The Current Constitution

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The current Constitution of Tasmania is a hybrid mix of written (Federal and State legislation) and unwritten (common law and convention) sources. The primary source of authority for the State Constitution is the Commonwealth Constitution (particularly section 106) and the Australia Acts (Cth/UK). The consolidated legislative framework for the State Constitution, powers and procedures of the Tasmanian government is set out in the Constitution Act 1934. This Act interoperates with other legislation relating to the powers, procedures, restrictions and duties of government: such as the Electoral Act, Public Accounts Act, Supreme Court Act, Acts Interpretation Act, and so on. It is also dependent on Letters Patent, issued pursuant to the Australia Act 1986 (Cth). This legislative framework is informed by the common law for its operative effect.

There are therefore many historical and contemporary sources of Tasmanian constitutional law. This page sets out the history of the current constitutional framework, considers the source of constitutional authority for the State, and sets out issues and questions about the contemporary framework.

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## Introduction

The current constitution is almost entirely derivative of British common law. However, the British were not the first occupants of Tasmania, nor the first civilisation to exist here. Tasmania has been occupied by humans for at least 35,000 years. Much of the social and legal history of that human habitation has been lost, not least because of the persecution, forced integration and resettlement of Aboriginal peoples. This began with the claim of territorial possession of eastern Australia (named New South Wales and including part of the landmass of Tasmania, then called 'Van Diemen's Land') by James Cook in 1770 and the realisation of that claim by colonial acquisition (under the same said rules), in 1788 at Botany Bay. The legal dispossession of indigenous peoples was contributed to the colonial assumption that the Australian landmass was Terra Nullius. The correctness of that doctrine was only fully abandoned in the 1990s. That doctrine contributed to the lack of a treaty, or formal recognition of existing custom or law in Australia, and the wholesale imposition of the British Common Law by the British.

## European occupation of Van Diemen's Land (Tasmania)

The British claim over Van Diemen's Land (VDL) was pursued by commission of the Governor of NSW in 1803. The commission ordered the establishment of a permanent European settlement at Risdon Cove, near modern Hobart and vested command of the whole island to Lieutenant John Bowen, to operate the island as a penal colony under military governance. In actual fact, only a quarter of the original population were under penal servitude, and the predominant purpose of establishing the colony was to stave off competing French colonisation of the island. Upon occupation, the British colonisers were instructed to open intercourse and conciliate with the native peoples by the Colonial Office. A treaty or the continuation of indigenous law appear not to have been part of that instruction, and it was taken for granted that the British Common Law would apply to the territory and its inhabitants as part of the NSW Colony.

After an initial minor constitutional crisis between Lt. Bowen and Lt. Colonel Collins, the settlement was moved to its current location under the command of Collins. From 1804 -1812 the island of Tasmania was administered as a Northern and Southern county by Lieutenant-Governors / Commandants under command responsibility to the Governor of NSW in Sydney. No courts were established until 1814, and subsequently all legal disputes were necessarily resolved out of Sydney.
In 1814 a Second Charter of Justice for the colony of New South Wales made provision for two courts with jurisdiction over Van Diemen’s Land. Of those, only the Petty Court regularly sat in Hobart. The Supreme Court, while competent to sit in Hobart, did so infrequently. That meant that most substantial civil matters were still heard in Sydney, as were all Criminal matters, as the Charter did not vest either court with Criminal jurisdiction over Van Diemen’s Land.

Towards constitutional separation

The first real move to constitutional independence for Tasmania occurred with the enactment of the New South Wales Act 1823 (UK) and the Charter of Justice of 13 October 1823 (UK). Together these disbanded the previous Supreme Court of NSW, providing for two separate Supreme Courts of NSW and Van Diemen’s Land (VDL) (Tasmania), and granted them each full judicial power to hear criminal and civil matters within their respective territorial jurisdictions. However, these courts were still limited. That was because all appeals were heard by the Governor, and his consent was required for further appeal to the Privy Council.

The Act and Charter also allowed for the executive and legislative separation of VDL from NSW by an Order-in-Council - that is, a declaration by the NSW Governor and Legislative Council. A sunset clause provided a five year period for the appropriate arrangements for separate constitutional frameworks to be developed for the governance of each colony if such a declaration was issued.

The legislative separation of VDL provided for in the New South Wales Act 1823 (UK) was apparently granted by Lieutenant-Governor Arthur in 1825, although note there is no official record of this. Regardless, the apparent order was acted upon – without dispute from Lieutenant-Governor Arthur, indicating that there was a valid Order-In-Council – to establish a separate Legislative Council of VDL, effectively creating a separate constitutional government and colony, with equivalent powers to the Council in NSW.

The new body was only partly representative, being constituted of between five and seven members, appointed by the Imperial authorities to advise the Governor in the exercise of his legislative powers. The Council empowered to propose laws to the Governor, or oppose proposals by the Governor. It was also given control over domestic appropriation of revenue. However, it was legislatively constrained and subordinate to Britain. Specifically it was required to obtain certification from the Chief Justice of the Supreme Court that any law proposed by it was compatible with English law. It was also required to set all its decisions before the British Parliament for disallowance. The Legislative Council’s powers were greatly expanded by the enactment of the Australian Courts Act 1828 (UK) which expanded its size to up to fifteen members and stipulated that the colony would not be bound by Imperial laws passed after 25 July 1828, unless those laws made specific mention of the Colony (or the Colonies generally). The Act also made the Supreme Court a superior court of record, provided for juries in civil trials, and ended appeals from Supreme Court decisions to the Governor (although required the Governor’s consent for appeals to the Privy Council). Together this made it clear that VDL was to be a civil colony, not a military or penal one, both in the eyes of the colonists, other States, and British authorities.

Towards representative government

The colony of Van Diemen’s Land (VDL) moved further towards representative government with the enactment of the Australian Constitutions Act 1850 (UK), which was proclaimed to "provide for the Administration of Justice in … Van Diemen’s Land, and for the more effectual Government thereof". It did that by further increasing the size of the Legislative Council to up to twenty four members, and changing the method of appointment to a 2/3 representative character. The Governor, on the advice and consent of the Legislative Council, was directed to make laws "for the Peace, Welfare and good Government" of the Colony, so long as they were not 'repugnant to the law of England' and for the administration of justice within the Colony (including juries). Importantly it allowed the Governor in Council to establish rules for franchise, election and further houses of Parliament.

A Tasmanian Constitution (1855)

The first task of the reconstituted Legislative Council of Van Diemen's Land was to deliberate upon the appropriate constitutional framework for a bicameral system of government. The resultant Constitution Act 1854 - which received royal assent the next year (1855) - largely reflected the Westministerial model of government. Specifically it:

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

In the same year the Legislative Council petitioned Queen Victoria to rename the Colony to Tasmania, so as to reflect its move from penal to free colony. The relevant proclamation was issued on 1 January 1856.

A hybrid constitution

Outside of the Constitution Act, there was an assumption of unwritten constitutional conventions informing the powers, procedures and functions of the government of the Colonies. That is, the general common law constitutional conventions in the UK that shaped governmental action were assumed to apply to "expanded or elaborated such Constitution Acts". That included conventions such as responsible government, and fundamental constitutional statutes such as the Bill of Rights 1689 (UK), and Act of Settlement 1701 (UK).
Generally the question as to whether a UK constitutional statute or convention applied to the Colony was addressed by considering whether it related or was addressed specifically to a specific organ of the UK government as an entity (for instance the House of Commons or House of Lords), or whether it related to the role, function, power, duty or so on that entity was charged with. If it was the latter, then the equivalent body (or bodies) in the Colonies were assumed to be bound by that common law convention. For instance, whilst only the lower house of the British Parliament was considered to be the Grand Inquisitor of the Nation in the UK (as it was the representative body at the time), both houses of the colonial legislature were assumed to be empowered and bound by the same legislative and inquisitorial functions as representative chambers. Conversely, as subordinate legislatures they were not on the same footing as the House of Commons and only possessed what powers, privileges and immunities as were reasonably necessary for the carrying out of these representative functions. (see Powers, Privileges, Immunities).

Greater legislative autonomy: Colonial Laws Validity Act

Greater independence from Britain was afforded pursuant to the Colonial Laws Validity Act 1865 (CLVA) which clarified (and limited) the forms of legislation which could be found to be repugnant to the laws of England. Specifically only laws which were directly inconsistent with Imperial laws directed to the Colony (rather than to the common law more generally), were invalid. This solidified the Parliament of Tasmania as a legislative authority subordinate only to the Imperial Legislature. British constitutional convention of course, still applied in a general sense, in the absence of any conflicting Colonial legislation.

The exact status of the CLVA after Federation is uncertain. Some authority supports the view that it was no longer relevant as the States were no longer, strictly speaking 'colonies'. However, the enactment of the Constitutional Powers (Tasmania) Act 1979, which sought to remove any question of invalidity of state legislation by virtue of its repugnancy with UK legislation indicates that the Parliament of Tasmania considered the matter not to be resolved until at least that date.

Constitution Act 1934

Following the enactment of the 1854 Constitution Act, the Tasmanian Parliament made a series of amendments to the constitution of the State through ordinary Acts of Parliament: often confusingly also entitled 'Constitution Act (and year proclaimed), or 'Constitution Amendment Act (and year proclaimed). These Acts operated consecutively and were intended to be intended to be read together. They generally set out minimal clarifications of matters such as electoral qualifications, qualification for membership of a house of Parliament, and rules as to appropriation.

By the 1930s there were several calls for reform of the constitution, including the conservative austerity McPhee Nationalist Government, who argued for greater 'economy and efficiency' in the running of the state. Initially this included both reducing and clarifying the statutory thicket of constitutional law in the State as well as reducing the size of the Parliament and the electoral divisions to a single electorate. These proposals proved controversial and were defeated in the House, meaning that the Government's reform agenda became entirely focused on consolidation.

The Constitution Act 1934 was largely designed to repeal and/or consolidate previous imperial, colonial and state legislation into a single Act. However, the Constitution Act also altered the constitutional law of the State as it was at the time to:

- Clarify and express the prohibition on members holding office for profit under the Crown;
- Exclude certain public service contracts as being legally described as being Government contracts;
- Limit the sale of land from a member to the Crown; and
- Protect religious freedom and equality in public affairs.

While some of these provisions arise out of constitutional crises - such as the blockage of supply bills - others such as religious freedom are unique additions to state constitutions and are considered a 'historical puzzle'.

Tasmanian legislative independence

The subordinate legislative status of the Tasmanian Parliament as a part of the British Empire was removed by the Statute of Westminster in 1931. The result of the law was to remove any question of UK laws applying to the State, unless the Tasmanian Parliament had expressly requested a law to do so, by legislation, and the resultant UK legislation specifically was enacted as a consequence of that request. It also removed any question of State law being repugnant to the Law of England after 11 December 1931 (the date of enactment).

Section 9 of the Statute clarified two important matters of state constitutional power. First, it made it clear that the removal of legislative supremacy did not provide the Commonwealth Parliament with any extra power over the states that was not expressly contained within the Commonwealth Constitution. Secondly, it made it clear that States did not require the Commonwealth's concurrence for any exercise of power previously dependent upon Britain.

A federal constitutional foundation (Australia Acts)

Whatever question remained of Tasmania's legislative independence from Britain was extinguished by the Australia Act 1986, concurrently enacted by the Commonwealth and United Kingdom Parliaments, by request of Tasmania in 1985. These Acts terminated any legal relationship between Tasmania and Britain and extinguished the application of remaining UK legislation, including the Statute of Westminster, to any Acts of the Tasmanian Parliament enacted after their respective commencement (1986).
Whether the Australia Acts or some earlier acts of Britain, Australia or Tasmania are to be seen as the operative date of independence, there is consensus that the Tasmanian Constitution derives its constitutional authority from the Commonwealth Constitution alone. Hence, in Pfeiffer v Stevens, Kirby J noted at [113]:

It is important to approach the problem in the context of the relevant constitutional norms. In Australia, the legitimacy and authority of all law must ultimately be traced to, or be consistent with, the federal Constitution. That document envisions the Constitutions of the States and the power of the Parliaments of the States to make laws that will bind the people of the Commonwealth, and others, in and in relation to those States.

A smaller Parliament

In 1998 the Parliament agreed to reduce the size of both Houses. The Legislative Council was reduced from 19 to 15 members and the House of Assembly from 35 to 25 members. The amendments significantly changed the nature of house business, and there were concerns of the impact the reduction would have on 'an institution that was already at the limits of sustainability as a Westminster parliament'. However, the Parliament has sustained despite those concerns.

Current arrangements

The current government of Tasmania is an independent part of a polity which divides all powers necessary to "function as a polity ... carefully defined by law" between itself and the Commonwealth of Australia. This division is reflected in section 109 of the Commonwealth Constitution. However, beyond that and section 106 – which preserves and supports the existence of the states – the Commonwealth Constitution is silent about how the States are to be constituted or how the powers invested in them as independent governments are to be exercised and controlled.

Whilst Tasmania has a written Constitution Act 1934, this law is both skeletal and limited in nature. Specifically it does not generally have the status of a paramount law, being subject to amendment by ordinary parliamentary legislation - or by indirect invalidity through the enactment of later, conflicting legislation (see Entrenchment). The same can be said of the other parliamentary Acts which form part of the constitutional framework of the State.

It is proper to say that Tasmania's Constitution remains a hybrid of legislation, common law and convention. These sources are subject to and subordinate to the provisions of the Commonwealth Constitution (particularly ss 106 & 109) and the Australia Act 1986 (Cth) from which it gains its contemporary authority. Of these two sources of authority the Commonwealth Constitution involved convention and referendum in the 1890s. It may be therefore said to represent at least partial endorsement of the people of Tasmania for the source-power of the current Tasmanian Constitution. That said, the 1899 referendum, which led to the Commonwealth Constitution was a limited representation of the people of Tasmania. No women were represented, and men without sufficient property qualifications were precluded from participating. Equally, the consent provided was to bare source powers; for instance, section 106 only requires that there be a State constitution; it does not say anything about how it is to operate.

As with the Commonwealth Constitution, the Australia Acts do not address the minimum criteria or characteristics of those Constitutions. They also protect the existence of States and place restrictions on the manner and form of the amendment of State Constitutions. Unlike the Commonwealth Constitution, those Acts were not endorsed by popular referendum. Rather, the requests were made as ordinary Acts of Parliament and addressed to two external governments. Justice Kirby, a noted critic, argued that the Australia Acts represent an invalid exercise of constitutional transfer of power, insofar as they changed the federal constitutional framework, without properly going through the referendum process stipulated by s 128 of the Constitution. He further denied the authority of the British Parliament to pass laws relating to the constitution of States such as Tasmania because, he argued, they were already independent from Britain by 1986 and therefore:

The notion that, in 1986, Australia was dependent in the slightest upon, or subject to, the legislative power of the United Kingdom Parliament for its constitutional destiny is one that I regard as fundamentally erroneous both as a matter of constitutional law and of political fact. Indeed, I regard it as absurd. ... Sovereignty in this country belongs to the Australian people as electors. It belongs to no-one else, certainly not to the Government and Parliament of the United Kingdom elected in the House of Commons from the people of those islands and not elected at all in the House of Lords.

That view has not held sway with the majority of the High Court or the State Parliaments, both of which appear to have accepted the Australia Acts as superior laws to which the powers of a State are confined. Nevertheless, the debate about the constitutional authority of the states legitimacy highlights the fact that there has never been a formal establishment of popular sovereignty in Tasmania, such as a referendum on the Constitution Act. At best it can be said that a small representation of Tasmanian society voted for the transition into a State (without describing how it would be constituted), within a federation, over a century ago, but that is all.

Further questions about the fundamental and representative nature of the Constitution Act 1934 arise from its history as a consolidation act, designed to bring together piecemeal legislation created by various imperial, colonial and state parliaments (many of the latter two which were subordinate legislatures) for the sake of economy and efficiency. As noted, it was not designed to be, nor does it operate as, paramount or fundamental law. No r d does it reflect the notion of popular sovereignty or public agency. In fact it does not even prescribe the legislative power to acts for the peace, order and welfare of the state. If this is to be found anywhere it is through an implied reading of its preamble, which cites extinguished colonial legislation from the 1850s, passed for a highly dependent and subordinate colony. Nor does its preamble describe who the people of Tasmania are, their heritage, shared values, or shared vision.

That is not to say that the Tasmanian Constitution has not been successful to date. Tasmania has enjoyed a stable governmental system, with few constitutional crises, and certainly none that have truly destabilised the State. The lack of entrenchment of key provisions has allowed for the Constitution Act to be modified by the Parliament to reflect contemporary values and needs. When crises have occurred the flexible and reflexive system of convention has ensured some working solution has been found, even if it has been controversial. As Spigelman CJ stated in Egan v Chadwick:
If stability, responsiveness and public support (albeit implied) are the tests of a successful constitution, then the current constitution is largely successful. However, there are areas that certainly could be strengthened; endorsement by the people as popular sovereign; provisions in the preamble or elsewhere articulating public interest and popular values; entrenchment as the fundamental law ensuring the rule of law, legal certainty about the powers, duties and constraints on governmental power; and protection for the scrutiny systems which protect and promote the underlying integrity of the system as a whole. Some of the potential issues for discussion are listed below, and more specific issues and questions are raised in the following parts of this wiki:

- The Crown of Tasmania
- The Parliament: role, structure and functions
- Scrutiny and independence
- Entrenchment

**Issues**

- The lack of a preamble that reflects the heritage (including indigenous heritage), basic values, and shared principles of Tasmanian society.
- A lack of just terms provisions found in other constitutions. There is uncertainty as to the capacities of the Government to seize and acquire property, and its commensurate responsibility to provide just terms compensation for the deprivation of property. See expropriation.
- The lack of a dedicated prescription that the legislature (or other branches) act for the ‘Peace, Welfare and Good Government’ of the State.
- The Constitution does not speak to the relationship between citizens and the state in any articulated way. See ‘What is a Good Constitution’
- The questionable status of the Constitution as a fundamental source of law.
- Limited civil and political rights.

**Questions**

- What is the role of the Constitution to contemporary Tasmania?
- Should we maintain the current skeletal Constitution or replace it?
- Should we favour a more express Constitution, a bare-bones model, or a completely unwritten one?
- Should the Constitution be approved by the people of Tasmania?
- Should the Constitution be more express about shared community values?
- Should cultural and indigenous heritage be recognised?

**Footnotes**

5. Arthur Phillip the Governor-designate of the new colony wrote at the establishment of the colony "The laws of this country [England] will of course, be introduced in [New] South Wales" Historical Records of New South Wales, Volume 1, Part 2, Phillip 1783–1789, p 53.
6. In the common law by the High Court in Mabo v Queensland (1989) 166 CLR 186 and in statutory law in Tasmania with the enactment of the Aboriginal Lands Act 1995: ("An Act to promote reconciliation with the Tasmanian Aboriginal community by granting to Aboriginal people certain parcels of land of historic or cultural significance" - Long Title).
9. The Colonial Office Instructions to Lieutenant-Governor Collins were to ‘open intercourse with the natives, and to conciliate their goodwill’. Beyond that the question of civil and property rights of the Aboriginal inhabitants was rarely raised by early Tasmanian governors.” http://www.foundingdocs.gov.au/item-sdid-34.html.
10. The lengthy delay being attributed to the appointed Deputy Judge Advocate arriving in Hobart without a Charter of Justice (which would allow the creation and exercise of judicial power in the territory - http://www.foundingdocs.gov.au/item-sdid-27.html).
11. Criminal and civil jurisdiction over the colony of NSW (which included Tasmania) was granted to the New South Wales Courts of Criminal and Civil Jurisdiction by the New South Wales Court Act 1787 pursuant to the Charter of Justice 2 April 1787 (UK).
12. These were Lieutenant-Governor’s Court of Van Diemen’s Land, empowered to hear pleas of disputed sums under £50 and the Supreme Court of NSW, vested with appellate jurisdiction and original jurisdiction for civil pleas above £50.
13. Vested with appellate jurisdiction and civil jurisdiction for pleas above £50.
14. The Charter of Justice 13 October 1823 (UK) were Letters Patent issued pursuant to the New South Wales Act 1823 to provide ‘for the better Administration of Justice in New South Wales and Van Diemen’s Land, and for the More Effectual Government thereof’. They

- Repealed the New South Wales Courts Act 1787 (effectively disbanding the previous Supreme Court);
- Established a Supreme Court in Van Diemen’s Land, granting it full judicial power over criminal and civil matters within the territory;
The Court was provided powers equivalent to the common law courts of King's Bench, Common Pleas and Exchequer in England, and also the Equity Court of Chancery;

Provided the Chief Justice of Van Diemen's Land (initially Pedder CJ) equivalent judicial power to the Chief Justice of NSW;

Allowed for appeals to the Privy Council but only if approved by the Governor;

Provided for the separation of Van Diemen's Land from NSW by an Order-in-Council - that is, a declaration by the NSW Governor and Legislative Council; and

Created a sunset clause of five years to allow for more formal constitutional arrangements to be created.

The Letters Patent for the establishment of the Court were declared 7 May 1824 and proclaimed in Hobart (http://www.foundingdocs.gov.au/item-sdid-118.html). There was a 'sunset clause' to this provisional Act, which was to terminate in five years (Section 45).


Increased the size of the Legislative Council to up to 15 members;

Required that the the laws of England at 25 July 1828 would be the laws of each separate colony of NSW and VDL;

Stipulated that acts of the British Parliament enacted after 25 July 1828 would not apply to the colonies unless specifically passed with reference to them;

Confirmed the Supreme Court's of each colony of superior courts of record;

Ended appeals from Supreme Court decisions to the Governor (although required the Governor's consent for appeals to the Privy Council;

Provided for jury trials in civil matters.

The Act strengthened the legal and civil standing of the legislative and judicial institutions of New South Wales and Van Diemen's Land, in the eyes of the colonists and, perhaps, also in the view of Britain. Section 24 of this Act (the 'reception' Section) was to put beyond doubt that Van Diemen's Land was a civil colony, even if continuing penal functions and a strong quasi-military ambience made it an unusual one. With the 1828 Act, Van Diemen's Land enters the ranks of British colonies of settlement generally. Subject to the hurdle of the 'applicable in 1828' requirement, the broad body of English law was accessible to British subjects in the Colony. The 1828 Act included a provision stating that English law in force in that year was operative in the two Australian colonies. This meant that English law as it stood in 1828, rather than earlier laws, applied in both New South Wales and Van Diemen's Land. Later English Acts of Parliament did not apply unless they were specifically passed for the colonies.

Yougarla v Western Australia (2001) 207 CLR 344, 379 [93] (Kirby J). Kirby J's judgment at [93] reads: 'examination of the Constitution Acts of the States, even apart from that of Tasmania, quickly discloses that they by no means pretend to cover all of the considerations proper to a constitution of a polity such as the Australian colonies had become by 1900 and such as it was expected that the States of the Commonwealth would be. In several decisions of this Court views have been expressed that, after 1900, the constitutions of the States continued to include not only the Constitution Acts in force at that time but also those elements of Imperial legislation, of continuing operation within the States, that expanded or elaborated such Constitution Acts.'

See Egan v Willis (1998) 195 CLR 424 at 451 per Gaudron, Gummow and Hayne JJ: 'A system of responsible government traditionally has been considered to encompass "the means by which Parliament brings the Executive to account" so that "the Executive's primary responsibility in its prosecution of government is owed to Parliament .... whilst "the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people" and that "to secure account- ability of government activity is the very essence of responsible government."'

Egan v Willis (1998) 195 CLR 424, 445 per Gaudron, Gummow and Hayne JJ: 'the evident intention behind the provisions of the Imperial Acts Application Act that have been mentioned is that the constitutional norms [of the UK, including] ... the Bill of Rights should apply in [the colonies].'

Western Australia v Witsmore (1982) 149 CLR 79, 86 (Murphy J): 'The [State] Constitution (or at least its principal provisions) originally derived
its authority from the [British Imperial legislature] but now derives its authority from s 106 of the Australian Constitution ... a contravention of a State Constitution is a contravention of the Australian Constitution ... the Colonial Laws Validity Act 1865 (Imp.), this is irrelevant. When the colony ... became part of the Commonwealth of Australia as a state, the Colonial Laws Validity Act became inapplicable for the simple and sufficient reason that Western Australia was no longer a colony.'

See Constitution Amendment Act 1900 (64 Vic, No 5) 1900 s 10.

Since Constitution Act 1926.

See: Constitution Act 1923; Constitution Amendment Act 1900 (64 Vic, No 5) 1900; Constitutional Amendment Act 1870.

Constitution Amendment Act 1896; Constitution Amendment Act 1885; An Act To Further Amend The Constitution Act 1884.

Constitution Act 1926.


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Acts directly repealed are

<table>
<thead>
<tr>
<th>Act and Year</th>
<th>Description</th>
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<tbody>
<tr>
<td>10 Geo. IV No. 5</td>
<td>An Act for extending to this Colony an Act of Parliament passed in the tenth year of the reign of His present Majesty, intituled An Act for the relief of His Majesty's Roman Catholic Subjects.</td>
</tr>
<tr>
<td>18 Vict. No. 17</td>
<td>Constitution Act</td>
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<tr>
<td>34 Vict. No. 42</td>
<td>Constitution Amendment Act 1870</td>
</tr>
<tr>
<td>48 Vict. No. 54</td>
<td>Constitution Amendment Act 1884</td>
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<td>49 Vict. No. 8</td>
<td>Constitution Amendment Act 1885</td>
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<td>61 Vict. No. 9</td>
<td>Parliamentary Officers' Salaries Act 1897</td>
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<tr>
<td>62 Vict. No. 67</td>
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</tr>
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<td>64 Vict. No. 2</td>
<td>Demise of the Crown Act 1900</td>
</tr>
<tr>
<td>64 Vict. No. 5</td>
<td>Constitution Amendment Act 1900</td>
</tr>
<tr>
<td>3 Edw. VII No. 17</td>
<td>Constitution Amendment Act 1903</td>
</tr>
<tr>
<td>6 Edw. VII No. 47</td>
<td>Constitution Amendment Act 1906</td>
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<td>9 Edw. VII No. 5</td>
<td>Redistribution of Council Seats Act 1908</td>
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<td>9 Edw. VII No. 2</td>
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<td>11 Geo. V No. 4</td>
<td>Constitution (War Service Franchise) Act 1920</td>
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<td>12 Geo. V No. 61</td>
<td>Constitution Act 1921</td>
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<td>13 Geo. V No. 16</td>
<td>Constitution Act 1923</td>
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<td>16 Geo. V No. 90</td>
<td>Constitution Act 1926</td>
</tr>
<tr>
<td>17 Geo. V No. 57</td>
<td>Deputy Governor's Powers Act 1926</td>
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Three suggestions for reform:

1. Move all provisions relating to the demise of the Crown to another Act so as to not clutter up the Tasmanian Constitution;
2. Alternatively, have one single provision that consolidates all these provisions; and
3. Alternatively, have one provision that says that Parliament is not dissolved by the demise of the Crown and refer to another Act.

In 1924 the House of Assembly presented the budget bill directly to the Governor when the Legislative Council refused to pass it and a conference between the two Houses failed to reach agreement.

Current Section of the Constitution Act 1934

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<tr>
<td>Section 46 Religious freedom</td>
<td>Leave as is for now pending analysis of Corneloup v Launceston City Council [2016] FCA 974 at [38], where Tracey J stated in obiter dictum:</td>
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</table>

Given the inapplicability of the Guidelines it is not necessary to pursue this ground in any detail. Had it been necessary to do so Mr Corneloup’s argument would have confronted a number of difficulties. The first is that s 46 does not, in terms, confer any personal rights or freedoms on citizens. The qualified “guarantee” has been held to prevent coercion in relation to the practice of religion and to guarantee a freedom to profess and practise a person’s religion of choice: see McGee v Attorney-General [1974]IR 284 at 316 – a decision of the Irish Supreme Court on the equivalent provision of the Constitution of Ireland, Article 44(2)(f). There is, however, no authority to which I was referred which determines the practical effect of the “guarantee”. In particular, there remains an open question as to whether it could operate to render invalid provisions of other Tasmanian legislation (or subordinate legislation made thereunder), given that the Constitution Act is also an Act of the Tasmanian Parliament and s 46 is not an entrenched provision.

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- Prof David Clark: Could shrink preamble to a few lines and omit references to Her Majesty etc.
- Prof George Williams: 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.
- Prof Anne Twomey: Caution should be exercised in rewriting the preamble; it might clutter up the Tasmanian Constitution.
- Prof Anne Twomey: Reference of date whereby Van Diemen’s Land was changed to Tasmania is useful.

- Consensus on Indigenous recognition in the Preamble.
- Consensus on reference to people through Parliament.
- Consensus on shortening the Preamble to render it more accessible.
<table>
<thead>
<tr>
<th><strong>Indigenous Recognition:</strong></th>
<th><strong>Source of Power:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Prof Anne Twomey: Indigenous references in other jurisdictions talk about recognition by the parliament on behalf of the people.</td>
<td>Prof Anne Twomey: There needs to be a mention of the mandate of the people; recognises that there is an issue with mention of popular sovereignty unless the changes went to a referendum.</td>
</tr>
<tr>
<td>Prof George Williams: The Preamble is the hardest part, and reference to Indigenous Australians as a distinct community makes a challenge of balancing interests of community as a whole.</td>
<td>Prof David Clark: Might want to have the parliamentary system reflected in the preamble (ie: ‘the people through their representatives in parliament’).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Aspirational Material:</strong></th>
<th><strong>Partial consensus on the inclusion of the phrase (or its analogues) ‘peace, order and good government’:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Prof George Williams: Need to be clear as to what aims and audience are; attracted to idea of opening it up to school kids, and recognising Aboriginal people, history, object of constitution, and potentially something aspirational with reference to peace, order etc.</td>
<td>Lack of consensus on whether inclusion of aspirational material is problematic.</td>
</tr>
<tr>
<td>Prof Anne Twomey: Consider drawing on language from the South African Constitution (ie: ‘We commit ourselves …’).</td>
<td></td>
</tr>
<tr>
<td>Prof Anne Twomey: Aspirational text may have a freezing effect on the development of the Constitution.</td>
<td></td>
</tr>
<tr>
<td>Dr Brendan Gogarty/Prof David Clark/Ms Terese Henning: Peace, order and good government have a settled meaning in jurisprudence and should be included in the preamble.</td>
<td></td>
</tr>
<tr>
<td>Prof Anne Twomey: Preambles should not be substantive.</td>
<td></td>
</tr>
<tr>
<td>Lack of consensus on whether inclusion of aspirational material is problematic.</td>
<td></td>
</tr>
</tbody>
</table>

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See further (references)