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State Upper Houses in Australia

by

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1. INTRODUCTION

1.1 The contemporary debate

Upper Houses, in Australia and elsewhere, have recently become the focus of renewed political and academic attention. In NSW, a senior member of the Carr Government, Hon Michael Egan MLC, has campaigned for the abolition of the upper house or, failing that, for its 'substantial' reform.¹ Moreover, responding to concerns arising from the Council periodic election held in March 1999, in order to prevent the manipulation of preference flows by political parties the voting system for Council elections and the requirements for registration of political parties have been reformed.² In fact no government has had a majority in the NSW Legislative Council since 1988 and there are now 13 cross-bench members in a chamber with a total membership of 42, a situation with important implications for the Council as an effective house of review. Two major decisions, both arising from the prevailing balance of power in the Legislative Council, *Egan v Willis*³ and *Egan v Chadwick*,⁴ have also focused attention on the powers of scrutiny and review available to upper houses in this country.

Important developments have also occurred in other Australian States. In Victoria, the Bracks Government introduced a Bill to reform the Legislative Council in November 1999, a proposal it subsequently refined in June 2000; with the defeat of this proposal in October 2000, the Government intends to establish a constitutional commission to pursue its goal of reforming the upper house.⁵ In South Australia, it was reported that proposals to reform the Legislative Council would go before Parliament sometime in late 2000, but this must now wait for the resumption of parliamentary sittings in March 2001.⁶ As to overseas developments, with the passage of the *House of Lords Act 1999* the United Kingdom upper house has undergone a drastic overhaul. For the first time in its 700-year history, the automatic right of hereditary peers to sit in the Lords has been removed so that now, in what is supposed to be a transitional chamber, there are 525 life peers, 26 bishops, 27 current and ex-law lords, plus 92 remaining hereditary members.

Such developments have re-ignited worldwide academic interest in upper houses, while the increasing political significance of the Australian Senate in recent years, together with the controversies which have attended the exercise of its powers, have also proved to be a spur

¹ M Egan, 'One House or Two' a paper presented at the *Australian Study of Parliament Group Annual Conference – Hobart*, 18 September 1998.

² *Parliamentary Electorates and Elections Amendment Act 1999*.

³ (1998) 195 CLR 424.

⁴ (1999) 46 NSWLR 563.

⁵ 'Bracks sticks to reform', *The Australian Financial Review* 26 October 2000; 'Battle for reform continues', *The Age* 26 October 2000; 'Upper house reform cannot be stymied', *The Age*, 26 October 2000.

⁶ G Kelton, 'Reform in the House', *The Advertiser*, 25 July 2000.

to academic analysis. In 1999, SC Patterson and A Mughan edited an important work of comparative analysis titled, *Senates: Bicameralism in the Contemporary World*.⁷ More recently still, Meg Russell, from the London-based Constitution Unit, an independent think-tank devoted to the analysis of proposals for constitutional reform, published another comparative account of upper houses, *Reforming the House of Lords: Lessons from Overseas*.⁸ The Russell book, which was released around the same time as the report of the Royal Commission headed by Lord Wakeham on the reform of the House of Lords,⁹ was only one of many research initiatives undertaken by the Constitution Unit as part of the debate on the future of the upper chamber.¹⁰ That debate has also excited a plethora of journal and conference literature, much of which has asked fundamental questions about the appropriate powers and functions of upper houses in Westminster-style democracies. The question of the relationship between upper houses and the mandate to govern is often raised, as are the related implications of strong second chambers for the theory and practice of responsible government.

None of these is a new issue. The main focus of this paper is on their reconsideration in the light of the contemporary powers and functions of State upper houses in Australia, with particular attention being paid to the NSW Legislative Council. In effect, the paper is a study of bicameralism at the sub-national level within a federation. While much has been written about the Australian Senate in recent years, far less attention has been paid to the upper houses of the States.¹¹ The paper deals, therefore, with a relatively neglected area of study. It reflects the situation as at the end of February 2001.

1.2 The Australian Senate – leading by example?

Because so much work has been done on the Australian Senate over the past decade or so it is not considered in detail in this paper. The decision to present only a brief overview of the Senate has also been made on methodological grounds, on the basis that the States are comparable political entities, as are their upper houses, whereas different considerations apply to the Senate and the national polity of which it is a part. One obvious difference is that the Senate, as a federal upper house, was designed to protect the interests of the less

⁷ SC Patterson and A Mughan eds, *Senates: Bicameralism in the Contemporary World*, Ohio State University Press 1999.

⁸ M Russell, *Reforming the House of Lords: Lessons from Overseas*, Oxford University Press 2000.

⁹ Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm 4534, January 2000 ('the Wakeham report').

¹⁰ For example - M Russell, *Second Chambers: Resolving Deadlocks*, Constitution Unit, June 1999; A Reidy, *The House of Lords: In Defence of Human Rights*, Constitution Unit, October 1999.

¹¹ That is not to say that they have been overlooked entirely. This paper builds on the work which has been done in this field by, among others, Ken Turner, Campbell Sharman, Rodney Smith, Barbara Page, Raymond Wright and Scott Bennett.

populous States by giving equal representation to all States.¹² Even if it has not operated in practice in this way, or only intermittently,¹³ it is still important to recognise this federal dimension to the Senate, as well as the absence of any comparable considerations as far as the upper houses of the States are concerned.

Having said that, it is also important not to overstate the differences between the operation of bicameralism at the federal and State levels. For one thing, the powers of the Senate are comparable to those of the State upper houses.¹⁴ More particularly, the role the Senate has played as something of a model for the operation of bicameralism in the States must be recognised, especially as concerns the democratisation of the State upper houses and their activism as houses of review in the second half of the twentieth century.¹⁵ The most obvious developments in this regard were the adoption of proportional representation for Senate elections in 1949, the outcome of which has been the representation of minority parties in the upper house,¹⁶ and the subsequent development of the standing committee

¹² But note too the argument that some framers of the Australian Constitution and some of the founding generation of Commonwealth politicians supported a proportional representation electoral system for the Senate and saw it as a mechanism for providing representation for minority parties – J Uhr, 'Generating Divided Government' in SC Patterson and A Mughan, n 7 at 106-107 and 115-116; J Uhr, 'Proportional representation in the Australian Senate: recovering the rationale' (1995) 30 *Australian Journal of Political Science* (Special Issue) 127 at 133-125. For a discussion of the Commonwealth Electoral Bill 1902 and the proposals to establish an electoral system based on proportional representation for the Senate see – GS Reid and M Forrest, *Australia's Commonwealth Parliament 1901-1988*, Melbourne University Press 1989, pp 98-102. For an outline of the debate concerning the formation of the Senate see – B Galligan and J Warden, 'The design of the Senate' in *The Convention Debates 1891-1898: Commentaries, Indices and Guide* edited by G Craven, Legal Books Pty Ltd 1986, pp 89-111.

¹³ The 'brief effort' made to permit the Senate to function as a States' house in the early years of Federation is discussed in – LF Crisp, *The Parliamentary Government of the Commonwealth of Australia*, Longmans 1962, pp 183-187. For an account of how the Senate does in fact perform its 'federal' role see – H Evans, 'Federalism and the role of the Senate', *Upholding the Australian Constitution, Vol 8*, The Samuel Griffith Society 1997, pp 125-137.

¹⁴ Variations between the powers of the State upper houses are discussed in later sections of this paper. The Senate's law-making powers are equal to those of the House of Representatives except that it cannot introduce or amend proposed laws that authorise expenditure for the ordinary annual services of the government or that impose taxation. The Senate can, however, request that the House of Representatives make amendments to financial legislation and it can refuse to pass any Bill.

¹⁵ For Campbell Sharman, there is a definite connection to be drawn between 'the visibility of the Senate' and its effect on State politics: 'Members of state upper houses can see the Senate as a powerful example of the political potential that second chambers can have in the parliamentary process. It is no accident that, in reforming state legislative councils, PR has been adopted for three of Australia's five state upper houses, and all of these presently have minor party members holding the balance of power' - C Sharman, 'The representation of small parties and independents in the Senate' (1999) 34 *Australian Journal of Political Science* 353 at 360. PR applies to the Legislative Councils of NSW, South Australia and Western Australia.

¹⁶ Since the introduction of proportional representation the government of the day has only secured a majority in the Senate in the years 1951-55, 1958-61 and 1976-80. However, if

system since 1970 which, as John Uhr commented, 'brought a new sense of legitimacy to the upper house'.¹⁷ What has emerged in the past 20 years or so is a house in which neither the government nor the official opposition has a majority¹⁸ and in which the minority parties have grown ever more adept and confident in taking full advantage of their strategic position in the prevailing balance of power. So much so that Uhr has written of the post-1993 period as 'the age of minority' which has witnessed a 'procedural revolution'¹⁹ including: the establishment of a 'double-deadline' test requiring the government to meet deadlines for the introduction of Bills into the lower as well as the upper house;²⁰ plus the breaking of what Uhr called the 'government chokehold on committee power'.²¹ This 'age of minority' has also seen the outbreak of what he described as 'mandate wars' between the Government and the Senate,²² notably over such issues as Telstra privatisation and the introduction of the GST in which the Government has had to negotiate with the minor parties in the Senate.²³ One reads with historical interest now KC Wheare's classic discussion of bicameralism in which he noted, on one side, the inconsistencies between

the Democratic Labor Party were treated as a de facto coalition partner with the Liberal and Country parties then a different, and more realistic, picture would emerge of the period before the ALP gained office again in 1972.

¹⁷ J Uhr in Patterson and Mughan, n 12, p 117. On 11 June 1970 12 new Senate Standing Committees (5 Estimates and 7 Legislative and General Purpose) were agreed to, a decision which Reid and Forrest say 'revolutionised the Parliament as a whole' – GS Reid and M Forrest, n 12, p 375.

¹⁸ As at March 2001 the state of party representation in the Senate is as follows – Coalition 35 (Liberal Party 31, National Party 3, Country Liberal Party 1); ALP 31; Australian Democrats 9; Australian Greens 1; Independent 1; Pauline Hanson's One Nation 1.

¹⁹ J Uhr in Patterson and Mughan, n 12, p 110; J Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament*, Cambridge University Press 1998, pp 146-148.

²⁰ *Ibid*, p 97. For a commentary on its history and operation see – H Evans ed, Odgers' *Australian Senate Practice*, 9th edition, Department of the Senate 1999, pp 249-251.

²¹ J Uhr in Patterson and Mughan, n 12, p 110; H Evans ed, n 20, pp 350-352. Evans presents an overview of the evolution of the Senate committee system. He notes, for example, that since 1990 Bills have been systematically referred to legislative and general purpose standing committees. Also noted are the reforms which have taken place since 1994 when estimates committees were combined with legislative and general purpose standing committees and eight pairs of committees were established with a Reference Committee and a Legislation Committee in each subject area. The government party has the chair and majorities on Legislation Committees, but non-government parties have the chairs and majorities on Reference Committees (H Evans ed, pp 363-364). For a discussion of the Senate's recent record in amending legislation see – J Uhr, n 19, pp 148-149.

²² J Uhr, n 19 pp 105-108. Specifically, Uhr suggests the Senate is effecting a shift away from a 'party' theory of responsible government and towards a 'parliamentary' theory in which parliament is seen, not as a 'party prize', but as 'an arena of accountability' (pp 70-74).

²³ The Australian Democrats claimed their own mandate in 1996 to block the sale of Telstra and then in 1998 to block the introduction of the GST on the basis of their own campaign commitments – R Mulgan, 'The "mandate": a response to Goot' (2000) 35 *Australian Journal of Political Science* 317 at 319.

what he called ‘the conventions of Cabinet government’ and the creation of two popularly elected assemblies, ‘each entitled to claim to speak for the people’ and, on the other, his observations about the extent to which the Australian Senate was dominated, in fact, by the House of Representatives.²⁴

‘The conventional opinion’, according to Uhr, ‘is that responsible party government confers a mandate to govern on the majority party in the House of Representatives, although there is a clear trend to concede that the Senate is evolving its own modifications of that conventional doctrine’.²⁵ Added to this is Uhr’s assessment that ‘There is ample evidence that the Senate is in the process of redefining its representative role’ in a way that poses ‘fundamental challenges to the conventional model of Australian responsible government’.²⁶ In a similar vein, Richard Mulgan believed there are now ‘two contrasting models of the Senate’s role vis-à-vis the government of the day’: one as ‘an agent of accountability and review’, which appears to be consistent with responsible government; the other as ‘a partner in policy making’, a spill-over from Uhr’s mandate wars in which minor parties negotiate over the substance of government policy, a development which seems more at odds with the Westminster tradition of responsible government.²⁷

Perhaps not everyone would agree with such assessments and it may be that many would want to argue over details. It is certainly the case, however, that recent developments in the Senate’s parliamentary role are, for some, unwelcome intrusions into the traditional system of responsible party government, most famously in Paul Keating’s denunciation of the Senate as a ‘spoiling chamber...usurping the responsibilities of the executive drawn from the representative chamber, the House of Representatives’.²⁸ On the other hand, for many academic commentators the Senate’s new-found vigour is viewed as a positive development in the often lop-sided relationship between parliament and the executive. Bruce Stone has written of the Senate’s achievements as follows:

Despite the fact that a powerful upper house has long been held to be inconsistent with Australia’s Westminster inheritance of ‘responsible government’, the Australian Senate has undergone a celebrated revival in the second half of the 20th century. From an apparently failed ‘states’ house at the mid point of the century, the

²⁴ KC Wheare, *Legislatures*, 2nd edition, Oxford University Press 1968, pp 132-138.

²⁵ J Uhr, n 19, p 108.

²⁶ J Uhr in Patterson and Mughan, n 12, p 114.

²⁷ R Mulgan, ‘The Australian Senate as a “House of Review”’ in *The Australian Political System* 2nd ed, edited by D Lovell et al, Longman 1998, p 200.

²⁸ *Commonwealth Parliamentary Debates (House of Representatives)*, 3 March 1994, p 1747. Recent proposals to reform the Senate are discussed in – M Sawyer, ‘Overview: Institutional design and the role of the Senate’ in *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate* edited by M Sawyer and S Miskin, The Department of the Senate 1999, pp 8-9; B Costar ed, *Deadlock or Democracy? The Future of the Senate*, University of NSW Press 2000.

Senate was gradually transformed through electoral system change and consequent representation of minor parties to the point where it is now regularly described as the most vital element of the parliamentary system. Among Westminster-derived democracies especially, with their tendency towards executive-dominated lower houses (a product of single-member constituency electoral systems), the Australian Senate offers a model for recovering something of the text-book functions of parliament.²⁹

Can the same be said of some or all of the State upper houses in Australia? If bicameralism is so 'strong' at the national level, is this reflected or reproduced in the States? Bruce Stone has suggested this may be the case, writing that the Legislative Councils in the States 'have also been evolving over the past half century in ways which partly parallel the evolution of the Australian Senate'.³⁰

1.3 Terminology and scope

This briefing paper uses the terms 'upper house' and 'second chamber' interchangeably. 'Upper house' is now used generally in Australia as a descriptive term for the Senate and the Legislative Councils of the States without apparently invoking any connotations of class or some other kind of social stratification. Reference is also made to second chambers in contemporary Australia, a term suggestive of those 'ancillary' scrutiny or revising functions associated with a house of review.³¹ From a purely historical standpoint, 'lower houses' certainly did not precede 'upper houses' or 'second chambers' in colonial Australia. In NSW, for example, the Legislative Council first met as an appointed body in 1824, whereas the Legislative Assembly dates to the establishment of the system of bicameral, responsible government in 1856.³² Legislative Councils also predated Legislative Assemblies in Tasmania, South Australia, Victoria and Western Australia. 'Lower houses' may be considered as 'first' in terms of legislative initiative, therefore, but not otherwise.³³

²⁹ B Stone, 'The recent evolution of bicameralism in the Australian States', paper presented at the *Australasian Political Studies Association Conference*, Canberra 3-6 October 2000, p 1.

³⁰ *Ibid.* Stone recognises that there are differences between jurisdictions which he goes on to discuss.

³¹ R Mulgan, n 27, p 195. Mulgan writes that the word 'review' suggests a role for the 'second chamber' which 'cedes initiative, if not power, to the lower house'.

³² The first bicameral Parliament of NSW met on 22 May 1856.

³³ It could be argued that the same is true of the House of Lords but that in the British context the House of Commons is undoubtedly 'first' in power and prestige. As suggested by the brief comments on the Senate, in Australia the balance of powers between the houses within the six bicameral legislatures is in some cases less straightforward. Moreover, the extent to which legislation is initiated in some Australian 'second' chambers may not fit readily into the traditional Westminster model.

The paper starts with an account of the theoretical and practical questions which are often asked in relation to bicameralism, notably in relation to the doctrine of responsible government. It then looks at the powers and functions of the five State upper houses, and reviews their historical and contemporary record as houses of review. The main focus, however, is on the NSW Legislative Council and in this respect the paper can be looked upon as an update of the 1988 Background Paper by Barbara Page titled, *The Legislative Council of New South Wales: Past, Present and Future*.

2. THE THEORY OF BICAMERALISM AND RESPONSIBLE GOVERNMENT – QUESTIONS AND ISSUES

2.1 Bicameral legislatures – where?

The Inter-Parliamentary Union's most recent inventory of national parliaments found that around one-third of the 170 or so of the world's national legislatures are bicameral in form. Smaller polities, according to Patterson and Mughan, tend to have unicameral legislatures, including New Zealand and the Nordic countries; whereas, with some notable exceptions,³⁴ the larger countries of the world tend to have bicameral parliaments, composed often of senates and houses of representatives. The 61 countries with bicameral assemblies include most of the larger Western European countries,³⁵ the USA, Canada and, of course, Australia. Significantly, these last three countries are also federal polities. Federalism is an important factor in this context. As Russell found, of the 22 federal member countries of the Inter-Parliamentary Union, in 1996, 18 had bicameral legislatures, as compared to 40 of the 156 unitary polities. Another important factor is said to be whether a country has been influenced by the Westminster or US models of government: 'Thus as well as being concentrated in Europe bicameralism is common in the Americas and the West Indies. It is relatively less common across Asia and Africa'.³⁶ On the other hand, the question of 'influence' in this context is extremely complicated. At one time much of Africa was governed by Britain and therefore such countries as Kenya, Tanzania, Uganda, Zambia and Zimbabwe could all be said to have been subject to the influence of the Westminster style of government. However, they are all unicameral states. The 'influence' factor seems to operate only weakly in Africa, therefore, but strongly in the West Indies.

At the sub-national level in the major federations, bicameralism is a feature of five of the six Australian states and all but one of the US states.³⁷ Conversely, all the German states (or *lander*) are unicameral,³⁸ as are the Canadian provinces.

2.2 Why not unicameralism?

Those who oppose second chambers do so on a number of grounds, some of which are specific to the political contexts to which they belong. Much depends on the composition of the second chamber in question, whether it is popularly elected, as well as on the powers an upper house possesses. If it is perceived to be conservative in composition this may be a basis for criticising any delay or frustration it may cause, on the basis that it has no right

³⁴ China, for example, has a large unicameral assembly, the National People's Congress, with 2,978 members.

³⁵ The largest unicameral state in Europe is Portugal, with a population of 10 million.

³⁶ M Russell, n 8, p 23.

³⁷ Nebraska is the only unicameral state in the US. Its second chamber was abolished in 1937 – KC Wheare, *Legislatures*, 2nd edition, Oxford University Press 1968, p 132.

³⁸ Bavaria abolished its upper house in 1998 – M Russell, n 8, p 23.

to thwart the popular will. Much may depend on the power of the upper house in question: a relatively powerless upper house will tend to be less objectionable in this regard. Much may also depend on the electoral system, which can determine if the government will control both houses: if it routinely does so then any case for a second chamber as an effective house of review will be undermined. Critics say that second chambers are costly and often serve no constructive purpose, operating sometimes as convenient mechanisms 'for distributing consolation prizes for political failure, appeasing politicians ejected from more active political office'.³⁹

Philosophically, the key argument used by opponents of bicameralism is based on the concept of popular sovereignty and its operation in a representative democracy. Opponents of upper houses are apt to hold the view that the sovereign public will – and with it the mandate to govern – is expressed perfectly clearly in a single parliamentary chamber which has been directly elected by universal adult suffrage. To add a second chamber to the scheme, again directly elected by universal adult suffrage, is at best an exercise in redundancy and duplication. To conclude otherwise, it is said, is to contemplate that popular sovereignty can somehow be divided against itself, that it is subject to internal inconsistencies. Why have two chambers, critics ask? Cannot the will of the people be fully expressed through one?⁴⁰ Nor, it is said, should the people be given the option of 'endorsing two or more different views' by voting for one party in the lower house and another in the upper house: 'The will of the people can't be schizophrenic'.⁴¹

For the defenders of upper houses, the potential responses to this line of attack are varied. For example, it can be argued that, in practice, the voting systems used for lower house elections result in the exclusion of significant interests and opinion groups, with the consequence that, in the name of strong, stable government, the popular will is only imperfectly represented in those assemblies. In Australia, the failure of the Australian Democrats to gain representation in any lower house, despite consistently winning a sizeable percentage of the popular vote,⁴² is a case in point. All of which suggests that, in reality, the practice of representative government is less tidy than the majoritarian concept of popular sovereignty indicates. Far from being monolithic in nature, the popular will may be almost infinitely fractured. Indeed, the rising phenomenon of the 'split vote' or 'ticket switching',⁴³ – where a person votes for one party in the lower house and another in the

³⁹ P Carmichael and A Baker, 'Second chambers – a comparative perspective' in *The House of Lords: Its Parliamentary and Judicial Roles* edited By B Dickson and P Carmichael, Hart Publishing 1999, p 72.

⁴⁰ The argument is canvassed in - J Bryce, *Modern Democracies, Vol 2*, Macmillan 1921 p 444.

⁴¹ Hon M Egan MLC, 'One house or two?', *Paper presented to the Australian Study of Parliament Group, Hobart*, 18 September 1998, p 3.

⁴² Typically in a range up to 10 per cent – C Sharman, 'Politics in the states' in *New Developments in Australian Politics* edited by B Galligan et al, Macmillan 1997, p 53.

⁴³ E Thompson, 'The Senate and representative democracy' in *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate* edited by M Sawyer and S Miskin, Department of the Senate Papers on Parliament No 34, December

upper house – suggests that a divided will extends down to the individual voter and that such ‘schizophrenia’ is a legitimate expression of informed political sentiment.

2.3 Second chambers – contested institutions

What cannot be doubted is that second chambers are controversial institutions. According to Patterson and Mughan, in most bicameral systems upper house reform is never far from the political agenda and they, like many other commentators, describe the ‘senates’ they have studied as ‘contested’ or even ‘essentially contested’ institutions, that is, in the sense that their legitimacy is contested.⁴⁴ For Patterson and Mughan, upper houses are ‘essentially contested’ in the sense that ‘their very existence is inherently a matter of dispute’.⁴⁵ More specifically, for Hugh Emy, the role of the Senate is an aspect of the Australian political system which is ‘essentially contested’ in the sense of being subject to opposing interpretations and evaluations based on conflicting and irreconcilable political values.⁴⁶

It is one thing to explain, in outline, the rationale for the existence of upper houses in contemporary politics, be it in support of the federal principle of territorial representation, or in terms of the function as a house of review (or indeed by reference to a combination of the two). The difficulty arises when a more detailed exposition is undertaken. How, if at all, is territorial representation realised in parliamentary systems which are dominated by disciplined party politics? More urgently, what is meant by revision and review? What powers should an upper house have in this respect and how, if at all, should they be exercised? When does revision become obstruction or interference and at what point (if any) does the exercise of the review function bring an upper house into conflict with the doctrine of responsible government? And significantly in this context, what is meant by the term ‘mandate’? Does it refer to a core set of policies advocated by the government in the election campaign, or is its meaning broader in scope?⁴⁷ These are some of the conundrums

1999, p 53.

⁴⁴ M Russell, n 8, p 241; V Bogdanor, ‘Camera obscura: the contested institution of the upper house and the unsung virtues of the Wakeham Report’, *The Times Literary Supplement*, 4 February 2000, p 13.

⁴⁵ SC Patterson and A Mughan, n 7, p 338.

⁴⁶ H Emy, ‘Comments’ (1995) 7 *Political Theory Newsletter* 24 at 25; R Mulgan, ‘The Australian Senate as a “House of Review”’ in *The Australian Political System*, 2nd Edition, edited by DW Lovell et al, Longman 1998, p 195. Emy’s argument is that the competing models of the ‘essential characteristics’ of Australian government are ‘essentially contested’. Each model, he argues, ‘tends to be associated with a set of values, or a theory of government, which its opponents find unacceptable’. Emy’s comments were in response to a paper which articulated seven competing models of Australian government – RL Jackson, ‘Foreign models and Aussie rules: executive-legislative relations in Australia’ (1995) 7 *Political Theory Newsletter* 1-18.

⁴⁷ For an overview of the debate see – M Goot, ‘Whose mandate? Policy promises, strong bicameralism and polled opinion’ (1999) 34 *Australian Journal of Political Science* 327-361; JR Nethercote, *Mandate: Australia’s Current Debate in Context*, Commonwealth Parliamentary Library Research Paper No 19/1998-99.

over which defenders and opponents of upper houses argue, more or less perennially it seems.

Before looking at these more complex questions, the general arguments in favour of bicameralism can be presented, first in summary and then in more detail.

2.4 Bicameralism – why?

Historically, at least three main arguments have been mounted on behalf of bicameralism. These are, in brief, a class based argument which proved influential in the past when the case was made for separate representation for the upper echelons of society, an argument which in the nineteenth century came to be associated with the perceived need for upper houses to act as a brake on democracy. A second justification for bicameralism, the federal argument for equal State representation, dates back to the making of the US Constitution. Thirdly, for unitary states and for sub-national polities where federalism is not a valid justification, the class based model has been replaced by an argument founded on the ‘review’ functions of upper houses.⁴⁸ These can be defined to include the revising, delaying and scrutinising functions associated with preventing ‘precipitancy’ and compelling ‘a second deliberation’. Related to this argument is the view associated with JS Mill which states that the unchecked will of the majority carries dangers of its own, which an upper house can help to alleviate. Second chambers are said to restrain and moderate ‘the ebullience of popular sovereignty which would operate in too ruthless a manner if there were only a single chamber’.⁴⁹ Famously, James Madison, speaking at the convention at which the US Constitution was agreed, argued that second chambers had two purposes: ‘first, to protect the people against their rulers, secondly, to protect the people against the transient impressions into which they themselves might be led’.⁵⁰ Likewise, for JS Mill, writing in 1861, the rationale for upper houses was articulated in terms of a brake upon unchecked majoritarian power, as a ‘centre of resistance to the predominant power in the Constitution’:

A majority in a single assembly, when it has assumed a permanent character – when composed of the same persons habitually acting together, and always assured of victory in their own House – easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority.⁵¹

⁴⁸ In practice, this review argument has also proved influential in many federations, including Australia.

⁴⁹ P Ameller, *Parliaments*, Cassell/Inter-Parliamentary Union, 1966, p 12.

⁵⁰ *Ibid*, p 14.

⁵¹ JS Mill, *Utilitarianism, On Liberty and Considerations on Representative Government*, JM Dent 1972, pp 325-326. Mill was not an unequivocal advocate of upper houses, certainly not democratically elected upper houses. Ideally, he said, the main reliance on tempering ‘the ascendancy of the majority’ should be placed in a properly constituted lower or popular house, elected by proportional representation. However, he also recognised that in certain

Summing up this line of argument, Paul Carmichael and Andrew Baker stated:

The most fundamental and simple justification for the existence of a second chamber is that “it acts to prevent the excessive concentration of power in the hands of a single institutional actor and compensates for the apparent deficiencies elsewhere in the system”. In theory, second chambers do this by checking the power of an ascendant chamber whilst providing the legislature as a whole with an additional tier or extra dimension to offset the power of the executive. Such claims are based on the belief that the more branches government has, the more difficult it becomes for any one group entirely to monopolise its operation. Bicameralism thus augments polyarchy by contributing to a diverse and pluralistic institutional structure.⁵²

These arguments in favour of bicameralism can be considered in more detail, in particular the arguments most relevant to the contemporary debate, those associated with what can be called the ‘review’ and ‘restraining’ functions of second chambers. A ‘democratic/political representation’ model is also discussed.

2.5 Bicameralism – the class/representation model

Bicameral-like institutions, operating as forums for dual deliberation,⁵³ were found in ancient Greece and Rome where councils of elders – generally representing wealthy and powerful classes – sat alongside more representative citizen assemblies.⁵⁴ The name Senate, the preferred nomenclature in modern times for upper houses, at least at the national level, is a reference to the council of elders of ancient Rome. Consistent with the doctrine of ‘mixed government’, the purpose of these multi-chamber parliaments was to permit the representation of different interests and classes, ‘thus binding society together and creating more stable government’.⁵⁵ It is said in this respect that ‘bicameralism...originated in the

circumstances, where political history supported the arrangement, an upper house can act as ‘the centre of resistance to the predominant power in the Constitution’.

⁵² P Carmichael and A Baker, ‘Second chambers – a comparative perspective’ in *The House of Lords: Its Parliamentary and Judicial Roles* edited By B Dickson and P Carmichael, Hart Publishing 1999, pp 71-72.

⁵³ Whether these operated in a way that is familiar to modern bicameral legislatures is questionable. For example, Viscount Bryce was of the view that ‘In the ancient world the functions of a “Second Chamber” seem to have generally been not to revise or further discuss the decisions of the popular Assembly, but to consider the topics that were to come before it, much as does a modern Cabinet’ – J Bryce, *Modern Democracies, Vol 2*, Macmillan 1921, pp 437-438.

⁵⁴ G Tsebelis and J Money, *Bicameralism*, Cambridge University Press 1997, pp 17-21.

⁵⁵ M Russell, n 8, p 19.

essentially pre-democratic view that the representation of the nation required both an upper and lower house, in the class-conscious sense of ‘upper’ and ‘lower’.⁵⁶ Underlying these arrangements is the principle of special minority representation as defined in terms of class or social status.

What Russell called the ‘class-based model’ of bicameralism is obviously relevant to the development of the British House of Lords, as well as to the other second chambers which were established across Europe during the Middle Ages. However, its relevance does not end there. It reaches down to the development of second chambers in colonial Australia where, it is said, with the introduction of responsible government, the Legislative Councils of the day were ‘originally designed for the representation of special interests, either by the Governor’s nomination or by election on a restricted property franchise’.⁵⁷ NSW and Queensland opted for a nominated upper house, whereas the other colonies chose election on a property franchise (although in Western Australia there was nomination for a few years).⁵⁸

2.6 Bicameralism – the federal/representation model

A second model of bicameralism is that associated with the influential ‘federal’ example of the US Constitution, in which the second chamber was conceived as a ‘house of the states’. It has been said in this regard that federal systems of government are highly conducive to bicameralism in which a senate serves as a federal house whose members are selected to represent the states or provinces. As Patterson and Mughan said, ‘The paradigmatic federal house is the US Senate, whose one hundred members are distributed territorially on the basis of two senators for each of the fifty states regardless of differences in state population size’.⁵⁹ The Australian Senate was conceived along similar lines, with the Constitution guaranteeing each state, again regardless of its population, an equal number of senators. At present, the Australian Senate consists of 76 senators, 12 from each of the six states and two from each of the mainland territories.⁶⁰ The best contemporary example of a second chamber which does, in fact, operate as an effective ‘house of the states’ is the German Bundesrat, members of which are appointed by state governments from amongst their members, with each state having between three and six representatives, depending on population.

⁵⁶ G Loewenberg and SC Patterson, *Comparing Legislatures*, Little Brown 1979, p 121.

⁵⁷ HR Anderson, ‘The Constitutional Framework’ in *The Government of the Australian States* edited by SR Davis, Longmans 1960, p 6.

⁵⁸ J Rydon, ‘Upper Houses – the Australian Experience’ in *The Role of Upper Houses Today: Proceedings of the Fourth Annual Workshop of the Australian Study of Parliament Group*, edited by GS Reid, 1983, p 22.

⁵⁹ SC Patterson and A Mughan, n 7, p 10.

⁶⁰ Section 7 of the Commonwealth Constitution. At federation in 1901, each of the states had six senators.

The proposition behind both the ‘class-based’ and ‘federal’ models of bicameralism is that two houses of parliament can offer distinct, yet complementary, modes of representation. ‘According to the theory’, Patterson and Mughan explained, ‘one house is composed of popularly elected members representing the citizens directly. The other house, with a different basis of representation, may give voice to the interests of social classes, economic interests, or territorial diversity’.⁶¹

2.7 Bicameralism – the democratic/political representation model

While the ‘class’ model no longer applies to State upper houses in Australia, and the ‘federal’ model could never have applied, it may be the case that some form of ‘representation’ theory remain relevant at the State level. This is because proportional representation operates in elections for three of the five State upper houses and, as in the Australian Senate, this electoral system tends to generate a diversity of political representation in which minor parties hold the balance of power. It may be argued, as a consequence, that these upper houses can make an alternative claim to democratic legitimacy, different in kind to that of their respective lower houses which are elected on a majoritarian first past the post basis.

Upper houses, therefore, can be said to add another, complementary dimension to the representation of interests and opinions, thereby enhancing the democratic quality of that representation. For its proponents, this aspect of proportional representation can be justified on normative grounds as an ‘inherent’ public good, in that it facilitates a more accurate reflection of the electors’ choices and gives a substantial proportion of the electorate the only effective voice they have in Parliament.⁶² As well, it can be said to serve the better functioning of parliamentary democracy in an instrumental sense, bolstering the democratic legitimacy of the review functions associated with upper houses and providing for a more effective legislative safeguard against executive government.⁶³ That, at least, is the ‘democratic’ case ‘for’ upper houses. Against it is the view that the representation of minority interests in powerfully obstructionist upper houses can be at the expense of the more substantial body of electors who voted for the government in the lower house.

2.8 Bicameralism – the review model

Alongside and in addition to these ‘representation-based’ justifications for bicameralism, modern upper houses are also defended on grounds which can be associated with their functions as ‘houses of review’. This can be explained in different ways. For example, the classic formulations of the review functions of the House of Lords tend to emphasise its subordinate place in the Westminster parliamentary system, associating review with the

⁶¹ SC Patterson and A Mughan, 7, p 10.

⁶² C Sharman, ‘The Senate and good government’ in *Papers on Parliament No 33: The Senate and Good Government* edited by Kay Walsh, The Department of the Senate May 1999, p 159.

⁶³ H Evans, ‘Accountability versus government control’ in B Costar ed, n 28, pp 48-49.

revising of government bills initiated in the lower house. In this model, upper houses act as forums of sober second thoughts, providing the checks, balances and mutual controls essential to parliamentary systems in which lower houses are likely to be controlled by a government majority. For Lord Bryce, who chaired a conference on the reform of the House of Lords in 1917-1918, 'the chief advantage of dividing a legislature into two branches is that the one may check the haste and correct the mistakes of the other'.⁶⁴

2.9 Review functions – revising, delaying, scrutinising

The above view is reflected in the 1918 Conference Report on the Reform of the Second Chamber where Lord Bryce went on to formulate the classic statement of the functions of a second chamber, as follows:

- The examination and revision of bills brought from the lower house;
- The initiation of bills dealing with subjects of a comparatively non-controversial character;
- The interposition of so much delay – and no more – in the passing of a bill into law as may enable the opinion of the nation to be adequately expressed upon it; and
- To act as a forum for the full and free discussion of large and important questions of policy.⁶⁵

The second and fourth functions are relatively unproblematic. More controversial are the first, 'revising' function and the third 'delaying' function, both of which can be aligned with the broad notion of review (a term not used by Lord Bryce). The revising function is problematic because it begs the question of how far revision can go before it amounts to interference with the will of the lower house. It also begs the question as to whether the revising function is carried out in a partisan way, so that it depends for its operation on the political complexion of the government of the day. Similar controversies can surround the delaying function, especially where an upper house is not democratically elected, thus resulting in the claim that it is thwarting the popular will.⁶⁶ Precisely this argument was made in the past in relation to the Legislative Councils of the Australian States. It is said in this regard that the review function, however defined and understood, was originally conceived in largely 'conservative' terms, viewed as the colonial upper houses often were by their supporters as 'the only bulwarks against the coming Socialism'.⁶⁷ Reflecting this

⁶⁴ J Bryce, *The American Commonwealth*, Vol 1, Third Edition, Macmillan 1893, p 183; SC Patterson and A Mughan, n 7, p 13.

⁶⁵ (Viscount) J Bryce, *Conference on the Reform of the Second Chamber, Report*, Cmd 9038, 1918, p 4.

⁶⁶ N Baldwin, 'The membership and work of the House of Lords' in *The House of Lords: Its Parliamentary and Judicial Roles* edited by B Dickson and P Carmichael, Hart Publishing 1999, pp 38-40.

⁶⁷ LF Crisp, *The Parliamentary Government of the Commonwealth of Australia*, 2nd ed, Longmans 1962, p 174.

proposition from the opposing political side, for much of their history upper houses in Australia were viewed with hostility by Labor Party governments. However, as recent experience at the federal and State levels in Australia has shown, the manner in which the review function is exercised is not fixed, but evolves as the composition of upper houses and their electoral foundations change.

Another aspect of the review function, one not mentioned by Bryce, is that of scrutiny. This relates, not only to the review of government bills, but to the scrutiny of the executive generally, the purpose of which is to hold the government accountable to the electorate. Typically, it takes the form of ‘the detailed examination of government decisions and administration, particularly through committees’.⁶⁸ This scrutinising function is not intrinsic to upper houses. Rather, as Richard Mulgan suggests, it is better viewed as a general parliamentary function within a representative democracy which an upper house, in particular an upper house with an anti-government majority, is better fitted to perform. It is a function which, in any event, may be more suited to upper houses, for here the rigid party discipline required to maintain control of the lower house need not apply.

For some commentators these review functions can be conducted in a relatively weak or strong way.⁶⁹ In the weaker version, revision, delay and scrutiny are carried out in keeping with the British parliamentary model, based on responsible government, in which the upper house plays something of a support role, with the lower house constantly at centre stage. Underlying the formulation is the assumption that an upper house will not press its powers of legislative revision beyond a certain point and therefore not seriously challenge the government’s authority or those policies for which it has a ‘mandate’. However, it may also be the case that, if a powerful upper house carries a ‘strong’ version of the review model beyond whatever that ‘certain point’ happens to be, by playing a particularly activist or interventionist role in the fields of legislative revision and executive scrutiny, then it may come into serious conflict with the lower house and, possibly, with the responsible government doctrine itself.

2.10 Upper houses and responsible government

Never far from the debate about upper houses is the vexed question of their relationship with the doctrine of responsible government. In the Westminster tradition, popular sovereignty is typically seen to reside in the lower house and from this there follows the doctrine that the continued existence of the government of the day – the repository of the popular mandate – depends solely upon it retaining the confidence of what its champions call ‘the people’s house’. In the United Kingdom, this is settled doctrine and practice. In

⁶⁸ R Mulgan, ‘The Australian Senate as a “House of Review”’ in *The Australian Political System*, 2nd edition, edited by DW Lovell et al, Longman 1998, p 196.

⁶⁹ Mulgan has argued that the boundaries between a ‘strong’ and ‘weak’ sense of review ‘may be hard to define and the distinction may collapse’ (Ibid). The point is well made. However, the strong/weak distinction is indicative of the distinction which can be made between those upper houses which are relatively assertive in their pursuit of the review function, whereas others are more inclined, for whatever reasons, to remain quiescent. To be meaningful the distinction cannot be categorical in nature, but one of degree, a matter of more or less.

Australia, however, where upper houses are generally more powerful, in some cases having the power to block supply, the situation is more complicated. Much will depend, in any event, on how one defines responsible government and how that doctrine is then applied to the Australia context, at State and federal level.

The relationship of the scrutiny function to responsible government was discussed at length by the High Court in the recent case of *Egan v Willis*, as well as by the NSW Court of Appeal in the related case, *Egan v Chadwick*. The High Court was of the view that parliament's scrutiny function is inherent to the responsible government doctrine. The joint judgment of Gaudron, Gummow and Hayne JJ in the High Court stated:

A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament' ...It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that to 'secure accountability of government activity is the very essence of responsible government'.⁷⁰

This is the 'broader' view of responsible government, one in which its constitutional purpose is to serve the ends of representative democracy generally. From this perspective, a powerful upper house which avoids such extreme measures as blocking supply, yet exercises its review functions in a relatively strong way by making the government accountable and Ministers answerable for the administration of their departments can be seen to be operating in support of responsible government. The question is, how does it impact on what might be called the 'narrower' view of responsible government? In particular, does it disturb the accepted doctrine that the 'formal' responsibility of the executive is only to the lower house? The Final Report of the Constitutional Commission formulated this 'narrower' view as follows:

Part and parcel of the notion of parliamentary government is 'responsible government', whereby the ministers are individually and collectively answerable to the Parliament and can retain office only while they have the

⁷⁰ (1998) 195 CLR 424 at 451; (1998) 158 ALR 527 at para 42. This broader understanding of responsible government is not new. In the *Engineers case* (1920) 28 CLR 129 Lord Haldane's formulation of responsible government as 'a government under which the Executive is directly responsible to - nay, is almost the creature of - the Legislature' was cited with approval (at 147). Indeed, it has been said that 'Judicial comment has generally described responsible government as involving collective executive accountability to the Parliament' - J Lipton, 'Responsible government, representative democracy and the Senate: options for reform' (1997) 19 *The University of Queensland Law Journal* 194 at 203-4. That constitutional conventions are the means by which the will of the majority of the electors is, 'in the long run', given effect was also discussed by AV Dicey - *Introduction to the Study of the Law of the Constitution*, 9th edition, pp 422-23.

'confidence' of the lower House, that is, the House of Representatives in the case of the Commonwealth and the Legislative Assembly or House of Assembly in the case of the States.⁷¹

One way to maintain the integrity of that doctrine is to distinguish between 'responsibility' and 'accountability' in this context. By the exercise of their scrutiny power in examining, analysing and exposing to public view the actions, decisions and workings of the Executive, upper houses generally can assist in making governments, plus the bureaucracies which serve them, more democratically *accountable*.⁷² The government is not, however, on this understanding, *responsible* to an Upper House because 'it does not need to retain the confidence of that House to remain in office'.⁷³ In other words, the view of upper houses as houses of review and scrutiny need not, on this understanding, alter in any way the 'formal' responsibility of the Executive to the lower house only.

On the other hand, the situation may be more complicated where a second chamber takes its revising and restraining functions to a point where it challenges the 'mandate' of the government of the day. As with so many terms and concepts used in this context, the word 'mandate' is itself the subject of much debate. For the present, it can be taken to mean the possession of the popular authority and democratic legitimacy to proceed with a promised course of action in law or policy which, under the responsible government doctrine, belongs solely to the government. In Australia at present, where a revitalised Senate is said to be 'in the process of redefining its representative role',⁷⁴ the continued operation of the mandate theory is in some doubt. Indeed, it may be that, nationally, Australia's political system is moving towards some kind of 'negotiation model' of parliamentary politics, in which policies are more clearly the outcome of discussion and trading between the government and powerfully positioned minor parties. As Jack Richardson has remarked, the government of the day 'has to engage repeatedly in negotiation with opposition parties or one or two independent Senators to modify Bills rather than having them rejected outright'.⁷⁵

While academic analysis of the 'mandate' phenomenon has focused on the Senate, similar, if not entirely comparable, developments in the States have not been neglected entirely. Indeed, a case can be made for the States leading the way towards a 'negotiation model'

⁷¹ *Final Report of the Constitutional Commission*, Vol One, para 2.177.

⁷² *Royal Commission into the Constitution Act 1934 Tasmania*, 1982, p 39 and p 69.

⁷³ G Winterton, *Monarchy to Republic*, Oxford University Press 1994, pp 51-52. Winterton cited the comment of the Tasmanian Royal Commission that 'a vote of no confidence in the Council does not have any direct effect. In that sense, therefore, the Government does not depend on the "confidence" of the Upper House and is not "responsible" to it' - *Royal Commission into the Constitution Act 1934 Tasmania*, 1982, p 31. Again, the fact the Legislative Council in NSW cannot block supply may be said to add further weight to this observation.

⁷⁴ J Uhr, 'Generating Divided Government' in SC Patterson and A Mughan, n 7, p 114.

⁷⁵ J Richardson, *Resolving Deadlocks in the Australian Parliament*, Department of the Commonwealth Parliamentary Library, Research Paper No 9/ 2000-01, p ii.

where the making of legislation is concerned. South Australia is a case in point: since the mid-1970s, following the adoption of proportional representation, the balance of power in the upper house has been held for most of this time by the Australian Democrats with the result that, for any government to get its legislation passed, 'there has to be consultation and discussion with the Democrats, compromises made and concessions granted'.⁷⁶ Similar experience of minority government has been recorded in other States, including NSW where governments have had to adopt a 'consultative' approach to the minor parties in the upper house.⁷⁷ The questions are whether the 'mandate wars' of the Senate have also been replicated at the State level, and what implications do such conflicts have for responsible government itself?

A further point is that the relationship, actual or potential, between upper houses and responsible government, can vary depending on the powers an upper house possesses. This is particularly the case where an upper house has the power to block supply. As the events of 1975 showed, that power certainly resides in the Australia Senate, which is perhaps the most formidable national upper house in the Westminster parliamentary world. The powers of the State upper houses are also formidable, although these vary considerably from place to place. All of which points to the difficulties involved in making general statements about upper houses, especially where their relationship with the complex notion of responsible government is concerned.

2.11 Powers and method of composition – strong bicameralism

Writing in 1921 Lord Bryce said that the powers and functions allotted to second chambers were so diverse that he could only indicate three classes into which these assemblies fall. These were as follows:

- Those which are equal in power, both legally and practically, to the lower or 'popular' house. In contemporary terms, these include those second chambers elected by universal suffrage, such as the Senates of the Australian Commonwealth and the US. Perhaps the indirectly elected German Bundesrat also belongs to this group. At the State level in Australia, the Tasmanian upper house is a good example and those of South Australia, Victoria and Western Australia do not lag far behind.
- Those whose formal powers are legally equivalent, or nearly so, to the lower house, but which, in reality, are inferior, perhaps much inferior, in terms of the exercise of those powers to their lower house counterparts. The Canadian Senate which is still an appointed chamber is one example. The House of Lords may be another, although its legal powers are more clearly inferior to those of the House of Commons, as is true of the French and Spanish Senates. At the State level in Australia, the Legislative Council of NSW can be said to belong to this category.

⁷⁶ A Levy, 'Experiences of minority government in South Australia' (1997) 11 *Legislative Studies* 57 at 61.

⁷⁷ J Evans, 'State of play in the NSW Legislative Council: minorities in upper houses' (1997) *Legislative Studies* 46 at 50.

- Those whose powers are legally as well as practically slender, of which the Irish Senate may be the most credible modern-day example.⁷⁸

When it comes to the question of the powers, formal and actual, of upper houses the key issues relate to finance, disagreements and method of composition (by direct election or otherwise). Clearly, in the contemporary world, where the democratic legitimacy of any parliamentary assembly is of critical importance, a popularly elected upper house will tend to be more powerful than one that is appointed or hereditary in nature; a popularly elected house which can either amend or block supply Bills is more formidable still; and where the mechanisms in place to resolve disagreements over finance or other proposed legislation are either cumbersome or problematic, perhaps because they require the dissolution of the lower but not the upper house, then the likelihood of an upper house exercising its powers in situations of conflict and high political tension may be all the greater.

The powers of an upper house are, therefore, a combination of many factors, including its formal, legal powers and the mechanisms associated with these, plus the degree of democratic legitimacy it can claim. Reminiscent of Bryce's earlier classification, Arend Lijphart, in his much cited 1984 work, *Democracies*, classified the powers of upper houses in relation to lower houses as 'symmetrical', 'moderately asymmetrical', or 'extremely asymmetrical'.⁷⁹ Most examples, it has been said, will fall into the second or third categories, where the powers of the two chambers differ slightly, or where the upper house has rather weak powers. Lijphart added to this classificatory schema a division of upper houses and lower houses in terms of the congruency or otherwise of their composition. This is not only a question of whether an upper house is directly elected, it also enquires into the means by which it is directly elected and whether this offers an alternative representative basis to the lower house and, therefore, an alternative claim to democratic legitimacy. In other words, a lower house may be elected by a first past the post system in which members represent single constituencies, whereas an upper house may be elected on the basis of proportional representation according to a federal principle of representation (as in the case of the Australian Senate), or where the whole polity is a single electorate (as in elections for the NSW Legislative Council). Lijphart's argument was that 'strong bicameralism' operates where the two chambers are incongruent in their composition but have symmetrical or moderately symmetrical powers.⁸⁰ Meg Russell cited another highly respected political scientist, Giovanni Sartori, as supporting the proposition that the second chambers which will be most 'effective' are those with 'dissimilar composition to the first

⁷⁸ J Bryce, *Modern Democracies*, Vol 2, Macmillan 1921, p 441.

⁷⁹ A Lijphart, *Democracies*, Yale University Press 1984, p 99; M Russell, n 8, pp 41-43.

⁸⁰ A further commentary on Lijphart is found in – B Stone, n 29, pp 3-5. According to Stone, the idea of 'incongruence' requires elaboration. He added: 'The most relevant interpretation would seem to be that chambers are genuinely incongruent only when partisan majorities in the lower house are not replicated in the upper house. This would give the upper house the capacity, in an environment of disciplined parties, to challenge the will of the dominant partisan grouping in the lower house. But this interpretation is not clearly stated by Lijphart and, moreover, it cannot simply be assumed that the means referred to will necessarily produce this result'.

chamber, but similar powers'.⁸¹

For Lijphart, Australia, Germany, Switzerland and the USA were examples of strong bicameralism which, he went on to say, can be incompatible with responsible parliamentary government. In essence, strong bicameralism was defined to entail two differently constituted chambers which may have different political majorities, in which case the cabinet 'may therefore face the problem of retaining the confidence of two majorities which may disagree with each other'.⁸² Lijphart's illustrations of the conflicts which can ensue between the institutions of bicameralism and parliamentarianism were based on Australia's 1975 constitutional crisis. At the sub-national level, further illustrations might have been drawn from the political experiences of the Australian States, particularly from Tasmania and Victoria where, as it is explained in a later section of this paper, supply has been blocked by the upper house.⁸³

Note, however, that Lijphart did not argue that strong bicameralism and parliamentarianism are incompatible per se, but only that strong bicameralism is in conflict with the Westminster form of responsible parliamentary government, with its 'majoritarian bias'. Bicameralism, parliamentarianism (and federalism) are quite compatible, he argued, with a consensus model of parliamentary government in which 'cabinets are grand coalitions'.⁸⁴ Nationally in Australia at present we are a long way from this consensus model. On the other hand, the negotiation between parties, major and minor, which is part and parcel of that consensus model, is very much a feature of the contemporary Australian political landscape, albeit a feature which is only grudgingly accepted by the major political parties

⁸¹ The choice of the word 'effective' may not be apposite in this context. The focus in Sartori's work is on the problems involved in combining bicameralism with parliamentarianism, which means that a 'strong' upper house may be 'effective' in one sense, without being a model component of an efficient constitutional system on the other. His discussion of the Australian situation, for instance, tends to emphasise the potential for conflict between the two national Houses of Parliament. Federalism, he said, 'optimally requires...two Houses that are equal in powers but dissimilar in nature', a situation which, for Sartori, only takes us back to 'square one'. Sartori suggested that it is the German model, in which the Bundesrat is unequal in strength on two significant counts to the Bundestag but is a powerful body nonetheless 'on account of its being composed of the executives of the member states', which 'shows how federal bicameralism can best be amalgamated with a parliamentary system': M Russell, n 8, p 41; G Sartori, *Comparative Constitutional Engineering: An Enquiry into Structures, Incentives, and Outcomes*, Macmillan 1997, pp 183-189.

⁸² A Lijphart, n 79, p 101.

⁸³ In Tasmania in 1948; in Victoria in 1865, 1867, 1877, 1947 and 1952. In 1952 the Victorian Governor declined to accept the Premier's advice to dissolve the Legislative Assembly and bring on a general election. Following the Premier's resignation, the Governor installed a minority ministry which obtained passage of supply through the Legislative Council. The Governor then reinstated the former ministry on condition that the Premier advise a dissolution of the Assembly – *Halsbury's Laws of Australia* [90-4045].

⁸⁴ Sartori argued that in many instances where, as in Australia in 1975, adversarial party politics is to the fore, 'oversized coalition cabinets are neither obvious nor, indeed, possible solutions' and that, in this respect, Lijphart, 'belittles' the problem involved and 'ultimately misses its intractability': G Sartori, n 80, pp 186-187.

in most instances. With such developments in mind, how far, it can be asked, has Australian politics drifted from the moorings of the British doctrine of responsible government, always assuming that, at its various national and sub-national levels, it was intended to conform to that doctrine in the first place?

2.12 Application to State Upper Houses in Australia

The comparative work undertaken by Lijphart and others is a useful starting point for the analysis of ‘strong’ bicameralism at the State level in Australia. At the same time, it must be recognised that local variations in history, powers and practices can make the work of comparison difficult, especially across varying political cultures. Ultimately, what Lijphart offered are, at best, empirical generalisations which, if they are to have any explanatory value, need to be tucked and trimmed in the light of national (and sub-national) political experience. Writing in this vein, Carmichael and Baker commented that comparative studies of upper houses tend to reveal the ‘difficulties and complexities in attempting to construct bicameral models to act as standard types of second chamber’.⁸⁵ They continued: ‘Most bicameral arrangements are the product of a uniquely national process of state formation and constitution building, making it difficult to fit them into conceptually neat categories’.⁸⁶

Adding to these difficulties is the fact that many of the key concepts used in the discussion of upper houses tend also to be complex and contested in nature. The very notion of ‘review’, for instance, is problematic, lending itself to various definitions. So, too, is the doctrine of responsible government which is central to the discussion of upper houses in any political system which has its roots in the Westminster parliamentary model. In Australia the application of that model may be more problematic federally than it is at the State level, although that is not to underestimate the problems which can arise even in relation to relatively ‘weaker’ chambers such as the NSW Legislative Council. All of which points to further complications in the making of generalisations which can even claim to be descriptively accurate. At any rate, this paper seeks to describe the powers and composition of State upper houses in Australia with the aim of explaining the particular and, where possible, the general working of bicameralism at a sub-national level in a federal system with a shared political culture.

Before discussing the five State upper houses separately and in detail, note can be taken of Bruce Stone’s division of these upper houses into ‘three distinct types’. First is the Tasmanian Legislative Council, which Stone described, perhaps dubiously, as ‘the only true embodiment of the old ideal of a non-party chamber’.⁸⁷ Second are the NSW, South Australian and Western Australian Legislative Councils which conform to the Australian Senate model. Under this model, proportional representation has helped to fashion ‘a

⁸⁵ P Carmichael and A Baker, n 39, p 88.

⁸⁶ Ibid.

⁸⁷ The question of the Tasmanian Legislative Council’s independence from party politics is discussed later in this paper at section 3.7.

developing Australian mainland norm that parliamentary systems should comprise a “house of government” whose electoral system overrepresents major parties and frequently manufactures partisan majorities, and a “house of review” whose electoral system ensures more diverse representation and the incongruent composition which underpins autonomy and a sustained capacity to exert influence’. Thirdly, Stone referred to the Victorian Legislative Council as a distinct type, one ‘flawed in its design’. Although democratised, according to Stone ‘its legitimacy is weakened by its continued domination by one side of the partisan competition for government’.⁸⁸ This three-fold typology is a useful starting point for the analysis of State upper house in Australia.

⁸⁸

B Stone, n 29, p 12.

3. STATE UPPER HOUSES IN AUSTRALIA – SOUTH AUSTRALIA, TASMANIA, VICTORIA AND WESTERN AUSTRALIA

The aim of this chapter is to offer an overview only of the history and powers, together with some analysis of the contemporary performance, of the upper houses of South Australia, Tasmania, Victoria and Western Australia. As such, it establishes a framework for the more detailed analysis of the NSW Legislative Council in Chapter 4.

3.1 The Legislative Council of South Australia

3.1.1 Overview

Paradoxically, relatively little has been written about the South Australian Legislative Council, in particular, and the South Australian political system generally; and yet, in some ways, the politics of that State, where successive governments have failed to gain majorities in the upper house since the introduction of proportional representation in the 1970s,⁸⁹ can be seen as something of a forerunner of developments elsewhere in Australia. The evidence suggests that some form of ‘negotiation model’ for the passage of legislation has operated in South Australia for many years, with both Labor and Liberal governments having to enter into consultations with the minor parties - the Australian Democrats and, more recently, the representative of the SA First Party and two independent members⁹⁰ - who have held the balance of power in the upper house. At any rate, there is little doubt that South Australia is an example of some form of ‘strong bicameralism’ at work. Not only have governments in recent times failed to win a majority in the Legislative Council, the formal powers of the Council are also formidable: except as to Money Bills the Council has equal power with the House of Assembly; in respect to Money Bills, while the Council cannot initiate or amend such Bills, it can reject them or suggest amendments to the lower house. Moreover, since 1969 the Council and its powers are entrenched in the constitution, which means that the upper house can neither be abolished, nor its powers reduced, without a referendum. All of which has helped to make the Legislative Council a controversial institution, with both major parties now calling for its reform.

3.1.2 History of the South Australian Legislative Council

The establishment of the Colony of South Australia dates back to 1834, to the passing of an Imperial Act which gave statutory authority ‘to erect South Australia into a British province’. As well as prohibiting the transportation of convicts, the South Australian Colonisation Act of 1834 also made provision for a form of government which differed from that in other colonies, in that authority was divided between the Governor and the Colonisation Commissioners, the latter having responsibility for the sale and distribution of lands within the province. It seems this division of authority soon ‘proved unworkable’.⁹¹

⁸⁹ *Constitution and Electoral Acts Amendment Act 1973 (SA)*.

⁹⁰ Nick Xenophon is referred to as the ‘No Pokies’ Independent member; the second Independent MLC is Trevor Crothers.

⁹¹ B Selway, *The Constitution of South Australia*, The Federation Press 1997, p 6.

A redefinition of powers occurred in 1838. Then, in 1842 the British Government passed an Act establishing a Legislative Council comprising the Governor, three official members – the Colonial Secretary, the Advocate-General and the Registrar-General – and four non-official members, all nominated by the Crown. Provision was also made for the Crown to establish a bicameral legislature with an elected lower house, but this power was never exercised.⁹²

Subsequently, following the tabling of a report by a committee of the Privy Council in 1849 proposing a Bill ‘for the separation of Port Phillip from New South Wales, and the extension of representative institutions to Van Diemen’s Land and South Australia’,⁹³ an enabling statute was passed in August 1850 – the *Australian Constitution Act 1850* – which empowered the present Legislative Council to establish a new hybrid institution, part appointed and part elected. Under the authority of that Imperial enabling Act, in 1851 the Legislative Council passed Ordinance No 1 of 1851 which provided for a new Council consisting of 24 members: four official and four non-official members nominated by the Crown; and 16 members returned by the electors. For this purpose, the Colony was divided into 16 electoral districts, with each district returning one member to the Council; the restricted franchise required ‘possession of freehold estate to the value of £100, or to be a householder occupying a dwelling house of the clear annual value of £10, or have a leasehold estate of the value of £10 per annum’. Subject only to Her Majesty’s assent, power to amend the constitution of this hybrid Legislative Council, which was acknowledged to be something of an experiment, was granted to the Council itself. The Council also had the power to establish a bicameral legislature. True to the busy spirit of the times, the work of reform started more or less immediately. Its culmination was the South Australian Constitution Act of 1855-66,⁹⁴ subsequent to which the Colony’s first bicameral parliament met on 22 April 1857. In just over twenty years since its establishment, therefore, South Australia had become a self-governing Colony under responsible government.⁹⁵

This account, in summary form, of South Australia’s early constitutional history says nothing about the personalities, the conflicts and the motivating impulses behind the process of reform; nor does it say anything about South Australia’s relations with either the Colonial Office, far off in Whitehall, nor yet with developments somewhat nearer home in other parts of Australia. It is akin, at best, to an X-ray image of the Colony’s developing constitution. As such, it does reveal something of the speed at which the movement towards

⁹² Ibid.

⁹³ A Munyard, ‘Making a polity: 1836-1857’ in *The Flinders History of South Australia* edited by D Jaensch, Wakefield Press 1986, p 63.

⁹⁴ A previous Act of the Legislative Council which attempted to establish a bicameral parliament (Act No 3 of 1853) was reserved for Royal Assent and lapsed – B Selway, n 91, p 6.

⁹⁵ This account of South Australia’s early constitutional history is based on – GD Combe, *The Parliament of South Australia*, 1970, pp 5-6; K Seaman, ‘The South Australian Constitution Act of 1856’ in *The Flinders History of South Australia: Political History* edited by D Jaensch, Wakefield Press 1986, pp 76-94.

a bicameral parliament occurred, which in itself suggests an urgency, driven perhaps in part by a confidence born of the Colony's unique origins and character. Be that as it may, by 1857 the constitution of South Australia included the following features:

- A bicameral Parliament consisting of a Legislative Council of 18 members, and a House of Assembly of 36 members.
- Members of the Legislative Council to serve for terms of 12 years and to be elected by the Colony as one district; six members retiring every fourth year. Members to be at least 30 years of age and resident for three years.
- The franchise for the Legislative Council to be based on a property qualification – freehold of the value of £50, leasehold of the annual value of £20 having three years to run or a right of pre-emption, or occupation of a house of the annual value of £25.
- All adult males to be entitled to vote at House of Assembly elections;⁹⁶ the House of Assembly to consist of 17 districts, varying in representation from one to six members.
- Voting at parliamentary elections to be by secret ballot.
- Money Bills to originate in the House of Assembly; otherwise, the two Houses were to have equal power in respect of Bills.
- Ministers to be members of either the House of Assembly or the Legislative Council.
- Any amendment to the Constitution of 1856 had to be passed by an absolute majority in both Houses and be reserved for the Royal Assent.

Though quite remarkable in some respects – ‘the most liberal of the colonial constitutions’⁹⁷ - in others the constitutional settlement of 1856 was typical of its times, most particularly in the form of its bicameral arrangements and the arguments advanced on their behalf. These arrangements were, in fact, a compromise between conservative and more radical or liberal forces. The Legislative Council, with its restricted property franchise, was in effect the price that had to be paid for the support of conservative opinion which saw the Council as protecting ‘the rights of property, and especially rural property, against the possible incursions by those who had little’.⁹⁸ A few ‘disgruntled extremists’ apart, the ‘old colonists’ of South Australia were said to be satisfied with the settlement of 1856: ‘Their rights were protected against the external despotism of Westminster; their

⁹⁶ The Constitution Act was amended in 1895 to confer on women the right to vote for, or to be elected as, members of either House of Parliament, subject to the same qualifications and in the same manner as men.

⁹⁷ D Jaensch, *The Government of South Australia*, University of Queensland Press 1977, p 1.

⁹⁸ D Jaensch, ‘Parliament and government’ in *The Flinders History of South Australia*, n 93, p 366.

property safeguarded from internal despotism by a constitution unalterable without the consent of a Legislative Council elected by the owners of property themselves'.⁹⁹

According to Dean Jaensch, the focus of the debate in the 1850s was 'on the nature of the Legislative Council rather than on relations between the houses'. He then discussed the absence of any provision for the resolution of deadlocks in the Constitution Act of 1856, something which the then colonial secretary and leader of the conservative grouping, Boyle Travers Finniss, said he had no reason to expect, looking as he did 'upon members of the Legislative Council as reasonable beings who would exercise ordinary forbearance in their proceedings...'.¹⁰⁰ Finniss was proved wrong, at least in his expectation that conflicts between the Houses would not arise. Conflict surfaced, in fact, on the first day of the new Parliament in 1857 over the obscure Tonnage Duties Repeal Bill which was designed to substitute a system of wharf leasing for the existing harbour duties at Port Adelaide.¹⁰¹ At least in relation to Money Bills, a compromise was reached in the form of the Compact of 1857 under which the Legislative Council could not amend the appropriation for the ordinary annual expenses of government, but might suggest changes to any other money Bill.¹⁰² Still, Jaensch commented, 'every session of Parliament after 1857 was replete with disagreements between the houses, conferences of managers, and the application of a veto by the Legislative Council'.¹⁰³

Confirming the South Australian predilection for innovative constitutional reform, in 1881 the first provision in Australia for the resolution of deadlocks was inserted into the Constitution Act.¹⁰⁴ Observers have said that the effect of this convoluted mechanism was to preserve the power of the upper house, as 'any Government would shrink from involving itself in the protracted "deadlock" clauses of the constitution, particularly in view of the fact that at the end of the process it might be no better off than before'.¹⁰⁵ The mechanism has never been used, in fact, but remains in force in substantially the same form to this day under section 41 of the *Constitution Act 1934* (SA).

⁹⁹ SR Davis ed, *The Government of the Australian States*, Longmans 1960, p 335.

¹⁰⁰ Cited in D Jaensch, 'Parliament and government' in *The Flinders History of South Australia*, n 93, p 366.

¹⁰¹ Ibid.

¹⁰² CJ Sumner, 'The South Australian Legislative Council' in *The Role of Upper Houses Today*, edited by GS Reid, Proceedings of the Fourth Annual Workshop of the Australian Study of Parliament Group, 1983, p 84.

¹⁰³ D Jaensch, n 93, p 369.

¹⁰⁴ J Rydon, 'Upper Houses – the Australian Experience' in *The Role of Upper Houses Today*, n 102, p 25.

¹⁰⁵ SR Davis ed, n 99, pp 373-374; D Jaensch, n 93, p 372. Jaensch commented that 'The constitutional amendment ensured the dominance of the Council...It is not surprising that the proposal was considered useless, and not surprising that the provisions were never initiated in the colonial period and have never been carried through since then'.

At the same time as the deadlock provision was inserted into the constitution, membership of the Legislative Council was increased from 18 to 24 members; further, its previous single, whole-State electorate was divided into four six-member districts. In 1901 the size was reduced again to 18, but then increased to 20 in 1913. From 1913 to 1973 there were 20 members elected from five electorates each returning four members. During this period, members served six year minimum terms and half the members retired every three years; that is, at each election, two members were elected from each electoral district. Politically, the significance of these arrangements was that the boundaries were consistently drawn in favour of the conservative, rural areas of the State. Three of the five electorates were non-metropolitan, added to which the division of Adelaide into two Council districts along the line of the Torrens River 'had the effect of confining the effective Labor vote to a single Council district, Central No 1.'¹⁰⁶ The result was that Labor consistently failed to gain more than four of the 20 seats, thereby making the Legislative Council a safe bastion for the conservative side of politics, notably the Liberal and Country League, until the introduction of proportional representation in the 1970s.¹⁰⁷

A restricted franchise for the Legislative Council also remained in place till that time. Successive extensions occurred in 1907, 1913, 1918, 1940, 1943, 1968, 1969 and 1971, but not until 1973 did the upper house share the same franchise of universal adult suffrage as the House of Assembly. Particularly significant was the amendment in 1913 which extended the Council franchise to the head of each household (but not to his or her spouse);¹⁰⁸ spouses of qualified electors were only entitled to vote in 1969 when the property qualification was further broadened to enfranchise joint tenants and anyone who owned or leased land in the State, or who owned or rented their home, regardless of the value of the land or home. The reforms of 1918 and the 1940s had related to war service qualification; in 1969 this was also broadened to include all military personnel on active service, whether overseas or not.¹⁰⁹ Furthermore, unlike the House of Assembly which had introduced compulsory voting in 1942, both enrolment and voting for the Council remained voluntary: in 1965 only 38% of Assembly electors were on the Council roll; in 1968 the formal Council vote as a percentage of the Assembly roll was 40.5%, and in 1973 it was 47.5%.¹¹⁰

¹⁰⁶ N Blewett and D Jaensch, *Playford to Dunstan: Politics of Transition*, Cheshire 1971, p 40.

¹⁰⁷ AT the 1968 election the Labor Party contested all five two member districts, secured 52.8% of the vote, but only won two of the ten vacant seats: D Jaensch, 'Electoral Reform' in *The Dunstan Decade* edited by A Parkin and A Patience, Longman Cheshire 1981, p 221.

¹⁰⁸ Provided the person was 21 years of age, a British subject and a resident in the State for six months. The minimum age for enrolment was reduced to 18 simultaneously in 1971 for the upper and lower houses. In 1982 the franchise for both Houses was limited by requiring Australian citizenship rather than status as a British subject, with the saving provision continuing the entitlement of British subjects already enrolled to vote in the State.

¹⁰⁹ J Newton, *The Electoral System in South Australia: A Legislative Summary 1850-1990*, Parliamentary Library of South Australia, Information Paper No 9.

¹¹⁰ CJ Sumner, n 102, p 88. Sumner cited the work of Blewett and Jaensch in support of these figures.

In summary, two points can be made about the actual role played by the Legislative Council up until the constitutional changes of the 1970s. One relates to the long dominance of the lower house by the conservative forces under the leadership of Thomas Playford, Premier from 1938 to 1965, who was returned to office at eight successive elections, from 1941 to 1962. In that time, with some few exceptions, the Council's considerable powers of obstruction lay dormant, prompting the comment in 1960 that, 'though in form bicameral, the South Australian Parliament functions very much as it would under single chamber government with the House of Assembly by far the most important body'.¹¹¹ But it was also said, and this relates to the second point, that the Council's powers remained formidable and could be used 'against a Labor Government as they had in the past'.¹¹² This occurred when Labor was finally returned to office in 1965. Supply was not denied to this, or any other, Labor administration, but there is no doubt that, as had been the case when Labor last held office in the early 1930s, the Council's powers of obstruction were reawakened. According to Blewett and Jaensch: 'During the three years of ALP rule [1965-1968] the Legislative Council had rejected or laid aside eleven Government bills, including some of the major legislative proposals of the Ministry; and had successfully insisted on major partisan amendments to at least twelve others'.¹¹³ Predictably enough, reform of the Legislative Council itself, its franchise and method of election, was resisted.¹¹⁴ Opinion was divided. For the conservative upper house member, Mrs Jessie Cooper, this more robust bicameralism was 'simply democracy working at its best';¹¹⁵ for Don Dunstan, arguing the case for reform in the ALP's 1970 policy speech, the Legislative Council should be given

¹¹¹ SR Davis ed, n 99, p 376. RL Reid and his co-authors commented: 'Inactive is perhaps too strong a word for the Council, but it is certainly not unduly active. It sits for a few hours in the afternoon on Tuesdays and Wednesdays during the sitting of the Lower House – in all about thirty days during the year. Its debates do not usually attract much notice. Its importance lies in the fact that it is the focus for occasional opposition to the Premier's more radical policies'. One such occasion was the dispute in 1946 with Playford over the Electricity Trust Bill under which the Government planned to nationalise the Adelaide Electric Supply Company. The Bill was originally defeated in the Council on its third reading by the casting vote of the President. But after a special session of Parliament was called one member of the Council, Jack Bice, was persuaded to change his vote and the Bill passed.

¹¹² Ibid. Between Federation and the Walsh Labor Government in 1965 five Labor Premiers had held office (one in coalition) for a total of only 14 years: B Muirden, 'The Electricity Trust Affair' in D Jaensch ed, *The Flinders History of South Australia*, n 93, p 270.

¹¹³ N Blewett and D Jaensch, n 106, p 56. They noted that 'In the three years 1930-32 the Legislative Council rejected eighteen bills. In the twenty-seven years that Playford rules South Australia the Legislative Council rejected twenty-four bills, the majority of which were non-governmental measures'.

¹¹⁴ A 1966 ALP Bill to introduce full adult suffrage was defeated in the Council. In 1968, the then Leader of the Opposition, Don Dunstan, made a further attempt and the Bill passed the House of Assembly with the support of the Liberal Premier, Steele Hall, after Dunstan had agreed to the entrenchment of the Legislative Council and its powers in the Constitution. The Bill was defeated in the Council by 15 votes to 4.

¹¹⁵ N Blewett and D Jaensch, n 106, p 41.

‘the opportunity of working genuinely as a House of Review, rather than it is at the moment, a bastion of selfish privilege’.¹¹⁶

It was Dunstan, as Premier from 1970 to 1979, who orchestrated the reform of the upper house, assisted it must be said by a divided Liberal Party, split between more conservative and progressive elements, the latter headed by Steele Hall who, in 1973, broke away from the Party to form the Liberal Movement. Hall’s decision as Premier to support Dunstan’s proposals for upper house reform back in 1968 was, in fact, ‘the public beginning’ of the differences which later divided the Liberals.¹¹⁷ The 1969 extension to the Council franchise was the work of the Hall Government, which also took the opportunity to constitutionally entrench both Houses, together with the Council’s powers, thereby ensuring that the Council could neither be abolished nor its powers reduced without a referendum.¹¹⁸ In any event, after a number of false starts, following the election of 1973 and a Conference of Managers to resolve the ongoing disputes, agreement was finally reached on a package of reforms to both the franchise and the electoral system for the upper house: the age qualification for membership of the Council was reduced from 30 to 18 years of age; the size of the Council was to be increased by stages to 22 members, with 11 to be returned at each periodic election; the five electoral districts were abolished and replaced with an electorate comprising the whole State; voting in Council elections remained voluntary, a situation which did not change till 1985.¹¹⁹ Most dramatically, a list system of proportional representation was introduced (that is, where electors vote for a party list and not for individual candidates on that list) based on optional preferential voting. This was amended in 1981, when, with the support of the Australian Democrats, the Liberal Government provided for full preferential voting and the distribution of all preferences. As in NSW, electors can vote for one party (an above the line vote) or for every individual candidate (a below the line vote). In the last three State elections 96% of formal ballot papers for the Legislative Council were marked with above the line votes. Jenni Newton-Farrelly has presented an overview of the present arrangements as follows:

In South Australia the Legislative Council has a proportional representation electoral system with compulsory voting, full preferential voting and a top-down bottom-up count. There is no threshold. Members’ terms are for 8 years, and half are elected each four years – in practice at each general election for the House of Assembly. The lagged election cycle for the Legislative Council means that a party needs to win 6 Council seats at *two consecutive* elections in order to have control of the House. In practice this has been impossible for parties to attain.¹²⁰

¹¹⁶ D Jaensch in A Parkin and A Patience eds, n 107, p 225.

¹¹⁷ C Sumner, n 102, p 92.

¹¹⁸ The Hall Government, acting against its own interests, also dismantled the ‘Playmander’ in the Legislative Assembly.

¹¹⁹ Section 85 (1), *Electoral Act 1985* (SA).

¹²⁰ J Newton-Farrelly, *The South Australian Legislative Council: Possible Changes to its*

Following the 1979 election, the numbers in the Legislative Council were: ALP 10; Liberal Party 11 (one in the Chair); Australian Democrats 1. At the 1985 election the Australian Democrat representation rose to 2, with both major parties holding 10 seats (one ALP member in the Chair). An era in which minor parties hold the balance of power emerged therefore, one that remains to the present day: at the 1997 election 3 Australian Democrats were returned; 1 'No Pokies' Independent; 10 Liberals (one in the Chair); and 8 ALP (but 2 members have since defected, one establishing the SA First Party, the other sitting as an independent member). Commenting on the South Australian situation in 1986, Parkin and Jaensch remarked that 'With the Australian Democrats now holding the balance of power in the Legislative Council, relations between the two Houses in practice involve inter-party negotiations between the major parties and the Democrats'.¹²¹ To that equation there must now be added three further factors – an SA First member, plus two independents.

3.1.3 Recent History of Reform Initiatives for the South Australian Legislative Council

As one would expect, South Australia's political history over the past 100 years or so is littered with attempts, mostly failed, to reform the Legislative Council. This has continued on into the more contemporary period when, at one time or another, both major parties have become frustrated over their failure to gain a working majority in the upper house. The situation is, in fact, rendered more complex by the difficulties governments have had in recent years in securing majorities in the lower house: between 1989 and 1993, for example, the ALP formed a minority government, with the support of 2 independent Labor members;¹²² at present, the administration of Premier Olsen must rely on the support of independent members in a House of Assembly comprising 22 Liberals, 21 ALP, and 4 others (one National, and 3 independents – 2 of whom were originally elected as Liberals). However, while the problem of minority government may be temporary or intermittent in nature where the House of Assembly is concerned, for the foreseeable future, at least, it would seem to be a permanent feature of the Legislative Council. Perhaps inevitably, reform of the upper house is back on the political agenda.

Not that it ever went away altogether. In the 1980s, for example, the ALP member of the Legislative Council and Attorney-General, Chris Sumner, argued that the Council should not have the power to block supply and should only have delaying powers on other legislation, similar to those enjoyed by the House of Lords. Sumner maintained that 'in a unitary system such as South Australia, the upper house should not be the house that can make and unmake the Government or unreasonably frustrate its legislative programme'.¹²³

Electoral System, Parliamentary Library of South Australia, Information Paper 17, p 1.

¹²¹ A Parkin and D Jaensch, 'South Australia' in *Australian State Politics* edited by B Galligan, Longman Cheshire 1986, p 109.

¹²² A Levy, 'Experiences of minority government in South Australia' (1997) 11 *Legislative Studies* 57.

¹²³ C Sumner, n 102, pp 104-105.

Nothing came of it, this despite the fact that Labor was in office from 1982 to 1993. No commissions of inquiry of the kind which have flourished in certain other States were established; if there was an impulse to undertake concerted analysis of the performance of the upper house in these years it was either stifled or its results remained unpublished.

The current debate got under way in January 2000 when the Premier, John Olsen, was reported to be thinking about various reforms, including ‘reducing the number of members possibly to 16 from 22’ and ‘changing the voting system so members are elected for districts, similar to the Victorian system instead of the current statewide electorate’.¹²⁴ According to Jenni Newton-Farrelly:

Terry Cameron MLC representing SA First, proposed that the number of Members of the Legislative Council be reduced to 15 or 16, elected for 4-year terms. Journalist Terry Plane proposed that the number of Members should be cut to 12. Both Mr Olsen’s and Mr Plane’s proposals also included the return of specific electorates for Legislative Councillors, but these electorates were not specified.

In July, Mr Olsen announced that he would be presenting proposals for reform of the Upper House to the Parliament in October. While Mr Olsen ‘ruled out total abolition of the Council as an option’, no other details have been finalised. Mr Olsen announced that the Liberal party room would be discussing ‘a series of options...including reducing the number of MLCs and reintroducing electorates’. He also noted that ‘some MPs’ favoured multi-member electorates – possibly nine two-member districts. In the same press report, Opposition Leader Mr Rann favoured reducing the number of Members in both the Legislative Council and the House of Assembly, by 4 in each case. The next day Mr Cameron (SA First) proposed 6 fewer Members in each House (bringing the number of MLCs back to 16 and Assembly Members back to 41) and fixed four-year terms for Upper House Members.¹²⁵

The promised legislative proposals have yet to materialise and must wait now for the resumption of parliamentary sittings in 2001. Of the proposal to reduce the size of the Legislative Council, the Australian Democrats MLC, Mike Elliott, points out that it is a ‘relatively small chamber already’ and adds that its ability to serve committees, as befits a House of Review, would be diminished if the chamber’s size was reduced. He also suggests that a prohibition on MLCs serving as Ministers would lead to ‘a far more robust and independent house than the one that we currently have’. Further, he opposes any proposal to provide the Legislative Council with only a three month delaying power for

¹²⁴ G Kelton, ‘Order in the House’, *The Advertiser*, 4 January 2000, p 1.

¹²⁵ J Newton-Farrelly, n 120, pp 1-2.

legislation, saying ‘If that is done, it will remove all power from the upper house’.¹²⁶ That, it seems, is as far as the current reform debate has gone.

3.1.4 Powers, Deadlock Machinery, Committees and Performance

Powers

The powers of the South Australian Legislative Council are encapsulated in section 10 of the Constitution Act which provides: ‘Except as provided in the sections of this Act relating to money Bills, the Legislative Council shall have equal power with the House of Assembly in respect of all Bills’. Section 61 then states that ‘A money Bill, or a money clause, shall originate only in the House of Assembly’ and section 62(1) provides that the Council ‘may not amend any money clause’. The Council may, however, under section 62(2) return to the Assembly ‘any Bill containing a money clause with a suggestion to omit or amend such clause or to insert additional money clauses, or may send to the Assembly a Bill containing suggested money clauses requesting, by message, that effect be given to the suggestion...’.¹²⁷ In other words, the Council has equal legislative powers with the Assembly except that it cannot originate or amend money Bills; it can, however, suggest amendments or omissions to such Bills, as well as reject them altogether.¹²⁸ These provisions were inserted into the Constitution in 1913, thereby formalising the Compact of 1857 which was designed to avoid disputes over Money Bills.¹²⁹ In recent times, at least, there do not appear to be any instances where the Council has refused, or threatened seriously to refuse, supply to the government of the day.¹³⁰

¹²⁶ SAPD (*Legislative Council*), 11 October 2000, pp 112-113.

¹²⁷ Section 62(2) continues, ‘...and the Assembly may, if it thinks fit, make any omission or amendment, or insertion so suggested, with or without modification’. Section 62(3) of the Constitution Act only permits the Council to suggest amendments to an Appropriation Bill when the money clause at issue ‘contains some provision appropriating revenue or other public money for some purpose other than a previously authorised purpose...’.

¹²⁸ RD Lumb has written that the sections relating to the content of Money Bills ‘are directory rather than mandatory for it is expressly provided that any infringement of these provisions shall not affect the validity of any act assented to by the governor’ – section 64, *Constitution Act 1934 (SA)*: RD Lumb, *The Constitutions of the Australian States*, 5th edition, University of Queensland Press 1991, p 58.

¹²⁹ The Constitution Act of 1856 had only provided, under section 1, that ‘all Bills for appropriating any part of the Revenue of the said Province, or for imposing, altering, or repealing any rate, tax, duty, or impost, shall originate in the House of Assembly’.

¹³⁰ Jan Davis, the Clerk of the Legislative Council, has written of an occasion in 1992 when the Labor Government used the upper house to amend the Government’s Appropriation Bill, by suggesting the substitution of a Schedule on the pretext that it contained a purpose ‘not previously authorised by Parliament.’ That incident, however, would seem to be more a case of the Council assisting the government to correct an anomaly than anything like a classic crisis of supply. Only after the Appropriation Bill had passed through the lower house and had been transmitted to the Council did the Government realise that the Schedule to the Bill did not reflect changes that had taken place with the new Premier restructuring his Ministry and Government Departments: J Davis, *The Upper house: a ‘snap-shot’ of the South Australian experience, 1975-1998*, 29th Conference of Presiding Officers and Clerks, Sydney 1998, p 5.

It has been noted that the Council and its powers are entrenched under section 10A of the Constitution Act, which means that it can neither be abolished, nor its powers altered, without the approval of a majority of electors voting at a referendum.

Deadlock machinery

Section 41 of the Constitution Act reflects the arrangements that were arrived at in 1881 for the resolution of deadlocks between the two Houses. This mechanism has already been described as convoluted and it has been said that no government has ever used it. Under section 41 when a Bill has been passed twice by an absolute majority of the Assembly, with an election intervening, and is again rejected by the Council, the Governor might grant a double dissolution or order the election of additional members to the Council. But there is no further provision for the resolution of any deadlock which persists after these steps have been taken, with the result that a government which had put itself through the designated hoops would have no assurance of success at the end of the day.

Since 1985 an alternative mechanism has also been available under section 28A of the Constitution Act. The overall purpose of the section is to provide that the Assembly can only be dissolved within three years in specified circumstances, including where a Bill certified to be of 'special importance' has been passed by the lower house but is rejected by the Council and not more than one month has elapsed since that rejection. In these circumstances the Governor may dissolve the Assembly, resulting in a general election; at the same time, the provision does not seem to have any consequences for members of the Council. Again, the provision has not been used.

Committees

As in other upper houses throughout Australia, the burgeoning of committees has proved to be a significant off-shoot of the prevailing balance of power in the South Australian Legislative Council. Initially, beginning in the mid-1980s, with the Democrat presence in the upper house, select committees became an established part of the Council's operations. The Clerk of the Legislative Council, Jan Davis, wrote of the 1986-1989 period:

Whilst some Select Committees have been established for obvious political purposes, others have provided the opportunity for comprehensive investigations and consideration free from the often adversarial style within the Council Chamber forum. The issues of pastoral land management and conservation, adoption of children, housing for low income groups and child protection were subjects of some of the Committees during this period.¹³¹

She continued:

It is also interesting to note that Committees have sometimes been the product of the negotiation process when the Parties have been

¹³¹

ibid, p 4.

endeavouring to obtain agreement on particular legislation, even at the late stage of a deadlocked Conference between the Houses. The more recent example of this was the setting up of a Joint Committee of Inquiry into Retail Shop Tenancies. To enable agreement to be reached and the legislation to pass, the Government agreed to establish a Committee which would provide the opportunity for certain issues to receive more detailed examination.¹³²

Select Committees were active throughout the 1990s, with the issues of privatisation and the outsourcing of government contracts proving fertile grounds for the proliferation of such committees since the Liberals were re-elected in 1994. The ALP and the Democrats, in particular, have combined to attempt to secure the parliamentary accountability of the tendering processes and contracts in question.¹³³ In this context, disputes over the powers of parliamentary committees to order the production of State papers, where these have involved commercial in-confidence matters, have arisen. Davis reported that in October 1996 the Attorney-General advised the select committees that the Government and the Opposition had reached agreement concerning outsourcing contracts and their availability to parliamentary committees. Under the agreement, authentic summaries of relevant contracts were to be provided without delay to each select committee, but with these summaries excluding matters of a commercially sensitive nature; the right of the Parliament to require the full contract would remain, but, the Attorney-General maintained on behalf of the Executive, 'If the Parliament requires the full contract to be produced, the Government reserves the right to refuse to produce the contract and then the matter is subject to the political and Constitutional processes'.¹³⁴ Although committee members have generally found these summaries to be inadequate for their purposes,¹³⁵ unlike in NSW where the production of State papers has been the subject of protracted litigation, this would seem to be where the issue still stands in South Australia.

Since the passing of the *Parliamentary Committees Act 1991* (SA), the work of these select committees has been supplemented by the creation of a number of statutory committees, some exclusive to either the Council¹³⁶ or Assembly,¹³⁷ others joint in nature.¹³⁸ This division of labour is established under section 3 of the 1991 Act, with further sections

¹³² Ibid, p 5.

¹³³ Ibid, p 7.

¹³⁴ Ibid, pp 8-9.

¹³⁵ Ibid, p 9.

¹³⁶ Statutory Authorities Review Committee.

¹³⁷ Economic and Finance Committee and Public Works Committee.

¹³⁸ Environment, Resources and Development Committee; Legislative Review Committee; Social Development Committee; Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation; and the Statutory Officers Committee.

setting out the functions of the various committees, as well as enumerating their privileges, immunities and powers. A significant immunity is from judicial review in relation to committee proceedings, reports or recommendations.¹³⁹ Included among the statutory committees is the Legislative Review Committee, the functions of which include the review of subordinate legislation, but can extend to ‘any matter concerned with legal, constitutional or parliamentary reform or with the administration of justice...’.¹⁴⁰ The more active committees include: the Environment, Resources and Development Committee which produced four reports in the year 1999-2000 on the wide-ranging topics of rail links with the Eastern States, mining, aquaculture, and environment protection;¹⁴¹ the Social Development Committee which has produced major reports on many subjects over the years, the latest on the issue of rural health;¹⁴² and the more recently established but industrious Statutory Authorities Review Committee.¹⁴³

The 1991 expansion of the committee system was prompted in part by staffing considerations, owing to the problems involved in securing adequate support staff for *ad hoc* select committees. With the establishment of statutory committees, a modestly-sized but permanent secretariat is now in place to assist with the more long term inquiries these committees tend to undertake. Of course, more profound policy reasons can also be detected behind the establishment of these statutory committees, consistent with the bolstering of the Council’s review and accountability functions. Yet, the South Australian upper house has not established General Purpose Committees of the kind now in operation in NSW, modelled as these are on the former Senate Estimates Committees. Just as staffing problems are an issue for the upper house committees, so is the question of the availability of members to serve in this capacity, bearing in mind that, at present, from a total of 22 MLCs, four are Ministers, with the result that several of the remaining MLCs are members of several committees: for example, the record for the period September 1999 to August 2000 shows that the Democrat member, MJ Elliott, served on three of the six statutory committees which include Council participation, as well as on the Select Committee on the Outsourcing of State Government Services.

Performance

Any generalisation about the performance of the South Australian Legislative Council as a house of review will tend, at some stage, to find itself embroiled in the ongoing contest over the democratic legitimacy of upper houses. This is especially the case when, realistically, the major parties have little chance of gaining a majority in the Council in the foreseeable future, with the frustration this engenders creating a perception that the line between review and obstruction is hard to draw, and that the case for reform must be re-

¹³⁹ Section 31, *Parliamentary Committees Act 1991(SA)*.

¹⁴⁰ Section 12, *Parliamentary Committees Act 1991(SA)*. Note that parliamentary standing orders are excluded.

¹⁴¹ *SAPD* (Legislative Council), 8 November 2000, p 319.

¹⁴² *SAPD* (Legislative Council), 11 October 2000, p 129.

¹⁴³ *SAPD* (Legislative Council), 11 October 2000, p 120.

visited. At present in South Australia reform, but not abolition, of the upper house is on the political agenda, but quite what form these proposals will take, if any, remains to be seen, as does the impact they may have on the viability of the Council as a house of review.

Against the argument that the Council is 'gridlocking the Government's legislative programme', Jan Davis said that, from 1975-1998:

...only 1.8% of Government Bills have been rejected outright and this was usually after going through the whole legislative process to a deadlocked Conference between the Houses. Excluding sessions which have been prorogued owing to the calling of an election and where the Government's legislative programme had not been completed, only 7.1% of Government Bills have not passed the Upper House. Bills which have been the subject of in-depth consideration have, on balance, benefited from this dual process of investigation and amendment and indeed, in certain circumstances, it has obviously been essential. In the last Parliament, the Legislative Council made a total of 2,234 amendments to Government legislation, whether introduced in the Council or in the House of Assembly.¹⁴⁴

Of itself, this tells us nothing about the importance to the government of the day of those Bills which were defeated in the Council; nor does it touch upon the more analytically difficult issue of inquiring into the curtailment of the government's legislative program where it thought it could not find sufficient cross-bench support in the Council; nor, for that matter, does it consider where a government might have agreed to support a minor party proposal as a quid pro quo for an assurance that an aspect of its own program would gain the necessary majority; nor, yet, does it touch upon such issues as where a government might have made the upper house a scapegoat for the frustration of electoral promises it had no intention of honouring. As SR Davis indicated as far back as 1983, these are precisely the sorts of issues which need to be researched if the performance of an upper house is to be properly assessed.¹⁴⁵ In the case of the South Australian Legislative Council, the amount of research into its contemporary performance as a house of review seems to be so minimal as to bear an inverse relation to its actual powers.

In her 1998 paper, the Clerk of the Legislative Council recognised the complexities of the situation by acknowledging that, political realities being what they are, 'the Upper House has been used for purposes of political expediency on many occasions'.¹⁴⁶ Nonetheless, the overriding implication in Jan Davis' paper is that, despite its considerable powers for obstruction, the Legislative Council has pursued its review functions both vigorously and responsibly in recent years; the suggestion is that the upper house has, through its

¹⁴⁴ J Davis, n 130, p 10.

¹⁴⁵ SR Davis, 'What price upper houses in Australia?', n 102, p 13.

¹⁴⁶ J Davis, n 130, p 10.

committees, made the Executive more accountable than it is ever likely to be under a unicameral system and that, by its record of legislative amendment, it has made a positive contribution to the work of the Parliament. Privatisation and the outsourcing of government services are issues which have attracted considerable upper house attention in recent years, as has a current Bill for the regulation of prostitution. From September 1999 to August 2000 only one Bill, the Water Resources (Water Allocations) Amendment Bill, went to a Deadlock Conference, at which point agreement was reached.

The political scene in the present parliament is more complicated still, for now the Olsen Government lacks a majority in both houses. For the moment, therefore, it can be as difficult for the Government to navigate its legislation through the Assembly as through the Council: indeed, on at least one occasion its proposed legislation has failed to reach even the second reading stage in the lower house.¹⁴⁷ Whereas in the 1980s, for governments to ensure passage of their legislative program they had to arrive at an understanding with the Democrats in the Council, there is now a situation where policy-making can only be achieved by negotiation in the lower house, as well as the upper. If nothing else, events of this kind serve to remind us that the functions of scrutiny and review are not exclusive or peculiar to upper houses. As with other jurisdictions, however, the South Australian experience suggests that these functions are more likely to be undertaken more or less perennially by second chambers, especially second chambers elected by proportional representation. By contrast, lower houses, in Australia at any rate, tend only to perform these parliamentary functions on a temporary or intermittent basis.

3.2 The Legislative Council of Tasmania

3.2.1 Overview

In important respects the Tasmania Legislative Council stands apart from its mainland counterparts. It is one of only two jurisdictions, the other being Victoria, which elects Council members under a preferential voting system. After the 1998-9 reforms, there are 15 single-member 'divisions' or electorates decided in this manner. Members have a fixed six year term of office and elections for either two or three seats are always held each year on the first Sunday in May. Although in reality a significant number of members are sympathetic to the Coalition parties, the Council has a strong tradition as a non-party house. Something of a culture of independence has developed in the Council, therefore, and this has arguably had a direct impact on the way it exercises its powers and performs its functions, as well as on its dealings with the Legislative Assembly. Significantly, the Constitution vests the Tasmanian Legislative Council with formidable powers, including the power to reject, though not amend, all Money Bills. With the provision in section 12 of the Constitution that the Governor 'shall not have the power to dissolve the Council', these powers give the Council an unchecked ability to dismiss the Government by forcing a dissolution of the Assembly. Taken together, these features make the Tasmanian Legislative Council unique in Australian constitutional politics.

¹⁴⁷ G Kelton, 'Vote sinks lottery sale bill', *The Advertiser*, 30 November 2000, p 1. A Bill to privatise the South Australian lotteries was defeated by the three Independents and the National party member voting with the Opposition.

In fact, the Council's rhetoric of independence from party politics has been underscored, historically, by a decided conservative bias. The Council has always consisted of a majority of independent members, due in part to the rotational periodic election method that is used, but stemming also from the policy of the Liberal Party towards the upper house. Until recently, for decades the Liberal Party had not endorsed a candidate for the Legislative Council; and yet, throughout this time several independent MLCs had held Liberal Party membership, some had held positions on the executive of the Party and a number had even been unsuccessful Liberal candidates for the Assembly. Departing from this longstanding policy in December 1999, the Liberal Party formally endorsed candidates for two seats, Wellington and Paterson. Both candidates were unsuccessful. The Labor Party has never held more than five from a total of 19 seats in the Council (in 1957). It held only two by 1968 and one for many years after. Currently, in a 15-member Council, it holds four seats and one seat is 'Independent ALP'.

3.2.2 History of the Tasmanian Legislative Council

Originally, Tasmania (called Van Diemen's Land until 1856) was a dependency of New South Wales. Initially divided into two colonies, Buckingham and Cornwall, between 1804 and 1812, Tasmania subsequently became one Colony under the control of a single Lieutenant-Governor. This arrangement caused considerable problems for both territories.¹⁴⁸ In 1823, the *New South Wales Act* empowered the British Government to separate Van Diemen's Land from New South Wales and establish a new Legislative Council. This power was exercised in 1825. At first, the Council comprised 6 members appointed by the Crown and the Lieutenant-Governor. In 1828, the Council's size was increased to 15: 8 official nominees, 6 peoples' nominees and the Governor as Presiding Officer. In 1851, there was a further increase to 24 members, 16 being elected by restricted property franchise and 8 members nominated by the Governor (who ceased to be a member).

The origins of bicameralism in Tasmania can be said to date back to 1848 when Governor William Denison suggested to English authorities that Tasmania ought to have two representative chambers because he was of the view that 'there is an essentially democratic spirit which actuates the large mass of the community and it is with a view to check that spirit, of preventing it coming into operation, that I would suggest the formation of an Upper Chamber.'¹⁴⁹ Clearly, this was a view grounded firmly in the class model of bicameralism. Indeed, it was with this in mind that the Council, as envisaged in 1856, was to be more permanent in nature, indissoluble under the Constitution, and to reflect a high

¹⁴⁸ See M Stokes, 'The Constitution of Tasmania' [1992] *Public Law Review* 99 at 99-101.

¹⁴⁹ This comment is from one of Governor Denison's government dispatches in 1848 to Lord Grey, quoted in *Bicameral Parliament*, Parliamentary Museum Fact Sheet No. S4, produced by the Tasmanian Parliamentary Library. The government dispatches are housed on microfilm in the Tasmanian Parliamentary Library archives.

property franchise.¹⁵⁰ However, its function was stated in less class-based, and more review-based, terms by the Select Committee of the Colonial Legislative Council as being to ‘...guard against hasty and inconsiderate legislation by securing due deliberation previous to the final adoption of any legislative measure’.¹⁵¹ Since the introduction of responsible government and a bicameral Parliament in 1856, the number of members in the Council has varied between 15 and 19. The change from a restricted property franchise was slow and full adult suffrage was only finally introduced in the Council in 1968.

Historically, the Council’s relationship with the Assembly after 1856 was difficult.¹⁵² One month after the opening of the first Parliament, a disagreement over Money Bills led to a Managers’ Conference to define the powers and duties of both Houses with respect to the problem of supply. The Conference failed. The Government in 1899 prepared a case for the Privy Council on relative powers but leave was refused to have the case heard. Another attempt in 1900 by the Assembly to create a deadlock mechanism was rejected by the Council.

In 1924, passage of the Appropriation Bill was resisted in the Upper House leading to another Managers’ Conference which again failed to find a resolution. Pending the arrival of a new Governor, the Bill was assented to by the Administrator, Sir Herbert Nicholls, without passing through the Council.¹⁵³ It seems that even before the Bill had come to him Nicholls had confided to the Premier, JA Lyons, that he had little sympathy with the Council’s attitude. He had also asked the Secretary of State in London, LS Amery, for instructions adding that, if it were left to him he intended to give the Royal Assent when it was asked for. WA Townsley explained that ‘In support he pointed to the indissoluble nature of the Council, and expressed the view that the will of the people’s House must, since the Parliament Act of 1911, prevail according to law and convention’.¹⁵⁴ The Secretary of State, in turn, only advised Nicholls to seek an opinion on the legality of his giving the Royal Assent in these circumstances, so that responsibility would rest with ‘your Ministers and no question can arise as to the constitutionality of your action’. Following advice from his Ministers, the Royal Assent was duly given and, as Townsley said, ‘the bill went on to the statute book with the usual preamble, “with the advice and consent of the Legislative Council”’. Townsley also cited the views of the constitutional authority,

¹⁵⁰ For a thorough discussion of the debate surrounding the introduction of bicameralism in Tasmania, see WA Townsley, *Struggle for Self-government in Tasmania 1842-1856*, Government Printer, Tasmania (1951).

¹⁵¹ Quoted from WA Townsley, n 150, at p 144.

¹⁵² A historical account of the relationship between the two Houses and the experience of bicameralism in Tasmania may be found in T Newman, *Tasmania’s Constitution and Bicameral Parliament*, Tasmanian Parliamentary Library, Parliamentary Research Service, Issue Brief 91/8, 1991, pp 4-19.

¹⁵³ See T Newman, n 152, pp 14-6, for an account of the clash between the two Houses and the passing of the “One-House” Bill.

¹⁵⁴ WA Townsley, *The Government of Tasmania*, University of Queensland Press 1976, p 88.

Berriedale Keith, who wrote that the ‘absolute illegality of the course followed was patent’.¹⁵⁵

Subsequent to these extraordinary constitutional events, a Joint House Select Committee was established to formulate principles in relation to Money Bills. The Government and the Council reached an agreement, which resulted in the passing of the Constitutional Amendment Bill of 1926. This vested considerable power in the Council, including the power to reject all Money Bills, but only empowered the upper house to suggest amendments to those Bills for raising revenue for ordinary annual services of the government (as well for Bills imposing income and land tax). In essence, these arrangements continue in operation to this day.¹⁵⁶ Since the 1926 agreement, the Council has rarely exercised its formidable powers with respect to supply. In 1948, the last time this occurred, the Council refused to pass a Supply Bill, resulting in the dissolution of the Assembly and new elections for that House, at which the incumbent government was returned to office.

3.2.3 Recent History of Reform Initiatives for the Tasmanian Legislative Council

The reforms contained in legislation passed by the Tasmanian Parliament on 23 July 1998 were a response to three much discussed issues: whether Tasmania was over-governed; the problem of the propensity for hung parliaments; and the impact of the existing political system on the State’s economy.¹⁵⁷ In the event, the reforms reduced the size of both Houses of Parliament: membership in the Assembly falling from 35 to 25; and in the Council from 19 to 15. These changes to the Tasmanian parliamentary system were, in fact, the culmination of almost 20 years of extensive debate and discussion, beginning with the Beaumont Royal Commission of 1982.¹⁵⁸

The Beaumont Royal Commission was created to investigate whether it was desirable for the Tasmanian Constitution to provide a mechanism for the resolution of deadlocks between the Council and the Assembly; as well, the Commission was required to consider what amendments to the law would best effect the resolution of such deadlocks and, generally, any related matters.¹⁵⁹ After an extensive inquiry into the existing laws pertaining

¹⁵⁵ Ibid, p 89.

¹⁵⁶ For an account of the circumstances surrounding this enactment and the consequences for the Tasmanian experience, see D Lowe, ‘The Role of Upper Houses Today- A Tasmanian Viewpoint’ in GS Reid (ed), *The Role of Upper Houses Today*, University of Tasmania (1983) 126, at 127-9.

¹⁵⁷ See S Bennett, ‘The Reduction in the Size of the Tasmanian Parliament’ Research Note 2 1998-99, Parliament of Australia, Parliamentary Library..

¹⁵⁸ *Report of the Royal Commission into the Constitution Act 1934 Tasmania*, Hobart, Tasmania 1982 (the ‘Beaumont Report’).

¹⁵⁹ *Beaumont Report*, n 158, p 1.

to the two Houses, the theoretical issues raised by bicameralism and the various options available for the resolution of deadlocks between the two chambers, the Royal Commission concluded that change was necessary.¹⁶⁰ To this end, the Beaumont Report recommended a deadlock procedure for ordinary Bills: three months after failing to pass through the Council, the Assembly may declare a Bill a 'prescribed Bill'; if six months further to such a declaration the Bill has still not been passed by the Council, the Governor would be empowered to issue a writ for referendum or dissolve the Assembly.¹⁶¹ The report also recommended that Money Bills and taxation Bills, in particular, be subject to a suspensory veto. The suspensory veto mechanism recommended by the Beaumont Royal Commission is similar to that which operates in New South Wales and would allow an Appropriation or Supply Bill confined to the ordinary services of the government to be subject to Royal Assent if not passed by the Council within six weeks of its transmission to that Chamber.¹⁶² With respect to constitutional amendments, the Report recommended that they be required to pass a two-thirds majority of each House or, in cases where only a majority is obtained in both Houses, be required to be passed at referendum as well.¹⁶³

In 1984 the Ogilvie Committee, which was established by the Gray Liberal Government in 1983 to consider parliamentary reform, reported against reduction in the size of the Council.¹⁶⁴ It considered that Parliament would struggle to perform its constitutional functions in a representative democracy if the number of members was reduced from the then total of 54 (35 in the Assembly and 19 in the Council).

Ten years on, in 1994 the Morling Board of Inquiry was set up by Liberal Premier Ray Groom in the wake of the collapse of the Field Labor Government in 1992, following the withdrawal of support by the Greens. It concurred with the Ogilvie Report and recommended against a reduction in the size of Parliament.¹⁶⁵ It, too, concluded that an Assembly with fewer than 35 members would be unable to perform its constitutional functions as the House of Government at an appropriate level. However, its views on a reduction in the number of members of the Council was less categorical, with the report

¹⁶⁰ See Parts 4, 5 and 6, *Beaumont Report*, n 158, pp 10-39.

¹⁶¹ See Recommendation 1, *Beaumont Report*, n 158 p 72.

¹⁶² See Recommendations 2 and 3, *Beaumont Report*, n 158, pp 72-3. In Recommendations 5 and 6, the Royal Commission extends this procedure to taxation bills.

¹⁶³ See Recommendation 7, *Beaumont Report*, n 158, p 73 (discussed in Part 5, pp 32-4, and Part 9, pp 58-9).

¹⁶⁴ *Report of the Advisory Committee on the Proposed Reduction in the Number of Members elected to both Houses of the Tasmanian Parliament*, Hobart, Parliament of Tasmania, 1984 (the "Ogilvie Report").

¹⁶⁵ *Report of the Board of Inquiry into the Size and Constitution of the Tasmanian Parliament*, Hobart, Parliament of Tasmania, 1994 (the 'Morling Report').

stating that the size of the House could be reduced from 19 to 15 ‘without the same degree of risk of impairing its ability to discharge its functions as a House of Review’.¹⁶⁶ The report went on to say that ‘the consequential small reduction in the overall number of members of the Parliament would achieve very little and is not recommended’. On the other hand, should a reduction in the size of Parliament be considered as imperative (a conclusion it disputed), then the report recommended that a unicameral Parliament of 44 members be established, 28 elected under the Hare-Clark method and 16 from single member electorates by preferential voting.¹⁶⁷ With some modifications, the Morling Report also recommended adoption of the Beaumont Report’s proposals for deadlock machinery and other amendments to the Constitution.¹⁶⁸

The most recent investigation was the 1997 Commonwealth-State inquiry into the Tasmanian economy, headed by Peter Nixon.¹⁶⁹ Nixon handed down a report citing over-governance and the uncertainty of passage of legislation through the Upper House as major reasons for the economic problems faced by the State. He made various recommendations, of which the most extreme was the abolition of the Council for a 27 member unicameral Parliament, together with a reduction in both the number of ministries and local government municipalities. Some of Nixon’s more moderate suggestions were taken up by Liberal Premier, Tony Rundle.

Picking up on Nixon’s reform agenda, the Liberal Government sought to allow the electorate to decide the question of unicameralism by putting it to a referendum. In the event, the proposal was blocked in the upper house. Rundle subsequently pushed for an Assembly of 28, made up of four 7 member divisions, and a Council of 16 (the 44 seat model), which best suited the Greens upon whose support he depended. However, this proposal was resisted within his own party and was not compatible with Labor’s 40 (“25+15”) seat model.¹⁷⁰ The Council also opposed the 44 seat model and resolved in late 1997 that Parliament should be bicameral and that there should be 25 members in the Assembly and no fewer than 15 members in the Council.¹⁷¹ When Rundle chose to support the 25+15 model which was finally adopted, the Greens called for a referendum. There is, however, no legal provision for referendum for constitutional change in Tasmania; the constitutional reform package was passed, therefore, by Parliament alone.

¹⁶⁶ *Morling Report*, n 165, p 1.

¹⁶⁷ *Morling Report*, n 165, pp 1-2.

¹⁶⁸ *Morling Report*, n 165, p 2.

¹⁶⁹ *Tasmania into the 21st Century* (‘the Nixon Report’), Hobart, Government Printer, 1997.

¹⁷⁰ This model had its origins in a Bill introduced in 1995 by Labor Leader Michael Field which lapsed without a decision being taken on it.

¹⁷¹ This was based on the recommendations contained in Legislative Council Select Committee on the Operation of the Legislative Council, *Interim Report No. 2 Statement of Principles*, Parliament of Tasmania 1997.

Concerns about these reforms have been expressed from a number of quarters. From a minor party perspective, New Zealand Green Party MP, Rod Donald, said they demonstrated how the major parties in Tasmania had manipulated the parliamentary system to their own advantage. Donald explained the effect of the reforms on minor party representation as follows, 'As a result of the number of seats in the Tasmanian Parliament being cut from seven to five in each constituency, the Hare-Clark first-preference threshold increased from 12.5 per cent to 16.7 per cent. While the Greens polled as well this time as they did at the last election, the increase in the threshold caused three of the four Green MPs to lose their seats'.¹⁷² A Tasmanian academic, Ralph Chapman, was also critical of the reforms, concluding that the reduction in size of the Legislature 'weakens the [constitutional] safeguards and undermines bicameralism'.¹⁷³ Likewise, Harry Evans has said that 'there is an optimum size for a legislature that is not related to the size of the electorate. The Tasmanian Parliament is now below the optimum size'.¹⁷⁴

3.2.4 Powers, Deadlock Machinery, Committees and Performance

Powers

Under the *Constitution Act (Tasmania) 1934*, the Legislative Council of Tasmania possesses legislative powers equal to those of the Assembly (section 45) with two exceptions. First, under section 42, the Council may not amend Money Bills which authorise expenditure for the ordinary services of Government or which impose a land or income tax; but it may, under section 43, return such Bills to the Assembly requesting the latter to 'delete', 'amend' or 'insert' any provision, and it may amend other Money Bills such as those dealing with loan funds or probate. Secondly, under section 37 the Council may not initiate Bills for expenditure or imposition of taxes. At same time section 44 of the *Constitution Act* entrenches the Council's power to reject all Bills, including any type of Money Bill.

No part of the Tasmanian Constitution is entrenched and any provision can therefore be altered without a requirement for either a referendum or a special parliamentary majority.

Deadlock Machinery

There are no constitutional provisions for resolving deadlocks between the Assembly and the Council in Tasmania. There were however provisions in the Standing Orders for joint consultation through the initiation of a Free Conference of Managers. In November 1996, the Assembly, voting on an ALP motion, removed the formal mechanisms for a Free Conference from its Standing Orders. The reason would appear to be that the process was

¹⁷² See R Donald MP, 'Unicameral Parliaments do work' (1999) 13 *Legislative Studies* 30, p35.

¹⁷³ R Chapman, 'Unicameralism, Bicameralism and Small States: reflections on the 1998 ASPG Conference' (1999) 13 *Legislative Studies* 55, p 59.

¹⁷⁴ H Evans, 'Constitutional Safeguards, Bicameralism, Small Jurisdictions and Tasmania' (1999) 13 *Legislative Studies* 1, p 4.

too cumbersome, including the forming and reporting of 'Reasons Committees' in both Houses,¹⁷⁵ and the Council could, in any case, ultimately refuse to compromise or use its leverage to pressure the Government to do so. Conferences could only consider amendments to Bills. If either House rejected a Bill outright there was no facility for resolving the impasse. Conferences comprised a small number of members, usually four from each House. For the period 1947 to 1995, 122 Free Conferences were held, with apparent concessions made by both Houses at 52 (42%) of these; concessions were made by the Assembly alone at 33 (27%); and by the Council alone at 21 (17%).¹⁷⁶ 16 Conferences (13%) either failed or lapsed.

In 1997, the Council Select Committee on the Operation of the Legislative Council recommended that the system be re-established for the proper functioning of the Upper House.¹⁷⁷

Committees

In addition to Committees on Privileges and Standing Orders, the Committee of the Whole and Joint Library and House Committees, at present the Tasmanian Legislative Council has four Select Committees, three Joint Standing Committees and three Joint Select Committees. These Committees are as follows:

- Select Committee on Post School Options for Young Adults with Disabilities
- Select Committee on Industrial Relations
- Select Committee on Aboriginal Lands
- Select Committee - Government Business Enterprises and Government Corporations Scrutiny Committee
- Joint Standing Committee of Public Accounts
- Joint Standing Committee on Public Works
- Joint Standing Committee on Subordinate Legislation
- Joint Select Committee on the Working Arrangements of the Parliament
- Joint Select Committee on Adoption and Related Services 1950-1988
- Joint Select Committee on Gene Technology

It should be noted that the three Joint Standing Committees are in fact statutory committees. Also worthy of note is that the Government requested the formation of the Gene Technology Committee and, interestingly, the relevant Government Minister is a member of the Committee.

¹⁷⁵ These had to draw up responses to amendments not agreed upon before a request for a Free Conference could be sent from each House.

¹⁷⁶ See Parliamentary Research Service, *Background Paper on Principles 6 to 11 agreed to by the Legislative Council on 3 and 4 September 1997*, Parliament of Tasmania, 1998, p 3.

¹⁷⁷ The issue now forms part of the terms of reference of a Joint Select Committee on the Workings of Parliament.

As part of the process of readjustment after the downsizing of the Tasmanian Parliament, the work of committees is currently being comprehensively reviewed by a Joint Select Committee on the Working Arrangements of Parliament. In its second report, the Committee stated that the reduction in the size of the Parliament had made it ‘increasingly important that the maximum number of members of the Parliament of Tasmania are able to participate in the committee system’.¹⁷⁸ In 1998 the Joint Select Committee produced three reports examining the operation of certain committees in some detail. It recommended: the establishment of Estimates Committees in the Council to replace the more informal Expenditure Review Briefings;¹⁷⁹ that the statutory bar on the President, Speaker and Chair of Committees of each house be lifted allowing them to be appointed to Committees;¹⁸⁰ and that committees be established in both Houses with leave to sit over two days to examine the operations of various Government Business Enterprises and Government Corporations (GBEs and GCs).¹⁸¹ Further, in December 1998 the Joint Select Committee reviewed the Estimates Committees system and, subject to certain modifications, recommended its continuation.¹⁸² Of course, a key issue in all of this is whether such a small upper house can perform the many duties which an active committee system requires? Perhaps so, but not without duplicating committee membership many times over and thus greatly increasing the workload for some MLCs. With such issues in mind, Terry Newman has written that the Joint Select Committee on the Working Arrangements of the Parliament will need to recommend ways ‘to cope with the interaction between the two Chambers, and to facilitate greater common practice in the area of joint committees’.¹⁸³

Performance

A thorough investigation of the performance of the Legislative Council was last undertaken in 1994 by Alistair Scott and Stuart Young.¹⁸⁴ The authors used a statistical analysis of the work of the Council for the five years between 1989 and 1993, half of which was during minority Labor government and the other half when a Liberal Government was in power.

¹⁷⁸ Joint Select Committee on the Working Arrangements of the Parliament, *Report No. 2 on Parliamentary Standing Committees*, Parliament of Tasmania, p 2.

¹⁷⁹ *Report No. 1 on Estimates Committees*, Parliament of Tasmania, p 10.

¹⁸⁰ *Report No. 2 on Parliamentary Standing Committees*, Parliament of Tasmania, p 4.

¹⁸¹ *Report No. 3 on Government Business Enterprises and Government Corporations Scrutiny Committees*, pp 5-12. On 30 November 2000, by order of the Council, two Government Business Enterprises and Government Corporations Scrutiny Committees were established.

¹⁸² *Report No. 4 Review of the Estimates Committees Process November 1998*, pp 5-6.

¹⁸³ T Newman, ‘Reducing Parliament’ (1999) 80 *The Parliamentarian* 207 at 209.

¹⁸⁴ A Scott and S Young, *The Legislative Council as a House of Review*, Hobart, Government Printer (1994). This report was commissioned by the Morling Board of Inquiry and was a basis for its preference for retaining a bicameral parliament in the absence of a reduction in size: see *Morling Report*, n 165, pp 6-12.

This statistical analysis was employed to examine three propositions: (1) that the existence of a bicameral legislature does not unduly delay the passage of legislation; (2) that the existence of a bicameral legislature contributes a legislative review function not otherwise available in a unicameral system; and (3) that the proclaimed independence of Legislative Councillors is evident from the impartiality of their approach to the review process.¹⁸⁵ Of the many statistical results they obtained for the period 1989-93, the following can be noted:

- Of 323 Bills considered by the Council, originating in the Assembly, 88.9% were agreed to by both Houses, 10.5% lapsed and only 0.6% (2 Bills) were negatived by the Council.¹⁸⁶
- Of the 292 Bills agreed to by the Council, 197 (67.5%) were agreed to without amendment and 95 (32.5%) were amended before being passed.¹⁸⁷
- Of the 877 total amendments made by the Council, 275 (31.3%) were of a ‘policy’ nature, 63 (7.2%) were of a ‘preference’ nature and 539 (61.5%) were of a ‘technical’ nature.¹⁸⁸

In their conclusions,¹⁸⁹ Scott and Young compared the time taken for the passage of Bills in Tasmania with the unicameral legislatures in Queensland and the Australian Capital Territory. They did not make any direct conclusions as to *undue* delay, but they did find that that the Council accounted for 50% of the average sitting days (20.4) required for Bills to proceed from first reading in the Assembly to Royal Assent.¹⁹⁰ They also concluded that,

¹⁸⁵ A Scott and S Young, n 184, p 1.

¹⁸⁶ See Table 1 ‘Bills considered by the Legislative Council (originating in the House of Assembly)’, p 5.

¹⁸⁷ See Table 2 ‘Bills agreed to by the Legislative Council (originating in the House of Assembly)’, p 6. This compares with statistics for the more lengthy period of 1947 to 1995, during which 4738 bills came before the Council which amended 1252 (26.4%) and rejected 114 (2.4%): see Parliamentary Research Service, *Background Paper on Principles 6 to 11 agreed to by the Legislative Council on 3 and 4 September 1997*, Parliament of Tasmania, 1998, p 2.

¹⁸⁸ See Table 15 ‘Amendments made by the Legislative Council – Types of Amendments’, pp 22-24. The authors define the three categories of amendments as follows (p 22): ‘1. **Policy**... includes amendments that clearly related to matters of policy or ideology in the sense of dealing with the substantive merits of the legislation. 2. **Preference** ...are those that reflect a different preference in terms of wording, phrasing and style. 3. **Technical** ... includes amendments that remedy defects in the legislation, correct anomalies and overcome problems not substantially policy-oriented.’

¹⁸⁹ A Scott and S Young, n 184, pp 42-44.

¹⁹⁰ The authors note that Bills in Tasmania took an average number of 102.1 calendar days to pass through Parliament and gain Royal Assent for the period in question (see p 42). They also state that the information they obtained suggested that in Queensland Bills were

given the types of amendments it most commonly makes (technical) and the types of Bills most commonly amended (financial, policy, and machinery of government), the Legislative Council contributes arguably to a review function not otherwise available in unicameral systems. Nearly half (49%) of the amendments made by the Council and not agreed to by the Assembly related to financial Bills.¹⁹¹ This, it was explained, was a direct result of the constitutional requirement that such amendments are not amendments *per se*, they are merely *requests* for amendments. From this, Scott and Young inferred that it reflected a willingness on the part of the Council to challenge Money Bills. Many disagreements over these amendments resulted in Free Conferences for the Bills in question, which in turn led to a number of amendments which were agreed upon.¹⁹² Perhaps this was a reflection of the Council's powers, to reject but not amend Money Bills, the suggestion being that, while the Assembly in these circumstances need not take heed immediately of the Council's concerns, it would be unwise for it never to listen to them at all.

In relation to the third proposition under investigation, concerning the 'independence' of the Legislative Councillors, for the period between 1989 and 1993 Scott and Young noticed a significant difference between the Council's treatment of the Labor and Liberal Government. Labor Government Bills, they found, were 'significantly more likely' to be amended than those of their Liberal counterparts.¹⁹³ If correct, such a finding seriously undermines the proclaimed independence of the Council and serves to reinforce the contention that, in reality, many 'independent' members of Council have had strong connections with the Liberal Party. More generally, Scott and Young's work suggests the extent to which the Tasmanian upper house has operated as a powerful and active House of Review, while at the same time indicating the way in which its 'review' functions have been coloured by party political considerations.

As to the constitutional relationship between the lower and upper houses in Tasmania, in the Statement of Principles contained in its 2nd Interim Report of 1997, the Legislative Council Select Committee on the Operation of the Legislative Council made it clear that the Council should play a subordinate role to the Assembly. It stated:¹⁹⁴

passed after an average of 61 days 'before the Queensland Legislative Assembly' and that in the ACT. 'the average number of days between introduction and gazettal ... has been 62 days'. It would appear that these figures refer to calendar days, and not sitting days, but the point is not clarified by the authors.

¹⁹¹ If the controversial *HIV/Aids Preventive Measures* Bill is excluded (accounting for 29 of the 80 amendments not agreed to), financial bill amendments (39) increase to 76% of the total not agreed to by the Assembly. See Scott and Young, n 184, pp 25-30.

¹⁹² In 1996, the provisions in the Assembly's standing orders for Free Conferences were removed – see section, 'Deadlock Machinery'.

¹⁹³ Scott and Young, n 184, p 44.

¹⁹⁴ Legislative Council Select Committee on the Operation of the Legislative Council, *Interim Report No. 2 Statement of Principles*, Parliament of Tasmania 1997, p 5.

1. *The Parliament be of two Houses.*
2. *The House of Assembly be the House of Government.*
3. *The Legislative Council be the House of Review (checks and balances).*

There is little doubt that the second and third principles restate the standard formulations of the functions of each House in a bicameral Parliament, but it is the *content* of ‘review’, of ‘checks and balances’, and the specific manner in which such functions are exercised that is crucial. Nevertheless, the Committee defines a review function for the Council and confirms its subordinate role at all times in the legislative process. Indeed, the Committee appears to leave little room for the Council to initiate legislation of *any* kind, however uncontroversial. The Council does not, in fact, have a history of initiating legislation and the Committee appears to support this position. On the other hand, the Council’s ‘review’ functions have not only been exercised through the amendment of legislation; it has also been active in committee work, including the establishment of select committees upon matters of public importance, something which must be taken into account when its overall performance is assessed.

Whether any or all of these findings carry over in the long term into the new 15-member Council remains to be seen. What is clear is that the upper house continues to be the focus of a major parliamentary reform initiative. The Legislative Council Select Committee on the Operation of the Legislative Council has been superseded by a Joint Select Committee on the Working Arrangement of the Parliament. As part of its terms of reference, the Joint Select Committee is to examine the six substantive principles of the former Committee’s 2nd Interim Report.¹⁹⁵ These principles are as follows:

- To facilitate the good working of the House of Government the Legislative Council accepts the need to limit its powers to that of a suspensory veto on all Bills based on the principles enunciated by the Beaumont Royal Commission of 1982;
- Both Houses of Parliament should retain their existing rights to disallow subordinate legislation;
- That the system of the Free Conference of Managers as a tool to resolve disputes between the Houses be re-established;
- To facilitate the good working of the Legislative Council as the provider of checks and balances to the Government of the day the Parliament accept a more robust system of Legislative Council Committees as recommended by the Beaumont [Report]...;
- To protect the democratic rights of the people of Tasmania as provided in the Constitution Act 1934, and in keeping with the Beaumont [Report], two-thirds majority of each House be required to amend that Act...;
- That a Constitutional Convention process be established to review the structure and roles of the Parliament on a regular basis into the future.

¹⁹⁵ Legislative Council Select Committee on the Operation of the Legislative Council, *Interim Report No. 2 Statement of Principles*, Parliament of Tasmania 1997, pp 5-6.

The point to make is that the work of the Joint Select Committee on the Working Arrangement of the Parliament could be the catalyst for further reform of the parliamentary system, including the upper house. The cause of reform could also be reignited by some of the same factors which motivated the reduction in size of the Parliament in 1998. As Scott Bennett points out, the election in 1998 of Peg Putt of the Greens to the reconstituted Assembly suggests that a hung parliament, though less likely now, still remains a real possibility. Whilst this is an issue particular to the Assembly it could serve to rekindle the debate about parliamentary reform, perhaps renewing calls for a unicameral Parliament which remains one of the major alternative models for a small State, as it combines 'simplicity and economy'.¹⁹⁶ For example, on 15 August 2000, Peg Putt announced a decision of the Greens to seek abolition of the Council, thereby overturning the stance the Party had taken on the upper house during the 1997 reform debates. By advocating the Council's abolition and the creation of a larger unicameral Legislative Assembly of 45 members (five 9-member Regions) still elected under the Hare-Clark proportional representation system, the Greens seek to remedy their loss of representation in the House of Government after the reforms implemented in 1998.¹⁹⁷ This change in policy on the part of the Greens, from being ardent supporters of bicameralism when Labor sought the Upper House's abolition, is matched by the Labor Government's switch in policy in opposing Putt's suggestions, seemingly because the new reformed system better suits its interests while it has control of the Assembly.¹⁹⁸ All of which underlines the 'political' nature of any reform process.

In recent decades Tasmania has experienced the most comprehensive debate on Upper House reform of all the Australian States. This has been undertaken through the party political process, but also in substantial detail by various commissioned inquiries, some of which have produced the most erudite disquisitions on the subject of bicameralism. Interest in the Legislative Council is the result of many factors, none more so than the propensity of the upper house to use its substantial powers to amend government legislation. That legislation has seemingly been amended more when one of the major parties has been in government than the other is suggestive of a perennial dilemma facing upper houses and one which goes to the very core of the debate concerning their democratic legitimacy. It is one thing to claim legitimacy for the 'review' functions of an upper house but, as it has been said, it is the content of 'review' and the specific manner in which such functions are exercised that is crucial. In the current climate, when the Legislative Council has been reduced to 15 members, the further issue is whether such a reduced House can, in a practical sense, continue to perform its constitutional functions at an appropriate level. Is its size equal to its powers? It is, at any rate, a small upper house for a small State.

¹⁹⁶ Harry Evans has said that it is remarkable that Tasmania has avoided the temptation of unicameralism, which is the most obvious way of creating simplicity and economy': H Evans, n 174, p 3. He added (p 3), agreeing with Australian Constitution co-author Andrew Inglis Clark, that unicameralism 'is also the simplest way of creating absolutism and the tyranny of a faction'.

¹⁹⁷ See Editorial, 'Reforming Parliament' *The Mercury*, 16 August 2000, p 20; 'Putt wants referendum' *The Advocate*, 16 August 2000.

¹⁹⁸ *Ibid.*

Tasmania's particular small State concerns will likely ensure that the question of parliamentary reform remains very much alive into the future. The composition, powers and functions of the Tasmanian Legislative Council, will surely continue to be central to that debate.

3.3 The Legislative Council of Victoria

3.3.1 Overview

A substantial history of disagreements between the two Houses of the Victorian Parliament and the power the Legislative Council has exerted, on these occasions, over the government of the day has gained for the Victorian upper house a formidable reputation as an influential second chamber.¹⁹⁹ During the 19th century and the first half of the last century, deadlocks were relatively common events which sometimes provoked constitutional crises. Supply was rejected in 1865-67, 1877, 1947 and 1952. No wonder, then, that throughout the twentieth century reform and potential abolition of the Council remained important issues for both major political parties.²⁰⁰ For the conservative parties, which have exercised control over the upper house for much of the era of responsible government, the object has been to retain this advantage; for the Labor Party, on the other hand, the goal has always been to reform, or even to abolish, the Legislative Council.

At present, there are 132 members of the Victorian Parliament: 88 in the Legislative Assembly; 44 in the Legislative Council. There are 22 Electoral Provinces, with two Councillors representing each Province; the Provinces are themselves divided into four electoral Districts. Legislative Councillors serve for two terms of the Legislative Assembly which means that the Council's term is between six and eight years. Along with Tasmania, Victoria is the only other Australian jurisdiction whose upper house members are elected under a system of preferential voting. Further, Victoria is the only bicameral jurisdiction which does not use proportional representation for either of its Houses. The use of preferential voting for the Council clearly favours the major parties and currently there is a complete absence of minor party or independent representation in the Council.²⁰¹ Currently, the Liberal Party retains a majority in the Council in its own right: the Liberals hold 24 of the 44 seats; with the Labor Party holding 14; and the National Party 6. On 14 July 2000, the leader of the Victorian National Party, Peter Ryan, announced that the Party had ended its alliance with the Liberals.

¹⁹⁹ A reputation claimed by the Victorian Parliament's official description of its Council: website.

²⁰⁰ See R Wright, *The Legislative Council: Retain, Reform or Abolish?*, Library, Parliament of Victoria, Background Paper 84/1, 1984. The paper begins by noting that 'the Legislative Council of Victoria has long been a bone of political contention. It has been variously described as an anachronism best got rid of, as a valuable institution in need of overhaul, and as an indispensable feature of State Parliamentary democracy' (p 1).

²⁰¹ For a comparative perspective of the Victorian Upper House among the other Australian Upper Houses in this respect, see Table 3, p 98 below, 'Comparative Representation of Minor Parties and Independents in Australian Upper Houses as at February 2001.'

At the 1999 general election the Labor Party won government by the narrowest of margins: indeed, it was able to form government only after obtaining a written commitment of support from three independents.²⁰² The Labor Government, led by Premier Steve Bracks, committed itself to considering parliamentary reform, both for reasons of its own, as well as in response to the undertakings it had made to the independents. For this purpose, on 25 November 1999 the Second Reading speech for the Constitution (Reform) Bill was moved by the Premier. The Bill was laid on the table for public comment and consultation. Then the Government decided to replace the original reform proposal with two new Bills, the Constitution (Amendment) Bill and the Constitution (Proportional Representation) Bill, both of which were introduced into the Legislative Assembly on 31 May 2000. In summary, the Constitution (Amendment) Bill sought to reduce the term of the Council to one term of the Assembly, which would be fixed at four years; it also sought to remove the Council's ability to block supply, replacing it with a power of suspensory veto. At the same time, the Constitution (Proportional Representation) Bill sought to introduce regional proportional representation into Council elections, as well as to reduce the number of members in the upper house from 44 to 40. In the event, the Liberal Party Opposition opposed both reform measures and the Bills were defeated in the Council.²⁰³ These proposals, together with the controversy surrounding them, are discussed in a later section of this paper, as is the Government's commitment to a constitutional commission to consider the next step in the reform agenda.

3.3.2 History of the Victorian Legislative Council

Although illegal 'squatting' dates back to the early 1830s, it was only in 1836 that the Colonial Government in Sydney first recognised the area then known as the Port Phillip District of New South Wales. In 1839, a Superintendent, Charles La Trobe, was appointed as the Crown's representative to administer the area. The desire of early settlers to administer their own affairs led first, in 1843, to the election of six councillors to represent the District in the reformed 36-member Legislative Council of New South Wales, an arrangement which soon proved to be unworkable. Repeated calls for separation led, in 1850, to the creation of Victoria as a separate Colony.

Formal separation occurred on 1 July 1851. Victoria's first Legislative Council met on 11 November 1851 and consisted of 30 members: 20 of these were elected by men holding substantial property interests; the remainder were appointed by La Trobe in his new capacity of Lieutenant-Governor. Faced with the chaotic times of the gold rushes, the new

²⁰² The ALP had won 42 of the 88 seats in the Assembly and the Liberal/National Coalition had won 43 seats. The three remaining seats were held by Independents, two of whom had supported the National Party in the past, while the third had formerly been an ALP candidate. The Independents released a Charter which announced the terms on which they would support a government from either side and which sought written responses from the Coalition and the Labor Party. The Labor Party accepted these proposals in their entirety whereas the Coalition disagreed with sections of the Charter, including Upper House reform. See J Waugh, "Minority Government in Victoria" (2000) 11 *Public Law Review* 11.

²⁰³ *VPD* (Legislative Council), 24 October 2000, p 592.

Council nevertheless managed to draft a Constitution for Victoria, as well as to approve the use of the secret ballot, the first jurisdiction to do so in the world.²⁰⁴ The constitution, which, in line with New South Wales, Tasmania and South Australia, introduced bicameralism and responsible government, was officially proclaimed in 1855. Elections for the new Parliament were held in the Spring of 1856. Parliament met for the first time on 21 November 1856, with 60 members elected to the Legislative Assembly, 30 to the Legislative Council.

The members of the new Council, which had a term of 10 years, represented six large electoral provinces. As was the norm for a colonial upper house, it was to be more patrician than democratic, thereby reflecting the interests of wealth and privilege.²⁰⁵ To this end, property qualifications for candidates²⁰⁶ and voters²⁰⁷ for the Council were stringent; although they were gradually relaxed from 1869 onwards, it was not until the mid-20th century that the Council finally surrendered its powerful function as guardian of the 'rights of property'.²⁰⁸ By contrast, as early as 1857, universal suffrage and the abolition of property qualifications for candidates applied to elections for the Legislative Assembly. These marked differences reflected the opposing sides in the colonial politics of the day, namely, the 'liberals' and populist 'radical/democrats', on the one side, and the

²⁰⁴ For an account of the period from 1851 to 1856 - see R Wright, *A People's Counsel: A History of the Parliament of Victoria 1856-1990*, Oxford University Press 1992, pp 11-22. The use of the secret ballot was one way of meeting the need to protect voters on polling day from 'disorder, crimes, riots and drunkenness' and, more importantly, the poll from abuse (pp 19-20). Wright added that the secret ballot was adopted in modified form throughout the democratic world and for a time was known as the 'Australian' or 'Victorian' ballot.

²⁰⁵ See G Serle, 'The Victorian Legislative Council, 1856-1950' (1954) 6 *Historical Studies: Australia and New Zealand* 186 at 186-8.

²⁰⁶ Originally, members of the Legislative Council had to own freehold property to the value of £5000, or £500 per year. Of this requirement John Waugh has said, 'It reflected both the inflated values of the gold rush and the framers' determination to protect the conservative character of the new Legislative Council. In modern terms, they created a house of millionaires' - J Waugh, 'Framing the First Victorian Constitution' (1997) 23 *Monash University Law Review* 331 at 348. Council members also had to be at least 30 years of age and male. In 1869 the property requirements were halved, and were reduced again in 1881. By 1903 the property qualification had been reduced to the ownership of freehold property to the value of £500, or £50 per year, and these requirements were reduced in 1937 to £250 and £25 respectively. Only in 1923 were female candidates of 30 years or over permitted to stand. The age requirement was reduced in 1937 to 21; and in 1973 to 18 years of age.

²⁰⁷ Originally, voting was restricted to men over 21 who possessed freehold land worth £100, or with an annual leasehold value of £100. Doctors and other professional men were also entitled to vote. In 1869 the property requirements were halved and by 1908 they had been reduced to the possession of freehold property to the value of £10, or with an annual leasehold value of £15. These requirements remained in place till 1950. For a table of Victorian Legislative Council Member and Voter qualifications since 1856, see R Wright, n 200, Appendix B.

²⁰⁸ G Serle, n 205, p 186.

conservatives, on the other. The latter established the Council's restrictive property franchise 'that it may consist of men who may reasonably be expected to possess education, intelligence, and leisure to devote to public affairs ... that portion of the community naturally indisposed to rash and hasty measures'.²⁰⁹

Wright has observed that 'the Legislative Council was relentless in fulfilling its task of checking the apparent excesses of the more volatile Assembly. From the outset, Bills were either rejected outright or passed only after significant compromises had been extracted from the Lower House'.²¹⁰ Likewise, Geoffrey Serle commented that 'the history of the Council shows a succession of major crises – 1865-8, 1877-81, 1903 and 1936-7 – but from each the Council emerged with its powers intact except in 1937 when a slight modification was achieved'.²¹¹ Pursuant to section 56 of the Victorian Constitution, the upper house had the power to reject, but not alter, Money Bills.²¹² Money Bills were, in fact, the source of most of the early constitutional crises, two of which occurred between 1865-8 when the Assembly attempted to tack extraneous items to its money Bills. In the wake of these crises, concessions were made to the Council's member and voter qualification requirements, but its powers remained intact. The Council again resisted tacking in the protracted crisis from 1877 to 1881, only to pass separately the payment of members provisions which were the subject of the tacking. Once more the Council's powers remained intact after an Assembly Bill in 1878 to reduce its powers to a suspensory veto failed. Instead, in 1881, the property qualifications both for voting and membership requirements were reduced, as well as the length of term from 10 to six years; the number of members was also increased from 30 to 42. Such changes tended to strengthen the position of the Council, lending it greater legitimacy and support by widening its electoral basis and level of representation. In 1889, the size of the Council was increased again from 42 to 48.

Continued obstructionism in 1893 led to a Royal Commission made up of parliamentarians which recommended the referendum as the solution for deadlocks.²¹³ Following Federation, further proposals were introduced for the Council's financial powers to be defined, as well as for the introduction of a double dissolution mechanism which was to be followed by a joint sitting to resolve deadlocks. Instead, after obstruction of the proposal in the Council, in 1903, a requirement of two dissolutions of the Assembly and one of the Council for the resolution of deadlocks was agreed upon. This process was both cumbersome and held no certainty for the government that its disputed legislation would be passed. Again the Council's powers remained intact. Indeed, there was now added a defined power to make

²⁰⁹ *Report from the Select Committee of the Legislative Council on a New Constitution for the Colony*, 1853, quoted in G Serle, n 205, p 186.

²¹⁰ R Wright, n 200, p 2.

²¹¹ G Serle, n 205, p 188.

²¹² It could, however, suggest amendments.

²¹³ See G Serle, n 205, pp 189-90.

suggestions on Money Bills, which, as Serle commented, would permit the upper house to delay such Bills, as well as to put pressure on the Assembly to alter them. Also in 1903, a reduction in qualification requirements for membership was accepted,²¹⁴ as well as a reduction in Council numbers from 48 to 35.²¹⁵ In 1908, with property qualifications still in place, the Council's franchise was extended to women; only in 1923 were women given the right to stand for Council elections.²¹⁶

The cause of reform was advanced in 1937 when, after initial failures, the Country Party Government, under Premier Dunstan, with Labor Party support, succeeded in modifying the deadlock machinery. This provided for the following stages: dissolution of the Assembly after rejection of a Bill by the Council: after at least nine months delay and rejection again, dissolution of the Council; and if rejected once more then a joint sitting with an absolute majority to decide the Bill's fate.²¹⁷ The provision remained in force from 1938 to 1985,²¹⁸ in which time it was never used. Plural voting in Legislative Council elections was also abolished in 1937, and the minimum age for candidates was reduced from 30 to 21.²¹⁹ Voting eligibility, however, remained unchanged, with approximately 37% of Victorian adults being eligible to vote in upper house elections.²²⁰ A similar alignment of parties, relying on the support of two Liberal MLCs, made possible the major reform of 1950, when universal adult suffrage was introduced for Council elections, thereby bringing it into line with arrangements which had been in place for 93 years for the Legislative Assembly. At the same time, the property qualification for membership of the Legislative Council was abolished.

If the post-war years brought franchise and other reforms to the Council, they also heralded an era of turmoil and controversy for the upper house. Most spectacularly, supply was rejected twice, first in 1947 and then soon after the franchise reforms, in 1952. In 1947, supply was withheld from the Cain Labor Government, at a time when the political climate was set by the controversial issue of bank nationalisation. In 1952, Labor's split from its

²¹⁴ From ownership of freehold property worth £1000 to £500.

²¹⁵ At the same time, the distribution of seats was also changed from six 4-member provinces and eight 3-member provinces to 17 2-member provinces plus one member representing Public Servants (this position was removed soon after in 1906, reducing the Council's membership to 34). In 1921, preferential voting was introduced for elections.

²¹⁶ For a concise chronology of major constitutional events in Victoria until 1984, see R Wright, n 200, Appendix A.

²¹⁷ See G Serle, n 205, p 190.

²¹⁸ The *Constitution (Duration of Parliament) Act 1984* came into force on 1 January 1985. This is discussed in a later section of this paper.

²¹⁹ As noted, property qualifications for prospective members was halved (from the ownership of freehold property worth £500 to £250).

²²⁰ R Wright, *A People's Counsel*, n 204, p 172. Wright commented: 'Democratisation of electoral and membership practices, without any corresponding modification of Upper House powers, ultimately did little to check confrontations with the Assembly'.

politically odd bedfellow, the Country Party, over the question of electoral reform precipitated the crisis, and it was Labor that blocked supply in the Council. On this occasion, the Victorian Governor declined to accept the Premier's advice to dissolve the Legislative Assembly and bring on a general election. Following the Premier's resignation, the Governor installed a minority ministry, headed by Tom Hollway of the Electoral Reform League, which obtained passage of supply through the Legislative Council. The Governor then reinstated the former ministry on condition that the Premier advise a dissolution of the Assembly. With the advent of the long period of Liberal Party government, from 1955 to 1982, originally under Bolte (Premier 1955-1972), then Hamer (Premier 1972-1981) and Thompson (Premier 1981-1982), the Council settled more into a pattern of occasional obstructionism, defeating 30 Bills passed by the Assembly between 1955 and 1970, and even delaying supply for 24 hours in 1965. The difficulty for the Government was that, throughout the 1950s and 1960s, the balance of power in the Council was held by the Country Party which could combine with Labor on certain issues to defeat the Government. Famously, Premier Bolte remarked, 'I do not think it [the Legislative Council] could be got rid of overnight; one would have to whittle it away gradually'.²²¹ As Wright stated, this was 'Bolte pique rather than Liberal policy', as the Party itself remained committed to the cause of bicameralism.²²² Indeed, Wright went on to say that, as a result of the Government's lack of a majority in the Council, a 'process of consultation, of negotiated legislation, developed as an intermittent but nevertheless necessary feature of the Bolte years', and continued, in fact, after 1970 when the Liberals won control of the upper house.²²³

Still, the cause of reform, and even abolition, lived on. In 1965, an additional Province was added, thereby increasing the size of the Council from 34 to 36; and in 1974 four more Provinces were added so that the Council reached its present size of 44 members. In 1959 and in 1976, Legislative Council (Abolition) Bills were introduced in the Victorian upper house by JW Galbally, ALP Leader in the Council from 1955 to 1979. Both were defeated. Broad-ranging debate on the role of the upper house continued, however, partly in relation to the Statute Law Revision Committee, which in 1975 had been given the whole Victorian Constitution as its terms of reference. The Committee released its interim report in 1982 on the role of Upper Houses.²²⁴ Among its recommendations, it advocated: the need for a committee system; that there should be no reduction in the Council's powers but that rejection of supply should entail automatic double dissolution; and simplifying the machinery for the resolution of deadlocks. It was unable to agree on reforms to the electoral system.

Labor won government in 1982 and remained in power for a full decade. Subject to one

²²¹ R Wright summarised this period in - n 200, pp 11-12.

²²² R Wright, *A People's Counsel*, n 204, p 211.

²²³ Ibid.

²²⁴ Statute Law Revision Committee, *Progress Report on the Constitution Act. The Role of Upper Houses of Parliament (Interim Report)*, Victorian Parliamentary Papers, 1982, D. No. 1. Victorian Parliamentary Papers, 1982, D. No. 1.

brief exception, during this period it never had control of the Council,²²⁵ thereby providing renewed scope for debate on reform.²²⁶ Prior to the 1982 elections, the ALP held 13 seats in the 44-member Council; the Liberals 26; the Nationals four; with one seat vacant. After the elections, the ALP increased its representation to 21 seats at the expense of the Liberals, who retained only 18 seats, while the Nationals secured five.²²⁷ Unbeknown to the Government, the Liberal Opposition in the Council (excepting one member) had adopted a set of guidelines for its conduct, based on constitutional and tactical considerations:²²⁸ they would recognise that they were not the government and therefore would not seek to govern; they would use their powers judiciously, not capriciously, and only to protect the public at large; and, while never becoming a rubber stamp, would respect the mandate of the government. In the decade of Labor Government, supply was never blocked, but a number of important Bills were defeated. Even more were abandoned by the Government and in a number of cases Bills were amended in a substantive way which altered Government policy.²²⁹ The Cain Government tried in 1982-83 to remove the Council's power to block supply, but the amendments suggested by Liberal and National Party members proved unacceptable to the Government and the Bill was abandoned. Cain tried again in 1987, introducing a Bill that would have established proportional representation for upper house elections,²³⁰ while at the same time removing the Council's power to block supply. Predictably, the Bill was defeated. But inroads were made into the Council's powers in these years, notably in 1984 through the introduction of a new mechanism to resolve deadlocks, the details of which are discussed in a later section of this paper. The

²²⁵ Following the 1985 election, when the Council first met as a 43-member chamber on 16 July 1985, Labor had 22 members and the Coalition 21, but one Labor member (Roderick Mackenzie) was President. On 17 August 1985, following a decision in the Court of Disputed Returns, the 44th member was elected, the Liberal, Rosemary Varty. The result left the ALP with 22 seats, with Mackenzie remaining President. The Coalition parties also had 22 seats, but with a Labor President this gave them a one vote majority on the floor of the House.

²²⁶ K Coghill, "In government but not in power: Victorian Labor 1982-92" (1997) 11 *Legislative Studies* 75.

²²⁷ Significantly, the Liberal and National parties were not yet in coalition, and so the latter held the balance of power.

²²⁸ K Coghill, n 226, p 76.

²²⁹ During the 1985-88 Parliament, 3.4% of Bills were defeated and 7% of Bills were withdrawn: see K Coghill, n 226, p 78. Ken Coghill, a former ALP member of the Legislative Assembly, is scathing in his estimation of the Council's performance during the period, arguing that the Council 'demonstrably failed to respect the Government's mandate on two occasions in which there were the clearest possible electoral mandates for legislation of major social and constitutional significance': he adds, 'as a House of Review monitoring and scrutinising the executive actions of government, [the Council] sat on its hands and did the absolute minimum for almost the entire period'.

²³⁰ A legislative proposal for proportional representation was also introduced in 1988 but was rejected in the Council. An attempt by the Kirner Labor Government in 1990 to resuscitate the Bill by referring it to a joint parliamentary committee was also blocked: M Considine and B Costar eds, *Trials in Power: Cain, Kirner and Victoria 1982-1992*, Melbourne University Press 1992, p 212.

overall picture, however, is one of continuing tension between the Houses, at least from the Labor side, thereby ensuring that reform would remain on the political agenda.

3.3.3 Recent History of Reform Initiatives for the Victorian Legislative Council

When the Kennett Government came to power in 1992 the relationship between the Houses changed dramatically, if only because the Coalition Parties controlled both the lower and upper houses. This situation continued after the 1996 election when the Liberals won a landslide victory in the Legislative Assembly and, with their Coalition partners, increased their representation in the Legislative Council to 34 in a 44 seat chamber. The Liberals were to remain in government till 1999 and, although the Kennett impulse to reform touched almost every other area of Victorian political life, the Legislative Council was left undisturbed in these years.

By the time Labor had regained office in 1999, a major issue in Victorian politics was Executive accountability, or the lack thereof, in a Parliament in which the government controlled both houses.²³¹ The Council, it was said, had become ‘less a house of review than a retirement home for the loyal servants of various parties’.²³² Indeed, writing in the aftermath of Kennett’s defeat, Nick Economou argued that the fate of the new Bracks Government depended largely on ‘what happens in that previously irrelevant institution, the Victorian Parliament’.²³³ He pointed out that Bracks did not have a majority in either house, with his minority ministry depending on the support of three independents in the Legislative Assembly. Reform of the Legislative Council was a condition of that support, as formulated under the *Independents’ Charter Victoria 1999*, a document endorsed by the ALP on 12 October 1999. In his response to the Charter, Steve Bracks committed his Government to ‘Improving the democratic operation of Parliament’, an agenda which included: abolishing the current six-eight year terms for MLCs, so that members of both Houses face four year terms; adopting a system of proportional representation for the upper house, based on five Provinces each electing seven members in a 35 member Legislative Council; in the event of the defeat of these proposals in the Council, to establish a Constitutional Commission ‘for consideration of putting a question by way of plebiscite to the Victorian community’; and the establishment of a system of standing committees, similar in kind to those in operation in the Senate, to review legislation and the operation of the Executive.²³⁴

²³¹ Editorial, ‘Democracy put on hold again’, *The Age*, 7 September 2000.

²³² Editorial, ‘The upper house at work’, *The Age*, 2 April 1997; Cited in A Harkness, ‘The Victorian Parliament: An Institution in Decline?’ in *The Kennett Revolution* edited by B Costar and N Economou, University of NSW Press 1999, p 69.

²³³ N Economou, ‘Victoria, June to December 1999’ (2000) 46 *Australian Journal of Politics and History* 226 at 237.

²³⁴ S Bracks, *Letter to Susan Davies MP, Independent Member for Gippsland West*, 12 October 1999.

The next day, on 13 October 1999, Jeff Kennett, in a bid to win independent support for a minority Liberal administration, said he would create a Victorian Constitutional Commission to report on various options for the reform of the upper house. Of the ALP reform proposals, Kennett claimed there was no mandate for such change and that, in any event, they were ‘fundamentally flawed’ as they would: reduce the number of rural MLCs; secure the one-off election of divisive candidates from groups like One Nation; and permanently deliver Victoria into an unstable electoral environment. It was noted that of the 44 members of the Legislative Council, 16 were from rural and regional Victoria, the contention being that the current arrangements ‘provide significant and fair representation for non-urban Victoria’.²³⁵ Note, in this regard, that the erosion of the Coalition’s electoral support in 1999 ‘occurred primarily in regional and rural Victoria’.²³⁶

On 25 November 1999, Premier Bracks gave the Second Reading speech on the Constitution (Reform) Bill in the Legislative Assembly. Debate was adjourned until 23 December, but in fact the Bill was not debated again and was subsequently withdrawn. On 31 May 2000 two new Bills, the Constitution (Amendment) Bill and the Constitution (Proportional Representation) Bill were introduced, again in the Legislative Assembly. This change of direction was said to be the result of ‘consultations with a number of persons, including the independent members of this house and the non-government parties’.²³⁷ The Constitution (Amendment) Bill proposed:

- Removal of the power of the Legislative Council to block supply. Under the original Constitution (Reform) Bill it was proposed that, once passed by the Assembly, the annual appropriation Bill would be presented for assent, thereby by-passing the upper house altogether. Following concerns that this would deprive the upper house of its ability, as a house of review, to debate and comment on Supply Bills, the Constitution (Amendment) Bill reflected the approach adopted in NSW: that is, the Council would be permitted to debate and consider annual appropriation Bills, but should it reject or fail to pass such a Bill within one month of it being passed by the Assembly, the annual appropriation Bill must be presented for assent.²³⁸
- Fixing the term of the Parliament at four years unless there is a vote of no confidence. All other grounds for early dissolution, including the rejection of a Supply Bill, would be removed.
- A reduction of the term of the Legislative Council to one term of the Assembly, in contrast to the present arrangement where the term of an MLC is equal to two terms of a member of the Assembly. Provisions relevant to the duration of the Council were to operate from the next election, at which time the terms of all MLCs would cease.

The Constitution (Proportional Representation) Bill proposed:

²³⁵ J Kennett, *Response to Charter*, 13 October 1999.

²³⁶ N Economou, n 233, p 230.

²³⁷ VPD (Legislative Assembly), 1 June 2000, p 2163.

²³⁸ *Ibid.*

- A reduction of the numbers of members in the Council from 44 to 40. The Constitution (Reform) Bill had proposed a reduction to 35 members, in keeping with Premier Bracks' letter of 12 October 1999.
- A reduction in the number of Provinces from 22 (each returning two members) to eight (each returning five members), with changes to the *Electoral Boundaries Commission Act 1982* ensuring that three of the eight Provinces will be 'primarily outside of the metropolitan area'.²³⁹ Each Province would consist of 11 complete and contiguous Assembly electoral districts.
- The introduction of proportional representation in the upper house modelled on the electoral system for the Senate, with above and below-the-line voting and where a candidate must receive a minimum number of first preference votes to be elected.²⁴⁰ This would of course be calculated on a Province by Province basis and set at the relatively high figure of 16%, thus still making it hard for independent and minor party members to be elected.

After lengthy debate in both houses, the two Bills were defeated along Party lines in the Legislative Council on 24 October 2000.²⁴¹ Opposition members were particularly concerned that the reduction in the number of Provinces would lead to significantly less representation for rural Victoria, an issue of the highest sensitivity in the current political climate.²⁴² Back in September an editorial in *The Age* had taken a very different view, criticising both the Bracks Government and the independents for seeking to introduce electoral boundaries under the Proportional Representation Bill which 'would give extra weighting to rural votes, thereby wiping out the equality of representation between city and country achieved under the Cain Government'.²⁴³ Opponents of reform also raised the question of the Government's mandate to introduce constitutional change,²⁴⁴ something an editorial in *The Age* later described as veering 'close to nonsense'. The editorial writer added, 'If there was one overarching theme to Labor's surprisingly successful campaign at last year's state election, it was that parliament and the state sector generally had become dangerously unaccountable under Mr Kennett'.²⁴⁵ Responding to the defeat, Premier Bracks immediately promised that a committee of inquiry would be established to examine constitutional change. At this stage, that is where the debate stands.

²³⁹ Ibid, p 2161.

²⁴⁰ The quota is calculated by dividing the total number of first preference votes by one more than the number of seats to be filled.

²⁴¹ For the purposes of section 18(2) of the Victorian *Constitution Act 1975*, an absolute majority was required at the Second and Third Reading stages in both Houses. This is discussed in a later section of this paper.

²⁴² A Rollins, 'Battle for reform continues', *The Age* 26 October 2000.

²⁴³ Editorial, 'Democracy put on hold again', *The Age*, 7 September 2000.

²⁴⁴ M Birrell, 'Why Labor wants to abolish the upper house', *The Age*, 19 August 2000. Birrell is the Liberal Leader in the Legislative Council.

²⁴⁵ Editorial, 'Upper house reform cannot be stymied', *The Age*, 26 October 2000.

3.3.4 Powers, Deadlock Machinery, Committees and Performance

Powers

Money Bills apart, the two houses of the Victorian parliament are equal in power. As to Money Bills, as the events of 1947 and 1952 showed, there is no doubt that the Victorian Legislative Council has the power to block supply. Section 62 of the Constitution Act 1975 provides that Money or Appropriation Bills must originate in the Assembly and ‘may be rejected but not altered by the Council’. In addition, under section 64 the Council can suggest amendments or omissions to such Bills at certain stipulated stages, provided that their effect would not be ‘to increase any proposed charge or burden on the people’. The practice of ‘tacking’, that is, where a government seeks to pass other proposed laws by adding them to an Appropriation Bill, is expressly prohibited by section 65 which states that ‘An annual Appropriation Bill shall deal only with appropriation’. Unlike the NSW Constitution Act, the provision does not spell out the effect which will follow if such ‘tacking’ takes place, which leads RD Lumb to conclude that section 65 is a ‘directory provision’: if the Council has not taken advantage of its powers to invalidate the whole Bill, Lumb explained, ‘then the purpose of the section would be fulfilled and the validity of the bill could not be questioned after it had received the royal assent’.²⁴⁶

Note, however, that the Council’s power to reject Appropriation Bills has been altered and reduced by the *Constitution (Duration of Parliament) Act 1984*, the overarching purpose of which was to adopt a three year qualified minimum term with a four year maximum for the lower house. One exception to the three year minimum now provided under section 8 of the Victorian *Constitution Act 1975* is where the Council ‘rejects or fails to pass within one month’ an annual Appropriation Bill. This, in effect, confirms the Council’s power to reject Money Bills, but limits its power to force an early election to those occasions when it blocks a Bill ‘dealing only with the appropriation of the Consolidated Fund for the ordinary annual services of the Government’. At least one commentator, Brian Costar, has remarked that ‘The political genius of the reforms lay in the definition of a relevant appropriation bill’ which, according to section 8(4), does not include a Bill to appropriate moneys for – (a) the construction or acquisition of public works land or buildings; (b) the construction or acquisition of plant or equipment which normally would be regarded as involving an expenditure of capital; (c) appropriations for services proposed to be provided by the Government which have not formerly been provided by the Government; or (d) appropriations for or relating to the Parliament. Costar explained:

Since it is traditional in Victoria that supply bills contain some or all of the items covered by sub-sections (a) to (d), the rejection of such a bill no longer provides grounds for an early dissolution of the Assembly. Put bluntly, the Legislative Council has lost its power to force elections during the three-year fixed term parliament by rejecting money bills. Its powers in the fourth year of the parliamentary term are uncertain – an uncertainty which

²⁴⁶ RD Lumb, *The Constitutions of the Australian States*, 5th edition, University of Queensland Press 1991, p 57.

would favour a government enjoying the confidence of the lower house.²⁴⁷

In effect, the provision curtails the Council's historical powers very substantially. It can still block supply in the first three years of a Parliament, but doing so will no longer trigger an election for the Legislative Assembly. The implications of the provision are considered further in relation to the settlement of deadlocks between the Houses.

Unlike South Australia and NSW, the powers of the Legislative Council are not entrenched and so do not require a referendum to be altered. Under section 18(2) of the Constitution Act, for the constitution of the Council to be altered, the Second and Third readings of the relevant Bill must pass both Houses by an 'absolute majority of the whole number' of their members. While this special majority provision applies to the Council's power to block supply, certain matters relating to the constitution of the upper house are expressly exempted from the operation of section 18 (2), including varying the number of Council Provinces, increasing the size of the House, and altering the qualifications of electors.²⁴⁸

Deadlock machinery

The present arrangements for the resolution of deadlocks were introduced under the *Constitution (Duration of Parliament) Act 1984*. As noted, the purpose of that Act was to adopt a three year qualified minimum term with a four year maximum for the lower house. It provided the following exceptions to a three year minimum term for the Legislative Assembly: rejection of supply by the Legislative Council; development of a deadlock over a Bill of special importance; and a vote of no confidence by the Legislative Assembly. These exceptions permit but do not require an early dissolution.

It has already been explained that under the 1984 scheme the rejection of supply by the Legislative Council in the first three years of a Parliament would not automatically trigger an election of the Legislative Assembly. Of course, this raises the practical question of how a government which cannot ensure supply is to remain in office and, indeed, how the deadlock between the Houses is to be resolved if the calling of a general election is not a legal option. It may be that section 66, headed 'Bills of special importance', could be relied upon when read in conjunction with section 8(3)(b). The latter provides that the Governor may dissolve the Assembly before three years has elapsed if the dissolution 'is authorized under the provisions of section 66'. Under section 66, if the upper house rejects a Bill which has been passed by the lower house, then the Assembly can resolve 'that the Bill is a Bill of special importance'. If the Council again rejects the Bill and a period of 'not less than four months and not more than eight months has elapsed' between the first and second rejections, then the government may seek to dissolve the Assembly. In these circumstances it is presumably open to a government, using its numbers in the Assembly, to resolve that a Money Bill is a Bill of special importance, in which case, with the Governor's agreement, there can be an early election for the Assembly and for half of the Council. Of course, from the government's standpoint, this may be a politically difficult and unwelcome option. As

²⁴⁷ M Considine and B Costar eds, n 230, p 206.

²⁴⁸ Section 18(4), *Constitution Act 1975* (Vic).

well, there may be other practical impediments to this course of action, especially when one bears in mind that supply would have to be held up for at least four months before the section 66 mechanism could be triggered, in which time the ‘government would be bereft of funds but unable to advise a dissolution’.²⁴⁹ This suggests the possibility of a deadlock over supply to which, legally, there is no apparent answer. It may be that the government and opposition would be left to work out some political compromise in the midst of a constitutional crisis. These reflections suggest, in turn, a need for constitutional reform.

The closest Victoria has come to ‘testing’ these provisions was in the ‘pseudo-constitutional crisis’ of 1991 when, in opposition to the then Kirner Labor Government, the Liberal leader, Alan Brown first threatened to block supply in January of that year.²⁵⁰ Brown later withdrew the threat but ‘declared that the opposition would block all other legislation in the Legislative Council to force the Kirner government to the polls’.²⁵¹ Instead, Brown’s own leadership came under threat and on 23 April 1991 he was replaced as Liberal leader by Jeff Kennett who promptly announced that the Coalition in the Assembly would vote against the Supply Bill currently before the Parliament. Moreover, Kennett urged Labor MLAs to do likewise, claiming he was offering them ‘a way through the constitutional maze’ by engineering an early election without provoking a constitutional crisis.²⁵² On 14 May 1991, after this offer had been ignored, Kennett had a Private Member’s Bill – the Constitution (Dissolution of the Legislative Assembly) Bill – introduced into and passed through the Council. Its object, as Brian Costar explained, ‘was to suspend, for the life of the current parliament only, those sections of the constitution which prevented the premier advising the governor to dissolve the lower house’.²⁵³ Predictably enough, this ‘extraordinary Bill’, in Kennett’s words, was defeated in the Assembly.²⁵⁴

Committees

It is probably fair to say that, in recent decades at least, the development of parliamentary committees in Victoria has taken a somewhat distinctive turn, especially in the emphasis that has been placed on joint investigatory committees, as well as in the relative dearth of select committees. The claim is made that Victoria ‘has a long tradition’ of appointing

²⁴⁹ M Considine and B Costar eds, n 230, p 209.

²⁵⁰ The Labor Party had gained office in October 1988 under the leadership of John Cain. He was replaced as Premier in 1990 by Joan Kirner.

²⁵¹ M Considine and B Costar eds, n 230, p 209.

²⁵² VPD, Legislative Assembly, 7 May 1991; ‘Political Chronicle – Victoria’ (1991) 37 *Australian Journal of Politics and History* 479 at 481.

²⁵³ M Considine and B Costar eds, n 230, p 209.

²⁵⁴ ‘Political Chronicle – Victoria’ (1991) 37 *Australian Journal of Politics and History* 479 at 481. Subsequently, Kennett threatened that, if the Labor Government did not resign by midnight 29 May 1991, a future Coalition Administration would introduce retrospective legislation to deny retired or defeated Labor members the government funded component of their superannuation benefit. The threat was later abandoned.

parliamentary committees, with the point being made that, as early as 1895, ‘the concept of on-going committees was introduced with the appointment of a Public Accounts Committee.’²⁵⁵ Late in 1979, in the last years of the Hamer Liberal administration, that Committee was reconstituted as a joint house committee, called the Public Accounts and Expenditure Review Committee, with instructions to examine ‘the administration of government programmes and policies’. The following year a joint house committee was established, the Public Bodies Review Committee, with a still more ‘vigorous watching brief’ over the activities of government and, in particular, over the ‘efficiency’, ‘effectiveness’ and ‘accountability’ of the legion of government agencies.²⁵⁶ Of this period it has been said:

The Victorian parliamentary committee system became, during the Liberal era, the most developed of any state legislature, with one of the eight committees, the Public Bodies Review Committee, being a striking innovation in Australian parliamentary procedure. The committee’s notable impact on Victorian administration and politics was made possible by its broad powers to conduct inquiries and to apply a sunset clause to public bodies.²⁵⁷

In relation to this ‘sunset clause’, Wright explained that ‘Whatever recommendations were made by the committee would automatically be implemented within 12 months of a report being tabled in the Parliament unless formally negatived – and even then, the committee had the right to further examine the issue in question’.²⁵⁸ In this way the Committee could not table a report and then, ‘in the rush and urgency of other matters’, have its findings overlooked. As Wright said, ‘the onus was placed on the government to respond’.²⁵⁹

In 1982 the Statute Law Revision Committee published a progress report on the role of upper houses in Parliament which advocated ‘the establishment of a Standing Committee system similar to that which operates in the Senate’.²⁶⁰ In the same year the committee structure was reformed, under the new Labor administration, with the establishment of a new system of Joint Investigatory committees. This entailed the replacement of seven existing committees with four new joint committees: the Economic and Budget Review Committee, the Legal and Constitutional Committee, the Natural Resources and

²⁵⁵ ‘Parliamentary committees’ from the Parliament of Victoria’s Web Page, <http://www.parliament.vic.gov.au/ctees.html>.

²⁵⁶ R Wright, *A People’s Counsel*, n 204, p 213.

²⁵⁷ J Holmes, J Halligan and P Hay, ‘Victoria’ in *Australian State Politics* edited by B Galligan, Longman Cheshire 1986, p 36.

²⁵⁸ R Wright, *A People’s Counsel*, n 204, pp 213-214.

²⁵⁹ *Ibid*, p 214. Section 48F(2), *Parliamentary Committees (Public Bodies Review) Act 1980* (Vic). Where the Committee had recommended that a public body should be abolished, the Parliament had to expressly resolve that the body should continue to exist.

²⁶⁰ Statute Law Revision Committee, n 224, p 3.

Environmental Committee and the Social Development Committee. All these were to be adequately resourced and staffed. Each committee consisted of 12 members, six government and six non-government: on all but one committee there were six ALP, four Liberal and two National Party members, the exception being the Natural Resources and Environmental Committee where there was an equal number of Liberal and National members. Under the legislation, each committee was to comprise up to six Council members and up to 10 Assembly members: in practice, all but one committee had five Council and seven Assembly members, the exception being the Legal and Constitutional Committee which had four members from the Council and eight from the Assembly. The relevant legislation also stipulated that the Chair was to have a deliberative and a casting vote. In addition to the four new committees, a reconstituted Public Bodies Review Committee continued in operation. In fact, this served as something of a model for the new system, although in certain respects its powers (while somewhat curtailed) remained unique to itself. In particular, its power to apply a 'sunset clause' to public bodies remained in force.²⁶¹

Of these five joint committees, it was observed in 1986 that government references dominated their work and that their recommendations were 'frequently accepted by ministers'.²⁶² This suggests that the committees were engaged in constructive work at this time in terms of policy formulation and recommendation. Whether this function predominated at the expense of a more independent watch dog role is another matter. There is no simple answer. What occurred is that a deal was struck under which Opposition members chaired two of the committees, the Legal and Constitutional Committee and the Natural Resources and Environmental Committee. This meant that the Labor Government retained control of the three most politically sensitive committees, the Public Bodies Review Committee, the Economic and Budget Review Committee and the Social Development Committee. In crude terms, the upshot was that these three committees were dominated by the executive and remained more partisan in character. A general point to make is that, reflecting as they often do the government's numerical dominance of the lower house, joint committees tend by their nature to be different political creatures to some upper house committees. This is especially the case where a government is in a minority in the upper house and estimates and select committees tend to take on more of a scrutiny role and are less predictable in their behaviour.

The situation in Victoria between 1982 and 1992 was that, apart from a few weeks in 1985, the Labor Government did not have the numbers to control the Council. One might have expected this to have resulted in a flurry of activity on the committee front in the Council in these years. In 1986 an Estimates Committee was formed to examine public sector financial management but, as Wright said, 'Commentators judged the results dull'. Some select committees were established, including a joint select committee into the controversial workers' compensation scheme, Workcare. Perhaps the most politically hostile select committee was that established on 13 November 1991 to look into the propriety of the Kirner Government's practices when hiring consultants. This, however, was an exception;

²⁶¹ Section 4P(5), *Parliamentary Committees (Joint Investigatory Committees) Act 1982* (Vic).

²⁶² B Galligan ed, n 257, p 36.

for the most part, the Opposition in the Council found other means to express its political hostility to the Labor Government.

With a change of government in 1992, the joint committee structure changed again, this time with nine new joint investigatory committees being established in place of the previous five, and with only the Public Bodies Review Committee being retained with the same terms of reference. Introducing the Bill for these reforms in October 1992, the new Premier, Jeff Kennett, observed:

Over the past few years the joint committees of Parliament fell into disrepair; they were dependent on references being provided by the then government. Once the references ceased to be as frequent the committees were underutilised. That affected not just the members of those committees but also the staff who, on occasion, had nothing to do. At one stage the Natural Resources and Environment Committee did not have a reference at a time when the community was commenting on matters of critical importance to the environment.²⁶³

Even accounting for any partisan element in this assessment, it still suggests a perception in some quarters that, by the early 1990s, the joint committee system was in need of reform. At any rate, the legislation established the following seven joint investigatory committees: the Public Bodies Review Committee; the Scrutiny of Acts and Regulations Committee; the Law Reform Committee; the Environment and Natural Resources Committee; the Public Accounts and Estimates Committee; the Community Development Committee; and the Economic Development Committee. In addition, two specific purpose committees were also established: the Crime Prevention Committee; and the Road Safety Committee. Premier Kennett went on to say:

An active, well-focused system of Parliamentary committees has two broad objectives. Firstly, it is a critical part of the accountability of any government to Parliament. Secondly, it enables measures to be developed which can improve the economic, legal and social well-being of Victorians.²⁶⁴

Taking up on earlier comments, it might be expected that joint committees upon which there is a government majority would tend to be more successful in terms of the second of these objectives. In broad terms, this is probably a fair reflection of the work of the joint committees in the Kennett years, although that is not to underestimate the important 'critical' contribution these committees made in certain areas, notably in the scrutiny of Acts and Regulations. In any event, any distinctive contribution made by the government-controlled Legislative Council in the Kennett era can only be judged by very modest standards. The record for the last year of the Kennett Government, the 1998-1999 session

²⁶³ VPD (Legislative Assembly), 29 October 1992, p 247.

²⁶⁴ VPD (Legislative Assembly), 29 October 1992, p 248.

of the Victorian Parliament, shows that no upper house select committees operated at this time.

With the change of government in 1999, the issue of accountability came to the fore, including the role that a differently constituted committee system might play in this process. As part of its plan to improve the 'democratic operation of Parliament', the *Independents' Charter Victoria 1999* advocated the establishment of 'standing committees to review legislation and the operation of government (similar to the operation of the Senate)'. In response, the present Premier, Steve Bracks, committed a Labor Government to 'The establishment of properly resourced standing committees to review legislation and the operation of Government on behalf of the Victorian Parliament'.²⁶⁵ The Coalition's response included a proposal to establish three new Legislative Council committees to: review all Bills before Parliament; review all Regulations before Parliament; and review all redundant Acts of Parliament.²⁶⁶

In the event, something of a compromise appears to have been negotiated. The joint investigatory committee system has been retained, with seven of these currently in operation: the Drugs and Crime Prevention Committee; the Environment and Natural Resources Committee; the Family and Community Development Committee; the Law Reform Committee; the Public Accounts and Estimates Committee; the Road Safety Committee; and the Scrutiny of Acts and Regulations Committee. In addition, a 'deal' of sorts appears to have been made with the Opposition under which the Economic Development Committee is to operate as a Legislative Council select committee, but only, curiously enough, for the term of the present Parliament, after which it will revert to a joint standing committee. One Government member, Craig Langdon, has suggested that a more thorough revision of the committee structure must wait upon the long awaited reform of the upper house itself.²⁶⁷ An Opposition member, Louise Asher, welcomed the historic creation of the Council select committee and said she looked 'forward to a furtherance of the review role of the Legislative Council as a direct consequence of it'.²⁶⁸ In the Council itself a letter from the Premier to the Leader of the Opposition in the lower house, Dr Napthine, was tabled in which the terms of the deal were spelled out: 'It is acknowledged', the Premier wrote, 'that the state opposition has no plans to create separate Scrutiny of Acts or Public Accounts and Estimates (style) Committees in the Legislative Council, and that, during this term of Parliament, any action to seek to create (any) upper house committees would be preceded by consultation (and negotiation) with the government'.²⁶⁹ There matters stand at present.

²⁶⁵ S Bracks, n 234.

²⁶⁶ J Kennett, *Response to Charter*, 13 October 1999, p 7.

²⁶⁷ VPD (Legislative Assembly), 8 December 1999, p 951.

²⁶⁸ *Ibid*, p 953.

²⁶⁹ VPD (Legislative Council), 8 December 1999, p 443.

Performance

Until recently a favourite theme in the academic study of politics has been the decline of Parliament as an institution and its domination by the Executive. Contemporary events in Australia suggest that this line of thinking is generally overstated.²⁷⁰ Victoria in the Kennett era, however, is probably as good an example of the fluctuating fortunes of Parliament as one is likely to find. If Parliament did not expire between 1992 and 1999, it certainly slumbered; and if Parliament as a whole slumbered, the Council was particularly somnolent. Writing in 1999 on the theme of the Victorian Parliament as an 'institution in decline', Alistair Harkness said of the Council:

The opposition party has not proposed any legislation in the chamber since May 1992. The level of debate in the upper house has fallen over recent years, with 19 coalition MLCs failing to contribute to the daily adjournment debate in 1996, and four who have not contributed to it since 1992. The number of sitting days has fallen from 46 in 1991-92 to 27 in 1995-96.²⁷¹

In 1996-97 Council sitting days rose to 34, then 36 in 1997-1998, but fell back again to 26 in 1998-99; by 1999-00 sitting days were up again to 34. Barely any Bills were initiated in the upper house in the later Kennett years, from a low point of one in 1996-97 to a high point of 10 in 1998-99; for 1999-00 the figure is up slightly to 16. As a house of review, the Council was notoriously inactive in this period: for example, of the 115 Bills it dealt with in 1997-98, 106 were passed without amendment; of the 99 Bills it dealt with in the following year, 95 were passed without amendment. Nor does the picture appear to have changed greatly in 1999-2000 when, of the 79 Bills dealt with by the Council, 75 passed without amendment.²⁷² Was an editorial writer in *The Age* right in his estimation of the Council as 'less of a house of review than a retirement home for the loyal servants of various parties'?²⁷³

Between 1995-96 and 1999-2000 no Bills were defeated in the Council. The same cannot be said of the year 2000-01 when two Bills intended to reform the Council's constitution were defeated along party lines in the upper house on 24 October 2000. This may suggest, in turn, the extent to which the current reform debate is dictated by the interests of major parties. Some would contend that the reforms proposed by the Bracks Labor Government are indicative of this for, it is claimed, the proposed reforms of the composition and electoral system of the Council would still leave that House as the least friendly towards

²⁷⁰ For a commentary on this issue see – R Smith, 'Parliament' in *Developments in Australian Politics* edited by J Brett, J Gillespie and M Goot, Macmillan 1994, p 107.

²⁷¹ A Harkness, 'The Victorian Parliament: An Institution in Decline?' in *The Kennett Revolution* edited by B Costar and N Economou, UNSW Press 1999, p 69.

²⁷² Department of the Legislative Council, *Annual Report, 1 July 1999 to 30 June 2000*, Appendix D, p 87.

²⁷³ Editorial, 'The upper house at work', *The Age*, 2 April 1997; A Harkness, n 271, p 69.

minor parties and independents of all Australian upper houses.²⁷⁴ A consideration of the gross percentage votes obtained in recent Council elections by the major parties indicates also that the Labor Party would have the most to gain by the reforms and the Liberal Party would have the most to lose.²⁷⁵

As ever, any estimation of the performance of the Victorian upper house is sure to become entangled at some point in broader debates about the democratic legitimacy of second chambers generally. About that subject there is no consensus. Less contentious perhaps is the proposition that a second chamber must have a *raison d'être* of some kind, some underlying philosophical justification for its existence. If a constitutional commission is established in Victoria the elucidation of that justification would be seem to be a crucial first stage in the formulation of a program of reform. What emerges afterwards, if anything, from the subtle dance of interest with principle which forever characterises the process of institutional reform, remains to be seen.

3.4 The Legislative Council of Western Australia

3.4.1 Overview

Historically, the reputation of the Legislative Council of Western Australia has rested on two unassailable propositions: first, that in a formal constitutional sense it is reckoned to be a particularly powerful upper house;²⁷⁶ and, secondly, that until very recently it has been dominated by conservative political forces. The two propositions are connected, practically if not logically. Until 1996 the conservative parties had an unbroken stranglehold on the upper house; and to that time the Council had used its powers most often when the Labor Party was in government. During the 110 years of responsible government in Western Australia, it has only been since the 1996 elections that the balance of power has shifted away from the conservative parties to the minor parties.²⁷⁷ As at January 2000 the 34-member Council comprised: 14 Liberals; 10 ALP; 3 National Party of Australia; 3 Greens (WA); 2 Australian Democrats; and 2 independents.²⁷⁸ For its part, the ALP has never held

²⁷⁴ 'Friendliness' in this context may be measured by the quota requirements for representation in the upper house, the higher the quota the less friendly the house is to minor parties and independents. Tasmania has to be considered as its own particular case in many respects, especially because its Assembly employs proportional representation and its Council has a history of apparent independence from strict party politics.

²⁷⁵ According to analysis prepared by the Proportional Representation Society.

²⁷⁶ The former President of the Legislative Council, Clive Griffiths, has said that it 'remains, unarguably, one of the most powerful second chambers in the Commonwealth': 'Bicameralism; Thoughts on its Future' in *Report of Proceedings: 27th Conference of Presiding Officers and Clerks, Tasmania 1996*, Hobart (Govt. Printer), p 392.

²⁷⁷ The outcome of the elections did not affect the composition of the Council until the middle of 1997, owing to the fixed terms for Members.

²⁷⁸ Both independents, Thomas Helm and Mark Nevill, were originally elected as ALP members but subsequently joined the cross-benches in the upper house.

a majority in the upper house. Against this background, recent calls for reform in Western Australia have predominantly advocated greater independent and minor party representation and a stronger committee system for the Council, with a view to enhancing its performance as a house of review.

The Council comprises 34 members representing six regions, of which two regions elect seven members and the remaining four elect five members. Members' terms are fixed at four years and, since 1987, elections for all Council seats are held at the same time. This is unique among Australian upper houses which otherwise have partial continuity of representation when upper and lower house elections are held concurrently. Without going into too much detail on what is a complex area, one argument is that the Western Australian system facilitates an upper house reflecting the political composition of the lower house. It is too early to say at this stage whether this will prove to be the case in the long term in Western Australia. The argument did not hold for the most recent election, held in February 2001, after which the Council and the Assembly were comprised as follows:

Legislative Council	Legislative Assembly
ALP 13	ALP 32
Liberal 12	Liberal 16
Greens (WA) 5	National Party 5
Pauline Hanson's 3	Independent 4
National Party 1	Total 57
Total 34	

The 1996 elections returned the Coalition Liberal and National Parties to government comprehensively in the Assembly. Whereas in the Council the Coalition won only half the available seats. Moreover, after a Liberal MLC, George Cash, was elected President, the balance of power shifted to the minor parties, the Greens and the Democrats.²⁷⁹ This electoral outcome was the most significant event in the Council's recent history and was the direct legacy of the introduction, in 1987, of proportional representation for Council elections. A similar outcome resulted from the 2001 elections, only now the Greens (WA) hold the balance of power, with no fewer than five seats. Prior to this election, the received wisdom seems to have been that significant hurdles remain for the representation of minor parties and independents in the longer term.²⁸⁰ The main argument behind this was the division of the Council into electoral regions so that, despite election on a proportional representation basis, the necessary quotas for election are among the highest in Australian parliaments.²⁸¹ Further, the regions distribute seats amongst rural and metropolitan areas

²⁷⁹ As noted, two independent members were added to the cross-benches following their defection from Labor.

²⁸⁰ See Table 3, p 98 below, 'Comparative Representation of Minor Parties and Independents in Australian Upper Houses as at February 2001'. On the other hand, as evidenced by the February 2001 election, the fact that the regions elect an odd number of members assists minor parties and independents.

²⁸¹ The quota is 12.5% for 7 member regions and 16.7% for 5 member regions. Amongst the jurisdictions which employ a system of proportional representation for their upper house

equally, even though the population in the metropolitan areas is far greater than in the country. Proponents of this system argue that it is akin to a federal approach to power distribution, which is rendered necessary in Western Australia because of the size and relatively unpopulated nature of the State.²⁸² However, the 2001 election result in which eight minority party members (23.5% of the total Council membership) were elected to the upper house shows that, in the right circumstances, these apparent disadvantages can be overcome, even in the rural regions. It remains to be seen whether this proves to be an aberrant result.

A major catalyst for recent discussion of reform of the upper house was the WA Inc saga of the late 1980s. Both the Royal Commission that arose from it and the subsequent reports of the Commission on Government considered that the structure and work of the Council needed to be reassessed. In 1992, the Royal Commission into the Commercial Activities of Government and Other Matters (the WA Royal Commission) stressed that the Legislative Council had a 'vital, if unrealised, place in [the State's] constitutional fabric'.²⁸³ The findings of both of these bodies, together with the debate they generated, are discussed further below.

3.4.2 History of the Western Australian Legislative Council

In keeping with the separate origins of Western Australia as a Colony, the development of its Parliament was in some respects different from its counterparts in the eastern States.²⁸⁴

Less than three years after the first British settlers arrived in 1829, the first Legislative Council of Western Australia was formed. It comprised five appointed members, including and presided over by the Governor, and met for the first time on 7 February 1832. Initially, it was a mere adjunct to, and rubber stamp for, the Colony's Executive Council.²⁸⁵

elections, only the Australian Senate, with a quota of 14.3% in the States, is comparably onerous. Note that the failed Bracks Labor Government reform proposals in Victoria would have created a 40-member Council divided into eight regions of five seats, thus establishing a quota of 16.7% for *all* Council seats in that State.

²⁸² See P Pental, 'The Western Australian Upper House – A Perspective' in GS Reid (ed), *The Role of Upper Houses Today*, University of Tasmania (1983) 112 at 114-5, 119-20. Although Pental is defending the pre-1987 system, which had even greater rural bias, his arguments remain equally applicable to the current system. For a more recent defence of this electoral system feature see - *Commission on Government Report No. 1*, August 1995, Chapter 9.

²⁸³ Section 5.3.6, *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, Western Australia, 1992.

²⁸⁴ A thorough account of the history of the Western Australian Parliament is given in D Black ed, *The House on the Hill; A History of the Parliament of Western Australia 1832-1990*, Parliament of Western Australia, 1991.

²⁸⁵ 'Early Parliamentary History 1832-1890' in *Commission on Government Report No. 1*, n 282. In fact, Brian de Garis points out that the Executive and Legislative Councils were initially each made up of the same five men with Governor Stirling presiding over both: 'The First Legislative Council, 1832-1870' in D Black ed, n 284, p 21.

Nevertheless, the establishment of an Estimates committee in 1835, without the Governor being present, saw the first real involvement of the Council in the Colony's affairs.²⁸⁶ During the period soon after, the nascent Colony's economic malaise and lack of direction created disquiet amongst settlers and led, in 1839, to the expansion of the Council to include four non-official, but appointed, members.²⁸⁷

With the introduction of convict transportation in 1850 and the consequent rapid expansion of the Colony, the Council's workload increased which, in turn, created pressure for an enlarged non-official presence among its members. In 1867, as a temporary measure before greater constitutional change was considered, the British colonial authorities responded to the growing demands in the Colony for self government by allowing for a further two non-official members. Governor Hampton, in his turn, allowed for all six non-official members to be elected from six districts in the Colony. Elections for five seats, the first elections in Western Australian history, were held in late 1867. Major changes soon followed, and in 1870 the British Secretary of State for the Colonies legislated for a new constitution for Western Australia, under which two-thirds of an enlarged 18-member Council was to be elected, the remainder being official or nominated appointees.²⁸⁸

Only in 1890 was responsible government truly established.²⁸⁹ The *Constitution Act 1889* was based on the experiences of the other Australian colonies which had been operating under responsible government for over 30 years. Bicameralism was introduced and both Houses were vested with the powers with which the former Council had been entrusted. It was only under the *Constitution Amendment Act 1893* that an electoral system was introduced.²⁹⁰ Restrictive voting qualifications were a feature of that system: voters had to be male; 21 years old; British subjects resident in Western Australia for one year; and had to meet demanding property requirements. Seats in the now 21-member Council were

²⁸⁶ There were numerous budgetary disagreements between the Governor and the Committee as the latter held increasingly the former to account: see B de Garis, n 284, pp 27-8.

²⁸⁷ See B de Garis, n 284, pp 26-28, for an account of the events of this period. The expansion was welcomed by the new Governor who, seemingly favouring the separation of powers, said it would relieve the official Members of 'the odium of being at once the framers and executors of the laws'.

²⁸⁸ For an account of the Council during the period of 1870-90, see B de Garis, 'Constitutional and Political Development, 1870-90' in D Black ed, n 284, p 41.

²⁸⁹ The period including and soon after the introduction of self-government is detailed by B de Garis, 'Self-Government and the Emergence of Political Parties, 1890-1911' in D Black ed, n 284, p 63. See also Ch 9.1.2, 'Evolution of the Legislative Council' in *Commission on Government Report No. 1*, n 282, p 323.

²⁹⁰ The 1889 Act initially established an upper house of 15 members nominated by the Governor but provided that, as soon as the population of the Colony reached 60,000, the Council should be elective. This population limit was reached in July 1893: see P Pental, 'The Western Australian Upper House – A Perspective' in GS Reid (ed), *The Role of Upper Houses Today*, University of Tasmania 1983, p 112.

distributed equally amongst seven regions, creating a strong rural bias and power base amongst land owners.²⁹¹ This structure of representation, with some alterations, continued until 1965. Its legacy is to be found, admittedly in a far less severe form, in the present regional structure.

Many changes to the composition of the Council and the electoral system have occurred since the early 1960s.²⁹² The division of seats was altered, first to 15 two-member provinces (1963-4) then, in order to remedy the rural bias to a certain extent, to 17 such provinces (1975 and 1981). The system of rotational Council elections with a third of the House coming up for re-election every two years was replaced with elections for half of the House, one member from each province, every three years (1963). The property franchise requirements were abolished (1964), which had the effect of increasing enrolment numbers from 167,212 in 1963 to 408,462 in 1965, and in 1983 the British subject qualification was abolished and replaced with an Australian citizenship requirement. The candidate qualifications were relaxed progressively (1964 and 1973), bringing the Council into line with the Assembly's requirements.

In 1987, the *Acts Amendment (Electoral Reform) Act* restructured the Legislative Council from provinces to regions and introduced proportional representation. Six multi-member regions were created, three in the metropolitan area and three in the non-metropolitan area, with all members facing election every four years. The effect was to place 17 members in country areas and 17 in metropolitan areas.²⁹³ The rotation system for elections was abandoned, therefore, and replaced with elections for the whole House once every four years.

3.4.3 Recent History of Reform Initiatives for the Western Australian Legislative Council

Although the 1987 reforms of the electoral system represent the last significant change to the Council's structure, there has been considerable debate on reform since. As mentioned earlier, the greatest impetus for this came with the WA Inc saga. In its report presented in November 1992, the WA Royal Commission stated that Parliament remained at the centre of many of its proposals because 'if there is to be government for the people, there must be public trust and confidence in the processes and practices of Parliament and in the role it performs in advancing and safeguarding the interests of the public'.²⁹⁴ In light of the fallout

²⁹¹ Only three of the 21 members were elected from the 'metropolitan' areas.

²⁹² 'Changes Since 1963' in *Commission on Government Report No. 1*, n 282, pp 326-7.

²⁹³ The North Metropolitan (urban) and the South West Region (rural) electoral regions each return seven members; the South Metropolitan Region and the East Metropolitan Region (urban) each return five members, as do the Agricultural Region and the Mining and Pastoral Region (rural).

²⁹⁴ *Report of the Royal Commission Into Commercial Activities of Government and Other Matters, Part II*, Western Australia 1992, p 5-2.

of the WA Inc scandal, the Royal Commission was particularly concerned with the ‘safeguarding’ role. To this end it stated that the Assembly is properly regarded as the House of Government. The accountability role, one of ‘subjecting the Government and the public sector as a whole to measured and comprehensive review’, rests predominantly with the Legislative Council.²⁹⁵ The Royal Commission urged that the Council be properly constituted as a house of review and for this it considered ‘both the role of the Legislative Council and the basis of its representative character require some alteration’.²⁹⁶

The Royal Commission was clearly critical of the Council for its failure to hold the executive to greater account when the events of WA Inc were taking place. Clive Griffiths, President of the Council during the period 1977 to 1997, has commented that ‘whether the criticism is justifiable depends on what one can reasonably expect a second chamber to achieve, bearing in mind that an Opposition majority violates the customs and usages of the House at its peril’.²⁹⁷ He added that Oppositions vested with powerful coercive powers, such as those which exist in the Western Australian Legislative Council, must tread very carefully and that ‘the national trait of “fair go” influenced Opposition tactics’.²⁹⁸ Griffiths stressed that the Council did, eventually, come to the realisation that the Government had to be held to account. He pointed out that the upper house required Ministers to table documents, under protest, on threat of expulsion if they failed to comply, and that it was this pressure from the Council which led the new Labor Premier, Carmen Lawrence, to call the Royal Commission.²⁹⁹

Before making its recommendations, the Royal Commission made the following observations:³⁰⁰

- (a) Whatever the criticisms and questions as to current legitimacy advanced against the Council, it has a vital, if unrealised, place in the State’s constitutional fabric.
- (b) Despite the predominant role of parties, with the appropriate representational and procedural arrangements, the Council’s primary role can and should be to serve as the house primarily responsible for the systematic oversight and review of the public sector as a whole.
- (c) It is desirable, but probably impractical, that upper house members not hold ministerial office. Nevertheless, such a prohibition would enhance the demarcation of roles and responsibilities between the house of government

²⁹⁵ Ibid, pp 5-2-5-3.

²⁹⁶ Ibid, p 5-3.

²⁹⁷ C Griffiths, ‘Bicameralism; Thoughts on its Future’, n 276, pp 391-2.

²⁹⁸ Ibid, p 392.

²⁹⁹ Ibid, p 392.

³⁰⁰ Summarised from *Report of the Royal Commission*, n 294, pp 5-6 – 5-7.

- and the house of review.
- (d) Lacking the immediate constituency responsibilities of Assembly members and being less directly involved in the struggle for political supremacy than the lower house, the Council carries greater capacity than the Assembly to exploit its procedures and committees so as to perform effectively the proposed review function.
 - (e) The Council should not be the public's sole guardian, but empowered properly and committed to the role proposed for it by the Royal Commission, the Council would give the Executive arm of Government reason for pause before even contemplating embarking on actions similar to those involved in WA Inc.
 - (f) Though the Council should be Parliament's primary review agency of the public sector, the Assembly should also strive to play a role in this process. Both Houses should complement each other and, where appropriate, conduct review activities jointly.
 - (g) In assigning this primary review role to the Council, the Royal Commission does not propose that it be denied its traditional legislative function.

The Royal Commission took the view that the Council should 'be acknowledged as having the review and scrutiny of the management and operations of the public sector of the State as one of its primary responsibilities'.³⁰¹ Further, it recommended that its suggested Commission on Government review the following matters: the representativeness of the Council's electoral system; the use of parliamentary committees, question time and departmental reporting to Parliament for the purposes of scrutinising the Government and the public sector; and the scope of parliamentary privileges.³⁰²

The Commission on Government (COG) took up these matters as part of its terms of reference.³⁰³ After hearing submissions from numerous Members of Parliament and interested parties, the COG commented in 1995:³⁰⁴

- The discipline of political parties can inhibit an upper house from acting as an effective house of review. A problem occurs if the governing party or coalition in the lower house is able to command a majority in the upper house as it reduces the likelihood of the government's legislative program being rigorously scrutinised. By contrast, where the government does not command a majority in the upper house it is likely that its

³⁰¹ Recommendation 27, *Report of the Royal Commission*, n 294, p xi.

³⁰² Recommendations 28, 30, 32 and 33, *Report of the Royal Commission*, n 294, pp xii-xiii.

³⁰³ The 24 specified matters which the Commission on Government was referred to address can be grouped under four broad headings: Parliamentary Matters, Electoral Matters, Statutory Officials, Public Administration. See *Commission on Government Report No. 1*, n 282, pp 23-6.

³⁰⁴ See *Commission on Government Report No. 1*, n 282, pp 330-2. The Commission's observations are given in point form and paraphrased from the original text.

program will be extensively scrutinised.

- It is difficult, and perhaps undesirable, to remove party influence entirely from any chamber. The goal must be to reduce party discipline and encourage members to adopt an independent stance when they believe it is appropriate. Their function as reviewers of government policy should be more important than their role as members of a political party.
- Rather than duplicating the function of lower house members who are constituency representatives, members of the upper house need to be encouraged to take a larger perspective of the governance of the State, representing interests and ideas and acting for the entire State.
- The electoral system for the Council should be changed to enhance the ability of the house to act as a mechanism for accountability, review and scrutiny. Measures can be implemented to loosen party discipline and provide more opportunity for the election of independents and minor parties. The ability of the Council to effectively review and scrutinise the legislative and administrative activities of government depends on the ability of the electoral system to deliver a different partisan structure from that of the Assembly.

The COG proceeded to recommend that the Council's role be recognised as that of a house of review and that the electoral system be changed to enhance this role.³⁰⁵ It accepted that proportional representation is the system most suited to the elections of upper houses, but noted that there are many systems of proportional representation in use in Australia and throughout the world. The current system in Western Australia, though one of proportional representation, was considered too susceptible to major party domination and thus party discipline.³⁰⁶ Nevertheless, seemingly mindful of the need for regional representation in what one contributor stated was 'the most urbanised State probably in the world', the Commission recommended against a state-wide proportional voting electorate.³⁰⁷ Instead it sought to alter the present system of regional proportional representation and introduce five regions each returning seven members.³⁰⁸ Whereas under the current system 20 of the 34 members obtained a quota of 16.7% of the vote (in the four 5-member regions), under the recommended system, all 35 members of the Legislative Council would require only 12.5% of the vote in each region.

³⁰⁵ Recommendation (section 9.3.1.5), *Commission on Government Report No. 1*, n 282, p 332.

³⁰⁶ See issues (9.3.3.1), submissions (9.3.3.3) and analysis (9.3.3.4), *Commission on Government Report No. 1*, n 282, pp 333-9.

³⁰⁷ See statement of Dexter Davies, *Commission on Government Report No. 1*, n 282, pp 337-9. Mr Davies warned that a State-wide system could theoretically return all members of Council from the metropolitan area.

³⁰⁸ Recommendations (9.3.3.5), *Commission on Government Report No. 1*, n 282, p 339. The COG proceeded to particularise how the quota of electors for each of the five regions should be determined: analysis (9.3.4.4) and recommendations (9.3.4.5) *Commission on Government Report No. 1*, n 282, p 341-2.

‘Ticket voting’, the COG concluded, should not be permitted because of the ‘powers it gives to political parties to influence the distribution of preferences of ticket votes’.³⁰⁹ It also considered that any concern over the increase in informal votes would be reduced by introducing optional expression of preferences into the proportional system.³¹⁰ The COG recommended retaining the four year fixed term for members whereby they all face election at the same time.³¹¹ With a view to weakening party discipline, the COG recommended adoption of the Tasmanian system of randomly ordered ballot papers (“Robson rotation”).³¹²

With respect to the committee system, the COG made recommendations aimed at fortifying the role of the Council in scrutinising the administrative arm of government. Most important was the recommended establishment of an upper house Public Administration Committee for the purpose of monitoring the entire public sector, as well as the activities of the proposed Public Sector Standards Commissioner, the State Ombudsman and the Commissioner for the Investigation, Exposure and Prevention of Improper Conduct.³¹³

At any rate, in the aftermath of WA Inc the reform agenda in WA has emphasised the need to further empower the Council and increase independent and minor party representation. At the official inquiry level, at least, due regard is had to the dangers inherent in a lax upper house which is dominated by party discipline.

3.4.4 Powers, Deadlock Machinery, Committees and Performance

Powers

The *Constitution Acts Amendment Act 1899* vests the Western Australian Legislative Council with the power to reject but not amend or initiate Money Bills. Section 46(1) provides that Money and Tax Bills shall not originate in the Council. Section 46(2) provides that the Council may not amend Money, Tax and Loan Bills. Section 46(3) provides that the Council may not amend any Bill so as to increase any proposed charge or burden on the people. Section 46(4) provides that the Council may at any stage return to the Assembly any Bill which it may not amend and request that the Assembly amend or omit any item or provision in the Bill, provided that it does not violate section 46(3). The

³⁰⁹ Analysis (9.3.5.4) and recommendation (9.3.5.5) *Commission on Government Report No. 1*, n 282, p 344.

³¹⁰ Analysis (9.3.6.4) and recommendation (9.3.6.5) *Commission on Government Report No. 1*, n 282, p 346.

³¹¹ See sections 9.3.8 and 9.3.9, *Commission on Government Report No. 1*, n 282, pp 349-52.

³¹² See section 9.3.7, *Commission on Government Report No. 1*, n 282, pp 346-8.

³¹³ See generally, sections 8.4. and 9.3 *Commission on Government Report No. 2*, Western Australia 1995, pp 164-83 and 209-21.

Assembly is free to accept or reject such requests. Section 46(5) stipulates that, except as otherwise provided in the preceding provisions, the powers of the Council are equal to those of the Assembly in respect of Bills. Accordingly, the Council can reject all Bills, including Money Bills, if it sees fit.

Deadlock Machinery

The Constitution Acts of Western Australia do not provide any formal mechanism for the resolution of deadlocks between the Assembly and the Council. Nevertheless, for much of the era of responsible government the Standing Orders of both Houses have provided for a Free Conference of Managers to consider amendments acceptable to both Houses.³¹⁴ This facility has been rarely used and the matter of deadlocks between the Houses was the subject of a Royal Commission by the Burke Labor Government in 1984.³¹⁵ The Royal Commission recommended that the powers of the Council be reduced with respect to Supply Bills and that a system of suspensory veto, similar to that in place in New South Wales, be introduced.³¹⁶ Predictably enough, the recommendations did not gain the support of the conservative Opposition parties in either House.³¹⁷

Committees

The first of the Council standing committees, the Committee on Government Agencies, was established in 1982. Three years later an upper house Select Committee on Standing Committees in the Legislative Council reported and advocated the establishment of a committee system.³¹⁸ This was undertaken in 1989 with the establishment of the Estimates and Financial Operations Committee, Legislation Committee and the Constitutional Affairs and Statutes Revision Committee.³¹⁹ In response to the recommendations of the WA Inc Royal Commission and the Commission on Government, the Council has embarked on a far more pro-active approach to the work of scrutiny and review committees. As Andrew McLaren Young has observed, when the Commission on Government recommended significant strengthening of the parliamentary committee system it stated that many members of the Legislative Council had expressed the view 'that if its future does not lie in developing a strong and effective committee system, the Legislative Council has no future at all'.³²⁰ The result has been an increase in the number of scrutiny and review

³¹⁴ See D Black, 'Financial Relations' in D Black ed, n 284, at 193 and *Royal Commission into Parliamentary Deadlocks: Background Papers, 2, 1984-5*, Western Australia, pp 82-6.

³¹⁵ *Report of the Royal Commission into Parliamentary Deadlocks 1984-5*, Western Australia.

³¹⁶ *Ibid.*, pp 34 and 74-5.

³¹⁷ D Black ed, n 284, p 444.

³¹⁸ Legislative Council, Select Committee on A Committee System in the Legislative Council, *Report* Perth, 1998. See discussion in *Commission on Government, Report No. 2, Part 2*, n 313, pp 207-11.

³¹⁹ See *Commission on Government, Report No. 2, Part 2*, n 313, pp 164-77, 207-11.

³²⁰ *Commission on Government, Report No. 2, Part 2*, n 313, pp 173-4, quoted in A M Young,

committees from four in 1995 to seven in 2000. Of these seven committees, two are joint committees and concern themselves with delegated legislation and the anti-corruption commission.

Consistent with the COG's recommendation a newly constituted Public Administration Committee has been established. This Committee's primary objective is to inquire into and report to the Council on: the means of establishing government agencies; the roles, functions, efficiency, effectiveness, and accountability of agencies; and, generally, the conduct of public administration by or through agencies, including the relevance and effectiveness of applicable law and administrative practices. It is currently paying particular attention to out-sourcing and the contracting out of government services.³²¹ As at September 2000, the Committee had produced 15 reports on issues ranging from out-sourcing and sale of Government assets to Government domestic air travel and the appeals and review processes for Western Australian universities.

Performance

To date, there has been no comprehensive study of the performance of the Western Australian Legislative Council. Still, some observations can be made. Tom Stephens, a Labor member of the Council, commented in 1997 that 'from the Labor perspective over this century, the Council has been highly selective of which government's legislation it decides to reject or amend. An examination of the statistics of Bills rejected by the Council show conservative governments have an overwhelming advantage in gaining passage of their legislation'.³²² He pointed to the Australian Senate's experience as possibly indicative of the way in which the Council, with its then recent cross-bencher balance of power, may perform its functions in the future.

More specific is David Black and Harry Phillips's 1999 case study of the operation of bicameralism in Western Australia in the contemporary era of cross-bench balance of power.³²³ Their analysis focuses on the passage of a particular piece of legislation, the 1998 abortion legislation which had its origins in a Private Member's Bill sponsored by the upper house Labor member, Cheryl Davenport. On this basis, Black and Phillips suggest that the shift in the balance of power in the Council has created the possibility for that House to play a pivotal role in the legislative process, a role which may even go beyond those functions

'Parliamentary committees. A collection of the unfit appointed by the unwilling to perform the unnecessary?' (1997) 12 *Legislative Studies* 49 at 50.

³²¹ Information on this Committee and other committees of the Western Australian Parliament is available at the following Internet address: [http://www.parliament.wa.gov.au/parliament/home.nsf/\(FrameNames\)/Committees](http://www.parliament.wa.gov.au/parliament/home.nsf/(FrameNames)/Committees)

³²² T Stephens, 'House of Review: A new era for Western Australia's upper House?' (1997) 78 *Parliamentarian* 143.

³²³ D Black and H Phillips, 'A bicameral case study: the 1998 Western Australian abortion legislation' (1999) 13 *Legislative Studies* 7.

traditionally associated with a house of review.³²⁴ The argument is that the insulation from marginal seat strategy which a multi-member electorate affords, combined with the opportunity to introduce Private Member's Bills, can allow members of most Legislative Councils to take legislative initiatives which would not otherwise be likely in a party dominated and single constituency based Assembly.³²⁵ While such events may be rare, they do serve to emphasise the fact that a cross-bencher balance of power can have implications which travel beyond those functions of upper houses associated with the review and scrutiny of the executive arm of government.

These are interesting times for the Western Australian Legislative Council. In the 35th Parliament minor parties and independents held the balance of power, albeit owing to the fact that the Liberal President of the Council is only able to exercise a casting vote. The 36th Parliament will take this situation a step further. There are now five Greens and three One Nation members, with the Greens holding the balance of power, an outcome which may well herald an era of legislation by negotiation in Western Australia, with a revitalised upper house more eager still to perform its constitutional functions as a house of review.

³²⁴ Ibid, pp 20, 22-4.

³²⁵ Ibid, pp 20-1.

4. THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES

4.1 Overview

It is a truism to say that the Legislative Council of NSW, Australia's first legislature, has undergone very significant changes since its establishment in 1824 as a five-member appointed body. That its powers and composition, as well as its underlying political *raison d'être*, have altered dramatically since that time is as obvious as it is unsurprising. What is less obvious, perhaps, and more surprising is the relatively recent nature of certain changes. Before the reforms of 1978, membership of the Council was part-time and members were indirectly elected; its reputation as an effective house of review was modest, at best;³²⁶ and, completing the portrait of an institution not overly imbued with dynamism and independence, it is said that membership generally was a 'source of patronage by which the party faithful could be rewarded'.³²⁷ As late as 1983 Ken Turner commented that 'A little improvement in the Council's modest review performance does not seem a fully satisfactory rationale for the Council, but it may be all there is'.³²⁸ But in some respects the subsequent performance of the upper house in NSW may have exceeded expectations. Since 1978, with the introduction of full-time membership and an electoral system based on proportional representation, there has been a gradual transformation of the Council into a politically diverse³²⁹ and active house of review with a strong committee system. Formally, at least, the Legislative Council of NSW is not as powerful as other Australian upper houses, in that it lacks the constitutional power to block supply. Appropriation Bills apart, however, its formal powers are equal to those of the Legislative Assembly. It is also the case that the Council is itself entrenched and that it cannot be abolished, or its powers or membership altered, without a referendum. Politically, moreover, the contemporary Council is enormously influential, if for no other reason than, since 1988, no government has controlled the upper house. Indeed, at present no fewer than 13 of the 42 members sit on the cross benches. Predictably enough, these developments have not pleased everyone. Just as the cause of reform, and even abolition, was active before 1978, it remains so today; for parliamentarians, academics, the media and the public alike the Council continues to be the subject of persistent, if not continuous, scrutiny. Like the Senate, the NSW Legislative Council invites partisan debate about the role upper houses can play in the revival of parliament as an institution, on one side, and concerning the whole question of the democratic legitimacy of second chambers, on the other.

³²⁶ K Turner, *House of Review? The New South Wales Legislative Council, 1934-1968*, Sydney University Press 1969, pp 123-24.

³²⁷ B Page, *The Legislative Council of New South Wales: Past, Present and Future*, NSW Parliamentary Library Research Service Background Paper No 1990/1, p 3.

³²⁸ K Turner, 'Some changes in the New South Wales Legislative Council Since 1978' in *The Role of Upper Houses Today*, edited by GS Reid, Proceedings of the Fourth Annual Workshop of the Australasian Study of Parliament Group, 1983, p 55. Turner wryly added, 'For that matter, if we examined the actual, rather than the traditional, performance of the Assembly, we might find similar difficulty in justifying that chamber too!'

³²⁹ In terms of party political representation.

At present the Council consists of 42 members elected on an optional preferential proportional representation basis from one electorate, the State of New South Wales. Members serve an 8 year term, one-half (21) being elected every four years to coincide with the term of Parliament. This means that a candidate requires approximately 4.5% of the total vote (after distribution of preferences) in order to secure a seat in the upper house.³³⁰ A different perspective is gained when one compares the distribution of seats with the percentage of primary votes gained. Viewed from this perspective, the results of the 1999 periodic election for half the Council seats were as follows: 8 Labor Party (37.27% of total vote); 6 Liberal/National Parties (27.39% of total vote); 1 Pauline Hanson's One Nation (6.34% of total vote); 1 Australian Democrats (4.01% of total votes); 1 Christian Democratic Party (3.17% of total vote); 1 The Greens (2.91% of total vote); 1 Reform the Legal System (1.00% of total vote); 1 Unity (0.98% of total vote); 1 Outdoor Recreation Party (0.20% of total vote). Another comment to make on this election is that it involved a huge number of candidates, 264 in all in 80 groups, set out on a 'tablecloth' ballot paper approximately one metre across by 70 centimetres down. Concerns that the system permitted the manipulation of preference flows, especially by micro and front parties, prompted the Carr Government to introduce significant changes to the above the line method of voting and the registration requirements for parties.³³¹ The likely net effect of these reforms is that, while minor parties such as the Australian Democrats and the Greens will continue to flourish in the upper house in NSW, micro parties will find it harder to attract sufficient preferences to achieve the required quota.

4.2 History of the New South Wales Legislative Council

Just as Australia's colonial history begins with NSW, so too does the account of the transition to self-government. In fact, that account does not begin until 1824, with the establishment of the Legislative Council a full three decades after the colony's inception. Even then, the transition from autocratic rule to self-government was modest in nature. Reflecting upon this slowness in the development of independent legal institutions, commentators have attributed it in part to the fact that NSW was originally a penal colony.³³² At first the social structure of the colony was correspondingly simple, a division

³³⁰ Percentage required is determined by dividing 100% by one more than the number of seats to be contested in the electorate, in this case $100 \div 22$.

³³¹ *Parliamentary Electorates and Elections Amendment Act 1999*; D Clune, 'Political Chronicles – NSW, July to December 1999' (2000) 46 *Australian Journal of Politics and History* 221 at 222. In future, voters will be able to choose their own preferences above the line by numbering the different groups listed. The first choice indicated will take the voter's preferences through the list of candidates in that group below the line. If a second choice is indicated the application of preferences will then continue through all of the candidates in that group and so on. As the Constitution requires that an elector needs to record a vote for at least 15 candidates, only groups with this number or more will be able to apply to be listed above the line. Note that owing to the changes in the registration laws for political parties, A Better Future for Our Children has been deregistered and Alan Corbett is now an independent MLC – *NSW Government Gazette*, No 34, 2 February 2001, p 552.

³³² For a discussion of the constitutional significance of these origins and subsequent developments, see R.D. Lumb, *The Constitutions of the Australian States*, 5th ed, University

between government officials on one side and convicts on the other. It was not long, however, before there were also free settlers, migrants or native born.³³³ From the convict class a growing number were emancipated either by the expiration of sentences or the receipt of pardons. With this growing social complexity came political conflicts between ‘exclusivists’ and ‘emancipists’, notably concerning the legal status of the latter. Moreover, the status of NSW itself as a penal colony became a source of constitutional conflict, with doubts being cast over the very legality of the Governor’s ordinances.³³⁴ All of which, in time, forced the British government to consider whether NSW was to be ‘continued as a gaol or converted into a colony’.³³⁵

In 1819 the British authorities appointed Commissioner JT Bigge³³⁶ to inquire into affairs in NSW and suggest reforms. On the basis of Bigge’s three official reports, plus numerous dispatches and two confidential supplements, an Act³³⁷ was passed in 1823 under which, as RD Lumb explained, NSW ‘attained the status of a full colony’.³³⁸ Quick and Garran wrote that the history of NSW as a ‘constitutional colony’ begins from that date.³³⁹ As well as providing a power to separate Van Diemen’s Land (afterwards Tasmania) from NSW, the Imperial statute of 1823 declared that ‘it is not at present expedient to call a Legislative Assembly’ and, in section 24, it provided instead for the establishment of a Legislative Council, ‘to consist of such Persons resident in the said Colony [NSW], not exceeding Seven nor less than Five, as His Majesty, His heirs and Successors, shall be pleased to appoint...’. According to ACV Melbourne:

...this Legislative Council was created as an afterthought; it was not created in response to any particular demand in New South Wales, it was not created because the government of the United Kingdom thought a Legislative Council to be necessary; it was

of Queensland Press, 1991, pp 4-21.

³³³ WC Wentworth reckoned that in 1817 the free population outnumbered the convict population by 4,470. This figure was said to include former convicts – ACV Melbourne, *Early Constitutional Development in Australia*, University of Queensland Press 1963, p 68.

³³⁴ It was uncertain whether local laws made by the Governor’s fiat in NSW were repugnant to the law of the United Kingdom. For the growing hostility of the judges to some of Governor Macquarie’s actions see - RD Lumb, n 332, pp 7-8.

³³⁵ Ibid, p 64.

³³⁶ The Commission to John Thomas Bigge was issued on 19 January 1819. For background details see – ACV Melbourne, *Early Constitutional Development in Australia*, University of Queensland Press 1963, Chapters VII and IX.

³³⁷ 4 Geo. IV. C 96 (1823). It was provided that this transitional Act should only continue in force till 1 July 1827 and until the end of the next session of Parliament.

³³⁸ RD Lumb, n 332, p 9.

³³⁹ J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books 1995, p 37.

created merely because it seemed likely to afford the simplest and the surest means of legalizing the necessary legislative acts.³⁴⁰

Such, in outline, were the origins of the Legislative Council, the history of which can be divided into four phases: first, from its inception in 1824 to the enactment of the Constitution of New South Wales Act and the creation of a bicameral Parliament in 1856; secondly, from the establishment in 1856 of a nominated Legislative Council to 1934; thirdly, from the creation in 1934 of an indirectly elected Legislative Council to 1978; and, fourthly, from the introduction in 1978 of direct elections for the Council up until the present day.

1824 – 1856: Australia's First Legislature

With Governor Brisbane presiding, the Legislative Council met for the first time on 25 August 1824. It consisted of the Lieutenant-Governor, the Chief Justice, the Colonial Secretary, the Principal Surgeon and the Surveyor-General. Their power was extremely limited, as only the Governor (who was also the chief executive officer) could initiate a Bill. The Council would then discuss the proposed laws but the Governor could override its suggestions if, in his view, such a course was consistent with the colony's needs. It seems that, in this tight web of executive and legislative power, once the Governor had presented a Bill he retired from the Council 'chamber'³⁴¹ so as not to inhibit free discussion. On the other hand, the Chief Justice remained in the Council to deliberate on the merits of a Bill upon which, in his judicial capacity, he had already issued a pronouncement on the question of its repugnancy with the laws of the United Kingdom.

The Council soon expanded. In 1825, the same year that an Executive Council was formed and Tasmania became a separate colony, the Council's numbers were increased to 7. Most importantly, this included three non-official members. In 1828, a further Act of the British Parliament changed the composition of the Council and further reduced the Governor's power.³⁴² The number of members of the Council was increased to no less than 10 and no more than 15; the Governor was to preside; and seven members were to be non-official persons. At the same time, the Governor retained a deliberative and casting vote and remained in control of what matters were brought before the Council.

Despite the continued concentration of power in the executive office of Governor, the first sitting of the new Council in 1829 marked the beginning of the transition toward responsible government. In 1842, two years after the cessation of transportation, the first Constitution Act for NSW was passed in the form of an Imperial statute.³⁴³ The Act increased the size of the Council to 36 members, 12 of whom were nominated by the

³⁴⁰ ACV Melbourne, n 333, p 112.

³⁴¹ The Council originally met at the then Government House.

³⁴² Imperial Act 9 Geo.IV Cap.83.

³⁴³ Imperial Act 5 and 6 Vic. Cap. 76.

Crown and appointed by the Governor, with the remaining 24³⁴⁴ members of this ‘squatters’ Parliament,³⁴⁵ elected by the colony’s inhabitants on a property-based franchise.³⁴⁶ The Governor no longer had immediate control of the Council and, with the introduction of the position of an elected Speaker in 1843, he ceased to be a member. Nevertheless, the Governor could propose laws for the Council to consider; as well, in the event of disagreement with the Council the Governor could use the prerogative power to withhold assent to any Bill; further, any Bill assented to by the Governor could be disallowed by the Crown within two years. A major source of ongoing friction with the squatter-dominated Council was that Crown lands, together with the revenues they generated, remained under the Governor’s control.

A watershed in the transition from an unaccountable Executive to responsible self-government was the passing, in 1850, of the Australian Colonies Government Act. For NSW, the Act’s first and most immediate effect was to further expand the Council, so that in 1851 there were 54 members, two-thirds elected. The Act also allowed the Australian Colonies to make laws for the membership of their Legislative Councils (provided one-third were nominated by the Governor) and to alter the constitution of those Councils. More significantly for the long term, the Councils were further empowered to introduce bicameral legislatures, subject to the requirement that such laws be approved by the Queen after being laid before the House of Commons and the House of Lords for at least 30 days. The opportunity existed therefore for the colonists to create their own constitution, an opportunity which resulted three years later in a Select Committee chaired by William Charles Wentworth drafting a Constitution which provided for an upper house of hereditary peers, similar in nature to the House of Lords. In the face of intense criticism this ‘bunyip aristocracy’ model was later dropped. Instead, in the revised Constitution which it sent to the British Parliament the ‘ultra-conservative’³⁴⁷ Council proposed a model based on an upper house whose members were appointed for life. With some amendments this Constitution was eventually passed into law by the British Parliament on 16 July 1855.³⁴⁸

³⁴⁴ Including 6 from the Port Phillip district which, in 1850, became the colony of Victoria.

³⁴⁵ CH Currey, ‘The Legislative Council of New South Wales, 1843-1943’ (1943) 29 *Royal Australian Historical Society Journal* 337 at 344. But note that from the outset some members, including Dr John Dunmore Lang, were of a more radical persuasion. Currey presented a detailed analysis of the appointed and elected members. He also described the first election for the electorate of Sydney as one of ‘exciting disorder’ in which the Cabbage Tree mob, as it was called, attacked the polling booths.

³⁴⁶ The qualification for electors was ownership of a freehold estate of £200 or occupancy of a dwelling house of an annual value of £20: RD Lumb, n 332, p 13.

³⁴⁷ CH Currey, n 345, p 355.

³⁴⁸ The ratification of the Imperial Parliament was required because the NSW legislature had in certain respects gone beyond its powers in drawing up the constitution: RD Lumb, n 332, p 16.

1856 – 1934: Responsible Government and an Appointed Council

The bicameral Parliament of New South Wales sat for the first time on 22 May 1856. Under the terms of the Constitution Act of 1855 the upper house consisted of no fewer than 21 members nominated by the Governor on the advice of his Executive Council for an appointment of five years; after this the membership of the Council was to be reconstituted and appointments were for life. Although a minimum number of members was specified, a maximum was not, leaving the way open for governments to ‘swamp’ an uncooperative Council with their supporters.³⁴⁹ In fact, 32 members took their place at the first sitting. There were no property qualifications for appointment, but members had to be 21 years of age and British subjects. With the Constitution Act referring to the appointment of ‘persons’ to the Council, women were not expressly barred from membership; but it was only in 1926 that an amending statute declared that the word ‘person’ in the relevant section ‘shall be construed as including a woman whether married or unmarried’.³⁵⁰ Only in 1931 were the first women appointed to the Council.³⁵¹

While most of the functions of the old Council now passed to the Legislative Assembly, under the Constitution Act of 1855 the Council retained almost the same powers as the lower house. In the years that followed the Council used these powers fully, amending or rejecting many Bills sent from the lower house, including Money Bills. With the granting of manhood suffrage in 1858, the Legislative Assembly could clearly claim to be the more democratic voice of the people, but it was frustrated repeatedly in its attempts to implement popular policies. When, in 1861, Sir John Robertson’s Land Bill was blocked by the upper house, the Government under Premier Charles Cowper introduced the tactic of ‘swamping’ the house – appointing new members to the House to get legislation passed – a tactic which became so prevalent that by 1932 the numbers in the Council had reached 126.

In the meantime, after the early flurry of constitutional conflicts, the Legislative Council appears to have settled into a more stable role of review. It is claimed in this respect that:

Conservative governments feared that an unreasonably hostile Council could lead to its abolition and from 1861 to 1934, the Legislative Council’s actions were generally less controversial, it being usually accepted that the elected House was supreme in money matters. Reform, however, was constitutionally rejected, eight attempts at reconstituting the Council having failed by 1900.³⁵²

³⁴⁹ B Page, n 327, p 1.

³⁵⁰ *Constitution (Amendment) Act 1926*. This provision amended section 16 of the *Constitution Act 1902* (NSW).

³⁵¹ Catherine Green and Ellen Webster.

³⁵² *The Parliament of New South Wales: Its Development and Operation*, Parliamentary Education and Community Relations Section of the Parliament of NSW, 1995, p 24.

In this period the Council began to perform the more characteristic roles of a house of review, considering Bills and amending or delaying them in limited cases, investigating social and political issues through committees and, more generally, perceiving itself as the guardian of the constitution and political stability. Although the two Houses came into conflict over some Bills, Geoffrey Hawker reports that 'only four free conferences between the representatives of each House had to be arranged before 1890'.³⁵³ However, this is not to say that there was not conflict between the two Houses, sometimes of a robust kind, and the movement to reform or abolish was never far away. In 1894-1895 the radical fiscal reforms proposed by Premier Reid resulted in a constitutional crisis which saw the Premier seeking a mandate to reform the upper house whose power he described as 'the very root of the source of nearly all political grievances in the Colony'.³⁵⁴

The advent of the Labor Party in government saw fresh potential for conflict between the Houses. According to Hawker:

the first Labor Government inevitably suffered from the autonomy of the Council as no previous government had...The general figures...can only suggest how badly damaged was the programme of the government, especially in the sessions of 1911-12 and 1912 when important bills affecting savings banks, State coal mines, rural tenancy, the regulation of coal miners' working conditions, early closing and the municipal franchise, failed to return from the Council. In other instances, notably industrial arbitration, the government reluctantly accepted the half-a-loaf allowed by the amendments of the Council. The Council did not, however, prevent any vital measure from passing. And, equally important, the ministry did not provoke a showdown with the Council that so many feared and that so many others in the labour movement had hoped for throughout the life of the McGowen and Holman governments.³⁵⁵

In fact, major internal tensions were caused by Holman's refusal to yield to pressure from the extra-parliamentary Labor Party to deal with Council obstruction by making ALP appointments.

J T Lang's election as Premier in 1925 signalled a more aggressive ALP approach. Throughout the two and a half years of the Government's term, the Council failed to pass almost one-sixth of Bills and unacceptably amended another 4.8 per cent.³⁵⁶ In response,

³⁵³ GN Hawker, *The Parliament of NSW, 1856-1965*, NSW Government Printer 1971, p 136.

³⁵⁴ *Ibid*, pp 185-187.

³⁵⁵ *Ibid*, p 243.

³⁵⁶ Hagan, J, and Turner, K. , *A History of the Labor Party in NSW 1891-1991*, Longman Cheshire 1991, p 125.

Lang had three appointments made to the Council and forced a reluctant Governor De Chair to agree to 25 more. Lang then introduced an abolition Bill which was defeated in February 1925 by 47 votes to 41.³⁵⁷ It seems that Lang knew he did not have the numbers to succeed but used his assault on the Council to bolster successfully his support in the ALP outside Parliament.

Intent on protecting the Council from Lang and Labor, and with the example of Queensland Labor's 1922 abolition of that State's upper house fresh in its mind, in 1929 the Nationalist Party Government introduced section 7A into the Constitution Act. The section entrenched the upper house by requiring that no Bill to abolish the Council, or alter its constitution or powers, receive the royal assent unless it was passed by both Houses and approved at referendum by a majority of the electors. Moreover, this provision requiring a referendum was itself entrenched, with the result that it could not be altered or repealed except by a Bill approved at referendum. The Premier, TR Bavin, also sought to reform the upper house during this term of Parliament, introducing into the Council in September 1929 a Bill proposing a Council of sixty, elected indirectly.³⁵⁸ The Bill passed through both Houses but was never submitted to a referendum because of the economic crisis.³⁵⁹

By 1930 the Labor Party had regained power and Lang once again sought to abolish the Council. Instead of holding an abolition referendum, Lang decided to challenge the legal validity of section 7A. Two Bills were sent from the Assembly to the Council, one to repeal section 7A and the other to abolish the upper house. On the advice of two prominent jurists who had helped draft section 7A, Professor JB Peden and FS Boyce KC, the Council allowed both Bills to pass without division. An injunction was then secured in the Court of Equity preventing the Bills' assent on the basis of a failure to observe section 7A's referendum requirement. The High Court (and later the Privy Council after Lang's dismissal) upheld section 7A and held also that it could only be repealed by a further Bill which also went to referendum.³⁶⁰

During his second term Lang also pressured Governor Sir Phillip Game for more appointments to the Council. Rejecting Lang's wilder demands, the Governor eventually agreed to 25 new MLCs. This failed to give the Government control as a split between State and Federal Labor meant that some existing MLCs deserted Lang. Hagan and Turner have concluded that during the second Lang Government 'Although Legislative Council resistance was inconvenient, the delays and defeats were not as severe as for earlier Labor Governments. In addition, the Council often provided a useful alibi, while his attacks

³⁵⁷ For a detailed account of the political events of this period, see K Turner, *House of Review?*, n 326, pp 12 – 31. The abolition attempt failed when two Labor members crossed the floor and five (including four of the 25 recent nominees) were absent.

³⁵⁸ K Turner, n 326, p 15.

³⁵⁹ A Green, *Electing the New South Wales Legislative Council 1978 to 1995: Past Results and Future Prospects*, NSW Parliamentary Library Background Paper No 2/1995, p 3.

³⁶⁰ *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

enhanced Lang's image as the implacable opponent of vested interests.³⁶¹ Troubles with faction fighting in the Labor Party and the crisis of the Depression curtailed Lang's struggle with the Council. In perhaps the most dramatic constitutional event in the State's history, Lang was dismissed from office by Governor Game on 13 May 1932 on the ground that Lang's attempts to evade federal laws involved the Crown in an illegal act.³⁶²

1934 – 1978: An Indirectly Elected Legislative Council

Despite the Labor Party's failure to abolish the Council, the events leading up to and including Lang's dismissal led to public concern as to the Governor's role, as well as the nature and function of the upper house, and resulted in general agreement that the Council's structure should be reviewed. Other forces were also at play, including concern from the conservative side of politics that the practice of 'swamping' could create a Council beyond its control, one capable of passing such 'extremist' measures as Lang's Mortgages Taxation Act of 1932. Great emphasis was placed, therefore, on the need for an effective safeguard against any 'revolutionary measure'.³⁶³ The Stevens-Bruxner Coalition Government, which now had a strong majority in both Houses, put the matter to referendum in 1933, with the electorate approving reforms for a new Council comprised of 60 members elected by both Houses of Parliament on the basis of proportional representation. A new deadlock procedure was also introduced.

There was considerable debate as to whether the Council should be directly elected. However, a system of indirect election was ultimately favoured by the Stevens Government in keeping largely with the recommendations of the Bryce Conference of 1917 in Britain for reform of the House of Lords. The intended aim was to produce an independent chamber insulated from partisan pressures that would be a genuine 'house of review' and, with the removal of 'swamping', a second chamber that would be more resistant to 'extremism'. Members were to be elected by both Houses; election was to be for a term of 12 years; 15 members (one quarter) were to retire every three years. The longer, 12-year term of office was intended to guard against sudden swings in opinion. Significantly, there were changes to the powers of the upper house too. Money Bills generally still had to originate in the Legislative Assembly. However, new section 5A of the Constitution Act introduced a 'suspensory veto' over Bills 'appropriating revenue or moneys for the ordinary annual services of the Government'. The section provides that if the Council rejects, unacceptably amends or fails to pass within one month any Bill of this kind, the Assembly can present the Bill directly to the Governor for Royal Assent. A deadlock provision, section 5B, was also introduced under which disagreements over all other Bills, including

³⁶¹ Hagan and Turner, n 356, p 132.

³⁶² Lang sought to prevent the Federal Government seizing NSW revenues for interest owed by the latter to foreign bondholders. For an analysis of the dismissal and the exchanges between Lang and the governors, see H.V Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions*, Cheshire, 1967, Chapters 14 & 19.

³⁶³ K Turner, n 326, p 26.

taxation Bills, could be resolved ultimately by referendum after a lengthy process involving delay of at least nine months.

Although elected governments found themselves confronted with a hostile Council on occasion, the period from 1934 to 1978 was also characterised by significant stretches of time when the government of the day had a majority in both Houses. Between 1934 and 1967, for approximately 18 years, or 55% of the time, the Government of the day controlled both Houses.³⁶⁴ Significantly, over 10 and a half of these were years of Labor Government: by 1949 Labor had finally gained a majority in the upper house, only to lose it once more a decade later when a group of ALP MLCs defected over the introduction of legislation to abolish the Council. Labor controlled the upper house for about 18 months after the by-election of 9 September 1965. With that exception, for the period from 1965 to 1976 the Liberal/National Coalition Government effectively controlled both Houses, albeit with the support of five or six Independent Labor members.³⁶⁵ Looking, then, at the whole period of indirect election of the Legislative Council, from 1934 to 1978, the government controlled both Houses for approximately 27 of 44 years, or 61% of the time, Labor accounting for just over 10 of these years and the Coalition for the remaining 17 or so years.

Table 1: Government Control of Both Houses in NSW from 1934 to 1988

Government Control of Both Houses³⁶⁶	Party in Government
April 1934 to May 1941	UAP/UCP Coalition
April 1949 to December 1959	Labor
May 1965 to September 1965	Liberal/Country Coalition
April 1967 to May 1976	Liberal/Country Coalition
October 1978 to March 1988	Labor
Total: approx 37 of 54 years	Total: Labor 20 years Coalition 17 years

There is agreement that, while the system of indirect election of a fixed number of Councillors put an end to swamping, it also worked to strengthen the party presence in the House. The Bryce ideal of 'independent' members with a varied experience and expertise remained just that at a time when Council membership generally became a source of patronage by which the party faithful could be rewarded.³⁶⁷ Membership of the Council

³⁶⁴ K Turner, n 326, p 10.

³⁶⁵ From 1973 to 1976 the Coalition had a majority in its own right.

³⁶⁶ Control does not necessarily mean that the party or parties in question had clear numbers in the upper house as for many years numerous members of the Council refused to identify themselves with particular parties. Furthermore, in the case of the Labor Party, internal divisions made its control of the Council uncertain at various times. Nevertheless, this Table seeks to identify periods of *de facto* control of the Council by the Government of the day.

³⁶⁷ See B Page, n 327, p 3.

was still part-time and the record of attendance for some Members was very poor.³⁶⁸ Ken Turner, in his study of the performance of the Council during the period of indirect election up to 1968, concluded that the Council during this time had a useful record of undramatic ‘tidying up’ of legislation and that attendance, amendments to Bills, debate and use of committees were all on the increase.³⁶⁹ But he went on to note that ‘the Council was intended to be much more than a useful supplement. It was expected to be a “citadel of reaction” or “bulwark of democracy” – depending upon the viewpoint of the observer’.³⁷⁰ Turner also presented a comparative perspective on the performance of the NSW Legislative Council, stating that, viewed beside its South Australian and Victorian counterparts in these years, it had ‘not been so assertive’. Turner added, ‘Perhaps its relative lack of pretension is related to its lack of a basis in popular election’.³⁷¹

Performance is always hard to gauge. For obvious reasons, during periods of government control of both Houses, an upper house tends to be little more than a ‘rubber stamp’. On the other hand, when the opposition is in control of the second chamber, the exercise of true review functions must be distinguished from the use of obstructive party tactics aimed at frustrating or embarrassing the government.³⁷² Then again, times of cross-bench balance of power are more unpredictable. For example, at the time the Askin Government introduced ‘breathalyser’ legislation in 1968 Independent Labor (those who had defected over the 1959 abolition Bill) held the balance of power; although they basically supported the Coalition Government, on this occasion the Government itself was forced to sponsor a key amendment which it knew the Opposition had the numbers to pass through the Council.³⁷³ As is discussed later, in relation to the period of Coalition Government from 1988 to 1995, periods of cross-bench balance of power can promote far greater legislative negotiation and innovation than is usual in periods when the upper house is controlled by either governments or oppositions.

Party attitudes can also be hard to gauge. In power after 1941, Labor continued to resent the Council’s capacity to block its legislation, and it is no surprise to find that it attempted both to reform (1943) and abolish (1946) the upper house at this time. Both attempts failed,

³⁶⁸ Ibid.

³⁶⁹ See K Turner, n 326, p 123.

³⁷⁰ Ibid.

³⁷¹ Ibid, p 5.

³⁷² Turner wrote, in regard to the period in question, that ‘the Council does not seem to have been greatly obstructive except for fairly short periods when dominated by an Opposition aroused by bills disliked by doctors, graziers, insurance companies, or trade unions...’: n 326, pp 124-5.

³⁷³ See K Turner, n 326, p 124.

however, and neither, it is said, was pursued with much determination.³⁷⁴ By the time Labor gained control of the Council in 1949 it was clear that some Party members, especially Labor MLCs themselves, had formulated a role for the Council as a useful buffer to protect Labor's achievements in office. These forces held sway within the Party until 1958 when a resolution for abolition was carried at the Party's Conference.³⁷⁵ Then Premier Heffron waited till November 1959 before introducing the abolition Bill into Parliament. Subsequently, the abolition Bill was defeated soundly at referendum in 1961 with 57.6 per cent of those casting valid votes replying "NO" to the question whether they favoured abolishing the Council.

Although the party presence generally was strengthened during this period in the Council, at least until well into the 1950s the Liberal Party continued to refuse to accept the formal title of official Opposition. True to this image of independence, as nurtured by the leading Liberal in the Council, Sir Henry Manning, only in the early 1960s was a more party-regulated approach adopted for the Council preselection process.³⁷⁶ In policy terms, as Labor control of the Council persisted throughout the 1950s, so disillusionment with the upper house grew in Liberal ranks. This, in turn, fuelled disagreement within the Liberal Party leading up to the 1961 referendum as to whether its policy should be abolition, reform or maintaining the status quo. After much debate, the numbers ultimately fell on the side of the latter, though with its 'retain, reform' slogan this was now only a temporary position in advance of reforming the Council and introducing direct election at a later time. More consistent was the Country Party which had determined quite early to oppose either abolition or reform of a House in which it was well represented in its existing form.

The opportunity for the Coalition to introduce upper house reform came when it was in government during the 1965-1976 period, but agreement could not be reached on a proposal to put before Parliament.³⁷⁷ According to Turner, 'in office...they had been unable to find an acceptable new formula, especially because the Country Party was unconvinced that any likely reform would suit its interests'.³⁷⁸

³⁷⁴ See RS Parker, 'The Government of NSW' in *The Government of the Australian States* edited by SR Davis, Longmans, 1960, pp 118-9 and K Turner, n 326, pp 39-49 for detailed accounts of this period.

³⁷⁵ See K Turner, n 326, pp 62-4.

³⁷⁶ See K Turner, n 326, pp 64-6.

³⁷⁷ Turner, for example, in the 1969 postscript to *House of Review?*, n 326, pp128-9, discussed a reform proposal approved by the State Council of the Liberal Party in 1969, in which a 48-member Council (half the Assembly, compared with the then 60) would have been elected on the basis of direct universal franchise on a two-members per province (24 provinces) direct election basis. This would have made the Council's electoral system most similar to that of Victoria's Upper House. The proposal did not reach Parliament.

³⁷⁸ E Chaples, H Nelson, and K Turner, *The Wran Model: Electoral Politics in New South Wales 1981 and 1984*, OUP, 1985, p 79.

1978 to 1988: A Directly Elected Council and Labor Control of Both Houses

After coming to power in the Assembly elections of 1976, the Labor Government of Premier Neville Wran introduced, in 1977, a Bill to establish a directly elected Legislative Council.³⁷⁹ At first the Bill was rejected by the Opposition controlled Council. However, a way through the impasse was found using the deadlock mechanism in section 5B of the Constitution Act. Under the terms of that section the Assembly requested a free conference of managers appointed by both Houses, the first since reconstitution of the Council in 1934 and the introduction of section 5B. In this way a compromise was reached. The Opposition obtained a number of concessions from the negotiations: replacement of the proposed list system of proportional representation with an optional preference system; and a delay in the first election for the reformed Council until the next Assembly election, so that Labor could not gain control of the reformed upper house (and potentially redistribute the 1973 boundaries which were favourable to the Coalition) before the Assembly elections due in 1979.³⁸⁰ Some have argued that Wran, in fact, never intended to go through with this tortuous process so the Opposition's gain was largely illusory.

With the support of both major political parties (although a party to the original agreement the Country Party did not campaign for the reform proposal), the Bill was approved overwhelmingly (82.6% of votes cast) at referendum on 17 June 1978. Under this new scheme, the reformed Council would consist of 45 members sitting for three Assembly terms (reducing the term from 12 to 9 years as the Assembly term was then three years), with a third retiring at each election.³⁸¹ This resulted in a quota of 6.25% of the votes for a candidate to be elected. An early general election followed on 7 October 1978 at which Labor won nine of the 15 Council seats contested, giving it a clear majority of 23 of the then 43 seats.³⁸²

At the 1981 election Labor won eight of 15 seats contested, again giving it a comfortable majority of 24 of the 44 seats. However this election also saw the first signs of minor party presence in the upper house under the new system: Fred Nile's Call to Australia group won 9.1% of the vote (but only one seat) and Elisabeth Kirkby won one seat for the Australian Democrats, with 4% of the vote. A referendum was also held in the same year increasing

³⁷⁹ For an account of the events surrounding the 1978 reforms and their significance see K Turner, n 328, pp 43-5.

³⁸⁰ Also omitted was the proposal that groups of candidates securing less than 6.25% of the total number of formal votes be excluded and their votes discarded: *Minutes of the Proceedings of the Legislative Council*, 11 January 1978, p 740.

³⁸¹ The Council was to be reconstituted in three steps; 15 members were to be elected at the 1978, 1981 and 1984 elections. Owing to the way that existing (or 'continuing') members were to be retired on a staggered basis, it would have 43 members in 1978, 44 in 1981 and 45 after the 1984 election. Thus, only after the general election of 1984 was the Council fully reconstituted as a directly elected body: B Page, n 327, p 4.

³⁸² This was accompanied by the "Wranslide" in the Assembly.

the Assembly's term to four years. This had the flow on effect of returning the Council term to potentially 12 years. The Government faced a dilemma. On the one hand, for as long as it controlled both Houses then the Council could be maintained as little more than a 'rubber stamp'. On the other, the threat posed by minor parties was looming. Moreover, a Council term of 12 years was considered by all to be too lengthy; but, then, any reduction in the Council term, to two Assembly terms or a maximum of eight years, for example, without a reduction in the number of members, would also reduce the quota required for election (to approximately 4.25% in the example given). The implications for the growth of minor party representation were all too obvious. In the event, Labor failed to use the control it had over both Houses until 1988 to propose a solution to this dilemma. Two proposals for reform were mooted when Barrie Unsworth was Premier, the first in May 1987, the second in early 1988, but neither advanced beyond 'the talking stage'.³⁸³ The first involved reducing the number of members from 45 to 35, the term from 12 to eight years and, in a novel twist, giving the party with the highest first-preference vote in the Assembly five extra seats in the Council to ensure that the government of the day had control of both Houses.³⁸⁴ This 'winner bonus' was dropped from the 1988 reform proposal which, instead, proposed changes to the deadlock machinery under which disagreements on legislation would be resolved through a joint sitting of both Houses. It was, in fact, 1991 before some kind of resolution was achieved, by which time the Greiner Coalition Government was in office.

One reform, not requiring a referendum,³⁸⁵ which was introduced before the 1988 election was the modification of the ballot paper for Council elections to adopt the 'ticket' or 'above the line' voting introduced in the Senate in 1984. This system allows voters to cast a vote for a party ticket by filling in only one box, and the determination of preferences is then made from a registered distribution lodged with the Electoral Commissioner. Its effect was to give political parties great control over the distribution of preferences as the vast majority of electors use this system of voting.³⁸⁶ In 1991 the ballot paper was further modified by the addition of party names. The political impact of these changes has been analysed by Antony Green who, in relation to their effect on minor party representation, concluded:

With minor parties able to be identified on ballot papers, and with the ticket voting option allowing control over preferences, minor parties have been able to increase their impact on the filling of the final vacancies.³⁸⁷

³⁸³ See B Page, n 327, pp 17-18.

³⁸⁴ See B Page, n 327, p 17.

³⁸⁵ Although the actual voting system for the NSW upper house is entrenched in the Constitution Act, the provisions providing for above the line voting are not.

³⁸⁶ In 1988 the figure was 85.86%, in 1991 89.29%, in 1995 90.93%, and in 1999 96.2%.

³⁸⁷ A Green, n 359, p 13. For a commentary on the more recent changes to the above the line voting system see – D Clune, n 331.

4.3 Recent History – the New South Wales Legislative Council since 1988

At the 1988 general election a decisive victory was won by the Liberal/National Coalition which claimed 59 of the 110 seats in the Assembly. But if that result was clear-cut, in the Council neither the Coalition nor Labor had a majority.³⁸⁸ For the first time in the post-1978 era of the reconstituted Council, the balance of power was held by the minor parties. At the 1984 general election, the Call to Australia group had extended its representation to two seats; after the 1988 election it now held three. The Australian Democrats also gained one more seat in 1988, thus bringing the number of cross-bench members up to a total of five in a 45-member House, with 19 Coalition members and 21 Labor making up the balance. Labor's fortunes were in decline. In the first years of the directly elected Council it was Labor which gained at the expense of the Coalition parties; now Labor suffered voter desertion to the minor parties. From 1981 to 1984, after gaining 51.8% of the Council vote at the 1981 election, Labor had held 24 of 44 seats; by 1988 it held 21 of 45 seats and at that year's election obtained only 37.5% of the vote.³⁸⁹

This was scant comfort for Premier Greiner who was forced to gain minor party support for the passage of his Government's legislation through the Council. With only 19 upper house seats between 1988 and 1991, the Government needed the support of at least three of the five minor party members to pass its legislation.³⁹⁰ After the 1991 election the Coalition Government's position improved, for it increased its upper house numbers to 20 in a reconstituted Council of 42. After subtracting the casting vote of the Liberal President, the Coalition Government only needed the support of the two Call to Australia Party members, the Reverend Fred and Elaine Nile, both of whom had for the most part been supportive during the Government's first term. The Coalition's difficulties after the 1991 elections lay elsewhere, in the Assembly, where they were in minority government with 49 of the 99 seats.³⁹¹

By 1991, the size of the Council had been reduced from 45 to 42 and the terms of office for MLCs from 12 to 8 years. As ever, behind these bare facts there lies a complex tale. For much of the Greiner Government's first term in office most of the reform proposals canvassed by the Coalition, such as that put forward by Liberal Party Minister J. Schipp in April 1989,³⁹² involved sizeable reductions to the Council and were, therefore, very much

³⁸⁸ A thorough analysis of the experiences of Parliament in the State's most recent Coalition Government during the period 1988 to 1995 is contained in R Smith, 'Parliament' in M Laffin and M Painter (eds), *Reform and Reversal: Lessons from the Coalition Government in New South Wales 1988-95*, MacMillan, 1995, p 22.

³⁸⁹ For changes to the composition of the Legislative Council since 1978, see Table 1 of Appendix A. The major party primary vote is set out in Table 5 of Appendix A.

³⁹⁰ See the last column of Table 1 of Appendix A for the cross-bencher votes required by successive governments from 1978 to 2000. There was an ALP President at the time.

³⁹¹ R Smith, n 388, pp 22-24 - Table 2.1 'The disposition of parliamentary forces in New South Wales, 1976-94'.

³⁹² Schipp suggested a Council of 39, divided into 3 provinces of 33 electorates, each province

to the detriment of the minor parties. Greiner's own frustration with the upper house had led him in late 1988 to describe the Council as 'totally irresponsible' and the 12-year terms as an 'obscurity'.³⁹³ Perspectives altered however when, in 1990-1991, in an effort to remove the Labor bias of the 1986-87 redistribution, Greiner sought to redistribute the electoral boundaries for the Assembly.³⁹⁴ To achieve this, as well as to reform the Council itself, he needed cross-bench support in the upper house and, as this was prior to the 1991 elections, the Government could not hope to rely solely on the support of the Call to Australia members. The result was a compromise on Council reform, which included significant concessions for the minor parties. In particular, the effect of reducing the size of the Council to 42 was that 21 seats would now come up for election at each general election, thereby reducing the quota required by each candidate from 6.25% to around 4.5% and, consequentially, increasing the likelihood of minor party representation.

These proposals, which were combined with proposed reductions to the size of the Assembly, were submitted to the electorate at a referendum which was held concurrently with the 1991 election. The referendum succeeded, with 57.74% of the electorate voting in favour of reform. Most contentious, politically, was the method used to remove the three surplus members of the Council,³⁹⁵ with the reform Bill providing that the last three members elected in the 1984 Council elections would have their membership terminated. These three members were as follows: one Labor (Mick Ibbett); one National (Judy Jakins); and Independent Marie Bignold.³⁹⁶ Nonetheless, the result in the longer term was to increase cross-bench representation dramatically, as well as to increase the diversity of candidates standing for election. Indeed, the 1999 ballot paper for the Legislative Council was a considerable challenge for voters. Possibly the world's largest, it comprised 264 candidates and 80 groups or parties who contested the 21 seats on offer. The outcome of that election is discussed below.

4.4 Comparative overview of the composition and structure of the New South Wales Legislative Council

At present, the Council consists of 42 members who serve an 8 year term, with one-half (21) being elected every four years to coincide with the term of Parliament. The quota requirement of 4.54% for election is the lowest of any upper house in Australia which employs a system of proportional representation. It compares with a range of 8.3% for the

electing 13 Members (this would have increased the quota to 7.14% for each province seat). Greiner foreshadowed reducing the number of Councillors to 40, and their term to 8 years (creating a quota of 4.8%): see B Page, n 327, pp 18-19.

³⁹³ See B Page, n 327, p 18, quoting *The Australian*, 5 September 1988.

³⁹⁴ For a discussion of the 1990-91 redistribution and the politics of redistribution of electoral boundaries in NSW more generally, see A Green, 'The New South Wales State Election 1991' *New South Wales State Election Series*, NSW Parliamentary Library, 2000.

³⁹⁵ See A Green, n 394, p 27.

³⁹⁶ Marie Bignold was originally appointed in place of the Call to Australia member, Jim Cameron.

South Australian Legislative Council to 14.3% for the Senate. Another, but different, point of comparison is the 16.7% quota requirement for the 5-member regions in the Western Australian Legislative Council .

Table 2: The Composition and Voting Systems of Upper Houses in Australia

	NSW Legislative Council	Senate	Victorian Legislative Council	South Australian Legislative Council	Western Australian LC	Tasmanian Legislative Council
No. of members	42	76	44	22	34	15
Electorates	Whole State	6 States: 12 seats each 2 Territories: 2 seats each	22 provinces: 2 seats each	Whole State	6 regions 7-member regions: 2 5-member regions: 4	15 divisions
Term	8 years fixed (2 LA terms)	Up to 6 years (2 HR terms) ³⁹⁷	8 years maximum (2 LA terms)	6 to 8 years (2 LA terms)	4 years fixed term	6 years fixed term
Voting System	Proportional representation	Proportional representation	Preferential voting	Proportional representation	Proportional representation	Preferential voting
% Vote Required by Candidate	4.5%	14.3% in the States	50% + 1 vote	8.3%	12.5% for 7-member regions; 16.7% for 5-member regions	50% + 1 vote
Elections	Half (21 seats) concurrently with Assembly	Half (38 seats) concurrently with House of Representatives	Half (22 seats) concurrently with Assembly	Half (11 seats) concurrently with Assembly	All at once (34 seats) with Assembly	Rotational: 2 or 3 seats yearly

The quota amount is of course critically important for the representation of major and minor parties. The greater the number of seats on offer in a multi-seat electorate at any given election, the lower the quota requirement and thus the greater the chance for minor parties and independents to secure seats. In NSW, where the quota for election is the lowest of all Australian upper houses, 13 of 42 Council seats (31%) are presently held by independents or minor parties. In South Australia, which has the next lowest quota, cross-bench members hold 22.7% of the seats.³⁹⁸

³⁹⁷ Territory Senators hold office for the same term as that of the Members of the House of Representatives, ie. up to 3 years.

³⁹⁸ As discussed in the section on the Tasmanian Legislative Council, there is clear indication that many of the 'independent' Members of that House are in fact sympathetic to the Liberal Party. The figure for Tasmania in Table 3 is taken by subtracting 4 Labor Party and 1 Independent/Labor Party Members from the total of 15.

Table 3: Comparative Representation of Minor Parties and Independents in Australian Upper Houses as at February 2001

	NSW Legislative Council	Senate	Victorian Legislative Council	South Australian Legislative Council	Western Australian LC	Tasmanian Legislative Council
Voting System	Proportional representation	Proportional representation	<i>Preferential voting</i>	Proportional representation	Proportional representation	<i>Preferential voting</i>
% Vote Required by Candidate	4.5%	14.3% in the States	50% + 1 vote	8.3%	12.5% for 7-member regions 16.7% for 5-member regions	50% + 1 vote
No. Seats	42	76	44	22	34	15
No. Seats held by Minor Parties/Independents	13	12	0 (6) ³⁹⁹	5	8	10
% of seats held by Minor Parties/Independents	31.0%	15.8%	0 (13.6%)	22.7%	23.5%	66.7%
Balance of Power	Cross-Benchers	Cross-Benchers	Liberal Party Majority	Cross-Benchers	Cross-Benchers	Independents

This is not to suggest that the level of independent and minor party representation in those State upper houses which employ a system of proportional representation (NSW, South Australia and Western Australia) is solely determined by the quota requirement. Clearly, the impact such an electoral system has in this respect will also be affected by such factors as the method of distribution of preferences, the employment of lists in election ballots and whether the State is divided into electorates (as in Western Australia). The result will also be influenced by regional variations and differences in voter demographics, as well as the extent of disaffection with the major parties, all of which are likely to vary between jurisdictions. Purely local and *ad hoc* factors can also be important. Certainly, recent experience in Western Australia does not support an unqualified link between quota size and minority party and independent representation. There the quota is relatively high: 12.5% for 7-member regions and 16.7% for 5-member regions. Immediately following the 1996 election 14.7% of upper house members (5 of 34 members) belonged to minority parties;⁴⁰⁰ with the most recent election of February 2001 that figure has now climbed to

³⁹⁹ The figure in brackets represents the number of Members of the Council representing the National Party. The Council is comprised entirely of Members from the Liberal Party, the Labor Party and the National Party. There is no minor party or independent representation. On 14 July 2000, the leader of the Victorian National Party, Peter Ryan, announced that the party had ended its alliance with the State's Liberal Party. For this reason, the National Party representation is provided here in brackets as a minor party representation.

⁴⁰⁰ Subsequently, two independent members were added to the cross-benches following their

23.5% (8 members). Still, it remains the case that the impact of the size of quotas on cross-bench numbers can be highly significant, as suggested by the NSW experience.

The term of office of members of the upper house can also have a significant impact on minor party representation. Before the changes introduced in 1991 by the Greiner Government, the Council consisted of 45 members, one-third of whom (15) retired at each general election which, given a maximum three year term of Parliament, resulted in a term for each member of up to nine years. Because only 15 seats, and not 21, were contested at each election, the percentage vote required by each candidate for election was approximately 6.25%. That the subsequent reduction in the total number of members of the Council has tended to serve the best interests of the minor, as against the major parties, is clear enough.⁴⁰¹

Again, a deterministic analysis of the relationship between electoral systems and outcomes is to be avoided. The fact is that no matter what benefits might accrue to minor parties from proportional representation generally, or the particular system in operation in NSW, it remains the case that minor party success or otherwise is attributable, in part, to the swings in popularity of the major parties with voters. Put another way, the rise in cross-bench members must be understood in the context of the disaffection and long term de-alignment in voter identification with the major parties.⁴⁰² At the periodic election of 1999 for the NSW Legislative Council, the successful minor parties and independents obtained 18.6% of the primary vote and secured 7 of 21 seats contested (33.3%).⁴⁰³ Conversely, the combined Labor Party and the Liberal/National Coalition primary vote was pegged at 64.7%.⁴⁰⁴ The suggestion is that approximately one in three electors identified with a minor

defection from the ALP, thus bringing the figure for minor party and independent representatives up to 20% (7 of 34 members).

⁴⁰¹ As discussed in section 4.3, the Greiner Government was forced to compromise on upper house reforms in order to secure the support of Independents for his reforms of the Legislative Assembly.

⁴⁰² This trend was noted by the Clerk of the NSW Legislative Council, John Evans, in 1997: J Evans, 'State of play in the NSW Legislative Council: minorities in upper houses' (1997) 11 *Legislative Studies* 46 at 46. See also, R Smith, n 388, p 24, who commented that 'during the 1980s the level of major party identification among New South Wales voters declined from about 90 per cent to 65 or 70 per cent. Political institutions, including the party machines, were viewed increasingly negatively by the electorate'.

⁴⁰³ The figure of 18.6% was obtained by adding the party votes, expressed as a percentage of the electoral roll, of successful minor parties and independents: see, A Green, *New South Wales Legislative Council Elections 1999*, NSW Parliamentary Library Research Service Background Paper No 2/2000, Table 1.1 'Summary of Votes by Party'.

⁴⁰⁴ The Labor Party obtained 37.27% of the vote and the Liberal/National Coalition 27.39%, expressed as a percentage of the electoral roll. Including informal votes, total votes/turnout was 93.13% of the electoral roll. Thus as a percentage of the *turnout*, the major parties obtained 69.5% of the vote: see A Green, n 403.

party or independent, not with one of the major parties.⁴⁰⁵ A further point to make is that the level of minor/independent representation, including votes for unsuccessful candidates in this category, accords pretty well with electorate sentiment (winning 33.3% of the seats with 30.5% of the votes cast). Moreover, these 1999 election figures can be contrasted with those for the Legislative Assembly for which the combined Labor and Liberal/National Coalition primary vote was 75.9%, more than 11% above the comparable Council figure.⁴⁰⁶ This suggests that around one in ten voters engaged in ‘split-ticket’ voting as between the two Houses. In turn, it indicates the importance of voter intentions when judging electoral outcomes and serves to underline the limitations of any deterministic form of analysis.⁴⁰⁷

4.5 Powers, Deadlock Machinery, Committees and Performance

Powers

The constitutional provisions for the respective legislative powers of the two Houses in New South Wales are unique in Australian politics. These powers are set out in Part 2 of the *Constitution Act 1902* (NSW). Section 5 is a standard provision which, first, defines the plenary powers of the NSW Legislature before, secondly, stipulating that Money Bills must originate in the Legislative Assembly. This arrangement, which seemingly provides that the Legislative Council has powers equal to those of the Assembly except that it cannot initiate Money Bills, is then qualified by sections 5A and 5B. These provisions were inserted into the Constitution in 1933 when the Council was reconstituted as an indirectly elected House. In consequence of section 5A, in respect to Appropriation Bills⁴⁰⁸ the Legislative Council is in a position comparable to that of the House of Lords.⁴⁰⁹ If the Council rejects the Bill, suggests amendments which are unacceptable,⁴¹⁰ or fails to pass

⁴⁰⁵ Calculated on the basis of turnout vote, the successful minor parties and independents obtained 20% of the turnout vote. The votes of unsuccessful minor parties and independents account for the remaining 10.5% of the turnout vote. This, of course, does not account for the distribution of these and other surplus votes under the system of preferences.

⁴⁰⁶ Five independents, but no minor party representatives, were successful.

⁴⁰⁷ While the figures in Table 5 of Appendix A, showing the primary vote for the major parties from 1978 to 1999, do not reveal a consistent pattern, the trend is towards de-alignment in both houses. In 1978 the major parties secured over 90% of the vote in both houses, a marked contrast to the 1999 result. Table 5 also indicates that the ‘split-ticket’ phenomenon has not been consistent since 1978. However, it has been over 10% for the past two NSW elections, compared with around 3-4% in 1978.

⁴⁰⁸ Section 5A refers to ‘any Bill appropriating revenue or moneys for the ordinary annual services of the Government’.

⁴⁰⁹ The *Parliament Act 1911* (UK) defined a category of Money Bills which the Lords could only delay for one month. Other Bills could become law without the consent of the Lords following a delay of approximately two years. In fact, the class of Bills to which section 5A of the NSW Constitution Act applies is much narrower than the class of Bills to which the *Parliament Act 1911* (UK) applies. It does not, for example, include taxation Bills.

⁴¹⁰ Section 5A does not expressly prohibit the Council from amending Appropriation Bills. It implies, however, that the Council cannot amend Bills appropriating revenue or moneys for the ordinary annual services of the Government, but may merely request amendments –

the Bill after one month has expired since it was transmitted from the Assembly, the Assembly may nevertheless present the Bill to the Governor for Royal Assent. A safeguard against the Assembly ‘tacking on’ provisions of an alien nature in an Appropriation Act is provided in section 5A(3). Provisions of this kind are deemed to be ‘of no effect’. The deadlock machinery, contained in section 5B, is discussed below.

It is also the case that the Council and its powers are entrenched under the Constitution Act, with the relevant parts of section 7A(1) and (2) providing as follows:

(1) The Legislative Council shall not be abolished or dissolved, nor shall:

(a) its powers be altered...

except in the manner provided by this section.

(2) A Bill for any purpose within subsection (1) shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.

The amendment to the Constitution was inserted at the end of the turbulent 1920s when the then appointed Council had come under sustained pressure from Labor under the leadership of Jack Lang. It was designed, in the words of Premier Bavin, to ‘prevent an alteration of the Constitution involving the abolition of the Legislative Council without a referendum of the electors of the State’.⁴¹¹ In its original, 1929 form, section 7A read: ‘The Legislative Council shall not be abolished nor... shall its *constitution or powers* be altered except in the manner provided in this section’. This was amended in 1978, so that the reference now in section 7A(1)(a) is only to the alteration of the Council’s powers. In *Arena v Nader*⁴¹² the NSW Court of Appeal held that section 7A referred to the Council’s legislative powers only and that, read in a purposive light, it was confined to an ‘alteration of powers by their diminution or limitation’. The arguments presented by Arena’s counsel, that section 7A protected the House’s privileges,⁴¹³ in addition to its legislative capacity, and that it prevented an enlargement, as well as a diminution, of the Council’s powers were rejected.⁴¹⁴ The effect of section 7A is to entrench the Council and its powers so that, if it is to be abolished or its powers diminished, the relevant Bill must be submitted to a referendum. In the normal course of things this will occur after the Bill has first been passed through both Houses; as discussed below, an exception may apply where the Houses disagree and the deadlock mechanism of section 5B is used.

Final Report of the Constitutional Commission, Vol 1, 1988, p 227.

⁴¹¹ NSWPD, 12 March 1929, pp 3619-3620.

⁴¹² (1997) 42 NSWLR 427.

⁴¹³ This argument was also rejected by the High Court – *Arena v Nader* (1997) 71 ALJR 1604.

⁴¹⁴ G Griffith, ‘The powers and privileges of the NSW Legislative Council: *Arena v Nader*’ (1998) 9 *Public Law Review* 227.

The clarification of the Council's powers in two related cases can also be noted in this context. In *Egan v Willis*⁴¹⁵ the High Court held that the Council had a common law power to call for state papers from Ministers in the House. In *Egan v Chadwick*⁴¹⁶ a key issue was whether the Executive may withhold documents from the Council on the ground of public interest immunity. The NSW Court of Appeal found that it could, but that such immunity would only extend in an absolute sense to a limited class of documents disclosing the 'actual deliberations of Cabinet', notably Cabinet minutes.⁴¹⁷ On the other hand, it was found that legal professional privilege is not available to resist a claim by the Council for the production of documents by the Executive.

These cases are of the highest importance in defining the powers and functions of the Legislative Council. In their joint judgment in *Egan v Willis*, Gaudron, Gummow and Hayne JJ placed this discussion of the Council's primary legislative and other scrutiny powers in the context of a broader consideration of the position of Australian upper houses in relation to the doctrine of responsible government. Quoting the Queensland Electoral and Administrative Review Commission with approval, they said that, in Australia, 'to secure accountability of government activity is the very essence of responsible government'.⁴¹⁸ After noting the introduction of responsible government in NSW under the *Constitution Act 1855 (Imp)* and analysing its implications for the relative powers of the two Houses of the NSW Parliament, the joint judgment observed that the power to order the production of State papers is 'reasonably necessary' for the proper exercise of the Council's functions which include the 'superintendence of the conduct of the executive government'.⁴¹⁹ In the NSW Court of Appeal Chief Justice Gleeson had expressed the matter in these terms:

The capacity of both Houses of Parliament, including the House less likely to be 'controlled' by the government, to scrutinise the workings of the executive government, by asking questions and demanding the production of State papers, is an important aspect of modern parliamentary democracy. It provides an essential safeguard against abuse of executive power.⁴²⁰

Deadlock machinery

Section 5B relates to disagreements between the Houses over all Bills, other than Appropriation Bills. The section provides that, if the Council twice rejects, unacceptably amends or fails to pass within two months any Bill (other than an Appropriation Bill) that

⁴¹⁵ (1998) 195 CLR 424.

⁴¹⁶ (1999) 46 NSWLR 563.

⁴¹⁷ G Griffith, *Egan v Chadwick and Other Recent Developments in the Powers of Elected Upper Houses*, NSW Parliamentary Library Briefing Paper No 15/1999.

⁴¹⁸ (1998) 195 CLR 424 at 451.

⁴¹⁹ *Ibid* at 453.

⁴²⁰ *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 665.

has twice passed the Assembly (with an interval of three months between the first rejection by the Council and the second passing by the Assembly), the Bill can be referred to a Free Conference of Managers. If the Council fails to resolve the deadlock, the Governor may convene a joint sitting of both Houses, at which members consider the matter without voting on it. In the event of continued disagreement between the Houses, the issue can then be decided by a referendum. If a majority vote in favour of the Bill at the referendum, the Bill is then presented to the Governor for Royal Assent.

Commenting on this mechanism in 1994, David Hamer said that NSW was the only jurisdiction to introduce the referendum as a means of resolving legislative deadlocks. He added that NSW 'has the right solution, but the wrong method of applying it', for the simple reason that the procedure set out in section 5B 'is so cumbersome that it is almost unusable'. On his reckoning, it takes at least nine months for the preconditions for holding such a referendum to be met, whereas a period of four months from the time the Bill left the lower house should be ample.⁴²¹ At all events, the hurdles encountered in the referendum mechanism are sufficiently formidable to deter governments from using it. Since its insertion into the Constitution Act in 1933, section 5B has in fact only been used on one occasion, in 1960 on a Bill to abolish the Council – the Constitution Amendment (Legislative Council Abolition) Bill. On that occasion, in an attempt to prevent the referendum from proceeding an action was taken claiming that the requirements of section 5B had not been met. That section 5B(5) permits the use of the deadlock mechanism for Bills to which section 7A applies is clear. This means that the Council can be abolished, or its powers diminished, by a Bill which has not passed through the upper house itself, but which has, instead, satisfied the requirements of section 5B. One point at issue in the ensuing case of *Clayton v Heffron*⁴²² was whether the decision of the Legislative Council to decline to send members to a free conference invalidated any subsequent reliance on the section 5B referendum mechanism. A majority of the High Court decided that the free conference requirement was, in fact, directory, not mandatory and therefore not an essential condition for the validity of legislation passed through section 5B.

In the lead up to the reconstitution of the Legislative Council as a directly elected House in 1978, the relevant Bill - the Constitution and Parliamentary Electorates and Elections (Amendment) Bill- was also the subject of disagreement invoking the section 5B mechanism. In the event, the disputes were resolved at the free conference stage. Reflecting on these events, the former Clerk of the Legislative Council, LA Jeckeln, said they showed that 'the Free Conference, cast aside in Great Britain since 1836 as obsolete...could still be utilised as a valuable parliamentary procedure for resolving differences between the two Houses, especially on a matter of deep constitutional and political importance'.⁴²³ On the other hand, that is the only occasion that a free conference has been resorted to, successfully or otherwise, for the resolution of a legislative deadlock since reconstitution of the Council in 1934.

⁴²¹ D Hamer, *Can Responsible Government Survive in Australia?*, University of Canberra 1994, p 136.

⁴²² (1960) 105 CLR 214.

⁴²³ LA Jeckeln, 'Reform of the Legislative Council of NSW' (1979) 47 *The Table* 72 at 83.

Committees

Committees have been appointed throughout the history of the New South Wales Parliament, but it was not until the early 1980s that committees began to emerge as a significant mechanism for parliamentary review of executive activity.⁴²⁴ In 1983, the Public Accounts Committee (a Legislative Assembly committee) was reconstituted under new legislation and was given a permanent secretariat and budget. A joint standing committee on Road Safety (Staysafe) was established in 1983 and, four years later, the Council's Subordinate Legislation Committee was reconstituted into the Joint Regulation Review Committee. If anything, this last development suggested a diminution of the Council's role, as the upper house only provided two of the nine members for this new joint committee.

Before its conversion to a House of full-time members the Legislative Council had been, in Turner's words, 'modestly active' in joint and select committee work.⁴²⁵ Page reported that this trend had continued for much of the 1980s.⁴²⁶ For the Council, it was the period after 1988 that proved the most important in this respect. The lack of a clear government majority in the upper house since that time has resulted in a marked increase in parliamentary committees, so much so that in a report on the performance of Legislative Council committees for the period July 1999 to December 1999, the Clerk of the Parliaments stated that 'Anecdotal evidence suggests that this has been the most intense period of Committee activity in the history of the Legislative Council'.⁴²⁷ A proliferation in committee inquiries can also be noted, rising from 21 in 1998-1999 to 37 in 1999-2000.

An important landmark in this development was the report in November 1986 of the Select Committee on Standing Committees for the Legislative Council, recommending the establishment of a system of standing committees. This resulted, in 1988, in the establishment of two standing committees of the Legislative Council: the Standing Committee on State Development and the Standing Committee on Social Issues.⁴²⁸ Both were 'firmly under the control of government members', there being initially five government and four non-government members on each committee.⁴²⁹ By 1991 the Standing Committee on State Development had been reduced to a membership of seven; whereas the Standing Committee on Social Issues had been increased to 10, of which five were government members, three Labor and two cross-benchers (one Australian Democrat

⁴²⁴ M Willis, 'Committee Action: New South Wales strengthens the parliamentary process', (1990) 71 *The Parliamentarian* 163.

⁴²⁵ K Turner, n 328, pp 48-55.

⁴²⁶ B Page, n 327, p 10. Table 3 in Page's work sets out the Council's committees and joint committees between 1976 and 1989.

⁴²⁷ New South Wales, Legislative Council, *Report on Performance: Legislative Council Committees: 1 July – 31 December 1999*, Number One, February 2000.

⁴²⁸ The Standing Committee Upon Parliamentary Privilege was also established in 1988. In 1995 it was reconstituted as the Standing Committee on Parliamentary Privilege and Ethics.

⁴²⁹ B Page, n 327, p 10.

and one Call to Australia). Since 1999 there are five members on each government controlled upper house standing committee, the government retaining its majority⁴³⁰ with three members (including the Chair), plus one Coalition members (including the Deputy Chair) and one cross-bench member. A third Standing Committee on Law and Justice was established in 1995. All these committees have produced important reports over the past decade or so, on subjects as diverse as accessing adoption information and juvenile justice (Standing Committee on Social Issues), the management of fisheries in NSW (Standing Committee on State Development), and the motor accidents scheme (Standing Committee on Law and Justice). Reflecting on the early years of these committees, a long-serving Labor MLC and later Chairman of the Standing Committee on Law and Justice commented that they had 'given backbench MLCs a valuable input into policy they would not otherwise have had'. He also referred to MLCs taking on the Government in a bipartisan manner:

The Social Issues Committee, for example, as a result of its Adoption reference, proposed that, contrary to existing government policy, access be provided to adoption information on the grounds that every person should have the right to information on their origins. This recommendation was accepted by the Minister and existing policy changed accordingly. When investigating drug abuse, the Social Issues unanimously recommended, again in direct contradiction to existing government policy, the elimination of virtually all forms of tobacco advertising. In this case, however, the Government was not so sympathetic and rejected the recommendation out of hand. A further instance of Council Committees acting in a bipartisan fashion to scrutinise government policy is the fact that the State Development Committee recently unanimously endorsed a report highly critical of the Government's coastal development policy.⁴³¹

In June 2000 the Deputy President of the Council, Hon Tony Kelly MLC, reported that these standing committees:

...have continued their in-depth inquiries into complex matters of public policy, in a co-operative manner. In most of these inquiries it has been possible for a consensus, unanimous report to be produced. Furthermore, these Committees have continued to see positive outcomes result from their inquiries with a good record of implementation of recommendation by Government.⁴³²

⁴³⁰ The Standing Committee on Privilege and Ethics has eight members and is now chaired by a cross-bench member.

⁴³¹ B Vaughan, 'The situation in a State Parliament' in *The PRS 25 Years On*, Department of the Parliamentary Library 1995, p 43.

⁴³² A Kelly MLC, 'Co-operation and confrontation: committees of the NSW Legislative Council', *Paper Presented to the 31st Presiding Officers and Clerks Conference*, July 2000.

A second landmark was the establishment in 1991 of joint estimates committees, the direct result of the memorandum of understanding, known as the 'Charter of Reform', signed by leaders of the minority Coalition Government and the three independent members who held the balance of power in the Assembly.⁴³³ Of this period, Rodney Smith commented that '25 joint estimates committees have been established. To date their potential to allow close questioning of government expenditure has been blunted by the inexperience of members at this task, procedural difficulties, the government's opaque accounting methods and the brevity of committee meetings'.⁴³⁴ These joint estimates committees operated until the 1995 Budget Session, after which time the Houses failed to reach agreement on their mode of operation. The Council's reaction was to set up three estimates committees of its own in October 1995, reflecting the portfolio responsibilities of the Ministers in the upper house. These committees, which were authorised to examine the appropriations of government departments, as well as the expenditure or income of statutory bodies, comprised of four Government, two Opposition and two cross-bench members. Assembly Ministers attended these Estimates Committee hearings on a voluntary basis. As discussed below, as the two Houses were again unable to agree to a joint resolution, in 1997 the Council's General Purpose Standing Committees took on the role of estimates committees, an arrangement which remains in place today.

A third landmark occurred in 1997 when a major step was taken towards establishing a comprehensive system of parliamentary committees. In that year, the Legislative Council appointed five general purpose standing committees modelled on the Senate committees in the Australian Parliament. These committees were established on an Opposition motion with the support of the cross-bench and independent members who held the balance of power in the upper house. The Government opposed the motion. The committees were re-established in 1999 at the commencement of the current Parliament, again in the face of Government opposition. In the light of these developments the Deputy President of the Council, Hon Tony Kelly MLC, has argued that there are now really 'two parallel committee systems' in the NSW Legislative Council, with a distinction being drawn between the government-controlled Standing Committees and the General Purpose Standing Committees which remain outside government control. He went on to say that these parallel sets of committees handle different types of inquiries.⁴³⁵ Kelly commented:

...in May 1999 there was a strong movement from the Opposition and cross-bench members to discard the government controlled standing committees in favour of the General Purpose Standing Committees. However, an understanding was reached that, at this stage in the development of the Legislative Council's committee system, such a move would not be appropriate. A key concern was the risk that such a move could result in the Government no longer

⁴³³ R Smith, n 388, pp 26-27.

⁴³⁴ *Ibid*, p 34.

⁴³⁵ A Kelly MLC, 'Co-operation and confrontation: committees of the NSW Legislative Council', *Paper Presented to the 31st Presiding Officers and Clerks Conference*, July 2000.

including the upper house committees in their policy development and policy review processes.⁴³⁶

As set out in the Council's resolution of 13 May 1999, under which the General Purpose Standing Committees are presently constituted, each committee is responsible for a set of government portfolios as follows:

***General Purpose Standing Committee 1
Portfolios***

Premiers, Arts, Citizenship
Treasury, State Development
Olympics
Education and Training
The Legislature

***General Purpose Standing Committee 2
Portfolios***

Health
Community Services, Ageing, Disability Services, Women
Small Business, Tourism
Mineral Resources, Fisheries

***General Purpose Standing Committee 3
Portfolios***

Police
Attorney General, Industrial Relations
Fair Trading, Sport and Recreation
Juvenile Justice, Youth

***General Purpose Standing Committee 4
Portfolios***

Urban Affairs and Planning, Aboriginal Affairs, Housing
Transport, Roads
Gaming and Racing, Hunter Development
Public Works and Services

***General Purpose Standing Committee 5
Portfolios***

Information Technology, Energy, Forestry, Western Sydney
Agriculture, Land and Water Conservation
Environment, Emergency Services, Corrective Services
Local Government, Regional Development, Rural Affairs

Each General Purpose Standing Committee consists of seven members: three government members, two opposition members and two cross bench or independent members. The

⁴³⁶

ibid.

committees may inquire into and report on: any matters referred to them by the House; the expenditure, performance or effectiveness of any department of government, statutory body or corporation; any matter in the annual report of a department of government, statutory body or corporation. Very importantly, the inquiries undertaken by these committees do not depend on a reference from the Council, but can be generated from within the committee itself, subject to the requirement that the inquiry can be accommodated under one of the committee's portfolios.⁴³⁷ In this way, inquiries can be tailored to suit the interests and expertise of their members. The committees have been granted express power to:

- (a) send for and examine persons, papers, records and things;
- (b) adjourn from place to place;
- (c) make visits of inspection within the State;
- (d) request the attendance of and examine members of the House;
- (e) publish, before presentation to the House, submissions received and evidence taken in public; and
- (f) report from time to time its proceedings, evidence taken in public and recommendations

Taken together, the fact that these General Purpose Standing Committees are not controlled by the Government, plus the broad nature of their powers and their capacity for self-referencing, make them flexible and, potentially, formidable instruments for the scrutiny of the Executive. In a relatively short space of time they have reported on an impressive range of subjects of more immediate and long-term political interest, including: Olympic budgeting and ticketing (General Purpose Standing Committee No 1); rural and regional health services in NSW (General Purpose Standing Committee No 2); the police commissioner's contract of employment (General Purpose Standing Committee No 3); the privatisation of FreightCorp (General Purpose Standing Committee No 4); as well as the NSW rural fire service and the M5 East ventilation stack (General Purpose Standing Committee No 5). The very political nature of their inquiries has tended to make this reporting process more confrontational than is usually the case for the Council's Standing Committees. For example, five of the eight reports of inquiries (apart from the examination of budget estimates) by the General Purpose Standing Committees from May 1999 to June 2000 included dissenting reports.⁴³⁸

It is fair to say that the establishment of these General Purpose Standing Committees is

⁴³⁷ A Committee meeting may be convened at the request of three members. At such a meeting, an inquiry can be proposed and the proposal voted upon. Usually, given the make-up of these committees, the outcome will depend on the casting vote of the Chair. In fact, other Council Standing Committees can initiate inquiries into matters arising in annual reports, but in practice this power is rarely, if ever, used.

⁴³⁸ A Kelly MLC, 'Co-operation and confrontation: committees of the NSW Legislative Council', *Paper Presented to the 31st Presiding Officers and Clerks Conference*, July 2000. Various factors are considered, including the tight timeframes for several of these reports, the personalities involved, as well as the inherently controversial nature of the subjects under inquiry. The paper was responding to the argument presented by Anne Lynch at the 1999 Conference on the theme of 'the fragmentation of the Senate committee system'.

among the most important developments in the Council's role as a house of review. They are, however, subject to limitations of various kinds. For example, a weakness of a practical sort is that, when acting as estimates committees, Ministers often take questions on notice, but the time taken typically to respond to these may limit their value when the questions at issue are of immediate political concern. To date no Minister based in the lower house has refused to appear before a General Purpose Standing Committee, yet it remains the case that such committees do not have the power to summon Ministers from the Assembly,⁴³⁹ or for that matter to require lower house Ministers to answer questions when they do appear. Also, in the case of the General Purpose Committees there is no formal requirement for the Government to respond to a report in any set time frame. This contrasts with the Standing Committees of the upper house, in relation to which the Government is required to respond to a committee report within six months. However, the General Purpose Committees are in a position to require attendance by public servants; and further, if a General Purpose Committee is dissatisfied with a Government's response, or by its failure to respond, then it can use its self-referencing powers to reconvene and continue the scrutiny process by establishing a new inquiry.

Opinion may differ about the actual impact the reports of the General Purpose Committees have had on Government policy to date. As was the case in relation to the inquiry into Olympic ticketing, these committees tend to deal with the most highly politicised issues and it may be that governments will be unlikely to accept any recommendation which does not accord very firmly with its own policy and agenda. In spite of this, the committees can still sometimes perform a valuable role in publicly discussing contentious issues at hearings. Further, Olympic ticketing is a good example of an inquiry where, during its course, the Government addressed many of the problems that had acted as a catalyst for the inquiry. More generally, it can be argued that the possibility that governments will ignore reports is a perennial dilemma facing parliamentary committees. This suggests, in turn, that the committee system should not be looked upon as a panacea for all the real and imagined faults of the parliamentary government. Conversely, it might also be said that considerations of this kind should not lead us to underestimate the potential significance of the committee system which is now in place in the NSW upper house. Of particular note is the unique self-referencing power of the General Purpose Standing Committees which, on one view, permits members to pursue with new vigour the Council's constitutional scrutiny or accountability function, defined by the High Court in terms of the 'superintendence of the executive government'. Just how effectively and responsibly this power is exercised may prove an important indicator of the performance of these committees. It can be noted in this regard that the Legislative Council now produces an annual report on performance in which the work of all its committees is analysed against such criteria as the number of hearings conducted, the number of reports and recommendations produced and the outcomes in relation to these.⁴⁴⁰

⁴³⁹ Legislative Council, Parliament of NSW, *General Purpose Standing Committees: Manual for Budget Estimates Hearings*, June 2000. This limitation is not peculiar to these committees. Rather, it is a reflection of the customary arrangements which apply between the two houses of parliament in the Westminster system.

⁴⁴⁰ The first of these reports is dated February 2000.

At present there is one upper house select committee – on the increase in prisoner population. In addition, excluding the various domestic committees, there are a total of nine joint committees. Two of these are joint select committees;⁴⁴¹ five are joint statutory committees;⁴⁴² and two are joint standing committees.⁴⁴³ An upper house threat in April 2000 to refer rail safety to General Purpose Standing Committee No 4 was only averted by the Government's agreement to broaden the terms of reference of the inquiry into the Glenbrook rail disaster chaired by Acting Justice McInerney.

Writing in 1990, Barbara Page thought it 'questionable' whether the Council as constituted at that time could 'support an effective committee system along the lines of the Australian Senate'. She added, 'Two committees are hardly enough to constitute a "system", but it is hard to see that many more could be staffed by a Council of 45 members, not all of whom are available for committee work...If the number of Councillors was to be further reduced, then this would be even more unlikely'.⁴⁴⁴ This is precisely what occurred in 1991 when the Council was reduced to its present size of 42 members. Clearly, the 'system' of parliamentary committees which has developed since Page wrote over a decade ago can only operate if members are prepared to serve on several committees at a time; and, echoing Page's views, it is hard to see how it could operate efficiently if the Council's size were reduced still further.

Performance

For the decade from 1978, when a directly elected Legislative Council was established, to 1988, a period in which the upper house remained under the control of the Labor Government, the performance of the Council as a house of review can be characterised as significant but limited.⁴⁴⁵ Reviewing this period and looking towards possible future developments, Barbara Page concluded:

At their best, independent upper houses, with diversified party representation, can not only prove effective means of reviewing legislative programs, but in the process can reinvigorate the entire parliamentary process. Developments in the New South Wales Legislative Council since 1978 have gone some way towards this goal. Where the Council goes from here will depend upon many

⁴⁴¹ Into safe injecting rooms and victims compensation.

⁴⁴² Committee on Children and Young People; Committee on the Health Care Complaints Commission; Committee on the ICAC; Committee on the Office of the Ombudsman and Police Integrity Commission; and the Regulation Review Committee.

⁴⁴³ The Small Business and the Staysafe Joint Standing Committees.

⁴⁴⁴ B Page, n 327, p 16.

⁴⁴⁵ A thorough analysis of the Council's performance for the period from 1976 to 1990 is contained in the NSW Parliamentary Library Background Paper by Barbara Page: see n 327.

factors, including the calibre of members, the party mix of members, the resources afforded to members and the way the committee system develops. Two crucial determinants, however, will be the extent to which parliamentarians and governments appreciate the work that can be done by a house of review, and the success with which members of that house can maintain a balance between the independence that effective review requires and the restraint needed to allow a government to govern.⁴⁴⁶

As ever, there will be different perspectives on the performance of the Council as a house of review since 1988. Throughout this period, sections of the press have campaigned for the reform or abolition of the upper house, one paper describing it as ‘a waste of taxpayers’ money’. Alternatively, that paper suggested reform proposals to reduce the number of MLCs from 42 to 34 should be ‘re-activated’.⁴⁴⁷ The Treasurer, Michael Egan, has also been a concerted critic of his own legislative chamber, calling for its abolition, refusing in the long-running saga of litigation to accept the legitimacy of its review functions, and claiming that its new committee system was a sign that ‘crossbenchers and the Opposition are prepared to behave in a wacky and reckless way for the next four years’.⁴⁴⁸ But that is only one perspective. Another would emphasise the contribution the upper house has made to reinvigorating the parliamentary process in NSW, especially in securing the accountability of government activity. In any event, an analysis of the Council’s performance since 1988 is needed if the questions posed by Page about the Council’s future development are to be answered.

1988-1995 (49th - 50th Parliaments)

As noted, after the 1988 general election, when the Liberal/National Coalition gained office, minority parties held the balance of power in the upper house. Call to Australia now had three seats in the Council, the Australia Democrats two. Following the 1991 general election, when the Coalition Government could achieve a majority with the support of the two Call to Australia members, its position in the Council was less problematic; certainly less so than in the Assembly where it was now in a minority. All the same, the successful passage of its legislative program through the Council required delicate handling throughout these years. Indeed, Premiers Greiner and Fahey had to devise strategies to keep Parliament itself functioning.⁴⁴⁹

In the Council, this involved attempting to form ad hoc coalitions of support during the period 1988 to 1991 by formally briefing independent MLCs on contentious legislation, as

⁴⁴⁶ B Page, n 327, p 19.

⁴⁴⁷ Editorial, ‘The ideal replacement is no one’, *The Daily Telegraph*, 25 July 2000.

⁴⁴⁸ G Jacobsen, ‘Inquisitors keeping up the pressure’, *The Sydney Morning Herald*, 17 January 2000.

⁴⁴⁹ R Smith, n 388, p 25.

well as making pre-emptive amendments to legislation in anticipation of objections.⁴⁵⁰ In the Assembly, the developments were even more significant. Through the 'Charter of Reform', signed in 1991 and forming the cornerstone of the Coalition Government's fragile hold on tenure until March 1995, the three independent MPs made a major impact on policy initiatives and parliamentary reform.⁴⁵¹

The impact of the Council on the Government's legislative program can be gauged from the statistics for Bills during each of the parliamentary sessions during this period.⁴⁵² As Smith notes, after the 1988 election the Council 'went from being a chamber in which amendments were rare, and successful Opposition amendments almost unknown, to one in which both government and non-government amendments were commonly passed'. To a very large extent this is an effect of the cross-bencher balance of power. There are, however, variations in this effect depending on the nature and extent of the cross-bencher support which the Government needed.

During the first period from 1988 to 1991, when the Government required support from three of the five cross-bench members, passage of legislation through the Council was difficult. Of the 556 Bills which were introduced in the Council, 116 (20.9%) had amendments proposed to them and 80 (14.4%) were actually amended. A particularly difficult area for the Government was industrial relations reform. Over 300 amendments were made to the Industrial Relations Bill 1990 in the Council, which was subsequently withdrawn by the Government.⁴⁵³ In contrast, during the period after the 1991 election through to the end of the 1993 session, when, due to the support of the two Call to Australia members, the Coalition had the numbers in the Council, the passage of legislation through the upper house appears to have been somewhat easier. Of the 325 Bills which were introduced in the Council during this period, 42 (12.9%) had amendments proposed to them and 24 (7.4%) of these Bills were amended.⁴⁵⁴ During the same period, of the 227 separate

⁴⁵⁰ See R Smith, n 388, p 25; B Page, n 327, pp 6-7.

⁴⁵¹ See R Smith, n 388, pp 25-7.

⁴⁵² Such information has been compiled from the *Journal of the Legislative Council of New South Wales, Minutes of Proceedings* and is tabulated in Tables 3 and 4 of Appendix A. It must be noted that statistics on amendments to Bills can only provide a crude indication of trends. Without differentiating between technical amendments and policy amendments (and, perhaps, amendments indicating preferences as to wording as opposed to substance), no conclusive positions can be taken. Nevertheless, the statistics on amendments do provide useful points of departure for analysis.

⁴⁵³ After the 1991 election, when the Industrial Relations Bill 1991 was proposed by the Greiner Government, the then Minister for Industrial Relations actually appeared in the Council to pilot the legislation through the debate. The relevant section of the Constitution Act 1902 permitting this action is section 38A which allows a Minister who is a member of the Legislative Assembly to sit in the Council to explain the provisions of a Bill. This can only be done with the consent of the Council itself.

⁴⁵⁴ See Table 2 of Appendix A, "Bills brought before the New South Wales Legislative Council between 1988 and 1999".

amendments which were carried in the Council, 187 (82.4%) were amendments which were moved by the Government.⁴⁵⁵ While many of these amendments are likely to have been technical in nature, it may also be that negotiations with the CTA Party were partly responsible.

The situation appeared to change in the 1994 session, the last of the Coalition Government: 123 Bills were introduced, 32 (26%) had amendments proposed to them and 15 (12.2%) were amended. But note that 10 of the 15 Bills were amended either entirely or partially by amendments moved by the Government in the Council. The Coalition Government still only required the support of the two Call to Australia members in the Council. However, in comparison to the previous sessions since the 1991 election up until 1993, both the Australian Democrats and the Call to Australia Party were somewhat more active and successful in proposing and securing carriage of their amendments. From 1991 to 1993, the Australian Democrats proposed 44 amendments but none were carried. During the 1994 session, they proposed 64 amendments and eight were carried. Similarly, from 1991 to 1993, the Call to Australia Party proposed 31 amendments and eight were carried. During the 1994 session, they proposed 26 and 18 were carried.⁴⁵⁶ This may have been due to the increasing pressure and scrutiny which the Coalition Government came under towards the end of its term of office. Call to Australia may have sought, perhaps belatedly, to capitalise on its bargaining power. It should be noted, however, that the eight successful amendments moved by Call to Australia related to two Bills, the Farm Debt Mediation Bill 1994 and the Independent Commission Against Corruption (Amendment) Bill 1994. These amendments were passed without a division and with the support of the Government.⁴⁵⁷ The Australian Democrats, for their part, were successful in amending three Bills, all of which concerned the criminal law – the Crimes (Dangerous Driving Offences) Amendment Bill 1994, the Sentencing Legislation (Amendment) Bill 1994 and the Victims Compensation (Amendment) Bill 1994. Again, these amendments were passed without a division and with the support of the Government.⁴⁵⁸

1995 to 1999 (the 51st Parliament)

The general election of 1995 saw Labor returning to office under Premier Carr, with a slim majority in the Assembly.⁴⁵⁹ It also saw a change in the composition of the Council. Politically, the upper house was now more complex. The 21 seats were distributed as follows: 8 Liberal/National; 8 Labor; 1 Australian Democrats; 1 Greens; 1 Call to Australia;

⁴⁵⁵ See Table 3 of Appendix A, 'Amendments of Bills in the New South Wales Legislative Council between 1988 and 1999'.

⁴⁵⁶ See Table 3 of Appendix A, 'Amendments of Bills in the New South Wales Legislative Council between 1988 and 1999'.

⁴⁵⁷ *NSWPD*, 30 November 1994, p 5967; *NSWPD* 1 December 1994, p 6084.

⁴⁵⁸ *NSWPD*, 23 November 1994, p 5618 and p 5260; *NSWPD*, 22 November 1994, p 5478; and *NSWPD*, 3 May 1994, p 1719, p 1725 and p 1728

⁴⁵⁹ Labor won 50 seats; the Coalition 46; Independents 3.

1 A Better Future For Our Children; 1 Shooters Party. The Coalition Parties won 38.49% of the primary vote; Labor 35.25%; minor parties and independents 26.26% in total, with successful minor party and independents winning 14.09% of the primary vote.⁴⁶⁰ Immediately after the 1995 election the composition of the upper house was as follows: 18 Coalition; 17 Labor; 2 Australian Democrats; 2 Call to Australia; 3 other. However, during the course of the 51st Parliament matters became more complex still. One defection each from the Coalition,⁴⁶¹ Labor⁴⁶² and the Australian Democrats⁴⁶³ created 3 Independent members, so that now there were: 17 Coalition; 16 Labor; and 9 others.

As one might expect, the result was a steady upsurge in legislative amendment by the Council in the 51st Parliament. The first session of the Parliament ran from 2 May 1995 to 27 January 1996. In this period a total of 21 Bills (of 124) were amended by the Council. Of the total of 199 amendments which were carried, 48.2% were proposed by the Government and 23.1% by the Opposition; no fewer than 28.7% were therefore proposed by the minor parties and independents. Of these, the Australian Democrats carried 19.6% of the total number of successful amendments (39 of 54 proposed); the Greens carried 4% of the total of amendments carried (8 of 45 proposed); the Shooters Party carried 3.5% (7 of 7 proposed); Call to Australia 1% (2 of 27 proposed); and Better Future For Our Children 0.5% (1 of 1 proposed). This last amendment related, appropriately enough, to the Children (Care and Protection) Amendment Bill 1995. Six of the amendments carried by the Shooters Party concerned the Conveyancers Licensing Bill 1995. The amendments carried by the Greens concentrated on environmental issues, but also included Bills relating to electricity supply (3 amendments); all 16 of the amendments the Greens proposed to the Olympic Co-ordination Authority Bill were negated. Call to Australia carried 2 amendments to the Bill dealing with the regulation of disorderly houses. The Australian Democrats (still with 2 members in the upper house) successfully proposed 21 amendments to the State Owned Corporation Amendment Bill 1995, plus 18 other amendments to Bills on subjects ranging from witness protection to waste management.

The second session of the 51st Parliament ran from 16 April 1996 to 30 July 1997 by which time a very clear picture of legislation by negotiation had emerged. In this period a total of 66 Bills (of 261) were amended by the Council. Of the total of 482 amendments which were carried, 28.6% were proposed by the Government, 24.3% by the Opposition and 47.1% by minor parties and independents. Of the minor parties and independents, Better Future For Our Children was responsible for 15.6% of the amendments which were carried (75 of 97 proposed). No fewer than 35 of these were to the Children (Protection and Parental Responsibility) Bill 1997; another 15 concerned a Bill amending apprehended violence orders; and 14 related to a young offenders Bill. In a similar pattern of

⁴⁶⁰ A Green, *NSW Legislative Council Elections 1995*, NSW Parliamentary Library Background Paper No 2/1996.

⁴⁶¹ Helen Sham-Ho resigned from the Liberal Party on 29 June 1998 to be an independent.

⁴⁶² Franca Arena resigned from the ALP on 7 November 1997 to be an independent.

⁴⁶³ Richard Jones resigned from the Australian Democrats on 12 March 1996 to be an independent.

concentrated legislative amendments, the 26 amendments carried by the Shooters Party related to two Bills, one dealing with home invasion, the other concerning victims rights. All 40 amendments proposed by the Shooters Party to the firearms legislation were negated. The profile for the Greens where successful amendments are concerned is somewhat broader, with the record showing that amendments were carried in the fields of criminal and administrative law, transport legislation, the supply of gas, as well as the core areas of environmental regulation. Richard Jones, formerly an Australian Democrat but now an independent, has a similar profile, including successful amendments to local government legislation and the prevention of cruelty to animals. In crude terms, the dramatic change is to the number of successful amendments – a drop from 39 to 14 (2.9% of the total of amendments carried) - proposed by the Australian Democrats, now reduced to one member in the upper house. As with Call to Australia, which carried three amendments, the Democrats no longer held such a pivotal position in the Council's ever changing balance of power.

Overall, the picture to emerge from these figures is that the minor parties and independents had successfully carried amendments in the key areas of interest to their own constituencies, be it children's rights, law and order, the environment, the rights of animals, or whatever. Whether in some cases this was the result of a deal with the Government, for example, in return for support for a key piece of legislation, cannot be said definitely. Statistics of the kind presented here can only reveal so much, and only hint at the subtleties involved in the complex behind the scenes arrangements now at work in the NSW Legislative Council.

The last session of the 51st Parliament ran from 16 September 1997 to 3 February 1999 in which period a total of 98 Bills (of 277) were amended by the Council. Of the total of 826 amendments which were carried, 38.4% were proposed by the Government, 18.8% by the Opposition and 42.8% by minor parties and independents. The last figure is slightly down on the previous session, but it does not reveal the compromises the Government may have had to make in order to secure passage of its legislative program. Perhaps the outstanding figures to note from this second session are the 134 and 132 amendments successfully proposed by Richard Jones and the Greens member, Ian Cohen, respectively. Better Future for Our Children successfully moved 38 amendments, Call to Australia (now titled the Christian Democratic Party) 29, Australian Democrats 16, and the former Labor MLC, Franca Arena, 5. As ever, great care needs to be taken when analysing statistical data of this sort, but these figures clearly reveal a trend towards increasing minor party and independent involvement in the legislative process. Among the proposed legislation which was most heavily amended by the minor parties and independents were Bills relating to: the Commission for Children and Young People; companion animals; police and public safety; forestry and national parks; native vegetation conservation; privacy and personal information; and the management of Sydney water.

1999-2000 (the 52nd Parliament)

Labor retained office in the 1999 election with an increased majority in the Assembly. In the Council, on the other hand, there were now 13 cross-bench members in a House of 42 seats. As noted, the periodic election for 21 upper house seats produced the following outcome: 8 Labor Party; 6 Liberal/National Parties; 1 Pauline Hanson's One Nation; 1 Australian Democrats; 1 Christian Democratic Party; 1 The Greens; 1 Reform the Legal

System; 1 Unity; 1 Outdoor Recreation Party. The Labor Party won 37.27 of the primary vote; the Coalition 27.39%; minor parties and independents a total of 35.34%, with the successful minor parties and independents winning 18.61% of the primary vote. At present the Council comprises: 16 Labor; 13 Coalition; and 13 other (1 Australian Democrat; 2 Christian Democratic Party; 2 Greens; 1 One Nation; 1 Better Future for Our Children; 1 Shooters; 1 Reform the Legal System; 1 Outdoor Recreation Party; 1 Unity; plus 2 Independents⁴⁶⁴).

To date, there has only been one completed session of the 52nd Parliament, the short Budget session from May to August 1999. The second session, which is still ongoing, started in September 1999 and figures for the amendment of Bills are available up until December 2000. The picture to emerge from the first session is, predictably, one of mounting complexity, in which the Government adopted a tentative approach to its legislative program. In total, 7 Bills (of 81) were amended in this period. Of the total of 127 amendments which were carried: 80 were moved by the Government; 6 by the Opposition; 23 by the Australian Democrats; 9 by the Christian Democrats; 4 by Richard Jones; 2 by Better Future For Our Children; and one each by the Greens, Reform the Legal System, Unity and Helen Sham-Ho. Most amended was a Bill dealing with motor accidents compensation.

The statistics for the ongoing second session of the 52nd Parliament are set out in Table 4 of Appendix A. They show that 50 Bills (of 255) were amended, with a total of 428 amendments being carried. Of these, 137 were moved by the Government, 68 by the Opposition and the other 223 (52.1%) by the minor parties and independents. Again Richard Jones and the Greens were particularly active in this regard, moving 107 and 55 successful amendments respectively. In percentage terms, Richard Jones moved 25% of successful amendments, and the Greens 12.9%. Other successful amendments were moved by: Better Future For Our Children 23 (5.4%); Reform the Legal System 12 (2.8%); Australian Democrats 10 (2.3%); Christian Democrats 8 (1.9%); Outdoor Recreation Party 2 (0.5%); and one each (0.2%) for One Nation, Unity and Helen Sham-Ho, all relating to the Community Relations Commission and Principles of Multiculturalism Bill 2000. Most of the Government's major pieces of legislation were amended to some extent or other, including Bills dealing with adoption, sentencing, the regulation of gambling, water management and various other environmental measures. Again, this tells us nothing of the process of legislative negotiation which must now occur on a regular basis if the Government wants to secure passage of its legislation through the upper house. In fact, a feature of the present upper house is the fact that the minor parties and independents caucus on a weekly basis, mostly it can be assumed for the purpose of deciding upon such arrangements as committee membership and procedural and resource matters generally.⁴⁶⁵ It seems that, in addition to any dealings the Government may have with individual members, it also briefs members on policy-related issues at these caucus meetings. The point can also be made that, at times, the minor parties and independents may seek to act in concert over a certain policy matter, as in the case of upper house electoral reform. On

⁴⁶⁴ Richard Jones and Helen Sham-Ho.

⁴⁶⁵ Each minor party and independent member has two full-time staffers.

other occasions, of which gambling regulation and liquor licensing are two outstanding examples, they have found themselves largely working together to achieve similar policy goals, operating more or less as a bloc against both the Government and the Opposition. Of course, where the Government and Opposition do agree, and where the required political will is in place, they have the numbers to carry legislation through the Council.

Whatever amendments have been proposed and carried to Government Bills in this period, the fact remains that the kind of 'mandate wars' which have affected the Australian Senate have not been replicated in the NSW upper house. Disagreements, sometimes trenchant in nature, have arisen, but usually a way has been found through these. One instance is the Dairy Industry Bill 2000, which saw both the Opposition and certain independent members pressing for amendments to provide for a State funded top up compensation package to farmers. The amendments providing for this package were defeated in the Assembly but passed in the Council. The Assembly disagreed with the amendments with reasons and the Council in turn insisted on its amendments. In the Assembly, again, the Government suspended Standing Orders to permit a motion to be moved in Committee of the Whole 'That the Assembly insists on its disagreement to the Legislative Council amendments a second time'. In Committee, the Leader of the National Party moved an amendment to this motion to refer the amendments to a conference of managers of both Houses. The amendment was negatived and the original motion agreed to. In the Council, the amendments were not insisted upon but only after the Government gave an undertaking to look at other avenues of assistance.

It remains the case that some Bills have not proceeded owing to the impossibility of their being passed in the Council. For example, a foreshadowed Bill to combine the positions of the ICAC and Ombudsman Commissioners was not introduced owing to lack of Legislative Council support. Also, attempts by the Government to bring independent contractors under the jurisdiction of the Industrial Relations Commission by declaring them to be employees were thwarted by the Council.⁴⁶⁶

Inevitably, many questions remain. Statistical analysis can say nothing about the legislation which the Government may have introduced in other circumstances, or about any changes which may have been made by negotiation before or after a Bill was introduced. Nor, for that matter, can it say anything about the likelihood of minor parties and independents sometimes serving the ends of Government, for example, by championing amendments which the Government might support but which it could not have introduced itself for political reasons. It is probable that the present situation in the NSW Legislative Council makes for a Government which is accustomed to negotiation and amendment as the price it must pay to get its program through. The present situation could also make for a cautious Government, at least as far as legislative initiatives are concerned. It could be, too, that an

⁴⁶⁶ D Murphy and L Doherty, 'Labor backdown on industrial bill', *The Sydney Morning Herald* 24 June 2000. The Industrial Relations Amendment Bill 2000 was in fact divided into two Bills, the Industrial Relations Amendment Bill and the Industrial Relations Amendment (Independent Contractors) Bill. The first was returned to the Assembly as the original Bill, while the second, dealing with the independent contractor provisions, remains on the Council's business paper.

upper house is itself cautious in this situation, determined to amend and scrutinise up to a point, but aware also of the dangers involved in a house of review exerting its powers to the limits of its constitutional functions.

Future perspectives

Viewed in this light, from a pragmatic standpoint, the performance of the contemporary Council can be seen as a question of balance – of the balance of political power, certainly, but also of the balancing of constitutional powers and proprieties, public expectations and political realities. Page called it a balance between the independence that effective review requires and the restraint needed to allow a government to govern. The indications are that the present NSW Legislative Council has achieved much of what Page had in mind when writing of an upper house reinvigorating the parliamentary process. Views will always differ about its underlying legitimacy, as well as concerning the performance of its members in a more pragmatic sense. However, that the Council is now a house of review in every sense is not in doubt.

With the introduction of electoral reforms in 1999, it is unlikely that its present mix of membership, with single representatives of several micro parties, will continue into the future. On the other hand, there is every likelihood that minor parties of different political persuasions will continue to be represented in the Council. If, as seems likely, minor parties still hold the balance of power, there is also every likelihood that the developments in the committee system will continue, as will the pattern of legislative amendment discussed above. But nothing is certain. Much could depend on the political make-up of the minor parties: whether they are more ‘left-leaning’ or ‘conservative’ in disposition may affect their determination to scrutinise the government of the day. Quite different patterns of legislative amendment, both in terms of volume and direction, could apply when, for example, the balance of power lies with more ‘right-leaning’ minor parties and the government itself is conservative in nature, as against a situation when an ideologically conservative government must deal with more ‘left-leaning’ or ‘progressive’ minor parties. Ideology is one important factor to bear in mind; personality and the quality of members are others. Then again, there is always the prospect of the major parties combining to abolish the Council. In his valedictory speech upon resigning, long-serving Liberal MLC, John Hannaford, warned that ‘Unless existing members made a concerted decision to enhance the role and relevance of this House, I believe during my lifetime this House will be abolished’.⁴⁶⁷ On a more positive note, he added:

The use by members of the effectively designed committee structure, together with the clearly established power of this Chamber to secure executive accountability through the production of papers to the House, is the way to satisfy the public that this House is a proper bulwark of democracy...During the next decade all members of this House should focus on the quality of public administration and make certain the Executive is accountable for the quality of that administration.⁴⁶⁸

⁴⁶⁷ NSWPD, 7 September 2000, p 8772.

⁴⁶⁸ Ibid, p 8773.

That may be a counsel of perfection, or possibly of imperfection depending on one's point of view. Still, it suggests the challenges ahead for the NSW upper house. Nothing is certain; but all things considered it seems that the Legislative Council will continue to be a vigorous and powerful component of the NSW Parliament for the foreseeable future.

5. CONCLUSIONS

At the level of principle, in terms of contested debate concerning the democratic legitimacy of upper houses, the arguments for and against bicameralism can often be black and white in nature. From this perspective, an upper house is either right, in theory, or it is not. At a more pragmatic level, however, any assessment of the performance of a Legislative Council is likely to be less certain. There will be instances when some particular achievement, such as a committee report or an amendment to a controversial piece of legislation, is considered positively by many people and will be pointed to as an instance of the value of a powerful house of review. Indeed, an effective upper house committee structure may itself be seen as an important indicator of parliamentary vitality. Conversely, other instances or indicators of performance may be viewed more negatively. Critics can point to such things as the potential for committees to replicate party political divisions, or the instinct of governments to ignore wherever they can any unwelcome recommendations made by upper house committees. Doubts can also be expressed about the whole process of legislative amendment when minor parties hold the balance of power, both as an issue of principle as to whether this is an undermining of the democratic system, and as a more pragmatic question concerning the effective formulation of statutory law.

For those who have long-argued for the reinvigoration of the parliamentary system, the new-found activism of upper houses is a welcome development, in principle as well as in a practical sense. But to what extent is this dependent on more contingent considerations, including the political make-up of an upper house? Upper houses in which predominantly right-wing minor parties or independents hold the balance of power may be looked upon quite differently to ones in which, as has recently tended to be the case in most Australian jurisdictions, the balance of power is in the hands of more 'progressive' forces. In some circumstances, what was a principled commitment to bicameralism could very easily dissolve into pragmatic scepticism. Tasmania has long had a Legislative Council supposedly not controlled by the major parties, but few are the essays of praise on its behalf. It is also interesting in this regard to note how ideological perspectives on upper houses have changed. For the first three-quarters of the 20th century they were damned by the Left as obstructing the will of the people, most dramatically at the federal level in 1975; now some elements of the Left champion the role of upper houses in enhancing democracy. Attitudes towards upper houses can also be influenced by the political climate of the day: for example, when a government with a big program is in office, the possibilities for conflict increase; whereas in times like the 1950s when there is little call for governmental activism a hostile upper house may not be such a problem. All of which suggests that, while any analysis of a bicameral legislature must be based on theoretical considerations and issues of principle, the influence of contingency is never far away. What is perceived to be review, in one context, is looked upon as obstruction in another. The line between independent upper house review and the independent pursuit of policies by minor parties in areas where their mandate is questionable can be very fine.

One thing is clear, the same 'strong bicameralism' which is said to characterise the Australia Senate is also found in the Australian States. As for the Tasmanian Legislative Council, even if the reputed 'independence' of its members is more a matter of appearance than reality, its constitutional powers are real enough, as is the fact that the use of differing

electoral systems for the upper and lower houses has resulted in what Lijphart described as an incongruence in their composition. On the other side, the added fact that the Tasmanian Legislative Council has now been reduced to 15 members must call its capacity to operate in the long term as an effective house of review into question. When this is combined with the observation that the Tasmanian upper house is not entrenched and can therefore be abolished or eroded by an ordinary Act of Parliament, then this instance of ‘strong’ bicameralism is probably the most vulnerable of the second chambers in the Australian States. Like the Tasmanian upper house, the Victorian Legislative Council is elected by a system of preferential voting, but Victoria is also the only bicameral Australian jurisdiction which does not use proportional representation for either of its Houses of Parliament. In fact, the composition of the Victorian Council has tended to replicate that of the lower house, especially when the conservative side of politics has been in power. As in the Kennett era in the 1990s, this has led to periods of relative inactivity where the functions of review and scrutiny are concerned. Yet, the Council’s powers, although reduced in the 1980s in respect to Supply Bills, remain considerable. As recently as October 2000, a conservative dominated Victorian Council showed it still had the constitutional capacity and political will to defeat the latest proposals for upper house reform.

The ‘strong’ bicameralism of the three remaining jurisdictions - NSW, South Australian and Western Australian – is less qualified in nature. An important and common factor in this respect is an electoral system based on proportional representation. With certain variations in detail, the Legislative Councils of these three States are all of this kind. All three combine the key attributes of democratic legitimacy, well-defined constitutional powers and a strong element of minor party representation. Indeed, in all three at present minor parties and independents hold the balance of power. In NSW, in particular, the opportunities this has presented for the refashioning of the committee system, as well as in relation to legislative amendment, have resulted in very important developments. Moreover, these seem to have been achieved within the broad parameters of the doctrine of responsible government. To date, the ‘mandate wars’ of the Australian Senate have not occurred in the States. Policy disagreements have emerged, of course, but they generally been accommodated by some compromise, or simply by the upper house not insisting upon its amendments.

‘Split-ticket’ voting suggests that, for now, the electorate looks favourably on a situation where government majorities in the lower house are not replicated in the second chamber. Again, at one level this raises concerns about mandates, as well as theoretical considerations about the constitutional functions of houses of review. At another level, however, such matters may be less relevant. Reflecting on these matters, the former Liberal Party strategist, Grahame Morris, remarked recently that the electorate generally ‘doesn’t really care’. He went on to say:

The electorate is quite happy to have independents around or someone with the balance of power...When you say to them that the Government can’t really govern properly, they say ‘that’s your problem. Stop whingeing, go away and sort it out’.⁴⁶⁹

⁴⁶⁹M Grattan, ‘Howard ally predicts messy election’, *The Sydney Morning Herald*, 20

The electorate may not always take this attitude, nor may there always be such disaffection with the major parties. For now, however, something like this would appear to sum up the public perception of the various Australian versions of 'strong bicameralism'.

Table 1: Composition of the New South Wales Legislative Council since 1978¹

Period	Total seats	ALP seats (%)	Liberal seats (%)	National seats ² (%)	Coalition (%)	Australian Democrat seats (%)	CTA/CDP seats ³ (%)	Other Minor Parties seats (%)	Indep. seats (%)	Total Minor Parties/ Indep. Seats (%)	Cross-Bencher votes needed by Govt. ⁴
1978-81	43	23 (53.5%)	14 (32.6%)	6 (14.0%)	20 (46.5%)	-	-	-	-	-	ALP 0
1981-84	44	24 (54.5%)	12 (27.3%)	6 (13.6%)	18 (40.9%)	1 (2.3%)	1 (2.3%)	-	-	2 (4.5%)	ALP 0
1984-88	45	24 (53.3%)	11 (24.4%)	6 ⁵ (13.3%)	17 (37.8%)	1 (2.2%)	2 (4.4%)	-	1 (2.2%)	4 (8.9%)	ALP 0
1988-91	45	21 (46.7%)	12 (26.7%)	7 (15.6%)	19 (42.2%)	2 (4.4%)	3 ⁶ (6.7%)	-	-	5 (11.1%)	Coalition 3 of 5
1991-94	42	18 (42.9%)	13 (31.0%)	7 (16.7%)	20 (47.6%)	2 (4.8%)	2 (4.8%)	-	-	4 (9.5%)	Coalition 2 of 4
1995-97	42	17 (40.5%)	12 (28.6%)	6 (14.3%)	18 (42.9%)	1 ⁷ (2.4%)	2 (4.8%)	1 BFFOC ⁸ 1 Greens 1 Shooters (2.4% each)	1 Richard Jones (2.4%)	7 (16.7%)	ALP 4 of 7
1997-99 ⁹	42	16 (38.1%)	11 (26.2%)	6 (14.3%)	17 (40.5%)	1 (2.4%)	2 (4.8%)	1 BFFOC 1 Greens 1 Shooters (2.4% each)	3 Richard Jones Franca Arena ¹⁰ Helen Sham-Ho ¹¹ (2.4% each)	9 (21.6%)	ALP 5 of 9
1999-	42	16 (38.1%)	9 (21.4%)	4 (9.5%)	13 (31.0%)	1 (2.4%)	2 (4.8%)	1 BFFOC 2 Greens 1 One Nation 1 Outdoor Rec 1 RTLS ¹² 1 Shooters 1 Unity (2.4% each; Greens 4.8%)	2 Richards Jones Helen Sham-Ho (2.4% each)	13 (31.0%)	ALP 6 of 13

¹ Compiled from statistical data contained in *Journal of the Legislative Council of New South Wales*, Minutes of Proceedings, Vols 168 - 189. Resignations or deaths which did not affect seat distribution between parties are not included.

² Originally the Country National Party.

³ The Call to Australia Group was renamed the Christian Democratic Party (Fred Nile Group) on 17 September 1997.

⁴ Due to the fact that the President of the Council has only a casting vote, the number of cross-bencher votes needed by the government may depend on the affiliation of the President.

⁵ Originally 7, The Hon. Finlay Melrose MacDiarmid OBE resigned from the National Party on 2 July 1985 to be an independent.

⁶ Marie Bignold left the Call to Australia Group on 27 March 1991 to be an independent for the 1991 session (20/2/91 – 3/5/91).

⁷ Richard Jones resigned from the Australian Democrats on 12 March 1996 to be an independent.

⁸ The Better Future for our Children Party.

⁹ The 3rd session of the 51st Parliament (1995-99), listed separately from the first two due to changes in composition.

¹⁰ Franca Arena resigned from the ALP on 7 November 1997 to be an independent.

¹¹ Helen Sham-Ho resigned from the Liberal Party on 29 June 1998 to be an independent.

¹² The Reform the Legal System Party.

Table 2: Bills brought before the New South Wales Legislative Council between 1988 and 1999 (49th to 51st Parliaments)

Period (by sessions)	Total Bills Introduced	Passed by Council	Bills intd. in Council	Priv. Members bills intro. in Council	Bills to which amends. Proposed (% total bills)	Bills amended by Council (% total bills)
1988	43	40	-	-	15 (34.9%)	9 (20.9%)
1988-89-90	341	334	25	4	59 (17.3%)	43 (12.6%)
1990-91	139	128	11	4	37 (26.6%)	25 (18%)
1991	33	20	0	0	5 (15.2%)	3 (9.1%)
1991-92	91	80	6	8	14 (15.4%)	6 (6.6%)
1992-93	128	115	16	4	16 (12.5%)	12 (9.4%)
1993	106	90	21	2	12 (11.3%)	6 (5.7%)
1994	123	95	44	5	32 (26%)	15 (12.2%)
1995-96	124	102	25	7	36 (29%)	21 (17%)
1996-97	261	231	44	10	92 (35.2%)	66 (25.3%)
1997-99	277	244	39	15	115 (41.5%)	98 (35.4%)

Table 3: Amendments of Bills in the New South Wales Legislative Council between 1988 and February 1999 (49th to 51st Parliaments)

Session of Parl.	Total Bills Introduced	Total Bills amended	Total amends. Proposed	Amends. Carried (% total proposed)	Amends. moved by Govt (% total proposed)	Govt. amends. carried (% total carried)	Amends. Moved by Opp. (% total proposed)	Opp. amends. carried (% total carried)	Amends. moved by AD. (% total proposed)	AD amends. carried (% total carried)	Amends. moved by CTA. (% total proposed)	CTA amends. Carried (% total carried)	Amends. Moved by others. (% total moved)	Others amends. Carried (% total carried)
1988	43	9	-	-	-	-	-	-	-	-	-	-	-	-
1988-89-90	341	43	-	-	-	-	-	-	-	-	-	-	-	-
1990-91	139	25	1068	897 (84.0%)	606 (56.7%)	588 (65.6%)	290 (27.2%)	226 (25.2%)	117 (11.0%)	76 (8.5%)	31 (2.9%)	6 (0.7%)	Bignold: 15 (1.4%)	Bignold: 1 (0.1%)
1991	33	3	30	9 (30.0%)	2 (6.7%)	2 (22.2%)	19 (63.3%)	4 (44.4%)	4 (13.3%)	3 (33.3%)	1 (3.3%)	0 (0%)	Bignold: 4 (13.3%)	Bignold: 0 (0%)
1991-92	91	6	173	57 (32.9%)	44 (25.4%)	41 (71.9%)	104 (60.1%)	14 (24.6%)	22 (12.7%)	0 (0%)	3 (1.7%)	2 (3.5%)	-	-
1992-93	128	12	154	126 (81.8%)	105 (68.2%)	105 (83.3%)	22 (14.3%)	15 (11.9%)	7 (4.5%)	0 (0%)	20 (13.0%)	6 (4.8%)	-	-
1993	106	6	82	44 (53.7%)	41 (50.0%)	41 (93.2%)	18 (22.0%)	3 (6.8%)	15 (18.3%)	0 (0%)	8 (9.8%)	0 (0%)	-	-
1994	123	15	173	66 (38.2%)	30 (17.3%)	30 (45.5%)	53 (30.6%)	10 (15.2%)	64 (37.0%)	8 (12.1%)	26 (15.0%)	18 (27.3%)	-	-
1995-96	124	21	352	199 (56.5%)	96 (27.3%)	96 (48.2%)	122 (34.7%)	46 (23.1%)	54 (15.3%)	39 (19.6%)	27 (7.7%)	2 (1.0%)	BFFOC 1 (0.3%) Greens 45 (12.8%) Shooters 7 (2.0%)	BFFOC 1 (0.5%) Greens 8 (4.0%) Shooters 7 (3.5%)
1996-97	261	66	963	482	138 (14.3%)	138 (28.6%)	318 (33.0%)	117 (24.3%)	60 (6.2%)	14 (2.9%)	51 (5.3%)	3 (0.6%)	BFFOC 97 (10.0%) Greens 167 (17.3%) Shooters 69 (7.2%) Jones 63 (6.5%)	BFFOC 75 (15.6%) Greens 69 (14.3%) Shooters 26 (5.4%) Jones 40 (8.3%)
1997-99	277	98	1440	826	322 (22.4%)	317 (38.4%)	295 (20.5%)	155 (18.8%)	23 (1.6%)	16 (1.9%)	73 (5.1%)	29 (3.5%)	BFFOC 57 ((3.6%) Greens 360 (25.0%) Shooters 4 (0.3%) Arena 5 (0.3%) Jones 301 (20.9%)	BFFOC 38 (4.6%) Greens 132 (16.0%) Shooters 0 (0%) Arena 5 (0.6%) Jones 134 (16.2%)

Table 4: Amendments of Bills in the New South Wales Legislative Council between May 1999 and December 2000 (52nd Parliament)

Session of Parl.	Total Bills Introduced	Total Bills amended	Total amends. Proposed	Amends. Carried (% total proposed)	Amends. moved by Govt (% total proposed)	Govt. amends. carried (% total carried)	Amends. Moved by Opp. (% total proposed)	Opp. amends. carried (% total carried)	Amends. moved by AD. (% total proposed)	AD amends. carried (% total carried)	Amends. moved by CTA. (% total proposed)	CTA amends. carried (% total carried)	Amends. Moved by others. (% total moved)	Others amends. Carried (% total carried)
May 99-Aug 99	81	7	223	127 (57%)	81 (36.3%)	80 (63.0%)	26 (11.7%)	6 (4.7%)	55 (24.7%)	23 (18.1%)	10 (4.5%)	9 (7.1%)	BFFOC: 2 (0.9%) Greens: 11 (4.9%) ORP: 0 (0%) PHON: 0 (0%) RLS: (0.9%) Shooters: 0 (0%) Unity: 3 (1.3%) Jones: 33 (14.8%) Sham Ho: 1 (0.4%)	BFFOC: 2 (1.6%) Greens: 1 (0.8%) ORP: 0 (0%) PHON: 0 (0%) RLS: 1 (0.8%) Shooters: 0 (0%) Unity: 1 (0.8%) Jones: 4 (3.1%) Sham Ho: 1 (0.8%)
Sept 99-Dec 2000 (session ongoing)	255	50	1479	428 (28.9%)	138 (9.3%)	137 (32.0%)	166 (11.2%)	68 (15.9%)	162 (11.0%)	10 (2.3%)	73 (4.9%)	8 (1.9%)	BFFOC: 42 (2.8%) Greens: 338 (22.9%) ORP: 3 (0.2%) PHON: 6 (0.4%) RLS: 19 (1.3%) Shooters: 0 (0%) Unity: 19 (1.3%) Jones: 283 (19.1%) Sham Ho: 6 (0.4%)	BFFOC: 23 (5.4%) Greens: 55 (12.9%) ORP: 2 (0.5%) PHON: 1 (0.2%) RLS: 12 (2.8%) Shooters: 0 (0%) Unity: 1 (0.2%) Jones: 107 (25%) Sham Ho: 1 (0.2%)

BFFOC – Better Future For Our Children; ORP – Outdoor Recreation Party; PHON – Pauline Hanson One Nation; RLS – Reform The Legal System

Table 5: Major Party Primary Vote for Both Houses, 1978 -1999

Election	Legislative Council Primary Vote %			Legislative Assembly Primary Vote %		
	ALP	Coalition	Total Major Parties	ALP	Coalition	Total Major Parties
1978	54.91	36.28	91.19	57.77	36.88	94.65
1981	51.78	33.77	85.55	55.73	38.83	94.56
1984	46.88	42.61	89.49	48.77	43.00	91.77
1988	37.51	46.15	83.66	38.40	49.54	87.98
1991	37.29	45.34	82.63	39.05	44.68	83.73
1995	35.25	38.49	73.74	41.26	43.94	85.20
1999	37.30	27.40	64.70	42.20	33.70	75.90