

**CONSTITUTIONAL AND ELECTORAL LEGISLATION AMENDMENT
(ELECTORAL EQUALITY) BILL 2021**

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Steve Martin) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 2: Commencement —

Committee was interrupted after the clause had been partly considered.

Hon TJORN SIBMA: When I was last on my feet, I was canvassing the arguments the parliamentary secretary used in his second reading in reply speech to argue against, in the government's view, the need for a referendum to be held on this bill. I do not think that point is contested even by the government necessarily, considering that the measures embedded in the bill, particularly as they pertain to the abolition of regional representation, are an issue for which the government does not have a mandate. It was referred to throughout the course of the debate that in one particular interview the claimant denied any intention to draft a bill of the kind that we have in front of us on seven occasions and that he repeated that assertion when we had the single televised debate during the pre-poll phase. I think that question was put to him by Peter Hall and the Premier responded in the same manner that he responded to Daniel Mercer when those questions were put by regional media in Albany.

The first justification, though, that the parliamentary secretary seems to rely upon is that, apparently, in 1977 and 1978—I mentioned that I was a mere infant at that time—the then Premier, Sir Charles Court, introduced the Acts Amendment (Constitution) Bill, which, among other things, ensured that there could be no reduction in parliamentary representation in either house other than through a referendum to deal with the question and a range of other factors.

But my question, I suppose, directly, is: did the bill introduced by the then Premier undermine or abolish regional representation?

Hon MATTHEW SWINBOURN: Deputy Chair, this is clause 2. It deals with commencement. I cannot see any connection between the matters that have been raised and clause 2, and I do not intend to elaborate on anything that relates to a referendum.

Hon TJORN SIBMA: Try as he might, I do not think the parliamentary secretary can completely avoid the issue of having to deal with a referendum. I draw the parliamentary secretary's attention to supplementary notice paper 47, issue 1. He will see at clause 2, two amendments standing in my name.

Hon Matthew Swinbourn: Are you moving those amendments, member?

Hon TJORN SIBMA: I will get there. Is the parliamentary secretary in a real hurry?

Hon Matthew Swinbourn: I'm just asking whether you are moving the amendments because if you move them, then we can discuss them. But you haven't yet moved them.

Hon TJORN SIBMA: I will get to the point of doing that. I will be doing that. I will just note that the parliamentary secretary has not contradicted the obvious in that the government does not have a mandate for these measures.

Hon Matthew Swinbourn: You can't take from a non-response agreement. It's not good faith to do so.

The DEPUTY CHAIR: Members, I ask that comments be directed through the chair. I give the call to Hon Tjorn Sibma.

Hon TJORN SIBMA: Thank you, Deputy Chair. I know this is uncomfortable.

Hon Matthew Swinbourn: I'm very comfortable, member. Very comfortable. This is clause 2, which is the commencement clause. Ask me a question about commencement.

Hon TJORN SIBMA: I will get to this, but I will not be rushed. I still have eight minutes and 26 seconds to get there and, frankly —

Point of Order

Hon STEPHEN DAWSON: This is clause 2; it is about the commencement date. I would urge the honourable member to actually ask a question about the commencement date. Otherwise, he may well be holding up the house unnecessarily, and we can get on to more important clauses.

The DEPUTY CHAIR (Hon Steve Martin): Thank you, Hon Stephen Dawson. I had only heard several interjections and Hon Tjorn Sibma just making the first point of this discussion. I rule that there is no point of order.

Committee Resumed

Hon TJORN SIBMA: Indeed, Mr Deputy Chair. What prolongs this issue are the unruly interjections. We will get to where we need to get to if I am heard in silence, which is the customary way in which these matters are dealt with. We have made progress; we have passed clause 1.

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I want to try to understand. The government indicated that it would not support the need to take these issues to a referendum for a couple of reasons, the first of which was the invocation of a precedent some 44 or 45 years old. I think the parliamentary secretary in his second reading reply speech then invoked a measure introduced by the Barnett government to establish four-year terms. In the course of making that contribution, the parliamentary secretary committed an error, which he then later retracted and corrected for the record because, indeed, that measure was spoken about in the course of that election campaign by the gentleman who was then elected Premier. The fundamental justification that the government seems to rely upon is the ministerial expert committee process, and the fact that it has to some degree solicited views by virtue of an abbreviated submissions process. In the course of providing, again, a correction I think directed at Hon Martin Aldridge about facts and figures, the parliamentary secretary identified that only 62 submissions of a total of 184 submissions received explicitly supported the government's policy position to abolish regional representation. One does not have to be a gifted mathematician to identify that that represents only one-third of the views submitted. There was some dispute about what other submissions were actually referring to, but there was not any overwhelming support expressed for the view that regional representation in the upper house should be abolished. In fact, this would indicate that indeed the majority view is either ambivalent or against that proposition.

Although there is some dispute around it, and in light of the fact that the government did not take this to an election and denied that it was on its agenda, why would a referendum on the question not be justified? After a week of frustration, which I can understand at a personal level, the parliamentary secretary asserted that somehow the statement that this is an issue that ethically should be taken to a referendum contradicted the position that the opposition had put. I found that interesting. I refer the parliamentary secretary to his remarks; he said —

I pause to point out that in a referendum, each vote is counted equally. They are not subject to vote weighting. By invoking a referendum, members opposite —

Meaning us —

are essentially embracing the concept of one vote, one value.

I will just hold up there and say that what we are embracing is the concept of electoral responsibility. We are committed to enshrining and upholding democracy. If the government is attempting to introduce a bill that it purports to say its primary purpose is to introduce one vote, one value, why would the government not take its own medicine at the first opportunity? We are giving it that opportunity. If it is consistent with its own proposition, why is it running away from that opportunity? I suspect it is because it would be embarrassing—because it would involve conceding to the public that we cannot always take the Premier at his word. If he tells us that he will not do something seven times in a row, he might change his mind and do it. I suspect that that is the problem.

With that in mind, noting that this is the second occasion that the government has been given the opportunity to take this issue to a referendum, I point out for those of a technical bent that the motion standing in my name at 1/2 on supplementary notice paper 47 has been drafted in consultation with the Parliamentary Counsel's Office, and it has been drafted in such a way to avoid the Legislative Council effectively obliging an appropriation on the Legislative Assembly. It is drafted in this manner for a specific purpose—to keep it within the Legislative Council standing orders. If the government is going to oppose it, it should oppose it because it does not want a referendum—do not try a cute calling it out of order trick. That is all preamble to this: I move —

That the Legislative Assembly be requested to make the following amendment —

Page 2, line 9 — To delete the line and insert —

- (b) the rest of the Act — on the day after the day on which the statement referred to in the *Referendums Act 1983* section 30(3) is published in the *Gazette* in relation to the referendum required by section 2A(2) if that statement evidences that, as regards the whole of the State, the number of votes marked “yes” exceeds the number of votes marked “no”.

Point of Order

Hon MATTHEW SWINBOURN: I think this amendment is out of order. The proposed amendments will impose a financial burden by requiring expenditure on a proposed referendum. The house is not permitted to amend any bill so as to increase any proposed charge or burden on the people. The prohibition at section 46(3) of the Constitution Acts Amendment Act 1889 is not overcome by a request to the Assembly to amend, pursuant to subsection 46(4) of the Constitution Acts Amendment Act. I ask that you make a ruling on the amendment.

The DEPUTY CHAIR (Hon Steve Martin): Thank you, parliamentary secretary. Members, I will need to take some advice.

I have sought some advice. It is unusual that the Parliamentary Counsel's Office did not inform Hon Tjorn Sibma of this advice. It appears that we cannot increase expenditure in this place. Apparently, we cannot request the Legislative Assembly to do so. On that basis, I rule the amendment out of order.

Committee Resumed

Clause put and passed.

Clause 3 put and passed.

Clause 4: Section 47 amended —

Hon TJORN SIBMA: I have some questions relating to clause 4, particularly driven by the quite helpful explanatory memorandum concerning the amendment made to section 47 of the Constitution Act 1889. The guidance here is that the amendment will be made to section 47 to provide that the Council cannot continue to operate if an election wholly fails or is declared absolutely void. Previously, the Council could continue to operate in circumstances in which an election for a region failed or was void. Although this was in operation 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 state election fails or is void.

I wish to ask a very basic question at the outset. Presently, under what specific set of circumstances would an election wholly fail or be declared absolutely void as it relates to the election of an upper house member?

Hon Matthew Swinbourn: Just by way of clarification, under the current act?

Hon TJORN SIBMA: Yes.

Hon MATTHEW SWINBOURN: An election will be deemed to have wholly failed if no candidate was nominated or no candidate was returned, subject to section 89(1) of the Electoral Act. In that case, a new writ would be issued for a supplementary election. A Council election will be deemed to have wholly failed if a candidate died between nomination and close of polls. 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 an election. That is currently set out in section 162(3). If an election is declared absolutely void, a new election is to be held in accordance with section 172(1)(c). Where an election is void if a person not qualified is elected under section 76(3)(a) or 76(3)(b) of the Electoral Act, it can be contested in the Court of Disputed Returns. If an election is declared absolutely void, a new election will be held.

Hon TJORN SIBMA: Can the parliamentary secretary indicate when such a declaration, either that an election has wholly failed or has been absolutely void, has been made in the context of an election to a lower house seat or a seat in the Legislative Council in recent Western Australian history? I was struggling to find any examples.

Hon MATTHEW SWINBOURN: The advice we received from the Electoral Commission is that it was not within the corporate knowledge of anyone there that such a thing has happened. Obviously, to ascertain if it had would require a wider degree of work. I am winging it a bit here, but I suggest that a few people at the commission probably have a lot of corporate knowledge, so I think we can take it on good faith that it is not something that has happened in recent memory.

Hon TJORN SIBMA: Under the existing statute—this might be a terminological matter—is a gradation of failure being voided? I ask this question genuinely. Is it possible to declare an election that partially fails or is partially void? The language here seems to be completely absolute. It seems that everything is either successful or legitimate or not.

Hon MATTHEW SWINBOURN: I am advised that an election for a region could fail, and that would affect that particular region. Also, a general election could fail overall, which would mean that it would fail for both houses of Parliament. That would require a new general election for both houses of Parliament.

Hon TJORN SIBMA: Some of the examples that the parliamentary secretary cited previously would effectively trigger the Electoral Commissioner to declare that an election had wholly failed or was absolutely void.

Hon Matthew Swinbourn: In the Court of Disputed Returns.

Hon TJORN SIBMA: Yes, sorry, the Court of Disputed Returns does that, in the context in which no candidate was proffered or a candidate died between certain points in time or there were questions about the eligibility of a particular individual who had been voted to sit in the Parliament because of a constitutional invalidity.

Hon Matthew Swinbourn: Also illegalities.

Hon TJORN SIBMA: Yes. I am reminded of something that occurred in recent Australian federal political history when the Senate ballots for Western Australia were lost somewhere.

Hon Matthew Swinbourn: I think they finally found them.

Hon TJORN SIBMA: They were in somebody's garage.

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Not to be cheeky, but is there capacity under an existing statute for a similar declaration of an election effectively being annulled as a consequence of some logistical or handling failure on behalf of the Western Australian Electoral Commission? I imagine there is but I do not know whether there is.

Hon MATTHEW SWINBOURN: Part 5 of the Electoral Act 1907 deals with disputed returns. The member made reference to the Senate in the 2014 federal election, I think. It was obviously conducted under commonwealth electoral laws. If I recall correctly, the federal Electoral Commissioner tried to declare the results for the Senate and an application was made to the federal version of the Court of Disputed Returns. It was petitioned. That is the process that would be available under the state system. Section 157, “Validity of election or return, how to dispute”, sets that out. Section 158 of the Electoral Act states —

Every petition disputing an election or return, in this Part called the petition, shall —

- (1) set out the facts relied on to invalidate the election or return;
- (2) contain a prayer asking for the relief the petitioner claims to be entitled to;
- (3) be signed by a candidate at the election in dispute;
- (4) be attested by 2 witnesses whose occupations and addresses are stated;
- (5) be filed in the Central Office of the Supreme Court within 40 days after the return of the writ.

Section 162 deals with the court’s powers on petition. I will not take members through all those powers because the section is quite long, but it includes, for example, the powers to declare any election absolutely void, to declare any candidate duly elected who was not returned as elected and to declare that any person who was returned as elected was not duly elected. The section goes on to state those sorts of powers. I will not cover each and every one of those powers.

Hon TJORN SIBMA: I want to cite the example of the 2014 federal election. I am trying to find an analogue for the substance of what is being discussed here. My recollection is that the Western Australian Senate election needed to be re-run. I will call it the implosion in Western Australia, but it did not affect the election of that Senate overall nor did it impede senators elected in New South Wales, Tasmania, Victoria and Queensland from taking their seats in the chamber. Is my knowledge correct to the best of your knowledge?

Hon MATTHEW SWINBOURN: I think so. I do not have advisers here who are experts in federal elections or were involved in that regard, but I think the member is on the general track. I stand to be corrected, as I think the member would, too, if that is not in fact the case. If I remember rightly, it may have been a double dissolution election. I think 12 Western Australian senators had to be elected, which changed things.

Hon TJORN SIBMA: I will put a hypothetical so that I understand the operation of the present law. Let us pick my region, the North Metropolitan Region; those people probably deserve a bit more attention. If the Court of Disputed Returns determines that the election of one or more members from that region either wholly failed or can be declared absolutely void for a particular reason, would that affect the legitimacy of the election of members from the East Metropolitan, South Metropolitan and three country regions? Would it necessarily affect the legitimacy of the overall Council election?

Hon MATTHEW SWINBOURN: I think it would depend on the circumstances of that particular election, but, obviously, if it is quarantined to the region affected, I think maybe the member’s assertion is a fair one. I think in the circumstances in which an election is declared void in North Metropolitan, it would not necessarily cascade into every other region, although we do not have an example of that.

Hon TJORN SIBMA: My understanding is that it is stated more explicitly in the explanatory memorandum. Page 7 states —

Previously —

I imagine that means currently —

the Council could continue to operate in circumstances where an election for a region failed or was void.

That does not seem to be disputed. I make the assertion that to a large degree, even though this is a set of circumstances that does not appear to have occurred in the course of a Western Australian state election—I hope this is never the case, but I was lauded for my capacity to see into the future by Hon Stephen Dawson earlier today on the need to focus on immunisation —

Hon Stephen Pratt: Nostradamus!

Hon TJORN SIBMA: Well, I did not say it.

Hon Stephen Dawson: I didn’t say anything.

Hon TJORN SIBMA: There you go—led along!

Would it be a fair assertion to say that the current system of regional representation actually imposes a safeguard that quarantines the fallout of the potential skulduggery or improper, illegal or just unfortunate behaviour of a particular candidate—for example, if a member from the Agricultural Region unfortunately passed away?

Hon Sandra Carr: Now, you're killing us off!

Hon TJORN SIBMA: I am not. I am sorry; I am not making any accusations and I am not invoking any evil intent. This is not an incantation! My time for incantations has passed; that was during debate on the second reading and the two amendments. Do not worry; you are all safe! My people put paganism to bed probably millennia ago, so you have nothing to fear.

The issue is this: I think there is embedded in the current set of arrangements, constituted as they are, an ability to quarantine the ill. Unfortunately, a consequence of the abolition of regional representation and the move to a whole-of-state electorate model is that if some malfeasance or unfortunate behaviour or some other unfortunate outcome occurs in an isolated pocket of Western Australia, it will imperil or undermine the legitimacy of the election of what will soon be the 37-person chamber of the Legislative Council. I think that even though we have not encountered that risk previously, it might be a risk. I will not dwell on unfortunate recent political history, but we have all experienced members from our own side who might not necessarily tell us the full truth or might not provide their full bona fides. Unfortunate, unpredictable things can happen, but we can count on human failure in some form. My proposition is: was the risk of deconstructing regional representation and implementing a whole-of-state electorate considered in any sort of deep way; and, if so, how does the government propose to mitigate that risk?

Hon MATTHEW SWINBOURN: I think there is a bit to unpack with what the member is trying to get at here. I take the member to section 89 of the Electoral Act 1907. Subsection (1) states —

If no candidate is nominated for an election, or if no candidate is returned as elected at an election, the election shall be deemed to have wholly failed, and a new writ shall forthwith be issued for a supplementary election.

Subsection (2) states —

If an insufficient number of candidates is nominated for an election in a region where the relevant number is more than one, or if an insufficient number of candidates is returned —

That is the partial failure because someone was removed because of any number of things —

as elected at such an election, the election shall be deemed to have partially failed, and a new writ shall forthwith be issued for a supplementary election to fill the remaining vacancy or vacancies, as the case may be.

It would not necessarily mean, if there were a partial failure, that everything would fail, even under a whole-of-state model, because we could then have a further election that would result in filling the vacancies in those circumstances. As the member will be aware, we have introduced some measures in relation to the death of candidates. Under the current legislation, that causes an election to wholly fail. We will get to those provisions at clause 88, but in general it makes provision that, if a candidate passes away between nomination and election, it will not cause the failure of the election. I am trying to short-circuit this to get to the point, but the vote would keep being counted as though they had been taken off the ballot. That might not be quite the right language, but I think the member gets the thrust of what I am trying to say.

Hon MARTIN ALDRIDGE: This is an interesting line of questioning and I want to try to extend on from Hon Tjorn Sibma's questions on the risk, as small as it may seem, of the election of the Legislative Council failing wholly. What would happen if, after the election, thirty-seven members are sworn in and someone takes a writ to the Supreme Court or, indeed, the High Court, and challenges the validity of this law, and the challenge is upheld? Let us say the court finds, on whatever grounds, that an argument exists—be it on constitutional grounds or technical grounds in respect of the operation of the legislation—that the election is not valid because the law is not valid, and the court upholds that argument. This is not a remote hypothetical; I remind the parliamentary secretary that not all that long ago the validity of a piece of Labor government electoral legislation was challenged and it was taken to the Supreme Court. What would happen in those circumstances?

Hon MATTHEW SWINBOURN: I think the member is asking for a legal opinion, so that is not what I am giving him here. This is a general comment about what happens when a court strikes down a law, depending upon the manner in which it is struck down. If it is struck down as a nullity, as though it never existed, the current act would prevail and obviously an election would have to be conducted according to the act as unamended by the Constitutional and Electoral Legislation Amendment (Electoral Equality) Bill 2021. I think the member might be suggesting that that is what could happen because of the nonexistence of the Legislative Council as a result of changing the laws in relation to how people are elected, but that is not what would happen. The bill, once it has been

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passed by Parliament, becomes an act. That act would then be struck down and the Electoral Act as it currently stands would continue to exist in its current form. Obviously, there would be consequences flowing from that, and I suspect the court would make consequential orders arising from things like that.

Having said that, it is the same for any other amendments to the Electoral Act since its proclamation in 1907. Anyone could go back and challenge any one of the amending laws and say that they are not constitutional or lawful. The member was obviously referring to what happened back in, I think, the early 2000s, although I do not think that act was ever proclaimed because the legal proceedings happened in the intervening period.

Hon MARTIN ALDRIDGE: If there was a failure after the election through some legal challenge, the Electoral Act, the Constitution Act and the Constitution Acts Amendment Act would all exist as they do today. I assume there would be fresh elections, probably for both houses, because I think the government recognises that this bill has an impact on both the Legislative Council and the Legislative Assembly. There would need to be fresh elections and perhaps a reversion to a pre-existing form of boundaries, because the boundaries will be impacted by this bill when it becomes an act and the redistribution process occurs. I do not think these are remote hypotheticals. The types of people who are currently litigating against Western Australia might also want to contest the next state election in some form and may well want to test the validity of the laws that are made.

I am concerned about the way in which this bill has been rushed together, instructed not by an agency of government with special expertise but by the minister's office. It has been rushed together, and committee referrals have been denied on two occasions—once in the other place and once in this place. According to the government, this bill is perfect —

Hon Dan Caddy: Have you got a question?

Hon MARTIN ALDRIDGE: I have eight minutes and 25 seconds to get to my question. It is not question time.

In the government's view, this bill is perfect and no amendments will be supported. The best legal minds in Western Australia have advised on this bill—from the Ministerial Expert Committee on Electoral Reform to advice from the State Solicitor's Office and the WA Solicitor-General, and others. It is perfect. My concern, parliamentary secretary, is that some of these things may well come unstuck. It is the government's express desire to rush this through the Legislative Council. Noting that there is no rush. I think the government admits that this bill need only pass before the next election for the Legislative Council to convert to 37 members at large, rather than six regions comprising 36 members.

There is still time in our standing orders to have this bill discharged and referred to a standing committee or a select committee. We are about to go into a summer recess when we can pause and can contemplate and ensure that the three acts that we will amend through this bill will not easily be subject to legal challenge. Perhaps we can help the parliamentary secretary obtain the information that he cannot get from the Minister for Electoral Affairs. I think it would be a very dire situation indeed if we had an entire failure of an election for the Legislative Council, as remote as that may seem. If an election were to fail through legal challenge, that would present great difficulty for not only this place, but also the other place. I implore the parliamentary secretary to contemplate seeking advice from his masters and consider supporting a referral of the bill to a committee inquiry.

Hon TJORN SIBMA: This is slightly painful and technical —

Hon Stephen Dawson: Not as painful for you as it is for us, I can tell you.

Hon TJORN SIBMA: I will take that interjection because it was a good one, but the benefit you have is that you win everything. You may as well do it with a smile on your face and if you have to wait another 10 minutes before you get there, so be it. I do not know why you do not look happier more of the time.

Hon Stephen Dawson: Who? Me personally?

Hon TJORN SIBMA: No, not you. Hon Stephen Dawson is a man of very positive disposition and I wish his sentiment was more broadly shared among his cabinet colleagues. Most of them are happy; they have nothing to worry about for at least another three and a half years. I want to understand something, and I think this is an important point. I hope we do not get to a point in 10 or 15 years when a court goes back over *Hansard* and attempts to divine some sort of clarity or purpose or a theme to the debate. I want to understand whether, through the process of disestablishing regional representation and creating a whole-of-state electorate for the Legislative Council, will we potentially introduce a new risk vector that will impede the capacity of the Council to operate? I am still trying to grapple with that.

The parliamentary secretary made reference, quite helpfully, to the circumstances or amendments that relate to the unfortunate passing of a candidate if they die between nomination and the close of polls, for example. We can probably return to this at clause 54. I hope we will not, but I might use this as the example. Previously it was said that you more or less fish off the list. Would a Council still have the capacity to operate or would it have to come to a grinding halt and would writs need to be issued again for a whole-of-state election for the Legislative Council? I do

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not think that is likely, but I want to understand the contingencies we might deal with as a consequence of introducing a whole-of-state electorate. I ask because emphasis is placed, at least on page 7 of the explanatory memorandum, on the fact that the amendment provides that the Council cannot continue to operate if a whole-of-state election fails or is voided. My view is that the threshold for determining that seems to have been lessened by the fact we cannot compartmentalise that to a region.

Hon MATTHEW SWINBOURN: I bring the member's attention to section 172(2) of the Electoral Act, which states —

The proceedings of the Legislative Council or Legislative Assembly shall not be invalidated by reason of the presence in that House of any person returned under this Act as elected to that House but later subject to a declaration of the Court that —

- (a) he was not duly elected to that House; or
- (b) his election to that House is void or absolutely void.

I think those provisions contemplate the circumstances. If that were every single member, that would not void those decisions. That is the current act and the current provisions.

Hon MARTIN ALDRIDGE: If the entire election is not void and it is just that one member's election that is void, rather than just going to a fresh election for that, how would that work? Normally, if a person was not eligible for election, let us say, there would be a casual vacancy and it would be filled by a recount, but what would happen if one person's election was not valid, but it was not significant enough for the entire election to be invalid?

Hon MATTHEW SWINBOURN: I think we come back to section 89(2) of the Electoral Act. I will read it again so that I do not misrepresent it —

If an insufficient number of candidates is nominated for a Council election where the relevant number is more than one, or if an insufficient number of candidates is returned as elected at such an election, the election shall be deemed to have partially failed, and a new writ shall forthwith be issued for a supplementary election to fill the remaining vacancy or vacancies, as the case may be.

There would be a supplementary election.

Hon MARTIN ALDRIDGE: I see that here. It is a section that has obviously been —

Hon Matthew Swinbourn: By way of interjection I was looking at the blue bill and I included the words "a Council election" because that is how the provision will be amended. My apologies if that misled the member.

Hon MARTIN ALDRIDGE: I see that here. This section will be amended in a minor way in respect of the definition of the Council no longer being divided by regions. If the Council was, say, a member short or a member was elected invalidly, we would then have a statewide election to fill one vacancy. That is a possibility, is it not?

Hon MATTHEW SWINBOURN: Yes.

Hon MARTIN ALDRIDGE: If there were a handful of vacancies or we were two or three short, we would then have a fresh ballot of the entire state of Western Australia to fill those one, two or 10 positions.

Hon MATTHEW SWINBOURN: Yes, member.

Clause put and passed.

Clause 5 put and passed.

Clause 6: Section 5 replaced —

Hon MARTIN ALDRIDGE: Why does the Legislative Council need an additional member of Parliament?

Hon MATTHEW SWINBOURN: I think I did cover this in both my second reading speech and my reply, but for the sake of the Committee of the Whole House, I will repeat the government's view. When there are an even number of seats, the vote required to secure the majority of seats is above 50 per cent. Having an odd number of council members will make it more likely for a party that wins a majority of votes to win a majority of seats. In addition, an odd number of seats will deal with the anomaly of the President having only a casting vote at present, and not a deliberative vote. With 35 members voting under our current system, excluding the President, there is no need for a casting vote, because if every eligible member votes or is paired out, the situation does not arise in which there is an even number of members, unless somebody abstains from a vote. Effectively, the President's vote is never used. In my four and a bit years in this chamber, the casting vote has not been used. Other members have been here for longer than I have, but I do not know the last time it was used. Increasing the number of members to 37 will mean that if all members vote, excluding the President, and the vote is equal—18 to 18 votes—the casting vote will now have value. That is our reason for this provision.

Hon MARTIN ALDRIDGE: It is interesting to hear the government's view on having a meaningful casting vote because, as far as I can read in the explanatory memorandum, none of that is reflected as the reason for amending the act in this way. Of course, every casting vote is meaningful. The government's issue is that there is not enough

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of them. I struggle to understand the government's rationale of trying to bring the Presiding Officer into the debates in this chamber. Their job is to preside, not to decide. When they are required to use a casting vote, the convention is that they would typically use it in favour of the status quo, in the same way that a tied vote in Committee of the Whole is exercised when the presiding member of this place does not have a casting vote. Why is it that the government wants to burden the taxpayers of Western Australia with an expense of up to \$1 million per annum, when as far as I can tell there is zero appetite to increase the number of parliamentarians in Western Australia? I would not want to take this to an election.

Hon Darren West: It was not that long ago you tried. It was not that long ago you wanted two more in the Assembly.

Hon MARTIN ALDRIDGE: I am glad Hon Darren West is still here. What was Hon Darren West's position on that private member's bill at the time?

Hon Darren West: It never got to a vote.

Hon MARTIN ALDRIDGE: It did. It passed this place, honourable member.

Point of Order

Hon MATTHEW SWINBOURN: Deputy chair, there seems to be a discussion happening across the chamber. Can I ask that you bring it back to have comments directed through you and that we deal with clause 6?

The DEPUTY CHAIR (Hon Steve Martin): You beat me by a few seconds, honourable member. Members, please refer your comments to the chair. I give the call to Hon Martin Aldridge.

Committee Resumed

Hon MARTIN ALDRIDGE: Thank you, deputy chair. It is always helpful when Hon Darren West provides assistance to me. He reminds me of the relevance to the clause in question, because, if my memory serves me right, he voted against the private member's bill that he referred to. It may well be some homework for me overnight to reflect on the views of the Labor Party not all that long ago. I am not sure that Hon Matthew Swinbourn was a member of this place when that bill was considered, so he will be excused from my homework tonight, but not other members, particularly those members who seek to interject but not contribute to the debate, of course, who may well have contributed if by no other way than voting on that matter. Hon Darren West, that will be something that I will give further attention to overnight. However, my question remains, parliamentary secretary. Why is it that the government seeks to politicise the office of President of the Legislative Council?

Hon MATTHEW SWINBOURN: I do not accept that we are politicising the office of President of the Legislative Council. I reject the premise of the member's question—or statement, more like it.

Hon TJORN SIBMA: Just so that I can understand the origin of this concept, can the parliamentary secretary direct me to where this appears in the report of the Ministerial Expert Committee on Electoral Reform? Is it referred to in that document?

Hon MATTHEW SWINBOURN: The issue of an odd number was certainly discussed in the report and can be found on page 23, I am told. I have been distracted by that and have now forgotten the second part of the member's question. The expert committee discussed it but it did not make a recommendation for an additional member. I am certain that we have made no claim that that arose. I think we have been clear to say that the thirty-seventh member is one of those things that sat outside the recommendations.

Hon TJORN SIBMA: Thank you, parliamentary secretary, for refreshing my memory and that of the chamber in relation to it being an issue which was canvassed, but for which no firm recommendation was made. What was the origin of the proposition, if not from the ministerial expert committee membership? Presumably, this is not one of the clauses on which there was consultation with the Electoral Commissioner, even though I would not have expected that to occur. From where did the idea originate?

Hon MATTHEW SWINBOURN: I can refer the member only to the comments of the minister in the other place on 12 October 2021 in response to a question from Mia Davies. The minister said —

This matter came out of cabinet and I do not want to discuss the matters that happened in the cabinet room. It was a cabinet decision to go with an uneven number.

I cannot take the member any further than that. I am not a member of cabinet and I am constrained, obviously, by my master, as he has been described on a number of occasions.

Hon TJORN SIBMA: I would not describe their relationship that way. Nevertheless, I want to focus on this because I reflect quite seriously on the theme of the argument that the parliamentary secretary has made about the government's management of this bill, particularly in light of his second reading reply speech. I reflect on one of the first passages of the second reading speech read in by the parliamentary secretary. He stated —

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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.

Despite the fact that we disagree quite strenuously with the establishment of a whole-of-state electorate, but have—I might just reinforce this point—supported the government in its endeavours to abolish group voting tickets, I want to reinforce that there is good and there is ill with this bill. I want to try to understand the logical connection between the desire to increase the membership of this chamber by a sum total of one, and the purported reform of introducing electoral equality, and chasing preference harvesters out of the kingdom of Western Australia. I do not see how this particular measure is in any way consistent with or relevant to the purported purpose of the bill. Can the parliamentary secretary explain the relationship to me a little bit?

Hon MATTHEW SWINBOURN: My second reading speech is my second reading speech, but I will refer the member to the explanatory memorandum, which states under “General Outline” —

The Constitutional and Electoral Legislation Amendment (Electoral Equality) Bill 2021 effects a number of electoral reforms as summarised below.

The first point refers to electoral equality. The second point states —

The number of members in the Council increases from 36 to 37, by amending section 5 of the *Constitution Acts Amendment Act 1899*.

I am not suggesting that the member is saying that we have slipped it in, but the fact that it was not mentioned specifically in my second reading speech does not mean it was not front and centre to what was also tabled with my second reading speech, which is the explanatory memorandum.

Hon TJORN SIBMA: I think that was a worthy contribution, parliamentary secretary. Just to clarify, it was not necessarily an accusation, because the reference to —

Hon Matthew Swinbourn: I did not take it that way, member.

Hon TJORN SIBMA: Okay; thank you. Although it was referred to in the course of the second reading speech, probably at the halfway point, it was not identified earlier in the speech as constituting the primary purpose of the bill. I do not think the parliamentary secretary has made an argument that suggests contrariwise that it is central to the longstanding Labor Party desire for one vote, one value in Western Australia, and nor does it bear any necessary relationship to the abolition of group ticket voting. Nevertheless, I find it an interesting inclusion, particularly in light of the fact that the ministerial expert committee recommended government activity on a range of fronts. In the parliamentary secretary’s very instructive contributions in reply to questions put yesterday, he canvassed that there was a range of other electoral reforms to which the government might give some consideration upon the passage of this bill.

I am struggling to understand the priority afforded to this measure and why it is in this bill, when other reform tasks have been—I will not say kicked down the road, but deprioritised, I suppose, and excluded from inclusion in this particular bill. I want to understand effectively what priority the government is affording to this measure, and whether it is of the view that the changes proposed by way of clause 6 are absolutely integral to fulfilling the government’s mission to introduce electoral equality and optional preferential voting.

Hon MATTHEW SWINBOURN: Member, I am not sure that I can take it a lot further from where I left off, given the comments I quoted to the member from the minister in the other place about it being related to a cabinet decision, and his decision not to elaborate further on the deliberations with respect to that. As the member knows, I am not a member of cabinet, so I am not even in a position to do that. In terms of priority, clearly we have prioritised this, because it is in the bill—I think that is plain—as opposed to other things that are not there. If the member wants me to say why we have picked X and not Y, I cannot really get into that kind of thing because, again, of what has been said before. But I will make this general point about the President exercising a vote. The President is a member who is elected by the people. Our desire in one respect of electoral equality is to give effect to the will of the people. Effectively in this Council—it is not necessarily the case in other chambers—our President is not involved in any deliberative way in terms of the vote that the people have given to the President in that role. Obviously, our expectation is that if in the future this bill were to pass and we had a thirty-seventh member, and there were even numbers, and the President were to exercise their casting vote, that the President would respect the conventions of the house.

However, there is a history. I will go through the history of the casting of that vote in this place. The advice that we sought from the very helpful Clerks, of course, is that in the last 20 years or so, the casting vote has been used three times. The President employed a casting vote on 26 May 2005 on the Ningaloo Marine Park (Alteration of Boundaries) Order 2004 disallowance, following a division. Then President Griffiths stated —

Honourable members, this is one of those unusual situations in which the votes are tied. In those circumstances, the President has a casting vote, and in exercising a casting vote the President may, if he so desires, give a reason or reasons for the way in which he votes. I vote with the noes to maintain the status quo.

The question was thus negatived.

Prior to that, in 2000, then President Cash made two detailed casting votes. The first was on 10 October 2000, in relation to a division. I do not have the details of what that division was on. The second was on 22 November 2000, also in relation to a division. For that second one, in November 2000, the President actually voted not to maintain the status quo. There was a unique circumstance in that case, because there had been an issue with pairs. Members can obviously refer back to *Hansard* to get the specifics of that, and the reasons. On those three occasions in the last 21 years, two respected the convention, and the third was not in accordance with the convention but was done to respect another convention, which is the pairs convention. It is a rare occurrence here for that to happen, which is the point when we get back to what the member was talking about in terms of electoral equality. There is obviously, with the thirty-seventh member, the prospect, particularly after a close election, of the President exercising a casting vote, and that could be because the member's side is in the position of government, or our side is in the position of government, so that becomes more realistic. That is just the nature of the numbers. How the President uses that casting vote would obviously, as I say, be subject to the convention in this house.

Hon NEIL THOMSON: I come back to page 22 of the expert committee's report. I draw the parliamentary secretary's attention to the discussion we had yesterday about 37 members. I want to focus on why the number 37 was chosen. Assuming the argument for the casting vote of the President on a very tightly run election was critical and therefore an odd number was needed—we do not agree with that, but assuming that is correct—was 35 members considered for this chamber?

The DEPUTY CHAIR: Member, noting the time, I will report progress.

Progress reported and leave granted to sit again, pursuant to standing orders.