The State of Tasmania in Recent* Litigation – Is the State a Moral Exemplar?

In the Melbourne Steamship case (*Melbourne Steamship Co Ltd v Moorehead* (1910) 15 CLR 333, His Honour Sir Samuel Griffith made certain canonical pronouncements about the Crown, and its obligations when dealing with citizen litigants, in particular His Honour stated:

> *"It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and* a fortiori *not in criminal proceedings.*
>
> *I am sometimes inclined to think that in some parts—not all—of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken."*

In *Hughes v Airservices Australia* (1997) FCA 558, Finn J stated:

> *"There is, I consider much to be said for the view that, having no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals at least insofar as this is consistent with its obligation to serve the public interest (or interests) for which it has been created."*

This point had been reflected in Commonwealth Model Litigant Guidelines contained in Appendix B of the *Legal Services Directions* 2017 (Cth).

Equally, the Tasmanian Solicitor General's Office issued Model Litigant Guidelines on 14 May 2019, those guidelines apply to all legal practitioners acting on behalf of the State of Tasmania, and all State service officers or employees instructing said lawyers.

In respect of criminal proceedings, lawyers acting as a Prosecutor on behalf of the Crown have onerous duties that are distinct and unique to that role but are, on one view, consistent with the Crown acting as a model litigant. For example, in the Tasmanian Court of Criminal Appeal decision of McCullough v The Queen [1982] TASRp 7; [1982] Tas R 43 the Court had to consider whether a prosecutor in a murder trial had gone too far in describing the accused, among other things, as a "pathological cold-blooded killer", a "despicable" and "disgusting man" who felt no remorse. In examining the duties of a prosecutor and the limitations upon their speeches in a jury trial, Green CJ with whom Neasey and Everett JJ opined, at p.57:

> *"[the prosecutor] must always do so temperately and with restraint, bearing in mind [their] primary function is to aid the attainment of justice, not the securing of convictions."*

At page 58:

> "Nevertheless, it is wrong for Crown Counsel to become so much the advocate that he is fighting for a conviction and quite impermissible to embark upon a course of conduct calculated to persuade a jury to a point of view by the introduction of factors of prejudice or emotion."

In the High Court decision *King v R* [1986] HCA 59, Murphy J stated at [6]:

> *"The duty of a prosecutor is to present the case against the accused fairly and honestly; not to use any tactical manoeuvre legally available in order to secure a conviction."*

This comment clearly flows, in a similar vein, to the observations of Barwick CJ in *Melbourne Steamship Co Ltd v Moorehead* (1910) 15 CLR 333.

The Model Litigant Guidelines, along with the common law above, also make for sound policy considering that the State, in the majority of cases, has substantially greater resources than the average civil (or criminal) litigant, that the Crown has no private interest in civil cases, that their role in criminal cases is concerned with justice and not securing convictions at any cost, and there is no public interest in skirmishing over technical points, save for circumstances where the State's interests may be unfairly or improperly compromised.

Given the foregoing, it will surprise readers that the case of *Tasmania v Pilling* [2020] TASSC 13 and *Tasmania v Pilling (No 2)* [2020] TASSC 46, and Bourne v Nguyen [2020] TASFC 11 did ever transpire.

By way of a brief summary in the Pilling case, Ms Pilling was employed by the State Service as a patient services officer at the Launceston General Hospital. On 29 May 2019 she made a worker's compensation claim alleging that she had suffered a psychological injury due to workplace bullying. The notice, and the supporting medical certificate were sent by Ms Pilling's doctor by facsimile. It is noted that Ms Piling also provided a copy of the medical certificate in person to her employer 3 days after submitting the claim. The claim was disputed with the Crown alleging that she ought to be precluded by reason of s37 of the WRCA because of a failure to give notice in accordance with the requirements of s32 WRCA.

In later proceedings (*Tasmania v Pilling (No 2)* [2020] TASSC 46) regarding costs, and the notice argument, His Honour Brett J admonished the Crown, stating:

> *"I am satisfied that the appellant's position from the commencement of the reference has been misconceived. It has relied on technical points to seek some advantage in circumstances in which the full operation of the legislative scheme, and the justice of the case, made it inevitable that it would become liable to pay compensation to the respondent. It was unsuccessful because it relied on an erroneous legal argument to gain that advantage. The respondent has been wrongly and unjustly put to the expense of the litigation in order to defend her entitlement to compensation."*

Even though the Solicitor General had given clear guidance to his staff and all Crown employees, such as the Tasmanian Health Service and the Department of Justice, a technical objection was taken in circumstances where the Crown was arguably inviting the Court to create a mischief under the legislation through misinterpretation or misapplication of the WRCA.

In the case of *Bourne v Nguyen* [2020] TASFC 11 Nguyen was sentenced for drug trafficking and received a term of imprisonment which had a fixed non-parole period. While subject to parole, Nguyen breached his parole by committing a new crime, namely drug trafficking, and on 05 April 2019 his parole was revoked and he was returned to prison to serve the remainder of his sentence (unless parole was subsequently granted). When sentenced by Justice Brett in relation to the later offending, on 11 May 2020 Brett J imposed a sentence of three years and six months imprisonment with a non-parole period of two years and three months duration ("the new sentence"). His Honour ordered that the parole eligibility would be calculated from the end of the non-parole period of the first sentence. The Director of Corrective Services took the position that the whole of the first sentence needed to be served before the parole eligibility period on the new sentence could come into effect. The Director contended this left a parole eligibility date of 11 May 2020, whereas Mr Nguyen's counsel argued the correct date was 08 January 2020. A difference of approximately five months imprisonment.

The matter was sent for determination before the Full Court of the Supreme Court of Tasmania who then considered the effect of s71 of the *Corrections* Act, insofar as it considered minimum sentences, designated sentences, and the operation of non-parole periods. In a split decision Blow CJ and Estcourt J agreed that the interpretation proffered by Mr Nguyen'a Counsel was the correct interpretation, and that the Custodial Director had undertaken a fundamentally flawed interpretation of s71 of the Corrections Act. Estcourt J in rejecting the Director's arguments, observed that the language of s71 of the *Corrections* At act could not lead to the position contended by the Director, and that it was apparent that Parliament intended for minimum non-parole periods to cumulate for the purposes of fixing the earliest non-parole period, without a requirement to serve the whole of the original sentence first.

In effect, the decision in *Bourne v Nguyen* is a further example of the Crown applying the law in a needlessly technical and self-serving way, and then seeking to pursue the same during litigation. It is deeply concerning that the Crown was seeking to keep prisoners in gaol longer than required or permitted by law by the pursuance of an overly (and erroneous) technical application of the law. It is understood that some prisoners will have spent months or years longer than intended by the sentencing Court, waiting for their parole eligibility date to arrive as a direct consequence of that unfair and unjust technical application.

The question that flows from this is, 'can litigants, trust that the State of Tasmania will act fairly and abide by its own model litigant guidelines?' Thus, it follows that practitioners must fearlessly challenge erroneous, wrongful, or capricious point taking (whether in civil or criminal litigation) and be no *shrinking violet* when the State is involved in litigation against the subject. Sadly, the cases of *Pilling* [2020] TASSC 13 and *Pilling* (No.2) [2020] TASSC 46, as well as *Bourne v Nguyen* [2020] TASFC 11 serve as a sad reminder that despite the existence of a model litigant policy some Crown employees are not sufficiently familiar with their obligations, or are seeking to (unreasonably) take technical points, where they ought not be taken and are failing their obligation to be moral exemplars. Lamentably, it could be said that the Tasmanian Model Litigant Guidelines are a mere aspirational statement and not a serious statement of policy.

*Originally drafted but not published in November 2020.