CONSTITUTIONAL ELECTORAL LEGISLATION AMENDMENT (ELECTORAL EQUALITY) BILL 2021

Receipt and First Reading

Bill received from the Assembly; and, on motion by Hon Matthew Swinbourn (Parliamentary Secretary), read a first time.

Second Reading

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [5.33 pm]: I move —

That the bill be now read a second time.

I rise to introduce the Constitutional and Electoral Legislation Amendment (Electoral Equality) Bill 2021. The purpose of the bill is to establish a whole-of-state electorate, abolish group voting tickets and introduce optional preferential voting for the Western Australian Legislative Council. Each of the six existing regions will be replaced with a whole-of-state electorate for the Council. The bill will remove the reference to the metropolitan area of Perth in the Electoral Act 1907 because the metropolitan boundary will no longer be used to delineate the three contiguous regions known as North Metropolitan, South Metropolitan and East Metropolitan. The bill will amend the Electoral Act 1907, the Constitution Act 1889 and the Constitution Acts Amendment Act 1899 and will make consequential amendments to the Local Government Act 1995 and the Salaries and Allowances Act 1975. The bill will repeal the Electoral (Ballot Paper Forms) Regulations 1990. This bill will reform the Legislative Council, addressing well-known anomalies that have been canvassed from multiple quarters both interstate and locally over a long time.

In the words of Australia's leading electoral analyst, Antony Green, AO, in his blog in March 2021, "The WA Legislative Council's electoral system is the worst in the country." Western Australian political commentator Paul Murray wrote in 2017 that the Council "has a long and inglorious history as the most undemocratically elected parliamentary chamber in Australia". Veteran political scribe Peter Kennedy earlier this year described the Legislative Council as "the last blatant gerrymander in Australian politics". The WA Legislative Council has the most extreme malapportionment of any state or territory in Australia. It lags behind most legislatures in the developed world. A whole-of-state electorate is not a unique proposal. The South Australian and New South Wales upper houses have been elected using the state as a single electorate for many years. In South Australia, the change to become a single statewide upper house electorate was introduced in 1973 by the Dunstan government and contested for the first time in 1975. In 1977, the Wran government introduced reforms to provide for members of its Legislative Council to be elected by voters across the whole state of New South Wales. Neville Wran's reforms also transformed the New South Wales Council from a house indirectly elected by the members of Parliament in joint sittings to a house directly elected by the people—a change that required a referendum at the time. The introduction of a whole-of-state electorate did not require a referendum in New South Wales, and it does not require a referendum here in WA.

As far back as 1995, the Western Australian Commission on Government concluded that there is no justification for the electoral system to be weighted on a geographical basis because proportionality will ensure that a diversity of views are represented in the Legislative Council. The Commission on Government was established by the then Premier, Richard Court, as his government's response to shortcomings in governance exposed by the WA Inc royal commission.

I turn now to group voting tickets. The problem of malapportionment, or regional vote weighting, is compounded by the group voting tickets system in the Council. Groups lodge an automatic list of preferences enabling electors to simply number one box and have their preferences distributed to each of the other candidates in accordance with the wishes of the group they voted for. The system was first introduced in the Australian Senate as a solution to the chronic high rates of informal voting and designed to make voting easier while retaining full preferential voting. At the time of implementation in Western Australia, there were fewer political parties and it was not anticipated that the group voting tickets system would be the catalyst for the formation of new parties. Over time, parties learnt how to engage in preference swaps to "game" the system by what is now known as "preference harvesting". The preference arrangements, although published on the website of the Western Australian Electoral Commission and in a limited number of other places such as the ABC election pages, are neither well understood nor visible to the vast majority of WA electors. Because the system deals with preferences in an opaque manner, it effectively stymies elector choice. The group voting tickets system has now been abolished in the Australian Senate and in the electoral systems for the upper houses of New South Wales and South Australia. The combined effect of malapportionment and group voting tickets resulted in the anomalous election of a Daylight Saving Party candidate with 98 primary votes or just 0.2 per cent of the vote in the Mining and Pastoral Region of the Legislative Council.

Hon Wilson Tucker was elected to the Mining and Pastoral Region, a region with just 69 651 enrolled electors at the 2021 election. This compares with 449 182 electors in the South Metropolitan Region, 427 779 in the

North Metropolitan Region, 423 759 in the East Metropolitan Region, 242 983 electors in the South West Region and 103 378 electors in the Agricultural Region. Each of these regions elects six members, producing the undemocratic vote weighting that Antony Green, Paul Murray and Peter Kennedy highlighted.

In April this year, the Minister for Electoral Affairs established the Ministerial Expert Committee on Electoral Reform to conduct a review into the electoral system for the Legislative Council. The committee's terms of reference were to make recommendations on how electoral equality might be achieved for all citizens entitled to vote for the Council and recommendations on the distribution of preferences. The committee was chaired by eminent barrister, Mr Malcolm McCusker, QC, who was also WA's thirty-first Governor. Its other members included John Curtin Institute of Public Policy executive director, Professor John Phillimore; Law Reform Commission of WA member and University of Western Australia Law School professor, Professor Sarah Murray; and University of Notre Dame Director of Public Policy, Associate Professor Martin Drum. Submissions to the Ministerial Expert Committee on Electoral Reform from the WA public and stakeholders widely condemned the group voting tickets system.

I turn now to regional vote weighting, and pose the following questions: Why should a vote in Kalgoorlie be worth 3.5 times more than a vote in Albany? How is it fair that a vote in Kalbarri is worth 1.5 times more than a vote in Geraldton or that a vote in Broome is worth 6.2 times more than a vote in Burns Beach? Wundowie is just nine kilometres down the road from Wooroloo and yet a vote in Wundowie is worth four times more than a vote in Wooroloo. This bill will abolish both group voting tickets and malapportionment in the Legislative Council. There are widely accepted fundamental principles for a democratic parliamentary electoral system. Two of the most important democratic principles of Parliament are representation of the people and accountability to the people. The basic task of a democratic electoral system is to translate votes of the people into seats—to transform the expressed will of the voters into people who will represent it. Representation is key to designing a fair system.

Equally, it is important that the mechanisms of the electoral system be as transparent as possible and known to voters, political parties and candidates well in advance in order to avoid confusion and distrust in the results they produce at elections. An electoral system must also be inclusive. This means that not only as many citizens as possible are able to vote, but also it does not discriminate against any one group in society, minority or otherwise. These are not controversial principles; they are widely accepted. Indeed, in 1980 Australia ratified the International Covenant on Civil and Political Rights, which states at article 25 that every citizen has the right to vote and that vote shall be of equal value.

Let me take members through the history of the Legislative Council. The franchise for the Legislative Council has continually evolved over the last 130 years. The Legislative Council was established in 1832, and included five official members, all of whom also constituted the Executive Council. From 1870, the Council was partially elected; that is, some members took office after being elected while others were Legislative Councillors by virtue of appointment. In 1890, Western Australia gained self-government in most domestic matters and was given a constitution establishing a system of parliamentary responsible government. The Legislative Council was reconstituted as the upper house of the new Parliament. It was not until the Constitution Act Amendment Act 1893 that the Legislative Council became fully elected; however, that franchise remained limited to landowners and those of a prescribed level of income. The initial changes during the 1890s were to reflect an increase in metropolitan population.

During the period 1894 to 1962, voting for the Legislative Council remained voluntary. The franchise for the Legislative Council underwent change, particularly in its first 20 years. In 1899, it was altered to permit joint owners of property to vote, adding a new category of voter to the Legislative Council's enrolment rolls. The vote was also given to women who met the property qualifications during this year, ending the Council's history as a house elected solely by males with property. Women were not permitted to stand as candidates until 1920. The restrictive property qualifications that maintained the Legislative Council's position as a house representing wealth and property were relaxed in 1911. There were, however, no other major changes to the franchise until 1962, when Indigenous Australians and the spouses of property owners were acknowledged as qualifying to vote.

Universal suffrage was finally introduced in 1963, with the Constitution Acts Amendment Act (No. 2) 1963, and the Council consisted of a series of two-member electorates, called provinces, with half the members being elected at each election for a six-year term. Since 1989, members have been elected via a form of proportional representation by single transferrable vote. Under this system, multiple members from a given region are elected by a combination of quotas and preferences. Following amendments contained in the Electoral Amendment and Repeal Act 2005, the number of members was increased to 36. The 2005 reforms, however, increased the previous level of regional vote weighting in the Legislative Council. The Council now comprises six regions and, as previously mentioned, each returns six members.

It is important to understand the role of the Legislative Council. The primary role of the Legislative Council is to be a house of review. It is not the role of the Legislative Council to mirror the Assembly in terms of its form and function. The Council reviews legislation brought from the Assembly and initiates bills that are not money bills

and those with non-controversial subjects. The Council also has a role to scrutinise and review public appropriation and expenditure. The government is formed in the Assembly, regardless of the composition of the Council. The Legislative Assembly is the house of Parliament where the party or coalition that can maintain majority support on the floor of the Assembly puts forward its policies and major legislative initiatives.

In 1995, the Commission on Government report concluded that —

> Rather than merely duplicating the function of members of the lower house who are constituency representatives as well as members of the governing or opposition political parties, members of the upper house need to be encouraged to take a larger perspective of the governance of the State. Instead of focussing on their constituency and party concerns, the goal of any effective house of review should be to encourage those members to represent interests and ideas and thus think and act for the entire State rather than a particular constituency or political party. Only then can members effectively function as reviewers of government activities.

Members, this bill is steeped in equality, and democratic values. Malapportionment that benefits a select minority is a grievous and oppressive injustice to all other voters. Every voter, wherever they are, can claim to have unique circumstances that ought to be considered. Far from entrenching the major parties, in a whole-of-state electorate with 37 members the quota of the vote for a candidate to be elected will be just 2.63 per cent. This virtually guarantees that a range of diverse interests can access seats in Parliament. All interests will be able to compete on an equal basis for a share of parliamentary power.

At its heart, this bill seeks to restore the franchise of the individual over particular sectional interests. The basic unit of the community is the citizen. It is the citizen to whom the franchise should attach. Even this basic premise has proved controversial in our community over time. Voting rights have varied according to ethnicity, nationality, property ownership, marital status, sex, age, capacity and criminal history. Fundamental to our decency as a community should be a principled commitment to recognising and respecting the individual dignity of every citizen and to do so from the operating presumption of equality.

This bill, the electoral equality bill, is based on the recommendations of the final report by the independent Ministerial Expert Committee on Electoral Reform. I say "independent" in the following context. The government set the policy question—how to best achieve electoral equality in the Legislative Council. It then asked a panel of leading experts in electoral and constitutional law to turn their independent minds to providing the Minister for Electoral Affairs with the best way to achieve reform, drawing from their extensive expertise in the complex fields of constitutional law and psephology. It was called a ministerial expert committee because its purpose was to inform the minister. However, the question put to it was resolved using the independent exercise of the members' collective intellect. The committee called for public submissions and published a discussion paper to elicit responses from the community. A total of 184 submissions were received, the vast majority of which were published online.

I turn now to the main features of the bill, starting with the whole-of-state electorate. Proposed section 16C in the bill provides —

> The State is a single electorate (the ***whole of State electorate***) for the purposes of the election of the members of the Council.

Under a whole-of-state electorate, the vast majority of seats will be filled by groups or candidates reaching quota, maximising the choices available to voters. The quota will be drastically reduced from 14.28 per cent in the current regions to 2.63 per cent of the whole-of-state electorate.

Clause 19 will delete section 16H(1) from the Electoral Act 1907. This will remove the reference to the three contiguous regions, known as the North Metropolitan Region, being a region that is generally to the north of the Swan River; the South Metropolitan Region, being a region that is generally to the south of the Swan River; and the East Metropolitan Region, being a region that includes the hills and foothills of the Darling escarpment.

Clause 19 will also delete section 16H(2), which provides for the metropolitan area of Perth. There will no longer be regions, and the metropolitan boundary will no longer be used to delineate the three contiguous metropolitan regions. Minority viewpoints will be proportionately represented and it will permanently remove the need for both the drawing and, following demographic shifts, redrawing of electoral boundaries. One statewide electorate puts the level and range of diversity largely into the hands of electors.

Group voting tickets will be abolished in the Western Australian Legislative Council. In Australia, there are two types of divided ballots for upper houses. The first is divided ballots with group voting tickets—the current system in Western Australia and Victoria. The second type of divided ballot incorporates voter preferences both above the line and below the line. This type of ballot is used in New South Wales, South Australia and the Australian Senate. All three of these jurisdictions have abolished group voting tickets. The ministerial expert committee recommended that a whole-of-state electorate should be established in conjunction with the abolition of group voting tickets and the introduction of optional preferential voting, to give voters greater control over their preferences.

Voting will become an easier task, enhancing participation in elections. Under the existing system, all candidates had to be preferenced for a vote to be formal, subject to minor errors. At the last election, for some regions, this meant numbering as many as 64 squares below the dividing line on the ballot paper. This is akin to a wholly inappropriate numeracy test to earn the privilege of voting. Clauses 10, 63, 65, 68 and 73 of the bill will remove references to group voting tickets and voting ticket squares, and introduce optional preferential voting. Candidates will no longer be able to lodge a voting ticket with the Western Australian Electoral Commission that preferences all candidates in an election. This puts an end to a system that is, as I have noted, neither well understood nor visible to the vast majority of WA electors.

Electors will no longer be constrained by a compulsory preferential voting system but will be able to choose candidates under an optional or semi-optional preferential system. If they choose to vote above the line, they can number as many squares as they wish for the groups in their preferred order. If they choose to vote below the line, where there are more than 20 candidates, they must number "1" through "20" and can choose to preference all candidates but are not required to do so. In the rare event that there are fewer than 20 candidates, they must number all candidates when voting below the line.

In another significant consequence, this bill will increase the Legislative Council from 36 to 37 members. The bill will amend section 5 of the Constitution Acts Amendment Act 1899 to provide that the Council is to consist of 37 elected members. With an even number of seats, the vote by the community required to secure a majority of seats is above 50 per cent, often significantly so. Having an odd number of Council members makes it more likely for a party that wins a majority of votes in the community to win a majority of seats, thereby reflecting the will of the people. An odd number of seats also addresses the anomaly associated with the President's casting vote. Currently, with 35 members entitled to a deliberative vote, there is very rarely the need for the President's casting vote. Increasing to 37 members means that if 36 members vote and the vote is tied, the President's casting vote will now have value.

Clause 4 of the bill will amend section 47 of the Constitution Act 1889 to provide that the Council cannot continue to operate if the election wholly fails or is declared absolutely void. Under the existing section 47, the Council may continue to operate in circumstances in which an election for a region failed or was void. Although this was appropriate in a regions-based electorate, it is not appropriate for a whole-of-state electorate. This amendment provides that the Council cannot continue to operate when the whole-of-state election fails or is declared absolutely void. An election would be deemed to have wholly failed if no candidate was nominated or no candidate was returned. This amends section 89 of the Electoral Act. In that case, a new writ will be issued for a supplementary election. In addition, prior to the amendments in clause 54 of the bill, a Council election would have always been deemed to have wholly failed if a candidate had died between nomination and close of polls.

Under section 162(3) of the Electoral Act, the Court of Disputed Returns has the power to declare an election absolutely void in circumstances in which illegal practices were committed in connection with the election. If any election is declared absolutely void, a new election is to be held, pursuant to section 172(1)(c) of the Electoral Act. When a person who is not qualified is elected under sections 76A or 76B of the Electoral Act, it can be contested in the Court of Disputed Returns and, if voided by the court, a new election will be held.

Clause 54 of the bill will amend the provisions relating to the death of a candidate. Under the act, a new election was required in every case when a candidate had died after close of nominations but before close of polls. The bill will now provide that, when more than one seat is to be filled and a candidate who dies during the relevant period is then elected, the vacancy provisions will continue to apply. Section 146E(7) and item 20 of schedule 1 of the Electoral Act will now provide that in the case of a multi-member election, when a candidate dies between nomination and close of polls, the recount provisions will also apply. Although a new election is appropriate for a single region, these amendments will avoid the need for a costly and time-consuming whole-of-state election. As I mentioned, under a whole-of-state election of 37 members, the quota for election will be just 2.63 per cent or approximately 45 000 votes. The ministerial expert committee recommended that measures be taken to minimise what could result in an unwieldy or impracticable ballot paper, such as the infamous "tablecloth" ballot paper in the New South Wales upper house election in 1999, which contained 233 candidates.

It is important that measures do not unduly restrict the ability of members of the community to nominate as a candidate, either individually or as a group. There should be opportunities for groups or candidates who have a genuine foundation of community support. The registration requirements for parties have been tightened to manage the size of the ballot paper. Clause 34 provides that two or more parties cannot rely on the same person as a member for the purpose of qualifying or continuing to qualify as an eligible political party. South Australia requires a party to have 200 unique members to gain registration and New South Wales requires 750 unique members. The federal government has just introduced a bill requiring 1 500 unique members. In line with the recommendations of the ministerial expert committee, the bill requires that applications for registration must be accompanied by 500 unique declarations as to membership of a party.

Clause 37 provides that parties cannot contest a general election—that is, have their name on the ballot paper, nominate candidates or receive electoral funding—unless they have applied to register at least 12 months prior to the issue of the writs. The ministerial expert committee recommended a six or 12-month period prior to the election date. Parties in Western Australia will now be required to pay a $2 000 fee on application, mirroring the arrangements in New South Wales.

Clause 39, which creates new section 62KA, provides that parties must provide annual returns for continued registration. This has been adopted from the New South Wales electoral system. It is the intention that a return will be signed by the relevant party official and require signed declarations from members only when the membership details of the 500 members change, or as required by the Western Australian Electoral Commissioner. This will allow the Electoral Commissioner to verify that each party continues to remain eligible for registration. The ministerial expert committee recommended that independent candidates must demonstrate a degree of popular support to access the ballot. The committee recommended that a significant number of electors be required to nominate an independent candidate and that these electors must not have nominated another candidate.

Clause 47 will require that independent candidates who apply for nomination are to have 250 supporting declarations from enrolled electors, thereby demonstrating community support for their nomination. This mirrors the requirement in South Australia. Currently, the nomination fee for candidates in WA is $250. The ministerial expert committee recommended that the fee be increased given that the candidate is seeking statewide support. South Australia requires a $3 000 nomination fee for upper house candidates. New South Wales requires $500.

Clause 49 of the bill will increase the fee for Legislative Council candidates to $2 000, but it will be capped at $10 000 for five or more candidates. As per existing provisions in the Electoral Act, the nomination fee will be returned should a candidate be elected or their group achieve four per cent of the primary vote.

The bill provides measures that will ensure that the size of the ballot paper is manageable. On the divided ballot paper used for Legislative Council elections in Western Australia, Independent candidates are grouped below the line in the same columns to prevent the ballot paper from stretching horizontally in an unwieldy fashion. The government recognises that a new quota of 2.63 per cent could lead to an increase in the number of candidates; therefore, it is critical that the size of the ballot paper is managed so as not to repeat the chaotic tablecloth ballot that occurred in New South Wales. Managing the size of the ballot paper includes recognition that attaining a square above the dividing line on the ballot paper is a privilege. Government formed the view that it is not unreasonable for groups to have a minimum number of candidates in order to attain a square above the dividing line on the ballot paper. Clause 63 will insert new section 113B(5)(b), which provides that groups are entitled to a square above the line when there are five or more candidates in the group.

Clause 63 also will insert new section 113B(3)(b) and (c), which provides that in the case of an election where more than one Legislative Council seat is to be filled and where there are two or more groups, registered party groups are to be printed in columns sequentially from the left across the ballot paper, followed by other groups, and that the order within both groups will be in accordance with section 80(1). Clause 63 also will insert new section 113B(3)(d), which provides that ungrouped candidates are to be printed in one column or, if there are too many names, in two or more columns, in the order determined under section 87(6).

Previously, the death of a candidate for a region between the close of nominations and close of polls required a new election for the region. Clause 54 will amend section 88 of the act so that a new election will not be required in every instance. Section 146E(7) will be amended and new clause 20 will be inserted into schedule 1 to provide that in the case of the death of a candidate for the Council, when more than one seat is to be filled and there are more candidates than seats, the vacancy provisions will apply so that there is a recount of candidates. Without these amendments there would be the requirement and expense of holding a new election for the whole of the state following the death of any candidate for the Council between nomination and the close of polls.

The bill will insert new part 9 into the act to provide for a transition period. The act will continue to apply if a vacancy arises in the Council prior to 22 May 2025 and members in the Council continue to represent regions before the commencement of the amending provisions or, in the case of a vacancy occurring in the Council, before 22 May 2025.

New section 217 provides for continued registration of parties following commencement of the act. All existing parties may apply for continued registration within 12 months after commencement of the act. If they do not apply, their registration will be cancelled. If they do apply, their application will be considered under the new registration provisions in new section 217(1) and (3).

New section 217(3) provides that the Electoral Commissioner must cancel a party's registration if the party does not make an application within 12 months of commencement of the act or if satisfied that the application would have been refused under section 62J.

Before I commend the bill to the house, let me emphasise that this bill will achieve electoral equality for all electors in Western Australia. It will not reduce regional representation, as any citizen can nominate to run as a candidate

and would require only 2.63 per cent of the vote to be elected, rather than the 14.28 per cent as is the case now. It will retain proportional representation in the electoral system for the Legislative Council. The bill will provide for an electoral system that will reflect the expressed will of the voters. All Western Australians want a system that is fair. The new model will mean that the percentage of votes a political party receives determines the percentage of seats they will win. It cannot be fairer than that. It does not discriminate against any one group in society. It will provide every voter in Western Australia, regardless of their postcode, with 38 representatives—their local lower house member and 37 upper house members. The group voting tickets system, which has been roundly criticised by the public and stakeholders, will be abolished. Preferences will now be transferred according to the voter's will and not from party to party without the voter's consent. Sensible measures will be introduced to manage the size and design of the ballot paper.

Geared as it is towards advancing the interests of all Western Australian voters, it is fitting for the last word on this bill to go to a member of our community. I quote Gerald Hitchcock, who wrote to the ministerial expert committee —

> Your vote must count the same whether you live in Esperance or Success, in Hall's Creek or Margaret River. Whether you feature in the Rich List or on Centrelink records. Whether you are dynamic and innovative or phlegmatic and compliant. Whatever kind of person you are, and wherever you live, you are equally subject to the laws, and so should have an equal say in determining who makes those laws.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and I table the explanatory memorandum.

[See paper 799.]

Debate adjourned, pursuant to standing orders.