

**PARLIAMENTARY LAW, PRACTICE & PROCEDURE LUNCHEON**  
**SPEECH BY**  
**HER EXCELLENCY PROFESSOR THE HONOURABLE KATE WARNER AC**  
**GOVERNOR OF TASMANIA,**  
**UNIVERSITY STAFF CLUB, HOBART, THURSDAY 27 JUNE 2019**

Thank you for inviting me to your Parliamentary Law, Practice and Procedure Luncheon.

I begin by paying my respects to the traditional and original owners of this land: the palawa people. I acknowledge the contemporary Tasmanian Aboriginal community, who have survived invasion and dispossession, and continue to maintain their identity, culture and Indigenous rights.

I am using this invitation to speak to you today as an opportunity to reflect on some of the legal and constitutional aspects of the role of Governor. There are three aspects to the Governor's role: the legal and constitutional, the ceremonial and the community role.

### **The legal and constitutional role**

State constitutional law has never had much of a profile in Australian legal education and is very much overshadowed by Federal Constitutional Law. And as an academic criminal lawyer I have had a lot to learn about the legal and constitutional role of a State Governor.

The Tasmanian Constitution is an unsatisfactory statute and has been described by George Williams as a 'combination of the mundane and the missing'.<sup>1</sup> There have been some moves to reform our state constitution, and the Tasmanian Branch of the Australian Association of Constitutional Law has formed a Working Group on Constitutional Reform. Following a symposium in February 2016, which I attended, a consensus statement was issued urging the Government to consider constitutional reform.

This statement noted, amongst other things, that the Constitution provides no express power for the Parliament to legislate for the people of Tasmania or the basis upon which it should make such laws. Moreover, it is the least reviewed, reformed or entrenched State constitution in Australia.<sup>2</sup> Terms of reference for the Tasmania Law Reform Institute were proposed, and these include clarifying the

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<sup>1</sup> Expert Symposium, Hobart, Tasmania, 22 February 2016.

<sup>2</sup> (2016) 35(1) *University of Tasmania Law Review* (forthcoming).

powers and duties of the Governor. While the Board accepted the reference, little more has happened and the project seems to have stalled.

I have found that exploring the constitutional and legal powers of the Governor has been an interesting exercise. I will touch on appointment of Governors, the Executive Council and the reserve powers, using examples from my personal experience.

Appointment: State governors are appointed by the Queen on the advice of the Premier. This was settled by s 7(5) of the *Australia Acts 1986*, which in effect provides that the advice to Her Majesty concerning the appointment or removal of State Governors, 'shall be tendered by the Premier of the State'. This was preceded by a lot of controversy. Should the State Premiers have a direct relationship with the Queen or should advice be channeled through the Commonwealth Government? The fact that this was resolved in favour of the Premiers may have implications if Australia becomes a Republic.<sup>3</sup>

So, the Governor of Tasmania derives legal authority from s 7(1) of the *Australia Act 1986*, which provides that Her Majesty's representative in each State shall be the Governor, and the Letters Patent of 1986, clause II which provides that there shall be a Governor and the appointment shall be during 'Our Pleasure and by Commission under Our Sign Manual'. Interestingly, while the Commission states a beginning date, it does not specify an end date – the appointment being 'during Our Pleasure'. Does this mean that it is unnecessary to have an extension beyond the term offered by the Premier and accepted by the Governor? Anne Twomey is of the view that the term expires in accordance with the underlying agreement to a fixed term and it can only be continued if an express extension is sought from the monarch.<sup>4</sup> However, there would be no need for a new Commission.

The Executive Council consists of the Ministers of State and the Letters Patent of 2005 tell us that the Governor presides over the Executive Council and that the Executive Council advises the Governor on the day-to-day work of the government. Typically, there are Regulations to be made, appointments to be made, resignations to accept and a myriad of other things. Whenever a statute provides that the Governor has the power to do something it has to go through the Executive Council. This is because the term 'the Governor' in a statute generally means the Governor acting on the advice of the Executive Council.<sup>5</sup>

Does that mean the Governor is obliged to act on the advice of the Executive Council? An often-quoted writer on constitutional law (Walter Bagehot) has said that the Monarch, and it follows Vice-Regal representatives, have 'the right to be

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<sup>3</sup> See Anne Twomey, *The Chameleon Crown: the Queen and her Australian Governors*, 2006.

<sup>4</sup> Twomey, n 3, 41.

<sup>5</sup> *Acts Interpretation Act 1931* (Tas) s 43.

consulted, the right to encourage and the right to warn.’<sup>6</sup> So this suggests the Governor has the right to call into question advice tendered and to suggest reconsideration, but in the last resort the advice tendered must be accepted.<sup>7</sup> Sir Guy Green, Tasmanian Governor between 1995 and 2003, had a different view. He argued that, reserve powers aside, it is correct to say a power can only be exercised if the Governor has been advised to exercise it, but it does not mean that a Governor must always act on the advice.<sup>8</sup>

There is an obligation on the Governor to see that the processes of the Executive Council and the action being taken are lawful and to refuse to act when they are not. So, if the proposed action is clearly unlawful, or there is a failure by a Minister or the Council to provide information about an aspect of the advice that was crucial to the determination of whether an action is lawful, a governor could refuse to act on the advice.

The rule of law trumps the principle of responsible government. So, for example, if regulations are clearly ultra vires or an appointment or dismissal is not authorised by the empowering legislation, the Governor can do more than warn. He or she can refuse to make the regulations, appointment or dismiss an office holder.

On one occasion, early in my term, I was advised by the Attorney-General that I would be asked to dismiss the Director of Public Prosecutions. The *Director of Public Prosecutions Act 1973*, s 10 provides that the DPP may be removed from office by the Governor on a number of grounds including being ‘guilty of misbehaviour’. The Director had been convicted of causing death by negligent driving, sentenced to four months imprisonment, which was wholly suspended. Was the conduct which led to the conviction misbehaviour? The advice was, in effect, that as this conduct could lead to an erosion of public confidence in the office of the DPP, it constituted ‘misbehaviour’.<sup>9</sup> I accepted the advice.

I have perhaps over-simplified this. What if the illegality is unclear? And what about the separation of powers? Should not the matter be resolved by the judiciary rather than the head of state?

## Reserve powers

The reserve powers are notoriously controversial, particularly the power of dismissal of a chief minister (Prime Minister or Premier) and his or her government.

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<sup>6</sup> Walter Bagehot, *The English Constitution*, London, Chapman and Hall, 1867.

<sup>7</sup> *FAI v Winneke* (1982) 151 CLR 342.

<sup>8</sup> Sir Guy Green, ‘Governors, democracy and the rule of law’ (2006) 9(1) *Constitutional Law and Policy Review* 11-16.

<sup>9</sup> David Killick, ‘DPP ELLIS sacked with no payout over road death; 24 January 2015, <http://www.themercury.com.au/news/dpp-ellis-sacked-with-no-payout-over-road-death/news-story/640dd680382263b927f05232d106373a>, accessed 25 October 2016.

Dismissals aside, the Governor has the undoubted power to act when there is a hung parliament and to decide whom to call upon to form government. There has not been a hung parliament during my term and so I have not been called upon to exercise this power. However, the Liberal Government, which was re-elected in 2018, does only have a one seat majority.

However, I have been called upon to exercise what is arguably at least a reserve power, namely, to refuse the advice to prorogue parliament. It came about in this way. In late February this year, Rene Hidding, the member for Lyons in the House of Assembly, resigned following the disclosure by the *Australian* that his sister-in-law had lodged a complaint to the police of historical sexual assault against him. He has strenuously denied the complaint but resigned to deal with it. The resignation required a recount with Liberal, John Tucker, predicted to be elected. At this time the session of House of Assembly had been adjourned at the end of the year until 12 March. As the Electoral Commissioner informed the Premier that the recount could not be completed by that date, the Premier asked me to prorogue Parliament until 19 March by which time the count would be completed. With the resignation of one member, the Government no longer had a majority. The Premier also undertook to add an extra week to parliamentary sitting times.

### **What is prorogation?**

Prorogation is an act performed by head of state that ends a session of Parliament, creating a recess until the next session of Parliament commences or Parliament is dissolved. This has the effect of quashing unfinished business. Parliamentary activity is suspended activity and committees may be terminated if their establishment is sessional. Prorogation is now not usually done each year in Tasmania (compare UK where it is an annual procedural event).

The *Constitution Act 1934*, s 12(2) provides that the Governor, by proclamation, may prorogue Parliament ... whenever he shall deem it expedient to do so.

Was I being asked to exercise a reserve power with the right to refuse the Premier's advice? And if so, should I accept or refuse to follow this advice?

### **Is it a reserve power?**

This is unclear. Traditionally it is not listed as such but a growing number of scholars now recognise the possibility that a Governor may justifiably refuse advice to prorogue in certain circumstances.<sup>10</sup> For example, it is suggested advice to prorogue could be refused where a Prime Minister or Premier loses majority

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<sup>10</sup> Anne Twomey, *The Veiled Sceptre*, 2018, 587-589.

support in the Lower House and advises prorogation, as a means of avoiding a no-confidence motion.

So, assuming that it is a reserve power, I had the discretion to refuse to accept the advice. However, there is authority to the effect that where the loss of confidence is only temporary, due to the absence or illness of a member or due to death or resignation that will result in a by-election that the government may win, it is reasonable for Parliament to be prorogued so that any vote of no confidence can be taken once a full complement of members can determine it.<sup>11</sup>

Thank you.

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<sup>11</sup> Twomey, n 10, 596-598 with examples.