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REFORM OPTIONS FOR THE SOUTH AUSTRALIAN LEGISLATIVE COUNCIL

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While my presence here today was prompted by the recent Senate election, my main purpose is to look forward to next March's Legislative Council election.

In the light of the Senate election, every independent and minor political party is suddenly aware of how Senate-style electoral systems can be gamed.

So what can done to prevent next March's Legislative Council election being flooded with candidates and having its result distorted by exotic preference deals? Can we avoid voters being presented with a ballot paper the size of a tablecloth?

This close to the election, it is too late to implement changes to prevent what we saw at the Senate election. There are several reasons for this.

First, as yet there is no agreed solution to the problem. Second, there are not enough sitting days before the March election in which to consider and pass legislation. Thirdly, even if legislative change could be agreed on and passed, the Electoral Commission of South Australia would have great difficulty implementing changes to its Legislative Council count software in time for the election.

However, as I will outline in this speech, there are aspects of South Australian electoral law that make the Legislative Council even more open than the Senate to the sorts of ballot paper stacks we saw in September. Addressing these legislative weaknesses is possible before the state election.

Why Legislative Councils?

Before moving on to the subject of the Legislative Council's electoral system, it is worth spending a moment or two explaining to a modern audience why state Legislative Councils still exist.

I'll be blunt in stating that parliamentary upper houses are something you inherit rather than invent. Legislative Councils have continued to exist because no consensus on their abolition ever

developed, but consensus on retention and reform did. As I'll explain, Legislative Councils avoided revolution but could not avoid evolution.

Bicameralism was adopted for the Australian colonial parliaments in the 1850s to imitate the mother parliament in Westminster with its hereditary House of Lords and elected House of Commons.

The House of Lords was once described as providing 'a bond between the dead, the living and the yet to be born'. Conservatives in New South Wales originally proposed copying this model with a titled Legislative Council, a proposal quickly laughed off as a 'bunyip aristocracy'.

In Australia it was accepted that a broad franchise would be adopted for the colonial lower houses, certainly much broader than applied in the United Kingdom at the time. Conservatives were concerned that popularly elected lower houses would be captured by ephemeral or short term interests. It was essential that the Legislative Councils therefore be a bulwark against an excess of democracy, to represent the 'permanent' interest of the colony. It was an argument still being put as recently as 1970 in support of the restrictive property franchise then in use for the South Australian Legislative Council.

NSW created an appointed Legislative Council, a system inherited by Queensland when it became a separate colony in 1859. Conservatives in other states chose to create elected chambers but with a restricted property franchises, able to claim an electoral mandate in clashes with the lower house.

It is significant that for more than a century the powers of elected Legislative Councils remained unchanged even though their franchise were liberalised. The two appointed Legislative Councils were less able to resist their powers being weakened, Queensland abolishing its Council in the 1920s and NSW radically reforming its in 1933.

Comparing experience in other Commonwealth countries, New Zealand's appointed Legislative Council was abolished in 1950, while of Canada's ten provinces, only seven ever had Legislative Councils, and only three survived into the twentieth century, with Quebec's Legislative Council being the last abolished in 1968.

In the 1970s and 1980s the Australian Commonwealth government created three new Parliaments, for the Northern Territory, Papua New Guinea and for the Australian Capital Territory. All were created as single chamber parliaments.

This experience backs my point that Legislative Councils are not an essential part of a parliamentary system. The further experience of how the Australian Legislative Council have been reformed since 1970 backs my point that they are an institution that you inherit rather than invent.

Legislative Councils in the 19th century were the bastions for conservatives against the dominant liberalism of colonial societies. In the 20th century they became front line in the battle against the Labor Party's socialism. Until the 1970s, abolition of upper houses was an article of faith for the Labor Party, though concerted attempts at abolition were rare.

The Legislative Councils we have today are largely a product of the 1970s when the Labor Party shifted away from abolition and towards reforming the existing chambers. The change had its roots in Labor adopting proportional representation for the Senate in 1949, but really began in South Australia in the 1970s with the battle between Don Dunstan's Labor government and a recalcitrant Legislative Council protected by a malapportioned electoral system and a restricted property franchise.

In broad outline, Legislative Councils have undergone three broad phases of reform since their heyday as conservative chambers. These have been the introduction of full adult franchise, the introduction of joint election for both chambers on the same day, and finally the introduction of proportional representation.

As shown in the table below, the order and timing of these changes has varied from jurisdiction to jurisdiction.

Upper House Reforms

Jurisdiction	Full Adult Franchise	Joint Elections	Proportional Representation
Federal	1901	(variable)	1949
New South Wales	1978	1978	1933
Victoria	1950	1950	2006
Western Australia	1963	1963	1989

South Australia	1975	1979	1975
Tasmania	1968	(seperate)	..

The jurisdictions in the table now share a system where lower houses are elected from single member electorates and upper houses by proportional representation. The exception is Tasmania, there the electoral systems by chamber are reversed, and where Legislative Council elections are still required to be held at a different time to lower house elections.

In summary, where in the 19th century Australian parliaments consisted of two chambers with different franchises, the Australian norm has become two chambers with different electoral systems, Victoria becoming the final jurisdictions to move to this model in 2006.

But to introduce proportional representation while maintaining full preferential voting was a problem that became evident with Senate elections in the period of the Whitlam government, and experiments at state and federal level fed the development of the current electoral system.

The Origins of Upper House Electoral Systems

Australia has a long history of experimenting with the use Proportional Representation by Single Transferable Vote (PR-STV), the technical name covering the different variants of the Hare-Clark electoral system used in Tasmania and the ACT, and the Senate style system used in the Senate and for mainland states with Legislative Councils.

These systems have been introduced at various times and each implementation has drawn on lessons from other jurisdictions.

The first version of PR-STV introduced in Tasmania in the 1890s listed candidates in alphabetic order, a system also used in NSW from 1920 to 1925, and used in Tasmania until the 1940s.

In 1919, with the introduction of preferential voting for the Senate, the senate ballot paper was re-designed to group candidates by party. This was copied into Tasmania's Hare-Clark system in the 1940s, and also continued for the Senate with the introduction of PR-STV in 1949.

One difference between the Senate and earlier experience with PR-STV is that the Senate used compulsory preferential voting. Tasmania always has and still uses limited preferential voting. The 1920 NSW implementation of PR-STV used compulsory preferential voting and resulted in

a record informal vote, resulting in the 1922 and 1925 elections reverting to limited preferential voting.

By the 1970s the Senate system's insistence that every box be numbered was creating enormous rates of informal voting, often above 10%. At the 1974 double dissolution election, activists opposed to the Whitlam government stacked the NSW Senate ballot paper with 73 candidates, the assumption being that less well-educated Labor voters were more likely to make mistakes, damaging Labor's chances of winning a majority of seats in its safest states.

Labor learnt from this lesson as Legislative Councils began to be reformed in the 1970s. The Dunstan government introduced proportional representations for the Legislative Council in 1975, but used the Federal experience to introduce a system of party list voting with only limited preferences that couldn't be gamed by forcing up the rate of informal vote.

New South Wales also adopted limited preferential voting when voting for its Legislative Council was finally introduced in 1978.

The Hawke government's electoral reforms in 1984 modified the South Australian idea of party voting but retained full preferential voting. It created the current Senate ballot paper, with electors required to express a preference for every candidate 'below-the-line', or to vote for a single party ticket 'above-the-line' and adopt the party's full list of preferences.

South Australia changed to the Commonwealth system of ticket voting in 1985, NSW in 1988 (though retaining limited preferential voting), Western Australia in 1989 and Victoria in 2006.

As intended, the new system slashed the rate of informal voting at the 1984 Federal election, though it inadvertently caused an increase in the rate of lower house informal voting.

But ticket voting also gave parties much tighter control over their preferences than had previously been possible. It allowed parties to control of their preferences until the end of the count and play a part in determining the final member elected. In a Senate elected by proportional representation, such control was important for any party concerned about the Senate balance of power.

The Consequences of Ticket Voting

The major beneficiary of ticket voting when it was introduced was the Australian Democrats, it being the only significant minor party at the time. Sitting in the middle of the political spectrum, it was always placed favourably on the preference lists of both major parties.

Ticket voting also permitted parties to keep political intruders out of the Senate. In 1984 the Labor Party and the Coalition conspired to keep the Nuclear Disarmament Party's dangerous Peter Garrett out of the Senate. In 1998 and 2001, the existing parties used the system to deny One Nation preferences, meaning it only elected one Senator instead of five or six.

Yet what was good for the major party goose was also good for the minor and micro party gander. Ticket preferences also gave micro-parties a control over preferences they would otherwise never have been able to achieve. If enough micro-parties ran, and engaged in a game of political 'keepings off' between each other and against the major parties, one of them might be able to get enough preferences to win election.

This was dismissed as a possibility for the Senate, but the lower quota for Legislative Council elections saw it become a live possibility.

Now the 2013 Senate election has revealed that even the higher Senate quota is susceptible to being gamed with the election of an unknown party that polled just 0.5% of the vote.

Group ticket voting first descended into farce at the 1999 NSW Legislative Council election when voters were forced to manipulate a 'tablecloth' ballot paper one metre by 700mm deep with 81 columns and 264 candidates. The array of front parties with attractive names designed to corral the preferences of unwary voters forced the state to change its electoral system.

While it wasn't as organised as modern preference 'harvesting', South Australia saw its first example of harvesting in 1997 when Nick Xenophon was elected. Running on a platform in opposition to the proliferation of poker machines, he polled 2.9% and reached a quota thanks to every other minor party on the ballot paper directing preference his way.

The table below shows all South Australian Legislative Councillors elected with less than 5% of the party vote since the current system was first used in 1985.

South Australian MLCs Elected with Low First Preference Votes

Election	Party	Candidate	% Vote
1997	Independent No Pokies	Nick Xenophon	2.9
2002	Family First	Andrew Evans	4.0
2006	Family First	Dennis Hood	4.8
2006	Greens	Mark Parnell	4.2
2010	Family First	Rob Brokenshire	4.4
2010	Dignity for Disability	Kelly Vincent	1.2

It has to be said that Nick Xenophon has moved from harvesting preferences to growing his own votes. Xenophon has turned his initial success into record personal votes for the Legislative Council in 2006, and the Senate in both 2007 and 2013. In 2013 Senator Xenophon's ticket outpolled the Labor Party and finished a close second to the Liberal Party. Few others have turned their initial electoral success on preferences into future votes.

The election of Family First's Steve Fielding in 2004 from 1.9%, and the DLP's John Madigan in 2010 from 2.3%, were also examples of minor and micro parties corralling and harvesting preferences. However, both Fielding and Madigan required major party preferences for election, harvesting only getting them as far as leading the third candidate on a major party ticket.

Ricky Muir's victory in the Victorian Senate on behalf of the Australian Motoring Enthusiasts Party (AMEP) is the first Senate example of pure preference harvesting, the corralling of preferences from a large number of minor and micro parties, winning election without the need for major party or Green preferences.

Muir's party finished 13th in the Victorian Senate race. AMEP polled just 0.50% of the vote, but achieved the 14.3% vote needed for a quota by harvesting the preferences of 25 other parties, including nine parties that polled more votes.

Depending on the recount of Senate votes in Western Australia, Muir may yet be joined by Wayne Dropulich of the Australian Sports Part. It polled just 0.22% of the vote, finishes 21st of

all the groups on the ballot paper. If he is eventually elected in the re-count, it will be on the back of preferences from 18 other parties. To show how complex the preference deals are that could produce his result, 14 of those parties actually polled more votes than the Australian Sports Party.

How to Fix the Senate System

There have been several solutions put forward to change the Senate system and prevent preference harvesting.

One is to introduce a threshold, a minimum percentage of vote or proportion of a quota, that a party must achieve before it is able to reap preferences and achieve election.

Thresholds based on first preference votes are not a feature of PR-STV, it being a system based on quotas and the use of preference distributions to fill remaining quotas. Thresholds are more common in divisor-based proportional representation systems where proportionality is achieved based on share of vote.

I know of only three systems that have ever tried to incorporate thresholds in systems of preferential voting. One was the Modified D'Hondt system used for the ACT between 1989 and 1992. It was an example of the old joke about a camel being a committee's design for a horse. A simple D'Hondt list system of proportional representation had been proposed, but both quotas and preferences were grafted on to the design during its passage through the Senate. It was an amalgam that proved a nightmare to count, let alone for voters to work out the most effective way to vote.

The other examples of Senate-style systems with a threshold were in South Australia, with a party list system using quotas, preferences and thresholds used in 1975 and 1979, and a more complex variant used for a single election in 1982.

The 1975 South Australian system only allowed party voting with no choice of candidate. Electors could vote for a single party, and if they wanted to, could give a second preference for another party.

The quota for election was the same as for the current Legislative Council, 8.33%. But to be elected, a party had to pass a threshold equal to half of the quota, roughly 4.2%. All parties

below this quota would be excluded, preferences from them distributed, then the quota would be re-calculated and a number of seats allocated to each remaining party.

Trying to emulate this system while continuing to allow individual choice for candidates would be complex. The old South Australian system had one bulk exclusion and distribution of preferences, not the multiple exclusions and distributions used in the Senate.

There are also potential constitutional problems in trying to apply a party-based threshold Senate as the Constitution states that Senators must be directly elected by the people.

Introducing a threshold while retaining ticket voting may also have unintended consequences. Would all these micro parties suddenly become preference funnels for one of the major parties? Would they become preference funnels for an independent or for the largest minor party. In the current political climate that would benefit Family First or the Palmer United Party.

At what level do you set the quota? Low at 1%, at a quarter or half of a quota, or high at 8-10%? The choice between the possible threshold values is essentially arbitrary and has major political consequences.

In my view a better solution would be to deal with the root cause of the Senate's current problem, which is the system of group preference ticket voting, what we commonly call 'above-the-line' voting.

New South Wales has already gone down this path. Above the line voting has been retained, but the tickets of preferences attached to an above-the-line vote have been abolished.

When you vote '1' above-the-line for the NSW Legislative Council, your vote only applies to that party. It cannot be controlled by a party and directed as preferences to another group on the ballot paper. The only preferences in the count are those filled in by voters themselves.

However, voters are permitted to direct their own preferences above the line. Voters can indicate '1' for Party A, then 2 to Party B, and preferences are distributed to candidates for each of the parties in the order specified by the elector.

This system is optional preferential voting. It is a system that rewards parties that campaign for votes rather than deal in preferences. A party can still influence preferences by encouraging voters to fill in squares either above or below the line, but the only preferences in the count are

those directed by the voter themselves. The whole business model of preference harvesters is destroyed by this system

At the 2011 NSW election only 1.6% of voters voted for candidates below the line, a figure lower than is normal at Senate elections. However, another 15.6% of voters used the option to direct preferences above the line.

That left 82.2% of voters giving only a single '1' above the line. The final few candidates elected at each election are elected with less than a quota. This is not a problem in NSW as in electing 21 members at large, the system is still proportional to first preference votes.

At the 2003 and 2007 NSW elections, the system worked like list-PR with a highest remainder method of allocating the final seats to parties. This trend was reversed in 2011 when just enough preferences remained live in the count to allow the 11th Coalition candidate to pass Pauline Hanson and fill the final vacancy.

Such a high rate of exhausted preferences would be more problematic at a Senate election where six Senators are elected, or the South Australian election where 11 members are elected.

However, avoiding high rates of exhausted preferences would encourage parties and candidates to get the message out about giving preferences above the line. There are also other technical changes to the count that can help overcome high rates of exhausted preferences.

The change would discourage the plethora of candidates entering the lottery of election as currently operates with ticket voting. Any decrease in the number of candidates would create a more manageable ballot paper.

Some may decry a decline in the number of candidates as somehow undemocratic. However, I would argue that if the ballot paper becomes so large that voters are unable to find the names of candidates and parties they do know of, then there is a problem with the process.

A more manageably ballot paper will encourage electors to take their vote more seriously. It is worth asking whether democracy is better measured by the quality of candidates or the quantity. I would argue for quality.

What about the South Australian Legislative Council in 2014?

While all these reforms are possible given time, it is far too late to implement any of them in time for the 2014 Legislative Council election.

Even if there was agreement on change and time to legislate, the Electoral Commission of South Australia would struggle to re-write its computer software in time to conduct the Legislative Council count in 2014.

However, there are changes to the nomination process that can be implemented before next March and can play a part in preventing the Legislative Council being flooded with candidates.

One reason for the surge in candidates contesting the 2013 Senate election was Julia Gillard's announcement in February that the election would be in September. Prospective parties then had a deadline in mid-May for registration, doubling the number of registered parties and increasing the size of Senate ballot papers.

The table below shows the number of members needed and the relevant fee to register a political party in each jurisdiction.

Rules for Party Registration

Jurisdiction	**Members**	**Fee**
Federal	500	$500
New South Wales	750	$2,000
Victoria	500	..
Queensland	500	..
Western Australia	500	..
South Australia	200	$500
Tasmania	100	..
Australian Capital Territory	100	..

Northern Territory 200 ..

With only 500 members needed to register a party under the Commonwealth Electoral Act, it is proportionally easier to register a national party than a state based party in NSW, Victoria, Queensland and Western Australia. The documentation required to verify party membership also varies between jurisdictions, with NSW, Queensland and South Australia toughest on requiring proof of membership.

While all jurisdictions require a minimum time to verify and register a party, NSW and South Australia have cut-off dates before the election for registration. A NSW party must be registered twelve months before an election to have their name appear on a ballot paper. In South Australia a party must have its application lodged six months before an election. (Both states have fixed date elections.)

Below are listed the 13 parties registered to contest the 2014 South Australian election.

- Australian Labor Party (South Australian Branch) - includes Country Labor Party
- Liberal Party of Australia (SA Division)
- National Party of Australia (SA) Inc
- Australian Greens SA
- Family First Party
- Freedom, Rights, Environment, Educate Australia Party
- Dignity for Disability
- Fair Land Tax - Tax Party
- South Australian Fishing & Lifestyle Party
- Liberal Democratic Party
- Multicultural Progress Party
- Stop Population Growth Now Party
- Katter's Australian Party South Australian Division

The Shooters and Fishers Party is currently awaiting registration.

Political parties receive significant benefits from registration. As well as having their names appear on ballot papers, registered parties are given the right to nominate candidates centrally

under the signature of their registered officer rather than go through the process of gathering nominators to back each candidate.

Clearly the Commonwealth needs to toughen its process for registering parties. The number of members required and rigour of testing membership having fallen behind standards in several states.

Based on these measures, South Australia has a relatively tough process for registering parties. However, South Australia has a special provision related to Independents that means a party can effectively stand a full slate of candidates without being registered as a party.

When an Independent nominates in South Australia, they are permitted to put forward five words in addition to 'Independent' that will be printed on the ballot paper. They are not permitted to use the word party, or to use key words from the name of another party. The Independents who in 2002 labelled themselves as 'Independent Alliance Member Liberal Labour Democrats' is no longer permitted to do so, but 'Independent Ban Duck Shooting' is allowed.

Which means that even though Palmer's United Party is not registered in South Australia, it can stand candidates in every seat with the affiliation 'Independent Palmer United'. It is a unique provision of the South Australian Electoral Act and to some extent undermines the restrictions on registering a political party.

At Federal elections, in NSW, South Australia and Western Australia, the word "Independent" can be used next to the name of a candidate. In Victoria and Queensland, only party names appear and independents are listed with no affiliation.

In Senate and upper house elections in NSW and Victoria, only party affiliations are shown and Independent is only allowed for candidates in the ungrouped column. Space above the line on the ballot paper is reserved for parties and the word Independent cannot appear.

Senate and upper house elections in all mainland states permit like minded independents to be grouped in their own column. South and Western Australia allow single independents to have their own column. Columns are reserved entirely for registered parties in the ACT, while Tasmania permits grouped Independents but sets them a higher number of nominators equal to the 100 members required to register a party.

The table below sets out the deposit fee and the number of nominators required for a candidate not nominated centrally by a registered party. The second the third columns refer to the nomination of a single candidate, the final two columns to any additional requirements for access to a column on the ballot paper.

Nomination Requirements Compared

Jurisdiction	Candidate Nominators	Candidate Deposit	Group Nominators	Min. Group Deposit
Federal	100	$2,000	200	$4,000
New South Wales	15	$500	..	$10,000
Victoria	50	$350	..	$700
Western Australia	Self	$250	..	$500
South Australia	2	$450	..	$450
Tasmania	10	$400	100	$400
A.C.T.	20	$250	..	n.a.

As the table clearly demonstrates, South Australia has a relatively high individual deposit, but has very weak rules on the number of nominators required. Western Australia is the only state that allows self-nomination. South Australia effectively needs only a nominator and seconder.

For access to a column and group voting square, the Senate and Victoria require two candidates, effectively doubling the deposit, and in the Senate's case doubling the number of nominators. In NSW, constitutional restrictions mean a group must nominate 15 candidates for a column with a group voting square above the line, the deposit fee for the group capped at $10,000. In the ACT only registered parties can have their own column.

A useful comparison is between South Australia and the much smaller Tasmania. In South Australia a single candidate can get on to the Legislative Council ballot paper with their own column and a ticket vote square above the line with the word 'Independent' and up to five words printed above the line, all with two nominators and a $450 deposit.

In Tasmania, under the Hare-Clark system, the deposit is $400, but the Independent must put up 100 nominators for their own column. Andrew Wilkie had his own ballot paper column in Denison at the 2010 Tasmanian election thanks to putting forward 100 nominators.

In looking at changes to the South Australian electoral system for the 2014 Legislative Council election, the nomination process is an area ripe for change. The questions that have to be asked are

- Should Independent candidates require more than two nominators. Why not a higher figure such as the 50 required in Victoria or 100 in Tasmania?
- Should single independents be allowed their own column with access to a group voting square without having to pay a higher deposit?
- Should Independents continue to side-step the party registration process by being allowed to nominate how they should appear on the ballot paper?

The way groups are allocated columns may also be influencing the manner in which Independents nominate.

In South Australia and Western Australia, where single Independents can have their own group on the ballot, the allocation of positions is done first between all groups with more than one candidate, and then all groups with only a single candidate. If you stand more than one candidate your group is more likely to appear at the top of the ballot paper. If you stand only one candidate you will appear at the end of the ballot paper.

The table below shows the number of candidates and groups at South Australian elections since 1989, and the break-up of these groups into multi-candidate and single candidate groups.

SA Legislative Council - Candidates and Groups 1989-2010

Election	Candidates	Total Groups	Multi-Candidate Groups	Single-Candidate Groups
1989	34	10	7	3
1993	44	17	13	4
1997	51	19	13	6

2002	76	48	13	35
2006	54	25	10	15
2010	74	35	23	12

Until 1997 all groups appeared in a single row. The increase in groups saw the ballot paper broken into three rows of 16 groups in 2002, two rows in 2006, with triple-decking returning for the 35 columns in 2010.

However, the increase in 2010 was with multi-candidate groups, not the 35 single-candidate groups in 2002. By standing more than one candidate, a group gets moved out of the bottom rows of the ballot paper and receives a chance to draw a prime spot somewhere towards the top left of the ballot paper where most voters start to read.

In South Australia, the requirement for only two nominators leaves Legislative Council elections wide open for the ballot paper to be stacked with candidates, each with access to a group voting square. In addition, the ability for Independents to nominate their own party name as five words following the word 'Independent' essentially undermines the state's relatively tough rules on registering parties.

It is too late for South Australia to change its electoral system before March's election. Given the looming debate on the Senate's electoral system, it is probably worthwhile waiting for more discussion on the best form of voting reform to be adopted.

But South Australia should look at its nomination laws. At the moment they combine the worst aspects of the Federal legislation, making it too easy for candidates to nominate and get access to a group voting square, and providing an easy option by which Independents can circumvent the state's laws on registering political parties.