

Tasmania's Legislative Council elections — is reform needed?

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Perspectives on the question of Tasmanian Legislative Council election arrangements identifiable in the literature are varied. One view is that, as the Council does not face a general election, reform is needed to foster greater accountability over all members collectively for their actions. Another sees the Council as not sufficiently representative of all views and argues that elections are contested on local issues rather than those affecting the state more broadly. An alternative position is that Tasmania has a unique bicameral model into which present arrangements fit. All critics are dissatisfied with the *status quo*, though there is a lack of clarity in the debate.

Is there a 'perfect' electoral system?

A basic tenet of democratic elections is that they take place at regular intervals to ensure members remain accountable to their constituents.¹ According to Costar, electoral systems occupy 'a central but controversial place in democratic politics' as governments (or majorities in upper houses) in Australia are formed 'according to the calculus of seats won in parliament, rather than according to the sum total of votes obtained.'² Farrell says there is not one single system that is ideal for all circumstances; rather 'a judgement on which electoral system is best... should be made in the light of that country's history, social composition and political structures.'³ In this regard, Tasmania has the most regional and dispersed population of all Australian jurisdictions.

Identifying deficiencies within an electoral system is, by contrast, more straightforward. Problems with electoral systems in a technical sense — pervading even those jurisdictions considered to be well progressed — include malapportionment (imbalances of population among electorates), gerrymandering (electorate boundaries designed to disadvantage a party or group), manipulated election thresholds (adjusting quotas to exclude minority parties), and party-specific laws

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(such as outlawing a highly radical party).⁴ In a systemic sense, single-member electorate preferential methods have been subject to criticism because too many voters are consequently left unrepresented. According to Wright, these methods ‘fail to meet some of the basic requirements of a democratic electoral method.’⁵ He argues, first, that as a matter of principle, Article 21 of the Universal Declaration of Human Rights proclaims that ‘the will of the people shall be the basis of the authority of government’;⁶ and secondly, that, as not all community opinions are subsequently represented in parliament, such methods fail to meet the ‘will of the people’ test.⁷ However, the concept of representation is an unresolved debate and the notion of the best practice will largely depend upon how representation is perceived.⁸ In essence, advocates of proportional representation models are concerned with the composition of parliament and ensuring that elected members mirror the electorate in terms of socio-economic and cultural groups. For advocates of majority government models, the important factor is that an elected member makes decisions in the interests of the electorate — though as constituents seldom agree upon what is in their interest, this can be complex.

At the same time as noting the elusiveness of a best practice electoral model, however, Lakeman and Lambert have observed that there is ‘no such thing as finality in political development’ and assuming a pinnacle can be reached is presumptuous.⁹ This observation, surely, applies to the Tasmanian legislative council as equally as it would to all legislatures generally. Literature, however, does not specifically distinguish between the logic or otherwise of elections for an entire legislative body as opposed to sporadic elections for some electorates at periodic times.

The Legislative Council as an institution

As an upper house, the council’s primary role is to serve as a house of review. When conceived in the 1850s, the council was envisaged to be a guard against hasty and ill-considered legislation, instinctively conservative, cautious, and resistant to change not proven to be beneficial.¹⁰ This description, though perhaps accurate in the earlier years, has become a generalisation. The Council’s powers are extensive, as it cannot be dissolved and has the power to block passage of any bill, including those for supply.¹¹ With independent members holding a majority, passage of legislation is not guaranteed. The former Clerk of the Council has stated that the ‘most predictable trait of the Legislative Council from a Government’s perspective is indeed its unpredictability.’¹² In practice most bills pass without amendment and rejection of a bill is relatively rare.¹³

Since the current council’s inception in 1856, party-affiliated members have always been a minority.¹⁴ In 2010, the council comprised 11 independents, three Labor, and one Liberal. The Greens and other minor parties, though standing candidates, have not succeeded in gaining a seat. Relatively few MLCs have been appointed ministers. In Townsley’s view, ‘often proceedings [in the Council] are dull, especially as individual members are apt to ride hobby horses.’¹⁵

Legislative Council elections

Unlike other bicameral parliaments in Australia, the Tasmanian Parliament's lower house uses a proportional representation method and the upper house uses a preferential voting method. At a Legislative Council election, the winner is the candidate who receives a majority of 50% + 1, the same as for House of Representatives elections. Where no candidate receives a majority based on first preferences, according to the Tasmanian Electoral Commission, 'the candidate with the fewest votes is excluded, and each ballot paper counted to him/her is counted to the unexcluded candidate next in the order of the elector's preference.'¹⁶

Under the *Electoral Act 2004*, in autumn each year upper house elections are held for two or three out of 15 single-member electorates in accordance with a planned schedule. Writs are issued in late-March or early April and polling day usually takes place on the first weekend of May. Council election candidates are restricted to a campaign expenditure limit of \$10,000 at the year 2005, which increases each year in increments of \$500. In addition, Tasmanian electoral law prohibits campaigning within 100 metres of a polling place on polling day and restricts the production, distribution and display of how-to-vote cards. Members are returned for fixed six-year terms. As the Council cannot be dissolved but prorogued only, this schedule continues largely uninterrupted, save for the occasional by-election.

In practice, the Council's periodic electoral cycle prevents a sudden change of its membership in line with abrupt shifts of public opinion and attitudes favourable to representatives with different political stances.¹⁷ In other jurisdictions that once had similar kinds of arrangements to Tasmania the logic had been the same.¹⁸ As such, in all probability this situation has contributed to or at least protected the dominance of independent members rather than party-endorsed candidates in the Tasmanian upper house. Critics do not cite this situation as being problematic *per se*, but rather question the appropriateness of the electoral framework. A salient point to remember is that electoral rules may not singularly determine outcomes: the electoral system must be seen in the overall context within which it operates.¹⁹ Even if substantive change were made to the way MLCs are elected, it is not inevitable that voters would necessarily move away from a preference for independent candidates. Sharman has sought to explain why independents can get elected into parliament ahead of party candidates: first, he says, where members are drawn from local electorates, local issues tend to matter; secondly, the smaller the electorate when viewed as a ratio of voters to elected members the easier it becomes for an independent to be elected; and, thirdly, when voters are dissatisfied with parties due to internal strife or because party policy is too distant from local interests, independents become an attractive alternative.²⁰ He argues, in the specific case of the Legislative Council, that independents make up the largest grouping due to the 'regional nature of Tasmania' and 'the politics of locality and personality' being dominant.²¹

Aside from conducting in-depth case-by-case analyses, the extent to which local interests have been the overriding factor in the minds of voters at contemporary legislative council elections remains difficult to prove.

Alternative election models

Debate surrounding the council's periodic election cycle process has led to calls for reform, in particular by holding elections simultaneously with the lower house to introduce a degree of collective accountability and to enhance the Council's review capacity. In Tasmania, elections for Tasmania's lower house, the House of Assembly, operate using the Hare-Clark proportional representation method, whereas the upper house uses a preferential method. Other bicameral legislatures in Australia usually employ preferential voting methods for lower house elections and proportional representation methods for upper house elections. Further, as shown in the table, the trend for other Australian upper houses is to have multi-member electorates, elections ordinarily coinciding with the lower house and a proportional representation voting methods. Length of member's terms and the coincidence of member's terms vary from jurisdiction to jurisdiction, though upper house members generally serve fixed terms.

Australian upper houses: electoral and membership arrangements					
	<i>Membership size and number of electorates</i>	<i>Election timing: simultaneous or separate from lower house</i>	<i>Length of terms</i>	<i>Coincidence of terms</i>	<i>Voting method</i>
Senate (Special arrangements if a double dissolution)	76 members; 12 from 6 states; 2 from territories	Simultaneous elections not a constitutional requirement	Fixed at 6 years	Half-Senate elections triennially	Proportional representation
New South Wales LC	42 members; 1 statewide electorate	Simultaneous	Fixed at 8 years	Half-Council elections every four years	Proportional representation
Victoria LC	40 members; 8 regions; 5 members from each region	Simultaneous	Fixed at 4 years	All terms coincide	Proportional representation
Western Australia LC	36 members; 6 regions 6 members from each region	Simultaneous in practice (though not a constitutional requirement)	Fixed at 4 years	All terms coincide	Proportional representation
South Australia LC	22 members; 1 statewide electorate	Simultaneous	Fixed at 8 years	Half-Council elections every 4 years	Proportional representation
Tasmania LC	15 members; 15 single-member electorates	Separate to House of Assembly; fixed to occur during May annually	Fixed at 6 years	Terms are staggered so two or three electorates are up for election each year	Preferential

Reform furthest from present arrangements would involve moving to a whole-of-Council election held simultaneously with Assembly elections, with members of each house having the same terms, drawing MLCs from a statewide electorate using the Hare-Clark voting system. Another option is to hold a half-Council election coinciding with each general election with members having terms twice that of lower house members. This would be done every three or four years, separate from Assembly elections, with members having fixed 6- or 8-year terms and drawn from a statewide electorate using the Hare-Clark voting system — essentially as was recommended by the Morling Inquiry.²² The justification provided in the Morling report was that sporadic localised elections do not stimulate debate of major political issues, leading to voter apathy, low voter turnout, and instances of incumbent members being returned without a poll required. A third option would be, as Kellow has suggested, for both house to undergo an exchange of electoral systems with MLCs elected through a proportional representation method and MHAs elected from single-member electorates through a preferential method.²³

Reform involving the least departure from present arrangements would be to hold biennial elections for one-third of council members or triennial elections for half of Council members. Concerns with present arrangements relate to a need to improve accountability, ensure a broader range of views are represented and to address voter apathy and incumbent advantage.

A need for greater accountability?

Stokes has argued that the periodic electoral cycle allows the Council to make legislative and policy decisions, without ever being held accountable as a whole to the electorate for its actions, and changing the electoral system would offset the Council's power to veto legislation.²⁴ As such, holding an election for all MLCs simultaneous with Assembly elections would introduce collective accountability between the Council and the electorate. MLCs would come under collective examination for their actions, providing a gauge of public satisfaction in respect of the whole Council's treatment of major legislative and policy questions. A criticism aired at the time of the Morling Inquiry, as described by its report, was that 'the fragmentation of the electoral process inevitably results in matters of policy not being agitated when elections are held' and consequently 'a member of the Council need not have policies of his own.'²⁵

Former Premier Paul Lennon has argued that 'the failure to provide for collective accountability means that its members can and do act excessively without any recourse' and called upon MLCs to agree to amend electoral laws so that 'the Council must dissolve and face the people through a democratic election each four years.'²⁶ However, under the Tasmanian *Constitution Act 1934*, the Governor may prorogue parliament but in doing so may not dissolve the Council. Dissolving the Council to accommodate elections simultaneous to the Assembly, therefore, would

also necessitate modification to power relations between the two houses. The fact that the Council cannot be dissolved allows it to block the passage of legislation, including bills for supply, and force the government to an election (though this last occurred in 1948). A separate debate has sought to resolve whether this situation is appropriate or needs revision.

The absence of simultaneous elections as a constitutional or statutory requirement is not without contemporary precedent in Australia. The Commonwealth *Constitution*, for example, does not require simultaneous elections. Whereas a half-Senate election should take place ‘within one year before the places are to become vacant’ the House of Representatives continues in duration for three years unless sooner dissolved by the Governor-General. There have been six House of Representatives elections — 1929, 1954, 1963, 1966, 1969, and 1972 — and four half-Senate elections — 1953, 1964, 1967, and 1970 — held separately. Proposed constitutional amendments to provide for simultaneous elections have failed four times at referendum (1974, 1977, 1984 and 1988).²⁷

Other issues associated with accountability is the tendency for elections to be low-key events that favour incumbent members. Indeed, they have been described as being more akin to by-elections.²⁸ The former Deputy Leader for the Government in the Council has argued that the rotational election cycle and expenditure limit provides incumbent members with an ‘extraordinary advantage’, incumbent members are rarely ousted and members are returned opposed only by one or two other candidates and sometimes unopposed.²⁹ Whilst the turnover rate of Council members is similar to the Assembly,³⁰ of 64 elections held from 1990 to 2010, only on eight occasions has an incumbent candidate recontesting their seat been defeated. From 1947 to 1993 there were 22 occasions where a member was returned unopposed.³¹ In 1956, Townsley wrote that in light of instances where members are returned unopposed, and that if ‘the electoral system so favours the sitting candidate that no newcomer has a chance of election, then there is something seriously wrong with the electoral system.’³² Voter apathy and low turnouts were issues also noted in the Morling Inquiry report among reasons to support change.³³ In their submission to that inquiry, the Greens Party claimed that the ‘constitution of the Legislative Council has resulted in an extraordinarily high level of voter apathy’ with voters having ‘no idea’ which electorate they belong to or who their local member is.³⁴ Turnout rates for Council elections (voting is compulsory) for the last decade are shown below; by way of comparison, turnout at the last Federal election in 2010 for the House of Representatives was 93.22% and for the Senate 93.83%.

There is a view that suggests a move away from single-member electorates would come at a cost to accountability between voters and members, as multi-member electorates create blurred lines of accountability and responsibility because constituents cannot easily identify with an individual member. An advantage of single-member electorates is that there is a clearer relationship between the ‘local member’ and the constituent body.³⁵

Legislative Council election turnout rates, 2000-2010 (%)					
Paterson	2000	88.17	Rumney	2005	89.56
Wellington	2000	83.61	Rowallan	2006	88.60
Nelson	2001	85.54	Wellington	2006	78.80
Pembroke	2001	92.42	Nelson	2007	83.65
Rowallan	2001	94.53	Pembroke	2007	90.78
Huon	2002	90.98	[Montgomery	2007	Unopposed]
Montgomery	2002	92.97	Rosevears	2008	84.86
Rosevears	2002	90.08	Huon	2008	86.54
Derwent	2003	92.72	Windermere	2009	84.04
Mersey	2003	93.07	Mersey	2009	88.79
Windermere	2003	90.08	Derwent	2009	86.31
Apsley	2004	96.28	Pembroke (BE)	2009	88.57
Elwick	2004	90.90	Elwick	2010	81.19
Murchison	2005	92.76	[Apsley	2010	Unopposed]
[Paterson	2005	Unopposed]			

Source: Tasmanian Electoral Commission election reports

Note: 'BE' = by-election. Paterson renamed Launceston; Wellington renamed Hobart; and Rowallan renamed Western Tiers

Broadening representation to improve the Council's review function

According to Newman, the intention of periodic elections is to make the Council 'a continuing body able to act as an independent house of review.'³⁶ Others, however, believe that the effect has been the opposite and to the detriment of the Council's ability to act as a house of review. The report of the Morling Inquiry recommended that Council's members should be drawn from a statewide electorate with half going to election at the same time as the Assembly and members should be elected using the Hare-Clark system. In part, this was based on the general observation that upper houses usually comprise members from a whole-of-jurisdiction electorate using a proportional representation election method. The report also claimed that, if MLCs were elected from a statewide electorate rather than many small electorates, there would be members returned with broader and more diverse views, thereby enhancing the capacity of the Council as a house of review.³⁷

Aside from whether the changes to the Council's present electoral model would enhance its review capacity, conflicting and apparently unresolvable notions of representation persist. Some argue that the composition of the legislature should mirror demographic groups within society to ensure there is a proportionate representation of genders, ethnicities, socio-economic groups, and so forth. Others believe that decisions in the legislature should be made on behalf of constituents and the important element is that interests are heard.³⁸ Further, according to

Lijphart, problems relating to representation can be a product of small legislatures. In his view, as a general rule a legislature's size can be determined through applying the cube root law to the population it represents. For a jurisdiction with a population of 500,000 (such as Tasmania), this translates to a legislature of 79 members: currently there are 15 members in the Council and 25 members in the Assembly. The smaller the legislature, therefore, the greater likelihood or tendency there is for disproportions to be exacerbated and reinforced.³⁹ The former Clerk of the Senate told an ASPG conference in 1998 that 'there is an optimum size for a legislature which is not related to the size of the electorate' and a legislature that is too small makes adequate representation and deliberation more difficult.⁴⁰

In the case of other Australian upper houses, the effect of introducing proportional representation has been the emergence of minor parties that have tended to hold the balance of power, which, in Stone's view, 'enhance the democratic legitimacy of those Councils.'⁴¹ In the case of the Senate, for example, Sharman has argued that proportional representation has led to the emergence of minor parties and independents, which in turn has enabled the Senate to act as an independent scrutineer of government.⁴² However, if the rationale elsewhere of introducing proportional representation has been to keep the upper house out of government hands to improve its capacity, the Tasmanian Legislative Council appears to have avoided the problem necessitating the apparent solution. Though ironically not applicable to the Tasmanian situation, an imperfection that has been cited against electoral procedures in Australia generally is that discrimination — intentional or otherwise — has prohibited independents being elected to parliaments.⁴³ Notwithstanding, it has been claimed that independent MLCs are generally conservative in outlook, move in and out of party affiliation throughout their political careers when the timing suits, and act more as parallel unilateralists than as truly independent actors.⁴⁴ Townsley, though, has said, that while the Council sometimes defends vested interests, it also acts as a *de facto* opposition to the government of the day when the backbench and *de jure* opposition have been ineffective.⁴⁵

Fitting with Tasmania's unique bicameral model?

An alternative justification for staggered and periodic Legislative Council elections is that these arrangements neatly fit into the overall system. 'Tasmania's unique bicameral model', in Stone's view, 'seems stable and sustainable.' While elsewhere in Australia there has been to move to simultaneous lower and upper house elections, Tasmania remains an exception. Stone has noted that simultaneous elections have been the catalyst for partisan upper houses in other Australian States.⁴⁶ According to *Odgers*, 'in a truly bicameral system there is no requirement at all for synchronisation of elections.' Further, *Odgers* states: 'Effective bicameralism requires that the second chamber should have a significant measure of autonomy in its electoral cycle, as well as distinctive electoral arrangements.'⁴⁷ This assertion, nonetheless, falls short of an endorsement of staggered elections; the point made is merely that each house of a bicameral parliament should have its own

electoral arrangements. In addition, Tasmania's decentralised population in dispersed clusters provides a reasoned basis for regional single-member electorates and provides a balanced offset against the Assembly's electoral system. Though operating under a proportional representation model, the lower house has remained a parties' house. Additionally, the wide geographical coverage of its five multi-member electorates can mean constituents have little in common with one another — the electorate of Lyons, for example, reaches from the north coast of Tasmania to Port Arthur in the south.⁴⁸ As shown below, the Council's single-member electorates are currently an assortment of characteristically urban and rural areas and distinguishable regions of Tasmania, reflecting the state's dispersed population.

Legislative Council divisions by setting and region			
	<i>Largely urban</i>	<i>Mixed urban and rural</i>	<i>Largely rural</i>
<i>Hobart Area</i>	Hobart, Nelson, Elwick, and Pembroke		
South			Rumney, Huon
Central			Derwent
East/North East			Apsley
North	Launceston	Rosevears and Windermere	Western Tiers
North-West	Mersey	Montgomery	Murchison

Change to the Council's electoral arrangements resulting in party majorities has the incidental potential to make constitutional amendments too easy. The *Constitution Act 1934* does not contain a provision stipulating that amendments must be approved by referendum. Tasmania's constitution, therefore, can be amended by statute with the approval of a simple majority in each house. Thus, in the event a government ever intended to proceed with constitutional amendments that might introduce rules in its own favour, the consent of the independents in the Council would be required. A dilemma arises here as, earlier noted, it is this very veto power over legislation that justifies a change to the electoral model, yet reform that hypothetically — at some point in time — causes a party to hold a majority in both houses has the potential to create a power imbalance at the other extreme favouring the government of the day.

Conclusion

The essence of the debate would appear to rest with two competing priorities. On the one hand, maintaining the *status quo* would continue to preserve the Council's autonomy from executive control, but a risk persists that its independent members might at some time use their numbers to force the government of the day to an election, which last occurred in 1948. Whilst in theory this could be repeated, the lapse of time suggests the chance of a repeat is unlikely. On the other hand, reform

has the potential to improve perceptions of legitimacy, representativeness and the ability of the Council to perform as a house of review. But here the risk is that its members could be sidelined and unable to safeguard against excesses of the executive, which would be a problem requiring its own range of solutions. The least preferred outcome of any reform, bearing in mind that the constitution may be amended by parliament alone, is one where a party holds majorities in both houses and the upper house becomes totally ineffectual as a house of review.

A separate and underlying point raised by those in favour of reform is that the upper house has become an anomaly that should move into line with other upper houses in Australia. This alone does not make a case for certain reform; parliaments throughout Australia and the Commonwealth have varying characteristics and unique institutional features. Other bicameral parliaments are surely not immune from problems relating to representation and accountability, and, though there may be untapped virtue among practices in other jurisdictions, moving to replicate another parliament might not be the panacea to the range of complaints relating to the Legislative Council's electoral arrangements. In any event, if a bill were introduced into the Parliament to provide for new arrangements, whatever form this might take, the concurrence of the Legislative Council would be required. ▲

Notes

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