

Ms Cassy O'Connor MP

Chair

Select Committee on House of Assembly Restoration Bill

Parliament House

Hobart 7000

Dear Chair,

1. Our submission is that:
  - a) The proposed Clause 6 (amending section 22 of the Constitution Act) dealing with an increase in the numbers of members in the House of Assembly be altered to guarantee two Aboriginal members of the House of Assembly;
  - b) Whether the proposed increase in numbers of MHAs is supported or not, two new Aboriginal seats should be created in the House of Assembly anyway.
  - c) That the constitution should provide for two Aboriginals to be elected by Aborigines from a single state-wide electorate. Under this proposal, Aboriginals could elect to have their names entered on the State Aboriginal electoral roll or the general electorate division roll within which they reside, but not both. The whole of the State would constitute the Tasmanian Aboriginal electorate.
2. This submission focuses on structuring political representation for the original people of Lutruwita. After almost 200 years of formal political representation, Tasmania has never provided a voice for Tasmanian Aborigines in the political process. Never has an Aboriginal member of the Tasmanian parliament been elected by Aboriginal people to represent them.
3. According to the 2016 ABS figures, there were 23,572 people who identified as Aboriginal. At 4.6 % of the total Tasmanian population, Tasmania has the highest proportion of Aboriginals in the country behind the NT. In the Northern Territory, electorate divisions are drawn up to have a fair chance of electing their own people to parliament. There is no equivalent electoral reform in Tasmania.
4. Aboriginal people have political issues that require agitating in the parliament. Dispossession of a whole country, systemic racial discrimination, alienation, cultural destruction, economic deprivation, social inequality and denial of justice are just some of the issues that need to be raised at the highest political level. But who in the parliament will raise them?
5. Historically, the Tasmanian parliament has been an all-white parliament. It has never had a single Aboriginal member *elected by their own people* to represent Aboriginal interests. Hundreds of white people have been elected by their people (white voters). The policy positions of major political parties are understandably geared toward people who might vote for them, inevitably sections of the white population.

6. Political parties may claim to represent all Tasmanians but none of them really do - they represent sectional interests, each primarily representing the political values of voters who put them there. The claim that 'all' Tasmanians get represented is more believable when the parliament sits; where representatives of the Liberal, Labour and Greens voters speak for the people who supported them and the values held by the elected and the voters. Missing from this political melting pot is the Aboriginal sectional interest – the Aboriginal people are not, and have not ever been, represented in the Tasmanian political chamber. We acknowledge some members of the parliament have genuinely stood up for Aboriginal interests from time to time irrespective of their particular political persuasion. But that is not the same as having a permanent Aboriginal voice in the parliament ready always to advocate for the interests of Aboriginal people. Whatever the definition is of representative democracy, John Chesterman points out that it normally provides for the make-up of parliaments to reflect the society they govern. (John Chesterman, 'Chosen by the people?' How Federal parliamentary seats might be reserved for indigenous Australians without changing the constitution [2006] Fed Law Review 9]
7. Whereas sections of the Tasmanian community can reasonably expect their interests to be regularly represented in the parliament – business, farmers, workers, environmentalists – Aborigines are denied the same opportunity. It has been that way since the establishment of the Legislative Council in 1825 as a nominal representative chamber and as a bicameral House in 1854. When Australia became a federation in 1901, white people had already taken all the land from Aborigines, called us half-castes and denied our Aboriginality, and treated Aboriginal people with contempt. In the circumstances, an attempt to give Aborigines a political voice should have been made. The opportunity was ignored. It was the same in 1967, when Tasmania voted overwhelmingly 'Yes' to righting the wrongs for Aboriginal people while hypocritically denying Aborigines a voice in the Tasmanian parliament. Without a genuine effort to provide for Aboriginal representation, Aboriginal people will continue to be denied a political voice in Tasmania's democratic process and will remain alienated from that political process.
8. This submission is not about Aboriginality. This submission is about improving representative democracy in Tasmania. Providing for political representation of a people denied such access for over 200 years is overdue. It can be argued the political system in Tasmania has been racially prejudiced against Aboriginal representation. The system is geared against Aboriginal people effectively participating in parliamentary democracy. Deliberately or inadvertently, the Tasmanian electoral system guarantees white representation. It also guarantees Aboriginal representation in the parliament will be denied.
9. Representative democracy is about being represented. The joy of voting is diminished if the vote is meaningless. Minority voters feel the vote is meaningless where the minority vote cannot mathematically influence the outcome. Democracy rightly considers majority interests but it should not be exclusive. Minority interests cannot be ignored in a democracy otherwise people can lose their country, be openly discriminated against and denied a remedy. Representative democracy is a special form of democracy: it defines the political system by which the rulers are representative of the whole of the electorate, not just the majority. The representative nature of a democracy must provide a means by which minorities, such as the original people of a country, are represented. Designated seats are a sound method to achieve minority representation.

10. Representative democracy is not satisfied by simply having the vote. Having the right to vote in a system that dilutes the power of minority voting is delusional democracy. The chances of Aborigines being elected by Aborigines in any of the five Tasmanian electoral divisions is a mathematical impossibility. The 2016 ABS statistics records the number of people identifying in the census as indigenous in Tasmania at around 23,000. An even distribution of those numbers between the five electorates sees around 4,500 people identifying as Aboriginal in each electorate of which, say, 3,000 are eligible voters. With each Tasmanian electoral division containing about 75,000 voters, it is mathematically impossible for an Aboriginal candidate to be elected by those identifying as of Aboriginal origin. (The census question asks 'Is the person of Aboriginal or Torres Strait origin').
11. The Committee should give maximum possible effect to the community of interest criteria that is essential to representative democracy. The relevant community of interest is the Aboriginal people. We are the original people of Tasmania. Our heritage and history are different from that of the white population. We still feel the adverse effects of dispossession, discrimination and domination. Of the 67,000 square kilometers of lands we once owned, we now have less than 1% of it. Without a sound land and economic base, and a modicum of justice, political representation is more crucial for the survival and welfare of Aboriginal people than it is for any other sector in Tasmania. As Prime Ministers have often reported, government efforts on all social improvement targets for Aboriginals have failed or fallen short. Clearly, the current arrangements in Tasmania for Aboriginal political representation are not working.
12. There are no rigid formulae requiring the Committee to follow hills and roads and townships in shaping electoral districts. The boundary of the State of Tasmania can equally be established as an electoral district along with streets and towns.
13. The single Aboriginal electorate would undoubtedly provide a greater value for the Aboriginal vote than for other votes in the 5 general electorates. However, it would be hypocritical of those who have remained silent while the Aboriginal vote was historically valueless to suddenly complain that it now has great value. Existing electorates throughout Australia give greater weight to some votes over others. For instance, at the 1993 WA State election, the quota for a metropolitan electorate was 21,988 and Wanneroo, the most populous electorate, had 26,580 enrolled voters. The quota for a rural electorate outside the WA metropolitan area was 11,702 and Ashburton, the least populous electorate, had only 9,135 enrolled voters. This meant the weight of a vote cast in Ashburton was 291% greater than a vote cast in Wanneroo.
14. Some will claim that designated seats are undemocratic. The view is that catering to a particular segment of the population undermines democracy. But what is democracy? NZ and the State of Maine in the US have designated seats for the first peoples. No-one would say NZ and Maine are undemocratic. With its small population compared to the larger States, Tasmania gets the same number of Senators, effectively guaranteeing Tasmania parliamentary seats it would not be entitled to if population numbers were the only criteria. Australia has described itself as a democratic country, yet Aboriginals and women were initially denied the vote. Australia now has a system of compulsory voting, but this did not exist in 1901. Voters do not elect the Prime Minister. While regular elections of Parliaments are essential to democracy, there is no definition of democracy that precludes designated seats. Concepts such

as representative democracy and responsible government no doubt have an irreducible minimum content, but community standards as to their most appropriate forms of expression change over time, and vary from place to place.<sup>1</sup> Accordingly, the detail of the form that Australian democracy takes is left to the parliaments.

15. Representative government is not a static institution. It accommodates change and parliaments, as has always been the case, have great flexibility in legislating the better forms of representative democracy. The electoral system accommodates single or multi-member electorates. Voting methods may vary, including varieties of proportional representation, whereby the significance and outcome of the votes cast may be pre-determined. No one formula can pre-empt the field as alone consistent with representative democracy. (Attorney-General (Cth); *Ex rel McKinlay v Commonwealth* [1975] HCA 53 at [9] per Stephen J.)
16. The aim of the Tasmanian Electoral Commission is stated to provide all Tasmanians with a convenient opportunity to exercise their right to vote and to ensure that their votes are counted accurately and transparently. This suits the majority but condemns the Aboriginal minority to pointless participation – the carrot and the donkey arrangement. What is the point of participation in voting if the vote is worthless? There is more to electoral equality than simply dividing the population into evenly divided precincts. Failure to address minority representation means society is undemocratic.
17. The United States addressed minority voting in 1965 with the *Voting Rights Act 1965*. It allowed for the redrawing of electorates to pick up compact, cohesive minorities, especially in certain States and local government districts with historically bad records on racial discrimination. The new system increased the likelihood of minority candidates winning a seat. Between 1965 and 1990, the number of black State legislators and members of Congress rose from just two to 160. Looking back, the US has gained much from a more even distribution of representation that had to design special electoral change to enable blacks and Hispanics to have their voices heard in political institutions.
18. The Committee on the Elimination of Racial Discrimination (CERD) is responsible for hearing complaints about the failure of nation states to comply with the Convention (on which the Racial Discrimination Act is based). The Committee raised concerns about the lack of indigenous representatives on Guyana's Ethnic Relations Commission, and in its 2004 review of Argentina, endorsed the Co-ordinating Council of Argentine Indigenous Peoples, a body established by law to represent indigenous peoples. The Committee supported Norway and Sweden's Sami parliaments but in the case of Sweden wondered to what extent the Sami Assembly was independent of Swedish government and had genuine powers.
19. On the specific issue of indigenous representation in parliaments the Committee expressed concern at the absence of Tuareg in Mali's parliament and congratulated Columbia on the constitutional reservation of three seats for indigenous peoples in its senate. In its 68th session, the Committee endorsed designated seats as consistent with the requirements of the Convention and made the following comment about Mexico: '[Mexico] should guarantee in

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<sup>1</sup> per Chief Justice Murray Gleeson in *Mulholland v Australian Electoral Commission* [2004] HCA 41, para 10

practice the right of the indigenous peoples to participate in government and in the management of public affairs.’

20. The recommendation addressed Article 2, s VII of the Mexican Constitution, where the right of the indigenous peoples to elect their political representatives is limited to the municipal level. In light of that factual background, it may be that the Committee sees Article 5(c) as prohibiting any restriction on participation rather than imposing a positive duty on states to ensure actual representation. Nevertheless, the Committee’s support for designated seats in New Zealand and Columbia is persuasive for other countries with indigenous minorities.
21. Maori have had four designated seats in the New Zealand parliament since 1867. Since 1993, there have been 7 Maori seats of the 120 seats in parliament. The Maine House of Representatives has 3 designated seats for the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians.

Opponents of designated seats have mainly three arguments: designated seats are divisive; that the right to vote is more important than the outcome of the vote, and that all candidates should be elected on merit, not race. We have already addressed whether the vote is more important than actual representation.

**a) Designated seats are not divisive: they guarantee political inclusion**

It is naïve to consider designated seats would create division when division has been the hallmark of white/black relations in Tasmania since white occupation.

The division was evident when dispossession began, and the killings took place along racial lines. It was evident when Aboriginals were excluded from being counted as citizens in 1901; when Tasmanian Aboriginals having a white parent were not to be classed as being Aboriginal; when the children were taken because of their race; when Aboriginals were denied access to hotels, jobs and rentals because of their race. It is still evident today when Australia celebrates the coming of the white people on January 26<sup>th</sup>. It is evidenced by the appearance and reality of Australian parliaments (with the exception recently of the NT Assembly) looking and acting as white parliaments catering to the needs of white Australia.

To the limited extent designated seats can counteract this historical and existing institutionalised division along race lines, designated seats promote inclusiveness; that political representation in Tasmanian democracy means representation by all. To now provide for guaranteed Aboriginal representation would constitute a powerful political symbolic gesture of recognition of Aboriginal people, of our history, our grief and previous denial of representation.

On this point, High Court Justice Michael McHugh pointed out in submissions and argument in the case of West Australian case of *McGinty*, that *‘[m]any people today would see democracy ... as requiring groups to be represented; that Aborigines, that other ethnic groups should be represented in Parliament and that democracy requires that it is so, and when a complaint is made, well, these groups just become diffused in electorates and they really have no voting power.’*<sup>2</sup> By way of

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<sup>2</sup> HCA transcript of argument, *McGinty v Western Australia* [1996] HCA 48, P44/1993. His Honor was joined by Justice Mary Gaudron enquiring, ‘Yes, what I am directing my mind to is the possibility, for example, of a beneficial provision with respect to an electorate of Aboriginal people to enable Aboriginal representation in the Houses of Parliament, which may not be discriminatory under any of the canons of discrimination as we know them.’

example, Justice McHugh suggested that Aboriginals in the Kimberley region of WA might only number 5,000-10,000 people, and if representative democracy called for better Aboriginal representation then perhaps the Kimberley could be one electoral district. The logic can easily be applied to the Tasmanian context.

- b) Designated seats do not mean that Aboriginal parliamentarians elected through the designated seats process do not face an election. They are elected by popular vote in the same way other politicians are. The difference is that instead of the Aboriginal vote vainly competing against an overwhelming number of contrary voters, the Aboriginal vote is given meaning, respect and recognition. Designated seats for Aborigines do not guarantee ease of access to parliament: designated seats merely provide an avenue for Aboriginal representation. The guarantee is that there will be Aboriginal representation.

### c) Party Quotas

Getting more Aboriginals into parliament through party quotas is sometimes pushed as an alternative to designated seats. Party loyalty is a dilemma for Aboriginal politicians. Aboriginal candidates have many issues to raise and need unrestrained freedom to do so. As members of mainstream political parties, they are often silenced by party demands for solidarity. It was noticeable in the lead-up to the 2016 federal election that normally high-profile Aboriginals such as Pat Dodson and Malarndirri McCarthy were barely seen and rarely heard.

Northern Territory Aboriginal MLA Larissa Lee summed up the frustration felt by Aboriginal politicians: ‘At the end of the day we are not here to represent [a political party]. We are here to represent the bush [Aboriginal people]’. High profile Northern Territory Aboriginal parliamentarian Allison Anderson moved from one party to another in her quest to find a political party that would give priority to Aboriginal issues. She has consistently fought for Aboriginal people throughout her parliamentary career. She left the Labor Party because it failed to address housing; the CLP because they were allegedly trying to destroy Aboriginal organisations and land rights, and Palmer United Party because it failed to seriously use its position in the Senate to protect Aboriginal funding from savage cuts.

- 22. From 2002-2006, high profile Aboriginal woman Kathryn Hay was elected to the Tasmanian parliament as a member of the Labour Party. She did well in trying to support Aboriginal people but her first loyalty was to the Party and the voters who put her there.

Proposal: the bill be amended to include a new section along the following lines:

### **Aboriginal representation in the House of Assembly**

- i. *In addition to the numbers of members of the House of Assembly elected by the general voting population there shall be two members of the said House who shall be elected under the provisions of this Act to represent the Aboriginal people of Lutruwita/Tasmania.*
- ii. *For the purpose of the election of such members of the said House the electorate shall be the whole of the State.*
- iii. *Such members shall be chosen from amongst and by the votes of Aborigines who are eligible to be enrolled on the general roll.*

- iv. *An Aboriginal who qualifies as being eligible to apply to enrol or is enrolled on the commonwealth roll of electors shall be entitled at his or her option to be registered either as an elector of the Aboriginal electoral district or as an elector of a General electoral district, but not both.*
- v. *An Aborigine who is registered as an elector on the Aboriginal electoral roll shall not be entitled to be registered as an elector of a General electoral district except where an application is made in the prescribed manner to remove the voters name from the Aboriginal electoral roll and be moved to the general roll.*
- vi. *An Aboriginal who is registered as an elector of a General electoral district shall not be entitled to be registered as an elector on the Aboriginal electoral roll, except where an application is made in the prescribed manner to remove the voters name from the general electoral roll and be moved to the Aboriginal electoral roll.*

This is a joint submission by the following Aboriginal organisations –

Elders Council of Tasmania Aboriginal Corporation – contact Rosemary Brown

Cape Barren Island Aboriginal Association – contact Denise Gardner

Tasmanian Aboriginal Centre – contact Heather Sculthorpe

Aboriginal Land Council of Tasmania – contact Graeme Gardner