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WOMEN'S CONTRIBUTION TO LAW REFORM
IN NEW ZEALAND

I want to commence my story about Women's Contribution to Law Reform by introducing to you, Ethel Benjamin, New Zealand's first woman lawyer (second in the British Empire). Over the years quite a few facts have been gathered to give us a snapshot of Ethel Benjamin – this intelligent, determined, plucky young woman born in Dunedin in 1875 whose heart set itself on studying law. It is interesting to reflect that this young woman, whose example and contribution we today regard as highly significant, was seen by many of her legal peers as outrageous and an embarrassment. She was treated with resentment and subjected to discrimination. If only she could know, that the spirit with which she met the many rebuffs was not in vain - for at times she must have wondered - and that today her efforts are applauded. She is a star in the 21st century. Her contribution is recognised by a commemorative address delivered each year in Dunedin.

We know that when Ethel Benjamin started her law degree at Otago University in 1893 she did not know whether she would be able to practise law when she completed her degree. But she was no doubt alert to the momentous event that would occur later that year: women won the right to vote in September 1893.

For Ethel Benjamin to practise law, required the passage of the Female Law Practitioners Act of 1896. The Act's portentous preamble recorded:

Whereas women are now prevented by statute from exercising their talents in the study and practice of the law, and it is desirable that such disabilities shall no longer continue ...

The Act did not have an easy passage through Parliament. There was, for example, a luminary by the name of The Hon Sir G S Whitmore who, in opposing the Bill, complained that it would have the effect of:

[i]nducing a number of females to quite unsex themselves and to neglect the ordinary female duties.

The provisions of the Female Law Practitioners Act 1896 have always interested me. Whereas under the Law Practitioners Act, men who wished to practise law had to pay their fees and pass the appropriate examinations and prove themselves to be persons of good character, there was no such requirement under the Female Law Practitioners Act, that women should be of good character. I choose to assume that was because it went without saying that women are of good character; or perhaps it was that Parliament thought it impossible. However, they found out all about us women, because in 1908 the two Acts were amalgamated into the Law Practitioners Act of 1908 and from then on women as well as men who wish to practise law have had to prove that they are of good character.

Ethel Benjamin was accorded the honour of giving the reply to the Chancellor's address at the graduation ceremony in 1897. One wonders if she was a fill-in at short notice for she said:

It was only yesterday that I was asked to undertake this pleasant task, and while deeply sensible of the compliment paid to me, I was somewhat diffident about taking so much upon myself at so short a notice. But I knew that little would be expected of me and even if I succeeded in talking nonsense, the charitable verdict would be, oh well, it is all that can be expected of a woman.

She went on to say:

... it is well that women should make such an inroad into the fields of labour. We should come to a position where women should be economically independent of men and should marry for love and not just for a home.

Her speech was regarded as an outrage. To me it is at once immensely sad and quite remarkable; sad in encapsulating the legal and conventional barriers that denied choice to women, and remarkable in foreshadowing the struggle which would occupy the next century and which is ongoing, to accord to women the financial and the economic independence which is essential to the exercise of choice, and full participation in society.

I wish I had known of Ethel Benjamin when I started to study law in 1960. It would have encouraged me greatly. There were very few women studying law at that time. Ours was the first year at Auckland University in which two women graduated from

the law school in the same year. But I did not know of Ethel Benjamin. In fact I knew very little about what I was taking on when I enrolled for an LL.B degree in 1960 except that, like Ethel Benjamin, I wanted to study law.

I recall my interview with the careers' liaison officer, a Mr Turtle. Such an interview was compulsory. He immediately expressed disapproval that I was entering University after only four years at secondary school. "Tut", he pronounced. I explained to him that I wished to study law, that it was a lengthy degree course and I had decided to get started. He retorted "Tut, tut. Study law. But you're a woman". I agreed that I was. He professed considerable cynicism that even if I were to attain such a degree it would ever be of any use to me. He concluded with another "Tut", a sniff and a direction that if I insisted on coming to University from the first year 6th and, as a woman, undertaking a law degree, I had better make sure I passed my first year's units. I should therefore take only three units. I took only three units. Looking back I wish I had had the opportunity to point out to Mr Turtle that for Ethel Benjamin to practise law, an Act of Parliament had to be passed, and all I wanted was the opportunity to do something upon which my heart was set and which I believed I could achieve.

Ethel Benjamin was a pioneer. Many women who have followed her in the law have also been pioneers and continue to be. For there have been so many "firsts" to encounter along the way, so many instances when the spirit exemplified by Ethel Benjamin has had to rise to the fore to ensure that, no, women will not suffer disadvantage and discrimination because we are sisters in law, rather than brothers in law.

In New Zealand we still carry something of the pioneering spirit; a belief that we can make it happen, that we individually and together, can, will and do make a difference. We might well think that it all *has* happened in New Zealand when you consider our seats of power. The Prime Minister Helen Clark, the Speaker of the House and former Attorney-General Margaret Wilson, the recently retired Governor-General Silvia Cartwright, the Chief Justice Sian Elias. We might well be forgiven for asking, do men have any say any more in New Zealand. We know the answer – emphatically yes. My hope is that history may show that the long travail of women

to gain recognition and implementation of their rights, contributes to their being leaders who are just, wise and fair to all, freed from the entrenched attitudes and stereotypes that have led to and perpetuated discrimination against women and other groups, through so many generations, governments and judicial systems. History will judge us.

Early Pioneer Women

Tonight I want to talk about just some of the ways in which women have influenced law reform in New Zealand. But that topic cannot be validly addressed without recognising the contributions of the early pioneer women to every aspect of human struggle and existence in this youthful country. Because when we begin to think about legal rights and responsibilities, certain assumptions are made: for example that basic human needs such as food and shelter are taken care of, at least to some essential level. What was it like for those women?

Many of you will have seen Jane Campion's film "The Piano"; the upright piano, the long black skirts of the English immigrant woman, the dense bush, the rain, the mud – endless deep, thick mud - of this new country she had to call home. You might have reflected that the woman and her environment were badly matched; incongruous.

Arini Tonore and Riperata Kahūtia were both daughters of Chiefs, Arini Tonore in the Hastings area and Riperata Kahūtia at Tologa Bay. Arini Tonore married a pakeha in 1877; Tonore is the Maori version of her husband's name Donnelly. She entertained royalty but as well as being renowned as a social hostess she was a strong and able advocate for the rights of her people in the native land courts. She was described as "a revelation of advocacy and understanding of the law".

Riperata Kahūtia had little English but in the 1870's she travelled to the Privy Council in the company of an interpreter to assist in putting a case about Maori land rights to their Lordships. She stood fearlessly and conducted the case in Maori with her interpreter translating to English, and she won it.

So as I turn to consider how women have contributed to reforms which represent milestones for the progress of women in New Zealand, it is important not to forget the many women, each of them heroines, who often in conditions quite foreign to them made homes, grew food, reared and educated children, and also shared in the life of the community around them, contributing their considerable skills and perseverance to developing a society which was better for all.

Civil and Political Rights

The starting point is indisputably Kate Sheppard and the Women's Suffrage Movement. While Ethel Benjamin in 1893 determinedly started to study for her law degree not knowing if she would ever be able to practise, the suffrage movement was about to achieve its main goal. New Zealand women won the right to vote in September 1893. You can see Kate Sheppard on the back of a \$10 note.

For nearly a decade, a group of women worked tirelessly to gain for the women of New Zealand the right to vote. Their goal had to be to convince members of Parliament that the necessary legislation should be passed. Kate Sheppard was an outstanding tactician both as a public speaker and a writer. Her contribution to the campaign for women's suffrage was incalculable. The movement was strongly based in the women's Christian Temperance Movement and Kate Sheppard in 1891 began editing a page in their magazine to promote votes for women. She set out here some of her most telling Reasons for Women's Right to Vote:

- Democracy – Because it is the foundation of all political liberty that those who obey the law should be able to have a voice in choosing those who make the law. Thus a Parliament that does not represent women, who are half the people, does not reflect the wishes of the people.
- Special Needs – Because some laws such as those which restrict women's guardianship of their children, which accept different standards of morality for men and women, or which afford women inadequate protection, press unfairly on women.

- The effect of the vote on party politics – Because women’s vote would not support a particular political party, but would generally add weight to more settled and responsible communities.
- Justice – Because large numbers of thoughtful, educated women deserve the Franchise ... it is just.

For the suffrage campaigners the right to vote was not simply a matter of abstract principle. They wanted to change society by their votes, to acknowledge the place of women in it, and to protect them where necessary.

Petition pressure was mounted and maintained. In 1892 more than 19,000 women signed the petition presented to Parliament. Electoral bills were introduced and abandoned. In 1893 a petition was signed by nearly 32,000 women, between a fifth and a quarter of the adult female population of New Zealand at that time. There were anti-suffrage petitions as there had been for many years. All the old tried tactics of obstruction were employed. An all-out-last-ditch effort was made to convince the governor Lord Glasgow, that he should block the bill.

Jessie MacKay a poet and feminist and one of the founding members of the National Council of Women described their opponents this way:

They little know of suffrage
Who only suffrage know.

The Bill was finally passed into law. On 28 November 1893 the populace resoundingly voted in the Liberals who had granted women the right to vote. 90,219 New Zealand women cast their vote for the first time.

Out of the suffrage movement grew the National Council of Women. In Kate Sheppard’s words:

We women need self education, and we know of no more thorough method of educating ourselves and each other, than by discussion and study. Having obtained the franchise, it is of the utmost importance that we women should be thoughtful and well informed.

I admire those words; I cannot think how to better them over 100 years and many developments later – that we women should be thoughtful and well informed.

Kate Sheppard was the first president of the National Council of Women, a movement which has been particularly important in promoting women's rights in New Zealand. Apart from a decade from about 1906, the National Council of Women has commanded the attention, not only of women, but of parliamentarians and persons in organisations of influence. Through networking it claims to speak for a quarter of a million New Zealand women. Its parliamentary watchdog committee formed in 1966 has a well-deserved reputation for thorough, constructive, balanced submissions on bills before parliament, of which it scrutinises approximately 85%.

Margaret Wilson in an article in 1993 described the National Council of Women as:

[t]he most persistent and professional presenter of submissions from the perspective of women. Their submissions are well researched, considered, written after consultation, *and frequently ignored*.

In 1919 women obtained the right to sit in Parliament with the passing of the Women's Parliamentary Rights Act. The first woman entered Parliament in 1933 and Kate Sheppard lived to see the day. She was Elizabeth McCombs. Her maiden speech included these words:

... Nothing will happen during my term of office that will disturb the harmony of relations so created. I would like to warn the honourable members, however, that women are never satisfied unless they have their own way. It happens in this case the women's way is the right way.

In 1949 Iriaka Ratana became the first Maori woman member of parliament. She confronted an issue which is live today, that on most Marae women do not have the right to speak. Mrs Ratana when denied the elders' permission to speak on a Marae in her electorate, responded:

I will respect your kawa to the letter, so that I will even keep silent in the House when your matters arise.

Although universal suffrage did not occur until 1893, women had the right to vote in municipal elections from 1875. The day after women got the municipal vote, Elizabeth Yates was elected Mayor of Onehunga in Auckland. She took up office at

a controversial period. As a result of her election four council members resigned, the Town Clerk left and the fire brigade threatened to walk out. She was bold however.

At her installation ceremony she said:

They have tried men in Council for 17 years ... with unsatisfactory results and they would find the affairs of the Borough would be looked after more efficiently with a woman at their head.

However, three of the nine councillors began a policy of automatic opposition to everything she suggested, and at one meeting more than 200 spectators came to watch the antics this caused.

Jury Service

Women in New Zealand had to wait a long time for the right to serve on juries. This is surprising given the vigour and success of the suffrage movement which led to New Zealand women early having the right to vote.

The Juries Act 1880 provided that “every man ... is liable to serve as a juror”, which mirrored the British legislation. But in 1919 the British Government passed an Act which allowed women to serve on juries, although they could exempt themselves.

In 1914 Lady Stout whose husband became Chief Justice, led a deputation demanding that women be allowed to serve on juries in cases where women and children were involved. Inherent in the initiative was of course, the claim of equal treatment for women, but also the concept that women on juries would benefit society generally. It was only in 1942 that the Juries Act was amended to allow willing women to serve on juries and it was not until 1963 following another campaign headed by the National Council of Women, that jury service for women was made compulsory. Even then women could exempt themselves on the grounds of gender. In 1976 this last provision was repealed.

So it has been a slow road to achieve a situation the benefit and justice of which, I believe speaks for itself. Women on juries do benefit society generally and greatly. From my perspective as a Judge presiding over many jury trials, I believe the

dedication, life experience and wisdom women bring to juries, is immeasurable. I take great comfort as any jury is empanelled comprising a good mix of gender, colour and creeds. I believe the recent removal of the upper age limit has also had a beneficial effect on jury composition.

Property Rights

When representatives of the British Government signed with the Maori chiefs in 1840 the Treaty of Waitangi, New Zealand essentially inherited English statute law which was re-enacted in New Zealand as appropriate; also English common law and equity. Private property was the norm. Community of property accepted in Scotland and most European and many Asiatic countries, had no place. Likewise there was no place for Maori laws and customs.

So it is from the background of private individual property rights and the common law principle of matrimonial unity, that New Zealand's property law developed. This had two consequences. First that the two spouses became one person, and that was the husband for legal purposes. Secondly, that the husband was the controlling mind and representation of the marriage union. On marriage the husband had exclusive right to the use of and income from his wife's property and retained an interest in her property after death, provided there were issue who could inherit.

In preparing for this address I have found it most interesting and enlightening to look back over the 100 years of resolutions of the National Council of Women.

From the earliest times their approach to these issues has been principled. I can imagine the anxious and determined analysis of each proposal to ensure that it met with the principled approach adopted by the Council: that is, it met the criteria of achieving equality for women with men, and also of being beneficial to society at large.

In respect of the doctrine of coverture, the common law doctrine which denied a married woman financial capacity in relation to matrimonial assets and income and her own assets acquired before marriage, the Council resolved in 1896:

This Council is of the opinion that the marriage laws of New Zealand should be rendered remedial, not merely palliative, of disabilities at present grievously affecting married women, and to this end the whole law relating to marriage founded on the exploded doctrine of “possession” or “coverture” should be repealed.

The Married Women’s Property Act of 1884 gave married women the capacity for acquiring, holding and disposing of property in the same manner as an unmarried woman. This was a theoretical advancement but of little assistance to the ordinary woman without independent means who stayed at home, looked after the children and had little or no property to which the Act could apply. She seldom had an interest in the family home. This was regarded as the husband’s, because in most cases he paid for it. Joint ownership was discouraged by gift duty.

It was not until the Matrimonial Property Acts of 1963 and 1976 that a regime was introduced which gave recognition to the concept of equal sharing in the matrimonial partnership, a significant advance.

But nothing is static. In 1988 the National Council of Women passed the following resolution:

... that NCW while upholding stable marriage as the ultimate basis and the hope of our society, also condemns the exploitation of women, and consequently supports in principle legislative measures designed to ensure equal shares in the division of property on the break-up of de facto marriage partnerships under conditions comparable to those in the Matrimonial Property Act ...

The 1988 resolution reflects how much families have changed since the last century. Today a law that relies on the so-called nuclear family as the norm, cannot hope to do justice sufficiently. De facto relationships have become mainstream and the concern is now to protect women in these relationships.

Property (Relationships) Amendment Act 2001

In 2001 the Matrimonial Property Act 1976 was renamed the Property (Relationships) Act 2001. The purpose of the new Act was to comprehensively amend the principal Act by extending the property division regime so that it applies to the division of property amongst de facto couples when they separate or one of

them dies. The Act applies to de facto heterosexual relationships and gay relationships as well as marriage.

The Act aspires to achieve equality of outcome for former partners (married or de facto), rather than the previous focus of matrimonial legislation which was one of equality of division of matrimonial property at the time of the property split. While the Matrimonial Property Act sought to even out the imbalances that occurred on separation by recognising the equal contribution of both partners to a marriage, it failed to recognise the post-separation inequality which continued for so many who had chosen, or been relegated to, the role of caregiver or home-maker. In the case of *Z v Z* [1997] NZFLR, 241 the Court of Appeal issued a clarion call for legislative intervention to address the issue of financial equity between parties.

There are a number of provisions in the 2001 amendments designed to assist partners who will be in an economically weaker position after the end of a relationship:

- The economically stronger partner may be required to provide a lump sum or other compensation to the economically weaker partner.
- The vesting of relationship property can be deferred if there are dependent children; and
- Where one partner has concentrated on their own separate property during the relationship, some compensation may be ordered where there is otherwise economic disparity.

Earnings

Employment and Equal pay and opportunity in the workforce were always high on the agenda. An 1896 resolution of the National Council of Women which focused on earnings, particularly interested me:

That this Council is of the opinion that in the eye of the law every married woman should be held to share and share alike in the earnings of her husband; that if she also earned money it should go into the common treasury, that every facility be given to the woman, if she so desire it, at any time requiring her share of the joint income, should be paid into her separate account, or that her name should be included with that of her husband in their common bank account.

That was also a resolution of 1898, 1899, 1900, 1901, 1902. Margaret Sievwright and Kate Sheppard were two of the leading proponents of this resolution. They referred to the humiliation of always having to ask for money.

Today there is no real change. Both spouses have a liability to meet the reasonable needs of the other spouse while they are married. With the removal of impediments to married women being able to take outside employment, came an expectation that married women should work and support themselves. But this does not mean that women today are not faced with many of the same dilemmas as women 100 years ago. There has been no revaluation of women's worth within the home as being the equivalent of external employment. The liability to maintain during marriage does not translate to placing a woman in possession of money of her own, as does a wage earned outside a home.

Health Issues

As you can imagine, health and education were always matters of deep concern to the NCW. They were unimpressed, for example, by speeches in the early 1900's by Dr Frederic Truby King and the obstetrician Ferdinand Bachelor claiming that higher education for girls was dangerous to their health and that of their future children. They agitated for a more effective voice for women in shaping education and health policy.

Women in the Legal Profession

From the time of Ethel Benjamin, there have been a number of significant women in the legal profession, and this is particularly so today. I believe we will in future look back on the formation and early jurisprudence of our fledgling Supreme Court, and recognise the significant input and influence of our Chief Justice, Sian Elias. But although there has been a dramatic increase in the number of women entering law schools and qualifying as lawyers – well over half of those admitted to the Bar for more than a decade – women are still under-represented in the practising profession today and they are under-represented in the judiciary.

The NZLS reported in June 2004 that women were considerably more than half the law graduates and 60% of the admissions to the Bar. But from there, the proportions drop off – 37% of practising certificates and around 24% of Judges. Those percentages seem to be more or less mirrored in the medical profession: the 2003 survey by the Medical Council of New Zealand reports that the proportion of women doctors was 35%, an increase of 1% over 2004; and women were 30% of specialists. The Medical Council report also shows that by the third year after graduation approximately 20% of doctors from a graduate year will be lost. I have not seen comparative loss statistics for the legal profession. They would probably be similar, though I expect attrition may impact more gradually. There is no breakdown of how many of the lost graduates are women, or why they are lost and where they go. But it is undeniable that women are not sufficiently retained or represented in the senior ranks of our professions. Research in the legal profession suggests a number of reasons for the under-representation of women, which again I think would be reflected in both professions.

- The maleness of the legal profession.
- The hours of work demanded which are incompatible with raising a family.
- The expectations of clients as to availability of their lawyers.
- The retention of traditional habits and attitudes, such as Court sitting hours, Court dress, which are less manageable and less acceptable to women than to men, who after-all created the system in the form in which we still practise today.
- Women have more choices than men.

Representation of women in all aspects of legal and judicial work is crucially important. Legislation is not the only way in which the law is made. Judges interpret the law and develop legal principle. They make law. Judges are clearly influenced by their perception of the factual background, which in turn is influenced by gender, social and economic backgrounds, i.e. by their own social context. A couple of reflections on the relevance and importance of social context:

(Honourable Claire L'Heureux-Dubé (SCC, ret.,) Address to NJI, "Social Context: It is Not Law?" Montreal, 2003):

There is no doubt that equality is a component of justice, just as independence and impartiality are. All three require that judges take into account the social context of facts and law in order to render justice since people are contextual as much as law is ... without social context, there is no justice.

(Edwin Cameron (now Justice of the Supreme Court of Appeals, South Africa), "Judicial Accountability in South Africa" (1990):

Judges do not enter public office as ideological virgins. They ascend the Bench with built-in and often strongly held sets of values, preconceptions, opinions and prejudices. These are invariably expressed in the decisions they give, constituting 'inarticulate premises' in the process of judicial reasoning.

I would say this: Contribution by women across the board, is essential to avoid resort to assumptions that reflect entrenched views. Unless there are women active in every aspect of the law, on our juries, in the legal profession, as teachers and researchers, as members of the judiciary, then justice and women's access to justice are seriously impeded. For as we all know only too well, legal recognition of rights is one thing, recognition in fact is another. The translation of theory into fact is a necessity and an entitlement for women, as it is for every member of our community.

Conclusion

Justice Bertha Wilson, the first woman appointed to the Supreme Court of Canada in 1982, said in 1998 when she was the first recipient of the Human Rights Medal awarded by the International Association of Women Judges:

The century which is now drawing to a close has seen a truly remarkable evolution in the status of women. Women have made and continue to make a difference. They have been a defining and civilizing influence on our society: they have given it a more human and humane face. They have tempered violence both domestic and social, and in their concern for children have transformed a mothering instinct into a social and professional responsibility. ...

There is still much unfinished business, but I am confident that in the new millennium, the degree of women's participation in all walks of life will reflect more accurately than it does today, the reality that they are more than one-half of the human race.

The reality to which Justice Bertha Wilson referred is the same reality addressed by Kate Sheppard in 1891. And that same reality was emphasised recently by another famous Canadian, Stephen Lewis, who is the UN special envoy for HIV/Aids in Africa - but he spoke without the same sense of optimism. Stephen Lewis is one of 24 living Canadians who holds the Order of Canada. Speaking last year to a Summit on Global Issues and Women's Health in Philadelphia. He said:

We're looking towards the day when Governments are finally made to understand that women constitute half of everything that affects human kind, and must therefore be engaged in absolutely everything.

He continued:

I'm 67 years old. I am a man. I spent time in politics, diplomacy and multi-lateralism. I know a little of how this man's world works but I still find much of it inexplicable. I don't really care any more about whom I might offend or what line I cross; that's what's useful about inching into one's dotage.

I know only that this world is off its rocker when it comes to women. I must admit that I live in such a state of perpetual rage at what I see happening to women in the pandemic, that I would like to throttle those responsible, those who've waited so unendurably long to act, those who can find infinite resources for war but never sufficient resources to ameliorate the human condition ... I have it in me only to join with all of you in the greatest liberation struggle there is: the struggle on behalf of the women of the world.

Stephen Lewis reiterated those concerns just last month at a conference in Canada on Aids.

For society to progress to best advantage, it is imperative that women be given full opportunity to develop their talents, and to participate in every aspect of public life. The need is so obvious and the justice of the situation so clear, it is surprising that women for generations have had to show great determination and strength of purpose against considerable odds, to achieve change which is for the benefit of all.

In New Zealand, a young country settled by people of pioneering spirit who faced change, sometimes dramatic change, on a daily basis, the environment has perhaps been more conducive to effecting change than in some jurisdictions. I believe we women in New Zealand have been well served by the women who preceded us. Yet, the struggle has been and is, ongoing. There is a challenge here for all of us in the

legal and medical professions to continue to promote change that protects, supports and enables women to live full and valuable lives in our community, and to contribute fully to society's development and governance. Further, to ensure that when change is achieved in theory it is also translated into a reality. There will never be a time when to achieve those ends, change is no longer necessary.

Change to achieve equality is an individual, domestic, national and international imperative. It is not possible to win every battle; we cannot please everyone along the way; but that is a price well worth paying in search of equality, for equality is the lifeblood of justice.