The Parliament: role, structure and functions

The Parliament of Tasmania is a bicameral legislature in which members of both Houses are elected at periodic elections rather than being appointed or holding office by virtue of their status. Subject to some limitations, its legislative powers are plenary and their exercise is not subject to review by the courts.

Introduction

Tasmania is governed in accordance with the principles of responsible government, in which the political executive, the Premier and Cabinet, is chosen from and responsible to the Parliament. To be able to retain office, the political executive must enjoy the confidence of the lower house, the House of Assembly. That entails that at the very least, it must be able to command the support of a majority in the House with respect to money bills and other important measures. If it is defeated on a money bill or loses a motion of no confidence, it must resign or advise the Governor to call an election. Besides legislating, Parliament supervises the executive in a number of ways.

Firstly, it can question the Executive in question time and criticise it in debates.
Secondly, it controls the raising and spending of government money. No taxes or other levies can be raised without Parliament’s approval and no government money may be spent without first being appropriated by Parliament.
Thirdly, Parliamentary committees can scrutinize all aspects of government, including the activities of government agencies and government businesses as well as government departments.

Current provisions

The Parliament is bicameral, and formally constituted of The Governor, the Legislative Council and House of Assembly shall together...
Section 11 provides that there shall be at least one session of Parliament annually. Section 13 provides that the Governor may claim a special sitting of Parliament for the ‘despatch of business’. The Constitution Act provides for a system of local government.

**Membership**

On the passing of the Constitution Act 1934 (Tas), s 9 of the Act provided that: (i) both Houses would continue to form Parliament once the amended Act came into force; and (ii) Members of Parliament at the date the act came into force would continue to sit as Members. Section 15 provides that any Member can resign from his or her seat by writing to the Governor. Members must taken an oath.

**The constitution of the Legislative Council**

The Legislative Council consists of 15 members, elected from 15 divisions, the names and boundaries of which are to be as determined under section 25 of the Legislative Council Electoral Boundaries Act 1995. Members hold office for six years. Elections are held every year on a rotating basis, with two (2) members being elected in one year, and three (3) members being elected in the alternative year. Elections are held in accordance with the Electoral Act 2004. In Council elections each Division returns a single candidate in accordance with a preferential voting system. Division 2 of Part III of the Constitution Act 1934 (Tas) applies to the provisions concerning the Legislative Council until a determination is made by the Redistribution Tribunal under the Legislative Council Electoral Boundaries Act 1995 (Tas).

Whilst the Legislative Council is the original house of the Tasmanian Parliament, it is not a fundamental part of the constitutional structure, nor a mandated part of the constitution. There have been a range of calls for its reform, reduction or abolition since the establishment of Tasmania’s Parliament. Other states have had similar debates, but only Queensland has removed its Legislative Council.

**The constitution of the House Assembly**

The House of Assembly consists of 25 members, with five members selected from each of five divisions in accordance with the Electoral Act 2004. Boundaries or each division are set out in the Constitution Act, Schedule 4. Elections must be held every four years unless the Governor dissolves the House sooner. Elections are held in accordance with the Hare-Clark system of voting.

**Who can be a member of Parliament?**

An elector who has been resident in the State continuously for five years at any one time or resident for two years immediately prior to nomination may nominate for a seat in either House for the division in which he or she is an elector. State employees are expressly permitted to hold Parliamentary Office by virtue of the Constitution (State Employees) Act 1944 unless they are:

- Persons in prison or convicted of any crime and are sentenced or subject to be sentenced to imprisonment for any term exceeding one year.
- Or of unsound mind are incapable of being elected.
- A subject or citizen of any foreign state or power.
- A bankrupt.
- No person is capable of being a member of both Houses simultaneously.
- Judges of the Supreme Court.
- Members of the Commonwealth Parliament.
- A person who holds an office for profit under the Crown, unless the person only holds the office of Minister of the Crown or Secretary to Cabinet for this State. However, persons who hold any office of profit in the public service of the State, or in any business or undertaking carried on by any person, body, or authority on behalf of the State may be elected to Parliament. On being elected, they cease to hold the office in question.
- Any person who enters into a contract or agreement with the state, directly or indirectly, that is as trustee, beneficiary, agent, shareholder in a company consisting of less than 30 members or as owner of 1/5 or more shares in any company.

The effect of disqualification by the Constitution Act or Electoral Act is to render her or his election null and void.

**The power of the Houses**

Professor Lumb wrote in 1986 that...
One feature of the Tasmanian Constitution Act which distinguishes it from the other acts is that it is incomplete. There are no provisions in the Act which empower the legislature to make laws for the peace, welfare, and good government of the colony or enable it to change its constitution. The Act must therefore be read in conjunction with those provisions of the Australian Constitution Act (No 2) which conferred law-making power, including the power of constitutional alteration.

The Constitution does not expressly empower the Parliament of Tasmania to make laws for the peace order and welfare of the state. Its law making powers were originally sourced in the grant of power under the Australian Constitutions Act 1850 (UK) s 14, as extended by the Colonial Laws Validity Act 1865 (UK) ss 2 and 3 (see The Current Constitution). This grant of power was maintained after independence under the authority of the Australia Act 1986 (Cth) ss 2 and 3.

The Commonwealth Constitution expressly preserves the legislative powers of State parliaments and the laws which they have enacted except to the extent that those powers and laws are inconsistent with the Constitution (Constitution ss 107 and 108). The grant of power to the states is plenary within those limits.

Powers over Money Bills & Appropriation

The Council’s powers equal those of the Assembly in all respects except money bills, specifically:

- Money bills cannot be introduced in the Legislative Council;
- The Council cannot amend such Bills.

However, the Council has the power to request amendments and to reject such Bills. The Assembly may not appropriate any money unless the purpose of the appropriation is recommended to the Assembly by the Governor. If the Assembly passes an appropriation which has not been recommended by the Governor, it is valid on receiving the royal assent. There are specific limitations the Constitution Act 1934 (Tas) places on the matters that Acts about Income Tax Rating may concern.

How decisions are made in the houses

Decisions of the Houses

Decisions of both Houses are made by simple majority. The President of the Council and the Speaker of the Assembly do not have a deliberative vote but do have a casting vote. The exceptions to this rule are:

- The rescission of a resolution or vote of the Assembly and the suspension of any standing order of the Assembly shall be decided by such a special majority of the votes of the members thereof as may be prescribed in those standing orders. A motion for the suspension of any Standing order may be carried by a majority of members present.

- Bills relating to the duration of the Assembly require a vote of two thirds of the members of the Assembly to pass that house.

Privileges

See Powers, Privileges, Immunities

Issues

- Uncertainty and disagreement as to the role of the Governor in forming government when there is a hung parliament (as occurred in 2010).
- There is no mechanism for the resolution of deadlocks between the houses. Previously the standing orders of each house provided for a free conference, but has been removed from the current rules and standing orders of both houses.
- A lack of transparency about the role and influence of political parties within the legislative process.

Membership

- There are no residency requirements for members.

Questions

- What parliamentary functions should be described, expanded or limited?
- What parliamentary powers should be described, expanded or limited?
- What parliamentary protections should be described, expanded or limited?
State employees are expressly permitted to hold Parliamentary Office by virtue of the Constitution (State Employees) Act 1944. Dual citizens are currently precluded.

Electoral boundaries: ‘defining electoral boundaries is not only politically necessary, it is legally essential. Of course there would be irresistible political pressure to produce legislation defining electoral boundaries if the existing provisions were removed from the statute book. But not only would there be political pressure, the provisions of the Western Australian Constitution, particularly Pt I of the 1889 Constitution (ss 2-36) and Pt I of the Constitution Acts Amendment Act 1899 (ss 5-42), which deal with the Parliament of that State, cannot work except by reference to defined electoral districts and provinces. It follows that, if the Electoral Distribution Act were to be repealed, some replacement provisions would have to be made, at least to the extent of defining electoral boundaries. If that was not done, there could be no election’.{75}

Privileges

As to scrutiny role: No mention about rights of Houses to obtain, review or inquire into matters of the Cabinet or executive.

See Powers, Privileges, Immunities

Legislative Council

Whether it may be abolished by an Act of Parliament and whether it may block its own abolition.

There is a lack of any process for the dissolution or prorogation of the Legislative Council.

Limits on legislative power

- Retrospectivity;
- Bills of pains and penalties (Kable-stye legislation);
- Expropriation. 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.
- Taxation

Committees

- The size of the Parliament arguably limits the number, capacity and effectiveness of Committees, particularly in relation to their investigative power.

Symposium Opinions/Recommendations:
### Expert Opinions

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<tr>
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<th>Opinion</th>
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<tr>
<td><strong>Prof. David Clark</strong></td>
<td><strong>Preamble:</strong> 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</td>
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<tr>
<td><strong>Mr. Leigh Sealy</strong></td>
<td><strong>Legislative Council dissolution:</strong> 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? 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.</td>
</tr>
<tr>
<td><strong>Prof. George Williams</strong></td>
<td><strong>Legislative Council dissolution:</strong> Problem with inability to dissolve upper house is no dispute settlement mechanism: eg, 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 Prof Clark does not see this as necessary (Dr Richard Herr agrees with this as long as there is no change to fundamental constitutional practice).</td>
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<tr>
<td><strong>Mr. Michael Stokes</strong></td>
<td><strong>Legislative Council dissolution:</strong> There is an argument for a strong upper house.</td>
</tr>
<tr>
<td><strong>Dr. Richard Herr</strong></td>
<td><strong>Definition of Parliament:</strong> 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.</td>
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### Expert Recommendations

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<tr>
<td><strong>Prof. Anne Twomey</strong></td>
<td><strong>Role and function of an upper house:</strong> 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 such legislation.</td>
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<td><strong>Mr Ben Bartl</strong></td>
<td><strong>Legislative Council dissolution:</strong> 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.</td>
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<td><strong>Prof. David Clark</strong></td>
<td><strong>Other functions of Parliament:</strong> 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. 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.</td>
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### Footnotes

1. Constitution Act 1934 (Tas) s 10. It reads: 'The Governor and the Legislative Council and House of Assembly shall together constitute the Parliament of Tasmania'.

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| 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 be moved to section 1; and  
  - (b) A new section about legislative power (a 'peace, order and good government' provision) should comprise a new section 2. |


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| Section 11 Annual Sessions                  | Professor Anne Twomey:  
  - 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.  
  - It is good to have some fixed provisions in the constitution requiring the governor to come back and exercise reserve powers (i.e., Solomon Islands).  

  Mr Michael Stokes:  
  - Suggests that the twelve month requirement of bringing Parliament to come back and sit is ideal.  

  Mr Leigh Sealy SC:  
  - 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. |

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| Section 13 Special sittings of Parliament   | 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. | Consensus that this provision should be redrafted 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?). |

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<td>Sections 45A and 45B</td>
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<td>Sections 45C</td>
<td>Remove section entirely.</td>
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<td>Section 9 Continuation of existing Houses: Continuance in office of Members</td>
<td>Shift this to a transitional section (for example, in a Schedule to the Tasmanian Constitution) or remove altogether.</td>
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<tr>
<td>15</td>
<td>Resignation</td>
<td>Change 'upon receipt' to 'upon acceptance' to retain the Governor’s discretion.</td>
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| 30      | Oaths to be taken by Members. | Replace the specific reference to the Promissory Oaths Act with either:  
(a) 'must swear an oath as required by law'; or  
(b) 'an oath to Parliament'. |
| 19      | Council Elections | Save for ss 1 which provides for an office term of 6 years, all other sub-sections should be condensed to refer to 'as Parliament otherwise provides'. |
| 18      | Application of Division | 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. |
| 18AA    | Application of Division | No changes. |

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Current Section of the Constitution Act 1934

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Resignation
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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.

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| Section 18 Constitution of the Assembly     | • 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. | • Modify subsection 2 to read ‘as Parliament otherwise provides’ instead of referring to the Electoral Act.  
• Move sub-section 5 to the Electoral Act. |

| Constitution Act 1934 (Tas) s 23.          |                   |                                |
| Current Section of the Constitution Act 1934 | Workshop Comments | Workshop Conclusion/Follow-up |
| Section 23 Four year Parliaments           | Remove s 23(1) as it is transitional and unnecessary. |                                |

| Electoral Act 2004 (Tas) Schedule 4.       |                   |                                |
| Current Section of the Constitution Act 1934 | Workshop Comments | Workshop Conclusion/Follow-up |
| Section 18 Constitution of the Council     | • Replace references to the Electoral Act and to the Legislative Council Electoral Boundaries Act to ‘as Parliament otherwise provides’. |                                |

| Current Section of the Constitution Act 1934 | Workshop Comments | Workshop Conclusion/Follow-up |
| Section 14 Qualification of Members         | • 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. |

| Current Section of the Constitution Act 1934 | Workshop Comments | Workshop Conclusion/Follow-up |
| Section 34 Vacation of office for other causes | Consensus is that:  
• (a) the current provision is alright even though there are ambiguities, specifically in relation to (b) and (c) which may engender issues relating to dual citizens;  
• (b) unsound mind does not need a re-draft, nor is it contentious in practice; and  
• (c) possible timing issues may arise with (e) in relation to timing when there is a pending appeal after conviction and where you have been convicted of any crime which potentially has a sentence of more than one year (should relate to your real sentence and not possible sentence). | Slight re-draft to correct ambiguities. |

| Constitution Act 1934 (Tas) ss 34 and 35. |                   |                                |
| Constitution Act 1934 (Tas) s 14(2).       |                   |                                |
| Constitution Act 1934 (Tas) s 34(c).       |                   |                                |
| Constitution Act 1934 (Tas) s 34(d).       |                   |                                |
| Constitution Act 1934 (Tas) s 14(3).       |                   |                                |
| Constitution Act 1934 (Tas) s 32(2).       |                   |                                |
| Current Section of the Constitution Act 1934 | Workshop Comments | Workshop Conclusion/Follow-up |
| Section 31 Commonwealth Membership          | No changes.        |                                |

| Constitution Act 1934 (Tas) s 31.          |                   |                                |
| Constitution Act 1934 (Tas) ss 32(1) and (2). |                   |                                |
Workshop Conclusion

For the peace, welfare, and good government of the said colonies. This is a plenary power and it was recognized, even in an era when emphasis was given to the character of colonial legislatures as subordinate law-making bodies. The plenary nature of the power was established in the series of historic Privy Council decisions at the close of the nineteenth century: Reg. v. Burah (1878) 3 AppCas 889; Hodge v. The Queen (1883) 9 AppCas 117; Powell v. Apollo Candle Company (1885) 10 AppCas 262; Riel v. The Queen (1885) 10 AppCas 675. They decided that colonial legislatures were not mere agents or delegates of the Imperial Parliament.

9: "The power to make laws "for the peace, welfare, and good government" of a territory is indistinguishable from the power to make laws "for the peace, order and good government" of a territory. Such a power is a plenary power and it was so recognized, even in an era when emphasis was given to the character of colonial legislatures as subordinate law-making bodies. The plenary nature of the power was established in the series of historic Privy Council decisions at the close of the nineteenth century: Reg. v. Burah (1878) 3 AppCas 889; Hodge v. The Queen (1883) 9 AppCas 117; Powell v. Apollo Candle Company (1885) 10 AppCas 262; Riel v. The Queen (1885) 10 AppCas 675. They decided that colonial legislatures were not mere agents or delegates of the Imperial Parliament.'

10: "These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (see Drivers v. Road Carriers (1982) 1 NZLR 374, at p 390; Fraser v. State Services Commission (1984) 1 NZLR 116, at p 121; Taylor v. New Zealand Poultry Board (1984) 1 NZLR 394, at p 398), a view which Lord Reid firmly rejected in Pickin v. British Railways Board (1974) UKHL 1; (1974) AC 765, at p 782, is another question which we need not explore.'

The Legislative shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.

In contrast the NSW Constitution Act 1934 (Tas) s 33.

Workshop Comments

Consensus that this section needs an extensive re-draft.

Consensus that this section needs an extensive re-draft.

Discussion of whether section is necessary, but consensus that it should be retained because section refers to 'void' elections which are handled differently.

No consensus on re-drafting.
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| 42      | • Possible need for re-drafting but general principles are sound.  
• Possibility of changing section 1(b) and (c) to read 'Tax Act'. | |
| 43      | • Generally, no consensus on changing the provision notwithstanding the fact that its operation seems obvious. However, it has value as confirmation that the Council can request amendments without breaching privilege or limits of power.  
• **Prof George Williams**: Might be helpful to consider the alternative in NSW, where if the assembly doesn’t accept the Bill, it might get passed anyway. | No consensus on change |
| 44      | No changes. | |
| 45      | No changes. | |
| 36      | Possibility that a reference to income tax rating is anachronistic and otiose and should be removed after discussion with Treasury. | • Consolidate all the interpretation clauses by moving the contents of s 36 to s 3 of the Tasmanian Constitution.  
• Consider the possibility of removing the reference to income tax rating. |
| 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. |
<p>| 40      | No changes. | |
| 37      | No consensus on changes. | |</p>
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<td>Section 38</td>
<td>Dr Brendan Gogarty: 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>
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<td>Constitution Act 1934 (Tas) ss 37 and 38.</td>
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| Section 41 | • Mr Michael Stokes: Instead of setting out the two acts, may want to just say ‘an Act setting tax rates’.  
• Prof Anne Twomey: Issue with MS’ suggestion is that Acts may set tax rates or do other things. Specificity might be helpful.  
• Prof George Williams: 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. |
| Constitution Act 1934 (Tas) ss 20 and 25. | | [a b] |

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| Section 25 | • 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.  
• Prof Anne Twomey: 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. |

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<th>Current Section of the Constitution Act 1934</th>
<th>Workshop Comments</th>
<th>Workshop Conclusion/Follow-up</th>
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<tbody>
<tr>
<td>Section 21</td>
<td>No changes.</td>
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| Section 24 | Prof Anne Twomey:  
• The idea behind this section is that there is a forced changeover point at which a new speaker would be chosen.  
• 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. |

<p>| Constitution Act 1934 (Tas) s 25A. | | |</p>
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| Section 41A Powers of the Assembly in respect of its own duration | **Prof George Williams:** Consider keeping it in the Constitution as it serves a ‘political entrenchment’ purpose.  
**Prof Anne Twomey:** Problem with this provision is that it is an un-entrenched entrenchment provision. | No consensus on what to do with this provision. Possible options:  
(a) move it just after section 23 as it seems to be in the wrong place; and/or  
(b) if it is to be entrenched, double-entrench it; and/or  
(c) if it is not to be entrenched, take it out. |
| Section 17 Houses to make Standing Orders | **Dr Brendan Gogarty:** Possible synchronisation with section 50 of the Commonwealth Constitution while also keeping in view the respective provisions in State Constitutions. | 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. |

**See further (references):**


**Speaker Documents**

DavidClark.docx