



Karrakatta Club

Dinner Address

The Hon Wayne Martin
Chief Justice of Western Australia

16 March 2007
Karrakatta Club

It's a great pleasure and an honour to have been invited to join you for a very enjoyable dinner this evening and to now address a few short remarks to you.

Your club was, of course, the first women's club formed anywhere in Australia, and perhaps anywhere in what was then known as the British Empire, when in 1894, 38 foundation members gathered to create this enduring Western Australian institution. As it was the first club of its kind, it may reasonably be supposed that its foundation members were progressive and enlightened. Corroboration for that proposition is found in their choice of a name for their club - drawing upon an Aboriginal word - generally thought to have been used to describe the area near the top of Mount Eliza.

The choice of an Aboriginal name for a venerable Western Australian institution is particularly pleasing to note. Since my appointment as Chief Justice last year, I have become acutely aware of the importance of the intersection between Aboriginal people and the justice system. Tonight, Aboriginal people will make up 41% of the prison population of this State, compared to only 3% of the general population. That figure has got significantly worse over the last 20 or 30 years. Tonight, approximately one in 16 adult Aboriginal men will be incarcerated. And, most depressingly, the situation is worse when one looks at juveniles, because tonight, 85% of the inmates of each of our juvenile facilities - Rangeview and Banksia Hill, are Aboriginal. And viewed only in terms of the Aboriginal population, the imprisonment rate in this State is almost twice as high as that of the Aboriginal population of the Northern Territory.

And, of course, for the overwhelming majority of Aboriginal offenders, there is an Aboriginal victim. The rate of assaults on Aboriginal women is 45 times higher than the rate of assaults on non-Aboriginal women. And our justice system provides many opportunities for inadvertent discrimination against Aboriginal people of an institutional kind. For example, Aboriginal people are much more likely to be arrested than summoned to attend court, and when arrested, much more likely to be denied bail, and when convicted, more likely to be imprisoned. This is not because policeman and Judges are bigots, but rather because the accepted rules and principles operate adversely in practice against Aboriginal people.

This presents one of my great challenges as Chief Justice and a challenge which is a fit topic for an address on some less social occasion. There are, of course, other challenges - some of which I will mention briefly a little later. But when I confront the task of reforming aspects of our legal system, I draw some support and encouragement from a number of reformers historically associated both with your club and the law.

Edith Cowan was, of course, the founding secretary of your club, and the first woman elected to a Parliament anywhere in Australia. She was married to James Cowan, who was a Registrar and then Master of the Supreme Court. Her great grand-nephew, David Malcolm, was my predecessor as the 12th Chief Justice of Western Australia.

Another founding member of the club was Lady Onslow, the wife of another of my predecessors, Sir Alexander Onslow. Onslow distinguished himself by having a serious falling out with Governor Broome, which resulted in Onslow's suspension in 1887, when a report

was forwarded from the Governor to the Colonial Office. However, upon review the Privy Council decided that Onslow's suspension should be lifted and his office returned. Perhaps his enduring punishment lies in the fact that Governor Broome has, of course, had the town which has become the pearl of the Kimberley named after him.

And just to show that tensions between the Chief Justice and the Editor of The West Australian are nothing new, an editorial in that august journal of December 1885 attacked Onslow because of the lack of professional ethics in the legal profession. The editor wrote:

"It is with real pain that we observe his Honour's unconsciousness of the discredit impending over the administration of justice, or his apparent hesitation to take any steps to abate it."

Quite how you could be criticised for failing to take steps to correct something of which you were unconscious is not immediately clear to me.

Relations between Chief Justice Onslow and The West Australian deteriorated even further. Alfred Hensman, who had replaced Onslow as Attorney General when Onslow was appointed Chief Justice, and who later became a Judge himself, after also falling out with Governor Broome and being suspended and ultimately removed from office as Attorney General, sued The West Australian for defamation. The paper was represented by Septimus Burt, and Winthrop Hackett. Onslow heard the case with a jury and damages of 800 pounds were awarded. An appeal to the Full Court, on which Onslow also sat, was dismissed, unsurprisingly perhaps. The newspaper then presented a petition to the

Legislative Council requesting that the Chief Justice be removed from office on the ground of prejudice and persecution. After fully reviewing the matter, the Legislative Council resolved that there was no reason to impugn his Honour's integrity, "But that peace and harmony in the community could not be hoped for as long as Onslow remained Chief Justice". The papers were again sent off to England, and again it was decided that Onslow should remain in office - perhaps peace and harmony in the colony of Western Australia was not high on their Lordships' priorities.

As a complete digression, it is recorded that Onslow had a very fine singing voice, and even after his appointment as Chief Justice, he often sang at public concerts. While I may, unfortunately, emulate his rocky relationship with the local media, I am sure you will be relieved to hear that I have no present intention of following his public singing career.

Another founding member of your club was Lady Eleanora James, who was married to Sir Walter James, a prominent lawyer and Premier of the State between 1902 and 1904.

In common with many other members of your club, Lady Eleanora was a strong supporter of suffrage for women. Her husband, who had been elected to Parliament in 1894 as the member for East Perth, was a prominent Parliamentary campaigner for law reform. He introduced legislation to allow women the right to vote on a number of occasions following his election in 1894. While initially unsuccessful, in 1899 he ultimately succeeded, and Western Australia became one of the first jurisdictions in the world to give women the right to vote - after New Zealand, South Australia and a few states of America.

Walter James shared a relationship with his wife Eleanora, herself an advocate for feminist causes, more familiar to us today than it might have been to many in the late 19th century. The nature of that relationship emerged in the course of Parliamentary Debates upon women's suffrage: Confronted by the opposition to his initiative of the Premier, Alexander Forrest, whose wife incidentally was also a foundation member of this Club, James stated:

" ... the Premier suggests the difference that exists between us is that the woman should be the comfort and solace of the home. That is exactly what I do not think. I look on my easy chair as one of the comforts and a solace of my home. That is a part of the furniture of the house, and my wife is not. The duty rests upon me just as much as it does upon my wife to make the home the comfort and solace of both of us."

I think you will agree that these were particularly enlightened views for the 19th century.

Going back to matters Aboriginal, it is, of course, interesting to note that it was not until 63 years later, in 1962, that Aboriginal women obtained the right to vote in Western Australia.

Sir Walter's enlightened views may at least in part lie in the fact that he found in Lady Eleanora a kindred spirit in his concern for social reform. Lady Eleanora served as president of the National Council of Women (Western Australia), a body which since its formation in 1911 has lobbied government at all levels on a wide range of social reform matters. She

also enjoyed the opportunity to represent Australia at the British Empire Red Cross Conference in London in 1930. Ten years earlier the British Red Cross Society had extended its work from a more narrow focus upon war-related suffering to the relief of suffering and the improvement of health generally. The Conference had been called to examine the impact of that reform and ways to further enhance the role of the Red Cross in combating sickness and disease.

Sir Walter James, ably assisted by his wife Lady Eleanora, is a shining example of a social reformer. He has been described as the most significant social reformer in this State. His campaign for suffrage was fought alongside campaigns for better working conditions, equal pay and better social conditions for women and their children. Amongst his many contributions, he was responsible for the Employer's Liability Act of 1894, the Mines Regulation Act of 1895, the Adoption of Children and Bastardy Laws Amendment Acts of 1896 and the Lien on Wages Act 1897.

Sir Walter was born in Perth in 1863, of humble origins. His parents were publicans and his early life was the more difficult for his father's death when Walter was just 14. After finishing his schooling at Perth High School, he worked as a jackaroo – at de Grey station in the Pilbara – where he worked for three years. A career alternative presented itself when, returning to the North West, he was shipwrecked off Rottnest Island. Not an obvious point of entry to the legal profession, but it led to his abandoning his pastoral interests and serving articles with the Crown Solicitor, George Leake QC, one of the patrons of the hotel his mother ran.

Already having learned some hard lessons in life, his egalitarian attitudes were only sharpened after spending 6 months in London with a London solicitor during his articles which "opened his eyes to urban squalor and confirmed a commitment to the underdog born of his upbringing".

He was called to the Western Australian Bar in 1888, but quickly moved towards a political career where he clearly felt more able to influence and shape the socio-economic and cultural affairs of the State in keeping with his egalitarian values. A Perth city councillor from 1890-96, he married his wife, Eleanora, in 1892. In 1894 he won the "working class seat of East Perth" in the Western Australian Legislative Assembly. Very independently minded at a time before party discipline had come to more formally shape the political environment, he was successful in politics. While in Parliament he sat as an independent, successfully introducing a range of social reforms.

Sir Walter James took over as Premier at the age of 39, following the death of Premier George Leake, the son of Sir Walter's former principal. While Premier, his policies of social reform continued - through the Lunacy Act, which reformed mental health care, and the Prisons Act, which sought to humanise prisoners' treatment. However, as an independent lacking the backing of a party, he was an anachronism whose time was destined to be shortlived. His government was defeated in 1904, and he resigned to accept a job as Agent General for Western Australia in London.

Returning to Western Australia in 1907, he resumed an illustrious legal career and became renowned as the leader of the Bar.

As a lawyer he practised in partnership with Derbyshire, but later amalgamated that firm with the firm of Sir Edward Stone (another of my predecessors) and the same Septimus Burt (who was, of course, the son of the first Chief Justice of Western Australia, Sir Archibald Burt, and the grandfather of one of my favourite predecessors, Sir Francis Burt). The firm, Stone James and Co, was one of the most prominent firms in the State, and its successor now practises under the name Mallesons Stephen Jaques.

Sir Walter was also very interested in education, and was prominent in the establishment of the Royal Commission which inquired into the creation of a university in Western Australia, and which ultimately led to the founding of the University of Western Australia. He had, of course, been joined in that important endeavour by Sir Winthrop Hackett.

Of course, the relationship between women and the law has not always been an easy one. Prior to the creation of the University of Western Australia, the only means by which persons resident in Western Australia could become admitted to legal practice without leaving the State was by serving 5 years articles with a law firm. On 15 October 1900, Edith Haynes wrote to the Barristers' Board requesting the Board to register the commencement of her service of articles with her uncle, Richard Haynes, a prominent practitioner. The Barristers' Board, as then constituted, resolved to register her articles, but also to advise her that there could be no guarantee that she would be entitled to admission under the *Legal Practitioners Act*, even if she satisfied all the provisions of that Act.

Edith continued to serve in her uncle's firm and in 1903 was due to sit her intermediate examinations. Her application to sit the examinations was considered by the Barristers' Board on December 8, 1903. The composition of the Board had changed, and it was resolved to refuse to permit her to sit her examination on the basis that she was not eligible for admission under the *Legal Practitioners Act*. She commenced proceedings in the Supreme Court to compel the Board to permit her to sit her exam.

Her uncle, Richard Haynes KC, appeared on her behalf. He pointed out that the *Legal Practitioners Act* provided that "any person" who satisfied the requirements specified in the Act, could be admitted as a legal practitioner by the Court. One wouldn't have thought it was too difficult a task to persuade the Court that Ms Haynes was a person, especially when regard is had to s 3 of the *Interpretation Act 1898* which provided that the word "person" included both men and women, unless the provisions of the Act in which the word was used indicated a contrary intention. And the same word when used in the *Medical Act*, had been construed as including women for at least the last two decades of the 19th century. A formidable array of arguments you might have thought.

However, counsel for the Barristers' Board argued 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 ... "

Implicit in that submission is, of course, the proposition that being female is a disability. Counsel for the Board also argued that the fact that no

woman had been admitted before raised a very strong presumption that they had no right to be admitted.

The Full Court of the Supreme Court unanimously upheld the Board's submissions. Acting Chief Justice Parker observed:

"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."

It is interesting to note that he invoked the concept of motherhood to describe Australia's relationship to Great Britain.

In his Honour's view, if it had been the intention of the legislature that a woman should be capable of being admitted as a practitioner, they should have said so in express language. Apparently the expression "any person" was not explicit enough for his Honour!

Justice MacMillan was reinforced in the same conclusion by the observation that if women were entitled to become members of the Bar, they would also be eligible to sit on the bench. Again, implicit in this observation is the proposition that such an outcome would be extraordinary, and could not have been intended by the legislature.

Justice Burnside thought it important to:

"Also bear in mind that throughout the civilised world, so far as we know, we have not been able to ascertain any instances under the common law of the United States, which is based on the common law of England, or of any instance in England or any British

speaking colony where the right of women to be admitted to the Bar has ever been suggested."

Apparently implicit in this observation is the proposition that denial of professional opportunities to women is an aspect of civilisation!

Accordingly, because the Court thought Ms Haynes could not be admitted, there was no point in ordering the Barristers' Board to permit her to sit her exam. Tragically, Ms Haynes never completed her legal studies. She ceased working in her uncle's firm and commenced work with the National Bank. It was not until 1923 when Edith Cowan introduced a Private Members Bill which became the Women's Legal Status Act 1923 that women became entitled to admission as legal practitioners on the same terms as men.

Regrettably we have a long way to go before women can be said to be equal participants in the legal profession. In that regard, many have observed that it would have been better if I had been a woman, and a number agree with that sentiment - a number which hopefully doesn't include my wife. Since at least 1980, more than half of the graduates of this State's law schools have been women. I regularly preside over admission ceremonies in which a significant majority of the admittees are women. But something goes wrong after that. Women are still grossly under-represented at the Independent Bar and as partners in law firms, and as Senior Counsel. In Western Australia women are as well represented on the bench as any other comparable jurisdiction, but that has been at the expense of early recruitment from the senior ranks of the profession, leaving a large gap - especially in the role of mentoring and acting as role models for younger women. As a profession, we lawyers

must find ways of restructuring which makes it easier for women to stay in the profession and move through to its senior ranks.

I am sure Sir Walter and Lady Eleanora James would have had the solution. Using them as inspiration, I hope to do whatever I can to encourage greater female participation in the senior ranks of the profession.

So in conclusion I would like to thank the club again for its hospitality this evening, and for providing a number of conspicuous examples of progressive social reformers, whose lives and achievements should inspire us all.