

Raising the Bar Sydney 2018

Anne Twomey – Equal representation? Not even close

Welcome to the podcast series of Raising the Bar, Sydney. Raising the Bar in 2018 saw 20 University of Sydney academics take their research out of the lecture theatre and into bars across Sydney, all on one night. In this podcast you'll hear Anne Twomey's talk, "Equal representation? Not even close." Enjoy the talk.

[Applause]

Well, welcome everybody. I should say, if you are using Twitter, don't copy your Twitter into a hashtag that – or, whatever that deals with – someone called Dr. Anne Twomey, because she's an Irish dentist who now knows far too much about constitutional law in Australia, because she gets all my Twitter hate mail. So, probably best not to hassle the poor Irish dentist. I should say, I did once get in contact with her to apologise for the fact that she gets all my constitutional stuff. And, I offered to give her a bottle of champagne in compensation, and her response was, "No, don't do that. Champagne rots your teeth." So, there's some really useful news for an evening in a pub, okay? So, you're lucky I'm not an Irish dentist.

Okay, so tonight what I'm going to do is talk about the centenary, this year, of the women obtaining the right to be able to stand for parliament in New South Wales and the right to actually be a legal practitioner. So, that occurred 100 years ago this year.

And, the existence of centenaries is a useful time for us to look back and say, "Well, look what has changed over time and what hasn't? What's remained the same and probably shouldn't remain the same?" And, it's also a good time to remember the people who went before us. The people who made enormous efforts to achieve things that frankly we just take for granted every day.

So, the process of cultural change and the giving of rights to women is a change that is still ongoing. It has not been completed even though we're well over 100 years into it. So, for example, women CEOs of ASX top 200 companies. Out of the all the women are CEOs of those companies, completely swamped by CEOs that have the name John. Okay, just males with one name of John outnumber every single woman who's a CEO of an ASX company. And, you can add to that males who have the name of Peter and males who have the name of David. There are far more Peters, Davids, or Johns than there are women running ASX 200 companies in Australia. And, women come to political representation as well. Political representation is growing, but in some cases it's actually going backwards.

So, although we thought we were heading to some kind of level of parity, we're certainly not there yet. We still see in public life double standards, condescension, bullying, and under representation. But, nonetheless, at the same time we've also seen enormous strides being made, and the mere fact that I'm standing here before you as a female, a lawyer, a professor of constitutional law, would have been impossible 100 years ago. I couldn't have been those things, and more to the point, I probably couldn't have even been here unless this was the ladies lounge. Because, in those days, women weren't allowed to drink at the main bar. Maybe this was the ladies lounge. I don't know whether anyone remembers, but anyway.

So, one of the striking things that I've found in looking back at that history of women and getting the right to vote and the right to stand in parliament, is how extraordinarily long this has taken. So, if you got back and you look, you'll see that the first time that this was debated

in the British parliament was a motion in the House of Commons in 1848, okay? We've been going at this since 1848, and we still haven't quite got it right in terms of equal representation. In 1860 – sorry, of course the 1848 thing didn't work, it failed. And, in 1867, John Stuart Mill put a motion to the United Kingdom parliament to change the electoral laws, so that instead of referring to a man having the right to vote, it would have referred to a person. And, the idea behind that was that a lot of women were otherwise qualified in terms of being people who were property owners and who would otherwise be qualified for the franchise. And, by changing the word man to person he thought, and we'll come back to this, he thought that would have given them a right to vote. Now, again, he failed, but what's quite interesting is he said that that was the most important thing that he ever did as a member of parliament.

So, even that failure was in some ways a success, because all of these failures that go before us are the stepping stones to actually achieving things. And, personally I find that quite comforting, because if any of you have ever been involved in something like, you know, indigenous constitutional recognition will realise that there's this constant failure that keeps on going, steps and steps and steps of it. But, maybe those failures are success, because maybe they are the steps on the same sort of process that will eventually achieve something useful in the end. Now, 1867 was also quite interesting, because there was another small success. And, that was from a woman called Lilly Maxwell.

Now, I gave a similar talk to this last night in the parliament, in the Quarry Street, and I had the ability to put up big pictures on the screen. And, so I had photos of all these women, and Lilly Maxwell is a formidable – was a formidable woman. So, imagine a very large, quite sturdy and strong woman with a very jaunty black hat. And, Lilly was the owner of a shop. A shop that, by the way, sold red herrings, which I didn't actually think was a real thing, but apparently it is. Anyway, so Lilly, with her shop and her red herrings, discovered that she'd accidentally been put on the electoral roll, because she was a property owner. And, then she thought, "What the hell? Why don't I actually go and vote?" So, she exercised her right to vote in a by-election in 1867, and her action in doing that inspired a whole lot of other women who were also property owners and would otherwise have been able to vote to go out and try to vote. And, in fact, she inspired 5346 women in Manchester to assert their right to vote, and that had a cascading effect as well. So, there were thousands of people now across the whole of England, women, asserting the right to vote. Now, what happened then was that the male barristers who did the revising of the electoral roll said, "Well, hang on a minute. You're not entitled to be on this electoral roll."

So, there were legal arguments about it, and so the women came and said, "Well, if you look at statutes every time they have criminal laws or other sort of laws, they're all referring to men. Because, man includes women for these purposes, so no man is allowed to commit murder, and by the way, that includes women." And, they pointed to a provision in the Statutory Interpretation Act that said that, "The word man includes woman, unless you expressly say otherwise." And, they said, "Well, there's nothing in the electoral laws that say otherwise, therefore we should have the right to vote." Okay, so that was their argument. Didn't actually work in most cases. Nonetheless, although many of them were thrown off the electoral roll, we know that at least 230 women managed to survive on the electoral roll. And, there's evidence that at least 80 of them voted in the next election in 1868. And, if you have been doing your calculations, that's another anniversary. That's 150 years ago from today, so 150 years ago women voted in the British elections in 1868, in relatively small numbers, most of them having been chucked off the electoral roll.

Now, after that, the main case actually came to the courts about, "Well, can women legitimately vote under the existing law?" And, the court held, "No, they couldn't," and why – and, they said that, "Yes, we accept that normally a man includes a woman, but we assert that for that sort of change is so significant that it is the sort of change that parliament should

make, okay? And, it should not be able to be achieved through the back door." And, I have to say, they had a bit of a point in relation to that. So, that's what they held, but there are also – there are a number of these cases, and some of them today would seem quite shocking to us.

So, in one of these cases they said that, "Married women in particular could not possibly be given the right to vote, because a married woman's status was so entirely merged with that of her husband that she became incapable of exercising almost all public functions," okay? So, any of you who are married women, okay, you just became merged into your husband, and therefore lost all civic rights. The other surprising and quite disturbing thing was in relation to female graduates, because some of you would know that the universities had their own electorates and their own representation in those days. And, all graduates of the university were entitled to vote for the university seats. Women of course had become graduates of universities, and the interesting thing there was that the legislation did not say man. It said, "Every person who was a graduate of the university could vote." So, could women vote? "No," said the courts when this was argued before them. Because, a woman is not a person, so there you have your legal authority that women were not persons, and therefore could not vote. And, interestingly, that survived as English law until a very famous privy council case in 1930 with respect to Canada, where the privy council held that a person under the Canadian constitution did include a woman.

So, a woman could be a person from 1930, but it took a long time. Now, how did this work in Australia? Actually, in Australia, we were more liberal than they were in the United Kingdom about voting rights. In fact, south Australia was the most liberal of all, so if you go back to 1861, which is before Lilly Maxwell actually exercised her accidental right. Women in 1861 in south Australia did have a right to vote at the municipal level, so they could vote for local councils. If there were land holders they were perfectly entitled to vote. It wasn't a back door thing. It was allowed under the law. And, south Australia of course was the first in 1894 to allow women the full right to vote in the south Australian elections, so colonial elections. New South Wales lagged behind a bit more.

There were bills to try – Sir Henry Parkes introduced to try and get the right of women to vote in 1890, 1891. They failed, and later in 1900 and 1901 he tried again. He'd gotten through the – well, sorry it wasn't him. It was another premier, got on through the lower house, but they were all blocked in the upper house by the more conservative legislative council. It wasn't until 1902, after the commonwealth allowed women to vote in commonwealth elections, that New South Wales parliament followed and allowed women to vote in relation to state elections. Now, at the commonwealth level they enfranchised women not – sorry, they not only allowed them the right to vote, but they critically allowed them the right to stand for parliament. And, was – that was the first place in the world that allowed that. New Zealand beat us on the voting bit, but actually allowing women to stand for parliament, the commonwealth was the first to do that. Having said that, took a long time for women actually to get elected. So, it wasn't until 1943 that you had Dame Enid Lyons in the House of Reps, and you had Dorothy Tangney in the Senate. One labour, one coalition, Unite Australia Party. And, again, for anniversaries sake, 75 year ago today that we had women first being able to represent – be representatives in the commonwealth parliament. Now, at the state level, after 1902, the other states all sort of followed along. The last state to allow women to vote for Victoria in 1908. So, it was a bit a laggard in that regard, and Victoria had also accidentally allowed women the right to vote in elections in 1861. So, again, it was one of those things with women getting onto the electoral roll simply because they owned property. But, in Victoria they had very quickly changed the legislation to get rid of the right of women to vote in 1861, and it took them all the way until 1908 to actually restore that right. But, all of the Australian states and the commonwealth beat the United Kingdom in terms of allowing women the right to vote. So, in the United Kingdom it wasn't until 1918 that women were allowed to vote, and even then you had to be at least 30 years old.

Apparently, if you were younger than 30 years old you were still too silly to be able to vote. You were treated as having an – being an incapacity. You were treated in the same way as an infant, or what they described in those days as an imbecile. Someone who was mentally incapable of voting. It wasn't until 1928 that women were actually treated as equal with men in terms of having the right to vote.

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Now, in New South Wales, women were allowed to vote from 1902, but were excluded from being able to stand for parliament. So, the campaigns of women for the right to vote didn't stop in 1902, because they continued as campaigns to get women into parliament, and to allow women to exercise legal roles as well. Because, what they realised was having the right to vote is not the end of the matter. You still need your voice to be heard, and you needed your voice to be heard in relation to things were of particular interest and importance to women. So, they included things like custody and guardianship of children, laws about marriage, divorce, property rights for women, economic rights of women, citizenship rights of women, and rights to work. So, the campaign for political rights for women continued.

New South Wales was behind Victoria in one thing, and that was allowing women to be lawyers. They were not allowed to practice as lawyers, and therefore they couldn't be judges. They couldn't be on juries. They had no real role in the courts or the legislative process. And, this was exacerbated by my own university, the University of Sydney. So, the dean and professor of constitutional law at the time, so my predecessor by a few, was a fellow called Pitt Cobbett. Now, Professor Pitt Cobbett was not very keen on women, and he refused to admit women to the law school to study law. However, as academics are want to do, once, he went off on sabbatical to the United Kingdom. While he was away on sabbatical, Sir William Cullen took over as dean. And, Sir William himself had a very intelligent and quite formidable wife, and the consequence of that is that while Pitt Cobbett was away, Sir William Cullen admitted the first woman to study law at the University of Sydney. And, her name was Ada Evans. When Pitt Cobbett returned after his sabbatical, apparently he roared very loudly, "Who is this woman?" Now, poor Ada got hauled before Pitt Cobbett, and do you know what he told her? He said that, "She did not have the physique to do law." I'm still wondering what sort of physique you need to do law, but apparently according to Pitt Cobbett, she would be better suited to medicine. And, now I'm wondering, you would have thought that you'd need more physical physique to do medicine, I would have thought, than to do law, but anyway. Apparently, she did not have the physique for law and should have done medicine.

Well, fortunately Ada Evans had a number of other lecturers at the law school who did support her and encouraged her and saw her as a trailblazer for women. And, said to her, "Even if you're not able to practice at the end of this, you will be opening doors for the people behind you." And, therefore fulfilling that role was a really important one. Now, slight diversion here from Ada Evans. We'll come back to her in a minute, but Pitt Cobbett's attitude towards women at university was not dissimilar to that of many of the male students. And, in 1914, coming back to issues of women and the right to vote and the right to stand for parliament, Adela Pankhurst, one of the famous Pankhurst suffragettes from the United Kingdom came out to Australia. And, came to give a speech to the women students at the University of Sydney. So, how did our male students react? Well, what they did was they effectively decided to drown out her voice, or, in today's lingo, de-platform her. How do you do that? You get firecrackers, and you light them, and you throw them in the windows of the room in which the talk was being held. Not only that, they stood outside, yelled and jeered, so that she couldn't be heard, and then the enterprising sods got rocks and threw them onto the iron roof, so that the noise of the rocks landing on the roof would stop anyone from hearing what Adela Pankhurst had to say.

Now, what they didn't know is that a number of the women who were there attempting to listen to this were the members of the University of Sydney Female Hockey Club. So, the women of the hockey clubs, with their hockey sticks, poured out of the room and engaged in a deal of hockey with the young men outside.

According to *The Sydney Morning Herald*, so it must be true, "One young anti-suffragist," so one male student who wasn't keen on the suffragettes, "Received the full strength of a blow with a hockey stick delivered by a muscular young woman undergraduate." According to another paper, the *Evening News*, the education hoodlums of Sydney University, I wonder if there are any here today, but anyway, were criticised for their discourteous behaviour. But, nonetheless, the university criticised – sorry, the newspaper criticised the university for allowing Pankhurst to speak. They said that, "Public institutions should not support sectional purposes." And, this is a debate that we see going on today. When you're talking about, you know, how much has changed and how little has changed, well unfortunately there are a lot the little that has changed is still this notion that if you don't like someone's view, you try and drown them out rather than listening to them. And, then responding to them with why you think they're wrong. Anyway, despite Pitt Cobbett, who by the way during his term as dean never admitted another woman to a law degree. So, despite that, Ada Evans did graduate from her law degree, and again, this was a significant – this was the first woman in the whole of Australia to gain a law degree. And, so it was a matter that was remarked upon in the newspaper. So, the Australasian newspaper said this. "Professor Pitt Cobbett, who is a bachelor and not partial to women, could not conceal his disapproval as he introduced the interesting looking girl to the chancellor, who smiled pleasantly." Not sure who was smiling pleasantly. I'm betting it wasn't Pitt Cobbett. Now, Ada, according to the newspaper, "Was slender built and dressed very prettily. Her dress matched the colour of the hood for her law degree."

So, you can be the first woman to have ever achieved a law degree in Australia, and what does the newspaper write about? What you were wearing! It did also notice that while she wished to practice as a barrister, the law did not permit her to do so. And, it said she would, quote, "Begin an agitation for a new act of parliament to change that." Now, the problem for Ada was that the legislation said that you could be admitted as a practitioner if you were a properly qualified person. So, what was Ada's problem? She was not a person, exactly. So, those British voting cases about persons and who was a person actually came and haunted us here in Australia by stopping women from being able to be admitted as legal practitioners. So, how did this change? Well, Ada had one advantage later on in her life, and that was that the man who became attorney general of New South Wales was a fellow student of hers at the University of Sydney. So, in August 1916, David Hall, who was the attorney general and Ada's contemporary from the University of Sydney, brought a bill into parliament to allow women to stand for parliament, be legal practitioners and judges and local – involved in local government and all the rest of it. His bill was blocked on the ground of technicalities and it failed. But, he wasn't deterred. In September 1916, he brings back the bill for a second time. This time, however, it's collateral damage of the Great Labour Split over conscription, and as a consequence of that the bill lapses and fails. Doesn't come back again until 1918. Why? Another woman, who was quite important in this area, a woman called Kate Dwyer, managed to convince the University of Sydney's senate to campaign and to write to the parliament to say, "We want you to admit our women graduates as lawyers." And, the reason she managed to get the University of Sydney's senate on side was A, Pitt Cobbett had retired by then, and B, someone who was on the senate was Sir William Cullen.

Now, he was the man who had admitted her when Pitt Cobbett was on leave, and he was now chief justice of New South Wales. So, having the chief justice on side and the university senate was enough to get this bill back into the parliament. Again, it was put forward, again it failed. This time it failed, because the legislative council said, "Hey, we don't want women in our nice little men's club in the legislative council." So, they pulled out that part of the bill, and just said,

"Okay, we're just going to do it for the legislative assembly." And, so they changed the bill again to do that, introduced it again, and finally it passes.

So, in 1918 we finally have a bill that's passed that permits women to be elected to the legislative assembly, although they couldn't still be appointed in the legislative council. Allows them to be elected as a mayor or a local councillor. Allows them to be a judge or a magistrate or a justice of the peace, and critically allows them to practice as a barrister or a solicitor in the supreme court. Now, Ada Evans was admitted in 1921. Again, this is the first woman admitted as a barrister, so the newspapers reported on her. What do we think they said? According *The Sun*, "The new lady barrister looked picturesque in her wig and gown as she walked most erectly down the corridor of the full court to take the oath."

Well, apparently apart from the great skills of looking picturesque and being able to walk erect, it also noted that, "She had confidence and address." Okay, so Ada got admitted to practice. I'll skip over now. There's a fair bit more to say about women being able to stand in the legislative council. But, just to give you a snap shot of how things developed after that, women couldn't participate in juries until 1947. And, then even when the law was changed to allow that, in practice they couldn't, because they didn't have toilet facilities, which is another perineal problem of these things. First district court judge, not until 1980. First supreme court judge who's a woman, not until 1987, and it was in fact the same person. It was Jane Matthews who was both the first district court judge and the first supreme court judge. In the New South Wales parliament, at the moment, ten out of 42 in the legislative council, that's about a quarter, are women. In the lower house it's about 30 percent. At the commonwealth level it's actually a bit better. It's actually better than I thought to be honest. 40 percent of senators are women, and in the House of Reps, about 30 percent. And, once you get to 30 and 40 percent you're getting towards critical mass, so it is an important improvement. But, if you look at statistically between the parties, it's the Labour Party that's doing most of the lifting there.

So, if you look in the House of Reps, of women, 66 percent of them are Labour Party members. And, that's because of the quotas in the Labour Party. Now, I was going to say something about indigenous voices, so I should do that before I conclude. So, the long period of time that it's taken for women's voices to be heard were – reminds us that culture change does take an incredibly long period. But, remember, women are 50 percent of the population, so when it comes to indigenous constitutional representation, how much harder is it to achieve that given that you're a much smaller percentage of the population? Now, that's why the [inaudible] statement from the heart is important, because in arguing for a constitutionally enshrined voice to the parliament, I think it's something that women should be able to empathise with. Because women had been voiceless and had to campaign to be heard in the parliament, in the courts. And, enormous efforts were made over time to do that. And, enormous efforts have also been made over time by indigenous people to obtain the right to vote, to obtain the right to stand for parliament, and still to obtain the right to be heard and the right to be listened to. So, the claim for a voice, I think, to parliament is quite a modest and a reasonable claim. And, it has two important aspects to it. One is respect and recognition. So, to be heard entails someone listening to you, and that process of listening gives dignity, respect, and recognition to the person who is listened to. And, the key thing here is that these are not just words of recognition on a page of a document that hardly anyone will read. This is a form of constitutional recognition that is a living form of recognition, because the recognition happens every time that the voice is heard. And, hopefully, every time it is listened to. The second aspect is a practical one, and that is the intention behind the voice to parliament is to make the parliament better informed about laws that impact upon the lives of indigenous Australians.

So, just as women needed to be represented in parliament to inform the parliament of matters that effected their interests, so too do indigenous people need a voice into parliament, to inform the parliament, to ensure that it enacts laws that are well considered and appropriate. And, I asked myself, in all the controversy about this, "Who could be against the idea of having a better informed parliament?" Now, the last point I want to make as I finish is going back to our friend Pitt Cobbett. Now, Pitt Cobbett, after he retired from the University of Sydney, spent the last two decades of his life writing his great opus on the constitution of Australia and the government of Australia. And, as he was dying of cancer, he realised that he hadn't quite finished it, and he was terrified that this manuscript would just decay like his bones. And, that his voice would not live on.

So, he wrote all these letters to people saying, "Can you come on as a co-author with me?" And, everybody said, "No, sorry, too busy." Pitt Cobbett died, and in his will he said to his executors, "I want you to get someone to finish my work and publish it." But, the following year, so this was 1919, the following year in 1920, the high court handed down the engineer's case, the engineer's decision. And, this was a really significant change to constitutional interpretation, and it changed a whole lot of constitutional doctrines. And, the executors of the will said, "Actually, we'd need someone to rewrite the manuscript to take this change into account. We don't want to entrust it to the hands of someone else, because they might not do it well. And, that would damage Pitt Cobbett's reputation."

So, what do they do? They gave the manuscript to the University of Sydney, and they just left there, and it's been sitting there for 100 years, and no one's done anything. Well, now, Pitt Cobbett's wishes are about to come true, but with a twist. Two lawyers have decided to finish and publish Pitt Cobbett's book, but they are women. What, I think, would Pitt Cobbett have thought of two women finally producing and publishing his book, which by the way, now, is a really interesting, historical work, which gives us a snap shot of the constitution at a particular time. Now, as I was going through the university archives, looking through his documents, I found in one of the boxes, another manuscript. It was a manuscript for a book on the constitution of New South Wales. Now, some of you may know that I'm the first person who actually wrote and published a book on the constitution of New South Wales. And, as I was reading this manuscript, I saw all these headings of this book that I had written. And, suddenly I thought, "My god, I'm Pitt Cobbett!"

[Laughter]

So, I thought to myself, "Well, if Doctor Who can turn into a woman, then a crusty, old constitutional law professor can turn into a crusty, old constitutional law professor." Now, after I had dissuaded myself of this, thinking to myself, "Actually, I think I'm quite different from Pitt Cobbett." I then thought to myself, "Okay, well, what if Doctor Who, with her TARDIS went back to Pitt Cobbett, brought him to the current age, current time, and said, look. Here's a copy of a book on the constitution of New South Wales. Have a read of that." And, I thought to myself, "What would Pitt Cobbett have thought?" Would he have thought, begrudgingly, "Actually, this book written by a woman, is really quite good," because it is. And, what would he then have done if he was returned back to his time? Would he have welcomed women into the law school once he'd recognised – once he'd listened to their voices. Because, I don't think Pitt Cobbett ever did, but once he'd listen to the voice of a woman, a woman who had written the book that he wanted to publish, and if he actually thought it was a good book, would it have changed his attitude over time. And, if that is so, if would have, one thing I want to leave you with is, if we were now picked up by Doctor Who in the TARDIS and taken 100 years into the future, how would that change how we are now? What voices would we listen to in the future which would change the way that we would perceive the world now? And, I think that is an excellent thing to think about over your beers. Thank you.

[Applause]

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