

LEGAL REFORM - NEW SOUTH WALES.INTRODUCTION.

In 1881 New South Wales had a population of 749,825^{1.} of whom 410,211 were women. The bulk of this population was located in Sydney and the larger country towns and consisted of a prosperous and growing middle class, a large working class in the expanding industrial areas, and a relatively high proportion of agricultural workers.

The twenty years between 1860 -1880 were years of fairly steady economic prosperity during which industrial activities had multiplied, communications had been extended and an urban and generally settled society had developed. The whole period between 1860-1890, though it showed periods of uneven economic progress, was generally one of relatively full employment and of rising money and real wages.

The government of the state was open to a number of reforms, but for the time, it was an advanced democratic one. Much of the legislation of the period reflected the localism of members, but it also reflected the needs arising from changing social conditions brought about by New South Wales growing prosperity, and particularly it mirrored the general interest in social reform overseas.

1. Year Book of the Commonwealth of Australia No.50. 1964, Canberra. p.268. A large proportion of this number was of middle or working class background and many had arrived or were descended from those who had arrived in the colony as assisted migrants.

The expanding population of wage earners demanded factory and shop legislation while a growing middle class population became concerned with education at all levels and with the extension of civil rights; particularly it became concerned with the extension of the franchise which culminated in the Franchise Act of 1894 and its provision for one man, one vote.

The one large area in which civil rights could most gainfully be extended was in that affecting the status of women and in New South Wales, as earlier in England and America, the period immediately preceding 1880 was a time of considerable activity in this direction. The subject was promoted by men, but increasingly supported by women because the social circumstances which produced a women's rights movement in England and America at the time were by then being duplicated in Australia.

The reception of overseas ideas was considerably easier in New South Wales after the middle of the century. The news and views of the other side of the world arrived regularly, and after the connection of the telegraph in 1872, more quickly. English and American magazines were read and extracts from them printed in local papers. Although women's main reading matter centered around social doings, fashion, how to keep a home well organised and a husband happy- all features of present day publications as well - there was a sufficient number of serious articles on the position of women and sufficient reports on the oversea women's movement for them to be aware of what was happening elsewhere.

Australian women wanted very much to be like oversea women, particularly in view of the stigma on social life carried over from the colony's beginnings . In time this desire applied as equally to women whose convict ancestry might have been proven, as to those who were newly arrived in the colony, or first or second generation Australian. The actual leaders of the New South Wales Women's Movement were however, mainly members of the latter group and nearly all of them came from families with social standing, cultural or educational achievements or all three. They initiated most ideas and set the lead.

To them first, and eventually the whole of New South Wales feminine society, it was important that colonial social life and values be organised on a similar basis to those of London, and the colony's beginnings dictated more than average care in carrying out this plan. Almost certainly it had the backing of a considerable number of New South Wales men as well.

Many visitors to, and settlers in, Australia described the social life of the late 19th century, particularly of the cities and their reports were similar. In OCEANIA, published in the 1880's, J.A. Froude wrote that Sydney was a settled, busy, commercial city, with its people predominantly materialistic in interest. He found its leading citizens engaged in a busy and often impressive round of social activities. Louisa Macdonald,



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PHOTOGRAPHERS TO HIS EXCELL. THE GOVERNOR SYDNEY

Lady Carrington (left) and Lady Jersey,
wives of New South Wales Governors of the period.

who came to Australia in the same period to become Principal of the Sydney University's Women's College, reported that Sydney was " a small, delightful society, where everybody knew everybody else".²

The social circle, which stamped its ideas on the New South Wales Women's Movement and from which many of the most significant utterances by women on their current outlook and ideas emanated, was formed of a social coterie bounded by Government House, the British Naval Squadron with its resident Admiral, members of the Bench, the Bar, Sydney University, the squatters and the big landowners, and certain members of Parliament. With very few exceptions, most members of the Women's Movement in New South Wales before the end of the 19th century moved in or near this circle, basing their social life as far as possible on the social life of upper class London, and inordinately anxious to develop as many similarities as possible.

The desire of the 19th century Australian woman to belong to a society which was restricted and conformist was marked in New South Wales, and because of the colony's early history, somewhat more urgently striven for there than in other states. Nevertheless although women in South Australia espoused such causes as the Boarding Out System and the adult suffrage, and saw them introduced successfully there first and the women of Victoria produced the nucleus of a militantly feminist movement,

2. M.V. Hale and A.H. Treweek, History of the Women's College Within the University of Sydney, Sydney 1953, p.11.

basically there was very little difference in the aims and ideals of women in any part of Australia. They all practised participation in public affairs only so far as the rules of current Victorian society allowed, and they tended to conform to these rules far more strictly than did many women overseas. In fact, in their desire to stress their similarities with overseas societies, Australian women missed, or purposely ignored, a great many of the more radical undercurrents of feminism both in Europe and the United States.

Social reform in the period also represented more that was similar to, rather than was dissimilar from, overseas legislation particularly British legislation. Most reforms represented a determination to bring Australian colonies up to date with, and occasionally in advance of, other countries. In so far as legal reforms affecting women were concerned, the New South Wales Government, though influenced by American ideas, set the pace of most of its measures by the pace and arguments of Westminster.

This determination to move as one with other countries is well demonstrated in this matter of the extension of legal rights to women. Where there were differences, these were the result of local factors, the personalities of local leaders, and the potent fact of geographical isolation which the exchange of printed news and even the influence of overseas settlers and visitors could not overcome.

Coupled with the desire to encourage certain standards and values in New South Wales society, geographical isolation also had a marked effect on the Women's Movement in the colony. New South Wales women grasped the idea of women's rights readily enough, but not always the larger possibilities. It is highly probable that a freer and easier exchange of views with nearer overseas neighbours would have enlarged their ideas, removed some of their rigidity of vision and changed their concept of the goals of the movement in general, many of which linger in present day women's organisation. But distance and the strong desire to change not the ideals of 19th century middle class society, but only some of its forms, prevented this. On the other hand, this very limitation of vision served to remove much of the danger of the movement from a male point of view and certainly contributed to the success of the New South Wales suffrage campaign. Many men were highly sympathetic to the ideal of women's rights, but in New South Wales they saw no real danger in any of the claims made by women.

Before 1880 there was no agitation for women's rights in New South Wales similar to agitation overseas. Before this date no movement as such existed in the colony, nor were there outside stimuli in the shape of national issues or military threats to bring it into existence.

It must be remembered however, that while Mrs. Stanton and Mrs. Mott in the United States were working on Anti-Slavery

campaigns and planning their women's right convention, New South Wales was still a convict colony where the most important public considerations for both men and women revolved first around the cessation of transportation, and later the possible introduction of squatting regulations, the establishment of municipal institutions and the question of admitting emancipists to the Legislative Council. There was no question of granting legal rights to women, especially when many were convicts or emancipists themselves and there is no real evidence that their comparative scarcity or value as pioneers led men to value them politically any more highly in a new country than in an old one. Women immigrants were promised a great many comforts if they went to Australia, but they were not promised an extension of civil rights, nor was the question of one man one vote ever amended to read one woman one vote.

Women's progress in other fields in New South Wales was not yet remarkable. In the 40's when Troy and Oberlin Colleges had already been founded in the United States, the idea of higher education for women was commented on with wonder by the SYDNEY MORNING HERALD, and provoked spirited debate by men in the School of Arts.

3. SYDNEY MORNING HERALD, 7 January 1841. There were 35,507 inhabitants in the city and surrounding country. Of these 20,735 were men and 14,774 were women.
4. Ibid. 28 January, 1841. On 7 January 1841 a letter signed "Currency Lass" appeared written in support of higher education for women, but did not begin any spirited debate.

During the 50's and 60's the Sydney papers when they referred to women at all out of the context of social events referred briefly and with distaste to female Chartists in England, the place of women under the changed New York marriage laws which, according to the SYDNEY MORNING HERALD " would disgust most English Parliamentary lawyers,"⁵ and to women's intermittent oversea campaigning for the franchise. On 29 January, 1847 the SYDNEY MORNING HERALD in its editorial announced that it would as soon see women with the vote as some men - an idea put forward at the time of a projected extension of the male franchise and considered as patently ridiculous.

The paper continued this line on 28 January, 1850 when it reported the efforts of the Rochester Women's Rights Convention as an " absurd and ridiculous proposition" and repeated it on 20 August by printing the NEW YORK HERALD's account of the Ohio Convention. This paper had announced its support of equality if " [the women] would cut off their long hair ... and put on the breeches." At much the same time the SYDNEY MORNING HERALD began to reprint PUNCH's " Scenes from the Life of an Unprotected Female",⁶ a character generally shown as both stupid and incompetent.

5. Ibid. 17 October, 1848

6. After the paper was acquired by the Fairfax family, women were inclined to obtain a better press. Women members of the family became leading members of a number of important women's organisations in Sydney.

Nevertheless, the oversea actions of women, whether trivial or otherwise, were constantly noted in New South Wales papers, and the 50's marked the beginnings of a new interest by women in women in New South Wales. These expressions ranged from concern for women prisoners taken on foot to lockups by police,⁷ to requests for committees on female education and the establishment of seminaries.⁸ It was also the time of the first large scale attempt to win women's support for a special cause. This was the Organisation of the Ladies' Petition to the Legislative Council against transportation, masterminded by Henry Parkes, who won through it, and through his later public utterances on the extension of the franchise, his reputation as the champion of the women's cause.

The question of the franchise actually gained some support during this decade, bringing forth an increasing number of letters to the papers and on one occasion at least, a remarkably objective editorial from the SYDNEY MORNING HERALD which stated that [so long as women themselves allow their rights as members of society to be regulated by the sex which has in all ages depressed them, things will go much as they are ...]⁹

7. SYDNEY MORNING HERALD, 26 September, 1851

8. Ibid. 16 October, 1853

9. Ibid. 14 August, 1858

LEGAL REFORM

But the fact that things did change in New South Wales was almost wholly the result of the laws passed in the Imperial Parliament. New South Wales Parliamentarians were very cautious radicals as far as social reform for women was concerned- an area in which there was no immediate danger of extreme agitation. They were not wholehearted followers of the English example, but they were obedient, or tried to be.

The prelude to the New South Wales reform of the divorce laws was embodied in the Royal Instructions to the Governor-General in 1851. He was informed that he was "not to propose or assent to any Act whatever for the divorce of persons joined together in holy matrimony",¹⁰ but with the change of views in England and the passage of the English Divorce Act, copies of which were forwarded to Australia, the Colonial Governments were informed that Her Majesty's Government regarded the subject as being within the general class of internal affairs which it was the duty and right of a free colonial legislature to regulate. In Victoria and South Australia similar Acts were passed relatively quickly, but a Bill introduced in the New South Wales Legislative Assembly in September 1861 ran into immediate trouble as did every proposed Bill and amendment for the next 30 years.

This Bill, like subsequent ones, was not generally supported publicly or at least commented on by women. It aroused bitter

10. Ibid 31 January, 1853

Church antagonism, and brought forth a flock of petitions against it. It had however, some firm supporters, who once rallied, were prepared to go further than the English Act in establishing causes for divorce, equating for example, drunkenness with cruelty and including the ground, valid in some American states, of incompatibility of temperament. The more radical Scottish divorce laws were also quoted.¹¹

Most amendments, however, were lost in committee, and the Bill instead of incorporating the best from all countries, finally emerged as a close copy of the English Act containing nothing particularly new or advanced. It was defeated at its various appearances in the Upper House in 1861, 1866, 1870 and 1871, and did not become law until 1873. Almost immediately it became the subject of attempted and necessary amendment.

Under this Act, a man could obtain a divorce on the grounds of adultery. A wife was obliged to prove adultery, and in addition incest, or bigamy or rape or sodomy or bestiality or cruelty or desertion for two years without reasonable cause. The Act did, however, establish the debt of alimony and the position of a wife as feme sole with respect to property which she might acquire or which might devolve on her. She could dispose of such property in her own right. In the next half century successful amendments both clarified procedure to be followed and extended the grounds of divorce for both sexes.

11. Quoted by Mr., later Sir John Hay in particular.

Other Acts on English models passed more quickly and without opposition. The first Custody of Infants Act¹² in 1875, which allowed a mother access to infants subject to certain Court Orders, and in some cases gave their control to her followed two years after the English Act. The more controversial Marriage with a Deceased Wife's Sister Act was passed the same year. In 1873 Victoria and South Australia had passed similar marriage acts close on the heels of the English Act, but the New South Wales Upper House was still debating it in 1874, opposing the amendment to allow marriage with a deceased husband's brother because in the words of Sir William Manning,

....it would be better not to rush ahead of the decisions of the House of Commons and those of the legislatures of other Australian colonies.

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12. Women and children were affected by some earlier legislation. Deserted Wives and Children's Acts in 1840 and 1858 had provided for a wife to be paid maintenance allowances.
13. Sir William Manning was partly sympathetic towards extension of grounds for divorce for women and was tempted to approve. The fact that England had not given the lead, and because he did not believe it helped them, caused him to vote against the Bill. Sir Alfred Stephen, who was later to direct an almost 20 year struggle for more liberal amendments, voted against the Bill in 1875 on the grounds that adultery in a man was wrong morally, but not socially.

The passage of these Acts, which in two cases at least, benefitted men as much as women, were wholly dependent on English example and owed nothing at all to
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 so-called advanced colonial thinking. In fact the New South Wales Upper House represented feelings far more conservative than those of the House of Lords in England. The Legislative Council gave in reluctantly always ; in the case of the Married Women's Property Act, based on English law, it took from 1871 to 1879 to steer the Bill through
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 both Houses.

This was the first major Act to give a married woman some control over her personal property. The Deserted Wives and Children's Acts had afforded some relief and the 1876 Married Women's Revisionary Act had allowed a wife to dispose of her own or her husband's future or revisionary interests in her personal estate

14. The imitative quality of Australian society frequently impressed itself on oversea visitors. Jessie Ackerman, who first visited Australia for the Women's Christian Temperance Union in the 1880's, wrote in Australia from a Woman's Point of View London and New York, 1913, p.2, "A lack of originality, indeed, is the most striking characteristic of the people as a whole. They are almost destitute of this form of genius."
15. In contrast, a minor Bill such as the Married Women's Revisionary Interests and Personal Estate Bill, also a copy of the English Act and introduced in Victoria, passed in the New South Wales Parliament with little opposition,

The 1879 Act went much further by establishing eight classes of separate property to which a wife was entitled. These were: rents; profits of any estate freehold to which she became entitled; personal property under a deed or will; wages or earnings; Savings Bank deposits; fully paid up shares, debentures or stocks; claims allowable on Friendly Societies; and insurance policies and property belonging to her before marriage. There were still limitations and future Acts were designed to overcome these.

CONTAGIOUS DISEASES BILL

Unexpected caution and a remarkable degree of conservatism delayed the passage of these early reforms in New South Wales. On the other hand the defeat of the Contagious Diseases Bill designed to deal with the suppression of prostitution and control of venereal disease in New South Wales, owed its delay, but not its final defeat, to an organised opposition and some fortunate postponements. It became a dead issue only when a similar fate befell the question in England. While it was a public issue, however, it illustrated some interesting points, namely, the comparative readiness of the New South Wales Assembly to follow English example in the matter of restrictive legislation, and the absence of vocal interest at this point in time, on the part of women on a topic which was likely to affect them.

The English Contagious Diseases Acts were a cause célèbre[^] in England for a number of years before they were openly discussed

in Australia, and it was towards the end of the 19th Century before Australian women gave any great indication of being aware of their history and implications. The English measures were an attempt by the House of Commons to deal with the ever-present question of prostitution and the spread of venereal disease in naval and military districts. It did this by passing a series of Acts, the first of which appeared in 1864, named misleadingly after those applying to contagious diseases in animals. It was believed that some members voted for the Bill under the impression that this was indeed what they were. In any case, there was little opposition.

When passed, the Acts provided for the compulsory medical examination of suspected prostitutes in a number of specified military and naval districts and empowered policemen to name women suspected of operating as prostitutes in them. Suspects were asked to sign a voluntary submission declaring themselves willing to undergo examination, and if they refused, could be summoned before a magistrate who could order the examination.

If they failed to appear they could be put in prison; if they were proved diseased they were put in hospital. No appeal was allowed and no examinations were demanded of men contacts.

During the tenure of the Acts there were many abuses. The reported injustices to the innocent, coupled with the general question of the social aspects of prostitution, rallied sympathy for women from sometimes entirely unexpected quarters.

Mrs. Butler, the wife of a Church of England Canon who became the most closely connected of all women with the fight to repeal the Acts and to deal more effectively with prostitution, directed the opposition for twenty years in England and, until her death, on the Continent as well. She never quite overcame the genuine surprise of many that she had allowed a charitable impulse to develop into a campaign with such unsavoury overtones. Mrs. Butler's reasons were based on deep compassion, deeply held religious convictions and a constantly growing, though seemingly not fanatical desire, to advance the standing of every woman. The general one-sidedness of the Acts alarmed her, as it was to alarm women for many years to come when similar¹⁶ legislation was mooted.

For these reasons, Mrs. Butler won early support from working class women, who were the first to be suspected in the districts named in the Acts, though in time the movement became highly influential and enjoyed the support of most of the liberal thinkers of England. Mrs. Butler was summoned as the only

16. Vida Goldstein in her Victorian paper, Women's Voice, concentrates heavily on the question and it was raised at most women's conventions in Australia in the early 1900's. See also Liberal Woman in New South Wales in 1911 after the passage of the Prisoners Detention Act. This was in effect a Contagious Diseases Act applying to prisoners already in custody, but later legislation applying to non-prisoners contained many safeguards.

woman witness at the Royal Commission called finally to investigate the Acts, and there is reason to believe that her carefully considered views, not only on this matter, but on allied subjects including the raising of the age of consent, responsibility for illegitimate children and solicitation, influenced the framers of later laws on these subjects as well.

Before 1870 the existence of the English Acts was hardly mentioned inside or outside the New South Wales Parliament, and the newspapers discussed them briefly only when agitation for repeal was reported in England. Prostitution in New South Wales was a problem as old as the colony, but most attempts to deal with it had taken the form of prevention by means of provision of refuges for women¹⁷ and the earnest and usually vocal endeavours of public morals associations. The problem was chronic, but not acute, and there is no evidence that any official action would have been contemplated at the time if the passage of the English Acts had not been followed by a request¹⁸ that they be introduced in a similar form in the colonies.

17. There were occasional letters to the paper about more institutions but they were widely spaced. For example, the SYDNEY MORNING HERALD on 5 May, 1859 and 26 October, 1866 both contained letters. Colonial institutions by then ranged from the Female Convict Factory of 1822 to the Female Refuge Asylum of 1858.
18. It was discussed in the SYDNEY MORNING HERALD on 21 March and 2 April, 1870. On 23 February, 1876 the matter gained wider publicity when the paper reported that the Inspector-General had revealed that there were 270 known prostitutes in Sydney.

Queensland and Tasmania did in fact do this; Victoria and South Australia did not. New South Wales followed its usual course of reluctantly following suggestions¹⁹, but the Bill, when it appeared in 1875, ran into small scale but organised opposition.

It was introduced by James Farnell, and immediately challenged by Henry Parkes. Parkes was a convinced opponent whose eloquence was badly needed as support for the Bill grew. He was well informed about Mrs. Butler's campaign and in personal touch with her, sanguinely promising her that she could cease worrying about the possibility of the Bill being passed in New South Wales. As it happened, he was very nearly proved wrong.

Parkes' correspondence with Mrs. Butler began at the time of the introduction of Farnell's first Bill. He claimed that there was no discussion before 1875 and the introduction was a complete surprise to him. Farnell he described as a

well meaning, conscientious man (who) ...
sees himself as a social reformer .

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19. Henry Parkes was Colonial Secretary when the original request to pass legislation arrived in 1866. He had deliberately ignored it, but James Farnell had taken up the matter.
20. Henry Parkes to Mrs. Josephine Butler, 8 May, 1876.
Parkes Correspondence, Vol.45, pp.519-29. Mitchell Library Sydney.

He asked Mrs. Butler in the course of his correspondence for further information and literature about the subject and particularly for facts proving "hygienic failure of all legislative enactments, police regulations on the subject."²¹ He was not in favour of a depot for the sale of publications about the matter in view of his belief "that the less the young community knew of the subject the better."²² Parkes may have been reflecting a general repugnance, echoed by the almost total newspaper silence.

Between 1875 and 1882 the Bill made a number of appearances, and despite Parkes' opposition, generally succeeded in raising a majority in the Lower House. Its apologists were both anxious to do as the Imperial Parliament requested and earnestly convinced that they had been shown an excellent method of controlling the evil. In the long run the Bill owed its defeat to a number of factors: influential opposition, the fortunate lapsing of the Bill in the Lower House, the dissolution of Parliament, and finally the repeal of the English Acts.

The effects in New South Wales of Mrs. Butler's twenty year campaign were thus both direct and indirect. As far as her views affected later legislation in England, they certainly indirectly affected the imitative social legislation concerning women in New South Wales as well. But as far as the actual

21. Ibid.

22 Ibid.

passing and repeal of the laws themselves were concerned, her influence was far more direct and immediate. News of their repeal, for example, effectively stopped the persistent agitation for similar laws in New South Wales; thereafter their only convinced supporters were members of the recently formed New South Wales Social Purity League.

The general attitude of Members of Parliament to questions concerning women was varied and personal. Intensely liberal on some points, many could prove remarkably conservative on others. Parkes, for example, fought the Contagious Diseases Bill and introduced the first women's suffrage resolution but he appeared to have disapproved violently of other liberal legislation. He opposed the Divorce Acts, saying in 1870 that women should make the best of their marriages, and he showed a lively fear of American-inspired amendments. Sir William Manning, who voted against the Divorce Bill, was nevertheless in favour of higher education for women, while David Buchanan, a firm upholder of liberal divorce laws, was not in favour of the franchise extension. Sir Arthur Renwick, who sponsored factory legislation to improve the working conditions of women, became a long-time opponent of women's suffrage. Sir William Manning was influenced by his standing in University circles. David Buchanan was an admirer of the Scottish divorce laws and Sir Arthur Renwick, as a doctor, was concerned with the effect of working conditions on women's health.

Similar inconsistencies characterised other Parliamentarians of the period. There was no party or faction line-up for or against legislation affecting women and no government stood or fell on its attitude to them.

CONCLUSION

By 1880 a number of important measures had become law in New South Wales which considerably improved the legal status of women. Women themselves had played almost no part in agitating for the passage of any of these measures. The Acts were passed almost solely because of overseas example and because the Imperial Government had signified that such Acts should be considered. In many cases New South Wales displayed a greater reluctance to introduce more liberal legislation than other Australian states and a far greater degree of conservatism. Nevertheless, by 1880 New South Wales women were enjoying many of the same legal privileges as their sisters overseas and many had become aware of this improved status. From this point the extent of women's active participation in much public life in New South Wales became greatly accelerated.

23. Many Parliamentarians who supported one aspect or another of this legislation had wives active in public affairs. Sir John Hay, Sir Alfred Stephen, Sir William Manning, Sir William Windeyer, all championed various causes and their wives served on various committees.