

## **SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS**

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### **I Introduction**

1. This submission examines the results of the 2019 federal election and the operation of the electoral system from the perspective of fairness to voters and consistency with democratic principles. It builds upon a previous submission to the Committee in 2016, but with new data, new evidence drawing upon the experience of a number of jurisdictions, an analysis of relevant decisions of the High Court and a revised and expanded set of recommendations.
2. The issue of the fairness – or lack thereof - of Australia’s electoral system is virtually invisible in public debate, yet it is of critical importance to ensuring that our democracy is truly representative. For most people, casting a vote is the only opportunity they have of influencing government, therefore it is of paramount importance that the electoral system operates in such a way as to give effect to their views.
3. This submission addresses two key issues: Do the 2019 election results accurately reflect the views of the voting population and, if not, what alternative systems are available?
4. The Committee provides the only formal opportunity – in the sense of being a part of the parliamentary process - available to ordinary members of the public to have this important issue raised and considered. I would therefore urge the Committee to take the issues presented in this submission into consideration.
5. Part II of the submission discusses the unfairness inherent in the electoral system contained in the *Commonwealth Electoral Act 1918* (Cth). Part III examines the impact that the distortions

in the electoral system have on the formation of government. Part IV discusses the affects that the electoral system has on the political process. Part V examines the extent to which the electoral system is compatible with democracy. Part VI examines alternative electoral systems and the extent to which they serve the objectives of proportionality and of giving voters an identifiable representative to whom they can take their concerns. Part VII concludes with recommendations to the Joint Committee.

## II Unfairness of the current electoral system to minor parties and their voters

6. The electoral system contained in the *Commonwealth Electoral Act 1918* (Cth) is markedly unfair to minor parties and thus by extension to their voters.
7. This is reflected in Figure A, which contains data from the 2019 election obtained from the Australian Electoral Commission. It compares (i) the percentage of the national first preference vote for the House of Representatives won by each party, (ii) the number of seats that those votes yielded and (iii) the notional number of seats that would have been yielded had the electoral system been such as to allocate seats in proportion to votes.
8. Approximately 2% of the national first preference vote was allocated to parties not reflected in this table. For this reason, and because of the effects of rounding, the total number of seats in the fourth column does not add up to 151. It should also be noted that the percentage of first preference votes for Independents in the table reflects the Australian Electoral Commission’s combined percentage first preference vote cast for Independent candidates.

**Figure A**

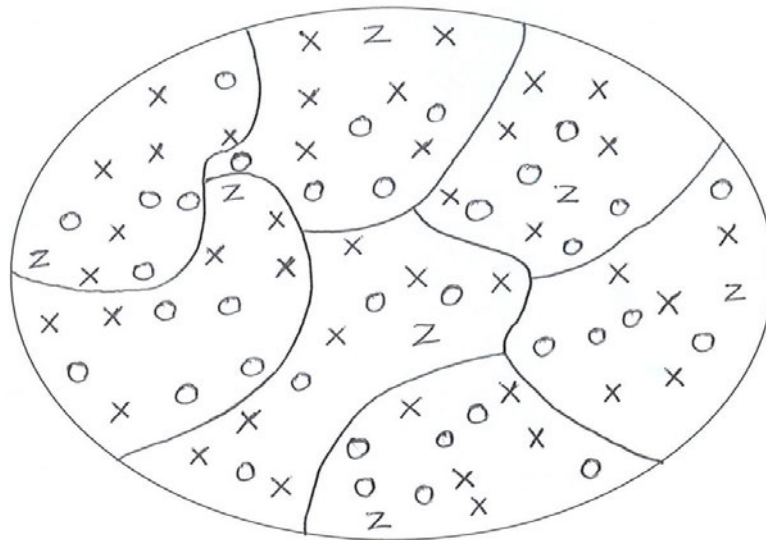
	<b>Percentage of first preference votes</b>	<b>Seats won</b>	<b>Notional seats allocated proportionately to share of first preference votes</b>
Australian Labor Party	33.34	68	50
Liberal	27.99	44	42
The Greens	10.4	1	16
Liberal National Party	8.67	23	13

The Nationals	4.51	10	7
United Australia Party	3.43	0	5
Independents	3.37	3	5
Pauline Hanson's One Nation	3.08	0	5
Centre Alliance	1.85	1	3
Animal Justice Party	0.82	0	1
Christian Democratic Party	0.68	0	1
Fraser Anning's Conservative National Party	0.54	0	1
Katter's Australian Party	0.49	1	1
<b>TOTALS</b>	<b>96.05</b>	<b>150</b>	<b>150</b>

9. As is evident from these figures, the electoral system gives an enormous advantage to the two major political blocs constituted by the Australian Labor Party and the Coalition. The Labor party's 68 seats significantly exceeds its notional entitlement of 44. Similarly, the Coalition's 77 seats (the combined total of seats won by the Liberals, Liberal Nationals and Nationals) are substantially in excess of its notional entitlement of 62.
10. By contrast, the electoral system was extraordinarily unfair to Greens voters, who are represented by just one seat as compared to their proportional entitlement of 16.
11. These discrepancies are not surprising. They are the natural consequence of any voting system based on single-member electorates.
12. The reason why an electoral system based on single-member electorates is inherently – and inevitably - unfair is illustrated by Figures B and C below, which represent a hypothetical country with a seven-seat Parliament, 12 voters in each electorate and three political parties, X, O and Z. These diagrams represent on a small scale what happens on the large scale in Australia.

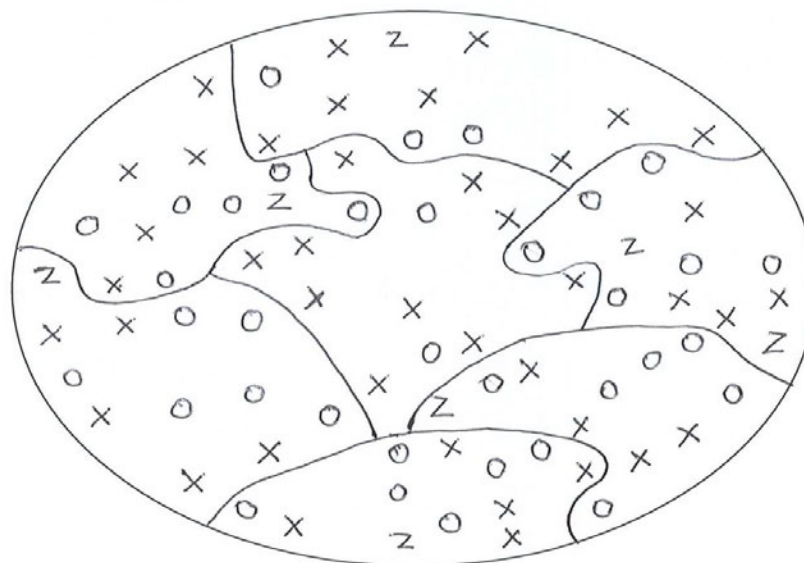
13. It is crucial to note that in each diagram *the number of votes won by each party X, O and Z remains exactly the same, as does the physical location of their voters.* The only difference lies in how the electoral boundaries are drawn.
14. Irrespective of how the boundaries are drawn, party Z wins none of the seven seats, even though its seven out of 77 votes would entitle it to one of the seven seats. The problem faced by party Z is that because its supporters are widely spread, there is no single constituency in which it has a majority.
15. What is also striking is how a change in electoral boundaries causes a *reversal* in the fortunes of parties X and O: In Figure B, party X wins a clear majority of seats, even though its vote is the same as the combined votes of parties O and Z.
16. However, in Figure C, party X wins a smaller number of seats than does party O, even though party X has more votes. Furthermore, party O would form government, even though its vote is less than parties X and Z combined, and is less even than party X on its own. In other words, the critical factor that determines the outcome of elections is not how much support a party has, but rather the accident of where its supporters happen to live. A more arbitrary electoral system is difficult to imagine.

**Figure B**



	Votes	Seats
	X: 42	X: 6
	O: 35	O: 1
	<u>Z: 7</u>	<u>Z: 0</u>
TOTAL	84	7

**Figure C**



	Votes	Seats
	X: 42	X: 2
	O: 35	O: 5
	<u>Z: 7</u>	<u>Z: 0</u>
TOTAL	84	7

17. The fact that the *Commonwealth Electoral Act 1918* (Cth) embodies alternative voting in no way ameliorates its unfairness to voters. The ability to cast a first-preference vote in favour of a minor party or Independent merely postpones the inevitable necessity of voting for one of the major blocs if one's vote is to affect the outcome in one's electorate – unless one votes in one of those few electorates where unique local circumstances favour the election of minor party candidates or an Independent.
  
18. In addition, all votes cast other than for the candidate who wins an electorate have no impact at all on the composition of Parliament, which means that in electorates which are safe for one or other of the major parties – a situation which can persist for decades - voters may as well not go to the polls.
  
19. The fact that the geographic distribution rather than aggregate number of votes is critical to a party's success, means that the electoral system not only confers an unwarranted dominance over the political process on the two major parties but also means that the random factor of the location of electoral boundaries has a decisive effect on election results. For example, while

12 930 814 votes were cast in the 2007 election, the outcome was effectively decided by just 8 772 voters in 11 electorates<sup>1</sup> who, if they had given their first preferences to the Coalition instead of to Labor, would have handed victory to the former – and this in an election which, the allocation of seats in Parliament (83 to Labor and 65 to the Coalition) gave the appearance of a Labor landslide. In 2010 the margin was even closer - 13 131 667 votes were cast, but had only 2 175 voters in two electorates<sup>2</sup> voted for the Coalition instead of Labor (and had the Greens and independents made the same decisions as to who to support in government), the Coalition would have won power. How can an electoral system be considered fair when the winning of government depends upon the arbitrary fact of the geographical location of a tiny number of voters?

### III Impact of the electoral system on the formation of government

20. Even setting aside the fact that the decisive role played by the location of electoral boundaries always leads to parties receiving a different percentage of seats to that which their share of the nationwide vote would entitle them to, the single-member electorate system has the far more egregious consequences that it frequently leads to a party winning government without obtaining a majority of votes nationwide and sometimes even leads to a party winning a majority of seats with fewer votes than the major opposition party. This is illustrated by Figure D, containing the results from the federal elections held in 1990 and 1998:

**Figure D**

<b>Year</b>	<b>Party</b>	<b>Nationwide percentage of first preference votes</b>	<b>Percentage of House of Representatives seats</b>
1990	Labor	39.4%	52.7%
	Coalition	43.4%	46.7%
1998	Labor	40.1%	45.2%
	Coalition	39.1%	54%

21. What is striking about these results is that clearly the ‘wrong’ party won both elections, in that the victor (that is, the party which obtained a majority in the House of Representatives) was *less* popular in terms of nationwide share of the first preference vote than the vanquished. This

<sup>1</sup> These electorates were: Bass, Bennelong, Braddon, Corangamite, Cowan, Deakin, Flynn, Hasluck, Roberston, Swan and Solomon.

<sup>2</sup> The electorates of LaTrobe and McEwen.

is by no means a rare occurrence: Governments also came to power with fewer votes than were won by the opposition in 1954, 1961 and 1969.

#### **IV Impact on the political process**

22. Another result of a single-member electorate system is that it inevitably leads to a never-ending transfer in power between two parties, and thus the establishment of what is really a duopoly in place of a democracy. This, I would suggest, is a key reason why, as is frequently noted in the press and in public surveys, voters are becoming resentful of, and disengaged from, the political process in general and from the two major political parties in particular.
23. A reflection of this is the fact that an increasing number of voters are expressing their frustration by directing their first preference votes to parties other than Labor or the Coalition: In the 2007 election 14.5% of first preference votes went to minor parties or independents,<sup>3</sup> but this increased to 18.2% in 2010, to 21% in 2013, to 27% in 2016 and 25% in 2019 – and this is despite the fact that a first preference vote cast other than for one of the major parties amounts, in most instances to a gesture made before having to make a reluctant choice between the major parties, neither of which the voter may actually support.
24. Yet these figures probably fail to reflect the true level of support enjoyed by minor parties and independents, as their share of the vote would doubtless increase were there to be a real chance of their candidates being elected. Furthermore, in cases where the appeal of minor parties and independents is currently confined to specific regions (for example, the Centre Alliance which draws the bulk of its support from South Australia, and One Nation which draws its support from Western Australia), an electoral system which gave voters throughout the country the opportunity to contribute to candidates from these parties securing representation would also see more votes being cast in their favour.
25. The fact that the current electoral system has a deterrent effect on casting votes in favour of minor parties and independents – such votes being characterised as ‘wasted’ by the major parties – is pernicious, because it means that the system is not neutral as between parties, and that *the system itself*, and not just the true political sentiment of voters, becomes a factor in deciding how to vote. It is surely not consistent with democracy or equal opportunity as between political parties for this to be the case yet, to repeat what has been said earlier, a single-

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<sup>3</sup> That is to parties other than the Liberals, Labor and the various manifestations of the Nationals (Liberal Nationals, Nationals and Country Liberals ). The calculation ignores informal votes.

member electorate system has the inevitable consequence of dominance by two major blocs to the exclusion of other political formations and, in most electorates, deprives votes cast in favour of minor parties or independents having any effect on the outcome. The fact that the major parties exploit this fact - and indeed draw attention to it during election campaigns - shows how loaded in their favour the current system is.

26. Finally, under present electoral circumstances, a person aspiring to a political career must of necessity make their home with one of the two major parties - and trim their political views to conform to their discipline - if they want a realistic chance of being elected to Parliament. If our electoral system was changed to one based on proportional representation, the calibre of person who became involved in politics would likely be improved, because a broader range of parties representing a broader range of political views would have a real chance of electoral success and would therefore be able to draw on a wider pool of talent from the community.

## **V The electoral system and democracy**

27. To what extent does our electoral system conform to the requirements of democracy? First, it is important to understand that democracy is a system of government, not a moral concept. Such moral value as attaches to democracy depends upon the extent to which it serves some norm which is *external* to it. So what is the underlying norm served by democracy? According to political theory developed in Ancient Greece, it was the entitlement of citizens to participate in law-making. During the Enlightenment this came to be phrased in the language of rights – that each citizen was of equal status, from which flowed an equal right to participate in law-making, the only practical way of achieving that being through the mechanism of representative democracy. It was crucial to the success of vindication of that right that the franchise not be restricted by class or be distorted in its effect by, for example, weighting one person's vote differently from that of another, or by allocating law-making authority to legislative chambers representing social classes unequally.

28. Once one appreciates that democracy is a mechanism used to give effect to a higher norm, it follows that whether an electoral system is consistent with democracy is a question of degree, and depends on the extent to which that system gives effect to the right of citizens to *equal influence* over the law-making process. Thus the effectiveness of an electoral system in serving its purpose must be determined by how accurately it reflects the political sentiments of the voters, and an electoral system is less consistent with democracy the greater the extent that arbitrary factors distort that reflection.



29. It is therefore incorrect to say that compliance with the principles upon which democracy is based is satisfied simply by holding elections. That would be to reduce democracy to mere formalism and would mean that no principled distinction could be drawn between countries in which there is a right to vote but only for one party, those in which there is a multi-party system but government control over the media, those in which there is a multiparty system and free media but an electoral system which does not accurately reflect voter sentiment and those in which there is a multiparty system with free media and in which the electoral system is designed so as to ensure that every vote is of equal effect. Only the last of these categories would be fully consistent with the principles underlying democracy.
30. In comparison with the various systems of government in the world, Australia's system falls within the spectrum of democracies in that s 24 of the Constitution requires that Members of the House of Representatives be 'directly chosen by the people' and the *Commonwealth Electoral Act 1918* (Cth) establishes a system where people vote in free elections. However, given that the electoral system so obviously does not lead to the views of voters being accurately represented in the House of Representatives and that the effect of a person's vote depends on the arbitrary fact of the location of electorate boundaries, it cannot be said that it gives each voter an equal right to affect the outcome of elections. Furthermore, our electoral system not infrequently cannot pass even the most basic test of a democracy, which is that the government should be formed by the party or parties which have the support of a majority of voters. For these reasons it is clear that the electoral system falls short of being truly democratic.
31. The root cause of this problem is that, as it stands, the Commonwealth Constitution defines no standard with which electoral legislation must comply. Despite this lack of specificity in the Constitution, the validity of the electoral system has twice been challenged (on both occasions unsuccessfully) by litigants in the High Court, although on narrower grounds than that as a geographically-based system it is inherently unfair.
32. In the first of these, *Attorney General (Cth); Ex rel McKinlay v Commonwealth*,<sup>4</sup> a challenge was launched against a provision in the Act permitting a 10% deviation in voter population between electorates. The court rejected the challenge on the basis that the Constitution does not mandate a particular electoral system other than by using the phrase 'directly chosen by the people', and that the system embodied in the Act provided for a direct choice by the people. However, some of the justices stated that, at some point (which they did not define) and

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<sup>4</sup> (1975) 135 CLR 1.

electoral system might become so unequal in its treatment of voters as to no longer comply with the mandate of direct election by the people.

33. The second case, *McGinty v Western Australia*,<sup>5</sup> was as the result of a challenge to provisions in the *Electoral Distribution Act 1947* (WA) which worked in such a way as to lead to a situation where electorates in metropolitan Perth had an average of 23 000 electors (plus or minus 15%) while rural electorates had an average of 12 000 electors (plus or minus 15%). Although this case related to State law, what the Court had to say is of relevance to the federal level, because the state and Commonwealth Constitutions all embody the same system of representative government. The court rejected the challenge, holding that, just as in the case of the Commonwealth Constitution, the Constitution of Western Australia did not mandate any particular electoral system, and that the degree of variation between electorates was permissible in a system of representative government (the phrase used by the court to refer to democracy). Members of the court did however re-affirm what had been stated in *McKinlay* to the effect that an electoral system could be so disproportionate in its treatment of voters as not to be consistent with representative government,
34. The problem with these decisions is that although in both cases justices of the High Court said that - at some point - an electoral system could be so disproportionate in its treatment of voters as to no longer be considered to be consistent with democracy, they did not produce any overarching theory to justify that statement or explain how disproportionate an electoral system would have to be before it was inconsistent with democracy.

## **VI Alternative electoral systems**

35. Our electoral system is fundamentally unfair to voters and to political parties. The fact that it is founded upon single-member electorates has the inevitable effect that it distorts rather than reflects the political sentiment of voters, because in the vast majority of electorates a voter who does not support either of the major political blocs is nevertheless forced to choose between whichever of them is the lesser of two evils if their vote is to have any chance of affecting effect on the outcome of an election – and votes cast for parties which fail to win the seat have no effect on the composition of the House of Representatives.

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<sup>5</sup> (1996) 186 CLR 40.

36. There are electoral systems which could ensure proportionality between the nationwide support parties have and the seats they win in the House of Representatives while maintaining connection between voters and an identifiable local representatives to whom they can take their concerns. Two are of particular interest, in that they strike a balance between nationwide representivity and representation of identifiable geographic electorates.
37. Under the Mixed-Member Proportional (MMP) system - used in Germany, New Zealand, Scotland and Wales – half the seats in Parliament are filled from single-member electorates and half from party lists. A voter has two votes, one for their single-member electorate and another for whichever party they favour, with the objective that the combined total of electorate seats won by a party plus its allocation of seats drawn from party lists must be proportionate to the percentage of party votes it obtained nationwide.
38. MMP produces highly proportional results. Its only drawback is that because half the seats are filled from party lists, parties rather than voters have control over who is elected.
39. The Single Transferrable Vote (STV) system – used in the Republic of Ireland, Northern Ireland, Malta, Finland, Tasmania and the ACT – is based on multi-member electorates, where voters allocate votes to candidates in order of preference. The degree of nationwide proportionality achieved under this system depends on the number of seats per electorate – the larger the number of seats, the more proportional the outcome.
40. The degree of proportionality achieved by STV can be determined if one analyses its operation with a view to determining how often an STV election leads to a government achieving power without obtaining a majority of votes. In Ireland, which uses a mix of three, four and five member electorates, 18 elections have been held since STV was introduced,<sup>6</sup> and governments won a majority of seats with less than a majority of votes in only two of them.<sup>7</sup> The experience of Tasmania<sup>8</sup> is particularly informative, because it had seven-seat electorates between 1959 and 1986, during which period eight elections were held and no government won power with less than a majority of votes. But after 1989, when the number of seats per electorate was

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<sup>6</sup> Information on elections in Ireland is obtainable from the Department of Environment, Community and Local Government at <<http://www.environ.ie/en/LocalGovernment/Voting/>>. A convenient summary of election results since 1918 can be found at Nicholas Whyte, *Dail Elections* (3 June 2007) <<http://www.ark.ac.uk/elections/gdala.htm>>.

<sup>7</sup> In 1965 and 1969.

<sup>8</sup> Information on elections in Tasmania can be obtained from the Tasmanian Electoral Commission at <<http://www.tec.tas.gov.au/>> (accessed 10 October 2015). A summary of Tasmanian election results since 1909 can be found at Parliament of Tasmania, *House of Assembly Election Results 1909-2014* (3 April 2014) <<http://www.parliament.tas.gov.au/tpl/Elections/ahares.htm>> .

reduced to five, governments were twice able to win power with a minority of votes in the eight elections held since that change came into effect.<sup>9</sup>

41. The advantage of STV is that as well as being able to produce proportionate results between parties,<sup>10</sup> all members of the legislature are identifiable with a specific electorate, and that unlike in systems which rely on party lists, voters rather than parties have ultimate control over whether each candidate is elected. This is true even as between candidates of the same party because, unlike in the case of single-member electorates where supporters of a party have to accept whoever that party selects as its candidate, in multi-member electorates voters can express a preference as to which of a party's candidates they prefer.
42. Because it is extremely rare for a party to win an absolute majority of votes nationwide (and thus a majority of seats), coalition government is almost inevitable under proportional systems.
43. This has led to the criticism that such electoral systems result in governmental instability. This conclusion rests on the false hypothesis that coalition government is inherently unstable. Data on the effect of electoral systems on governmental stability do not support the contention that systems that lead to coalition government are inherently unstable. In the most comprehensive study, a tabulated ranking of countries listing their electoral systems and durability of governments indicated that whereas some countries (for example, the United Kingdom and Jamaica) using disproportionate single-member constituency systems produce long-lived governments, other countries using the same system (such as India and Papua-New Guinea) are afflicted with severe governmental instability. Conversely, while some countries using proportional representation (such as Italy and Israel) are prone to instability, others (such as Switzerland and Austria) have governments that are more stable than those in the United Kingdom. Another interesting statistic is that while there have been the same number of elections in Germany since 1949 as in the United Kingdom (19 in each country) overall German politics has been more stable, with eight Chancellors compared to 14 Prime Ministers in the United Kingdom, despite that the former uses a highly proportional system and the latter single-member electorates.

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<sup>9</sup> In 1982 and 1989.

<sup>10</sup> For an analysis of the proportionality of various voting systems see David Farrell and Ian McAllister, *Voter Satisfaction and Electoral Systems: Does Preferential Voting in Candidate-Centred Systems make a Difference?*(2004) Center for the Study of Democracy, UC Irvine <http://www.escholarship.org/uc/item/4c51z9mt?display=all#page-10> and H Catt, P Harris and N Roberts, *Voter's Choice: Electoral Change in New Zealand?* (Dunmore Press, 1992).

44. Moving closer to home, New Zealand, which uses a system of proportional representation, has had three Prime Ministers in the last ten years, whereas Australia has had five. In other words, the data fails to show any causative relationship between coalition government and governmental instability. This result is not surprising - it simply reflects the fact that a whole range of factors, including economic prosperity, ethnic composition and national character affect the politics of a country - and thus how stable its governments are.
45. Perhaps the most powerful point that can be made against those who argue that coalition government is unstable is to point to the fact that here in Australia, coalitions have held power for 59 of the 118 years the Commonwealth has been in existence. Of that period, 42 years are accounted for by three very long periods of Liberal / Country Party or Liberal / National Party coalitions, from 1949-72, 1975-83 and 1996-2007. Thus for refutation of the idea that coalitions are inherently unstable one need look further than our own experience.

## **VI Recommendations**

46. We need to recognise that our current system is defective and needs to be replaced.
47. I therefore recommend that the Joint Committee establish an inquiry, the terms of reference of which would be to examine the electoral system for the House of Representatives and to consider which alternative system(s) would best serve the principles of democracy - specifically that, as far as practicable, each vote should have an equal effect on the composition on the House of Representatives and each voter should have identifiable local representative(s).
48. On the basis of that analysis the inquiry should be tasked with identifying which electoral systems should be put to voters in a plebiscite. The plebiscite should consist of two questions: the first asking voters whether they want to depart from the existing electoral system, the second as to which of the possible alternative systems identified by the inquiry they favour.
49. The plebiscite should then be followed by a constitutional referendum in which voters are asked whether they wanted to retain the existing system or adopt whichever alternative system obtained the most votes in the plebiscite.
50. The electoral system should give voters a real choice, a real voice and a real opportunity to see representatives reflecting their views gain representation in Parliament. Irrespective of where a vote is cast, it should have an equal impact on the composition of the House. Our current system does not do this, and that is why it needs to be replaced.