

COMMUNITY LEGAL CENTRES TASMANIA

14 April 2022

South Australian Law Reform Institute
Adelaide Law School
University of Adelaide
South Australia 5005

via email: salri@adelaide.edu.au

To Professor John Williams,
Re: Review of Tasmania Law Reform Institute

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to respond to the Review of the Tasmania Law Reform Institute ('the Review'). We strongly support the work of the Tasmania Law Reform Institute ('the TLRI') and its work over twenty years to modernise, simplify and consolidate Tasmanian laws. As Tasmania's peak independent law reform body, its expertise has been invaluable in promoting best-practice law reform. We strongly recommend that the TLRI's independence and impartiality is guaranteed both in the Agreement and through a more sustainable funding model.

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

Whether the aims and objectives of the TLRI, set out in its founding agreement, require modernisation, clarification or amendment

The aims of the TLRI currently provide for the modernisation, simplification and consolidation of Tasmanian laws, as well as uniformity between laws of other States and the Commonwealth.¹ We note that the aims of the TLRI were broadened in 2019 to include improving access to justice.² We support the inclusion of an access to justice clause because it recognises that law reform will often have a disproportionate impact on disadvantaged members of the community.

¹ Clause 2.2 of the Tasmania Law Reform Institute 'Founding Agreement'. As found at https://www.utas.edu.au/data/assets/pdf_file/0003/302943/FoundingAgreement-1.pdf (accessed 14 April 2022).

² Clause 2.2(e) of the 2019 Renewal Agreement sets out the functions of the Institute including "optimising the operation of the law and facilitating access to justice": Tasmania Law Reform Institute, 'Renewal of Agreement'. As found at https://www.utas.edu.au/data/assets/pdf_file/0008/1338614/TLRI-Renewal-of-Agreement-2019.pdf (accessed 14 April 2022).

If the review thought further clarification of the TLRI's aims and objectives would be beneficial, the inclusion of a clause that saw the TLRI able to consider new or more effective methods for administering the law is recommended. An example is found in the *Australian Law Reform Commission Act 1996* (Cth) which relevantly provides "adopting new or more effective methods for administering the law and dispensing justice".³ Example projects that would fall under this clause include *Problem Trees and Hedges: Access to Sunlight and Views* where the TLRI recommended alternative dispute resolution for disputes between neighbours where trees and hedges on one property are obstructing access of sunlight to and/or views from a neighbouring property.⁴ Another example is *The Establishment of a Drug Court Pilot in Tasmania* which assisted in the implementation of Tasmania's court mandated drug diversion program.⁵

Recommendation: Broaden the aims of the TLRI to include new or more effective methods for administering the law and dispensing justice

Whether there are sufficient provisions for the protection and promotion of the institutional integrity and independence of the institute

There is no express protection contained within the founding agreement to ensure the TLRI's integrity and independence. Although the 2019 Renewal Agreement was amended to note that the Director is responsible for "working to ensure the independence of the Institute",⁶ there is no explicit reference to the independence of the TLRI. In our opinion, the implied independence and impartiality of the TLRI should be explicitly set out. A useful model is Tasmania's Commissioner for Children and Young People, who "must act independently, impartially and in the public interest".⁷ Another model that could be considered is the New Zealand Law Commission which "must act independently in performing its statutory functions and duties...".⁸

Tasmania along with South Australia and the Northern Territory are the only jurisdictions whose law reform bodies may accept law reform proposals or research projects from a wide range of stakeholders including the judiciary, government departments, Parliament, the legal profession and members of the community or community groups.⁹ The Australian Law Reform Commission and the New South Wales and Queensland Law Reform Commissions are restricted to receiving referrals from the Attorney-General.¹⁰ In Victoria, a mixed model

³ Section 21(1)(iv) of the *Australian Law Reform Commission Act 1996* (Cth). Also see section 10(1)(v) of the *Law Reform Commission Act 1967* (NSW) which states "adopting new or more effective methods for the administration of the law and the dispensation of justice".

⁴ Tasmania Law Reform Institute, *Problem Trees and Hedges: Access to Sunlight and Views* (Final Report No. 21: January 2016).

⁵ Tasmania Law Reform Institute, *The Establishment of a Drug Court Pilot in Tasmania* (Research Paper No. 2: December 2006).

⁶ Clause 5.3 of the 2019 Renewal Agreement.

⁷ Section 8(3) of the *Commissioner for Children and Young People Act 2016* (Tas).

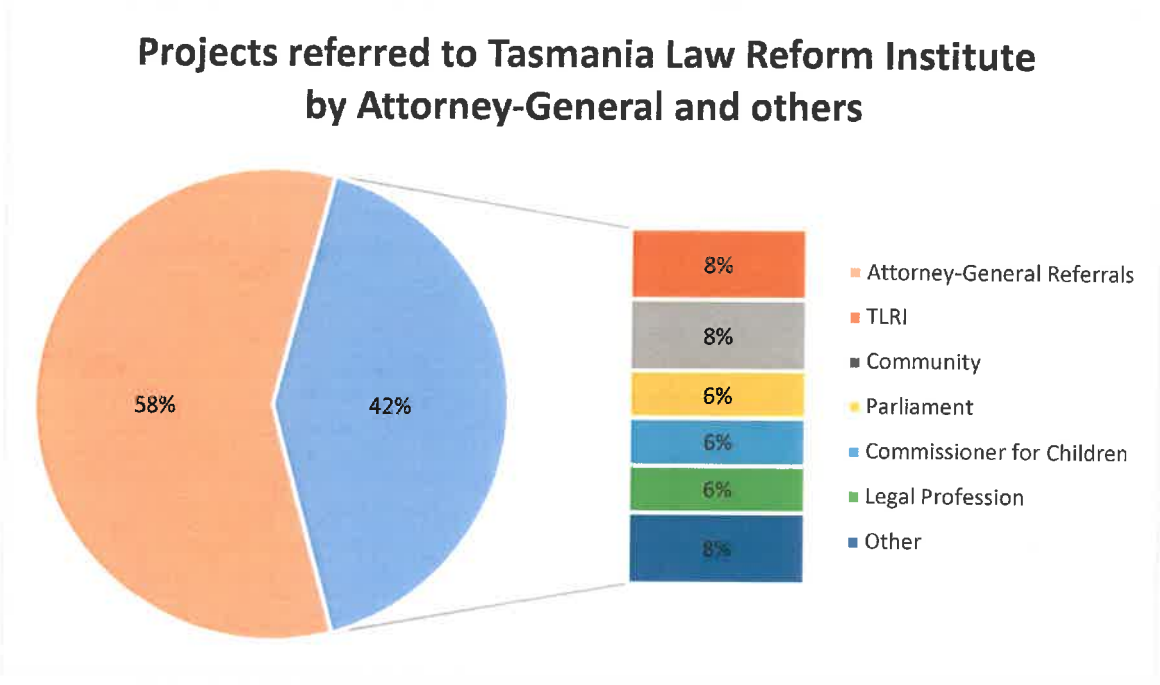
⁸ Section 5(3) of the *Law Commission Act 1985* (NZ).

⁹ Clause 4.1 of the 2019 Renewal Agreement. See also South Australian Law Reform Institute, Sources for Institute's Work. As found at <https://law.adelaide.edu.au/research/south-australian-law-reform-institute#sources-for-institutes-work> (accessed 14 April 2022); clause 2(a) of the *Constitution of the Law Reform Committee of the Northern Territory*. As found at https://justice.nt.gov.au/data/assets/pdf_file/0004/621922/constitution-law-reform-committee.pdf (accessed 14 April 2022).

¹⁰ See, for example section 20 of the *Australian Law Reform Commission Act 1996* (Cth); section 10(1) of the *Law Reform Commission Act 1967* (NSW). In Queensland, section 10(2) of the *Law Reform Commission Act 1968* provides that the Queensland Law Reform Commission may "receive and consider any proposal for the reform of the law which may be made or referred to it" however on its website it notes that "the

is used with the Commission accepting referrals from the Attorney-General¹¹ but also able to review any area of law reform that is “of general community concern if the Commission is satisfied that the examination of that matter will not require a significant deployment of the resources available to the Commission”.¹²

Of the 36 law reform projects completed by the TLRI, 21 have been referrals from the Attorney-General and 15 proposals from a person or organisation other than the Attorney-General. The 15 proposals have come from a broad range of stakeholders as the following graph demonstrates:



The ability to accept proposals from a wide-range of stakeholders provides the TLRI with a degree of independence that most other Australian law reform bodies lack. It also means that the TLRI is able to undertake cutting-edge law reform of national and even international significance without fear or favour. We do not believe the TLRI should be constrained to merely accepting referrals from the Attorney-General and strongly recommend that the TLRI retain its powers to accept proposals from any person or organisation. We do however support the express inclusion of independent statutory authorities/officers as a source of referrals, particularly given that the Commissioner for Children and Young People has previously referred two proposals to the TLRI.¹³

Commission’s role is limited to reviewing particular areas of Queensland law referred to it by the Attorney-General at any given time”: <https://www qlrc.qld.gov.au/about-us#Function> (accessed 14 April 2022).

¹¹ Section 5(1)(a) of the *Victorian Law Reform Commission Act 2000*.

¹² Section 5(1)(b) of the *Victorian Law Reform Commission Act 2000*. Similarly, in Western Australia section 11(1) of the *Law Reform Commission Act 1972* provides that the Commission “may consider any proposal for the reform of the law which may be made to it by any person” but in practice the Commission will only “research and make recommendations to the government if the law reform idea involves minor changes”: <https://www.wa.gov.au/organisation/law-reform-commission-of-western-australia/contribute-law-reform> (accessed 14 April 2022).

¹³ Tasmania Law Reform Institute, *Non-Therapeutic Male Circumcision* (Final Report No. 17: August 2012); Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No. 4: October 2003).

As well as greater independence, it is also worth emphasising that the TLRI retains more impartiality than most other Australian law reform bodies, with the independent Board retaining a powerful oversight role “with respect to the conduct of business at the Institute, including making recommendations as to whether a particular reform project should be undertaken”.¹⁴

This can be contrasted with the Australian Law Reform Commission where the Commonwealth Attorney-General has the power to “alter the terms of a reference”¹⁵ and may “give the Commission directions about the order in which it is to deal with references”.¹⁶ Similar provisions about the priority in which law reform references are finalised is also contained in other Australian jurisdictions¹⁷ which may give rise to concerns about political interference.

We also support the current structure of the Board, which is “established as an advisory board”¹⁸ with membership provided from a variety of sources including the University of Tasmania, the Attorney-General, the Supreme Court of Tasmania and the Law Society of Tasmania.¹⁹ We strongly support the amendment made to the Renewal Agreement to provide for “a member of the Tasmanian Aboriginal Community”²⁰ particularly given that law reform and in particular criminal law reform can have a disproportionate impact on our First Nations people. In our view, the Board’s current membership should remain unchanged, as the Board’s composition means that it is less likely to be constrained by political considerations. We strongly recommend that the TLRI retains its current level of impartiality through the Board retaining both its oversight powers and current membership.

Recommendations: The independence and impartiality of the TLRI should be explicitly set out. The TLRI should retain the power to accept proposals from a wide-range of stakeholders including independent statutory authorities/officers. The TLRI’s Board should retain oversight.

The appropriateness and sustainability of the Institute’s resourcing and staffing having regard to the size of the jurisdiction in which it operates

The 2001 founding agreement provided that the University of Tasmania would provide the TLRI with \$80,000 per annum worth of funding (including in-kind contributions) and appoint a Director,²¹ the Government would provide \$50,000 per annum²² and the Law Society would “support the operation of the Institute by the provision of advice on proposals for research projects... and the provision of funding on a case by case basis”.²³ As the following table establishes, over the last ten years the commitment made by the University has been at least 24 per cent higher (2011) and as much as 40 per cent higher (2018) than originally agreed

¹⁴ Clause 3.3 of the 2019 Renewal Agreement. See also Clause 4.4 which outlines that the Board “will identify the extent of the project, the time for completion, the expected output and the cost of the project”.

¹⁵ See section 20(2) of the *Australian Law Reform Commission Act 1996* (Cth). See also section 20(2)(a) of the *Victorian Law Reform Commission Act 2000*.

¹⁶ Section 20(3) of the *Australian Law Reform Commission Act 1996* (Cth).

¹⁷ Section 20(2)(b)(i) of the *Victorian Law Reform Commission Act 2000*; section 10(3)(d) of the *Law Reform Commission Act 1968* (Qld); section 11(5) of the *Law Reform Commission Act 1972* (WA).

¹⁸ Clause 3.1 of the 2019 Renewal Agreement.

¹⁹ Clause 3.2 of the 2019 Renewal Agreement.

²⁰ Clause 3.2(h) of the 2019 Renewal Agreement.

²¹ Clauses 5.1, 5.2 and 6.1(b) of the Founding Agreement.

²² Clause 6.1(a) of the Founding Agreement.

²³ Clause 6.2 of the 2019 Renewal Agreement.

upon. In 2019 the agreement was renewed with the University agreeing to provide up to \$206,000 (including in-kind contributions) per annum.²⁴

Tasmania Law Reform Institute Funding Sources 2011-2020

Year	State Government Funding	University Funding (including in-kind contributions)	Grants
2011	\$50,000	\$99,620	\$9,344.73
2012	\$50,000	\$102,460	\$14,501.50
2013	\$50,000	\$106,172.00	\$41,681.73
2014	\$50,000	\$107,560.00	\$19,256.14
2015	\$50,000	\$110,641.00	\$33,684.00
2016	\$50,000	\$96,761.00	\$60,000.00
2017	\$50,000	\$106,753.00	\$250,039.27
2018	\$50,000	\$112,715.00	\$50,019.95
2019	\$50,000	\$206,867.92	
2020		\$173,759.51	\$1958.56

Source: Tasmania Law Reform Institute Annual Reports. As found at <https://www.utas.edu.au/law-reform/publications/annual-reports> (accessed 14 April 2022)

Over the years, the Law Foundation of Tasmania, the Solicitors' Guarantee Fund and other funding sources have provided the TLRI with one-off funding through the provision of grants. This is one-off discretionary funding that may not be available every year. It is also time-consuming, requiring the drafting of funding applications that take away from the core business of the TLRI, namely to modernise, simplify and consolidate Tasmanian laws.

The Government's commitment to provide \$50,000 per annum has not changed in twenty years with the TLRI observing recently that this amount "leaves the Institute unable to undertake its role as the State's peak independent law reform body".²⁵ Expressed in another way, whilst the University is now providing more than twice as much resourcing to the TLRI as was originally agreed, the Government's commitment has gone backwards in real terms over the last two decade as is made clear in Annexure 1.

It is clear the TLRI requires a more sustainable funding model. Appropriate funding will ensure that the TLRI can appropriately unravel complex legal issues and recommend best-practice law reform. Improved funding will also provide the TLRI with the ability to engage in improved community consultation, an important function that ensures community confidence in law reform. As current Emeritus Professor of Law Kate Warner but formerly Director of the Tasmania Law Reform Institute observed:²⁶

The fact that law reform bodies are independent of government is what sets the consultation process apart from community consultations conducted by governments. It provides a level of confidence, which is essential to achieving wide community input. While the nature and extent of community engagement depends upon the subject matter of the reference, it is no longer considered enough for a law reform body to publish a discussion or issues paper, schedule a public hearing or two and wait for the submissions to flow in. Greater creativity is expected.

²⁴ Clause 6.1(b) of the 2019 Renewal Agreement.

²⁵ Tasmania Law Reform Institute, *Annual Progress and Financial Report 2019* at 1.

²⁶ Rosalind Croucher, 'Defending Independence' (2014) 34(3) *Legal Studies* 515 at 521.

Finally, increased funding will also mean that the TLRI's findings are more accessible, with resourcing made available for the publication of easy-to-read issues papers and final reports.

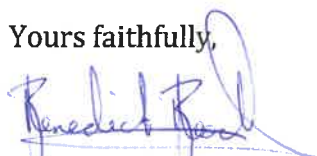
Given that law reform ultimately benefits the community it is clear that the Tasmanian Government needs to significantly increase its core funding of the TLRI. Additional Government funding is also necessary to ensure that the University can appoint a suitably qualified academic in the role of Director "with 15 academic teaching staff resigning or leaving the university since 2020" according to a recent news story about the Law School.²⁷ If the Director continues to remain an academic appointed by the University, appropriate research allocations must be made available. As well as a Director, we strongly believe that the TLRI requires at least one permanent researcher to undertake the research and provide continuity in the role.

The TLRI must also be provided with longer-term funding cycles. Funding cycles of five years will provide the TLRI with the ability to better budget and plan their operations as well as allaying concerns about the independence and impartiality of the TLRI.

Recommendations: The TLRI be provided with a sustainable funding model provided predominantly by the Tasmanian Government. Longer-term funding cycles of around five years are assured.

If you have any queries, or would like to discuss our submission further, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania

²⁷ Australian Broadcasting Corporation, 'Concern for state's law system as academics leave, University of Tasmania' 'moves away' from 'intimate' teaching', 8 March 2022. As found at <https://www.abc.net.au/news/2022-03-08/concerns-for-the-future-of-law-in-tasmania/100887800> (accessed 14 April 2022).

Annexure 1
State Government Funding + CPI

Year	State Government Funding	CPI – annual change (%)	Government Funding + CPI	Amount not paid per year
2001	\$50,000	4.3	\$52,150.00	-
2002	\$50,000	2.1	\$53,245.15	\$2,150.00
2003	\$50,000	2.0	\$54,310.05	\$3,245.15
2004	\$50,000	2.0	\$55,396.25	\$4,310.05
2005	\$50,000	2.0	\$56,504.18	\$5,396.25
2006	\$50,000	3.3	\$58,368.82	\$6,504.18
2007	\$50,000	1.8	\$59,419.46	\$8,368.82
2008	\$50,000	3.6	\$61,558.56	\$9,419.46
2009	\$50,000	1.3	\$62,358.82	\$11,558.56
2010	\$50,000	2.9	\$64,167.22	\$12,358.82
2011	\$50,000	3.4	\$66,348.91	\$14,167.22
2012	\$50,000	1.2	\$67,145.10	\$16,348.91
2013	\$50,000	2.4	\$68,756.58	\$17,145.10
2014	\$50,000	3.1	\$70,888.03	\$18,756.58
2015	\$50,000	1.6	\$72,022.24	\$20,888.03
2016	\$50,000	1.1	\$72,814.48	\$22,022.24
2017	\$50,000	2.1	\$74,343.59	\$22,814.48
2018	\$50,000	2.3	\$76,053.49	\$24,343.59
2019	\$50,000	1.8	\$77,422.45	\$26,053.49
2020	\$50,000	-0.4	\$77,112.76	\$27,422.45
TOTAL				\$195,794.87

Source: Australian Bureau of Statistics, *Consumer Price Index, Australia* (6401.0). As found at <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/consumer-price-index-australia/latest-release#data-download> (accessed 14 April 2022)