THE RIGHT OF WOMEN TO STAND FOR ELECTION TO THE SOUTH AUSTRALIAN PARLIAMENT

Generations of South Australians have proudly said that ours was the first Australian legislature to grant women the right to vote and also the first to grant women the right to be elected to the Parliament.

However, while the Parliament's intention was clear, the original legislation passed in 1894 did not explicitly state that women would be eligible to nominate and stand as candidates, and to take their seats in the Parliament if they were elected. The intention was only clearly expressed in the legislation in 1959, after a Supreme Court challenge to the right of the Returning Officer to allow women to nominate for election.

Winning the right to vote, and the right to be a Member of the Parliament

When the Hon. Charles Cameron Kingston, as Chief Secretary, introduced the Adult Suffrage Bill into the Legislative Council in 1893, he made it quite clear that women were to become entitled to vote

1. The right to vote for persons to sit in Parliament as members of the Legislative Council, and the right to vote for persons to sit in Parliament as members of the House of Assembly, are hereby extended to women.
2. Women shall possess and may exercise the rights hereby granted, subject to the same qualifications and in the same manner as men.

But clause 4 of the Bill also made it clear that women would not be entitled to be elected to the Parliament.

4. Until otherwise provided by Act, no woman shall be capable of being elected to Parliament as a member of either House thereof.

During debate in the Legislative Council, some Members argued that because the Constitution Act 1855 allowed "persons" to be Members of the Council, women already had the right to stand as candidates for that House, and to take a seat if elected.1 This argument was rejected ("Dr Magarey: I looked into it but there was nothing in it") so the effect of clause 4 would be to clarify the fact that women would remain ineligible to be elected to the Parliament. The clause was negatived in the Legislative Council, not by supporters of the franchise, but by opponents of the idea of women being able to vote, who thereby passed the Bill to the House of Assembly in a state which they thought would be untenable to enough Members of the Lower House that the Bill would lose support and would not pass in that House.2

1 South Australian Parliamentary Debates (SAPD) 16 August 1894: 963-965.
The Legislative Council's removal of clause 4 - the barrier to women being elected to the Parliament – was generally understood to have the effect of giving women the right to stand as candidates and take a seat in the Parliament. Even though women seemed unlikely to take up that opportunity, the Legislative Councillors knew the difficulty that many Members would have with the idea of women being elected to the Parliament, and this could have been a real problem with the Bill.

Knowing the power of the idea that the Bill, as amended, would allow women to be elected to the Parliament, the Minister introducing the Bill into the House of Assembly played the idea down. He remarked that the Bill "did not mean they would take a seat in the Legislature." A Member asked "What reason have you to keep them from here?" and the Minister replied: "No reason except that they do not want to come. All they wanted was to have a voice in electing those who made the laws by which they were governed equally with men."

But Sir John Downer's first words in opposing the Bill at the beginning of its third reading debate were that "this Bill gave to women the same right to sit in Parliament as men." Another opponent, Mr Giles, could "hardly understand how the Government could ask the House to agree to the Bill, seeing that they had given women a right to sit in the House." Mr Landseer "was quite unprepared to see the Premier, who only a few years ago pooh-poohed the principle, support not only giving women the right to vote but also a seat in Parliament. A nice state of things it would be when women had a seat in Parliament, and the action of the Premier proved to what extent some Members were prepared to carry some of their peculiar freaks."

Clearly, the Members understood the Bill to give women the right to take a place in the Parliament as well as the right to vote under the same circumstances as men, and when the Bill passed in this form, they clearly understood the legislation to say that that women had not only gained the right to vote, but had also gained the right to stand as candidates and to take their seats if elected to either House.

The Commonwealth legislation

A similar legal situation existed in relation to women as candidates for the Federal Parliament.

The Commonwealth Franchise Act 1902 stated that 'all persons not under twenty-one years of age whether male or female married or unmarried' would be entitled to vote in federal elections. (The Act excluded Aboriginal women and men unless they were eligible to vote under state law). One of the qualifications for candidates for election to federal Parliament is that they are eligible to vote in federal elections. The removal of the requirement that voters be male, which had been carried into the first federal elections in 1901 by all states except South Australia and Western Australia, also removed that qualification on eligibility to stand for the federal Parliament. Once women had the right to vote in federal elections, they had the right to become members of Parliament. This issue was barely discussed in parliamentary debates on the Franchise Act in 1902.

There was a lot of public discussion, however, when, in December 1903, at the first federal election following the passage of the Act, four women nominated for election. Vida Goldstein (Victoria), and Nellie Martel and Mary Ann Moore Bentley (New South Wales), stood for election to the Senate, and Selina Anderson stood for the seat of Dalley (New South Wales) in the House of Representatives. They were the first women nominated for any national Parliament within what was then the British Empire; none of the women were elected.

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3 Adult Suffrage Bill, 2R by the Minister of Education, SAPD 8 November 1893:2238.
4 SAPD 17 December 1894: 2921-2922.
5 The Adult Suffrage Bill 1893 passed on 21 December 1894 and was reserved for Royal Assent. It became the Constitution Amendment Act 1894.
Making things explicit

In South Australia, the fact that women's eligibility to stand was not clearly stated in the Constitution Act 1855 (SA) meant that it remained unclear on some readings of the law. In the dying days of the 1916 Parliament, South Australian Labor Premier Hon. Crawford Vaughan put forward the Parliamentary Qualification (Women) Bill "an Act to remove Doubts as to the Qualification of Women to be Members of Parliament". That Act would have interpreted the Constitution Act 1855 (SA) provisions as follows

3(1) Notwithstanding any law or usage to the contrary, the fact that any person who is otherwise qualified to be elected a member of the Legislative Council or the House of Assembly is a woman, shall not be held to disqualify her to be so elected, or to sit or to vote in the House whereof she may be elected a member, or to take any part in the proceedings of such a House which might be taken by any member thereof who is a man.

(2) For the purposes of giving effect to the provisions of this Act, every word in the Standing Orders of either House, as well as in any Act, of or importing the masculine gender, shall be read and construed as including the feminine gender.

In his second reading speech Mr Vaughan stated that the Bill was necessary because no express provision had been made in South Australia to recognise the right of women to be Members of the South Australian Parliament. In 1894, when the franchise provisions of the Constitution Act 1855 (SA) had been amended,

"any person" would have meant "any male person" and unless that clause has been expressly altered by subsequent Acts I take it that the limitation of sex would still apply. That is the reading put on it by the Parliamentary Draughtsman, and by the Crown Solicitor. ........It might be possible that women are entitled to sit in the House, but it is not well to leave that point in doubt.7

In reply, the Hon AH Peake for the Opposition denied that there was any doubt about the provision "in the minds of anyone familiar with the practice of Parliament", and argued that no concrete case had arisen to challenge the belief that women were currently entitled to be elected as members. He also argued that if such a concrete case should arise it would be a matter for the courts, not the Parliament, to decide on any ambiguity. "Legislators ought not to be bothered in legislating on abstract questions to remove doubts where the doubt has never been raised publicly."8

Both speakers were at pains to say that they would not deny the right of women to vote or to sit in Parliament, and to most Members even raising the question may have seemed pointless. Mr Peake looked to a day in the future when women might be elected to the Parliament and thought that

I do not think it is at all probable, if any women were elected as members of this Parliament, that anyone would be daring enough to take exception to their right to sit in this Chamber.

Perhaps neither party really thought the matter was one of importance. The Parliamentary Qualification (Women) Bill was introduced in the final week of sitting and lapsed at the end of that week, when the Parliament was prorogued.

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7 SAPD 24 August 1916: 955.
8 SAPD 24 August 1016: 980
Rewriting the Constitution Act

The clarity of the statutory provision was raised again in 1934, when South Australia’s various Constitution Acts were consolidated, and the sections relating to the right to vote and to be elected were re-written. The section relating to the right to be elected to the Council became:

12. No person shall be capable of being elected a member of the Legislative Council unless –
   a. he is at least 30 years of age; and
   b. he is a British subject or legally made a denizen of the State; and
   c. he has resided in the State for at least three years.

In relation to the right of a person to be elected to the House of Assembly, the new section read

29. Any person qualified and entitled to be registered as an elector in and for any electoral district shall be qualified and entitled to be elected a Member of the House of Assembly for any electoral district.

The clause of the original Act which originally granted women the right to vote, and which was understood to also grant women the right to stand, was transferred to the new Constitution Act 1934 in a narrower way, referring only to the right to vote. It reads as follows:

48. Women shall possess and may exercise the right to vote at parliamentary elections subject to the same qualifications and in the same manner as men.

The new Constitution Act 1934 was intended to be a consolidation of the existing provisions which had been spread over several separate Constitution Acts. Consolidation Bills should not change the meaning of the provisions they consolidate, and to ensure this they are sent to joint committee. The Joint Committee on Consolidation Bills formed in relation to the Constitution of S.A. (Consolidation Bill), asked the Parliamentary Draftsman (Mr E.L. Bean) whether the new wording might be interpreted as prohibiting women from voting or standing. In reply to a former Attorney-General, Mr Homburg, Mr Bean stated

"The point raised is whether women can sit in Parliament. There is no doubt, if the matter can be determined on the present language, that the courts would say that they can sit in our Parliament. I understand that Mr Stephens has accepted the nomination of women and that he has been advised by the Crown Solicitor that that is correct. I have a decision of the Privy Council on the Canadian Constitution in which the word "person" was used. The clause was drafted in the masculine, but the Privy Council held that the word "person" included both men and women, and that that was the proper way to interpret a Colonial Constitution. I think the word "person" is used in all the Constitutions. We have no trouble in practice, and the Electoral Officer is quite convinced as to his position.

Mr Anthoney: If a woman were elected, would there be any possibility of upsetting that election?"

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9 This is currently covered by Joint Standing Committee Order No. 18, under which a Consolidation Bill is to be sent to a joint committee which "shall inquire into whether the Bill makes any alteration in the law; and it shall be an instruction to all such Committees that wherever it shall appear to them that any such alteration is made, they do amend the Bill in conformity with what they hold to be the law."

10 Mr Bean (later Sir Edgar Bean) was not the Parliamentary Draughtsman who advised the government at the time of the 1916 Bill.
Mr Bean: 'It would be possible, but whether the challenge would succeed is another matter. In view of the Privy Council decision the average person would say that there was not much hope of succeeding in a challenge.\textsuperscript{11}

Mr Ferdinand Lucas Parker, Clerk of the House of Assembly, was then called by the Committee. He noted that

".....The original Act was for men. In 1890 another Act was passed, extending franchise to women. It did not say definitively that they had the right to sit. It is referred to in the debates several times as to how the law would be interpreted. It was pointed out at the time that it was unlikely that women would ever attempt to get into Parliament.

Hon H Tassie: You said that the original Act provided that only men could be elected?

Mr Parker: Only men had the franchise.

Hon H Homburg: As the word "person" appeared in the original Act, if there is any right for women to sit it was right for them to be elected from the inception.

Hon SW Jeffries (Chairman): No, the only persons who had the franchise were the men at the time.

Mr Anthoney: Would the extension of the franchise to women ipso facto make them eligible for Parliament under the Electoral Act?

Mr Bean: I do not know that I satisfied myself that it would. That is one reason why I prefer to use "person" so that whatever is the present meaning will be preserved.

Mr Parker: Before the decision of the Privy Council in 1930 I discussed the matter with leading Constitutional authorities here and in the other States and I was convinced then that it would have been necessary to put through a short Bill to bring about the right for women to sit in Parliament. However, since the Canadian case the position has been made clear.

Mr Bean and Mr Parker both read the Act as being unclear on the question of whether women could be elected to the Parliament. While they both understood that the Parliament's intention in 1894 was to give women that right, they were aware that the Courts could not take Parliament's intentions into account in any challenge - a court must only take into account what the statute says.

The outcome of the 1934 discussions seems to have been that the Committee accepted that the Privy Council's interpretation of the word "persons" as including women\textsuperscript{12} in a Canadian case would mean that a Court should come to the same conclusion if asked whether the word "person" included women under the South Australian Constitution. In that case, the new Constitution Bill would be consistent with the intention they understood to have been embodied within the original Act and would give women the right both to vote and also to stand as candidates and be elected to the South Australian Parliament.

The Joint Committee's report was tabled in the House of Assembly on 11 September 1934; the Bill was immediately passed through that House and was sent to the Council where it was passed without amendment.\textsuperscript{13}

\textsuperscript{11} Joint Committee on Consolidation Bills, Minutes of Evidence, Friday September 7 1934.

\textsuperscript{12} This case appears to be Edwards v Attorney-General for Canada (1930) A.C. 124.

\textsuperscript{13} The Committee's report was not published as a Parliamentary Paper; a copy is available through the Parliament Research Library's catalogue.
The challenge: *The Queen v. Hutchins*

The Joint Committee's understanding would be tested in 1959.

The Electoral Officer had accepted nominations from women before the 1934 discussions (from Selina Siggins and Jeanne Young in 1918 and Ruth Ravenscroft in 1929), and would again before 1959 (from Ruth Ravenscroft again in 1938, Ada Bromham in 1941 and Frances Mary Ryan in 1956). But his acceptance of these nominations was never challenged, perhaps because none of these women seemed likely to win a seat. That situation changed in 1959. Eight women nominated for the 1959 elections: Jessie Cooper, Susan Critchley, Jean Davis, Mary Mills, Dorren Pattison, Margaret Scott and Joyce Steele. But the real difference in 1959 was that a woman was likely to win a seat: Jessie Cooper's chance was very high because she had been placed at the top of the LCL ticket for a two-person Legislative Council district that was normally won by two LCL candidates (Central No.2), and the ALP had also preselected a woman (Margaret Scott) to top its ticket for this safe Liberal district.

Two men, Frank Hewett Chapman and Arthur Cockington, applied to the Supreme Court of South Australia for a writ of mandamus against the Returning Officer for the Central No.2 district (Mr Hutchins)

"(a) to reject the nomination of any female person as a female candidate to serve in Parliament as a Member of the Legislative Council for that District;
(b) if the number of male candidates nominated for that district was not greater than the number of candidates required to be elected to declare at the hour and place of nomination such candidates duly elected;
(c) if the proceedings on the day of nomination stood adjourned to polling day, to provide ballot papers which did not contain the names of any female person,
On the grounds that under the provisions of the Constitution Act 1934-1955 and by law female persons could not be elected as members of the Legislative Council of the Parliament of South Australia."\(^14\)

The case was argued before the full bench of the Supreme Court, by Dr Bray for Chapman and Cockington, the Crown Solicitor for the Returning Officer, Mr AJ Hannan QC for Mrs Steele and Don Dunstan for Mrs Scott. The case was argued on five days in February with judgement handed down on March 2\(^{nd}\), just five days before the State election.\(^15\)

Each of the three judges of the Supreme Court found that the Court had no jurisdiction to make the order sought.

Justice Mayo saw the issue as not only a question of whether women were "entitled to be elected, and if elected to sit, in the Legislative Council" but also one of whether the court had jurisdiction to make the orders sought. His opinion was that the duties of a Returning Officer as specified under the Electoral Act did not allow a Returning Officer to refuse any nomination that was compliant with that Act. On this basis Justice Mayo would dismiss the application (to require the Returning Officer to reject any nomination from a woman).

Justice Abbott noted the Crown Solicitor's argument that in fact the Parliament had jurisdiction, not the court

If it is a question of qualification or not, then the election must go on, and in due course the House in which the candidate seeks to take his seat has authority to decide whether he is properly there.\(^18\)

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\(^14\) *The Queen v Hutchins; ex parte Chapman and Cockington*, (1959) SASR 189.

\(^15\) Costs were awarded in October.

\(^16\) RR StC Chamberlain QC, Crown Solicitor, at (1959) SASR 189 at 200.
Justice Abbott continued

It is, of course, possible that if a woman is not qualified to sit in the Legislative Council, one of these women having been nominated may possibly be elected as a Member. In such an event, a defeated candidate or some other person interested may petition the House, and the whole question of the qualification of the elected candidate to take her seat may then be considered and decided.

A candidate is required to state that he is qualified to be elected, and it is an offence to wilfully make a false statement17 so Justice Abbott was of the opinion that "...it is therefore not unreasonable to require that the Returning Officer shall accept any nomination which appears to be in proper form, leaving to the House the duty of ascertaining the correctness of the candidate's claim to have the required qualifications." Justice Abbott therefore agreed that the Court had no jurisdiction to make the order sought.

Finally, Justice Piper's decision was based on the principle that the legislative branch retains the right to determine of whom its members shall consist... The reservation by Parliament of the right to determine of whom its members should consist involves the reservation of the right to determine the validity, so far as it concerns the result of the election, of every step taken by the Returning Officer between the time of the issue of the writ and the return of the writ by him endorsed with the names of the candidates elected, including therein the correctness of that return.

To grant a writ of mandamus in this case would...result in this Court determining in advance a question which it is peculiarly the province of the Parliament to determine, viz, who is and who is not to sit and vote therein.....This Court would be endeavouring, in effect, to determine the qualifications of the person elected to Parliament, a matter which, in my opinion, is exclusively a matter for the House and for the Court of Disputed Returns, which the Parliament has constituted to deal with these matters.18

Justice Piper stated that he would "refrain from expressing any view of the principal question....namely whether as the law now stands, women are, or are not, eligible to sit and vote in the Legislative Council." This was on the grounds that as Junior Puisne Judge of the Supreme Court he would be called on to preside over any Court of Disputed Returns that might be called into effect.19

The outcome of the case was therefore that the legal position of women as candidates was not definitively resolved, but the Supreme Court had made one thing clear -- it was for the Parliament to resolve the issue, not the Courts. The Hon. AH Peake's assumptions that no-one would dare challenge the election of a woman to the Parliament, and that if they did the courts would accept jurisdiction to deal with the matter proved to be mistaken, if not sadly naive.

Five days later Jessie Cooper was elected to the Legislative Council (and Joyce Steele, also an LCL candidate, was elected to the House of Assembly), and the LCL was elected to form government.

17 Electoral Act 1929 (SA) s.62 and Schedule 3, and s.154.
18 Piper J at (1959) SASR 189 at 208.
19 Piper J at (1959) SASR 189 at 204-5.
Making things clear

On 9 June 1959, the Governor opened the new Parliament and noted that

During the recent election period doubts were expressed as to the eligibility of women to sit as members of either House of the Parliament. It had been commonly supposed that women were not disqualified for membership, and in fact, both parties nominated women candidates. Two of these candidates were elected. To remove all doubts as to the validity of their election and to make it clear that women are not disqualified for sitting and voting in either House, a Bill to amend the State Constitution will be laid before you at an early date.  

In the Legislative Council, four members were elected to a Committee of Disputed Returns, in preparation for any order from either House to convene a Court of Disputed Returns. No order was made. Instead, the Council welcomed Jessie Cooper by electing her to move the adoption of the Address in Reply, which gave her the honour of making the first speech on that matter (she made no reference to the court case).

The Constitution Act Amendment Bill had the support of both parties, and passed both Houses without amendment. That Act clarified the position of women candidates by inserting a new section 48A into the Constitution Act 1934 to read as follows

48A. A woman shall not be disqualified by sex or marriage for being elected to, or sitting or voting as a member of, either House of the Parliament.

That provision remains as section 48A of the current Constitution Act 1934 (SA).

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20 SAPD 9 June 1959: 5-6.
21 The Court of Disputed Returns would be constituted of the Junior Puisne Judge of the Supreme Court and four members of the House to which the case referred (Electoral Act, Part XVI). Since 1969 the Supreme Court has been the Court of Disputed returns, and its jurisdiction can be exercised by a single judge.
22 As an amendment to the Constitution the Bill was reserved for Royal Assent.