Around the Nation: Tasmania

Editor: Justice Stephen Estcourt AM

WOMEN AND THE LAW IN TASMANIA

In one sense the establishment of the Supreme Court of Van Diemen's Land on 10 May 1824 was something of a setback for women in the law, as far as legal practice was concerned anyway.

The Charter of Justice, establishing the Court, put an end to former convicts being able to practice as legal practitioners. Men such as Robert Lathrop Murray and William Adams Brodribb, who had practiced as barristers before the Lieutenant-Governor's Court from about 1816, were expressly excluded from admission as barristers or solicitors after the commencement of the Supreme Court in 1824. However, it was not only former convicts whose careers as lawyers were cut short. Women who had previously appeared before that court as "agents", were also no longer able to do so before the Supreme Court, due to the longstanding English disqualification of women from joining the Bar.

The Lieutenant-Governor's Court had from the outset treated women differently from the manner of English law. Married women in England were unable to bring proceeding in courts in their own name as they were not regarded as having a separate legal existence from their husband. However, not only did the Lieutenant-Governor's Court permit women to bring and defend actions in their own names, it also allowed woman to act as agents for their husbands and for other litigants.

The establishment of the Supreme Court put an end to that and the situation would thenceforth remain unchanged until 26 October 1904 when the *Legal Practitioners Act 1904* (Tas) was enacted. That Act, 4 Edw VII, No 14 had the long title, "An Act to Confer on Women the Right of Practising as Barristers, Solicitors, Proctors, or Attorneys".

As well as providing that women were entitled to admission and were to have the same rights and privileges, and should be subject to the same liabilities and obligations as a male barrister, solicitor, proctor or attorney, the Act provided that, relevantly, "[i]n all Statutes and in all Rules of Court … the words 'barrister', 'person', 'attorney', 'solicitor', 'proctor', 'articled clerk' and 'clerk', shall be applicable to a woman as well as a man". In a final flourish of largesse, the last section of the short Act provided that "[a] solicitor may employ a woman under articles, in the same manner as he (sic) may employ a man".

As will be seen, it would be another 31 years, well into the 2nd century of the Court, before a woman was admitted to practice.

As Dr John Emerson put it, in an article in the November 2004 edition of the *South Australian Law Society Bulletin*:

> The single biggest change in the legal profession in its history is the entry of women in the twentieth century. But although it is easy to forget, it is still only early days. The law is a medieval profession. If you compressed its history from 800 years into one single day, and we are at midnight now, then the first women were admitted at around twenty-five past nine in the evening.

In an essay published in *The Critic* on 3 March 1923, Carrel Inglis Clark observed that by the middle of the 19th Century the progress of Jeremy Bentham's ideas as to the legal rights of women began to filter through to the Tasmanian statute books.

In 1863 the provisions of the *Deserted Wives and Children Maintenance Act of 1863* (Tas); 27 Vic No 14. signalled the awakening of a social conscience by compelling men to provide maintenance for their deserted wives and children. This advance continued through the 1st century of the Court, culminating in the passage of the *Maintenance Act 1921* (Tas); 12 Geo V, No 40.

By the *Matrimonial Causes Act of 1860* (Tas); 38 Vic No 13, the Court assumed all jurisdiction in the area of divorce with power to grant judicial separation on the grounds of adultery or cruelty or desertion for a period of two years. In 1919 the definitions of cruelty and desertion were expanded to include habitual drunkenness, lunacy and imprisonment for three years, as added grounds for divorce.

In 1874 the *Infants' Custody Act of 1874* (Tas); 38 Vic No 8, gave the Court power to grant a mother custody of, or access to, her children.

The *Married Women's Property Act of 1883* (Tas); 47 Vic No 18 and the later 1890 Act of the same name, 54 Vic No 14, allowed married women to own and dispose of property in their own right and enabled them to act as trustees. These laws extended to earnings and income and also exempted a wife's assurance policy as property available to her husband's creditors.

Workplace legislation in the form of the *Women and Children's Employment Act of 1884* (Tas); 48 Vic No 20, restricted a woman's hours of work to ten hours a day and provided for meal breaks after five hours. These protections were extended by the *Factories Act 1910* (Tas); 1 Geo V, No 57.

Inglis Clark cites as a "notable example of the social conscience rising superior to hoary conscience", the recognition by the *Testator's Family Maintenance Act 1912* (Tas); 5 Geo V, No 7, of the legal as well as the moral obligation of a testator to make provision from his estate for his widow and children. For the first time a testator's right to do what he wished with his estate was curtailed so that he could not, out of spite or neglect, leave his wife or children without sufficient means for their support. The Court was given jurisdiction to make such provision for them out of the testator's estate as a judge deemed necessary.

Tasmanian women also made slow but certain progress in the political sphere. Women became eligible to vote in House of Assembly elections in 1904, following a change to the eligibility criteria from 'man' to 'person' in the *Constitution Act 1903* (Tas); 3 Edw VII, No 17. However, although this allowed women to vote, they were still not eligible to stand for election to either House.

In October 1920 women who had served as nurses in the First World War became eligible to vote in Legislative Council elections by virtue of the *Constitution (War Service Franchise) Act 1920* (Tas); 11 Geo V, No 4.

And finally, in 1921 the *Constitution Act 1921* (Tas); 12 Geo V, No 61, gave women the right to stand for election. This change permitted Alicia O'Shea-Petersen and Edith Waterworth to stand in the electorate of Denison and Annette Youl to stand in Wilmot, now the electorate of Lyons, albeit unsuccessfully, in June 1922. It would be another 26 years, however, before a woman was elected to the Tasmanian Parliament.

Despite the *Legal Practitioners Act 1904* (Tas) however, it took until 1935, well into the 2nd century of the Tasmanian Supreme Court, before a woman was admitted as a legal practitioner. On 7 February 1935, legal history was made when Ms Nancy Helen McPhee, a daughter of a former premier of Tasmania, Sir John McPhee and Lady McPhee, became the first woman admitted as a practitioner of the Court. Ms McPhee was educated at Lesley House in Hobart, which was at the time known as Cleaves College, and afterwards became the Collegiate College.

She obtained her degree of Bachelor of Laws at the Tasmanian University as the degree was then called. From January 1932 she was articled to Mr FW Dennis Butler's firm, the long-established firm of Butler McIntyre and Butler. Mr Butler moved her admission. That firm was established in 1824 and is the oldest law firm in Tasmania continuing to operate. Its founder Gamaliel Butler was admitted to the Court on 3 September 1824 just short of four months after the Court was established.

In admitting Ms McPhee, Justice Inglis Clark Jr said it was always a pleasure for a presiding judge to admit any person to the practice of the Court, as in making such an order the judge was setting the person concerned on a career and a great profession, and the knowledge of that fact naturally excited a great sense of gratification, a sense that he said that he felt that day.

His Honour mentioned that it was at the time 30 years since the legal barrier against women practising in the Court had been removed. Why such a long time had elapsed before a woman practitioner came forward, he said he could not say. He felt sure however, that no one could better be fitted to lead the way than Ms McPhee.

As one might have expected of the times, Ms McPhee's admission was reported in no less than the *Australian Women's Weekly*. The report published on Saturday 23 February 1935, in the progressive

section "What Women Are Doing", included a description of the newly admitted practitioner as "a popular and charming girl in her early 20s".

The considerable change since then has been welcome, fair and pleasing, but it needs to be recorded that it was a very long time coming and still more needs to be done to achieve an appropriate gender balance on and before the Court.

As Amanda Pinto QC of the English Bar wrote in an article published in [2019] *Criminal Law Review*, Issue 12, and entitled *100 Years of Women in the Legal Profession – Some Personal Reflections from Three Perspectives*:

> Our courageous predecessors had to manage on their own or, with luck, with the help of friends and colleagues, but in a much more haphazard way. Looking to the future, I feel optimistic that women will thrive and rise up through our professions in more significant numbers. In 2015 Lord Sumption said that it could take 50 years to achieve gender equality within the senior judiciary. I disagree. By identifying the causes of inequality at the Bar, addressing the reasons why women have been leaving in the mid-years of practice, and by positively supporting our colleagues, including those young practitioners with family responsibilities, I believe that we will achieve a better balance in the senior branches of the legal professions far more quickly. And the quicker we do so, the better for everyone!

None could disagree.

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