A Bicameral Watershed

Parliamentary reform in Victoria

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The passage of a major constitutional reform Act in the Legislature of Victoria opens the way for the upper House to operate as a genuine "House of review".

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The passage of the Constitution (Parliamentary Reform) Bill 2003 by the Victorian Parliament in March 2003 may prove to be a watershed in Victorian bicameralism. The new Act provides for the most extensive set of changes to the state's constitutional arrangements since 1856. In 2006, the Victorian upper House, which is currently elected on a majoritarian preferential voting system, will join all Australia's other upper Houses, except Tasmania’s, which are elected under proportional representation (STV PR). The Act provides for eight new multi-Member electorates (regions) to cover the state of Victoria, with five Members in each of the regions. The quota for successful election has been set at just over 16.66 per cent. These changes are likely to lead to new entrants to the Victorian political landscape, with the most likely addition, based on figures derived from the 2002 state election, to be the Greens party.

This article describes and discusses the principal features of the Act, the changes it inaugurates to Victoria's bicameral system, and the possibility of an emergent "culture of review" in the upper House post-2006. Much of the discussion surrounding the changes to Victoria's constitution, both in the reports of the Constitution Commission, and in parliamentary debates on the Bill, centred on the development of the Legislative Council as a chamber of review.

Constitution Commission

The current state Labor government, which was first elected in 1999, and re-elected with record majorities in both Houses in 2002, established the Constitution Commission Victoria in 2001 and empowered it to make such recommendations as would “enable the Legislative Council to operate effectively as a genuine House of Review”. The Commission's final report, A House For Our Future, was presented on 1 July 2002.

The major recommendations that the government incorporated into its legislation were as follows:

- New multi-Member Council electorates using the PR voting system,
- Election by the Senate system of PR,
- Electoral system to be modified for optional preferential voting,
- Fixed concurrent terms for both Houses of four years,
- Candidate's address to be printed on the ballot paper,
- Government mandate to be recognized,
- A system for resolving deadlocks between the Houses,
- A prohibition on the Council blocking supply, and
- Entrenchment of fundamental provisions of the Constitution Act.

In broad terms, the commission argued a position for a less powerful, yet, more effective and responsive upper House. While losing the power to block supply, the Council would retain the right to initiate, amend and reject Bills. In the commission's view “review” was closely allied to "scrutiny", and the latter had to be underpinned by the power of the chamber to be legislatively proactive.

In relation to the introduction of a PR voting system, and multi-Member electorates, the commission argued that the changes would produce a Council that was more representative, with enhanced powers of review and accountability, and which would satisfy the desire for differentiation between the Houses. The new electorates would, in the commission’s view, shift the emphasis away from a local constituency role for MLAs (a role the commission saw as more appropriately played by the lower House Assembly Members), and towards a broader constituency role of policy review and examination of issues at state and regional levels. The commission also made a series of lesser recommendations for improvements to the conduct and effectiveness of the House through, for example, changes to the standing orders.

Of the four region models it proposed for consideration, the commission opted itself for Model One: six regions, comprising seven Members each, and with a quota of just over 12.5 per cent. The commission was in favour of lower rather than higher quotas, with the caveat that the quota should not be so low as to allow for the election of candidates who were not broadly representative. As well as recommending the inclusion of human rights standards in the constitution, the commission urged a future Council to employ human rights principles as benchmarks in its review process.
Key features of the Act
The 2003 Act ties the term of the Council to that of the Assembly, and provides for a fixed four-year parliamentary term, with coincident elections for both Houses to be held on the last Saturday in November. The dissolution of the Parliament can occur earlier than the fixed term in the event of: a successful motion of no confidence in the government passed in the Assembly (including a cooling off period of eight days, and notice of motion of three days); or the Premier advising the Governor to dissolve the Assembly in the case of a deadlocked Bill, following the failure to resolve a disputed Bill. An election can be postponed in exceptional circumstances (e.g. natural disaster) by agreement between the Premier and the Leader of the Opposition.

The Act re-constitutes the Council to consist of 40 Members (down from 44) elected from eight regions with each region returning five Members. Each region must consist of 11 contiguous lower House districts. (These provisions were based on Model Three of the Constitution Commission’s four proposed models).

The Act provides for proportional representation with optional preferential voting. Voters would have the choice, as in the Australian Senate, of an “above the line” vote (a ticket vote), or a below the line vote (numbering candidates one to five). The quota formula ensures that with five Member regions a quota of just over 16.66 per cent is required for successful election of a candidate. The Act outlines, in detail, the process for transferring surplus votes (the Australian STV system) from successful candidates to other candidates based on preferences. The Act amends the Electoral Boundaries Commission Act 1982, to provide the commission with authority to divide the state into new electoral regions, on the basis of the legislation, in 2005. In the event of an early election, the regions outlined in the Act’s schedule would apply (i.e. Model Three).

Casual vacancies in the Council are to be filled by a process of a joint sitting of both Houses. The party of the vacancy will nominate their replacement candidate. In the case of independents, a nominee will be required to have resided in the region for at least 12 months, and to have not been a Member of a political party for a period of five years (the Bill is somewhat opaque on the process of independent nomination). Vacancies need not be filled within three months of a general election. The President of the Council will have a deliberative, not a casting, vote. The House quorum will now include the President.

The Act recognizes the principle of government mandate, and is itself essentially a statement of principle. The section defines a government’s mandate in two forms: the specific mandate, based on election campaign policies; and, the general mandate deriving from the government’s election.

Sections 62 and 65 of the Victorian constitution are both substituted with new sections which remove the ability of the Council to block supply. Appropriation Bills must originate in the Assembly, and may be rejected by the Council. However, an Annual Appropriation Bill, (Supply), as defined, which is returned to the Assembly by the Council with amendment(s), or is rejected by the
Council, must be presented for assent within one month of its having passed the Assembly, regardless of whether it has passed in the Council. The Speaker of the Assembly certifies the Annual Appropriation Bill as an Annual Appropriation Bill.

New Division 9A establishes a dispute resolution process for disputed Bills between the Houses and creates a new Dispute Resolution Committee, with seven Assembly and five Council Members, to negotiate the resolution of disputed Bills. Disputed Bills are defined as Bills which, having passed the Assembly, have either not been passed by the Council, or have not been passed with amendments agreed by both chambers, within two months of their passage in the Assembly. If the Committee cannot reach agreement on a resolution, the Bill becomes a deadlocked Bill, which may then be the trigger for an election, or alternatively, can be held over until after the following election. If a reintroduced deadlocked Bill is not subsequently passed in the next Parliament within two months of its Assembly passage, the Premier can call a joint sitting to determine the fate of the Bill.

The Act provides for the entrenchment of certain legislative provisions. Hitherto, Victoria’s has been the most flexible of the federation’s constitutions, amendable by the passage of Bills by absolute majorities through both chambers. The Act amends the Constitution Act 1975 by the addition of two forms of entrenchment; by referendum, and by five-tenths of the total number of Members in each House.

**Entrenchment**
The following core matters are entrenched in the constitution by referendum:

- The requirement for a referendum;
- Regions, number of Members and the quorum of the Council and to the President,
- Districts, duration of, quorum of and number of Members of, the Assembly and to the Speaker,
- A session of Parliament each year,
- Appropriation Bills and the inability of the Council to block supply,
- Dispute resolution process for deadlocked Bills,
- Local government as a distinct and essential tier of government,
- Continuance of the Supreme Court,
- Executive arm of government and the Executive Council,
- The Auditor-General, the Director of Public Prosecutions, the Ombudsman and the Electoral Commissioner as independent officers of the Parliament,
- Electoral Boundaries Commission functions, and
- Freedom of Information functions.

The following procedural matters are entrenched by a special three-fifths majority:

- The requirement for a special majority,
- The Crown, including provisions relating to prorogation and dissolution,
- Constitution and powers of the Parliament,
- Eligibility requirements for Members and voters, and
- The provision which enables a House to relieve a Member from the consequences of alleged defaults (e.g. breach of the office of profit provisions).

The following matters are entrenched by absolute majority:

- The requirement for an absolute majority,
- The membership of the Court, appointment of judges, reserve judges, judge’s and master’s salaries, allowance and pensions etc, and
- The jurisdiction of the Supreme Court.

**A House of review**
Much of the discourse surrounding the changes to the upper House centred on its development as a “House of review”. The legislation itself provides for a Council exercising its powers as a House of review, in the context of recognizing a government’s specific and general mandate. Government speakers to the 2003 Bill were keen to underline that a principal aim of the legislation was to change the role of the House, so that it could become a “true House of review”. The Opposition claimed that the Council already functioned as a real House of review.

Notions of upper Houses as places of review have a long pedigree. The Westminster model traditionally provides for an upper House review function to include: examination and revision of Bills passed by the lower House; initiation of non-controversial Bills; delay of controversial legislation; and, debate of important issues. Review has also been more broadly interpreted to mean the general scrutiny of the executive by an upper House, a function made all the more necessary as Parliaments’ lower Houses have been captured by the party Whips over the previous century. In this context review also encompasses detailed examination of government decisions and administration, particularly through standing or select committees, and public inquiries or hearings.

For some review covers a wide range of potential activism by an upper House. The acceptance of a government’s mandate does not prevent or inhibit an upper House from exercising its review function, which in its fullest expression could bring it into conflict with the government from time to time. The review role is therefore central to the notion of accountability of government, a crucial role for an upper House in an era in which lower Houses are often viewed as effectively standing electoral colleges, voting consistently on party lines. The need for a vigorous reviewing upper House is even more necessary in the context of modern media culture, with its obsession with political conflict stories and relative disinterest in the details of legislative programs.

In the Victorian context, it is difficult, in historical terms, to disentangle the notion of review from the original project of the Council, which was to act as a restraining brake on potential radical initiatives.
emanating from the lower House. In the modern era the review function of the Chamber has been inextricably linked to politics, specifically, the ability of the government or opposition to control the numbers on the Floor of the House. A former Speaker of the Legislative Assembly, Mr Ken Coghill, has argued that a true review culture was unlikely to emerge in the Council where a party, or coalition, holds a majority in the Council, regardless of whether such a majority was formed by government or opposition.

**Changing the culture**

The introduction of a PR system to the Council does provide for the majoritarian impasse to be overcome, and an opportunity for the development of a review culture in the upper House. But, we will need to see the new Council performing to establish how effectively this role develops. Several issues already stand out.

While the election of independents is certainly possible under the new system, the relatively high quota will more than likely prevent all but the most organized political groupings achieving representation. If all Members of the Chamber are tied to party Whips, there is a potential for coming Houses to develop an “alliance mentality” towards legislation and issues, with brokered agreements between parties potentially preempting genuine review. There remains a question therefore over whether the high quota will produce a sufficient diversity to underpin effective review.

The second issue concerns power and influence. While the Constitution Commission recommended that the Council be stripped of its power to block supply, it also argued that the House must retain the power to initiate, amend and reject legislation in order for it to carry out its function as an active review chamber. This outcome will reduce the symmetry of the Houses, and is therefore problematic. The threat of blocking supply will become a thing of the past, but how much actual power is lost by its removal? Given the unexercised nature of the power over 50 years, the fact that it can (now) only be exercised in the final year of a government’s four year term, and, in a post-1975 era, the inevitable political opprobrium that would attach itself to any party exercising this power, it seems that this change is not hugely significant.

As a Chamber of review, the new House will be seeking to establish itself as a place of influence in policy and legislative terms. If the Council actively pursues an agenda of influence through engagement with contemporary issues, develops a reputation in the community as an open, constructive, and progressive institution, the loss of the power to block supply will be a negligible loss. However, much will depend on how the new Council conducts its business, what committees may be formed, what the sessional orders permit.

The operation of the new Dispute Resolution Committee will also be very important to the review role of the House. The Council will appoint five of the Committee’s 12 Members. According to the government, the intention is for the Council membership of this committee to reflect the composition of the chamber, but importantly, with the caveat that all of the separate interests of the House are represented. This committee has the potential to become a very powerful player in the parliamentary political process to emerge post-2006.

A third issue concerns the role of mandates in relation to upper House review. While the legislation places the review work of the House in the context of the recognition of a government’s mandate, this will not prevent Members of the Council claiming that they too have their own particular mandate from the electorate. The demise of majoritarianism in the upper House could allow for a Senate-style assertiveness on the part of minor parties, which could claim that, without derogating from the government’s mandate(s), their political agenda was also the subject of a limited mandate from their electors. In this context, the reviewing role of the Council may well be extended beyond its traditional Westminster confines to encompass the kind of negotiation over policy that the electorate has come to expect from minor parties in the Australian Senate. As it does in the Senate, much will depend on the numbers on the Floor of the House, but the introduction of PR to the Council could have far reaching effects on the way the policy agenda is driven by Parliament.