What is a good constitution?

Introduction

In Attorney-General (WA) v Marquet (2003), Callinan J observed that

the whole intention of a constitution is to provide for the community that it is to govern a degree of genuine and effective, but not entirely inflexible, stability and certainty.

In pursuit of that objective, a constitution will likely speak to the nature and scope of the institutions of government and governmental powers, and the means by which government can be held accountable in relation to exercises of its powers. Further, a constitution will also likely provide means for achieving change in constitutional arrangements; however, a constitution might, to some degree, also limit the circumstances in (or methods by) which such change can be achieved. These characteristics are reflected (to varying degrees) in the current architecture of State Constitutions in Australia.

What is a 'good' constitution?

The mere fact that a constitution provides for the machinery of government does not, of itself, mean that it is a 'good' constitution. More may be required (both in substance and in form) in order for a constitution to be regarded as good. One might take, as a starting point, McGinnis and Rappaport's identification of aspects of a good constitution:

- A good constitution defines the limits of governmental powers;
- A good constitution makes government accountable to the people by providing for checks and balances on the exercise of governmental power;
- A good constitution promotes long-term structures, and is typically (1) of an indefinite term and (2) difficult to change;
- A good constitution is typically the product of consensus among those who are subject to its limits and afforded its protections;
- A good constitution reflects the preferences, values and factual views of the people.

To that list, one might add that a good constitution:

- Reflects its significance as an instrument of and for government;
- Reveals its status as the fundamental or highest law;
- Provides legal authority for the exercise of governmental powers;
- Creates (or clarifies) any (legal) duties/obligations that the government must observe or satisfy;
- Articulates the relationship between the government and the people;
- Is accessible to the people governed subject to its terms.

It is also worth considering the characteristics of a good State Constitution in the context of the Australia federal system of government. Thus, a good State Constitution might:

- Signal the importance of a State Constitution for the State community;
- Embody unique aspects of a State, including unique governmental and governance arrangements;
- Reflect the position of the State as a component of the Australian federal system of government.

McGinnis and Rappaport also recognise the significance of the constitution making process in the development of a good constitution.
A number of the characteristics identified above are relevant not only to the substantive content of a good constitution, but may also influence the procedure through which alterations to constitutional arrangements are developed and implemented.

It may also be helpful to note that the aspects of a good constitution identified above speak to the past, the present, and to the future. Some of the aspects of a good constitution are important for their historical significance (i.e., for the account they provide of the means by which the current system of government developed, and for what they do not say about other aspects of Australian history, such as the treatment of Aboriginal peoples following European settlement). Other aspects of a good constitution are significant because they both authorise and control the day-to-day operations of government (and, perhaps, because they articulate the relationship between the government and the people). Still other aspects of a good constitution are important because of their aspirational qualities (i.e., statements about values to be reflected and objectives to be obtained through government). Thus, constitutional reform may seek to address those dimensions of a good constitution where the Tasmanian Constitution can be enhanced.

**Constitution making process**

The process by which a constitution is made has important ramifications for its perceived legitimacy. However, the Tasmanian Constitution has come into existence as a result of the legislative process, rather than via some broader popular process (such as a referendum). (Direct) popular ratification of State Constitutions has been a matter of interest since the Federal Conventions of the 1890s (e.g., Sir Samuel Griffith, noted in Aroney et al. below). It may also be worth considering the potential effects of popular ratification of a State Constitution, in terms of both political legitimacy and for interpretive purposes.

Entrenchment measures are an important signal of the status of a constitution (or parts of a constitution) as a fundamental or the highest law. It is thus worth considering:

1. Whether a mechanism for entrenching aspects of the Tasmanian Constitution is required in order to further highlight the status of the constitution as fundamental law;
2. What an entrenchment mechanism might involve; and
3. What aspects of the Tasmanian Constitution should be considered for entrenchment.

For further details see the Entrenchment stub.

**Current Arrangements**

Tasmania's current constitutional arrangements are detailed in The Current Constitution section of the Wiki. Key points to note for the purposes of this stub include:

- The current Tasmanian Constitution is a hybrid of legislation, common law and convention;
- The Constitution Act 1934 (Tas) is skeletal;
- A small number of provisions in The Constitution Act 1934 (Tas) are entrenched; legislative components of the Tasmanian Constitution do not generally have the status of paramount law;
- There has never been a formal demonstration of popular support for the Tasmanian Constitution;
- The preamble to the Constitution Act 1934 (Tas) is limited (i.e., it does not describe who the people of Tasmania are, their shared values or their vision for the State).

| Section by section analysis |
| Current section | Analysis |

**Issues**

- What is the role and relevance of a State Constitution in 21st century Australia?
- Conventions contributing to the Tasmanian Constitution are not binding. Are they observed?
- Responsiveness versus minimum standards.
- Rights and duties - a mixture?
- A social contract, governance framework, a mixture or more?
- Process by which the Constitution should be developed and endorsed?

**Questions**

- What is the relevance and role of a State Constitution in 21st century Australia?
- Should the Constitution be more or less prescriptive than current arrangements?
- Should the Constitution be in written, unwritten, or hybrid form?
- Should we favour a more express constitution, a bare-bones model, or a completely unwritten one?
- What matters should be addressed in the substantive provisions of the Tasmanian Constitution (i.e., structure of government / powers of branches / limits on governmental powers / relationships (state/individual) / civil and political rights)?
- What political characteristics, if any, should be reflected by the Tasmanian Constitution? (i.e., is it descriptive or is it representative of the wishes and characteristics of the Tasmanian people? that is, what is the function of the preamble?).
Should the Tasmanian Constitution contain a preamble? If so, what matters should be addressed in the preamble? Specifically, should cultural and indigenous heritage be recognised?

What is the significance of entrenchment (i.e., relevant to establishing the status of the Constitution as a fundamental law)?

What aspects, if any, of the Tasmanian Constitution should be entrenched?

What popular and/or political process(es) might be relevant to the development and enactment of a good constitution?

### Symposium Opinions/Recommendations:

<table>
<thead>
<tr>
<th>Expert</th>
<th>Opinion</th>
</tr>
</thead>
</table>
| The Hon Stephen Gageler SC | **What should a State Constitution do?**
- See Harvard Professor, Adrian Vermeule ‘The Constitution of Risk’.
- A Constitution is basically a machinery for Government. Designed to produce governmental output (public welfare, peace, order and good government).
- Provides solution to unpredictable problems.
- A machine that breaks down is a machine that does not do anything.
- *Ideally - must optimise outputs, whilst accepting and managing a degree of inherent risk.*
- It is a machine that must produce ongoing solutions to problems. |
| The Hon Stephen Gageler SC | **What should a State Constitution look like?**
- It appears there are a number of ‘binary choices’ which arise at every juncture:
  - Choice 1 - is it to be unwritten or written?
  - Choice 2 - if it is written is it to be flexible? (Able to be amended normally or entrenched, or requires extraordinary amendments?)
- If it is entrenched what are the extraordinary measures for amendment? 2/3 majority or referendum? Combination or other procedure?
- There is only one entrenchment provision in the Tasmanian Constitution.
- If written, choices as to what goes in:
  - Establishing and defining the functions of the institutions of government.
    - Confined to establishing and confining institutions? What institutions should be included (traditional only, 3 arms?).
    - Or do we include other agencies of government - fourth arm, fifth and sixth arms?
    - Bruce Peterman at Yale has said problem with modern constitutional discourse is that it includes only the three arms counted by Montesquieu and this perception restricts the future of the way we see government.
  - If it is written and not confined to the functions of government, should a Constitution define the relationship between citizens and State? Political rights?
  - To what extent should it set out the elements of the electoral system?
  - To what extent should it be aspirational?
  - To what extent should it acknowledge failures of the past?
    - This will come up in public discussion. |
| Mr Leigh Sealy | **Survival:**
- For the last seventy or eighty years the document has survived intact in the form it is: in the modern political environment, how do we pass a law saying here’s a document that we can’t change?
- Rev Prof Tate agrees with reticence to meddle.
- Mr Peter Heerey AM QC: historically Australians have not had much enthusiasm for abstract political ideals. |
| Professor George Williams | **Context defines what is ‘ideal’ (eg Fiji and Myanmar different to Australia):**
- Cannot easily identify an ‘ideal’ constitution. At an international level there is no consensus of what such an ideal constitution my look like.
- Question of length: short or succinct?
- NT approach - what is and isn’t working. Aboriginal population (need special protections). |
| Professor George | **Tasmanian Constitution is a creature of its history:**

<table>
<thead>
<tr>
<th>Expert</th>
<th>Recommendation</th>
</tr>
</thead>
</table>
| **Williams** | • Creature of its history and the drafting practices at the time. It is too much a mixture of the mundane and the missing.  
• Some provisions are very lengthy, whilst important aspects too vague. Skeletal, but missing vital limbs. Overly reliant on common law conventions and practices (which are uncertain in some aspects- including reserve powers).  
• Poor structure, money bill section contains irrelevant material: eg, s 41A duration of assembly. Ineffective and complex. Section 41A single entrenchment of a provision. Section 46 is unique in State Constitutions, protects religious freedoms despite not being protected? |
| Dr Richard Herr | **Constitution and the rule of law/legitimacy:**  
• A democracy does have to respect the rule of law, and that the purpose of the Constitution at the end of the day is legitimacy, so that the people believe that what the government does is legitimate. |
| Professor George Williams | **Survival:**  
• It is in spite of the Constitution that the political system here has worked – the Constitution has fostered controversy that just should not be here. The Constitution is in the worst state of any of the States in terms of missing key criteria it should have. |
| **Expert Recommendations** | |
| **Expert** | **Recommendation** |
| The Hon Stephen Gageler SC | **If it is to be written (entirely or partly), what should be expressed in its text?**  
• Blue sky thinking is unrealistic. Basic question is not helpful and attention must be paid to the language that is to be used.  
• Law reform project could take two approaches:  
  1. Home grown, organic, implemental approach:  
  • We have a Constitution, we have letters patent, practices.  
  • Take an inventory – what works what doesn’t? Try fix these existing mechanisms.  
  2. Comparative approach:  
  • Used in 1890’s during the Convention Debates. What is being used and is/is not working in other States. What might be appropriated for local conditions? Look at what might be appropriated by from other Constitutions.  
• These are both ways of moving forward. |
| Professor George Williams | **Entrenchment:**  
• Put some things beyond Parliament itself (rarely done in State governments) but should not be completely flexible. |
| Professor George Williams | **When you draft a constitution need an intelligible preamble (what is the desire of the document):**  
• As such, for transparency purposes, it needs to make clear what the purpose of the document is and explain its connection to the community.  
• The 1970s/1980s ACT experience demonstrates that codification of conventions such as the role of the Chief Minister avoids controversies such as during the 2010 hung Parliament in Tasmania. This is despite the fact that the ACT is more prone to hung Parliaments. |
| The Hon Elise Archer MP | **Constitution/Standing Orders:**  
• Very few members of Parliament have actually read the Constitution, or Standing Orders in their entirety.  
• Procedural matters could be set out fully in the Standing Orders. Difficult to teach when not contained in one document or subject to common law.  
**Reform:**  
• Do not need to go as far as having more than the three arms of ‘government’. There is a danger with too much information in that you miss something and then overly complex documents result.  
• Needs to be amended to clearly define roles and powers. What happens in situation of hung Parliament – this is the classic case for reform. |
| Professor George Williams | **An ideal constitution needs to be drafted with plain and straight forward language – it can then be a gateway for community to understand the basic facets of their government:**  
• Needs to be accessible for civics education.  
• Should set out the arms and functions of government and make reference to constitutional values such as judicial independence. |
• Internationally there is a consensus that the relationship between citizen and state in a constitution is just as axiomatic as setting out the arms of government.
• Right to freedom of political communication. Set our basic things such as right to vote.

Footnotes

1. 217 CLR 545, [268].
6. See Saunders, above n 2, 1011.
7. See Twomey, above n 5, 24.
9. This reflects Saunders’ work on the significance of State Constitutions: above n 2, 1001-9.
10. See, eg, Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104, per Deane J at 171, referencing the ‘original adoption (by referenda) and subsequent maintenance (by acquiescence)’ of the Australian Constitution.
12. See, eg, Twomey above n 5, regarding the significance of the Australia Acts 1986 for entrenchment and the need for care when entrenching.

See further (references)

4. Jason G Allen, Salus Populi Suprema Lex: Justifying Compulsory Mining Leases in the Mineral Resources Development Act 1995 (Tas)’ (2011) 30 University of Tasmania Law Review 1. 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.