Tasmanian Constitutional Reform Project

Symposium & Workshop 22 – 23 February 2016
Minutes and notes

An initiative of the Australian Association of Constitutional Law
Supported by the Law Faculty, University of Tasmania and Law Foundation of Tasmania

Please note the second part of these minutes (Workshop) are in A4 Landscape.
Dr Brendan Gogarty
- Tasmanian Constitution needs reform. However there are difficulties in any reform:
  o Constitution replete with empty sections.
  o Lack of clarity in leading sections.
  o Executive not mentioned in text of Constitution.

- Both the problems and resolution of the Constitution are found in the notion of responsible government in *Egan v Willis* as discussed by McHugh J.
  o Representative and responsible government - open government structure needs transparency.
  o The irony is that the mandate for transparent representative and responsible government is not itself transparent.

- Survival of small government is inadequate to show success.
  o Entrenchment is fundamental to ensuring rule of law.
  o Un-entrenched constitutions (ie Tasmania) are limited.
  o Question of whether the Tasmanian Westminster system has been successful

Governor Kate Warner
- What is the Governor’s role?
  o When appointed difficult to precisely determine role. Went to source documents.
  o *Governor of Tasmania Act 1982* was unhelpful. (primarily about salary and super)
  o Then looked at the Tasmanian Constitution which says very little about the Governor.
    ▪ § 10 what Parliament comprises – House of Assembly, Legislative Council and the Governor. Section 12 also relevant – Governor has the power to dissolve Parliament.
    ▪ Constitution is skeletal and makes no mention of the Executive Council or Premier.
- **Letters Patent 2005:**
  - Useful however it is rather strange that para 11 provides for the appointment of the Governor by the Queen by commission but the Letters Patent were proclaimed by the Governor.
  - Preamble refer to s 7(2) *Australia Act 1986*, providing that all powers of State except power of appointment may be exercised by the Governor.
  - Para IV provides there shall be an Executive Council to inform Governor.

- **Issues:**
    - Even after resignation from Parliament Minister remain members of the Executive Council (but are not under summons) because they are appointed during Governor’s pleasure. Some judges are also sworn in as members of the Executive Council. The appears incongruous.
  - 2. Role in relation to Chair of the Executive Council. Are you always obliged to act on the advice? Not it seems if you are being asked to act unlawfully.
    - This includes judges who are sworn in for life.
  - 2. Reserve powers, dismissal and appointment are particularly problematic. These are unclear when things ‘go wrong’ as such. This is demonstrated by the 2010 hung parliament when there was a lot of pressure on the Governor.
  - 3. The Constitution has many gaps and a lack of clarity.

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**Session 1: An Ideal Constitution?**

*Session Leaders: The Hon Stephen Gageler SC and Professor George Williams*

**The Hon Gageler SC**

1. **What should a State Constitution do?**
   - Harvard professor, Adrian Vermeule ‘The Constitution of Risk’-
     - Constitution is basically a machinery for Government. Designed to produce governmental output (public welfare, peace, order and good government).
     - Provides solution to unpredictable problems.
   - A machine that breaks down is a machine that doesn’t do anything.
   - ***Ideally- must optimise outputs, whilst accepting and managing a degree of inherent risk.***
   - Whatever you call it, it is a machine that must produce ongoing solutions to problems.

2. **What should a Constitution look like?**
   - It appears there are a number of ‘binary choices’ which arise at every juncture:
     - Choice 1- is it to be unwritten or written?
     - Choice 2- if it is written is it to be flexible (able to be amended normally or entrenched, requires extraordinary amendments?)
   - If it is entrenched what are the extraordinary measures for amendment? 2/3 majority or referendum? Combination or other procedure.
     - There is only one entrenchment provision in the *Tasmanian Constitution*.
   - If written, choices as to what goes in:
     - Establishing and defining the functions of the institutions of government.
Confined to establishing and confining institutions? What institutions should be included (traditional only, 3 arms?)

Or do we include other agencies of government - fourth arm, fifth and sixth arms?

- Yale, Bruce Peterman has said problem with modern Constitutional discourse is that only 3 arms counted by Montesquieu and this perception restricts the future of the way we see government.
  o If it is written and not confined to the functions of government, should a Constitution define the relationship between citizens and State? Political rights?
  o To what extent should it set out the elements of the electoral system?
  o To what extent should it be aspirational?
  o To what extent should it acknowledge failures of the past?

This will come up in public discussion.

3. If it is to be written (entirely or partly), what should be expressed in its text?

- Blue sky thinking is unrealistic. Basic question is not helpful and attention must be paid to the language that is to be used.

- Law reform project could take two approaches:
  1. Home grown, organic, implemental approach:
     a. We have a Constitution, we have letters patent, practices.
     b. Take an inventory – what works what doesn’t? Try fix these existing mechanisms.
  2. Comparative approach:
     a. Used in 1890’s during the Convention Debates. What is being used and is/ is not working in other States. What might be appropriated for local conditions?
     b. Look at what might be appropriated by from other Constitutions.

- These are both ways of moving forward.

Professor Williams

- Context defines what is ‘ideal’ (eg Fiji and Myanmar different to Australia):
  o Cannot easily identify an ‘ideal’ constitution. At an international level there is no consensus of what such an ideal constitution my look like.
  o Question of length: short or succinct?
  o NT approach- what is and isn’t working. Aboriginal population (need special protections).

- When you draft a constitution need an intelligible preamble (what is the desire of the document):
  o As such, for transparency purposes, it needs to make clear what the purpose of the document is and explain its connection to the community.
  o The 1970s/1980s ACT experience demonstrates that codification of conventions such as the role of the Chief Minister avoids controversies such as during the 2010 hung Parliament in Tasmania. This is despite the fact that the ACT is more prone to hung Parliaments.

- An ideal constitution needs to be drafted with plain and straight forward language – it can then be a gateway for community to understand the basic facets of their government:
  o Needs to be accessible for civics education.
  o Should set out the arms and functions of government and make reference to constitutional values such as judicial independence.
  o Internationally there is a consensus that the relationship between citizen and state in a constitution is just as axiomatic as setting out the arms of government.
    ▪ Right to freedom of political communication. Set our basic things such as right to vote.

- Entrenchment:
- **Tasmanian Constitution is a creature of its history:**
  -Creature of its history and the drafting practices at the time. It is too much a mixture of the mundane and the missing.
  -Some provisions are very lengthy, whilst important aspects too vague. Skeletal, but missing vital limbs. Overly reliant on common law conventions and practices (which are uncertain in some aspects- including reserve powers).
  -Poor structure, money bill section contains irrelevant material s 41A duration of assembly. Ineffective and complex. S 41A single entrenchment of a provision. S 46 unique in state constitutions, protects religious freedoms despite not being protected?

- **Inaccessibility:**
  -If Governor cannot find basic responsibilities then a member citizen will not be able to access and understand either.
  -Preamble. Difficult to understand. Not inclusive of community including Aboriginals. Need understanding of other documents to understand some provisions.

- **Survival:**
  -Has survived. Fostered level of controversy. Worst state compared to other State Constitutions.
  -It is in spite of the constitution that the political system here has worked – the constitution has fostered controversy that just should not be here. The Constitution is in the worst state of any of the States in terms of missing key criteria it should have.

**Elise Archer:**
- Very few members of Parliament have actually read the Constitution, or Standing Orders in their entirety.
  -Procedural matters could be set out fully in the Standing Orders.Difficult to teach when not contained in one document or subject to common law

**Leigh Sealy:**
- For the last seventy or eighty years the document has survived intact in the form it is: in the modern political environment, how do we pass a law saying here’s a document that we can’t change?
  -Prof Tate agrees with reticence to meddle;
  -Peter Heerey: historically Australians have not had much enthusiasm for abstract political ideals).

**Richard Herr:**
- At the end of the day a democracy does have to respect the rule of law, and that the purpose of the constitution at the end of the day is legitimacy, and so that the people believe at the end of the day that what the government does is legitimate.
Session 2: Parliament
Session Leaders: Professor David Clark and Leigh Sealy SC

- What parliamentary functions should be described, expanded or limited?
- What parliamentary powers should be described, expanded or limited?
- What parliamentary protection should be described, expanded or limited?

Prof David Clark
- Preamble:
  o We have a very elaborate preamble – with key values mentioned and the system e.g. rule of law and part of Australian federation. These are not controversial. Can be contrasted with beautifully clear NZ constitution.

- Other functions of Parliament:
  o Most constitutions in Australia stop at the point of ‘parliaments can make laws’ even though they carry out a range of other functions such as inquiries and removing public officers.
  o If a role of the constitution is to describe functions the Tasmanian one falls short. There is an oddity when it comes to standing orders; it is also a peculiarity – the electoral divisions should be deleted.

Leigh Sealy:
- Legislative Council dissolution:
  o Thorniest issue of all is that the legislative council is the only upper house in the world that can sit still while the lower house goes to election; there is no power to dissolve. Should that remain the case?
  o At a federal level it is explicable why there are two chambers (different constituents); why do we need two houses in Australia elected on different boundaries – there might be comfort in having a brake on the executive.

- Privileges:
  o The Tasmanian constitution has nothing with respect to privileges and immunities of parliament (now we have statutes); specific questions arise for powers under existing legislation – ought it to be incorporated into the Constitution?
  o Even within Act as presently stands there are oddities – debate about production of Cabinet documents; the position as understood now would be following Egan v Chadwick but question left open is that documents with respect to Cabinet deliberations do not have to be presented to parliament; but some see there can be no public interest immunity as role of legislature is to superintend executive (but could be used for political purposes).

Michael Stokes
- There is an argument for a strong upper house.
George Williams:
- **Legislative Council dissolution:**
  - Problem with inability to dissolve upper house is no dispute settlement mechanism e.g. blocking a money bill. Furthermore, Parliament is constructed for a two party system and there has been no reckoning with the Hare-Clark system. There is also an assumption that reform would need to go to referendum but he does not see this as necessary (Richard Herr agrees with this as long as there is no change to fundamental constitutional practice).

Richard Herr:
- **Definition of Parliament:**
  - The only function of the parliament in NZ is to make laws due to constitutional definition. Problem with our language is we keep referring to parliament as only the legislature. Failure to distinguish it is what creates problems.

Ben Bartl:
- **Legislative Council dissolution:**
  - Upper house is not accountable to parliament or electorate in that it can reject a money bill without dissolution; importantly, voter awareness about upper house elections is at an all time low, with members being re-elected unopposed – elections on the same day as lower house would see a more informed electorate.

Prof Anne Twomey:
- **Role and function of Upper House:**
  - Reflecting on NSW Upper House there was a concern with lack of drafting and poor bills getting through; lack of Upper House improved speed but produced poor legislation. Overall, even if they are obstructionist, it’s still preferable to have them there.
  - Furthermore, on deadlock procedures, especially in relation to supply, deadlock procedures should not be so unwieldy as to be unusable as they are in NSW – they need to functionally work, and perhaps there could be a special deadlock provision for supply due to special nature of it.

Leigh Sealy:
- **Respecting executive confidence:**
  - General consensus – need to respect confidence of documents which are sensitive; importance of integrity of parliamentarians.
  - Richard Herr – responsible government means responsible to parliament, but not in every detail responsible to the public because of the need to be efficient and functional.
  - General consensus – power to imprison for contempt of parliament is objectionable.

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**Session 3: The Role of the Crown**

**Session Leaders: Professor Anne Twomey and the Hon Stephen Gageler SC**

- What Crown powers need to be described, expanded or limited?
- Should the rules relating to the formation, structure and constitution of the Crown need to be better articulated?
- What limits on Crown power need to be described, expanded or limited?
The Hon Gageler SC

- **Formal and substantive role of Crown:**
  - Distinction between formal role of the Crown as nominal repository of state executive power and legislature, and the substantive role of the Crown in formation of government on the other hand.
  - With respect to the nominal role, there is little to talk about.
  - With respect to the substantive role, there are intractable problems at the heart of responsible government and no amount of talking or prescription is going to get rid of those problems.
  - There is a question whether reserve powers can be codified and, if they are, whether there is some way of setting up procedural mechanisms or whether they might be able to be substantively collected into a set of publicly available and discussed guiding principles.

- **Governor acting on advice (proper and open advice - distinction):**
  - Notes disagreement with Prof Twomey – in Gageler J’s experience the ideal solution is that the governor should always act on the advice of the premier and the premier, in giving advice, and the governor in acting on it should both see themselves as following rules/principles; they should see themselves in attempting to find the uniquely correct or preferable solution to the problem, with neither seeing themselves as having leeway to exercise personal or political discretion.
  - It is often as an advisor to the Crown much easier and more appropriate to advise on what is proper to do as that is often obvious; rather than advising on what it is open to do. Gageler J has no issue with normative advice being provided based on constitutional principle, and that advice being available to and acted upon by the premier and governor; tends to think that Dicey did a disservice by saying there is constitutional law and constitutional convention and seeing a distinction between the two.
  - Reserve powers are inaptly named – there are some rules that cannot be properly spelt out or articulated, and their application leading in some circumstances to difficulties though no more difficult than any other legal question; the problem arises when the players see themselves as having discretion and receive advice from different sources.

Prof Anne Twomey:

- **Inaccessibility:**
  - Virtually nothing in the Act about the crown, everything is in the Letters Patent. The inaccessibility is a problem.
  - Is it still appropriate for parts of the constitution to exist in Letters Patent that can be changed by parliament which the executive has control over? No. There are also technical problems with amending the Letters Patent.
  - Problems with the executive regulating itself through the Letters Patent.
  - Constitution should include provisions dealing with appointment of the governor.
  - Consider the language that you use, specifically whether it allows for discretionary action – is that appropriate?

- **Governor acting on advice: clarity needed:**
  - Clarity about when the governor acts on advice and on whose advice – there could be clarity about when the governor is required to act on certain advice and from whom.
  - If there is nothing on this circumstance then it could be the premier who advises. Refer to Twomey's draft Northern Territory constitution. Would need to include clause as to non-justiciability.
  - The critical thing is that advisers to the Governor should not be advising on a policy outcome – the Governor should not be able to shift responsibility to [un]elected person such as solicitor-general, who can advise on conventions but not policy outcomes.
Explicit references to conventions in Constitution:
- The provisions in the Constitution Act 1934 (Tas) relating to the executive can be improved by making explicit references to certain conventions – for instance the collective responsibility of Cabinet, what the individual responsibilities of a minister are, the role of the Premier, and the onus of accountability to Parliament that responsible government creates. Again, these should be non-justiciable.
- For example the role of Cabinet – something to be said for this but must be balanced against risks of codifying conventions which can lead to inflexibility in a crisis and justiciability issues.

Solicitor-General providing advice:
- Solicitor general is not elected so they shouldn’t provide formal constitutional advice simply assistance
- The Solicitor-General’s advice to the Governor is not constitutionally binding. In many situations, there is no need for legal advice because the course of action to take is obvious.

Governor’s tenure:
- Not necessary to constitutionalise.

State Chief Justice acting as Lieutenant-Governor:
- Prof Williams: should Tasmania follow South Australian route of appointing a senior community figure?
- Prof Twomey: you need a chain of people so there is a list to work through in Armageddon scenarios. There are bits of HCA dicta where they have accepted that Judges in vice-regal roles are a historical anomaly. It has been the State practice since 1890. In Canada McLaughlin CJ is the deputy GG.
- Prof Clark: also discussing issues with separation of powers between justices and lieutenant governors.
- Simon Gates: tendency to use judicial officers as lieutenant governors would seem to militate towards imposing a narrow or no discretion in advising governor.

Leigh Sealy:
- Unique Tasmanian convention:
  - There could be a convention that is unique to Tasmania – where the Premier advises the governor to see if there is someone else who can form a government. There just needs to be that quick required parliamentary sitting to create the circuit breaker for who is required to face parliament.

Session 4: Independence and Impartiality of Scrutiny Bodies
Session Leaders: Rev Professor Michael Tate AO and the Hon Peter Heerey AM QC

- What aspects of state judicial power require clarification, expansion or limitation?
- Does the current constitution sufficiently protect the independence and impartiality of judicial and other scrutiny bodies?
- Is there a need to include further scrutiny bodies or provisions relating to the exercise of constitutional power?

Hon Peter Heerey AM QC
- Dismissal:
o In Tasmania there is a gap or lack of clarity as to when dismissal can occur. The commission set up to deal with the Murphy J scandal came up with a number of recommendations, with such legislation desirable for Tasmania given clear procedural machinery.

- **Complaints against judges:**
  o Apart from the nuclear option of parliamentary dismissal, should there be some mechanism for complaints against judges? Three options:
    - An external body;
    - An internal complaints mechanism like with the Family Court;
    - Purely informal non-statutory system.

**Rev Professor Michael Tate AO**

- **Threshold of unconscionability:**
  o Part of the trauma with the Murphy affair was that the Senate could not decide on the appropriate threshold or nature of misbehaviour, and the threshold of proof. Constitution should be amended to reflect traditional language. There might be a big gap between what parliament and the judges think is unconscionable.
  o Who proves standards of proof? The senate? External body?
  o This area should be amended in the reform process.
  o Prof Williams: Higher standard for judges. Integrity commission perhaps inappropriate? Not in favour of including integrity commissions in constitution if aim is to keep shorter and more accessible.

- **Constitutional proscription for judicial misbehaviour?**
  o What would be the penalty if a judge consistently refused to adhere to a mandatory sentence prescribed by parliament? Could that be constitutionally proscribed for?
  o Doesn’t believe that there is a mood in the community for putting rights into the constitution.
  o Where are the codes of conduct – do they exist for all persons and what are they?
  o Where do you draw the line for pecuniary interests?

- **Other bodies:**
  o Should other bodies such as ombudsman and auditor get mention in the constitution – even the integrity commission too?

**Prof George Williams:**

- **Arbitrary power in Tasmania:**
  o Discussion has shown pockets of arbitrary power in Tasmanian government e.g. upper house able to reject money bills without consequence.

**General discussion:**

- Michael O’Farrell: why put integrity commission in the Constitution?
- Brendan Gogarty: does the constitution need to say something about preserving the integrity of judges beyond how much they are paid and when they can be sacked?
- Anne Twomey: careful about what should be entrenched in constitution. In Canada for example there were extraordinary implications found in the preamble about judicial independence; there may be unexpected extreme implications especially as judges decide what they are.
- Simon Gates – opinions change over time as to what kind of oversight body is best, so they should not be constitutionalised. They lack the same enduring need and appropriateness as the traditional three arms.
- Anne Twomey: on removal of judges and due process. In NSW it is less clear what the rules are when it comes to procedure in both houses of parliament which is problematic – and do rules of natural justice etc. apply.

Session 5: Entrenchment
Professor Anne Twomey & Michael Stokes

- Is entrenchment important?
- What are the legal and political problems with entrenchment?
- What are ‘fundamental constitutional provisions’ that might be entrenched?

Michael Stokes
- Entrenchment:
  o Pressure to change basic provisions often arises in an emergency when passions run high and dispassionate argument is difficult.
  o The Constitutional position is that entrenching can be seen as inconsistent with the supremacy of parliament. There is theoretical debate over whether entrenching positions is an addition or subtraction from legislative power.
  o Australia Acts 1986 (Cth) s 6 authorises manner and form entrenchments with respect to laws on the constitution, powers, procedures of parliament but not on other subjects. There are real doubts whether the parliament can impose binding entrenchments on itself with respect to other subjects.
  o Entrenchments should only be imposed by the proposed method of amendment or repeal. However, there may be difficulties in legally validating entrenchment provisions other than those authorised by section 6 of the Australia Act by means of a constitutional convention or referendum.
  o If the people of Tasmania were sovereign, a referendum or constitutional convention could give legal validity to such entrenchments just as the conventions and referenda of the 1890’s are now seen as validating the Australian Constitution. However, the parliament is not a sovereign parliament, being subject to the Constitution and the Australia Act. In my opinion there is no residual sovereignty in the Tasmanian people.

Prof Anne Twomey:
- Manner and form entrenchment provisions:
  o Don’t entrench if provision is detailed. WA entrenched ‘directly chosen by the people’ and accidentally gave themselves implied freedom. Victoria accidentally entrenched references to Monarchy in their constitution. Shouldn’t entrench by anything other than the same mechanism by which you would repeal a law.

Prof George Williams:
- Solution is partial entrenchment:
  o Issues with bipartisan consensus and importance should be entrenched, such as judicial independence.

Leigh Sealy:
- Entrenchment should reflect community values:

General discussion
- Should we entrench minimum numbers for parliament and the judiciary to ensure they can continue to function effectively?
- Automatic sunset clauses and mandatory reconsideration of entrenching provisions could help solve many of the foresight issues.
- There are other procedures to change these provisions, parliament special majorities not just referendum – what about implied appeal?

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Session 6: Moving Forward – Other Matters
Session Leaders: Dr Brendan Gogarty and Anja Hilkemeijer

- Is reform necessary?
- Is reform possible?
- What form of reform?

- Reform:
  
  o Process:
    ▪ To get reform there needs to be a champion in both houses of parliament
    ▪ Can be helpful to hand issue to institute with government support with terms very clearly set out which would legitimise things and make it more acceptable to the community
    o Will need to answer the question – is reform necessary; we’ve been operating for so long fine, if it isn’t broke why do we need to fix it?
  
- General agreement – all parties support constitutional recognition of Aboriginal People.

- Articulation:
  o Would be good to have an articulation about how the government and constitution actually work at present

- Reform stages:
  o Two stages
    ▪ 1. Put in there what actually exists;
    ▪ 2. What parts need to be changed
      • BUT you need to flag that there are problems to start with so there is some motivation to do something. If you start saying it’s just a mess and needs to be reordered, people will think it has been solved and it will be difficult to do part 2

- Momentum:
  o People will remember the hung parliament so you can draw on that for support
  o Where do you get momentum to get change as a priority, there are so many other issues going on in the community – this may get put on the ‘backburner’
  o We want to make the public aware

- Current actions:
  o Can we fix some things outside of the constitution before the end point?
  o Get the letters patent online** This would be a great first step.
Tasmanian Constitutional Law Reform Project

23 February
Workshop

Present

A Twomey, B Gogarty, D Clark, G Williams, M Stokes, S Gates, L Sealy, T Henning

Minutes prepared by Daryl Wong.

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<th>AT Professor Anne Twomey</th>
<th>MS Mr Michael Stokes</th>
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<td>BG Dr Brendan Gogarty</td>
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<td>DC Professor David Clark</td>
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<td>GW Professor George Williams</td>
<td>TH Ms Terese Henning</td>
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Section / Topic | Comments | Conclusion / Follow-up |
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General Changes | Reforming or amending the Legislative Council should be excluded from the scope of this project as prior attempts have always been unsuccessful | Place copies of the letters patent(s) online |
| | Avoid direct references to particular sections in other legislation | Update the Constitution Act 1934 (Tas) (‘the Tasmanian Constitution’) to be gender neutral |
| | Resistance to adding rights or freedoms in the Constitution | The Tasmanian Constitution should include a reference to the Premier |

Separation of Powers | AT: Sensitivities arise with separation of powers because it allows for the Court to imply certain things about entrenched divisions. However, this is only an issue with Separation of Powers if the different branches (eg: Legislature, Executive and the Judiciary) are entrenched | Consensus that there is no need to establish formal separation of powers by entrenchment or otherwise because of the possible effect on Tasmania’s tribunals |
<p>| | GW: The Tasmanian Parliament should be left to decide this issue | |</p>
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| Judiciary      | • The technical requirements relating to the Judiciary should be placed in a Supreme Court Act  
• No discussion of the need to consolidate the Supreme Court Act(s)  
• If something is to be added to the Tasmanian Constitution on the Judiciary, do not specify the number of judges. | • Consensus on limited additions:  
  a) a provision relating to the appointment and dismissal of judges by the Governor;  
  b) an explanation of courts and other bodies: e.g. ‘there shall be a Supreme Court and such other bodies as Parliament creates…Such courts shall exercise state judicial power’; and  
  c) make it clear that quasi-judicial tribunals can be created. |
| Entrenchment    | • AT: Entrenchment is acceptable as long as we are careful about how we go about it. For example: ensure that a facility to entrench embedded in the Tasmanian Constitution ensures that it is as difficult to entrench something as it is to un-entrench something.\(^1\)  
• GW: Entrenchment may be too much of a political / policy issue to address at this point. Simple re-drafting might be ideal | No consensus on whether to entrench anything in particular |
| Preamble        | Generally  
• DC: Could shrink preamble to a few lines and omit references to Her Majesty etc.  
• GW: Shrink it and condense it; make it accessible for civics education by explaining the basics of what the document is and what it seeks to do.  
• AT: Caution should be exercised in rewriting the preamble; it might be prudent to consolidate the changes to other areas of the Tasmanian Constitution prior to reforming the preamble because there must be consistency between what the preamble says and what the Constitution does  
• AT: Reference of the date whereby Van Diemen’s Land was | • Consensus on indigenous recognition in the preamble  
• Consensus on reference to people through Parliament  
• Consensus on shortening the preamble to render it more accessible  
• Partial consensus on the inclusion of the phrase (or its analogues) ‘peace, order and good government’  
• Lack of consensus on whether inclusion of aspirational material is ideal |

\(^1\) The draft NT Constitution has an entrenchment facility. This has been provided in hardcopy to BG, with the softcopy to be emailed in due course by AT.
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<td>• <strong>DC:</strong> Might want to have the parliamentary system reflected in the</td>
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<td>preamble (ie: ‘the people through their representatives in parliament’)</td>
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<tr>
<td><strong>Aspirational Material</strong></td>
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<tr>
<td>• <strong>GW:</strong> Need to be</td>
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<td></td>
<td>clear as to what aims and audience are; attracted to idea of opening</td>
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<td></td>
<td>it up to school kids, and recognising Aboriginal people, history,</td>
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<td></td>
<td>object of constitution, and potentially something aspirational with</td>
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<td></td>
<td>reference to peace, order etc.</td>
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<td></td>
<td>• <strong>AT:</strong> Consider drawing on language from the South African</td>
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<td>Constitution (ie: ‘We commit ourselves …’)</td>
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<td></td>
<td>• <strong>AT:</strong> Aspirational text may have a freezing effect on the</td>
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| Development of the Constitution | • **BG/DC/TH**: Peace, order and good government have a settled meaning in jurisprudence and should be included in the preamble  
• **AT**: Preambles should not be substantive  
• Lack of consensus on whether inclusion of aspirational material is problematic. | Three suggestions for reform:  
a) move all provisions relating to the demise of the Crown to another Act so as to not clutter up the Tasmanian Constitution;  
b) alternatively, have one single provision that consolidates all these provisions; and  
c) alternatively, have one provision that says that parliament is not dissolved by the demise of the Crown and refer to another Act. |
| Sections 4-7 Demise of the Crown | | |
| Section 8 Deputy-Governor’s powers: Provision as to deputy of Lieutenant-Governor or Administrator | • **AT**: Issues arise from:  
a) a reference to the letters patent but only to the one in 1971; and  
b) a reference to the seat of government without elaboration on what and where that is.  
• Discussion of restrictions on who may be appointed to Lieutenant Governor or Deputy (ie: to exclude sitting judges), however consensus is that:  
a) it is for others to decide whether to include such restrictions; and  
b) such restrictions may not be appropriate as there is a possibility that there are plenty of retired Supreme Court judges that may fill the role due to the fact that many people | • Consensus that at the very least, drafting should be improved, particularly the references to letters patent and seat of government  
• The relevant bits from the letters patent can be brought into the Tasmanian Constitution (ie: references to the Governor, Lieutenant Governor and the administrator)  
• No consensus on whether restrictions on who may be appointed to Lieutenant Governor or Deputy should be added |
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<tr>
<td><strong>Section 8A</strong> Limit on number of Ministers of the Crown</td>
<td>Consensus that current provision should be kept as is: It guarantees at least 3 back-benchers on the Government’s side</td>
<td>No changes</td>
</tr>
</tbody>
</table>
| **Section 8B** Appointment and tenure of office of Ministers of the Crown | - **AT:** There may be eligibility issues when you’ve lost your Premier or someone major and you can’t appoint someone who is not already a Minister  
- **AT:** Synchronise with the Commonwealth provision which gives 3 months leeway | Consensus that:  
a) any changes to this provision is for Parliament to decide; and  
b) the seven day shotgun on the Governor’s head is too much. |
| **Section 8C** Special provisions as to Attorney-General | | No changes |
| **Sections 8F-8H** Provisions relating to Secretary to Cabinet | Consensus that sections 8F-8H might be unnecessary and can be removed as long as a reference to the Executive Council is retained | To remove as long as there is a reference to cabinet, Executive Council and the Premier |
| **Section 9** Continuation of existing Houses: Continuance in office of Members | | Shift this to a transitional section (for example, in a Schedule to the Tasmanian Constitution) or remove altogether |
| **Section 10** The Parliament of Tasmania | Consensus that reference to both Houses of Parliament and the Governor should be retained; this provision should be moved to the start of the Tasmanian Constitution | Consensus that:  
a) This section should be moved to section 1;2 and  
b) a new section about legislative power (a ‘peace, order and good government’) |

2 Note that because the short title of the Act currently comprises section 1 of the *Constitution Act 1934* (Tas), the current section 10 and the proposed ‘peace, order and good government’ provision would probably comprise new sections 2 and 3 respectively.
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| **Section 11**  | • AT: Possibility of shortening the period from 12 months to 6 months. This is more appropriate when there is a constitutional crisis, and may also be more convenient for Parliament at times.  
• AT: It is good to have some fixed provisions in the constitution requiring the governor to come back and exercise reserve powers (ie: Solomon Islands)  
• MS: Suggests that the twelve month requirement of bringing parliament to come back and sit is ideal  
• SE: Should not allow the Executive to go unsupervised for more than six months | No consensus on the need to change the provision, though a shorter timeline was suggested |
| **Annual Sessions** | | |
| **Section 12**  | • AT: Must decide whether you want prorogation to be a reserve power or not. Prorogation is a controversial issue: if government remains responsible that’s fine when governor is advised, but it becomes controversial when it appears government has lost confidence of the house and the governor remains acting on advice for six months (this arose in Canada for example with the Harper government).  
• GW: The main issue is whether reserve powers should be left at large, or they should be restricted; prefers narrowing and restricting reserve powers to emergency situations, similar to the situation in the ACT. We should have a set of rules that must be followed: a) Parliament must be summoned within 3 months; b) addition of no confidence provisions where the majority can cause a recall of Parliament; and c) no confidence provisions must provide for constructive votes of no confidence (if you vote someone out you need to vote someone in).  
• GW: You want a Governor to have some discretion, but not to the | Consensus that:  
a) there must be a mechanism by which to recall Parliament;  
b) the processes to do so must be clarified by the words of the provision (consider whether the discretionary words of the section are appropriate, keeping in mind other provisions); and  
c) it may be prudent to mention the Premier’s role in this process.  
Lack of consensus as to whether discretion should be left with the Governor. Such discretion may be unnecessary if there is a mechanism by which to recall Parliament |
<p>| <strong>Governor to fix times for sittings; Delay in return of writs</strong> | | |</p>
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|                | extent that it is unbounded.  
• AT: There needs to be a connection between summoning parliament and any prorogation. Prorogation may not be necessary if there is another mechanism for summoning parliament.  
• AT: It should be clear which rules are convention, and which are discretionary  
• AT/BG: There are issues with hung parliaments and/or when Government collapses mid-term. There are various means to address hung Parliaments:  
a) leave everything to convention;  
b) make it clear by the language that you use (ie: What are the things you expect to be conventions and which ones aren’t); and  
c) return hung parliaments to the floor of the House, but make sure there is a set of rules and a process to follow.  
• DW: The issue of discretion may be one that is too large to resolve at this juncture.  
• TH: It may be prudent just to identify the issue for resolution after consultation with a broader range of stakeholders | Consensus that this provision should be re-drafted to make it clear who has the power to call these sittings and on what grounds (perhaps a majority of members in the House/Council?) |
| Section 13     | Discussion of how deadlock provisions relating to special sittings were removed in 2008-2010. Deadlock provisions are still in the Legislative Council standing orders are not elsewhere.  
• Discussion of what these special sittings actually are: An example given was the Pulp Mill assessment | |
| Special sittings of Parliament | | |
| Section 14     | Consensus that current provision is too prescriptive in terms of the qualifications for being elected as Member of the House  
• Possible simplification to merely require ‘qualification to vote’ or ‘simple residency’. Lack of consensus as to whether ‘residency’ needs to be defined or whether the common law is sufficient. | Consensus that current provisions is too prescriptive and should be simplified.  
• Lack of consensus as to precisely how it should be simplified |
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<tbody>
<tr>
<td>Section 15 Resignation</td>
<td></td>
<td>Change ‘upon receipt’ to ‘upon acceptance’ to retain the Governor’s discretion</td>
</tr>
<tr>
<td>Section 17 Houses to make Standing Orders</td>
<td><strong>BG:</strong> Possible synchronisation with section 50 of the Commonwealth Constitution while also keeping in view the respective provisions in State Constitutions</td>
<td>No consensus on changes, but if any change is to be made, be consistent with the Commonwealth and/or State Constitutions that deal with the power to make Standing Orders</td>
</tr>
<tr>
<td>Section 18AA Application of Division</td>
<td></td>
<td>No changes</td>
</tr>
<tr>
<td>Section 18 Constitution of the Council</td>
<td></td>
<td>Replace references to the Electoral Act and the Legislative Council Electoral Boundaries Act to ‘as Parliament otherwise provides’</td>
</tr>
<tr>
<td>Section 19 Council Elections</td>
<td></td>
<td>Save for section 1 which provides for an office term of 6 years, all other sub-sections should be condensed to refer to ‘as Parliament otherwise provides’</td>
</tr>
<tr>
<td>Section 20 Quorum of the Council</td>
<td></td>
<td>No changes</td>
</tr>
<tr>
<td>Section 21 Election of President</td>
<td></td>
<td>No changes</td>
</tr>
<tr>
<td>Section 22 Constitution of the Assembly</td>
<td>• Number of members should be in the Tasmanian Constitution but it should be subject to change • If the names of the five electorates are important for legacy reasons, they should be entrenched in accordance with the Hare-Clark electoral system</td>
<td>• Modify subsection 2 to read ‘as Parliament otherwise provides’ instead of referring to the Electoral Act • Move subsection 5 to the Electoral Act</td>
</tr>
<tr>
<td>Section 23 Four year Parliaments</td>
<td></td>
<td>Remove section 23(1) as it is transitional and unnecessary</td>
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<tr>
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| Section 24 Election of Speaker | • **AT:** The idea behind this section is that there is a forced changeover point at which a new speaker would be chosen.  
• **AT:** Possibility that a deputation is too excessive: change the word ‘deputation’ to something less excessive, but not specified what that word would be. | No consensus on change, but there is a possibility that the words ‘by deputation’ should be changed to something less excessive |
| Section 25 Quorum of the Assembly | • Discussion of whether the Speaker should play the tiebreaker role. Relevant issues:  
  a) if you want there to be an even number on the floor and the Speaker plays the casting role, do you want to have a convention whether the speaker always votes for further debate or otherwise; and  
  b) in NSW, you resolve in favour of more debate as opposed to less debate, in favour of keeping the Government alive, etc.  
• **AT:** Section 25 is really the only reason why you want to change the number of members of the House  
• Discussion of the possibility of bringing in someone independent to be the Speaker of the House. This might resolve deadlock issues where one party does not want to submit a person to become Speaker of the House because they would lose numbers on the floor | No consensus on amendments, only that this is a problem for later resolution |
| Section 28 Assembly and Council Electors | Tangential discussion of whether everybody ignored what the High Court said in *Roach v Electoral Commissioner* (2007) 233 CLR 162 | Change specific reference to Electoral Act to ‘subject to the provisions of this Act and any other Act’  
Other Possible areas of change:  
a) Putting in all the disqualifications (eg: unsound mind) for greater clarity; and  
b) define electors in the interpretation section to refer either to electors as defined in the Electoral Act or otherwise. |
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<tr>
<td>Section 30</td>
<td></td>
<td>Replace the specific reference to the Promissory Oaths Act with either:</td>
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<tr>
<td>Oath to be taken by members</td>
<td></td>
<td>a) ‘must swear an oath as required by law’; or</td>
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<td></td>
<td></td>
<td>b) ‘an oath to Parliament’</td>
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<tr>
<td>Section 31</td>
<td></td>
<td>No changes</td>
</tr>
<tr>
<td>Common wealth membership</td>
<td></td>
<td>Re-draft to simplify, but no specifics as to how that will be done</td>
</tr>
<tr>
<td>Section 32</td>
<td>Consensus that sections 32 and 33 do not need to be merged despite</td>
<td>Re-draft to simplify, but no specifics as to how that will be done</td>
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<tr>
<td>Office of Profit</td>
<td>an overlap between the provisions, however, there is a need to re-draft to</td>
<td></td>
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<td></td>
<td>simplify generally</td>
<td></td>
</tr>
<tr>
<td>Section 33</td>
<td>Consensus that this section needs an extensive re-draft.</td>
<td>Consensus is that extensive an re-draft is needed</td>
</tr>
<tr>
<td>Contractors</td>
<td>• BG: Keep the general principles in, but have the technicalities in</td>
<td>to distil to general principles, with technicalities in another Act</td>
</tr>
<tr>
<td></td>
<td>another Act</td>
<td></td>
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<tr>
<td>Section 34</td>
<td>Consensus is that:</td>
<td>Slight re-draft to correct ambiguities</td>
</tr>
<tr>
<td>Vacation of office for other causes</td>
<td>a) the current provision is alright even though there are ambiguities,</td>
<td></td>
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<td>specifically in relation to (b) and (c) which may engender issues</td>
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<td></td>
<td>relating to dual citizens;</td>
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<td></td>
<td>b) unsound mind does not need a re-draft, nor is it contentious in</td>
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<td>practice; and</td>
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<td>c) possible timing issues may arise with (e) in relation to timing when</td>
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<td>there is a pending appeal after conviction and where you have been</td>
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<td>convicted of any crime which potentially has a sentence of more than one</td>
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<td>year (should relate to your real sentence and not possible sentence)</td>
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<tr>
<td>Section 35</td>
<td>Discussion of whether section is necessary, but consensus that it</td>
<td>No consensus on re-drafting</td>
</tr>
<tr>
<td>Election and return</td>
<td>should be retained because section refers to ‘void’ elections which are</td>
<td></td>
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<td></td>
<td>handled differently</td>
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<tr>
<td>Section 36</td>
<td>Possibility that a reference to income tax rating is anachronistic and</td>
<td>Consolidate all the interpretation clauses by moving the contents of s 36 to s 3 of</td>
</tr>
<tr>
<td>Money Bills - Interpretation</td>
<td>otiose and should be removed after discussion with Treasury</td>
<td>the Tasmanian Constitution.</td>
</tr>
<tr>
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<tr>
<td>Section 37</td>
<td></td>
<td>Consider the possibility of removing the reference to income tax rating</td>
</tr>
<tr>
<td>Money Bills to Originate in the Assembly</td>
<td>No consensus on changes</td>
<td>No consensus on changes</td>
</tr>
<tr>
<td>Section 38</td>
<td><strong>BG:</strong> Suggested that sections 37 and 38 should become one section. There was no consensus on this change.</td>
<td>Possible removal of the word ‘purpose’ from s 38(1) because it requires the Governor to make determinations that are unnecessary</td>
</tr>
<tr>
<td>Money votes to be recommended by Governor</td>
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</table>
| Section 39                                                                      | • Possible issues with breaching the Constitution when there have been appropriations for more than one year. This is particularly relevant to public works.  
• May want to limit (b) to any ordinary expenditure of government and not public works after discussion with Treasury. | Possible re-draft limiting (b) to any ordinary expenditure of government and not public works after discussion with Treasury |
| Limitation of matters to be dealt with in Appropriate Bills                     |                                                                                                                                             |                                                                                                           |
| Section 40                                                                      |                                                                                                                                             | No changes                                                                                                |
| Certain provisions in Appropriation Acts inoperative                           |                                                                                                                                             |                                                                                                           |
| Section 41                                                                      | • **MS:** Instead of setting out the two acts, may want to just say ‘an Act setting tax rates’  
• **AT:** Issue with MS’ suggestion is that Acts may set tax rates or do other things. Specificity might be helpful  
• **GW:** Necessary to have a round-table with key officials prior to any change to this provision | While issues were identified, no consensus on changes until there has been a discussion / round-table with relevant stakeholders |
<p>| Limitation of matters to be dealt with in Income Tax Rating Acts and Land Tax Rating Acts |                                                                                                                                             |                                                                                                           |
| Section 41A                                                                     | • <strong>AT:</strong> Problem with this provision is that it is an un-entrenched entrenchment provision                                                  | No consensus on what to do with this provision. Possible options:                                         |</p>
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<tr>
<td>respect of its own duration</td>
<td>• <strong>GW:</strong> Consider keeping it in the Constitution as it serves a ‘political entrenchment’ purpose</td>
<td>a) move it just after section 23 as it seems to be in the wrong place; and/or</td>
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<td>b) if it is to be entrenched, double-entrench it; and/or</td>
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<td></td>
<td></td>
<td>c) if it is not to be entrenched, take it out.</td>
</tr>
<tr>
<td>Section 42</td>
<td><strong>Powers of the Council in respect of the amendment of Bills</strong></td>
<td>• Possible need for re-drafting but general principles are sound</td>
</tr>
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<td></td>
<td>• Generally, no consensus on changing the provision notwithstanding the fact that its operation seems obvious.</td>
<td>• Possibility of changing section 1(b) and (c) to read ‘Tax Act’</td>
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<td>However, it has value as confirmation that the Council can request amendments without breaching privilege or limits of power</td>
<td></td>
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<tr>
<td>Section 43</td>
<td><strong>Power of the Council to request amendment of Bills which it may not amend</strong></td>
<td>No consensus on change</td>
</tr>
<tr>
<td></td>
<td>• <strong>GW:</strong> Might be helpful to consider the alternative in NSW, where if the assembly doesn’t accept the Bill, it might get passed anyway</td>
<td></td>
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<tr>
<td>Section 44</td>
<td><strong>Power of the Council to reject Bills which it may not amend</strong></td>
<td>No changes</td>
</tr>
<tr>
<td>Section 45</td>
<td><strong>General powers of the Council and the Assembly</strong></td>
<td>No changes</td>
</tr>
<tr>
<td>Sections 45A and 45B</td>
<td></td>
<td>Join sections 45A and 45B into one section</td>
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<tr>
<td>Section 45C</td>
<td><strong>Municipal areas</strong></td>
<td>Remove section entirely</td>
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<td>Comments</td>
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<tr>
<td>Section 46</td>
<td></td>
<td>Leave as is for now as a case in Launceston regarding section 46 will be decided soon</td>
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<tr>
<td>Religious freedom</td>
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AT Professor Anne Twomey
BG Dr Brendan Gogarty
DC Professor David Clark
GW Professor George Williams

MS Mr Michael Stokes
SG Mr Simon Gates
SE Mr Leigh Sealy SC
TH Ms Terese Henning