

## **SECTION IV:**

# **Institutional Design, Political Parties and the Accountability of the Executive**

# Opposition in a Small Westminster Parliament: The case of Tasmania<sup>#</sup>

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## *Abstract*

The Parliamentary Reform Act 1998 (Tas) was officially ‘An Act to amend certain Acts to provide for reform of Parliament by a reduction in the number of members of both Houses of Parliament and for related matters’. However, when this act received Royal Assent on 27 July 1998, it changed more than the size of the Tasmanian Parliament. It performed radical reduction surgery on an institution that was already at the limits of sustainability as a Westminster parliament. Ostensively the surgery was necessary to improve the Parliament’s efficiency as a central organ in Tasmanian governance but many within the State believed it was to save the patient’s own members from a public backlash against ‘politicians’ and a 40% pay rise they awarded themselves several years earlier.<sup>1</sup> Eight years have elapsed since the operation was performed and the patient’s survival is still in question. Indeed, occasionally, the need for a second operation — perhaps toward unicameralism is proposed. Even without further alteration of the Parliament, a question has arisen about the relevance of the Westminster model in Tasmania. It is far from clear that the present diminutive parliament can maintain more a modest genuflection in the direction of Westminster.

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<sup>#</sup> Author’s Caution: This paper is still very much a work in progress despite every good intention and should not be cited without the author’s permission.

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<sup>1</sup> Summaries of the steps leading to the reduction in the size of the Tasmania in 1998 can be found in: Tasmanian Parliamentary Library, ‘Parliamentary Reform — Downsizing Parliament’ accessed at [http://www.parliament.tas.gov.au/tpl/InfoSheets/reform\\_1998.htm](http://www.parliament.tas.gov.au/tpl/InfoSheets/reform_1998.htm) and Scott Bennett, ‘The Reduction in the Size of the Tasmanian Parliament’ Parliament of Australia, Department of the Parliamentary Library, Research Note 2 1998–99 accessed at <http://www.aph.gov.au/library/pubs/m/1998-99/99m02.htm>.

Tasmania's parliamentary system has been based on the Westminster model since the inauguration of self-government in 1856. This linkage continued through the transition to Federation in 1901 and perhaps was even strengthened by the formation of the Commonwealth. Based solely on its survival over nearly 150 years, one might conclude that Tasmania had proved that small parliaments could successfully implement the Westminster system. One would wish to confirm this interpretation if possible; being both a partisan of the Westminster approach to parliamentary democracy and an advocate for small island polities. However, the simple measure of mere survival is an inadequate ground for claiming political success. There may be other reasons why the Tasmanian Parliament has retained the Westminster system other than its practical utility. Moreover, circumstances have changed in recent years to impose even burdens on the maintenance of Westminster at the very extremes of the Antipodes. Indeed, the tie between Westminster and the Tasmanian parliamentary system has had a very rocky union for the past two decades due largely to the restructuring of party politics in the Apple Isle with the emergence of the Greens.

This paper reviews how these new pressures of diminished scale have worked to contort and distort the Westminster system in Tasmania. This assessment involves several steps. First, the key features of Westminster system are set out to provide an initial understanding of this parliamentary form. Secondly, the impacts of the 1998 changes for the Opposition are outlined. These then, provide the premises for assessing the attempts to maintain an effective Opposition in a Westminster-style of Government after the reduction of the size of the parliament in 1998. The result of this analysis is that the endeavour to change electoral outcomes in Tasmania had serious unintended consequences for its Westminster Parliament. The decisions made in 1998, both constitutionally and politically, were taken without real consideration of what the Westminster system requires to remain robust and vital in an effective democracy.

### *The Westminster System*

The origins of the English parliamentary democracy extend well back into history but the key features of the Westminster system derived from Parliament's capture of the Crown most violently and physically expressed in the English Civil War. Without a doubt, however, the defining moment, the threshold distinguishing the Westminster system from all other forms of parliamentary collective leaderships was the Glorious Revolution (1688). The enforced departure of the second monarch from the throne of England in less than fifty years<sup>2</sup> led to a remarkable political accord between Parliament and the Crown. Under the Bill of Rights (1689) and

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<sup>2</sup> Charles I was defeated by the Parliament's armies in 1647 and he was executed in 1649. James II fled the throne in 1688 when William of Orange landed to oppose him. Parliament and the armed forces sided with William and his wife Mary (daughter of James II) and Parliament offered the two the throne jointly in 1689.

confirmed further by the Act of Settlement (1701), the Crown became a 'constitutional monarchy'. The monarchs agreed to renounce a right to have personal advisers but rather to act only on the advice of their parliamentary advisers. This has become entrenched in a convention that only MPs can be appointed ministers of the crown.<sup>3</sup> Clearly, the effect of this was to ensure that the Crown was under the control of Parliament but it also had an unintended consequence regarding the Executive and the Parliament. It linked the size of Parliament to the 'pool of talent' available for the ministry. Ministerial aspirants unable or unwilling to be elected to Parliament could not be commissioned as ministers and the Crown could not reach further than the membership of the Parliament to find this talent. This was to become a very important constraint subsequently for very small parliaments.

A second important feature of the Westminster system followed in William's prudent decision to select his advisers from the faction having substantial (later to become 'majority') support in the House of Commons. The narrow chamber of the Commons was arranged as ranks of pews facing each other and the Ministry came to sit together on one side (now the Speaker's right) of the chamber. And, those in the clique(s) not supporting the ministry sat facing them. Thus it emerged that those who sat opposite the parliamentary ministry were their principal opponents and, in the years following, as 'the Opposition'. By the time of King George IV, this group acquired the designation of 'His Majesty's (loyal) Opposition'.<sup>4</sup> The emergence of a formalised opposition with the specific, albeit self-assigned, role of shadowing the Government of the day introduced a further limitation affecting the size of the Parliament. The intention of the Declaration of Rights in establishing a 'constitutional monarchy' had basically the whole of the Parliament as a 'backbench' able to challenge the ministry/Crown — individually or collectively. However, institutionalising HM's Opposition early in the nineteenth century changed this image substantially. Only a fraction over half the Parliament (and even here, normally, just the Lower House) was genuinely eligible to be commissioned by the Crown as ministers. The available pool of executive talent could be nearly halved in practical terms.

As a consequence, the form of adversarial relations that came to dominate the Parliament was not the external manifestation of the Parliament versus the Crown. Rather, it was a highly internal form juxtaposing Government and Opposition. These adversarial relations are somewhat misunderstood by the community at large. The media frequently portray these as destructive; as ritualistic manoeuvres — all shadow without substance. This is to ignore the fact that our legal system is structured along similar adversarial lines to guarantee procedural fairness. In the case of the Westminster Parliament, the fairness is more political although not

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<sup>3</sup> The Australian Constitution both accepts this convention and modifies it to some extent by allowing a non-MP to be commissioned as a minister for up to three months before finding a seat in Parliament.

<sup>4</sup> John Cam Hobhouse is credited with coining the phrase in 1826. See following section.

without some curtsy in the direction of procedure as well. Oppositions are expected to oppose and thereby guarantee that at least one political alternative is considered in any decision. At its best, this arrangement prevents the Government from railroading issues through the Parliament with coopted and compliant majorities. At its worst, the arrangement creates an asymmetrically structured duopoly that denies third parties access to power, concentrates power in the hands of the two major parties' elites and prevents the Opposition from having any influence on political outcomes between elections. This latter, very negative image has tended to become the contemporary conventional wisdom.

Does it matter that the 'Government and Opposition' form of adversarial relations now dominates parliamentary expectations? Perhaps it does not, if the Parliament in question is large enough to staff both a Government and an Opposition (including a shadow executive) while still maintaining an effective backbench. However, this assumption is very much in jeopardy for the very small institutions that struggle to preserve the parliamentary forms and still meet, as a first priority, the obligation to produce an alternate Government. The consequence of this priority is that it has tended to undermine the rights, prerogatives, and political responsibilities of the Parliament separate from those of the Crown in the minds of MPs and public alike. It is scarcely surprising that the small Tasmanian Parliament steeped in the traditions of Westminster and hugely supportive of these values almost exemplify the modern difficulties facing the small parliament and retaining parliamentary values against the Crown.

### *The Loyal Opposition*

The term 'His Majesty's Opposition' is said to date from 1826 when it was first used by Sir John Cam Hobhouse to deride the members opposite.<sup>5</sup> It is noteworthy that the concept of a formal Opposition antedates the emergence of modern parties especially as the conventions of Westminster relating Government and Opposition developed during this period. The concept was sufficiently formalised that by 1865, Walter Bagehot (1826–1877) incorporated it in his seminal description of the Westminster system in his book *The English Constitution*.<sup>6</sup> He said it was a natural consequence of Cabinet Government. The major development after Bagehot was the formalisation of the Opposition as a 'Shadow Government'. This term, attributed to Winston Churchill, again as a term of derision, appeared to the members opposite to enhance their status and so was accepted with pleasure not irony. Over time, the office of the Leader of the Opposition was recognised financially — first in Canada

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<sup>5</sup> Kenneth Mackenzie, *The English Parliament*, (Harmondsworth: Pelican Books, 1959), p. 116.

Hobhouse hurled the term across the floor at the Whigs as a rather derisory and demeaning epithet but it was proudly adopted subsequently by the 'alternate Government' as a badge of honour.

<sup>6</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn; New York: Dolphin Books, facsimile edition, nd).

[1905], then in Australia [1920] and in Tasmania [1927] but payment to the Leader of the Opposition did not reach the ‘mother of parliaments’ in the U.K. until 1937.

As might be expected, the essential techniques of opposition changed as the formalisation of the Loyal Opposition evolved. Initially, the emphasis was wholly internal and focused on the individual who aspired to leadership. No real attempt to appeal to the public on oppositional objectives. The long running battles between Benjamin Disraeli (Tory) and William Gladstone (Liberal) from 1868 to 1880s helped to establish in the public mind that whole teams of Government and Opposition would alternative on the Treasury benches. Churchill’s observation showed that the adversarial tactics had reached their zenith so that the Opposition completely mirrored the Government of the day. Of course, underpinning this formalisation and institutionalisation of the Loyal Opposition was the growth of political parties as a mechanism for organising both the parliamentary and extra-parliamentary political agenda. Whether these party developments cut across, or reinforce, the linkage between public and Opposition, however, is still being debated. It rather depends on what is expected of the connection between Loyal Opposition and popular opposition.

### *The Opposition of Opposition*

The Whig target of Hobhouse’s barb, George Tierney, claimed that ‘the duty of an Opposition was very simple — it was to oppose everything and propose nothing.’ Views on the objectives of the Opposition had not changed much half a century later when Lord Randolph Churchill declaimed, ‘The role of the Opposition is to oppose!’ Even today this might be an adequate one-line job description; reinforced by the experience of John Hewson whose failed attempt to introduce a GST from Opposition has entered Australian conventional wisdom as clear evidence that an Opposition proposing policy is politically risky. It is true that the ‘shadow cabinet’ is very much a fiction of convenience. It does not have any real executive role or responsibility. Thus, there is little need to propose in order to promote policy.

On the other hand, the adversarial structure of Westminster’s Government v. Opposition does impose a duty on the Loyal Opposition to oppose Government across the board to ensure every action, expenditure and proposal is subjected to scrutiny. So again the question, did Tierney and Churchill get it right? Not really! A simple answer is often a simplistic answer and so it is here. There is a need to look at the tactics of opposition in finer detail.

An oppositional party accepts all the obligations of the Westminster traditions [not a light burden given the conventional nature of this tradition] when it becomes part of the Loyal Opposition and, even more so, if it is the Official Opposition. It must: conduct it itself constitutionally; work with the Government of the day to promote the best interests of the state [only where these are recognised and agreed, of

course!]; work within parliamentary procedures; and be prepared to serve as alternative Government.

It is this last issue that defines the Opposition as ‘Westminster’ and raise questions of balancing resources and particular tactics between ‘alternative Government’ and people’s opposition in Parliament much more seriously than for governing party [and its backbench].

### *The Shadow Cabinet*

The structure of the Westminster parliament has evolved to give some substance to the notion of the Opposition providing an alternative Government. The mechanism that has emerged in most systems based on Westminster has been that of a ‘shadow cabinet’. In part this evolution has derived from political prudence and, in part, from the practicalities of the operation of ‘countervailing power’. However, it has long been viewed in some quarters as a political obligation on the official Opposition. For example, in 1915, Bonar Law claimed that ‘the functions of an Opposition were twofold, that is to say, to be a vigilant critic of ministers and *to provide an alternative administration* when necessity arose’.<sup>7</sup> This latter view, that the official Opposition has a duty to be prepared to take over the reins of power at a moment’s notice and a responsibility to ensure that the constitutional monarch is never without advisers, has given rise to a series of provisions to prepare the Opposition for this onus.

The most important measures centre on the Leader of the Opposition. For example, in Australia, the Leader of the Opposition gets preference after First Minister in most matters in the House and the Leader is treated as the alternative First Minister [even by the Crown if the constitutional need arises for the Crown to take soundings beyond the advice offered by the first minister.] The Leader of the Opposition is placed tenth in the Commonwealth Table of Precedence and so is ranked higher than some ministers.<sup>8</sup> The resources that the official Opposition have by convention and Standing Orders, on the time of Parliament [motions, questions, organisation of the business of the House, and the like] are claimed and managed by official Opposition’s executive in the same way as if it were in power.

The evolution of the Shadow Ministry has come to mirror the commissioned Ministry so completely that typically portfolios are allocated by the same procedures that would be used if the party were in power. As was evident, for example, with Kim Beasley’s ‘back bench’ challenge to Simon Crean, where the manoeuvre commanded the same level of media attention that any ‘spill’ within the Cabinet would attract.

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<sup>7</sup> John P. Mackintosh. *The British Cabinet* (2<sup>nd</sup> edn; London: Methuen, 1968), p. 261fn. (emphasis added)

<sup>8</sup> House of Representatives Practice, p. 78.

For some, this has been interpreted as meaning that the traditional role of the Parliament as the critic of Government has passed to the formalised and institutionalised Opposition — that Westminster is indeed no more than ‘Government and Opposition’. And, over time, a variety of mechanisms and procedures has emerged to enable the Opposition to organise its activities to mirror the Government. These include: question time, examination of Government accounts, departments and policies, the primary role in debating Government legislation, and other familiar activities within the parliament

This interpretation may be true but, if so, it is because the Parliament has been recaptured by the Crown and its sole role is to serve as an electoral college for Government.

There is an opposing view and this was imposed on Papua New Guinea by Australia through constitutional fiat — the ministry cannot be more than one quarter size of House.

### ***The Backbench as Opposition***

The governing party’s backbench has been regarded as the real inheritor of the Parliament’s role in opposing Government of the day since this sector has the only effective capacity to enforce ‘ministerial responsibility’ — the real basis of parliament’s control over the Government. The grounds for this rests with the incapacity of the loyal Opposition to defeat the Government but the discipline of party can be used against the Government if its own backbench is large enough and alienated enough to act.

Of course, in the circumstance of *minority Government*, the whole House resumes the sort of control over Government that existed when the conventions of the Westminster were developed 150 years ago.

### ***The Tasmanian Electoral Experience***

Virtually from the advent of Statehood (1901), Tasmania has had an electoral system that favours a representational role for the Parliament rather than an executive one. Indeed, the Hare-Clark system adopted state-wide for elections to the House of Assembly in 1907 was derived from the single transferable vote system of proportional representation promoted by John Stuart Mill.<sup>9</sup> Andrew Inglis Clark, one of the framers of the Australian Constitution and a Tasmanian Attorney General modified Hare’s proposal slightly to suit the Tasmanian political system. However, his objective was basically the same as Hare’s — to curb the mischief of party in

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<sup>9</sup> Mill advocate this system proposed by Thomas Hare precisely because the representation of individual interests would ensure that Parliament had a deliberative function rather than merely being an electoral college for the ministry as Walter Bagehot preferred.



the Parliament. Yet, in practical terms, whatever Clark wanted, what he and Tasmania got was what all other Australian States have in their lower house elections — a referendum on which party should form Government.

Tasmania has long had one of the strongest two-party States in the Commonwealth despite its Hare-Clark electoral system.<sup>10</sup> Its primary explanation appears to be that the mandate theory of elections. The party imperative mandate has become a legitimating explanation for the commanding influence parties have on elections today. Originally conceived by reformist parties as a means for maintaining both democratic values of voting while pursuing a programmatic reform, the concept has been widely adopted by conservative parties as a means of demanding party discipline from its parliamentary membership. In Tasmania, accepting general elections as a simple contest between party platforms (and, in turn, a referendum on Government), severely undermined the intention of the Hare-Clark electoral system. It has also ensured that Tasmania, like most other Westminster systems, does not follow the basic conventions of the Westminster system in terms of ministerial responsibility. Party loyalty overrides loyalty to the Parliament (or so it seems) because the electoral mandate ‘demands’ it.

As much as one might wish to join the popular chorus blaming political parties for the Crown’s recapture of the Parliament, the Tasmanian evidence militates against such easy demonising of just one aspect of our political process alone. There is considerable evidence that Tasmanian voters, business and the popular media are opposed to parliamentary control of the Executive.<sup>11</sup> Since 1989, the Tasmania has had two minority Governments as a direct result of the Hare-Clark electoral system operating as intended. Despite, significant achievements as Governments (including noteworthy reform), both were soundly defeated at subsequent elections. Neither minority Government enjoyed public, business and/or media support during their abbreviated tenures in office. Criticisms of instability were rife throughout their periods in office yet in each case the government failed to go to full term by their own choice not for the want of confidence of the Parliament.<sup>12</sup>

Undoubtedly the real test for which value was to predominate — Parliament or Crown — occurred when the two major parties formed a temporary alliance to secure Governmental ‘stability’. This took place near the end of the second recent minority Government (1996-98) when the Liberal party, then in power, joined with the Opposition Labor Party to reduce the size of the Parliament. Concentrating the pressures of Government on fewer members would have been a strange argument except for the Hare-Clark electoral system. However, a reduction in parliamentary numbers under Hare-Clark meant an increase in the quota needed for election and

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<sup>10</sup> R.A. Herr, ‘Hare-Clark: The Electoral Legacy’, in Marcus Haward and James Warden (eds) *An Australian Democrat: The Life Work and Consequences of Andrew Inglis Clark* (Hobart: Centre for Tasmanian Historical Studies; University of Tasmania, 1995).

<sup>11</sup> I have addressed many of the points in this section in my chapter ‘Hare-Clark: The Electoral Legacy’, *op cit*.

<sup>12</sup> This fact contrasts with the fall of minority Governments in 1972 and 1982.

so significantly disadvantaged the minor parties. It was expected that the new quota would renew effectively the traditional duopoly within the State.<sup>13</sup> And so the 1998 election did.

### *The Two Oppositions*

Labor Premier Jim Bacon, in his 2002 victory speech announced that the Government would act to give extra support to the Greens to improve their capacity to act as one of two parties in Opposition. The apparently magnanimous gesture thrilled the Greens who saw themselves as winning public credibility but, of course, twisted the knife in the Liberals who saw it as an attempt to exacerbate their embarrassment. Of course, whether for the altruistic motive of ensuring that the Government would have an effective Opposition or not, the gesture guaranteed the two opposing parties would also be at each others' throats over the next four years.

The Greens had few adjustments to make, at least initially. The one aspect of their success that concerned them was their role as an Opposition party. While the Liberals maintained that there could be only one 'Opposition' in the Westminster system, the Government enjoyed the sport of referring to the opposition parties in the plural. In the event, it was the Liberals who were the 'official Opposition' and the Greens had to content themselves with being an Opposition party trying to play the role their leader played alone before the election as the 'real opposition'.

The 2002 general election would have likely produced figures in a pre-1998 Parliament of 9 Liberals and 6 Greens. These numbers would have enabled the Liberals to fill out a full shadow ministry and enabled the Greens to nearly match current Liberal capacity.

Relations between the two houses have been affected by the pressures of an all too small parliament. One early sign of recognition came with an attempt to strengthen the committee system as one form of compensation for the loss of critical mass.<sup>14</sup>

### *The Future*

Now that Tasmania has reduced the size of its Parliament, a question is raised of whether the new arrangement has crossed the threshold where it can function effectively within the strictures of the Westminster framework. As a long time supporter of the Westminster system for its many strengths,<sup>15</sup> I find it very difficult

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<sup>13</sup> In fairness, stability was not the only objective sought by this 'reform'. Proponents also claimed the reduction would be more affordable for the small economy of Tasmania.

<sup>14</sup> Tasmania, Parliament, Joint Select Committee, Working Arrangements of the Parliament, 'Draft Discussion Paper on a New Committee System in a Smaller Parliament', 2000.

<sup>15</sup> *Inter alia*, I would list the particular advantages of Westminster as:

1. a formal and adversarial but loyal Opposition [including use of question time]
2. the existence of an alternative Government
3. a collective executive leadership

to conclude that the Westminster system cannot operate effectively below a certain number. Moreover, having had the privilege of spending virtually all my scholarly life amongst the small polities of the South Pacific many of which maintain Westminster at the core of their political systems, I am aware of the important influence of context on all small political systems. Some small Westminster systems manage better than others do because they do not encumber their systems of government with a large number of other constraints. However, the context within which the Tasmania Parliament functions makes size an important issue.

Tasmania is a State in the Australian Commonwealth and therefore the demands on its Government are more complex than if it were a unitary state in its own right. As noted earlier, it has had a very strong two-party system that appears to enjoy substantial public (but not universal) support. Thirdly, it is a bicameral Parliament but with a tradition of independence so ministers are rarely appointed from the upper house. As a consequence, following the reduction in the size of the Parliament, out of 40 MPs, the talent available for the ministry is less than 20.<sup>16</sup> These factors combine to put the Tasmanian ministry under severe pressure; especially as the incoming Labor Party Government after the 1998 elections did attempt in good faith to maintain a Westminster relationship between the front bench and back bench. It limited itself to seven ministers in the House of Assembly — half the numbers it had on the floor of the chamber.

There is an increasing feeling that the present arrangement will prove unsustainable due to the constraints of size within the Westminster system.<sup>17</sup> The pressure for further change in consequence has tended to focus on unicameralism — that is, cannibalising the upper house to give the lower house the numbers to effectively recruit sufficient talent to form a workable Government and Opposition. The need for a change in this direction really only depends on holding to the constraints of the Westminster model that only members of Parliament can be commissioned as ministers. There are other possibilities for addressing the ‘executive talent’ issue and they may deserve attention before committing to unicameralism as the primary option.

And so, I will close as I began. The relationship between size and Westminster is not absolute but rather is a matter of context. There are many different elements that have gone into creating the context in Tasmania where the question of size has become a genuine factor. As difficult as it will be, maintenance of the Westminster system must be considered as one of the constraints to be relaxed if the present pressures on our small parliament compel further change.

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4. the ‘apprenticeship’ [i.e. ‘the backbench’] system for developing ministerial talent

5. the separation of the offices of Head of State from Head of Government

<sup>16</sup> The Australian Labor Party, the present Governing party, has 14 members in the House of Assembly and five in the Legislative Council. This probably over-estimates the number actually available since, although the ALP has one minister in the Legislative Council, this is unusual.

<sup>17</sup> Barry Prismall, ‘Minister’s workload is under scrutiny’, *Examiner*, 11 May 2001.

Nevertheless, there is a seeming implicit consensus between the political elites and the Tasmanian public that, whatever the size of the parliament, it should remain essentially Westminster in character. There is a further important factor at work in Tasmania that impacts on this consensus. As will be noted, this tacit agreement also holds that the Hare-Clark proportional electoral system should be maintained as well despite some contradictions between the electoral and Westminster systems in Tasmania. ▲