# Chapter One
# An Experiment in Constitutional Reform – South Australia's Constitutional Convention 2003

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I welcome this opportunity of delivering this paper on the Constitutional Reform project on foot in South Australia. I was a member, together with Trevor Griffin, who is to follow me and also with three other speakers at this conference, namely Professor Geoffrey Walker, Dr Geoffrey Partington, and Professor Howell, and others, of a so-called Panel of Experts whose task it was to prepare a discussion paper for use in connection with the Convention. Part of our brief was to be prepared, as the occasion arose, to speak to interested persons and bodies about the project. It is therefore in that capacity that I speak to you today.

In the title to this paper I have described the project as an experiment. I do so because, so far as I know, it is an unprecedented method of attempting constitutional reform. It had its genesis in the outcome of the South Australian general election in 2002. The outcome of that election was that the Labor Party won 23 seats in a House of Assembly of 47 seats, that is to say one seat short of the number required to form government. The Liberal Opposition won 20 seats. One seat was won by a National Party member, but in South Australia the National Party is not in coalition with the Liberal Party and that member is for all practical purposes an Independent. There were three other Independents, one of whom is Mr Peter Lewis.

Mr Lewis entered into a compact with the Labor Party by which he agreed to provide it with support on motions of no confidence and Appropriation and Supply Bills, thereby enabling the Labor Party to form government. Mr Lewis became Speaker of the House of Assembly. His support for the government was conditional upon the Labor Party's adherence to a compact which included the establishment of a Constitutional Convention to consider certain specified issues. A Steering Committee of the Parliament, comprising members drawn from both major parties and also Mr Lewis, was established to manage arrangements for the Convention. The Panel of Experts to which I have already referred was established to prepare a discussion paper for use in connection with the Convention.

The Panel of Experts consisted of academics or retired academics in the fields of History and Politics and also two former members of the State Parliament, namely Mr. Griffin and myself. Meetings have been held or are to be held in local communities throughout the State. I understand that there are to be some 27 such meetings. The ideas expressed at those meetings will be fed into the Convention.

The experimental character of the exercise consists in the nature of the Convention and the method of choosing its members. It is to be a Convention of some 300 members chosen at random from the population of the State. I am not aware of the methodology to be used in selecting 300 persons from the general population. A Constitutional Convention chosen in this way is, to my knowledge, unique and can fairly be described as an experiment. The Convention will have before it, as I understand the intention, the discussion paper prepared by the Panel of Experts and a compendium or distillation of the views expressed at the local community meetings. The Convention in its turn will make recommendations for changes to the Constitution to the Parliament of the State.

The power to amend the Constitution vests in the State Parliament. Amendments must be made by Act of Parliament. There are special provisions in the *Constitution Act* with respect to certain types of amendments. A Bill by which an alteration in the constitution of the Legislative Council or House of

Assembly is made, or by which the deadlock and double dissolution provisions are affected, or which abolishes local government, must be passed by an absolute majority of the whole number of the members of the Legislative Council, and of the House of Assembly, respectively.

A Bill providing for or effecting the abolition of the House of Assembly or the Legislative Council, or any alteration of the powers of the Legislative Council, or repealing or amending the absolute majority requirements, must be approved by the electors at a referendum. The "one vote, one value" and electoral redistribution provisions of the Constitution are protected in the same way. The final say as to which, if any, of the recommendations of the Convention are implemented therefore rests with the Parliament, and may require approval by referendum.

A constitutional reform process of this kind is necessarily limited in its scope. The Convention is restricted to the questions which have been referred to it. Moreover, such a Convention, by its nature and composition, is not a suitable instrument for tackling the more fundamental issues of constitutional reform which, in my view, require attention.

The Constitution of this State is a thing of rags and patches. The *Constitution Act* 1934, as amended from time to time, contains many of the principal constitutional provisions, but it lacks completeness and assumes a good deal. There are other statutes having constitutional implications, notably the *Australia Act* 1986. The role of the Governor is dealt with in Letters Patent and Governor's Instructions as modified by the *Australia Act*. The whole structure assumes the operation of the unstated conventions of constitutional government.

The only reference in the *Constitution Act* to the third, the judicial, arm of the government of the State is a provision that the Commissions of Judges remain in force notwithstanding the death of the Monarch, and that the Monarch may remove any Judge of the Supreme Court upon the address of both Houses of Parliament. The establishment of a court structure, even the Supreme Court, is not provided for in the *Constitution Act*, and there is no guarantee of the independence of the judiciary, except such implication as may arise as to the Supreme Court from the provision as to removal of judges to which I have referred.

The executive government fares no better. The provisions relating to the Executive are not only inadequate; they are downright misleading. They are based upon the traditional British model in which executive authority vests in the Crown. In South Australia that translates to the Governor, acting in some circumstances with the advice and consent of Executive Council. Ministers of the Crown are provided for, but there is no reflection in the *Constitution Act* of the political reality that the executive government of the State is carried on by the Ministers as a body, a Ministry or Cabinet, presided over by the Premier. Indeed, the office of Premier is not mentioned at all except for a provision for the appointment of a Parliamentary Secretary to the Premier.

A reader of the *Constitution Act* would be left with the misleading impression that the executive government of the State is in fact carried on by the Governor, albeit at times with the advice and consent of an Executive Council. There is no reference to the conventions of constitutional government, or the principle that the Governor acts on the advice of the Ministers. These anomalous provisions are not, of course, peculiar to South Australia, but they are nevertheless archaic and misleading.

These points are not by any means exhaustive of the incongruities in our constitutional documents, but they are perhaps the most blatant. It seems to me that the most imperative need for constitutional reform is modernisation. The time is surely ripe for a modern Constitution which truly reflects the constitutional and political realities.

The reality of executive government of the State by Cabinet and Premier should be unambiguously set out. The formality of the signing of executive orders by the Governor should be dispensed with. If this modernisation requires definition and specification of the reserve powers of the Governor, that thorny issue should be tackled and resolved. There should be explicit recognition in the Constitution of

the court system, and adequate safeguards of the independence of the judiciary. The experiment upon which the State has embarked does not embrace these fundamental issues of constitutional reform. Perhaps the composition of the proposed Convention and the nature of the process would make that impossible. The process is confined to questions which do not include these weighty matters.

There is another respect in which the process fails to address the most important constitutional issues. I notice that the question of the republic is the subject of a session later in this conference. I should make my position clear. I consider that the advent of an Australian Republic is both desirable and inevitable. I find very few people nowadays who really see the future of Australia as a monarchy. Many question the timing, some relating it to the lifetime of the present Queen. Others are uncertain about the model which ought to be adopted. A great many do not see it as a matter of urgency. But there are very few who really believe that it will not come. For that reason I use the word "inevitable". When there is a sentiment in a community as pervasive as this, the outcome takes on the air of inevitability.

In those circumstances, it seems to me that those undertaking a process of constitutional reform in a State should have as a priority the fashioning of the Constitution to accommodate the advent of the republic. Probably no great changes are necessary although, obviously, there must be new provisions for the appointment or election of a Governor. I regret that this process of constitutional reform will pass without an attempt to adjust the South Australian Constitution to accommodate a future Australian republic.

With all its limitations, however, the forthcoming Convention does have issues of importance to resolve. I will discuss some but by no means all of them.

**Citizens Initiated Referendum**

The first question to be submitted to the proposed Convention is: "Should South Australia have a system of initiative and referendum (citizen initiated referenda) and, if so, in what form and how should it operate?".

Most of you will be familiar with the concept of CIR. It may be defined as a form of direct democracy, in which a given minimum number or percentage of voters has the power to require a referendum to be taken on a given issue without the approval of the Parliament. It has two essential characteristics:

- The people have the power, by petition, to compel the holding of a referendum on whether a particular law should be enacted or repealed;
- The government and Parliament are bound by the results of such a referendum.

There are two principal forms of CIR. One restricts the power of voters to petition for a referendum to the question whether an existing law should be repealed. Another empowers voters to compel, in the same way, not only the repeal of an existing law, but also the enactment of a new law. The result of the referendum in either case is binding, in the sense that the result of the referendum, without further legislative intervention, has the force of law.

A variant has been discussed which would not give the result of the referendum the force of law, but would give the Parliament the choice of repealing or enacting, as the case may be, the result of the referendum. Failure of the Parliament to do so would result in a general election. I do not think that this second variant requires serious consideration. A general election, once called, would be decided on issues other than the issue which was the subject of the referendum, and to a great extent upon the voters' general ideological positions. The particular issue, the subject of the referendum, would not be satisfactorily resolved in that way.

The first variant, however, requires serious consideration. CIR was first introduced at the national level in Switzerland in 1874. In one form or another it has been adopted in 28 States of the United States of America, has been used in Italy, and now also operates in all German States and nationally in Russia. In

Canada it is widely employed at a local government level.

I note that CIR is the subject of the second session at this conference and a paper will be delivered by Professor Geoffrey Walker. Professor Walker was a member of the Panel of Experts to which I have referred. He is a very well informed enthusiast for CIR. As I do not share Professor Walker's enthusiasm for CIR, I suppose that what I intend to say on the subject can be regarded as, to borrow the current language of military strategists, a pre-emptive strike.

The genesis of democracy in the ancient Greek city states took the form of direct democracy. The Athenian democracy involved decision-making by an assembly of all the citizens of Athens. History shows that the assembly was often swayed by the power of persuasive orators into making unwise and sometimes unjust decisions, at times leading to the banishment of the city's best citizens. Where democracy came to be adopted as a form of government in modern nation states, it was necessarily in the form of representative government.

Our constitutional system is grounded upon the principle of representative government. In a true democracy the people are sovereign. They exercise their sovereignty by electing representatives to govern them. Those representatives are empowered, and may even be required in some situations, to submit questions to the people by way of referendum. In all ordinary circumstances, however, the representatives make the decisions on behalf of the people and are accountable for their stewardship at periodic elections.

Representative government is the means by which modern democracies meet what has always been the principal challenge for democracies – namely, how to reconcile the exercise of the sovereign will of the people with the need for strong and effective government. In a representative democracy, it is the business of representatives elected by the people to consider and determine public issues. They have the time and the means to do so. In modern democracies, Ministers, having the advantage of expert advice and input from public servants, are able to make considered decisions on proposed legislation. Backbenchers on the Government side generally have to approve legislation in the party room and, therefore, have to apply their minds in a deliberate way to the issues involved in the proposed legislation. The Opposition has to formulate a view and there is debate in the Parliament. It seems to me that democracy works effectively and efficiently only if legislation is left in the hands of the representatives elected by the people who, in the end, have to be accountable at an election.

There are many reasons for this, and I will discuss some of them:

- A proper decision on most public issues requires an assessment of complex considerations for and against a proposal. It also requires an understanding of the impact which a particular decision will have on other areas of policy or government, and of its wider social, budgetary and economic implications. Few members of the general public, who will be called upon to vote at a referendum, will ever have the opportunity to consider fully the merits and the wider implications of proposed legislation. Many members of the public may have only a superficial understanding of the legislation and the issues involved.
- The principle underlying representative governments is that the elected representatives have the responsibility of providing strong, consistent and effective government and of enacting wise and just legislation, and are accountable to the people who elect them at periodic elections. CIR detracts from this general principle, by placing some decisions in the hands of anonymous voters at a referendum who cannot be held accountable for any adverse effects of their collective decisions. Individual members of Parliaments, and even more so, political parties, can be held accountable for the policies they implement; anonymous voters cannot be held accountable.
- Strong and effective government requires from time to time the enactment of measures that are temporarily unpopular in order to promote the common good in the long term. CIR would enable such measures to be repealed by referendum. It is simply not true to say, as often is said, that the

people are in as good a position as politicians to make the required judgments on public matters. There are times when politicians are able to take a long view, knowing that they have until the next election to be proved right.

Voters would tend to cast their votes at a referendum according to their perception of their own interests at the time, and without much regard for the impact of the decision upon the longer term common good. Popular influence is already strong, and is exercised by the expression of public opinion through contact with local members, petitions, talk-back radio, letters to the press and demonstrations. Public opinion polls have a great influence, perhaps too great an influence. Poll driven politics does not always produce good policies. Finally, the ultimate control is expressed through the ballot box, when the electors have the opportunity of assessing the overall performance of their elected representatives. CIR is not necessary to ensure that the will of the people prevails in the long run, and it may well prove to be detrimental to good government.

- A referendum is a blunt and unrefined legislative instrument. Once a proposal is put before the voters, there is no capacity for amendment or refinement of the proposed legislation in response to public debate. Voters are then confronted with a particular proposition that may deal with only one aspect of a complex matter.
- Legislation by referendum has an inherent tendency to produce results which are oppressive to minorities or minority interests. Political parties and their parliamentary representatives must have regard to minority interests and views. Minorities have votes, and no political party can afford to antagonise a significant minority in the community. They will often tend to endeavour to tailor legislation to reflect the will of the majority in a way which is not unduly detrimental to minorities. There is thus an inbuilt safeguard in representative democracy against the tyranny of a majority. This safeguard is absent in legislation by referendum.
- There is a risk that different initiatives and referendum results, occurring at the same time, may lead to conflicting policy outcomes. For example, one popular initiative may operate to reduce State revenue, while another proposal, enacted at the same time, may have the effect of incurring substantial additional expenditure. A referendum result mandating balanced budgets may accompany other referendum results requiring additional expenditure and restricting capacity to raise additional revenue by taxation.
- The referendum process, as an instrument of wise legislation, is fraught with peril. The history of referenda on proposals to change the Commonwealth Constitution shows that debate has often been influenced by irrelevant arguments and scare campaigns which have deflected attention from the real issues, and have obscured the merits or demerits of the proposals. This would certainly happen in a referendum campaign as to particular legislative proposals, especially when those proposals might affect powerful interests adversely. Interests with access to funds for intensive campaigning, or with influence in the media, could easily mount scare campaigns which would deflect the voters from a proper consideration of the merits or otherwise of the proposal.

CIR has an undeniable attraction for our democratic instincts. There are occasions when all of us would dearly like to have the opportunity of a vote on a particular issue. When I thought about how much I would like to have had a vote on Australia's participation in the invasion and occupation of Iraq, I was almost deflected from my firm adherence to the principle of representative government. In my opinion, however, the dangers inherent in CIR far outweigh any potential benefits. It is, in my opinion, an undesirable constitutional innovation, which is not justified by the experience of other countries and which is not warranted by any demonstrable defect in our system of representative democracy.

**The numerical strength of the Parliament**

The second question referred to the Convention is: "What is the optimum number of parliamentarians in each House of Parliament necessary for responsible government and representative democracy in the Westminster system operating in South Australia?".

In South Australia there are two Houses of Parliament, the House of Assembly in which governments are made and unmade, and a second Chamber, the Legislative Council. There are 47 members of the House of Assembly and 22 members of the Legislative Council.

The belief that there are too many politicians in Australia is quite ingrained in the community. It surfaces, often associated with the notion that we are over-governed, in almost every discussion about Parliaments and politicians. It has its source, I think, in the fact that there is a separate Parliament in each State and Territory as well as a federal Parliament, and there is a common perception that the result is just too many politicians. The problem flows from the nature of the federal system. In a federal system there must be a legislature in each of the constituent parts. There is no escaping that; the question therefore becomes whether the legislatures in the various constituent parts have too many members. I am not convinced that there are too many members of Parliament, but I acknowledge the strength of public sentiment on the point.

To my mind one point is clear. If there is to be a Parliament in South Australia, the House of Assembly, in which governments are made and unmade, must be of sufficient size to perform that function adequately. The House of Assembly needs to be of sufficient size to make it likely that, in ordinary circumstances, an elected government will have a working majority sufficient to enable it to implement its programme. The prosperity and welfare of the State depend to a considerable extent on stable government. The smaller the number of members of the House, the more likely it is that the government will be dependent on a narrow majority. This might give a disproportionate influence to any member upon whose vote the government depends for its survival. It does not encourage good government, and it may discourage the implementation of necessary reforms that may be controversial. It may result in the tail wagging the dog to the detriment of good policy and the welfare of the State. To my mind, 47 members is the minimum number required to serve that purpose. I think that any reduction in the size of the House of Assembly would be most inadvisable.

The argument for reducing the number of parliamentarians is usually based upon the cost savings which would result. In a State the size of South Australia those savings could be significant. It is often urged that the responsibilities of the State Parliament have changed since Federation. Many of its former most crucial functions, such as defence, customs and immigration, were surrendered to the Commonwealth at Federation. Other responsibilities have gradually been taken over as a result of the financial dominance of the Commonwealth Parliament. Some other State responsibilities have been changed, as certain functions (for example, the provision of some government services) have been assumed by private corporations. As a result of these changes the responsibilities of the State Parliament have diminished, and some believe that, as a consequence, it may be appropriate to reduce the size of its membership.

If that sentiment is to prevail, it seems to be necessary to look at the Legislative Council. I cannot see the Legislative Council functioning as a useful second Chamber with much less than the present number of 22 members. If there is to be any worthwhile reduction in the number of parliamentarians, it seems to be that it could only come from the abolition of the Legislative Council. It is therefore necessary to consider that option.

**Abolition of Legislative Council**

The Legislative Council was established with the grant of responsible government to South Australia in 1857, as a House of Property with a very restrictive property franchise. There was some broadening of the franchise over the years, but it continued to be based on property, and all efforts to introduce full

adult franchise were resisted and defeated in the Legislative Council itself, where there was an inbuilt Liberal Party majority.

In a research report presented to the South Australian State Electoral Office in 2002 by Professor Dean Jaensch, School of International Studies, Flinders University, it is said:

> "The issue of equality of access became subordinate to the interests of a party which, through a severe malapportionment in favour of rural areas, and the property restrictions, was virtually guaranteed a majority of the seats in the Legislative Council and hence a veto power over all legislation".

Needless to say the Labor Party, which was so severely disadvantaged by the property franchise, was no friend of the Legislative Council.

Jaensch, in the same research paper, says:

> "Proposals for reform of the system to 'one person one vote' by the Labor Party were based on the principle of equality of access, although there was also the desire to have a better opportunity to win more representation in the Council".

The abolition of the Legislative Council became part of the ALP policy platform. In 1973, however, the Dunstan Labor government was at last successful in introducing full adult franchise for the Legislative Council and abolishing the electoral malapportionment, by establishing the State as a single electorate with members elected by means of proportional representation. The ideological basis for the Labor Party's advocacy of the abolition of the Council therefore disappeared, and the Labor Party lost interest in abolition.

By a curious twist, during the period of the Brown and Olsen Liberal governments in the 1990s, sections of the Liberal Party became so frustrated by the difficulties which a Legislative Council elected on proportional representation presented to the implementation of its legislative programme, that there was serious talk within at least some sections of the Liberal Party of the possibility of abolishing the Council.

The Council, however, remains, with 22 members elected by a State-wide single electorate on the basis of proportional representation, half the members retiring at each House of Assembly election. The system of proportional representation has resulted in the election of some members of minor parties and Independents, with the result in practice that since the system has been introduced, no governing party has had a majority in the Council in its own right. A question to be resolved is: Does the existence of the Legislative Council have a positive or a negative effect on the good government of the State? Or perhaps the question should be: Is any positive effect sufficient to justify the cost burden of its continued existence?

There are two types of argument advanced for the continued existence of the Legislative Council. Some see a second Chamber as a valuable constituent of the legislature in that it slows the pace of the passage of legislation through the Parliament, thereby giving greater opportunity for reflection and for the public to make its views felt. There is also an argument in this State based upon the method by which the Legislative Council members are elected and the consequent composition of the Council. Value is seen in a second Chamber elected on proportional representation, because it results in representation of minority parties and Independents, and thereby gives a voice to minority views in the community. The consequence that governments do not in practice have a majority in the Legislative Council is also seen by some as a valuable brake upon the power of a governing party.

I am not persuaded by these arguments. Unicameral legislatures function quite effectively, as we see in Queensland and New Zealand. The function of a second Chamber as a house of review would be largely fulfilled by constitutional changes affecting the passage of legislation through the House of Assembly. Provision could be made for a strong system of standing and select committees. Adequate opportunity for public scrutiny of, and comment on, proposed legislation could be provided by requiring

a minimum period between the second reading of a Bill in the House of Assembly and its committee stage (perhaps one to three months), although provision for emergency measures would have to be made. The House of Assembly would have to have the power to declare formally that a measure was of an emergency nature, and that the constitutional timetable therefore should not apply. This would have its dangers, but the voters would be likely to hold a government seriously accountable if it abused the emergency power.

I am not impressed by the arguments based upon the method of election of the Legislative Council. The supporters of proportional representation make big claims for it as being the most democratic method of election. I question the system's democratic credentials. Its practical effect, more often than not, is to produce the undemocratic consequence of enabling minorities to exercise an influence quite disproportionate to their degree of support in the community. The State, generally speaking, does not benefit from the frustration of the implementation of the government's programme by the second Chamber and the illogical and undesirable compromises which often result.

I am unable to see that the existence of a second Chamber in the State achieves anything for the benefit of the State which could not be achieved as well by appropriate modifications of the legislative process in a single Chamber. In my view the machinery of government would be streamlined by the abolition of the Legislative Council, and certainly the cost of government would be reduced. If it is desired to reduce the number of politicians in the State, this must be the way to go about it.

**The Houses of Parliament**

The third question to go to the Convention is: "What should be the role and function of each of the Houses of Parliament?".

*Independent Speaker:* One of the persistent complaints among members of the public about the workings of Parliament is the combative and sometimes disorderly behaviour of members of Parliament, especially in the lower House. I think that these complaints to a great extent arise from a misunderstanding of the role which Parliament plays. It seems to be thought of as a polite discussion group in which there is a co-operative search for the common good. The truth is that Parliament, among other things, is an arena in which conflicting interests and aspirations in the society struggle for supremacy. These societal conflicts tend to be reflected in the policies and the tactics of the opposing parliamentary parties, and the Parliament becomes the arena in which the power struggle between the parties, and the interests which they represent, is fought out. It is unrealistic to expect that such struggles and conflicts will not produce heat and passion, and at times spill over into disorder.

Nevertheless, much of what is undesirable in parliamentary debate can be greatly curbed by a wise, resolute and impartial presiding officer. In Australian Parliaments, however, presiding officers tend to be members of the governing party. In South Australia at the present time the Speaker of the House of Assembly is an Independent, but that is unusual. Generally speaking, the Speaker is a member of the governing political party, attends its party room meetings, participates in party decisions, and in all respects continues as a member of the governing party team. This makes it extremely difficult, for both personal and political reasons, for the Speaker to act firmly and independently when dealing with infringements of decorum by government members. Where partisanship occurs there is a general breakdown of confidence in the Speaker, and Oppositions become rebellious and unruly.

There is a great deal to be said for the system which exists in the House of Commons, where the Speaker elected by the House withdraws from the Party Whip and the party room meetings, and is thereby empowered to deal impartially with members from all sides of the House. Much has been written about a similar system for Australian Parliaments. Unfortunately there are difficulties which appear to be insuperable. The House of Commons system works satisfactorily in a House of over 600 members, where

the vote of a single member is rarely crucial. It is difficult to see how it could operate in a House the size of the South Australian House of Assembly. In a House of 47 members the government's majority tends to be small. It can easily happen that the government depends on a majority of one for its survival and for the passage of its legislation. It is not practical, in such circumstances, for a Speaker chosen from the government party to cease to be part of the government team.

It would be possible to appoint a Speaker who was not an elected member of the House, or who held a sinecure seat especially created for the purpose without voting rights, but such a person would be likely to lack familiarity with the procedures and conventions of the Parliament and may not command the respect of the elected members.

I do not think that the problems are insoluble, and an independent Speaker would go a long way towards improving the standards of behaviour and debate. I think it unlikely, however, that a body such as the proposed Convention will be able to solve the problems associated with such a reform.

*Powers of the Legislative Council:* If the Legislative Council is to be retained, questions arise as to whether its powers should be restricted. One suggestion is that it should be deprived of the power to defeat Bills passed by the House of Assembly, and that its power should be limited, as with the House of Lords, to the delay of such Bills for a period of, say, six or twelve months. This compromise is attractive to those who desire to retain the Legislative Council as a house of second thoughts and one in which the voice of minorities is heard, but who see the dangers of a government's legislative programme, or portions of it, being totally defeated in the second Chamber. A solution of this kind may prove to be attractive at the Convention, as a compromise between those who wish to abolish the Legislative Council and those who wish to retain it with its authority unimpaired.

A further topic is likely to be the power of the Legislative Council to withhold supply, thereby forcing the government to an election. Under the present Constitution all Bills, including money Bills, must pass both Houses of Parliament. The Legislative Council may not amend, but may reject, a money Bill.

Power of a second Chamber to reject supply has, of course, been a live topic ever since the 1975 crisis. Whatever may have been the merits of that particular crisis, it seems to me that it is difficult to justify a second Chamber's power to force an election by rejecting supply. Government is formed from the majority of members elected to the House of Assembly. To enable it to govern, the government must have the money necessary to carry on government. If an opposition in the Legislative Council, whether the official Opposition alone, or a combination of the official Opposition and minor parties or Independents, can refuse the supply of money for the ordinary services of government, it can prevent the government from governing and force an election at a time of the Opposition's choosing. This seems to me to go far beyond any reasonable function of a house of review.

This point receives greater cogency from the adoption in this State of a fixed four year term for the House of Assembly. This was introduced primarily to limit a government's power to call an election at a time of its choosing. There is no justification in those circumstances for an Opposition to have this power.

The compact between Mr Peter Lewis and the Labor Party provides that the Convention will consider a number of somewhat revolutionary proposals relating to the composition and functioning of the Legislative Council.

One such proposal is that all Ministers should be located in the House of Assembly. It is not clear to me how it is thought that this measure would improve the functioning of the Council as a house of review. It would certainly create some difficulties, although no doubt they could be managed. Some provision would have to be made for Ministers to attend sittings of the Legislative Council from time to time to explain and defend the proposed legislation, and perhaps to answer questions relating to their

departments. It is not clear how the management of government business in the Legislative Council would be undertaken. Presumably there would have to be an office similar to that of majority or minority leader in the United States Congress to do this.

A more radical proposal is to eliminate political parties from the Council. It is suggested that this would be done by requiring that no candidate may be a member of any political party registered with the Electoral Commission. Apart from the fact that this seems to infringe a somewhat basic democratic principle of freedom of association, it is difficult to see how it could be made effective. In every free Parliament in the world, members associate in political parties. People will always group with like-minded persons to achieve their ends. Even if members could not openly wear the badge of membership of a political party, they would undoubtedly, by various subterfuges, manage to carry on in the same way as if they were formally members of a party.

I will not discuss some of the other proposals, but I mention that one seeks to change the electoral system of the Council so that, instead of the State being treated as a single electorate, there would be only five members elected in that way, the remaining members being elected by and representing six regional electorates.

**Accountability, transparency and functioning of government**

The fourth question to be submitted to the Convention is: "What measures should be adopted to improve the accountability, transparency and functioning of government?".

A number of questions have been raised for consideration designed to achieve these goals. These proposals relate to the reform of question time in the Houses of Parliament, the functioning of both standing committees and select committees, the functioning of the Office of Ombudsman and also of the Auditor-General, and the operation of the Freedom of Information legislation. It has been suggested that all Acts of Parliament should contain a sunset clause.

Sunset clauses undoubtedly serve a purpose in some types of legislation, but the arguments against applying sunset clauses to all legislation seem to be overwhelming. The process of reviewing all legislation before it automatically lapses would create a great burden on the resources of the Parliament by considerably increasing its workload. Most legislation has a long-term operation, and the task of renewing it periodically would add a further unnecessary workload to the Parliament. The automatic repeal of legislation might give rise to crucial periods in which there is no operative law governing situations which require lawful regulation. I am not aware of any evidence to suggest that any evil exists which the universal operation of sunset clauses would remedy.

**Electoral systems**

The final question to be submitted to the Convention is as follows:

> "5.1 What should be the role of political parties in the Legislative Council and what should be the method of election to the Legislative Council?
>
> "5.2 What should be the electoral system (including the fairness test) and method of election to the House of Assembly?".

I have already adverted to the principal issues which have been raised under the first of these questions, and I will not pursue that topic further. The second part of the question raises important issues concerning the election of the House of Assembly. The House of Assembly is elected on the basis of 47 single member electorates, the member being elected by means of preferential voting. The boundaries of the electorates are determined by the Electoral Districts Boundaries Commission, there being a redistribution after each general election.

There is a one vote, one value rule requiring that electorates have the same number of electors with a tolerance of 10 per cent. An electoral redistribution is to be governed by two principal criteria: the first

is that it is to "reflect communities of interest of an economic, social, regional or other kind", and the other is what is called the fairness test. That requires that, as far as is practicable, the redistribution must be "fair to prospective candidates and groups of candidates so that, if candidates of a particular group attract more than fifty per cent of the popular vote (determined by aggregating votes cast throughout the State and allocating preferences to the necessary extent) they will be elected in sufficient numbers to enable a government to be formed".

There has, to my knowledge, been no suggestion of introducing proportional representation for the House of Assembly, and I think that it may be assumed that the single member system will continue. The controversial issue regarding the electoral system for the House of Assembly is the fairness test. It was introduced following a referendum in 1991 because of a belief that, although the system provided for one vote, one value, governments were sometimes elected with a minority of votes in the electorate, due to the concentration of voters supporting a particular political party in certain areas.

The fairness test has undoubtedly caused great difficulty for the Boundaries Commission. It requires the Boundaries Commission to make assumptions that voters who voted for a particular party at one election will do the same again, although public sentiment may have changed and the issues may be quite different. It requires the Boundaries Commission to make assumptions regarding voting patterns arising from shifts in population. It creates difficulties for members representing electorates with constantly changing boundaries, and may deprive them, at least partially, of the advantage of building up a personal vote by hard work in their electorates.

Against these difficulties must be weighed the reasonable expectation that a political party that gains a majority of the two party preferred vote at a general election should have a realistic prospect of forming government.

The ideal proposed by the fairness test provision can never be achieved perfectly, or perhaps even approximately. Nevertheless, it points the Boundaries Commission in the right direction, and directs its attention to a criterion which transcends the other criteria, which are focused on the individual electorates. Frequent boundary changes, which the application of the fairness test entails, are the price which has to be paid for the attempt to achieve a fair result at a general election.

**Conclusion**

In this paper I have attempted to provide something of an overview of the issues likely to arise at the proposed Constitutional Convention, and my own views about some of them. It is by no means exhaustive. A number of other issues have been raised in the discussion paper which will form the basis of the discussions, and yet other issues are already being raised at the meetings which are preceding the Convention. As I have already remarked, the whole process is experimental in nature. It differs fundamentally from all other constitutional reform processes of which I am aware. Quite apart from any recommendations which emerge from the Convention, the whole process will be watched with interest.

I conclude with the remark that much that is contained in this paper appears in the discussion paper. This is not due to plagiarism, but due to the fact that many of the views which I expressed at the meetings of the Expert Panel found expression in the discussion paper which emerged, expressed to a considerable extent in the language which I used. It will be no surprise to you, therefore, if you get to reading the discussion paper, to find that you are re-reading much of what has been said in this paper.