The Senate

Legal and Constitutional References Committee

State Elections (One Vote, One Value) Bill 2001 [2002]

March 2004

ISBN 0 642 71338 3

This document was printed by the Senate Printing Unit, Department of the Senate,
Parliament House, Canberra

MEMBERS OF THE REFERENCES COMMITTEE

Members
Senator the Hon Nick Bolkus, **Chair**, ALP, SA
Senator Marise Payne, **Deputy Chair**, LP, NSW
Senator Geoff Buckland, ALP, SA
Senator Brian Greig, AD, WA* # +
Senator Linda Kirk, ALP, SA
Senator Nigel Scullion, CLP, NT

Substitute Members
* Senator Andrew Murray to replace Senator Greig for the State Elections (One Vote, One Value) Bill 2001 [2002]
\# Senator Aden Ridgeway to replace Senator Greig for matters relating to Indigenous Affairs
\+ Senator Natasha Stott Despoja to replace Senator Greig for matters relating to the Australian republic

Participating Members

Sen the Hon Eric Abetz, LP, Tas
Sen Andrew Bartlett, AD, Qld (for DIMIA)
Sen Mark Bishop, ALP, WA
Sen George Brandis, LP, Qld
Sen Bob Brown, AG, Tas
Sen Kim Carr, ALP, Vic
Sen Grant Chapman, LP, SA
Sen Trish Crossin, ALP, NT
Sen Alan Eggleston, LP, WA
Sen Chris Evans, ALP, WA
Sen the Hon John Faulkner, ALP, NSW
Sen Alan Ferguson, LP, SA
Sen Jeannie Ferris, LP, SA
Sen Brian Harradine, Ind, Tas
Sen Len Harris, PHON, Qld
Sen Gary Humphries, LP, ACT
Sen Susan Knowles, LP, WA
Sen Meg Lees, APA, SA
Sen Ross Lightfoot, LP, WA
Sen Joseph Ludwig, ALP, Qld
Sen Sue Mackay, ALP, Tas
Sen Brett Mason, LP, Qld
Sen Julian McGauran, NPA, Vic
Sen Shayne Murphy, Ind, Tas
Sen Kerry Nettle, AG, NSW
Sen the Hon Nick Sherry, ALP, Tas
Sen Natasha Stott Despoja, AD, SA
Sen Tsebin Tchen, LP, Vic
Sen John Tierney, LP, NSW
Sen John Watson, LP, Tas

Secretariat

Ms Louise Gell	Secretary
Ms Julie Dennett	Senior Research Officer
Ms Marina Seminara	Executive Assistant

Suite S1.61
Parliament House

Telephone: (02) 6277 3560
Fax: (02) 6277 5794
E-mail: legcon.sen@aph.gov.au

TABLE OF CONTENTS

RECOMMENDATIONS

Recommendation 1

3.79 The Committee endorses the principle of One Vote, One Value that the Bill seeks to implement.

Recommendation 2

3.87 The Committee recommends that the State Elections (One Vote, One Value) Bill 2001 [2002] should not be agreed to because of fundamental technical and constitutional problems. The Committee recommends that consideration should be given to one of the following options:

- **redrafting the Bill to express the principle in generality. This would effectively implement in Commonwealth legislation Australia's obligations under the ICCPR in relation to universal and equal suffrage; or**
- **including the principle in broader Commonwealth legislation that enshrines human rights under the ICCPR generally.**

Recommendation 3

3.90 The Committee recommends that, if it is considered necessary to include a variation level for electorate sizes in such legislation, the appropriate variation should be no more than 10% rather than the 15% included in the current Bill, in order to accord with the accepted uniform minimum standard in Australia for the principle of One Vote, One Value.

Recommendation 4

3.92 The Committee recommends that any future legislation of this nature should restrict judicial review in relation to the practical operation of electoral equality.

ABBREVIATIONS

ACT	Australian Capital Territory
AEC	Australian Electoral Commission
ICCPR	International Covenant on Civil and Political Rights
NSW	New South Wales
SA	South Australia
WA	Western Australia

CHAPTER 1

INTRODUCTION

Background

1.1 On 9 September 2003, the Senate referred the State Elections (One Vote, One Value) Bill 2001 [2002] (the Bill) to the Senate Legal and Constitutional References Committee for inquiry and report by 30 October 2003. On 28 October 2003, the Senate agreed to extend the time for presentation of the report to 1 March 2004. The Committee tabled an interim report on 1 March 2004 which stated that, due to the need to thoroughly consider the evidence it had received, the Committee intended to present its final report on 3 March 2004.

1.2 The Bill was first introduced in the Senate in 2001 by Senator Andrew Murray but lapsed with the end of the 39th Parliament. It was reintroduced in 2002.

Purpose of the Bill

1.3 The Bill proposes that all electorates throughout Australia be comprised as closely as possible of equal numbers of electors. The specific aim of the Bill is to bring electoral law in Western Australia (WA) into line with the rest of Australia by ensuring that the principle of One Vote, One Value is enshrined in both houses of the WA Parliament.

Conduct of the inquiry

1.4 The Committee advertised the inquiry in The Australian newspaper on 24 September and 8 October 2003, and invited submissions by 10 October 2003. Details of the inquiry, the Bill and associated documents were placed on the Committee's website. The Committee also wrote to over 100 organisations and individuals.

1.5 The Committee received 21 submissions and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.6 The Committee held a public hearing in Canberra on 13 February 2004. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://aph.gov.au/hansard.

Acknowledgement

1.7 The Committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.8 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

BACKGROUND TO THE BILL

2.1 This chapter briefly outlines the scope of the proposed provisions and provides background to the Bill by examining:

- the current situation in WA;
- the WA State Government's recent attempt to legislate for the principle of One Vote, One Value; and
- the situation in other states and territories.

The scope of the Bill

2.2 The Bill is a Private Senator's Bill introduced by Senator Andrew Murray of the Australian Democrats. It intends to resolve the problem of malapportionment in Australia by proposing that all electorates in every jurisdiction be comprised as closely as possible of equal numbers of electors.[1] The specific objective of the Bill is to bring WA law into line with the rest of Australia.[2] Every Australian parliament has legislated for the principle of relative electoral equality, except the Senate (which was created to give all states an equal number of seats) and both houses of the WA Parliament.[3] WA is the only state where disparities in electorate numbers remain extremely large. A further objective of the Bill 'is to prevent, through force of Commonwealth law, any state reverting to a malapportioned status simply because it suits a party.'[4]

2.3 The Bill applies to both houses of state parliaments in those states that have bicameral legislatures. A quota of voters is calculated by dividing the total state enrolment, projected four years in advance, by the number of electorates. The Bill provides that a house of parliament of a state must be directly chosen by the people of

---

1 Malapportionment describes a distribution of electoral division boundaries that incorporates an inequality in the number of enrolled electors between electoral divisions: Australian Electoral Commission, *Submission 19*, p. 1.

2 The Second Reading Speech on the Bill specifically identified WA as not complying with the principle of One Vote, One Value. Indeed, WA's 'electoral history records a slow and incomplete process of democratisation' and the 'electoral system remains a study in inequality': Senator Andrew Murray, Second Reading Speech, *Senate Hansard*, 7 August 2001, p. 25746.

3 The Constitution also guarantees each state a minimum of five seats in the House of Representatives under s. 24: this is discussed further at para 3.39.

4 Senator Andrew Murray, *Committee Hansard*, 13 February 2004, p. 7.

that state, voting in electorates as nearly equal in size as possible but not varying by more than 15% from the quota of voters.[5]

2.4 A plus or minus variation from the quota must have regard to a variety of factors. The overriding factor for the allocation of voters to electorates is the community of interest in the area. Other factors include the means of communication with, and its distance from, the capital city of the state, the geographical features of the area and any existing boundaries, including local government boundaries.[6]

2.5 The plus or minus 15% variation in electorate size (with regard to the factors mentioned above) is based on the recommendations of the WA Commission on Government.[7]

2.6 The Bill also provides for certain people with standing to seek judicial review. Standing extends, but is not limited to, registered political parties and a member of the house of parliament to which the action relates.[8]

Current situation in WA

2.7 The main difference between WA's electoral system and those in the other Australian jurisdictions is that the WA system remains heavily weighted in favour of rural and remote electorates. The *Electoral Distribution Act 1947* (WA) prescribes that the electoral system be weighted in favour of non-metropolitan areas. This means that candidates in seats outside the metropolitan area require fewer votes to be elected.

2.8 In his Second Reading Speech, Senator Murray stated that non-metropolitan electorates account for 26% of voters but over 40% of the seats in the WA Legislative Assembly (lower house). He stated also that the malapportionment is even greater in the Legislative Council (upper house), where the vote of a person in a non-rural area is often worth up to nearly four times that of a metropolitan voter.[9] The extent of malapportionment in some areas in WA has increased since Senator Murray's Second

---

5 Clauses 3 & 4.

6 Clause 4.

7 *Report No. 1* (1995), pp. 302 & 342. The Commission on Government (COG) was established in response to a recommendation made by the Royal Commission into Commercial Activities of Government and Other Matters (WA Royal Commission). COG was to inquire into and report upon a range of issues emerging during the WA Royal Commission's investigations and a range of other matters which Parliament specified. COG, comprising a full time chairperson and four part-time commissioners, was appointed in November 1994 and handed down its last report (*Report No. 5*) in 1996.

8 Clause 5.

9 *Senate Hansard*, 7 August 2001, p. 25746.

Reading Speech was delivered, so that in the Legislative Assembly the discrepancy is now up to 500%.[10]

2.9 As a result, those in large electorates have less voting power than those from electorates containing fewer voters. Another consequence of malapportionment is that it may favour one or more political parties and lead to their over-representation in Parliament.[11]

2.10 It is often argued that WA's unique characteristics in terms of its size and sparseness of population in non-metropolitan regions provide valid reasons for allowing variations to the One Vote, One Value concept. Proponents of malapportionment argue that equal voter numbers do not guarantee a fair, representative democracy. For example, one of the perceived casualties of One Vote, One Value is lack of access to and limited availability of local members of parliament.[12]

2.11 It appears that those who support malapportionment argue more for equality of representation, as distinct from equality of voting power at elections. Solutions such as greater resourcing of members representing rural and remote areas are not considered to be substitutes for representation if this results in fewer members representing country areas. Rather, rural weighting is seen to ensure reasonably sized and manageable electorates, as well as a voice for country people.[13]

WA State Government's recent attempt to legislate

2.12 In 2001, the WA State Labor Government attempted to change the law in WA to enshrine the principle of One Vote, One Value in lower house elections.

---

10 In relation to the Legislative Assembly, the most recent enrolment figures available show that the range in the metropolitan area is now between Wanneroo with 45,731 electors and Girrawheen with 22,866 electors, and in the non-metropolitan area between Dawesville 19,612 and Eyre 8,964: Western Australian Electoral Commission, *Electoral Enrolment Statistics*, 31 December 2003, pp. 5 & 8. The voting power of electors in Eyre is now approximately five times that of electors in Wanneroo.

11 For example, it has been claimed that, regardless of the popular vote, the conservative political parties in WA will always win a majority of seats in the Legislative Council because of the malapportionment that exists: The Hon Jim McGinty MLA, WA Attorney General & Minister for Electoral Affairs, *Committee Hansard*, 13 February 2004, p. 34.

12 Other arguments for malapportionment include: it allows greater constituency representation for groups that genuinely need it; if electoral districts were of similar size, then metropolitan votes would far outweigh country votes; and the perceived extra wealth generated in country areas should attract greater voting power: K Robinson, "One Vote, One Value: The WA Experience" in G Orr, G Williams and B Mercurio, *Realising Democracy: Electoral law in Australia*, Federation Press, Annandale, 2003, p. 107.

13 ibid, pp. 107-108.

2.13 The Electoral Distribution Repeal Bill 2001 aimed to essentially repeal the existing *Electoral Distribution Act 1947*, while the Electoral Amendment Bill 2001 provided a new mechanism for drawing district and region boundaries. Electoral districts were to be redrawn to ensure voter enrolment in each district was no more than 10% above or below the average district enrolment. If enacted it would have meant that the voting power of everyone in WA would be equal, but a smaller proportion of Legislative Assembly members would represent the non-metropolitan areas of the state.[14]

2.14 Political necessity forced the WA Government to compromise over its legislation, and ultimately only a modified form of One Vote, One Value (adapted from the Queensland model) would have been introduced into the Legislative Assembly had the legislation passed, while the Legislative Council would have essentially remained unaltered.[15]

2.15 Senator Murray noted in his Second Reading Speech that, after achieving an excellent result in the Legislative Council under the current electoral system, the Greens did not support changes to abolish malapportionment in that House. However, they did support changes to abolish malapportionment in the Legislative Assembly where they have no members.[16]

2.16 The Electoral Distribution Repeal Bill 2001 and the Electoral Amendment Bill 2001 completed their passage through the WA Parliament in December 2001. However, the Legislative Council Clerk subsequently sought a declaratory judgement by the WA Supreme Court about the way in which the bills had been passed. Each bill had been passed by an absolute majority in the Legislative Assembly, but only by a simple majority of 17 members in the Legislative Council. Together, the ALP and the Greens had 18 members in the Legislative Council, but only 17 votes, as the President, who was an ALP member, only had a casting vote. This contravened section 13 of the *Electoral Distribution Act 1947* (WA) that requires that any bill seeking to amend that Act has to be passed by an absolute majority in both Houses.[17]

---

14 K Robinson, "One Vote, One Value: The WA Experience" in G Orr, G Williams and B Mercurio, *Realising Democracy: Electoral law in Australia*, Federation Press, Annandale, 2003, p. 108.

15 ibid.

16 Senator Andrew Murray, Second Reading Speech, *Senate Hansard*, 7 August 2001, p. 25747. Note that in the *Report of the Standing Committee on Legislation in relation to the Electoral Distribution Repeal Bill 2001 and the Electoral Amendment Bill 2001*, the WA Legislative Council Standing Committee recommended by a majority that the Greens (WA) Model for the Legislative Council be adopted: p. ix.

17 K Robinson, "One Vote, One Value: The WA Experience" in G Orr, G Williams and B Mercurio, *Realising Democracy: Electoral law in Australia*, Federation Press, Annandale, 2003, p. 110.

2.17 However, the bills were ruled invalid by the WA Supreme Court as they had passed through the Legislative Council without a requisite absolute majority. The legislation failed because of a technicality, with the Supreme Court not commenting on the merits of the legislative proposal. After the WA Supreme Court judgement was handed down, the WA Government reintroduced its legislation into the Legislative Assembly as the *Electoral Reform Bill 2002* which was an amalgamation of the two previous Bills. It also introduced legislation to alter the WA Constitution to allow the President of the Legislative Council a deliberative vote which would have meant that the ALP, together with the support of the Greens, would have had the 18 votes required to pass its electoral reform legislation. However, the Greens did not support the idea of changing the voting rights of the President, as they argued that this would have the effect of politicising the role of the President and allow the President to vote on all legislation.[18]

2.18 After the WA Supreme Court decision, the WA Government appealed to the High Court of Australia.[19] The High Court's decision was handed down on 13 November 2003.[20] The High Court (5-1) dismissed the WA Government's appeal and confirmed the earlier decision of the WA Supreme Court, holding that the legislation was not passed by an absolute majority of the Legislative Council.[21]

One Vote, One Value in other jurisdictions

2.19 The way in which the concept of One Vote, One Value has been put into practice in most jurisdictions in Australia is through electoral distribution, by which electoral district boundaries are drawn and/or new districts are created. In Australia, since some

---

18 ibid, pp. 110-111. Note that at the Commonwealth level, the Speaker of the House of Representatives has a casting vote and the President of the Senate has a deliberative vote. In all of the remaining states, the speakers of the lower houses have casting votes only, as do the presidents of the upper houses. The Speaker in the ACT Legislative Assembly has a deliberative vote only while the Speaker of the Northern Territory Legislative Assembly has both a deliberative and a casting vote.

19 The Commonwealth Attorney-General intervened in these proceedings.

20 *Attorney-General (WA) v Marquet* [2003] HCA 67 (13 November 2003).

21 The majority ruled on the validity of the passage of the legislation but did not specifically address the idea of ending malapportionment in WA. However Kirby J, in his dissenting judgement, noted the very large disparities in electorate numbers in WA: at 19. He also observed that none of the permitted variations in any of the states and territories (including where a more lenient tolerance is allowed for in limited and identified electorates, for example, in Queensland) approaches the disproportion in the value of votes in WA, entrenched in the law by virtue of the *Electoral Distribution Act 1947* (WA). He stated that the equality of the vote of each elector in state elections in WA is diminished to an extent, and by a means, not now found anywhere else in Australia: at 32.

tolerance from the average district enrolment is permitted, some seats can be smaller than others.[22]

2.20 The lower houses in Victoria, New South Wales, Queensland and South Australia all have electorates of approximately equal enrolments within a 10% tolerance. The Northern Territory allows up to a 20% variation, while 5% is allowed for the Australian Capital Territory's multi-member electorates. Each House of Representatives' electorate is permitted a variation of 3.5% of the projected enrolment for each state or territory. This is the same variation as in the Tasmanian lower house.[23]

2.21 In Queensland, the One Vote, One Value principle was introduced in 1992, in response to recommendations by the Electoral and Administrative Review Commission in its *Report on Queensland Legislative Assembly Electoral System* (1990). However, five geographically large electorates, with a land area of 100,000 square kilometres or more, were given special weighting due to their isolation.[24]

2.22 In the NSW and SA upper houses, electoral equality is achieved by proportional representation from one statewide electorate. In the Tasmanian upper house, each region contains an equal number of electors within a 10% tolerance based on a future projection of enrolments, while the Victorian upper house also allows for a 10% tolerance at distribution.[25]

22 K Robinson, "One Vote, One Value: The WA Experience" in G Orr, G Williams and B Mercurio, *Realising Democracy: Electoral law in Australia*, Federation Press, Annandale, 2003, p. 103.

23 ibid, p. 104.

24 ibid.

25 ibid.

CHAPTER 3

KEY ISSUES

3.1 While the majority of submissions and witnesses at the public hearing supported the policy and objectives of the Bill, several concerns were expressed about the drafting of its provisions, its constitutional validity, and its practical operation. This chapter discusses the key issues raised, including:

- technical flaws contained in the Bill;
- implications of the Bill in jurisdictions other than WA;
- constitutional law issues; and
- other issues arising in the context of WA.

Support in principle

3.2 Most submissions and witnesses at the public hearing applauded the policy objectives of the Bill as an attempt to implement the fundamental political right of universal and equal suffrage in Australian law. The principle of One Vote, One Value is a generally accepted one in Australia since it is considered that every Australian citizen should have an equal say in electing their governments.[1]

3.3 Professor George Williams made a particularly important observation about the issue of effective representation at the hearing:

> … sometimes people contrast equality of voting power with equality of representation. But if you look at the movement around the world, the days of suggesting that special interests should be accommodated through different levels of voting power are largely gone in other comparable nations. The reasons for that are many. One of them simply is that, if you do make special interests and build them into such a system, it is almost impossible to determine fairly what those special interests should be. If you are dealing with the notion of the difficulty of representing people, geography is obviously relevant to that. But equally, given today's multicultural Australian society, you might say someone with an inner city electorate, with great difficulties of language with a largely migrant community, might have even greater problems in representing and understanding the wishes of their voters.[2]

---

1 The Hon Jim McGinty MLA, WA Attorney General & Minister for Electoral Affairs, *Committee Hansard*, 13 February 2004, p. 32.

2 *Committee Hansard*, 13 February 2004, p. 18.

3.4 Only one submission opposed the Bill on a policy basis.[3] The Hon William Withers, a former Liberal Party member of the WA Legislative Council, expressed the view that, although the democratic theory of One Vote, One Value should be supported in a state or country with an equitable distribution of population, that theory destroys proper parliamentary representation if it is adopted in remote areas where people require it most. Mr Withers stated that he was forced to resign as a member of parliament 'because it was impossible to live within the electorate, in my Kimberley home town, and effectively represent the electorate'.[4]

Technical flaws in the Bill

3.5 Several submissions and witnesses identified various technical flaws in the Bill which, in their view, make the Bill unclear, impracticable and potentially unworkable in practice.[5] The vast majority of submissions and witnesses commenting on the technicalities of the Bill expressed the opinion that it would require substantial amendment it if were to achieve its stated objectives.

Clause 3

3.6 One of the main areas of the Bill that attracted criticism was the definition of 'quota of electors for each electorate' in clause 3 (see para 2.3). It was argued that this definition is defective in a number of ways. In his submission, Professor George Williams stated that the Bill is unclear in referring to 'a House of Parliament of a State': it does not identify how it would apply to the upper houses of some state parliaments, or how it is intended to apply to the various proportional voting systems that exist.[6]

3.7 At the public hearing, Mr Michael Maley of the Australian Electoral Commission (AEC) offered the following opinion on clause 3:

> It seeks to base a quota on predicted rather than current enrolments, for reasons which are not clear to the AEC, but leaves unanswered the question of how and by whom such predictions would have to be made. It takes no account of situations such as that which applies in the Australian Capital Territory … where there are multimember electorates which do not all have

---

3 The Hon William Withers, *Submission 2*.

4 ibid, p. 5.

5 See for example, Australian Electoral Commission, *Submission 19* and *Committee Hansard*, 13 February 2004; ACT Electoral Commission, *Submission 5* and *Committee Hansard*, 13 February 2004; Electoral Reform Society of Western Australia, *Submission 4*; Tasmanian Electoral Office, *Submission 7*; The Electoral Reform Society of South Australia, *Submission 11*; Proportional Representation Society of Australia, *Submission 12*.

6 *Submission 6*, p. 2.

> the same number of members. The bill's operation in relation to state legislative chambers elected on a rotating basis is unclear.[7]

3.8 And:

> There is a particular difficulty with the definition of a quota of voters for each electorate, because it is unclear where the predictions that are specified will come from. We do not know why there is that suggestion that predicted figures rather than current figures be used—it would seem to add an additional complication without any particularly obvious benefit …[8]

3.9 In its submission, the AEC argued further that it is uncertain whether the Bill intends that the predicted figures would be subject to challenges in the courts (as drafted it would appear that such challenges would not be precluded). The AEC also emphasised that there are many different techniques for making predictions, with different techniques potentially giving rise to different outcomes.[9]

3.10 The ACT Electoral Commission offered the following opinion on clause 3:

> The logic of the bill is difficult to follow. It appears to imply that enrolment at the time of an election should be within 15% of the predicted quota calculated 4 years into the future. This may be impossible to achieve in practice, depending on predicted growth rates. The purpose of looking 4 years into the future is unclear if the calculation is meant to apply to the current election. It would be more logical to require enrolments at the time of an election to within 15% of the average enrolment *at the time of the election*.[10]

Clause 4

3.11 The AEC submitted that clause 4 (described earlier at paras 2.3 and 2.4) imposes requirements not on the redistribution processes which take place in the various states and territories but upon elections which follow the redistribution processes.[11] The ACT Electoral Commission argued that this would be difficult to apply in practice since the decision-making process that leads to the drawing of electoral boundaries takes place well before an election, when a redistribution is conducted:

---

7 *Committee Hansard*, 13 February 2004, pp. 1-2.

8 ibid, p. 3.

9 *Submission 19*, p. 4.

10 ACT Electoral Commission, *Submission 5*, p. 2.

11 *Committee Hansard*, 13 February 2004, p. 2.

> It would be more workable to apply the one vote one value test at the time at which a redistribution is finalised, when there would be time to amend boundaries if necessary before an election commenced.[12]

3.12 This view was also put forward by the Proportional Representation Society of Australia:

> … typically redistributions comply with specifications of allowable tolerances at the time new boundaries are determined, and differences in projected enrolment numbers at the anticipated time of the next election. Where redistributions are mandated after each election, the conceptual mismatch with the literal requirements of section 3 of the Bill is even more curious, as population projections beyond the time of the next election will currently not be considered for good reason.[13]

3.13 It was noted also that the concept of 'directly chosen by the people' is problematic because it might be found by a court to preclude the filling of casual vacancies by appointment in state upper houses, which currently occurs in NSW and SA.[14]

3.14 A number of submissions and witnesses argued that the concept of electorates being 'as nearly equal in size as possible' is poorly phrased and raises some significant difficulties. It is presumably intended to achieve some sort of electoral equality as opposed to equality of "size" (which could be read as meaning physical or geographical size, particularly as most of the listed factors to take into account in clause 4 are geographic ones).[15] It could also mean that, if the High Court were to adopt a strict interpretation of the term, all current electoral boundaries in the states and territories would be invalidated since all of them could be improved from the point of view of strict numerical equality.[16] Indeed:

> None of the redistribution processes in place in the states and territories would appear to meet such a requirement at present.[17]

---

12 *Submission 5*, p. 2.

13 *Submission 12*, p. 4.

14 AEC, *Submission 19*, pp. 5-6.

15 ibid, pp. 5-7; ACT Electoral Commission, *Submission 5*, p. 2; Mr Phillip Green, ACT Electoral Commission, *Committee Hansard*, 13 February 2004, p. 8.

16 Mr Michael Maley, AEC, *Committee Hansard*, 13 February 2004, p. 2; AEC, *Submission 19*, pp. 5-8.

17 Mr Michael Maley, AEC, *Committee Hansard*, 13 February 2004, p. 2.

3.15 Further, since the language used in clause 4 is imperative, the criteria for consideration listed in the clause are completely subordinated to the numerical requirement of absolute equality. Mr Maley of the AEC explained:

> [Clause 4] says that people must be 'voting in electorates as nearly equal in size as possible' and there are some further qualifications. The language there is quite imperative. It is not saying that the objective is to have electorates which are all within a 15 per cent tolerance of the average enrolment at election time but that it is an imperative to get to a situation at election time where enrolments are as nearly equally as possible.
>
> …
>
> The problem with clause 4 is that it is not adopting the sort of scheme that exists at the Commonwealth level and in most of the state jurisdictions at the moment, where enrolments within a tolerance are acceptable, but it is requiring that you try to seek absolute equality. There are provisions in clause 4 which talk about quotas but they do not sit properly with the fundamental requirement, that absolute imperative, towards equality. That we see as a very big problem.[18]

3.16 It was also submitted that clause 4 does not specify what remedies might be open if a court were to find that the constituencies in the states and territories do not comply with the requirements of the clause at the time of an election.[19] The wording of the clause suggests that such a finding would only be able to be made after the dissolution or expiration of the state or territory legislature. In the absence of a validly elected subsequent state or territory legislature, it is not clear what would happen: not only would the election potentially be invalidated but, if the state or territory legislature had been dissolved or had expired, no mechanism would exist to rectify the problem.[20]

3.17 Such a situation would be even more complex in states and territories where electoral laws can only be amended by referendum. The AEC noted that the Bill does not make it clear what would be done to resolve the deadlock where there is a requirement for a referendum, and the electors in the relevant state or territory did not support the required change.[21]

---

18 ibid, p. 3.

19 Mr Michael Maley, AEC, *Committee Hansard*, 13 February 2004, p. 2; AEC, *Submission 19*, pp. 5-8; Mr Alex Gardner, *Committee Hansard*, 13 February 2004, p. 40.

20 Mr Michael Maley, AEC, *Committee Hansard*, 13 February 2004, p. 2; AEC, *Submission 19*, pp. 5-8.

21 AEC, *Submission 19*, p. 8.

Clause 5

3.18 Clause 5 of the Bill provides certain people with standing to seek judicial review. The ACT Electoral Commission submitted that it is not apparent what "judicial review" under the Bill is supposed to achieve. The AEC also expressed the view that clause 5 raises some problems:

> … clause 5's attempt to identify those who would be entitled to bring an action under the bill is unclear in that it refers to a registered political party without defining the term and refers also to a 'member of the House of Parliament to which the action relates' without taking account of the fact that, if that house had been dissolved, it would arguably no longer have any members.[22]

3.19 Professor Williams argued that a significant level of judicial review to determine matters such as those listed in the Bill (for example, whether the geographical features of an area can justify a variation within the 15% margin) would be problematic and difficult.[23] At the public hearing, he expanded on this point:

> I would resist having any significant level of judicial review of these types of criteria. With something like the geographical features of the states it is almost impossible to envision the correct judicial criteria. If you were arguing this before the High Court, what could you put forward to say, 'This is problematic geographically and that is not.' It is something the courts are not well equipped to do, and if it is put in their hands the danger is that you will end up with a system that lacks a lot of certainty. You might have a lot of legal challenges because of that. The system itself would become problematic.

3.20 Professor Williams suggested that other facts could be added to the criteria in clause 4, but that the courts should not be involved in reviewing the application of these criteria by the Electoral Commission:

> I note, though, that 'community of interests—economic, social and regional' is missing, and that is in the Commonwealth Electoral Act. I am not sure why it is not there but I would add it. I would probably simply have something there—perhaps even as a note to the legislation or something in that form—that might say, 'In this 10 per cent margin these are the sorts of things that electoral commissions might take into account in developing that.' But as to how they actually do it, leave it to them. Do not let the courts get involved. As long as it is within that 10 per cent it satisfies the test; otherwise there is no room for judicial proceedings in doing it.[24]

---

22 Mr Michael Maley, AEC, *Committee Hansard*, 13 February 2004, p. 2.

23 *Submission 6*, p. 2.

24 *Committee Hansard*, 13 February 2004, p. 24.

Is a 15% variation in electorate size acceptable?

3.21 The Bill allows a 15% plus or minus variation in electorate size. Several submissions and witnesses argued that this variation was too great and would effectively result in abrogation of the very principle the Bill is seeking to implement. A tolerance of 10% was generally considered to be more appropriate. The Hon EG Whitlam AC QC was resolute in expressing the following opinion:

> The federal parliament time and time again has adopted the 10 per cent variation—that is, allowing 10 per cent below or 10 per cent above—but even that can bring about, I think, a 30 per cent variation between the largest and the smallest.
>
> …
>
> My submission would be, my strong belief would be—and it is a belief strongly held over half a century—that 10 per cent variation is the most that should be permitted. It has been accepted in every subsequent federal election, including in Western Australia.[25]

3.22 The Hon EG Whitlam continued:

> I differed from the 15 per cent … in Senator Murray's bill because, for instance, one of the criteria set … by … [the] bill is distance from the capital city. In fact there are many country electorates in Western Australia from which it is possible to get a flight to Perth which takes less time than driving from a metropolitan electorate to Parliament House in Perth. It is distance. Accessibility is a point. I do not believe for one minute that we should say that federal members from Western Australia or any other state can adequately represent an electorate distant from the state capital and state members cannot. I do not believe that WA MLAs or MLCs are under greater handicaps than Western Australia senators or MHRs.[26]

3.23 Professor Williams expressed a similar opinion:

> … I personally would go for [a] 10 per cent [tolerance] despite the Western Australian report, simply because 10 per cent has been accepted in Australia as the uniform minimum standard for one vote, one value. If you are going to impose a national standard of general application, I think it ought to be imposed at the level that is generally accepted. Indeed, if there is any movement over time, I think it ought to be to reduce that 10 per cent. We should be asking the question through this and other committees, ought we to be moving to five per cent at the federal level depending on the technologies and other things available? Clearly in the US and other countries they do it. Ten per cent is there; we ought to be narrowing it as

---

25 ibid, p. 14.

26 ibid, pp. 14-15.

> much as possible over time. It would be unfortunate if we broadened it out; it would set a national standard at the wrong level.[27]

3.24 However, there are differing views. Emeritus Professor Colin Hughes argued that, since WA and Queensland share certain similar characteristics, the "Queensland compromise" (that is, where five geographically large electorates are given special weighting because of their isolation) could be effectively utilised in outback areas in WA.[28] At the public hearing Professor Hughes asserted:

> I would argue that the problems of the real outback areas are such that they cannot be accommodated satisfactorily within the 10 per cent variation. They would require the possibility of removing a very small number of seats and treating them specially.
>
> …
>
> Western Australia is the only conspicuous case and Queensland is a minor deviation from general principles, which I believe is justified, and I believe Western Australia could find that same solution to its problems, in which case I could live with the two of those.
>
> …
>
> If you were to have the Queensland formula in Western Australia then it would only be that Kalgoorlie area—Kalgoorlie plus a couple of bits—that would benefit from it. As I suggest in the submission, the number of seats involved would not be all that large.[29]

3.25 It should be noted, however, that if this line of reasoning were to be applied in WA, it may be difficult to achieve general acquiescence in relation to where a greater variation in electorate size might be acceptable. For example, the Hon Jim McGinty MLA, WA Attorney General and Minister for Electoral Affairs articulated a robust stance on the application of One Vote, One Value in his state:

> If there were to be any argument—and I do not concede that there is—for departure from the principle of one vote, one value, then you might be able to make that argument out in respect of the Aboriginal people who live in the western desert area who are truly remote, truly isolated and truly lack a

---

27 *Committee Hansard*, 13 February 2004, pp. 24-25.

28 *Submission 3*, p. 2. The Greens (WA) also expressed their support for the use in WA of a mechanism similar to that in Queensland: Greens (WA), *Submission 15*, p. 1.

29 *Committee Hansard*, 13 February 2004, pp. 29 & 30-31.

> lot of facilities, but you cannot make that argument out in respect of the country cities.[30]

What would be the practical effect of the Bill in WA?

3.26 The Committee received evidence that the Bill, as drafted, would not be successful in achieving its intended purpose in WA since it would not significantly change the current situation.

3.27 For example, The Electoral Reform Society of South Australia (the Society) argued that the Bill should be amended to refer to the quota of voters for each seat rather than for each electorate. The Bill assumes that all electorates return the same number of seats but currently, in the WA Legislative Council, the number of seats varies in each electorate. The Society submitted:

> As the Bill currently stands, while each electorate must have the same number of voters, it would still be possible to have 5 or 7 members from country electorates and only 3 from the city electorates. This would not be much different to the current situation in WA![31]

3.28 The Electoral Reform Society of Western Australia made a similar point:

> The Bill defines the "quota for each electorate" as the estimated total number of voters in the State, divided by the number of electorates. This assumes the same number of seats in each electorate. Otherwise a malapportionment can be generated by having equal sized electorates with different numbers of seats. For example W.A. could have equal numbers of voters in all electorates and then have one seat in every city electorate and four seats in every country electorate restoring the four to one malapportionment [in the Legislative Council].[32]

3.29 The Proportional Representation Society of Australia held a similar view about the Bill's key provision:

> [It] is so poorly drafted that it would … mak(e) it possible for quite large levels of what is called vote weightage to persist for Western Australia's Legislative Council, albeit in a form a little different from what currently applies separately in metropolitan and rural areas.[33]

---

30 *Committee Hansard*, 13 February 2004, p. 34. The Hon Jim McGinty also stated that a city such as Kalgoorlie is 'totally urban'. This view appears to be at odds with the opinion expressed by Professor Hughes.

31 *Submission 11*, p. 1.

32 *Submission 4*, p. 1.

33 *Submission 12*, p. 3.

3.30 Further:

> … the current criteria in the … Bill are open to one type of manipulation that would completely defeat the purpose of the proposed legislation.
>
> …
>
> The failure to consider the number of [members of the Legislative Council] in each electorate, or perhaps to restrict possibilities markedly by specifying that the same number of [members] be returned from each electorate, opens the door to even greater imbalances per elected [member] being acceptable.
>
> …
>
> Provided all the separate regions satisfied the criterion of having essentially the same enrolment, nothing in the … Bill would stop the assignment of nine or eleven [members] to each rural region and only three or five to each metropolitan one.[34]

3.31 In his submission, Associate Professor Malcolm Mackerras suggested that application of the principle of One Vote, One Value would make little practical difference in WA:

> … I know that the most recent map produced results that were as fair in practice as would have been produced by a One Vote, One Value distribution. I have also analysed the new boundaries and come to the conclusion that the result of the next WA election will be as fair as would be the case if the whole operation were to be done all over again to conform to the principle of One Vote, One Value.[35]

Implications of the Bill in jurisdictions other than WA

3.32 The Bill may have unintended implications in states and territories where the principle of One Vote, One Value is already enshrined in legislation. A Bill proposing to change the current situation in other jurisdictions is arguably unnecessary and undesirable where the electoral systems in those jurisdictions work well and have already achieved the objective of relative electoral equality. It was submitted by the AEC that, given that only WA has been identified as a matter of concern, it would seem that the Bill, if enacted, would fall disproportionately on the other states and territories.[36]

---

34 ibid, p. 6.

35 *Submission 9*, p. 6.

36 *Submission 19*, p. 10.

3.33 Six of the state and territory governments made submissions to the inquiry.[37] While the underlying principle of One Vote, One Value was generally supported, the state and territory governments strongly contended that the principle is already effectively embodied in their electoral systems. Moreover, they made the point that the formulation adopted by the Bill to implement One Vote, One Value is inconsistent (to varying degrees) with their current electoral laws.

3.34 For example, the NSW Government argued that its electoral system:

> … already provides a robust system for protecting the principle of "one vote, one value". While New South Wales could move to amend its laws to make them consistent with the proposed Commonwealth legislation, it is difficult to see why it should do this. Both systems achieve "one vote, one value" elections, but by different means. There is no reason to think that the Commonwealth's means are any better than those adopted some time ago in New South Wales.[38]

3.35 Similarly, the ACT Government argued that the formulation adopted by the Bill to implement One Vote, One Value is completely at odds with its electoral laws. In fact, the Bill completely invalidates the ACT's Hare-Clark system since it does not allow for the One Vote, One Value test to be applied to multi-member electorates.[39]

3.36 The ACT Government also noted that, since submissions to the inquiry have identified a range of deficiencies in the Bill, the disruption to a legislature caused by recourse to legal proceedings in order to clarify ambiguous electoral laws should not be discounted. Specifically, it was claimed that any measure seeking to change a clear and tried electoral system should not introduce unnecessary ambiguity or uncertainty.[40]

3.37 Several submissions from state and territory governments raised the issue of independence of state legislatures. For example, the ACT Government viewed the Bill as an attempt by the Commonwealth Government to unnecessarily intrude into the domestic affairs of the ACT, as well as a violation of its legislative sovereignty.[41] The NSW Government held the view that the powers of the Commonwealth do not extend to interfering in the constitutional and electoral processes of the states and, as a result,

---

37 Apart from the WA Government, the ACT, Queensland, Victorian, Tasmanian and NSW Governments provided submissions.

38 The Hon Bob Carr MP, Premier of NSW, *Submission 21*, p. 3.

39 Mr Jon Stanhope MLA, ACT Chief Minister & Attorney-General, *Submission 16*, p. 2. See also ACT Electoral Commission, *Submission 5*; Proportional Representation Society of Australia, *Submission 12*.

40 Mr Jon Stanhope MLA, ACT Chief Minister & Attorney-General, *Submission 16*, p. 2.

41 ibid.

the Bill would be likely to be subject to constitutional challenge.[42] The Tasmanian Government considered it inappropriate and possibly unconstitutional for the Commonwealth to legislate for the purpose of a perceived inequity in one state.[43]

3.38 Further, in some states a referendum would be required to amend electoral legislation. The Victorian Government expressed reservations about changes to the principles for electorate division, especially since a referendum would be necessary in Victoria to effect any such changes.[44] The NSW Government pointed out that there is no guarantee that a referendum would be passed. If it were not passed, it might then be the case that elections could be routinely challenged.[45]

3.39 However, while all states and territories besides WA have legislated for the principle of One Vote, One Value, Senator Murray has indicated that a secondary objective of the Bill is to prevent, through the use of Commonwealth legislation, the states and territories from reverting to malapportionment in the future to suit the particular political climate.[46] This is a point unlikely to find favour in the various states and territories, particularly given the fact that neither the House of Representatives nor the Senate systems would pass the test that is envisaged in the Bill. As Mr Phillip Green of the ACT Electoral Commission stated:

> … you have got state boundaries and you have got the same number of senators in each of the states, guaranteeing Tasmania five seats in the House of Representatives when its population does not entitle it to that number. I think you will have a presentational difficulty in trying to justify a scheme imposed on the states that the Commonwealth itself does not meet.[47]

Constitutional law issues

3.40 The long title of the Bill specifically provides that the intent of the Bill is 'to implement Article 25 of the International Covenant on Civil and Political Rights so that elections for State legislatures shall be by equal suffrage'. Article 25 of the *International Covenant on Civil and Political Rights* (ICCPR) provides for "universal and equal suffrage". Senator Murray argued that this assumes the objective of One Vote, One Value, subject to reasonable restrictions and that, since Australia is a

---

42 The Hon Bob Carr MP, Premier of NSW, *Submission 21*, p. 3.

43 The Hon Jim Bacon MHA, Premier of Tasmania, *Submission 20*, p. 1.

44 The Hon Steve Bracks MP, Premier of Victoria, *Submission 18*, p. 2.

45 The Hon Bob Carr MP, Premier of NSW, *Submission 21*, p. 3.

46 Senator Andrew Murray, *Committee Hansard*, 13 February 2004, p. 7.

47 *Committee Hansard*, 13 February 2004, p. 7.

voluntary signatory to the ICCPR, it has an obligation under international law to implement Article 25.[48]

Possible problems

3.41 The Commonwealth Parliament would be seeking to rely on the external affairs power in section 51(xxix) of the Constitution to enact the Bill. Some submissions and witnesses at the hearing expressed differing views in relation to whether or not the Bill might be considered to be valid under section 51(xxix) as implementing Article 25 of the ICCPR.[49]

3.42 In any event, it is clear that there is an enormous degree of uncertainty surrounding how the High Court might interpret the Commonwealth's reliance on the external affairs power in achieving its objective.[50] For example, Emeritus Professor Hughes' submission contended that:

> [The Commonwealth] has to rely on two very general words, "equal suffrage", which at worst may merely prohibit plural voting. Given the strict construction of the language of treaties likely to be applied by the High Court, the words might not support the defining limitation to 15% presently proposed.[51]

---

48 Second Reading Speech, *Senate Hansard*, 7 August 2001, p. 25748. At the public hearing, Professor Williams referred to paragraph 21 of the 1996 general comment to Article 25 of the ICCPR by the UN High Commissioner which stated that '(a)lthough the (ICCPR) does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another': *Committee Hansard*, 13 February 2004, p. 18.

However, it should be noted that the Joint Standing Committee on Electoral Matters in its Inquiry into the Constitution Alteration (Democratic Elections) Bill 1987 (April 1988) noted that the travaux preparatoires (preparatory work) for the ICCPR had shown that the parties responsible for drafting it had not meant for the words "equal suffrage" to mean One Vote, One Value. In particular, some parties had indicated at that time that they would not sign the ICCPR if anything relating to an insistence on One Vote, One Value was included: Joint Standing Committee on Electoral Matters, *One Vote, One Value*, Inquiry into the Constitution Alteration (Democratic Elections) Bill 1987, Report No. 1, April 1988, p. 94.

49 See, for example, Professor George Williams, *Submission 6* and *Committee Hansard*, 13 February 2004; Mr Alex Gardner, *Submission 13* and *Committee Hansard*, 13 February 2004; Emeritus Professor Colin Hughes, *Submission 3*; Law Student Community Support (Law School, University of WA), *Submission 10*. The 'treaty obligation must be implemented in a way that is reasonably and appropriately adapted to that obligation': Professor George Williams, *Committee Hansard*, 13 February 2004, p. 19.

50 Professor George Williams, *Committee Hansard*, 13 February 2004, p. 19.

51 *Submission 3*, p. 1.

3.43 Professor Williams made a similar point at the public hearing:

> The first difficulty is that the wording of the legislation itself does not expressly and precisely encapsulate the treaty obligation. It implements it in the form of setting up a 15 per cent margin and then sets out other criteria relating, for example, to geography and other matters. Those matters are not found in the ICCPR. That is a potential danger in the High Court—that this parliament would have gone beyond the ICCPR and implemented it in a way that the court might see as unreasonable. Indeed, if you go back to the Industrial Relations Act case in the High Court in the late nineties, the court found that an unfair dismissal law that went beyond implementing a general principle to actually add extra standards or criteria to that principle was invalid to the extent that it added extra criteria or principles into that.[52]

3.44 In his submission, Professor Hughes also argued that substantial responsibility would be placed on the courts, particularly the High Court, to intervene in the detail of electoral legislation if the Commonwealth were to pass the Bill.[53] It should be noted that the High Court has been reluctant in the past to imply constitutional restrictions which might be likely to invite litigation, or require detailed rules or refinement, especially in relation to what is seen to be more of a political issue than a judicial one.[54] The question of electoral equality has generally been left to the parliaments to resolve.

3.45 Even if the Bill was considered to be supported by the external affairs power, the Bill could be susceptible to challenge, and possibly found to be invalid, on the basis of the implied immunity contained in section 106 of the Constitution.[55] Submissions and witnesses argued that there is a possibility that the Bill could infringe the implied immunity of the states from Commonwealth laws that operate to destroy

---

52 *Committee Hansard*, 13 February 2004, p. 19.

53 Professor Colin Hughes, *Submission 3*, p. 1.

54 G Carney, "The High Court and the Constitutionalism of Electoral Law" in G Orr, G Williams and B Mercurio, *Realising Democracy: Electoral law in Australia*, Federation Press, Annandale, 2003, p. 181. Indeed, the High Court has not given the concept of One Vote, One Value itself a precise application. It has 'baulked at entrenching voter equality, declaring that one vote, one value is neither a constitutional guarantee nor an implied right': K Robinson, "One Vote, One Value: The WA Experience" in G Orr, G Williams and B Mercurio, *Realising Democracy: Electoral law in Australia*, Federation Press, Annandale, 2003, p. 102.

55 Section 106 of the Constitution provides that '(t)he Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State'.

or unreasonably interfere with their continued existence or their capacity to function independently and effectively as state entities.[56]

3.46 In evidence, Mr Alex Gardner stated:

> There is nothing really more central to the constitution of a state than the constitution of its parliament and it seems to me as though the bill would amount to the Commonwealth parliament endeavouring to determine how the state should constitute its parliament. I think that is likely to be invalid.[57]

3.47 Mr Gardner continued:

> Even though section 106 is subject to the Constitution, the intention is pretty clear that basically the core elements of the state constitutions were to be changed by the states themselves, not by the federal parliament … [I]f you look at our constitutional history and indeed the text of the Commonwealth Constitution, the foundation provisions readily acknowledge that the state constitutions were different, that there were different electoral qualifications and different compositions of state parliaments. I think that lends some support to the fact that the Commonwealth parliament should not be legislating in this degree for state constitutions.[58]

3.48 Emeritus Professor Colin Hughes expressed a similar view:

> The undesirable aspect of a federal intervention is the constitutional theory one: there ought to be within a federal system a core of matters in which each jurisdiction has protection and there has to be a very good reason indeed for intervening in those. Something as central as the electoral system, going to its representative theories, the composition of its parliament and so forth ought to be invaded only as a last resort.
>
> …
>
> Beyond that, it is just the general proposition that the states ought to be left alone unless they are doing something quite bad that has to be stopped immediately or unless there is a very good theoretical reason that what they are doing cannot be remedied by themselves. One might have said that of Queensland in the past, but Queensland managed to find salvation with a remedy which I would suggest is very attractive to Western Australia. We might be seeing the last fitful stand before Western Australia falls over.[59]

---

56 Professor George Williams, *Submission 6*, p. 1 and *Committee Hansard*, 13 February 2004, p. 20; Law Student Community Support (Law School, University of WA), *Submission 10*, p. 14; Mr Alex Gardner, *Submission 13*, p. 1 and *Committee Hansard*, 13 February 2004, pp. 39-40.

57 *Committee Hansard*, 13 February 2004, p. 40.

58 ibid.

59 *Committee Hansard*, 13 February 2004, pp. 27 & 28.

3.49 Guidance from the High Court on this issue is limited and unresolved.[60] It might be expected that if the Bill is passed by the Commonwealth Parliament, it will be challenged in the High Court.[61] The outcome cannot be accurately predicted but, in Professor Williams' view, the legislation would more than likely be found to be invalid 'because of the way it sets down more specific standards and because there is a strong likelihood that the current High Court will see something special and untouchable about state electoral processes.'[62]

3.50 A different, more pragmatic view was taken by the Hon EG Whitlam in relation to the Commonwealth legislating in this area:

> The federal parliament, and the federal parliament alone, has the responsibility of implementing international obligations. From the very outset the federal parliament has had responsibility for external affairs. Ever since the Koowarta case the High Court has upheld that view, that is, that the federal parliament and the federal government have not only the right and the jurisdiction but also, in my view, the duty to apply best international standards. The states and territories have no international standing.
>
> …
>
> I am quite dogmatic on this, but I believe I am correct: it is a federal responsibility. It has had the jurisdiction since 1901 in external relations, and the High Court ever since Koowarta's case [*Koowarta v Bjelke-Petersen* (1982) 153 CLR 168] again and again has applied that.[63]

3.51 According to the Hon EG Whitlam, constitutional difficulties would not arise. It is simply a matter of the Commonwealth passing legislation to implement Article 25 of the ICCPR and to protect the fundamental political right of universal equal suffrage for all Australians:

> With all respect to the previous witnesses, as you have related their evidence to me, there is no difficulty if this committee promptly reports, if the Senate promptly passes the bill and if the House of Representatives promptly passes the bill. If all this happens before the end of June—and there is plenty of time to do it—then the bill itself provides the machinery. The whole of this process, which the parliament has been considering for 2½ years, will apply at the next state elections in Western Australia.[64]

---

60 See *Australian Capital Territory Pty Ltd v Commonwealth* (1992) 177 CLR 106.

61 Professor George Williams, *Submission 6*, p. 2.

62 *Committee Hansard*, 13 February 2004, p. 20.

63 ibid, pp. 15 & 16.

64 ibid, p. 13.

3.52 Another issue brought to the attention of the Committee was the use of the external affairs power in respect of a political issue where the intention is to effectively bypass the results in past failed referenda.[65] Associate Professor Mackerras suggested that another referendum should be held to reverse the verdict of the people in relation to the issue of One Vote, One Value if that is what is desired and that the external affairs power should be used 'in relation to moral issues as opposed to political issues.'[66]

Possible solutions

3.53 The Committee heard evidence that suggested ways in which to overcome the constitutional difficulties and problematic legislative design of the Bill. Professor George Williams provided some particularly insightful suggestions. He expressed the view that the issue is about right of citizens to universal and equal suffrage in Australia and not about the rights of states:

> This is a right that is appropriately implemented by laws of general application at the federal level … I think also there are special considerations that apply when we are dealing with legislation that goes to the electoral franchise in a state, because it is arguable that in some cases federal intervention may be necessary—indeed to overcome a structural flaw within a state electoral system, as we have here.[67]

3.54 Professor Williams argued that the Bill should be redrafted:

> … with a view to insulating it from constitutional attack as much as possible, establishing it as a general principle at the federal level that applies generally to all the states and, in doing so, putting forward the best possible case to the High Court to hopefully protect it from being struck down.[68]
>
> …
>
> … my first preference for this legislation would be to simply embody the international obligation and leave it at that, and implement it in a way that does not operate through federal judicial bodies but simply operates by virtue of section 109 of the Constitution, which overrides inconsistent state legislation, and leaves it to the state parliament to come up with an

---

65 Associate Professor Malcolm Mackerras, *Submission 9*, pp. 3-4. Past referenda on the issue were the "democratic elections" referendum of 1974 and the "fair election" referendum of 1988 (which sought to specifically entrench the principle of One Vote, One Value in the Constitution).

66 ibid, p. 8.

67 *Committee Hansard*, 13 February 2004, p. 18.

68 ibid, p. 20.

> appropriate electoral model—and it would need to do so because of its own constitutional system requiring that there be elections and other matters.[69]

3.55 This would mean that the Bill would operate at a high level of generality:

> … in fact [it should be] a bill that does almost nothing more than contain a simple statement that the federal legislation implements the principle of equal suffrage. It may set out a 10 per cent margin, or something like that, but actually does not contain any greater detail. The benefit of a law of general application like that would be that it simply sets down the general principle that overrides state legislation by virtue of section 109 of the Constitution and leaves all of the implementation aspects to the states.[70]

3.56 Further:

> … if you look to other countries you will see that this piece of legislation, in the sort of form it is in, would be better in something like a human rights act. That is how other countries like the UK respond to this. It is a quasi-constitutional piece of legislation that has a particularly high level of standing, is very effectively used in educational and other settings and can be used to override state and federal legislation unless it is enacted in the appropriate form. That is a more easily achievable outcome and, frankly, is also a much cheaper way to achieve most of what the constitutional change would achieve.[71]

3.57 He suggested that the 'most preferable course' would be to include such provisions:

> … in something like a human rights act implementing the ICCPR generally, and indeed it is only when you look at something like this in isolation apart from a more general regime that you would find in any human rights act that some of these issues tend to arise. It is best seen as a human rights act like principle that for some reason here is being implemented in a piecemeal way. That does not undermine its importance. That just emphasises the need and the appropriateness of implementing those other obligations.[72]

3.58 Professor Williams also canvassed another way of addressing the issue, while emphasising the negative aspects of such an approach:

> The other alternative is to be very specific in a bill like this and to actually have it contain what you see in many of the sections of the Commonwealth Electoral Act, setting out in great detail how redistributions are to occur, the

---

69 ibid, p. 24.

70 ibid, p. 19.

71 ibid, p. 23.

72 ibid, p. 19.

> bodies responsible for doing those and imposing very definite obligations upon electoral authorities to carry those out. I think that is a very problematic and difficult way of implementing a scheme like this. I think the preferable way is to go for a law of general application at a higher level of generality even than is found in this legislation.[73]

3.59 The AEC also put forward possible ways of redrafting the Bill in order to overcome the flaws in its practical operation:

> You can focus on outcomes, as the bill does and as is done in the States, and say that it does not matter how you get to this point but this is the objective you must meet. The other approach, which is the one that is taken in the Commonwealth Electoral Act in relation to House of Representatives boundaries, is to say that we are more concerned with the process—that is, we will focus on what happens not at election time but at redistribution time and seek to get a process where certain tolerances are complied with. You also have electorates which are going to move together towards closer enrolments as you get further away from the redistribution and then live with the possible consequence, for example, that one or two seats might move the other way and get outside the 10 per cent tolerance at election time. The focus is on what happens at the redistribution process.[74]

3.60 Although Professor Williams' preferred approach would leave implementation to the states and territories, it would be necessary for them to do so in a form consistent with the general obligation contained in the overarching Commonwealth legislation. This would also ensure that those states and territories that have already enshrined the One Vote, One Value principle in their electoral legislation would not be in conflict with the Commonwealth legislation, since it is the outcome which is important and not the process by which the outcome is reached.[75]

3.61 Professor Williams also stressed that the legislation should not be specifically targeted at any particular state:

> The High Court has said on past occasions—though this is a principle that is in some doubt now, as a result of a case last year—that if legislation singles out a state in any way then it has the potential to be unconstitutional … That is why this legislation, for its own constitutional validity, must be a law of general application and must be seen to operate at a level such that it confers rights upon all Australian citizens irrespective of their state residency. It simply happens that it has a particular operation in Western Australia, but you do not want to identify in the legislation that, in effect, it is secretly

---

73 ibid.

74 Mr Michael Maley, AEC, *Committee Hansard*, 13 February 2004, p. 4. The success of the Commonwealth legislation is due to it being prescriptive rather than principles-based: Mr Kevin Bodel, AEC, *Committee Hansard*, 13 February 2004, p. 6.

75 Professor George Williams, *Committee Hansard*, 13 February 2004, p. 19.

> aiming to affect only them. I think you can defend the legislation because in fact it will operate for any state that in the future decided to depart from those boundaries.[76]

3.62 There was also some support for amendment of the Constitution via referendum to found a specific new power under which the Commonwealth could legislate more directly.[77] Professor Williams stated:

> I think the best option is, as a matter of policy, to have a constitutional change that would not say, 'The federal parliament can legislate for state electoral processes' but would simply say, 'Every Australian citizen has the right to equal and universal suffrage in federal and state elections.' You would just go direct and put the principle there. That is a completely unobjectionable principle. It ought to be in our Constitution. In fact I cannot think of any other Western constitution that does not have an express right to vote, whether it be through a human rights act or a constitutional change. It is a very serious omission from our system. It is something that ought to be remedied, and that would be the best policy outcome.[78]

3.63 Mr Alex Gardner agreed:

> I personally think [amendment of the Constitution by referendum to enshrine the principle of One Vote, One Value] is the better route. I think that is the route that can legally be successful … It seems to me as though it is the politically legitimate and the constitutionally valid route to go.[79]

3.64 Although constitutional amendment may be the best option in the long term, it may not be a realistic proposition given the past failure of referenda in Australia[80] and the political difficulties that would need to be overcome in order to achieve it:

> As to the politics of achieving it, at the moment it is incredibly difficult. On the other hand, if anything was likely to get up it might be something speaking of people's own entitlements to vote. It is such a basic proposition. Then again, the hard work would have to be done—you would need bipartisan support and you would need a number of things to go with it—but

---

76 ibid, p. 20.

77 See, for example, Professor George Williams, *Submission 6* and *Committee Hansard*, 13 February 2004; Mr Alex Gardner, *Submission 13* and *Committee Hansard*, 13 February 2004; Emeritus Professor Colin Hughes, *Submission 3*.

78 *Committee Hansard*, 13 February 2004, p. 23.

79 ibid, p. 43.

80 In this context, the failed "democratic elections" referendum of 1974 and the failed "fair election" referendum of 1988 are particularly relevant.

> it is one of those things that ought to capture the public imagination with effective leadership saying, 'There's a gaping hole here in our system.'[81]

3.65 Emeritus Professor Hughes made a related pertinent point about the dangers of a referendum on the issue being defeated:

> [A]n attempt, subsequently defeated, either by the High Court throwing out the legislation or the people refusing to amend the Constitution, would to some extent legitimate the status quo and certainly encourage the defenders of electoral inequality.[82]

3.66 Professor Hughes also noted that careful consideration would need to be made in relation to the particular wording that would give effect to any constitutional change in this area: 'a provision that would be appropriate for the federal Constitution would be extremely difficult to devise.'[83]

Other issues relevant to WA

3.67 Some other issues relevant to WA were raised in submissions and by witnesses at the hearing, and these are addressed below.

Should One Vote, One Value apply to both houses of the WA Parliament?

3.68 The Committee received evidence that the principle of One Vote, One Value should be applied to the WA Legislative Assembly and not to the Legislative Council. It was argued that this would meet the dual objectives of implementing the principle and protecting regional WA.[84] The Greens (WA) asserted that the Legislative Council should reflect a regional perspective to help protect the voice of regional WA and to balance the dominance of the metropolitan region in the Legislative Assembly.[85]

3.69 At the public hearing, Mr Gardner claimed that the application of One Vote, One Value to the Legislative Assembly only would be a fair compromise for reform in WA:

> … it seems to me that the scope of the bill should only apply to lower houses and not to upper houses. From a Western Australian perspective there are two reasons for this. One is that the state Labor government's recent electoral reform proposals proposed the application of the one vote, one value principle to the legislative assembly, the house in which

---

81 Professor George Williams, *Committee Hansard*, 13 February 2004, p. 23.

82 *Submission 3*, p. 2.

83 *Committee Hansard*, 13 February 2004, p. 31.

84 Greens (WA), *Submission 15*, p. 1.

85 ibid, pp. 1-2.

> government is formed, but not to the legislative council. Indeed, the model that was described for the legislative council was something akin to the Senate—that is, it is a house in which the various regions of the state are equally represented. It was proposed that there would be six regions each with six members of the council. It seems to me as though Senator Murray's bill overlooks the natural comparison with the Senate.[86]

3.70 Associate Professor Mackerras agreed in his assessment of the role of the Legislative Council:

> At a state level it seems to me that the WA Legislative Council is the chamber most like the Senate – malapportioned, indeed, yet turning in results which are very fair.[87]

Should the issue be resolved within WA?

3.71 Some submissions and witnesses asserted that any changes to WA's electoral laws to entrench the principle of One Vote, One Value should take place in WA and not at the Commonwealth level. Emeritus Professor Hughes maintained that allowing WA to resolve the issue internally would ensure that WA 'gets a solution that is appropriate, and which should settle for most purposes a divisive political question'.[88]

3.72 In evidence, Mr Gardner conveyed similar thoughts:

> I think these matters can be solved in Western Australia. They would have been solved in Western Australia had the correct legal view being taken at the President's vote in 2001. The other point about this is that, as a matter of the expenditure of time and energy, I suspect that the course proposed with this bill, even if it were redrafted to address some of the technical objections I have seen in some of the other submissions and even if it were to then go before the High Court and be tested constitutionally, will take more political effort and more time and energy on the part of a number of individuals than would resubmitting the matter within Western Australia to the vote of the parliament.[89]

3.73 However, the Hon Jim McGinty did not agree with such a proposition:

> … the West Australian state parliament is incapable of reforming itself, and that is why I strongly support this legislation.
>
> …

---

86 *Committee Hansard*, 13 February 2004, p. 39.

87 *Submission 9*, p. 4.

88 *Submission 3*, p. 2.

89 *Committee Hansard*, 13 February 2004, p. 42.

> Those people who stand to lose power and influence are those people who opposed the change. They will not change and therefore the parliament itself is incapable of adopting a position of principle because it affects existing power arrangements.[90]

3.74 He noted that it was not the most desirable solution:

> We believe, first of all, that it should be in the Western Australian parliament; failing that, reference to the courts and, failing that, the only other avenue by which we can achieve this matter is by the intervention of the federal parliament. It is the last option; it is not the favoured option; but the others have proven to no avail. We did go to the courts in the hope of achieving justice and it did not work.[91]

3.75 The Hon Jim McGinty also indicated that, while the WA Government remained committed to the principle of One Vote, One Value, it would not continue to focus on it:

> We indicated when we lost in the High Court that we had committed so much time, energy and passion to the issue of electoral reform in Western Australia that it was time, for the life of this government, to move on and focus on other matters. It is not our intention during the life of this government—and that is for another 12 months; the next state election is due in February 2005—to have more parliamentary time spent on this matter. We also believe that to do that would be a futile exercise, given that the parliament has dealt with it and we have other priorities that we now need to proceed with.[92]

3.76 The Committee also heard evidence in relation to the added complication that state referendum results are not binding in WA. Such a situation could arguably give greater credibility to the Commonwealth legislating to resolve the issue since, even if it were put to a referendum of the people and the result was "yes", the law would not be changed.[93] The absolute majority consent of the two houses of the WA Parliament would be necessary to effect the change, in addition to the referendum result.[94] As the Hon Jim McGinty noted in evidence at the hearing:

> There is a Referendums Act in Western Australia. That requires that the parliament pass a law to submit a question to the people. Interestingly the results of that referendum, unlike a referendum to change the

---

90 *Committee Hansard*, 13 February 2004, p. 33.

91 ibid, p. 37.

92 ibid, p. 35.

93 ibid.

94 Mr Alex Gardner, *Committee Hansard*, 13 February 2004, p. 41.

> Commonwealth Constitution, are not binding. If a referendum were conducted on this question, for instance, that would not change the law. The parliament would in the light of that referendum need to pass a law to give effect to this issue, and it would need to be passed in accordance with the Constitution. So I think the answer to your question is that there is a provision for a referendum to be conducted but that does not of itself change the law.[95]

The Committee's conclusions

3.77 The Committee strongly supports the policy behind the Bill and believes that the principle of One Vote, One Value is a fundamental political right that should be firmly entrenched in all jurisdictions in Australia. While variation in numerical equality of electorates has long been acceptable in Australia, the Committee does not believe that malapportionment to the extent currently existing in WA is acceptable.

3.78 Several other states and territories in Australia experience geographical problems similar to those in WA, but, apart from Queensland where some weighting is allowed for rural areas, they no longer differentiate between metropolitan and non-metropolitan areas. The situation in WA is even more difficult to justify when the principle of One Vote, One Value is applied to WA at the Commonwealth level for the House of Representatives and at the Senate level *within* WA. The Committee recognises the current WA Government's efforts to implement the principle in WA and the considerable difficulties it has faced in attempting to do so.

Recommendation 1

3.79 The Committee endorses the principle of One Vote, One Value that the Bill seeks to implement.

3.80 Despite agreeing with the Bill's objectives, the Committee holds the view that the range of technical flaws it contains is sufficiently serious to make the legislation impracticable, uncertain and unworkable in practice. Further, the Committee is concerned that the Bill may not sustain judicial challenge, particularly under sections 51(xxix) and 106 of the Constitution. It is not necessary or desirable for the Commonwealth to set out specific requirements for those states or territories where the principle of One Vote, One Value is already achieved. The Committee therefore recommends that the Bill not be enacted in its current form.

3.81 The Committee recommends that consideration be given to various alternatives that might overcome the difficulties identified during this inquiry.

---

95 *Committee Hansard*, 13 February 2004, p. 35.

3.82 One alternative is that the principle of One Vote, One Value should be expressed in generality in Commonwealth legislation. This would enshrine at an appropriate level Australia's obligations under the ICCPR in relation to equal and universal suffrage. A particularly persuasive argument is that the issue would be more appropriately dealt with in general Commonwealth human rights legislation which would override any inconsistent state legislation by virtue of section 109 of the Constitution.

3.83 Such an approach would not only ensure that a state such as WA complies with the principle but would also prevent states and territories from reverting to malapportionment in the future. Based on the evidence it received during this inquiry, the Committee does not consider that this course of action would be viewed as unduly interfering with the right of the states to function independently under section 106 of the Constitution.

3.84 The Committee also does not believe that the Bill should contain the specific mechanics and processes by which the principle should be implemented in each jurisdiction of Australia. The implementation aspect would be more appropriately left to the states and territories, so as not to offend the implied immunity of the states from Commonwealth interference under section 106.

3.85 One issue that may be raised is to what extent this principle should apply to the Commonwealth Parliament as well as the states and territories. The Committee notes that the Commonwealth has adopted the principle of relative electoral equality in the House of Representatives in relation to electorates *within* each state and territory. However, the constitutional guarantee of a minimum number of seats for each state means that there is some discrepancy in electorate sizes *between* jurisdictions, specifically in relation to Tasmania. More obviously, the Senate, created specifically to reflect the compact of Federation, guarantees equal representation of the six states regardless of the number of electors in each. Because of that history and the constitutional entrenchment of the provisions relating to the Senate and the House of Representatives, the Committee considers that current legislative arrangements apply the principle of One Vote, One Value as far as is possible under the Australian Constitution and the compact between the states at Federation.

3.86 While proponents of malapportionment based on geography *within* a state like WA may argue that it is justified as a principle by analogous Commonwealth malapportionment *between* the states, such representation cannot be changed unless it is overturned through the specific mechanisms provided by constitutional referendum. The Committee notes that in no state has malapportionment been a consequence of a compact between constituencies (even if that were valid). Neither is the Commonwealth malapportionment one that is between metropolitan and non-metropolitan areas or between various demographics; it is between *states*. The Committee is of the view that such an analogy is flawed.

3.87 Another alternative which may be considered is to include the general concept of universal and equal suffrage in Commonwealth and state/territory elections in the

Constitution. However, the Committee acknowledges that such an approach may involve significant practical and political difficulties and that the failure of a referendum in this area would, to a large extent, legitimate the status quo in WA.

Recommendation 2

3.88 The Committee recommends that the State Elections (One Vote, One Value) Bill 2001 [2002] should not be agreed to because of fundamental technical and constitutional problems. The Committee recommends that consideration should be given to one of the following options:

- **redrafting the Bill to express the principle in generality. This would effectively implement in Commonwealth legislation Australia's obligations under the ICCPR in relation to universal and equal suffrage; or**

- **including the principle in broader Commonwealth legislation that enshrines human rights under the ICCPR generally.**

3.89 The addition of a tolerance level for electorate sizes may usefully be included in any such legislation. However, the Committee urges that caution be exercised if a tolerance level is included, since some evidence presented during the inquiry suggests that, if challenged in the High Court, such a defining limitation may be deemed to go beyond the terms of the ICCPR itself.

3.90 If it is considered pertinent to include a tolerance level, the Committee considers that the appropriate level should be no more 10%, rather than the 15% in the current Bill. While a 10% deviation has been generally accepted in Australia as the uniform minimum standard for One Vote, One Value, the Committee considers the 3.5% variation permitted in each House of Representatives' electorate at the Commonwealth level to be ideal.

Recommendation 3

3.91 The Committee recommends that, if it is considered necessary to include a variation level for electorate sizes in such legislation, the appropriate variation should be no more than 10% rather than the 15% included in the current Bill, in order to accord with the accepted uniform minimum standard in Australia for the principle of One Vote, One Value.

3.92 The Committee also notes the evidence it received in relation to the problems and uncertainty that may arise when provision is made in legislation for significant judicial review of the practical operation of electoral equality matters. The Committee does not consider this to be appropriate, and notes that section 77 of the *Commonwealth Electoral Act 1918* provides that decisions of the Electoral Commissioner or Redistribution Commissioners are final and shall not be challenged or reviewed in any court. While as far as the Committee is aware this provision has not been tested in the courts, the Committee considers that there should be similar limitations on review by the courts of determinations under any such legislation.

Recommendation 4

3.93 The Committee recommends that any future legislation of this nature should restrict judicial review in relation to the practical operation of electoral equality.

Senator the Hon Nick Bolkus

Chair

ADDITIONAL COMMENTS BY SENATOR ANDREW MURRAY

This Committee Report once again confirms the value of the Senate legislative review process. I thank the Committee for their efforts.

I agree with the Report and its findings. The Bill was designed not just to enshrine in Australian law the most fundamental of universal political rights and principles, but as footnote 7 in chapter 2 makes clear, to try and implement the recommendations of the West Australian Commission on Government 1995/1996. The route proposed by the Committee will make the Bill far less subject to challenge or difficulty and I intend to have the Bill reworked accordingly.

Senator Andrew Murray

Australian Democrats

APPENDIX 1

SUBMISSIONS RECEIVED

Submission No.	Submitter
1	Professor David Carment
2	The Hon William R Withers
3	Emeritus Professor Colin Hughes
4	Electoral Reform Society of Western Australia
5	ACT Electoral Commission
6	Professor George Williams
7	Tasmanian Electoral Office
8	The Hon Jim McGinty MLA, WA Attorney General and Minister for Electoral Affairs
8A	The Hon Jim McGinty MLA, WA Attorney General and Minister for Electoral Affairs
9	Associate Professor Malcolm Mackerras
10	Law Student Community Support, University of WA
11	The Electoral Reform Society of South Australia
12	Proportional Representation Society of Australia
13	Mr Alex Gardner
14	The Hon EG Whitlam AC QC
14A	The Hon EG Whitlam AC QC
15	The Greens (WA)
16	Mr Jon Stanhope MLA, ACT Chief Minister and Attorney General
17	The Hon Peter Beattie MP, Premier of Queensland
18	The Hon Steve Bracks MP, Premier of Victoria
19	Australian Electoral Commission

Submission No.	Submitter
20	The Hon Jim Bacon MHA, Premier of Tasmania
21	The Hon Bob Carr MP, Premier of NSW

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Friday 13 February 2004

Australian Electoral Commission

Mr Michael Maley, Director, International Services Section

Mr Kevin Bodel, Assistant Director, Parliamentary and Ministerial Section

ACT Electoral Commission

Mr Phillip Green, Electoral Commissioner

The Hon EG Whitlam AC QC

Professor George Williams

Emeritus Professor Colin Hughes

WA Government

The Hon Jim McGinty MLA, WA Attorney General and Minister for Electoral Affairs

Mr Alex Gardner