Law Reform In Tasmania 1991/92

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The Law Reform Commissioner

Background

A multi-member Law Reform Commission of Tasmania was formally established in 1974 (under the Law Reform Commission Act 1974 (Tas)). The Commission's stated functions were, as provided by s 7(1), to put before the Attorney-General "suggestions and suggested programs for the reform of the law applicable to" Tasmania; to review the relevant law "with a view to the development and reform of the law" upon specific references from the Attorney-General; to consider proposals relating to the making of "necessary or desirable" laws, the consolidation or repeal of any laws, and uniformity of State laws with laws of the Commonwealth and other States; and to report and make recommendations to the Attorney-General.

Between 1 August 1974 and 31 December 1987 the Commission had made 52 reports to the Attorney-General; had a number of works in progress; and was also involved in community consultations and other activities relating to ongoing work.

As from 1 January 1988 the multi-member Law Reform Commission was abolished by the Tasmanian Liberal Government (under the Law Reform Commissioner Act 1988 (Tas)) and replaced by a single Law Reform Commissioner ("the Commissioner"). The functions of the Commissioner are the same as those of the Commission, with the additional one of monitoring reform proposals in other jurisdictions with a view to their adoption in Tasmania (wholly or in part; with or without modification) (s 7(1)(e)). Constrained as the Commission had been to operate under a small budget and with a small staff, it is clear that the object of the Government was to reduce the scope for effective law reform in this State even more. Indeed, it could be argued (on the basis of s 7(1)(e) of the 1988 Act) that law reform in Tasmania could, potentially, amount to nothing more than the consideration and/or recommendation of second-hand measures designed primarily for other jurisdictions.

Law reform in Tasmania would also appear to be subject to inadequate funding and, by implication, inadequate Government commitment. The Third Annual Report of the Law Reform Commissioner (for the year ended 30 June 1991) noted that expenditure (including Commissioner's remuneration, production of

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reports, travelling and accommodation and salaries of support staff: being one Legal Officer and 30 percent of a Secretarial Assistant) totalled $47,122 (see "Financial Statement" at p 12). Compare this figure to the 1990-91 budgets for Law Reform Commissions in some other Australian jurisdictions:

* Queensland: $362,000 (with three staff);
* New South Wales: $1,080,000 (with 13 staff);
* Victoria: $1,967,400 (with 25 staff); and
* Western Australia: $970,000 (with eight staff) (see Hunt: 1991 at p 71).

While clearly these other States are larger than Tasmania in both physical size and population, it is apparent that Tasmania is greatly under-resourced.

Notwithstanding inadequate funding and resources the Commissioner, with the invaluable support of a tiny staff and of the legal community generally (both practising and academic), has been able to pursue a limited program of law reform in Tasmania.

Review of 1991 - mid 1992

In February 1991 the first sole Commissioner resigned and was subsequently replaced, in August 1991, by an academic lawyer who continued with those academic duties on a full-time basis. Again, the position of Law Reform Commissioner has been seen by the Government (by this time Labor) to be worth only part-time attention. It is worth noting, too, the five-month gap between the resignation of one Commissioner and the appointment by the Government of another. While obviously such appointments do (and should) take time and care, such a time-lag does nothing to bolster the image of law reform in this State.

During 1991 the Commissioner continued with work on two standing references (issued in September 1988) on Criminal Law and Procedure and Civil Procedure and submitted two Final Reports (Nos 67 and 68: see below) to the Attorney-General for tabling in Parliament.

(a) Report No 67: Damages for Personal Injury

The reference from the State Government in 1990 (at the request of the Commissioner) was as follows:

> To investigate and report to the Attorney-General on -
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> (i) whether it is desirable to introduce legislation in Tasmania which provides as an alternative to lump sum awards, structured personal injury compensation for future economic loss and other heads of general damages;
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> (ii) if so, the nature and scope of such legislation.

After researching proposals and reforms in Canada, the United States and the United Kingdom, the Commissioner

recommended that legislation should be enacted to unrestrictedly empower courts to award damages (completely or in part) for personal injury or death by way of structured judgments (ie, allowing periodic payments of particular heads of damages) as an alternative to lump sum awards, so long as such damages were assessed once-and-for-all and were non-reviewable. The role of the jury should be confined to assessing the amount of damages payable either in a lump sum or periodically, with the final form of the order being reserved for the trial judge. In addition, the courts should be empowered, in all cases of claims for damages for personal injury or death, to order that the defendant's insurer be joined as a party to the proceedings and to order either the defendant or her or his insurer to provide an annuity, payable to the plaintiff, from a named institution. In appropriate cases the courts should also have the power to arrange such an annuity and to require the defendant's insurer to reimburse the courts for any associated costs and expenses. The Commissioner also specifically recommended that the legislation should include a provision that any assignment of a plaintiff's right to such periodic payments made without the court's approval, be void.

The recommendations are clearly sensible and fair. The stated purpose of compensation in tort is to restore the plaintiff to the position that she or he was in before the wrong had been committed (*Livingstone v Rawyards Coal Co* (1880) 5 AC 25 (HL)). However, it has been shown in many cases that to award an injured plaintiff lump-sum damages, assessed once-and-for-all, for the cost of future care and loss of earning capacity may, in fact, work against that purpose and against the public interest. For example, in relation to the costs of future care, it may be (and usually is) impossible to determine with any certainty what the future needs of an injured plaintiff will be, or for what length of time care will be needed. Nevertheless, at present, courts are required to assess a lump-sum intended to cover the plaintiff's future needs. It is then up to each plaintiff to make financial arrangements so that that sum of money is available to meet all of her or his needs as and when they arise for (often) the rest of her or his life. As the Commissioner has noted (Report No 67: at p 14):

> Very few plaintiffs have the financial expertise to do this. Very few have the strength of character to resist the urge to spend at least part of this large amount of money on projects other than their future care e.g. a new car, a world trip, a house for the son or daughter, and so on.....
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> Moreover, the plaintiff is now regarded by his [sic] friends and relatives as a rich man. He has as much money as if he had won a sizeable share in tatts lotto! Demands upon his generosity are made and often he has inadequate power to resist those demands. The Courts, intending to provide for his future, have presented him with problems which are practically insoluble.

Accordingly, should a plaintiff dissipate the damages awarded, or live longer or be in need of more care than was

anticipated by the court at the time of assessing the amount of damages, she or he may be forced to fall back on the social welfare and medicare systems, thus increasing her or his burden on the community. In particular, where damages are merely dissipated and the plaintiff then relies on social welfare benefits or pensions she or he has effectively been over-compensated, clearly at the expense of the community.

Similarly, where a plaintiff's future needs turn out to be not as expensive as anticipated by the court or a plaintiff dies prematurely, she or he (or her or his heirs) can be seen as having reaped a windfall, again at the expense of the community.

Under the scheme recommended by the Commissioner, courts will clearly still have the difficulty of assessing once-and-for-all the future needs and/or loss of earning capacity of a plaintiff. However, if the scheme is adopted, at least the plaintiff's needs would be met as they arise, by periodic payments.

At the time of writing, the Commissioner's recommendations have not yet been adopted by Cabinet.

(b) Report No 68: Dishonest Retention of Payments Mistakenly Made

This report arose out of the Standing Reference on Criminal Law and Procedure and the Commissioner's concern with the problem of transfer of property by mistake which had been the subject of a number of recent Tasmanian cases (eg, *Marshall v Szommer* (Tas Unreported: 57/1989 Crawford J; and 61/1990 Full Court): defendant, having received an overpayment of salary by computerised direct debit from employer's bank account, withdrew excess in cash; and *The Queen v Brenner* (Tas Unreported B45/1990 Neasey J): defendant mistakenly handed an excess quantity of bundled bank notes by bank teller in exchange for coins).

In recommending that a new crime be inserted into the Criminal Code 1924 (Tas), the Commissioner stressed that it was wrong "to endeavour to make conduct which is palpably not stealing fit into the definition of stealing" (Report No 68 at p 9), as had happened in the United Kingdom (s 5(4) of the Theft Act 1968) and in Victoria (s 73(10) of the Crimes Act 1958). Rather, in creating a new crime ("failing to account"), "payment under a mistake of fact" must be defined and the charge of failing to account made out when a person, who has received payment of more than she or he is entitled to under such a mistake of fact, becomes aware of that excess payment and does not advise the payer accordingly nor account to the payer for the value of the overpayment within a reasonable time, without reasonable excuse. However, the Commissioner also recommended that the new section of the Criminal Code should contain a provision that no criminal proceedings would be taken under the section where the relevant amount of money was less than

$1,000, on the basis that "[i]t would be wrong and cumbersome for such cases to be productive of expensive and public criminal proceedings" (at p 10). Nevertheless, nothing should stop civil proceedings being taken in such a case.

Again, the recommendation of the Commissioner has not yet been adopted by Cabinet.

(c) Reference on Limitation of Actions for Latent Personal Injury

In November 1991 the Commissioner was issued with the reference to:

> ... research and report to the Attorney-General on-
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> (i) whether it is desirable to introduce legislation in Tasmania which empowers the Court to extend the time period within which a person suffering from a latent personal injury is permitted to commence court proceedings to recover compensation from the wrongdoer.
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> (ii) If so, the nature and scope of such legislation.

At the time of writing the Commissioner has yet to formally make his recommendations but a draft report was circulated in March 1992.

Currently, under the Limitations Act 1974 (Tas) a person (or dependant) wishing to commence court proceedings for compensation for personal injury or death must do so within three years from the date on which the cause of action arose (s 5(1) and (2)). However, under s 5(3) and (4) the court is empowered to extend that three-year period by a maximum of a further three years (ie, six years maximum), even if the first three-year period has expired, where it is "just and reasonable so to do" (s 5(3)). Clearly, where a person is suffering from a latent disease (ie, a disease such as asbestiosis, silicosis, pneumoconiosis or mesothelioma, where the symptoms may lie dormant for years before becoming apparent) such a rigid limitation period of three (or, in some cases, six) years may (and does) bar common law recovery of damages and therefore work considerable injustice on that person.

In his draft report the Commissioner considered developments in the United Kingdom (s 2D of the Limitation Act 1975, providing that a court may override time limits in appropriate circumstances which are defined); in Victoria (s 23A of the Limitation of Actions Act 1958, to similar effect as the English amendment); and in New South Wales where the Limitation Act 1969 was amended in 1990 to allow for discretionary extension of the limitation period in cases of latent injury (ss 60F-60J).

Following such developments, the Commissioner has recommended generally in the draft report that the limitation period in Tasmania be extended at the court's discretion "to ensure that justice is not denied by the operation of strict legal rules in

meritorious cases" (Draft Report at p 21). In exercising its discretion, a court must consider the scope and purpose of the action; the plaintiff will be required to provide a satisfactory explanation for any delay in commencing action outside the usual time limits; and the court must determine each case on its own facts, while taking certain factors into account (such as, any likely prejudice to the defendant if time is extended; the merits of the plaintiff's case; the explanation for, and the length of, the delay; and the blamelessness of the plaintiff and/or the fault of her or his solicitor) and, ultimately, considering whether it is "just and reasonable" to extend the limitation period (*Knight v Smith* [1975] Tas SR 83 at 93 per Neasey J). The Commissioner has so far expressly left open the issue as to whether any amending legislation should be stated in wide terms, thus leaving it to judges to develop suitable principles for the exercise of their discretion, or whether the legislation should contain a list of suitable guidelines (based on existing principles).

(d) Uniform Evidence Laws

As part of the Standing Reference on Civil Procedure, the Commissioner has been reviewing reports of both the Australian Law Reform Commission and the New South Wales Law Reform Commission on uniform Australian evidence laws (ALRC: 26/1985 and 38/1987; NSWLRC 56/1988) and considering the provisions of the model Evidence Bill 1991 (NSW) with a view to recommending equivalent or similar legislation in Tasmania. Obviously, the area is a complex one. It is perhaps sufficient to state here that the Australian Law Reform Commission recommended a comprehensive restatement of the law of evidence (especially in relation to the admissibility of evidence). These recommendations have been adopted in the New South Wales bill.

(e) Mental Element in Crime and Uniform Criminal Laws

The Commissioner is also currently reviewing the Criminal Code 1944 (Tas) in order to attempt to clarify and define the mental element and the other external elements of each crime. This work has arisen out of the Standing Reference on Criminal Law and Procedure and is now integrated with work being carried out by the Attorneys-General from each State on the establishment of a model uniform Criminal Code throughout Australia.

(f) Future References

In line with his stated function to "place before the Attorney-General suggestions and suggested programmes for the reform of the law applicable to" Tasmania (s 7(1) of the Law Reform Commissioner Act 1988 (Tas)), the Commissioner has suggested that references should be provided in relation to the following:

* police powers of search and seizure;
* a review of the Police Offences Act 1935 (Tas);
* a data base for a computerised Tasmanian statute book;
* legislation in relation to "whistle blowers"; and
* enduring powers of attorney in relation to the provision of health care to people who have lost the capacity to make their own decisions.

In addition, the Commissioner has recently received a (perhaps timely) reference from the Attorney-General in relation to procedures in Royal Commissions.

Other Law Reform

Uniform Credit Laws

Since 1986 all States and Territories, by their respective Ministers for Consumer Affairs, have been working towards the development of nationally uniform credit legislation with the intention that it cover all credit-related transactions. The major policy objectives are that the legislation should reduce inequalities in bargaining power between consumers and credit providers; enable consumers to make informed choices when purchasing credit; reduce the costs and simplify the operations of credit providers; and give ready access to fair and equitable dispute resolution (Ormerod: 1992; and personal communication by D Johnston, Office of Consumer Affairs (Tas)).

As yet, there appears to be no final draft of the legislation, but it is expected that all States will be able to introduce legislation into their respective Parliaments by the end of 1992 (see Ormerod: 1992).

In relation specifically to Tasmania, uniform credit legislation, if passed, will mean the repeal of a number of other somewhat archaic statutes, including the Lending of Money Act 1915 and the Hire Purchase Act 1959, which offer little or no protection to consumers.

Residential Tenancy Laws

Tenancy law reform has been on and off the political agenda in Tasmania for some years. Report No 19 of 1978 of the (then) Law Reform Commission recommended that residential tenancies legislation be passed to amend the patchwork of (essentially archaic) laws in the State. That report is still "under consideration" (see Law

Reform Commissioner of Tasmania: Third Annual Report for the Year Ended 30 June 1991 at Appendix B). There is still no unified body of legislation regulating residential tenancies in Tasmania; nor any legislation seeking to balance the rights and obligations of tenants with those of landlords. The current laws favour landlords, at the expense of tenants, and perpetuate unequal bargaining positions. They are easily "the most outdated tenancy laws in Australia" (Bladel: 1990 at p 2).

Since 1977 every other State in Australia has progressively introduced new residential tenancies legislation that at least attempts (if not always completely successfully) to give to tenants reasonable security of tenure and forums for dispute resolution. In Tasmania, despite attempts by community-based groups, bureaucrats and individual politicians and, and despite the fact that residential tenancy reform remains a part of the Labor Party's platform, no bill has ever been presented to Parliament.

However, the issue is still alive. In 1990 and 1991 consumer and industry (real estate) representatives worked with government (specifically the Office of Consumer Affairs) in a Working Party in an attempt to come to some sort of compromise over the drafting of residential tenancy legislation. The Working Party was originally convened by the (then) Labor Minister for Consumer Affairs. Following the election of the Liberal Government (which had no policy in relation to residential tenancies) in February 1992 the status of the Working Party was unclear. However, it has recently been reconvened and it appears that a Cabinet Submission on reform of residential tenancy laws is currently being prepared in the Office of Consumer Affairs. Whether a Government Bill will, in fact, be introduced in the House of Assembly is yet to be seen. Even if it is, its fate has to be uncertain given the history of the Legislative Council in refusing to pass what might be seen elsewhere as socially necessary and desirable reforms (eg, consider the legislative histories of homosexual law reform and Aboriginal land rights in this State).

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