actually saves the Government thousands of dollars. This is because the residential care workers are paid significantly less per hour than the hospital based carers, even given the economies of scale.

The problem for disabled people is that there has been little option for access to complaint systems for a variety of reasons (such as physical access to community legal centres, communication problems, and common experiences of being ignored or having their opinions undervalued).

Disability legal service

In response to this situation, a steering Committee constituted by a group of disabled people representative of the disabled community in the State, has formed the Disability Legal Service. At present it is a volunteer service, but it is hoped that once up and running, there will be a possibility of funding. The volunteers will assist people with disabilities with any legal problem, whether a problem of discrimination, of financial concern (many disabled persons have their finances in trust), access to benefits, etc. It is hoped that this service will be able to respond to the demands of the disabled community in Tasmania rather better than agencies with a broader scope, not least because it will continue to be directed by people with a disability.

As with the question of homosexual law reform, change is coming from the groups affected, rather than from any formal grouping of government, political parties, or the legal fraternity.

Helen Gwilliam teaches law at the University of Tasmania.

Honey I shrunk the Parliament!

RICK SNELL reports on an inquiry into the size and constitution of Tasmania's legislature.

Between May and August 1994 Tasmanians witnessed a public debate about the size and operation of the Tasmanian Parliament. In this period, the Morling Inquiry Into the Size and Constitution of the Tasmanian Parliament received 211 written submissions from individuals, 33 submissions from political parties and other organisations and heard evidence from 108 witnesses.

The depth, extent and public participation in this inquiry has surprised many given the original terms of reference which included:

- To investigate and report on a reduction in the number of members elected to the Tasmanian Parliament, how such reduction might take place.
- To investigate and report on whether or not a reduced Parliament would be better constituted by a single chamber.
- To examine an improved mechanism for disagreements between the Legislative Council and the House of Assembly.

The inquiry attracted considerable interest because it arose out of the political fallout which accompanied the community reaction to the Tasmanian Parliament passing, in the space of nine hours, 40% pay rises for all MPs. The Morling Inquiry is due to make its final report to the Government by 30 December 1994.

Submissions to the Inquiry

The Morling Inquiry has produced a wealth of discussion and options for the reform of parliament. Researchers and reformers in other jurisdictions will now be able to consider a wide variety of reform proposals ranging from the novel to submissions that focus on offering considered solutions to the problem of responsible government in Australia. The concurrent publication of David Hamer's book *Can Responsible Government Survive in Australia?* is a timely one. Hamer's book poses a number of critical questions about parliamentary operation in Australia in the 1990s. The submissions to the Morling Inquiry have offered some fascinating answers to those questions.

The one generalisation that can be made safely about such a wide range of submissions is that Tasmanians display a propensity to offer new variants or models for the design of parliamentary democracy. The politics of Tasmania seem to consistently throw up interesting experiments, innovations and twists on parliamentary democracy. This is a State that embraces the Hare-Clark system of proportional representation for its lower house, yet retains single member constituencies and preferential voting for its upper house. Tasmania has the largest gathering of elected green Members of Parliament and yet retains a Legislative Council which is viewed by most commentators as the most conservative upper house in the Westminster world.

The submission of the Parliamentary Labor Party epitomises the radical proposals which many of the submissions were prepared to offer to the Board of Inquiry. The Parliamentary Labor Party offered the following suggestions:

- A single 40 member chamber (a reduction from the 54 current members in both houses)
- 25 members to be elected from five multi-member electorates.
- 15 members elected on a state wide proportional basis (in the same way as elections for the Senate)
- The Executive would be selected from the 40 member chamber.
- A simple majority of the 25 members would form a Government.
- All members could vote on bills except only the 25 members from the multi-member electorates could vote on Money Bills and No Confidence motions.
- Well resourced administrative and legislative checks and balances would be put into place including Budget estimate committees, anti-discrimination legislation and a State administrative appeals tribunal.

A submission that reflected the cynicism of young Australians about the parliamentary process came from students of a private secondary college. The students made a submission that proposed the creation of a Public Panel. The Public Panel would consist of two members chosen from each of the five House of Assembly electorates on a rotating basis (a bit like jurors for court cases). The ten members of the Public Panel would be able to debate and vote on legislation. The reasoning of the students was that the presence of normal electors in the parliamentary process would remove much of the 'club' atmosphere of Parliament and allow public sentiment to be directly considered in debates and discussions.

The outcomes

With history as a guide, most commentators are not expecting to see many or any of the final recommendations made by the Morling Inquiry adopted by the Government or the Parliament. In 1982 a Royal Commission tackled many of the same issues and its recommendations have gathered dust on library shelves.

The number and range of submissions will probably force the Morling Inquiry to offer the Tasmanian Government a series of preferred options. These options will attempt to encapsulate the main ideas and proposals presented to the Inquiry. The Inquiry members will indicate which options are preferred by the Board of Inquiry. The major problem, and the same one facing all reformers in Tasmania, is that such changes will need to be accepted by a majority of Upper House members. In light of this reality the Morling Inquiry will most likely suggest that its options be put to the Tasmanian public in a referendum.

Comment

The Morling Inquiry has been an interesting exercise in participatory democracy. For two months Tasmanians were able to follow and consider a wide variety of possible options for restructuring the Tasmanian Parliament. On each day of the hearing considerable space was given in the media to the substance of various public submissions. The debate was vigorous, informed and, above all else, constructive. My greatest apprehension is that the Australian parliamentary process of the 1990s may be unable to respond positively to so much well-meaning advice from the electorate.

Rick Snell teaches law at the University of Tasmania.

INTERNATIONAL LAW

A constitutional gap?

MELISSA CASTAN discusses the legality of the Timor Gap Treaty.

On 18 August 1994 the High Court of Australia rejected a challenge to Commonwealth legislation implementing the Federal Government's treaty with Indonesia over the Timor Gap.

The treaty established co-operative rule over petroleum resources in the Timor Gap area to the north of Australian territorial waters. In *Horta and Others v Commonwealth of Australia* (1994) 123 ALR 1 (subsequently *Horta*) three East Timor born Australians challenged the Timor Gap legislation.

The plaintiffs, led by Jose Ramos Horta, questioned the validity of Commonwealth legislation based on the 'external affairs' power of the Australian Constitution, when that legislation contravenes international law. They also challenged the propriety of Australia's recognition of Indonesian sovereignty over East Timor, and whether the Australian courts could inquire into those acts of recognition by the Australian Government.

The Timor Gap Treaty

The parties largely agreed to the facts underpinning the claim (set out at 3). To interpret the legal issues, some political context is necessary.

In December 1975 the Republic of Indonesia occupied the former Portuguese Colony of East Timor. Indonesia has remained in occupation of East Timor, and has claimed sovereignty over the territory since 1976. The Australian Government recognised that claim to sovereignty in 1979.

Australia and Indonesia claim rights to overlapping parts of the continental shelf that lies between the coast of East Timor and the coast of mainland Australia. The area of overlap is known as the Timor Gap. The Timor Gap is of strategic interest to Australia, but its real value lies in the petroleum reserves that are thought to exist in the sea-bed.

In the decade that followed Australia's recognition of Indonesia's sovereignty over East Timor, a series of negotiations was entered into over the rights to the Timor Gap resources. In 1989 Australia and Indonesia executed an agreement that treated the Timor Gap as a 'Zone of Co-operation'. The agreement permitted the two nations to share control of the rights to explore and exploit the petroleum resources in the Zone, until the making of a formal, permanent delimitation of the Gap area.

The agreement's terms are set out in a pact called the 'Treaty Between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area Between the Indonesian Province of East Timor and Northern Australia' (the Timor Gap Treaty). Australia considered its entry into the Timor Gap Treaty to be consistent with its obligations under international law (at 3).

In 1990 the Commonwealth Parliament enacted two pieces of legislation designed to enable Australia to fulfil its obligations under the Timor Gap Treaty. The primary Act, the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990* (Cth), was aimed at establishing the regime of co-operation and implementing financial arrangements envisioned by the Treaty. A secondary Act, the *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990* (Cth), amended other Commonwealth laws made necessary as a consequence of the primary Act. Both Acts operated from 18 February 1991 onwards.

To pass these laws, the Parliament purported to rely on its power to make laws with respect to 'external affairs', conferred in s.51(xxix) of the Australian Constitution.

The parties' submissions

Horta and his co-plaintiffs began proceedings in the High Court in 1993, seeking declarations that the two Acts were not valid laws, because the Commonwealth Parliament had exceeded its legislative powers. They also sought a ruling that the Timor Gap Treaty was beyond the scope of the Commonwealth Government's executive power; thus not validly made.

Horta's main argument was that the two Acts were not laws with respect to 'external affairs' for the purposes of the constitutional grant of legislative power in s.51(xxix) of the Constitution. This argument was based on Horta's assertion that the Timor Gap Treaty is void under international law. If Indonesia's occupation of East Timor is unlawful in international law, then Australia's entry into the Treaty with