WOMEN AND THE EXERCISE OF PUBLIC FUNCTIONS

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There was a time not far distant from the present when social convention and the law alike strictly barred female, married or single, from discharging those duties and functions thought to involve an element of public trust. Such were the legal disabilities imposed upon women that they were disqualified by sex from returning members to Parliament, from electing members to local authorities, and from being themselves elected or appointed to any public office or any body exercising legislative or judicial functions. Curiously, however, the position of women in public law was not unexplored and defined with any certainty until concerted efforts were made by English feminists to break down the legal barriers of prejudice and prevailing notions of propriety. Only when a sufficient number of determined female litigants appeared on the scene did the English courts determine authoritatively the extent of the common law disqualifications and pronounce upon the appropriate legislative formularies for the removal of these disqualifications.

Although the movement for emancipation of women in England began in the early part of the nineteenth century, removal of legal disabilities respecting the exercise of public functions was not fully realised until 1918 when provisions were permitted for the first time to sit in the House of Lords. The experiences of Australian women in some respects were more fortunate, for in such matters as the franchise, common law disqualifications were removed earlier and with far less opposition and civil disturbance than accompanied suffragettes activity in Britain. Adult female suffrage was not granted in Britain until 1928, whereas in Australia, Victoria, the last State to give equal voting rights to men and women, endured female franchise in 1899, ten years before the British Parliament made the first concession by extending the franchise to women of thirty years and over. In other respects, the time lag between British and Australian reforms was less pronounced: only Queensland and Victoria unequivocally declared women qualified to be elected to Parliament before, or about the same time as the British Parliament in 1918 enacted that women should "not be disqualified by sex or marriage from being elected to or sitting as a member of the Commons House of Parliament." Only New South Wales took the lead from Britain in enacting a general sex disqualification removal statute (in 1918), whilst the corresponding Victorian and Western Australian statutes of 1926 and 1928 respectively have been modelled on the British Sex Disqualification (Removal) Act of 1914 which provided that:

A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal charter or otherwise) and a person shall not be exempted from the liability to serve as a juror.

In the absence of express disqualifications removal provisions, the question of whether women are eligible for the exercise of public functions regulated by statute, usually turns on interpretation of the word "person." Notwithstanding that in 1850 the British Parliament declared that words of the masculine gender should import words of the feminine gender, English courts have taken the view that this provision in itself is not sufficient to remove common law disqualifications. How far the construction of Australian statutes containing clauses defining the qualifications of "persons" for the exercise of public functions is controlled by the strict interpretation of similar clauses in British statutes is now open to doubt. While there is no modern Australian authority on this issue, an opinion of the Judicial Committee of the Privy Council given on appeal from Canada in 1931, clearly suggests that the exacting requirements in legislative drafting need be fulfilled in the colonics and self-governing dominions then, in Canada, in overruling the advisory opinion rendered by the Canadian Supreme Court upon a case submitted by the Canadian Court of Appeal.

2. Representation of the People Act, 1918 (7 & 8 Geo. 5, c.61), Qualification of Women Act, 1918 (7 & 8 Geo. 5, c.47) and Representation of Voters (Representation of Voters) Act, 1867 (19 & 20 Geo. 4, c.12).

3. N.S.W.: Women's Legal Status Act, 1918 (Vic.: Women's Qualification Act, 1918). This Act was an Act of the same title passed in 1918; W.A.: Women's Legal Status Act, 1919. The South Australian Sex Disqualification (Removal) Act, 1922, dealt only with the offices of Justice of the Peace and Notary.

4. "6 & 7 Geo. 5, c. 71. This Act did not confer on women for the right to be admitted to the civil service in the same grade as men. The women were entitled to be admitted to the civil service on the same terms as men. They were empowered to receive civil service remuneration by Order in Council or from the Government or to receive payment in the form of a pension or, in the event of their death, to receive a pension.

5. Lord Belmore's Act, 1860 (1 & 2 Vict., c.41), s.4. Corresponding provisions appear in Australian statutes and interpretation Acts: see N.S.W. Interpretation Act, 1897, s.33(l); Victorian Acts Interpretation Act, 1928, s.171; Queensland Acts Interpretation Act, 1938, s.23(a); South Australian Acts Interpretation Act, 1925-1938, s.28; Western Australian Interpretation Act, 1893, s.24 III.


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by the Governor-General, the Judicial Committee said that for the purposes of the British North America Act, the "persons" who might be summoned to the Senate included qualified females. Although this conclusion was reached after careful examination of the use of the word "person" throughout the Canadian Constitution, their Lordships made it plain that they did "not think it right to apply rigidly to Canada of today the decisions and reasons therefor which commanded themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development."7

It is not proposed here to discuss in detail what interpretation might be placed upon every relevant Australian statute in which qualifications for the exercise of public functions are defined without express reference to females. Rather, it is proposed to survey the development of the common law in England, to outline the steps and devices by which Australian legislatures have sought to remove the common law disabilities, and to draw attention to some of the general anomalies and uncertainties which should merit legislative attention.

THE COMMON LAW

Neither legal historians nor counsel have yet discovered anything more than isolated and perfunctory references to the status of women in public law before the latter part of the nineteenth century. The absence of judicial authority forced the courts to find their law in "the inductive practice of the centuries," namely, that women had been excluded consistently from public offices and from participation in governmental affairs.9 Several instances were cited by counsel in which women appeared to have discharged functions normally assigned to men, but the courts found rather the sources of information unreliable or the examples given so isolated in occurrence as to provide no basis for the inference that the law was otherwise than as custom indicated.

In the eighteenth century at least two cases involving the eligibility of women to occupy minor offices were contested. In these we find the judges groping for principle, some of them unabashed in proclaiming their conviction in the inferiority of women's intelligence, wit and judgment, and fully persuaded that the impregnability and foolhardiness of conceding to women even a qualified right to fill the duties attached to offices of public trust.10 No attempt was made to catalogue exhaustively what came within the category of public functions, but in removing such offices as that of sexton and churchwarden from the range of offices of public trust the criteria seemed to be the importance of the office, the responsibilities it involved and, in particular, the quality of judgment expected of occupants of the office. In much later years and in different contexts, the definition of public offices was framed not so much in terms of the weight of responsibility but in terms of the source of the remuneration and the nature of the duties of the office. If the public were directly interested in the discharge of the duties and if the officer was paid out of public funds, he was a public officer.11

The origin of the common law exclusion of women from public offices is clouded in obscurity. In Edwards v. A.C. for Canada (1931) Lord Sankey, L.C.,12 citing Tacitus on the German tribes, surmised that the rule probably arose from the fact that persons attending at the deliberative assemblies of the tribes were required to attend with arms, a practice which automatically excluded women.13 When we come to post-Conquest times in England, the close association between offices and property and the difficulties of drawing the line between them makes it impossible to consider the exercise of public functions apart from property rights. Office personal in origin became attached to land and as such hereditary. Polelock and Maitland suggest that this was particularly true of the shrievalities and that ceremonial offices and grand sergeantries became offices which women could carry to their husbands and transmit to their heirs.14 Whether a woman could perform the duties attached to hereditary offices in person appears doubtful. In Coke on Littleton it is noted that Anne, wife of the Earl of Pembroke, Sir John Hastings, who held the manor of Ashey in Norfolk by grant serjeanty, "was adjudged to make a deputy because a woman cannot do it in person."15 However, in Hargraves' annotations to Coke on Littleton it is also noted that Anne, Countess of Pembroke, Dorset and Montgomery, held the office of hereditary sheriff of Worcestershire and exercised it in person and that she also sat with the judges at the Appleby Assizes.16 During Henry III's reign, Ela, Countess of Salisbury was for some years sheriff of Wiltshire.17 In the Duke of Buckingham's Case (1569)18 it was held that if a man holds manors of the king by service of constable and dies leaving daughters, they may, while unmarried, exercise the office of grand

7. id at 134-5.
12. (1900) A.C. 154 at 158.
13. (1900) A.C. 154 at 158.
14. Tacitus, Germ. v. 8 and c. 13. See also Upian, Dig. 1:10:185.
16. 1 Inst. 356a.
17. 3 Dyer 325b, (73 E.R. 640).
constable by deputy. In 1809 the grant to LadyRussell of the
custody of the castle of Dunnington was held good.19

The privilege of returning members to Parliament was yet another
which attached to land and though a few instances have been
recorded of women exercising the privilege,20 the evidence is too
meagre to warrant a conclusion that there may have been recognised
exceptions to Coke's categorical denial that women enjoyed such a
right.21 The question was raised incidentally in Oliver v. Ingrams
(1730)22 but no firm opinion was expressed one way or the other.
Probyn J's doubts were strengthened by his conviction that
selection of members for Parliament "requires an imperfect
understanding which women are not supposed to have".23 It is unlikely
that in the search for precedents favourable to their claim, counsel
for the suffragettes in the memorable series of cases beginning with
Cholton v. Long (1869) left many stones unturned, but the courts
were unimpressed and possibly wearied of the antiquarian miscellany
which counsel had so diligently collected. Finally in 1900, Loreburn,
L.C. closed the historical dispute by observing:24

"It may be that in the vast mass of valuable documents
buried in our public repositories, some of authority, others of
none, there will be found traces of women having taken part in
parliamentary elections. No authentic and plain case of a woman giving a vote was brought before your
Lordships. But students of history know that at various periods
members of the House of Commons were summoned in a
very irregular way, and it is quite possible that just as great
men in a locality were required to nominate members, so also
women in a like position may have been called upon to do
the same; or other anomalies may have been overlooked in
a confused time. I say it may be so, though it has not been
established.

"Liability to suit at the hundred or county court probably was
not imposed upon women or their land, but there was no legal bar
against attendance if women so desired. During Henry II's reign,
personal attendance at the sheriff's turns or plenary meetings of
the county courts was demanded but Folcoch and Maitland suggest that
"this exaction was regarded as an abuse and forbidden" and that
probably suit was performed by deputies.26 In the Mirror of Justice,
the exemption of women from doing suit to inferior courts was given
as their reason why the law forbade women to sit as judges.27 Coke,

20. See documents referred to by counsel for the appellants in Cholton v. Linnet
and Barnes v. University of St. Andrews.
22. Id. at 292
23. Warden v. University of St. Andrews (1800) A.C. 147 at 150-50
24. 5 Inst. 329, 312, 336, 336
25. F. & M. 1, 439-47
27. To accord with the Mirror of Justice the exemption of women from doing suit to inferior courts was given
as their reason why the law forbade women to sit as judges. Coke,

28. 1 Bl. Law, 223.
30. 12 M. R. 385. This appears to have overruled the decision in Ray v. Henley,
10 Atk. referred to in the G.L. J.'s judgment in Oliver v. Ingrams.
31. 584 (18 E.R. 274).
32. 5 Rob. 35 (84 E.R. 979)."
women to be attorneys.\textsuperscript{27} A view which Coke supported and qualified only by pointing out that a woman might be an attorney to deliver ejects to her husband, by which he meant, of course, that a woman might execute a power of attorney.\textsuperscript{28}

Whether the disqualification from exercising public functions depended in any way upon the civil and proprietary disabilities imposed on married women by the common law, is not revealed in any of the cases and authorities discussed in the preceding pages.\textsuperscript{29} Unquestionably these disabilities provided part of the rational foundation of the rule regarding public functions because for many centuries eligibility for exercise of public functions was directly linked with landholding. Further, it needs be remembered that until the present century, the feminine role was regarded more of a social abnormality, than she perhaps is today. Hence, as long as social pressure to marry at an early age, and civil and proprietary disabilities remained, removal of sex disqualifications was not likely to produce any significant change in a system which still reserved voting rights, public offices and places in the learned professions to the married classes.

**THE SUFFRAGE CASES**

Although the franchise was not extended to all adult women in Britain until 1928, the campaign for votes for women had gathered vocal adherents as early as the eighteen forties and fifties. A resolution to extend the franchise to women was moved in the House of Commons in 1848, in 1887 John Stuart Mill moved a similar amendment to the Reform Bill which, if carried, would have conferred on unmarried women householders the same right to vote as men. Not long after the Representation of the People Act, 1832, came into effect it was discovered that Mrs. Lily Maxwell's name had been entered in error on the Manchester electoral register, Mrs. Maxwell, moreover, insisted that her vote be registered. Her initial success prompted 5,346 other ladies of Manchester to claim entitlement to being enrolled as voters.\textsuperscript{30} On appeal from the ruling of the Reviving Barrister of Manchester that the female claimants were not so entitled the Court of Common Pleas in *Charlton v. Ling*\textsuperscript{41} unanimously held that although Lord Brougham's Act of 1832 had provided that "all words importing masculine gender shall be deemed and taken to include females", the provision in the 1887 Act pro-

\textsuperscript{27} Buck v. Ch. 1811 (vol. 7 Select Soc. Publications, p. 86).

\textsuperscript{28} ibid. 89(a), 128(a).

\textsuperscript{29} In *Babb v. Law Society* (1814) 1 Ch. 289, Phillips J. pointed out that the difficulty formerly standing in the way of admission of women to the profession of attorneys was that a married woman, lacking independent contractual capacity, could not enter into binding contracts with clients or execute articles of solicitors.


\textsuperscript{41} (1887-8) L.R. 4 C.P. 204. The judgment of Willes J. is especially noteworthy for its scholarly review of old common law authorities.

viding that "every man" of full age and "not subject to any legal incapacity" was entitled on compliance with certain conditions to be registered as an elector, did not entitle adult females to be so registered.

Without referring specifically to the legislative history of the Act of 1887 or to the defeat of Mill's motion, the judges stated that if Parliament had intended so momentous a change in the common law as that contemplated for by Mr. Chisholm Arney, counsel for the appellants, it should have left no room for doubt. One might have thought that a clause which stipulated that works importing the masculine gender should include females for all purposes connected with the vote, would have brought women into the category of persons entitled to vote. That such a clause did operate to qualify single women to vote at borough elections on the same conditions as men was not denied by the Queen's Bench in *The Queen v. Harrol* (1872).\textsuperscript{42} but married women, said the Court, could not be within the contemplation of the statute. The reason which commended itself to Cockburn C.J. was "that, by the common law, a married woman's status was so entirely merged with that of her husband that she became incapable of exercising all public functions"; that subsequent to the Municipal Corporations Act, 1889, married women had been declared by statute to have capacity to hold property did not affect the analysis, for a statute on property rights could not of itself confer political and municipal rights which did not exist before.

In 1899 five women graduates of Edinburgh University made what proved to be the last bid to win judicial recognition of females as "persons" within the meaning of the electoral law. The applicants claiming the right to vote at the election for the member of Parliament for the University of St. Andrews had been enrolled as members of the University's general council for which reason they alleged that they were persons within the meaning of the Representation of the People (Scotland) Act, 1918, s.27.\textsuperscript{43} The House of Lords in effect adopted the same course as had the Court of Common Pleas in *Charlton v. Ling*. Although further argument was adduced to show that women had from time to time voted for members of Parliament prior to the Reform Act, the Law Lords adhered to the accepted view that at common law and according to Scots law, women had no right to vote and that if so vast a change as disfranchisement was intended by Parliament, plain language to that effect should have been used.\textsuperscript{44}

\textsuperscript{42} 1 L.R. 7 Q.B. 392.

\textsuperscript{43} ibid. 77 (1927-7) L.R. 7 Q.B. 392.

\textsuperscript{44} *Naive v. University of St. Andrews* (1909) A.C. 147.
In all the Australian States the parliamentary franchise was conferred upon adult women on the same terms as men many years before the suffrage was given to women in Britain. In South Australia the vote was conferred in 1894, in Western Australia in 1899, in New South Wales in 1902, Tasmania in 1903, Queensland in 1905 and Victoria in 1906. Adult franchise for Commonwealth elections dates back to 1902.45

The history of the municipal franchise in Australia is even more chequered. In South Australia adult women were entitled to be enabled as citizens and to vote in municipal elections as early as 1881; in Western Australia they became entitled to vote at municipal elections in 1876 and at elections for road district councils in 1888; in New South Wales they could vote at shire and municipal elections from 1898 and at Sydney City Council elections from 1900; in Queensland, they could vote at local authority elections from 1879 and at Brisbane City Council elections from 1884, the date on which the Council was incorporated; in Tasmania, at rural municipality elections from 1884, at Hobart City Council elections from 1893 and at Launceston City Council elections from 1894; in Victoria, at municipal elections from 1893, if not before.46

WOMEN AS PUBLIC OFFICE HOLDERS

In legislation concerning elections for public office the qualifications of candidates are frequently made co-extensive with the right to vote. Hence if women are entitled to vote and if persons entitled to vote are declared eligible to be elected it is not unreasonable to assume that women are not disqualified by sex alone from election. However, in 1889 the Queen’s Bench Division held that although Lady Fanshawe was entitled to vote at county council elections, the absence of express words in the relevant statute declaring female voters to be qualified for election to county councils, she was not entitled to retain her seat on the council.47

In the words of Etheridge M.R., “when you have a statute which deals with the exercise of public functions, unless that statute expressly gives power to women to exercise them, it is to be taken that the true construction is, that the powers given are confined to men, and that Lord Lyndhurst’s Act does not apply.”48

Not until Edwards v. A.G. for Canada (1911) did it begin to emerge that courts might be prepared to treat the word “person” in relation to statutory qualifications for the exercise of public functions as ambiguous and possibly including females. As far as Canadian legislation was concerned the paramount consideration appeared to be, not the presumptive role of construction applied by English courts, but the probable intentions of the legislature and the usage of the word “person” throughout the Act. The object of the British North America Act being “to provide a constitution for Canada, a responsible and developing State” it should not be construed according to canons and presumptions evolved in another age and place.49 Thus far, the Board was only affirming the principle that constitutions are not to be interpreted as ordinary statutes, and being overridden in the instant case only with a constitution, its opinion cannot be taken as having destroyed the relevance of earlier English decisions in the interpretation of non-constitutional statutes. More important from the point of view of general rules of statutory interpretation is the manner in which the Board proceeded to explicate the meaning of “persons” in the context of s.24 of the British North America Act. Reading the Act as a whole it was found that in some sections “persons” must obviously include females; in others “male persons” was used, thus suggesting that where no reference was made to “persons” they should be taken as embracing males and females. No case has arisen for decision in Australia since 1901 in which the authority of Edwards’s case might be tested. All of the State Constitutions except the Tasmanian Constitution now expressly declare women eligible for election as members of Parliament, the

45. W.S.W.; Women’s Franchise Act 1900; see also Parliamentary Elections and Electors Act, 1918-1925, s.23. Visc. Adult Suffrage Act, 1906; see also Commonwealth Electoral Act, 1902, s.31. W.A.; see also Commonwealth Electoral Act, 1902, s.31. Q.; see also Commonwealth Electoral Act, 1902, s.31. S.; see also Commonwealth Electoral Act, 1902, s.31. T.; see also Commonwealth Electoral Act, 1902, s.31.
46. Commonwealth Franchise Act 1901; see also Commonwealth Electoral Act, 1914, s.31.
47. W.S.W.; Local Government Act, 1906, s.4; 48 and 85; Sydney Corporation (Amending) Act, 1906, s.5; see also Local Government Act, 1915, ss.50, 51, and Sydney Corporation Act, 1830-1832, s.13. Visc. Local Government Act, 1900, s.71; see also Local Government Act, 1908, s.72. Q.; see Local Government Act, 1915, s.49; see also Local Government Act, 1920, s.7; City of Brisbane Act, 1924, s.7; S.A.; Municipal Corporations Act, 1861; see also Local Government Act, 1914, s.38. W.A.; Municipal Institutions Act, 1875, s.15; Roads Act, 1880, s.13; see also Municipal Corporations Act, 1906-1906, s.27; and Road Powers Act, 1916-1916, s.33. Tenn. Rural Municipalities Act Amendment Act, 1880, s.4; Hobart Corporations Act, 1883, s.12; Launceston Corporations Act, 1896, s.12; see also Local Government Act, 1900, s.32; Hobart Corporations Act, 1897, s.7; Launceston Corporate Act, 1941, s.7.
49. 61 at 67.
50. [1902] A.C. 134 at 142.
necessary disqualification removal legislation being passed in New South Wales in 1818 (Legislative Assembly) and 1825 (Legislative Council); Queensland, 1915; Western Australia, 1920; Victoria, 1925; and South Australia, 1929. In view of the fact that South Australia was the first State to give the vote to women (1854); it is perhaps surprising that the right of women to nominate for election to the House of Parliament was not spelled out explicitly till 1919. Until then it had been assumed that as qualified electors, women were eligible for election to the Assembly; the eligibility of women to be elected to the Council was not so clear and it was only the nomination of women for election at the Council elections of 1919 that brought notice to the deficiencies of the existing legislation. Preferring not to determine what meaning should be placed on the existing provisions, the South Australian Parliament enacted amending legislation declaring sex not disqualification. Although the Tasmanian Constitution refers only to the "person" qualified for election to the House of Parliament, the fact that in 1922 "person" was substituted for "male person", can signify only that it was intended that henceforth both men and women should be qualified.

Like the Tasmanian Constitution, the Commonwealth Constitution is silent on the sex of members of Parliament; s.44 defines persons qualified for election as persons entitled to vote with additional qualifications as to residence and nationality. Although the section refers to persons in the masculine gender, there can be little doubt that at this stage in the history of the Constitution, "person" eligible for election would be construed as including female electors.

Women became entitled to be elected to local government authorities in South Australia and Victoria in 1894; in Queensland in 1920 (local authorities) and 1924 (Brisbane City Council); in Tasmania in 1921.

51. N.S.W.: Women's Legal Status Act, 1898, s.2(a); Constitution (Amendment) Act, 1924 (No. 1 of 1924); Parliamentary Elections and Elections Act, 1913, s.25; Constitution Act, 1925 (No. 1 of 1925). V.Q.: Local Authorities Act Amendment Act, 1929, s.2; see now Women's Qualifications Act, 1929, s.2.
52. Constitution Amendment Act, 1924; see now Constitution Act, 1954-1955, s.25.
54. Constitution (Amendment) Act, 1925, s.2; Constitution Act, 1924, s.14 Constitution (Amendment) Act, 1924 (No. 66 of 1924).

55. N.S.W.: Women's Legal Status Act, 1898, s.2(a); Vic.: Local Government Act Amendment Act, 1924, s.2; see Women's Qualifications Act, 1924, s.2.
56. Local Government Act, 1926, s.17; and City of Brisbane Act, 1928, s.17. S.A.: Municipal Corporations Act, 1914, s.4; see now Municipal Corporations Act Amendment Act, 1927, s.5; and S.A.: Municipal Corporations Act Amendment Act, 1914, s.15; and W.A.: Municipal Corporations Act Amendment Act, 1919, s.12; Local Government Act Amendment Act, 1919, s.17; Councils Act, 1919, s.2; and W.A.: Municipal Corporations Act Amendment Act, 1919, s.13.
57. Local Government Act (Amendment) Act, 1940; and W.A.: Local Government Act, 1940, s.2 and 3.
58. Cadwallad: Judicature Act, 1952-1959, s.47; N.S.W.: Supreme Court and District Courts Act, 1950-1957, s.47; Qld: Supreme Court Act, 1929, s.2; S.A.: Supreme Court Act, 1926, S.5; and Tas.: Supreme Court Act, 1887, s.3.
60. In re East, In re East, 6 W.L.R. 150.
62. Supreme Court Act, 1929, s.17; and W.A.: Women's Legal Status Act, 1924, s.25.
64. S.R.: Disqualification Act, 1919 (8 and 10 Geo. 5 c. 71).
65. Legal Practitioners Act, 1924.
tions in the States the right to appear before the High Court and again no doubt has arisen whether such persons include females.

Only in three States is there legislation specifically removing the disqualification from holding judicial office. In Victoria (1928) and Western Australia (1923) this has been done in general terms whereas in New South Wales by the Women's Status Act, 1918, the disqualification is removed for named judicial offices. These Acts also rendered women eligible for appointment to magisterial offices and to the office of Justice of the Peace and Coroner.63

In Tasmania women have been eligible for appointment as District Justices (i.e., Justices for cities and municipalities) since 1967, but Territorial Justices are still appointed under prerogative powers vested in the Governor. Although there are two recorded instances of women being appointed as Territorial Justices, it is doubtful whether such appointments were valid. Women in South Australia have been eligible to be appointed as Justices of the Peace since 1921.65 Queensland alone of all the States has no legislation unambiguously qualifying women for appointment as Justices; the Justices Act being silent on the sex of appointees.66

Women are eligible for jury service in all States except Victoria and South Australia. Liability to service in Tasmania, Queensland and New South Wales is dependent upon notification of a wish to serve, but in Western Australia a woman is liable to serve unless she gives notice of her wish to the contrary.67

No judicial decision has been rendered on whether the common law disqualification of women from holding public offices extended to civil service appointments. Since the introduction of competitive recruitment and the regulation of entry and promotions by statute, it has been customary to enact special provisions regarding the employment and tenure of married female officers, but there has been nothing in the way of guarantees in favour of equal treatment of males and females either with respect to admission on the one hand, or on the other hand, eligibility for promotion.

63. In Western Australia women could be appointed to Children's Courts as Justices of the Peace as early as 1881 (Childern's Amendment Act, 1912, and could be appointed District Justices as early as 1919 (Justices Act, 1919, r.31).
64. District Justices Act, 1919, r.31. The Act has been amended and incorporated in the Justices Act, 1959 (set to be proclaimed). Since 1959 District Justices are appointed by the Minister for Law.
65. Sex Disqualification (Removal) Act, 1923.

and rates of pay.67a The British Sex Disqualification (Removal) Act, 1919, affirmed the right of the Crown to regulate admission to the civil service by Order in Council and to reserve posts in the foreign and colonial services to men. The women's legal status legislation in New South Wales, Victoria and Western Australia makes no reference to public service posts but it is arguable that the terms of the Victorian and Western Australian Acts is wide enough to at least remove any common law disqualifications which might have existed.

The Commonwealth public service legislation and the public service legislation of all States but Western Australia and New South Wales, prohibits the employment of married women except in special circumstances.68 In New South Wales, the wives of State public servants are not eligible for employment or continued employment. Acute shortages of school teachers have induced some degree of relaxation of the general prohibition of employment of married women in the service of the State. Female teachers employed by the New South Wales Department of Public Instruction are now employable irrespective of their married status,69 whilst in Victoria they may continue in employment after marriage if they are dect.70 Women employed in the South Australian teaching service must notify the Director of Education of their intention to marry, and upon marrying their permanent appointment ceases. They may however, thereafter, be appointed as temporary officers.71

67a. Under s. 130 the Act is provided by statute or by regulation that in consideration of application for promotion the promoting authority is to give preference to male applicants, promoting a male applicant male applicant over a better qualified female candidate may be held to be an improper exercise of the authority's statutory functions. This would appear to have been the case in the recent case of 'Reynolds v. Crown Employer Appeal Board [1960] 1 W.A.R. 5'. Speaking for the High Court, Kirby J. noted that 'the mere expression of opinion in the periodical press that a sex discrimination board, or the public service is the property of the Commonwealth or of the States to which it is subject, is not conclusive of a sex discrimination board, or the public service is the property of the Commonwealth or of the States to which it is subject, is not conclusive of the fact that the application for promotion was made in circumstances where the applicant was not entitled to be appointed unless she met the requirements of the law and regulations applicable to her.' The fact that the applicants was a woman who was employed as a teacher and not engaged in teaching in the service does not appear to be a valid reason for refusing her promotion if she was better qualified than the men who were offering for it. (The Sydney Morning Herald, Tuesday, Oct. 30, 1960, p. 19, cols. 3 and 4.)
68. Cloth. Public Service Act, 1923-55, s.64; Commonwealth Bank Act, 1949-55, s.188; Broadcasting Act, 1942-50, s.175; Overseas Telecommunications Act, 1946, s.26; S.W. Public Service Act, 1900, s.64 and 65. Q: Public Service Act, 1923, s.51 (1) (a) and Regulations No. 2, formerly reg. 5, of the Public Service Regulations, 1903; S.A.: Public Service Act, 1908, s.69 (1) (a); W.A.: Public Service Act, 1914, s.24; Public Service Act, 1923, s.59.
69. Public Service Act, 1923, s.59. Under s. 35 of the Public Service Act, 1923, s.55, women were eligible to serve only in special circumstances and upon proof that the combined income of themselves and their husbands (other than income derived from the woman's personal earnings) was inadequate for the support of the family.
70. Teaching Service Act, 1923, s.9. This Act incorporates the Teaching Service (Married Women) Act, 1923.
71. Regulations made under the Education Act, 1925-30.
SUMMARY AND CONCLUSIONS

From the foregoing analysis it will be appreciated that changes in the common law regarding the qualification of women to exercise public functions have been uneven both in point of chronology and in the manner in which they were brought about. Only three of the States—New South Wales, Victoria and Western Australia—have enacted general sex disqualifications removal statutes, and States which have led the field in some areas have been among the last to remove other disqualifications. South Australia, for example, was the first of the Australian States to enfranchise women, yet its Sex Disqualification (Removal) Act, 1921, covers only Justices of the Peace and Notaries. Moreover, the eligibility of women to be elected to Parliament was not resolved finally till 1959 and the right to give jury service continues to be withheld from women. Victoria was the last State to enfranchise women yet was the first to permit women to be legal practitioners.

A review of the relevant State provisions reveals that in some States, notably Queensland, South Australia and Tasmania, the question of whether women are qualified to hold various public offices remains open to doubt and dependent upon the interpretation given to the words "person" or "persons". While Edwards case now lends authority to the view that the word should be construed as including females, it is suggested that any doubts should be anticipated and resolved by comprehensive women's legal status legislation such as that which exists in Britain, New South Wales, Victoria and Western Australia. With the possible exception of jury service, no issues of policy are involved in any such legislative changes. The policy of removing common law disqualifications from the exercise of public functions has been long settled and the only issue remaining is whether loopholes should be allowed to continue.

Taken as a whole, the Australian legislation surveyed here reveals little in the way of a consistent and even pattern towards female emancipation. Equal political rights with men were secured for Australian women earlier and with less resistance than was the case in Britain, yet the idea of a general sex disqualifications removal statute was clearly not thought necessary until the English courts had revealed the extent of common law disabilities and the British Parliament provided a model statute. Never has it been doubted by Australian courts that the common law in this respect applies equally in Australia and England and that express disqualifications removal legislation is required. While Edwards case has now thrown doubts upon the application of English decisions in the colonies and self-governing dominions, for better or for worse the present uncertainties be dispelled by unequivocal enactment.

72. On the common law disqualification of women from being appointed Public Notaries; see Re Kithen (1900) S.A. R. 259.