

From Suffrage to Citizenship: A Republic of Equals
2008 Dymphna Clark Lecture: Professor Kim Rubenstein, ANU

In this lecture Professor Rubenstein draws from her work on citizenship and Australian constitutional law to assess how well women have fared in Australia's democratic system. Starting with those women who participated in the constitutional debates of the 1890s and reflecting on the imminent 2020 summit – she will share her ideas on how best to achieve a republic of equals and an Australian citizenship that both men and women fully appreciate.

Introduction

I begin by acknowledging the Ngunnawal people, the traditional custodians of the land on which we are meeting and their elders past and present.

I am truly honoured to be invited to present this seventh Dymphna Clark lecture, following a line of wonderful former presenters:

- the first in 2002 presented by Dymphna's granddaughter Anna Clark, whose lecture about "history" has been even further developed in her most recent book *History's Children: History wars in the classroom* (UNSW Press 2008), ([First Dymphna Clark Lecture](#))
- In 2003 Dymphna's daughter Katerina Clark, presented [Identity in Diaspora; a case study of the refugees from fascism in the 1930's.](#)
- This was followed by Catherine Lumby in 2004 looking at "The Role of Intellectuals in Public Debate."
- In 2005 Gay Bilson spoke during a weekend revolving around food, whose book "Plenty" won the Age Book Prize later that year
- In 2006, Anna Rubbo presented. ['Make poverty history': Global Studio, the Millennium Development. Goals and some ideas that might make a difference'](#)
- And last year, Eva Sallis, spoke about. ['Australian dream; Australian nightmare - Some thoughts on Multiculturalism and Racism'](#)

Most of these presentations are available to read on the MCH Website, providing a rich store of ideas, paying tribute to Dymphna. An initiative such as this named lecture allows us to honour Dymphna while giving the presenter the opportunity to select a topic relevant to the "Weekend of Ideas" theme; which this year revolves around a topic central to my interests both personally and professionally – Australian citizenship.

Reflecting on Dymphna

I begin by reflecting on Dymphna as a way into my topic "From Suffrage to Citizenship: the creation of a Republic of Equals". Unfortunately, I didn't have the opportunity to meet or come to know Dymphna or be in a position to miss her as I know many of you here do. We get a strong sense of Dymphna from visiting this house regularly and seeing

the wonderful portrait of her in the living area painted by Pamela Houstein. Indeed this house as a place of ideas, and the Weekend of Ideas itself pay tribute to her.

Roslyn Russell's written portrait of Dymphna in the National Library of Australia's newsletter in 2005 (April 2005 Volume XV Number 7)¹ paints a strong vision of a highly intelligent individual who balanced her commitment to her family with her own interests and strengths. As Russell acknowledges, there is no autobiographical writing so information about Dymphna must be gleaned from the memories of those who knew her, including from Manning Clark's account of their life together in the second volume of his autobiography, *The Quest for Grace*, and from two oral history interviews (TRCs 2597 and 3548) and her papers (MS Acc03/179) in the National Library of Australia. There's also information in the papers of others held in the Manuscripts Collection.

I was struck by two things in my reading about Dymphna – first, on a personal level we were both graduates of the wonderful secondary school in Melbourne, Victoria, *Presbyterian Ladies College*. She attended it in its days at East Melbourne, where we now find the Dallas Brooks Hall and the Freemasons Hospital. I did when its buildings moved to Burwood.

PLC was a great institution instilling in its women a belief you could do whatever you chose in life and specifically that a University education was a natural step from school. With Charles Henry Pearson as its first principal in 1875, PLC “formed (as Kathleen Fitzpatrick writes in *PLC Melbourne, the First Century*) part of an educational movement that was new to history. The struggle for the higher education of women began in England. It crossed the border to Scotland, over the channel to France (which began to open its universities to women in 1866), spread to Scandinavia, the Low Countries and Switzerland, and leaving Germany untouched, reached the extremity of Europe in Russia. It crossed the Atlantic, was welcomed in the United States and came on, without much delay, to the very end of the earth in Melbourne Australia”².

Hilma Dymphna Lodewyckx, as she then was, attended PLC from the late 1920s until she left early at the age of 15, which would have been in 1931. She would have been about 9 or 10 years ahead of a woman who was also a school girl at PLC and later became its Principal – Joan Montgomery. Joan was an important role model for me – Joan turns 83 this year, Dymphna would have turned 92 this December.

Like Dymphna, Joan has no autobiographical writings³ and this has prompted me, as one of my extra curricular activities to write Joan's biography, which is still a work in progress. I won't be concentrating upon that project today, but one of my motivations for embarking upon that project is the same as what struck me reading about Dymphna.

¹ Available at <http://www.nla.gov.au/pub/nlanews/2005/apr05/article3.html>

² Kathleen Fitzpatrick, *PLC Melbourne, the First Century* (1975, Presbyterian Ladies' College) p 23

³ After the delivery of the lecture, David Headon brought to my attention that in the co-edited collection, by Dymphna Clark, David Headon and John Williams *The Ideal of Adlexis de Tocqueville by Manning Clark* (2000, Melbourne University Press) Dymphna contributed some autobiographical material in the context of the book. See pp 1-12.

As Jill Kerr Conway has written in her book *Written by Herself*; an edited collection of women's autobiography, women are much more passive about their accounts of their lives, and more importantly she highlights the low ratio of woman's autobiography to men's. I was interested in my reading of Manning Clark's *The Quest for Grace* of the contrast between his descriptions of many individuals and the way Dymphna is included in the story.

One great example of Manning's wonderful insight is his accounts of the University of Melbourne and the people there in the late 1930s. After writing about Max Crawford (and there is a thematic link in choosing this person's description with the end of my lecture) he wrote:

“There was another man in the class of 1938 who was ill at ease with the new Melbourne orthodoxy, but fearful lest by opposing it he be pushed off the ladder on which he was fast climbing to the top. He was Zelman Cowen. To characterise him as a man for whom fame was the only spur would be a travesty. He had a Grecian nose, an olive skin, and the eyes of a man who was magnificently alive, and yet fearful lest words be said which reminded him he did not belong to the Yarraside version of the Protestant ascendancy. He was an outsider who by charm, sheer ability and hard work was destined to be a distinguished and loyal servant of Yarraside”⁴

Yet we get little sense of Dymphna as an individual. We are introduced to her when Manning first set eyes on her 1936 – she would have been 19. We get Manning's response to her – he gulped and wondered “What if I dared to speak to her – would the gulping stop, would the beauty of her face and body be consumed away by the trivia of acquaintance?”⁵ We then discover that in taking the courage to talk to her, the talking began and it appears never stopped...but in the next 10 pages we read more about Dymphna's world – her parents, their culture and Manning's response to that world than we do about Dymphna as a person.

How can that be so, for as a reader of his book I assume her centrality to his world? Was this because Dymphna was so closely involved in the book that she chose that outcome? Perhaps she didn't want his portrait of her made known to the whole world – that was private between him and her...although, and as he states in his Preface, ‘It remains to thank the unthankable one, my wife Dymphna. I say this because I can only hope that anyone who reads the work will see it in part as a hymn of praise to her and to my mother and father’. Why was she unthankable? Did she not receive thanks or praise or was it that there was too much to thank.

And we discover in Bill Gammage's beautiful words delivered at Dymphna's funeral, which he kindly shared with me, a friend wanted to write Dymphna's biography, but she refused. Dymphna's experience and approach is to an extent, symbolic of many Australian women's political and civic journey – there are many silences that are slowly being rectified in

⁴ Manning Clark, “The Quest for Grace” (1990) p 52

⁵ Ibid at 35.

Australia's democratic landscape. It is not that women haven't been present politically or politically inactive, (although the space for them has been constrained) but even when they are there we don't hear as much or know as much of their stories.

This has been remedied to some extent with a range of books looking at women and Australian history and Australian politics including (and I list some of them, alphabetically acknowledging it is not exclusive!)

Kate Deverall (and others) edited collection: *Party Girls, Labor Women Now* (Pluto Press, 2000)

Margaret Fitzhebert's book *Liberal Women, Federation- 1949* (Federation Press, 2004)

Grimshaw, Patricia, Lake, Marilyn, McGrath, Ann and Quartly, Marian, *Creating a Nation*, McPhee/Gribble/Penguin, 1994, (reprinted 1996, 2000).

Anne Henderson's *Getting Even: Women MP's on Life, Power and Politics* (1999 Harper Collins)

Helen Irving's edited collection, *A Woman's Constitution* (Allen & Unwin, 1996)

Marilyn Lake's book *Getting Equal: The history of Australian feminism* (Allen and Unwin 1999)

Ann Millar's book *Trust the Women: Women in the Federal Parliament* (1994, Department of the Senate)

Margaret Reynold's book *The Last Baston: Labor women working towards equality in the Parliaments of Australia* (1995, Business and Professional Publishing_)

Marian Sawyer and Marian Simms's book, *A Women's Place: Women and Politics in Australia* (Allen and Unwin, 2nd ed, 1993)

Marian Sawyer's latest book, *Making Women Count: A History Of The Women's Electoral Lobby* (Forthcoming From Unsw Press, 2008)

These books provide some testimony of the powerful and active contributions of women in our political system.

For instance in Margaret Fitzhebert's book on Liberal Women, we read this wonderful quote from Alfred Deakin in 1912, exasperated by the work being done by the conservative Australian Women's National League:

Meanwhile a fierce unceasing strike inside and outside [the parliament] with the ultra Tories of this state thro the Constitutional Union & AWNL has continued to exasperate & harass me day by day. So far – singlehanded - I have beat them and kept them at bay. Is it because my position is so unquestioned & my retention of the leadership so universally accepted that I continue to keep them at bay. But how long can this last?⁶

And while we are now in a period in which we have our first woman Deputy Prime Minister and Deputy of the Opposition, in reality the numbers are not that great and the commitment to equal representation is not strong. In drawing from Marian Sawyer's forthcoming chapter

⁶ Margaret Fitzhebert, *Liberal Women Federation -1949* (2004, Federation Press)Preface, citing Deakin's personal diary entry 1 Sep 1912

title “Now you see them, now you don't: Women and the 2007 federal election”⁷ in a forthcoming book edited by Marian Simms,

The swing to Labor increased from 20 to 27 the number of Labor women in the House of Representatives and meant that the overall proportion of women in the House rose to a record 26.7 per cent This slightly improved Australia's position on the Inter-Parliamentary Union's scoreboard for representation of women in national parliaments, moving it up from 33rd to 30th position.

The number of Liberal women in the House fell to 12 and one of the two National women (De-Anne Kelly) was defeated. The number of women in the Senate was set to remain the same when the new Senators took their seats in July 2008 but the absence of Australian Democrat Senators will be a significant loss

And, so, in the lead up to a 2020 summit we were all rightly taken aback by the tremendous inequality in leadership positions given to women. How could it be that such an outcome could even be contemplated...even with the greater (although not yet adequate) number of women in Parliament?

It is because there are significant blind spots still in those men whom we know are open to progressive and reasonable ideas about women and equality.

In the recently released names of participants in the 2020 summit list I counted 449 women – we see the positive outcome from that original gaffe – with a significant number of women involved.

This is a reminder that in thinking about citizenship we need to continually speak about and demand a “Republic of Equals”.

I'd like to do that this afternoon by examining Australian women's road from Suffrage to citizenship –and ideas for the road towards a true equality in Australian life.

I'll be returning to some of my earlier scholarship written with Deborah Cass and published in the *Adelaide Law Review* over 10 years ago⁸ –and adding to it and reflecting upon those ideas in light of today's current realities, including reflecting upon my work on citizenship, and women and a republic.

In doing so, I'll follow the structure of the title of the talk – I'll begin by examining women and the suffrage movement, I'll share with you my ideas about women and citizenship and women and a republic (which are very much linked) before ending with my thoughts on the

⁷ Marian Sawyer, *Now you see them, now you don't: Women and the 2007 federal election*, Marian Simms (ed) *Kevin07: The 2007 Australian Federal Election*, forthcoming 2008, Perth: API Network Books.

⁸ Cass and Rubenstein, "Re/presentations of Women in the Australian Constitutional System" (1995) 17 *Adelaide Law Review* pp.3-48

ways to progress towards a republic of equals. A central theme to it all is the value of examining the Constitution as a foundation to Australian society.

Women and Suffrage

One of the stories I enjoy sharing is of the steps towards universal suffrage and the link to the formation of the Australian constitution. It highlights women's strong political activity and women's impact upon the formation of the Constitution.

Section 41 of the Constitution is often identified by people enthusiastic about finding a reference to rights in the foundation to our legal system. It reads as follows:

No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

It is this section that reminds us of women's involvement in the framing process. The first stage in the process of building a constitutional system was the holding of a series of constitutional conventions in 1891, 1897 and 1898. Women were not merely underrepresented in this process they were effectively not represented at all. At the 1891 Convention, attended by all colonial legislatures and New Zealand, no women were present, and, as none were eligible to vote in colonial elections, none could contribute to the process by electing the delegates.

In 1894, South Australia introduced universal suffrage, so South Australian women contributed to the 1897 Convention process by electing their representatives, with one particularly bold woman even standing for office. When Catherine Spence stood for election to the 1897 Convention as a South Australian delegate, she was the first woman to seek political office in Australia; but, despite being named in the Liberal organisation's list of '10 Best Men',⁹ and polling a 'credible' 7383 votes¹⁰ her bid was unsuccessful. Catherine Spence partly attributed her failure to comments by the South Australian Premier Charles Kingston¹¹, who cast doubt on her eligibility to stand as a woman, an attitude in keeping with prevailing legal doctrine in which married women had (along with lunatics and children) no civil legal capacity at common law. At the 1897 Convention, Western Australia appointed its delegates, who were all men; in New South Wales and Victoria where only men could vote and stand, only men were elected; and Queensland did not attend. No women were present in 1897, nor were they there in 1898.

But those women who did have a vote at the time of the Constitutional conventions, did have some influence over the wording of the Constitution. The South Australian women had threatened that, if they lost their vote at Federation, they would not support the move to Federation. Their delegates were the people who were involved with the drafting of what

⁹ J. Haines, *Suffrage to Sufferance* (North Sydney: Allen and Unwin, 1992), p. 60

¹⁰ *Ibid* 62

¹¹ *Ibid*.

became section 41. In order to ensure that those women would be entitled to vote in the Commonwealth elections, section 41 precluded the Commonwealth from legislating to prevent them from voting.

Women throughout the Commonwealth finally obtained the vote in federal elections (in Victoria it took until 1908 for women to obtain the vote in the State) and the *Commonwealth Franchise Act* 1902, at the same time of introducing white woman's write to vote, took away Indigenous women's vote. That Act also had an impact on the meaning and interpretation of s 41.

The most significant High Court decision about section 41¹² is an interesting example of law and politics. Not only does the judgment show a lack of concern for those with less power in the community, but the case also highlights how the Court was able to both use, and misuse, the setting within which our Constitution was framed in its interpretation of section 41 of the Constitution. The majority decision of *Sipka* interpreted the guarantee in section 41 as a transitional guarantee only. According to them, that guarantee ceased to exist after 12 June 1902, the date on which the *Commonwealth Franchise Act* came into force.¹³

The majority relied upon the historical story of the Constitutional framing process, and it is in this context that we can see the stories of women and their lack of involvement with the drafting of the Constitution. While the section was inserted to voice South Australian women's desire for a fuller, more democratic electoral system – a system that would properly represent the will of the people, including women - the majority of the Court chose to look at the section within the narrow formal context of its insertion, and used that story to read down the section. Because of its version of the story, the Court chose to limit its impact to just the period until the *Commonwealth Franchise Act* 1902 came into effect. Given that section 41 was inserted to respond to the South Australian women's desire not to lose the vote, and that was provided for in the *Commonwealth Franchise Act* 1902, from that time on, section 41 was spent – it had no more relevance to its original need.

The Court also held that, if a more general right was upheld, it would give the States the power to destroy the Commonwealth's power to create a uniform franchise. For instance, each State could determine its own franchise, so that there would be an inequality of voting between States. The majority of the Court was concerned with power as an issue between the States and the Commonwealth; it took no account of the individuals who would be affected. The Court interpreted the successful fight of the South Australian women as one concerned with the protection of State legislative power, rather than with the individual rights of women.

Yet the vote and the move towards white women's suffrage have not lead to a full and equal citizenship, and it is to the broader area of women and citizenship that I shall now turn.

Women and Citizenship

¹² *R v Pearson; Ex parte Sipka*, *Commonwealth Law Reports* (hereafter *CLR*), vol. 152, 1983, pp. 254ff.

¹³ See the judgment of Brennan, Deane and Dawson JJ at p. 280

In thinking about women and citizenship I need to clarify here my use of the term citizenship. And it provides a good point to reflect on its use throughout this weekend's programme.

In considering the meaning and consequences of citizenship, entirely different concepts are often discussed. For some, the discussion is about citizenship as a legal status: who is recognised as a citizen by the state – this is in contrast to other membership statuses such as permanent residents and temporary residents.

Others view the notion of citizenship as participation and membership within a democratic community. This may be broader than citizenship as a legal status and includes residents generally.

In addition, others discuss citizenship as a “desirable-activity”,¹⁴ that is, what communities want citizens to be like; the “civic virtues” concept of citizenship.¹⁵ Despite the different meanings of “citizenship”, most of the public discussion speaks of citizenship as a singular concept, oblivious to its shadings of meaning.

This Weekend of Ideas has sought to reflect upon these different notions – in looking at citizenship and rights, citizenship and Australian values, and Indigenous citizenship today, and tomorrow in looking at Australian citizenship in a Federal system, and in an international system before finalizing with our reflections on its place in the future.

If we look at the Australian legal term, we find it emanates from the Australian Citizenship Act which began its life in 1949 with the implementation of the *Nationality and Citizenship Act*, later to be called the *Australian Citizenship Act 1948* – now the *Australian Citizenship Act 2007*. The term does not appear in the Australian Constitution and the only reference to citizenship in the Constitution is of citizenship of a foreign power, which in s 44 (1) disqualifies those Australian citizens who are also citizens of a foreign power from running for Parliament.

While the Citizenship Act sets up the legal status of Australian citizenship it doesn't tell us much more about it. It is only through looking at other pieces of legislation that use citizenship as a basis for rights or entitlements or duties that we see what it means to be a citizen. And while the Act *formally* provides for equal access to the status of Australian citizenship regardless of gender it would be important to see, as just one example of highlighting the difference between formal and substantive equality, what the statistics are regarding women and citizenship by application - out of those eligible apply to do the Australian citizenship test how many women do so and what is their success rate?

¹⁴ Kymlicka and Norman, “Return of the Citizen: A Survey of Recent Work on Citizenship Theory” (1994) 104 *Ethics* 352 at 353.

¹⁵ Alejandro, *Hermeneutics, Citizenship and the Public Sphere* (1993) also refers to other models, such as “[c]itizenship as amelioration of class conflicts” (p 26), “[c]itizenship as self sufficiency” (p 28), and finally, his thesis of “[c]itizenship as a hermeneutic endeavour” (p 33ff).

In the first snapshot report of the Department regarding its introduction, covering the period 1 October to 31 December 2007 there is no reference to gender – but no doubt further research could and should highlight this sort of information.

To reinforce this idea that the equal right to the status does not necessarily play out in the quality or substantive value of that citizenship, I draw upon work of my colleague Professor Margaret Thornton. While the language of citizenship is often gender neutral, it often “perpetuat[es] the invisibility of women” as citizens.¹⁶ In Professor Margaret Thornton’s examination of the civil status of women as citizens in the early years of the 20th century she “illustrate[s] the peripheral civil status of women as citizens” and, therefore, questions the full membership consequences of citizenship.¹⁷

The 2020 summit announcement of chairs to the groups reminded us of women’s peripheral status in the minds of many.

The impact of gender on citizenship in Australia was identified in the 1996 parliamentary report, *National Well-Being*.¹⁸ Marilyn Lake argued that “active citizenship and a full engagement in civic and public life have traditionally rested on a sexual division of labour, which allocated responsibility for domestic work and the care of dependants to women.”¹⁹ This has also been explained by Bettina Cass in her research on women, citizenship and welfare in Australia.²⁰ Drawing upon the work of Carole Pateman,²¹ who argues that liberal citizenship is essentially patriarchal, revolving around a social contract giving rights to men, Cass draws upon the “Mary Wollstonecraft dilemma”²² in which women are conflicted in their desire for two different citizenship aspirations. The first is a citizenship that ought to be accorded to fulfilling the responsibilities of motherhood, and the second is the citizenship women want as independent income-earning individuals.

In Pateman’s view, “these two avenues to full citizenship are incompatible because patriarchal welfare states currently accord more value to men’s than to women’s work and spheres of participation.”²³

Bettina Cass’s response to this dilemma is to argue:

¹⁶ Ackers, “Women, Citizenship and European Community Law: The Gender Implications of the Free Movement Provisions” (1994) 4 *Journal of Social Welfare and Family Law* 391 at 392.

¹⁷ Thornton, “Embodying the Citizen” in Thornton (ed), *Public and Private: Feminist Legal Debates* (1995), p 198 and “Historicising Citizenship: Remembering Broken Promises” (1996) 20 *Melbourne University Law Review* 1072 and “The Judicial Gendering of Citizenship: A Look at Property Interests During Marriage” (1997) 24 *Journal of Law and Society* 486.

¹⁸ Australia, Parliament, Senate Legal and Constitutional References Committee, *National Well-Being: A System of National Citizenship Indicators and Benchmarks (National Well-being)* (April 1996).

¹⁹ *Ibid*, p 51.

²⁰ Cass, “Citizenship, Work, and Welfare: The Dilemma for Australian Women” (1994) *Social Politics* 106, which also draws upon Pateman’s work. For a comparative United States discussion, see Schultz, “Life’s Work” (2000) 100 *Columbia Law Review* 1881.

²¹ See generally, Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (1989); Pateman, *The Sexual Contract* (1991).

²² Cass, above, n 19 at 113-115.

²³ *Ibid* at 114.

“[A] democratic conception of citizenship would value and provide the resources for women’s economic and political participation, as well as women’s contributions to caring and welfare. But it would also be based unequivocally on the understanding that men cannot be accorded full citizenship if they do not fulfil their responsibilities for care-giving work”.²⁴

Therefore, a view of membership of the community, which includes social rights, has not been gender neutral: as illustrated above, the right to employment, one of those social rights, has traditionally been seen as the domain of men as breadwinners.²⁵

And as our current Sex Discrimination Commissioner, Elizabeth Broderick, in her 2008 International Women’s Day address explained while we can rightly point to many achievements of women over the past one hundred years in terms of formal access to many fundamental aspects of membership in our community, and many women can pursue opportunities that their predecessors could only imagine, she reminds us:

that our pursuit of gender equality in Australia has become stuck, and may even have been in retreat. Whilst it is now hard to find examples of overt discrimination against women in Australian laws and policies, we must face the fact that formal equality has not delivered. It has not delivered TRUE equality for many women in their daily lives. Indeed, in some respects, life is harder. We are no where near the so-called ‘tipping point’ on gender equality²⁶

In discussing a desire for citizenship to be inclusive, it is fundamental to be mindful of who, in practice, is included and in what contexts. This is not only highlighted through gender but also through race.²⁷ The previous session examining the treatment of indigenous Australians and their experience of the legal status of citizenship is another ever present reminder that formal citizenship does not necessarily accord substantive citizenship.²⁸ This neatly leads me onto citizenship and a republic

Women and a Republic

²⁴ Ibid at 114-115.

²⁵ See also Phillips, “Citizenship Theory and Feminist Theory” in Andrews (ed), *Citizenship* (1991), p 78.

²⁶ Gender Equality – Let’s not let it become a lost Australian Dream – see also

http://www.hreoc.gov.au/about/media/media_releases/2008/23_08.html

²⁷ See Young, *Justice and the Politics of Difference* (1990) and her proposal that “a democratic public should provide mechanisms for the effective recognition and representation of the distinct voices and perspectives of those of its constituent groups that are oppressed or disadvantaged” (p 184). This would be a practical way of ensuring a more progressive, inclusive citizenship as a normative notion.

²⁸ See further discussion in Rubenstein, *Australian Citizenship Law in Context* (2002) Chapter 3 and Chesterman and Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (1997); see also Lui and Blanchard, “Citizenship and Social Justice: Learning from Aboriginal Night Patrol in NSW” (2001) 5(5) *Indigenous Law Bulletin* 16 for a discussion about the relationship between formal citizenship and active citizenship. An interesting comparison in the United States is the place of Asian Americans and their citizenship status: see Volpp, “‘Obnoxious to their Very Nature’: Asian Americans and Constitutional Citizenship” (2001) 5 *Citizenship Studies* 57.

I'd like to talk about the relationship between women and a republic from two perspectives – one is in terms of the underlying conception of a democratic republic which involves participatory notions for all, and a rejection of exclusivity and elitism. In legal terms it emphasizes concepts such as liberty, the rule of law, popular sovereignty and the civic virtue practiced by citizens. To a large extent then, this has been covered in my comments about women and citizenship, because if we think of citizenship in its broader, extra legal sense, it includes civic and social participation –important elements of a democratic republic.

The other is in concrete terms about Constitutional change in Australia and the various attempts to change the Constitution to ensuring an Australian is Australia's Head of State. In this area I'd also like to highlight ways of making gendered issues more transparent and encourage us all to think of a republic that affirms equality of opportunity.

I would like to acknowledge that there are many women who have been actively and political involved with a move to a republic, both through the ARM itself, and other republican groups and associations and individuals like me supportive of a move to a republic. One particular group, Women for an Australian Republic has been thinking and working over many years to address these issues. The Women's Constitutional Convention in 1998 that preceded the mainstream (smaller) Constitutional Convention raised many issues that should reappear in public discussions.²⁹ Indeed, I have put the link to the website which has been archived at the National Library as a footnote to encourage researchers in this area to look closely at it for great ideas from a wonderful and extensive range of women (there were over 300 participants at that Convention from all around Australia representing a rich range of women's organisations thirsting to engage with the issues³⁰ – so politicians can't say there aren't enough women capable or interested in being involved). One concrete example I raised then and would like to repeat, but no doubt introduce most of you here to for the first time, is how we can think about women's representation in our political system in terms of the republic.

One of the issues in the appointment process for an Australian Head of State, of specific interest and concern for women is the accessibility of the position of Head of State equally for women. In the 107 years of Federation, no woman has been appointed to the position of Governor-General. The Queen is currently Australia's formal Head of State, however the laws of succession in England do not guarantee women's equal access to the position.

A central aspect of the position of the Head of State is that person's ability to best reflect the identity and collective experience of the people. If men are always, or mostly occupying that position, then women's identity and collective experience will not be properly reflected. In a society where women make up 52% of the population, then any new system of appointing a head of state MUST properly address the equal representation of women in the position of Head of State.

²⁹ <http://pandora.nla.gov.au/nph-arch/H1998-Sep-2/http://www.womensconv.dynamite.com.au/index.htm>

³⁰ See the list at <http://pandora.nla.gov.au/nph-arch/H1998-Sep-2/http://www.womensconv.dynamite.com.au/dels.htm>

The most conclusive way of ensuring that women are properly included in the selection of Head of State is to mandate the alternating gender of the position. For instance, the Constitution could guarantee that the gender of the first person appointed as Head of State would then be the basis upon which gender would alternate for the position.

Therefore, if a woman was appointed as the first Head of State in a move to a republic, then the Constitution would mandate that the next person appointed to the position would be a man.

The advantages of this system include that no matter what process of selection is chosen (election by the people or appointment by the Parliament) equality in outcome would be guaranteed.

This process would set clearly in our Constitutional document the fundamental importance of the equal opportunity for men and women to the most senior position in our Constitutional structure.

It would establish that all Australians regardless of gender could realistically consider that they have the opportunity of being considered for the position of Head of State.

The idea of placing such a condition on the position of Head of State is not without precedent.

For instance, one can look at the US Presidency as an example where conditions are attached to who is entitled to be elected as Head of State. A person who has occupied the position of Head of State for two terms cannot be re-elected as President. This condition reflects the principle that no person should accumulate power for more than a particular length of time. The parallel principle exists on a broader level with this proposal - that no one gender should accumulate power over the other (which has been the experience with public positions in Australia). Both examples reflect the belief that the institution of President has built into it principles that need to be reflected in the appointment process.

Another related example is the Federal principle that can influence the choice of appointments to the High Court. In choosing a new High Court justice, the system currently favours 'representation' of the States. That is, if a Queensland judge is not on the Court, this will be one factor influencing the new appointment. Or more specifically, our current democratic institutions skew a pure democratic system to take into account the representation of states in both our Senate and House of Representatives. These are examples illustrating positions of public power often incorporate other values that are important to us in best representing the community and its interests.

Some will argue that this consideration of gender should not be put above 'merit' for the position. This argument suggests that the 'best' person for the position may miss out because of the mandate of gender for the position.

Underlying this argument are several assumptions that need unpacking. First is the notion that there will only ever be one 'best' person for the position of Head of State. This is not a fair or realistic reflection of the pool of people available to take up the position at any one time.

Another issue is that 'merit' in itself is complicated. What do we mean by merit when we look at the position of Head of State? Some of the characteristics we would put next to the position of Head of State are as follows: Integrity, Wisdom, Intellect, Judgment, Objectivity in exercising any Constitutional powers - these are all matters that could be equally found regardless of gender. (Although because men have traditionally exercised public positions of power, there is a subtle implication that men best reflect these characteristics!).

Other matters important to the role of Head of State (as opposed to a regular Company Chief Executive or School Principal) include: reflection of the community, responsiveness to the community's needs, life experiences reflecting those of the community. We need to ensure the diversity of our community is reflected in the position of Head of State. This is one of the meritorious matters needing consideration in the appointment of the person.

Some argue that this would in fact be an unnecessary exercise of affirmative action. Once again there are some assumptions about the current process in need of questioning. It could be argued, that we currently have a position of affirmative action favouring men.

That reality can be seen in outcome where many men are appointed for positions where women could easily have been appointed, but have not. This system which is not transparent is arguable more insidious in its impact on society than one which openly proclaims the importance of men and women equally holding the position of Head of State.

The argument that women's position would be devalued due to the mandatory nature of women holding the position also needs to be unravelled. This has never been a problem for men who have benefited from a system working in their favour for so long.

Moreover, this system would also have the benefit of showing the range of women who are available and competent and meritorious and worthy of the position of Head of State. It is not that there will only ever be one woman who is available - rather there is a pool of women from the 52% of women in society who should properly be regarded for the position of Head of State.

This will also better emphasise the diversity of women's experience in society - women is not one monolithic group. The more women who occupy the position of Head of State, the more likely that this will be better understood and reflected in our public institutions.

Women and Equality and the Constitution

This won't necessarily lead on immediately to the achievement of substantive equality for women, but it would be one of many important symbolic and practical steps that need to be taken. For in the process of requiring a range of women to be considered for the position of Head of State there would be a need to truly examine the strong field of women within our community available to take on positions of public power. The same too could be said of the other significant positions such as Prime Minister and Chief Justice in our system of separation of powers. How was it that New Zealand experiences a period of having a woman Prime Minister (Helen Clarke) a woman as Governor General (Dame Silvia Cartwright 2001-2006) and a woman as Chief Justice (In March 1999, Dame Sian Elias was appointed New Zealand's first woman Chief Justice)?

Mandating this alternating Head of State would be one expression of practical equality in outcome. There are other ways too that our Constitution could be amended to better enhance women's participation and in doing so, women's practical life experiences, because the legislation that comes out of Parliament does impact upon Australian's lives.

In addition to the actual representation, there are aspects of our Constitution that don't sit well with rights protection; it would be another talk in itself to embark upon bills of rights issues, which are also being covered in this weekend – but fundamental principles of substantive equality (not just formal equality) could be built into legal understandings of interpretation, explicitly rather than through other means..

Former High Court Justices Deane and Toohey sought to find a commitment to equality in the Australian Constitution in the High Court decision of *Leeth* (1992) but this idea was clearly overruled by the High Court in *Kruger* (1997) and a return to that concept would require some significant changes on the High Court and some revisions of our understandings of our democratic foundations, as Justices Deane and Toohey JJ argued that the preamble made 'plain' that the Constitution's conceptual basis was the free agreement of 'the people' – all the people – of the federating Colonies to unite in the Commonwealth under the Constitution. Implicit in that free agreement was the notion of the inherent equality of the people as the parties to the compact.⁹⁸

In a recent PhD thesis by my ANU colleague Dr Heather Roberts titled 'Fundamental Constitutional Truths' The constitutional jurisprudence of Justice Deane, 1982-1995, we realize that Deane J needed to rely on an evolutionary notion of the free agreement of the people given as I showed in the beginning of the lecture, women were not part of that free agreement throughout Australia in the 1890s that he was seeking to rely on in finding that implied equality.

But in thinking about being explicitly about equality we must also be careful. As Professor Jenny Morgan from the University of Melbourne explained back at the Women's Constitutional Convention

[I]t is essential to include in any such guarantee of equality, whether legislative or constitutional, a definition or at least a methodology for determining whether equality rights have been infringed, that may allow us to move beyond mere formal equality. The ALRC, in a recommendation endorsed by the whole Commission, contained such an approach. We recommended that:

In assessing whether a law, policy, program, practice or decision is inconsistent with equality in law regard must be had to

- the historical and current social, economic and legal inequalities experienced on the ground of gender [race, sexual orientation etc]
- the historical and current practices of the body challenged and the extent to which those practices have contributed to or perpetuate the inequalities experienced
- the history of the rule or practice being challenged.³¹

Conclusion

In concluding this Dymphna Clark lecture, I return to where I began – with Dymphna herself – she was not a formal person – but she was substantive. We need to follow her substance and indeed her passion by enabling women throughout Australia to lead full lives with opportunities abounding. Dymphna had a lasting impact on many individuals, and she had an impact on us all here today for we have come together, as she so encouraged, in this weekend to share ideas.

I hope this lecture has brought out in the open, important issues for us all, women and men, in thinking about our road ahead in creating an Australian citizenship worth having – in working towards a Republic of Equals.

³¹ <http://pandora.nla.gov.au/nph-arch/H1998-Sep-2/http://www.womensconv.dynamite.com.au/morgan1.htm>