

Review of the Tasmanian Law Reform Institute, 2022

Submission: Distinguished Emeritus Professor DRC Chalmers

To: South Australian Law Reform Institute
29 March, 2022

Summary Submission

I strongly and unequivocally support the continuation of the Tasmania Law Reform Institute (TLRI). There must be an independent and dedicated law reform body in Tasmania. Within the legal framework of our federal constitutional arrangements, the TLRI alone can receive and consider submissions for reform of the laws of this State of Tasmania. This is the predominant, though not the sole, reason for continuation (see below).

1. Background to the establishment of the Tasmania Law Reform Institute (TLRI)

Within a federal system, law reform is a significant embodiment and expression of our state's identity, history and individuality. Following the law reform zeal of the early 1970's, Tasmania followed the national trend and established its own Tasmanian Law Reform Commission (TLRC). The TLRC had its counterparts in most other states and territories with a national Australian Law Reform Commission dealing with federal law. The ALRC and each state law reform agency were on the same broad law reform journey; a journey that spans from a reference from an Attorney General, to research, particularly in other common law jurisdictions, to issue and discussion paper preparation, public consultation, revisions based on submissions and consultations to final report completion and presentation to the sponsoring Attorney General. Though, there were differences in the issues addressed

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and recommendations made by each law reform agency in Australia, they were not always significant within their own autochthonous histories.

The TLRC, like its counterparts in other states, received references on areas of law, conducted enquiries and hearings and prepared reports with recommendations for presentation to the Tasmanian Attorney-General. The recommendations frequently included recommendations for legislation. These reports were then tabled in the Tasmanian Parliament by the Attorney-General for consideration and implementation. The TLRC was comprised of representatives of the government, Law Society, Bar Association, Faculty of Law and, following the lead of the Law Commission for England and Wales, two *community* (also termed “lay”) members were appointed.

The TLRC produced approximately 52 major reports on a wide range of topics. Many of the Commission's reports were accepted and resulted in the introduction of legislation (S. McCullough, (1991/2) 11(2) UTLR 232-240) Law reform was, in its earlier days, sometimes characterised as aligned with a reformist side of politics. In fact, the TLRC was provably non-political. It was procedurally consultative and its recommendations evidence-based. Nevertheless, the term of the TLRC was not extended and it lapsed in 1989, despite support and criticism of the decision. The reasons presented for its demise were principally financial but there were clearly political motivations and reasons.

The multi-member TLRC was replaced by a single Law Reform Commissioner beginning in 1989 (*Law Reform Commissioner Act 1988 (Tas)*). There were two Law Reform Commissioners who held the office consecutively. This trimmed-down budget version of law reform was also abolished. During their combined eight years, the two Commissioners completed and presented some 20 reports during their consecutive periods. Again, the government did not extend the sunset clause in this establishing Act and the office of the Tasmanian Law Reform Commissioner lapsed in mid-1997.

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2. The establishment of the Tasmania Law Reform Institute

Support for law reform remained strong amongst many sections of the Tasmanian community, interest-groups, the legal profession and the staff and students of the Faculty of Law. In the serendipity of a meeting with the chair of the Alberta Law Reform Institute (ALRI) in Canada and subsequent discussions and correspondence, the idea of a Tasmanian version of the ALRI germinated. The key consideration was that a Tasmanian version of the ALRI would not require the legislative or funding imprimatur of the State Government. Rather a Tasmania Law Reform Institute would be a partnership of interested parties with research, facility, consultation and expertise contributions from parties, as well as some financial support from each.

The initiative was first raised and discussed within the Faculty of Law and University. A summary proposal was prepared and, subsequently discussed with the Attorney-General and Government, the law profession (both Law Society and Bar Association) and the judiciary. The idea attracted strong overall support, particularly the formal involvement of the Law Society and the Faculty of Law.

A Tasmanian version of the Alberta Law Reform Institute was agreed. The Tasmania Law Reform Institute (TLRI) was established in 2001 by formal agreement of the University of Tasmania, the Law Society and the Tasmania State Government.

3. The functions and record of the Tasmania Law Reform Institute

The functions of the TLRI are consistent with those of a traditional common law reform body, namely, to review an area of the law with a view to modernisation, elimination of defects, simplification or consolidation and uniformity with laws of other States and the Commonwealth (see <https://www.utas.edu.au/law-reform/history>).

The TLRI operates under the governance of a Board that includes the

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Director of the TLRI, who is also an academic member of the Law School staff, appointed by the UTAS Vice Chancellor. The TLRI Board also has representatives from the judiciary, the Law Society and Bar Association as well as two “co- opted” members and a non-legal community member.

The University and Faculty also support the TLRI with the allocation of office space and access to the Law Library. Professor Kate Warner was the first, and an outstanding Director from 2001 until her appointment as the Tasmanian State Governor. She was followed by two equally outstanding directors, Associate Professor Terese Henning and, currently Associate Professor Brendan Gogarty.

Significantly, the TLRI is not restricted to references from the Tasmanian Attorney-General. Like the model Alberta Law Reform institute, our TLRI receives and operates on references referred by its Board. The TLRI may also consider and include in its agenda, its own reform projects. Unlike most law reform agencies, the TLRI Board has the privilege of deciding and setting its own agenda for law reform projects. Its agenda is not set or directed by the Attorney General.

The TLRI foundation Agreement provides that the TLRI may consider and accept proposals not only from the Attorney-General but also, importantly, from the community, community groups, the Parliament, the judiciary and the legal profession. The TLRI has taken on proposals, as examples, from the judiciary, the Children’s Commissioner, the UTAS Vice Chancellor, the Shadow Attorney-General, as well as members of the public.

The TLRI has been highly productive and has undertaken an impressive and diverse range of law reform projects. Significantly also. the TLRI not only sets its own agenda but also decides on the timing of the release of its reports and recommendations.

The TLRI also embodies the law reform philosophy and commitment ethos within our Law School. One of the features of the TLRI University-based law reform model is the opportunities available to students to be actively

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involved in law reform. This can be done through supervised research projects or formally funded under post-graduate student projects within successful applications for Australian Research Council Grants. There are also benefits in a flow of high-quality publications. In turn, TLRI projects themselves may also stimulate ideas for application for research grants.

The TLRI makes, I submit, a very positive contribution to the public profile of both our Law school and our University, within our State, nationally and, to a degree internationally. The TLRI is a focus for real and informed debates on actual reform issues, subject, of course to confidentiality assurances, where applicable. There TLRI invariably enjoys positive coverage in the media accompanying the release of both its Discussion Papers and its Final Reports. Another empirical measure for the success of the TLRI is its record in terms of the acceptance and implementation of its reform recommendations. It should be recognized that recommendations in some TLRI Reports may not be accepted and implemented. As an example, the TLRI's recommendations for a Charter of Rights have so far not been implemented.

Critically, many, if not all of the TLRI's projects and reports focus on the laws of Tasmania. The TLRI's work could not, jurisdictionally be undertaken by any other Australian law reform agency.

4. Tasmania Law Reform Institute - Continuation

Within the operational review cycle procedures of our University, this Review presents an opportunity to consider and review the operation, performance, governance and funding of the Tasmania Law Reform Institute.

I strongly support the continuation of the Tasmania Law Reform Institute (TLRI) for the following reasons:

4.1 Benefits to our State

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- Jurisdictionally, the TLRI alone can receive and consider submissions for reform of the laws of this State of Tasmania;
- The TLRI makes a positive contribution to the public profile of our State, nationally and, to a degree internationally.

- The TLRI has a proven record of highly productive sustained law reform work with over forty major reports on areas of Tasmanian law, particularly our laws on crime, property, commissions of enquiry and guardianship and administration (<https://www.utas.edu.au/law-reform/publications/completed-law-reform-projects> list dated September 2019)
- The TLRI has an established record of public consultation with the Tasmanian community and organisations in the preparation and finalisation of its reports.
- The TLRI has an excellent record of value-for-money law reform consultation, research and report preparation and completions.
- The work and recommendations of the TLRI have benefited the Tasmanian community.

4.2 Benefits to our University

- The TLRI makes a positive contribution to the public profile of our Law Faculty and University.
- The TLRI has worked collaboratively within its College of Arts, Law and Education (CALE) and the University of Tasmania
- The TLRI has a track-record of affording opportunities for undergraduate and post-graduate involvement in its research, consultation and report preparation work.
- The TLRI contributes significantly to the research profile and output of the Law School.

4.3 Benefits nationally

- The TLRI, based on the model of the Alberta Law Reform Institute,

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Canada, has been replicated, with success in both the Australian Capital Territory and South Australia.

5. Final Comment

I understand that, procedurally, your Review will extend opportunities to make oral submissions. May I indicate now that I would value an opportunity for an interview and to make some general comments about our TLRI's current aims and objectives, its governance arrangements and its future funding.

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