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Consensus statement on the Reform of the Tasmanian Constitution

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Australian Association of Constitutional Law Working Group on  
Tasmanian Constitutional Reform:

## **Consensus statement on the Reform of the Tasmanian Constitution**

BRENDAN GOGARTY, GEORGE WILLIAMS, MICHAEL TATE,  
LEIGH SEALY, DAVID CLARK, TERESE HENNING,  
ANJA HILKEMEIJER, MICHAEL STOKES, RICHARD HERR,  
PETER PATMORE, MATTHEW VERNEY, BEN BARTL, SIMON GATES

### **Abstract**

This is a consensus statement by a range of constitutional practitioners from Tasmania and across Australia on the proposal to give state constitutional recognition to Tasmanian aboriginal First Peoples. We strongly support that aim. However, we consider the current *Constitution Act 1934* (Tas) must itself be subject to reform to make that recognition meaningful. The *Constitution Act* preamble is out of date, a legacy of our colonial past and does not reflect the shared values and principles of contemporary Tasmanian society and Government. We urge the Government to refer the entire Constitution to the Tasmanian Law Reform Institute for public consultation, review and reform.

### **I CONTEXT**

On 7 June 2016, the Premier and Minister for Aboriginal Affairs, the Hon Will Hodgman MP, released a draft amendment to the Preamble to the Constitution. The amendment is intended to give recognition to the First People and the traditional and original owners of Tasmania as part of Tasmanian Government's commitment to resetting its relationship with Tasmania's Aboriginal community.

The new preamble would read (with additional text in italics).

Whereas by an Act of Council instituted an Act to establish a Parliament in Van Diemen's Land and to grant a Civil List to Her Majesty (known as the Constitutional Act and later as the *Constitution Act*) passed in the eighteenth year of the reign of Her Majesty Queen Victoria by the Governor and Legislative Council of the Colony of Van Diemen's Land in pursuance of the provisions of an Imperial Act called the Australian *Constitution Act* 1850, it was enacted for the purpose of securing the peace, welfare, and good government of the said Colony, that in place of the said Legislative Council there should be one Legislative Council and one House of Assembly, constituted as therein provided, which should exercise all the powers and functions of the then existing Legislative Council, and that the Governor and Legislative Council and House

of Assembly together should be called the Parliament of Van Diemen's Land: And whereas Her said Majesty Queen Victoria, by Order-in-Council directed that, on and after 1st January 1856, the name of the said Colony should be changed to Tasmania: And whereas by force of the Commonwealth of Australia *Constitution Act* 1900, the said Colony, on the establishment of the said Commonwealth, was constituted and became a State of the Commonwealth of Australia: And whereas many of the provisions of the *Constitution Act* have been repealed or replaced, and numerous amendments have been made therein, and it is desirable to make certain other amendments therein, and that the said Act and its amendment should be consolidated in one Act:

*Whereas the Parliament, on behalf of all the people of Tasmania, acknowledges Aboriginal people as Tasmania's First People and the traditional and original owners of Tasmanian lands and waters; recognises the ongoing spiritual, social, cultural and economic importance of traditional lands and waters to Tasmanian Aboriginal people; and recognises the unique and lasting contribution that Tasmanian Aboriginal people make to Tasmania:*

## II BACKGROUND

WE the undersigned.

CONCERNED about the status, operation and legal effect of the Tasmanian Constitution.

SUPPORTED by the Australian Association of Constitutional Law, Law Foundation of Tasmania, University of Tasmania, Faculty of Law, and Tasmanian Law Reform Institute.

MEETING at an Expert Symposium in Hobart, Tasmania on 22 February 2016

AGREED that the current Tasmanian *Constitution Act 1934* requires review and reform by the Parliament of Tasmania on behalf of the people of Tasmania.

RESOLVED to contribute to and work towards the reform of the Tasmanian Constitution for the benefit of all Tasmanians.

RESPOND to the proposal to reform the preamble of the Tasmanian *Constitution Act 1934* as follows:

We declare our support for the reform of the Tasmanian Constitution.

We believe that the Tasmanian Constitution should act as the fundamental law of the Tasmanian community, reflecting our heritage, shared values and principles upon which the people agree to be governed.

We note that Tasmania is the only state not to give constitutional recognition to its First Peoples.

We believe that the First People and the traditional and original owners of Tasmania must be recognised within Tasmania's Constitution.

We believe that universal recognition by the states will provide impetus for the reform of the Commonwealth Constitution to do the same.

We consider such clear and explicit recognition to be integral to the constitutional text.

We believe that the recognition of the First Peoples should be one of many values and principles informing the peace, welfare and good government of the state.

We question whether inserting the proposed text after an archaic and inaccessible statement recounting colonial and imperial laws made for Tasmania, not by Tasmanians, is appropriate to the legitimate aims of the Government's reform agenda.

We urge the Government to consider wider constitutional reform in addition to, and to provide effective constitutional meaning to, Aboriginal recognition.

Noting that the current *Constitution Act 1934*:

1. is a consolidation of imperial and colonial legislation and other instruments that has never been put to the Tasmanian people for consultation or consent;
2. does not contain any statement as to the social, legal or constitutional values upon which Tasmanians declare their government rests;
3. provides no express power for the Parliament to legislate for the people of Tasmania or the basis upon which it should make such laws;
4. contains a large number of blank, repealed, redundant or irrelevant provisions;
5. does not properly describe many of the organs of state, their powers or duties;
6. is not clear, readily accessible, transparent, or reflective of the actual conduct of government and the affairs of state;
7. is not, legally a fundamental or superior law in any way; and
8. is the least reviewed, reformed or entrenched state constitution in Australia.

We recommend that the Government extend its laudable reform agenda to the Tasmanian Constitution as a whole. The First Peoples of this state are an integral part of the community. Their recognition within the

*Constitution Act* should not be an afterthought in an archaic act. It should be part of a wider reform of that Act designed to reflect the contemporary values and principles upon which Tasmania now stands. It should aim at making the Constitution the best it can be so as to accurately reflect Tasmania's existing governance arrangements in a more independent and enlightened time.

We accept that Aboriginal Recognition is needed now. If the amendment is to go forward we urge that it is only the first step in a wider constitutional reform project.

We request that the Government refer the matter to the independent Tasmanian Law Reform Institute which is suitably equipped to undertake a public consultation and to prepare an issues paper on reform of the Tasmanian Constitution.

We note the considerable work already undertaken in reviewing and reporting on the current *Constitution Act 1934* at the Expert Symposium held in Hobart, Tasmania on 22 February 2016 and the subsequent work undertaken by this consensus group. We offer that work freely and commit ourselves to assisting in the process of inquiry and reform.

### III PROPOSED TERMS OF REFERENCE

Noting that Tasmania should have the best state Constitution in Australia, reflective of the fundamental principles and values of Tasmanian society, its heritage and its First Peoples, as a sovereign state within the federal Commonwealth of Australia. Recognising the poor state of the current *Constitution Act 1934* and for the people of Tasmania to contribute to a reform of that Act. Directing that reform to the clarification and strengthening of existing constitutional arrangements, including the powers and duties of the Governor, status and structure of Parliament as the bicameral supreme legislative body of the state, the independence and impartiality of the judiciary and the system of representative and responsible government.

The proposed terms of reference for the Tasmanian Law Reform Institute are:

1. Review and describe the current constitutional arrangements for Tasmania both written and unwritten;
2. Provide a list of constitutional powers, duties or privileges which require statutory clarification for good government, public interest and the rule of law;
3. Identify which essential institutions, organs, powers and duties of constitutional government are adequately described and which are not in the *Constitution Act 1934*;

4. Examine the accessibility, clarity and relevance of the sections, and structure of the current *Constitution Act 1934*;
5. Recommend whether best-practice would be achieved by amending the current *Constitution Act 1934* or drafting a new *Constitution Act*.
6. Consult with the public on how the Preamble to the Constitution may be drafted to reflect of the fundamental principles and values of Tasmanian society, its heritage and its First Peoples, as a sovereign state within the federal Commonwealth of Australia.
7. Consult with the public and stakeholders and make a recommendation about how to produce the best state Constitution in Australia in line with Tasmania's existing governance arrangements.

### **Signatories**

#### **Dr Brendan Gogarty**

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# **The worst of the State Constitutions: Why Aboriginal Constitutional Recognition must be Framed Against a Wider Reform of Tasmania's *Constitution Act***

BRENDAN GOGARTY\*

## **Abstract**

This paper explains the background and basis for the Consensus Statement on the proposed amendment to the *Constitution Act 1934* (Tas) to recognise Aboriginal people which is included in this Journal. Australian State constitutions have received insufficient attention over the years, and many are not effective or as efficient as they might be. However, Tasmania has arguably the most dysfunctional and least-operative State constitution in Australia. It is a legacy of the State's colonial and imperial past, which has never been subject to public consultation or reform. This paper explains why the time for that wider reform is now, not only to provide a meaningful basis for Aboriginal recognition, but to better reflect contemporary Tasmanian society and the shared principles, conventions, and doctrines upon which it should be governed.

## **I INTRODUCTION**

In June 2015, the Tasmanian House of Assembly Standing Committee on Community Development determined to inquire into Constitutional Recognition of Aboriginal People as Tasmania's First People.<sup>1</sup> After undertaking hearings and accepting a limited number of submissions (13) the Committee recommended inserting a recognition clause into the *Constitution Act 1934* (herein '*Constitution Act*'), the 'foundational constitutional document'<sup>2</sup> of the State. In June 2016, the Premier and Minister for Aboriginal Affairs, Will Hodgman MP, announced the

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\* Faculty of Law, University of Tasmania (UTAS). The author notes the contribution of the Australian Association of Constitutional Law Working Group on Tasmanian Constitutional Reform, and particularly the significant research contribution of UTAS students William Bartlett, Daryl Wong, Joseph Wenta and Daniel Westbury.

<sup>1</sup> Standing Committee On Community Development, House of Assembly, *Inquiry Into The Constitutional Recognition Of Aboriginal People As Tasmania's First People* (2016) 8  
<[http://www.parliament.tas.gov.au/ctee/House/Reports/Committee%20Report%20\(Tabled\).pdf](http://www.parliament.tas.gov.au/ctee/House/Reports/Committee%20Report%20(Tabled).pdf)>.

<sup>2</sup> Ibid.



intention of the Government to table a bill in the Parliament to achieve this recommendation.

The proposed amendment to the *Constitution Act* is contained in the Consensus Statement published in this Journal. As will be noted, it is a minor amendment, not in respect of the importance of Aboriginal recognition, but in terms of how much of the constitutional text will be amended. The proposed amendment will insert a recognition statement after the current preamble. The remainder of the Act, including its current preamble will remain intact.

The authors of the Consensus Statement are scholars, practitioners and professionals with expertise and experience in the State's constitutional law and governance. The Working Group operates under the mantle of the *Australian Association of Constitutional Law* and in partnership with the Law Foundation of Tasmania, University of Tasmania ('UTAS') Faculty of Law, and Tasmanian Law Reform Institute ('TRLI'). They have been participating in a separate, unrelated, review of the Tasmanian Constitution over the same time period as the House Standing Committee. The author of this paper is part of that Working Group.

While the Working Group strongly supports the Premier's policy to constitutionally recognise First Peoples, their consensus position is different to that of the House Standing Committee. Specifically, they consider it imperative that the entire *Constitution Act* be reformed to provide an appropriate platform for the recognition of Aboriginal peoples as well as a range of other values central to the government of Tasmania. Indeed, unlike the House Standing Committee, the Working Group behind the Consensus Statement consider that the *Constitution Act* does not have a fundamental status, at least in any significant way. This article defends that assertion and explains why wider constitutional reform is imperative for Tasmania.

It should be noted that, while Tasmania's constitution is, as one noted scholar and lawyer has stated 'in the worst state of any of the States', its deficiencies are not unique. In fact, the problems with the Tasmanian constitution highlighted in this paper are relevant to most other States, albeit in differing degrees. To date, much scholarly, public and parliamentary attention has been focused on the Commonwealth Constitution. Given the central and prominent nature of that constitutional document to the federation, that is understandable. However, States wield significant constitutional powers over their citizens. The Tasmanian example is evidence that the constitutional basis and justification for the exercise of that power is important socially, legally and politically. The discussion here is therefore relevant to all the states, and it is hoped it will foster a renewed consideration of the meaning, importance and status of their constitutional documents.

## II CAVEATS

The terms ‘Tasmanian constitution’ and ‘*Constitution Act*’ are taken to mean different things in this paper; the former being the full corpus of the constitutional law of the State, and the latter being the legislation under scrutiny. At present, much of the law relating to the constitution of the Tasmanian government is actually found outside of the *Constitution Act*, either in other statutes, letters patent, the common law or convention. This paper is not intended to provide a wider survey of those sources, except to highlight how little the *Constitution Act* actually relates to or explains the governance of the State.

Similarly, while this paper justifies the need for reform it is not intended to dictate the content or structure of that reform. Of course, highlighting that there are significant deficiencies and lacunas in the law carries with it an implicit recommendation that these matters are remedied. However, just how it should be remedied will require further deliberation by experts, the public and Parliament.

Finally, the author notes that this work is, necessarily, the product of a collective effort.<sup>3</sup> Given the brief time to prepare this paper in response to the Government’s proposal to amend the preamble of the *Constitution Act*, any errors are the author’s alone.

## III WHAT IS A ‘GOOD’ CONSTITUTION?

This paper aims to explain why the current *Constitution Act* is not the appropriate vehicle for Aboriginal recognition in its current form. Of course, there is no single formula for a constitutional document; nor indeed an unwritten constitutional framework. Indeed, there is a lively debate about the universality of constitutional principles within constitution-making and comparative constitutional law scholarship.<sup>4</sup> The intent of this

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<sup>3</sup> This includes the broader Working Group on Constitutional Law, as well as the researchers and law students who contributed to it. The materials and discussion from the symposium and workshop are currently being incorporated into a public wiki page – which can be found at <https://wikis.utas.edu.au/display/TCLRP> – and will be provided to the TLRI for a formal public law reform project later in the year. In the interim it is hoped that those involved in the project will be motivated to raise awareness of the need and possibility for reform across the sector.

<sup>4</sup> See the discussions and questioning of the migration and convergence of constitutional ideas in Sujit Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, 2011). See also: Nicholas Aroney, ‘Democracy, Community and Federalism in Electoral Apportionment Cases: The United States, Canada and Australia in Comparative Perspective’ (2008) 58 *University of Toronto Law Journal*, 421; Adrian Vermeule, *The System of the Constitution* (Oxford University Press, 2011); John McGinnis and Michael Rappaport, ‘Originalism and the Good Constitution’ (2009) 98 *Georgetown Law Journal* 1693, 1701; Elisa Arcioni, Andrew McLeod ‘Cautious but Engaged - An Empirical Study of the Australian High Court’s Use of Foreign and

section is not enter into that debate, or propose a normative or perfect constitutional system. Instead, it will list some commonly cited criteria of a good or effective constitution that are relatively non-controversial expressions of why a constitution is important and what it supposed to do, that are relevant to Australia. That is, criteria which can either be extracted from Australian jurisprudence, or the scholarship and works of common law scholars with whom Australia shares its constitutional foundations and history.<sup>5</sup> Ultimately, the criteria will be used to as an analytical lens through which to examine the current *Constitution Act*.

#### A A Constitution must have a Special, Fundamental Status

A.V Dicey described a constitution as a law (or laws) which contains ‘all the most important and fundamental laws of the state’, either in a flexible or rigid form.<sup>6</sup> The notion of a fundamental law connotes its status as a superior law, which the government relies upon for its existence and which exist separate to the general laws made and enforced by it. Given the reliance of the state upon such a law, its alteration should be strictly controlled and limited, regardless of whether it is flexible or rigid in nature.<sup>7</sup> In the United States, this notion of a constitution as a fundamental law was taken further, not just connoting a law that shouldn’t be changed by ordinary means, but also mandating this to be the case. In the seminal

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International Materials in Constitutional Cases’ (2015) 42(3) *International Journal of Legal Information* 437.

<sup>5</sup> Owen Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ in Justice Woinarski (ed), *Jesting Pilate and other Papers and Addresses* (Law Book Co, 1965) 203.

<sup>6</sup> The ‘flexible’ form is generally not consolidated in one Act, but rather found in a collection of laws ‘called constitutional, because they refer to subjects supposed to affect the fundamental institutions of the state’. Dicey accepted that: ‘as a matter of fact, the meaning of the word “constitutional” in that sense was necessarily vague and ‘rarely applied to any English statute as giving a definite description of its character. Conversely a ‘rigid’ constitution is one under which ‘certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws’ This, he accepted, was a much more precise form of constitution, and reflective of the notional of constitutionalism outside of England and the few other nations which adopt flexible constitutions. Paraphrased and quoted from AV Dicey, *Introduction to The Study Of The Law Of The Constitution* (Liberty Classics, 8th ed, 1984) 69. Available as a digital print at <[http://files.libertyfund.org/files/1714/0125\\_Bk.pdf](http://files.libertyfund.org/files/1714/0125_Bk.pdf)>.

<sup>7</sup> Hence Edward Coke, writing of such fundamental laws within the UK system of flexible constitutionalism wrote: ‘for any fundamental point of the ancient laws and customs of the realm, it is a maxim in policy, and a trial by experience, that the alteration of any of them is most dangerous; for that which hath been refined and perfected by all the wisest men in former succession of ages, and proved and approved by continual experience to be good and profitable for the commonwealth, cannot without great hazard and danger be altered or changed.’ Recited in: Michael Lobban (ed) *A Treatise of Legal Philosophy and General Jurisprudence, Volume 8: A History of the Philosophy of Law in The Common Law World, 1600–1900* (Springer 2016) 35.

constitutional case of *Marbury v Madison*, Marshal CJ of the US Supreme Court therefore concluded:

Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.<sup>8</sup>

B *A Democratic Constitution Binds the Government to the Rule of the Popular Sovereign*

The description of a constitution as a fundamental law also connotes that the government is the subject of the law, not the source of it. In other words, a constitutional text should form the foundation stone of the rule of law, which in the democratic tradition finds its source in the people not the government. In Australia, this notion has been eloquently summarised by Fullagar J (who accepted the principles from *Marbury v Madison* as ‘axiomatic to the Commonwealth Constitution’) to reflect the notion that ‘stream cannot rise higher than its source’.<sup>9</sup>

If Government is not the source of the law, then the secondary question is ‘who is?’. In the western democratic tradition, the answer is generally the people, otherwise described as ‘popular sovereignty’. However, in Westminster democracies the answer can become confused by the notion of ‘Parliamentary Sovereignty’, asserted by the British Parliament against the Regent following the Civil War.<sup>10</sup> Such confusion has continued within State constitutional law, with State Parliaments often being described as sovereign, even in legal scholarship.<sup>11</sup> As will be discussed the reality is that the colonial parliaments were never ‘sovereign’, nor are the States, who are subject to the *Commonwealth Constitution* and *Australia Acts*, the latter of which put to rest any confusion that both state and commonwealth constitutions bound the government to the sovereignty of the people. As McHugh J noted:

Since the passing of the *Australia Act* (UK) in 1986, notwithstanding some considerable theoretical difficulties, the political and legal sovereignty of Australia now resides in the people of Australia. But the only authority that

<sup>8</sup> *Marbury v. Madison* 5 US 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

<sup>9</sup> *Australian Communist Party v Commonwealth* (1950) 83 CLR 1, 258 (Fullagar J).

<sup>10</sup> Quentin Skinner, ‘Classical Liberty and the Coming of the English Civil War’ in Martin van Gelderen and Quentin Skinner (eds), *Republicanism A Shared European Heritage* (Cambridge University Press 2005) 9.

<sup>11</sup> Out of respect for my colleagues I have not cited any particular works, but a search of the AustLII journals database or Australian journals within InformIT for the term ‘parliamentary sovereignty’ will produce hundreds of results.

the people have given to the parliaments of the nation is to enact laws in accordance with the terms of the Constitution.<sup>12</sup>

It may therefore be observed within the Australian context that a constitution should establish and bind the government to the basic principles upon which it governs on behalf of the people it governs.<sup>13</sup> As Kirby J stated in *Newcrest Mining v Commonwealth* that:<sup>14</sup>

as the fundamental law of government ... [a constitution] speaks to the people of Australia who made it and accept it for their governance.

### C The Criteria of an Effective Fundamental Law in a Democracy

A good constitution must therefore not only provide a description of the machinery of government; it must also reflect its status as a fundamental law. Moreover, in a democratic, rule of law system, it should speak to the relationship between people as the source of power and the government as agent of power and the shared principles upon which they expect their society to be structured from age to age.<sup>15</sup>

Hence, an effective or 'good' constitution in a democratic, rule of law system, will:<sup>16</sup>

- Be the product of consensus among those who are subject to its limits and afforded its protections and involves those people in its design, review and reform;<sup>17</sup>
- Clearly articulate and reflect its status and significance as the fundamental or highest law;<sup>18</sup>
- Explain the legal source of authority for the exercise of government power;<sup>19</sup>
- Speak to the shared cultural, historical, and legal values, principles and aspirations shared by the society it governs;<sup>20</sup>

<sup>12</sup> *McGinty v Western Australia* (1996) 186 CLR 140, 25 ('*McGinty*').

<sup>13</sup> *Sankey v Whitlam* (1978) 142 CLR 1, 31. Gibbs ACJ stated at 31 that a constitutional law was 'part of the fundamental law from which the Parliament of the Commonwealth derives its legislative power - and can no longer be regarded merely as an exercise of the legislative power of the Commonwealth'.

<sup>14</sup> (1997) 190 CLR 513, 657.

<sup>15</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 141. Brennan J stated '[i]t is the chief of the organic laws of the Commonwealth ... [and] prevails over all other laws.'

<sup>16</sup> I am indebted to my colleague Joseph Wenta, for much of this list.

<sup>17</sup> John McGinnis and Michael Rappaport, above n 4, 1701.

<sup>18</sup> *Brown v R* (1986) 160 CLR 171 (Wilson J).

<sup>19</sup> McGinnis and Rappaport, above n 4, 1700.

<sup>20</sup> Cheryl Saunders, 'Australian State Constitutions' (2000) 31 *Rutgers Law Journal* 1014; Elisa Arcioni, 'Historical facts and constitutional adjudication: the case of the Australian constitutional preamble' (2015) 30 *Journal of Constitutional History* 107.

- Define the organs of government, their duties and the scope of their powers;
- Provide for the checks and balances on governmental power and accountability to the people;
- Be accessible to the people that it governs and on whose behalf it governs;<sup>21</sup> and
- Be expressed in indefinite terms that can be flexibly applied to different time periods and differing social circumstances,<sup>22</sup> while being generally be difficult to change.<sup>23</sup>

#### IV THE ROLE OF A STATE CONSTITUTION IN THE AUSTRALIAN FEDERATION

Australia is a federation of states, unified under the *Commonwealth Constitution* in 1900. Whilst that *Constitution* is often referred to as a compact or agreement between those States, it is better said that the States, like the Commonwealth were created by the *Constitution*, rather than the other way around.<sup>24</sup>

That is not to say that the Commonwealth *Constitution* created subordinate or dependent states. State constitutional powers, and in particular legislative powers not transferred exclusively to the Commonwealth were preserved within state jurisdiction in the new federation,<sup>25</sup> and were to be exercised in a manner 'not subordinate to the federal Parliament or Government'.<sup>26</sup> However, it did serve to reinforce, as a matter of law, that the people of Australia are the absolute sovereigns, not only in respect of

<sup>21</sup> Anne Twomey, 'The Dilemmas of Drafting a Constitution for a New State' (2013) 28(1) *Australasian Parliamentary Review* 17, 18.

<sup>22</sup> As Callinan J observed in *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 592, 'the whole intention of a constitution is to provide for the community that it is to govern a degree of genuine and effective, but not entirely inflexible, stability and certainty'.

<sup>23</sup> *Brown v R* (1986) 160 CLR 171, 190 (Wilson J).

<sup>24</sup> As Barwick CJ observed in the *Payroll Tax Case* (1971) 122 CLR 353 at 386, the Commonwealth *Constitution* 'does not represent a treaty or union between sovereign and independent States. It was the result of the will and desire of the people of all the colonies expressed both through their representative institutions and directly through referenda to be united in one Commonwealth with an agreed distribution of governmental power ... as a statutory Constitution under the Crown.'

<sup>25</sup> In fact, Chapter V (particularly sections 106, 107, and 108) of the Commonwealth *Constitution* explicitly transitioned the constitutions of the colonies into State constitutions and preserved them, except where they involved legislative powers exclusively vested in the Commonwealth or involved inconsistency with the laws made pursuant to powers concurrently operated on behalf of the states. In all other aspects the States exercised their constitutional powers as equals in the federation.

<sup>26</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 50 (Latham CJ).

the Commonwealth, but in the States too.<sup>27</sup> Any uncertainty about the source power of the State constitutions deriving from anywhere other than the people of the State was put to rest by the enactment of the *Australia Acts* in 1986.<sup>28</sup>

For present purposes, it is sufficient to say that the enactment of the Commonwealth *Constitution* represented the establishment of the doctrine of popular sovereignty in Australia,<sup>29</sup> which includes the constitution of the State of Tasmania.<sup>30</sup> However, beyond preserving the State constitutions, the Commonwealth *Constitution* does not describe their form, structure, content or the general principles upon which they permit State governments to exercise their powers.

It is worth noting that, at least at federation, the States exercised significantly more power over a much wider range of subjects than the Commonwealth did. While the power balance may have shifted towards the Commonwealth in the long tug-of-war since federation, there is no question that States retain a significant power over, and arguably have more proximate relationship with, citizens. Given that is the case, and given the operative effect of Chapter V of the Commonwealth *Constitution*, the

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<sup>27</sup> The creation of the States under Chapter V of the Constitution created an immediate tension about the basis and source power for State constitutions. As Colonies of the British Empire, the source of constitutional authority and power was the British Crown, to whom the colonial governments owed their ultimate allegiance and duty. Moreover, as subordinate legislatures the colonies had been designed in the constitutional image of the Britain, inheriting its flexible constitutional framework with all the vagaries that entailed; albeit in a subordinate manner to the Imperial Parliament. Conversely, the Commonwealth Constitution created, in form if not reality, a rigid constitutional system, debated and endorsed by the Australian people. This was quickly resolved by the High Court which reinforced that the *Constitution* created two separate polities as agents of the absolute sovereign. As Windeyer J wrote in the *Payroll Tax Case* (1971) 122 CLR 353 at 395, 'The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so.'

<sup>28</sup> *McGinty* (1996) 186 CLR 140, 295–6. McHugh J stated: '[s]ince the passing of the *Australia Act* (UK) in 1986, notwithstanding some considerable theoretical difficulties, the political and legal sovereignty of Australia now resides in the people of Australia. But the only authority that the people have given to the parliaments of the nation is to enact laws in accordance with the terms of the Constitution.'

<sup>29</sup> Gibbs J in *NSW v Commonwealth* (1975) 135 CLR 337 at 386 expressed that principle as follows: "'sovereignty". That word is at best imprecise, but when used in relation to a federation it assumes protean qualities. ... for the purposes of the municipal law of Australia there exists that division of sovereign authority which is characteristic of, if not essential to, a federal constitution. All the powers of government are distributed between the Commonwealth and the States.'

<sup>30</sup> In *Australia Capital Television v Commonwealth* (1992) 177 CLR 106, at 151–5, Mason CJ said: '[t]he very concept of representative government and representative democracy signifies government by the people through their representatives ... Thus the people hold the ultimate sovereignty ... all citizens of the Commonwealth who are not under some special disability are entitled to share equally in the exercise of those ultimate powers of governmental control'.

following criteria are additionally relevant to the measure of a State constitution; namely that it:

- Signal the importance of a State Constitution for the community that resides there;<sup>31</sup>
- Embody unique aspects of a State, including unique governmental and governance arrangements;<sup>32</sup>
- Reflect the position of the State as a component of the Australian federal system of government and provide a coherent basis for absolute sovereignty in the country;<sup>33</sup>
- That it recognises the history, values and factual circumstances, particularly to the people of the State in which it is enacted; and
- Relatedly, that it recognise the contributions, ownership and stewardship by the first peoples of the State and their status within contemporary society.<sup>34</sup>

These and the above stated criteria will now be used to analyse the *Constitution Act*.

## V THE TASMANIAN CONSTITUTION

Unlike the Commonwealth *Constitution*, the Tasmanian constitution – in its broadest sense – has never been put to popular referendum. It has certainly not the product of a ‘very great exertion’ of the people of the State to assert their ‘right to establish for their future government such principles as, in their opinion, shall be most conducive to their own happiness’ spoken of in *Marbury v Madison*. On the other hand, the Tasmanian constitution is not, nor has ever been, a flexible unbounded constitutional system in the sense of the British Constitution. Rather, the State was first subordinate to the British Parliament and then limited and controlled by the *Commonwealth Constitution* and *Australia Acts*.

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<sup>31</sup> Saunders, above n 20.

<sup>32</sup> Twomey, above n 21, 24.

<sup>33</sup> Specifically, that it is based on the same constitutional underpinnings in relation to absolute sovereignty over the same jurisdiction, regardless of who exercises legal sovereignty. See, eg, *Lamshed v Lake* (1957) 99 CLR 133 in which Kitto J concluded that the *Constitution* had to be treated as a coherent instrument for the government of the nation, not two Constitutions, one for the federation and the other for the States. For a discussion of the particular characteristics of the Australian model, and its comparative influences see Nicholas Aroney, ‘Comparative Law in Australian Constitutional Jurisprudence’ (2007) 26 (2) *The University of Queensland Law Journal* 317.

<sup>34</sup> George Williams, ‘Should Aboriginal Peoples Be Recognised in the Australian Constitution?’ (2013) 17 *University of Western Sydney Law Review* 13.



### *A Tasmania's Constitutional History*

Ever since the European invasion of the island, it has been subject to fundamental laws situated outside the jurisdiction and direct control of the people and legislature there. Prior to that, Tasmania was occupied by Aboriginal peoples: a largely forgotten history extending back at least 35,000 years.<sup>35</sup>

If there was a form of Aboriginal Constitution or fundamental law(s), there is no documentation of it. Much of the social and legal history of the First Peoples has been lost, not least because of the persecution, forced integration and resettlement of Tasmanian Aborigines by the British, on their arrival in Tasmania in 1804.<sup>36</sup>

The legal dispossession of indigenous peoples was also facilitated by the colonial claim that the Australian landmass was *Terra Nullius*.<sup>37</sup> That doctrine contributed to the lack of a treaty, or formal recognition of existing custom or law in Australia, and the wholesale imposition of the British Common Law by the British. It was only fully abandoned in by the High Court in the seminal *Mabo* case in 1992<sup>38</sup> and in statutory law in Tasmania with the enactment of the *Aboriginal Lands Act 1995* (Tas).<sup>39</sup>

Tasmania was originally called 'Van Diemen's Land' by the British, who arrived in 1804<sup>40</sup> to establish a penal colony as part of their larger claim to

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<sup>35</sup> Nick Porch and Jim Allen 'Tasmania: Archaeological and Palaeo-Ecological Perspectives' (1995) 69 *Antiquity* 714. doi.10.1017/S0003598X00082296.

<sup>36</sup> Lyndall Ryan, *Tasmanian Aborigines: A History Since 1803* (Allen & Unwin, 2012); Benjamin Madley, 'From Terror to Genocide: Britain's Tasmanian Penal Colony and Australia's History Wars' (2008) 47(1) *Journal of British Studies* 77.

<sup>37</sup> This began with the claim of territorial possession of eastern Australia (named New South Wales and including part of the landmass of Tasmania, then called 'Van Diemen's Land') by James Cook in 1770 and the realisation of that claim by colonial acquisition (under the same said rules), in 1788 at Botany Bay (Arthur Phillip, the Governor-designate of the new colony, wrote at the establishment of the colony: '[t]he laws of this country [England] will of course, be introduced in [New] South Wales': *Historical Records of New South Wales*, Volume 1, Part 2, Phillip 1783–1792, 53).

<sup>38</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

<sup>39</sup> Being 'An Act to promote reconciliation with the Tasmanian Aboriginal community by granting to Aboriginal people certain parcels of land of historic or cultural significance': *Aboriginal Lands Act 1995* (Tas) Long Title.

<sup>40</sup> The British claim over Van Diemen's Land was pursued by commission of the Governor of NSW in 1803. The commission ordered the establishment of a permanent European settlement at Risdon Cove, near modern Hobart and vested command of the whole island to Lieutenant John Bowen. Risdon Cove, which was initially called Hobart, was landed at by Lt Bowen on 13 September 1803. A commission from the Governor-in-Chief in Sydney, dated 13 October 1803, appointed Bowen Commandant of 'Hobart' and the whole island of Van Diemen's Land (*Historical Records of NSW* vol V, page 676; Colonel Collins' Commission 14 January 1803 (NSW) (*Constitution Act 1934* (Tas), *FoundingDocs.gov.au* <<http://www.foundingdocs.gov.au/item-sdid-26.html>>); Colonel

the continent of Australia.<sup>41</sup> Upon occupation, the British colonisers were instructed to open intercourse and conciliate with the native peoples by the Colonial Office. A treaty or the continuation of indigenous law appear not to have been part of that instruction, and it was taken for granted that the British Common Law would apply to the territory and its inhabitants as part of the NSW Colony.<sup>42</sup>

Tasmania was originally administered as a northern and southern colony by Lieutenant-Governors under military command from the Governor of NSW. Over the next four decades it developed a more centralised governance infrastructure although it remained under the significant influence of the Governor and UK Colonial Office, and largely subordinate to the British Imperial Parliament.<sup>43</sup>

In 1850 the UK Parliament passed the *Australian Constitutions Act 1850* (UK) to 'provide for the Administration of Justice in ... Van Diemen's Land, and for the more effectual Government thereof'. This permitted greater legislative autonomy within the colonies – so long as the laws passed were not repugnant to the laws of England – and provided the foundation for the establishment of a system of franchise and election.<sup>44</sup> In particular, it expanded the size and representative nature of the existing

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Collins' Commission 14 January 1803 (NSW) (*Constitution Act 1934 (Tas)*, FoundingDocs.gov.au <<http://www.foundingdocs.gov.au/item-sdid-27.html>>)).

<sup>41</sup> Records indicate that the real purpose may have been to stave off competing territorial claims to the island by the French. Only a quarter of the original population were under penal servitude, and the predominant purpose of establishing the colony was to stave off competing French colonisation of the island. See *Constitution Act 1934 (Tas)*, FoundingDocs.gov.au <<http://www.foundingdocs.gov.au/item-sdid-27.html>>.

<sup>42</sup> The Colonial Office Instructions to Lieutenant-Governor Collins were to 'open intercourse with the natives, and to conciliate their goodwill'. Beyond that the question of civil and property rights of the Aboriginal inhabitants was rarely raised by early Tasmanian governors. See: *Constitution Act 1934 (Tas)*, FoundingDocs.gov.au <<http://www.foundingdocs.gov.au/item-sdid-34.html>>.

<sup>43</sup> Courts were not established until 1814, with only the Petty Court regularly sat in Hobart, until 1824 when a full Supreme Court was constituted. The British Imperial legislation which established the Court also provided for the establishment of a quasi-legislative body, the Legislative Council for Van Diemen's Land which was established in 1825. The body was only partly representative and subordinate to Britain, but was pivotal in the decision to separate Van Diemen's Land into a separate, civil, colony under the *Australian Courts Act 1828* (UK). See: <https://wikis.utas.edu.au/display/TCLRP/The+Current+Constitution>

<sup>44</sup> It did that by further increasing the size of the Legislative Council to up to twenty-four members, and changing the method of appointment to a 2/3 representative character: *Australian Constitutions Act 1850* (UK) s 7. The Governor, on the advice and consent of the Legislative Council, was directed to make laws for: (i) 'the Peace, Welfare and good Government' of the Colony, so long as they were not 'repugnant to the law of England' (*Australian Constitutions Act 1850* (UK) s 14); and (ii) for the administration of justice within the Colony (including juries) (*Australian Constitutions Act 1850* (UK) s 29). Importantly it allowed the Governor in Council to establish rules for franchise, election and further houses of Parliament (*Australian Constitutions Act 1850* (UK) s 32).

Legislative Council of the State, and charged it with establishing representative and responsible Government. The resultant *Constitution Act 1854* – which received Royal Assent the next year (1855) from the British Crown as required by the *Australians Constitutions Act*<sup>45</sup> – largely mirrored the Westminster mode of government within a subordinate colony. Specifically, it:

- Retained the Legislative Council, as an upper house, constituted of fifteen (15) members elected on a three year rotating cycles;
- Instituted a representative lower house, the House of Assembly, constituted of thirty (30) members elected every five years;
- Restricted the franchise to those with property or educational qualifications<sup>46</sup>; and
- Provided limited explanation of the exercise of legislative power, the relationship between the houses, the question of assent to money bills, blockages to the passage of legislation, or the manner and form of constitutional amendment.

In the same year, the Legislative Council petitioned Queen Victoria to rename the Colony to Tasmania, so as to reflect its move from penal to free colony. The relevant proclamation was issued on 1 January 1856. No mention of Tasmanian Aboriginals was made in any of these enactments.

It is worth noting that the *Constitution Act 1854/1855* may have been created by a Tasmanian body, but the source of its authority is strictly British. Beyond this, there was an assumption of unwritten British constitutional conventions informing the powers, procedures and functions of the government of the Colonies. That is, the general common law constitutional conventions in the UK that shaped governmental action were assumed to apply to ‘expand or elaborate such Constitution Acts’.<sup>47</sup> However, as subordinate legislatures, they were not on the same footing as the House of Commons and only possessed what powers, privileges and immunities as were reasonably necessary for the carrying out of these representative functions.<sup>48</sup> Furthermore, Tasmania could not make laws

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<sup>45</sup> *Australian Constitutions Act 1850* (UK) s 32.

<sup>46</sup> *Constitution Act 1854* (Tas) s XVII.

<sup>47</sup> That included conventions such as responsible government, and fundamental British constitutional statutes such as the *Bill of Rights 1689* (UK) s 47 and *Act of Settlement 1701* (UK). See *Yougarla v Western Australia* (2001) 207 CLR 344, 379 (Kirby J) and *Egan v Willis* (1998) 195 CLR 424 1, 45 (Gaudron, Gummow and Hayne JJ).

<sup>48</sup> *Egan v Willis* (1998) 195 CLR 424, 436 (McHugh J).

which were repugnant to the laws of England, or later, laws that were made with respect to the Colonies.<sup>49</sup>

### B *The Constitution Act 1932*

Following the granting of royal assent for the *Constitution Act 1854*, by the British Crown in 1855, the Tasmanian Parliament enacted a range of legislation designed to clarify matters relating to the governance of the State; for instance, matters relating to electoral qualifications,<sup>50</sup> membership of the Houses, or rules as to appropriation.<sup>51</sup> These Acts operated consecutively and were intended to be read together.<sup>52</sup> There were also a range of other enactments under different titles, relating to matters of Crown and Government, such as the status and demise of the Crown, public salaries and appointments and the conduct of elections which had constitutional elements outside of the 1854 Act.<sup>53</sup>

By the 1930s, the thicket of constitutional legislation was a matter of some concern and led to calls for reform of the constitution, including from the McPhee Nationalist Government, who argued for greater ‘economy and efficiency’ in the running of the State.<sup>54</sup> It also recommended reconstituting Parliament and the electoral system.<sup>55</sup> There was little public consultation or debate about the Tasmanian *Constitution* more broadly.

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<sup>49</sup> Moreover, the Parliament of Tasmania was unquestionably subordinate to the Imperial Parliament in both a direct and indirect way. While this was limited by the enactment of the *Colonial Laws Validity Act 1865* (UK), which provided greater autonomy to the colonies, there was still no question they were still subordinate to, and the creature of, the Imperial Legislature, in fact, there is uncertainty as to whether that remained the case after federation. While some authorities suggest that the Colonial Laws Validity Act no longer strictly applied when the Colonies became States, practice seems to indicate the opposite. Indeed, such was the assumption that Imperial Law could override State law that the Parliament of Tasmania saw it necessary to enact the *Constitutional Powers (Tasmania) Act 1979*, which sought to remove any question of invalidity of state legislation by virtue of its repugnancy with UK legislation once and for all.

<sup>50</sup> *Constitution Act 1923* (Tas); *Constitution Amendment Act 1900* (64 Vic, No 5) 1900; *Constitutional Amendment Act 1870*, *Constitution Act 1926* (Tas).

<sup>51</sup> This was done through the enactment of ordinary Acts of Parliament – subject to the subordinate legislative provisions described above – often confusingly also entitled ‘*Constitution Act*’ (and year proclaimed), or ‘*Constitution Amendment Act*’ (and year proclaimed).

<sup>52</sup> These Acts operated consecutively and were intended to be intended to be read together: see *Constitution Amendment Act 1900* (64 Vic, No 5) 1900 s 10.

<sup>53</sup> These included: the *Demise of the Crown Act 1900* (Tas); *Electoral Act, 1907* (Tas); *Payment of Members Act 1927* (Tas); *The Officers of Parliament Salaries Act 1927* (Tas); and the *Ministers of the Crown Act 1927*. See: *The Mercury* (Hobart, Friday 9 December 1932, 14 <<http://nla.gov.au/nla.news-page1817504>>.

<sup>54</sup> See: ‘*Constitution Bill*’, *The Mercury* (Hobart), 25 November 1932, 9 <<http://nla.gov.au/nla.news-page1817327>>.

<sup>55</sup> *Ibid.*

The McPhee proposals to reconstitute the parliamentary and electoral system proved controversial and were defeated in the House, meaning that the Government's reform agenda became a consolidation exercise only.<sup>56</sup> There are a few limited exceptions to this, namely the addition of provisions to:<sup>57</sup>

1. clarify and express the prohibition on members holding office for profit under the Crown;
2. exclude certain public service contracts as being legally described as being Government contracts;
3. limit the sale of land from a member to the Crown; and
4. protect religious freedom and equality in public affairs.<sup>58</sup>

For all other intents and purposes the *Constitution Act 1934* represents an amalgam of the previous *Constitution Act 1854/1855* with the various imperial, colonial and state legislation relating to the government of Tasmania. Indeed, this is made clear by the adopted Preamble, which specifically cites the 1850 Australian Constitutions Act as the source of its foundational authority to secure:

[The] peace, welfare, and good government of the said Colony ... [which] by force of the Commonwealth of Australia *Constitution Act 1900* ... became a State of the Commonwealth of Australia”

AND WHEREAS many of the provisions of the *Constitution Act* have been repealed or replaced and numerous amendments have been made therein and it is desirable to make certain other amendments therein and that the said Act and its amendments should be consolidated in one Act.

Importantly, this is the only mention of peace, order and welfare in the legislation and there is no express statement that such a power or duty is vested in the Parliament itself, either within the preamble or in the remainder of the Act. Tasmania is the only State without an express power or duty to legislate within its constitutional legislation.

<sup>56</sup> Acts directly repealed are: 10 Geo. IV No. 5; 18 Vict. No. 17; 34 Vict. No. 42 1870; 48 Vict. No. 54; 1884; 49 Vict. No. 8 1885; 54 Vict. No. 58 1890; 1 Vict. No. 9 1897; 62 Vict. No. 67 1898; 64 Vict. No. 2 1900; 64 Vict. No. 5 1900; 3 Edw. VII No. 17 1903; 6 Edw. VII No. 47 1906; 9 Edw. VII No. 5 1908; 9 Edw. VII No. 1909; 11 Geo. V No. 4 1920; 12 Geo. V No. 61 1921; 13 Geo. V No. 16 1923; 16 Geo. V No. 90 1926; 17 Geo. V No. 57 1928.

<sup>57</sup> While some of these provisions arise out of constitutional crises - such as the blockage of supply bills (for example, in 1924 the House of Assembly presented the budget bill directly to the Governor when the Legislative Council refused to pass it and a conference between the two Houses failed to reach agreement) – others such as freedom of religion are unique additions to State Constitutions and are considered a ‘historical puzzle’. See *Constitution Act 1934 (Tas)*, FoundingDocs.gov.au <<http://www.foundingdocs.gov.au/item-sdid-32.html>>.

<sup>58</sup> *Constitution Act 1934 (Tas)* s 46.

The 1934 Act also did not represent a full consolidation of constitutional laws. Notably, it does not:

- Incorporate provisions for the establishment of the State's courts or specify how they are to be constituted or protected from interference;
- Provide for, or incorporate, legislation establishing and prescribing the powers, privileges and duties of the Houses;
- Describe the Crown in any great detail or how it relates to Premier and Cabinet;
- Explain where to find relevant constitutional documents. For instance, the constitutions of the Governor and Executive Council are found in ancillary letters patent, but this is not mentioned or referred to in the *Constitution Act*.

The *Constitution Act* has been amended several times since 1934, ordinarily to remove sections which the Parliament no longer considers appropriate or relevant. Three notable amendments are the:

- Addition of a manner and form provision in 1972 designed to limit the ability of the Legislative Assembly to alter its own duration requirements (four years);
- Reduction of the size of Parliament by amendment in 1998: the Legislative Council was reduced from 19 to 15 members and the House of Assembly from 35 to 25 members.<sup>59</sup>
- Insertion of IVA into the Act relating to democratically elected local Government in 1988.

The ostensible manner and form restriction relating to the duration of the Legislative Assembly is legally unenforceable as it only involves a single-entrenchment; the High Court has determined that entrenchments must themselves be entrenched (double entrenched) to be effective.<sup>60</sup> Even if this was not the case, this is the only such restriction in the Act, leaving the remainder to ordinary amendment. That can occur directly by legislation or impliedly, through the enactment of later conflicting legislation.<sup>61</sup> Hence, Parliamentary legislation which prohibited a religion would not be

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<sup>59</sup> The amendments significantly changed the nature of House business, and there were concerns of the impact the reduction would have on 'on an institution that was already at the limits of sustainability as a Westminster parliament': Richard Herr, 'Opposition in a Small Westminster Parliament: The Case of Tasmania' (Paper presented at Australasian Study of Parliament Group Annual Conference, Wellington, 29–30 September 2006) 2 <[www.aspg.org.au/conferences/wellington2006/herr.pdf](http://www.aspg.org.au/conferences/wellington2006/herr.pdf)>.

<sup>60</sup> *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

<sup>61</sup> Thomas Roszkowski and Jeffrey Goldsworthy, 'Symmetric Entrenchment of Manner And Form Requirements' (2012) 23 *Public Law Review* 217.

restricted by the current religious freedom provisions in the current *Constitution Act*; in fact, the opposite would be true. Similarly, the Parliament can enact new legislation which contradicts or limits the provisions of the *Constitution Act* – without actually including the amending provisions in the *Constitution Act* itself. A recent example of this is the *Treasury (Borrowing) Act 2016* (Tas) which retrospectively legitimises any appropriation act which also contains a general spending power, despite the *Constitution Act* specifically prohibiting bills of this form.<sup>62</sup> The Act specifically states that sections 39 and 40 of the *Constitution Act* have no effect, but does not extinguish them expressly.

Beyond this, the amendments to the *Constitution Act* have been piecemeal, reactive and disparate.<sup>63</sup> Several amendments have resulted in blank sections.<sup>64</sup> Indeed, otiose and repealed legislation is referred to throughout the Act.<sup>65</sup> Conversely many provisions with only peripheral constitutional status are included in highly prescriptive detail.<sup>66</sup> How and why it describes some constitutional features and not others is entirely mysterious and hard to ascertain.<sup>67</sup> Other provisions which have proved problematic or untenable have not been amended.<sup>68</sup> Nor have various constitutional crises in the State been responded to by clarifying the Act, inserting new provisions or removing offending provisions.<sup>69</sup> In sum, the *Constitution Act* is, to quote Professor Williams a ‘creature of its history and ... too much a mixture of the mundane and the missing’.<sup>70</sup>

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<sup>62</sup> For bill information see:

<[http://www.parliament.tas.gov.au/bills/Bills2016/27\\_of\\_2016.htm](http://www.parliament.tas.gov.au/bills/Bills2016/27_of_2016.htm)>

<sup>63</sup> See the section by section review of the Tasmanian Constitution under ‘Final Minutes 13 March 2016’ at <<https://wikis.utas.edu.au/display/TCLRP/Symposium+Files>> (‘Law Reform Group Minutes’).

<sup>64</sup> *Constitution Act 1934* (Tas) ss 2, 8D, 16, 24A.

<sup>65</sup> Especially in relation to income tax legislation in ss 36, 41, 42.

<sup>66</sup> Such as the requirements for membership of the House under *Constitution Act 1934* (Tas) s 14, or the restriction on contractors under s 33.

<sup>67</sup> For instance, while failing to describe the constitution of the Office of the Governor under its Part dedicated to the Executive Branch, it chooses instead to dedicate several sections to the ‘demise of the crown’. The Attorney General of Tasmania recently reported ‘it is not easy to ascertain why [extensive provisions as to the demise of the crown] was considered necessary at that time and parliamentary records for that period are difficult to obtain’. See:

<[http://www.parliament.wa.gov.au/parliament/commit.nsf/\(\\$lookupRelatedDocsByID\)/88149CC2FEA0BE5948257E67002AADCE/\\$file/ls.dcs.150408.let.001.vg.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/($lookupRelatedDocsByID)/88149CC2FEA0BE5948257E67002AADCE/$file/ls.dcs.150408.let.001.vg.pdf)>

<sup>68</sup> For instance, s 8B of the *Constitution Act 1934* (Tas) requires the appointment of ministers within seven days of the returning of writs. This creates significant pressure on the decision maker and can be problematic when a Premier cannot be appointed or has stepped down. In other constitutions this is three months.

<sup>69</sup> Such as the use of the reserve powers in a hung Parliament, or the breaking of deadlocks between and in the houses, especially in relation to *Constitution Act 1934* (Tas) ss 12, 25.

<sup>70</sup> Law Reform Group Minutes, above n 63, 5.

### C *Tasmania's Constitution Act is not a Good One*

Returning to the criteria of effective constitutional law set out above, it is evident that in almost all respects the current *Constitution Act* is lacking.

#### 1 *Not the Product of a Consensus*

The *Constitution Act* was not the product of any consensus amongst the people of Tasmania. Rather it is a consolidated amalgam of imperial, colonial and state laws (many of the latter two which were subordinate legislatures) rather than any single constitutional endeavour. It certainly has not involved any significant consultation with or input by the wider Tasmanian population.

#### 2 *A Lack of Fundamental Status*

The current *Constitution Act*, is in law and practice, treated like ordinary law, and changed – often without much thought for the consequences – without restriction by the body it is supposed to empower. While there are certainly problems with some constitutional provisions being entrenched – as is evidenced by the largely unaltered Commonwealth Constitutional landscape<sup>71</sup> – there are equal problems with rendering the document completely vulnerable to the government it is supposed to control. To use the words of Marshall CJ in *Marbury*, ‘the Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts’. In the Tasmanian case, the latter certainly seems to be the case. In fact, it seems to indicate that legal sovereignty over the State is divided between two governments who proceed on distinct and sometimes discordant constitutional assumptions; assumptions which are on the one hand axiomatic and the other, at best arguable. Certainly the *Australia Acts* envision the need for State constitutions to contain manner and form provisions which restrict the mode of constitutional alteration by State parliaments.<sup>72</sup> Section 6 of those Acts restrict the alteration of ‘[the] constitution, powers or procedure of the Parliament of the State ... unless it is made in such manner and form as may from time to time be required by a law made by that Parliament’. Thus far Tasmania has not opted to effectively incorporate any such manner and form provisions, as the other States have. Of course that means that Tasmania is not currently limited in any significant way to reforming its constitution to be more reflective of contemporary community values and governmental practice. The question is if it will choose to do so.

<sup>71</sup> George Williams, ‘Thawing the frozen continent’ (2008) 19 *Griffith Law Review* 11.

<sup>72</sup> This was originally contained in the *Colonial Laws Validity Act 1865* (Imp) s 5, but is now found in *Australia Act 1986* (Cth) s 6.



### 3 *Incomplete in its Explanation of the Legal Source of Authority for the Exercise of Government Power*

The Preamble of the *Constitution Act* makes no mention of: the people of the State, only a passing reference to the *Commonwealth Constitution*; and no reference to the *Australia Acts* of 1986 that resulted in the nation's independence. Whilst the High Court has made it clear that these two enactments vest sovereignty in the people of the State, that has to be implied, because the Act itself says nothing of about the relationship. The *Australia Acts* were not put to referendum,<sup>73</sup> and while a limited number of people participated in the referendum for the *Commonwealth Constitution*, they can only be said to have endorsed the existence of the *Tasmanian Constitution*, not its content or form.<sup>74</sup> This means that the State constitution has a much more strained historic linkage with the people as the source of its authority than the Commonwealth does.

### 4 *A Lack of Shared Cultural, Historical, and Legal Values, Principles and Aspirations*

Bar the obvious ties to Britain and the enactment of the *Commonwealth Constitution*, there is very little said about the wider heritage of Tasmanians, nor the basis upon which they agree to be governed. Its preamble is backwards looking and not expressed to the future. In fact, the people of Tasmania receive no real mention in the *Constitution Act*, certainly not in its preamble. The document is silent about the shared cultural, historical, and legal values, principles and aspirations of Tasmanians citizens.

### 5 *Does not Properly Describe the Organs of Government, their Duties and the Scope of their Powers*

The *Constitution Act* incorporates laws and concepts from times when the jurisdiction was penal, minimalist, subordinate and colonial. Certainly Tasmania has moved beyond this history, but the *Constitution Act* fails to explain that properly, or actually describe conventional constitutional governance. In particular, the lack of an express empowerment for the Parliament of the State to legislate makes the *Constitution Act* unique amongst State constitutions. If such a power is to be found anywhere it is through an implied reading of its preamble, which cites extinguished colonial legislation from the 1850s, passed for a highly dependent and

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<sup>73</sup> The *Australia Acts* were not endorsed by popular referendum at all, but were rather requests were made as ordinary Acts of Parliament and addressed to two external governments.

<sup>74</sup> The 1899 referendum, which led to the *Commonwealth Constitution* was a limited representation of the people of Tasmania. No women were represented, and men without sufficient property qualifications were precluded from participating. Equally, the consent provided was to bare source powers.

subordinate colony, not the free people of the State. That legislative power and responsibility has to be constructively implied into any constitution raises serious questions about its appropriateness. So does the general lack of description of many of the fundamental institutions of government, particularly the courts which are so central to the rule of law in a fundamental constitutional system.

#### 6 *Provides Limited Checks and Balances*

The lack of any protections within the fundamental law of the State for the independence and impartiality of the judiciary which holds the government to account is highly problematic. Similarly, the lack of manner and form provisions effectively entrenching any part of the constitution indicates that it is not a restriction on the government or parliament. In fact, it creates an image of a government which sits upstream of its constitution, not the other way around. That is clearly not the case in Tasmania, which has enjoyed a long history of democracy and stability. However, the *Constitution Act* does not represent that legacy or the reasons for it. It makes no mention of democracy, the rule of law or public accountability and its terms and provisions obfuscate the mechanisms by which these important constitutional features are achieved in practice.

#### 7 *It is not Accessible to People that it Governs*

In commenting on the *Constitution Act*, the current Governor of Tasmania, Her Excellency Kate Warner AO, described it as ‘unhelpful’ in explaining the role or terms of her office, and containing ‘many gaps and a lack of clarity’ making it extremely difficult to ‘precisely determine [her] role’.<sup>75</sup> In fact, the Constitution of the Governor is not found in the *Constitution Act*, but rather letters patent that are not easily accessible to the public. The Act does not, to quote AV Dicey, ‘contain all the most important and fundamental laws of the State’.<sup>76</sup>

In a similar vein to Her Excellency, the Speaker of the House of Assembly Hon Elise Archer indicated that the disparate nature of Tasmania’s Constitution failed to ‘clearly define roles and powers’ of Government and that, subsequently, ‘many members of Parliament have not actually read the Constitution’. Both of these commentators are legally trained and representative of the highest offices of the State. As Professor Williams noted, the Act is ‘in the worst state of any of the States’ in respect of its lack of accessibility, clarity and explanation to the people about the form and manner of their governance.<sup>77</sup>

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<sup>75</sup> Law Reform Group Minutes, n 63, 2–3

<sup>76</sup> See above n 6.

<sup>77</sup> Law Reform Group Minutes, above n 63.

### 8 *Too Backward Looking and Lacking a Vision*

While the terms of the *Constitution Act* proper are definite, the document lacks vision and aspiration. In fact, they are heavily influenced by their imperial colonial history – albeit one that completely ignores the much longer pre-history of the First Peoples of the State – with scant consideration for the future or even arguably the present.

### 9 *Does Little to Describe Tasmania within the Federation*

While the Preamble does mention the Commonwealth *Constitution*, that is almost all that reflects its status as a State constitution within the federation. In fact, its design is much more reflective of the colonial situation that existed when the 1854 Act that it was based was passed. Bar that, there is nothing particular about the State itself, or why it is an autonomous entity representing all Tasmanians. Importantly it makes no mention of the contribution, ownership and stewardship by the First Peoples of the State and their status within contemporary society.<sup>78</sup>

## VI THE NEED FOR CONSTITUTIONAL REFORM

There may be room to debate whether or not the *Constitution Act* is the ‘worst’ of all the States, but it is certainly arguable in the circumstances. What is undoubtable is the need – some might argue imperative need – to examine its constitutional system; if not its underlying basis, then at the very least the role and written expression of that system within its *Constitution Act*.

In February 2016, the AACL Working Group on Tasmanian Constitutional Reform began its work with an expert symposium<sup>79</sup> comprised of constitutional experts from the Crown office, academy, bar, bench, NGOs and parliament in a roundtable discussion of the current constitution.<sup>80</sup>

<sup>78</sup> Williams, ‘Should Aboriginal Peoples Be Recognised in the Australian Constitution?’, above n 34.

<sup>79</sup> A more focused workshop on the following day undertook a section by section analysis of the current *Constitution Act*.

<sup>80</sup> The reasons for the stakeholder and expert led approach are two-fold. The first is that, due to the poor state of the *Constitution Act 1934* (Tas) a great deal of constitutional practice is based on convention which is either undocumented, or not centrally accessible. Similarly, much of the knowledge of the practical issues, problems (and workarounds) exists in the corporate memory of those working in the field, rather than in any one written text. The project aims to draw upon this significant institutional knowledge at the outset. Indeed, if nothing else comes from the project, its documentation of the State’s constitution will be worth the effort. The second reason for inverting the usual law reform process is a pragmatic one. Law reform is a fraught and often frustrated process, especially in Tasmania, where several notable law reform projects have failed to translate into legislative or institutional change. Added to that is the fact that reform will necessarily affect the *status quo* that brought the current government to power – something of a disincentive to change. We consider that

What was patently clear from that process was the high level of existing dissatisfaction with the current Tasmanian constitutional framework amongst those who are most intimately involved in it and affected by it. There was also a consensus that reform is highly desirable and needs to be done sooner than later. That reform must include Aboriginal recognition, but it should not be limited to it.

It must be emphasised that the Working Group does not purport to speak on behalf of, or contrary to the interests or wishes of the Tasmanian Aboriginal community. Nor is it generally opposed to the proposal of the House Committee. What it does question is whether limited reform is the best way of achieving the underlying policy aims behind the proposal.

Tasmania should not just be playing catch up, it should be trying to create the best constitutional system it can; one in which Aboriginal recognition is a fundamental and central part. It should also engage with those whose interests and rights it seeks to represent and promote. A persistent problem with indigenous relations is the tendency for non-indigenous people to speak on behalf of aboriginal people, rather than allowing them to represent themselves. As the *Royal Commission into Aboriginal Deaths in Custody* concluded in 1991:

Aboriginal people have for two hundred years been dominated to an extraordinary degree by the non-Aboriginal society and that the disadvantage is the product of that domination ... elimination of disadvantage requires an end of domination and empowerment of Aboriginal people<sup>81</sup>

If the Tasmanian Aboriginal community supports the proposal for constitutional recognition in its current form, then it should be pursued; albeit as a starting, not end-point to wider constitutional reform. However, the relatively low representation of Tasmanian Aboriginals in the House Inquiry – four of thirteen submissions, with one not favoring recognition as things stand – suggests that is not the case. Indeed, the Committee itself expressed disappointment that the ‘peak body for Aboriginal Tasmanians did not make a written submission to this inquiry’ at all. It also recognised that, ‘the Committee considers that meaningful legislative reform is more likely with the full engagement of Tasmanian Aboriginal people’. During the preparation of the Consensus Document, a senior member of the Tasmanian Aboriginal community wrote to the author, stating that ‘apart

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momentum for change must be initiated from the agencies and stakeholders who understand and are invested in the constitutional system; particularly those with influence on governmental practice and policy. Achieving early buy-in will not only ensure the reform process is evidence-based but those involved are much more likely to facilitate change from within the system as the project progresses.

<sup>81</sup> Royal Commission into Aboriginal Deaths in Custody *National Report* (AGPS, Canberra, 1991) vol 1, 6.

from a few at the University, most Aboriginal people will oppose the Tasmanian government's attempt at recognition as a cynical exercise'.<sup>82</sup>

The perception of mere symbolism is not helped by the insertion of the recognition statement behind the current, archaic and highly legalistic Preamble statement. As noted, that statement was not designed to be a popular heritage or values statement. Rather it provides a legal description of the passage of imperial, colonial and state laws. Indeed, it records a passage of legal enactments that resulted in the dispossession, domination and disadvantage of Tasmanian Aboriginals. Not only would the statement be obscured by the much larger and inaccessible text, it would look out of place and very much an afterthought. If the ultimate aim is to move forwards towards reconciliation, in which Tasmania's Aboriginal heritage is recognised as part of the core and shared features of the State, then it should be integrated into the Preamble, as part of a cooperative exercise directly involving those it represents; namely the Aboriginal and general community.

Of course, one of the major problems with restructuring or rewriting the Preamble as it currently stands is that it is the only source of implied legislative authority for the Parliament of Tasmania. Ultimately a re-write of the Preamble should at least deal with this strange and unique oversight. Yet, whether further minor amendments and changes to an already crumbling document is a good thing is highly questionable. The reality is that *Constitution Act*, as a whole, lacks almost all the criteria of a good, meaningful constitution, and so is not a good platform for meaningful aboriginal recognition. It must be reformed.

## VII CONCLUSION

The *Constitution Act* has arguably always lacked the character of a fundamental law. As time has progressed it is becoming harder to see that legislation as anything more than an anachronism that is long past its use-by date. The whole of the Act needs to be reviewed or replaced, not only to ensure that aboriginal recognition is meaningful, but in fact, to create a genuine constitutional document for the State. As Dicey noted, a constitution is supposed to incorporate the most important and fundamental laws of the State. If it fails to do that, then statements inserted into it will also be deprived of their importance.

The policy of constitutionally recognising the First Peoples of Tasmania is a significant move away from a dark past towards a more enlightened and inclusive one. However, embedding the statement into an archaic, crumbling Act undermines its importance and value. It should be part of wider reform which declares the contemporary values and principles upon

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<sup>82</sup> Email letter, on file with author.

which Tasmania now stands. That reform must aim to making the *Constitution Act* the best it can be so as to accurately reflect Tasmania's existing governance arrangements in a more independent and enlightened time.

The important work by those who have championed this policy should not be understated. Neither the author or Working Group wish for that work to be undone, only to suggest it should be done effectively in a way that reflects the significance and importance of the underlying policy of reconciliation.

If stakeholders, and more importantly, the larger Tasmanian Aboriginal community, consider it vital to make a stop-gap recognition statement now, rather than wait for a wider process of constitutional reform to occur – indeed based on history, that may never happen – then it should be pursued. However, the problem with stop-gaps is they tend to delay much more significant and necessary repairs, further undermining the structural integrity of a broken system. That system needs to be fixed and restarted for us to move forward as a community that fully embraces its history and vision for the future.