

**Submission to the Constitution Commission of Victoria**

**House of Review:  
The role of the Victorian Legislative Council  
in the Democratic Process**

**Introduction**

The Victorian Council for Civil Liberties Inc – Liberty Victoria (Liberty) is an independent non-government organisation which traces its history back to the first civil liberties body established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the rights and freedoms recognised by international law. Liberty has campaigned extensively in the past on issues concerning democratic processes, government accountability, transparency in decision-making and open government. Our most visible campaign on these issues in recent years concerned the attempts by the previous state government to curb the powers of the Auditor-General in Victoria. We welcome this opportunity to comment on the role of the Victorian Legislative Council in the democratic process and hope our contribution is of assistance to the Commission. This submission responds to the Consultation Paper published by the Commission in December 2001 ("the Consultation Paper").

**1. Need to Improve**

- 1.1 Liberty agrees with the submissions, referred to on page 5 of the Consultation Paper, that the Legislative Council is not operating as a sufficiently effective House of Review. In particular, Liberty is of the view that the Upper House in recent times has been ineffective as a House of Review largely due to the dominance and power of the two party system and the consequent adversarial approach which promotes party allegiance rather than genuine discussion and debate of important political and social issues.
- 1.2 Liberty does not agree with the submissions, referred to at the foot of page 5 of the Consultation Paper, that the Legislative Council should be abolished; and considers that an upper house performs an important role as providing checks and balances in the legislative process.

1.3 Liberty agrees with the thrust of the submissions, summarised at the top of page 6 of the Consultation Paper. In particular, Liberty considers that, to act as an effective House of Review, the Legislative Council needs to:

- Adopt a less partisan focus;
- Articulate a broader range of interests including substantial minority interests.

## **2. Blocking of Supply**

Liberty is of the view that the Upper House should not have the power to block supply.

## **3. Deadlock Mechanism**

3.1 Liberty's view is that the Legislative Council should continue to have the power to block bills that have been passed by the Legislative Assembly (other than Supply Bills). That is to say, Liberty does not believe that the powers of the Legislative Council should be limited in the way, for example, that those of the House of Lords in the United Kingdom are limited. Although there is an argument that the government of the day should have the ability, perhaps after some delay for consultation and reflection, to force its legislative programme through, we think these arguments are outweighed by the considerations that the Legislative Council is democratically elected and performs a role as a House of Review. This role would be undermined if the Lower House could, in the end, always overrule the Upper House. There would be a risk that the Lower House would pay lip service to consultation with the Upper House if the Lower House could always force its proposed legislation into law.

3.2 We do not consider that a formal deadlock mechanism, such as the one that applies to the Commonwealth Parliament, is necessary. The Consultation Paper refers to reviving a Committee of Management, and we agree that that is a sensible proposal. But we do not believe it is necessary that there be a mechanism for resolving the dispute if, in the end, agreement is not able to be reached by means of the Committee. We consider that it is satisfactory to leave resolving the deadlock in these circumstances to the political process.

## **4. Role of Government Mandate**

4.1 Liberty questions the usefulness of the concept of a "mandate" in the context of considering the Legislative Council's role as a House of Review. For while the Lower House will have been elected on the basis of certain policies promulgated at the last election, so too the members of the Upper House will have been elected to review on the basis of their policies. In these circumstances it is difficult to sustain the argument that members of the Legislative Council should defer to

the policies of the majority party in the Legislative Assembly in reviewing proposed legislation, rather than act in accordance with their own announced policies. In any event, the concept of mandate loses utility once one moves to areas where there was no specific policy announced at the last election.

## **5. Greater Use of Committees by a House of Review**

- 5.1 Liberty believes that the Upper House should act as a house of review, both of the Lower House and of executive action. In order to assist the Upper House's function as a house of review it should be able to monitor and review executive power, particularly by use of committees such as the Expenditure Review Committee and the Scrutiny of Acts and Regulations Committee.
- 5.2 This means the necessity to properly resource committees to enable members to carry out their functions, including holding public hearings and forums, obtaining expert reports and using other consultative measures as required by the nature of any given piece of legislation before the House. The financing and resourcing of committees needs to be guaranteed, proper committee functioning should not be dependent on government whim, prejudice or cost-cutting. Guaranteed funding of committees would also assist independents and minor party representatives to participate in the review function as it reduces the prospect of only major parties having the resources to participate.
- 5.3 Liberty considers that the state committee system should be closer in operational terms to the federal Senate committee system. This means that if a particular inquiry requires evidence from a Minister from the Assembly then that Minister should be required to appear before the committee.
- 5.4 Consideration also needs to be given to committee process, with a view to looking at the creation of permanent committees, when and how ad hoc committees are necessary, how they are constituted and who has the power to initiate inquiries. The Committee system whilst maintaining accountability and transparency to the people, must be made more independent from the government of the day.
- 5.5 In addition, Liberty believes that in scrutinising Government activities, policies and legislation, Council committees should be guided by the principles expressed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
- 5.6 Further, an aspect of public life that requires increased attention is the ethical standards of our public officials including politicians. In an ideal world, Council committees would play an important role in fostering and safeguarding high ethical standards in public life.

## **6. Ministers in the Legislative Council**

- 6.1 In Liberty's view, the present structure, whereby members of the Legislative Council are eligible to be appointed Ministers is satisfactory and does not require change. It has the advantage that some Ministers are available themselves to introduce Bills and answer questions to the Legislative Council. Removing Ministers from the Legislative Council may have the effect of detracting from the Council's status as a chamber of equal importance as the Assembly. It may make it harder to attract quality candidates as members of the Upper House; and it would reduce the pool from which Ministers can be drawn and thus potentially the quality of Ministers.
- 6.2 Liberty is supportive of the proposal that Ministers from the Lower House be able to address the Upper House on Bills and other matters within their portfolio.

## **7. Term of Election of Members of the Legislative Council**

- 7.1 Liberty believes that in order to make the Council more democratic and reflective of the views of the electorate, the Council should go to the electorate at the same time as the Assembly. In order to overcome the ability to call an election to suit the incumbent party, fixed terms should be introduced for both Houses of Parliament (subject to the calling of an early election in the event that the government loses the confidence of the Lower House and no new government can be established).
- 7.2 We consider that the current term for members of the Lower House - four years - is appropriate as the fixed term for members of both House of Parliament.

## **8. Fixed Term for Parliament**

- 8.1 See 7.1, 7.2.

## **9. Re-election of Members**

- 9.1 Liberty does not consider that there is a need to limit the number of terms which a member is permitted to serve.

## **10. Voting System for the Upper House**

- 10.1 Liberty is of the view that there should be several multi-member electorates for the Upper House, elected by a system of proportional representation and with a sufficient number of members per electorate to secure a strong level of representation of *substantial* minority views.

We do not consider that it is essential that each electorate have the same number of members, but it is fundamental that, consistently with the principle of “one-vote one-value”, the ratio of members to electors should be constant. In determining the number of members for each Upper House electorate, care must be taken that the “quota” (the percentage of the vote required for a member to be elected) is not too high, because this will make it difficult for substantial minority interests to gain representation.

- 10.2 We believe that if the Upper House is to function effectively as a House of Review then it should not be dominated by a political party whose actions it is to review. Liberty thus favours a system that is less likely to entrench the dominant political party in the lower house as the dominant party in the upper house.

## **11. Voting Method**

- 11.1 As indicated in 10.1 above, Liberty favours a proportional representation system of voting. We consider that this system is likely to increase the representation of substantial minority views in the Legislative Council, which would increase the prospect of the Council fulfilling a different role to that of the Legislative Assembly. That role is not limited to acting as a House of Review but also as a forum for the expression of views which may not be represented at all in the Lower House, as a consequence of the system of voting for that house, which makes it difficult for people to be elected who are not members of the major political parties.

## **12. Referenda**

- 12.1 Liberty considers that the fundamental elements of the Constitution should be entrenched in some way, for example by requiring that amendments be passed by a special majority of both Houses of Parliament. We suggest that the special majority should be greater than 50% of the number of members: for example, two-thirds of the number of members. (The two-thirds majority is not required for provisions which can be described as merely “machinery provisions”).
- 12.2 The concern with entrenching these provisions so that they can be changed only by referendum is that, as the history of failed referendums at the Commonwealth level demonstrates, it is notoriously difficult to effect change by referendum. Introducing this amendment mechanism would be likely to stultify future changes to the Constitution which may be desirable.

**Liberty Victoria  
Level 4,  
360 Little Bourke Street  
Melbourne Vic 3000**

**Ph: 9670 6422  
Fax: 9670 6433  
Email: [vccl@iosphere.net.au](mailto:vccl@iosphere.net.au)**

**22 March 2002**