



## ARTICLES

*Cass\* and Rubenstein\*\**

### REPRESENTATION/S OF WOMEN IN THE AUSTRALIAN CONSTITUTIONAL SYSTEM

#### INTRODUCTION

*Like the goddess of wisdom the Commonwealth uno ictu sprang from the brain of its begetters armed and of full stature.*<sup>1</sup>

**A**CCORDING to Sir Owen Dixon, the Commonwealth of Australia sprang, like the Goddess Athena, fully armed from the head of the States. Whether or not this is an apt metaphor from a classical perspective,<sup>2</sup> from the perspective of Australian

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1 *In Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 530 per Dixon J.

2 According to Greek mythology, Athena, the Goddess of Wisdom, was born from the head of her father, Zeus, the King of the Gods. See Harvey, (ed) *The Oxford Companion to English Literature* (Clarendon Press, Oxford, 3rd ed 1946) p46. Gatens points out that an often neglected part of the myth is that Zeus "gave

women, it is a strange choice. Athena is one of the strongest female images of the Western literary tradition. In contrast, Australian women have not been represented with such vigour in Australian constitutional law. They appear rarely as litigants,<sup>3</sup> occasionally as members of Parliament,<sup>4</sup> sometimes as part of the Executive,<sup>5</sup> and virtually never as judicial decision makers.<sup>6</sup> Their presence in the Australian system could never be described as "armed" or "of full stature". To this extent, the ascription of feminine strength to the entity which represented Australian nationhood is at odds with the reality; the historical exclusion of women from the constitutional arena.

However, with the coming of the centenary of Australian federation, discussion of constitutional change is commonplace and reform may be imminent. Academic issues are being debated in the public arena.<sup>7</sup> The question of how best to redress the historical constitutional imbalance between men and women and to incorporate the interests and concerns of women has been raised. Suggestions have been made to examine barriers

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birth" to Athena only after he had swallowed whole the body of his pregnant wife. See Gatens, "Corporal representation in/and the body politic" in Diprose and Ferrell (ed) *Cartographies: Poststructuralism and the Mapping of Bodies and Spaces* (Allen & Unwin, Sydney 1991) 79 at 81

- 3 As Australia does not possess a Bill of Rights, most constitutional litigation has concerned the division of powers between the States and the Commonwealth. However even in relation to the small number of claims by individuals, women are unlikely to feature.
- 4 Statistics are presented in the Australian Law Reform Commission, *Equality Before the Law* (Discussion Paper No. 54) (1993) 59 [hereafter "ALRC Discussion Paper No 54"] and Sawyer & Simms, *A Woman's Place: Women and politics in Australia* (Allen & Unwin, St Leonards, 2nd ed 1993) p58.
- 5 Women have been successful in entering the bureaucracy but they have not been rewarded with advancement to the highest policy levels: ALRC Discussion Paper No 54 at 63.
- 6 The first appointment of a woman to the High Court of Australia, Mary Gaudron, was made in February 1987. For one of the earliest discussions of the entry of women into the legal profession generally see Greig, "The Law as a Profession for Women" (1909) 6 *Commonwealth Law Review* 145. The absence of women from the judiciary has become a concern for government. See, for example: Aust, Attorney General's Dept, *Judicial Appointments* (Discussion Paper, September 1993). When the ALRC reported in 1993, only 12 out of 233 senior federal State and Territory judges were women. There are 3 women among the 136 State and Territory Supreme Court judges: ALRC Discussion Paper No 54 at 81.
- 7 The Constitutional Centenary Foundation has produced material which has received public attention. The Republican Advisory Committee which reported to the Commonwealth Parliament has also received public scrutiny.

to participation of women in public and political life;<sup>8</sup> to consider the inclusion of an equality right in any Bill of Rights;<sup>9</sup> and to review the history of women's struggle for the right to vote.<sup>10</sup>

None of these suggestions directly focus on the principles which underlie Australia's current constitutional system and the way those principles operate. None of them ask whether the system, in practice, meets or even aspires to meet, the theories or assumptions encapsulated by the principles. Nor do they deal with the related question of increasing importance; what it means to be a citizen within a representative democracy.<sup>11</sup>

The Australian Law Reform Commission's 1993 Discussion Paper, *Equality Before the Law*, stated that women should be able to "share equally in political power and in the formation of policy", "feel confident that their views are adequately represented ... and taken fully into account in policy formulation", and know that their views are being taken into account by the Parliament.<sup>12</sup> These statements reflect three principles fundamental to constitutional law: *representation, accountability and the sharing of power*.<sup>13</sup>

The focus of this article is representation. It examines women as *representatives in government; women as they are represented by government; and women in representations of government*.<sup>14</sup> The argument in this article is that at the level of doctrine, the High Court is moving to a position which emphasises the participatory aspect of representation. This position is consistent with a feminist critique of

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8 ALRC Discussion Paper No 54 Ch 6 "Equal Participation in Political and Public Life".

9 Marquis, "A Feminist Republic? A Feminist Constitution?" [1993] *Spring Australian Quarterly* 29.

10 "Women's Suffrage Centenary Issue" (1994) 3 *Constitutional Centenary Foundation Newsletter*.

11 For some recent discussions of this question see Blackburn (ed) *Rights of Citizenship* (Mansell Publishing, London 1993); Thornton, "Embodying the Citizen" in Thornton (ed.) *Fragile Frontiers: Feminist Debates Around Public and Private* (forthcoming).

12 ALRC Discussion Paper No 54 at 57.

13 This paper is part of a larger project which questions the underlying assumptions of the Australian Constitution. Its thesis is that, despite its claims to representative democracy, accountability and the sharing of power, the practice of the Australian constitutional system, on all three accounts, has failed to meet the evolving standards of each of the principles.

14 This later sense means the visual and textual descriptions of government, primarily through the media.

representative democracy which demonstrates that low levels of participation by women undermine the representative nature of that concept. In history and current practice, Australia's system lags behind the theoretical insights suggested by feminist argument, and the conclusions which follow from High Court doctrine. The aim of this article is to demonstrate the need for a synthesis of constitutional practice with theory and doctrine, by suggesting that increased participation of women is essential for Australia's constitutional system to conform with evolving standards of representative democracy.

One part of the background to this discussion occurs in the international arena. In light of Australia's international obligations and the growing international focus on the under representation of women in public life, any deficiency in the Australian constitutional system of representative democracy is unsatisfactory. Australia is a signatory to the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). This obliges State parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country, to ensure women's participation in the formulation of government policy, and to provide them with the opportunity to represent government internationally.<sup>15</sup> The United Nations committee established to review compliance with CEDAW has decided to make these provisions the focus of its forthcoming deliberations.<sup>16</sup> Under-representation of women was also a focus at the 1993 Vienna World Conference on Human Rights. In the lead up to the United Nations sponsored World Conference on Women to be held in Beijing in 1995, it is one of three areas designated for action in the Asia-Pacific region.<sup>17</sup> The regional preparatory conference held in Jakarta in June 1994 called for the achievement of full and equal participation of women in government and the strengthening of institutions to support women's full and active participation in community and national decision-making.<sup>18</sup> At the international level, representation of women has clearly emerged as a major issue.

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- 15 Articles 7 and 8. This followed the *Convention on the Political Rights of Women*, July 7 1954, TIAS No 8289, 193 UNTS 135.
- 16 Arvonne Fraser, *International Women's Rights Action Watch, Women and Public Life, Articles 7 and 8 of the Women's Convention and the Importance of Non-Governmental Organizations in Creating Civil Societies* (Humphrey Institute of Public Affairs, University of Minnesota 1993).
- 17 Aust, Dept of Foreign Affairs and Trade, (1994) 3(9) *Insight* 6.
- 18 Aust, Dept of Foreign Affairs and Trade, "Draft Plan of Action for the Advancement of Women in Asia and the Pacific" (6 June 1994) 3(9) *Insight* 6. Note the inconsistency between these aims and the Australian government statement that as the provision for women of food, shelter, income, employment,

Moreover, Australia has taken an active role on these issues in the lead up to Beijing, by claiming that it is a "leader" in the region with a history of "innovative government" which took "proactive, creative measures" for raising the status of women.<sup>19</sup> Further, the governing Australian Labor Party (at its 1994 National Conference) committed itself to preselecting women in 35 per cent of winnable seats by the year 2002.<sup>20</sup> Scrutiny of Australia's constitutional system is thus critical at this time.<sup>21</sup>

This article asks whether, *according to its own internal principles* of representation, the Australian constitutional system is deficient when it comes to women. Does the Australian constitutional system represent women in a manner consistent with an evolving standard of representative democracy?<sup>22</sup>

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basic education and health-care are "non-controversial", they may be "implemented to a large extent by men making decisions on behalf of women": Aust, Dept of Foreign Affairs and Trade, (6 June 1994) 3(9) *Insight* 6 at 6.

19 The Australian government claims that in international fora on the status of women, "Australia is a leader": Aust, Dept of Foreign Affairs and Trade, (1994) 3(9) *Insight* 5.

20 See "Historic win for ALP women" *The Australian*, September 28 1994, 1.

21 The notion that women should be better represented in society is not, of course, limited to the constitutional and political spheres. For example, the Commonwealth government is reviewing selection procedures for judicial appointments because the present process has resulted in an "unrepresentative" judiciary. See Aust, Attorney General's Discussion Paper, *Judicial Appointments - Procedure and Criteria* (1993) at 3. Work is being conducted on the representation of women in a variety of other fields including commerce and health. In the field of health the United States' *Public Health Service Act* was amended in 1993 to ensure "clinical research equity" by requiring the National Institute of Health to take steps to ensure that women and members of minority groups are, where appropriate, included in the NIH clinical research projects. We would like to thank Natasha Cica for this observation.

22 Only tangentially does the project explore the claim made by some feminist theorists that the structure of constitutional theory itself fails to take account of women's concerns. In so limiting the argument we acknowledge that we may fall, albeit knowingly, into the critique referred to by Gatens, which is concerned with how the content of theories oppress women rather than challenging the neutrality of the framework, discussed in Phillips, *Engendering Democracy*, (Polity Press, Oxford 1991) p38. For a summary of different feminist critiques of the State see Rhode, "Feminism and the State" (1994) 107 *Harvard Law Review* 1181. MacKinnon argues that the law, and constitutional law in particular, sees and treats women in the way men see and treat women. So, according to MacKinnon, the "state is male". Constitutional theory is thus designed to suppress any consideration of gender. And, because the pre-constitutional social order assumes gender is not a status category, then constitutional cases in relation to issues such as pornography and abortion, will inevitably protect male

Rather than revisit debates which have been extensively canvassed elsewhere, this article seeks to examine gender inequality in the context of constitutional principles of representation which structure the Australian system of government.<sup>23</sup>

## REPRESENTATIVE DEMOCRACY AS A PRINCIPLE WHICH UNDERPINS THE AUSTRALIAN CONSTITUTIONAL SYSTEM

Underlying the Australian constitutional system are four principles or concepts, namely federalism, responsible government, representative democracy and the separation of powers.<sup>24</sup> These four principles can be found in a variety of sources, including the text of the Constitution, constitutional conventions,<sup>25</sup> case law, and lesser tools of interpretation.<sup>26</sup>

Federalism, for example, is expressed in the Constitution by the division of legislative power between State and Commonwealth legislatures;<sup>27</sup> the saving of State constitutions,<sup>28</sup> and State laws,<sup>29</sup> the supremacy of federal law in the case of any inconsistency between State and Commonwealth laws,<sup>30</sup> and in representation of the States in the Senate.<sup>31</sup> Responsible government is implicit in that Ministers must be members of either the House of Representatives or the Senate,<sup>32</sup> and ensures that those who

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power: MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, Cambridge Ma 1989) pp157-170. Also see Pateman who argues that the status of women in marriage is related to their political status and that liberal democratic theory, and thus constitutional theory, is built around gendered assumptions based on male identity: Pateman, *The Sexual Contract* (Polity, Cambridge 1988).

23 We do not address issues of gender inequality in constitutional law through the insertion into the Constitution of a right to equality.

24 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69-70 per Deane and Toohey JJ.

25 Jennings, *The Law and the Constitution* (University of London Press, London, 5th ed 1959).

26 For example the High Court has relied on constitutional debates in *Cole v Whitfield* (1988) 165 CLR 360.

27 The Constitution vests a small number of powers exclusively in the Commonwealth (eg ss52, 90). The remainder of listed powers are exercised concurrently with the States, (s51) except in the case of inconsistency when Commonwealth laws prevail (s109). Those powers that are not set out in the Constitution remain exclusively with the States (s107).

28 *Commonwealth Constitution* s106.

29 Section 108.

30 Section 109.

31 Section 7.

32 Section 64.

administer the Departments of State are also responsible to Parliament. The separation of powers doctrine can be discerned in the division of the Constitution into three chapters covering the legislature, the executive and the judiciary;<sup>33</sup> and the vesting of relevant power in each branch respectively.<sup>34</sup> This paper focuses on the fourth principle of representative democracy.

## The Constitution and Representative Democracy

The Constitution creates a system where people are chosen to be members of Parliament. Sections 7, 24 and 29 each refer to members being "chosen". In addition there are references to "elections" and "electors" in a variety of sections.<sup>35</sup> Furthermore, s41 appears to protect the right to vote.

The interpretation of these sections has been determined by the High Court on several occasions. The more recent cases of *Nationwide News v Wills*,<sup>36</sup> and *Australian Capital Television v Commonwealth*<sup>37</sup> have held that representative democracy is fundamental to the Constitution.<sup>38</sup> But what representative democracy actually entails has not been clearly determined.

Matters of representative democracy arising before the High Court have ranged from compulsory voting,<sup>39</sup> to the right to vote,<sup>40</sup> to the value of the vote,<sup>41</sup> to the representation of the Territories<sup>42</sup> and to the nature of speech and participation.<sup>43</sup> Each of these matters will be analysed in order to

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33 Chapter 1 is headed "The Parliament", Chapter II "The Executive Government" and Chapter III "The Judicature".

34 Section 51 (legislative power); s61 (executive power); s71 (judicial power).

35 Sections 8, 9, 10, 12, 30, 31, 32, 41 and 47. See also Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166 at 175 and his discussion of rights based on representative government.

36 (1992) 177 CLR 1.

37 (1992) 177 CLR 106.

38 This has been affirmed in *Theophanous v The Herald & Weekly Times Limited* (1994) 124 ALR 1; *Stephens v West Australian Newspapers Limited* (1994) 124 ALR 80; and *Cunliffe v Commonwealth of Australia* (1994) 68 ALJR 791.

39 *Judd v McKeon* (1926) 38 CLR 380.

40 *R v Pearson*; *Ex parte Sipka* (1983) 152 CLR 254.

41 *A-G (Cth)*; *Ex rel McKinlay v Cth* (1975) 135 CLR 1; *A-G (NSW)*; *Ex rel McKellar v Cth* (1977) 139 CLR 527.

42 *Western Australia v The Cth* (the Territorial Senators' Case) (1975) 134 CLR 201.

43 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106.

assess the standards of representative democracy that have been developed so far by the High Court.

### *Voting and Notions of Representative Democracy*

One of the early cases which could have raised the constitutional requirements underlying our democratic system was *Judd v McKeon*.<sup>44</sup> Ernest Judd failed to vote at an election of members of the Senate for NSW. Voting was compulsory. Judd sought special leave to review the Divisional returning officer's determination that he had failed to provide a "sufficient reason" for not voting, on the ground that the right to vote implies a right *not* to vote, and that the *Electoral Act* (Cth) 1918-1925, which prescribed the compulsory voting, was not a valid exercise of power under s9 of the Constitution.

The opportunity therefore existed for the Court to explain some of the principles upon which the constitutional system was based. Knox CJ, Gavan Duffy and Starke JJ held that the only constitutional restriction within s9 was that the method of choosing senators had to be uniform for all the States. The closest general statement about the democratic system was made by Isaacs J. He stated that the franchise was to be regarded as a right and referred to the fact that s41 spoke of the right to vote.<sup>45</sup> Yet this did not extend to a right not to vote. No further elaboration of the principle of representative democracy was made. Parliament's prescription validly included compulsory voting.

This case reflected the view that Parliament was entitled to define the franchise. The Court did not develop constitutional principles associated with representative democracy. The only conclusion which can be drawn for our purpose is that women, like men, could potentially rely on a "right to vote" according to Isaacs' statement. The meaning of representative democracy, however, remained undetermined by the Court.

### *A Right to Vote?*

Section 41 of the Constitution prescribes that

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

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44 (1926) 38 CLR 380.

45 As above at 385.

law of the Commonwealth, from voting at elections for either House of the Parliament of the Commonwealth.

This "right to vote", if it was one, was to be short lived. Courts interpreted the provision in a narrow manner, and in a manner that gives us insight into the historical under-representation of women in our constitutional system.

The decision of *R v Pearson; Ex parte Sipka*<sup>46</sup> interpreted the guarantee in s41 as a transitional guarantee only. That guarantee ceased to exist after 12 June 1902, the date on which the *Commonwealth Franchise Act 1902* (Cth) came into force.<sup>47</sup> In *Sipka*, the majority of the Court relied upon the historical context in which s41 was framed. At Federation, the qualifications of electors for the more numerous Houses of the Parliaments of the respective states were not uniform. This was particularly in relation to the position of women. Only South Australia and Western Australia extended the franchise to women over the age of 21. In order to ensure that those women would be entitled to vote in the Commonwealth elections, s41 precluded the Commonwealth from legislating to prevent them from voting. Section 41 however did not establish a general "right to vote". Interestingly, federal principles influenced the court in reaching this conclusion<sup>48</sup> and underlay the compromise represented by the provision. The so-called "right to vote" in s41 was concerned with the protection of State legislative power, more so than individual rights of women. It has been shown that the intention of the section, according to the Court, was to preserve the power of States at Federation to determine their own franchise, and thus ensure that South Australia particularly, would join the union.<sup>49</sup> Concern for the rights of women to vote were scant.

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46 (1983) 152 CLR 254.

47 See the joint judgment of Brennan, Deane and Dawson JJ at 280.

48 For instance, the Court 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. The principles of federalism and the place of women in the constitution will be developed in another article as part of this project.

49 The South Australian delegates warned that South Australia would reject federation if South Australia lost the adult suffrage for federal elections. Mr Symon (SA) *Convention Debates*, Adelaide 1897, p132 and Mr Holder (SA) p150. See Bennett *The Making of the Commonwealth* (Cassell Australia, Melbourne 1971) p122, and more generally on the franchise, Stretton and Finnimore "Black Fellow Citizens: Aborigines and the Commonwealth Franchise" (1993) 25 *Australian Historical Studies* 521. Note discussion in Part 3 of this paper under the heading *Representation as Voters*.

The majority judgments in *Sipka* confirmed the principle underlying the majority in *Judd v McKeon*, that the power lay with Parliament to determine the extent of the franchise. There were no underlying Constitutional principles necessarily to be drawn from the Constitution in guiding Parliament.

The decision in *Sipka* once again emphasises the difficulty in discerning the Court's view of the scope or content of the principle of representative democracy at this time, save to say that it did not bode well for women and their representation.

The majority view in *Sipka* was fiercely contested by Murphy J who did seek to draw from sections 7 and 24 constitutional principles for a democratic system. These were principles that he had also relied on, as a minority, in the earlier case of *McKinlay*<sup>50</sup> which looked at the notion of the value of the vote. *McKinlay* also gave rise to a greater examination of representative democracy within the Constitutional system. However, some of the opinions in *McKinlay* on the principles of democracy may not necessarily have been positive for women.

#### *An Equality Between Votes?*

*McKinlay* involved the validity of the *Representation Act 1905-1974* (Cth) and the *Commonwealth Electoral Act 1918-1975* (Cth). It was essentially about the distribution of electorates, and the allocation of seats between the States. It is the distribution of electorates issue that we seek to analyse here.

The principal submission was that there was a guarantee in s24 of the Constitution, that the number of people or electors in a single member electorate should be nearly as equal as is practicable.

A majority of the Court held that s24 of the Constitution did not require such an equality of numbers, and the principles upon which this was based suggest the nature of representative democracy assumed by the court in its decision. Gibbs J held it to be clear from ss25, 30, 41 and 128 of the Constitution that people might constitutionally be denied the franchise on the grounds of race, sex, or lack of property.<sup>51</sup> This conclusion ignored the participatory aspect of the principle and detracted from the force of the

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50 (1975) 135 CLR 1.

51 At 44.

argument that s24 required equality of numbers.<sup>52</sup> A system which did not include women in the franchise would still be representative according to this view.

A similar conclusion may flow from the opinion of Stephen J, although the opposite may also follow from a reading of his carefully nuanced approach. Stephen J dealt at length with the ramifications of s24 in light of Chapter 3 of the Constitution. Both ss7 and 24 called "for a system of representative democracy in the sense that the Houses of the legislature are to be composed of members whom the people choose".<sup>53</sup> Moreover, Stephen J discerned three great principles in s24 of the Constitution: representative democracy, by which he meant that the legislators were chosen by: the people; direct popular election; and the national character of the lower House. Furthermore, Stephen J held that the principle of representative democracy was predicated upon "the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus "elected".<sup>54</sup> However, the particular quality and character of the content of each of those ingredients was not fixed and precise.<sup>55</sup> Most significantly though, Stephen J was prepared to say that representative democracy is

descriptive of a whole spectrum of political institutions, each different in countless respects yet answering to that generic description ... and in a particular instance there may be absent some quality which is regarded as so essential to representative democracy as to place that instance outside those limits altogether; but at no one point within the range of the spectrum does there exist any single requirement so essential as to be determinative of the existence of representative democracy.<sup>56</sup>

Whilst numerical equality was an important factor, Stephen J upheld the view that it was up to Parliament to determine the electoral system as long as it was "consistent with the existence of representative democracy as the

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52 At 45.

53 At 56.

54 As above.

55 As above.

56 At 57.

chosen mode of government and is within the power conferred by s51(xxxvi)."<sup>57</sup>

Just as Gibbs J had pointed out the inadequacies of democratic principles contained in the Constitution, so too did Stephen J highlight the fact that "the Constitution in no way pretended to any perfect embodiment of some particular model of democratic principles"<sup>58</sup> and as such it was not accurate to determine that s24 required a practical equality of votes.

Stephen J's opinion could therefore be read in two ways. On one view his emphasis on the indeterminate content of representative democracy could be read as a prescription for labelling as "representative" any voting system, no matter whom it includes or excludes. On this view it would not be possible to argue that under-representation of women violated representative democracy. However Stephen J's view is much more finely constructed than this interpretation would suggest. His Honour was careful to state that the "quality" of any voting system may at some point lose an aspect "essential" to calling it representative.<sup>59</sup> He left open the question of when that occurs, and was keen to emphasise that there is no one precise moment when it does. But on this reading it can be argued that once a system of representative democracy has lost that "quality which is regarded as so essential to representative democracy"<sup>60</sup> it no longer conforms to the concept of representative democracy. Thus a system which under-represented women could fall "outside the [representative democracy] limits altogether".<sup>61</sup>

Murphy J dissented and it is in this case that some of the principles that he developed later in *Sipka*<sup>62</sup> were formulated. He discerned a "democratic theme of equal sharing of political power which pervades the Constitution";<sup>63</sup> s24 demanded it as did s30 which prohibited voters from voting more than once.

There are essentially mixed messages from the above principles, but messages, nonetheless, relevant to any assessment of how well the constitutional system represents women. Gibbs and Stephen JJ remind us that at its inception the system was not representative of women.

57 At 58.

58 As above.

59 At 57.

60 As above.

61 As above.

62 (1983) 152 CLR 254.

63 *A-G (Cth); Ex rel McKinlay v Cth* (1975) 135 CLR 1.

Moreover, particularly from Stephen J's description of representative democracy, there is no clear sense of what the internal principles of representative democracy actually require. However, at some point on a spectrum, certain systems fall outside the concept. The requirement of actual representation of a specific group, in Parliament, was considered by the court in a case dealing with the representation of the Territories.

### *The Right to Representation*

Murphy J's view of democracy did receive some support in *WA v Cth*<sup>64</sup> when he was in the majority. The case validated Commonwealth legislation that provided for representation of the Territories in the Senate.

The concept of representation was weighed against the notion of the Senate as a States' house. Barwick CJ, Gibbs and Stephen JJ held that allowing territorial representation would distort the ability of the Senate to operate as a states' house, and in essence, held that the Australian democratic system allowed for some of the population to be excluded from the system of representative government. Three judges were, therefore, prepared to say that actual representation was not essential for representative democracy.

Even though Murphy J was in the majority, his was the only judgment that dealt substantially with the issues of democracy and representation. McTiernan, Mason and Jacobs JJ concentrated on the meaning of s122 in light of the Constitutional text.<sup>65</sup> Murphy J, in looking at the text, highlighted the fact that the term "representation" was significant in s122, and he went beyond the text as well. He maintained that the purpose of the Constitution and the fundamental constitutional doctrines must be kept in mind, which included the fact that "the Constitution is designed for a democratic society".<sup>66</sup> He examined the American system of government and the English philosopher John Stuart Mill on Representative Government, quoting from Mill's analysis:

The only government which can fully satisfy all the exigencies of the social state is one in which the whole people participate ... In a really equal democracy every or

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64 (1975) 134 CLR 201.

65 At 234 per McTiernan J, at 270 per Mason J, at 273 per Jacobs J.

66 At 283.

any section will be represented, not disproportionately but proportionately.<sup>67</sup>

The requirement for equal representation for different groups does require linkage of the elector to the electorate, in our view. And to fulfil this, one needs representation in the form of participation of particular sections within the community,<sup>68</sup> namely women.

The view that the Constitution encapsulates these underlying fundamental constitutional concepts was clearly a minority one in the High Court in 1975. Further, the cases discussed so far generally display a very narrow approach to representative democracy as a requirement of our Constitutional system. As a context in which to interpret the provisions, they show an overriding concern to reflect the text of the Constitution and a recognition of the non-democratic historical foundations of the system. Only occasionally does the Court indicate that some types of government may be beyond the Constitution's requirement of representative democracy.

*Participation as an Essential Element of Representative Democracy.*

It is in the context of freedom of political speech that the present High Court has developed principles associated with representative democracy, and it has done so in a manner that departs significantly from the views of the earlier courts which placed a strong emphasis on the Parliament's power to determine matters associated with representation.<sup>69</sup>

The two cases raising these issues are *Nationwide News* and *Australian Capital Television*. The first concerned the validity of s229(1)(d) of the *Industrial Relations Act 1988* (Cth); the second, the validity of provisions in the *Broadcasting Act 1942* (Cth). The relevant sections in each of the acts prevented certain speech. The cases established a right to free speech associated with the Australian system of representative democracy. In reaching this conclusion, some judges elaborated upon the meaning of representative democracy. These cases have been affirmed in *Theophanous v The Herald & Weekly Times Limited*, *Stephens v West*

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67 At 284.

68 See p19ff.

69 Dawson J has however maintained the approach that it is up to Parliament to determine these matters. See *ACTV v Cth* at 184.

*Australian Newspapers Limited and Cunliffe v Commonwealth of Australia.*<sup>70</sup>

Justice Brennan in *Nationwide* began by looking at the text of the Constitution and asserted that the text supported the principles of separation of powers, federalism, responsible government and a Parliament answerable to the people. In order to

sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential: it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.<sup>71</sup>

This was an inherent part of representative democracy and therefore was an inherent part of our constitutional system.

Deane and Toohey JJ went further and discussed the basis of the doctrine of representative democracy which they, too, agreed was a principle that underlies the Constitution: "The rational basis of that doctrine is the thesis that all powers of government ultimately belong to, and are derived from, the governed."<sup>72</sup>

Moreover, since the adoption of full adult suffrage, all citizens who were not under some special disability were entitled to share equally in the exercise of those ultimate powers of governmental control, in their view. This control by the people was expressed through the right to choose their representatives, and, secondly, the power to amend the Constitution through s128. This view emphasises the aspect of representative democracy which requires the electorate to be somehow linked to the elected so that the power which derives from the people is the power which government exercises. One method of achieving that linkage, according to this view, is the equal participation of citizens.

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70 *Theophanous v The Herald & Weekly Times Limited* (1994) 68 ALJR 713; *Stephens v West Australian Newspapers Limited* (1994) 68 ALJR 765; and *Cunliffe v Cth* (1994) 68 ALJR 791.

71 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 47.

72 At 70.

Further expressions of these principles were developed in *Australian Capital Television*. Mason CJ reaffirmed that the Constitution prescribed representative democracy through the creation of Parliament, and through ss7 and 24 in prescribing for the choice by the people. He also described the theoretical basis for representative democracy:

The very concept of representative government and representative democracy signifies government by the people through their representatives ... And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.<sup>73</sup>

In determining essential elements of this concept of representative government, Mason CJ stated: "In truth, in a representative democracy, *public participation* in political discussion is a central element of the political process."<sup>74</sup>

This right to freedom of speech in our democratic system was therefore an essential part of the Constitution because public participation was an integral part of representative democracy. Again, a corollary of this view is that representation without participation may not meet the requirements of representative democracy.

Gaudron J also proclaimed that a free society governed by principles of "representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally".<sup>75</sup> Each of these notions is based on the involvement or participation of the people.

These judgments reflect the Court's willingness to state that there are fundamental principles, such as representative democracy, which underlie our constitutional system. Furthermore, there is an acceptance of principles that are integral to representative democracy. Public participation, and its role in linking the elected with the electorate, are two of the principles that are developed strongly. Finally, this also reflects a Court prepared to interpret the Constitution according to present principles, rather than being confined, necessarily, to the meaning of the

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73 At 137-138.

74 At 139.

75 At 212.

terms at the time of Federation. In this respect, the Constitution is being interpreted as a living document.<sup>76</sup>

These "strengthened" principles assist us in determining whether the Australian constitutional system is deficient with respect to women.

## REPRESENTATIVE DEMOCRACY AND THE RELEVANCE OF GENDER

The High Court's approach to representative democracy shows that there are different conceptual levels informing constitutional interpretation. At one level, there is the text of the Constitution which contains certain rules - such as requiring members of Parliament to be directly chosen by the people. At another, there is the principle or doctrine of representative democracy which underpins the rule; and, at yet another level, there are the theories or assumptions behind the formal principle.

It is accepted that representative democracy requires some linkage of the elected and the electorate;<sup>77</sup> that is an ongoing requirement,<sup>78</sup> and that electoral systems can vary over time.<sup>79</sup> The crucial point in relation to under-representation of women is whether individuals or groups can nevertheless be represented in the elected assembly without physically being present themselves. Does it matter that the Australian legislature in 1995 is overwhelmingly composed of one sex at a ratio of ten to one in one house and five to one in the other? Is it necessary for women to be actually present in order to be represented?

We argue that gender is relevant to representation, and the under-representation of women in government makes the system unrepresentative. Four justifications for the view that gender is relevant to representation are identified here: the invisibility of gender; the difference between interests of men and women; the injustice of exclusion; and the nature of democracy.

76 This is similar to the approach of the Court in *Cheatlev R* (1993) 177 CLR 541. In that case, the Court was looking at the principle of unanimity of jury verdicts, and in the course of its joint judgment held that contemporary standards would have to be applied in determining what was a representative jury.

77 Dicey, *An Introduction to the Law of the Constitution* (MacMillan Press, London 1960, reprinted 1970) p84.

78 *Nationwide News v Cth* (1992) 177 CLR 1 at 71-72.

79 Discussion of Stephen J in *McKinlay* above. See also *Cheatle v R* (1993) 177 CLR 541 for a discussion of the nature of society changing and the effect of this on constitutional principles.

## The Invisibility of Gender

This first argument stresses that gender is hidden or made invisible in current notions of a representative democracy, but it is nevertheless there, evidenced by the overwhelming numerical imbalance between men and women.

The invisibility of women in government means that no challenge is offered to the status quo of imbalance in men's representation. The imbalance appears "normal" and indeed inevitable, and maintains the necessity of natural supportive female roles.<sup>80</sup>

Young refers to the "paradox" of representative democracy in which men and women are formally represented, but social power renders some citizens more equal than others.<sup>81</sup> Thornton argues that as gender is already relevant to citizenship, albeit in a masked way, citizenship ought to become, explicitly, more "gender-conscious".<sup>82</sup>

The effect of this invisibility no doubt means that the agendas of governments are affected by the imbalance of representation. It is difficult, however, to determine this precisely as there is no nation that provides an example for determining the effect of equal representation. This leads into a discussion of whether men and women have different interests.

## The Difference Between Interests of Men and Women

Charlesworth argues that research from a number of countries suggests a difference between men and women on political issues. As examples, she refers to women supporting peace initiatives, environmental protection, and social services more than men. She also refers to the fact that increased representation in the European Parliament in 1979 coincided with the increased concern with issues of sex equality.<sup>83</sup> Sawyer and

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80 Charlesworth, "Transforming the United Men's Club: Feminist Futures of the United Nations" (1994) 4 *Transnational Law and Contemporary Problems* 420.

81 Iris Marion Young, "Polity and Group Difference" cited in Thornton, "Embodying the Citizen" in Thornton (ed) *Fragile Frontiers: Feminist Debates around Public and Private forthcoming* (Oxford University Press, Melbourne 1995) p259.

82 Thornton "Embodying the Citizen" in Thornton (ed) *Fragile Frontiers: Feminist Debates around Public and Private*.

83 Charlesworth, "Transforming the United Men's Club: Feminist Futures fo the United Nations" (1994) 4 *Transnational Law and Contemporary Problems* 420.

Simms argue that the entry of women into the formal institutions of power in Australia has resulted in significant challenges to the content of politics. They highlight the fact that in the 1980s women politicians were airing such issues as abortion, domestic violence, sexual harassment, rape, single parenthood, women's health issues or even just the experience of suburban isolation in a manner unprecedented in Australian political life.<sup>84</sup> However, Rhode argues in the US context that whilst gender parity in political representation is valuable in its own right, its achievement would not guarantee a broadening of political agendas. She also refers to women supporting environmental and welfare measures more than men and greater opposition to the use of military force, but acknowledges that women have also been more conservative on some feminist issues.<sup>85</sup> In fact, she argues that gender is not nearly as important as education and race in predicating electoral behaviour in the US.<sup>86</sup> Commentators point out that issues such as sexuality, race and class influence women's views and practices as well as gender, and that each woman possesses a "multiple consciousness"<sup>87</sup> and thus will recognise an intersectionality<sup>88</sup> of interests involved.

This information raises the difficult issues associated with the "difference" debate. Briefly, difference theory, which is associated with the work of psychologist Gilligan, argues that men and women approach moral and legal dilemmas from different perspectives and therefore have "a different voice".<sup>89</sup> Feminist legal theorists applied Gilligan's work to argue that where law fails to recognise the different voice of women, it fails to take account of their different interests. Thus for our purposes, altering the composition of Parliament to include more women may facilitate the realisation of legislative programs more attuned to the interests of women. In a similar vein, Karst has argued that constitutional doctrines limit

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84 Sawyer & Simms, *A Woman's Place: Women and Politics in Australia* (Allen & Unwin, Sydney, 2nd ed 1993) p154.

85 The question of whether Australian women are more conservative than men is discussed in Sawyer & Simms, *A Woman's Place: Women and Politics in Australia* p29.

86 Rhode, "Feminism and the State" (1994) 107 *Harvard Law Review* 1181 at 1206-1207.

87 Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1992) 14 *Womens Rights Reporter* 29.

88 Crenshaw, "Mapping the Margins: Intersectionality, Identity, Politics and Violence Against Women of Color" (1991) 43 *Stanford Law Review* 1241.

89 See Gilligan, *In A Different Voice* (Harvard University Press, Cambridge Ma 1982).

women's access to equality because they are based on a male conception of morality, rather than what he calls an "ethic of care".<sup>90</sup>

Other feminist scholars recognise the pitfalls of characterising women's voices as different. MacKinnon, for example, objects to Gilligan's approach because it does not acknowledge the reasons for that difference; that women's voices are different because women are in a position of subordination to men. It also fails to recognise that often women do not just speak differently to men, "A lot you don't speak."<sup>91</sup> Moreover, Gilligan's views contain the danger of "essentialising" women as sharing, caring and basically inferior.<sup>92</sup>

Whilst there are difficulties in dealing with these issues, Phillips concludes that this is no reason to completely reject the difference approach. It is *because* of the complexity and varied nature of women's interests that women themselves ought to represent their own views. Looking at these difficulties in light of the international arena, Charlesworth argues:

How or whether women's equal participation in decision-making would affect the quality of UN decisions is not yet certain. But whatever the evidence of a distinctive woman's influence in political decision-making, it is at least clear that the realities of women's lives under the present unbalanced system do not contribute in any significant way to the shaping of UN policy.<sup>93</sup>

The central insight suggested by the justification remains compelling, namely that women experience the world differently to men as an undeniable matter of practical reality. Moreover, regardless of how many different voices women may have, it does not mean that men can properly represent those different voices. The personal experience of some women representatives suggests that men cannot listen to women's views.<sup>94</sup> If this

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90 Karst, "Woman's Constitution" (1984) *Duke Law Journal* 447.

91 MacKinnon, "Difference and Dominance" in *Feminism Unmodified* (Harvard University Press, Cambridge 1987) p39.

92 Gilligan does state that the contrasts between male and female voices are presented to highlight a distinction between two modes of thought, and to focus a problem of interpretation, rather than to represent a generalisation about either sex. See Gilligan, *In A Different Voice* p2.

93 Charlesworth, "Transforming the United Men's Club: Feminist Futures of the United Nations" (1994) 4 *Transnational Law and Contemporary Problems* 420.

94 See p33ff.

is so, how can they adequately represent and pursue them?<sup>95</sup> As such, the interests of women may not be adequately represented by the current, largely male, composition of Parliament. The under-representation of women skews the system of representative democracy toward one gender.

## Justice

Another argument identified by Phillips is that it is unjust to exclude women from political life, just as it is unjust that they should be "typists but not directors".<sup>96</sup> Imagining a reversal of the gender balance emphasises the point of Phillips' rhetorical question about the British system of representative democracy: "What would men think of a system of political representation in which they were outnumbered nineteen to one?"<sup>97</sup>

This argument implicitly rejects the proposition that formal access to politics is sufficient to ensure equality for women. Opponents of increasing representation for groups not physically present in decision making assemblies have rejected this. They would argue that not being there *does* matter, but as these groups are not being *physically* prevented from being there, there are no obstacles to their presence which cannot be overcome by reforms aimed at achieving equality of opportunity. This argument fails to accept that there is a difference between formal equality and substantive equality.<sup>98</sup> As Charlesworth points out, "[i]nstitutional practices may not directly discriminate against women, but they can

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95 We are grateful to Bridget Gilmour-Walsh for making this point so succinctly.

96 Phillips, *Engendering Democracy* p62.

97 As above, p2

98 This position is at best naive. Teson, for example, in discussing the level of representation of women in the international sphere, states that representative democracy requires the elected body to be broadly inclusive of the population, but says that liberal feminism already addresses the issue of underrepresentation with the principles of nondiscrimination and equal opportunity. "Radical feminist theory" according to Teson, would go too far by advocating other means of redress such as affirmative action. In any case, there is no "real injustice, unless feminists are suggesting that women are being prevented from voting". He poses the question: does a radical feminist solution propose appointing women "regardless of popular vote" or even "forc[ing] women who do not want to run for office to do so?" See Teson, "Feminist International Law: a Reply" (1993) 33 *Virginia Journal of International Law* 647. For a response to this in the international context see Charlesworth, "Transforming the United Men's Club: Feminist Futures for the United Nations" (1994) 4 *Transnational Law and Contemporary Problems* 420.

effectively inhibit women's participation by relying on norms reflecting male life patterns as benchmarks of eligibility or success."<sup>99</sup>

## Democracy

Anne Phillips favours a fourth argument which concerns the revitalisation of the democratic process. She states that approximate equality between men and women when linked to "a more ambitious programme of dispersing power through a wider range of decision-making assemblies"<sup>100</sup> is necessary for the enhancement of the democratic process. The strongest justification is one concerned with the nature of democracy, in her view.

Some commentators argue that presence is not necessary to representation; the composition of the Parliament does not have to include particular groups in order for those groups to be represented. It is argued that taken to its extreme it would accept the proposition that only lunatics can be represented by mad people.<sup>101</sup> It puts too high a premium on who the representatives are, rather than what they are doing;<sup>102</sup> and it would lead to a "slippery slope" where parliamentary quotas are introduced for other sections of the community whether they be people with definable interests such as lesbians and gay men, and pensioners, or people with arbitrary common characteristics such as blue eyes and red hair.<sup>103</sup> These advocates are arguing quite explicitly that "being there", or presence, is not essential to representation.

Those arguments are rejecting the notion of linking electors to the elected. They certainly limit the concept of participatory democracy to a pure ability to vote. In addition, one must ask whether women can be categorised as a group similar to other groups? First of all, women often represent at least *half* of the community, and secondly, within the category of gender, all those other groups may also be represented.

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- 99 Charlesworth, "Transforming the United Men's Club: Feminist Futures fo the United Nations" (1994) 4 *Transnational Law and Contemporary Problems* 420, referring to Knop, "Re/Statements: Feminism and State Sovereignty in International Law" (1993) 3 *Transnational Law and Contemporary Problems* 293 at 304.
- 100 Phillips, "Democracy and Representation, Or, Why Should it Matter Who Our Representatives Are?", unpublished paper (On file with author) at 19.
- 101 Griffiths quoted in Phillips, as above at 3.
- 102 Pitkin *The Concept of Representation* quoted in Phillips, above at 4.
- 103 Phillips, "Democracy and Representation, Or, Why Should it Matter Who Our Representatives Are?", unpublished paper at 4.

Democratic theory is sometimes divided into three models: liberal or representative democracy; direct or participatory democracy; and civic or republican democracy. Each model includes a notion of representation, although the form it takes may alter. Thus in Anne Phillip's discussion of these models<sup>104</sup> she emphasises how, in a liberal democracy, the interests of the individuals who make up the citizenry are represented by representatives elected to the decision-making assembly. In a model of participatory democracy people participate in decision-making themselves. Participation occurs in local arenas such as the workplace, as well as in the political sphere. The likelihood of personal involvement through direct participation is greater according to this view, but not all people will be able to participate all of the time, and their interests will be represented by others. In this model there will normally be a closer link between the parties. A model of civic republicanism differs from both of the above, while still retaining a notion of representation. In republican democracy the people involved in public life are required to transcend localised concerns and represent a more general notion of community.

The involvement of women enhances the model of participatory democracy most. This would also accord with the recent High Court attitudes towards participation as a fundamental part of representative democracy.

Moreover, the critique of "difference", in Phillips' view, only strengthens the need for more women to represent that diversity amongst women. If interests are easily determined it matters less who represents them. When they are complex and divergent, however, there is a greater need for complexity and diversity in the representatives. To this extent, the very difficulties in defining what are in women's interests strengthen the case for more women as representatives.<sup>105</sup> This would enhance representative democracy for men and women, for men would also benefit from the counsel that women would afford.

In summary, representation is a significant element in democratic theory. It implies a linking between the electors and the elected in order to produce some coincidence between them.<sup>106</sup> Participation is one mechanism for establishing that link. The need for the elected body to be

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104 Phillips, *Engendering Democracy* p13f.

105 Phillips, "Democracy and Representation, Or, Why Should it Matter Who Our Representatives Are?"; unpublished paper at 15.

106 This is reflected in the judgments of *Nationwide* and *Australian Capital Television* as discussed above.

representative does not end once the body is elected; representation is an ongoing process. While the content of representative democracy is not set in the sense that differing electoral methods may satisfy its requirements, the system is not representative without the presence of a broad range of people and groups from the electorate. In order to be representative that range should include gender. The invisibility of the currently gendered system, the injustice of under-representing women, the difference between men's and women's interests and the need to revitalise democratic processes compel the conclusion that gender is relevant to representation. Women's representation may not be achieved by men alone, regardless of whether it will necessarily be achieved, for all women, by including more women in the representative system. Regardless of whether women speak in a different voice to men, or the same voice as each other, the gender of those present is relevant to representation, and the under-representation of one gender means that the system is not representative overall.

### THE REPRESENTATION OF WOMEN IN THE AUSTRALIAN CONSTITUTIONAL SYSTEM

Representation is used in the literature in a number of different senses. First, women ought to be *represented by government* in a representative democracy. This meaning usually conveys the idea of being able to vote.<sup>107</sup> Second, they ought to be *represented in government*. This entails being a part of the government.<sup>108</sup> Third, and perhaps more controversially, if the appearance of representation is important to the existence of a representative democracy, then women ought to appear *in representations of government*. Just as the law traditionally relied on the maxim that justice should not only be done, but be seen to be done,<sup>109</sup> the representative nature of the constitutional system should be *seen* as well as simply assumed. In order for the Australian constitutional system to reflect the principle of representative democracy in respect of women, women should feature as those who are *represented* (as voters); as those who are *representatives* (as members of parliament); and *in representations of the constitutional system* (in visual and textual descriptions).

107 The reliance on ss7 and 24 as an expression of representative democracy is based upon the notion of choice by the people. See discussion above and *Australian Capital Television Pty Ltd. v Commonwealth* at 137 per Mason CJ.

108 The importance of participation in relation to representative democracy is highlighted in *Nationwide* and *Australian Capital Television*. See discussion above.

109 The oft quoted statement is of Lord Hewart CJ in *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

A range of different indicators might be used to test whether the system is representative in the sense of these three connotations. We could look at the composition of the bodies involved in the constitution-making process. For example, who drafted the Constitution? Who approved it by voting for it at referendum? We could look also at the composition of the elected assembly. Who are they and who do they claim to represent? Who voted for them? We could also look at the way in which various interests are taken into account in the debates in the legislature; in the law-making program; and in the administration of policy. How are the contributions of women viewed? And finally, how are those women represented in portrayals of the Australian constitutional system? This section explores those questions in order to demonstrate that Australian constitutionalism does not conform with the principles of representative democracy. In so doing, we adopt a combination of arguments about the relevance of gender to representation. Notions of injustice, difference and revitalisation of the democratic process inform this discussion. Similarly, we argue that as gender is already relevant to representation, albeit in a disguised manner, representation should be "gendered" explicitly to the benefit of women whose presence in the decision-making assembly has so far been minimal, despite the formal appearance of equality of opportunity for representation.

### **The Historical Under-Representation and Exclusion of Women From the Australian Constitutional System in Relation to Representative Democracy**

Historically, women have been either grossly under-represented or totally excluded from significant aspects of the Australian constitutional system. Although the historical exclusion of women from these processes may accord with the practices of the period, it does not address the question of whether the practice accords with the notion of representative democracy, particularly when the imbalance continues into the present day. Women remain under represented, not simply as part of the story of the past but in the story of the present. This is not surprising given, as O'Donovan notes, that "[p]ast exclusions inform present practices. History is not yet abolished."<sup>110</sup>

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110 O'Donovan, "Gender Blindness or Justice Engendered?" in Blackburn (ed) *Rights of Citizenship* (Mansell, London 1993) p19.

## Representation in the Drafting of the Constitution

The first stage in the process of building a constitutional system based on representative democracy was the holding of a series of constitutional conventions in 1891, 1897 and 1898, at which the Constitution was drafted. Women were not merely *under represented* in this process, they were virtually 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 had introduced universal franchise, and so South Australian women contributed to the 1897 Convention process by electing their representatives and, in the case of one particularly bold woman, even standing for office. But 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. Despite being named in the Liberal organisation's list of "10 Best Men",<sup>111</sup> and polling a "creditable" 7383 votes,<sup>112</sup> her bid was unsuccessful. Catherine Spence partly attributed her failure to comments by the South Australian Premier Charles Kingston,<sup>113</sup> who cast doubt over her eligibility to stand as she was 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 in 1898.

Unless it is accepted, as was argued at the 1897 Convention, that women can be represented at the ballot box by "their relations and male friends",<sup>114</sup> women were virtually excluded from this crucial constitution-making aspect of representative democracy.<sup>115</sup>

111 Haines, *Suffrage to Sufferance* (Allen and Unwin, North Sydney 1992) p60.

112 As above p62.

113 As above.

114 *Convention Debates*: Vol. 2, 15 April 1897, p637.

115 Despite their official exclusion from the process, women's groups worked hard to have their views represented in the constitution-making process by informal means. See Irving, "Who are the Founding Mothers? Women and Australian Federation" *Papers on Parliament* (Forthcoming, to be issued by the Department of the Senate, Parliament House, Canberra 1994). Numerous petitions were sent to the Conventions by women's groups. Appropriately enough, one of their major issues pursued was universal suffrage. See the *Convention Debates*: Vol

Despite the skewed nature of this process of representation, it is sometimes argued that the "founding fathers" were broadly representative of the Australian population. Craven, for example, has argued that it has become fashionable to criticise the members of the Conventions on the grounds of lack of diversity, when the Convention included a range of different interests including commercial, labour and agricultural.<sup>116</sup> Presumably the point of this argument is to make the claim that in view of their diversity in terms of class, political party, socio-economic background, they were representative of the Australian community. Despite the diversity, however, they all shared one significant characteristic, namely their gender. The "founding fathers" may have included a cross section of some groups in Australian society, but they did not include one major group, women.

### **Representation in the Endorsement of the Constitution**

The next phase in the making of Australia's most basic law was the holding in each State of a referendum to seek approval for the Constitution. It is a critical moment in the development of any new nation, and in the case of Australia, the popular mandate bestowed on our Constitution by the referendum process, is often touted as Australia's unique badge of democracy. The only problem with this argument is that the electorate which endorsed the Constitution comprised only half of the population in terms of gender, and none of the indigenous inhabitants. Not only were women not represented in the Conventions which drafted the basic law, but they were virtually not represented in the electorate which endorsed it.

Little wonder, then, the anger of many women in Victoria, Tasmania and New South Wales,<sup>117</sup> who, having struggled since the 1860s for the right to vote, now saw the consequences of their exclusion from the franchise; they were effectively silenced in the constitution-making process. As one commented: "[i]t is manifestly unjust that this great national question of Federation should be decided by only half the adult population of New South Wales."<sup>118</sup>

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1, 10 March 1891, p174; Vol 2, p23 March 1897,5; p24 March 1897, pp33,34; 30 March 1897, p261; 8 April 1897, p408; 15 April 1897, p637; and Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* (1992).

116 Craven, "The Founding Fathers: Constitutional Kings or Colonial Knaves?" *Papers on Parliament No 21* (1993) Issued by the Department of the Senate, Parliament House, Canberra

117 Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* p62.

118 As above.

This is a good example of how women of the time were caught in a classic cycle of discrimination. As they were not entitled to vote, they were not entitled to any say in the nature and content of the Constitution, the legal instrument which determined the very rights, such as voting, that they struggled to achieve.<sup>119</sup> Some of the most basic rights of representation and citizenship (for example determining what would be included in the basic law and voting for it) were denied them, because they were denied representation in the first place. The failure of the constitution-making process to conform to the principle of representative democracy boded poorly for the type of constitutional system which followed. The exclusion of women, once institutionalised in the constitution-making process, legitimated any subsequent exclusion and also provided a reason for excluding women.

### Representation as voters

As women were excluded in the making or approving of the Constitution, so they were virtually excluded from voting for representatives in the new federal Parliament until 1902, when the vote was granted to all women except Aboriginal women in Queensland and Western Australia.<sup>120</sup>

At the State level, the franchise had been extended over a period of some 25 years. South Australia was the first colony to grant women the right to vote in 1894 after the defeat of no less than six attempts in nine years.<sup>121</sup> Western Australia granted women the franchise next in 1899, after three earlier attempts had been defeated.<sup>122</sup> Then came the Commonwealth in June 1902,<sup>123</sup> followed shortly thereafter by New South Wales in August 1902,<sup>124</sup> and Tasmania in 1903.<sup>125</sup> Queensland and Victoria held out against universal suffrage until 1905<sup>126</sup> and 1908<sup>127</sup> respectively, with Victoria having gone to the trouble of repealing the right it inadvertently granted to women ratepayers in 1863.<sup>128</sup> Many of the early attempts to

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119 Note the discussion above on section 41 and the "right to vote".

120 Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* p64. See also generally, Sawyer & Simms, *A Woman's place: Women and Politics in Australia*, above.

121 Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* p23-38.

122 As above, pp46-52.

123 As above, p64.

124 As above, p96.

125 As above, p109.

126 As above, p27.

127 As above, p156

128 As above, p132.

extend the franchise were limited to women who owned property,<sup>129</sup> or were married,<sup>130</sup> and did not always extend to Aboriginal women.<sup>131</sup>

At the Commonwealth level, the question of plural voting according to property holdings was the major controversial issue and little of the discussion at the Constitutional Conventions focussed specifically on female representation. At the 1891 Constitutional Convention held in Sydney,<sup>132</sup> one delegate, however, candidly noted that although the lower house was elected to represent the whole of the people, "it does not really do that, for it does not represent the women."<sup>133</sup>

Eventually the wording of cl 30 allowed the colonies to determine the qualification of electors and a proposal to exclude property qualifications was rejected. In Adelaide in 1891, and at the 1897 Convention, Holder proposed that adult suffrage be included within the Constitution. This was rejected. In a convoluted turn of logic, delegates argued that as some colonies were opposed to suffrage for women, federation would be jeopardised by agreeing to the South Australian position.<sup>134</sup> The matter was characterised as a conflict between "states rights" and women's rights and thus the former larger interest had to prevail. Holder then immediately proposed an amendment which guaranteed the continued right of South Australian women to vote in federal elections. It was phrased in the negative and provided that no person who held the State franchise could be restricted from voting at Commonwealth level. This amendment was eventually severed from cl 30 and became s41 of the Constitution. States continued to be able to prescribe qualifications of voters until the Commonwealth otherwise provided.<sup>135</sup>

Apart from ingrained prejudice about the appropriateness of women participating in a representative democracy as full citizens, Oldfield puts

129 See for example introduction by Caldwell of measure into SA Parliament in 1889 in Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* p30.

130 As above, p103-104.

131 See Stretton and Finnimore, "Black Fellow Citizens: Aborigines and the Commonwealth Franchise" (1993) 25 *Australian Historical Studies* 521.

132 *Convention Debates*, Sydney 1891, Vol 1, 52-3, 62, 174, 488, 614, 625, 627.

133 McIlwraith, *Convention Debates*, Sydney 1891, Vol. 1, 62.

134 *Convention Debates*, Adelaide 1897 See, for example, Wise 3:717; Howe 3:719; Fraser 3:720; Glynn 3:720; Trenwith 3:722-723. The latter three specifically claimed to support women's suffrage but thought federation was more important.

135 See the discussion above. Gibbs CJ and Stephen J drew on this historical reality in interpreting ss7 and 24 in *McKinlay's* case, and this approach was also relied on in *Sipka* in interpreting s41 as a transitional provision.

forward a number of other reasons for the rejection of universal suffrage. The debate was stifled because of its association with the wider issue of abolition of the plural vote. For this reason the labour movement generally favoured abolition of the plural vote before the extension of the franchise to women.<sup>136</sup> Similarly the very fact that a property qualification was still attached to the vote indicated that the type of voting system in the fledgling democracy was not representative in any case.<sup>137</sup> Fear of cheap labour and that women involved in politics would not bear sufficient children to populate the sparse continent in the Asian region also influenced the debate. Finally the legal doctrine of coverture<sup>138</sup> assumed that, upon marriage, men and women were joined in a unity of spoushood making it unnecessary for women to vote because their relatives and friends were already representing them.

The struggle for enfranchisement illustrates a key premise of the discussion about constitutional law and women, namely that representative democracy is important for the claim of women to equality in a broad sense. The right to vote is just one of a bundle of rights which constitute full citizenship in society, a point clearly demonstrated by an examination of the issues which were linked to the suffrage debate. The debate did not solely concern a right to exercise political choice; it was intimately connected with the way in which women were, on a deeper level, subject to discrimination and inequality. For example, Oldfield surveys the issues which impinged upon the debate about granting the vote to women. They included the need to improve working conditions of women;<sup>139</sup> rights of women to own property;<sup>140</sup> automatic guardianship of children by fathers;<sup>141</sup> the inequality of divorce laws which still required women, but not men, to prove an aggravated adultery;<sup>142</sup> treatment of women prisoners;<sup>143</sup> legislation which provided for detention of any women suspected of engaging in prostitution;<sup>144</sup> and education for women.<sup>145</sup> Taxation of women without representation<sup>146</sup> and natural rights theories

136 Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* p174.

137 As above, p16.

138 See discussion in Graycar & Morgan, *The Hidden Gender of Law* (Federation Press, Sydney 1992) Chapter 6.

139 Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* p203.

140 As above, p204.

141 As above, p206.

142 As above.

143 As above.

144 As above, p207.

145 As above, p189.

146 As above, p187.

which demanded that every person should have the same rights<sup>147</sup> were also discussed. Economic, social, educational, property and family rights of women were intertwined with the issue of representation. Clearly representation was not simply about political rights but about the way women were conceived of in the new society.<sup>148</sup> As the Constitution is the foundation of law-making, the ability of women to vote for the law-makers was essential to the notion of representative democracy. It was a small but significant step toward women exercising their rights on an equal basis to men, although its achievement did not guarantee substantial change as indicated by the continuing prohibition on women's entry to a number of public activities including aspects of the legal profession.<sup>149</sup> After a long struggle,<sup>150</sup> a constitutional system committed to the principle of representative democracy finally granted the right to be represented to half its constituents.

### Representation as Members of the Parliament

Despite the opportunity for women to stand as representatives in the Parliament, the actual history of women's election to that role is not encouraging.

Apart from South Australia, where the right to stand was introduced in conjunction with the right to vote in 1894, the right to stand for election to Parliaments of the States was generally not introduced until around the period of the First World War.<sup>151</sup> The right to stand for the Commonwealth Parliament was granted in 1903 along with the vote.<sup>152</sup>

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147 As above.

148 See also Irving, "A Gendered Constitution? Women, Federation and Heads of Power." (1994) 24 *Western Australian Law Review* 82.

149 Thornton, "Embodying the Citizen" in Thornton (ed) *Fragile Frontiers: Feminist Debates around Public and Private* (forthcoming Oxford University Press, 1995) p6.

150 Oldfield refutes the claim by other historians that the granting of votes for women was a "gift" of the new Federation to women, by demonstrating that it was in fact the result of a 28 year long struggle by women: Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* pp14-15ff.

151 *Constitution Amendment Act* (SA) 1894; *Parliament (Qualification of Women) Act* (WA) 1920; *Women's Legal Status Act* (NSW) 1918; *Constitution Act* (Tas) 1921; *Elections Act* (Qld) 1915; *Parliamentary Elections (Women Candidates)* (Vic) 1923 cited in Thornton, above, appendix 1. See also Haines, *Suffrage to Sufferance* (1992) 73 and Sawyer & Simms, *A Woman's Place: Women and Politics in Australia* Chapter 3.

152 Haines, *Suffrage to Sufferance* (Allen and Unwin, Sydney 1992) p73.

As to the actual election of women to Parliament in all States, apart from South Australia and Tasmania, women were elected fairly soon after the introduction of enabling legislation.<sup>153</sup> In the Commonwealth, however, no women were elected to Parliament until 1943, when Enid Lyons won the seat in the House of Representatives and Dorothy Tangney entered the Senate.<sup>154</sup>

The dearth of women representatives was not through any lack of willing candidates. Between 1902 and 1943, 39 women had unsuccessfully nominated for the lower house and five for the upper house.<sup>155</sup>

Numerous reasons, many of which still resonate today, have been put forward for these dismal statistics. Haines attributes it to greater family responsibilities of women, the fact that women generally remained outside the party system, and, that when inside, they were given unwinnable seats.<sup>156</sup> The idea of women representatives evoked fear on the part of male representatives: "The prospect of women occupying their hallowed parliamentary benches seemed to frighten most nineteenth-century Australian parliamentarians out of their wits."<sup>157</sup>

Sensationalist, and contradictory comments were made to the effect that women representatives would be at once dangerous, and feminising. "No Government would be safe against the persistent attacks of a feminine opposition";<sup>158</sup> "[d]o you want to bring them in here with their babies and their bottles".<sup>159</sup>

The persistent failure of women to win seats continued well after the election of Enid Lyons and Dorothy Tangney. In the twenty-five years between 1943 and 1969 women were successful on only five occasions,

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153 The first woman to be elected to any Australian Parliament was Edith Cowan. In 1921 she was elected as a Nationalist to the West Australian Legislative Assembly. See Souter, *Acts of Parliament: A Narrative history of the Senate and House of Representatives of the Commonwealth of Australia* (Melbourne University Press, Carlton 1988) 358-359. In NSW in 1923, in Queensland in 1929, but in SA in 1959 and in Tasmania in 1943: Haines, *Suffrage to Suffrance* (Allen and Unwin, Sydney 1992) p123.

154 Haines, *Suffrage to Suffrance* p73.

155 As above.

156 As above, p74.

157 As above, p178.

158 *Observer* 23 July 188, quoted in Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* p179.

159 *Mercury*, 9 October 1903, quoted in Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle*.

and as Haines points out, as Enid Lyons was elected three times, only three different women represented the electorate during that period.<sup>160</sup> At State level the figures are even worse. Of the 46 women who stood as State representatives, only seven were elected.<sup>161</sup>

The most disturbing data however comes from the period of the 1960s and 70s, an era in which so-called second-wave feminism had advocated successfully for a range of initiatives. In this enlightened period, women responded enthusiastically to the idea of entering the public domain as representatives of the electorate. In an eight-year period between 1969 and 1977, no less than 161 women offered themselves as candidates for election to the House of Representatives. Only 44 of these were endorsed by either of the major parties, and only one, Joan Child, was elected.<sup>162</sup> Equality of opportunity or not, clearly a system which produces such a run of statistics is open to question.

During the 1980s and the early 1990s, the figures have very gradually improved. At 8 November 1994, there were 136 women in Australian parliaments, out of 841 seats. This represents 16.17 %.<sup>163</sup> It is clear from this evidence that merely providing the opportunity for women to become representatives is not sufficient to guarantee that the constitutional system is actually "representative". Since Federation, only 50 women out of a total of 1279 parliamentarians have been elected to federal Parliament. Despite the existence of equality in the formal sense, the reality has been that the representative nature of the Parliaments of Australia has been anything but equal in relation to women. If, as noted above, one condition of representative democracy is that the Parliament be broadly representative, then this failure of Parliaments around Australia to seat women calls into question the representative nature of the Australian constitutional system.

### **The composition of the current Federal legislature grossly under-represents women in the Australian community.**

The basic condition of representative democracy is that the composition of government reflect a broad cross-section of the community. This notion is

160 Haines, *Suffrage to Sufferance* p121.

161 As above, p121.

162 As above, p142.

163 The percentage of women in each Parliament on 8 November 1994 was: Commonwealth 14.35%; NSW 19.15%; Vic 12.12%; Qld 14.6%; WA 16.48%; SA 23.19%; Tas 14.82%; ACT 35%; and NT 12%: Parliamentary Research Service, Parliament of Australia.

supported by the importance of the represented being linked to the representatives and the ability of the representatives to listen to and ascertain the views of their constituents during the life of the Parliament.<sup>164</sup>

In common with other countries,<sup>165</sup> the composition of the federal parliament is not representative of the community in respect of women. "The body politic remains a predominantly fraternal organisation".<sup>166</sup> The current Prime Minister, Paul Keating, has labelled this gender disparity as "the great flaw in Australian democracy".<sup>167</sup> Figures taken from the ALRC Discussion Paper, *Equality Before the Law*,<sup>168</sup> indicate that representation of women in the federal legislature, and the federal executive, is grossly disproportionate to the number of women in the community.<sup>169</sup> In the federal parliament women comprise less than 9 per cent of members of the House of Representatives and just over 21 per cent of the Senate. Women hold less than 10 per cent of positions in a federal ministry of 32, and approximately 5 per cent in federal Cabinet. And, as noted by the ALRC "there has never been a woman Governor General or

- 164 *Australian Capital Television v Cth* (1992) 177 CLR 106 at 232-233 per Toohey J. See also the discussion above of High Court doctrine following the free speech cases.
- 165 The roll of the New Zealand House of Representatives lists 36 women and 1127 men: Fish, Kirby & Waring, *Petition to Members of House of Representatives of New Zealand*. In 1990 percentages in other countries ranged from between 5-6% in France and the U.K. to 10-12% in Austria, Italy and Poland, and 20-30% in Germany, the former Soviet Union and Denmark: Janova and Sinean, "Women's Participation in Political Power in Europe" (1992) 155 *Women's Studies International Forum* 117; *The World's Women: Trends and Statistics 1970-1990*, (Social Statistics and Indicators, Series K, 8, United Nations, New York 1990) p39.
- 166 Thornton, "Embodying the Citizen" in Thornton (ed) *Fragile Frontiers: Feminist Debates around Public and Private* (Oxford University Press, 1995) p18.
- 167 Kingston, "PM wants more women in Parliament" *Canberra Times* 4 December 1994. The Prime Minister's stance on this issue contrasts with his attitude toward the ability of female journalists married to Liberal party members to report Canberra politics without bias: see Kingston, "Lawrence criticizes PM's stance on women", *Canberra Times* 3 June 1994.
- 168 ALRC Discussion Paper No 54 at 59.
- 169 In this respect, the political arena is no different to other sectors of the community such as business where, contrary to popular impressions, recent survey demonstrate, women remain underrepresented. See Still, *Where To From Here? The Managerial Woman in Transition* (Business and Professional Publishing, NSW 1993): the proportion of women in senior management fell from 2.5% in 1984 to 1.3% in 1992 as compared to a fall for men from 11.3% to 10.1%.

Prime Minister".<sup>170</sup> The decision by the Australian Labor Party at its 1994 annual conference to commit itself to preselecting women in 35 per cent of all winnable seats by the year 2002 is seeking to address this deficiency.<sup>171</sup>

**The division between public and private spheres reflects and perpetuates the under-representation of women.**

The gross under-representation of women in the Australian constitutional system is due partly to the division between public and private spheres. This view, common to feminist theory, is strongly argued by Pateman who claims that the abstract individual, so essential to liberal democracy, can only operate because of the gendered distinction between public and private.<sup>172</sup> Thus, a woman's domestic responsibilities in the private sphere impede her entry into public life. O'Donovan argues that "[w]hat goes on in the family is crucial to political life".<sup>173</sup>

Applying this approach to under-representation in the constitutional life of the state does not simply mean that women were impeded in entering into the public sphere. Once they had entered they still carried the double burden of their roles. The significance of a perceived distinction between public and private spheres of life continued to be a hindrance to their role as representatives. Sawer notes how the early Australian women politicians were expected to demonstrate their commitment to the private sphere, over their public responsibilities: "... their first commitment was to traditional gender roles in the home, and ... housekeeping the state could only come later and never at the expense of the primary role."<sup>174</sup>

The practical consequences for women can be extreme. As Justice Elizabeth Evatt observed, women would have never agreed to s125 of the Constitution, placing the Federal capital within New South Wales, but at least one hundred miles from Sydney. Women would have recognised the impossibility of leading a normal domestic life while participating in

170 ALRC Discussion No. 54, above. Note that the more powerful the institution, the less likely that women will be represented on it.

171 See "Historic win for ALP women", *The Australian* 28/9/94.

172 Pateman, *The Sexual Contract*.

173 O'Donovan, "Gender Blindness or Justice Engendered?" in Blackburn (ed) *Rights of Citizenship* (Mansell Publishing, London 1993) at 15.

174 Sawer, "Housekeeping the State: Women and Parliamentary Politics in Australia" in *Trust the Women: Women in Federal Parliament* (Papers in Parliament No17, Department of the Senate, Canberra 1992) p18.

Parliament so peculiarly located that even modern-day transport has not overcome its inconvenience.<sup>175</sup>

The distinction also had the effect of influencing the view that women's interests differed from those of men. Sawyer's study also found that early women politicians were expected to confine their discussion to women's issues affecting family, children and welfare matters.<sup>176</sup>

Constitutional decisions in other jurisdictions perpetuated the continuance of such a division, and thwarted women's ambitions to enter the public domain. Judge Ruth Bader Ginsburg (as she then was) notes how the U.S. Supreme Court rationalised exclusion of women from the public sphere on the basis that it was not their place.<sup>177</sup> So, for example, Judge Ginsburg notes that, as late as 1961, the Court could find a women's place at "the centre of home and family life" could exclude her from the obligation to sit on juries. The public/private distinction was thus constitutionalised.<sup>178</sup>

Simply providing equality of opportunity in the sense of removing overt barriers to women's entry to Parliament will not necessarily change the imbalance until these structural issues are also addressed. This of course includes, amongst other things, broadening the responsibilities of both parents in the domestic sphere.

### **The contribution of women representatives is seen as "different" and accorded less weight.**

This section concerns the way in which women's interests are taken into account in the legislative process. It takes as its starting point the view that the nature of women's contribution, or "voice" differs from that of men's. This has two consequences. The first is that in order for the constitutional system to be representative, women should represent their own interests. The second, is that women's interests are given less value in parliamentary debate than those of men's because they are different from the interests of men. Just as women's "different voice" would be incorporated into the law under this view, the different voice of women

175 Cited in Irving, "A Gendered Constitution? Women, Federation and Heads of Power" (1994) 24 *Western Australian Law Review* 82 at 93.

176 Sawyer, "Housekeeping the State: Women and Parliamentary Politics in Australia" in *Trust the Women: Women in Federal Parliament* p19.

177 Bader Ginsburg, "Remarks on Women Becoming Part of the Constitution" (1988) 6 *Law and Inequality* 17 at 19.

178 *Hoyt v Florida* 368 US 57 (1961).

would also be incorporated into the constitutional system in order to make it more representative.

The idea that in a constitutional system, women have a different interest, and therefore "voice", to men has expressed itself in the representative process. During the debate over female enfranchisement, supporters of suffrage argued that the electoral process would benefit if women were given the vote. Louisa Lawson, editor of the first women's magazine in Australia, argued that women would introduce a superior, feminine form of logic into the representative process. Women voters: "will be a power for good in every place and she will conquer error by truth and love."<sup>179</sup>

When women representatives first appeared in the Parliament the notion of a different voice surfaced again. According to Dame Enid Lyons, when she made her maiden speech, men wept.<sup>180</sup> History does not report whether it was the subject matter or style of Dame Enid's presentation which produced such an overwhelming response, but it is clear that her contribution differed from that which was usually heard.<sup>181</sup> There is of course an obvious point, that women's voices are different physiologically; apart from anything else they sound different. As Parliament is a forum for debate, tone and style of delivery is often important in persuasion and debating style. On the hustings too, the voice of Dame Enid was perceived as being somehow "different" from that which was ordinarily heard: "[s]he gave her own speech, talking politics in terms of 'pots and pans and children's shoes'."<sup>182</sup>

The view of the difference of women's contributions is still current. Introducing a proposal to encourage women from the Liberal Party to run for pre-selection, the current president of the Liberal Party federal women's committee Joan Hall was reported to have said: "Women have a different perspective on the way they view life and the way they exercise power in politics. I think Parliament will have a different sort of emphasis ... a different set of priorities."<sup>183</sup>

179 Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* pp195-196.

180 Lyons quoted in Langmore, *Prime Ministers' Wives* (McPhee Gribble, Melbourne 1992) p108.

181 According to Langmore, Dame Enid's speech was "thoughtful and substantial, compassionate and visionary": as above.

182 Langmore, *Prime Ministers' Wives* p86.

183 Lang, "Women the key to new-age Parliament" *Canberra Times* 30 August 1993.

Moreover, Sawyer and Simms argue that "[w]omen in Australian political parties have often found that the price of acceptance is to agree to the sidelining or marginalising of issues concerning the status of women."<sup>184</sup>

Proponents of double sex representation where each sex would be represented in each electorate, argue that women who entered Parliament under the proposed system would not have to operate in the same competitive manner as men. Thus, they would not be in the mould of Margaret Thatcher, and there would be "a greater sense of co-operation, and, unencumbered by the extremes of ego that cause such posturing in the political process, the system itself would gradually change".<sup>185</sup>

Another variant on the idea of the difference of women's contribution is the notion put forward by some citizenship theorists that qualities associated with mothering or nurturing would enrich the ideas of representation and citizenship.<sup>186</sup>

There is further evidence that women may fulfil their role as representative differently to men. The Budget process is an important aspect in the way representatives exercise power on behalf of the electors. In 1993 the Australian parliamentary system was subject to change in the Budget process. Ordinarily in the Budget process, if a government needs the support of a minor party in order to have the Budget bills passed by the Upper House, the minority grouping would put a list of demands to the government. The government may be forced to make concessions. The election of two women Senators from the Greens Party has injected a new dimension into that process. Senator Christobel Chamarette and Senator Dee Margetts asked for something which had not previously been demanded: answers to questions about how the Budget would affect the people they represent.<sup>187</sup> The effect of this different voice may lead to different emphases in the parliamentary process and hence the constitutional system of representative democracy. Gilligan claims that women's different voice leads them to emphasise contextual relationships

184 Sawyer & Simms, *A Woman's Place: Women and Politics in Australia* p208.

185 Macklin, "An idea whose time has come" *Canberra Times* 22 October 1993.

186 Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (Princeton University Press, Princeton 1981) cited in O'Donovan, "Gender Blindness or Justice Engendered?" in Blackburn (ed) *Rights of Citizenship* p22.

187 According to newspaper reports, the Federal Treasurer Mr John Dawkins was forced to supply a graph of the alleged effects of the Budget on taxpayers, and a complete analysis of the same. Kingston, "Greens entangle Keating" *Canberra Times* 4 September 1993.

over abstract rights.<sup>188</sup> The Senator's demands could be seen as an example of this approach. Instead of assessing the impact of the budget in abstract terms, they looked at the specific context of its effect. This could be seen as an illustration of the different way in which women approach moral dilemmas.

But even assuming that there is no different voice between men and women,<sup>189</sup> anecdotal evidence suggests that contributions by women are "heard" as different and consequently accorded less weight. Sawer's study confirms that historically male politicians either patronised or ignored the contributions of female politicians. A letter to the newspaper noted that Ministers replied to women members of Parliament with "a mixture of coyness and fatherliness that they no doubt also apply to their teenage grand-daughter's demands".<sup>190</sup>

If accounts of current members of Parliament are examined, this attitude still holds true. They suggest that the different nature of the "voice" of women in the Parliament leads to their views being accorded less weight than those of the male representatives. With a hindsight tinged with regret parliamentarian Kathy Sullivan reflected recently:

It appeared that women MPs could state their views however they liked - tactfully or aggressively, sweetly or stridently, obliquely or bluntly - but if they were expressing views about women, too often a majority of the men in their parliamentary audience automatically close their ears, believing they are about to hear fringe feminist rhetoric, which was to be automatically rejected. This realisation was a painful one - considering the number of years I had spent, I thought, I had been patiently explaining modern women's aspirations.<sup>191</sup>

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188 Gilligan, *In A Different Voice*, in particular Chapters One and Five.

189 Rhode is wary of this view. She states that "we cannot expect that women who internalize the norms necessary for political success and who gain vested interest in current structures will promote a transformative vision": Rhode, "Feminism and the State" (1994) 107 *Harvard Law Review* 1181 at 1206-1207.

190 *United Associations of Women News Sheet* May 1964 quoted in Sawer, "Housekeeping the State: Women and Parliamentary Politics in Australia" in *Trust the Women: Women in Federal Parliament* (Papers in Parliament No17, Department of the Senate, Canberra 1992) p20.

191 Sullivan, edited text of lecture in Main Committee Room of Parliament House September 27 1993, reprinted in *The Canberra Times* 28 September 1993.

When women speak, all some men hear is women's issues, regardless of whether they are speaking about issues relevant to both sexes. The previous federal women's minister claimed she was restrained from speaking out publicly because of the lack of credibility accorded to matters she discussed.<sup>192</sup> If there were equal numbers of women in Parliament, then men would be forced to reconsider their attitude to women, for half of the participants would be speaking in this different voice, and the men could not then afford to ignore them.

### **Women in Representations and Images of Representative Government.**

The question of representation in the sense of inclusion of women and of women's interests is closely linked to another connotation of the word "representation", namely the way in which women are represented in visual and textual descriptions of aspects of the constitutional process. This part briefly introduces some thoughts about representations of women in the latter sense.

Historically, representations of women in the Australian constitutional system have been characterised by trivialisation, ambiguity, or complete absence. Women were either not there at all; there in the guise of men in drag; or there to be ridiculed. Josie Castles and Pringle conducted a study of political cartooning at Federation.<sup>193</sup> They noted that apart from the occasional use of women as allegories of statehood, the more common symbol of the new Australian identity was of a man dressed in woman's clothing. The authors argue that this frequent cross-dressing indicated an ambivalence, and anxiety about Australian nationhood. "A crisis in political legitimacy is signalled in the cartoon as sexual ambiguity".<sup>194</sup>

For our purposes there are two consequences of this analysis. First, and most obviously, the absence of female images reflected the exclusion of women from the Constitutional drafting and endorsement process. Despite vigorous informal lobbying they were hardly visible and, hence, were not portrayed in images of the nascent constitutional system. Second, if sexual ambiguity is associated with ambiguity over Statehood, then it becomes more apparent why it was necessary to keep women in

192 Kingston, "Feminism's new confidence" *Canberra Times* 20 October 1993.

193 Castles, J & Pringle, "Sovereignty and Sexual Identity in Political Cartoons" in Magarey, Rowley & Sheridan (eds), *Debutante Nation* (Allen & Unwin, St Leonards 1993) 136

194 As above, p142-143.

traditional roles and thereby exclude them from the processes of representative democracy. A State in transition is portrayed as a man dressed as a woman. Given the uncertainty this image conveys, it is hardly surprising that women were not encouraged to act in a way which was beyond their expected role. In a state of "semiotic restlessness", certainty about women's roles, including their traditional exclusion from representative democracy, was the least that could be counted upon. Again, women's absence confirmed traditional exclusion from representative democracy and served to lessen other anxieties Australia had about its impending status change.

Sawer and Simms note in the preface to their second edition of *A Woman's Place: Women and Politics in Australia*, that the absence of women and women's issues from discussions of Australian politics was identified in the late 1970's. In 1981, the Australasian Political Studies Association (APSA) adopted a policy that the study of women be incorporated into all politics courses. In 1991, a review commissioned by the APSA Women's Caucus concluded that "introductory textbooks in Australian government published during the last five years have contributed little to making women more visible in the analysis of Australian politics and almost nothing towards the inclusion of feminist scholarship in Australian political science."<sup>195</sup>

In addition to the inadequate representation of women in the constitutional system generally, women have often been represented in a trivialised manner. It is common in political debate to either belittle women politicians or, conversely, when successful, to compare them to men. Senator Bronwyn Bishop is a frequent butt of a combination of this approach.<sup>196</sup>

This trivialisation has a long and not so honourable history in Australian parliamentary politics. Early this century, men warned against the danger of granting women the vote because it would lead to "petticoat government".<sup>197</sup> In political literature and cartoons women suffragettes were depicted as less than women, as masculine; they were caricatured as unattractive, bossy, violent and ridiculous. A suffragette was "that

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195 Cited in Sawer & Simms, *A Woman's Place: Women and Politics in Australia* xi.

196 Interesting case studies of this phenomenon would be the resignation of Ros Kelly from the Keating Cabinet in early 1994, and the "head to head" conflict between Carmen Lawrence and Bronwyn Bishop.

197 Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* p190.

creature of abhorrence to all true men and women - the masculine woman."<sup>198</sup> In one pamphlet of the period, entitled "The Wild Woman in Politics",<sup>199</sup> a large frowning woman attending a political meeting throws an egg at the man chairing the meeting, beats men with her umbrella, and tosses a man out the window in order to force her will on the meeting. She then reaches her decision not on the basis of the candidate's political views but because "he eats peas with a knife". Not only is she bossy, violent and unattractive, but she is stupid enough to decide political questions on the basis of rules of etiquette. Moreover, she is emasculating: the woman "and her family of 15" reduce "the anguished candidate" to a "limp condition."<sup>200</sup>

While this portrayal is not the direct responsibility of government in the same way as is under-representation in the Parliament, it is a phenomenon worth noting. The way in which people are represented may affect the way in which they act. Where women are left out or trivialised in the picture of what constitutes representative democracy, this may stifle their attempts to become more actively a part of the system. This also has importance for role-modelling, and its place in encouraging younger women to contemplate a future in politics. If there is a trivialisation of women in politics, it will not encourage other women to enter the arena.

Therefore, this section has shown, first, that historically women have been excluded from the constitution-making process of drafting and approval by referendum, and from early voting under Constitution; thus in the past women have not been adequately *represented in or by government*. Second, this is not purely an historical anomaly; the current composition of Parliament grossly under-represents women in the Australian community. Women therefore are not, to a sufficient extent, *representatives in government* in the Australian constitutional system. Moreover, the division of life into public and private spheres restricts women from *being representatives in government*. Third, the contribution of women in the Parliament has been, and continues to be, perceived as "different" to that of men's, and accordingly given less weight; *representation by women* has been marginalised. Finally, images of women in government either cast them as men or trivialise or omit them altogether. The invisibility of women in the constitutional system is confirmed in *representations of government*. In sum, the Australian

198 Montague Whitney "Womanhood Suffrage" quoted in Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle* p192.

199 As above, p193.

200 As above.

constitutional system is not representative of women in any of the three senses of the term identified above.

## BECOMING A MORE REPRESENTATIVE DEMOCRACY

This paper has documented some of the ways in which women are under-represented in the Australian constitutional system. This demonstrates a violation of the notion of representation in light of the meanings attributed to it by recent High Court doctrine and also according to the theories and assumptions that lie behind the principle of representative democracy. In the words of the Prime Minister, Paul Keating: "The ruling body of the nation should be representative of the people it serves. At present it is not."<sup>201</sup>

Any constitutional system which has failed in the past and continues to fail in the present, to adequately represent women cannot continue to be called "representative". Just as the notion of what is representative has altered with time from a property based to a universal franchise, so too has the content of representative democracy in relation to women. It is no longer valid (if it ever was) to label as representative a system in which one sex outweighs another at a ratio of approximately ten to one in some sectors of government, and at a ratio of infinity to nothing in others. Pressure to address the gross under-representation of women in constitutional systems around the world has led to a range of options being considered.<sup>202</sup>

Some aim to alter the composition of parliament and the executive directly. These include: the introduction of voluntary<sup>203</sup> or mandatory<sup>204</sup> gender quotas for the party preselection of candidates, in major political parties; double sex parliamentary representation whereby the size of each electorate would be doubled<sup>205</sup> and each would elect a male and a female

201 Kingston, "Feminism's new confidence" *Canberra Times* 20 October 1993.

202 An International Plan of Action to Correct the Present Imbalances in the Participation of Men and Women in Political Life was adopted in Paris in March 1994 by the Inter-Parliamentary Union.

203 The Liberal Party is encouraging more women to stand for preselection. Lang "Women the key to new-age Parliament" *Canberra Times* 30 August 1993. In the late 1980s the German Christian Democrat Party introduced voluntary quotas: Phillips, *Democracy and Representation* at 2.

204 The Australian Labor Party's commitment to 35% of winnable pre-selection seats to be mandatorily allocated to women women follows a trend in other countries. The British Labour Party has moved from a 50% target to be achieved within three general elections to a 1993 principle of all-women short lists for candidate selection in half the winnable seats: Phillips, as above.

205 Macklin, "An idea whose time has come" *Canberra Times* 22 October 1993.

representative; the introduction of constitutional quotas guaranteeing a certain percentage of seats to women;<sup>206</sup> and the inclusion in Cabinet of the Minister responsible for women's affairs.<sup>207</sup> A petition presented to a select committee of the New Zealand parliament calls for alteration of electoral legislation to ensure equality and parity of gender representation.<sup>208</sup> Other methods of group representation include the use of functional constituencies in Hong Kong representing groups such as unions and industry within the Legislative Council.<sup>209</sup>

Other proposals aim to alter the political and legal culture in which the under-representation has occurred. "Schooling" in parliamentary skills for women;<sup>210</sup> using the Upper House to "experiment" with representation for particular groups;<sup>211</sup> reforming parliamentary working hours;<sup>212</sup> and regular government reporting to international review bodies such as the CEDAW committee about percentages of women in parliamentary institutions,<sup>213</sup> have all been suggested.

Some suggestions are addressed to under-representation in government and government policy more generally. These include equal representation of women on all government bodies by the year 2000;<sup>214</sup>

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- 206 The Indian constitution was amended in 1991 to allocate 30% of seats in local government to women: MacDonald, "Non-feminist female politician" *Canberra Times* 21 April 1994. In Australia see, for example, Constitutional Centenary Foundation, *Representing The People: The Role of Parliament in Australian Democracy* (Constitutional Centenary Foundation, discussion paper 1993) p9.
- 207 Kingston, "Cabinet to make room for women's affairs minister", *Canberra Times* 19 October 1993.
- 208 Written submission of Paul Hunt in support of the Petition of Jocelyn Fish, Georgina Kirby and Marilyn Waring, concerning Equality of Gender Representation in New Zealand's House of Representatives.
- 209 Although it is not suggested that this method necessarily leads to broader representation.
- 210 Phillips, "Democracy and Representation, Or, Why Should it Matter Who Our Representatives Are?", unpublished paper at 2.
- 211 Constitutional Centenary Foundation, *Representing the People: The Role of Parliament in Australian Democracy* p27.
- 212 Hewitt, edited extract of the Donald Horne address, *Canberra Times* 26 January 1994; Reported comments of convenor of Australian Government's National Women's Consultative Council, "Good job ... pity about the hours" *Canberra Times*.
- 213 Fraser, "Women and Public Life: Articles 7 and 8 of the Women's Convention and The Importance of Non-Governmental Organizations in Creating Civil Societies" (1993) *International Women's Rights Action Watch* 9.
- 214 Kingston, "A Woman of Status" *Canberra Times* 23 October 1993. Federal Cabinet endorsed a strategy to encourage women to take positions on

mandatory representation of women in government appointments to non-government bodies such as UN committees;<sup>215</sup> and a requirement that departments take account of the effect on women of policy.<sup>216</sup> Finally, some proposals call for reform of the underlying issues which inhibit the entry of women into the constitutional system, such as inadequate education, health-care and employment.<sup>217</sup>

Common to all proposals is the need to make visible the gendered nature of representation in the current constitutional system, a need that has particular resonance for contemporary Australian debate about changing the Constitution, most of which has occurred without a mention of the representation of women or their interests.<sup>218</sup> If questions about whether Australia should become a Republic, or have a Bill of Rights, are decided without explicit consideration of women, Australia will be repeating the mistakes of the past. Adopting a neutral position clearly operates to the disadvantage of women. To avoid excluding women from the process of making, or re-making, the Constitution, it is crucial that any convention held to discuss such issues should be composed of approximately equal numbers of men and women.<sup>219</sup>

Unless Australian constitutional law takes seriously the challenge from women to include them and their interests in the representative process, beginning with the way in which alterations to the Constitution are debated, the constitutionality of the whole system is surely in doubt. There is a distinct possibility that over the next few years it will be said that women are adequately represented in the process by men, or even by the inclusion of one or two women. These arguments bear a striking

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Commonwealth boards, councils and other government authorities. In 1989 the target was set at 50%. In 1994 the figures only show 25% of women in those positions. *The Age*, 8 October 1994, p3.

215 Kingston, "Feminisms' New Confidence" *Canberra Times* 20 October 1993. This recommendation followed the appointment to the United Nations world population conference committee of 10 men and no women.

216 As above.

217 Fraser, "Women and Public Life: Articles 7 and 8 of the Women's Convention and The Importance of Non-Governmental Organizations in Creating Civil Societies" (1993) *International Women's Rights Action Watch* 9 at 4ff.

218 The Constitutional Centenary Foundation has as one of its projects the issue of representation of women in the political process. See "Women's Suffrage Centenary Issue" (1994) 3 *Constitutional Centenary Foundation Newsletter*.

219 Note that one widely circulated paper calls for a broadly representative Convention (and one which includes specific representation for indigenous people), but does not mention the inclusion of women. See, Constitutional Centenary Foundation Inc, "*If We Wanted to Review the Constitution, How Would We Do It?*", 24 September 1993 at 3.

resemblance to those put at the 1897 Constitutional Convention, when it was said that women's interests could be adequately represented by their male friends and relations. It was patronising then and it is worse now.

However, there may be cause to be more optimistic in view of the recent developments in High Court doctrine. As we argued, the recent cases of the High Court state that there are fundamental principles, such as representative democracy, underlying our constitutional system. Moreover, there is an acceptance that there are principles that are integral to representative democracy. Public participation and its role in linking the elected with the electorate are two of the principles that have been developed to date.

These ideas developed by the High Court are supported by the theories and principles underlying representative democracy. There must be a link between the represented and the representatives, representation must be an ongoing process, and the meaning of representation changes over time. For the linkage to occur satisfactorily for women, and for representation to be ongoing for women, there needs to be a broad cross-section of representatives. At this time in Australian history, there needs to be an acknowledgment that women's interests are not being adequately represented at present. This has been displayed above in addressing how the present system operates for women, denying both women and men a representative democracy and the counsel that women afford.

As the Inter-Parliamentary union stated in adopting its international plan of action:

The concept of democracy will only assume true and dynamic significance when ... politics and national legislation are decided upon jointly by men and women with equitable regard for the interests and aptitudes of both halves of the population.<sup>220</sup>

Or in the words of the New Zealand petition, "A society governed overwhelmingly by men is a society half-governed."<sup>221</sup>

For the constitutional system to reflect its underlying principle of representative democracy, women must be *representatives in government, resented by government*, and must be seen in visual and textual *representations of government*.

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220 Quoted in *The Age* 8 October 1994 p3.

221 The petition of J Fish, G Kirby and M Waring, above.