



Centenary of
Re Edith Haynes (1904) 6 WAR 209

The Hon the Chief Justice
David K Malcolm AC

Monday, 9 August 2004

Supreme Court Foyer

Ms Penelope Giles, President of the Women Lawyers of WA
Your Honours
Mr Attorney
Mr Solicitor
Your Worships
Members of the Haynes Family
Ladies and Gentlemen

I congratulate the Women Lawyers on their initiative to organise this function to mark the centenary of the decision in *Re Edith Haynes* (1904) 6 WAR 209 which decided that the word "person" in the *Legal Practitioners Act 1893* did not include a female. It is interesting to note that the same word in the *Medical Act* had been consistently interpreted to include a female. It was 20 years later that my Great Aunt Edith Cowan introduced her private members Bill in the Legislative Assembly, following her defeat of the Attorney General of the day, Thomas Draper, the member for West Perth, who was promptly appointed to the Supreme Court. The *Women's Legal Status Act 1923* is a very simple Act which contains only one substantive provision.

Section 2 provides that:

"A person shall not be disqualified by sex from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from being admitted and entitled to practise as a practitioner within the meaning of that term in the Legal Practitioners Act, 1893, or from entering or assuming or carrying on any other profession, any law or usage to the contrary notwithstanding."

My copy of her biography, "*A Unique Position*" was a gift to me from Keith Nicholson, Justice Robert Nicholson's uncle, when the book by Edith's son Peter was published in the sesquicentennial year of 1979. This was symbolic because Keith Nicholson's father, John Nicholson, some time Lord Mayor of Perth and later a permanent member of the Legislative Council was one of Edith's champions and admirers. My mother was close to Edith. Sheila McClemans was one of my mother's cousins. My mother was one of the early members of the Kindergarten Union and taught at the Lake Street Kindergarten where her pupils included the former Commonwealth Attorney General, Peter Durack, and the former Chief Stipendiary Magistrate, Con Zempilas.

My connection with the Haynes family followed my admission to practice in 1964. By 1965 I had saved up enough to purchase my own set of Commonwealth Law Reports which I acquired from R S Haynes & Co.

One hundred years ago, on August the 9th 1904, the Full Court of the Supreme Court made a decision about the career of a young woman. She wanted to be a lawyer. In the view of the Court, her gender prohibited her from achieving her dream. That decision has resounded through the

century. It was the beginning of a quest for equal opportunity for women in the law, which is now much advanced, although not entirely achieved.

Edith Ann Mary Haynes was born in 1876 in Sydney, the oldest of six children. Little is known about Theresa Mooney, her mother. Her father was a doctor, Edward James Ambrose Haynes. He was descended from an Irish Catholic family from County Cork which had come to Sydney in the 1840's¹.

Edward and Theresa settled in WA in 1891.² Edith was then 15 years old. It appears that she was either sent back to Sydney, or stayed in Sydney to complete her education. She attended St Vincent's College at Potts Point in Sydney, a school established by the Sisters of Charity. Edith was awarded her Junior School Public Certificate, passing subjects in June 1895 in French, Latin, Algebra, Arithmetic, and Geometry.³ In 1895 she was also awarded a gold medal by the school, which is still in the family's possession.

The next that is known about Edith is that she was employed by her uncle's firm, Haynes and Purkiss, later known as R.S. Haynes and Co.

¹ Haynes' family tree - notes

² Battye J S Cyclopaedia of Western Australia Volume 1 (1912)

³ Junior School Public Examination Certificate (date unclear) – original held at Legal Practice Board

Her uncle, Richard Septimus Haynes KC was born in New South Wales in 1857. He was admitted to practice in 1880, and moved to Perth, apparently to look after the interests of a commercial client, in 1885. He established the firm Haynes & Purkiss practicing from the South British Chambers in Barrack Street. He took silk in 1902. Richard Haynes was a radical thinker, and deeply involved in the State's political life. He held a seat in the Legislative Council from 1896 to 1902, and a large number of public appointments.⁴

Edith's father was also active in the community, being regarded as one of Perth's most prominent surgeons and having founded a training home for midwives in 1901.⁵ Edith, therefore, was not without influential connections. One would imagine a young man in this position would have had no reason to doubt his future.

Richard Haynes also sat on the Legal Practice Board, and sometimes presided over its meetings.⁶ He is also on record as writing about the conditions in which Aboriginal prisoners were kept in the colony.⁷

⁴ Australian Dictionary of Biography Volume 9: 1891 – 1939 at 241-242. Among his many appointments was as the Consul for Norway.

⁵ Ericson, Rika Dictionary of Western Australian Volume 5 "The Golden Years 1889 – 1914" at 400

⁶ Minutes of the Barristers Board of WA between 1900 and 1904. Originals held by the Legal Practice Board.

⁷ State Library website search facility

It is not known how Edith came to be working for her uncle's law firm in 1900. With her uncle and father being prominent in legal and medical circles respectively, and two brothers who became doctors, she was not short on professional role models. Quite possibly the Sisters of Charity had imbued her with a sense of community service which required some outlet not satisfied by the traditional roles of wife and mother to which middle class woman of that generation were generally restricted.

Whether she badgered her uncle to employ her, or was engaged by her activist uncle in order to promote his political campaign (as is suggested by author Lloyd Davies) may never be known. However, on 15 October 1900, Edith wrote to the Barristers Board requesting that her Articles be registered. Accompanying the letter is her uncle's letter of support for her application.⁸ The minute made by the Board's special meeting held on 27th November 1900 recorded that after discussion, the Board resolved to send the following letter to Miss Haynes:

“With reference to your application for admission as a Law Student, I have the honour to inform you that the same has been approved by the Board. I am directed however to inform you that although the Board is of opinion (with some

⁸ Original letters from Edith and Richard Haynes held by Legal Practice Board

doubt) that women are eligible for admission under the Legal Practitioners Act yet the Board cannot guarantee such admission even if you comply with all the provisions of the Act and the Regulations framed thereunder.”

Presumably in order that the applicant was under absolutely no misapprehension about the precarious nature of her position, the Board sternly added:

“It must be distinctly understood by you that you accept all risk of the Court eventually refusing your application.”⁹

At the time, being admitted to practice required serving 5 years of Articled Clerkship, and passing a series of examinations set by the Board. Edith was exempted from sitting her preliminary examinations by the Board.¹⁰ She worked in her uncle’s firm, at the very least until August 1904, presumably attending to the myriad tasks of the Articled Clerk. Doubtless, her beautiful copperplate handwriting, for which she was justly famous¹¹, was much in demand.

⁹ Minutes of the special meeting of the Barristers Board held on 27th November 1900, original held by the Legal Practice Board.

¹⁰ Musk J An Overview of Women in the Legal Profession, Brief September 1984 at 6; Barristers Board Minutes, 14 January 1900

¹¹ Interview, Peggy Monk, Edith Haynes' niece

At some time in late 1903, Edith was due to sit her Intermediate Examinations. Her application to sit the examinations was considered by the Board at its meeting on December 8th 1903. The Board resolved not to accede to her application, remarking rather coyly that:

*“On perusal of Miss Haynes’ papers it appears that the formalities connected with the registration of her articles have not been complied with.”*¹²

Whether it was this decision, or a later decision the record of which has been lost, there is no doubt that at some time prior to August 1904, the Board refused Edith Haynes the right to sit her Intermediate Examination solely because of her gender.

Courageously, Edith determined to challenge this decision. She obtained a *rule nisi* from the Supreme Court, requiring the Barristers Board to show cause why an order of mandamus should not be issued requiring it to permit her to sit her examination. The return of the rule was heard by the Full Court, comprising Acting Chief Justice Parker, and Justices McMillan and Burnside. Her uncle Richard Haynes KC (he had taken silk two years earlier) appeared for her. Solicitors, James & Darbyshire briefed Mr Pilkington to appear for the Board.¹³

¹² Minutes of Barristers Board December 8th 1903

¹³ Mr Pilkington was also a member of the Board, and attended the meeting on 8 December 1903. He abstained from voting on the resolution.

On 3 August 1904, six days prior to the hearing in the Supreme Court, Richard Haynes wrote to the Board excusing himself from attending the Board meeting at which the imminent hearing was to be discussed, but included in his letter his advice as to the approach he considered the Board ought to take – that is to submit to the jurisdiction of the Court.¹⁴

With great prescience he remarked in his letter that:

“...I anticipate I shall have quite enough difficulty with the Bench without a strenuous opposition from the Board.”

Unfortunately, Mr Haynes’ opinion about the position the Board ought to take was not shared by his fellow Board members. Mr Pilkington is recorded as submitting to the Court on behalf of the Board that:-

“There are disabilities which the Court will recognise as precluding a person from admission, even though those disabilities are not mentioned in any Act or rule as in the case of Ex parte Cragg, ... where the Court refused admission to an infant, even though the Act did not state that the applicant must be over 21 years of age. Further, the fact that no woman has been

¹⁴ Letter from Richard Haynes to Barristers Board dated 3 August 1903 – held by Legal Practitioners Board.

*admitted before raises the very strong presumption that they have no right to be admitted.”*¹⁵

The Full Court discharged the *rule nisi* Edith had obtained against the Board. Its reasoning was that while the Act permitted the admission of “persons” this description did not include women. The fact that no other woman had been admitted in the common law world appeared to influence their Honours greatly, perhaps more than a strict application of the principles of statutory interpretation would warrant. This argument was seen to be considerably more weighty than the enactment of the Interpretation Act in 1893 which provided that the word “person” meant “man” and “woman”.

We can only imagine how devastating it must have been for Edith Haynes to sit in Court No. 1 in this building and hear that as far as the Legal Practitioners Act was concerned, she lacked the status of a “person”, suffering apparently from the disability of being a person of the female gender, who, like infants, and others suffering from a disability, could not be entrusted with the heavy responsibilities and duties required of legal practitioners.

¹⁵ In re Edith Haynes (1904) WAR 209

It was not until 1923, when the *Legal Status of Women Act* was enacted, that the right of women to enter legal practice was enshrined in legislation. Edith Cowan, the State's first female member of Parliament, introduced this Act as a private member's bill. To read the Hansard debate relating to the Bill shows us just how tenacious, clever and determined our first female Parliamentarian was. Despite this groundbreaking legislation, it took a further seven years before the first woman was admitted to the roll of practitioners, when Alice Cummins was admitted in 1930.

Edith Haynes was never admitted to legal practice. It is not known whether, and for how long, she continued to work for her uncle's firm, after the Full Court put paid to her legal ambitions. Nor did she ever marry. However, the First World War appears to have delivered her (as it did for many women) a career, and some measure of economic independence. In 1916, Edith Haynes commenced work at the National Bank where she worked until 1931.¹⁶

Records are not available which might show the nature of her employment in the Bank, but the recollections of her family would tend to indicate that Edith's legal training was well utilised by the Bank in its

¹⁶ Information supplied from archive material held at the National Australia Bank

legal section.¹⁷ It should not be thought that attitudes towards women in banking were in any way more progressive than those in the law. Banking was heavily dominated by male employees until the War, when the shortage of male employees led to the employment of women. Historical records of the influx of women into banking in the First World War make it clear that this development was seen as an unfortunate necessity, to be borne only temporarily until the cessation of hostilities, when they could return to their proper place in the home.¹⁸

The fact that Edith Haynes was not required to relinquish her job at the Bank at the conclusion of the War as many women were, to make way for returning soldiers, would tend to indicate that her skills were valued by the Bank.

In the 1920's, Edith's brother's wife died, leaving a number of young children. Among these children were Peggy and Jim then aged 5 and 3 respectively. Edith took on the care of her young niece and nephew, and together with Edith's mother, they lived together as a family at 49 Outram Street in West Perth. Edith and her mother shared the care of

¹⁷ Interview with Peggy Monk

¹⁸ Holder R F History of the Bank of New South Wales at 594-5; Faulkner CC History of the Commonwealth Bank at 274; DT Merritt History of the Australian and New Zealand Bank at 258; Blainey G Gold and Paper at 274

these two small children, until Edith's mother became incapacitated, when Edith took over their care on a more full-time basis.

I am very pleased to welcome Edith's niece and nephew, Peggy Monk and Jim Haynes who have joined us tonight, together with Ted Monk, Peggy's husband, and a number of other family members. In the years that passed, Edith never spoke to her nephew and niece about her thwarted dream to be a lawyer, or her extraordinary challenge to the legal establishment, although they became aware of it from other family members. However, she would no doubt be pleased to know that members of her family are present today, to witness the fruits of the battle she began in the very building in which she laid down the gauntlet 100 years ago.

Edith Haynes is remembered by her family as being a strong and determined person, with a firm sense of what was right and wrong, and interestingly, decidedly conservative political views. Her nephew, Jim Haynes recalls Edith telling him of the fierce debates she had with her Uncle Richard, on current events and political issues. Her only "vice", if one can call it that, was that she was fond of the races, and used to

attend the Saturday races at Belmont to have a flutter on the horses.¹⁹

She died in a nursing home in Mount Lawley in 1963, aged 92.

Edith Haynes began a revolution which continues today. Four women now hold office as Judges of the Supreme Court of Western Australia. In addition to the Chief Judge, five women are now members of the District Court, and seven women hold office as Magistrates. Two out of five judges of the Family Court are women, and four women sit as Family Court magistrates. More than 50 percent of law graduates are women. The right of women to practice any profession, trade or vocation is now beyond doubt.

Despite these significant advances, Edith's challenge has yet to be completely met. Equal opportunity for women lawyers, and women in our legal system remains elusive. Only 10 percent of all members of the Independent Bar are women, and partnerships in firms, particularly large firms, are heavily dominated by men. Structural inequalities, and particularly the lack of availability of part-time work in private practice militate against the advancement of women in the profession.

¹⁹ Interview with Jim Haynes

Women in the society at large still suffer from the burden of subterranean discrimination, which is manifested in being the victims of violence, unequal pay, poor promotion prospects and a highly segmented workforce. Many of the formal barriers to women's equality have been removed, but many still remain.

In 1994, my report on Gender Bias was published. This report contained 200 recommendations for wide-ranging reform, including public education, and specific law reform proposals. In 1997, this Report was reviewed by the Ministry of Justice and significant progress was reported. I have now formed a Taskforce, chaired by her Honour Justice Christine Wheeler of the Supreme Court, to conduct a further review to determine what has been achieved, and what still needs to be done. I hope through a process of continual highlighting of the issues, and reminding the policy makers that we can continue the progress of the change initiated by Edith Haynes 100 years ago.