

T A S M A N I A  

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L A W R E F O R M  

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I N S T I T U T E

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## Annual Progress and Financial Report 2012

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### **1. Structure, Board Members and Staff**

The Institute was established on 23 July 2001.

The functions and operations of the Institute are undertaken by its director, with assistance from Board members, research assistants and Law Faculty staff and students.

All written proposals for law reform projects are presented to the Board, which then makes recommendations for consideration by the Institute (Tasmania Law Reform Institute Renewal Agreement, clause 3.3), including identifying a recommended project's extent, time for completion, expected output and cost (clause 3.4).

#### *Board members*

Professor Kate Warner, Director of the Institute, appointed by the Vice-Chancellor of the University of Tasmania

Professor Margaret Otlowksi, Dean of the Faculty of Law at the University of Tasmania

The Honourable Justice AM Blow OAM, appointed by the Honourable Chief Justice of Tasmania

Simon Overland, appointed by the Attorney-General (appointed September 2012)

Rohan Foon, appointed by the Law Society (appointed March 2012)

Terese Henning, appointed by the Council of the University

Craig Mackie, nominated by the Bar Association

Ann Hughes, community representative

#### *Legal researchers during 2012*

Dr Helen Cockburn BA, LLB (Hons), PhD (also Executive Officer)  
Jenny Rudolf LLB (Hons)  
Dr Caroline Spiranovic BA (Hons), PhD  
Esther Newitt LLB (Hons)  
Dr Rebecca Bradfield BA/LLB (Hons), PhD  
Bruce Newey BA, LLB, LLM  
Pip Shirley LLB (Hons) MBA, MPP  
Amelia Higgs  
Kate Stewart

## **2. Activities**

### ***(a) Board meetings***

The Board held three formal meetings in 2012 (13 March, 22 May and 24 September), all held at the University Law Faculty. In addition, Board members' approval to undertake two projects was sought by email.

### ***(b) Projects***

#### ***Completed law reform projects***

##### *Tendency and Coincidence Evidence and Hoch's Case*

This project was approved by the Board in November 2006 and considers the operation of sections 97, 98 and 101 of the *Evidence Act 2001* in the context of sexual offence cases. The rules governing the admissibility of tendency or coincidence evidence continue to cause difficulties for complainants, prosecutors and judges, particularly in cases of sexual assault involving multiple complainants with some association. The project considered the need for amendments to the law designed to lessen the exposure of a complainant to repeated cross-examination, and to avoid repeated voir dieres, appeals and retrials. The Institute received a grant of \$10,000 from the Solicitor's Guarantee Fund in 2011 towards the production of the Final Report. The Issues Paper was released in September 2009 and the Final Report was released in February 2012. The report made recommendations for fundamental changes to the laws governing the conduct of sexual assault cases where an accused is charged with offences against multiple complainants. Notably, the report recommended that questions of concoction should not be determined by a judge in a preliminary hearing but should be determined by the jury at the trial.

##### *Male Circumcision*

This project originated in a request from the Children's Commissioner to review the current law regulating the circumcision of male children in Australia, with particular reference to Tasmania. The Board approved the project in February 2008. An Issues Paper was released in June 2009. The Issues Paper was prepared by Warwick Marshall as a Masters project, under the supervision of Professor Margaret Otlowski and Professor Kate Warner. Funding support for the project was received from a postgraduate research scholarship. The project examined the criminal and civil responsibility of those who perform, aid or instigate the non-therapeutic circumcision of male children. It generated much interest and 126 written submissions were received. The Final Report, also prepared by Warwick, was released in August 2012. It made a series of recommendations including a general prohibition on the circumcision of incapable minors with an exception for well-established religious or ethnicity motivated circumcisions.

### *Sexual Offences against Young People*

In September 2010, following a controversial Tasmanian case involving the prostitution of a 12 year old girl, the Attorney-General requested the Tasmania Law Reform Institute to review the sections of the *Criminal Code* dealing with the crime of sexual intercourse with a young person and the defence of mistake as to age. The final project plan included a consideration of the mistake as to age defence in relation to all sexual offences involving children and the interaction of the consent and mistake as to age defences. The Attorney-General approved a request from the Institute for an additional \$5,000 in funding to complete this project. An Issues Paper was released in May 2012. It attracted 20 written submissions. In addition two oral submissions were received. The Final report was released in October 2012. It contained 16 recommendations. While stopping short of recommending a 'no defence age', the report proposed further limitations on the defence of mistake as to age which would require, in addition to the requirements that the mistake be both honest and reasonable, that the defendant took all reasonable steps to find out the young person's age. The report also made recommendations in relation to the onus of proof and the extra-territorial application of the offence of maintaining a sexual relationship with a young person.

### ***Ongoing law reform projects***

#### *Protecting the Anonymity of Victims of Sexual Crimes*

This project arose from the same case which sparked the Institute's inquiry into sexual offences against young people. Board member, Craig Mackie, considered that media reporting on the case may have breached the prohibition against identifying the complainant in sexual offences cases which is contained in s 194K of the *Evidence Act 2001*. His reference to the Institute was supported by the then Commissioner for Children (Tasmania), Paul Mason. An Issues Paper was released in August 2012. It examined the operation and scope of s194K of the *Evidence Act 2001*. Although the project arose in the context of a child sexual offence case, the paper also considered how the provision operates more generally. Central to the inquiry are questions about the nature of the prohibited details and who should be prevented from making the identification. The Final Report is currently being prepared and will be released early in 2013.

### ***New law reform proposals and projects***

The Institute considered five proposals for reform projects in 2011. Two were accepted, two were deemed inappropriate as projects for the Institute and consideration of one other proposal has been deferred.

### **New law reform projects**

#### *Marriage Equality Research Paper*

In November, Rodney Croome of Australian Marriage Equality requested the Institute to examine the issues arising in relation to the Tasmanian government's recent unsuccessful attempt to introduce same-sex marriage legislation. The objective of this discussion paper is not to decide if the Bill is constitutional but to present in an easy-to-understand way:

- who can potentially challenge the Bill, and on what basis;
- the arguments for and against the constitutionality of the Bill that would be presented in the event of a High Court challenge; and
- a realistic assessment of what the costs would be if Tasmania lost.

The paper is being prepared by a recent graduate of the Law school, Amelia Higgs, who completed a supervised research project on the topic as part of her undergraduate degree. A grant to support further research has been secured from the Premier's Discretionary Fund and additional funding will also be sought in the next round of grants from the Solicitor's Guarantee Fund. It is anticipated that the paper will be published in April 2013.

### *Self-defence*

The Attorney-General, The Hon. Brian Wightman, has requested that the Institute conduct an examination of the law in Tasmania relating to self-defence and provide advice on whether the law should be amended. The request comes in response to concerns raised with him by the Director of Public Prosecutions that the current Tasmanian law on self-defence, as contained in s 46 of the *Criminal Code*, is too lenient and is out of step with modern standards. The project will consider the interaction of s 46 with the insanity provisions and the defence of intoxication, the desirability of consolidating the defence of self-defence with related defences, arguments for consistency between the *Code* provisions, s 46 and s 39 and will also include a review of national and international case law and legislative provisions on self-defence. This will be a far-reaching enquiry that raises a number of complex practical and theoretical legal issues. The Issues Paper is currently in a very early draft form and it is anticipated that it will be released towards the middle of 2013.

### ***Proposals not undertaken***

#### *Property Law Project*

This project was first discussed at the June meeting of the TLRI in 2010. It was intended to examine whether property law Acts in Tasmania, in their current form, support an efficient and effective system of property rights and transactions. A project plan was prepared and Julia Wheeler, a final year law student, was recruited to undertake a supervised research project on the topic. Julia's research paper was completed in June 2012. She identified two developments at the national level towards harmonisation of property transfer legislation and it was decided that it was not appropriate to proceed with the project. Instead, Julia's paper will be published as a TLRI Research Paper which can feed into the national project.

#### *Wind Turbines*

The TLRI received a reference proposal from Mr Lynden Griggs, Senior Lecturer at the Faculty of Law, relating to the installation of small scale wind turbines. Preliminary research was undertaken on the feasibility of the reference as a project for the Institute. The reference was initially approved by the Board. However, following a meeting with representatives from the Department of Justice (including the Tasmanian Planning Commission) in October 2012 it became clear that there would be little benefit in proceeding with the reference. The Commission has undertaken considerable work in this area to date, it has significant expertise in the area and the work forms part of a larger strategy to encourage and develop state wide consistency in planning issues which will enhance business confidence and aid in economic development.

#### *Spite Hedges*

In 2012 the Institute has received several references relating to neighbour disputes about problem trees and hedges. Dr Vanessa Goodwin MLC wrote to the Institute in support of two of her constituents who had requested that the Institute examine the issue. The Institute has yet to decide whether it is appropriate to undertake this project. It may be that some of the issues will be addressed within the larger strategy of state wide planning consistency referred to above. It may be that the existing mechanisms to resolve neighbour disputes are generally

sufficient. It also seems that the Government has little appetite for reform in this area. In correspondence with Dr Goodwin, the Minister for Planning stated, '[A]s with most private disputes involving neighbours, the matter is best addressed by the neighbours dealing successfully with the matter themselves.' However, the proposal remains on the Institute's agenda.

### ***(c) Additional activities***

#### *Wind turbines*

Although, as noted above, the wind turbines project was ultimately not proceeded with approximately 40 hours was devoted to initial background research and the development of a project plan.

#### *Student engagement*

As in previous years the Institute has continued the practice of recruiting law students to work on projects or to explore the feasibility of proposals. In 2012 Julia Wheeler completed a supervised research project on property law reform in Tasmania and Amelia Higgs completed a supervised research project on the constitutionality of same-sex marriage legislation. Julia's report forms the basis of a TLRI Research paper and the work that Amelia has done ensures that much of the preliminary research on the Institute's same-sex marriage consultation has already been completed. While the Institute has access to a pool of talented volunteers the students also benefit from working closely with a professional body like the TLRI. Such collaborations also provide an opportunity to assess possible future employees for paid research work.

### ***(d) Addresses, presentations and consultations***

**Professor Kate Warner** made the following invited presentations:

28 May – Legal studies professional development day, 'The Tasmanian Law Reform Institute – An Update'.

22 June – The Law Society of Tasmania, 'Mistakes as to Age in Sex Offences – Do we Need Reform?'

13 September – The Australasian Law Reform Agencies (ALRAC) Conference 2012, 'Designing a Law Reform Inquiry' (facilitator).

**Dr Helen Cockburn** made the following invited presentation:

10 September – Address to the Tasmanian Youth Parliament on the workings of the Tasmanian Law Reform Institute and issues relating to law reform more generally.

### ***Summary of publications***

#### **2012:**

*Sexual Offences against Young People*, Final Report No 18 (October).

*Protecting the Anonymity of Victims of Sexual Crimes*, Issues Paper No 18 (August).

*Non-Therapeutic Male Circumcision*, Final Report No 17 (August).

*Sexual Offences against Young People*, Issues Paper No 17 (May).

*Evidence Act 2001 Sections 97, 98 & 101 and Hoch's case: Admissibility of 'Tendency' and 'Coincidence' Evidence in Sexual Assault Cases with Multiple Complainants*, Final Report No 16 (February).

**2011:**

*Consolidation of Arrest Laws in Tasmania*, Final Report No 15 (May)  
*Racial Vilification and Racially Motivated Offences*, Final Report No 14 (April)

**2010:**

*Criminal Liability of Drivers who Fall Asleep Causing Motor Vehicle Crashes Resulting in Death or Serious Injury*, Final Report No 13 (October).  
*Racial Vilification and Racially Motivated Offences*, Issues Paper No 16 (June).  
*Law of Easements in Tasmania*, Final Report No 12 (March).

**2009:**

*Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper No 15 (September).  
*Non-Therapeutic Male Circumcision*, Issues Paper No 14 (June).  
*Law of Easements in Tasmania*, Issues Paper No 13 (February).

**2008:**

*Sentencing*, Final Report No 11 (June).

**2007:**

*A Charter of Rights for Tasmania?*, Final Report No 10 (October).  
*Criminal Liability of Drivers who Fall Asleep Causing Motor Vehicle Crashes Resulting in Death or Serious Injury*, Issues Paper No 12 (September).  
*Criminal Liability of Organisations*, Final Report No 9 (April).

**2006:**

*The Establishment of a Drug Court Pilot in Tasmania*, Research Paper No 2 (December).  
*Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (October).  
*A Charter of Rights for Tasmania?*, Issues Paper No 11 (August).  
*Intoxication and Criminal Responsibility*, Final Report No 7 (August).  
*Consolidation of Arrest Laws in Tasmania*, Issues Paper No 10 (July).

**2005:**

*Criminal Liability of Organizations*, Issues Paper No 9 (June).  
*Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Issues Paper No 8 (June).  
*Intoxication and Criminal Responsibility*, Issues Paper No 7 (March).

**2004:**

*The Forfeiture Rule*, Final Report No 6 (December).  
*Vendor Disclosure*, Final Report No 5 (September).  
*Vendor Disclosure*, Issues Paper No 6 (June).  
*Offending While on Bail*, Research Paper No 1 (May).

**2003:**

*The Forfeiture Rule*, Issues Paper No 5 (December).

*Physical Punishment of Children*, Final Report No 4 (November).  
*Report on the Commissions of Inquiry Act 1995*, Final Report No 3 (September).  
*Adoption by Same Sex Couples*, Final Report No 2 (May).  
*Custody, Arrest and Police Bail*, Final Report No 1 (March).  
*Adoption by Same Sex Couples*, Issues Paper No 4 (February).

**2002:**

*Physical Punishment of Children*, Issues Paper No 3 (October).  
*Sentencing*, Issues Paper No 2 (August).  
*Custody, Arrest and Police Bail*, Issues Paper No 1 (March).

### 3. Financial Statement for the period 1/1/12 - 31/12/12

Accumulated funds from 2011	\$91,864.00
<b>Income</b>	
Standard grant from State Govt Dept of Justice	\$50,000.00
State Government research consultancy	\$14, 501.50
<b>Total Funds Available</b>	<hr/>
	<b><u>\$64, 501.50</u></b>
<b>Expenditure</b>	
<b>Salaries</b>	
Salary	\$52,514.13
Superannuation	\$4,726.22
Payroll Tax	\$3,491.77
Workers Comp. Insurance	<u>\$367.65</u>
	\$61,099.77
<b>Non-Salary expenditure</b>	
General travel	\$6175.72
Publications	\$4783.00
Telephone	\$528.53
Entertainment	\$321.21
FBT Expense	\$332.10
Other	<u>\$30.91</u>
	\$12,171.47
<b>Total Expenditure</b>	<hr/>
	<b><u>\$73, 271.24</u></b>
<b>Balance of Funds as at 31/12/12</b>	<hr/>
	<b><u>\$83,094.26</u></b>

## University Contributions (in kind)

### Academic Support\*

*Salary and salary on-costs*

Prof. Kate Warner (Director) 30 days @ \$1,822	\$54,660.00
Prof. Margaret Otlowski (Board member) 4 days @ \$1,822	\$7,288.00
Terese Henning (Board member) 8 days @ \$1,327	\$10,616.00
Lynden Griggs (consultant) 6 days @ \$1,327	\$7,962.00

### Administrative Support\*

*Salary and salary on-costs*

David McGuire 3 days @ \$1,123	\$3,369.00
Rachael Ormerod 3 days @ \$907	\$2,721.00
Matt Taylor (computer) 7 days @ \$907	\$6,349.00

**Office and Running Costs (Law Reform Inst. Office) \*\*** \$9,495.00

### **Total**

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**\$102,460.00**

\* calculated on University consultancy rates, exclusive of GST

\*\* includes office rental, computer depreciation, furniture depreciation, stationary, heating and electricity and use of fax, photocopier and printer.