Parliament: Background

In 1774 Edmund Burke described Parliament as a ‘deliberative assembly’, [1] and common interpretations of the role of Westminster-style Parliaments include definitions that Parliament may be called a 'law-making institution which is ... one part of the complex governing apparatus of a modern state.' [2] In addition, the 'legislative process itself is in many ways integral to the idea that the making of law by the Parliament is both public and deliberative.' It is public so that ‘citizens are able to ascertain from the public record that a law is validly enacted.’ Otherwise, ‘any putative enactment which has not properly followed this process is not a valid law.’
Other parts of the ‘modern state’ include the ‘courts [which] develop the law and executive agencies that administer it, but these cannot claim direct democratic legitimacy in the same way as a Parliament.’ Of course, two other principal elements of the state are the Monarch and the Executive or Government, but all three elements are theoretically restrained by the notion of the separation of powers. This notion is ‘taken to be the essential means whereby government is limited and the conditions for avoiding the oppression of individuals by those in power enhanced.’

The separation of the executive, legislative and judicial systems is only theoretical because ‘there is inevitably an overlap between the different powers. Indeed, responsible government itself is arguably a compromise of the doctrine of the separation of powers in that the ultimate heads of executive departments are also members of the governing party in the legislature.’ [3] Moreover, such theories of Parliament and law-making have not remained static and a ‘more recent view is that policy consideration underlying the process of law-making are to some extent relevant in finding what was intended by the legislation.’

Reflecting this evolution in the mid-1980s Tasmanian legislation authorised the use of extrinsic material — background documents — so that the judicial system could better determine the meaning of Parliament’s principal output, statutes. Produced by public servants ‘Fact Sheets’ and ‘Clause Notes’ form background documents that assist in resolving any ‘ambiguity or doubt as the meaning’ of a statute, and ‘help establish the purpose or object underlying an Act or provisions in an Act.’

**Tasmania’s Principal Constitutional features**

The Tasmanian Constitution Act 1934 determines a great deal of the fundamental elements of Tasmania’s parliamentary democracy, as outlined below. For example, the Governor is mentioned repeatedly, as are elections and Members. Yet important elements of modern democracy, such as the Cabinet are not. A number of other important matters are determined by the Commonwealth Constitution, to which the State referred powers in 1901 such as customs. Other subject areas can or may be referred to the Commonwealth by the State Parliament. However, if the Commonwealth enters a field, as it is known, Section 109 of the Australian Constitution provides that, where a law of a state is inconsistent with a federal law, the state law is invalid to the extent of the inconsistency.

The Tasmanian Parliament, first established in 1825 as a unicameral or single chamber Parliament, has been a bicameral Parliament, with two chambers, since 1856. Based on the Tasmanian Constitution, Parliament has many powers, not least over its own conduct by virtue of Standing Orders. Parliament alone can pass or repeal statutes, and it can monitor action or inaction by the Executive and Public Service through Question Time and Committees. It alone can remove judicial or other official appointments, and compel witnesses to give evidence before parliamentary inquires. This oversight includes monetary control and the power to order the tabling of government documents, etc.

Adjournments of Parliament are pauses between sitting days, while prorogations are an act of the Executive, because only the Governor can proclaim that Parliament stands prorogued. Prorogation clears all pending parliamentary matters - wipe the slate clean - while dissolutions terminate the Parliament for a general election - in Tasmania this applies only to the House of Assembly.

Apart from joint committees the Legislative Council and House of Assembly operate separately except for two reasons. First, when the House of Assembly Members temporarily attend the Legislative Council Chamber to hear the Governor’s Opening of Parliament Speech after an election. The other reason is if a Senate vacancy arises by resignation or death of a Senator. At federal level State Senators are elected for a fixed six year term and s15 of the Commonwealth Constitution states that for casual vacancies:

If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together … shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.
Parliament of Tasmania
Each Tasmanian Act states: "Be it enacted by His Excellency the Governor of Tasmania, by and with the consent of the Legislative Council and House of Assembly, in Parliament assembled"

Legislative Council
Chaired by the President
Clerk of the Council
- Established as 7 Member nominee Council in 1825
- From 1851 part nominated, part elected
- From 1856 fully elected with up to 19 MPs
- 15 Members since 1998
- Leader of the Government and (occasionally) Ministers

House of Assembly
Chaired by the Speaker
Clerk of the House
- Established in 1856 with 30 Members
- After several fluctuations 35 Members 1959-1998
- 25 members since 1998
- Premier and Ministry (potential Ministry of up to 9 MPs)

15 single Member electorates
Elections 2 or 3 seats each May for 6 years [by-elections]

Semi-Optional Vote
(Preferential)
(Compulsory)
with Robson rotation

Proportional Voting
(Compulsory)
Hare-Clark PR since 1909
with Robson rotation

Select or Standing Committees of Legislative Council
Select or Standing Committees of House of Assembly

Joint Standing Committees
Joint Select Committees
Governor

State Governors are appointed by the Monarch as their ‘representative’ on the advice of the Premier and their Royal Assent must appear on every statute. The Governor meets with the Premier and Ministers as the Executive Council to give formal legal standing to government decisions [see chart]. Each Governor’s commission is issued by the Monarch based on Letters Patent and may only be extended or terminated by the Monarch, again on the advice of the Premier. Even so, under unwritten ‘reserved powers’ it is the Governor who issues each Premier with a commission and likewise appoints Ministers to their portfolios. Importantly, while the Premier is not actually mentioned in the Tasmanian Constitution Act, by s8 of the 1985 Australia Act, which severed the last links with the British Parliament, it is confirmed that advice on the exercise of gubernatorial powers ‘shall be tendered by the Premier of the State.’ For example, when so advised, the State Governor dissolves Parliament and opens a new Parliament after each election.

- By s10 of the Constitution Act 1934 ‘The Governor and the Legislative Council and the House of Assembly shall together constitute the Parliament of Tasmania’ [see above chart].
- The Governor shall, by s12 (1), ‘fix times and places for holding the sessions of Parliament’, and under s11 ‘there shall be a session of Parliament once in every year, so that a period of 12 months shall not intervene between [sitting days]’.
- If, while Parliament stands prorogued or adjourned, in the opinion of the Governor it is ‘desirable that Parliament shall be called together for the despatch of business’, ‘not less than six days’ must elapse after a proclamation of the Governor for a special sitting of Parliament.

Members of Parliament

Citizens over 18 years must be enrolled to vote as electors before they can stand as parliamentary candidates, and, under s14, ‘no person of unsound mind or is in prison’ may stand as a candidate for Parliamentary election. Tasmanian Members of Parliament are known as MLCs if elected to the Legislative Council or MPs if elected to the House of Assembly. Upon election all Members are protected against prosecution for anything they might say during debate which forms the doctrine of freedom of speech, a part of ‘parliamentary privilege’ that stems from the British Bill of Rights of 1688 and elements of the Tasmanian Criminal Code.

- By s14 (3) ‘no person shall be capable of being a Member of both Houses at the one time’. Tasmanian MP’s, who, by s30, must take an ‘oath of allegiance’, may resign under s15, and must do so ‘by writing to the Governor’.
- By s32 (30), ‘no Judge … ‘shall be capable of being elected to, or holding, a seat in either House’. No Tasmanian MP may be a ‘Member of either House the Parliament of the Commonwealth’, and, under s31 (2) the seat of any Tasmanian MP becomes vacant upon the declaration of their election to either house of the Commonwealth.

Parliamentary Procedure [Standing Orders]

Daily Notices of Motion and Orders of the Day set down the ‘agenda’ for Parliament and Votes and Proceedings record the outcome of parliamentary procedures. Standing Orders can be suspended by a two thirds majority vote of Members in order to change the pattern of parliamentary business if an urgent matter arises, for example. Standing Orders allow a Presiding Officer to suspend a Member of Parliament, and determine the procedures for Parliamentary Committees.

- By s17 ‘Each House … shall prepare and adopt such standing orders as shall appear to be best adapted for the orderly conduct of the business of such House’. These Orders also establish how such Houses shall ‘confer, correspond, and communicate with the other House’. They also set down the ‘manner in which Bills shall be introduced, passed, numbered, and intituled in such House.’ All proposed Standing Orders ‘shall be laid before the Governor by the House making them and, being approved by him, shall become binding and of force’.
- By s21 and s24, elections must take place for a President of the Legislative Council and, at its first meeting after a general election, a Speaker of the House of Assembly. These Presiding Officers ‘shall be notified to the Governor by a deputation’, which again connects the Governor to Parliament [see chart]. They also remain in office after dissolution until the next Parliament, which ensures the continuation of the administration of parliamentary departments is not disrupted.
- All questions of Parliamentary nature ‘shall be decided by the majority of the votes of the Members present’ in either House, ‘exclusive of the President or the Speaker [s20 (1) and s24A
(2). Both Presiding Officers, either the President of the Legislative Council or the Speaker of the House of Assembly shall only ‘have a casting vote’.

**Legislative Council**

The Tasmanian Legislative Council was first established in 1825 and after several changes was reconstituted in 1856. Since then the number of members has fluctuated from 15-19, and they have deliberated in the same Chamber continuously since 1856. For more on these fluctuations see: [http://www.parliament.tas.gov.au/php/hb/NumberParl.htm](http://www.parliament.tas.gov.au/php/hb/NumberParl.htm).

- By s18 (1) ‘The Council is to be constituted of 15 members’, one from each of 15 divisions, who ‘shall hold office for 6 years’ [s19 (1)] with annual ‘periodical elections’ for two or three divisions to be held in alternate years.
- Elections for the Legislative Council occur on the first Saturday in May each year, with candidates elected to fill casual vacancies, by s19 (6), to serve out the ‘expiration of the period for which the vacating member was elected’.
- Quorums of the Council are set by s20 (1). The Council ‘shall not be competent to despatch any business unless at least 7 members, including the President … are present’.

**House of Assembly**

The Tasmanian House of Assembly, was established in 1856, and met for the first time on 2 December. Since then the number of Members has fluctuated from 25-38.


The State’s five electorates, whose names have not been static, are the same as those used for federal elections, viz; Bass, Braddon, [previously Darwin], Denison, Franklin and Lyons [previously Wilmot].

- By s22 (1) ‘The Assembly is to be constituted of 25 members’, from five divisions ‘each of which is [by s 22 (3)] to return 5 members’. General elections are held using the Hare-Clark proportional representation electoral method, with casual vacancies filled by recounts of ballots of the outgoing candidate, as received at previous election.
- Every Assembly, by s23 (2), ‘shall continue for 4 years from the day of the return of the writs for the general election’ and ‘no longer, unless it is sooner dissolved by the Governor’. In addition, the Assembly ‘may not pass any Bill to amend section 23 unless not less than two-thirds of its Members vote’ on the matter.
- Quorums of the Assembly are set by s25 (1). The Assembly ‘shall not be competent to despatch any business unless at least 10 members thereof, including the Speaker … are present’.

**Dissolution and Elections**

The Tasmanian Constitution is specific on the connection between Parliament and elections, which in turn fall under the Electoral Act. The Governor with the advice of the Premier) has the power of dissolution over the House of Assembly and the issuing of writs for an election. The people then act as electors to choose the people’s representatives. After the declaration of the polls the Governor is required to convene the new Parliament within a specified time. For the Assembly the electoral system used is a form of proportional representation known as Hare-Clark and has applied since 1909. For the Legislative Council the method used may be termed semi-optional preferential voting: see Chart and Electoral Act.

- By s12 (2) ‘The Governor, by proclamation, may prorogue Parliament or dissolve the Assembly’ … ‘but shall not have power to dissolve the Council’, making it a continuing body. However, prorogation of Parliament does clear all business before the Council so that ‘fresh’ matters can proceed.
- Most matters concerning elections are determined by the Electoral Act, but by s28, electors must be Australian citizens or eligible ‘aliens’, over the ‘age of 18 years, whether male or female’. Also they must have ‘resided in Tasmania continuously for a period of at least 6 months at any one time’.
- The Governor, by s12 (3) ‘shall call Parliament together …within 90 days after the dissolution of the Assembly’ for a general election.
• S12 (4) enables both Houses to ‘proceed to business’ after elections without full membership, but only ‘so long as the deficiency in the number of members … does not exceed 2 in the case of the Council or four in the case of the Assembly’.

Ministers

Tasmania follows the Westminster model of ‘Responsible Government’ whereby the party, or parties, which can gain or hold a majority on the floor of the Assembly after an election forms, and retains, Government. As explained, Ministers are appointed by the Governor, and thereafter the Premier and Cabinet Ministers are individually and collectively responsible to the Parliament, and to the electors at the next election.

• By s8a there shall be ‘no more than 9, or, where a Secretary to Cabinet has been appointed … no more than 8, persons shall hold office as Ministers of the Crown at any one time’. Such appointments, which, by [s8B] survive for seven days after the return of the writs after an election, do not qualify, as ‘an office of profit’ under the Crown, because otherwise, the ‘seat shall … become vacant’. [s32].

Monetary Powers of Parliament

By parliamentary tradition, based on English precedent, financial matters - ‘the power of the purse’ - belong to the House of Parliament that is responsible, at election time and beyond, to the people, who are taxed. In Tasmania this is the House of Assembly, which faces general elections for all of its membership every four years. The Tasmanian Legislative Council, despite its virtually equal powers, does not face the people as a whole [see chart]. While its Members are responsible to their own electorates ever six years the Council is not ‘collectively responsible’ for its action or inaction.

• Money Bills must originate in the Assembly, and as defined in s36, ‘Appropriation’ means ‘any money from the Consolidated Fund to meet’ the ‘cost of the ordinary annual services of the Government’ and the ‘expenditure on public works or any property required for public purposes’ or the ‘making of a loan authorised by law’. Such Appropriation Acts ‘shall not … apply for a ‘longer period than one year’ [s39, s40 and s41], which requires Parliament to meet, as per s11 of the Constitution.
• By s37 (1) State financial matters, including, a ‘vote, resolution, or Bill for the appropriation of any money, or for the imposition of a tax, rate, duty, or impost, shall originate in the Assembly’, and be ‘recommended to the Assembly by the Governor’ s38 (1).
• The Council, by s42 (1) may not amend a ‘provision of a Bill’ for money related to the ‘ordinary annual services of the Government’, nor Income Tax or Land Tax. Nor, by s42 (2) the Council must not ‘insert’ any ‘appropriation of moneys … impose or increase any burden on the people’.
• The Council may, however, by s43 ‘at any stage of a Bill which it may not amended, return such Bill to the Assembly’ with ‘deletion’, ‘amendment’ or ‘insertion’ of any item or provision.
• While the Assembly, ‘may, if it thinks fit, make any such deletions, amendments, or insertions, without modifications’, the Council, by s44, has the power to ‘reject any vote, resolution, or Bill’.
• By s45 ‘except as otherwise expressly provided … the Council and the Assembly shall, in all respects, have equal powers’.

Local Government

• Part IVA of the Tasmanian Constitution Act 1934 established the third tier of government in Tasmania. ‘There shall in Tasmania a system of local government with municipal councils elected in such manner as Parliament may from time to time provide.’
• Municipal or local councils ‘shall have powers as Parliament may from time to time provide, being such powers as Parliament considers necessary for the welfare and good government’ of council areas.
Religious Freedom

- Part V of the Tasmanian Constitution Act 1934 ensures religious freedom. By s46 (1) ‘Freedom of conscience and the free profession and practices of religion are, subject to public order and morality, guaranteed to every citizen’.
- Nor by s46(2) may any person ‘be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office’ in Tasmania.

