

# BICAMERALISM

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Bicameralism was a keystone of mid-Victorian constitutional theory – “safeguard through a Second Chamber”. It was no surprise, then, that bicameralism was incorporated in the thinking which preceded South Australia’s constitution.

Once the decision was made to have two elected chambers – and that was not easily decided – then the debates focussed on just what sort of chamber each should be. The radicals in the 1850s won the day in the House of Assembly, with “full” democracy. They had to accept a compromise in the Legislative Council, which was far from democracy.

The founders established in the Council a legislative chamber which rested on three fundamental foundations, the combination of which provided the conservatives in the colony with protection against any untoward democracy in the House of Assembly. The *Thursday Review* in 1860 put it nicely.

The Upper House is a very useful check on the delegates of the unemployed, and is operating to retard in some measure the evil and retrograde tendencies of the worst provisions of our electoral system.

The three foundations were a property-based franchise, malapportionment in favour of rural areas, and a veto power over all legislation. To explore how bicameralism worked for over 120 years, it is necessary briefly to unpack each.

There were constant attempts by the progressives in the colony to broaden the restricted franchise. For example, in the seven years between 1893 and 1899 – the Kingston era – there were nine attempts. All were defeated by the Council. The first reform took 50 years to achieve, and then it was very minor – adding some “special” occupational qualifications such as a Minister and postmaster, but then only if they resided in a provided house.

In 1913, the “inhabitant occupier” franchise was introduced – but not for the spouse. In 1969, this was enlarged to “household suffrage”, and spouses won the right to vote. It was not until 1973, after 116 years, that adult suffrage was finally accepted by the conservative majority in the Council.

That is, for over a century, relations between the houses – bicameralism – was a matter of property dominant.

There was no malapportionment in the electoral system for the Council for its first 24 years: from 1857 to 1882, the Council was elected from a single State-wide electorate. On the other hand, the restricted property franchise was a de facto malapportionment – in 1875, for example, 70 per cent of the enrolments for the Council were in the rural areas.

In 1881, the election map was transformed to four electorates with four members each, and a massive sorting of democracy began. It was not finally abolished for almost another century. Over the period until the 1970s, the election map changed, but the rural weighting was retained, even strengthened. In 1918, for example, the two city electorates contained an enrolment of 5 743 and 7 245, while the three country electorates contained 2 542, 2 325, and 1 948. A ratio of bias against the city of almost 3:1.

Finally, by 1975, the Council electoral system was reformed to one person, one vote, one value, on the basis, again, of a single State-wide electorate, but this time with and proportional representation. In fact, the Council's electoral was then, and remains today, much more democratic than that for the House of Assembly.

For over a century, bicameralism had worked under conditions which made the relationship very uneven – on the basis of the property restrictions and the malapportionment for the Legislative Council.

The third bicameral component from the beginning, a component which is still in force, was a key demand from the conservatives in 1857 – a total veto power for the Legislative Council over all legislative matters. If the other two components – property and malapportionment - were weakened, the veto power remained as the final defence against democracy.

The strains inherent in bicameralism emerged immediately the parliament was formed. The first Bill in 1857, on Tonnage Duties at the ports, passed the Assembly but was amended by the Council in a manner which was rejected by the Assembly. The Bill was laid aside, but only after a bitter fight between the houses.

This brought into focus a point which the progressive founding fathers had not considered – how to resolve deadlocks between the houses. Hence the 1857 surrender by the Assembly was inevitable. In 1879, the Assembly tried for a deadlock provision with a Bill for a double dissolution after a Council veto. This was vetoed by the Council. As a fall-back position, the Assembly proposed the nomination of further members of the Council, up to a third of the membership. Vetoed by the Council.

In 1881, the Assembly proposed a joint sitting to resolve deadlocks. Vetoed by the Council, which put up its own proposal – that there be an election of two more Council members per electorate. The Assembly realised that this would not modify the attitudes of the Council, as the property franchise would ensure the election of like-minded Councillors, and refused the offer.

But a compromise was reached. The first ever deadlock provisions were incorporated into the constitution after 25 years. If the Assembly twice passed a Bill, and the Council twice vetoed it, and there was an intervening election, then there could be a double dissolution, and the Bill presented for a third time. One observer noted “a comparative absence of disputes after 1882” – not surprising, as the deadlock system solved nothing. An election would return the conservatives to a dominance and still left all authority in the hands of the Council.

From 1890, the relations of the houses took on a fourth component - political parties. By 1910, every seat in both houses was occupied by either Labor or Liberal. Conflict within bicameralism re-emerged, but now on party lines as well. The Labor party was determined to attain full adult suffrage and end malapportionment for the Council; the Liberal party was equally determined to retain both. Hence conflicts increased, on basic constitutional matters as well as policies.

The tradition grew of using informal conferences of “managers” from each house to meet and attempt to resolve deadlocks. But party lines usually held, compromises were rare, and the Council’s, and hence the conservatives’ veto was always there.

As a result, the Labor party became firmly committed to the policy of abolition of the Legislative Council. Its problem was that it had never been in a position to carry this policy through, as it had never held a majority in the Council, and seemed unlikely to do so.

But the Liberal party itself provided the possibility. In 1970, the Liberal and Country League faced a serious internal revolt by its urban progressives, which resulted in the formation of the Liberal Movement. The LM was a resurgence of the radicals of the 1850s in that they believed in, and were willing to support, fair electoral systems. When the LM won three seats and the balance of power in the Council in 1973, the LCL decided that change was inevitable. But, if it was to happen, it had to be on the “right” terms.

This was painful for them, as the following selection of their stated attitudes over time shows.

The first two are from the early period.

I hold that the upper house essentially represents the acquired and settled property – the independent leisure and superior education of the colony (1857)

The advantage of a second chamber was that it often stopped hasty and dangerous legislation ( 1879)

The following are from the Liberal and Country League in the lead-up to the reforms in the 1970s..

The founders ... acted wisely in providing safeguards against hasty and undemocratic legislation ( 1966)

There is no political partisanship ... My party acts impartially in the interests of the people of South Australia (1966)

The members of this Legislative Council will use their own well-considered judgement on matters before them, without influence from any government (1967)

One vote one value in a State ... where 90 per cent of the State receives less than ten inches of rain in a year! (1968)

If the powers of the Council are decreased, it will no longer have the power to defend itself (1970)

By 1975, the Council's electoral system had been democratised to one person, one vote, one value, with malapportionment abolished by a return to a single electorate. That is, two of the three foundations of the 1857 system of bicameralism had been removed. But the veto remained, which brings the narrative to the modern day, and to the future. And to a different type of veto. To 1890 it was a conservative power; from 1890 to the 1970s it was a Liberal veto power. Today there is a very different scenario.

In the early 1970s, the Legislative Council became hung, when the Liberal Movement won a balance of power. But this was only temporary. In 1985, however, the party numbers in the Council again produced a hung parliament, partly as a result of the introduction of PR (STV), a numbers situation which appears to be permanent. The Democrats and other minor and micro parties managed to achieve a numerical balance of power, and a real balance – that is, not allied with either Labor or Liberal.

The two major parties reacted in contrasting ways. The Liberal party, in its official statements, remains a committed supporter of the existence and power of the Legislative Council. The Labor party maintained its official position of seeking the abolition of the Council, a position which became more strident as the hung Council refused to give full support to some key policies of the Dunstan, Bannon, and Rann Labor governments.

The practical working of bicameralism has been transformed. Where it was, for decades, a case of the Liberal-dominated Council acting as either an echo or an obstruction, depending on whether Liberal or Labor held government, neither major

party has held control of the Council for 20 years, and governments of both parties have had to compromise, negotiate, and offer concessions to get their legislation through – if they get it through at all.

There is a value question here, with the new and seemingly permanent hung Council. One value would hold that an elected government should be able to put its policies into law, as long as it stays within its mandate. The Council should accept this – debate, consider, request, argue – but in the final analysis, recognise that there is a democratically elected government.

On the other hand, a hung parliament reflects the opinions of the electorate – more so than in an Assembly election. Hence the Council has every right to legislate as well. This, of course, does not apply to the 16-4 control of the LCL over Labor in the Council which applied for decades.

A summary of 120 years. The Legislative Council was planned to be constitutionally powerful, politically conservative, and beyond the control of the people at large. It was deemed to be prudent and necessary to safeguard the rights of property, especially rural property, against the possible incursions of those who had little. The Diggers, the Chartists, the commercial and industrial workforce and the rural labourers were economically necessary, but politically doubtful elements. This view dominated, believe it or not, until 1975.

The governments in the House of Assembly claimed authority over legislation on the grounds that they were the representatives of the people; the Legislative Council denied them authority because they were! The view of BT Finnis in the first parliament was that of a man committed to a reasoned democracy. His view was that “the members of the Council will be reasonable beings who would exercise forbearance in the deliberations, so we have no reason to expect a deadlock”. He was wrong then, and his view remained wrong for over a century. It is no surprise, then, that the Labor party has been no friend of the Council

Labor has received support for its abolition policy from key sectors of the society, such a Business SA, but then it realised that it was still all but impossible to achieve

it. Under the historic agreements between Labor and Liberal which brought reform of the Council in the 1970s, protection of the existence of the Council was entrenched into the Constitution. Any abolition proposal needs to pass two hurdles. A Bill needs to pass both houses. Given the independents and minor parties would be far from keen to abolish their only representation, and the Liberal party is firmly opposed to abolition, that passage is unlikely.

The second hurdle is a referendum. Given the electoral patterns of support for Liberal and minor parties, it would be very unlikely if any abolition referendum would be carried. Hence Premier Rann has eased the hard-line commitment of the Labor party, and has promised a “choice” referendum at the next election: abolition, reform, or status quo.

I would suggest that the result will be strong support for retention and reform. The key issue is what reforms? I would propose three, each of which would provide an improved bicameral system.

The conservatives in 1856 demanded a term of office for members of the Council which was double that for the Assembly, and a fixed double term. This aimed to ensure that the power of property had a legislative base which was not open to rapid change. This means, today, that members of the Council are elected for an eight-year term. This is not justified, and the Constitution should be amended to ensure that all members of the Council face their electors at the fixed term date set for the Assembly. This would allow bicameralism to better reflect the opinions of the electorate.

In fact, consider a hypothetical case. A person enters the Council after a casual vacancy in 2002, and serves out the remaining term of seven years. He then is re-elected for a further eight year term. But the Assembly is dissolved prior to the end of the term, so he remains until the next Assembly election. That is, the person has been a member of the Council for 19 years, and been elected once.

Second, the concept of the Legislative Council as a house of review has been seriously eroded by the discipline of the major political parties. Even when the Council is hung, when minor parties and independents hold a balance of power, the

agenda and style of the Council is dominated by major parties, and government versus opposition confrontation.

The proposed reform is to remove all ministers and shadow ministers from the Council. This would emphasise that the Assembly is the house of government (and opposition). It would also allow the debates and decisions in the Council to be less dominated by government versus opposition confrontation, and allow the Council to be more of a house of review.

Parallel with this, the Council should change its procedures to become a “committee house”. All legislation brought to the Council should be first examined by a select committee of the Council, and the reports of such committees would then be debated in the full Council. In this way, it may be possible to improve the legislative process, and to add a positive component to bi-cameralism.

The proposal has been made that the veto power of the Council should be removed, replaced by a delay power. However, given that the Council has an electoral system which is more democratic than that of the Assembly, and that the membership of the Council more closely reflects the opinions of the electorate, then an argument can be made that the veto is justified.

To the future. My prediction is that there will be majority support in the promised referendum for retention and reform of the Council. The question then is: what reforms? Neither Labor nor Liberal showed any interest in applying the proposed reforms which emerged from the Constitutional Convention.

I doubt whether they will have changed their minds. Bi-cameralism is likely to continue, but, I hope, reformed.