CABINET - SUBJECTS FOR CONSIDERATION, 10 SEPTEMBER 2007 1:00 PM

Royal Adelaide Showgrounds

Not Relevant

2 **Bills and Regulations in Principle**

201 AGO0084/07CS Attorney-General's Item (Michael Atkinson)
DEFERRED

Not Relevant

201

LOCKED

AGO0084/07CS

CABINET COVER SHEET

1.	**TITLE:**	*Referendum for the Reform of the Legislative Council*
2.	**MINISTER:**	**THE HON. M.J. ATKINSON M.P.** **ATTORNEY-GENERAL**
3.	**PURPOSE:**	To have Cabinet select from the list of reforms set out in the Submission those that are to be included in a Bill to reform the Legislative Council To approve the drafting of a Bill to include the selected reforms and to reform the deadlock procedures To approve the drafting of a Bill to establish the process by which the reform Bill will be put to a referendum at the next general election as an alternative to a Bill to abolish the Legislative Council
4.	**IDENTIFY THE RELEVANT GOVERNMENT POLICY OR TARGET IN SOUTH AUSTRALIA'S STRATEGIC PLAN OR BOTH:**	Implements the Premier's public pledge on 24 November, 2005 to seek the electorate's views on the abolition or reform of the Legislative Council
5.	**I.C.T. COMPONENT:**	Does the submission have a material I.C.T. Component? ☐ Yes ☑ No
6.	**RESOURCES REQUIRED FOR IMPLEMENTATION:**	No resources required for introduction of Bills. Resources will be required for the holding of a referendum if the Bills pass both Houses. These costs will be calculated in advance of the 2008/2009 budget process. Net savings brought about by the reform or abolition of the Legislative Council will be calculated in general terms in advance of the 2008/2009 budget process.
7.	**PUBLIC AND ENVIRONMENTAL EFFECT:**	Benefit to the public in speeding the passage of legislation through the Parliament. No environmental effect

8. **RISKS:**

There are risks that one or both of the substantive Bills will not pass through both Houses with the required majority. There is a further risk that, if passed, the electorate will reject one or both proposals, and that the Government will be criticised for the expenditure on the referendum.

9. **CONSULTATION:**

The Crown Solicitor, Solicitor-General and Parliamentary Counsel have been involved in working up the proposal. Note that other agencies, including the Electoral Commissioner, Treasury and Finance, and the Parliamentary Superannuation Fund, have not been consulted at this stage.

10. **COMMUNICATION STRATEGY:**

A detailed strategy will be prepared in advance of the referendum if one or more of the substantive Bills passes both Houses.

11. **URGENCY:**

10-day rule

12. **RECOMMENDATIONS:**

I recommend that Cabinet:

11.1 select from the list of reforms set out in this Submission those that are to be included in a Bill to reform the Legislative Council being:

11.1.1 reducing the length of Members' terms from eight years to four years;

11.1.2 reducing the number of Members from 22 to 16, or some other number;

11.1.3 dividing the State into electoral districts for the Legislative Council;

11.1.4 changing the way votes for the Legislative Council are counted;

11.1.5 requiring all Ministers to be

selected from the House of Assembly;

11.1.6 reducing the power of the Legislative Council to prevent Bills passed by the House of Assembly receiving Royal Assent;

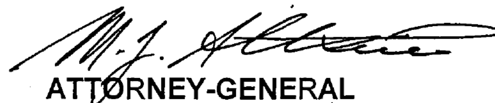
11.1.7 removing the power of the Legislative Council to amend Bills, but allowing it to suggest amendments;

11.2 if any of reforms 1.1.1 to 1.1.5 are selected, approve the inclusion in the Bill of a deadlock provision like that used by the Commonwealth Parliament;

11.3 approve the drafting of a Bill to include the selected reforms or deadlock provisions or both ("the Reform Bill");

11.4 approve the drafting of a Bill ("the Reform Referendum Bill") to establish the process by which the Reform Bill will be put to a referendum at the next general election.

I declare that I have no actual or potential conflict of interest about the proposals contained in this submission.



MICHAEL ATKINSON M.P.
PORTFOLIO: **ATTORNEY-GENERAL**

DATE: 30 August, 2007

Contact Officer: Dianne Gray
8207 2099

MINUTES forming **ENCLOSURE** to **AGO0084/07CS**

To **THE HON. THE PREMIER FOR CABINET**

About **REFERENDUM FOR THE REFORM OF THE LEGISLATIVE COUNCIL**

1. PROPOSAL

That Cabinet:

1.1 select from the list of reforms set out in this Submission those that are to be included in a Bill to reform the Legislative Council being:

1.1.1 reducing the length of Members' terms from eight years to four years;

1.1.2 reducing the number of Members from 22 to 16, or some other number;

1.1.3 dividing the State into electoral districts for the Legislative Council;

1.1.4 changing the way votes for the Legislative Council are counted;

1.1.5 requiring all Ministers to be selected from the House of Assembly;

1.1.6 reducing the power of the Legislative Council to prevent Bills passed by the House of Assembly receiving Royal Assent;

1.1.7 removing the power of the Legislative Council to amend Bills, but allowing it to suggest amendments;

1.2 if any of reforms 1.1.1 to 1.1.5 are selected, approve the inclusion in the Bill of a deadlock provision like that used by the Commonwealth Parliament;

1.3 approve the drafting of a Bill to include the selected reforms or deadlock provisions or both ("the Reform Bill");

1.4 approve the drafting of a Bill ("the Reform Referendum Bill") to establish the process by which the Reform Bill will be put to a referendum at the next general election.

2. BACKGROUND

2.1 Administration of the *Constitution Act* is committed to the Attorney-General.

2.2 The A.L.P. policy platform before the 2006 election included these principles:

- Support for the bicameral system [principle 25]
- The role of the upper house as a house of review [principle 25]
- Investigating the potential involvement of upper house members in the estimates process [principle 29]
- To investigate four year terms for the Legislative Council following a full review of the Victorian model [principle 34]

- To investigate simultaneous Legislative Council and House of Assembly elections [principle 34]
- To entrench proportional representation for the Legislative Council in the constitution [principle 34]
- To reform the Constitution to ensure that the Legislative Council may not block a money bill for more than two months and that there is a more effective deadlock provision [principle 37].

2.3 However, in a Ministerial Statement to Parliament on 24 November, 2005 the Premier announced the Government's intention to seek the views of the South Australian public, through a referendum, about the abolition or reform of the Legislative Council. There was a statement also in the Governor's Speech in 2006. [principle 25]

2.4 The reform option was described as effecting a reduction to the tenure of Legislative Council members to four years, a reduction in the number of members "from 22 to 16 or some other number"[1] and limiting the ability of the Council to delay legislation that has passed the House of Assembly. The reform options were not described as alternatives or as a package.

2.5 The announcement also promised that the public would have four years to consider the proposal. Thus, notwithstanding suggestions from some non-Government Members of Parliament that a referendum should be held mid-term, the current pledge is to a referendum at the next election. By holding a referendum on polling day, the additional cost is minimised.

2.6 In June, 2006 I submitted to Cabinet a submission for approval to introduce two substantive Bills and two accompanying Referendum Bills to Parliament. The Abolition Bill was to abolish the Legislative Council. The Reform Bill was to change the term of Members of the Legislative Council to four years, so that all Members would be elected every four years, to reduce the number of M.L.C.s from 22 to 16, and to repeal section 41 of the *Constitution Act* and replace it with new deadlock provisions like those used in the Commonwealth Parliament. Cabinet discussed the Submission, but did not make any decisions.

2.7 Since the 2006 Submission, a paper by Ms Jennifer Newton-Farrelly has been obtained reporting the results of modelling she has done for elections from and including 1985 to and including 2006, assuming various changes, namely -

2.7.1 reducing the terms of Members;

2.7.2 reducing the number of Members;

2.7.3 reducing both;

2.7.4 having electorates for the Legislative Council instead of a Statewide electorate;

2.7.5 changing the voting system.

Her report forms Appendix A to this Submission.

[1] The number of Legislative Councillors has previously been as follows: 18 (1857-1881); 24 (1881-1901); 18 (1901-1913); 20 (1913-1973); 22 (1973 to date).

2.8 Two new Cabinet Submissions have been prepared. The first is for approval to introduce to Parliament the *Constitution (Abolition of Legislative Council) Amendment Bill 2007* and the *Referendum (Abolition of Legislative Council) Bill 2007.* The second is this Submission, which contains some possible reforms of the Legislative Council, including some that were not contained in the 2006 Submission.

2.9 PARLIAMENT OF SOUTH AUSTRALIA

2.9.1 A brief summary of the South Australian system of government and the history of the Legislative Council is set out in Appendix B.

2.9.2 The Legislative Council has the same legislative powers as the House of Assembly, except that it cannot initiate or amend money Bills. It can reject or suggest amendments to money Bills.

2.9.3 The reason for a bicameral system of Government is explained in Odgers as:

> *The requirement for the consent of two differently constituted assemblies improves the quality of laws. It is also a safeguard against misuse of the law-making power, and, in particular, against the control of any one body by a political faction not properly representative of the whole community.*

2.9.4 The pre- and post-deliberation survey results of the South Australians[2] interviewed for the Constitutional Convention in 2003 tend to indicate that there is support for the retention of the bi-cameral system. In particular it disclosed these opinions:

- Current size of the Upper House was considered to be about right: Before 58%; After 65%
- Upper House to stand for election every 4 years: Before 66%; After 75%
- Belief in the need to continue with two Houses of Parliament: Before 65%; after 80%
- Belief in power of both Houses to block legislation: Before 76%; After 84%.

2.10 OTHER AUSTRALIAN JURISDICTIONS

2.10.1 In the Australian bi-cameral Parliaments the Upper Houses have much the same Legislative power as the Lower Houses. Typically, governments have not had an outright majority in the Upper Houses.

2.10.2 *The Senate*

The Senate consists of 76 Senators, 12 from each of the six States and two from each of the Australian Capital Territory and the Northern Territory. Senators are elected for six year terms, Territory Senators for three year terms. Historically, the Senate was regarded as a States' House. This is because the States enjoy equal representation in the Senate, regardless of their population. The Senate has a highly

[2] 1201 South Australians were polled prior to the Convention. 323 delegates were chosen to attend, profiling the same demographic, and were interviewed after the Convention: Issues Deliberation Australia paper.

developed Committee system. The ratio of Lower House to Upper House Members is 150:76.

2.10.3 *Queensland*

The Legislative Council was abolished in Queensland in 1922.

2.10.4 *Northern Territory and Australian Capital Territory*

The Northern Territory and Australian Capital Territory have never had an upper house.

2.10.5 *New South Wales*

The New South Wales system is very similar to ours, in that the 42 Members of the Council are elected by a system of proportional representation and represent the whole State as a single electorate. Members now have a fixed term of eight years. The ratio of Lower House to Upper House Members is 93:42.

2.10.6 *Western Australia*

For the purposes of electing Council Members, Western Australia is divided into six electorates, two of which return seven Members to the Council, the remaining four of which return five Members. Members are elected for a set term of four years. The voting system is a proportional representation one designed to ensure that the mix of successful candidates in a multi-member electorate reflects as closely as possible the proportional break-up of all the valid votes cast in an election. The ratio of Lower House to Upper House Members is 57:34.

2.10.7 *Victoria*

In Victoria, since 2003, there have been eight regions and the voters for each region elect five Members at every general election and each Member holds office until the dissolution of the Lower House. The method of counting votes is almost identical with South Australia. The ratio of Lower House to Upper House Members is 88:40.

2.10.8 *Tasmania*

Tasmania is divided into 15 single Member electorates. Members have a fixed six-year term, but retire on a rotational basis, so that two or three Members retire each year. This is intended to ensure a level of stability in the Upper House. The ratio of Lower House to Upper House Members is 25:15.

3. REFORM POSSIBILITIES

3.1 Four-Year Terms

This proposal was included in the June, 2006 Submission. The tenure of Members would be reduced from eight years to four years so that the whole membership of the Legislative Council would be elected every four years at the same time as Members of the House of Assembly.

3.2 Reduce the Number of Members

It was proposed in the 2006 Submission that the number of M.L.C.s be reduced from 22 to 16. This was part of the Premier's suggestion in November, 2005, although his public statement left open some other number.

3.3 Reduce both the Number of Members and the Length of their Terms

3.4 Divide the State in to Electoral Districts

The current electorate for the Legislative Council is the whole of the State. However, there could be a return to dividing the State into electorates. There could be a number of electorates equal to the number of Members, each returning one Member. Alternatively, there could be a lesser number of electorates each returning more than one Member. For example, if there were 16 Members, there could be eight electorates, each with two Members, or four electorates, each with four Members. Other arrangements could be devised. It would not be essential for each electorate to return the same number of Members.

3.5 Changing the way votes for the Legislative Council are counted

A threshold could be introduced to prevent parties or candidates with very small numbers of votes from continuing in the count.[3] For example, a threshold of 5% of the first preference votes could be set. This would be either 5% of the State vote, or, if electoral districts were re-introduced, 5% of the votes in the district. Alternatively, the threshold could be half a quota. There are two alternatives for preferences of excluded parties:

- they could be distributed to other candidates or parties; or alternatively
- they could be ignored.

The first alternative is preferred, as being more democratic.

3.6 All Ministers must be Members of the House of Assembly

This was one of the ideas discussed at the Constitutional Convention.

3.7 Reduce the power of the Legislative Council to prevent Bills passed by the House of Assembly receiving Royal Assent

The power of the Legislative Council to reject or decline to pass a Bill could be limited by copying the English system.
Under that system, which applies to most public Bills, if a Bill is passed by the Lower House in two successive Sessions, whether of the same Parliament or

[3] Preferences from other parties or candidates would not be distributed to an excluded party.

not, and, having been sent up to the Upper House at least one month before the end of the session, is rejected by the Upper House for the second time, then the Bill may be presented for Assent and become law as if it had been passed by both Houses.[4]

- A Money Bill passed by the Lower House, but not passed by the Upper House within one month, may receive Royal Assent and become law despite the lack of consent of the Upper House.

3.8 Legislative Council cannot amend Bills - only suggest amendments

Another possible alternative would be to remove the ability of the Legislative Council to amend Bills, other than those originating in the Council, but permit it to suggest amendments for the consideration of the House of Assembly.

3.9 Alter deadlock provisions

I proposed in the 2006 Submission that this be done, whether or not other changes are made. The proposal in the 2006 Submission was based on the Commonwealth deadlock provisions. There are other alternatives, which are set out in Appendix C.

4. DISCUSSION

4.1 Four Year Terms

4.1.1 Every four years, half of the twenty-two seats in the Legislative Council are vacated and those seats are the subject of election in accordance with sections 14 and 15 of the *Constitution Act.*

4.1.2 Victoria has recently changed from eight year terms to four year terms for the 40 Members of its Upper House.

4.1.3 Ms Newton-Farrelly says that if no other component of the electoral system were changed at the same time, the effect of electing 22 M.L.C.s would be to *roughly* double the number of seats won by any group compared to the outcome if 11 were elected.

4.1.4 She says that electing all 22 Members every four years would give Independents and single-issue candidates a better chance of being elected, because the quota for winning a seat would be less. She says that under this system, between 1985 and 2006, the A.L.P. and Liberal Party would have fairly consistently occupied fewer seats than they actually did. On her analysis, the comparison for the 2006 election would be -

2006	Quota	ALP	Lib	Greens	Family First	Ind No Pokies	Total
Electing 11 MLCs	77,573	4	3	1	1	2	11
Electing 22 MLCs	40,474	8	6	1	2	5	22

[4] Halsbury's Laws of England 1997

4.1.5 Arguments in favour of electing all M.L.C.s every four years is that the Membership of the Council is more likely to reflect the currently prevailing views of the electorate and there is a lower chance of Members who have lost interest remaining in their seats. On the other hand, it would reduce the stability of the Council, and tend to reflect temporary trends rather than long term ones.

4.1.6 The Final Report to Parliament dated 29 October, 2003 about the Constitutional Convention reported that, after deliberations, 75% of participants favoured the reduction of terms to four years.

4.2 Reduce the Number of Members

4.2.1 Section 11 of the *Constitution Act* provides "The Legislative Council shall consist of 22 members elected by the inhabitants of the State qualified to vote".

4.2.2 The whole of the State constitutes a single Legislative Council electoral district.

4.2.3 In States with bi-cameral Parliaments, the Upper House has between 45% and 60% of the membership of the Lower House. From consideration of early South Australian history and the position in other States, there appears to have been a general consensus that in a bi-cameral Parliament, the Upper House should be approximately half the size of the Lower house. In South Australia that would be 23 or 24 Members. Table 3 in Ms Newton-Farrelly's paper contains information about the sizes of Upper and Lower Houses in Australia and see paragraph 2.10 of this Submission.

4.2.4 Reducing the size of the Legislative Council to 16 Members would result in it being about one third of the size of the House of Assembly.

4.2.5 The number could be reduced to say 18, 19 or 20, which would be closer to the ratios in other States, although still on the lower side.

4.2.6 Ms Newton-Farrelly says that one of the forces working against reducing the size of the Upper House too much is the inability of a very small Upper House to properly perform the task of being a House of review. Further, a Committee system that provides checks and balances on any government will require a certain number of Members able to give it their time and attention. Queensland has dealt with this by having a comparatively large House of 89 Members, strengthening and resourcing well its committees and a having a separate Commission to inquire into allegations of Government malpractice.

4.2.7 If the only change were to reduce the size of the Council, the size of the quota to win a seat would be larger. Ms Newton -Farrelly says that, although one might expect this to favour the major parties, in fact it would not. Table 4 of her paper sets out the results of her modelling using 16 Members compared to 22 Members, and it shows that following the 2006 election a 16 Member Council would have been constituted thus -

After 2006 election	ALP	Lib	Dem	Greens	Family First	Ind No Pokies	Total
16 M.L.C.s	6	6	1		1	2	16
22 M.L.C.s (actual result)	8	8	1	1	2	2	22

4.2.8 There would be consequences for staff of the Legislative Council, and staff of Members who lose office, particularly from 2014 when the changes would take effect.

4.2.9 There would also be consequences for existing Parliamentary Committees.

4.2.10 It is proposed that, should a Bill to reduce the number of Members pass both Houses, these consequences be examined in detail before the referendum is held.

4.3 Change both terms and number of Members

4.3.1 Ms Newton-Farrelly says that if both numbers and terms of Members were changed at the same time, the biggest impact would be on the major parties. She says that in the 2002 and 2006 elections it would have increased the relative power of the Independent candidates and smaller parties compared to the major parties. She sets out the results of her modelling for the elections for 1985 to 2006 in Table 5 of her paper.

4.4 Divide the State in to Electorates

4.4.1 As mentioned in paragraph 3.4 above, there are several possibilities, but the simplest would be to have either a number of electorates equal to the number of Members, or to have a number of electorates that would result in several, but equal numbers, of Members from each electorate.

4.4.2 The State used to be divided into electoral districts for the Legislative Council. See Appendix D.

4.4.3 Recent changes in Victoria have created eight electoral regions for the Upper House, with five Members for each. In the 2006 election the overall result was -

19 ALP, 15 Liberal, 3 Greens, 2 National, 1 DLP = 40

Ms Newton Farrelly has calculated that if there had been only one electorate, the result would have been -

17 ALP, 14 Lib, 4 Greens, 1 Nat, 1 DLP, 2 Family First, 1 People Power = 40

4.4.4 She has modelled the results for the South Australian election in 2006 on a hypothetical division of the State in to four electorates (being country, northern suburbs, central suburbs and southern suburbs) with four Members to be elected for each. Her results are set out in Table 7 of her paper. She has done the same exercise for four electorates with five Members for each (Table 8 of her paper). Her conclusion is that the smaller parties would have been disadvantaged on either hypothesis.

4.4.5 She says, however -

A difficulty with introducing electorates into the Upper House may well be that districts were a part of the Upper House electoral system which favoured the Liberal Party until the 1970s. The ALP fought long and hard to change that system to one which translated voters' choices into seats in a more equitable way and it could be hard to argue that re-introducing electorates would make the system fairer or more effective.

4.5 <u>All Ministers must be Members of the House of Assembly</u>

4.5.1 It has been usual for a minority of the Ministers of any Government in a bi-cameral Parliament to be appointed from the Upper House. The Ministers in the Upper House have responsibility for introducing Bills within their portfolio, taking Bills that have passed through the Lower House through the Upper House, taking questions directed at Ministers in the Lower House and bringing back answers, tabling reports and Government documents and presenting petitions. On occasions they introduce Bills that are not within their portfolio, which gives flexibility in arranging the business of the Houses.[5]

4.5.2 It is sometimes argued that having all Ministers in the House of Assembly would make the Legislative Council more truly a House of review.

4.5.3 Arguments against this are that:

4.5.3.1 it would reduce the pool of talent for appointment to the Ministry;
4.5.3.2 discourage competent and ambitious candidates from standing for the Council;
4.5.3.3 reduce flexibility in arranging legislative business; and
4.5.3.4 new arrangements would have to be made for taking Bills through the Legislative Council and attending to other business normally performed by Ministers in the Council.

4.5.4 Under the new system in Victoria, not more than six Ministers may be Members of the Upper House.

[5] The House of Lords in England spends about 60% of its time on legislation. It examines and amends Bills and some (usually less controversial) Bills are initiated in the Lords. The Parliament website says that an increasingly bigger share of Government Bills start in the Lords to spread the legislative loads more evenly throughout the year.

4.6 <u>Change the way votes for the Legislative Council are counted</u>

4.6.1 See paragraph 3.5 above. The selection of any percentage or proportion would, of necessity, be arbitrary.

4.6.2 In Germany a party that wins less than 5% of first preference votes is excluded from the count and so cannot win a seat as a result of the distribution of preferences from other parties. Preferences from excluded parties are distributed.

4.6.3 It might be thought that this would reduce the number of Independents and small party Members, who rely on preferences from excluded candidates to reach a quota. However, the results of Ms Newton Farrelly's modelling tends to indicate the contrary.

4.6.4 In the 1975 and 1979 elections there was a system of eliminating parties under which candidates with less than half a quota of first preference votes were excluded, and their votes were transferred to parties still in the count. These were the only preferences that were distributed. Ms Newton-Farrelly says that if this system had been used at the 2006 election, and 16 Members were to be elected, the result would have been -

ALP 6, Liberals 4, Ind No Pokies 4, Family First 1, Greens 1

She suggests that "there was no ideological basis" for the 1975 and 1979 system - "it was a labour saving device". At that time sophisticated computer programmes to distribute preferences were not available.

4.6.5 Ms Newton Farreliy points out that if candidates who received less than 5% of first preference votes were excluded and the number of Members was also reduced to 16, a quota would be "only about 5.9% of first preference votes, and it would seem harsh to eliminate a party with two thirds of the votes required to win a seat".

4.7 <u>Reduce the power of the Legislative Council to prevent Bills passed by the House of Assembly receiving Royal Assent;</u>

4.7.1 See paragraph 3.7 above. This would reduce the legislative power of the Council considerably, because;

4.7.1.1 generally it could not delay a Bill for more than about one year; and

4.7.1.2 it could not delay a Money Bill for more than one month.

4.7.2 Cabinet could select only 4.7.1.2, or it could select both.

4.7.3 It could be argued that, although the English system is appropriate for a very large Upper House (730 Members), none of whom are popularly elected, it is not appropriate to reduce the powers of a Legislative Council that is fully elected on a universal State suffrage.[6]

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[6] Since November 1999 the House of Lords comprises Life Peers appointed by the Queen on the nomination of the Prime Minister, 90 Hereditary Peers elected by the Life Peers voting in party

4.7.4 It could result in the Government and the opposing parties in the Council being less willing to compromise on amendments to Bills.

Clause 10(1) Legal Professional Privilege

4.8 Legislative Council cannot amend Bills - only suggest amendments

4.8.1 See paragraph 3.8. The Council could not amend Bills that have been passed by the House of Assembly.

4.8.2 This would be a more extreme reduction in the legislative powers of the Legislative Council and concentrate all real legislative power in the House of Assembly.

4.8.3 However, it is likely that suggested amendments would be debated in both Houses the same way as amendments are now and there might not be much saving in parliamentary time.

4.8.4 No Australian State has this system, except for money Bills. Nor does the **U.K.**

4.8.5 This would make the current deadlock provisions redundant.

5. RESOLUTION OF DEADLOCKS

Not Relevant

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groups and by all the Hereditary Peers using an optional preferential voting system, Bishops, 2 Hereditary Peers holding positions of ceremonial significance, and until recently Law Lords.

5.2 Clause 10(1) Legal Professional Privilege

5.3 There are a number of alternative models for resolving deadlocks. A summary is contained in Annexure C. In New South Wales a deadlock may be resolved by a referendum on the deadlocked Bill, which is expensive and time-consuming, but ideologically sound in a democratic system. In Victoria there is now a discretion to refer a deadlocked Bill to a parliamentary dispute resolution committee.

5.4 *Commonwealth System*

5.4.1 Clause 11 of the Reform Bill presented to Cabinet in June, 2006 was based on the Commonwealth model. It has the advantage of having been tried. Its selection was based on two other criteria:

- retaining a role for the Legislative Council as an 'overseer' of Government legislation;
- limiting the extent to which the Legislative Council can block legislation indefinitely.

5.4.2 It entails the following steps:

- the House of Assembly passes a Bill that, within 45 sitting days from transmission to the Legislative Council, is rejected or not passed by the Legislative Council (or the Council proposes amendments that are rejected by the House of Assembly);
- the House of Assembly re-passes the Bill after a three-month interval and it is again rejected by the Legislative Council (or amendments are proposed and rejected by the House of Assembly) within 30 sitting days;
- then the Governor may dissolve both Houses (but not within 6 months of a general election);
- elections for both Houses are held;
- following the elections, the newly constituted House of Assembly re-passes the Bill;
- the Legislative Council rejects the Bill or fails to pass it within 30 days of transmission;
- the Governor may then proclaim a joint sitting of both Houses;
- if the Bill is passed by an absolute majority in the joint sitting, it may be presented to the Governor for assent.

5.4.3 This would be the most 'favourable' to the House of Assembly of the deadlock systems currently in existence in Australia.

5.4.4 The accountability mechanism is that the electorate has the opportunity, at the election, to choose not to re-elect the Government on the basis of the Bill, or to elect so many non-government members to the Legislative Council that the Government does not achieve an absolute majority in a joint sitting.

6. Clause 10(1) Legal Professional Privilege

Clause 10(1) Legal Professional Privilege

Clause 10(1) Legal Professional Privilege

7.

Clause 10(1)

8.

Clause 10(1) Legal Professional Privilege

Clause 10(1) Legal Professional Privilege

9. THE REFERENDUM BILL

9.1 In accordance with section 10A(3) of the *Constitution Act,* the regulation of the referendum in South Australia must be determined by a new Act that addresses the particular referendum in question and is passed by both Houses of Parliament.

9.2 The matters that the referendum Bill would address include:

9.2.1 that the State Electoral Commissioner will administer the referendum;

9.2.2 the specific questions that will be put to the voters;

9.2.3 that assent to the substantive Bill is contingent upon approval of the voters in the referendum;

9.2.4 that a political party registered under the *Electoral Act 1985* may, by notice in a form approved by the Electoral Commissioner, appoint scrutineers;

9.2.5 that the *Electoral Act* applies to the referendum with adaptions, exclusions and modifications prescribed by regulation as if the referendum were a general election of members of the House of Assembly;

9.2.6 the State Electoral Commissioner must notify the outcome of the referendum result by notice in the Gazette;

9.2.7 that the Governor be authorised to make regulations.

10. Other Consequences and Impacts

10.1 Economic, Financial and Budget Implications

10.1.1 There would be economic, financial and budget consequences, depending on which of the proposals is selected and becomes law (if any).

10.1.2 There would be once-off expenditure requirements for the holding of the referendum. The estimated cost of holding the referendum would be determined in consultation with the State Electoral Commissioner.

10.1.3 If the size of the Council is reduced, there would be ongoing savings of the salaries of Members and their staff whose offices are abolished. These cannot be finally calculated yet, because it will not be known until after the referendum which of the Bills, if any, has succeeded and which Members have failed to retain office.

10.1.3.1 Members' salaries are governed by the *Parliamentary Remuneration Act 1990* and paid from consolidated account.

10.1.3.2 Members' superannuation entitlements are governed by the *Parliamentary Superannuation Act 1974* and paid from the Parliamentary Superannuation Fund. The Fund is made up of Members' contributions and employer (Crown) contributions. Members' entitlements vary significant depending on the length of their tenure.

10.1.4 These will be addressed (in general terms) in a Cabinet Submission before the commencement of the 2008/2009 budget process:

10.1.4.1 the projected savings to the State on Council Members' salaries will be calculated (in general terms), according to the proposed number of Members;

10.1.4.2 the projected savings to the State on Parliamentary Committee costs for any committees that are to be abolished or reduced in size.

10.2 Required Resources

10.2.1 These will be addressed in a Cabinet Submission before the commencement of the 2008/2009 budget process.

10.2.2 Once-off resources for the State Electoral Office may be required for the holding of the referendum in March 2010.

10.2.3 Once-off resources for the Department of the Premier and Cabinet for the oversight and administration of the abolition /reform may be required in the lead-up to and, assuming abolition or reform is approved, following the 2010 election.

10.3 Staffing Implications

10.3.1 Consequences for staff of Legislative Councillors and of Parliament -see paragraphs 10.1.3 above.

10.3.2 Consequences for staffing for the State Electorate Commission - see paragraph 10.1.2 above.

10.4 Impacts on the community (including family, small business, regional and regulatory impacts) and the environment

This will depend on which of the reforms is selected by Cabinet. The Government is of the opinion that it would be beneficial for the community if Government Bills could be passed through Parliament and receive Assent more quickly and with fewer amendments, and reducing the powers of the Legislative Council might achieve this. On the other hand, it may be argued that reducing the legislative powers of the Legislative Council is not appropriate for a fully elected House of Parliament. Some other effects of the several possible reforms are outlined in paragraph 4 under the heading DISCUSSION.

10.5 Risk Management Strategy

There is a risk that neither the abolition, nor the reform proposal will succeed and the Government will be criticised for the cost of holding the referendum. The cost will be minimised by holding the referendum in conjunction with an election.

10.6 Consultation

10.6.1 Crown Solicitor's Office.

10.6.2 Solicitor-General.

10.6.3 Parliamentary Counsel about the 2006 Cabinet Submission.

10.6.4 Further consultation is proposed when the Bills have been introduced to Parliament to enable the Government to examine further the consequences of abolition or reform on the administration of the Parliament.

10.7 Implementation Plan

Discussed above in paragraph 7.1.

10.8 Communication Strategy

A communication strategy will be required before the referendum to inform the debate.

10.9 Executive Council

Not required.

11. RECOMMENDATION

I recommend that Cabinet:

11.1 select from the list of reforms set out in this Submission those that are to be included in a Bill to reform the Legislative Council being:

11.1.1 reducing the length of Members' terms from eight years to four years;

11.1.2 reducing the number of Members from 22 to 16, or some other number;

11.1.3 dividing the State in to electoral districts for the Legislative Council;

11.1.4 changing the way votes for the Legislative Council are counted;

11.1.5 requiring all Ministers to be selected from the House of Assembly;

11.1.6 reducing the power of the Legislative Council to prevent Bills passed by the House of Assembly receiving Royal Assent;

11.1.7 removing the power of the Legislative Council to amend Bills, but allowing it to suggest amendments;

11.2 if any of reforms 1.1.1 to 1.1.5 are selected, approve the inclusion in the Bill of a deadlock provision like that used by the Commonwealth Parliament;

11.3 approve the drafting of a Bill to include the selected reforms or deadlock provisions or both ("the Reform Bill");

11.4 approve the drafting of a Bill ("the Reform Referendum Bill") to establish the process by which the Reform Bill will be put to a referendum at the next general election.

I declare that I have no actual or potential conflict of interest about the proposals contained in this submission.

MICHAEL ATKINSON M.P.
PORTFOLIO: **ATTORNEY-GENERAL**

DATE: 31 August, 2007

Contact person: Dianne Gray
Policy and Legislation Section
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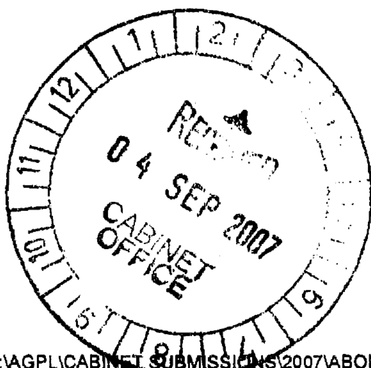
8207 1558

Defer



Appendix A.

Possible changes to the Upper House electoral system in South Australia.

In November 2005 Premier Mike Rann foreshadowed that in 2010 he would hold a referendum on the future of the South Australian Legislative Council.[1] Voters would be asked whether they would prefer to keep it as it stands, abolish it, or reform it. The reform options canvassed publicly so far have included changing MLCs terms from 8 years to 4, and reducing the number of MLCs from 22 "to 16 or maybe more".[2] Less-publicly-discussed possibilities include the adoption of multi-member electorates rather than a single Statewide electorate. If a more complete range of options was to be considered then the list might include changes to the *voting* system (e.g abolishing the ticket vote or introducing an optional preferential vote) or changes to the *count* (e.g. introducing a threshold) or changes to the *administrative arrangements* (e.g changing the deposit required for candidacy or introducing election funding). Finally, there could be changes to the Legislative Council that would not have an electoral basis (e.g. removal of Ministers from the Upper House).

I have looked at the effect of those options which have an electoral basis, in the following sections.

1. Reducing the current 8 year terms to 4 years.

In South Australia half of the Members of the Legislative Council are elected at each general election to serve terms which are twice as long as those of Lower House Members. This gives us a lagged electoral system for the Upper House and it is not uncommon – the Senate[3], and the Legislative Councils of New South Wales and Tasmania are also made up in this way, and terms in the Victorian Legislative Council were double until a legislative change which took effect at the Victorian State election of 2006 (see the table at Appendix 1).

If South Australians elected all of our Upper House Members at each general election, then each MLC would serve the same term as each House of Assembly MP, namely 4 years.[4] This change could be made without affecting any other component of the electoral system.

If no other component of the electoral system was changed at the same time, then the effect of electing 22 MLCs would be *roughly* to double the number of seats won by any group compared to the outcome if we had elected 11 MLCs, *although it is not an exact doubling*. For example, in

[1] "Rann to call referendum for 2010; Abolish the Upper House", The Advertiser, 24 November 2005, p.1.
[2] Ministerial Statement, House of Assembly Hansard 25 November 2005, pp.4130-4131.
[3] Actually Senators representing the States are elected for double terms but Senators representing the Territories are elected for single terms.

2006 we elected 11 MLCs, of whom 2 represented the IND No Pokies group, but <u>if we had elected 22 MLCs then IND No Pokies would have won 5 seats, not 4.</u> Table 1 below shows the number of Members from each group who *were actually* elected at each Upper House election from 1985 until 2006, and the number who *would have been* elected if we had elected all 22 MLCs at the same time.[5]

Table 1: Effect of electing 11 or 22 MLCs, South Australia, 1985 to 2006.

	quota	ALP	LIB	DEM	Call To Aust	Grey Power	Greens	Family First	IND No Pokies	IND McCarty	TOTAL
1985											
electing 11 MLCs	67,912	5	5	1							11
electing 22 MLCs	35,433	11	9	1	1						22
1989											
electing 11 MLCs	71,274	5	5	1							11
electing 22 MLCs	37,187	9	10	2	1						22
1993											
electing 11 MLCs	75,711	4	6	1							11
electing 22 MLCs	39,502	6	12	2		1				1	22
(See NOTE below)	39,502	7	12	2		1					22
1997											
electing 11 MLCs	74,709	4	4	2					1		11
electing 22 MLCs	38,979	7	8	4		1	1		1		22
2002											
electing 11 MLCs	77,539	4	5	1				1			11
electing 22 MLCs	40,455	8	9	2		1	1	1			22
2006											
electing 11 MLCs	77,573	4	3				1	1	2		11
electing 22 MLCs	40,474	8	6				1	2	5		22

<u>NOTE:</u> The two alternatives for 1993 with 22 Members depend on how the surplus votes are distributed when Grey Power is excluded.

Each of the two alternatives is equally likely.

<u>SOURCE:</u> my calculations based on a ticket vote model.

In general, if we elected all 22 MLCs at the same time:

---

[4] Currently, each MLC serves an eight year term; half of the MLCs are elected every 4 years at the same time as the House of Assembly Members.

[5] These figures are my calculations based on a model which assumes that every formal vote is transferred in a way which is consistent with the tickets lodged by parties and candidates before the election, i.e. that enough people vote above the line that the below-the-line votes make no difference to the outcome. This model works for electing 11 MLCs for each of the six elections from 1985 to 2006, and is likely to continue to work, given that below-the-line voters contribute only about 4-6% of all formal votes.

- Everyone who won a seat under the current system would still win at least one seat;
- Anyone who won a seat under the current system would win *twice* as many seats, *plus or minus one*; and
- minor parties and Independents would have a better chance of winning a first seat.

If we changed to electing all 22 MLCs at the same time, there is a good chance that more Independent or single-issue candidates would be elected. This is because the quota for winning a first seat would be much lower than it is currently, and so IND candidates and minor parties could stay in the count long enough to win a seat.

This would make it more likely that single-interest groups and candidates standing in response to matters of current interest will win a seat – whereas the current system with its large quotas does have the effect of damping down surges of community enthusiasm. Table 1 shows that if we had elected all 22 MLCs at the same time we would have had a Call To Australia MLC for two terms from 1985 to 1993, a Grey Power MLC from 1993 for three terms right through until 2006, an IND (McCarty) for one term from 1993 until 1997, and Greens MLCs in the Council from 1997 (actually the first Greens MLC arrived as a result of the 2006 election).

Would those IND, single-issue or smaller party candidtaes be elected at subsequent elections? There is an argument that the advantage of incumbency would make it easier for IND candidates and smaller parties to continue on in the parliament, but Table 1 shows that even though an IND No Pokies MLC had been elected in 1997, at the next election in 2002 the IND No Pokies team did not manage to win enough votes to win a seat, and would not have won a seat even with the much smaller quota associated with electing 22 MLCs at the same time. So we should see incumbency as an advantage but not a promise.

While Table 1 shows the different results on election day, the real outcome of the election is who occupies the seats in the Legislative Council chamber after the election.

Table 2 shows who would have occupied the seats in the Legislative Council chamber under the two electoral systems – electing 11 MLCs for 8 years or 22 MLCs for 4 years.

Table 2 shows that *if we had been electing all of the 22 MLCs at each general election*,

- The major parties (ALP and LIB) would have fairly consistently occupied fewer seats than they actually did. The ALP would have held only 7 seats from 1997 until 2002 (it actually held 8) and only 9 from 1989 until 1993 (it actually held 10); meanwhile the Liberal Party would have held *two* fewer seats from 1997 until 2002 and also during this current term from 2006 until 2010.
- one Grey Power member would have had a seat in the South Australian Upper House right through from 1993 until March of 2006. As it is, we have not had a Grey Power member at all;
- the Greens would have held a seat since 1997 and would still hold a seat (in fact, the first Greens candidate was elected to the Legislative Council in 2006);
- Family First would not have been affected – they would not have arrived in the Cpuncil any earlier than they did (Mr Evans was elected at the 2002 election and Mr Hood in 2006) nor would they have won any extra seats;

- Representatives of Nick Xenophon's IND No Pokies group would not have arrived in the Council any earlier but at this most recent election in 2006 they would have won 5 of the 22 seats (in fact they currently hold 2 of the 22 seats); and
- The Democrats would not currently have a representative in this (2006-2010) Parliament.

Table 2: Just changing the terms:

Composition of the Legislative Council if we had elected 11 or 22 MLCs each time, 1985 to 2006

	ALP	LIB	OEM	CTA	Grey Power	Greens	Family First	IND No Pokies	IND McCarty	TOTAL
After the 1985 election:										
having elected 11 MLCs in 1982	5	5	1							11
and electing 11 MLCs in 1985	5	5	1							11
Continuing and new Members	10	10	2							22
OR, electing 22 MLCs in 1985	11	9	1	1						22
After the 1989 election:										
having elected 11 MLCs in 1985	5	5	1							11
and electing 11 MLCs in 1989	5	5	1							11
Continuing and new Members	10	10	2							22
OR, electing 22 MLCs in 1989	9	10	2	1						22
After the 1993 election:										
having elected 11 MLCs in 1989	5	5	1							11
and electing 11 MLCs in 1993	4	6	1							11
Continuing and new Members	9	11	2							22
OR, electing 22 MLCs in 1989	6	12	2		1				1	22
(see NOTE below)	7	12	2		1					22
After the 1997 election:										
having elected 11 MLCs in 1993	4	6	1							11
and electing 11 MLCs in 1997	4	4	2					1		11
Continuing and new Members	8	10	3					1		22
OR, electing 22 MLCs in 1997	7	8	4		1	1		1		22
After the 2002 election:										
having elected 11 MLCs in 1997	4	4	2					1		11
and electing 11 MLCs in 2002	4	5	1				1			11
Continuing and new Members	8	9	3				1	1		22
OR, electing 22 MLCs in 2002	8	9	2		1	1	1			22
After the 2006 election:										
having elected 11 MLCs in 2002	4	5	1				1			11
and electing 11 MLCs in 2006	4	3				1	1	2		11
Continuing and new Members	8	8	1			1	2	2		22
OR, electing 22 MLCs in 2006	8	6	-			1	2	5		22

NOTE: The two alternatives for 1993 with 22 Members depend on how the surplus votes are distributed when Grey Power is excluded. Each is equally likely.

SOURCE: my calculations based on a ticket vote model.

Perhaps the real difference between the current system of electing half of our MLCs for 8 years and a proposal to elect 22 for 4 years, is that the current composition of the Council contains 11 MLCs who were elected between 4 and 8 years ago, so it reflects a lagged picture of the electorate's priorities and beliefs, whereas a Council all elected at the same time will consist of MLCs who are all representative of more-recent feelings of the electors.

Tables 1 and 2 show the complexity of the proposal to change terms from 4 years to 8, for the minor parties at least. It is true that a smaller party candidate or an Independent candidate would find it much harder to win a seat under the current system with a quota of 77,000 votes or so, than under a system with a quota of about 40,000 votes. But once won, that seat is held for eight years- not just 4 - and possibly through parliaments controlled by governments of different political colour. This longer period of influence within the parliament and longer period of public exposure would be potentially more valuable both for achieving some of a smaller party's objectives and for building public understanding and support for a smaller party's agenda and thereby potentially consolidating support for re-election. So an eight year term is a richer reward for a smaller party, than a four year term.
On the other hand, smaller parties will by definition find it more difficult to achieve the level of support required to win a seat, and might see the lower (4-year) quota as achievable, compared to the existing higher quota. Smaller parties might realistically see the lower-quota regime as giving them an opportunity to sometimes win a seat even if it might not be possible to keep it at a subsequent election; in this case being out of the parliament (and its associated publicity opportunities) for 4 years might be a lesser danger to membership levels and public support than being out of the parliament for eight years.

2. Reducing the number of Members of the Legislative Council.

Another option which Mr Rann proposed was to reduce the number of Members of the Legislative Council, "from 22 to 16, or maybe more."[6]

Choosing the appropriate number of Members for the Legislative Council will be a difficult task. Many factors will need to be considered. One guide might be the size of Upper Houses elsewhere, and Table 3 below shows that in the Federal parliament and in other States there are roughly 2 Members in the Lower House to each Member in the Upper House, although the relationship is not exact.

[6] House of Assembly Hansard 24 November 2005, Ministerial Statement by Mike Rann.

Table 3: Size of Upper and Lower Houses around Australia, 2006

	Lower House (No. of seats)	Upper House (No. of seats)	ratio
Commonwealth	150	76	1.97
New South Wales	93	42	2.2
Queensland	89	No Upper House	
Victoria	88	40	2.2
Western Australia	57	34	1.7
South Australia	47	22	2.1
Tasmania	25	15	1.7
Northern Territory	25	No Upper House	
Australian Capital	18	No Upper House	

SOURCE: my calculations based on numbers available from each Parliament's site.

Table 3 shows that where the Lower House is relatively small (Tasmania and Western Australia in particular) the Upper House tends to be a bit *bigger* than half the size of the Lower House. It is as though there is a size below which an Upper House does not have enough Members to be workable. The South Australian Legislative Council is a bit smaller than half the size of the Assembly, and is already relatively small by comparison with the other States and Territories where there is an Upper House. If the number of MLCs was to be reduced further to just 16 Members, there would be almost 3 times as many Members in the House of Assembly as in the Council. Of course there is no reason why the ratio between the Houses needs to be set at 2:1, rather than 3:1, but it seems to work elsewhere.

One of the forces working against reducing the size of the Upper House too much, is the inability of a very small Upper House to properly perform the task of being a House of Review. A functioning committee system that provides the checks and balances on any government will require a certain number of Members able to give it their time and attention. The Territories and Queensland have managed without an Upper House by strengthening their Lower House committee system and in Queensland's case augmenting it with a Commission outside the Parliament's ambit altogether, and providing much larger resources for them. So if we choose to keep an Upper House, and choose to maintain its function as a House of Review, then reducing the Council to a very small body may not be a very productive change.

When the choice of the appropriate number of Members for the Legislative Council is made, we should not limit the possibilities to an even number of Members. Certainly our Legislative Council has always had an even number of seats, but there is no inherent reason why this should be the case – Tasmania has an odd number of Members in their Upper House and we have 47 Members in our House of Assembly.[7] Even if we were to continue to elect half of the

[7] Tasmania has 15 MLCs. In South Australia we have had 18 MLCs from 1857 until 1882; 24 from 1882 until 1901, and then 18 again until 1913. From 1913 until 1973, there were 20 MLCs. A larger Council was phased in from the 1973 election - from 1975 until the current day there have always been 22.

Council at subsequent elections, we could elect different numbers of MLCs at the two elections – 10 at one election and 11 at the next, for example – we did that in order to phase in the 22 Member Council between 1973 and 1975.

What would be the effect on the parties and candidates of reducing the size of the Council? If the only change was to elect fewer Members, then it would *increase* the size of the quota, and we might expect that the major parties would benefit because smaller parties would find it more difficult to stay in the count long enough to win enough votes for a seat.
Actually, Table 4 below shows that it doesn't work that way at all – the major parties would give up most of the seats to be lost.

Table 4 below shows that if we had made no change other than to reduce the number of seats in the Legislative Council by 6 – from 22 back to 16 as mooted by Mr Rann – then at least 4 of those 6 seats would have been lost by the major parties, and in Councils sitting after the 1989 and 1993 elections all 6 would have been cut from the major parties' representation rather than from the minors or IND candidates.

Table 4: Just reducing the number of seats in the Council: composition of a 16 seat or a 22 seat Legislative Council, still electing half of the MLCs each time, for 8 year terms.

	ALP	LIB	DEM	CTA	Grey Power	Greens	Family First	IND No Pokies	IND McCarty	TOTAL
After the 1989 election:										
16 continuing and new MLCs	7	7	2							16
22 continuing and new MLCs	10	10	2							22
After the 1993 election:										
16 continuing and new MLCs	5	9	2							16
22 continuing and new MLCs	9	11	2							22
After the 1997 election:										
16 continuing and new MLCs	4	8	3					1		16
22 continuing and new MLCs	8	10	3					1		22
After the 2002 election:										
16 continuing and new MLCs	5	7	3					1		16
22 continuing and new MLCs	8	9	3				1	1		22
After the 2006 election:										
16 continuing and new MLCs	6	6	1				1	2		16
22 continuing and new MLCs	8	8	1			1	2	2		22

SOURCE: my calculations based on a ticket vote model.

It is a surprise to see how little the minor parties and Independent candidates would be affected by a change to the size of the Council, if we retained 8 year terms and a lagged Council

Membership. My guess is that it is a function of the way that minor parties and IND candidates tend to send their preferences around to most of the other IND and minor party candidates before their preferences reach the major parties. This means that raising the quota will make it more difficult for *a given* IND or minor party candidate to reach a quota, but the preference flows are likely to ensure that *someone from this group* will still be elected.

3. <u>What if we made both changes at the same time – reduced the number of MLCs and elected all MLCs at each election, to serve for 4 years?</u>

Table 5 below shows who would have won the seats in the Council at each election from 1985 to 2006, had we elected either 16 or 22 MLCs all at the same time.

Table 5: Composition of the Legislative Council from 1985 until 2006, electing 16 or 22 Members all at the same time, for 4 year terms.

	ALP	LIB	DEM	CTA	Grey Power	Greens	Family First	IND No Pokies	IND McCarty	TOTAL
1985										
electing 16 MLCs	8	7	1							16
electing 22 MLCs	11	9	1	1						22
1989										
electing 16 MLCs	6	7	2	1						16
electing 22 MLCs	9	10	2	1						22
1993										
electing 16 MLCs	5	9	1		1					16
electing 22 MLCs	6	12	2		1				1	22
(See <u>NOTE</u> below)	7	12	2		1					22
1997										
electing 16 MLCs	5	6	3		1			1		16
electing 22 MLCs	7	8	4		1	1		1		22
2002										
electing 16 MLCs	5	7	1		1	1	1			16
electing 22 MLCs	8	9	2		1	1	1			22
2006										
electing 16 MLCs	6	4	1			1	1	3		16
electing 17 MLCs	6	4	1			1	1	4		17
electing 18 MLCs	7	5				1	1	4		18
electing 19 MLCs	7	5	1			1	1	4		19
electing 20 MLCs	8	5	1			1	1	4		20
electing 21 MLCs	8	6	1			1	1	4		21
electing 22 MLCs	8	6				1	2	5		22

<u>NOTE:</u> The two alternatives for 1993 with 22 Members depend on how the surplus votes are distributed when Grey Power is excluded. Each of the two alternatives is equally likely.

<u>SOURCE:</u> my calculations based on a ticket vote model.

Cutting 6 seats from the Council but electing the MLCs all at the same time would have had the biggest impact on the major parties. For most of these elections, 4 or 5 of the 6 seats cut from the Council would have come from the major parties and indeed in 1989 all 6 of the seats cut from the Council would have come from the ALP and LIB ranks.

In 2006 and in 2002 one effect of electing all of the Members of the Legislative Council at the same time, but electing fewer MLCs overall, would have been to increase the relative power of the IND candidates and smaller parties in the Chamber, compared to the major parties.

In 2006 the Independent and minor party Members would have (together) won more seats than the Liberal Party whether we had chosen a Legislative Council size of 16 MLCs or 22 or any number in between, as long as we elected them all at the same time. Indeed in a Council of just 17 Members this group would have held 7 seats and would have been the biggest, winning more seats than the ALP and more than the Liberal Party. In a Council of 16 Members, or 19 or 22, the group of IND and minor party Members would have held as many seats as the ALP and more than the Liberal Party.

There is no reason to suppose that the *possibility* of wielding power would be enough to make it *probable* that these IND and minor party Members would be able to work together as a bloc, but at least in 2006 they would have been in a position to try, under an electoral system that provided for a smaller number of MLCs, all elected simultaneously.

It has not always been the case that the minor parties would have held as many seats as the major parties - Table 5 above shows that it actually seems to occur only with the 1997 and 2006 election figures. So it does *not* seem to be a *necessary* effect of making the two changes at once (reducing the number of Members in the Council and elect all MLCs at the same time). Rather, I suspect that it has more to do with the fact that the minor parties and IND candidates won a relatively high proportion of voters' first preference votes at the 1997 and 2006 Legislative Council elections, and the proportional representation basis of the count to elect Members to Council seats has translated that percentage quite straightforwardly into seats.

Table 6: Major Parties' share of first preferences, Legislative Council elections 1985 to 2006.

Election	ALP (%)	LIB (%)	All Others (%)
1985	48.0	39.3	12.7
1989	39.7	41.1	19.1
1993	27.4	51.8	20.8
1997	30.6	37.8	31.6
2002	32.9	40.1	25.1
2006	36.6	26.0	37.4

SOURCE: my calculations based on official results from the State Electoral Office.

It is clear that in 1997 and again in 2006 the minor parties and IND candidates have held enough seats to be in a position to exert some power within the Council, especially if they have acted together. *This is a result of their level of support at the polls, not an unintended function of the way that votes are distributed during the count.* These parties and Independents will continue to have a powerful position in the Council regardless of the total number of seats in the Council and regardless of whether we elect all of the MLCs at the same time. Nonetheless, changing the size of the Council or electing all of the MLCs at the same time (and leaving everything else the same) would be likely to take seats away from the major parties more than from these minor parties and Independents, so the *relative* power – or potential- of these smaller groups seems likely to be increased.

4. Electorates for the Upper House.

From time to time there have been suggestions that we could divide the State into several districts and have MLCs elected by voters from individual districts - rather than by voters from all across the State. People who argue that it would be a good idea to have MLCs responsible for particular areas, tend to support this kind of electoral system. Victoria's recent election provides us with a good example of this kind of system.

Victoria's Legislative Councillors are elected to represent 8 Regions, and voters from each region elect 5 MLCs. The ballot papers within each region are counted in a way that is almost identical to our Legislative Council count, so I can model the count and show who would have been elected if the MLCs had been elected by voters across the whole of Victoria rather than just the regions. That is, I can have a look at what the effect might be of *not* having regional electorates in the Victorian Upper House.[8]

The following members were actually elected in Victoria on 25 November 2006[9]:

19 ALP, 15 Liberal, 3 Greens, 2 National, 1 DLP (totalling 40 MLCs).

if the voting system had been based on a single Statewide electorate (as ours currently is) my calculations show that the result would have been:

17 ALP, 14 Liberal, 4 Greens, 1 National, 1 DLP, 2 Family First and 1 People Power (totalling 40 MLCs).

That is, under the multimember electorate system the ALP gained two more seats than it would have won under a Statewide electorate, the Liberal Party gained one more and the National Party gained one more. The losers under the regional electorate system were the smaller parties – Family First and People Power did not win seats at all, and the Greens won only 3 seats compared to the 4 they would have won under a Statewide electorate like ours.

[8] It is true that the vote will not be quite right – for example voters in metropolitan regions did not have a NAT candidate to vote for. But it is the closest indication that we are likely to get.

[9] See www.vec.vic.gov.au SA. State Electoral Department, 1986, General Elections 1985: Statistical Returns, SA Parliamentary Paper 145 of 1986-87.

My estimate is therefore that the Victorian regional electoral system has had a result (this time) which has disadvantaged the smaller parties and helped the ALP and the Liberal Party, and also the Nationals.

Another way of looking at the question of introducing electorates into the Upper House is to put forward hypothetical electorates. There are obviously many possibilities but to elect an Upper House of 16 MLCs there could be 4 districts of 4 MLCs[10] in which case a proportional representation count could still be used. My feeling is that it would be important to retain a proportional representation count because the Legislative Council needs to have an electoral system which is acknowledged to be at least as fair to both electors and candidates as the House of Assembly electoral system.
Dividing the State into 4 roughly equal electorates for the Upper House could work as follows:

- A country electorate containing Mt Gambier, Mackillop, Hammond, Chaffey, Finniss, Kavel, Schubert, Goyder, Frome, Stuart, Giles and Flinders (269,845 electors in 2006);
- A northern suburbs electorate – essentially all of the metropolitan area north of Grand Junction Road – containing Port Adelaide, Playford, Florey, Newland, Ramsay, Wright, Little Para, Napier, Taylor and Light, and also including Lee and Torrens (270,377 electors in 2006);
- A central suburbs electorate containing suburban areas south to about Cross Road, including Cheltenham, Enfield, Colton, Croydon, Adelaide, Norwood, Hartley, Morialta, West Torrens, Ashford, Unley and Bragg (267,993 electors in 2006); and
- A southern suburbs electorate containing Morphett, Elder, Waite, Bright, Mitchell, Davenport, Reynell, Fisher, Kaurna, Mawson and Heysen (247,132 electors in 2006).

Table 7 below shows the results in 2006 if these districts had been in place and we had elected 4 MLCs to each of these districts using the current proportional representation count.

Table 7: Using 4 Districts or the Statewide electorate, to elect 16 MLCs, 2006

	ALP	LIB	OEM	Greens	Family First	IND No Pokies	TOTAL
Electing 4 MLCs to each district							
Country	1	1			1	1	4
Northern Suburbs	2	1				1	4
Central Suburbs	2	1				1	4
Southern Suburbs	2	1				1	4
TOTAL	7	4			1	4	16
Statewide electorate	6	4	1	1	1	3	16
SOURCE: my calculations							

[10] An alternative would be 8 electorates returning 2 MLCs each but PR will not be as effective electing 2 MLCs as electing 4 MLCs.

Table 7 indicates that introducing multi-member electorates into the Legislative Council count would disadvantage the smaller parties – the Democrats and Greens would each have won a seat in a 16-Member Legislative Council elected according to a Statewide electorate, but would have missed out if 4 multi-member districts had been introduced. This is true even if the number of MLCs elected from each electorate is increased: Table 8 shows the results if we used the same districts but elected 5 MLCs from each, and this time the Democrats and Family First would have won seats under a Statewide electorate but not if districts had been in effect.

Table 8: Using 4 Districts or the Statewide electorate, to elect 20 MLCs, 2006

	ALP	LIB	DEM	Greens	Family First	IND No Pokies	TOTAL
Electing 4 MLCs to each district							
Country	2	2				1	5
Northern Suburbs	3	1				1	5
Central Suburbs	2	1		1		1	5
Southern Suburbs	2	1		1		1	5
TOTAL	9	5		2		4	20
Statewide electorate	8	5	1	1	1	4	20

SOURCE: my calculations

A difficulty with introducing electorates into the Upper House may well be that districts were a part of the Upper House electoral system which favoured the Liberal Party until the 1970s. The ALP fought long and hard to change that system to one which translated voters' choices into seats in a more equitable way and it could be hard to argue that re-introducing electorates would make the system fairer or more effective.

5. Other changes to the voting system – ticket voting.

In South Australia, voters completing a ballot paper for the Senate or for the Legislative Council, can choose to accept a party's list of candidates (to be elected in the order that the party has chosen) and the party's direction of preferences according to its ticket, by voting Above the Line (these votes are also called *ticket votes*). Or, voters can specify their own preference for every one of the candidates contesting the election by voting Below The Line (these votes are also called *preferential votes*). Above and Below the Line voting was introduced in time for the 1985 Legislative Council election, and it was said at the time that it would reduced the informal vote, which it did (the informal vote declined

from 10.1% in 1982 to 3.7% in 1985).[11] The change also had the effect of giving parties control over the preferences of their voters, and then, being able to guarantee a high level of compliance, parties gained the ability to make preference agreements with each other.

The system has been criticised because although the State Electoral Office publishes the order in which each party's ticket transfers votes from one party to the next, it is likely that most voters are not aware of how their votes will be transferred. The system has also been criticised because parties list their candidates in a given order, and a voter might favour the party but not agree that one candidate should be elected rather than another.

In theory, if voters favour a party but do not agree with either the party list or the party's preference distribution, the voters have the option of voting "Below the Line" and can make that choice themselves. But in practice only about 7% of voters use that option, and even then about one in three Below the Line voters make a mistake and their votes are discarded as informal.

Below The Line voters in 2006 needed to make sure that they numbered 54 individuals without repeating a number or missing a number. In 2002 Below The Line voters needed to make sure that they numbered 76 individuals without repeating a number or missing a number. At that election, about 43,000 voters chose to vote Below The Line and about 1 in every 3 of them[12] made a mistake; roughly 15,600 ballot papers with Below the Line votes were informal. At that election only 6 parties won more than 15,600 votes, so this is a considerable number of votes – indeed a considerable number of preferences lost - and these were all votes from electors who particularly wanted to make their own informed choices.

If Below The Line voting is not a very effective method of allowing voters to express their own preferences, what would be better? It would be difficult to argue that democracy would be better served if we abolished ticket voting and everyone had to vote Below The Line, or even that we should make ticket voting compulsory and require everyone to vote Above The Line, because the difficulty seems to lie in *completing the ballot paper fully.*

New South Wales solved this problem in time for their 2003 State election, by allowing voters to number just 15 (or more) candidates, in order to elect 21 MLCs. Both Above the Line and Below The Line votes are still possible, and voters can make a new kind of Above The Line vote where they can number several parties Above The Line, in which case the vote travels down through the candidates representing the party for which the voter has marked a first preference and then transfer to the candidates of the party for which the voter has given a second preference, and so on. Parties or groups can only have a position above the line if they field at least 15 candidates. This system allows the fullest range of voting to take place – voters can number every candidate below the line if they wish, or can number just the 15 candidates they prefer (below the line) or can give a single preference to the party of their choice (and accept the party's list of candidates as well as the party's choice of

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[11] SA. State Electoral Department, 1982, Periodical and General Elections 1982: Statistical Returns, SA Parliamentary Paper 145 of 1982-83; SA. State Electoral Department, 1986, General Elections 1985: Statistical Returns, SA Parliamentary Paper 145 of 1986-87.

[12] 29.5% of the 24,000 informals examined, showed this kind of informality; the total number of informal ballot papers was 53,105. State Electoral Office 2003, Election Report for the South Australian State Elections 9 February 2002, SEO, Rose Park, at p.44.

where the preferences should flow if the party is excluded) or can show several preferences above the line and thereby specify which party the vote should flow to if the most-preferred party is excluded. Finally, if a Below The Line voter successfully specifies 15 preferences and then goes on to specify some more but makes a mistake, the ballot paper is treated as a formal one with a vote which exhausts at the point of the mistake. By making only the first 15 preferences compulsory, the NSW system makes it easier for voters to *successfully* vote Below The Line.
Although the change made Below the Line voting simpler, about 98% of formal votes were lodged as Above The Line votes,[13] and parties lodged tickets that exhausted after their own candidates, so when it came to transferring votes from an excluded party to the next, almost 80% of votes exhausted before they transferred. *This meant that seats were won on the basis of the size of a party's first preference votes only.*[14] If 16 MLCs had been elected just on the basis of their parties' first preference vote in South Australia in 2006, we would have elected 6 ALP, 4 LIB, 3 IND No Pokies, 1 Greens, 1 Family First and finally another IND No Pokies MLC, bringing that group to 4. (By contrast, if preferences are transferred, the final seat would have gone to DEM – see Table 5 above.)

By requiring only 15 preferences, the NSW now uses an optional preferential system for the Upper House,[15] and it also uses an optional preferential system for the Legislative Assembly ballot.[16] Would it be possible to introduce optional preferential voting for the South Australian Upper House without also allowing optional preferential voting for the Lower House? And if we did, how many preferences would we need to ask voters for? New South Wales manages with 15 preferences (to elect 21 MLCs) so to elect 16 MLCs we might only need to ask voters to order about 10.

The change to optional preferential voting in the Upper House elections could mean pressure to allow optional preferential voting for the Lower House. The argument might be made that whereas Legislative Council ballot papers are often so big that voters will be in danger of making mistakes, House of Assembly seats never have so many candidates that numbering each one of them is likely to be beyond the ability of a large number of electors. But the main reason why optional preferential voting would be a problem for the Lower House is that the Boundaries Commission relies on the two party preferred count, and optional preferential voting would make it impossible for the Commission to judge whether it had complied with the fairness provisions.[17]

My feeling is that abolishing the ticket vote would only make sense if it was done in order to introduce an optional preferential count for the Upper House, and the House of Assembly ballot process would need to be quarantined.

6. <u>Other changes to the count.</u>

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[13] http://www.elections.nsw.gov.au/__data/assets/pdf_file/744/summaryfirstprefs.pdf
[14] " The election of the final vacancies was determined entirely by the number of primary votes received by each party, not by the distribution of preferences." A Green, 2003, 2003 New South Wales election – Final Analysis, NSW Parliamentary Library Background Paper No 6 of 2003, at p.54.
[15] Constitution Act 1902 (NSW), No 32, Sixth Schedule.
[16] Constitution Act 1902 (NSW), No.32, Seventh Schedule.

Proportional Representation is considered to be a very fair counting system because it translates votes into seats in a very direct way. Parties will only win a majority of seats if they have a majority of votes, and the system does not amplify a winning party's margin to the extent that it leaves the Opposition in an unduly weakened state. Upper House reform groups in Australia have worked *towards* introducing proportional representation where possible, rather than against it. So it seems unlikely that South Australia would move away from a PR count for the Legislative Council.
Still, PR counts are applied in various ways. In Germany a party which wins less than 5% of first preference votes cannot continue in the count to receive preferences from other parties as they are excluded, and will not win a seat. In Australia Senator Helen Coonan suggested in 1999 that a threshold[18] of between 5% and 11.4% of first preferences could be applied to the Senate count.

If optional preferential voting was introduced, preferences would become less important in the count and it is unlikely that a threshold would have much effect. But if full preferential voting is retained, then an argument might be made that a party with votes below a certain level of support should not continue in the count. Choosing the appropriate level of the threshold would be a matter of judgement. We might say that a candidate for a House of Assembly loses his or her deposit if he or she wins fewer than 4% of first preferences, so a 4% threshold might be reasonable for the Upper House too, but if we are likely to be electing 16 MLCs all at the same time, a quota will be only about 5.9% of first preference votes and it would seem harsh to eliminate a party with two thirds of the votes required to win a seat. A half-quota threshold might be more reasonable. The actual method of the count would need to be looked at but my feeling is that seats should only be allocated after parties that fall below the threshold have been excluded and their preferences distributed.[19] I should point out that this is essentially the system that was used to count the results of the 1975 and 1979 Legislative Council elections, which also, by chance, allowed a form of optional preferential voting[20], although voters could not choose to vote for candidates, only for parties. Parties with less than half a quota of first preference votes were excluded, and their votes were transferred to parties still in the count. At this point, seats were awarded to parties still in the count according to how many full quotas they had won, and the final one or two seats were won by the parties that had the biggest portion of a quota. The only preferences that were distributed at any stage of the count were the preferences of parties which were excluded because they did not achieve the threshold of half a quota of votes.

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[17] Constitution Act 1934 (SA), s.83(1).

[18] Of between 5% of first preferences and 80% of a quota (11.43% of first preferences). S Bennett, 1999 "Should the Australian Electoral System be Changed?" Parliamentary Library Current Issues Brief No 10 of 1998-9.

[19] In a hypothetical count of the 2006 results to elect 16 MLCs with a half-quota threshold, the ALP won 6.22 quotas of first preferences, LIB won 4.41, IND No Pokies won 3.49, Family First won 0.85 and Greens 0.73. If the seats are recognised at the first stage of the count (6 ALP, 4 LIB, 3 IND No Pokies), and the ALP's .22 of a quota does not allow the ALP to carry on to the next stage of the count, (nor the LIB .41 nor the No Pokies .49), then there would be only two groups left in the count with more than half a quota - Family First and Greens - which would somehow need to win 3 seats between them. That doesn't seem fair, so I think the groups which survive the threshold should continue in the count even if they have less than half a quota of votes remaining after winning seats. The final seat could either go to the group with the largest remaining portion of a quota, or we could conduct the count as now (exclude the group with the lowest number of votes and distribute these to the next-preferred group). In fact in 2006 the final seat would have gone to IND Xenophon No Pokies whichever method we chose.

This system operated for the 1975 and 1979 elections but was changed to our current system in 1981, with the Liberal government arguing that *our current system produces a fairer result.*
Under the Electoral Act Amendment Act of 1981, optional preferential voting was abandoned, with both parties arguing as if voters could actually choose to vote for individual candidates,[21] although in fact the list system was in force and voters could only show their preferences for parties.[22]
At the same time, the count was changed to the current system – no threshold and distribution of preferences according to a transfer value. There was no debate about the abolition of the threshold, and the change was introduced as a government amendment at the committee stage. I suspect that the threshold had been put into place because it meant that preferences would not have to be distributed, and that would have been a huge task without computer assistance, but New South Wales had demonstrated that they could distribute preferences fairly using a transfer value rather than a sample survey of ballot papers, so once the parties had agreed that this method would be fair, it was adopted virtually without debate. *There was no ideological basis to the threshold – it was a labour-saving device.*

If we had counted the 2006 Legislative Council ballot according to this method, the ALP would have won 6 seats, LIB 4 and IND No Pokies 3 just from first preferences, and then the votes for parties which failed the threshold would have been distributed and Family First and the Greens would each have won a seat; the final seat would have gone to IND No Pokies whether it was on the basis of the largest remaining portion of a quota or on the basis of the distribution of preferences from the smallest remaining parties. *So in 2006 the result with a half quota threshold would have been ALP 6, LIB 4, IND No Pokies 4, Family First and Greens each 1.*

Now that we have Above the Line voting, it would be harder to argue that a *candidate* with votes below a certain level should not continue in the count, because that candidate could have had a lot of supporters who voted Above the Line for the party as a whole. Nonetheless this has certainly been a point of contention for some observers who have noted that some MLCs have arrived in the Upper House with very few first preference votes. Since 1985, for example, 11 MLCs have been elected with fewer than 100 first preferences. Allowing optional preferential voting for the Upper House could conceivably reduce this problem by increasing the number of formal Below the Line votes.

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[20] Voters were required to mark twice the number of candidates required plus one.

[21] "The Government believes.... that preferential voting will make possible a more accurate ascertainment of the will of the people in relation to the election of members of the Council." Hon T Griffin, Electoral Act Amendment Act second reading debate, Legislative Council Hansard 11 February 1981, p.2711

The change to full preferential voting was not supported by the ALP, then in Opposition:
"...surely, if a voter gives his preference to one candidate, that is the person he wants to see elected. Even one's second preference cannot be seen in democratic terms to have the same worth as one's first preference. Yet, in a compulsory preferential system the second preference , third preference or 36th preference (if it gets down that far) has the same value as the first preference. ......However, with an optional preferential system the voter has the choice and can express them all the way down the line of he likes, but he does not have to do so." Hon C Sumner, Electoral Act Amendment Act second reading debate, Legislative Council Hansard 24 February 1981, p.3064.

SUMMARY TABLE:
Composition of the Legislative Council in 2006 under hypothetical electoral systems

	ALP	LIB	DEM	Greens	Family First	IND No Pokies	TOTAL
22 MLCs:							
Current 22-Member Legislative Council (MLCs elected in 2002 and 2006):	8	8	1	1	2	2	22
Electing 22 MLCs at the same time (no other changes):	8	6		1	2	5	22
16 MLCs:							
16-Member Legislative Council (MLCs elected in 2002 and 2006):	6	6	1		1	2	16
Electing 16 MLCs at the same time (no other changes):	6	4	1	1	1	3	16
Electing 16 MLCs at the same time, with no distribution of preferences:	6	4		1	1	4	16
Electing 16 MLCs at the same time, to 4 x 4-Member districts:	6	4	1	1	1	3	16
Electing 16 MLCs at the same time, with a half quota threshold:	6	4		1	1	4	16

SOURCE: my calculations using official results from the 2006 State election.

Appendix B

Summary of Nature of South Australian Government
And
History of the Legislative Council in S.A.

The South Australian system of Government is a system of responsible Government. The Government is formed by the group which is supported by a majority of Members in the House of Assembly. The Government is responsible to Parliament through its Ministers, who may be chosen from Members in the House of Assembly and the Legislative Council.

Parliament is based on the principles of representation and accountability. Parliament is not intended to be a "rubber stamp" for Government action.

A primary role of Parliament is to make the laws by which the State is governed. In addition, Parliament has these functions:

- providing a public forum for the examination of the Government and its Ministers and the administration of Government through Government agencies;
- approving Government finances;
- providing a public forum for the debate and scrutiny of Government policy and programmes;
- providing a reporting mechanism through the tabling of various Papers, including reports of the Auditor-General and the Ombudsman, who report directly to Parliament, and annual reports of Government Departments and boards, financial papers, Parliamentary Committee reports and Royal Commission reports;
- giving Members the opportunity to raise issues of public interest and concern;
- providing a means of dealing with electors' petitions and grievances;

At the commencement of responsible government in South Australia, the Legislative Council was a House of review in that it acted as a check on executive action and it accepted, amended or rejected the legislation passed in the Lower House. However, for many years now, many Government Bills have been introduced in the Legislative Council, and in more recent times there have been many Private Member's Bills introduced there.

The Legislative Council currently consists of 22 members elected by the voters of the State. Each Member is elected for a term of up to 8 years by the whole State voting as a single electoral district. Eleven members are elected at each general election provided they have served approximately 6 years from the 1st March in the year in which the Member was last elected.

A history of the Legislative Council is set out in the table below.

SUMMARY OF HISTORY OF LEGISLATIVE COUNCIL

Year	Alteration	Amending Act
1834	Imperial Parliament passed Act to enable establishment of South Australia as a British province. It did not establish a Constitution, but empowered the King in Council to take the necessary steps to establish a legislative body.	
1836	South Australia founded. Legislative power vested in the Governor with the concurrence of the Chief Justice, the Colonial Secretary and the Attorney-General, or any two of them.	

1842	Imperial Parliament passed Act for the "Better Government of South Australia". Act repealed the 1834 Act. Section 5 of the Act empowered the Queen in Council to constitute a legislative council to be composed of the Governor and seven other persons with authority to make laws for the peace, order and good government of the colony. A Legislative Council consisting of the Governor, three official Members and four others to be nominated from the independent colonists was constituted. Section 6 made provision for the establishment of a bicameral legislature to consist of a General Assembly to be elected by the inhabitants and a Council of nominated Members, or a unicameral legislature to consist of both elected and nominated Members. This section was never implemented	
1850	Australian Constitutions Act enacted. Existing Council empowered to establish a Council consisting of not more than twenty-four Members (a third nominated by the Crown, the remaining two thirds elected by the inhabitants)	13 & 14 Vict., c.59
1851	Legislative Council constituted.	
1855-6	South Australian Constitution Act enacted. This Act replaced the existing Legislative Council with two houses, the Legislative Council and the House of Assembly. The Legislative Council was to consist of eighteen Members, elected by those inhabitants of South Australia who were legally qualified to vote. To be elected, a Member had to be thirty years old, a natural born or naturalised subject of the Queen, or legally made a denizen of the province, and must have resided in South Australia for three years. Electors had to be: • twenty-one years old; • a natural born or naturalised subject of the Queen, or legally made a denizen of the province; • holder of a freehold estate in possession, situated within South Australia, of the clear value of fifty pounds sterling, or a leasehold estate in possession, situated within South Australia, of the clear annual value of twenty pounds with three years to run at the time of voting, or containing a clause authorising the dweller to become the purchaser of the land, or occupying a dwelling-house of the clear annual value of twenty-five pounds sterling; and • registered on the Electoral Roll of South Australia six months prior to the election. The Act made provisions for the election of a president of the Council. The Act provided for one third of the whole number of Members of the Council (consisting of the longest standing Members, and drawn by lot where Members were of equal standing) to vacate their seats every four years. Judges and Ministers of Religion were ineligible for election.	No 2 of 1855-6
1881	Number of Members of the Legislative Council increased to twenty-four. For purpose of electing Members of the Legislative Council,	No 236 of 1881

	South Australia divided into four districts. In time, with attrition of existing Members, each district to be represented by six Members.	
1901	Existing Parliament dissolved. New Parliament summoned. Legislative Council to consist of eighteen Members. South Australia to be divided into four council districts, one of which (central) to be represented by six Members, the remaining districts to be represented by four Members each. Each Member of the Legislative Council to sit for at least six years.	No 779 of 1901
1908	The Constitution Amendment Act enacted.	No 959 of 1908
1908	Electoral Code enacted. This again involved a system of four districts, one represented by six members, the remainder represented by four members each.	
1913	The Constitution Further Amendment Act enacted. Number of Legislative Council Members increased to twenty. For purposes of electing Members of the Legislative Council, South Australia expanded into five districts (two central districts (dividing the former central district), a southern district, a midland district and a northern district), each of which returned four Members. Crown leaseholders were added to the list of persons qualified to vote. The residence requirement was reduced to six months. The requirements for residents of a dwelling house were tightened.	No 1148 of 1913
1918	Returned servicemen were added to the list of persons qualified to vote for Members of the Legislative Council. Such servicemen did not have to comply with any of the other requirements relating to age or residency.	No 1335 of 1918
1934	Constitution Act enacted. This Act consolidated existing Acts relating to the Constitution of South Australia.	No 2151 of 1934
1942	Persons fighting in World War II enfranchised.	No. 41 of 1943
1959	Women enabled to become members of the Legislative Council	No. 39 of 1959
1973	Constitution amended to remove the requirement to have a freehold or leasehold interest in land.	No 51 of 1973
1973	Constitution and Electoral Acts Amendment Act enacted. Increased number of Members of Legislative Council to twenty two.[1] Reduced the age of qualification for membership of the Council to the age at which a person became entitled to vote. The voting districts were dissolved and the State became a single Legislative Council electoral district, with a proportional voting and preferential system. The decision to return to a system of the State voting as a single electorate was in part a response to the unequal situation which had arisen whereby country voters elected proportionately more Members for their population than city	No 52 of 1973

[1] This was done incrementally. The number of members was increased by one at the next two elections, unless the Council was dissolved because of a double dissolution in the interim, in which case the increase to twenty-two members would occur from then on. In 1982 this section was repealed and replaced by a section which simply provided that the Council was to consist of twenty-two members.

	voters.	
1982	Simplified qualification of Members of the Legislative Council to entitlement to vote at an election for the Legislative Council and residence in South Australia.	No 77 of 1982
1985	Retirement of Members altered. 11 Members to retire whenever the House of Assembly was dissolved or expired. No Member required to retire unless 6 years have elapsed from first day of March in year in which Member last elected. Disqualification of Members from occupying seats in both Houses.	No 84 of 1985
1988	Section 12 (qualification of Members) repealed.	No 1 of 1988

Annexure C

SOME DEADLOCK RESOLUTION MODELS

Commonwealth[1]

1 The House of Representatives (H/R) passes a Bill.
2 The Senate rejects it, or fails to pass it, or passes it with amendments to which the H/R will not agree.
3 Three months or more elapses
4 The H/R passes the Bill again in the same or the next Session, with or without any amendments made or suggested by the Senate.
5 The Senate rejects or fails to pass the Bill again, or again passes amendments to which the H/R will not agree.
6 The Governor-General may dissolve both Houses (provided that it is not within six months of an election).
7 An election is held.
8 The newly constituted H/R passes the Bill again (with or without amendments made or suggested by the Senate).
9 The newly constituted Senate rejects the Bill again, or fails to pass it, or passes it with amendments to which the H/R will not agree.
10 The Governor-General may convene a joint sitting of both Houses.
11 During the joint sitting the Members of both Houses deliberate and vote together on the Bill as last passed by the H/R and any amendments.
12 If the Bill is carried by an absolute majority of the total number of the members of both Houses, then it may be presented to the Governor-General for Assent.

NSW[2]

The deadlock provisions outlined below do not apply to Appropriation Bills, i.e. Bills for the ordinary annual services of Government.

The NSW system does not require that there be an election before an intractable deadlock is resolved, but the Bill may be put to a referendum for approval.

1 The Lower House passes a Bill.
2 The Upper House rejects the Bill, or fails to pass it, or passes it with amendments to which the Lower House does not agree.
3 Three months or more elapses.
4 The Lower House passes the Bill again in the same or the next Session, with or without any amendments made by the Upper House.
5. The Upper House again rejects the Bill, or fails to pass it again, or passes it with amendments to which the Lower House does not agree.
6. There is a free conference between the Houses.[3] This is a conference in which free discussion of the points of contention is permitted between at least 10 Lower House managers and an equal number of Upper House managers. The conference is to deal with the matters in dispute only. The conference is to be held without delay at a time and place appointed by the Upper House.
7. If agreement is not reached at the free conference, the Governor may convene a joint sitting of both Houses. The joint sitting may deliberate on the Bill as last

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[1] Section 57 of the *Consitution.*
[2] Information taken from Anne Twomey *The Constitution of New South Wales* 2004 ed.
[3] A free conference in NSW is similar to a conference of managers used in South Australia.

proposed by the Lower House and upon any amendments, but no vote is taken in the joint sitting.

8. If agreement is not reached, the Lower House may, by resolution, direct that the Bill as last proposed by the Lower House, with or without amendments subsequently agreed by both Houses, be submitted to the electors qualified to vote in Lower House elections at a referendum.
9. If at the referendum a majority of electors approve the Bill, it is presented to the Governor for Assent.

Victoria[4]

The new procedure for ordinary Bills that was established in 2003 has not been tested yet.

1 A dispute resolution committee must be appointed at the beginning of each new Parliament and it holds office for the duration of the Parliament. It comprises five members of the Upper House and seven Members of the Lower House. Appointments should be made having regard to the political composition of the House making the appointments.
2 A Bill is passed by the Lower House and transmitted to the Upper House.
3 If the Bill was transmitted to the Upper House not less than two months before the end of the Session and the Upper House has not passed within two months, then the Bill becomes a disputed Bill.
4 The disputed Bill then goes to the Dispute Resolution Committee, which attempts to resolve the dispute through a free conference and reports to the Lower House.[5]
5 If the Committee resolves the dispute, it may recommend that the Bill be not proceeded with, or that it be passed with amendments, or that it be passed as last passed by the Lower House.
6. The Bill becomes deadlocked if:
    6.1 either of the Houses refuses to appoint members to the Dispute Resolution Committee; or
    6.2 the Committee fails to meet; or
    6.3 the Committee recommends that the Bill be passed as last passed by the Lower House and the Upper House does not comply within 30 days, or 10 sitting days (whichever is the longer); or
    6.4 the Committee recommends that the Bill be passed with amendments, but one or both Houses fail to pass the Bill with the specified amendments; or
    6.5 the Committee recommends that the Bill not be passed and one or both Houses resolve to reject the recommendation.
7 If a Bill becomes deadlocked, the Premier decides whether to recommend to the Governor that the Lower House be dissolved and if he does, an early election is held.
8 The Bill may be re-introduced in the newly constituted Lower House after the early election or the next general election.
9 If the re-introduced Bill again becomes a disputed Bill, the Premier may advise the Premier to convene a joint sitting of both Houses.
10. The joint sitting considers the Bill in the form in which it was last passed by the Lower House. If the Bill is passed by an absolute majority of the total number of Members at the joint sitting, with or without amendments, the Bill may be presented to the Governor for Assent.

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[4] Information from Greg Taylor *The Constitution of Victoria* 2006

[5] Taylor says that this procedure is very similar to the Mediation Committee of the German Parliament and that it has its origins in a long disused procedure of the Westminster system. It is similar to a conference of managers in South Australia.

Tasmania
There are no provisions in the *Constitution Act* for resolving deadlocks.

Western Australia

There are no provisions in its *Constitution Acts* for resolving deadlocks.

United Kingdom

1. *Most public Bills*

The modern law that applies to most public Bill is that if the Bill is passed by the House of Commons in two successive Sessions, whether of the same Parliament or not, and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the Lords for the second time, then the Bill may be presented for Royal Assent and become law as if it had been passed by both Houses.[6] The result is that a Bill can be delayed for the Lords for about one year.

A Money Bill passed by the House of Commons, but not passed by the House of Lords within one month, may receive Royal Assent and become law despite the lack of consent of the Lords.

The House of Lords has 730 Members none of whom are popularly elected.

Model 1 proposed by 2003 Commonwealth discussion paper[7]

This proposal would allow the Prime Minister to ask the Governor-General to convene a joint sitting of both Houses of Parliament to consider a deadlocked Bill without an intervening election.

1 The House of Representatives (H/R)passes a Bill.
2. The Senate rejects the Bill, or fails to pass it, or passes it with amendments to which the H/R does not agree.
3 Three months or more elapses.
4 The H/R passes the Bill again.
5. The Senate rejects the Bill again, or fails to pass it, or passes it with amendments to which the H/R does not agree.
6 The Prime Minister asks the Governor-General to convene a joint sitting of both Houses.
7. If an absolute majority of the members of both Houses support the Bill at the joint sitting, it can be presented to the Governor-General for assent. Thus the decision of an absolute majority of all Members of Parliament prevails.

Model 2 proposed by 2003 Commonwealth discussion paper

This proposal would allow the Prime Minister to ask the Governor-General to convene a joint sitting following an election to consider a Bill that has been blocked by the Senate twice in the previous Parliament, and is blocked again in the new parliament. If the Bill is passed by an absolute majority at the joint sitting, it could receive Assent and become law. Depending

[6] Halsbury's Laws of England 1997
[7] *Resolving Deadlocks: A Discussion Paper on Section 57 of the Australian Constitution.*

on the time the deadlock arose, the election would either be for the H/R only, or for the H/R and half of the Senate.

1. The H/R passes a Bill.
2. The Senate rejects the Bill, fails to pass it, or passes it with amendments to which the H/R does not agree.
3. At least three months elapses.
4. The H/R passes the Bill again.
5. The Senate again rejects the Bill, fails to pass it, or passes it with amendments to which the H/R does not agree.
6. There is a general election for either the H/R alone, or the H/R and half of the Senate.
7. The newly constituted H/R passes the Bill.
8. The Senate rejects the Bill, fails to pass it or passes it with amendments to which the H/R does not agree.
9. The Prime Minister may ask the Governor-General to convene a joint sitting of the H/R and the Senate.
10. If an absolute majority of M support the Bill at the joint sitting, it can receive Assent.

Electoral Districts for the Legislative Council

Year of Act	Number of electoral Districts	Number of Members Legislative Council District	Number of Members of the House of Assembly
1857	1, being the whole State	18 Members, each representing the whole State	36 Members

Changes between the start of responsible government in 1857 and 1872 have been omitted

1872	1, being the whole State	18 Members as above	46 Members
1881	4 Districts o Central o Southern o North Eastern o Northern	24 Members Each District returned 6 Members.	52 Members 26 electoral Districts each returning 2 Members
1901	4 Districts as above, including the Northern Territory	18 Members: o 6 Members for Central District o 4 Members for Southern District o 4 Members for North Eastern District o 4 Members for Northern District	42 Members 12 electoral Districts for South Australia and one for the Northern Territory
1913	5 Districts: o Central District No 1 o Central District No 2 o Southern District o Midland District o Northern District	20 Members 4 from each District	46 Members 19 electoral Districts
1973	1 being the whole State	22 Members Optional preferential voting used	46

For more detail see attached pages 23 to 28 of a paper written by Jenni Newton-Farrelly *The South Australian Legislative council: Possible Changes in its Electoral System,* Parliamentary Library of South Australia, Information Paper 17, August 2000,
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JENNI NEWTON - FARRELLY
PARLIAMENTARY LIBRARY OF SOUTH AUSTRALIA
DISCUSSION PAPER 17, AUGUST 2000

Similarly, the (single) ALP ticket for the Legislative Council ballot distributes all ALP ticket votes to DEM before LIB, but in the 3 House of Assembly seats where only the three major parties fielded candidates and the ALP candidate was excluded, there was a leakage of about 11% of ALP preferences to LIB rather than DEM.

There was only one seat where only the three major parties fielded candidates and the LIB candidate was excluded (Napier); there was a leakage of 16% of LIB preferences to the ALP rather than to DEM.

If we recalculate the 1997 Legislative Council vote in 1997 changing the allocation of ALP, LIB and DEM excluded votes from 100% to DEM, 100% to DEM and 50/50 respectively, to 90% to DEM, 85% to DEM and 60/40 respectively, *the result in 1997 would not have been any different,* whether we are looking at electing large or small numbers of Members at one time. This is because all three were either still in the race at the end of the count or had relatively few votes to transfer because most had been used to win a quota. It seems likely that abolishing ticket voting would have little effect on the outcome of a proportional representation count, as long as the problems with an increased informal vote were addressed at the same time.

From 1973 here in South Australia the Legislative Council count was a proportional representation count and tickets were not in use until 1985. In the intervening 12 years voters marked their preferences for individual candidates or groups, and marking a preference against every candidate was not necessary.[24] There was, however, a relatively high level of informal votes (10.1% in 1982) which was reduced considerably with the introduction of the ticket vote in 1985 (informals were 3.7% of total votes for the Council).

ELECTORATES FOR UPPER HOUSE MEMBERS

Is there any reason why we do not currently have electorates for the **Upper House in** South Australia?

The idea of Members of the Legislative Council representing geographic areas of the State is not a new one for South Australia.

The 16 elected Members of the composite (partly-elected and partly-appointed) Legislative Council of 1851[25] each represented single-Member electorates.

However, when responsible government was attained in 1857 and there were two Houses, only the Assembly Members represented electorates.

In debate on the Constitution Bill which would allow election to the 1857 Parliament, G S Kingston proposed that "all of the electors of the colony should vote for all of the members of the House. Kingston considered that this course would get rid of the bugbear of local influence".[26] In the end, Kingston's view prevailed and the new Parliament[27], comprised an 18-Member Legislative Council, *with each Councillor representing the State as a whole*, and a 36-Member House of Assembly, made up of 17 single-Member or multi-Member electorates.

The ideal of the Legislative Councillors speaking for the State as a whole, rather than for interests within a smaller area was still strongly held nearly 30 years later.

> As to the division of the colony into districts, he considered the introduction of the local element into the Council most undesirable. It was one of the proudest things that a member of the Council could

[24] At first voters needed to mark a preference for at least 23 candidates, but from the 1982 election voters needed to mark only 11 preferences.
[25] Elected according to Ordinance No 1 of 1851 (SA).
[26] G D Combe, 1957, Responsible Government in South Australia, p.60.
[27] Elected according to the Constitution Act 1956 (No 2 of 1855-56)

> say that he was elected by the whole colony, and not by a particular district of it. ... He knew from experience in Assembly that, even without log-rolling, members frequently felt obliged to support the construction of works required by their district, respecting which they personally scarcely felt that the expenditure was justifiable as regards the interests of the whole colony.[28]

Nonetheless, as settlement expanded further from the metropolitan area the ideal became harder to uphold in practice.

> If hon. Members bore in mind the increased extent of occupation and settlement in South Australia they would see the absolute necessity to divide the country into districts.[29]
>
> There could be no doubt that the great expense connected with putting candidates' views before the country tended to keep out many good men who would otherwise come forward, and he thought that was a strong argument in favour of reducing the size of the districts...[30]
>
> ...if there was anything that had been universally demanded during the past two or three years it was the division of the electorate of the Council into districts.... It would be manifestly unfair when some great question was under discussion that the members should have to go to the whole colony, but that objection would not stand if a member had only to go before a district.[31]

Despite several attempts to re-introduce electorates for the Upper House[32], the single State-wide District continued until 1881 when the State was divided into four Districts, each returning 6 Members to the Legislative Council. These four Districts were not equally-sized in terms either of population or of geographic area.

The boundaries of the new Legislative Council Districts were drawn around groups of Assembly electorates,[33] and this arrangement continued from 1881 for almost a century until 1973.

- In 1901[34] the number of Members in the Legislative Council was reduced to 18 but the four Council Districts were retained. Most Districts still returned 6 Members to the Council but one would now return 4 Members.
- When Council Membership was increased to 20 in 1913[35], the four existing Districts were increased to 5, each returning 4 Members. Each of the 5 new Council Districts was again made up of groups of Assembly electorates.
- From the end of the Great War until the end of the Second World War there were at least 13 attempts[36] to adopt Federal House of Representatives boundaries for Assembly electorates;

[28] Hon RC Baker, Legislative Council 19 July 1881: 289

[29] Hon W Morgan, Legislative Council 26 July 1881: 346

[30] Hon JB Spence, Legislative Council 27 July 1881: 379

[31] Hon J Pearce, Legislative Council Hansard, 19 July 1881: 286

[32] Both the Constitution Act Amendment Bill, 1858 and the Electoral Act Amendment Bill 1858, proposed 6 three-Member Council districts. The Select Committee on Amendment of the Constitution 1865-6 (P.P. No147 of 1855-6) also recommended districts for the Legislative Council but did not specify how many.

[33] Under the Constitution Act 1881, Central District contained 6 Assembly electorates; Southern contained 7, North-Eastern contained 6 and Northern contained 3. Under the Constitution Act Further Amendment Act 1882 (No 278 of 1882) 4 new Assembly electorates were created and under the Northern Territory Representation Act 1888 (No 450 of 1888) the Territory was allocated its own separate Assembly electorate. Whenever new Assembly electorates were created they were allocated to existing Council Districts.

[34] Constitution Act Amendment Act 1901 (No 779 of 1901). Changes took effect at the Legislative Council election of 1902.

[35] Constitution Further Amendment Act 1913 (No 1148 of 1913). Changes were phased in at the 1915 and 1918 Legislative Council elections.

[36] Proportional Representation Bill 1919,
Proportional Representation Bill 1920,
Proportional Representation Bill 1922,
Proportional Representation Bill 1924,
Proportional Representation Bill 1932,
Reduction of Members (Proportional Representation Bill) 1932,
Constitution Amendment (Proportional Representation Bill) 1933,

most of these attempts would have broken the relationship between Assembly and Council boundaries. All were unsuccessful.

- Later attempts to change Council (and Assembly) boundaries[37] refrained from tying State boundaries to Federal boundaries, and were more successful. In 1955 the number of Assembly electorates was changed but the Council retained its 5 Districts, each taking in between 6 and 9 Assembly electorates, as recommended in an Electoral Commission Report[38] of that year.
- The next Electoral Commission (1962) was required[39] to recommend boundaries for 6 Council Districts, each to be based on two or more complete Assembly electorates. In addition, 3 of the Council Districts were required to be rural and 3 to be urban. The appointed Commission provided boundaries which would have complied with these requirements but the Report was never implemented.[40]
- An unsuccessful Bill was brought forward in 1965 to constitute another Electoral Commission; the guidelines for this Commission would also have required it to produce boundaries for 5 multi-Member Council Districts with boundaries drawn around groups of Assembly electorates.
- An Electoral Commission constituted in 1969[41] was required to redistribute Assembly boundaries to accommodate an increase of Members to 47 (from 39) and to propose consequent changes to Council boundaries. The number of Council electorates was to stay at 5. *For the first time, the Commission was given express permission to divide parts of any of its proposed Assembly districts between Council Districts,* but in the event each Council District covered complete Assembly electorates.
- An unsuccessful attempt was made in 1972[42] to increase the number of Council Members from 20 to 24 and reduce the number of Council Districts from 5 to 2 – one metropolitan District covering all of the metropolitan Assembly electorates and one Country District covering all of the rural Assembly electorates. Each of the proposed Council Districts would have 12 Members.

In 1973[43] legislation was passed to make the Council one State-wide District. At the same time, the method of counting the Council vote was changed to an optional preferential vote using a proportional representation count.[44]

Constitutional and Electoral Acts (Proportional Representation) Bill 1940,
Constitutional and Electoral Acts (Proportional Representation) Bill 1943,
Constitutional and Electoral Acts (Proportional Representation) Bill 1945,
Constitutional and Electoral Acts (Proportional Representation) Bill 1946,
Constitution (Legislative Council Franchise) Bill 1946,
Constitutional and Electoral Acts (Proportional Representation) Bill 1947.

[37] Constitution Act Amendment Bill 1950,
Constitution Act Amendment Bill 1953,
Constitution Act Amendment Bill 1954.

[38] Electoral District (Redivision) Act 1954,
SA. Electoral Commission, 1955, Report, P.P. No 12 of 1955
Constitution Act Amendment Act 1955. These changes took effect at the general elections of 1956.

[39] Electoral Districts Redivision Act 1962 (No 34 of 1962)

[40] The Constitution Act Amendment Bill (No 3) 1964 attempted to implement the recommendations of the Commission but was defeated.

[41] Electoral Districts (Redivision) Act 1968-69 (No 2 of 1969)
Electoral Act Amendment Act (No 2) (No 99 of 1969)
SA. Electoral Commission, 1969, Report, P.P. 79 of 1969.
Constitution Act Amendment Act 1969 (No 110 of 1969) The changes took effect at the general elections of 1970.

[42] Constitution Act Amendment Bill (No 2) 1972

[43] Constitution and Electoral Acts Amendment Act 1973 (No 52 of 1973) The changes took effect at the general elections of 1975 and 1977.

[44] Constitution and Electoral Acts Amendment Act 1973 (No 52 of 1973) The count used a list system whereby voters could only choose groups of candidates – usually parties - rather than individual candidates within those groups. At the beginning of the count those groups winning less than half a quota of first preference votes were excluded from the count and had their votes distributed to continuing parties.

Why was it decided that one State-wide electorate would be appropriate for the Legislative Council?

From the late 1960s there had been a series of changes which broadened the Council franchise,[45] culminating in the 1973 change to the Constitution Act[46] which enabled anyone enrolled to vote for the Assembly to also vote in Council elections. Under the more limited franchise the Council had been dominated by conservative Members, and the arguments for opening up the franchise to everyone qualified to vote for the House of Assembly, were based on equity. These equity arguments were also applied to the gross mal-apportionment which then existed in Legislative Council electoral boundaries. (In 1972 country electorates contained roughly half the number of voters in city electorates, which had the effect of increasing the value of country votes compared to those lodged by city voters.)

In the Assembly a boundary redistribution in 1969[47] had lessened the effect of the mal-apportionment and by 1973 the focus turned to reform of the Council. When the two reform Bills were introduced at the end of the 1972-73 session (designed to ensure full adult franchise for the Council and a proportional representation count for Council elections) the change to a single electorate for the Council was seen as a change made necessary by the choice of proportional representation, *and did not draw a single line of Hansard debate.*[48]

What did take up most of the debate was the method by which the proportional representation vote should be counted. The original provisions of the Bill would have had some first preference votes discarded. Voters would only be able to vote for groups (along the lines of our current above-the-line vote provisions) and any candidate or group which received fewer than half a quota of votes would be excluded from the count, with those votes then being completely *disregarded*. Half a quota of first preference votes was proposed as a threshold, below which no candidate or group could expect to win a seat. During a series of conferences on the Bill, the threshold was rejected, thereby allowing the first preference votes of such candidates to be "attributed" (distributed) at their full value to continuing groups.

What kind of electorates would be possible for the Upper House?

In January both Mr Olsen and Mr Plane proposed that electorates or districts could be re-introduced for the South Australian Upper House, and in July Mr Olsen noted that some MPs wanted to see the re-introduction of multi-member districts, "possibly nine districts each returning two members".[49] This would mean electing 18 Members to the Legislative Council – all at once or 9 at 4-year intervals. It would also mean reducing the size of the Legislative Council by 4

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[45] Constitution Act Amendment Act 1969 (No 110 of 1969) broadened the property qualification and enabled spouses of qualified electors to vote for the Council.
Constitution Act Amendment Bill 1970 attempted to extend Council franchise to anyone enrolled to vote for the House of Assembly.
Constitution Act Amendment Act 1971 (No 17 of 1971) reduced the age of voting from 21 to 18.
Constitution Act Amendment Bill 1971 attempted to extend Council franchise to anyone enrolled to vote for the House of Assembly.
Constitution Act Amendment Bill (No 4) 1972 attempted to extend Council franchise to anyone enrolled to vote for the House of Assembly.

[46] Constitution Act Amendment Act 1973 (No 51 of 1973) extended the Council franchise to anyone enrolled to vote for the House of Assembly.

[47] Electoral Districts (Redivision) Act 1968-69 (No 2 of 1969) and Electoral Act Amendment Act (No 2) (No 99 of 1969).
Electoral Commission Report, 1969, PP No 79 of 1969. (Although the redistribution was a major step towards equality in the value of votes, the largest recommended metropolitan seat was Price, with 16,164 electors, and the smallest country seat was Frome, with 8,576 electors.)
Constitution Act Amendment Act 1969 (No 110 of 1969).

[48] Committee stage of the Constitution and Electoral Acts Amendment (Council Elections) Bill. Clauses 9 to 11 were passed without discussion (Hansard 26 June 1973, p.130)

[49] Greg Kelton, "Reform in the House" The Advertiser, 25 July 2000, pp.1-2.

Members, which would be in line with the reported preference of the Opposition Leader Mr Rann for a reduction of 4 members in each House.[50]

Nine Districts?

Boundaries could be drawn according to House of Assembly electorate boundaries or even Federal House of Representatives boundaries.

There are two problems with using the Federal House of Representatives boundaries. Firstly, South Australia elects 12 Members to the House of Representatives so using these boundaries would require a choice of either 12 Members in single-Member districts or 24 Members in two-Member districts. Neither of these numbers seems to be within the scope of the proposals Mr Olsen is reported to have been considering. Secondly, the number of Members which South Australia elects to the House of Representatives will change with time according to the relative size of our population. It is not unreasonable to expect that the next time any change is made it will be to reduce the number of Members of the House of Representatives for South Australia from 12 to 11 (because of more rapidly increasing populations in other States). If this were to happen then the number of Members elected to the South Australian Parliament would change not because of a decision made by this Parliament but due to a quite external factor.

It seems more likely that if the proposed Legislative Council districts were to have their shapes linked to any other electorates, there would be an Assembly – Council link.

While there are 47 House of Assembly electorates it would be difficult to link them with 9 Legislative Council districts but if that number were reduced to 45, each Upper House district could be effectively an umbrella district for 5 House of Assembly electorates.

Of course, the Parliament could choose any number of districts – for example 8 Legislative Council districts each covering 6 House of Assembly electorates (requiring one new House of Assembly district to be created).

If Legislative Council districts were to follow House of Assembly boundaries the requirements imposed upon the Electoral Districts Boundaries Commission when drawing up House of Assembly boundaries would probably also be imposed in the case of Legislative Council districts. These requirements include making the electorates roughly equal in terms of the number of voters (with a tolerance of 10%),[51] and drawing continuous boundaries except where islands are included.[52] The requirement that the Commission take account of community of interest, topography and ease of communication between sections of an electorate[53] might all be less stringently imposed upon a Council redistribution than an Assembly redistribution, simply because of the much larger scale of the resulting districts. Finally, the fairness requirement might be seen as less relevant for the Upper House, partly because it relates to the necessity of a party with a majority of support being able to *form government*, and partly because any move away from proportional representation to another voting system would indicate the Parliament's intention to give a lower priority to equity in the Legislative Council.

What Voting system?

Optional Preferential? If the Parliament decided to re-introduce electorates for the Legislative Council, and to require the election of *one* candidate for each district at each general election (effectively continuing the present system of double terms for Legislative Councillors) there is no reason why the preferential voting system used for the House of Assembly could not be used.

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[50] As above.
[51] Constituton Act 1934 (SA), s.??
[52] Constituton Act 1934 (SA), s.82(5).
[53] Constituton Act 1934 (SA), s.83(2).

The only other Australian State which uses the same voting system to elect Members of both its Upper and Lower Houses, is Victoria, but this seems likely to change soon. After its 1999 election with the support of three Independents, the Bracks ALP government agreed to introduce a Bill[54] to change the number of Members in their Legislative Council from 44 to 35, reduce the number of Upper House electorates from 22 (each returning 1 MLC every 4 years but for 8-year terms) to 5 (each returning 7 MLCs at every 4 years) and introduce a proportional representation count for the Legislative Council.

A link would remain between the Upper and Lower House electorates: each province would cover 17 Legislative Assembly electorates, and for that reason the number of Assembly Members would be reduced from 88 to 85.

PR? If the Parliament decides to re-introduce electorates for the Legislative Council, and to require the election of either one or two candidates for each district at each general election, then it would be possible to use a proportional representation count within each district.

The old one? If the Parliament decides to re-introduce electorates for the Legislative Council, and to require the election of two candidates for each district at each general election, an alternative would be to revert to the system which was used until 1975. Before the change to a single State-wide electorate for the Legislative Council, there were 5 Council districts each electing 4 Legislative Councillors – 2 MLCs per electorate every 3 years.

There was an optional preferential count, but as voters were required to show their preferences for 5 of the candidates (where only 2 were required to be elected) few votes were exhausted. The first vacancy was filled if a candidate had an absolute majority of first preference votes, or otherwise by the distribution of preferences of the least-favoured candidates, until one candidate had an absolute majority of votes. But the count to fill the second vacancy was effectively a rethrow of all of the ballot papers; the count began again as if the successful first candidate had not been available and his or her ballot papers were allocated (at their full value) to the second-preferred candidate.

This voting system effectively gave an *extra* vote to those voters who had been far-sighted enough to give their first preference to the candidate who filled the first vacancy. In this way the voting system amplified the vote of the most popular party, and it is probably not surprising that in 1973 each of the 5 Legislative Council Districts returned 2 members from the same party.

[54] Constitution (Reform) Bill (Victoria) second reading in the Legislative Assembly on 25 November 1999 available on-line through www.parliament.vic.gov.au.