tony Cunneen has suggested, the death of Bernard Wise in 1915 and the retirement of Professor Pitt Cobbett from Sydney University in 1910 had served to remove two powerful opponents⁴⁵.

On 18 August 1916, Attorney-General David Hall introduced the Women's Legal Status Bill to the Legislative Assembly⁴⁶. It was not plain sailing. On its second reading, Thomas Waddell successfully raised a point of order and the bill was ruled out of order⁴⁷.

Attorney-General Hall introduced a fresh Bill on 13 September 1916. Thomas 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, Mr Waddell asked how any women could "have as much knowledge

⁴⁵ Cunneen, "One of the 'Laws Women Need'" (2011 Summer) *Bar News: Journal of the NSW Bar Association* 102 at.110.

⁴⁶ New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 August 1916 at 989.

⁴⁷ New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 August 1916 at 1099.

as a man of the mining laws, the land laws, and the many other matters with which parliamentary representatives have to deal"⁴⁸? 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.

In September 1916, the Labor Party was bitterly divided over the issue of conscription leading ultimately to a split. The Premier, William Holman, and 20 other Labor members were expelled from the party forcing Holman to form new a coalition Government. Hall was again appointed as Attorney-General; however, circumstances had overwhelmed the Women's Legal Status Bill, which lapsed⁴⁹.

A second Women's Legal Status Bill was introduced to the Parliament in October 1918. In speaking for the Bill, Attorney-General Hall suggested that New South Wales 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 he noted that she had occasionally communicated with his Department inquiring

⁴⁸ New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 September 1916 at 1792.

⁴⁹ Cunneen, "One of the 'Laws Women Need'" (2011 Summer) *Bar News: Journal of the NSW Bar Association* 102 at 107.

when she would be permitted to practice for the profession for which she had qualified herself 17 or 18 years earlier⁵⁰.

The Bill encountered an obstacle in the Legislative Council. As introduced, 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 Assembly⁵¹. On its return to the Legislative Council it received a warmer reception. Albeit 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 joke⁵².

An undercurrent in the parliamentary debates, albeit generally expressed with more circumspection than by Dr 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

⁵⁰ New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 October 1918 at 1955.

⁵¹ Cunneen, "One of the 'Laws Women Need'" (2011 Summer) *Bar News: Journal of the NSW Bar Association* 102 at 113.

⁵² New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 5 December 1918, at 3464.

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. Vida Goldstein made three unsuccessful bids for election to the Commonwealth Parliament. The first woman elected to the New South Wales Legislative Assembly was Millicent Preston-Stanley⁵³.

Preston-Stanley was one of the new generation of feminists. In 1919 she became the 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:

⁵³ Radi, "Preston-Stanley, Millicent Fanny (1883 - 1955)" *Australian Dictionary of Biography* (1988), vol 11.

"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"⁵⁴.

Preston-Stanley's principal efforts were directed to the question of equal guardianship for children. Partly those efforts were prompted by the case of Emilie Polini. Polini was an actress who had enjoyed success in London and New York. She was contracted by J&N Tait, theatrical entrepreneurs, to take up an engagement in Sydney. On the ship coming out she met Lieutenant Harold Ellis, who was returning home from service with the Royal Field Artillery. In 1918 they married. Polini made over to him her savings for the purchase of a property at Hartley Vale. In October 1921, their daughter, Patricia was born⁵⁵.

By March 1922, Ellis, who had mortgaged the Hartley Vale property, had lost everything. They separated and Polini returned to the stage to support herself and Patricia. She arranged for Ellis' mother to look after Patricia while she was performing in a JC Williamson Ltd production. At the completion of her engagement, she proposed to return to England where her sister would assist with

⁵⁴ New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 August 1925 at 369.

⁵⁵ Radi, "Polini, Emelie Adeline (1881 - 1927)" *Australian Dictionary of Biography* (1988), vol 11.

the care of Patricia. Ellis refused to consent to Patricia being returned to her mother. Polini applied for, and was refused, custody.

Justice Harvey found that there was no suspicion of misconduct on Polini's part and that her husband had shown decided weakness of character. Nonetheless, his Honour explained, the law in New South Wales did not put the wife's right to custody as high as in England⁵⁶. This was a reference to the *Guardianship of Infants Act* 1886 (UK), which required the English court in dealing with custody to take into account the conduct of the parties and the wishes of the mother as well as the father⁵⁷. In New South Wales the law gave the father of a legitimate child custody and guardianship of the child⁵⁸.

Ellis v Ellis was decided before Preston-Stanley entered the New South Wales Parliament but she was galvanised by it. She took up a petition which was presented to the Minister for Justice, Thomas Ley, in May 1924. With a tenderness not always exhibited by parliamentarians, Ley declined to take action stating that it was

⁵⁶ "In Equity: Emilie Polini's Application for Custody of Her Child", *Sydney Morning Herald*, 11 April 1924, p 8.

⁵⁷ *Guardianship of Infants Act* 1886 (UK), s 5.

⁵⁸ Byles, "The Custody and Guardianship of Infants", (1931) 5 *The Australian Law Journal* 53 at 53; see also *Infants' Custody and Settlement Act* 1899 (NSW), s 5.

not "the practice in English speaking countries to bring in legislation specially for the purpose of upsetting a decision of a judge"⁵⁹.

On 2 November 1926, Preston-Stanley now a member of the Legislative Assembly moved to bring in a Bill to amend the law relating to the guardianship and custody of infants⁶⁰. The object of the Bill was to require the court to take into account the wishes of the mother as well as the father on matters of access and custody.

Edward McTiernan, then Attorney-General for New South Wales, was strict in ensuring observance of the time limits allocated to private members' business. Preston-Stanley's Bill was listed for a second reading on 16 November 1926. The time for private members' business was taken up with answers to questions on notice and her Bill was not given a second reading on that day or any day thereafter.

Preston-Stanley was not re-elected in 1927.

Undeterred by the failure of her Bill, Preston-Stanley wrote a play *Who's Child?* which dramatically interwove Polini's case with the saga of her Private Members' Bill. She hired the Criterion

⁵⁹ "Mothers' Rights: Custody of Children - Deputation to Minister", *Sydney Morning Herald*, 1 May 1924, p 12.

⁶⁰ New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 November 1926 at 693.

Theatre, engaged a professional director and actors, cast herself in the role of the female parliamentarian and took out advertisements promoting this "tense, throbbing drama of real life interest to women". *Whose Child?* opened in November 1932. The Prime Minister, the Premier, the Lord Mayor and other dignitaries were in attendance including the Minister for Justice, Lewis Martin. At the curtain-call Preston-Stanley announced that during the interval, Mr Martin had sent a note backstage to say that he would give instructions for a Bill to be prepared to "provide for mothers' rights so eloquently depicted in your play"⁶¹. Reviews of *Who's Child?* were crowded out by the publicity of this dramatic turn of events.

True to his word, Attorney-General introduced a Bill in September 1933 to amend the statute governing the guardianship of infants⁶². The amendment came into force on 1 November 1934 and as the Attorney-General put it, it was the "concluding stage of a long struggle waged by women's organisations" to put both parents on the same footing in relation to child custody⁶³.

⁶¹ *Guardianship of Infants Act 1934 (NSW)*; "Mothers' Rights: Minister Promises Reform - Announcement from Theatre Stage", *Sydney Morning Herald*, 28 November 1932, p 10.

⁶² New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 August 1933 at 326.

⁶³ "Guardianship of Infants: New Act in Force", *Sydney Morning Herald*, 3 November 1934, p 14.

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 New South Wales.

Flos Greig, the first woman to practice law in the Commonwealth, wrote on the law as a women's profession, in an article published in the March-April 1909 edition of the *Commonwealth Law Review*⁶⁴. This was itself something of a surprise given that the Review's consulting editor was Pitt Cobbett. Grieg commented on broad changes in society which had seen women attending university and entering the medical and other professions. The most important change in her estimate was the emergence of women's organisations and political associations. As she put it, the "awful dullness has been lifted from the women's realm"⁶⁵. While she acknowledged that women take up a profession to earn a living, the driving force as she saw it for these women pioneers was altruism: "you will hardly find one amongst them who

⁶⁴ Greig, "The Law as a Profession for Women" (1909) 6 *Commonwealth Law Review* 145.

⁶⁵ Greig, "The Law as a Profession for Women" (1909) 6 *Commonwealth Law Review* 145 at 146.

has not at bottom the interest of women as a whole sincerely at heart, and who will not go to a great deal of trouble to benefit the mass of her sex"⁶⁶.

It is an observation that applies to Ada Evans. Her niece, when interviewed by a researcher, recalled her aunt as a person who had been involved in welfare work with the pioneering doctor and feminist, Kate Hogg. She had been concerned about the plight of poor women living in inner city suburbs and about the deficiencies in their legal protection⁶⁷. She had sought to be instrumental in securing the advancement of women as a practising lawyer. In a sad postscript to her struggle, she refused a brief in June 1921 to appear for women clerical officers of the Public Service Association in an application for equal rates of pay⁶⁸. She was concerned about undermining the standing of women by any show of incompetence, which was the product of her involuntary 19 year absence from the law.

There was one notable omission from the disqualifications which the *Women's Legal Status Act* removed and that concerned

⁶⁶ Greig, "The Law as a Profession for Women", (1909) 6 *Commonwealth Law Review* 145 at 148.

⁶⁷ Atherton, "Early Women Barristers in NSW", in *No Mere Mouthpiece* (eds) Lindsay and Webster (2002) 113 at 126.

⁶⁸ Atherton, "Early Women Barristers in NSW", in *No Mere Mouthpiece* (eds) Lindsay and Webster (2002) 113 at 121 fn 60.

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 jurors⁶⁹.

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 on 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 least notion that a woman would be appointed as a judge. And they were right. No woman was appointed as a judge in New South Wales 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 roll⁷⁰. In moving the Bill, the

⁶⁹ "Women's Rights: Deputation to Mr Hall", *Sydney Morning Herald*, 21 August 1918, p 13.

⁷⁰ *Jury (Amendment) Act*, s 3(3)(b).

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 so⁷¹. 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 permitted⁷². A woman unlike a man was able to obtain exemption as of right from jury service on notice to the officer responsible for the rolls⁷³. I had graduated in law before a fundamental obligation of citizenship, jury service, applied in New South Wales equally to women and men⁷⁴.

In 1939, New South Wales barrister, Nerida Cohen, described the impact of the *Women's Legal Status Act* in a paper published on the Silver Jubilee of the Feminist Club⁷⁵. She bemoaned that twenty years had passed and yet few women were establishing themselves

⁷¹ New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 October 1947 at 346.

⁷² *Administration of Justice Act* 1968 (NSW).

⁷³ *Administration of Justice Act* 1968 (NSW), s 10.

⁷⁴ *Jury Act* 1977 (NSW).

⁷⁵ Cohen, "Women's Legal Status Act – How Far It Goes" (1939) *The Feminist Club of NSW: Silver Jubilee Souvenir, 1914-1939* 15.

in professional and public life⁷⁶. 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's Evans' admission to the Bar she was reported to have been pursued by "a flight of photographers and cinema-men"⁷⁷. Much was made in the press of her attire and her "low and sweet" voice. When Sybil Morrison, the first woman practising barrister at the New South Wales 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"⁷⁸.

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

⁷⁶ Cohen, "Women's Legal Status Act – How Far It Goes" (1939) *The Feminist Club of NSW: Silver Jubilee Souvenir, 1914-1939* 15 at 15.

⁷⁷ Atherton, "Early Women Barristers in NSW", in *No Mere Mouthpiece* (eds) Lindsay and Webster (2002) 113 at 120.

⁷⁸ Atherton, "Early Women Barristers in NSW", in *No Mere Mouthpiece* (eds) Lindsay and Webster (2002) 113 at 125-6.

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.