



Tasmanian Council of Social Service Inc.

Review into the Tasmanian Law Reform Institute

April 2022



**INTEGRITY
COMPASSION
INFLUENCE**

About TasCOSS

TasCOSS's vision is for one Tasmania, free of poverty and inequality where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry in Tasmania; and to challenge and change the systems, attitudes and behaviours that create poverty, inequality and exclusion.

Our membership includes individuals and organisations active in the provision of community services to Tasmanians on low incomes or living in vulnerable circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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Introduction

Thank you for the opportunity to participate in the current review ('the Review') of the Tasmanian Law Reform Institute ('the TLRI'). As the peak body for community services in Tasmania, TasCOSS has benefited from the extensive and specialist research engaged in by the TRLI on numerous occasions. We further note the work of the TRLI also promotes justice and equality, whilst also providing opportunities for the Tasmanian community to receive comprehensive information in relation to complex social and legal issues.

The work of the TLRI has also provided comprehensive law reform in relation to issues of particular importance for marginalised groups. For example, recent projects have included reports and research projects relating to same-gender adoption and marriage, the legal recognition of sex and gender and conversion practices, issues which have been particularly relevant for LGBTQIA+ Tasmanians. There are many more examples of instances where independent, comprehensive and high-level research has been, and is likely to continue to be, of benefit to vulnerable communities, as well as supporting the community as a whole.

We understand the purpose of the current review is to reflect on the current structure, governance and funding of the TLRI, as well as the stated objectives of the TLRI and its relationship to its founding members.

TasCOSS is supportive of the work of the TLRI and strongly advocates for its continued operation. Our submission will highlight the benefits of having an independent, expert advisory body which is able to provide research and advice on law and social reform, as well as reflections relating to the Terms of Reference of the review.

Overview

The TLRI has been in operation since 2001 and was founded through an agreement between three parties: the Law Society of Tasmania, the Tasmanian Government and the University of Tasmania. The functions of the TRLI are outlined in the Founding Agreement between these three parties,¹ and include consideration of law reform proposals from the Attorney-General, conducting research and reviews relating to existing and/or proposed laws and working in collaboration with other law reform agencies. The Founding Agreement also specifies the TLRI can receive proposals for projects from a wide range of stakeholders, including the judiciary or legal profession, Parliament, the Attorney-General or community members and/or groups.

The staffing structure of the TLRI is outlined in the Founding Agreement and includes a Director, a Board and the possibility of employing administrative staff as needed. According to the Founding Agreement,

¹ Tasmania Law Reform Institute, Founding Agreement (23 July 2001) and Renewal of Agreement (23 November 2019) accessed at <https://www.utas.edu.au/law-reform/history>.

the Director is appointed by the Vice-Chancellor of the university,² and the Board must be comprised of the following members:³

- The Director;
- The Dean of Law from the University of Tasmania;
- A person appointed by the Chief Justice of Tasmania;
- A person appointed by the Attorney-General of Tasmania;
- A person appointed by the Law Society of Tasmania;
- A person appointed by the Council of the University of Tasmania; and
- No more than three co-opted members, one of whom shall be a member of the Tasmanian Aboriginal community.

Since it was established in 2001, the TLRI has engaged in a number of research and law reform projects, as well as providing feedback on existing and proposed legislation.

Terms of Reference

TasCOSS is supportive of the continuation of the TLRI, noting the positive impact of the research and work of the TLRI for our organisation, our members and the broader Tasmanian community. We further note most Australian states and territories (with the exception of the Australian Capital Territory) have a law reform advisory body of some kind which engage in similar work to the TLRI. Although there are other bodies providing expert legal research and reviews (for example, the Sentencing Council of Tasmania), TasCOSS highlights the benefits of an independent law reform body which can also work collaboratively with other organisations (including our member organisations), and strongly recommends ongoing support and funding of the TLRI to ensure this work can continue.

The following is a brief response to the terms of reference of the Review:

Whether the aims and objectives of the Institute, set out in its Founding Agreement, require modernisation, clarification or amendment

TasCOSS is supportive of the objectives as outlined in the Founding Agreement.⁴ In particular, we note the ability of the TLRI to engage in research and reviews as requested by various groups and communities,

² Ibid, 5.1.

³ Ibid, 3.2.

⁴ The objectives and functions of the TLRI are outlined in the Founding Agreement at 2.2:

- (a) To conduct reviews and research on areas specified by the Board; and
- (b) To conduct these reviews and research, where appropriate on a consultancy basis; and
- (c) To consider proposals from the Attorney-General for the reform of the law;
- (d) To conduct reviews and research on proposals for reform of the law referred by the Attorney-General; and
- (e) To review an area of law with a view to –
 - (i) the modernisation of the law; and
 - (ii) the elimination of defects in the law; and
 - (iii) the simplification of the law; and
 - (iv) the consolidation of any laws; and

not only the Attorney-General or Government.⁵ TasCOSS is very supportive of the clauses which confer this power on the TLRI and recommend that any changes to the structure or governance of the TLRI allow for the institute to continue to perform this function.

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

The independent nature of TLRI is reflected in the objectives and functions outlined in the Founding Agreement, which allows for research and reviews to be conducted following recommendations or referrals from a broad range of agencies. The composition of the Board and the role of the Board as outlined in the Founding Agreement work to promote independence and cross-sector collaboration, which we identify as strengths of the current model. The nature of the Founding Agreement, which is a tripartite agreement between the Law Society, the Tasmanian Government and the University of Tasmania, is also a reflection of the independent nature of the TLRI.

As noted above, TasCOSS is strongly supportive of having an independent law reform/advisory body. We would also be supportive of measures or amendments which could safeguard the independence of the TLRI, which could include the following:

- Amending the Founding Agreement to expressly state the independence of the TLRI both from the three founding bodies (the Law Society, the Tasmanian Government and the University of Tasmania);
- Amending the Founding Agreement to include a provision conferring sole decision-making power on the TLRI in relation to accepting references or proposals for research, to ensure the independent role of the Institute in relation to the work it engages in and safeguard against potential influence from external parties; and
- Amending the provisions of the Founding Agreement in relation to the appointment of the Director to allow for Board participation in decisions relating to the appointment of a person for this position.

The position, role and relationship of the Institute to its founding members

As stated above, TasCOSS strongly supports a model which ensures independence from the founding members of the TLRI.

(v) the repeal of laws that are obsolete or unnecessary; and
(vi) uniformity between laws of other States and the Commonwealth; and
(f) To make reports to the Attorney-General or other authorities arising out of any review and, in those reports, to make recommendations ; and
(g) To work with the law reform agencies in other states and territories on proposals for reform of the laws in any other jurisdiction or within the Commonwealth;
in accordance with the University's standard procedures for the operation of Research Centre's

⁵ As per 4.1 of the Founding Agreement, the TLRI can receive proposals for law reform projects from the judiciary, the Attorney-General, The Legal Aid Commission and other government departments, the Parliament, the legal profession, members of the community or community groups.

The Terms of Reference include a question about the position of the Institute in relation to the research capacity and priorities of the University. We strongly support an Institute which can engage in research for the principal benefit of the Tasmanian community, regardless of the research priorities of the University. To align the priorities of the TLRI with the research objectives of the University could significantly compromise the independence of the Institute by giving disproportionate power to only one of the three founding bodies and would inappropriately restrict the nature and scope of its work.

For similar reasons we affirm the importance of having a body that is independent of Government to provide research and information relating to law reform proposals. TasCOSS believes that any provisions which could limit the ability of the TLRI to accept referrals for law reform (for example, provisions which only allow for referrals to come from the Tasmanian Government or Attorney-General) could significantly limit the scope and effectiveness of the work of the Institute, as well as potentially compromise its independence.

TasCOSS strongly believes the Institute must also be generally independent in nature, and not bound to any organisation, group or community who could potentially seek to advance their interests through the TLRI's work. To function as intended, any funding or support provided to the TLRI cannot be perceived to have influenced in any way the outcome of any project undertaken by the Institute.

The adequacy and appropriateness of the Institute's current constitution, governance arrangements and reference process

TasCOSS is supportive of a model which promotes the independence of the TLRI and encourages collaboration between the judiciary, legal profession, government, university and community. As noted above, we support the continuation of current provisions (outlined in the Founding agreement) which allow for referrals for law reform projects from a wide range of stakeholders. Although this may be a difference between the Tasmanian model and law reform advisory bodies in other jurisdictions,⁶ TasCOSS believes this to be a strength of the Tasmanian model and strongly encourages this to continue. We further note the ability to receive law reform proposals from a wide range of stakeholders is not unique to Tasmania and exists in models from other jurisdictions, including South Australia⁷ and the Northern Territory.⁸

We believe the work and independence of the TLRI could be further strengthened by including a provision in the Founding Agreement to allow for the Institute to engage in law reform work on its own motion, including referrals from Board members, as well as receiving proposals from external bodies. We also

⁶ For example, the Law Reform Commission of Western Australia can only receive proposals for law reform from the Attorney-General pursuant to s11 of the *Law Reform Commission Act 1972* (WA). A similar provision exists in the Queensland legislation: see s10 of the *Law Reform Commission Act 1968* (Qld).

⁷ According to the South Australia Law Reform Institute website, the Advisory Board can receive proposals for law reform projects from a wide range of bodies and groups, including: the Attorney-General, the University of Adelaide, the South Australian judiciary, the Legal Services Commission of South Australia, the Law Society of South Australia, the South Australian Bar Association and other representative organisations having standing in the community – see <https://law.adelaide.edu.au/research/south-australian-law-reform-institute#history-of-law-reform-in-south-australia>.

⁸ See the stated objectives in the Northern Territory Law Reform Committee, Constitution of the Law Reform Committee of the Northern Territory, 2 (a): *To receive and consider proposals from any source for review of the law in the Northern Territory*

recommend the Founding Agreement include a provision in s4.1 to allow for referrals from Government agencies, such as the Commissioner for Children and Young People.

As noted above, we view the existence of a representative Board as a strength of the current model and believe that a diverse Board composed of professionals from a wide range of areas (not only from the legal, government or academic sphere) is needed to ensure the work of the TLRI is relevant and responsive to the needs of Tasmanians. We are also supportive of a model which requires the Director to be part of the Board, as we are in favour of a model in which the TLRI staff work collaboratively with the Board in assessing, accepting and working on proposals. As noted above, we encourage the Review Team to consider whether further provisions are necessary to ensure the ongoing collaborative relationship between the Director and the Board, including (but not limited to) provisions allowing for Board input in the appointment process.

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

The staffing arrangements of the TLRI are not dissimilar to similar bodies in other jurisdictions: for example, the South Australian Law Reform Institute currently has three staff members (a director, deputy-director and part-time administration officer). Other jurisdictions which have a committee or board as part of their organisational structure have a similar membership to the TLRI's: the Northern Territory Law Reform Committee has 12 members, other than the chair; and the South Australian Law Reform Institute has an advisory board consisting of eight members.

The TLRI currently employs a full-time Director, who is provided advice and assistance by the Board. We understand there are also arrangements for the TLRI to receive further support from the Law School of the University, particularly from law school students, who can provide research support and assistance. We note, however, that reliance on students as well as on other academic staff cannot be guaranteed. The work of the Institute requires a high level of academic and professional expertise and our consultations suggest the support provided by academic staff and students is insufficient to meet the current needs. TasCOSS believes the staffing model of the Institute should be commensurate with the complexity of the inquiries conducted by the Institute and the need for considerable community engagement to both prepare and present materials relating to law reform.

In relation to funding, our consultations also suggest the TLRI is currently operating under significant funding constraints. Although the principal objective of the TLRI is to engage in law reform, the practical reality of the current funding arrangements is that the Institute would be unable to operate effectively without applying for, and being awarded, additional money through funding grants for various projects. This process is time-consuming for the TLRI staff, impacting their ability to fulfill the key requirements of their position (such as comprehensive research, community engagement and education relating to law reform proposals).

Other jurisdictions are able to rely on partial funding from Government money allocated to the legal services sector. For example, in Victoria, money can be allocated to the Victorian Law Reform Commission

from the ‘public purpose fund’, a statutory fund which is intended to provide money for the regulation of the legal profession, as well as funding for projects which benefit the community. We understand the allocation of these funds is discretionary and approved by the State Government. The latest annual report explains that, [t]he Attorney-General may each financial year direct the Victorian Legal Services Board to pay an amount out of the Public Purpose Fund to the Victorian Law Reform Commission established under the Victorian Law Reform Commission Act 2000. These amounts are paid to it under Section 144 of the Legal Profession Uniform Law Application Act 2014.⁹ We are unsure, however, whether such a model could be adopted in Tasmania.

We again emphasise the importance of long-term sustainable funding to ensure the continuation of the Institute and to enhance its capacity to undertake its investigations in a timely and considered manner. Recent media articles (concerning proposed cuts to national bodies, including the Australian Law Reform Commission), have also highlighted that, ‘funding for accountability and integrity bodies must be made independent of the normal budget processes, to avoid government interference’.¹⁰

We recommend the Review consider additional staffing and funding options for the TLRI to ensure it can continue to meet its stated objectives. TasCOSS also reiterates the importance of the independence of the TLRI and encourages the Review to consider funding models which would safeguard this independence from the founding members.

⁹ Victorian Law Reform Commission, *VLRC Annual Report 2020–2021*, 42.

¹⁰ Christopher Knaus, ‘Federal budget cuts to integrity bodies spark calls for independent funding’, *The Guardian*, (online news article, 31 March 2022) <https://www.theguardian.com/australia-news/2022/mar/31/federal-budget-cuts-to-integrity-bodies-spark-calls-for-independent-funding>.