

Australian Association of Constitutional Law Working Group on
Tasmanian Constitutional Reform:

Consensus statement on the Reform of the Tasmanian Constitution

BRENDAN GOGARTY, GEORGE WILLIAMS, MICHAEL TATE,
LEIGH SEALY, DAVID CLARK, TERESE HENNING,
ANJA HILKEMEIJER, MICHAEL STOKES, RICHARD HERR,
PETER PATMORE, MATTHEW VERNEY, BEN BARTL, SIMON GATES

Abstract

This is a consensus statement by a range of constitutional practitioners from Tasmania and across Australia on the proposal to give state constitutional recognition to Tasmanian aboriginal First Peoples. We strongly support that aim. However, we consider the current *Constitution Act 1934* (Tas) must itself be subject to reform to make that recognition meaningful. The *Constitution Act* preamble is out of date, a legacy of our colonial past and does not reflect the shared values and principles of contemporary Tasmanian society and Government. We urge the Government to refer the entire Constitution to the Tasmanian Law Reform Institute for public consultation, review and reform.

I CONTEXT

On 7 June 2016, the Premier and Minister for Aboriginal Affairs, the Hon Will Hodgman MP, released a draft amendment to the Preamble to the Constitution. The amendment is intended to give recognition to the First People and the traditional and original owners of Tasmania as part of Tasmanian Government's commitment to resetting its relationship with Tasmania's Aboriginal community.

The new preamble would read (with additional text in italics).

Whereas by an Act of Council instituted an Act to establish a Parliament in Van Diemen's Land and to grant a Civil List to Her Majesty (known as the Constitutional Act and later as the *Constitution Act*) passed in the eighteenth year of the reign of Her Majesty Queen Victoria by the Governor and Legislative Council of the Colony of Van Diemen's Land in pursuance of the provisions of an Imperial Act called the Australian *Constitution Act* 1850, it was enacted for the purpose of securing the peace, welfare, and good government of the said Colony, that in place of the said Legislative Council there should be one Legislative Council and one House of Assembly, constituted as therein provided, which should exercise all the powers and functions of the then existing Legislative Council, and that the Governor and Legislative Council and House

of Assembly together should be called the Parliament of Van Diemen's Land: And whereas Her said Majesty Queen Victoria, by Order-in-Council directed that, on and after 1st January 1856, the name of the said Colony should be changed to Tasmania: And whereas by force of the Commonwealth of Australia *Constitution Act* 1900, the said Colony, on the establishment of the said Commonwealth, was constituted and became a State of the Commonwealth of Australia: And whereas many of the provisions of the *Constitution Act* have been repealed or replaced, and numerous amendments have been made therein, and it is desirable to make certain other amendments therein, and that the said Act and its amendment should be consolidated in one Act:

Whereas the Parliament, on behalf of all the people of Tasmania, acknowledges Aboriginal people as Tasmania's First People and the traditional and original owners of Tasmanian lands and waters; recognises the ongoing spiritual, social, cultural and economic importance of traditional lands and waters to Tasmanian Aboriginal people; and recognises the unique and lasting contribution that Tasmanian Aboriginal people make to Tasmania:

II BACKGROUND

WE the undersigned.

CONCERNED about the status, operation and legal effect of the Tasmanian Constitution.

SUPPORTED by the Australian Association of Constitutional Law, Law Foundation of Tasmania, University of Tasmania, Faculty of Law, and Tasmanian Law Reform Institute.

MEETING at an Expert Symposium in Hobart, Tasmania on 22 February 2016

AGREED that the current Tasmanian *Constitution Act 1934* requires review and reform by the Parliament of Tasmania on behalf of the people of Tasmania.

RESOLVED to contribute to and work towards the reform of the Tasmanian Constitution for the benefit of all Tasmanians.

RESPOND to the proposal to reform the preamble of the Tasmanian *Constitution Act 1934* as follows:

We declare our support for the reform of the Tasmanian Constitution.

We believe that the Tasmanian Constitution should act as the fundamental law of the Tasmanian community, reflecting our heritage, shared values and principles upon which the people agree to be governed.

We note that Tasmania is the only state not to give constitutional recognition to its First Peoples.

We believe that the First People and the traditional and original owners of Tasmania must be recognised within Tasmania's Constitution.

We believe that universal recognition by the states will provide impetus for the reform of the Commonwealth Constitution to do the same.

We consider such clear and explicit recognition to be integral to the constitutional text.

We believe that the recognition of the First Peoples should be one of many values and principles informing the peace, welfare and good government of the state.

We question whether inserting the proposed text after an archaic and inaccessible statement recounting colonial and imperial laws made for Tasmania, not by Tasmanians, is appropriate to the legitimate aims of the Government's reform agenda.

We urge the Government to consider wider constitutional reform in addition to, and to provide effective constitutional meaning to, Aboriginal recognition.

Noting that the current *Constitution Act 1934*:

1. Is a consolidation of imperial and colonial legislation and other instruments that has never been put to the Tasmanian people for consultation or consent;
2. Does not contain any statement as to the social, legal or constitutional values upon which Tasmanians declare their government rests;
3. Provides no express power for the Parliament to legislate for the people of Tasmania or the basis upon which it should make such Laws;
4. Contains a large number of blank, repealed, redundant or irrelevant provisions;
5. Does not properly describe many of the organs of state, their powers or duties;
6. Is not clear, readily accessible, transparent, or reflective of the actual conduct of government and the affairs of state;
7. Is not, legally a fundamental or superior law in any way; and
8. Is the least reviewed, reformed or entrenched State Constitution in Australia.

We recommend that the Government extend its laudable reform agenda to the Tasmanian Constitution as a whole. The First Peoples of this state are an integral part of the community. Their recognition within the

Constitution Act should not be an afterthought in an archaic act. It should be part of a wider reform of that Act designed to reflect the contemporary values and principles upon which Tasmania now stands. It should aim at making the Constitution the best it can be so as to accurately reflect Tasmania's existing governance arrangements in a more independent and enlightened time.

We accept that Aboriginal Recognition is needed now. If the amendment is to go forward we urge that it is only the first step in a wider constitutional reform project.

We request that the Government refer the matter to the independent Tasmanian Law Reform Institute which is suitably equipped to undertake a public consultation and to prepare an issues paper on reform of the Tasmanian Constitution.

We note the considerable work already undertaken in reviewing and reporting on the current *Constitution Act 1934* at the Expert Symposium held in Hobart, Tasmania on 22 February 2016 and the subsequent work undertaken by this consensus group. We offer that work freely and commit ourselves to assisting in the process of inquiry and reform.

III PROPOSED TERMS OF REFERENCE

Noting that Tasmania should have the best state Constitution in Australia, reflective of the fundamental principles and values of Tasmanian society, its heritage and its First Peoples, as a sovereign state within the federal Commonwealth of Australia. Recognising the poor state of the current *Constitution Act 1934* and for the people of Tasmania to contribute to a reform of that Act. Directing that reform to the clarification and strengthening of existing constitutional arrangements, including the powers and duties of the Governor, status and structure of Parliament as the bicameral supreme legislative body of the state, the independence and impartiality of the judiciary and the system of representative and responsible government.

The proposed terms of reference for the Tasmanian Law Reform Institute are:

1. Review and describe the current constitutional arrangements for Tasmania both written and unwritten;
2. Provide a list of constitutional powers, duties or privileges which require statutory clarification for good government, public interest and the rule of law;
3. Identify which essential institutions, organs, powers and duties of constitutional government are adequately described and which are not in the *Constitution Act 1934*;

4. Examine the accessibility, clarity and relevance of the sections, and structure of the current *Constitution Act 1934*;
5. Recommend whether best-practice would be achieved by amending the current *Constitution Act 1934* or drafting a new *Constitution Act*.
6. Consult with the public on how the Preamble to the Constitution may be drafted to reflect of the fundamental principles and values of Tasmanian society, its heritage and its First Peoples, as a sovereign state within the federal Commonwealth of Australia.
7. Consult with the public and stakeholders and make a recommendation about how to produce the best state Constitution in Australia in line with Tasmania's existing governance arrangements.

Signatories

Dr Brendan Gogarty

Tasmanian Convenor, Australian Association of Constitutional Law

Professor George Williams

Dean, Anthony Mason Professor, Scientia Professor, University of New South Wales Faculty of Law

Reverend Professor Michael Tate AO

Honorary Research Professor, University of Tasmania

Mr Leigh Sealy SC

Barrister, Tasmanian Independent Bar, Former Solicitor General of Tasmania

Professor David Clark

Professor of Constitutional Law, Flinders University

Ms Terese Henning

Director, Tasmanian Law Reform Institute

Ms Anja Hilkmeyer

Lecturer in Law, Faculty of Law, University of Tasmania

Professor Richard Herr OAM

School of Government, University of Tasmania

Mr Michael Stokes

Adjunct Senior Lecturer, Faculty of Law, University of Tasmania

The Hon Dr Peter Patmore

Lecturer, University of Tasmania

Mr Matthew Verney

President, Law Society of Tasmania

Mr Ben Bartl

Barrister and Solicitor, Community Legal Centres Tasmania

Mr Simon Gates

Barrister and Solicitor, McLean McKenzie and Topfer Barristers and Solicitors