Submission

on

Electoral Reform

to

Electoral Reform

Strategic Policy

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1. Introduction

On 3 January 2013 the Hon Jarrod Bleijie MP, Attorney General and Minister for Justice, released a discussion paper canvassing options for electoral reform in Queensland.[1]

Submissions on matters raised in the discussion paper have been invited and are due by 1 March 2013.

FamilyVoice Australia is a national organisation which, among other things, has a longstanding interest in democracy, the rule of law, constitutionalism and the separation of powers. It is independent of all political parties.

2. Democratic principles and electoral funding

The funding of political candidates and parties in elections is an integral element of a democratic system of government. The way in which elections are funded is of critical importance to the integrity of the electoral process and the strength of parliamentary democracy as a whole. Consequently, election funding law should facilitate the kind of representative democracy cherished by the Australian people.

2.1 Individual freedom

As Professor Lumb points out in his book Australian Constitutionalism, the roots of the modern Australian system of government lie in the debates and battles in earlier centuries over providing a system of effective constraints on government power.[2] The idea of the rule of law, or limited government, overturned the earlier doctrine of unlimited sovereignty under which people were subject to the arbitrary will of the ruler.

The core idea of the Australian system of government is recognition of the right of the citizen to freedom under the law. This fundamental freedom is expressed in many ways, including the right to stand for election and vote, and also through the right of a citizen to use his financial resources to further his political objectives. Any constraint on the freedom of a citizen to fund political candidates or parties needs to be fully justified.

Reasonable measures to encourage citizens who wish to fund political candidates or parties should be seen as a means to foster political freedom.

This recognition of individual freedom emerges from the Judaeo-Christian understanding of mankind being made in the image of God and therefore being entitled to respect and dignity.[3]

2.2 Freedom of association

Another central element of the dignity of mankind is the recognition that people are inherently relational and naturally join with others in groups of various kinds.

In a political context this involves "recognition of the fact that between the ruler and the mass of the citizenry there are a variety of groups to which the citizens belong. They may be occupational (guild, union, association), religious (church), educational (school, university), cultural and social. Certainly, in earlier periods, battles over authority and allegiance were often fought between an overweening State (Monarch) and the Church anxious to preserve the rights of its members but also at times

encroaching on such rights. The concept of limited sovereignty recognises that claims to allegiance or obedience may arise from a number of groups..."[4]

Political parties are among the kinds of association which citizens should have the freedom to form or to join. Furthermore, political parties should have the freedom to raise funds and use them in political campaigns, subject only to constraints which have strong justification.

2.3 Civil society

Freedom of association provides the basis for civil society, which has been defined by the London School of Economics Centre for Civil Society as follows:

> *Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy groups.*[5]

The links between civil society and democracy were explored by Alexis de Tocqueville and developed by 20th century theorists like Gabriel Almond and Sidney Verba, who identified civil society as having a vital role in a democratic order.[6] They argued that many civil society organisations facilitate better awareness and a more informed citizenry, who make better voting choices, participate in politics, and hold government more accountable as a result. Such organisations also accustom participants to the processes of democratic decision making.

Consequently, election funding arrangements should facilitate, not hinder, the organisations which constitute civil society, including political parties, trade unions, business associations and advocacy groups.

2.4 Representative democracy

Australia's system of representative democracy must be distinguished from direct democracy on the one hand and totalitarian democracy on the other.

Representative democracy is characterised by elected representatives who form a parliament charged with the responsibility of making decisions and acting in the public interest – without direct consultation with the electorate. This enables swift and resolute action in the face of changing circumstances.

Direct democracy involves decisions being made either by referendum or by delegates to a ruling body bound to vote in accordance with decisions made by a majority of their electors. Such a system is inherently slow and can be dominated by sectional interests.

In a totalitarian democracy, elected officials are bound to support an ideology independently of the views of the electorate. The ideology may be considered beyond the understanding of the electorate. The duty of the officials is to ensure that any inconsistent public or private activities are eliminated.[7]

Representative democracy works best when elected representatives maintain a close relationship with their constituents. While not being bound by their electorate, representatives are then able to take the views of the electorate into consideration when decisions are made in parliament.

Election funding arrangements should be designed to facilitate a close working relationship between representatives and their constituents.

2.5 Limitation of abuse

While civil society has a vitally important role in a healthy democracy, some elements of society nevertheless create the potential for corruption and abuse. Political donations may be used to purchase political favours, access to decision-makers, or consideration in policy formation. Such practices could distort the democratic process and undermine faith in government.

An important element of the Judaeo-Christian perspective on human society is an understanding of frailty or sinfulness of mankind. This notion is captured in Lord Acton's famous dictum: "Power tends to corrupt and absolute power corrupts absolutely."[8]

Consequently, some constraints on civil society and commercial institutions are necessary for the limitation of corruption and abuse.

2.6 Caps and bans on political donations

The democratic principles outlined above suggest that any restriction on private donations to political parties or candidates would need to be justified on the basis of verifiable concerns that could not be adequately addressed by other means such as disclosure requirements.

In the absence of any specific concerns about inappropriate sources of donations there is no justification for the current caps on political donations.

The right to freedom of association includes the right to form corporations or industrial organisations in accordance with the relevant laws. In the final analysis corporations and industrial organisations are the creatures of natural persons. In principle then the same kind of rules about donation should apply to both natural persons and corporations and industrial organisations. It may be that donations from corporations and industrial organisations may in general be larger than from those from natural persons. In this case an appropriate disclosure threshold will, as a matter of course, disclose a higher percentage of all donations from corporations and industrial organisations.

There is no justification for banning donations from particular sources such as corporations or industrial organisations.

Appropriate disclosure requirements should adequately meet the need for transparency.

> ***Recommendation 1:***
>
> ***The current caps on political donation should be removed and no bans on donations from particular sources such as corporations and industrial organisations be introduced.***

2.7 Disclosure of contributions and gifts

Mandatory public disclosure of financial contributions to political parties and candidates and their campaign expenditures is an important safeguard against inappropriate influence on the political system.

Disclosure thresholds should be set to achieve an appropriate balance between encouraging participation in the democratic process through financial support to political parties and candidates, and the public interest in knowing the source of political donations, especially larger donations.

The *Electoral Act 1992* currently requires the disclosure of any donation of $1,000 or more.

This is arguably too low as it is hard to imagine that a donation as low as $1,000 gives rise to serious concerns about the possibility of undue influence.

Factors supporting a higher threshold for disclosure include:

(a) preserving the privacy of citizens (and their businesses) who choose to make political donations, and

(b) limiting the compliance costs of political parties in reporting the sources of donations over the threshold.

The disclosure threshold should be high enough to allow political parties to attract adequate private donations without an undue administrative burden of disclosure.

The major factor that should limit the threshold is the public interest of enabling the public to be aware of the major supporters of political parties. A robust democracy requires openness and accountability in the contributions to political parties, since those contributing large amounts could have significant influence over candidates who are elected to positions of responsibility and authority. The disclosure threshold should be set at a level that will allow the public knowledge of the source of the larger donations to political parties and candidates.

The three criteria for determining an appropriate threshold are: preserving donor privacy, limiting compliance costs, and safeguarding the public interest.

One approach to determining the threshold would be by reference to a fixed proportion of the total donation income raised. This would:

(a) safeguard the public interest by ensuring that a fixed proportion of the donation income raised is subject to public disclosure; and

(b) adjust the threshold to compensate for changes in donor generosity affected by changing salaries, living costs and other economic factors.

A large proportion of party campaign funds come from relatively few big donations. For example, in 2005 the Joint Standing Committee on Electoral Matters of the Commonwealth Parliament reported that "88% of the value of disclosed donations to the major parties is greater than $10,000".[9]

Young and Tham[10] point out that this percentage refers only to receipts classified as "donations", whereas if the total receipts were used instead then only an average of 64.1% of total receipts would have been disclosed from 1998/99-2004/05 with a threshold of $10,000. The earlier threshold of $1500 would have resulted in an average disclosure of 74.7% of all receipts.

An analysis of New South Wales data on political donations[11] suggests that a disclosure threshold between $4000 and $5000 would ensure that the source of 80% of total donation income was disclosed.

From the Queensland mandatory income disclosure returns for the First Half of 2012, it would seem that donations of $10,000 or more accounted for some 80% of party income. Some 90% of party income was received from donations over $2,000. The remaining 10% of party income was received from a large number of smaller donations. It seems unnecessarily burdensome to require individual

disclosure of some many small donations. Reporting the total amount received from smaller donations should suffice, without needing to identify the individual donors.

The following hypothetical example illustrates the typical makeup donations to campaign funds:

Tom	$8,000
Dick	$1,000
Harry	$200
Mary	$200
Ann	$100
John	$100
Bill	$100
Jane	$100
Peter	$100
Judy	$100
Total	**$10,000**

One donor contributed 80% of the funds, 90% came from two donors, and the remaining eight donors contributed only 10% of the funds. The potentially most influential donors were firstly Tom and secondly Dick. To ensure disclosure of 80% of campaign funds, a threshold of $8,000 would suffice. A threshold of $1,000 would achieve disclosure of 90% of campaign funds.

In order to balance donor privacy, compliance costs and the public interest, a fairly high percentage of total annual donations – possibly about 90% – would be appropriate to determine the monetary threshold required to ensure disclosure of this percentage of donations.

Recommendation 2:

The annual threshold for disclosure of political donations should be based on the previous year's returns so as to ensure that a fixed percentage, possibly about 90%, of total donations are disclosed.

2.8 Public funding

Proponents of public funding of electoral campaigns claim that this is the best means to provide a greater equality in the opportunity to present policies to the electorate and to reduce the risk of corruption and undue influence.

Proponents suggest that undue influence can be controlled by reducing the reliance of political parties on private donations to raise sufficient funds for an election campaign. However, it appears that public funding simply increases the amount available for election campaigning by all parties unless it is accompanied by severe restrictions on private donations. Proponents of public funding tend to support such restrictions.

This approach presumes that government, rather than civil society, is responsible for ensuring that parties and candidates are adequately funded. This well-intentioned presumption has the potential to undermine the strength of political parties by reducing their dependence on supporters as well as to alienate taxpayers who resent the use of taxes to fund election campaigns by parties whose values they oppose.

The notion that candidates should be entitled to public funding might be expected in a top-down totalitarian democracy but not in a bottom-up representative democracy.

Recommendation 3:

Public funding has failed to achieve its stated objectives of creating equality between parties and reducing reliance on private donations. Support for public funding is increasingly coupled with calls for upper limits on private donations and caps on election expenditure. These measures cannot be justified in a free society. In order to avoid undermining the important relationships between citizens and political candidates, public funding of political parties and candidates in elections should be discontinued entirely.

2.9 Caps on election expenditure

The democratic principles outlined above suggest that, in the absence of a clear justification, any caps on election expenditure would be inappropriate.

The case for caps on election expenditure has not been made out. It is either merely a sentiment that "too much" is being spent on elections or, when coupled with proposals to increase public funding and limit private donations, an attempt to "socialise" election campaigning.

Recommendation 4:

There is no case for capping expenditure on election campaigns. Current caps should be removed.

3. Truth in political advertising

Proposals for truth in advertising laws to apply to electoral campaigning have a superficial appeal. However, such laws also involve practical problems of enforceability.

Who would decide whether a particular statement was untrue? This is not a role for the Electoral Commission of Queensland. It would require judgement, for which judicial proceedings in court would be needed.

If court action were commenced the matter would presumably become *sub judice* and this would silence further public debate on the matter – a direct curtailment of freedom of speech.

How quickly could the matter be decided? Court proceedings are often relatively slow. A decision before polling day would be most unlikely.

What relief would be appropriate? In a very close election, the losing candidate might see an opportunity to initiate action against his or her opponent in the hope of forcing a re-election. That would delay the declaration of the result in that electorate until a new election for that position could be held. If such action by losing candidates became routine, it could create uncertainty and instability in the parliament.

Much better would be for the truth to emerge from public debate on the matter in dispute – and let the voting public decide.

Such laws would be likely to trespass on the implied right to freedom of political speech. The existing robust methods of democracy give ample opportunity for defeated political parties to expose inaccuracies or dishonest promises made by a successful political party in an election campaign. The next election is always just three years away!

Recommendation 5:

Truth in advertising laws for election campaigns are unworkable and undesirable and should not be pursued.

4. How to vote cards

The familiar scene of several volunteers offering how-to-vote cards, each recommending a vote for a particular candidate or party, to electors as they approach the polling booth is a vibrant part of a robust democracy in action.

For many of these volunteers this is the only overt political activity they may engage in. The ability of parties and candidates to recruit volunteers for this purpose is a sign of a healthy democracy with a pleasing level of civic engagement.

Those who have engaged in this activity almost universally remark on the mutual respect exhibited towards volunteers handing out the how-to-vote cards of rival candidates and parties.

How-to-vote cards play a significant role in assisting voters complete their ballot papers in such a way as to ensure a formal vote by the numbering of all squares as well as by advising voters on the recommendations for preferences by the candidate or party who attracts their first preference vote.

Any proposal to curtail this process by banning the handing out of how-to-vote cards at polling booths is ill-conceived and unworthy of support.

It could be useful to have how-to-vote cards available on the Electoral Commission of Queensland (ECQ) website prior to the election but there is no need to make submission of a how-to-vote card compulsory.

Recommendation 6:

The current provisions for handing out how-to-vote cards at polling booths should be maintained and no steps should be taken to curtail this democratic activity.

The Electoral Commission of Queensland should publish any how-to-vote cards received on its website.

5. Proof of identity: Integrity of the voting process

The process of voting can be considered to have integrity if two conditions are satisfied. Firstly, the identity of each voter should be correct, i.e. the person voting should be the elector whose name is marked as having voted. Secondly, each voter should vote only once.

Many electorates have 20 or more polling booths. Suppose John knows the full name and address of Bill who lives in his electorate and the polling booth at which Bill intends to vote.

Currently, John can go to the same polling booth as Bill to cast his own vote, and then go to the other 19 or more polling booths and vote under Bill's name, thus voting 20 or more times in the election, let's say in a marginal electorate. If several people did this, the extra votes could have a significant effect on the outcome of the election.

The current ECQ processes will quickly identify that Bill has voted multiple times when the lists of voters at each polling booth are compared after voting closes. However that will only lead the ECQ

and the police to Bill, who has done nothing wrong and is completely unaware of John's dishonest voting.

Although the number of extra votes could be identified, they could not be removed from the count because there is no way of knowing which candidate gained the invalid votes. If the number of extra votes were sufficient to change the result of the election, the best that the losing party could hope for is an appeal to the Court of Disputed Returns, which may or may not order another election. The process of having another election is time and resource consuming, and a hassle for everyone involved. The hassle may also affect the voting of the electorate, which may prejudice the party that sought another election.

In a close election such a disputed outcome could affect which party had the numbers to form a government. It is not prudent to wait until after this occurs to improve the integrity of the voting system.

5.1 Voter identity

The integrity of the voting system requires that a person vote only once, and as themselves. It is reasonable to require some personal identification, such as a driver's licence, rates notice, or electricity or gas account. Banks routinely require some personal identification when making over-the-counter withdrawals and it should be possible for a similar system to be applied by election officials.

With such a requirement enforced, it would be very difficult for one person to claim to be someone else and vote as that person. With a requirement to show adequate personal identification in place, a person could only vote multiple times as themselves, and would be identified by existing ECQ processes.

Recommendation 7:

To prevent a person from voting either multiple times or under another name, each person should be required to provide adequate personal identification to the AEC officials at polling booths prior to casting his or her vote.

5.2 Voting locations

An alternative solution to the problem of multiple voting is to limit each voter to one polling place, as advised by the ECQ. The ECQ, which already mails information regarding the election to each household, could include a card assigning the electors at that address to a designated polling place.

If a person were unable to attend that polling booth, they would still be able to use absentee voting, but their vote would not be counted immediately. The counting of those votes could then wait until there has been a comparison with other absentee votes and the electoral roll in the polling booth to ensure that a person has neither voted normally, nor tendered multiple absent votes.

Recommendation 8:

As an alternative to adequate personal identification of voters on the day of the election, to prevent a person from voting either multiple times or under another name, each person should be required to vote either at a polling booth assigned by the ECQ or use an absentee vote.

6. Closing the rolls

Central to the conduct of a free and fair election is the integrity of the electoral roll. The integrity of the electoral roll must not be compromised and all Queenslanders should have confidence in the accuracy of the roll.

Allowing enrolment on polling day or in the days immediately before polling day creates a possible loss of integrity of the roll with increased possibility of fraudulent enrolments that cannot be easily checked in time given the other pressures on the ECQ during the election period.

Following the decision of the High Court in *Rowe v Electoral Commission*[12] it may not be constitutionally valid to close the rolls when the writs are issued. However, any grace period after the issuing of writs should be kept to the constitutional minimum of seven days.

Recommendation 9:

Enrolment on polling day should not be introduced. The rolls should be closed seven days after the issuing of writs.

7. Electronic voting

Electronically assisted voting for those with particular disabilities that prevent them from exercising a secret and independent vote by writing on a ballot paper should be introduced on a trial basis using the best available technology. The right to vote, and to do so secretly, should not be limited by a person's physical disabilities.

Recommendation 10:

Electronically assisted voting for those with particular disabilities that prevent them from exercising a secret and independent vote by writing on a ballot paper should be introduced on a trial basis using the best available technology.

8. Postal voting

The trend to broaden the grounds on which a postal vote can be requested is not healthy. Postal votes can be lodged before polling day and therefore before the conclusion of the election campaign. Election campaigns are an important feature of a robust democracy in which those seeking election present their case to the voters. Broadening eligibility for postal votes could result in a significant proportion of the electorate voting before the campaigning is finished and without the full benefit of all the information and arguments being put by candidates for election. Some critical fact or policy announcement may come to light only in the last few days of the campaign when it will be too late for early postal voters to be affected by it.

Recommendation 11:

There should be no general broadening of the grounds for allowing a postal vote.

9. Compulsory voting

Queensland has been well served by a system of compulsory voting. This system has contributed towards making Queensland, along with the Commonwealth and the other States of Australia, one of the most politically stable jurisdictions in the world.

Compulsory voting, which was introduced for Queensland in 1915, is relatively unusual outside Australia.

While it could be argued theoretically that true democracy demands the right to refuse to vote, the practical reality is that compulsory voting produces a better indication of the opinion of the people than voluntary voting.

Other constitutional democracies which have voluntary voting, such as Britain and the United States of America, have much lower participation in elections than Queensland's 91% turnout at the 2012 election. In the United States of America huge sums of money are spent on encouraging people to vote, regardless of which party they vote for. Voluntary voting also creates the possibility that some areas could be ignored in attempts to encourage voting if the residents seem likely to vote in the opposite manner to those organising the "encourage people to vote" campaigns. The number of UK votes cast to elect the European Parliament was reported to be less than the number of votes cast in the British version of the television show Big Brother.[13]

Recommendation 12:

Compulsory voting should be retained to ensure that Queensland governments are determined by most of Queensland's adult population rather than by a more politically motivated minority.

10. Full preferential voting

Another important element of electoral systems in Australia is preferential voting. Indeed, preferential voting is relatively exclusive to the Australian political system. Most similar political systems employ the simple majority (first-past-the-post) system.

The main advantages of the full preferential system are:

- It ensures that only a candidate with the support of an absolute majority of the electorate can win, eliminating the possibility of minority winners; in other words, the winning candidate is the "most preferred" or "least disliked" candidate.

- It ensures that voters can support minor parties and independent candidates, knowing that their preferences may be used to decide the winner; thus, votes for minor parties and independents are not wasted.

In short, the primary benefit of full preferential voting is that it most accurately represents the will of the voters.

A major disadvantage of simple majority voting is that candidates can be included for the purpose of weakening an opponent's support. Consider John who becomes a candidate for an electorate and campaigns for the building of a shopping centre in his electorate. Suppose that Bill decides to oppose this development by becoming a candidate for the same electorate. John might enlist three other people as candidates for the same electorate who would agree with Bill. With simple majority voting, the total vote against John is split among four candidates and John may win easily. Under a

preferential system, the vote is ultimately split between the two candidates who have the most preferred support and the winner in an electorate always has more than half of the final preferred vote.

Optional preferential voting as it has been used in Queensland effectively disenfranchises those voters who may not fully understand the consequences of not expressing an order of preference for all the parties or groups contesting the election. In particular votes for minor parties or independents which fail to indicate a preference for either of the major party candidates would frequently be exhausted before the final determination of a ballot.

Full preferential voting ensures that the person elected is preferred by a majority of at least 50% of voters in the electorate over the next leading candidate.

Optional preferential voting can result in the person elected being supported by only a minority of voters in the electorate.

Full preferential voting is the appropriate way to determine which candidate should represent a single member electorate.

A savings provision should be introduced to deal with those circumstances where a voter has clearly expressed preferences up to a certain number and then mistakenly duplicated a number making it impossible to follow the full preferences. Such a vote should be counted as far as the preference indication is clear.

Recommendation 13:

Full preferential voting should be reintroduced to Queensland with a savings provision to allow ballot papers with non-consecutive numbering errors to be included in the count up to the point at which the numbering error began.

11. Restoration of the Upper House

Restoring an upper house to the Queensland Parliament would be the single most important action that would improve the electoral system in Queensland.

11.1 The problem of power

Lord Acton recognised the problem of power in his famous letter to Bishop Mandell Creighton in 1887: “All power tends to corrupt and absolute power corrupts absolutely.”[14]

British Prime Minister William Pitt the Elder had said much the same thing in a speech to the House of Lords in 1770: “Unlimited power is apt to corrupt the minds of those who possess it.”[15]

Earlier still, French philosopher Baron Charles-Louis de Montesquieu noted the problem in his book The Spirit of the Laws (1748). He suggested limiting the tendency for governments to become tyrannical, by proposing a “separation of powers”.

Montesquieu believed that power in society should be separated among the three French classes: the monarchy, the aristocracy and the commons (ordinary people). He said that such a system would provide "checks and balances" – thus coining a phrase we still use today.

Montesquieu said a government must have certain features if its citizens are to have the greatest possible liberty. He said that since “constant experience shows us that every man invested with power is apt to abuse it ... it is necessary from the very nature of things that power should be a check to

power". This can be achieved by separating the executive, legislative, and judicial powers of government. If different persons or bodies exercise these powers, then each can check the others if they try to abuse their powers. If only one person or body holds several or all of these powers, then nothing can stop that person or body from acting tyrannically.[16]

He also said the parliament (or legislature) should be composed of two houses, each of which can prevent acts of the other from becoming law. The judiciary should be independent of both the parliament and the government. Judges should restrict themselves to applying the laws to particular cases in a fixed and consistent manner.[17]

Montesquieu visited Britain from 1729 to 1731. He expressed admiration for its system of government which had evolved over many years to embody, if somewhat imperfectly, many of the ideas he later expressed in his book The Spirit of the Laws.

This book had great influence on political leaders across the Atlantic as they began framing a constitution for the new United States of America. At the US Constitutional Convention of 1787, The Spirit of the Laws was frequently cited as delegates attempted to lay down the principles for a government that would maximise political liberty while also maintaining the rule of law. The resulting Constitution reflected many of Montesquieu's ideas, including his advocacy of a separation of powers via such measures as bicameral parliaments.[18]

11.2 The Australian Senate – constraining government power

The eminent Australians who framed the Australian Constitution in the late 19th century were well aware of the need for a separation of powers. They drew upon experience in other countries, especially Britain, the US and Switzerland, to devise a system of government in which no single group could gain absolute power. They designed a bicameral parliament with a lower house called the House of Representatives and upper house called the Senate – as in the US.

Harry Evans has been the Clerk of the Senate since 1988. In 2008 he wrote: "Australia may be regarded as one of those fortunate societies which has managed to deal with the problem of power by constructing a system in which the power of the state is constrained by power controlling power. The Australian Constitution has many of those safeguards which arise from that construction:

- a practically irremovable constitutional monarch, operating through a prestigious representative;
- federalism: an entrenched division of power between the centre and the states;
- the cabinet system, which ensures collective decision-making by a politically responsible group rather than one person;
- responsible government, whereby the holders of the executive power can be removed at any time when the legislature (parliament) loses confidence in them;
- an independent judiciary with a powerful constitutional court."[19]

However Harry Evans believes that these safeguards have been weakened over time. Various High Court rulings have meant that the commonwealth government can and does interfere with the responsibilities of the states. The cabinet is largely controlled by the prime minister and his inner circle, who dictate votes in the lower house where the government always has a majority. Members of the judiciary are appointed by the executive alone – if governments hold power for long enough, the High Court can be stacked with judges of a particular or extreme ideology.

The Senate, with 12 senators elected from each state and two from each territory, stands out as a lone bulwark against the otherwise relatively unfettered power of the prime minister and government of the day. The method of election (by proportional representation since 1949) usually ensures that the government does not have a majority of senators and must negotiate with other parties to achieve its legislative aims.

Governments tend to dislike upper houses for this very reason – they act as a check on government power. Former Australian Prime Minister Paul Keating once described the Senate as "unrepresentative swill",[20] even though its members represent the diversity of Australian viewpoints more effectively than the House of Representatives. Other government leaders have complained that upper houses "obstruct" government legislation.

Harry Evans said that the "obstructionist" charge against the Senate is not supported by the facts. "In the first ten years of the Howard government, during which it lacked a majority in the Senate, an average of 154 bills were passed each year. There were only 17 deadlocked bills in the term 2001-2004," he said.

"… It may be argued that they were important bills. The contrary consideration is that, lacking broader support, they did not deserve to pass. Many more passed that were also important. Thus there was little obstruction. Many bills passed because the government compromised with other parties and accepted amendments. This can hardly be called obstruction; it is what legislatures are meant to do, according to the textbooks."[21]

Harry Evans said Senate inquiries may be even more important than the Senate's legislative role. "During its history the Senate has adopted measures which have had the effect of compelling governments to provide information and to explain themselves in ways that would otherwise not be required," he said. "These measures ranged from insisting in 1901 on details of proposed expenditure in appropriation bills, to requiring in 2001 the publication on the internet of details of government contracts. All of these measures depended, directly or indirectly, on governments not having control of the Senate…

"Of particular significance was establishment in 1981 of the Scrutiny of Bills Committee, to scrutinise all legislation to detect any violations of civil rights or of legislative propriety. This measure was taken, in a period when the Fraser government had a majority in the Senate, only because several government senators promoted it and then voted against the government on the issue," Harry Evans said.[22]

11.3 NSW Legislative Council – uncovering corruption

The NSW Legislative Council was originally an undemocratic body – its members were appointed by the governor on advice from the government of the day. However this changed with reform in 1978, when 45 Council members were elected by proportional representation from the whole state, with a third of the seats contested at each election. In 1991 the number of Council members was reduced to 42, with half the seats contested each election.[23] Proportional representation has made possible the election of minor parties who are not normally able to achieve lower house seats – such as the Greens and the Christian Democratic Party (CDP, formerly known as Call to Australia). CDP leader Rev Hon Fred Nile MLC was first elected to the NSW Legislative Council in 1981. He was elected for a third term in 2007.

Harry Evans has described some of the ways in which the NSW Legislative Council provides a safeguard against tyranny. One example is the Council's power to require the NSW government to produce documents on matters of public concern, in situations where the government wanted to protect itself by keeping the documents secret.

"In 1996, when the Treasurer (a member of the NSW Legislative Council) refused to disclose documents in response to an order, the Council ejected him from the chamber and from the building. He was sufficiently ill-advised to take the Council to court, and lost the case comprehensively," Mr Evans said. "The NSW Supreme Court upheld the power of the Council to impose a penalty for refusal of an order for documents… Council orders for documents have now become so unremarkable that they go unreported … the first disclosures of disturbing information about the financial entanglements of the cross-city tunnel were the result of a Council order."[24]

11.4 Queensland's lost upper house

The Queensland Legislative Council chamber, complete with plush red carpet and furnishings, is still in use in Brisbane's Parliament House. It provides a dignified setting for official openings of parliament by the Queensland governor, and the occasional reception or poetry reading. However its original purpose – to serve as an upper house to constrain abuse of power by the Queensland government of the day – ceased in 1922 when the Council was abolished, in defiance of an earlier referendum.

The bicameral parliamentary system of the new colony of Queensland, set up in 1860, was copied from the parent colony of New South Wales. Members of the Queensland Legislative Council were appointed by the governor on advice from the premier of the day, for life.

Since early governments were conservative, so were the unelected upper house MPs. The Australian Labor Party was formed and began to win government in the 1900s. The ALP was unimpressed when the Council blocked part of its reform agenda. In 1915 the Queensland Labor government twice passed a bill in the Legislative Assembly to abolish the upper house – but that house, comprising mostly non-Labor MPs, rejected it.

To resolve the deadlock, the government held a referendum to abolish the Council in 1917. But most people – 179,105 – voted a clear no. The yes vote was just 116,196. Queenslanders wanted to keep their parliamentary safeguards.[25]

Labor forces were not deterred. Over the next few years, Labor governments advised the governor to appoint a total of 30 new Labor members of the Legislative Council – enough to defeat the remaining conservative members. A bill to abolish the Council eventually passed in 1921 and came into effect in 1922. Some conservative calls for reform rather than abolition of the upper house had fallen on deaf ears.

Nicholas Aroney and Scott Prasser comment:

> *Queensland's Constitution was thus fundamentally altered through successive acts of executive and legislative power effectively concentrated in the hands of the premier and cabinet. And, indeed, the politics of Queensland have ever since been determined by this same concentration of power – executive and legislative – in the hands of a small coterie of politicians. If there was no separation of powers under the conservative regime of Premier Bjelke-Petersen, its origins are to be traced to the abolition of the Legislative Council by the progressive forces of 1922…*
>
> *As Justice Bruce McPherson has pointed out, 'In fashioning an instrument of unlimited power for their own use, the politicians of that era lacked the wisdom to foresee, or perhaps to care, that control of it would one day pass to their opponents. Those who now regret the ambit of executive authority in Queensland can be in no doubt who were responsible for creating it.'*[26]

While other states have at times been plagued by government corruption, Queensland has arguably experienced more of it. In recent times, Queensland governments have attempted to deal with the lack of government accountability associated with their "winner takes all" power in the single house. They have established a Crime and Misconduct Commission and parliamentary committees.

However these attempts have not succeeded, since members of the CMC are appointed by the government,[27] and every parliamentary committee has a majority of government members. Only an upper house, elected by a different method from the lower house (like the Senate), can provide independent oversight of government operations and adequate review of legislation.

Aroney and Prasser argue that Queenslanders should vote in a referendum to restore their upper house of parliament: "Queensland's present unicameral legislature fails to deliver democratic practice, effective citizen participation, regional and minority representation and accountable government. An upper house for Queensland is an idea whose time has come…"[28]

11.5 A restored upper house - proportional representation

All lower houses in Australia, except for Tasmania's, are composed of members elected from single-member electorates. This favours large political parties and generally results in a party or coalition having a clear majority in the lower house, thereby enabling the formation of a strong government. In the absence of an upper house, however, an unfettered government may become effectively an elected dictatorship.

A government having no effective checks on its power can become crudely 'majoritarian' and ignore the views even of substantial minorities in the community. In contrast to majoritarianism, a healthy democracy, according to John Stuart Mill, includes a 'willingness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views'.[29]

For an upper house to provide an effective check on such majoritarian rule it is desirable that it is not usually controlled by any major party or coalition. Rather, the composition of the upper house should reflect a broader range of community opinion than the lower house. This is best achieved with multi-member electorates and proportional representation as the voting system.

A good example of multi-member electorates is provided by the Australian Senate, for which each state acts a single electorate from which six senators are elected. For state legislative councils, the whole state acts as a single electorate in New South Wales and South Australia. For electing the legislative councils in Victoria and Western Australia, the states are divided into several multi-member regions, each returning several members. In Victoria, five members are elected from each of eight regions. In Western Australia, six members are elected from each of six regions.

Either approach would be feasible in Queensland.

Proportional representation has proved successful as an upper house voting method that achieves a broader composition including independents and representatives of the larger minor parties as well as the major parties. As a result, the government party or coalition seldom controls the upper house and must negotiate contentious legislation with others. Usually, this results in modified legislation that is more acceptable to a larger proportion of the community – a good democratic outcome.

For a candidate to be elected from a multi-member electorate by proportional representation, his or her total number of votes must exceed a quota. The quota is the total number of formal votes divided by one more than the number of candidates to be elected. For example, in a regular Senate election where there are six senators to be elected in each state, the quota is the number of votes divided by 7, that is approximately 14%. This system generally results in the upper house better reflecting the spread of political views in the community rather than being completely dominated by the major political parties.

11.6 A restored upper house - rotation and double terms

Another positive contribution that upper houses can make to good government is stability. When the government formed in the lower house changes, a new and inexperienced government may make hasty decisions and introduce ill-conceived legislation. An upper house elected by rotation, with only half of the members facing re-election each time, provides greater continuity of experience and stability.

Governments formed in the lower house are rightly accountable to the people at elections every three or four years. However this can lead to short-term thinking and planning which may not be in the best interests of the state. A longer term for upper house members has the advantage of encouraging a longer-term perspective when government legislation is reviewed. Even members of a major party are encouraged to think more independently when they don't have to face an election so frequently.

A rotation system of re-election works well in states where the upper house is elected from the whole state as a single electorate. In New South Wales, the upper house has 42 members with 21 elected each time from the whole state. The quota of 1/22, or about 4.5%, enables several smaller parties to be represented. In South Australia, the upper house has 22 members with 11 elected each time from the whole state. The quota of 1/12, or about 8.3%, is also within reach of some smaller parties.

The Australian Senate also uses the rotation system of re-election. Each state is represented by 12 senators, with six being elected at alternate normal elections.

11.7 Restoring an upper house is a matter of priority

Sir Winston Churchill famously said "Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time."[30]

Upper houses, as they have developed in Australia, have proved to be an effective means of improving the way democracy works by providing an important check on the growing power of executive governments.

The restoration of an upper house in Queensland should be a matter of priority for all those who value good government and who want to improve integrity and accountability.

> ***Recommendation 14:***
>
> ***The restoration of an upper house to be elected by a method of proportional representation, with six year terms and mid-term rotation of half the members should be made a matter of priority.***

12. Endnotes

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