

Submission to the Ministerial Expert Committee on Electoral Reform

AUTHOR

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GUIDANCE

The Government appoints the Ministerial Expert Committee to review the electoral system for the legislative council and provide recommendations.

MEMBERS

Hon. Malcolm McCusker QC AO (Chair)

Professor John Phillimore

Professor Martin Drum

Dr Sarah Murray

TERMS OF REFERENCE

Whereas at the 2021 election for the Legislative Council:

The Daylight Saving Party won one seat in the Mining and Pastoral region, having received 98 first preference votes, which is equivalent to just 0.2% of all formal votes in that region;

AND the Greens in the North Metropolitan Region received 27,077 first preference votes, or 7.4% of all formal votes in that region, but did not win a seat;

AND in the Agricultural Region, the Nationals received 22,999 votes and won two seats;

AND in the South Metropolitan Region, the Liberal Party received 67,000 votes but won only one seat;

The Government now asks the Committee to review the electoral system for the Legislative Council and provide:

Recommendations as to how electoral equality might be achieved for all citizens entitled to vote for the Legislative Council;

AND

Recommendations for the distribution of preferences in the Legislative Council's proportional representation system.

FURTHER MATTERS PRESENTED IN DISCUSSION PAPER

The Committee invites submissions on:

(a) which model (whole-of-state electorate or region-based) is preferable to achieve electoral equality;

(b) the strengths and drawbacks of each model;

(c) whether any other electoral model, not covered in this Discussion Paper, is better suited to achieve electoral equality, with reasons; and

(d) what changes (if any) should be made to the distribution of preferences in the Legislative Council's proportional representation system, including group voting tickets

DISCLAIMERS

1. This submission is made in the capacity of a private citizen.
2. This submission is offered as an opinion piece. Some references are made for reader convenience however this is not a formal research paper.

INTRODUCTION

The Committee has been tasked with addressing two very separate matters in relation to the Western Australian Constitution. Recent attempts have been made by the State Government to conflate them.

Premier McGowan was categorical in his repeated denials that the government planned to introduce electoral reform when questioned by the ABC just days before the election. "I'll be clear: it's not on our agenda. Enhanced regional representation will continue, and this is just another smokescreen by the Liberals and Nationals," he said. The Premier defended his repeated statements during the election campaign that this "reform" was not on Labor's agenda. "I didn't know the Daylight Saving Party (DSP) was going to get elected — I'm not a mind-reader," he said. "The system has significant flaws" (ABC, 30/4/21).

This Expert Committee, comprising the esteemed members it does, should not allow itself, regardless of the personal views of its members, to be an instrument of a State Labor Government that has patently misled the people of Western Australia on the very subject of this review, while weaving in a quite unrelated matter.

Those personal views are encapsulated in an article titled "An affront to anyone who believes in democracy" (Reilly, Phillimore, Murray and Drum 23/2/21).

In that article, members of this Committee quite rightly pointed out that “Premier McGowan said in January that changing the mix of city and country representatives in the upper house was not on the government’s agenda” (Reilly, Phillimore, Murray and Drum 23/2/21).

In any case, I will first address the election of the DSP as it has been weaved into this matter.

Apart from misleading electors on the substantive matter of “electoral equality”, the State Labor Government has also misled on the unrelated matter of preference harvesting. Labor could in fact very easily foresee that the DSP might get elected, with Labor themselves having placed the DSP in the Mining & Pastoral Region extremely high on their preference list, just after the Shooters, Fishers and Farmers Party (WAEC, 2021). Labor in fact placed the DSP higher than the Greens and other parties that Labor voters would expect to have been placed more highly. Labor’s indignation cannot be regarded as genuine. They took their supporters for granted by asking them to put a “1” in the WA Labor box when their preferences were not going where those supporters reasonably expected them to go. According to members of this Committee, Labor along with others partook in a “pragmatic free for all” (Reilly, Phillimore, Murray and Drum (2021).

I would be extremely surprised if this Committee recommends the continuation of group voting tickets, especially as three of its members have described it as “the most obvious and overdue reform” (Reilly, Phillimore, Murray and Drum 23/2/21).

Therefore the focus of this submission is on the “electoral equality” question, most particularly its meaning. I will briefly address the current voting ticket system however,

because I think suggestions and innuendo that the DSP was somehow illegitimately elected should be addressed.

DSP ELECTION AND VOTING METHOD

We should rebuke any suggestions that cast any cloud over the legitimacy of its elected representative Mr Wilson Tucker as he deliberates in the Legislative Council. If there is any cloud at all to be cast it surely sits over the Labor Members, particularly its 10 regional ones, who appear poised to obliterate much of the representation of their regions, which they themselves only earned by misleading their electorates that an attack on the current system was “not on the agenda”. This very direct deception has caused the election of many more Labor members than any alleged deception from group voting tickets.

Labor’s indignation is a very unhelpful part of this process. Although I would not ever vote for the DSP, I was particularly affronted when Attorney General Quigley made a direct and personal reference to Mr Tucker’s salary, saying Mr Tucker being elected with 98 primary votes was “an insult” (The West Australian, 3/5/21).

Let us then briefly examine the primary votes of Labor’s 2nd, 3rd and 4th elected candidates in Mining & Pastoral Region:

CANDIDATE	PRIMARY VOTES	OUTCOME
Kyle McGinn	32 votes	Elected
Peter Foster	18 votes	Elected
Sahanna Rosetta	23 votes	Elected

Even the combined primary vote of these individuals is less than Mr Tucker’s 98 votes or his “0.2%”. Further, 15 of Labor’s 22 elected MLCs received less than 0.2% of the primary vote. Now it is clear nonetheless that they were elected. That is the system –

the preferences of unsuccessful candidates and the surpluses of successful candidates are both distributed. The current ticket voting aspect of the system is one which Labor, and not the Liberals, helped to herald in.

Now I have no doubt that if you were to ask most members of the general public whether it is fair that the aforementioned Labor members were each elected with less than 0.1% of the primary vote, most would say no. However, that is simply feeding into public misunderstanding of the system, something the Attorney-General is selectively doing with Mr Tucker. It is base politics, and when we are seeking to address important Constitutional matters, that type of emotional and personalised rhetoric, even from the State's top law officer, needs to be comprehensively excluded from these deliberations.

As already stated, the DSP was able to attract favourable preferences from Labor, but also from numerous other parties. We use a preferential system of voting. The candidate with the fewest votes is eliminated, and so it goes until someone achieves over 50% in the Legislative Assembly or 14.3% in the Legislative Council.

In a proportional representation system, it should not be too surprising that the micro-parties have picked up 3 out of 36 seats in the Legislative Council, since they get about 10% of the vote. Similarly the larger parties picked up seats in approximate proportion to their vote. The suggestion therefore that the Legislative Council is not broadly representative of how people voted is simply untrue. And Labor is weaponising this untruth to alter the State's Constitution.

In proportionate terms that argument is more relevant in the Legislative Assembly. In round figures, while Labor's vote of 60% delivered it 60% of the Legislative Council, it delivered Labor 90% of the seats in the Legislative Assembly. More particularly, the Liberal Party, which easily obtained the second largest vote, lost its Opposition status. It

is curious therefore that the Council and not the Assembly should suddenly be the chamber which offends Labor's sense of fairness.

I am not advocating a change to the Legislative Assembly, but simply point out that parties can and do win over 40% of the vote in an Assembly seat and not win it, so there is hardly some injustice done, as the ill thought out terms of reference suggest, when the Greens did not win a Legislative Council seat in North Metropolitan with 7.4%. Indeed, the evidence is scant that the absence of ticket voting would have changed that outcome.

To view the matter comparatively, in NSW, micro-parties hold 5 out of 42 seats, and in Victoria 10 out of 40.

Importantly, it was WA Labor that supported the current State electoral system. The current arrangements were similar to that introduced by Federal Labor for the Senate in the 1984 Federal Election. Labor had reasoned that on average, their voters were more likely to vote invalidly with the requirement to number every box. They changed the law and conducted an extensive campaign that all one now needed to do was put a '1' in the Senate box. This had an unintended consequence, which was a record high invalid vote (6.8% compared with 2.1% in 1983) in the House of Representatives. Prime Minister Bob Hawke attributed this to Labor doing far worse than expected, saying it was mainly Labor voters who had voted informally (Hawke Memoirs, 1996).

Labor federally and state by state has repeatedly sought to change electoral and voting systems to suit their own perceived advantage. Sometimes they flip and flop back, and the situation before us now is not different.

To give a very visible example, in 1992 Queensland Labor introduced optional preferential voting. This enabled the votes between the Liberals and Nationals to

exhaust. When the Liberal and National Party officially merged in 2008, however, “Labor watched as a voting system which had worked in its favour began to sour as Greens voters did not number all their boxes” (Brisbane Times, 22/4/16).

ABC election analyst Antony Green reviewed the 2015 results and found that if compulsory preferential voting had been in place, Labor would have won 8 more seats than it did, bringing its number in the House to 52. That would have given the Queensland Labor Government a clear majority. And to that end, in controversial circumstances, Labor reintroduced compulsory preferential voting, the very system they had previously abolished.

And of course Labor had no concerns either about protecting regional representation in Queensland when it kept them in office almost continuously for 42 years until 1957.

So the problem Labor enunciates, that Mr Tucker was elected with so many preferences, could be easily resolved by doing away with preferences, but Labor does not want to do that because it relies heavily on Green preferences. In fact, in an earlier era when Labor in Western Australia thought it suited them they tabled in the WA Parliament the Fair Representation Bill (1984) which included a clause for the adoption of optional preferential voting (Legislative Assembly, 25/9/84).

Labor now appears to want a system where their many MPs can get elected on preferences but others cannot, or at the very least, where major parties can get elected with micro-party preferences but micro-parties cannot. In such a scenario it appears Labor’s view of micro-parties is that they can exist to give preferences but not to get elected i.e. they should be seen but not heard.

And herein lies the challenge. An esteemed committee has been assembled, where the government’s intended purpose is for it to do the bidding of Labor. This bidding

however requires Constitutional amendment, which ought not to be made lightly just to suit the government of the day. Moreover, the very short time given for submissions, along with inherently biased terms of reference that could fit on the back of an envelope, suggest Labor, based on its ongoing behaviour, continues to regard the WA Constitution like tissue paper. It therefore becomes incumbent upon this Committee, as believers in constitutionalism, not only to steer itself where possible from being a pure instrument of Labor's bidding, but to use its newfound influence to preserve, where practical and possible, the evolutionary and not revolutionary development of the WA Constitution.

ELECTORAL EQUALITY

The Committee has made clear in the Discussion Paper that its task is not to debate "electoral equality" but how to achieve it. Therefore it is extremely important that the Committee come to a very clear definition of the term.

I believe it has been accepted in some circles that Attorney-General Quigley has been quite clear what the State Labor Government means by "electoral equality". This bears close examination.

The Attorney-General has stated:

There are no plans to change the system of voting in the Legislative Assembly, or Lower House, where each member represents a district and **those in regional areas are given a weighting so that large electorates can be well served by their MP** (emphasis added). For example, my electorate of Butler in the northern suburbs of Perth had the most electors of any district this election (32,711 voters), compared with the geographically larger electorate of North West Central (10,993), which had the lowest number of electors of any district. **That means a vote weighting of almost 3:1 — but we are not seeking to change this** (emphasis added).

(The West Australian 3/5/21)

On this basis, it would seem reasonable to many that to achieve equality, given the additional challenges of serving the regions, that 3:1 could still apply in some circumstances.

Likewise, the Premier stated before the State Election that he supported "enhanced regional representation" (ABC, 9/3/21).

In 2001, the Legislative Council's Standing Committee on Legislation, comprising 3 Labor members, 2 Liberals, 1 Green and 1 One Nation member) produced an extensive report with 31 recommendations. This included 12 recommendations with unanimous support, including that the existing 50:50 ratio balance between metropolitan and non-metropolitan regions be retained for the Legislative Council (Report of the Standing Committee on Legislation in Relation to the Electoral Distribution Repeal Bill 2001 and the Electoral Amendment Bill 2001, Legislative Council, 26/11/01).

By all these various accounts it does seem reasonable that the vast size of the regions requires a weighting in order to give them effective equality of representation.

And these views are no different from what the ordinary citizen believes, even in the metropolitan area. While somewhat anecdotal, I believe I know this from conversations I have with people in the city. To the extent anyone has an interest in the subject, they believe in doing everything we can to support the plight of the regions, including by way of representation.

If we are simply to conclude that equality is achieved by having the same number of enrolled voters in each electorate, that would be a very disappointing and simplistic outcome.

The question of having identically populous electorates was brought before the Australian and the Western Australian people in a 1988 Constitutional Referendum.

To that question, even with its biased wording:

A proposed law: To alter the Constitution to provide for fair and democratic parliamentary elections throughout Australia. Do you approve this proposed alteration?

The Australian public voted 37.6% Yes and 62.4% No. More particularly, the people of Western Australia voted 32.0% Yes and 68.0% No.

To put that into context, the WA vote on this question was more decisive than the WA vote on many other issues including Daylight Saving (4 referenda, Yes votes ranging from 45.4% to 46.9%), Weeknight Trading (41.3% Yes), Sunday Trading (38.6% Yes), and even the marriage law postal survey (63.7% Yes) and Secession (66.2% Yes).

While I understand there are elitists who have formed the view that Australians simply vote 'No' at Constitutional referenda, this hypothesis has been widely discredited by various examples, including the 1967 referenda, when the people were asked two questions, both supported by all major parties, and one returned a 'Yes' vote of 90.8% and the other just 40.2%. Likewise 3 out of 4 questions were overwhelmingly carried in 1977, with one narrowly losing for failure to pass in a majority of states.

Therefore the evidence is very clear that an assault on regional representation would very unlikely have the support of Western Australians, even those who reside in the city. I submit that this matter is so important it should at the very least be tested with a referendum.

While some elitists may again satisfy themselves that they are giving the people democracy, they ought to ask the people if they want what is actually being proposed.

The public may support the principle of “electoral equality” but it does not support it being defined by having electorates with equal numbers of registered voters.

There is something inherently perverse in imposing on people, in the name of democracy, a system they have overwhelmingly rejected.

Indeed the Attorney-General has himself said: “The Parliament does not belong to politicians like me. It belongs to you, the people. I encourage everyone to have their say.” (The West Australian 3/5/21).

I doubt he was suggesting that this Committee should receive 1.5 million submissions. The only practical way for “everyone to have their say” is with a referendum, if there was sincerity in the statement.

Need to avoid Self-perpetuating Centralisation

It usually appears to me that when an identifiable group has a permanent majority in a majority rule structure, that majority will almost invariably advantage itself, therefore equality between the majority and minority is unlikely to be achieved. We see examples of this in corporate and community life all the time, for example where one group has majority control of a company, and it is certainly true in political life.

Now granted it is not possible to give every group an equal weight, for there are countless ways to split the community into groups e.g. drivers vs cyclists, employers vs employees, and so forth. Where it is most critical is where we know from experience that groups act in ongoing unison. That is why we insist that every country has an equal vote at the United Nations or that each State have an equality of Senators. We have electoral equality between States in the Senate. We have electoral equality between countries at the United Nations.

In the Western Australian system there is a very clear and identifiable situation where the State's population overwhelmingly inhabits the city of Perth. From that already, the city group as a voting bloc in the Legislative Assembly (where government is formed), have advantaged themselves time and again with the best schools, hospitals and transport systems, to name a few items. From these advantages, even more people congregate in Perth, giving them even more electoral power to advantage themselves even further.

The problem is that such advantage is generally short-term, because Perth's prosperity is overwhelmingly dependent on the wealth produced by the rest of the State, so ultimately the whole State is damaged. The only real check on this is the electoral equality currently given to the regions in the Legislative Council. If anything, that check is insufficient.

When I was a candidate in North Metropolitan, I would often find myself traversing from one end to the other. It could be a one hour drive each way just for a 45 minute meeting. When I thought of our fellow candidates and members in the region, only equal in number to us but covering the remaining 99% of the State, I already thought of it as unfair, not just on them but on the constituents who had substantially reduced access. Metropolitan residents are spoilt for access to MPs compared with their country cousins. (I reiterate at this point that that my submission is as a private citizen).

I have had similar experiences in the telecommunications industry and in the resources industry, and to say the city folk have it much easier would be an understatement.

There was much historic criticism of Queensland's regional weighting, however Queensland today thrives with many large, prosperous towns and regional centres throughout that state. The regional representation is not the only explanation for that prosperity, but it is a highly significant factor.

The criticism has been frequently made over the years that enhanced representation meant that the Queensland Government kept advantaging the regions over Brisbane. I do not doubt the truthfulness of that, and it is simply therefore inconsistent for those critics to now suggest that the Western Australian Government will not keep advantaging Perth over the regions if the shoe is firmly on the other foot.

In fact the critics of the current system do not seem to have answered the question “what is the practical problem with the current system?” It is clear that Perth with three quarters of the Assembly and half the Council has most of the power. Why does it need more? It seems a clear case that Labor is promoting a solution that is looking for a problem.

Now the point has been repeatedly made that we would not accept New South Wales having 3 times as many Senators as Western Australia. A point made less often is that we would not accept China having 55 votes to our one at the UN. Indeed in the latter scenario China and India could be quite dominant at the UN, and I would challenge the “equality of elector numbers” advocates to explain why in their worldview that wouldn’t be a fair thing, and regrettably some say it would be.

Certainly it is correct to argue that Western Australia is not a federation, so it is not the same as the Senate situation. That is true, but it is not completely different, either. The Senate was structured to protect the remoter and less populous parts of Australia, lest all the decisions favour the centre. Now it would be hypocritical for us to do to our country cousins what we would never countenance Canberra doing to us.

While the Committee’s Discussion Paper looks at what other States are doing, it is important to remain vigilant at all times in understanding that Western Australia’s vastness presents it with many unique challenges.

If Western Australia were its own country it would be the 10th largest in the world. The notion that the great bulk of this area, the Mining & Pastoral Region, would in a “per voter system” be represented by just 1 MP in the Legislative Council seems to lack the appropriate sense of proportion. This is especially so given this region hosts the State’s largest indigenous population. Moreover, the number of citizens in this region is disproportionately higher than the number of registered voters.

To summarise this point, I think it is open to the Committee to conclude that an equality between the regions and the metropolitan area as it stands does constitute electoral equality.

Vested Interests

It has been suggested on occasion that each Party is simply pushing for its advantage on this question. I submit that the evidence says otherwise. The Liberal Party, for example, consistently polls more strongly in Perth than it does in the regions.

The last 4 elections are instructive because they represent a mix of close results and landslides in either direction:

LEGISLATIVE COUNCIL SEATS WON

	LIBERAL		LABOR	
YEAR	Metro	Regional	Metro	Regional
2021	4	3	12	10
2017	6	3	8	6
2013	10	7	7	4
2008	9	7	6	5

As can be seen from this, it could advantage the Liberals to have a greater metropolitan weighting. Critics would counter that this is counterbalanced by a desire of the Liberals to strengthen the Nationals, however that is akin to alleging that Labor looks for ways to strengthen the Greens. People should therefore accept the matter at face value, which is that the Liberals have been philosophically committed to protecting the regions. That includes equality with the city in terms of political representation.

The Liberals subscribed to this view even for the many years that all the mining regions were union and Labor strongholds. On the matter of championing the importance of regional Western Australia, the Liberals have often acted to their own detriment, so by and large they appear to come to this matter with clean hands. Other parties do not necessarily have this strength of claim.

The more curious matter is that if the balance were changed from 50:50 to 75:25, it would have, at best, in each of the last 2 elections, only delivered Labor a net of one extra seat in the Legislative Council. That seems hardly worth the harm to the regions that such an electoral change will bring.

If the matter is simply one of ideology for its own sake, people can take comfort from the upper houses of many other places. Upper houses across continental Europe, Canada, the UK, Ireland and elsewhere tend to comprise representatives of regional councils, appointees and so on, including France, the home of “liberty, equality and fraternity”. Many upper houses in effect satisfy the “equal weighting” definition because they have no elected members at all.

Although it has prevailed in other states, the system of upper houses with equal numbers of voters per electorate are an exception rather than the rule, and they are one of only many notions of “electoral equality”.

ISSUES REGARDING A WHOLE-OF-STATE ELECTORATE

There appear to be a vast array of disadvantages associated with a whole-of-state electorate. Just some of those issues are as follows:

1. All MLCs will be required to conduct statewide travel, increasing the demands on their schedules and the cost to taxpayers.
2. MLCs will decrease their specialised knowledge in particular regions, and many already struggle to be across the issues before them.
3. The model is only in use in NSW and SA which have rotating 8 year terms, something for which there appears to be little appetite.
4. Even as it stands there are tablecloth sized ballots in NSW for 21 positions, so it would not be difficult to imagine the impact of there being 36 positions.
5. There are actually many voters who do their research on the 50 or so candidates who run in each region at the moment. Having hundreds of candidates would be a great imposition on those voters or alternatively they will disengage.
6. It will require candidates running for the Legislative Council to campaign statewide, which will be a burden on candidates with a slightly more localised focus.
7. It will almost permanently give fringe parties the ongoing balance of power.
8. It will give each MLA 6 times as many MLCs that they will be required to liaise with on constituency issues. There will also be significant cross-noise on issues between MLCs.
9. It increases accountability of MLCs to their Party machinery while reducing their accountability to their constituencies. This is quite visible in NSW and SA.
10. It puts all but one or two major party candidates in “safe” seats, reducing their tendency to fight for their regions. In the present structure there is a much healthier combination of safe and marginal seats.

While it is undesirable to reduce the number of non-metropolitan regions, it would be especially undesirable to reduce the non-metropolitan area to a single region. If we do move to an “equality of numbers” arrangement, we could still adopt the Victorian model and incorporate metropolitan outskirts into the non-metropolitan regions. This would enable the retention of at least two non-metropolitan regions.

OTHER MATTERS

Submission Period

I make this additional point as a matter of fairness. The WA Electoral Commission website (see below) advised people that the deadline was 31st May, 2021. It is only when you click the further information link that you can see the deadline was 8th June, 2021.

It strikes me that people interested in making submissions may have gone to the front page, believed that they missed the deadline, and gone no further.

Given this error and the Attorney-General’s encouragement for all people to have their say, it would seem just and fair to extend the deadline and make that known.

WA Electoral Reform

6 May, 2021

The Government has Commissioned a Ministerial Expert Committee to review and report on the WA Electoral system for the election of Western Australian the Legislative Council.

The Ministerial Expert Committee on Electoral Reform is seeking submissions on the system used for the election of members to the Western Australian Legislative Council.

Interested members of the public and stakeholders are asked to provide submissions no later than 5:00pm Monday 31 May 2021.

See further information [here](#).

(WAEC, 7/6/21)

Conscience vote

Another difficulty the Committee should consider is that Labor enforces a binding vote on its MPs. That should not be countenanced on Constitutional issues. There would be something particularly sinister in binding its regional members to perform such a dereliction of duty in doing away with the representation of the constituents that elected them. The Committee should feel no compunction in recommending that all parties allow MPs to vote their conscience on this matter without explicit or implicit sanction.

Number of Legislative Council Members Overall and in each Region

I believe it is a positive feature of the present system that Constitutional change is more difficult to pass than normal legislation. This is aided by the existence of even numbers in the Council, as the government usually requires 20 out of 36 with the President i.e. 19 out of 35 on the floor are required. This is a more difficult threshold than 19 out of 35 with 18 out of 34 on the floor. It demonstrates the virtue of retaining even numbers.

Additionally, even numbers in each region make it considerably more difficult for the party winning the election in the Assembly to gain a constitutional majority in the Council. This should also be regarded as an important check and balance.

SUMMARY OF RECOMMENDATIONS

1. That the Committee accepts that equal representation between Perth and the rest of the State is a valid form of electoral quality, and in any event find at least a compromise between that form and one which advocates for equal numbers of voters in each constituency, in line with statements from the Premier supporting enhanced regional representation.
2. That the Committee makes a statement to all parties on the inappropriateness of binding its MLCs on Constitutional matters, especially ones severely cutting the representation of their own constituents.
3. That the Committee find it is in Western Australia's interests to continue with regional representation rather than a whole-of-state electorate. If it moves towards an "equal number of electors" model, it could still incorporate at least 2 non-metropolitan regions by including metropolitan outskirts as occurs in Victoria.
4. That the Committee, in order to promote stability, recommends that the regions each retain an even number of members, and that the Legislative Council retain an even number of members.
5. That the Committee recommends that the "electoral equality" matter go to a referendum in line with its importance, statements from the Attorney-General encouraging everyone to have their say, the public's last known view of the matter expressed in 1988, and the promises the State Government made to the people during the 2021 State Election.

Thank you.