The Crown of Tasmania

Introduction

The term ‘Crown’ is used to define the Executive of the State, based on the ‘ancient principle of the Government of England that the Executive power is vested in the Crown’. In Tasmania, the term is used to refer specifically to the Queen's representative in Tasmania, that is the Governor, the Deputy Governor who, in actual fact, acts on the advice (that is direction) of the Premier and Ministers. The Crown also includes the delegates of those ministers and the public service more broadly. Part II of the Constitution Act 1934 (Tas) refers to the 'The Crown'. Despite this reference, Tasmania's Constitution is silent on the source of the Tasmanian Executive's power, and as such, an understanding of the source of power relies upon 'upon constitutional implications derived ... from the common law and long established convention'.

Current arrangements

The Constitution Act 1934 Part II pertains to the Crown and includes the appointment of Deputy-Governor/ Lieutenant Governor (s 8), numbers, appointment and tenure of Ministers of the Crown (ss 8A-8E) and the appointment and functions of the Secretary to Cabinet (ss 8F-8H). The 'Crown' is not defined by the Constitution. However, Crown is defined variously in State legislation. For example, the Crown Proceedings Act 1993 gives that:

- 'State Crown' means the 'Crown in right of this State'; and
- Crown includes a 'Minister, an instrumentality or agency of the Crown and a prescribed person'.

The Acts Interpretation Act 1931, s 24(a) states that:

- 'In any Act … references to … the Crown, shall be construed as references to the Sovereign for the time being'.
The term is also used by the Acts Interpretation Act to describe the 'Crown in right of the State' (s 47(d)(iii)), and ‘a Minister of the Crown’ (s 40(1)).

The Constitution therefore reflects the constitutional fiction that the Crown of England was never deprived of its executive power and continues to reign as sovereign. Although minimalist in nature, the Constitution describes the Crown in the right of the state being the Governor, as Queen’s representative acting on the advice of senior Ministers (who, according to the Letters Patent are appointed by the Governor) and who operate Ministries of State on the Governor’s instruction. The common law convention however, operates to do the opposite. Hence, the Governor is appointed on the advice, and acts on advice of the Premier and Cabinet (who ordinarily serve as active members of the legislative council). No mention of this arrangement is contained within the Constitution Act 1934.

The constitutional basis of the various offices and parts of the the Crown of Tasmania are discussed below.

**Governor**

The Constitution Act refers to the Governor in several sections, but does not describe the nature or role of that Office. Instead the Constitution of the Office is established by the Letters Patent, which are the constitutional source of authority for the Governor. Notably these are issued under the Authority of The Governor pursuant to the Australia Act 1986 (Cth), s 7(s). That means that, strictly speaking, the office of Governor – including the constitution of that office - is created by authority of the Governor. Hence the Letters Patent of 21 November 2005 state that:

> "I The Honourable William John Ellis Cox, Companion of the Order of Australia, in and over the State of Tasmania and its Dependencies .... Declare, direct and ordain ... There shall be a Governor in and over Our State of Tasmania and its Dependencies"

The exercise of power appears to be rather circular. It also raises the question of what the source power actually is, or if the notion that a Governor's Office can establish its own constitutional authority is contrary to the ‘elementary rule of constitutional law ... that a stream cannot rise higher than its source’. In addition:

- The Acts Interpretation Act 1937, s 43 stipulates that the ‘Governor’ in Acts is taken to mean ‘the Governor of this State, or the person for the time being administering the government of this State, acting with advice of the Executive Council’.
- The preamble of the Letters Patent describes the role of the Governor to ‘administer the government of the State’. Cl IV indicates the role of the Executive Council is to advise the Governor in her or his ‘government of the State’.

All told however, this provides a very sparse description of the executive powers, functions and responsibilities of the Governor. Instead these are set out by convention and common law.

**Role**

Section 7 of the Australia Act 1986 (Cth) provides that the ‘Her Majesty’ (the Queen) is represented in Tasmania by a Governor, who is appointed by the Queen on the advice of the Premier (s 7). The effect of s 7(2) is that as the Queen's Representative in law and practice, the Governor exercises all of The Queen’s powers except the power to appoint and dismiss a Governor. These powers are exercised with allegiance and oath to The Queen and office before a Supreme Court Judge and God. In addition:

- The Acts Interpretation Act 1937, s 43 stipulates that the ‘Governor’ in Acts is taken to mean ‘the Governor of this State, or the person for the time being administering the government of this State, acting with advice of the Executive Council’.
- The preamble of the Letters Patent describes the role of the Governor to ‘administer the government of the State’. Cl IV indicates the role of the Executive Council is to advise the Governor in her or his ‘government of the State’.

**Ceremonial Head of State**

Section 7 of the Australia Act 1986 (Cth) provides that the ‘Her Majesty’ (the Queen) is represented in Tasmania by a Governor, who is appointed by the Queen on the advice of the Premier (s 7).

As the Crown (the Queen's) representative the Governor is the figurehead of the State of Tasmania. That allows Vice-Regal exercises of power, such as the conferral of awards or donors and the receiving guests to the state, to be undertaken in the name of Tasmania, rather than any political party. Similarly, when Her Excellency speaks at an event, or to an audience, she represents Tasmanians, not just one side of politics or one interest group. The importance of that apolitical ceremonial role can often be overlooked. It allows important matters of state to be undertaken in a manner which symbolises the whole community, not just one interest group or power broker. The award or honour of an individual can be made in a way that recognises their contribution to the whole of Tasmania, rather than simply having gained favour of one side of politics or the other.

**Parliamentary Guardian**

In addition to exercising the powers of the Crown in Tasmania, the Governor is part of the Parliament of Tasmania. Section 10 of the Constitution Act 1934 states that “the Governor and the Legislative Council and House of Assembly shall together constitute the Parliament of Tasmania.”. This means that there cannot strictly be a separation of powers in the State as the Executive forms part of the Legislative Branch. As the convention is that the Governor acts on the advice (direction) of the Premier and Cabinet, who are constituted from the Parliament, the convention also denies any true separation of powers in Tasmania. As heads of military / colonial governments, the original Governors had a range of law-making and executory powers that they could exercise independently. This changed in the mid 19th Century as the Colonies moved to a more democratic system in line with that of the Westminsterial model of constitutional government. When that happened the Governor's role became generally 'advisory', that is, Her Excellency acts according to the direction of the Premier and Cabinet to give assent to the bills passed by both Houses of Parliament so that they can become official laws. While this is also a 'ceremonial' function (there are few recorded cases of a Governor refusing to assent to a bill), it makes sure that the rule of law in the State is maintained. That is, the public can trust that the law was made with the proper process and, most importantly was considered, debated and agreed to by both Houses of Parliament.
That said, those decisions were premised on the Australian Constitutions Acts of 1842 and 1850, which grant power to the Governor of Tasmania to make laws for the 'peace, order and good government' of the State and required that 'every Bill which has been passed ... shall be presented for Her Majesty's assent to the Governor'. The current Constitution Act 1934 does not contain equivalent provisions (see The Parliament: role, structure and functions), although they can be implied by a constructive reading of the Act as a whole, indicating that the constitutional convention, and therefore judicial authority, remains the same.

The requirement that the Governor personally assent to bills also applies to any parliamentary bill to amendment legislation. That is, the Governor cannot be required, by general proclamation to substantially amend an existing statute. However, there is some authority to suggest that a Governor could, by general proclamation correct typographical, grammatical or other patent errors that do not change the underlying meaning or substance of the text. Again this authority is based on historical constitutional statutes containing provisions not found in the Constitution Act 1934. As the 1934 Act lacks similar provisions and no longer finds its authority in Imperial statute, the current position is unclear.

Parliamentary umpire

The Governor has a range of other powers reserved to Her Excellency by virtue of her apolitical role as head of state. Most of these relate to acting as an impartial overseer and protector of Parliamentary democracy. None are referred to in the Constitution Act 1934. As with her power to assent to bills the powers with respect to the Parliament are generally done on the advice of Premier and Cabinet. However there are times when this is not possible, because of the lack of an effective Premier and Cabinet, a deadlock in the Parliamentary system, or the receipt of advice which is clearly contrary to constitutional law. In those times the Governor may exercise powers reserved to her in the absence of advice or contrary to advice. These are referred to as 'reserve powers'.

A notable reserve power is the power to appoint Premier and Cabinet, particularly when it is uncertain who the Premier and Cabinet should be. This was the case in the 2010 election which resulted in a hung Parliament.

The 2010 Tasmanian elections for the House of Assembly (lower house) resulted in the Labor Party winning 10 seats, the Liberal Party 10 seats and the Greens Party five seats. The then leader of the Liberal Party had made political statements that he would not form a coalition with the minor Green party. If that was the case then the Parliament would not be able to operate effectively, or be able to ensure the supply of money to fundamental public infrastructure and services would be provided to Tasmanians. The leader of the Labor party - then Premier David Bartlett – had publicly indicated a willingness to form a coalition with the Greens in relation to supply. However, all of these statements were merely political as the Parliament was prorogued, and the Members were not sitting, so the matter could not be tested on the floor of the House. Then Governor, the Hon Peter Underwood had to make a decision about which of the two parties would command a majority of votes in the lower House (where money bills originate from).

The Governor eventually granted the incumbent Premier David Bartlett a commission to form a government, providing a lengthy opinion on the legal reasons for his decision. This proved to be highly controversial. The key constitutional issues that the issuance of this commission gave rise to include:

1) Whether the 'primary duty' of the Governor of Tasmania 'protect and maintain the Constitution and the State’s representative parliamentary democracy' means the Governor can act to an extent outside advice or contrary to advice (this issue is separate to consideration of the Governor's exercise of any reserve powers);
2) A determination of the precise role of the Governor in forming a government - that is, does it includes determining whether the proposed commission will ensure the 'stability' of government; and
3) Whether the Tasmanian Constitution, the inherited common law parliamentary conventions or Imperial Acts give effect to what the Hon Underwood called a specific constitutional obligation to form a government where there exists a contested hung Parliament.

The implication drawn from the Hon Underwood's reasons as to the source of the obligation is that Mr Bartlett was the person who currently held the commission of the Governor to form a government. As such this remains an unresolved issue, albeit only becoming an issue in a narrow set of factual circumstances. A particular point of importance is that is that s 8B of the Constitution Act 1934 (Tas) provides for a statutory termination period for the office of care-taker Ministers after the return of the election writs. This means that the Governor is required to make an 'active choice' to appoint a Premier and Ministry. The existence of this 'active choice', whether by legislative design or constitutional oversight, may provide support for the source of the obligation.

Other important reserve powers include the ability to dissolve parliament leading up to an election, or even to dismiss a Premier or Cabinet who is acting in a way prohibited by our constitutional system or causing it to go into deadlock.

While these powers are hardly ever used, they are exceptionally important to ensuring the rule of law and the stability of the state.

There is also judicial authority that the Governor may unilaterally act to protect the constitutional system. In Wrathall v Fleming [1945] Tas SR 61 Morris CJ indicated, in obiter dictum, that there was no constitutional bar to the Governor being legislatively conferred an independent
power, right or privilege, which did not require the advice of the Executive Council. Twomey argues that this possibility for independent action, combined with the convention that it is the Governor's role to 'protect and maintain the Constitution and the State's representative parliamentary democracy', may mean, in Twomey's words at 57:

> the Governor has an independent discretion and power to take such action as he or she deems necessary 'protect and maintain the Constitution' without ministerial advice, or even contrary to ministerial advice.

It is, perhaps, worth noting that our constitutional system doesn't have a lot of the checks and balances of others, such as the US separation of powers, or the New Zealand Bill of Rights, or even the 'manner and form' provisions of other states in Australia (see Entrenchment). The Parliament can override any written constitutional protections by an ordinary Act of Parliament, and may change our rights and duties as it sees fit. As the executive government tends to control much of the Parliament through its majority, and its use of block voting and whips, there is a risk that it could start acting in the party's interest and not the popular interest. The only real thing that stops this is a healthy, transparent and open democracy. The Governor is the official umpire who ensures all the rules are being met and that the system doesn't break down. Like any umpire they are not noticed when things are going smoothly, or the players are obeying all the rules, but when things go wrong, or the players start to act up, their importance to the viability and integrity of the game becomes obvious. The same is true of the Governor's role as the umpire of parliamentary democracy.

**Appointment, Term and Dismissal**

The office of the Governor is held at Her Majesty's will and pleasure. The form of appointment by Her Majesty is by Commission on the by advice (direction) of the Premier to the Queen (for example, the Letters Patent 2005). Neither the Constitution nor the Letters Patent provide for the period of appointment of the Governor. By convention it is five years [citation needed]. The Governor of Tasmania Act 1982(Tas) prov ides for the Governor's salary and other matters pertaining to the office, including the appointment and employment of officers and employees assisting the Governor.

Dismissal of the Tasmanian Governor is also at Her Majesty's pleasure on the advice of the Premier (ss 7(3) and 7(5) of the Australia Act 1986(Cth)). As such the Governor holds office as a Crown servant, and 'Crown servants have always held office at pleasure rather than under a contract of employment and are subject to dismissal without cause'. The controversial circumstances surrounding the resignation of Governor Butler in 2004 have raised questions about the impact of the unfettered powers over the tenure, and therefore independence of the office. For instance, Stokes argues that:

> The fact the government is not the State and is seen to be separate creates the space for loyal opposition. Where the government and the State are seen as one, all opposition is treason and loyal opposition is impossible ... Hence we need to guard the institutions and institutional boundaries which embody that distinction, especially the office and functions of the Queen's Representative as the de facto Head of State.

**Lieutenant-Governor**

The Lieutenant-Governor is the deputy to the Governor in Tasmania. As Clark notes, the 'role of this office is to stand in for the Governor whenever the Governor is outside' Tasmania. Air travel has reduced the constitutional importance of this role, as in the early colonial days the Governor may have been absent for months on overseas voyages. Tasmania currently follows convention with the Chief Justice acting as the Lieutenant-Governor. The issue the appointment of the Chief Justice to the Executive raises is discussed in the Judicial Power stub.

The Constitution (Doubts Removal) Act 2009(Tas) allows the Governor to appoint the Lieutenant-Governor.

**Administrator of the State**

If the Lieutenant-Governor is also unable to act, the convention is for the next most senior Supreme Court judge is then appointed administrator. This is reflected in the Letters Patent cl XII. This raises the same issues as the Lieutenant-Governor.

**Executive Council**

Under the Acts Interpretation Act 1931, s 43 the “Governor” in Acts is taken to mean ‘the Governor of this State, or the person for the time being administering the government of this State, acting with advice of the Executive Council’.

The Executive Council is not mentioned in the Constitution Act 1934 at all. Instead it is established by Letters Patent (21 November 2005), cl IV which stipulates that the Executive Council is to 'arise the Governor in the government of the State. The Letters patent constitute the Council as follows:
• Members are appointed by the Governor and hold office ‘during the Governor’s pleasure’ (cl V) swearing an oath and allegiance to the Queen, before God and a Supreme Court Justice (cl VI);
• That the Council is convened by the Governor on the request of the Premier or Acting Premier (cl VII), and presided over by the Governor a member appointed by the Governor to act in the Governor’s place by the Governor (cl VIII); and
• That a Quorum, not including the Governor and presiding member are required for decision making.

The Executive Council is often referred to as the Governor, Premier and Ministry. However, in Tasmania this body comprises of the Premier and the Ministry, but arguably not the Governor. That is because the Constitution Act, s 6 and Acts Interpretation Act 1931, s43 refer to the Governor and ‘Governor-In-Council’ as separate entities. On the other hand the Letters Patent (21 November 2005) cl VII states that the Executive Council cannot conduct business ‘unless at least two Members other than the Governor’ [emphasis added] are present. This would indicate that the Governor is a member of the Council. Whether there is any legal issue with the Governor being a member or not is unclear and has never been tested. What is certain is that the Executive Council is not the Cabinet, even though it is similarly constituted [citation needed].

In Tasmania Ministers are appointed as Executive Councillors immediately after being sworn in [citation needed] and hold membership for life [citation needed]. The Governor is able to ask questions of his or her Ministers and request further information or advice. However due to the convention of responsible government, the Governor acts on advice (direction) of the Premier and Ministers. As such the Executive Council functions to translate the political decisions of the Premier and Cabinet into official executive or legislative acts. Hence, in practice the Executive Council is:

...the body which gives the force of law to, and thus makes effective, decisions of the executive government, ie the Cabinet and individual Ministers. That is the body in which executive power is vested by the constitutional system although the mode of carrying into effect of the decisions of executive government differs according to circumstances.

Ministers and Ministries

Public Service

Tasmania’s Constitution is silent on the role and function of the public service, its organisation, relationship with the ministry or its duties. Instead the public service is controlled by Parliamentary legislation, which basically creates a career service whose primary function is to formulate and execute government policy. The Civil Service Act 1900 centralised the statutory management of Tasmania’s public service with the current enabling legislation of the public service being the State Service Act 2000 (SSA), State Service Regulations 2011 and Employment Directions. The State Service Principles (pursuant to SSA s 7(1)) and a Code of Conduct (pursuant to SSA, s 9) establish the principles and expectations for the conduct of the public service in relation to the Government. These include requirements and protections for impartiality, ethical and professional propriety, accountability, integrity, merit and accountability.

While there is a comprehensive legislative regime describing and protecting the public service there is no constitutional recognition of its role. The public service has significant influence on the inception and implementation of public policy and law, which places it in a unique constitutional position given that it is not directly accountable to the people.

Responsible government

As may be clear from the description of the various offices of the Crown, the framework established of executive government by the Constitution Act of NSW McHugh J noted:

The Constitution Act plainly assumed a body of constitutional and political practice which would give meaning to its very sparse provisions. And the contemporary materials make it clear that the Imperial authorities intended that the new Constitution would be administered in accordance with the principles of responsible government. This was so notwithstanding that powerful and conservative interests in the Colony may have taken the view that it was contrary to their interests to have responsible government with Ministers answerable to a Parliament which in turn was answerable to the people. The opposition of these parties - some of whom were responsible for the draft Constitution - may explain the lack of any clear indication in the text of the Constitution that the Colony was to have responsible government … leading pastoralists and officials … and their allies … needed the [Colonial Secretary’s] help to have their constitution enacted by the [Imperial Parliament]; therefore, they had to do his bidding by providing for responsible government in the constitution as he wished. They were careful merely to make responsible government possible; they did not make it mandatory and most of them did
not believe that it would actually begin for many years. For their purposes responsible government was unnecessary and possibly dangerous, and they did not seek it ... However, the Imperial authorities had no doubt that the Constitution was intended to and did in fact introduce responsible government into the Colony.

Notwithstanding these intentional silences in the early Constitutions, Colonial government quickly developed to reflect the Constitution of the UK in practice, attaching the unwritten constitutional conventions onto the bare provisions of the written constitutions - or in some cases ignoring what those constitutions expressly required in law. That convention was explained in Egan v Willis to include:

- the conventional requirement that ministers be chosen from amongst the members of one or other of the Houses of Parliament ... the conventional requirement that the Governor may only appoint as Premier a person who commands the confidence of the Legislative Assembly ... that the ministry must have the confidence of that House ... The contemporary operation of a system of responsible government reflects the significant role of modern political parties, one of which, or a coalition of which, in the ordinary course "controls" the legislative chamber or, in a bicameral system, at least the lower House ... [and establishes] Ministers and the public service ... [and] of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature."

The actual Executive is therefore the Premier and Cabinet, the Ministers of state and the public bodies that are created by statute.

Premier

The Constitution Act 1934 (Tas) follows Westminster convention and does not refer to the Premier of Tasmania. The title of Premier has been recognised in Tasmania since the beginning of responsible government, with the head of the executive in Parliament first titled the 'Colonial Secretary and Premier' which was shortened to 'Premier' in 1857. The Letters Patent (21 November 2005) do specifically mention the Premier as responsible for 'advising' the Governor as to the declaration, direction and ordaining of the Letters Patent (preamble); and requesting the convention of the Executive Council (VII). Similarly, various acts of Parliament refer directly to the Premier.

The Premier exercises executive power as an elected Member of Parliament on the commission of the Governor. According to the doctrine of responsible government, the 'Governor may only appoint as Premier a person who commands the confidence of the Legislative Assembly, or that the ministry must have the confidence of that House'. This is not mentioned or reflected in the provisions of the Constitution Act.

Summary of issues and questions

- Whether the office of Premier should be recognised in the Constitution?
- Whether references to the head of state as 'His Majesty' should be changed?
- Whether to constitutionalise the Governor's tenure to protect the independence of the Governor's office?
- Uncertainty over the implications of appointments to the Executive Council such that every living former Minister of the Crown remains a member of that body.
- Uncertainty and disagreement as to the role of the Governor in forming a government when there is a hung Parliament.
- Uncertainty over the ambit of the Governor's executive powers, including consideration of whether the Governor should have the residual power to enact amendments to statutes.
- What the appropriate constitutional relationship between the Tasmanian Executive and public service should be? Should it be something described in the Constitution?
- Whether the role, independence and impartiality of the public service needs to be clarified?
- What is the permissible scope of legal determinations by executive officers? For example Lieutenant-Governors acting in Vice-Regal capacity: see further Judicial Power stub.

Symposium Opinions/Recommendations:

Expert Recommendations
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| Professor Anne Twomey | **Explicit references to conventions in the 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. |

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| Professor Anne Twomey | **Recommendation:**
| | - 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? |

### Expert Opinions

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| The Hon Stephen Gageler SC | **Governor acting on advice (proper and open advice - distinction):**
| | - Notes disagreement with Professor Twomey – in The Hon Gageler SC'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. The Hon Gageler SC 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. |

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| The Hon Stephen Gageler SC | **Formal and substantive role of the 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 getting 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. |

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| Professor Anne Twomey | **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 unelected person such as Solicitor-General, who can advise on conventions but not policy outcomes. |

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<td>Solicitor-General acting on advice:</td>
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### Workshop Comments and Conclusion/Follow-up

#### Section 8

**Professor Anne Twomey:**

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 reject the offer as we move down the list.

**Workshop Conclusion/Follow-up:**

- 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.

#### Section 8A - Limit on number of Ministers of the Crown

Consensus that current provision should be kept as is: it guarantees at least 3 back-benchers on the Government’s side.

**Workshop Conclusion/Follow-up:**

No changes.

#### Section 8B - Appointment and tenure of office of Ministers of the Crown

**Professor Anne Twomey:**

Consensus that:

- 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.

### Footnotes

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.

Synchronise with the Commonwealth provision which gives 3 months’ leeway.

- a) any changes to this provision are for Parliament to decide; and
- b) the seven day shotgun on the Governor’s head is too much.

Section 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.


Australian Communist Party v The Commonwealth (1950) 83 CLR 1, 258 (Fullagar J). That is especially the case given the Australia Acts, upon which the Letters Patent refer for the justification that the Governor is the appropriate authority to issue letters patent, was not an Act of the Tasmanian Parliament, but rather two external governments (see The Current Constitution).

The Governor is required by the Letters Patent to take an Oath/Affirmation of Allegiance and Office to the Queen before a judge of the Supreme Court of Tasmania and God. No specific requirement for the Governor to make such an allegiance is found within the Promissory Oaths Act 2015 explicitly. That can, possibly be resolved by the fact that Members of Parliament are considered required to take an oath and that s 10 of the Constitution Act 1934 describes the Parliament as being constituted of ‘The Governor and the Legislative Council and House of Assembly’. Alternatively, if the Executive Council is taken to include the Governor, then the matter is also resolved as all members are so required to make an oath or declaration. That requires that she or he swear to ‘faithful and bear true allegiance to Her Majesty the Queen, according to law. So help me God … [and] faithfully execute the office of Governor in and over the State of Tasmania and its Dependencies in the Commonwealth of Australia. So help me God’. Promissory Oaths Act 2015 (Tas) ss 13-14.

Prof Anne Twomey: 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.

Prof George Williams: The Tasmanian Parliament should be left to decide this issue.

Consensus that there is no need to establish formal separation of powers byentrenchment or otherwise because of the possible effect on Tasmania’s tribunals.

It was held by Clark J that s 8(8) was ultra vires and therefore invalid. This was because it is beyond the legislative authority of State Parliament to enact (by way of s 8(8)) that a bill passed by both Houses need not be presented to the Governor to be dealt by him in accordance with s 31 of The Australian Constitutions Act 1842 (UK).

Australian Constitutions Acts of 1842 (UK), ss 14 and 32; The Australian Constitutions Act 1842 (UK) s 31. Hence, in Re Scully; Re An Application for a Hotel Licence (1937) 32 Tas LR 3 Clark J held that, read together, ss 14, 32 and 31 provided that State Parliament’s power to make laws should be construed as being contingent upon the assent of the Crown. Therefore therefore s 8(8) was invalid because it operated to validate Bills which had not received royal assent.

Section 17 which sets out the procedure for standing orders, stating that such orders may be made ‘for the proper presentation of Bills to the Governor for His Majesty’s assent; and generally for the conduct of all business and proceedings of such House and of both Houses collectively.’ Section 38 also states that money bills are to be ‘recommended to the Assembly by the Governor’ and are ‘assented to by the Governor’.
Clark J held that s 8(1) was valid but the relevant proclamation made on the facts of the case (in relation to the 2010 House of Assembly election) was invalid because it carried the meaning of ‘revision’ to the extremity by widening a right of appeal to include an appeal on both law and fact (rather than just on a point of law). As such, the outstanding issue for discussion as a result of the decision in Re Scully is the extent of the Governor’s power to enact amendments by proclamation, as s 8(1) was found to be a valid provision. Clark J held at 31 in relation to s 8(1) that:

But I do not think it authorised any and every alteration of the existing statutory law.

Clark J went on to state in obiter at 34 that s 8(1) did not ‘alter the position as to vest the law-making power in the Governor alone’ by conferring on the Governor the power to make amendments by proclamation for the purpose of revision.

### Workshop Comments

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| **Section 12 Governor to fix times for sittings; Delay in return of writs** | • Professor Anne Twomey: 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).  
• Professor George Williams: 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).  
• Professor George Williams: You want a Governor to have some discretion, but not to the extent that it is unbounded.  
• Professor Anne Twomey: 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.  
• Professor Anne Twomey: It should be clear which rules are convention, and which are discretionary.  
• Professor Anne Twomey/Dr Brendan Gogarty: 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.  
• Professor George Williams: The issue of discretion may be one that is too large to resolve at this juncture.  
• Ms Therese Henning: It may be prudent just to identify the issue for resolution after consultation with a broader range of stakeholders | 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. |
Governor regards a bill as unconstitutional, the Governor must still give assent to it and leave it to the courts to determine constitutional validity' (at 58). This is a practical resolution of the issue of the extent of the Governor's powers in this regard, however the precise boundaries of this 'primary duty' remain somewhat unresolved and untested (see Twomey at 56-8).

In relation to the second issue, Twomey proposes that the test should be whether the the person to whom the commission is to be granted will be 'likely to command the confidence of the house' (at 58), as opposed to a test based on the 'stability' of the proposed government. The latter is only relevant where, consistent with convention, the practical alternative is holding another election. Twomey further notes that the Hon Underwood's decision to grant Mr Bartlett a commission on the basis of future stability most likely relied on the precedent set by Sir Phillip Bennett in 1989, the time of another hung Parliament. She argues this precedent was unsuitable because first it had been subject to criticism (see, eg, G Winterton, 'The Constitutional Position of Australian State Governors' in H P Lee and G Winterton (eds), Australian Constitutional Perspectives (Law Book Co, 1992) 328) and second, if Sir Bennett had found that Government unstable then holding another election would have been contrary to convention.

In relation to the third issue, Twomey notes that the 'source of the obligation is not clear' (at 59: see generally the discussion at 59-60).


Countering this argument are Twomey's twin points that it is unclear:

(a) why the incumbent Premier has a constitutional obligation to form a government where no party holds majority support in the lower house; or

(b) that the incumbent Premier need not show that he or she can form a stable government but the Opposition Leader can only be appointed as Premier if he or she can establish future stability to the satisfaction of the Governor.

In Wrathall v Fleming [1945] Tas SR 61 the extent of the Governor's executive powers were the subject of Morris CJ's obiter dictum. The Prison Act 1908 (Tas) empowered the Governor to both licence a prisoner to be 'at large' (in modern terms, on parole) during the term of his imprisonment and unilaterally revoke this licence. On the facts of the case, the Executive Council had provided advice to the Governor to revoke the licence in an official minute.

Critical to Morris CJ's decision is that s 2 of the Prison Act defined 'Governor' as meaning 'the Governor of this State, and not the Governor acting with the advice of the Executive Council'. This constituted an exception to the Acts Interpretation 1931 (Tas) which contained the latter definition. Therefore the constitutional issue raised by this case is the extent to which the Governor can exercise his or her Executive powers without the advice of the Executive Council. Morris CJ considered this issue in part, and stated in obiter at 63 that:

Parliament's purpose in assigning to the word "Governor" the particular meaning which it bears in the Prison Act 1908 was I think to confer a power or privilege upon the Governor. It belongs to that class of provision which confers special privileges whose waiver is not a matter of public concern.

This suggests that Morris CJ was tacitly endorsing the position that the Governor has 'extra' executive powers, the boundaries of which are uncertain. The real question is whether this seemingly innocuous 'exception' to the traditional notion of the Governor's powers still applies today - if so, could the Governor unilaterally order punitive detention or the expenditure of public funds to pursue a private end?


In Michael Stokes, 'Resignation of Richard Butler as Governor of Tasmania' (2004) 23 University of Tasmania Law Review 207, Stokes makes the argument that there is a need to protect the independence of the Tasmanian Governor by increasing the Governor's security of tenure. This is an argument made following Richard Butler's resignation from gubernatorial office in 2004 amid controversial circumstances. As by convention the Queen appoints the Governor on the advice of the Premier, Stokes argues that the Premier's 'unfettered power to control the Governor's appointment and dismissal threatens the independence of the Governor' (at 241). It is argued that this is for two primary reasons: (i) the Governor may be called upon to use the reserve powers, the exercise of which requires the Governor's impartial judgment unbehinden to the Premier for the Governor's continuing tenure (at 240); and (ii) the Governor's office is symbolic of the separation between the state and governments (the latter of which come and go).


David Clark, Principles of Australian Public Law (Lexis Nexis, 2nd ed, 2007) 199.

The Act was enacted to retrospectively validate the appointment of Tasmania's Lieutenant-Governors in the period following the enactment of the Australia Act 1986 (Cth). According to the fact sheet accompanying the Bill, it was introduced because:

On 20 July 2006 the Solicitors-General of the states of Tasmania, New South Wales, South Australia, Victoria and Queensland formed a joint view that, since the Australia Act 1986 (Cth) came into force, the power to appoint a Lieutenant-Governor to administer the government of a state of Australia could only be exercised by the Governor of that state and not the Queen, unless the Queen was physically present in the state.

Sections 3 and 5 operate to to retrospectively validate any 'relevant actions' by a 'Lieutenant- Governor, a Deputy Lieutenant-Governor, an Administrator or a Deputy Administrator', giving these actions the same force at law as if the person had been validly appointed to office. Section 6 provides that the State is not liable for any action arising as a result of the retrospective validation nor for any claim.

This was the case in 2015 when both the Governor and Lieutenant-Governor were unable to act, Justice Tennant became Administrator of the State. See: Tasmanian Government Gazette, Vol. CCCXXV [1505], Monday 12 October 2015 No. 21 553.


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See further (references)