

Dr Colin Huntly

Mr Malcolm McCusker AO CVO QC

Chair

Ministerial Expert Committee on Electoral Reform

11th Floor Dumas House

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WEST PERTH WA 6005.

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Dear Chair and Members

Submission

Ministerial Expert Committee on Electoral Reform

1. I wish to make the attached submission in response to the Committee's Discussion Paper and Terms of Reference.
2. Although I am an Australian legal practitioner, I make this submission in my private capacity as a citizen. No association should be taken or inferred between my comments and the views of any other person, entity or agency.
3. In the unlikely event that my simplistic written submissions attached are not self-explanatory, I would be happy to discuss them further with the Committee at a mutually convenient time.
4. I wish the Committee well in its deliberations on this important issue and thank you for your valuable public service.

Sincerely,

Colin

Dr Colin Huntly

Ministerial Expert Committee on Electoral Reform: Submission

1. I understand the basic premise of different electoral systems only as an interested observer. I know enough about the mechanics of the various electoral methodologies to appreciate that it is a recherche and specialist area of knowledge, requiring long years of study. I have none of these attributes. Accordingly, much of the technical details of the Discussion Paper is addressed to an audience of which I am not a member.
2. The preamble to the Committee's Terms of Reference refers to certain outcomes of the 2021 Legislative Council election results. Some of these references concern consequences to the advantage of single-issue parties that might be termed 'outlier results', and some of the references concern apparently disappointing consequences for parties which, although attracting substantial proportionate first-party votes, did not translate into parliamentary representation.
3. I make no comment about these specific outcomes in this submission. This is because I am not by nature or inclination a party-political person. I am an ordinary citizen who believes in our shared democratic and civic ideals. In making this submission, I wish to draw the attention of the committee to certain specific issues of concern that I have at the level of principle.
4. As I have no technical expertise in the science of electoral mechanics, my only submission relating to the Committee's second term of reference lacks nuance. It is made very much in passing and without detailed consideration. Accordingly, I suggest that the Committee accord it the weight such a submission deserves.

Above and below the line voting

5. I suggest that the extent to which the data referred to about 'above the line' voting demonstrates that this form of Legislative Council voting is the preferred method suggests that I occupy the majority audience on questions of electoral mathematics. To the extent that I have a view on the preferential voting system 'below the line' I favour optional preferential voting. My support for this is on crude democratic grounds.
6. Voting is a personal civic obligation. I do not personally favour presumptive associational voting. Where an elector agrees with the 'above the line' preference flows with which they have chosen to be aligned, this is a reasonable operating presumption for the allocation of down-ballot preferences.

7. Where individuals wish to indicate 'shallow' preferences by only selecting a sample of the below the line candidate offerings, their ballot should neither be invalidated (ie: they voted) nor retained in the count of ballots beyond the depth of the preferences that they have elected to express (ie: they gave limited assent to the ballot counting process). Once the precise depth of a below the line vote cast by an individual elector has been determined, the vote should be exhausted.

Term of Reference 1 (Legislative Council Electoral Equality)

8. When the issue of electoral reform was last seriously ventilated in Western Australia, asserting the primacy and necessity of constitutional parliamentary democracy as a safeguard to personal freedoms and social cohesion was not a controversial proposition. Regrettably, the events of just the last five years suggest that the very idea of democratic government is under stress around the world. The idea that the separation and division of government power is in the national interest, or that it is a political commitment best suited to the protection of individual human rights or personal freedoms, now needs to be articulated and defended in ways that, a few years ago would have seemed absurd. Further, facing the existential challenge of the global Covid 19 pandemic, communities have become accustomed to relying on strong unitary state action on matters of public interest and public debate can be viewed as both unhelpful and distracting.
9. We live in the era of troubling political tribalism and identity politics. This comes against the background of the rapid transformation of the profession of journalism, changes in the nature and format of the free press and mass communication generally and a social media environment that seems beyond the reach of regulation. Rather than creating a greater appetite for democratic institutions, these turbulent phenomena seem to invite strong, self-confident unitary institutional responses. This context is, I suggest, of considerable concern. It also suggests to my mind that what we need is greater confidence in our institutions than ever before.
10. Any structural reform that fails to enhance public confidence in the central institutions of government is, I fear, misconceived. It is one thing to be 'right' from the perspective of purity of expert of thought. It is another entirely to take the average elector and citizen with you.

11. People will not accept a reform that:
 - a) they cannot instinctively understand; and,
 - b) they do not instinctively trust.
12. As I understand it, the Legislative Assembly of Western Australia is comprised of an uneven number of single-seat electorates returning a Member by weighted numbers of electors on an optional preferential vote basis. Again, based on my imperfect understanding, the electorates in the lower house take account of both geographical spread and population. This method of election allows an elector to express both their choice of candidate AND their preferences between choices of candidates, and for both considerations to find expression in the calculation of the final electoral outcome for each seat separately. My own (probably facile) way of thinking about this, is that it allows an elector the privilege of placing maximum space between their most preferred candidate and their least preferred candidate in each election.
13. Whether or not this electoral system is the best, I cannot tell. It is, however, reasonably easy (at a high level of abstraction) to communicate to others, and (roughly speaking) it is the system we apply in electing our lower house members at both a State and Federal level. From this perspective, the method of election has the great advantage of being unremarkable, familiar, tested, and, generally speaking, trusted.
14. Currently in the Legislative Council of Western Australia, as I understand it, there are six 'regions' electing 36 members, using a form of optional proportional preferential vote calculation which I do not understand, and have probably mis-described. Indeed, I suggest that hardly anyone in Western Australia outside of the political realm, selected at random, could explain how their own upper house electoral region has been determined. If I understand it correctly, under the current system, in the most recent election, for every average vote cast in the Legislative Council by a Perth elector, each Mining and Pastoral region elector had around six times the vote-value and every Agricultural region elector had around four times the vote-value in returning MLC's.¹
15. Clearly, in the WA upper house, electors are not all equal. Further, it appears that disproportionate representation is the intended, rather than an incidental outcome of the current electoral system applicable in the Legislative Council.

¹ Source 'WA Upper House Enrolment Weights 1989-2021' Chart at antonygreen.com.au (WA's Zonal Electoral System and the Legislative Council Reform Debate, May 4, 2021) (accessed 21 May 2021).

16. One of the consequences of this electoral design that is not considered in the Committee's terms of reference is the fact that, under the multiple region/multiple member arrangement, there will always be an even number of members in the Legislative Council. This design almost guarantees the relatively frequent exercise of a President's constitutional casting vote, meaning that it is more likely to become a matter of controversy.
17. While the role of a casting vote has its place in any democratic process, it will necessarily be exercisable on occasions of controversy and sharply divided opinion. Structuring a Council in which divisions are predisposed to being evenly split simply engineers the institution towards more frequent reliance on a casting vote. It goes without saying that this structural design feature appears somewhat disobliging.
18. While there is nothing controversial about a presiding officer holding a casting vote per se, in a chamber where individual members hold their seats on the basis of widely different representation places the disproportionate representation in rather stark relief. Consider if the casting vote were to be exercised by a Mining and Pastoral MLC as opposed to a Perth Metropolitan MLC. It quickly becomes apparent that disproportionate representation is not merely a structural matter or one that is neatly confined to the tabulation of votes at a general election. Given the present numerical design of the Legislative Council, this dilemma is not far-fetched or fanciful.

The Status Quo

19. Advocates of disproportionate representation in the Western Australian Legislative Council often resort to one of two versions of rights-based discourse in support of maintaining the status quo. On the one hand, they appeal to a type of 'affirmative action' discourse as a way to ensure greater equity of participation and representation in legislative matters for particular under-represented minority communities of interest. In Western Australia, the argument often finds an anchor in the vast geographic land-mass of the State and its uneven population distribution.
20. On the other hand, the current disproportionate representation claim is justified on the basis that, because of the 'unique contribution' made to the common wealth of the State due to the unique forms of production that occur in those 'regions', electors in those regions are entitled to a greater say in the legislative process on a per-electoral basis.
21. The first argument in favour of the status quo goes further than a form of electoral 'affirmative action'. The elected government of the day is elected on the basis of the outcome of elections for lower house seats. It is also responsible to the electorate in the

lower house on regular sitting days. To borrow the phrase of former Lord Chancellor of the United Kingdom, Lord Hailsham, in practice, given that the State government both has a majority in the lower house and is accountable to the lower house, our Westminster-style government effectively operates as an 'elective dictatorship' between general elections.

22. The genius² of bicameral forms of government such as ours in Western Australia is said to be that, given different electoral systems for each house, the second chamber can act as a check to the 'elective dictatorship' of a government-dominated lower house. The second chamber acts as what Mill termed a 'perpetual school' for the elected government of the day. Executive government must secure the support of a separate elected chamber (which may not be controlled by the governing party) in order to pass its legislative agenda. Further, the scrutiny committees of the upper house effectively constitute a standing inquisition, providing additional democratic accountability measures in the wider public interest. The strengths of this system of government were endorsed and advocated for in the *Royal Commission into Commercial Activities of Government*³ and subsequent Commission on Government in this State, together with the need for reform of the then Legislative Council to enhance the democratic safeguards of our system of government.
23. Our inherited institutional architecture is intended to ensure that an elected government (formed following a general election that, in terms of the levers of government, is fought and won on the basis of localised single-seat contests under the lower house electoral system) might face a differently constituted upper house for the entire term of government. For some, this architecture represents a clog on efficient government. For others it is a necessary institutional safeguard for the rights and freedoms of the individual against an overweening and potentially all-powerful executive government.
24. Where the electoral status quo so clearly favours a minority of the electorate as in Western Australia's Legislative Council, what might otherwise be described as a legitimate institutional safeguard can be critiqued by an uncharitable mind as little more than a minority veto, held to the advantage of narrow self-interests to the exclusion of the electorate more generally. The affirmative-action justification for the electoral status quo applicable in the Legislative Council of Western Australia, when viewed in such a light, can readily be characterised less like a bulwark for the protection of minority interests against

² Evil or benign, depending on the democratic preferences of the observer.

³ At Part II, Chapter 5.

the capricious majority than a jealously guarded unaccountable and entrenched sectarian privilege, held in reserve to thwart the general community will.

25. Perhaps the most objectionable of the defences for the electoral status quo in the Legislative Council, is the claim that greater electoral representation is warranted because of the 'unique contributions' made by certain products originating in particular 'regions'. This argument is little more than the justification for electoral privilege based on property entitlement. Rather than locating the right to vote in terms of it being a basic democratic right of the citizen, it locates the right to vote in terms of what a given person, or a stratum of society, can 'produce'.
26. It will be appreciated that the property test was enshrined in the Westminster system centuries ago and reflects an ingrained social story that the impecunious cannot be entrusted with the franchise. I note that it was as recently as 1964 in Western Australia that this archaic and patronising doctrine was explicitly overturned with respect to the Legislative Council franchise.⁴ To the extent that a disproportionate franchise favouring certain 'productive' regions is grounded on similar theoretical grounds, the doctrine appears to continue to be at least implicitly entrenched.⁵
27. There is another unacknowledged theoretical commitment behind the 'unique contribution' justification of electoral privilege, namely Locke's natural law theory of property ownership. This theory locates ownership rights over real property in the labour exerted in bringing the land under cultivation. This theory formed the basis of the doctrine of terra nullius, which was relied upon as the formal legal justification of the dispossession of Australia's first peoples.
28. The resilience of this theory in collective consciousness should not be underestimated (recent legal developments in the area of native title notwithstanding). For example, despite the State Constitution now giving explicit recognition to the traditional owners and first peoples of Western Australia, the established narrative underpinning the 'unique contribution' justification rarely, if ever, includes the suggestion that 'regional' franchise in the Legislative Council should also take account of the 'unique contribution' of the traditional owners as a separate 'region'. I make this point in order to highlight the

⁴ *Constitution Acts Amendment Act (No. 2) 1963 (WA)*.

⁵ To the extent that the unique contribution of 'royalty' revenue forms the basis for such claims, I note the increasingly precarious constitutional theory underpinning the distinction between a 'royalty' and an 'excise' (Calzada, Manuel --- "State Government Mining Royalties: Required Taxes or Duties of Excise?" [2000] MurdochUeJlLaw 31; (2000) 7(3) Murdoch University Electronic Journal of Law).

problems associated with locating any aspect of the franchise in terms of either unique 'contributions' or access to property. Not all contributions, or property, are viewed equally by persons or communities of persons.

First principles

29. The basic unit of the community is the citizen. It is the citizen to whom the franchise should attach. Even this basic premise has proved controversial in our community over time. It has varied according to ethnicity, nationality, property ownership, parentage, marital status, sex, age, capacity and criminal history. Fundamental to our decency as a community should be a principled commitment to recognising and respecting the individual dignity of every citizen and to do so from the operating presumption of equality. Indeed, this is the basic democratic premise. One shudders to recall past legislative pronouncements requiring that some human souls should be weighed proportionally against those of others.
30. I recommend Rawl's 'Veil of Ignorance' or 'Original Position' proposition to the Committee when evaluating the various electoral models that might be considered in the course of its deliberations. The discipline of remembering how arbitrary one's own personal circumstances really are in the universal scheme of things is instructive when deciding which principles are more or less just in a given situation. It is trite to sloganise 'one vote, one value' in matters of the franchise. However, it is worth remembering how many of our fellow citizens have been excluded from full enfranchisement over the centuries (and in the lifetimes of many of us) as a result of seemingly impersonal, rational (if not logical) legal rules and formula.
31. In a democratic society there is little that is more valuable than the vote exercisable by the individual citizen. It represents a personal stake in the system of government, a chance to have a say in the making of the laws which govern us. It is a personal human right that, having previously been denied to some citizens, was only won as a universal entitlement in our society by diligent effort involving blood, sweat, tears and toil. The lights of democratic freedom are dimming all around the globe, including in our own region. I suggest that any reform of our electoral system (regardless the chamber or chambers) must, as a matter of principle, proceed on the basis of the equality of the citizen.
32. It might be argued that the proposition I have advanced represents a radical departure from the current status quo, in that it appears to favour metropolitan 'regions' over non-metropolitan regions in terms of upper house representation. Accordingly, I wish to make a simple recommendation in response.

33. I propose that any reform of the franchise in the Legislative Council should proceed on three principled grounds. Namely:
- a) equality of vote;
 - b) equality of representation;
 - c) general community acceptance and understanding.
34. There is already an upper house electoral model operating in Western Australia that meets these three principled grounds. That is the electoral model for the Senate.
35. Under the model of Senate elections, Western Australia is single electorate, with rotational elections for half of the senators, on the basis of optional proportional representation. Rather than build an entirely new electoral model for the State upper house, I suggest that here is a presumptive model which ought to apply unless there are compelling reasons why it is singularly inappropriate. As noted in the discussion paper, the single electorate model is also favoured by NSW and South Australia, both States with large land masses and unevenly distributed populations.
36. The single electorate model has a number of formidable advantages.
37. The first advantage of this model is that it is relatively simple to explain and is both familiar to, and accepted by, the electorate. This means that it would be a model that would readily achieve my suggested essential principle of general community understanding and acceptance.
38. By having a single electorate, the model also meets the remaining essential principles of equality of vote and equality of representation. Every elected MLC would be responsible to the entire electorate whether making legislative or scrutiny decisions. Every citizen would be their constituent. Assuming a change to 8 year terms for Legislative Councillors, every four years, every citizen would have a say in shaping half of the upper house's representation.
39. While minority communities of interest might have a limited capacity to secure seats in the Legislative Council chamber, every community of interest would have access to the entire membership of the chamber in furtherance of their concerns.
40. I acknowledge that my proposal would place considerable expectations on each representative, to weigh carefully the impact of their decisions on all citizens of Western Australia equally. Given a State which geographically constitutes one third of the continent, this is no small matter. However, this is as it should be. I refer again to Rawls' thought

experiment mentioned earlier. The purpose of the Legislative Council in theory and design is not to replicate the outcome of the Lower House electoral result. Otherwise, why have an elected second chamber?

41. If the purpose and design of the Legislative Council in the legislative and scrutiny functions of government, is to provide representation for different communities of interest to those which elect the lower house, there can be little that is objectionable in the principle that all MLC's should consider the consequences of their deliberative actions for all citizens of Western Australia equally.

Recommendation

42. It follows from the foregoing that my personal recommendation is that an appropriate electoral reform for the Legislative Council of Western Australia is as follows:

- a) A single electorate for Western Australia;
- b) An uneven number of seats in the chamber;
- c) Approximately half of the members elected every 4 years on a rotational basis;
- d) Method of election based on the current method of election applicable to WA Senators.

43. With respect to item 'd)' above, I would be guided by the opinion of experts as to the preferred technical details, with the proviso that, for the sake of community acceptance and confidence, it should be as close to the accepted methodology to that used for Senate elections as possible.

Observation

44. I should mention apropos the anxiety expressed by those who favour disproportionate representation, that I believe that this is both genuinely held and reasonably advanced by most people of good will. However, I suspect that this can be described in terms of human rights concerns generally. For all citizens to be genuinely equal in terms of government power, interest and service delivery, there should be rigorous recognition and respect for their human rights. I note that Victoria has legislated a Charter of Rights in response to this anxiety.⁶ Although it is not directly related to the electoral reforms before the Committee, it occurs to me that if moving towards a single electorate, it might be opportune to at least ventilate the possibility for such a Charter in Western Australia.

⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic).