



# Does the South Australian Legislative Council have a future?

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The existence and character of the South Australian upper house, the Legislative Council, is currently under threat.<sup>1</sup> According to the Premier of South Australia, Mike Rann, the Legislative Council is no longer relevant to South Australian government and politics. As he recently stated:

[I]t's time to modernise our parliament so it reflects the demands and expectations of a confident state as it prospers and grows into this 21<sup>st</sup> century...Let's face it, in my view the upper house has become a relic of a time in our democratic history that is long gone. It is passed its use-by date.<sup>2</sup>

The parliament may undergo significant changes at the next election, due in 2010. Rann has promised to hold a referendum concurrent with this election asking voters to determine the future the Legislative Council. Referendum voters will be offered a number of options: Whether they want to either retain the Legislative Council unaltered; reduce it in size from 22 members to 16 members and cut its term length to four years from eight years; or else abolish it. Were the final option to be enacted, South Australia would join Queensland as the second Australian State to abolish its upper house.

Rann has declared that he is most in favour of abolishing the Legislative Council altogether. It is unclear exactly what his motives are in preferring this option. Some commentators believe it is because the Legislative Council was conducting potentially damaging inquiries into alleged misconduct by the Attorney-General in the months leading up to a State election. On this view the announcement is both a reaction to the frustration that the Legislative Council caused Rann and a way of raising a smoke screen in order to divert attention away from the inquiry. Rann said of the Legislative Council at the time: 'It's become a circus of smear, a den of petty game playing.'<sup>3</sup> Another reason that Rann may harbour resentment towards the Legislative Council is that in the months leading up to the 2006 election, when Rann did not want parliament to sit, the Legislative Council voted to continue sitting so that it could continue to conduct its inquiries. The

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<sup>1</sup> Thank you to Dr Lisa Hill for her comments on this paper

<sup>2</sup> AAP Australian National News Wire; 24/11/2005

<sup>3</sup> *Ibid.*

final likely explanation for Rann's hostility to the upper house lies in its capacity to obstruct the government's legislation (the government does not have a majority in the upper house). At present it has to either negotiate in order to get its legislation passed, or face the possibility of its total obstruction. Some credence is given to this view by comments made by Rann, in which he expressed his desire for '[g]overnments that are elected being able to be judged on their performance rather than these constant delaying tactics and basically a huge waste of resources' (sic).<sup>4</sup> (This perception of an obstructionist upper house is countered by Rob Lucas, an Opposition MLC, who reports that out of the over 200 bills that have gone through parliament in the past four years, the Legislative Council has rejected only three.<sup>5</sup> )

The Legislative Council is a chamber of 22 members and is elected by proportional representation. Each member of the Legislative Council serves a term of eight years. Elections are staggered, so that at each general election, 11 members are elected. The powers of the Legislative Council are almost equal to those possessed by the House of Assembly, with the exception that the Legislative Council cannot initiate or amend money bills. The current partisan balance in the Legislative Council is: eight Labor, eight Liberal, two Family First, two Independents, one Green, and one Democrat.

At this stage, the announcement of the referendum is still recent, and so organised pro- or anti-Legislative Council groups have not had time to form. However, the Labor Party seems to be lining up behind Rann in calling for abolition, or at least major reform. Joining them at this stage is Business SA, the powerful South Australian business lobby group, that as early as called for the abolition of the Upper House. Other supporters are reporters at *The Advertiser* newspaper who, since the decision was announced, have been taking a fairly consistent anti-Legislative Council line. Opposing any changes to the Legislative Council are members of the Liberal Party. Opposing abolition but welcoming the move to four year terms are some of the minor party members of the Legislative Council.

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<sup>4</sup> ABC Premium News; 24/11/2005

<sup>5</sup> *The Advertiser*, 16/12/2005

Opponents of change argue that the Legislative Council is an important part of the South Australian Parliament. In various ways it serves and upholds key principles of parliamentary democracy, among them: the desirability of institutional forms of opposition to government; responsible and accountable government; checks and balances; diversity and equality of representation; and means to enable political parties to compete equally with each other for the organs of state power.

It is worth noting that the Legislative Council is more representative than the House of Assembly. This is due to the fact that it is elected under a system of proportional representation. Proportional representation more accurately awards seats to parties in proportion to the vote that they received than does the single member electoral system used in the House of Assembly, and so the Legislative Council is much more likely to contain independents and members of minor parties.<sup>6</sup> Apart from encouraging diversity in representation, elections to the Legislative Council better fulfill the principle of ‘one vote, one value’ than those to the House of Assembly. This is because such elections involve the entire State as a single electorate. This is in contrast to the House of Assembly, which is composed of 47 single-member electorates that can have up to a ten percent variation in the number of electors enrolled in each electorate. Thus, the overall level of representativeness will be higher in a parliament with the Legislative Council than one without. The presence of minor parties in the legislature also helps to fulfill the principle of majority rule with minority consent, since, for the government to pass its legislation, it usually has to negotiate with one or some of the minor parties and Independents in the Legislative Council. That the Legislative Council is frequently not controlled by the Government also makes it a valuable forum for the expression of opposition to the Government.

The Legislative Council is a different type of house to the House of Assembly. Under the theory of responsible government it is seen as secondary to the House of Assembly. The

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<sup>6</sup> For an in-depth analysis of proportional representation and preferential electoral systems as they operate in Australia, see David M. Farrell and Ian McAllister, 2006, *The Australian Electoral System: Origins, Variations and Consequences*, Sydney, University of New South Wales Press.

House of Assembly is the house where governments are made and broken, and it is the house where the Premier and the senior ministers sit. In the House of Assembly, one party clearly commands a majority of the votes on the floor of the House. There is a rigid system of party discipline in the House of Assembly and it is almost unheard of for members to cross the floor to vote against their own party. The government in the House of Assembly strictly enforces this discipline as losing a vote is deeply embarrassing for the government, and may in fact precipitate its downfall. This rigid party discipline has become very useful to the Government. When a government introduces legislation into the House of Assembly, it does so confident that it will pass.

In the Legislative Council, thanks to the system of proportional representation used to elect MLCs, no one party tends to dominate, thereby generating a different dynamic. Rather than simply introducing legislation with the expectation that it will pass, governments have to take account of the political sensibilities of the majority of members who do not belong to its party. This often entails negotiation and compromise to ensure the passage of legislation. This negotiation and compromise stands in stark contrast to the certainty experienced in the House of Assembly. And it has to be recognised that occasionally some legislation will be rejected, with no amount of negotiation saving it. This uncertainty makes Rann uncomfortable. In his political career he has risen through a house where the outcomes of votes are known before they are taken, thanks to party discipline. When he came into office, he faced in the Legislative Council a house that he could not control. This was epitomized by the convening of Legislative Council committees that investigated actions of his ministers that he would have rather remained uninvestigated.

Business SA sees the Legislative Council as it exists interfering now with the strong mandate that they see the House of Assembly holding. In their manifesto they express their desire for a government that can respond quickly and effectively to change, and can implement its legislation without delay or obstruction. They see a Legislative Council that blocks or significantly amends government legislation not as a democratically elected house exercising its constitutional right and as an important point of deliberation,

but as an institution that prevents governments governing. They would prefer to see the Legislative Council possess only short-term delay powers, with the length of delay allowed in reverse proportion to the urgency (however that is decided) of the Bill in question. Furthermore, on its model, the Legislative Council would only be able to suggest amendments, not enact them.<sup>7</sup> In this, they are thinking from the perspective of business, which values efficiency and cost effectiveness. However, it could equally be argued that the legislative process could end up being more expensive and inefficient if it were easy to pass legislation that has been insufficiently examined, debated and amended. Furthermore, efficiency and cost effectiveness are not the only (or most important) values to be considered when considering reforms to institutions integral to the democratic process.

Another effect of the abolition of the Legislative Council would be that the number of politicians would be reduced. Although some might consider this is a good thing, there is research indicating that Parliaments that are too small are prone to certain weaknesses.<sup>8</sup> As Herr points out in his analysis of the reduction in size of the Tasmanian Parliament, the size of parliament directly determines the talent pool from which ministers can be drawn.<sup>9</sup> Abolishing the Legislative Council would decrease the options open to governments when forming ministries and shadow ministries. Further, the smaller the parliament, the fewer backbench members there are to compete for the control of the executive, which can, in turn, lead to under-deliberation.<sup>10</sup> This can be seen already in the South Australian Parliament, where after the formation of the shadow ministry, the Liberals have very few backbenchers. This affects the Liberal Party's ability to act as a viable alternative government. Committees are also hurt by a reduction in the size of parliament, as there are fewer members to sit on them.<sup>11</sup> Finally, Herr points out that the

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<sup>7</sup> Business SA. *Manifesto – Governance*. [http://www.business-sa.com/library/FW1\\_Governance.pdf](http://www.business-sa.com/library/FW1_Governance.pdf)

<sup>8</sup> Richard Herr 2005 “Democracy and Small Parliaments: Some Diseconomies of Scale.” *Democratic Audit of Australia*, [http://democratic.audit.anu.edu.au/papers/200512\\_herr\\_smallparls.pdf](http://democratic.audit.anu.edu.au/papers/200512_herr_smallparls.pdf)

<sup>9</sup> *Ibid.* p. 1

<sup>10</sup> *Ibid.* p. 2

<sup>11</sup> *Ibid.* p. 3

ability for parliament to represent the community declines as size declines, as members of the public have fewer parliamentarians they can contact for assistance.<sup>12</sup>

Since the 2006 election, reform of the Legislative Council has not been at the forefront of the government's legislative program. There has been some reference made to the government's continued desire to hold the referendum, but as yet the enabling legislation has not been introduced into parliament. Rann has spoken about the referendum as if it is fully within his powers to hold it. This is not the case. To hold a referendum on whether or not to abolish the Legislative Council, an enabling bill would have to be passed by both the House of Assembly and the Legislative Council. It is worthwhile to consider Rann's chances of getting enabling legislation through parliament. The House of Assembly will not prove troublesome, as Rann is possessed of an overwhelming majority in this chamber. However, the Legislative Council has the potential to prove very difficult, and may even block the referendum. Rann has the eight Labor votes, but will require a further four votes to pass the bill. It seems as if the Liberals will vote against the bill, as two senior Liberal MLCs, Rob Lucas,<sup>13</sup> and Robert Lawson,<sup>14</sup> have stated their total opposition to the abolition of the Legislative Council. This robs Rann of eight potential votes, meaning that he will have to look to the six minor party and independent MLCs for the other four votes. Two of these MLCs are from the Family First Party, one of whom, Dennis Hood, has already stated his opposition to the abolition of the Legislative Council.<sup>15</sup> It can be assumed that this is the policy of the other Family First member. This leaves the Democrat MLC, Sandra Kanck, and the Greens MLC, Mark Parnell, along with the two independents, Nick Xenophon and Ann Bressington. Parnell's position on the referendum has not been stated; neither has Bressington's though the fact that she was elected on Xenophon's ticket may have some effect on her vote. Xenophon

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<sup>12</sup> *Ibid.* p. 4

<sup>13</sup> Parliamentary Debates, Legislative Council, May 3, 2006  
<http://www.parliament.sa.gov.au/catalog/hansard/2006/lc/wh030506.lc.htm>,

Parliamentary Debates, Legislative Council, May 4, 2006  
<http://www.parliament.sa.gov.au/catalog/hansard/2006/lc/wh040506.lc.htm>

<sup>14</sup> Parliamentary Debates, Legislative Council, May 8, 2006  
<http://www.parliament.sa.gov.au/catalog/hansard/2006/lc/wh080506.lc.htm>

<sup>15</sup> Parliamentary Debates, Legislative Council, May 3, 2006  
<http://www.parliament.sa.gov.au/catalog/hansard/2006/lc/wh030506.lc.htm>

is for the referendum, and has even suggested that it be held sooner. But his support has an important condition: 'I've also flagged that if a Premier wants to go to the expense of several million dollars of having a referendum on the Upper House, let's have referendum questions on other issues, including poker machines.'<sup>16</sup> At the 2006 election, Xenophon was reelected with over 20 per cent of the Legislative Council vote. Such a high level of public support suggests that many South Australians may not want to vote to abolish the house in which Xenophon sits. Meanwhile, Kanck's position is unknown, and hard to predict. This is her final term in the Legislative Council, and she will be retiring in the 2010 election. This means that she doesn't have to worry about job security if the referendum leads to support for the abolitionist position. Furthermore, she has been progressively alienating herself from her party organisation, and so may not be too worried about the electoral prospects of future Democrats candidates. Yet, she may harbour some hostility towards the Government, after it recently voted to censor a speech she made on voluntary euthanasia. Thus, it seems as if Rann can only be sure of nine votes for any bill to enable a referendum. He will have to work out ways to convince the minor party and independent MLCs to vote for the bill, or convince some of the Liberals to do so.

It seems that the proposal to abolish the Legislative Council was insufficiently thought through. One commentator has pointed out that it is impossible to have a referendum that asks people to choose between three separate options. The way that a referendum works means that voters can only indicate whether they do or do not support a specific proposal put before them. The effect of this could be that as the debate over the future of the Legislative Council progresses, the middle-ground option of reduction in size and term length could be discarded, and voters could be asked to pick between abolition and retention. Alternatively, if Rann does not see the vote going his way, the abolition option may be dropped in preference to the reduction option.

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<sup>16</sup> Interview on *The National Interest*, 26 March 2006, transcript available at <http://www.abc.net.au/rn/nationalinterest/stories/2006/1600149.htm#>