

# Engendering CONSTITUTIONAL DEBATE

---

Marian Sawer

***Women have yet to win acceptance of gender equality as a basic democratic value.***

Women have been trying to influence constitutional debate in Australia since the 1890s — but with little success up until now. In this article I look at ways in which women organised to influence February's People's Convention, including the Women's Constitutional Convention. I find that women have opened up space for creating their own constitutional agendas, have successfully introduced these agendas into mainstream debate, but have yet to win acceptance of gender equality as a basic democratic value.

## **Women's previous involvement in constitutional debate**

One great difference between the 1890s and the 1990s is the emergence today of a cohort of energetic young feminist lawyers, pushing at the envelope of constitutional law. While in the 1890s women tried to influence proceedings from outside, through petitions or organising to influence male votes,<sup>1</sup> today they want a place in the chamber for themselves and for a feminist agenda. The difference in professionalism is very striking if we look at the 1920s Royal Commission on the Constitution. Women's organisations presented evidence there, largely focusing on family law issues and Aboriginal affairs, but were diffident about their lack of familiarity with the law: 'It is the human side of the question we study and familiarise ourselves with...'<sup>2</sup>

Even in 1985, when federal MP Elaine Darling tried to raise the issue of the unrepresentative character of the almost totally male Constitutional Conventions of 1973–85, her intervention was not accorded legitimacy. She was compared to a schoolgirl who had not done her homework.<sup>3</sup> Again the topic on which women were most likely to contribute during these Conventions was that of family law.

Women intervened more forcefully in the Constitutional Commission of 1985–88, including the important role played by Justice Elizabeth Evatt in promoting a rights agenda. The Final Report in 1988 recommended an equality guarantee in the Constitution together with a special measures exemption.<sup>4</sup> Despite this important breakthrough, related constitutional changes sought by Evatt, Carmel Niland, and a number of women's organisations (including all women members of the South Australian parliament), were rejected.

Women were asking for two things in addition to the equality guarantee: a federal human rights power to enable more effective federal anti-discrimination or equality legislation; and recognition of the equality of men and women in the Constitutional Preamble. The Commission's response was firstly that the additional head of power was unnecessary and secondly that any new Preamble would be controversial and a distraction from more substantive issues. The Commission's Rights Committee had recommended a statement of values encompassing cultural diversity, Aboriginal ownership and environmental responsibility but not gender equality — a rehearsal of the outcome 10 years later. The 1988 Commission argued that any such statement of values would

---

*Marian Sawer is a Visiting Fellow in the Political Science Program, Research School of Social Sciences, ANU.*

lead to questions why other matters important to many people and groups were not referred to — and used as an example the request for what they termed a ‘recital about sexual equality’.<sup>5</sup>

### Prelude to the 1998 People’s Convention

When the Coalition was elected in 1996 with a commitment to hold a half-elected ‘People’s Convention’, women promptly began lobbying around the Convention proposal, spearheaded by young lawyers Kim Rubenstein (Women’s Electoral Lobby) and Susie Brennan (Young Women’s Christian Association). An initial statement of the demand for gender equity in the Convention, in regard to both appointed and elected members, was circulated electronically through the Ausfem-Polnet list in May. In terms of redress for the complete absence of women from the conventions of the 1890s, this was a popular demand endorsed by some 20 national women’s organisations and many prominent women.

The following month, WEL presented a slightly more developed proposal to a Ministerial Round Table convened by Senator Jocelyn Newman. Again a great range of women’s organisations, from the Muslim Women’s National Network to the Association of Women’s Apex Clubs, signed the proposal. The new proposal included a procedural requirement for registration as a group in the Convention election — the requirement being for gender equity in the group ticket.

As well as lobbying politicians and ministers, approaches were made to the main groups involved in the debate over Head of State. The Australian Republican Movement (ARM) gave a commitment to gender equity in its tickets while, as might have been expected, Australians for a Constitutional Monarchy (ACM) did not. Despite the fact that most of those supporting the continuance of the monarchy are women, this was certainly not reflected in the tickets eventually run by ACM.

After considerable delays, the *Constitutional Convention (Election) Bill* was introduced to Parliament in 1997. There was no procedural requirement for gender equity, although this issue was raised again during a Senate Committee inquiry into the Bill and was unsuccessfully moved by the Australian Democrats (supported by the Greens) as an amendment. The Government fulfilled its commitment to ensure gender balance in the appointed community representatives, although this hardly outweighed the under-representation of women amongst the Parliamentary appointees (one quarter of the Convention delegates).

The election was held in late 1997 — taking the unprecedented form of a nationwide postal ballot. The ballot was also voluntary rather than compulsory, contrary to Australian practice for parliamentary elections or constitutional referenda. Despite these controversial elements the election was conducted using proportional representation with state-wide electorates — enabling a diversity of tickets to gain representation. The Australian Women’s Party ran tickets in Queensland and New South Wales and in Queensland they were elected tenth out of 13 seats. A women’s ticket also narrowly missed out in Victoria, but Misha Schubert of WEL headed a youth ticket there and won a place. Overall, women won 37% of the elected places at the Convention, although one woman resigned before taking her seat.

### The Women’s Constitutional Convention

Meanwhile a proposal had been put forward for a Women’s Constitutional Convention and I presented the rationale for this at a Women into Politics (WIP) lecture at the NSW Parliament House in June 1997.<sup>6</sup> The idea was that women needed space to debate the Constitution on their own terms for once and to crystallise views to be taken forward to the ‘People’s Convention’ which would otherwise be dominated by male agendas. It was not sufficient for individual women to be elected or appointed to the Convention, women also needed to exercise collective influence.

Momentum behind the Women’s Constitutional Convention gathered pace, with Christina Ryan of WEL setting up the secretariat and a steering committee with representatives of WEL, YWCA, WIP, the Association of Women Lawyers, the National Women’s Justice Coalition and the Constitutional Centenary Foundation (ACT). All appointed and elected women delegates to the Convention were invited and national women’s organisations were asked to send two delegates each. Some 40 national women’s organisations did so, as did a number of women’s services, unions, political parties and Aboriginal and Torres Strait Islander Commission (ATSIC) regional councils.

The Women’s Constitutional Convention took place on 29 and 30 January 1998 — just before the People’s Convention. Altogether there were some 300 delegates from very diverse social, cultural and political backgrounds at the Women’s Convention. Particularly notable was the large number of Aboriginal women caucusing and participating forcefully — for example, they did not like the idea of an equality act available only to women. They also successfully supported the retention of a reference to Almighty God in the Preamble. There were also many strong young women at centre stage — no wonder women have been taking over student politics!

The Women’s Convention was notable for the respect shown divergent points of view — for example Aboriginal Tent Embassy representatives loudly contesting the legitimacy of ATSIC and of the Aboriginal negotiators on the *Native Title Act*. A standing ovation for Lois O’Donoghue followed soon after the Tent Embassy representatives had departed, suggesting delegates had been respectful but not persuaded.

### Recommendations of the Women’s Constitutional Convention

Despite their diversity, delegates were largely agreed on a range of principles to be taken forward to what was always described as the ‘little Convention’ (having 152 delegates as contrasted with 300). These included support for a republic provided that constitutional change included:

- full recognition of indigenous Australians;
- gender equity in all processes of change, including selection of head of state;
- outcomes which would promote gender equity;
- respect for diversity, including cultural, religious and sexual diversity; and
- the promotion of social cohesion, political stability and democratic culture (including no extra powers for the head of state).

There was also agreement on the need for a properly resourced process of community consultation and discussion following on from the Convention to consider broader

issues of constitutional change, including the values to be included in the Preamble.

The Women's Convention also gave support to a Constitutional Bill of Rights or, failing that, a legislative Bill of Rights, with equality and special measures clauses. The recognition of local government in the Constitution was spoken to eloquently by a delegate of the Country Women's Association and endorsed (there were no State Premiers or Opposition Leaders present).

Agreed elements for a new Preamble included:

- the Australian people to be the source of authority for the Constitution;
- acknowledgment of Aboriginal and Torres Strait Islander occupation, rights and culture;
- affirmation of multiculturalism, equality between women and men and between races, commitment to human rights and freedoms and representative democracy;
- commitment to peace and to the environment.

Not surprisingly, considering the current composition of Australian parliaments, electoral reform was high on the Women's Convention agenda. Recommendations included dedicated seats for Aboriginal and Torres Strait Islander peoples and the entrenchment of proportional representation. Other recommendations recognising that human rights require more than the letter of the law were that processes be implemented to ensure the appointment of more women to the High Court and that adequate funding be made available to ensure human rights legislation is accessible to all Australians.

The Women's Convention succeeded beyond expectations in creating a consensus on the need to tie any constitutional change to the issue of gender equity. One of the outstanding features of the Women's Convention was its electronic accessibility through the web wizardry of WEL's Val Thomson. Thomson's strength has always been the user-friendly nature of her web-sites; the Convention proceedings became almost instantly available, along with a discussion forum and links to the Ausfem-Polnet list which garnered support for feminist delegates.<sup>7</sup>

Delegates proceeding to the Constitutional Convention were empowered by the collective agenda of the Women's Convention, which was tabled by the Chair of the Constitutional Convention, Ian Sinclair, as well as distributed to all delegates. With the shift from one Convention to the other came a shift not only from women chairs to chairmen, but also a shift in venue from the theatre of new Parliament House to the House of Representatives chamber in old Parliament House.

### Moving on to the People's Convention

Thirty-five per cent of the delegates at the Constitutional Convention were women and many of them young women. The difference in *gravitas* to the 1890s was palpable — when delegates averaged almost 14 stone in weight and six feet in height.<sup>8</sup> The women delegates were, in general, professional and well-organised in their approach, simply less pompous and overbearing than some of their male colleagues (an example of such pomposity is given below). They did complain about having to queue for the women's toilet — which had never been a problem before in the old House of Representatives. There were, of course, no childcare facilities although one delegate, ARM's Karin Sowada, was breast-feeding.

Mary Kelly of the Australian Women's Party had already contacted Sinclair the week before the Convention to suggest changes to the order of proceedings to address gender equity. She was the first to find a photocopier on Monday morning and distribute her procedural amendments to all delegates. Seconded by Catherine Moore (Greens) and supported by Clare Thompson (ARM), Kelly was successful in having gender equity written into the Convention procedures, including 50% representation of women on the important resolutions working party. Gender equity provisions within the Convention were generally accepted with good grace, except by Bruce Ruxton of the Victorian RSL who claimed not to know the meaning of gender balance.

Kelly was also to take the lead role in promoting the Women's Convention proposal for gender equity in procedures and outcomes of selection of a head of state. This was adopted in various forms by the working groups dealing with different republican models. The Group C (bipartisan model) working party accepted a proposal that men and women should alternate as head of state, but only 'as an acknowledged principle'. Steve Vizard reported that to enshrine this principle in the Constitution would have 'implications for other groups' [!] and that in any case it was not necessary to enshrine gender balance because 'hopefully this issue will be non-contentious in the not too distant future' (Convention Hansard, 4 February 1998, p.133). Gender equity was either too controversial or not controversial enough to be included in the Constitution.

In the form finally agreed by the Constitutional Convention, gender is one of the issues to be taken into account in the composition of the Committee responsible for short-listing candidates for head of state, and 'community diversity' is also to be a relevant factor in the short-listing process. It should be noted that when Mary Kelly successfully moved the latter amendment, it was despite Professor George Winterton's contribution — the only speaker against. Winterton said: 'I am in support of the principle behind this, and I am sure the committee would be mindful of these things but, with all due respect, too much political correctness is going to kill the republic before it is even conceived' (Convention Hansard, 12 February 1998, p.620).

Apart from delegates already mentioned, Christine Milne, Misha Schubert, Karin Sowada, Natasha Stott Despoja and Geoff Gallop all referred back to the Women's Constitutional Convention, and only one delegate, ACM's Christine Ferguson, cast doubt on its representative status.

Tasmanian Greens' Leader Christine Milne was persistent through the Convention, finally achieving success on the last day, in pushing for the ongoing process of constitutional debate and reform recommended by the Women's Convention. As finally passed, the motion (moved by Tim Costello) called for the next Constitutional Convention to be two-thirds elected and to discuss further issues such as rights and responsibilities of citizens, a Commonwealth environmental power, proportional representation and equal representation of women and men in parliament.

Quite apart from those consciously promoting the collective agenda of the Women's Convention, women delegates played a major role on all sides of debate. Senator Jocelyn Newman, for example, was responsible for an amendment to the so-called 'McGarvie model' to make it more in tune with the theme of gender equity running through the Convention. She successfully moved that the council of elders should include at least one woman, saying it was clear that 'it is the

wish of a wide range of people that women have a more active role in the constitutional process than has been the case in the past' (Convention Hansard, 5 February 1998, p.253). In its final form this provision was to be a temporary one for 30 years.

On the republican side, women such as Mary Delahunty and Lois O'Donoghue were important in establishing a more conciliatory mode of operation than had been presented by ARM leader, Malcolm Turnbull. On the monarchist side, Kerry Jones was often the spokeswoman. She was clearly less of a 'silver tail' than ACM leader Lloyd Waddy QC, and fitted better with the ACM claim that it was republicanism not monarchism that was the elitist movement. Lawyers Moira Rayner and Pat O'Shane made much of the running on the popularly elected model of a Republic.

### The Preamble to a new Australian Constitution — missing out again?

The big disappointment in terms of outcomes was the Preamble. The Convention did agree (on Wednesday, 11 February 1998) that a new Preamble should contain a number of elements including:

- reference to Almighty God,
- recognition of our federal system of representative democracy and responsible government,
- affirmation of the rule of law,
- acknowledgment of original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders,
- recognition of Australia's cultural diversity, and
- affirmation of respect for our unique land and environment.

Missing from the list was the equality of men and women, recommended for inclusion by the Women's Convention and part of the Preamble earlier promulgated by Clem Jones (Queensland Constitutional Republic).

Instead, 'gender equality' was a matter referred by the Convention for 'consideration', along with equality before the law and recognition that 'Aboriginal people and Torres Strait Islanders have continuing rights by virtue of their status as Australia's indigenous peoples'. As the latter is unlikely to be supported by the Coalition, it seems likely to take down 'gender equality' with it.

This means that Australia alone of countries with modern Constitutions will have no mention of the equality of men and women as a fundamental value. This is expressed in varying ways — for example, the Greek Constitution says simply 'Greek men and Greek women have equal rights and equal obligations', while the Brazilian Constitution says 'men and women have equal rights and duties under the terms of the Constitution'. The Finnish Constitution specifies that 'Equality of the sexes shall be promoted in social activities and in working life, particularly in the determination of remuneration and other terms of service...'

The 1993 Preamble to the South African Constitution reads in part:

Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

For some reason the relevant Preamble working party appeared to think the inclusion of the equality of men and women in the Preamble to the Australian Constitution to be more controversial than the other elements endorsed. It is not clear exactly what the fears of the working party were. In recent years the equality of men and women has repeatedly been included in official statements of the core values of Australians — for example, in the National Agenda for a Multicultural Australia (1989); the Second Reading Speech on the *Australian Citizenship Amendment Act* (1993); and in the Government response to the Report of the Civic Experts Group (1995). Surprisingly, conservatives have often been the most assiduous in enunciating the equality of men and women as one of Australia's overarching values — although often in the context of critique of multiculturalism.

Whatever happened, it is important the Preamble issue should be remedied as soon as possible. Australia's reputation as a leader in gender equity issues has already been damaged over the last two years in a number of international forums such as the United Nations. To modernise our Constitution without reference to the equality of female citizens would take us back to the 'doormats of the western world' image of Australian women.

### References

1. Irving, Helen, 'A Gendered Constitution? Women, Federation and Heads of Power', (1994) 24 *Western Australian Law Review* 186-98.
2. Royal Commission on the Constitution, *Report of Proceedings and Minutes of Evidence*, Government Printer, Canberra, 1927-28, Part 4, p.918. See also Part 3, p.554.
3. Australian Constitutional Convention, *Proceedings*, Government Printer, Brisbane, 1985, pp.355-6.
4. Australian Constitutional Commission, *Final Report of the Constitutional Commission*, Vol. 1, Canberra, AGPS, 1988, Ch. 9, pp.536-48.
5. Australian Constitutional Commission, above, pp.634-7; pp.105-10.
6. Sawyer, Marian, 'Women are People Too! Strategies for the Inclusion of Women in the People's Convention' in Jane Gardiner (ed.) *Here We Come, Ready or Not!*, Women into Politics, North Sydney, 1998, pp.67-73.
7. The papers presented at the Women's Constitutional Convention and the outcomes are available at: <http://www.womensconv.dynamite.com.au/> Feminist debate on issues raised by the two Conventions is archived at: <http://www.utas.edu.au/docs/humsoc/cpmp/ES6.html>
8. Twomey, Anne, 'The Constitution — 19th Century Colonial Office Document or a People's Constitution?', in *The Constitution Papers: Parliamentary Research Service Subject Collection No.7*, AGPS, Canberra, 1996, p.10.

### Correction

In (1998) 23 *Alternative Law Journal* 2 at 4 in the article 'A People's Convention' by George Williams it was stated that:

The Convention found that the existing preamble and covering clauses of the British Act that brought the Constitution into effect should be left untouched.'

This sentence should read:

The Convention found that the existing preamble of the British Act that brought the Constitution into effect should be left untouched.

(The covering clauses would be either moved into the Constitution itself or repealed depending on whether they have a continuing operation. Ed.)