

Chapter Seven

The Attack on Australia's Democracy?

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Following the 2006 election in South Australia, Labor Premier Mike Rann reiterated his party's long held policy to abolish the Legislative Council.

This paper assesses his pledge: its generation almost 100 years ago, and why abolition has been a core Labor policy for so long. It also addresses the past structure of the Council; whether this merited criticism; the transformation of the Council in the 1970s; and the roles the Council carries out in the modern system of responsible government. It explains why a policy of abolition should be resisted and, finally, it analyses the reform proposals of the Rann government.

The historical context is crucial, and this involves three relatively discrete periods.

At the time of the inauguration of full responsible government in 1857, one key axiom of mid-Victorian constitutional theory, within the Westminster system, was the necessity for bicameralism. The Lower House should represent the people. The Upper House should consist of "the Education, Wealth and more especially the Settled Interests of the country ... that portion of the community naturally indisposed to rash and hasty legislation".

Five years of debate in the Colony leading to the Constitution resulted in a compromise. The House of Assembly incorporated full male adult suffrage, including Aboriginal males, and a system of representation which was close to equality of the value of the votes. This sparked dire warnings from the conservatives. Samuel Davenport in 1862:

".....recalled the feelings of mortification he experienced [when] ... this fine province will share no better fate than other communities which have transferred the representative power, without equipoise, into the hands of the most numerous and least instructed".

In fact, there was an "equipoise". The conservatives built the Legislative Council to be a bulwark against radicalism. They originally sought a second chamber which would be a nominated house. But they compromised to accept a fully elective chamber. They built in two means of defence for their interests. First, the members of the Council would be elected on the basis of a restricted property franchise. Second, the Council would have an absolute veto power over all legislation, including the budget.

In the 1880s, a third defence was added. When the electoral system was amended to divide the colony into four electorates, it included a severe malapportionment in favour of the country areas and of country property.

In the context of colonial politics, this was a democratic bicameral system which was ahead of the other colonies, and far ahead of Britain and the other nations of the Empire. Within the contemporary context of the colonial years, from 1857 to 1890, the Legislative Council was, and acted as, a house of review. That is, it was a brake on "rash and hasty legislation" – interpreted in terms of property.

Throughout the colonial years there were constant battles between the House of Assembly and the Legislative Council. These took on a greater intensity after the formation of a party system during 1890-1910. The disagreements between the more radical and the more conservative forces now

incorporated a lens based on Labor versus anti-Labor. Increasingly, this party confrontation centred on the Legislative Council.

For the next 65 years after 1910, the Legislative Council's election base was far from democratic, and it could not claim to be a house of review. By 1915, the elections for the Council were based on five electorates, each returning four members. Labor was virtually constrained to just one electorate in the city, while the Liberal Party had strong support in four electorates, three of which were in the country areas. The effect of this is shown by the results of eighteen successive elections: the Labor Party could not win more than four of the 20 seats from 1918 to 1973.

Further, the restricted property franchise was increasingly out of touch with modern concepts of a fair and democratic election system. As a result, the Legislative Council was not a house of review. It was a house of partisan bias, dominated by the Liberal and Country League (LCL); in fact, by the conservative wing of that party.

In summary: at its formation in the 1850s, the Legislative Council reflected the theory of Victorian parliamentary structures and processes – bicameralism, based on a belief in the need for a second chamber which would be a house of review. In the context of the time, the “review” was based on the principle that “property” should be defended, and any legislation of the House of Assembly should be scrutinized by the representatives of property, and especially rural property.

By the 1970s, this theory was no longer justified, neither in theory nor practice. For nearly 120 years, the conservative majority in the Council had refused to pass any legislation which it saw as against its interests, and refused to consider any substantial modifications to its power base – the restricted property qualifications for voters, and the severe rural malapportionment.

The Labor Party and Labor governments continually complained about the intransigence of the Council, and its refusal to allow reform. As a result, Labor settled on a firm policy of the abolition of the Council. It was not only the Labor Party which had complaints. Non-Labor governments also found that their legislation could fail to pass the scrutiny of the conservative majorities in the upper house. Tom Playford, the Liberal and Country League Premier from 1938 to 1965, had major problems with his party colleagues in the Council.

What convinced the dominant conservatives in the Council to accept reform in the mid-1970s was evidence that their base was being eroded. The formation of a Liberal Movement Party by Steele Hall, drawn from the more progressive faction of the LCL, threatened the LCL hegemony, and Labor party support was eroding the LCL domination in two of the rural electorates. Further, the Council had become such a biased and partisan chamber that the Labor Party could argue abolition with considerable justification.

The result was a unique agreement between Labor Premier Don Dunstan and the leader of the conservative majority in the Council, Ren de Garis. The electoral base of the Legislative Council was transformed. Adult suffrage was applied, and the electoral geography was changed to a single State-wide electorate, thus removing any possibility for malapportionment. This meant that two major complaints of the Labor party had been removed. A third reform was the introduction of proportional representation (PR) for Council elections.

At first sight, there was no longer any basis for the Labor Party to be critical of the Council or of its actions. After the reforms, the electoral base of the Upper House had been transformed to the point where it was far more democratic than that for the House of Assembly.

But there were two unintended consequences. The first has been that the PR system allowed for a close reflection of the electoral choices of the public in the Council. Since the reforms in the mid-1970s, neither Labor nor Liberal has held a majority of the 22 seats in the Council. It has been a hung Parliament, with a balance of power held by a range of minor parties and independents. Given the arithmetic of the PR system, and the growing support for minor parties and independents in all elections, it is very unlikely that either major party will win a majority in the Council in the foreseeable future.

The second unintended consequence has been that the Legislative Council had the ability to be a real house of review. Prior to the reforms, when the Liberal Party held a permanent majority in the Upper House, the Council was either an intransigent, party-based opposition to Labor governments, or an “echo” for Liberal governments – albeit a muted echo, on some occasions. It was not an independent house of review.

From 1975, the Council has had the structure to be a real house of review, and for over three decades has acted as such.

The unintended consequences resulted in the Labor Party re-emphasising its commitment to abolition. Since the reforms of 1975, Labor has been in government for 24 of the 35 years. During that period it has had to face the problem of convincing minor parties and independents in the Council to get its legislation through. It was no surprise, then, that Premier Rann announced that abolition of the Council was back on the agenda.

Is this policy justifiable? It was, in the period from 1910 to 1975. It is not justified in 2009. A uni-cameral structure would decrease the quality of parliamentary democracy and responsible government. Given the fact that both Labor and Liberal are disciplined parties, albeit enforced by differing methods, and given that the electoral contest in the House of Assembly is likely to result in a majority for one party (although South Australia has the record for the number of hung Lower Houses), the result would be domination by one party with few, if any, checks and balances.

Abolition of the Council would have the potential seriously to damage the quality of responsible government. The existence of a second chamber, based on a proportional representation system, has the potential to be a check and a balance. But there need to be means to ensure that a second chamber has both the opportunity and the basis to be, as far as possible, an independent house of review.

Would the Rann agenda for reform (as distinct from abolition) increase the potential for this? I will assess each of the proposals.

First, reduction of the term of office of a member of the Council from eight to four years.

The “double” term of membership is a relic of colonial years, when property-owners sought to keep democracy at bay. There is no justification for this in 2009, especially as the electoral system for the Council is now even more democratic than that for the Assembly. A term of eight years is too long without the people having the right to judge their representatives. Under the double term, it is possible for a member of the Council to remain in the house for eleven years without facing the electors. Further, a term which continues through a general election for the Assembly may not be a reflection of the opinions of the voters at that election.

This proposal merits support.

The second proposal of the Labor government is to reduce the membership of the Council from 22 to 16. This would cause serious problems in the processes of the Council. First, given the system of proportional representation for electing the Council, it would be unlikely for either Labor or Liberal parties to win more than six seats, with five a more probable result.

This would produce a very limited pool of talent, of a maximum of six available for the selection of a President and three Ministers. It is the case that Labor, especially, has been using the Council as a reward for long service to the party or the union movement, and there has been an increase in the number of “party hacks”. As the role of a Minister needs a certain level of “quality”, the pool from whom they are selected needs to be broad.

This proposal does not merit support. The membership of the Legislative Council should remain at 22.

Third, the government proposes an amendment to the deadlock provisions in the Constitution. The South Australian Constitution currently provides for a means of resolution of deadlocks between the Assembly and the Council, but in such a form that the deadlock would most likely not be resolved. The provision has never been invoked. It offers two choices to the Governor: either a double

dissolution, or the issuing of a writ for the election of two additional members for each Council district. Given that there is now only one district, the latter would be unlikely to resolve a deadlock.

The referendum proposal offers a system of resolution of deadlocks based on the existing system in the Australian Senate. In brief, if a Bill has twice passed the Assembly, and has twice failed to pass the Council, the Governor may issue a writ for a double dissolution of Parliament. If, after the election, the deadlock remains, it may be resolved by a joint sitting of the Parliament.

This procedure would enable the Legislative Council to continue to act as a real house of review, able to propose amendments to, and oppose, government legislation. But continued opposition would provide a trigger for a double dissolution. The resolution of the deadlock would then involve two processes. First, the electorate would have the right to decide, in a double dissolution election, the party makeup of the membership in both houses. Second, if the party result of the election is such that the Bill again passes the Assembly and fails to pass the Council, then a joint sitting would resolve the deadlock. This process would place the “final” decision in the hands of the electorate, a process which would be democratic.

This proposal merits support.

Labor’s fourth proposal is that the President of the Council be granted a deliberative vote rather than the current casting vote. This would benefit a major party in the case of a close election result, by providing a further government vote on the floor of the Council. However, given that the Speaker of the House of Assembly has only a casting vote, there seems no logical argument to support a change in the Council, beyond partisan advantage.

This proposal does not merit support.

One further point needs emphasis. It has been reported that the referendum on reform will be a single decision by the voters to accept or reject the whole package of four proposals. This is unacceptable, and raises the question of whether the Labor government’s reform proposals include an element of partisan advantage.

The four questions should be put to the voters as separate questions, as was the case in the 1988 federal constitutional referendum.

My interpretation is that a combination of the reduction of the membership to 16, a deliberative vote for the President, the proposed deadlock provisions, and a double dissolution at every election, would provide more opportunity for either major party to increase its ability to control the Parliament. As it is my opinion that the quality of responsible government increases where there is a “hung” Parliament, any stronger potential for major party control should be resisted.

Regardless of the result of the referendum, I would propose three further reforms to the Council which would not require an amendment to the Constitution.

It is the convention that three Ministers are drawn from the Legislative Council. This increases the potential for party confrontation, and government versus Opposition confrontation in the House, an aspect which is inimical to a function of a house of review.

I would propose that there be one Minister drawn from the Upper House, with the portfolio of Minister for Government Business in the Legislative Council. This would centre ministerial and cabinet responsibility – responsible government – in where it should be: the House of Assembly, the “house of government”. It would allow the Council to concentrate on its prime role of a house of review.

The second reform would be to inaugurate a full committee system in the Council, with all proposed legislation transferred to a committee after introduction in the house. This would allow a better, and hopefully less party confrontational approach to the assessment of all legislation. It would also allow the Council to encourage interested parties and the public to be directly involved in the process.

The third reform is to abolish the “above the line” voting system for the Council. In 1985, the proportional representation system was amended to provide for “above/below the line” voting. The

electors had a choice of voting below the line, and indicating a preference number for every candidate, or voting above the line by simply placing the number 1 next to a list of candidates. This system was introduced ostensibly to make the process easier for electors, and to reduce the number of accidental informal votes, due to a large number of candidates.

A simple single vote for a party above the line automatically applies a full preference distribution added to the initial party choice of the elector. This list system, combined with a high proportion of voters who have a strong party identification with one or other of the major parties, produces a high proportion of seats which are very safe. They are the “gift” of the party, rather than the informed choice of the voters. In fact, it can be argued that this was the purpose of the change, rather than minimizing informal votes.

This election system should be reformed so that the electors have the right to allocate their own preferences. The problem of a potential for informal votes due to the large number of candidates on the ballot paper could be eased by introducing a modified optional preferential vote, based on the Hare-Clark system.

In conclusion, the Legislative Council has had a checkered career: from a house of review within the context of mid-Victorian political theory and practice; through a long period of partisan domination when it was not a house of review, but a house of a faction of a party; to a real, independent house of review which bolsters the principle of responsible government in the State.

It merits retention, with the prime aim of any reform proposals to strengthen it as a house of review.