

CHALLENGING THE LEGAL PROFESSION A CENTURY ON: THE CASE OF EDITH HAYNES*

MARGARET THORNTON[†]

This article focuses on Edith Haynes' unsuccessful attempt to enter the legal profession in Western Australia. Although admitted to articles as a law student in 1900, she was denied permission to sit her intermediate examination by the Supreme Court of WA (In re Edith Haynes (1904) 6 WAR 209). Edith Haynes is of particular interest for two reasons. First, the decision denying her permission to sit the exam was an example of a 'persons' case', which was typical of an array of cases in the English common law world in the late 19th and early 20th centuries in which courts determined that women were not persons for the purpose of entering the professions or holding public office. Secondly, as all (white) women had been enfranchised in Australia at the time, the decision of the Supreme Court begs the question as to the meaning of active citizenship. The article concludes by hypothesising a different outcome for Edith Haynes by imagining an appeal to the newly established High Court of Australia.

Contents

I	Introduction	1
II	Edith Haynes 1876-1963.....	4
III	In Re Haynes	6
IV	The Citizenship Conundrum.....	9
V	Imagining An Appeal	14
VI	Conclusion	19

I INTRODUCTION

The struggle by women to enter the legal profession in many parts of the world was a notable manifestation of the internationalisation of first wave feminism in the late 19th and early 20th centuries. It represented one piece of the mosaic relating to the desire to be treated as the equals of men in public life, but corporeality, emotion and eroticism had been indelibly imprinted on the feminine

* Thanks to Tony Blackshield, Narrelle Morris and Susan Priest for reading and commenting on the text, and to Harry McLauren for research assistance. A version of this paper was presented at 'Narratives of Women in Law: Then and Now', Centre for International and Public Law, ANU College of Law, Australian National University, 19 September 2017.

[†] Professor of Law, ANU College of Law, The Australian National University, Canberra.

psyche throughout the western intellectual tradition,¹ and endlessly repeated as a justification for the exclusion of women from public life.² Opponents argued that the admission of women would not only corrupt the rationality of the public sphere but, bizarrely, it could also exercise a deleterious impact on the private sphere as intellectual activity had the potential to ‘unsex’ women and induce sterility.³ The endless repetition of such myths, particularly under the imprimatur of official reports, deflected attention away from the economic threat posed to masculine hegemony if women were permitted to enter professions such as law.⁴

Perhaps it is unsurprising that the earnest pronouncements of judges legitimised the exclusion of women from the public sphere in a spate of cases known as the ‘persons’ cases’ that occurred throughout the English common law world in a reaction to first wave feminism. Women who sought entry to universities, the professions and public office were consistently found not to be ‘persons’ for the purposes of admission, even though the relevant legislation was expressed in gender-neutral terms.⁵ Julius Stone noted that the exercise of ‘leeways of choice’ by judges is an inevitable dimension of the interpretative role,⁶ but when subjectively opposed to a particular outcome, judges claim to be ‘inexorably bound’ to reach a particular determination. In the persons’ cases, judges sought authority in the ancient common law to support a finding that the gender-neutral word ‘person’ did not include women. This was despite the existence of interpretation Acts from the middle of the 19th century, which expressly stated that words importing the masculine should include the feminine.⁷ Judges nevertheless argued that no legislature could have *intended* to refer to women as potential legal practitioners because they had *never* been admitted in

¹ For example, Aristotle, *Politics*, John Warrington trans, J M Dent, Everyman, 1959, pp. 24-25 (s. 1260a).

² For example, Genevieve Lloyd, *The Man of Reason: ‘Male’ and ‘Female’ in Western Philosophy*, Methuen, London, 1984; Lyn Hunt (ed.), *Eroticism and the Body Politic*, Johns Hopkins University Press, Baltimore, Md, 1991; Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession*, Oxford University Press, Melbourne, 1996, pp. 41 ff.

³ For example, Herbert Spencer, *The Principles of Biology*, Vol II, Williams & Norgate, London, 1899, 512-13. In 1903-04, a report by the New South Wales (NSW) Royal Commission on the Birth Rate gave weight to the fantasy by blaming the falling birth-rate on the women’s movement. See Audrey Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle?* Cambridge University Press, Cambridge, 1992, 200.

⁴ In the parliamentary debate on the admission of women to legal practice in WA, Mr Marshall argued that admitting women would be ‘cutting all the [male] solicitors and barristers out of their jobs’. See *WA Parliamentary Debates (Hansard)*, Legislative Assembly, *Women’s Legal Status Bill 1923* (WA), Second Reading, 5 September 1923, Vol 69, 593. Cf Thornton, *Dissonance and Distrust*, 45-46; Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias*, Martin Robertson, Oxford, 1978, 170.

⁵ For a thoroughgoing treatment of the leading cases, see Sachs and Wilson, *Sexism and the Law*.

⁶ Julius Stone, *Legal System and Lawyers’ Reasonings*, Maitland Publications, Sydney, 1968, 319.

⁷ The *Interpretation Act 1850* (13 & 14 Vict c 21) (Lord Brougham’s Act) was the first of such Acts.

the past. Judges invariably cite Lord Coke's view of 300 years before as authoritative.⁸

While sharing a common law heritage with other parts of the British Empire, Australasia was to the fore in terms of the enfranchisement of women and, in some jurisdictions,⁹ the admission of women to legal practice.¹⁰ Despite this seeming progressiveness, the animus towards women seeking to enter the public sphere in Australia generally echoed the experience elsewhere. The legal profession was the most intransigent, being described by Theobald as even 'more misogynist' than the medical profession.¹¹

While the persons' cases are a curious anomaly in the history of jurisprudence, the Australian examples are striking because they occurred *after* enfranchisement. Women had been enfranchised in South Australia (SA) in 1894, white women in Western Australia (WA) in 1899 and, following federation, all Australian women (other than Aboriginal women in Queensland and WA) in 1902.¹² Citizenship, however, includes civil as well as political elements.¹³ Thus, in addition to the right to vote and the right to be elected to Parliament to represent others, citizenship also implies a cluster of rights associated with active participation in civil life. This necessarily includes a right to engage in the professions, entailing practising as a lawyer and assuming leadership positions in civil society. Equality between all citizens of the polity in the exercise of civil rights is a norm of the liberal state.¹⁴ Hence, once women were enfranchised, they were theoretically entitled to exercise the full panoply of political and civil rights

⁸ Eg, *Bebb v Law Society* [1914] 1 Ch 286. A rare example of a progressive interpretation of legislative intent led to the admission of Arabella Mansfield by an Iowa Court in 1869. The court held that the gender specific phrase, 'white male persons' should be interpreted to include females in accordance with the interpretation statute. However, this decision was not accepted by courts elsewhere. See Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions*, Hart, Oxford, 2006, 41.

⁹ Australia retained its six separate State jurisdictions even after Federation in 1901, which accounts for the variable dates for the admission of women. A *Uniform Law Application Act 2014* has been developed but, by 2017, only NSW and Victoria had endorsed it.

¹⁰ Ethel Benjamin was admitted to legal practice in New Zealand in 1897. *Female Law Practitioners Act 1895* (NZ) and *Women's Disabilities Act 1895* (NZ) were passed following the enfranchisement of New Zealand women in 1893. See Gill Gatfield, *Without Prejudice: Women in the Law*, Brookers, Wellington, 1996, 30. Benjamin's admission occurred the same year as that of Clara Brett Martin in Ontario. For detailed discussion of the admission of Canadian women, see Mossman, *The First Women Lawyers*, 67-112.

¹¹ Marjorie Theobald, *Knowing Women: Origins of Women's Education in Nineteenth-century Australia*, Cambridge University Press, Cambridge, 1996, 71.

¹² *Commonwealth Franchise Act 1902* (Cth). For a thoroughgoing study of the campaigns in the States and the Commonwealth, see Oldfield, *Woman Suffrage*, 64-67.

¹³ T H Marshall, *Citizenship and Social Class and Other Essays*, Cambridge University Press, Cambridge, 1950, 74.

¹⁴ Jean Bethke Elshtain, *Power Trips and Other Journeys: Essays in Feminism in Civic Discourse*, University of Wisconsin Press, Wisconsin, 1990, 49.

in the same way as men. While this factor was recognised by numerous politicians in the enfranchisement debates,¹⁵ it seems to have eluded the judges.

In this article, I address *In re Haynes*,¹⁶ a case that arose when Edith Haynes was refused permission by the WA Barristers' Board to sit her intermediate examination in 1903, even though the Board had approved her articles in 1900. The Supreme Court of WA took no cognisance whatsoever of the issue of enfranchisement, which begs the question as to its meaning in the Australian context, other than placing a ballot paper in a ballot box. In addition to interrogating the philosophical underpinnings of citizenship, I speculate as to what might have happened had Edith Haynes appealed the decision to the newly created High Court of Australia. Would the neonate judges, one of whom strongly supported the enfranchisement of women, have adopted a more enlightened view than the judges of the Supreme Court of WA?

II EDITH HAYNES 1876-1963

Biographical details relating to the entry of women to the legal profession are scant, and law reports are notorious for their lack of detail, which compels the scholar to search for other clues, as Rosemary Auchmuty points out.¹⁷ Male historians have also largely ignored the early women of law as their contributions to the legal profession have tended to be seen as unimportant.¹⁸ Lloyd Davies states, for example, that the WA Barristers' Board 'expunged Edith Haynes from its records',¹⁹ a fact that was confirmed by an officer of the WA Legal Practice Board (the successor of the Barristers' Board) when I sought to obtain permission to peruse the minutes of the Barristers' Board for the period 1900-1904. Nevertheless, there is a little sketchy information about Edith Haynes, some of

¹⁵ Eg, Mr Walter James, Assembly, Parliamentary Debates on *Parliamentary Franchise* (WA). 1 December 1897, 738 ff; Hon R S Haynes, Legislative Council, Parliamentary Debates on *Legal Practitioners Bill 1900* (WA), 18 September 1900, 451; Hon A Jameson, Legislative Council, Parliamentary Debates on *Legal Practitioners Bill 1900* (WA), 18 September 1900, 453; The Colonial Secretary, Hon G Randell, Legislative Council, Parliamentary Debates on *Legal Practitioners Bill 1900* (WA), 18 September 1900, 453; Senator O'Connor (NSW, Protectionist Party), Parliamentary debates on *Commonwealth Franchise Act 1902* (Cth), Senate, Hansard, 9 April 1902, 11451.

¹⁶ *In re Haynes* (1904) 6 WAR 209. Cf *In re Kitson* (1920) SALR 230 in which Mary Kitson had already been admitted to legal practice and was a partner in a law firm when she applied in 1920 to be appointed as a notary public. However, the Supreme Court of South Australia interpreted the phrase 'every person' in the *Public Notaries Act 1859* (SA) in similarly narrow terms even though the *Constitutional Amendment Act 1894* (SA) not only enfranchised women but also bestowed on them the right to be elected to parliament.

¹⁷ Rosemary Auchmuty, 'Recovering Lost Lives: Researching Women in Legal History' (2015) 42 (1) *Journal of Law and Society* 34-52, 35.

¹⁸ Auchmuty, 'Recovering Lost Lives' 52.

¹⁹ Lloyd Davies, *Sheila: A Biography of Sheila Mary McClemons*, Desert Pea Press, Sydney, 2000, 9.

which came to light from family members on the centenary of her unsuccessful Supreme Court action.²⁰

Edith Ann Mary Haynes was born in Sydney, New South Wales (NSW), the eldest of six children to Edward James Ambrose Haynes and Theresa Mooney. Edward Haynes was a doctor, which signifies the middle class status typical of early women lawyers.²¹ While the family moved to Perth, WA, in 1891, it appears that Edith Haynes stayed in Sydney to complete her schooling at a private girls' school.²² Her uncle's law firm in Perth subsequently employed her. Her uncle, Richard Septimus Haynes, was a member of the WA Barristers' Board and described as a 'radical'.²³ He was also a member of the WA Legislative Council (1896-1902). He not only supported the enfranchisement of women in WA in 1899, but he also proposed a Bill in 1900 amending the *Legal Practitioners Act 1893* (WA) (LPA) by including the words 'any person of the female sex' in order to overcome the 'problem' in England and elsewhere caused by the supposed ambiguity inhering in the word 'person'.²⁴

While Edith Haynes lived for another 60 years after the unsuccessful attempt to sit for her intermediate examination, there is no evidence as to what she thought about her rejection, or whether she contemplated appealing the decision or moving to another State. There is also no evidence as to whether she campaigned for a change to the law, or how she reacted to the passage of the *Women's Legal Status Act 1923* (WA). In fact, we know little of Edith Haynes subsequent to her abortive attempt to enter the legal profession, as she seems to have abandoned altogether her youthful aspiration of becoming a lawyer. Indeed, there is no further sign of the spirit she displayed in standing up to the Barristers' Board. Based on archival material held by the National Bank of Australia, Malcolm ascertained that she worked for the Bank between 1916 and 1931. She then cared for her brother's children following the death of her sister-in-law.²⁵ In

²⁰ David K Malcolm, 'Centenary of *Edith Haynes* Decision' (2004) 31(9) *Brief* 16.

²¹ Mossman, *The First Women Lawyers*; Elizabeth Cruikshank, "Follow the Money" The First Women who qualified as Solicitors 1922-1930' in Judith Bourne (ed), *First Women Lawyers in Great Britain and the Empire Record*, St Mary's University, Twickenham, London, 2016, Vol 1, 48.

²² St Vincent's College, Potts Point, run by the Sisters of Charity.

²³ Tom Stannage, 'Haynes, Richard Septimus (1857-1922)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, Canberra, published first in hardcopy 1983 [website] <<http://adb.anu.edu.au/biography/haynes-richard-septimus-6615/text11389>> accessed 8 January 2018.

²⁴ *WA Parliamentary Debates (Hansard)*, Legislative Council, *Legal Practitioners Act Amendment Bill*, Second Reading, 18 September 1900, Vol 17, 450.

²⁵ Malcolm suggests that Edith's work must have been valued as she was not required to relinquish her position after the War. See Malcolm, 'Centenary' 18.

contrast to her politically radical uncle, family members described Edith as conservative and strait-laced, but with a weakness for a flutter on the horses!²⁶

III IN RE HAYNES

Unlike the Eastern States, there was no law school in Western Australia when Edith contemplated entering the profession. Nevertheless, as was commonly the case at the time, the path of apprenticeship, entailing five years of articles, the completion of prescribed examinations and the payment of a fee (12 guineas), was open to those wishing to practise law. Edith Haynes' uncle, Richard Haynes, wrote to the Barristers' Board in 1900 seeking to article his niece to himself. The Board approved Edith Haynes' articles and exempted her from sitting the preliminary examination.

While accepting her registration as a student-at-law, the Board nevertheless advised her in writing that it could not guarantee that the court would admit her to practice, and she would have to bear the risk of ultimately being refused admission by the Court. However, long before Edith Haynes was eligible to be admitted, the Board refused her permission to sit her intermediate examination. The initial doubt expressed by the Board regarding the admission of women had crystallised into opposition, but the reason for the change of heart is unknown.²⁷ Edith Haynes then issued a writ of mandamus directing the Board to show cause why she should not be admitted to the examination.²⁸

Edith Haynes' uncle, Richard Haynes, now a King's Counsel (1902), appeared for her before the WA Supreme Court, arguing that the word 'person' in the LPA, supported by the *Interpretation Act 1898* (WA), included women. Haynes KC pointed out that Edith Haynes was seeking permission to sit for the intermediate examination — not admission to practice — for which she would not have been eligible for another two or three years. By a certain sleight of hand, however, the Full Bench of the Supreme Court did not confine itself to the issue of whether she should be permitted to sit for the examination but focused almost

²⁶ Ibid.

²⁷ Davies suggests that it could have been because of the refusal of the NSW admitting authorities to admit Ada Evans, Australia's first female law graduate, in 1902. See Davies, *Sheila* 7. The rejection of Bertha Cave by Gray's Inn in London in 1903 and the Lord Chancellor soon afterwards, may have been determinative. See Judith Bourne, *Helena Normanton and the Opening of the Bar to Women*, Waterside Press, London, 2016, 60-62.

²⁸ In the leading British case, Gwyneth Bebb, who wished to present herself for the preliminary examination with a view to becoming bound by articles, unsuccessfully sought a declaration that she was a 'person' within the meaning of the *Solicitors Act 1843*. See *Bebb v Law Society* [1914] 1 Ch 286; see also Rosemary Auchmuty, 'Whatever happened to Miss Bebb? *Bebb v The Law Society* and Women's Legal History' (2011) 31 (2) *Legal Studies* 199-230.

exclusively on the question of whether women were eligible to be admitted as legal practitioners under the LPA. It is nevertheless unclear why Haynes KC did not make more of the representation contained in the letter from the Board to Edith Haynes in 1900, which had noted that there was some doubt regarding the eligibility of women to be admitted.

The three judges in *In re Haynes* were unanimous in finding that women had no right to be admitted to legal practice and, accordingly, no right to be registered as articled clerks under the LPA. In focusing on the interpretation of the word ‘person’, the judges were less concerned with the recently enacted LPA than with its antecedents, the WA Supreme Court Act of 1861 and the Imperial statute of 1831:

I think that one must first bear in mind what was the law at the time the Statute was passed, and if one takes the trouble to go back to the earlier Statutes of this Colony it will be found that the first references to admissions to the Court go back to 2 Wm IV, No 1...There is nothing there conferring a right on women to be admitted as solicitors.²⁹

The judicial manipulation of legislative intent is a familiar device invoked by judges ‘as an escape from avowing judicial policy choices’.³⁰ Hence, the judges in *In re Haynes* were able to find that in enacting the LPA, the legislature could not have *intended* the word ‘person’ to apply to women because they had *never* been lawyers. As Burnside J expressed it, legal practice had been confined to the male sex ‘from almost time immemorial’,³¹ a sentiment unequivocally supported by his fellow judges:

The idea of women practising in the Supreme Court seems to me quite foreign to the legislation which has prevailed for years past, not only here but in the mother country.³²

It is not for us whatever our opinions may be to depart from what has always been the established practice both in England and in all the Colonies and in the United States, which have originally derived their law from England.³³

²⁹ *In re Haynes* (1904), per Burnside J, 213. Cf *In re French* (1905) 37 New Brunswick Reports 359 (SC); *Re French* (1910-12) 17 *British Columbia Law Reports* 1 (CA). For discussion, see Mossman, *The First Woman Lawyers* 89-99 *et seq.*

³⁰ Julius Stone, *Precedent and Law: Dynamics of Common Law Growth*, Butterworths, Sydney, 1985, 113. Cf J M Balkin, ‘Ideology as Constraint’ (1991) 43 *Stanford Law Review* 1133, 1153.

³¹ *In re Haynes* 214.

³² *In re Haynes*, per Parker J, 211. Cf *Bebb v Law Society* in which the judges similarly relied upon inveterate usage. Swinfen-Eady LJ cites Coke and the statute of 1402 in support, with no evidence of a woman attorney in 500 years (at 295). Cf Phillimore LJ (at 298).

³³ *In re Haynes*, per McMillan J, 212.

The inveterate practice of the English common law was unquestioningly accepted to apply in what was no longer a colony, but a State within a newly federated nation.³⁴ As Grata Flos Greig, the first Australian woman to be admitted to legal practice drily observed a few years later: ‘I notice that most men, when it comes to an argument as to what women could or could not do, generally argue “You have not, ergo, you cannot”’.³⁵

Despite the existence of the *Interpretation Act 1898* (WA), the judges were of the view that ‘every person’ did not apply to both men and women in the context of admission to legal practice. If women were to be included, express words to that effect were deemed necessary. Burnside J referred to the wording in the Medical Act: ‘Every person, *male and female* may be a doctor’ [italics added].³⁶ The judges were insistent that they do not make law; the prerogative is one that resides with the legislature:

I am not prepared myself to create a precedent by allowing the admission of a woman to the Bar of this Court... [I]f the legislature desired that a woman should be capable of being admitted as a practitioner of this Court, or indeed if the Legislature intended to make women eligible for admission to the Court, that they should have said so in express language, as I believe has been done in New Zealand.³⁷

Burnside J referred to the English case of Miss Cave and the decision of the Lord Chancellor to rule against her admission because it would similarly ‘create a precedent’.³⁸ The rejection of Miss Cave undoubtedly carried weight with the Court and Burnside J went on to state that ‘we have not been able to ascertain any instances under the Common Law in the United States, England or British-speaking colony where the right of women to be admitted to the Bar has ever been suggested’.³⁹ Strictly speaking, however, this was not the case as lower courts had admitted women in multiple American states by the 1880s,⁴⁰ even though the US

³⁴ ‘Inveterate usage’ to resolve the claimed ‘ambiguity’ of the word ‘person’ was also used by the Scottish Court of Session in a case comparable to that of Edith’s, which denied a woman access to the Law-Agents’ examinations: *Hall v Incorporated Society of Law-Agents in Scotland* (1901) 3F 1059. Although not enfranchised, Scottish women could be medical practitioners, parish councillors and factory inspectors.

³⁵ Grata Flos Greig, ‘The Law as a Profession for Women’ (1909) 6 *Commonwealth Law Review* 145.

³⁶ *In re Haynes*, 214.

³⁷ *In re Haynes*, per Parker J, 211. Cf McMillan J, 212.

³⁸ Bertha Cave sent a letter to the Benchers of Gray’s Inn to be admitted as a student of the Society for the purpose of being called to the Bar in 1903. Her application was rejected and she appealed unsuccessfully to the Lord Chancellor and a group of Law Lords. See Bourne, *Helena Normanton* 60-61; Daniel F Gosling, *Gray’s Inn*, June 2017 [website] <<https://www.graysinn.org.uk/history/women-the-inn/bertha-cave/application>> accessed 8 January 2018.

³⁹ *Ibid*, per Burnside J, 213; cf McMillan J, 212.

⁴⁰ Virginia G Drachman, *Women Lawyers in Modern American History*, Harvard University Press, Cambridge MA, 1998, 151-53; Mossman, *The First Women Lawyers*, 50-51.

Supreme Court in 1873 had rejected the idea that women, especially married women, could be lawyers.⁴¹

Despite Edith Haynes' completion of three years of articles, the Supreme Court of WA determined that nothing would be gained by making the rule absolute. As Parker J said somewhat patronisingly: 'In my opinion this lady is not qualified to be an articled clerk, and consequently it seems to me that the time and money which would be expended would be quite wasted.'⁴² The time and money already expended, to say nothing of Edith Haynes' abilities or her wish to enter the profession, were accorded short shrift.

In the case of the absence of a binding precedent, the judiciary has the power to adapt the common law in accordance with changing social mores by exercising the leeways of choice open to it; a specific Act of Parliament is unnecessary.⁴³ In this case, however, it is difficult to disagree with Auchmuty that the reasoning 'camouflaged the underlying "prejudice and fear" ...of the majority of the legal men who did not want women intruding upon their professional space'.⁴⁴

IV THE CITIZENSHIP CONUNDRUM

Apart from the antipathy towards women as lawyers, the *Haynes*' case reveals the parlous and contingent status of citizenship for women. In construing the meaning of 'any person' in the LPA, the judges failed to take judicial notice of the fact that (white) women had not only been enfranchised in WA in 1899 and federally in 1902,⁴⁵ but they were also eligible to stand for election.⁴⁶ Furthermore, the judges would have been aware that numerous women's groups all over the country were actively campaigning not only for the suffrage but also for improvement in the status of women more generally. The Karrakatta Club in Perth, for example, pursued political, legal and educational aims on behalf of women for many years.⁴⁷ Indeed, there had been an attempt to enact legislation

⁴¹ *Bradwell v Illinois* 83 US 130 (1873).

⁴² *Ibid* 212.

⁴³ It was many years before an Anglo-Australian court was prepared to take the initiative and admit women to public office without the benefit of express legislation. This was *Edwards v Attorney-General for Canada* (1930) AC 124, the last of the 'persons cases', when the Privy Council decided that women were eligible to sit in the Canadian Senate.

⁴⁴ Auchmuty, 'Whatever happened to Miss Bebb?'

⁴⁵ Only WA and Queensland expressly excluded Aboriginal persons.

⁴⁶ Vida Goldstein was the first woman to stand for election to a national parliament when she stood in 1903, albeit unsuccessfully. See Janette M Bomford, *That Dangerous and Persuasive Woman: Vida Goldstein*, Melbourne University Press, Melbourne, 1993, 55.

⁴⁷ Peter Cowan, *A Unique Position: A Biography of Edith Dircksey Cowan 1861-1932*, University of WA Press, Perth, 1978, 65 ff.

that would enfranchise women in WA as early as 1893,⁴⁸ but the WA Supreme Court ignored all such activity.⁴⁹

What is even more surprising is the fact that Edith Haynes' counsel, her uncle, R S Haynes KC,⁵⁰ failed to advert to the crucial fact of enfranchisement. Not only had he employed his niece and supported her application for articles, but he had also been an MP at the time of the passage of the 1899 legislation when he spoke strongly in favour of the vote for women, as well as their right to stand for parliament and their right to enter universities and the professions.⁵¹ In the Second Reading Speech on the LPA Amendment Bill in 1900, in which he advocated clarifying the meaning of the word 'person', R S Haynes, in his capacity as an MLC, noted that extension of the franchise to women in WA 'on exactly the same footing as men' had made the country better.⁵²

Davies suggests that the narrow approach adopted by R S Haynes in arguing the case as counsel for Edith Haynes was determined by the fact that he was addressing the Full Court on a question of law.⁵³ This may well have been the case, but an application for a writ of mandamus constituted a hearing *de novo*, not an appeal. Enfranchisement for some, however, seemed to have a limited substantive meaning which, Oldfield suggests, appears to have had more to do with the preservation of the power of conservatives in the legislature than with equal political rights for men and women.⁵⁴ While such a view might have animated some of the men in the WA Parliament, it does not detract from the import of Haynes KC's speeches in Parliament or the support he otherwise gave his niece.

In making an argument in respect of citizenship, I stress that I am not focusing on the question of nationality, as Edith Haynes would have been a British subject,⁵⁵ but the philosophical meaning of citizenship. In this regard, Kant

⁴⁸ Ibid 73 ff.

⁴⁹ The struggle for the enfranchisement of women had been on the feminist agenda for much of the 19th century. See, eg, Harriet Taylor Mill, 'Enfranchisement of Women' (1851) in John Stuart Mill and Harriet Taylor Mill, *Essays on Sex Equality* (ed with an introductory essay by Alice S Rossi), University of Chicago Press, Chicago, 1970.

⁵⁰ Not 'QC' as Davies describes him. See Davies, *Sheila* 2-4.

⁵¹ Hon R S Haynes, Legislative Council, Parliamentary Debates on *Electoral Act 1899* (WA), Hansard, 17 August 1899, 952.

⁵² Hon R S Haynes, Legislative Council, Parliamentary Debates on *Legal Practitioners Bill 1900* (WA), 18 September 1900, 451.

⁵³ Davies, *Sheila*, 7.

⁵⁴ Oldfield, *Woman Suffrage*, 47.

⁵⁵ The Australian Citizenship Act was not enacted until 1948.

recognised enfranchisement as the mark of an active citizen,⁵⁶ whose attributes were freedom, equality and independence. The active category of citizenship was distinguishable from the passive category, to which Kant assigned women, children, domestic servants and apprentices. Whereas male children and apprentices were eventually able to make the transition from passive to active citizens, women and domestic servants were not. Instead, they remained permanently confined to the passive category. Although members of a legally cognisable political community, they were ‘mere underlings [*Handlanger*] of the Commonwealth’ who lacked ‘civil independence’.⁵⁷ While Kant was writing in the 18th century long before women’s enfranchisement, his schema nevertheless should have sufficed to enable women to move into the active category once enfranchised and to exercise the qualities of freedom, equality and independence like adult men. This would include being able to choose whether one wished to enter a profession or not. What we see, however, is that enfranchisement did not have this substantive meaning for women because the judicial gatekeepers of civil society sought to confine women to the passive category.

Hence, just as the word ‘person’ was read down in *Haynes*, the concept of enfranchisement was also implicitly read down so as to ensure that women were denied the entire complement of rights enjoyed by men arising from the basic assumption that formal equality prevails between and among citizens.⁵⁸ Decisions such as *In re Haynes* therefore played an important ideological role in legitimising the ongoing subordination of women. In no country in the world could the vote be anything *but* a gift from male parliamentarians.⁵⁹ However, once gifted, *In re Haynes* suggests that the donors, who included the powerful men of law, could circumscribe the value of the gift.

In re Haynes infers that the freedom, equality and independence associated with enfranchisement were lesser rights than the autonomy associated with legal practice. The position appears to have been the converse in some US States where admission to legal practice commonly preceded enfranchisement. When Mary Hall was admitted in Connecticut in 1882, the role of an attorney was characterised as a ‘lower’ kind of public officer.⁶⁰ Nevertheless, there was a clear connection between enfranchisement and admission to legal practice in most

⁵⁶ Immanuel Kant, *The Metaphysics of Morals*, trans Mary Gregor, Cambridge University Press, Cambridge, 1991, 126.

⁵⁷ *Ibid.*

⁵⁸ Elshstain, *Power Trips and Other Journeys*, 49.

⁵⁹ Oldfield, *Woman Suffrage*, 213.

⁶⁰ *In re Hall*, 50 Connecticut Reports 131 (1882); Cf *In re Ricker*, 66 New Hampshire Reports 207 (1890). See also Mossman, *The First Women Lawyers*, 50-51.

jurisdictions, with the former opening the door to the latter, albeit with the assistance of specific legislation.⁶¹ It is apparent that the freedom, equality and independence associated with enfranchisement and active citizenship were deemed to be vitiated by femaleness. In the judges' view, women, like children, remained in the passive category.

The judges also failed to take judicial notice of the steps recognising women as active citizens that were occurring in other Australian States. For example, there was no advertence to the fact that Victoria had already enacted legislation to admit women to legal practice,⁶² Tasmania was in the process of doing so,⁶³ and Queensland was about to do so.⁶⁴ New South Wales was reluctant to admit women but there had been significant activity since the early 1890s.⁶⁵ Ada Evans graduated from the University of Sydney in 1902, the first Australian woman to graduate in law, but she was refused admission to practice.⁶⁶ Unlike Edith Haynes, Ada Evans did not formally challenge the interpretation of the gender-neutral word 'person' in the *Legal Practitioners Act 1898* (NSW). However, a bill to admit women, supported by the Women's Progressive Association, was introduced into the NSW Parliament in 1902, the year of Ada Evans' graduation, as well as the year of the enfranchisement for women at both the NSW and the federal levels, albeit unsuccessfully.

The history of women as active citizens as manifested by the admission of women to legal practice in most Australian States suggests that WA lagged in the rear.⁶⁷ In fact, WA should have been the first as R S Haynes' LPA Amendment Bill of 1900, which was designed to clear up any doubt about the meaning of the word 'person', passed the Legislative Council with strong support from members 13 votes to eight. Hon A Jameson exhorted members to support the Bill to show how liberal-minded the House was. The Colonial Secretary, Hon G Randell, also

⁶¹ Two Acts, the *Female Law Practitioners Act 1895* (NZ) and *Women's Disabilities Act 1895* (NZ), followed the enfranchisement of New Zealand women in 1893. See Gatfield, *Without Prejudice*, 30. The enfranchisement of women in the UK in 1918 led immediately to legislation that admitted them to legal practice. See *Sex Disqualification (Removal) Act 1919* (UK).

⁶² The *Women's Disabilities Removal Act 1903* (Vic) was known colloquially as the 'Flos Greig Enabling Bill' as it was enacted to allow Grata Flos Greig, who graduated from the University of Melbourne in 1903, to be admitted to practice. See Ruth Campbell, *A History of the Melbourne Law School 1857-1973*, Faculty of Law, University of Melbourne, Melbourne, 1977, 28.

⁶³ *The Legal Practitioners Act 1904* (Tas).

⁶⁴ *Legal Practitioners Act 1905* (Qld), although Agnes McWhinney, the first woman to be admitted to practice in Queensland was not admitted until 1915.

⁶⁵ Rose Scott and the Womanhood Suffrage League were among the most prominent. See Judith A Allen, *Rose Scott: Vision and Revision in Feminism*, Oxford University Press, Melbourne, 1994.

⁶⁶ Ada Evans was not admitted until 1921 following enactment of the *Women's Legal Status Act 1918* (NSW). By that time, she declined to practise as she thought too much time had elapsed since her graduation.

⁶⁷ Cf Cowan, *A Unique Position*, 211.

spoke strongly in favour, stating his belief in the equality of women with men, as well as appealing to the grounds of justice and equity;⁶⁸ none of the members spoke in opposition. WA lost the opportunity to be the trailblazer in the admission of women to legal practice, however, when the Bill was discharged by the Assembly. It was withdrawn because '[t]he member who was in charge of it did not wish to proceed with it, as his main contention had been conceded by the Barristers' Board admitting ladies to practise.'⁶⁹

In speculating as to why R S Haynes persuaded his niece to apply to the Board prior to securing his amendment to the LPA, Davies suggests that Haynes might have thought that rejection by the Board would have supported his argument.⁷⁰ However, the withdrawal, which occurred two days *after* Edith Haynes received her letter of acceptance from the Board, was premature. It appears that R S Haynes paid insufficient attention to the qualification in the letter expressing doubt regarding the admission of women to legal practice.

Of course, we do not know for sure how the House of Assembly would have decided the issue had it gone to the vote, but Haynes may have been worried that the Bill did not have the numbers to pass, despite the positive support from the Legislative Council. Mr Illingworth, the only Member to speak, apart from the Attorney-General, pointed out that the amendment 'was of great importance to a few people, and he hoped the Government would take steps to amend the small difficulty in the existing law'.⁷¹ On its face, this statement appears to be supportive of the admission of women, but Davies points out that the ambiguity in 'the small difficulty in the existing law' might have had the opposite meaning and Illingworth wanted it made clear that the word 'person' meant 'man'.⁷² This is because Illingworth had opposed suffrage for women in 1897,⁷³ but such an interpretation would have been at odds with the *Acts Interpretation Act 1898* (WA) and similar legislation enacted since Lord Brougham's Act.

⁶⁸ *WA Parliamentary Debates (Hansard)*, Legislative Council, *Legal Practitioners Act Amendment Bill*, Second Reading, 18 September 1900, Vol 17, 453-54.

⁶⁹ *WA Parliamentary Debates (Hansard)*, Legislative Assembly, *Legal Practitioners Act Amendment Bill*, Discharge of Order, 29 November 1900, Vol 17, 2052-53.

⁷⁰ Davies, *Sheila*, 5.

⁷¹ *WA Parliamentary Debates (Hansard)*, Legislative Assembly, *Legal Practitioners Act Amendment Bill*, Discharge of Order, 29 November 1900, Vol 17, 2053.

⁷² Davies, *Sheila*, 6.

⁷³ *WA Parliamentary Debates (Hansard)*, Legislative Assembly, *Women's Franchise*, 1 December 1897, Vol 11, 749-50.

Although it transpired that WA was the last State to admit women to legal practice, the enabling legislation was secured by Edith Cowan,⁷⁴ the first woman to be elected to an Australian parliament.⁷⁵ It would have been worthwhile to have had the benefit of her analysis on the *Haynes* case or that of Grata Flos Greig, who graduated from the University of Melbourne in 1903 and was admitted to legal practice in 1905, the first Australian woman to be admitted. In 1909, Flos Greig wrote an article dismissing the ‘heaps of twaddle’ that surrounded women’s unsuitability to legal practice’,⁷⁶ pointing out that it was ‘Law itself [that] prevented women from entering its precincts’.⁷⁷

Contemporary commentary is sketchy when we venture beyond the official law reports. There is no extant record of support for Edith Haynes’ Supreme Court action or criticism of the outcome from women’s groups, although Edith Cowan was active in the Karrakatta Club at the time.⁷⁸ A critical editorial, however, appeared in the *West Australian* four days after the *Haynes* decision, although there is no record of it having been followed up:

But the reign of prejudice is to come to an end, and, if abstract justice is to carry the day, it is hard to see how one sex can for ever be debarred from following whatever occupation nature and inclination will permit, however incongruous to modern ideas the occupation may seem.⁷⁹

V IMAGINING AN APPEAL

Edith Haynes did not appeal the WA Supreme Court decision but, in this section, I imagine her chances of success had she done so. Theoretically, she could have appealed to the Privy Council in London, although the idea of a young woman travelling to London from WA with a legal team to assert a questionable ‘right’ at the dawn of the 20th century is virtually unimaginable.⁸⁰ In any case, the record of the persons’ cases in Britain since the 19th century was not promising.⁸¹

⁷⁴ *Women’s Legal Status Act 1923* (WA). Alice May Cummins was the first woman to be admitted in 1931.

⁷⁵ Edith Cowan was elected in 1921. See Cowan, *A Unique Position*, 210 ff.

⁷⁶ Grata Flos Greig, ‘The Law as a Profession for Women’ (1909) 6 *Commonwealth Law Review* 145, 149.

⁷⁷ *Ibid* 147.

⁷⁸ Cowan, *A Unique Position*, 105.

⁷⁹ Editorial, *West Australian*, 13 August 1904, 6.

⁸⁰ Burnside J insists in *Haynes* (at 214) that admission to legal practice is a privilege, not a right.

⁸¹ Sachs and Wilson, *Sexism and the Law*, ch 1. The rejection of Bertha Cave in 1903, first by Gray’s Inn and secondly by the Lord Chancellor, may well have been determinative.

Alternatively, appealing to the newly established High Court of Australia⁸² would have been a far cheaper option as the Court established a practice at an early stage of travelling to State capitals, including Perth.⁸³ Nevertheless, would the fledgling High Court have come to a different conclusion from the Supreme Court of WA? Would the three neonate High Court judges have taken judicial notice of the recent enfranchisement of women and the flurry of activity it engendered to achieve a radically different outcome in the interpretation of ‘any person’? After all, two of the judges, Edmund Barton and Richard O’Connor, had both been actively involved as politicians in the new Federal Parliament and had voted in favour of the Commonwealth Franchise Act in 1902 — Barton as Prime Minister and O’Connor as leader of the Senate with carriage of the Act.⁸⁴

Of the three judges of the Griffith Court (1903-05), Barton is reported to have been initially lukewarm about the enfranchisement of women but softened his position when he saw how strongly they supported federation.⁸⁵ Although he did not participate in the House of Representatives debates on the franchise, he is recorded as voting in favour.⁸⁶ The progressiveness of Australia-wide suffrage was recognised internationally and, when PM Barton was in London for the coronation of Edward VII, later in the same year (1902), he accepted a formal address of congratulations from the English suffragists.⁸⁷ His biographer, Geoffrey Bolton, described him as one who was ‘never unwilling to accept congratulations’,⁸⁸ but would this acceptance have been sufficient to embarrass him into subsequently supporting Edith Haynes had she appealed in 1904? Surely, he would have been unable to ignore women’s enfranchisement as did the WA judges.

In contrast to Barton’s initial ambivalence regarding women’s enfranchisement, O’Connor consistently expressed strong support not just for the vote, but also for women’s enhanced role in public life:

I should like to say that I see no reason in the world why we should continue to impose laws which have to be obeyed by the women of the community without

⁸² Established by the *Judiciary Act 1903* (Cth).

⁸³ The High Court travelled to Perth in both 1905 and 1906. Roger B Joyce, *Samuel Walker Griffith*, University of Queensland Press, St Lucia, 1984, 266.

⁸⁴ Jennifer Norberry, ‘The Evolution of the Commonwealth Franchise: Tales of Inclusion and Exclusion’ in Graeme Orr, Bryan Mercurio & George Williams, *Realising Democracy: Electoral Law in Australia*, Federation Press, Leichhardt, 2003, 81.

⁸⁵ Geoffrey Bolton, *Edmund Barton*, Allen & Unwin, St Leonards, 2000, 197.

⁸⁶ Final Vote, Parliamentary Debates on *Commonwealth Franchise Act 1902* (Cth), House of Representatives, Hansard, 23 April 1902, 11953.

⁸⁷ Bolton, *Edmund Barton* 262.

⁸⁸ *Ibid.*

giving them some voice in the election of the members who make those laws. Their capacity for understanding political questions, for thinking over them, and for exercising their influence in regard to public affairs, is certainly of that order and of that level which entitles them to take that part in public affairs which the franchise proposes to give them.⁸⁹

O'Connor's strong advocacy on behalf of women may well have dispelled any lingering doubt that Barton had, as the pair are described as having been the closest of friends since boyhood.⁹⁰ They had both been members of the Sydney School of Arts Debating Club and 'comrades in the struggle for union' in the 1890s.⁹¹ O'Connor seems to have possessed considerable strength of character and is described as bringing to the bench 'sound common sense', as well as being able to exercise 'a restraining influence' on Barton.⁹² Hence, Edith Haynes would almost certainly have been able to count on one vote and possibly two.

But what of the Chief Justice? Like his fellow judges, Samuel Griffith also had an extensive political career that included a stint as Premier as well as Chief Justice of Queensland. However, his stance on women's rights is uncertain, although he is described as 'liberal and humanitarian' and, like O'Connor, 'a radical',⁹³ although this may have been in his younger days. As with O'Connor and Barton, O'Connor and Griffith also shared a common outlook. According to Griffith himself, his and O'Connor's minds 'ran...in similar grooves'.⁹⁴

Griffith CJ wrote most of the early judgments of the Court and it is notable that Barton shared Griffith's views in all 164 cases reported in the first three years,⁹⁵ with O'Connor normally concurring. The three judges were therefore exceptionally close. Nevertheless, would their shared outlook have extended to

⁸⁹ Senator O'Connor (NSW, Protectionist Party), Parliamentary Debates on *Commonwealth Franchise Act 1902* (Cth), Senate, Hansard, 9 April 1902, 11451.

⁹⁰ Martha Rutledge, 'O'Connor, Richard Edward' in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia*, Oxford University Press, Melbourne, 2001, 509.

⁹¹ Martha Rutledge, 'O'Connor, Richard Edward (1851-1912), Senator for New South Wales, 1901-02 (Protectionist)'. *The Biographical Dictionary of the Australian Senate* [website] <<http://biography.senate.gov.au/richard-edward-oconnor/>> accessed 8 January 2018.

⁹² Martha Rutledge, 'O'Connor, Richard Edward (Dick) (1851-1912)', *Australian Dictionary of Biography*, Vol 11, Melbourne University Press, 1988.

⁹³ Harry Gibbs, 'Griffith, Samuel Walker' in Blackshield et al, *The Oxford Companion* 309.

⁹⁴ Rutledge, 'O'Connor', *Oxford Companion*, 510. Griffith also wrote to Commonwealth Attorney-General, Josiah Symon, and indicated that when the three justices of the High Court were travelling together on circuit, 'It has fortunately happened that we are on terms of personal friendship ...' See National Library of Australia, Symon Papers MS1736/11/862, letter from the Chief Justice to the Attorney-General, 14 June 1905.

⁹⁵ Geoffrey Bolton and John Williams, 'Barton, Edmund' in Blackshield et al, *The Oxford Companion* 54.

the idea of women becoming legal practitioners, a stance adopted by no other Anglo-Australian court at the time?

While O'Connor did not write any of the joint judgments of the Court, he seems to have been the pivotal member of the triumvirate. Not only was he respected for his common sense, he was clearly skilled in the art of persuasion. His sway over the NSW Legislative Council as Leader of the Government from 1892 was described as 'supreme and unquestioned'.⁹⁶ This is despite his ostensibly radical stance in respect of women and Aboriginal people, to whom he also advocated extending the franchise.⁹⁷ Indeed, subsequent scholars, including the noted constitutional lawyer, Geoffrey Sawer, are of the view that the 'ability and independence of mind' of O'Connor have been 'grossly undervalued by Australian legal tradition'.⁹⁸

The Griffith Court favoured a purposive construction in the interpretation of statutes,⁹⁹ which would also have been in Edith Haynes' favour. This jurisprudential style entails paying particular attention to legislative intention, a concept that I have already problematised. Would the Court have been able to transcend the ideologically laden interpretation of the WA Supreme Court that the legislature did not *intend* the word 'person' to apply to women in the LPA because of the inveterate practice of the common law? Unlike the Supreme Court of WA in 1904, the Griffith Court is described as 'applying scholarly standards to their judgments' and, even more promisingly, we are told that decisions of the State judiciaries were overturned with 'fatal frequency'.¹⁰⁰ Hence, the High Court would not have deferred to some imagined notion of 'States' rights', despite the novelty of federation. In scanning the early decisions of the Griffith Court, I note that there is some regard for the changing status of women, particularly married women, who are persons *sui juris* for all purposes,¹⁰¹ including having the right to maintain their own banking accounts;¹⁰² hold their own property,¹⁰³ operate a

⁹⁶ Rutledge, 'O'Connor', Senate.

⁹⁷ Senator O'Connor (NSW, Protectionist Party), Parliamentary debates on *Commonwealth Franchise Act 1902* (Cth), Senate, Hansard, 9 April 1902, 11453. See also Marian Sawer, 'Enrolling the People: Electoral Innovation in the New Australian Commonwealth' in Orr et al, *Realising Democracy* 52, n 1. The enfranchisement of Aboriginal people did not occur for another 60 years. See *Commonwealth Electoral Act 1962*.

⁹⁸ Martha Rutledge, 'O'Connor, Richard Edward'.

⁹⁹ Sir Anthony Mason, 'The High Court in Sir Samuel Griffith's Time: Contemporary Parallels and Contrasts' (1994) 3 *Griffith Law Rev* 179, 191.

¹⁰⁰ Rutledge, 'O'Connor', *Australian Dictionary of Biography*.

¹⁰¹ *Paterson v McNaghten* (1905) 2 CLR 615

¹⁰² *Marshall v Colonial Bank of Australia Ltd* (1904) 1 CLR 632.

¹⁰³ *Jack v Small* [1905] 2 CLR 684.

manufacturing concern¹⁰⁴ and to act as administrators of estates and trustees of infants.¹⁰⁵ These decisions are heartening, albeit not conclusive.

While the jurisprudential nub of *Haynes* was the interpretation of the word ‘person’ in the WA LPA, the issue of women’s entry to the legal profession was one of significance Australia-wide, underscored by the *Australian Franchise Act 1902*. It is nevertheless conceded that by 1904–05 when an appeal would have been heard, New Zealand and three Australian States had turned to the legislature to admit women to legal practice. However, rather than remit the case to the WA Supreme Court, the High Court could have grasped the nettle and decided the issue there and then.

At the same time, we cannot ignore the fact that Haynes KC as counsel for his niece in *In re Haynes* did not advert to the citizenship argument before the WA Supreme Court even though, as a Member of the Legislative Council, he had strongly supported both the enfranchisement of women in 1899 and the amendment to the LPA in 1900. Hence, it is uncertain whether we would have been able to rely on him in the appeal even if he were to have represented his niece. It is also entirely possible that O’Connor too might have treated enfranchisement and admission to legal practice as discrete. This would be unlikely, however, as O’Connor introduced the Franchise Bill into Parliament, one of the few bills to have emanated from the Senate in the First Parliament.¹⁰⁶ His commitment is supported by his rhetoric in the debates espousing a positive role for women in public life. Indeed, it is apparent from his speech that he envisaged the exercise of the vote to be much more than placing a ballot in a ballot box, for he refers to enfranchisement as not only a ‘measure of justice’, but also a means for women to be able to ‘exercise their influence in Australian public affairs’.¹⁰⁷ Such sentiments support the Kantian notion of active citizenship. Furthermore, if O’Connor were prepared to swim against the tide and make international history by taking carriage of an Act to enfranchise women and elect them to Parliament in the very first term of the new Australian Parliament, why would he demur about taking an equally daring decision to admit women to legal practice?

Of course, we will never know for certain how the High Court might have determined the hypothetical appeal, such are the vagaries associated with the

¹⁰⁴ *Beath, Schiess & Co v Martin* (1905) 2 CLR 716.

¹⁰⁵ *Holden v Black* (1905) 2 CLR 768.

¹⁰⁶ Parliamentary Debates, First Parliament First Session, *Senate Official Hansard*, 9 April 1902.

¹⁰⁷ *Ibid*, 11452.

judicial leeways of choice in the absence of binding precedents. I do not wish to attribute modern sentiments to the legal *dramatis personae* in the *Haynes* case, but I would like to think that the express support of O'Connor together with the influence he exerted on his two fellow judges would have carried the day and enabled Edith Haynes to sit for her intermediate examination.

As admission was a State issue, the High Court might have been diffident about making a determination as to whether women should be admitted to legal practice. However, it could have referred the matter back to the WA Supreme Court, upbraiding it for its flawed reasoning regarding its interpretation of the word 'person', its reliance on the inveterate practice of the common law, its failure to take judicial notice of the enfranchisement of women and their admission to and graduation from law schools, to say nothing of their admission to legal practice elsewhere. The High Court also could have pointed out that the Supreme Court of WA had the power either to admit women to legal practice by its own motion or, alternatively, to recommend that the WA Barristers' Board put pressure on the WA Parliament to enact an amendment to the LPA along the lines of that originally proposed by R S Haynes MLC in 1900.

The words of the WA Colonial Secretary, Hon G Randall, in support of amending the LPA in 1900 are salutary so far as both Barton and O'Connor are concerned: 'Having voted for female suffrage I do not see how I can consistently do other than further the advance of women in this direction.'¹⁰⁸ If Barton and O'Connor similarly did not resile, Edith Haynes would then have been admitted to practice when she had completed her articles and the course of the history of women and the law in WA, Australia generally, and possibly the Empire too, might have been somewhat different.

VI CONCLUSION

When women won the vote in Britain at the end of World War I, the legal profession hoped to retain its masculinist monopoly, but Members of Parliament feared losing their seats and supported legislation admitting women to legal practice.¹⁰⁹ Although the times had changed in Australia also by the end of the World War I, there is no evidence that women used the power of the ballot box to vote out of office those MP's opposed to admitting women to legal practice,¹¹⁰

¹⁰⁸ *WA Parliamentary Debates (Hansard)*, Legislative Council, *Legal Practitioners Act Amendment Bill*, Second Reading, 18 September 1900, Vol 17, 453.

¹⁰⁹ Sachs and Wilson, *Sexism and the Law*, 173.

¹¹⁰ Following the 1896 election in SA, in which women voted for the first time, Catherine Helen Spence, the prominent SA political reformer, expressed her disappointment that women allowed their interest in

even though the potential of the vote had been recognised by influential suffragists in the 19th century. In 1892, Rose Scott, for example, observed that enfranchisement meant more than ‘merely to drop a paper in a ballot box’ and it was ‘better for men and better for women that the laws which we must both obey we should have a direct voice in determining.’¹¹¹

The complementarity thesis, a central trope of the western intellectual tradition, which averred that men were *naturally* suited to the public sphere and women to the private, was endlessly repeated by the opponents of enfranchisement,¹¹² as well as by judges opposed to the admission of women to legal practice.¹¹³ Despite the passage of legislation and the understanding that ‘reasonable people did not condemn the suffrage outright’,¹¹⁴ doubts about women’s capacity lingered on, or were adduced as a convenient fig leaf to disguise the economic threat posed by the entry of women.¹¹⁵ The vested interests of male lawyers inferentially prevailed in sustaining the complementarity thesis and the construction of women as passive citizens, even after they had been admitted to legal practice. Of course, the sustained resistance to which women had been subjected for decades regarding their acceptance as active citizens in the public sphere was hardly likely to evaporate overnight and a century later, sites of contestation remain, particularly in regard to authoritative positions.¹¹⁶

public affairs to stop short at the act of voting: Helen Thomson (ed), *Catherine Helen Spence*, Queensland University Press, St Lucia, 1987, 464.

¹¹¹ ‘Rose Scott on Womanhood Suffrage (1892)’ in James Walter & Margaret MacLeod (eds), *The Citizens’ Bargain: A Documentary History of Australian Views since 1890*, UNSW Press, Sydney, 2002, 82. Perhaps influenced by Rose Scott, the same sentiment was echoed by Richard O’Connor a decade later.

¹¹² Eg, Senator Josiah Symon, SA, Parliamentary Debates on *Commonwealth Franchise Act 1902* (Cth), Senate, 9 April 1902, 11463.

¹¹³ The concurring opinion of Bradley J in *Bradwell v Illinois* 83 US 130 (1872) at 141 is exemplary: ‘The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood...The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.’

¹¹⁴ Helen Irving, *To Constitute a Nation: A Cultural History of Australia’s Constitution*, Cambridge University Press, Melbourne, 1997, 181-82.

¹¹⁵ The WA Colonial Secretary, Hon G Randell, alluded to this in exhorting support for the LPA Amendment Bill in 1900: ‘I do hope members of the legal profession will give this Bill careful consideration and will not, from any low motive as to the fear of competition, oppose this further advance of the enfranchisement of women.’ See *WA Parliamentary Debates (Hansard)*, Legislative Council, *Legal Practitioners Act Amendment Bill*, Second Reading, 18 September 1900, Vol 17, 453-54. Cf Daniel F Gosling, ‘Aftermath: After the Appeal: Bertha Cave in 1904/5’, Gray’s Inn, August 2017: <<https://www.graysinn.org.uk/history/women-the-inn/bertha-cave/aftermath>> accessed 7 August 2017.

¹¹⁶ Eg, in 2016, the gender tipping point was achieved in legal practice in Australia, with women comprising 50% of solicitors in law firms (Urbis Pty Ltd, *National Profile of Solicitors 2016 Report*, Urbis & NSW Law Society, Sydney, 2017) but only 24% of partners. See Marianna Papadakis and Edmund Tadros, ‘Women now 24pc of Law Firm Partners’, *Financial Review* 21 January 2016 [website] <<http://www.afr.com/leadership/women-now-24pc-of-big-law-firm-partners-20151216-glp6ly>> accessed 8 January 2018.