David Plater and John M Williams***

THE SOUTH AUSTRALIAN LAW REFORM INSTITUTE A DECADE ON: 'MAY YOU CONTINUE WELL INTO THE FUTURE'[1]

Abstract

The independent South Australian Law Reform Institute ('SALRI'), based at the Adelaide Law School, was established in December 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. This article considers the role and effect of SALRI during its first decade of operation and asks whether the initial pessimism expressed, notably by Michael Kirby, for the institute model of law reform and SALRI has been borne out. The authors examine the history and changing nature of law reform in South Australia. The authors draw on the legacy of Kirby at the Australian Law Reform Commission and identify, through SALRI's work to date, the key features of a modern and effective small law reform agency. While it is difficult to measure the success of a law reform agency, SALRI's efforts and effects over a decade are notable. It is argued that there is no one-size-fits-all model of law reform and that the institute model, whilst not without issues, has certain advantages, especially for a smaller jurisdiction like South Australia. The considerable output and impact of SALRI is discussed. It is concluded that SALRI's substantial and beneficial effect on law reform in South Australia to date belies its small size.

I Introduction

As South Australians we are proud that the foundations of our State were based on the ideals of social and democratic freedoms. The law and the legal system

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* BA, LLB (Monash), LLM (ICSL), PhD (Tas); Deputy Director, South Australian Law Reform Institute; Associate Professor, Adelaide Law School, University of Adelaide; Adjunct Senior Lecturer, School of Law, University of Tasmania.

** BA (Hons) (Tas), LLB (UNSW), PhD (ANU), Director, South Australian Law Reform Institute; Dame Roma Mitchell Chair of Law and Executive Dean, Faculty of Arts, Business, Law and Economics, University of Adelaide.

1 Frances Adamson, 'University of Adelaide: South Australian Law Reform Institute' (Speech, Government House South Australia, 26 October 2021) <https://www.governor.sa.gov.au/vice-regal-activity/speeches/tuesday,-26-october-2021>.

> play a vital role in ensuring those ideals are nurtured and remain relevant and responsive to today's society … Law reform is one of the significant and basic ways in which an on-going conversation can continue between our lawmakers, the justice system and the citizens they serve … There are many examples, known well to you I am sure, of how a long tradition of innovative law reform has transformed South Australia. This doesn't happen by chance. It relies on a society that is committed to equality and fairness and one that actively participates in forming the very laws that affect us all. To that end, the South Australian Law Reform Institute has played a valuable role during its 11 years of operation in researching, consulting, and recommending reforms; many of which have become law and shaped our community … May you continue well into the future your vital role in reviewing, researching and recommending reform.[2]

These comments were made on 26 October 2021 by Frances Adamson, the Governor of South Australia, at a reception at Government House to celebrate the 10th anniversary of the independent South Australian Law Reform Institute ('SALRI').[3] The Governor's comments raise not only the role of SALRI, but also the wider role and rationale of modern law reform.

How effective has SALRI proved since its establishment? Law reform agencies 'no longer have a monopoly over law reform activities'[4] and are only one player in a '"crowded field" of law reform agents that vary considerably in their format and function'.[5] There are many sources of law reform advice and research, both within and without government.[6] It is notoriously difficult to accurately assess or measure the success of a law reform body.[7] But in light of SALRI's 10th anniversary, some assessment of its output, impact, and success is timely. As Michael Kirby, inaugural President of the Australian Law Reform Commission ('ALRC') comments, '[n]o one owes a law reform agency a free lunch … If law reform bodies survive, it is generally because they are seen to be useful to government and to the communities they serve.'[8]

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2 Ibid.

3 SALRI's anniversary event was delayed by the COVID-19 restrictions.

4 Neil Rees, 'The Birth and Rebirth of Law Reform Agencies' (Conference Paper, Australasian Law Reform Agencies Conference, 10–12 September 2008) 9.

5 Patricia Hughes, 'Law Commissions and Access to Justice: What Justice Should We Be Talking about?' (2008) 46(4) *Osgoode Hall Law Journal* 773, 785.

6 David Weisbrot, 'The Future for Institutional Law Reform' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 18, 20–2 ('The Future for Institutional Law Reform').

7 Rosalind Croucher, 'Law Reform Agencies and Government: Independence, Survival and Effective Law Reform?' (2018) 43(1) *University of Western Australia Law Review* 78, 88–91 ('Law Reform Agencies and Government'); Brian Opeskin, 'Measuring Success' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 202, 202–21 ('Measuring Success').

8 Justice Michael Kirby, 'Forty Years of the Alberta Law Reform Institute: Past, Present, Future' (2009) 46(3) *Alberta Law Review* 831, 835 ('Forty Years of the Alberta Law Reform Institute').

This article examines the role and rationale of law reform and asks how effective or successful SALRI has been since its establishment — has SALRI 'earn[ed] [its] keep'?[9]

This article is divided into four parts. Part II briefly outlines the history of law reform in South Australia with a particular focus on comparing the design between SALRI and its precursors. Part III outlines that, although there is no one-size-fits-all law reform body, there are key features that modern law reform agencies possess and acknowledges the significant contribution that Kirby has made to frame this discussion. In particular, Kirby highlights those elements, or guides, that he considers to be essential to successful law reform. Part IV measures the achievements of SALRI and concludes that it has made an important contribution to the South Australian legal and social landscape.

II SALRI and the Legacy of Law Reform

The distance between reality and rhetoric is often perception. There is no shortage of instances where South Australia and its people have been noted for their reformist zeal. The founding of the Province of South Australia in the 1830s, based upon 'modern' aspirations for colonisation, has itself given rise to a distinctiveness that is hard to dismiss.[10] Indeed, the historian Douglas Pike famously characterised the founders' search for liberty and respectability as the quest for a 'paradise of dissent'.[11] Pike's description of South Australia has become a shorthand way of portraying a society willing to divert from the norm. Notwithstanding the regrettable, and near inevitable colonial conflict with First Nations Peoples, there were those who attempted to use the law to find a measure of justice and equality for all.

Through its laws, South Australia can claim a number of 'firsts': the Torrens system of land title;[12] the effective first Act for the incorporation of associations;[13] voting rights of women (including to stand for Parliament);[14] the first *Sex Discrimination Act* in Australia;[15] and the landmark 1975 decriminalisation of homosexuality;[16] ––

9 Hughes (n 5) 785.

10 See generally Paul Sendziuk and Robert Foster, *A History of South Australia* (Cambridge University Press, 2018).

11 See Douglas Pike, *Paradise of Dissent: South Australia 1829–1857* (Longmans, Green and Co, 1957).

12 *Real Property Act 1858* (SA).

13 *Associations Incorporation Act 1858* (SA). This Act provided a relatively simple and cheap means of incorporating a non-profit association formed for certain community purposes and of running the association after incorporation: see Greg Taylor, 'The Origins of Associations Incorporation Legislation: The Associations Incorporation Act 1858 of South Australia' (2003) 22(2) *University of Queensland Law Journal* 224.

14 *Constitutional Amendment (Adult Suffrage) Act 1894* (SA).

15 *Sex Discrimination Act 1975* (SA).

16 *Criminal Law (Sexual Offences) Act 1975* (SA).

these have all been results of effective advocacy and a response by a willing government and responsive legislature.

Each generation has had its own role in this narrative. The 1960s and 1970s are often highlighted as a time when South Australia was at the forefront of reform in the nation. Often associated with Premier Don Dunstan's progressive administration (1965–79), politics in South Australia were to be contrasted with the staid leadership in other states and territories. Paul Sendziuk and Robert Foster noted:

> Dunstan was cut from a different cloth and broke new ground by promoting Aboriginal rights, civil liberties, environmental issues and equality of opportunity for women, and by reinvigorating the arts. In doing so, he not only helped set the agenda for the modernisation of politics at federal and state levels, but also oversaw a period of profound cultural transformation in South Australia.[17]

A *South Australian Law Reform Committee (1968–87)*

The establishment of the South Australian Law Reform Committee ('Committee') in 1968 coincided with this progressive period. Its establishment was by government proclamation[18] and built upon the voluntary activities of the Law Society of South Australia ('Law Society').[19] The Committee comprised five members, drawn from nominations from the Attorney-General, the Law Society, the Adelaide Law School and the Leader of the Opposition. It was chaired by Justice Howard Zelling[20] and received virtually no funding.[21] An early reflection on its methodology highlighted that, while the Committee looked beyond itself for legal expertise, it acknowledged the limitations when reviewing areas that 'involve[d] considerations which are social rather than analytical'.[22] The Committee was acutely aware of its size and capacity. As David St L Kelly noted, 'in some ways [it] resembled … more closely the voluntary part-time bodies which preceded it than the highly organised, well-staffed law reform bodies established, for example, in England, in New South Wales and in Queensland'.[23]

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17 Sendziuk and Foster (n 10) 167.

18 Lieutenant-Governor (SA), 'Law Reform Committee: Establishment, Duties and Functions of' in South Australia, *South Australian Government Gazette*, No 41, 19 September 1968, 853–4.

19 D St L Kelly, 'The South Australian Law Reform Committee' (1967) 3(4) *Adelaide Law Review* 481.

20 Justice Zelling served as a Justice of the Supreme Court of South Australia from 1969 to 1986. Andrew Ligertwood interviewed Justice Zelling on the role of the Committee and the process of law reform in 1977: see Andrew Ligertwood, 'Law Reform in South Australia: An Interview with Mr Justice Zelling' (1977) 2(5) *Legal Service Bulletin* 178 ('An Interview with Mr Justice Zelling').

21 Ibid 180; St L Kelly (n 19) 485.

22 Ligertwood, 'An Interview with Mr Justice Zelling' (n 20) 483.

23 Ibid 484.

Writing in 1976, Andrew Ligertwood reflected that South Australia's law reform record was 'good'.[24] An advantage that the State had, he argued, was the support of three 'lawyer-politicians' in Don Dunstan, Len King (former Labor Attorney-General) and Robin Millhouse (former Liberal Attorney-General). Reflecting on the work of the Committee since its establishment, Ligertwood provided a realistic assessment that much of its work was 'technical' law reform and was in the area of 'lawyer's law'.[25] Given its size, the nature of the references, and an attitude amongst the Committee that 'policy is a matter for the Government', Ligertwood provided a gentle critique of the work to date and raised a larger question:

> Should there be a permanent independent law reform body with a mandate to make policy recommendations or should this be left to the politicians? This seems to be the most important question facing those interested in law reform in this State.[26]

When the Committee submitted its last report to the Attorney-General in 1987, it had completed 106 reviews.[27] The Committee's work ranged far and wide and reflected the fact that the major Commonwealth law reforms in the area of family and company law were yet to occur. The Committee dealt with matters relating to estates, family maintenance, women's rights, criminal law, powers of attorney, the inheritance of imperial laws in South Australia as well as actions against the Crown.[28] As highlighted by Ligertwood, the work largely focused on technical reforms without contemplating significant policy implications. This was undoubtedly a matter of resources as much as inclination.[29] The Committee was quietly disbanded in 1989, seemingly owing to the view that it was unnecessary, and duplicated the work of the Attorney-General's Department.[30]

B *SALRI (2010 – Present)*

In December 2010, John Rau, Attorney-General of South Australia, the Vice-Chancellor of the University of Adelaide and President of the Law Society, signed a Memorandum of Understanding ('MOU') establishing SALRI at the University of Adelaide. The reform agenda was, once again, being expanded beyond the Parliament and Government of the day. The Attorney-General explained SALRI's establishment in enthusiastic terms:

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24 Andrew Ligertwood, 'Law Reform in South Australia: An Overview' (1976) 2(2) *Legal Service Bulletin* 35, 35.

25 Ibid.

26 Ibid 36.

27 See 'Law Reform Committee of South Australia Reports Archive (1968–1987)', *Adelaide Law School* (Web Page, 18 October 2021) <https://law.adelaide.edu.au/research/south-australian-law-reform-institute/archive>.

28 See: ibid; Ligertwood, 'Law Reform in South Australia: An Overview' (n 24) 36.

29 Ligertwood, 'An Interview with Mr Justice Zelling' (n 20) 180.

30 The authors have been told this in conversation by various parties. There is no apparent record in Hansard or elsewhere of the demise of the Law Reform Committee.

> This is something which I regard as a very positive and exciting development for law reform in South Australia. Members may be aware that South Australia really has not had a law reform commission since the 1980s and up until now has been the only jurisdiction not to have one in any way, shape or form. That, however, is now a feature of the past. … [T]his is a very positive step for South Australia. I look forward to being able to keep the parliament advised of developments with the institute.[31]

SALRI is based on the institute model,[32] which originated in Alberta and is also used in Tasmania.[33] Thus, it draws on a close relationship between a tertiary institution and the practising legal profession. Under its terms of reference, SALRI is to conduct its reviews with a view to:

1. the modernisation of the law;
2. the elimination of defects in the law;
3. the simplification of the law;
4. the consolidation of any laws;
5. the repeal of laws that are obsolete or unnecessary; and
6. uniformity between laws of other states and the Commonwealth.[34]

With these guiding principles, SALRI provides reform recommendations to the Attorney-General for consideration. There is no particular hierarchy of how law reform should be approached. Movement towards uniformity of laws within the federation can be notoriously difficult[35] and, on occasions, may be measured in geological time.[36]

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31 South Australia, *Parliamentary Debates*, House of Assembly, 7 April 2011, 3378–9 (John Rau, Attorney-General).

32 The Alberta Law Reform Institute ('ALRI') was founded in 1968 under an agreement between the Alberta Attorney-General, the University of Alberta and the Law Society of Alberta. It is run by a Board and a full-time Director. Funding and support are provided by the three signatories as well as the Alberta Law Foundation: see Kate Warner, 'Institutional Architecture' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 55, 62 ('Institutional Architecture').

33 See ibid 62–4, 68. SALRI's MOU draws closely on the Tasmanian MOU and there are close links and joint research between SALRI and the Tasmania Law Reform Institute.

34 See also *Australian Law Reform Commission Act 1996* (Cth) s 21(1).

35 AF Mason, 'Law Reform in Australia' (1971) 4(1) *Federal Law Review* 197, 205–6.

36 See South Australia, *Parliamentary Debates*, House of Assembly, 31 May 2018, 814–15 (John Rau, Attorney-General). The former Attorney-General likened achieving national law reform to the pace of a glacier with the glacier the swifter of the two: at 814–15.

The subject of a reference may be at the request of the parties, such as the South Australian Attorney-General or the Law Society, but is ultimately determined by the SALRI Expert Advisory Board ('Advisory Board').[37] Therefore, unlike other law reform bodies, SALRI is not restricted to references from the government of the day.[38]

SALRI is small in size and is one of the smallest law reform bodies in the Commonwealth. John Williams has been the Director of SALRI since its establishment. The original Deputy Director was Helen Wighton, who sadly passed away in 2014.[39] In August 2015, David Plater became the Deputy Director. SALRI is ably supported by Louise Scarman, its Administrative Officer. The Director and Deputy Director both have other university roles and commitments.

Moreover, SALRI has no full-time employees as such. Louise Scarman, its indomitable administrative officer, is a part-time employee. Similar to its predecessor, SALRI receives limited funding from the State Government.[40] Given the size of the jurisdiction, the institute model does not receive the levels of funding available to statutory commissions like the English Law Commission, the ALRC,[41] the Victorian Law Reform Commission ('VLRC')[42] or government departments such as the Attorney-General's Department.[43]

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37 The Board consists of the SALRI Director and Deputy Director and nominees from: the State Attorney-General's Department (Dini Soulio, previously Ingrid Haythorpe); the Chief Justice (Stanley J, previously Gray J); the Law Society (Terry Evans); the Bar Association (Steven McDonald, previously Jonathan Wells); the University of Adelaide (David Bleby, retired judge of the Supreme Court); the Adelaide Law School (position currently vacant, previously Melissa De Zwart and Rosemary Owens); and Parliamentary Counsel (Aimee Travers). The Advisory Board also ably supports SALRI's work.

38 See also: LCB Gower, 'Reflections on Law Reform' (1973) 23(3) *University of Toronto Law Journal* 257, 260; Warner, 'Institutional Architecture' (n 32) 68.

39 'Helen sadly passed away in 2014. She was a tireless campaigner and worker for law reform in this and many other areas of the law and she started this important legislative project when she was at the Attorney-General's Department.': South Australia, *Parliamentary Debates*, House of Assembly, 7 May 2015, 1118 (John Rau, Attorney-General).

40 The Attorney-General's Department meets the costs of Ms Scarman's role, and the Director and Deputy Director's costs are met by the University of Adelaide.

41 The ALRC has operated under tight funding over recent years: see Rosalind Croucher, 'Re-Imagining Law Reform: Michael Kirby's Vision, Human Rights and the Australian Law Reform Commission in the 21st Century' (2015) 17(1) *Southern Cross University Law Review* 31, 45 ('Re-Imagining Law Reform'). In 2020–21, the ALRC had operating expenses of $2,713,000 and ten full-time and three part-time staff: see Australian Law Reform Commission, *Annual Report 2020–2021* (Report, 2 October 2021) 33, 43.

42 In 2020–21, the VLRC had a total annual income of $2,726,210 and 21 full-time, part-time, and casual staff: see Victorian Law Reform Commission, *Annual Report 2020–2021* (Report, 2021) 12, 22.

43 A lack of funds is a common complaint of all modern law reform bodies: see Alan Cameron, 'Law Reform in the 21st Century' (2017) 17(1) *Macquarie Law Journal* 1, 7.

Notwithstanding its size and resources, SALRI has been committed to the critical features of modern law reform. Consistent with its objectives, SALRI typically conducts extensive multidisciplinary research (often drawing on the work of other law reform bodies) and looks at similar law and practice and its operation in other jurisdictions (both in Australia and overseas). Further, SALRI consults widely with interested parties, experts, and the community. As with other modern law reform bodies, it has a focus on active and inclusive consultation processes.[44]

Based on the work and research undertaken during an inquiry, SALRI makes reasoned recommendations to the Attorney-General so that the government and Parliament can make informed decisions about any appropriate changes to law or practice. Its recommendations, obviously, do not necessarily become law. Rather, any decision on accepting and implementing SALRI's recommendations is entirely for the government and Parliament. In this way, SALRI does not undermine the democratic roles of these institutions.[45] As with similar law reform agencies or organisations, SALRI values its status as an independent non-partisan law reform body. It is not an advocacy body.

After a decade of operation, it is timely to assess and consider the effectiveness or success of SALRI. As with other law reform bodies, SALRI needs to be relevant and worthwhile to the needs of both the community and parliament. One has to be realistic in assessing SALRI's success over the last decade. There are obvious limitations of the institute model, not least its resources. SALRI lacks any statutory basis. It is also dependent upon additional funding to undertake any major reference.[46] Such funding is comparatively modest but is vital to enable SALRI to carry out any significant reference.

III Michael Kirby's Lament

Michael Kirby is synonymous with law reform in Australia. He served as first Chairman in 1975 until his appointment as the President of the New South Wales Court of Appeal in September 1984. It has been said that 'just about everything at the ALRC bears the imprint of Michael Kirby's vision'.[47] David Weisbrot, himself

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44 See generally Sarah Moulds, 'Community Engagement in the Age of Modern Law Reform: Perspectives from Adelaide' (2017) 38(2) *Adelaide Law Review* 441 ('Community Engagement in the Age of Modern Law Reform'). See also: Croucher, 'Law Reform Agencies and Government' (n 7) 80–3; below Part IV.

45 See also Brian Dempsey, 'Law Reform and Devolution: Consultation Processes and Divorce Law in Scotland' (2012) 63(2) *Northern Ireland Legal Quarterly* 227, 229–30.

46 Such funding may come from the Law Foundation of South Australia (for SALRI's references into succession law, powers of attorney and communication partners) or on a one-off basis from the State Government (such as for SALRI's references into abortion and surrogacy).

47 Croucher, 'Re-Imagining Law Reform' (n 41) 33.

a former president of the ALRC, wryly noted Kirby's national and international standing in the area:

> What is truly remarkable is that the institution is still so strongly identified with Kirby in the public mind. Almost any mention of the ALRC in Australia or overseas is met with a reaction along the lines of 'Oh, so you must know Michael Kirby …'[48]

Kirby has himself delivered many addresses and published numerous articles on the role and function of law reform.[49] Drawing on his considerable experience and insights, Kirby highlights those elements, or guides, that he considers to be essential to successful law reform and their agents. Critically, as will be argued below, Kirby's template must be viewed within the context that it was being made. Kirby entered the law reform fray at a time when significant social changes were on foot and the range of the possible was expanding. The modernisation of law reform processes was itself being contemplated. Writing in 1970, and reflecting on initiatives in the United Kingdom, Geoffrey Sawer suggested that '[t]he qualitatively new principle was that the *whole* body of the law stood potentially in need of reform, and there should be a *standing* body of appropriate professional experts to consider reforms continuously'.[50]

Discussing the Australian experience, Weisbrot noted that the ALRC 'fitted snugly' within the '"modernist" project and sensibility of the era'.[51] The 1970s was a time when there was faith in societal progress through law reform, where the agency of the law could bring about a solution to social ills.[52] As Justice Derrington notes, 'there was a "crusading" verve at the time in which it was thought that a new world was at hand, where change and decay in the legal system could be arrested and fixed. Law reform filled an institutional vacuum.'[53] There was 'the belief that government can, and should, play a central organising role in such activities'.[54] Kirby was at the vanguard of this law reform movement.

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48 David Weisbrot, 'Law Reform, Australian-Style' in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomson Reuters, 2009) 607, 607 ('Law Reform, Australian-Style').

49 A large collection of Kirby's speeches and papers are found on his website: 'Articles in Law Journals, Law Reviews and Miscellaneous Journals', *The Hon Michael Kirby AC CMG* (Web Page) <https://www.michaelkirby.com.au/content/articles-law-journals-law-reviews-and-miscellaneous-journals>.

50 Geoffrey Sawer, 'The Legal Theory of Law Reform' (1970) 20(2) *University of Toronto Law Journal* 183, 183 (emphasis in original).

51 Weisbrot, 'Law Reform, Australian-Style' (n 48) 612.

52 Weisbrot, 'The Future for Institutional Law Reform' (n 6) 19–20.

53 Justice SC Derrington, 'Law Reform: Future Directions' (Speech, Supreme & Federal Courts Judges' Conference, 29 January 2019) 1 <https://www.alrc.gov.au/wp-content/uploads/2019/08/Law-Reform-Future-Directions.pdf>.

54 Weisbrot, 'Law Reform, Australian-Style' (n 48) 612.

Kirby's contribution to law reform is immense.[55] Many of the attributes of law reform practised, if not pioneered, by Kirby during his time at the ALRC are now integral to modern law reform. These include: a multidisciplinary approach beyond law;[56] a focus on human rights and recourse to international treaties;[57] wide and inclusive consultation beyond the 'usual suspects';[58] reliance on sources beyond England and the common law; and the consideration of issues of policy.[59] However, the preferred ALRC model of law reform identified by Kirby must be seen as a product of the period. The social, political, and legal factors of the time supported the establishment and influence of ALRC-type commissions.

Turning to the essential attributes, Kirby observes 'the need for law reform to be committed to wisdom, truth and justice … In my experience, they are the guiding stars of law reform agencies throughout the world.'[60] With this as a preamble, Kirby prescribed ten attributes for success in modern law reform. These are:

1. be aware of fundamentals;[61]
2. be consultative;[62]
3. be empirical;[63]
4. be international;[64]
5. be realistic and flexible;[65]
6. be independent;[66]

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55 See ibid 607–38.

56 Weisbrot, 'The Future for Institutional Law Reform' (n 6) 24.

57 Croucher, 'Re-Imagining Law Reform' (n 41) 33, 35, 36–41.

58 JN Lyon, 'Law Reform Needs Reform' (1974) 12(2) *Osgoode Hall Law Journal* 421. See below Part IV.

59 See: Kirby, 'Forty Years of the Alberta Law Reform Institute' (n 8) 837–41; Michael Tilbury, 'A History of Law Reform in Australia' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 3, 13–15.

60 Justice Michael Kirby, 'Law Reform: Ten Attributes for Success' (Speech, Law Reform Commission of Ireland, 17 July 2007) 22 <https://cdn.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_17jul07a.pdf> ('Law Reform: Ten Attributes for Success'). See also Justice Michael Kirby, 'The ALRC: A Winning Formula' [2003] (82) *Australian Law Reform Commission Reform Journal* 58 ('The ALRC: A Winning Formula').

61 Kirby, 'Law Reform: Ten Attributes for Success' (n 60) 3.

62 Ibid 6.

63 Ibid 9.

64 Ibid 11.

65 Ibid 12.

66 Ibid 13.

7. be useful;[67]
8. be patient;[68]
9. be lucky;[69] and
10. be confident and bold.[70]

These attributes, which Kirby expounds upon, are largely jurisdictionally-agnostic. They still stand as good practice for the Law Commission of England and Wales as they do for the ALRC and SALRI. Further, the attributes do not themselves call out any distinction between the size of the law reform agency, though size (and thus resources) may impact on the capacity to achieve ends. However, upon closer scrutiny, Kirby does raise concerns about the institutional arrangements that are associated with bodies like SALRI. As Sarah Moulds characterises it, SALRI, as 'a modest law reform body … has not always enjoyed the admiration of its bigger, eastern state cousins or luminaries of the legal profession'.[71]

Against Kirby's attributes, there were initial gloomy predictions for SALRI. Drawing on the 'golden age'[72] of the ALRC and noting that the core functions of a law reform agency required 'dedicated, full-time personnel, both [as] commissioners and staff',[73] Kirby elaborated:

> A worrying feature of the current trend has been the noticeable shift back to volunteers.
>
> The demands that can be placed upon volunteers are necessarily more modest … Anyone wanting to maintain a facade of law reform activity, whilst spending virtually nothing on it and ensuring that the output would never seriously burden the decision-making capacity of government, will return to the safe haven of part-time volunteers. Those who see the challenges of law reform as larger and more urgent, will regard such a shift as deleterious and retrograde.[74]

Speaking more directly to the circumstances of the institute model, Kirby was initially unimpressed, describing it as

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67 Ibid 15.

68 Ibid 17.

69 Ibid 19.

70 Ibid 20.

71 Moulds, 'Community Engagement in the Age of Modern Law Reform' (n 36) 462.

72 Michael Kirby, 'Are We There Yet?' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 433, 434 ('Are We There Yet?').

73 Michael Kirby, 'Reforming Law Reform: Summing Up' (Speech, Conference on Law Reform on Hong Kong: Does It Need Reform?, 17 September 2011) <https://www.alrc.gov.au/news/reforming-law-reform-summing-up/>.

74 Ibid.

> under-funded, comprised of serious but over-worked lawyers, performing their law reform tasks at the 'fag end' of a busy day. Although some of the work of such bodies makes it into legislation, inevitably the output tends to be small. The pace is cautious. The research facilities (especially for social data) are tiny. The capacity for genuine public consultation is miniscule. And the ability to provide drafts of legislation to give effect to the reform ideas is generally non-existent. This is the danger of the model substantially utilised in Hong Kong and increasingly coming into fashion again in Australia.[75]

Kirby continued his critique by noting how the institute model was injurious to any modern law reform and in particular the capacity to engage in active and inclusive consultation. He stated that

> [i]t would not have been possible for that [law reform] task (or many other discharged by the ALRC) to have been performed in a few months; worked up by a part-time committee of busy people; and pushed forward with minimum consultation and trivial public and stakeholder engagement. Those who hold to such views should go back and live in the nineteenth century. They have no place in the current more demanding and transparent age. And basically they have a contempt for the right of citizens, including corporate citizens, to have the most modern, well-informed, efficient system of law that the state can reasonably provide.[76]

These are serious charges being levelled against the institute model — more so, given they are voiced by one of Australia's leading law reformers and jurists. A telling part of Kirby's analysis is that it echoes similar points that were made by those involved with the South Australian Law Reform Committee in the 1970s. Before returning to the matters outlined by Kirby, it is worth noting the conclusions of Moulds, a former SALRI researcher, who observed that

> [w]hile it is a small, part-time, law reform body, the experiences described above suggest that the Institute is beginning to make a significant mark on the legislative landscape in South Australia, renewing the State's strong reputation as a jurisdiction of innovative legislative practice and promoter of social justice. The

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75 Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform' (Speech, Conference on Law Reform on Hong Kong: Does it Need Reform?, 17 September 2011) <https://www.alrc.gov.au/news/changing-fashions-and-enduring-values-in-law-reform/> ('Changing Fashions and Enduring Values in Law Reform'). Kirby went on to declare:

> The very process of institutional law reform is much more likely to perceive and understand the basic problems and obstacles, and their potential enemies, than amateuristic [sic] resort to a part-time committee model, left over from the nineteenth century. Law is a major business in a modern society. It is an essential lubricant for the just and effective administration of conflict and interaction of competing interests in society. And if you do not spend money on doing it well, with appropriate expert and public input, the failures will be measured in communal discontent and anger and resort to shortcuts that may border on illegality. Or to zones of life where the relevance of law is excluded.

76 Ibid.

> above experiences also point to the Institute playing an important leadership role when it comes to innovation in consultation and community engagement strategies. For once, the Institute looks forward to continuing to prove the Hon Michael Kirby wrong![77]

Kirby laments that the scale, focus, and promise of law reform will be diluted with the return to the past with part-time, well-intentioned amateurs. It is a lament as much for the emerging situation in the states as it is at the Commonwealth level. Against such powerful critique, is there a reasonable and cogent response to Kirby? In part, it is to be found, not so much a recourse to the theoretical, but rather the outcomes achieved under the relevant law reform model. As Kirby comments, '[n]o one owes a law reform agency a free lunch … If law reform bodies survive, it is generally because they are seen to be useful to government and to the communities they serve.'[78] Law reform agencies no longer possess a monopoly over law reform activities[79] and are only one player in a '"crowded field" of law reform agents that vary considerably in both format and function'.[80] As Marcia Neave observes,

> [c]ommissions now face competition from a wide range of bodies which advise government on law and social policy reform including parliamentary committees, policy units within government departments, departmental and inter-departmental committees, Royal Commissions, standing committees of experts established to deal with particular areas of the law, ad hoc committees established to deal with a particular problem and private consultancy firms.[81]

'It is not much good', as Dame Mary Arden observes, 'having a Law Commission produce reports which are never implemented'.[82] Law reform bodies must remain 'useful' and justify their existence to the government, interested parties, and the community.[83] As one author notes, '[t]hey must be neither too ethereal, nor too pedantic; they must be just right, and "more than … a de facto academic research body or the clone of law advisers in government departments"'.[84]

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77 Moulds, 'Community Engagement in the Age of Modern Law Reform' (n 44) 462.

78 Kirby, 'Forty Years of the Alberta Law Reform Institute' (n 8) 835.

79 Rees (n 4) 8.

80 Hughes (n 5) 785. See also Laura Barnett, 'The Process of Law Reform: Conditions for Success' (2011) 39(1) *Federal Law Review* 161, 162–70.

81 Marcia Neave, 'Institutional Law Reform in Australia: The Past and the Future' (2005) 23(2) *Windsor Yearbook of Access to Justice* 343, 351–2 ('Institutional Law Reform in Australia').

82 Dame Mary Arden, 'Introduction' in Matthew Dyson, James Lee and Shona Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, 2016) 173.

83 Kirby, 'Law Reform: Ten Attributes for Success' (n 60) 15–17.

84 Hughes (n 5) 785–6, quoting Justice Bruce Robertson, 'Tradition and Innovation in a Law Reform Agency' (Occasional Paper No 11, New Zealand Centre for Public Law, 23 July 2002) 2 <https://www.wgtn.ac.nz/public-law/publications/occasional-papers/pdfs/tradition-and-innovation-in-a-law-reform-agency.pdf>.

How has SALRI fared since its establishment in December 2010? Has SALRI, in a crowded arena, made a worthwhile contribution to law reform in South Australia? It is difficult to assess or measure the success of a law reform body.[85] However, it is argued that the fears expressed by Kirby have not been realised and SALRI, on any measure over the last decade, has established its relevance and made a significant contribution to law reform in South Australia.

IV Measuring Success in Law Reform: Tangible, Structural and Attitudinal Measures of Success

Law reform means more than just changing the law. '"Reform" is change "for the better".'[86] Roslyn Atkinson defines law reform 'as the systematic development of the law, with a view to simplifying, modernising, and consolidating the law and finding more effective methods for the administration of the law, so as to improve access to justice'.[87]

Before addressing the challenging question of what success means for a law reform agency, it is worth reflecting upon the uncomfortable truth that law reform is not necessarily seen as a universal good. Reformers, either individual or institutional, often confront uncomfortable truths or disturbed historic consensus about the way the jurisdiction should be ordered.

Justice Astbury's famous comment, 'the bane of all law reformers' lives', is telling: 'reform, reform: are not things bad enough already'.[88] Sir Denys Roberts, Chief Justice of the Supreme Court of Hong Kong, is recorded as saying that '[o]ne of the important objectives of law reform is to provide a comfortable life for substantial numbers of unemployable academics and draftsmen' and that the law reformer was 'a bizarre blend of relentless enthusiasm, burning faith and detachment from reality'.[89] Michael Slattery KC observed at the retirement of Justice Sully of the New South Wales Supreme Court that

> [p]roposals for law reform these days normally start with people who are single issue obsessives; or people who have an unwholesome ambition for personal power and aggrandisement; or people who, to speak frankly, are plainly, not to

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85 See Opeskin, 'Measuring Success' (n 7) 202–21.

86 Justice MD Kirby, 'Law Reform, Why?' (1976) 50(9) *Australian Law Journal* 459, 460. See also John Barnes, 'The Law Reform Commission of Canada' (1975) 2(1) *Dalhousie Law Journal* 62, 71. Indeed, the most apt recommendations may be to change non-legislative policy and/or for no change in the law at all: see Kirby, 'Forty Years of the Alberta Law Reform Institute' (n 8) 840.

87 Roslyn Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 160, 164.

88 Sir Peter North, 'Law Reform: Problems and Pitfalls' (1999) 33(1) *University of British Colombia Law Review* 37, 43.

89 Kirby, 'Changing Fashions and Enduring Values in Law Reform' (n 75).

> say floridly, unstable. Such a proposal when once made, these days tends to take on a momentum all of its own; and part of that momentum is to put the proposal forward aggressively as though it is a matter of course that the proposal must be right unless somebody can prove that it is wrong. … [I]t is for the proponents of the reform, not to explain with a lot of empty rhetoric what they want, but to put on the table in clear and precise terms what they say is wrong with what we have; what they say we should have instead of what we have; and how they demonstrate that what they are proposing would improve on what we have.
>
> One looks at the efforts, to choose a neutral word, of current law reform and one wonders, really, whether they have not taken their motto from the saying famously attributed to Attila the Hun: that the grass never grew again where the hooves of his horse had once trodden.[90]

While such rhetorical assessments are damning of the nobility and role of law reform, they should not be instantly dismissed. They serve to remind that, while law reform serves a valuable and worthwhile purpose, it does not earn that centrality by mere self-declaration. As Neave J puts it, '[t]he word "reform" may be Orwellian double-speak, which is used to put a positive spin on changes which most people regard as backward steps, rather than advances'.[91]

It is difficult to measure or evaluate the success or effectiveness of law reform bodies.[92] Brian Opeskin highlighted that the rise of performance indicators in public administration has been predicated on laudable outcomes of public accountability, better internal management, and public relevance.[93] However, he also cautions that '[t]here is no single summary measure of success … in the linear ranking of performance'.[94] In the case of law reform, agencies tend to track and measure *inputs* such as timely production of reports, public education, and community engagement. The key *output* is often seen as the implementation of reform recommendations.[95] However, even implementation is an unreliable guide to the effectiveness and success of a law reform agency.[96] As Rosalind Croucher observes: 'But it is not all

90 MJ Slattery, 'Farewell to the Honourable Justice BT Sully as a Judge of the Supreme Court of New South Wales' (Speech, Supreme Court of New South Wales, 19 March 2007) 4 <https://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_publications/SCO2_judicialspeeches/sco2_speeches_pastjudges.aspx>.

91 Justice Marcia Neave, 'Making Law Reform Work: The Promise and Limits of Law Reform' (2007) 14(1) *James Cook University Law Review* 7, 8 ('Making Law Reform Work').

92 Croucher, 'Law Reform Agencies and Government' (n 7) 88.

93 Opeskin, 'Measuring Success' (n 7) 203.

94 Ibid 220.

95 Ibid 216.

96 See generally Cameron (n 43) 6–7. See also: Croucher, 'Law Reform Agencies and Government' (n 7) 88; Michael Tilbury, 'Why Law Reform Commissions?: A Deconstruction and Stakeholder Analysis from an Australian Perspective' (2005) 23(2) *Windsor Yearbook of Access to Justice* 313, 327 ('Why Law Reform Commissions?').

about statistics. A lack of implementation, of itself, does not mean failure. It is not even a very good guide to performance.'[97] The process of implementation, 'like the ways of God, can be mysterious and unexpected'.[98] There are various reasons why a report may never result in implementation.[99] Legislation, itself, may also be an incomplete or even ineffectual solution.[100]

So, what then are the measures that should be applied to a law reform body like SALRI to gauge its effect and success? In broad terms they appear to fall into three general categories of review: (1) tangible or material inputs and outputs; (2) structural; and (3) attitudinal independence.

Reviewing the literature, including much of the writing of leading law reformers, reveals an array of tangible elements to a successful and efficient law reform agency. Kate Warner, the inaugural Director of the Tasmanian Law Reform Institute ('TLRI'), listed four such requirements. First, the body must be adequately and regularly funded to perform the activities necessary for law reform. Second, it must have access to libraries and resources, which provide the agency with the ability to undertake extensive research. Third, it must have physical space and equipment. Finally, and most crucially, it requires qualified staff.[101]

Along similar lines, Weisbrot provides a checklist for the essential attributes of a 'modern' and even 'post-modern' law reform commission. The 'modern' law reform commission, after Lord Scarman's English model,[102] was to be

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97 Croucher, 'Re-Imagining Law Reform' (n 41) 41. Reports have a wider role than simply implementation: at 41–4. Croucher notes at 41 that

> an assessment of the contribution that law reform work makes must be seen through another lens. It is like a pebble in a pond. There are ripples that run over the surface of the pond — the extending, echoing impact, long after the pebble has disappeared beneath the surface of the water. The ripples are multiple and overlapping.

See also Croucher, 'Law Reform Agencies and Government' (n 7) 88–91.

98 Kirby, 'Are We There Yet?' (n 72) 439.

99 Barnett (n 71) 165, 186–7. The government of the day may disagree with the findings or the report may deal with issues, typically of private law, that are simply not a priority in a crowded political and parliamentary agenda. See: Kirby, 'Forty Years of the Alberta Law Reform Institute' (n 8) 842–4; Neave, 'Institutional Law Reform in Australia' (n 81) 365; Stephen Cretney, 'The Politics of Law Reform: A View from the Inside' (1985) 48(5) *Modern Law Review* 493, 498–503 ('The Politics of Law Reform'). The recommendations 'may simply not be "sexy" enough to capture the government's attention and inspire implementation': Barnett (n 80) 186–7, citing Michael Kirby, 'Reflections on Law Reform and the High Court' (2009) 34(1) *Alternative Law Journal* 41, 42.

100 Neave, 'Making Law Reform Work' (n 91) 9–11, 18–21.

101 Warner, 'Institutional Architecture' (n 32) 64.

102 Kirby, 'Changing Fashions and Enduring Values' (n 75); Weisbrot, 'The Future for Institutional Law Reform' (n 6) 22.

permanent,[103] authoritative,[104] full-time[105] and independent.[106] The 'post-modern' law reform commission, after the ALRC model, was additionally to be generalist in its legal capacities,[107] interdisciplinary in its composition and methodology[108] consultative in its outreach and engagement with the community and interested parties,[109] and implementation-minded in its determination 'to be more than an academic think tank and rather, to be an effective part of the machinery of legislative government'.[110]

However, there is no one-size-fits-all successful law reform model. As Neave J observes:

> Supporters of standing law reform commissions usually argue that law reform is likely to be most effectively practised by a permanent body with a core of full-time commissioners and research staff.
>
> To cynics these claims look self-serving. Not all successful law reforms emanate from established law reform commissions. Bodies such as the [TLRI], which uses academics to do much of its research, and the Law Reform Commission of Western Australia, which relies mainly on consultants, have produced well researched reform proposals.[111]

One can arguably add SALRI to such bodies. It has the attributes of an effective law reform body, as raised by Weisbrot and Warner. SALRI has adequate and regular funds to perform the activities necessary for law reform. It has access to the libraries and resources to enable it to undertake the necessary research. It has the necessary physical space and equipment. Finally, SALRI has, or has access to, the necessary qualified personnel whether through its staff, the linked Law Reform course, recent graduates, the Advisory Board, interested contributors within the university, practitioners and elsewhere (in both law and other disciplines).[112] It is telling that all of SALRI's reports to date, covering a range of diverse areas, have

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103 Weisbrot, 'The Future for Institutional Law Reform' (n 6) 23–4.

104 Ibid 25.

105 Ibid 26–7. Cf Tilbury, 'Why Law Reform Commissions?' (n 96) 324.

106 Weisbrot, 'The Future for Institutional Law Reform' (n 6) 27–9. See also Warner, 'Institutional Architecture' (n 32) 57–8.

107 Weisbrot, 'The Future for Institutional Law Reform' (n 6) 30.

108 Ibid 31–2.

109 Ibid 32–5. See also Kirby, 'Changing Fashions and Enduring Values' (n 75).

110 Weisbrot, 'The Future for Institutional Law Reform' (n 6) 35–8. See also Kirby, 'Changing Fashions and Enduring Values' (n 75).

111 Neave, 'Making Law Reform Work' (n 91) 11.

112 The value of the insight and input of such knowledgeable volunteers to a law reform body should not be overlooked: Neave, 'Institutional Law Reform in Australia' (n 81). See also below Part IV(B).

been either implemented or are in the apparent process of implementation. Only one of SALRI's reports has been relegated to 'sit on the shelf'.[113]

The ALRC commission model is often, as Warner notes, held out as the 'ideal model'.[114] However, such a model, especially for smaller jurisdictions such as South Australia or Tasmania in a tight fiscal climate, may be unrealistic. By contrast, the institute model offers 'considerable advantages', as aforementioned.[115] Both the commission and institute models can provide effective law reform[116] and produce the necessary 'absolutely first-class scholarship'.[117]

Croucher aptly observes the diversity of law reform models:

> In terms of structure, we are not all the same. … The reality is that some law reform agencies in the Commonwealth of Nations (formerly the British Commonwealth) have the direct involvement of parliamentarians; some are located within a branch of the executive, as part of a justice or Attorney-General's department; some are set up as more formally 'independent' bodies—like the Australian Law Reform Commission (ALRC), the New Zealand Law Commission and the Law Commission on England and Wales; some are located within, or associated with academic institutions—like the [TLRI], a model based on the Alberta Law Reform Institute, and copied also in South Australia and the Australian Capital Territory. … 'They are what they are'. What I want to argue in this presentation is that, *however* a law reform body is constituted, if it can retain its intellectual independence, then this is where its value lies, to governments and the communities it serves.[118]

A *Independence*

A guiding principle and prerequisite for successful law reform is the need for 'independence'.[119] But such independence does not mean 'splendid isolation' or 'never

[113] See Helen Wighton, John Williams and David Bleby, *Witness Oaths and Affirmations* (Final Report No 3, South Australian Law Reform Institute, February 2016). See also below Part IV(E).

[114] Warner, 'Institutional Architecture' (n 32) 71.

[115] Ibid.

[116] Ibid. See also Kate Warner, 'Lessons from a Small University-Based Law Reform Body in Australia' in Michael Tilbury, Simon NM Young and Ludwig Ng (eds), *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (Hong Kong University Press, 2014) 113.

[117] Weisbrot, 'The Future for Institutional Law Reform' (n 6) 25.

[118] Croucher, 'Law Reform Agencies and Government' (n 7) 78–9 (emphasis in original).

[119] See, eg: Weisbrot, 'The Future for Institutional Law Reform' (n 6) 27–9; Peter Hennessy, 'Independence and Accountability of Law Reform Agencies' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press,

the twain shall meet'.[120] 'This does not mean that law reform bodies should work in isolation from government.'[121] This independence has both the structural as well as the attitudinal elements. As Croucher explains:

> Intellectual independence does not mean we snub our noses at government. Having a good and open relationship with the relevant departments and relevant Ministers is important. Regular communication is sensible. Ensuring there are no surprises for Government is a different concept entirely from taking *direction*, which is anathema to independence.[122]

This can be a challenging balance. It is vital that law reform bodies are independent from the political process but, equally, law reformers should not be insensitive to the political process and '[t]here is no point in the law reformer making recommendations which manifestly will not command public, and, thus, political, support'.[123] A law reform body, as Kirby suggests, is

> constantly torn between [on one hand,] getting too close to politicians and the media in order to attract interest in, and action on, their proposals [and, on the other,] keeping too great a distance, in order to avoid seduction and so as to maintain product differentiation in the creation of reforming ideas.[124]

Croucher described this relationship as a 'mannered dance'[125] between government and the agency. It is a relationship that, as SALRI also acknowledges,[126] requires deft handling.[127]

Law reform agencies need to act as 'honest brokers'.[128] As Weisbrot comments: 'To the extent that law reform bodies become politicised, they lose the ability to attract

2005) 72, 72–86; Geoff McLay, 'Institutional Law Reform in New Zealand: The Importance of Independence' (2018) 6(2) *Theory and Practice of Legislation* 167; Tilbury, 'Why Law Reform Commissions?' (n 96) 322.

120 See also Croucher, 'Law Reform Agencies and Government' (n 7) 83–5.

121 Martin Partington, 'Law Reform: The UK Experience' in Michael Tilbury, Simon NM Young and Ludwig Ng (eds), *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (Hong Kong University Press, 2014) 67, 84.

122 Croucher, 'Law Reform Agencies and Government' (n 7) 83 (emphasis in original).

123 North, 'Law Reform: Problems and Pitfalls' (n 88) 45.

124 Kirby, 'Forty Years of the Alberta Law Reform Institute' (n 8) 840.

125 Croucher, 'Re-Imagining Law Reform' (n 41) 47, 49.

126 SALRI, for example, is careful to brief not only the Attorney-General of the day on its role and work but also the Shadow Attorney-General and any interested Member of parliament.

127 Croucher, 'Re-Imagining Law Reform' (n 41) 47–51.

128 Neave, 'Institutional Law Reform in Australia' (n 81) 353.

outstanding commissioners and members of advisory committees, and to play the "honest broker" role in policy development.'[129]

Many law reform agencies have enjoyed 'stormy relationships with their government'.[130] Since the 1980s,[131] many law reform agencies, including the South Australian Law Reform Committee, were 'abolished, restructured or downsized'.[132] The fate of an earlier version of the VLRC shows the particular peril of being too closely associated with a government. When the Liberal Government came to power in Victoria in 1992, it promptly acted to abolish the Law Reform Commission of Victoria which had been only set up eight years earlier. Within a month of being elected, a Bill to disband the Commission was introduced. The reasons given for the demise of the Commission were its lack of independence and its expense. The Attorney-General, Jan Wade, did not mince her words in her criticisms of the Commission. 'All in all', it had proved 'an expensive, self-indulgent servant of government policy and its abolition should be a matter of considerable satisfaction to the economically burdened people of Victoria'.[133] The Attorney-General elaborated:

> It is widely acknowledged that the Law Reform Commission has been, in general terms, a failure. In fact, it is another of the former government's grandiose and expensive experiments that has failed to deliver the goods, while absorbing a great many scarce resources. There have been two chief failures on the part of the commission.
>
> The first is that it has not maintained its independence from government and, indeed, has shown no real interest in doing so. It must be remembered that one of the chief functions of a Law Reform Commission is not merely to make sensible suggestions for legal reform, but to do so as an independent voice, at arm's length from government. Governments are perfectly capable of thinking up changes to the law without a Law Reform Commission: what makes such a body potentially valuable is its theoretical capacity to introduce a separate and critical note in debates over legislative reform.

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[129] Weisbrot, 'The Future for Institutional Law Reform' (n 6) 27.

[130] Barnett (n 80) 165.

[131] The recent history of Canada's federal law reform body is instructive. First established in 1971 as the Law Reform Commission of Canada, it was disbanded in 1992, re-established as the Law Commission of Canada in 1996, then abolished by the last Conservative government in 2006. It has since again been re-established by the current Liberal Government: see Elizabeth Raymer, 'Lawyers Laud Ottawa's Revival of Law Commission of Canada', *Canadian Lawyer* (Blog Post, 27 April 2021) <https://www.canadianlawyermag.com/news/general/lawyers-laud-ottawas-revival-of-law-commission-of-canada/355400>.

[132] Tilbury, 'Why Law Reform Commissions?' (n 96) 319. See also Kirby, 'Forty Years of the Alberta Law Reform Institute' (n 8) 835.

[133] Victoria, *Parliamentary Debates*, Legislative Assembly, 6 November 1992, 552 (Jan Wade, Attorney-General).

> Regrettably, however, the Victorian Law Reform Commission has too often operated less as an independent statutory authority than as a loyal branch of the Attorney-General's office.[134]

Whether this criticism was valid or fair is ultimately beside the point.[135] There was sufficient evidence, most notably in the area of senior staff cross-overs, to permit the imputation that

> [m]any who have studied the record of the commission in recent years believe that it has been at least as eager to provide 'the right answer' for the Attorney-General on a variety of references as it has been to fearlessly advance the cause of independent law reform.[136]

The above points are useful measures against which SALRI may be assessed in terms of independence. A first and immediate point to acknowledge is that SALRI or similar institute bodies have no statutory basis. Rather, SALRI was established through a partnership agreement between the profession, the University of Adelaide and governments.[137] This model was first set up with the Alberta Law Reform Institute in 1968.[138] More recently, this model has been followed in Australia by the TLRI[139] and now SALRI. These institutes are formed by an agreement between a university, a government and a peak professional body. The agency may be governed by a board appointed by the founding members or as determined in the agreement.

The lack of a statutory base, on its face, can be seen as a major shortcoming for SALRI's independence. Such a view of independence would place SALRI on a par with other statutory offices such as the Director of Public Prosecutions,[140] the Auditor-General[141] and the Ombudsman.[142] The security of tenure offered to these institutions is seen as necessary protection from an overbearing government. However, while SALRI lacks a statutory basis, that does not mean that it does not act with independence. A body like SALRI, unlike statutory law reform bodies, is not restricted to references from the government of the day and can undertake its own references.[143] SALRI is buttressed by the support of an independently-minded Advisory Board who reviews and provides input into reports. Further, SALRI is situated within the University of Adelaide where academic freedom is of paramount

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134 Ibid 550. This view was challenged. See: Victoria, *Parliamentary Debates*, Legislative Assembly, 13 November 1992, 903 (Neil Cole); Victoria, *Parliamentary Debates*, Legislative Council, 18 November 1992, 875 (Jean McLean).

135 Rees (n 4) 9–11.

136 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 November 1992, 551 (Jan Wade). See also ibid 8.

137 Warner, 'Institutional Architecture' (n 32) 61.

138 Ibid 62.

139 Ibid 63–4.

140 *Director of Public Prosecutions Act 1991* (SA) s 9.

141 *Public Finance and Audit Act 1987* (SA) pt 3 div 1.

142 *Ombudsman Act 1972* (SA) ss 6, 10.

143 Warner, 'Institutional Architecture' (n 32) 61.

value. In reality, the greatest sanction that can be applied to an unwelcome report to government is that it will be ignored. Kate Warner has argued that '[t]he fact that law reform bodies are independent of government is what sets the consultation process apart from community consultations conducted by governments'.[144]

Lastly, and not unrelated to the matter of independence, is the willingness of parliamentarians and governments of all political hues to engage with the recommendations of SALRI as an independent authority. In the decade since its establishment, SALRI has undertaken a range of references. Some were technical, such as electronic evidence[145] or aspects of succession law,[146] while others such as surrogacy[147] and LGBTIQ+ discrimination[148] had significant policy considerations.[149] An example of the latter would be the major reference into abortion which SALRI undertook in 2019. It provides a good example of the operation and standing of SALRI and its interaction with government and parliament.

SALRI's report on abortion[150] drew on its extensive consultation (including regional trips to Ceduna, Port Lincoln, Whyalla, Port Augusta and Murray Bridge)[151] and research. The landmark *Termination of Pregnancy Act 2021* (SA) to decriminalise abortion in South Australia was broadly based on SALRI's report.[152] This report

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144 Warner, 'Lessons from a Small University-Based Law Reform Body' (n 114) 127.

145 Helen Wighton, *Modernisation of South Australian Evidence Law to Deal with New Technologies* (Final Report No 1, South Australian Law Reform Institute, October 2012) ('*Modernisation of South Australian Evidence Law*').

146 See below nn 245–7.

147 David Plater et al, *Surrogacy: A Legislative Framework* (Report No 12, South Australian Law Reform Institute, October 2018).

148 See below nn 254–61.

149 There is an argument that law reform agencies should confine their efforts to black letter 'lawyers' law' and avoid topics of a policy or political content: see Mason (n 35) 215. This argument is unconvincing. As Mason observes at 215,

> [t]here is no field of law-making which can remain the exclusive province of the lawyer for there is no field of law which is without policy considerations, whether they be social, economic or political, which require to be taken into account. … In truth policy decisions, great and small, are inevitably involved in the making of all laws; lawyers cannot escape from participating in those decisions, but they must ensure they do not do so to the exclusion of other [sic] having a different background in learning and experience.

Though Mason sagely notes law reform bodies are well advised to avoid topics of partisan political controversy: at 221–2.

150 John Williams et al, *Abortion: A Review of South Australian Law and Practice* (Report No 13, South Australian Law Reform Institute, October 2019).

151 See also below n 219.

152 South Australia, *Parliamentary Debates*, Legislative Council, 14 October 2020, 1930–2 (Michelle Lensink, Minister for Human Services); South Australia, *Parliamentary Debates*, House of Assembly, 16 February 2021, 4225–9 (Vickie Chapman, Attorney-General).

on the complex and sensitive question of law and practice relating to abortion[153] was also widely acknowledged in parliamentary debate.[154] The Attorney-General noted 'the wise advice and counsel of SALRI' formed the base of the model before Parliament,[155] and described the Act as 'a historic day for the women of South Australia and their families'.[156] The Attorney-General also wished to 'commend some extraordinary people … We also have Professor John Williams and the team from the South Australian Law Reform Institute — months and months of work from them. We appreciate that compendium that they presented to us.'[157] The Minister for Human Services, Michelle Lensink, highlighted SALRI's 'exhaustively thorough'[158] work and noted that

153 SALRI made it clear that there was no simple answer and the regulation or not of abortion produced sincere and irreconcilable views. Williams et al (n 150) 10 note:

> Abortion raises significant legal, health, ethical, policy and practical questions. Often these questions are answered by recourse to deep personal beliefs. It is, therefore, unsurprising that abortion and its regulation in South Australian law has elicited a wide range of responses and submissions to this review. While on some matters there has been a large degree of consensus, on other issues the views and positions of respondents are diametrically opposed to each other. … SALRI acknowledges the sincerity and conviction of the various differing views expressed to it and that there is no simple, universal or straightforward position.

154 South Australia, *Parliamentary Debates*, Legislative Council, 27 February 2019, 2779 (Tammy Franks); South Australia, *Parliamentary Debates*, Legislative Council, 20 February 2020, 209–10 (Tammy Franks); South Australia, *Parliamentary Debates*, Legislative Council, 14 October 2020, 1930–2 (Michelle Lensink, Minister for Human Services); South Australia, *Parliamentary Debates*, Legislative Council, 15 October 2020, 2033 (Tammy Franks); South Australia, *Parliamentary Debates*, Legislative Council, 11 November 2020, 2128–31 (Tammy Franks); South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2020, 2151–2 (Ian Hunter), 2154 (Tammy Franks), 2161 (Connie Bonaros), 2167 (Stephen Wade), 2170 (Emily Bourke), 2170–1 (Irene Pnevmatikos); South Australia, *Parliamentary Debates*, House of Assembly, 16 February 2021, 3957–61 (Vickie Chapman, Attorney-General); South Australia, *Parliamentary Debates*, House of Assembly, 16 February 2021, 4276 (Zoe Bettison); South Australia, *Parliamentary Debates*, House of Assembly, 17 February 2021, 4400–1 (Vickie Chapman, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 2 March 2021, 2766 (Michelle Lensink, Minister for Human Services).

155 South Australia, *Parliamentary Debates*, House of Assembly, 17 February 2021, 4400 (Vickie Chapman, Attorney-General).

156 South Australia, *Parliamentary Debates*, House of Assembly, 16 February 2021, 4225 (Vickie Chapman, Attorney-General). See also South Australia, *Parliamentary Debates*, House of Assembly, 18 February 2021, 4626 (Vickie Chapman, Attorney-General).

157 South Australia, *Parliamentary Debates*, House of Assembly, 18 February 2021, 4626 (Vickie Chapman, Attorney-General).

158 South Australia, *Parliamentary Debates*, Legislative Council, 2 March 2021, 2766 (Michelle Lensink, Minister for Human Services).

> [SALRI] undertook a comprehensive review of existing laws and other models, and consulted with a very large range of stakeholders to come up with a report that was incredibly informative and which has formed the backdrop of the debate.[159]

SALRI's report was described as 'an extraordinarily comprehensive and erudite analysis of the situation that we currently have in South Australia and strongly recommends that we decriminalise abortion and remove it from our criminal codes'.[160] Tammy Franks noted: 'I commend SALRI for their fine work. The extraordinary efforts that went into that work I think ensured that the debate in this place and in the other was able to be based on fact and not on stigma.'[161] Ian Hunter noted:

> The respected South Australian Law Reform Institute conducted an in-depth analysis of abortion law reform, receiving submissions from stakeholders on all sides of the issues. SALRI's recommendations are considered, they are detailed and they form a strong basis for the legislation we have before us.[162]

Zoe Bettison also said: 'I read that report and found it to be well written and a very thorough report encompassing all facets of the issues. I would like to recognise the work of SALRI and the diverse stakeholders who participated.'[163]

Irene Pnevmatikos, drawing on SALRI's comprehensive efforts, outlined her thoughts:

> The 553-page comprehensive report covers every aspect of abortion law reform in South Australia and is an extraordinary piece of reference.
>
> Extensive independent and multidisciplinary research and consultation with interested parties and the community formed the basis of the 66 recommendations. Some members yesterday in another debate insinuated that the report was flawed. They made comments about anti-abortion supporters not being sought to contribute. No individual or group was targeted or identified, and many did respond to the open submission process. SALRI received 2,885 submissions from members of the public via the YourSAy platform.

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159 Ibid.

160 South Australia, *Parliamentary Debates*, Legislative Council, 20 February 2020, 209–10 (Tammy Franks).

161 South Australia, *Parliamentary Debates*, Legislative Council, 2 March 2021, 2769 (Tammy Franks).

162 South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2020, 2151 (Ian Hunter).

163 South Australia, *Parliamentary Debates*, House of Assembly, 16 February 2021, 4276 (Zoe Bettison).

> They received 340 written submissions and conducted a series of targeted expert forums with representatives across the board, which also included faith-based and civil libertarian groups. We are aware that [various groups] … have been extensively involved from the outset in terms of the consultation process.
>
> So if those representative groups did not provide evidence or submissions based on the individuals or the groups they claim to represent, then that is not a failing of SALRI. It was their responsibility to ensure that they put their views up and they had every opportunity to do so. In any event, the report considered their submissions and found them wanting in terms of the scope of the exercise. Funnily enough, we live in a democratic society. SALRI undertook the same democratic approach when gathering submissions and recommending reform.
>
> Further to these responses, SALRI looked at the extensive research that has been undertaken regarding reform in other jurisdictions. The report not only provided recommendations but also analysed current practices and sought the expertise of medical professionals and the experiences of women. Overwhelmingly, SALRI supported the notion that abortion be removed from the criminal code and placed within health care.
>
> The extent of consultation done in this report far exceeds any other research done for a piece of legislation that I have seen of late.[164]

SALRI's recommendations and reasoning were also relied upon in parliamentary debate as to particular contentious provisions. These most contentious areas were assisted by the SALRI report and all sides of Parliament, regardless of whether they accepted SALRI's recommendations, acknowledged the assistance provided.

SALRI in this (and indeed on other) reference demonstrated its role as an 'honest broker' in the formulation of law reform advice, notwithstanding the scope and sensitivity of the subject matter.

B *Resources*

Resources in terms of funding, regardless of the size of the institution, appear to be always in short supply to law reform bodies.[165] This is a reasonable concern and undoubtedly there is a correlation between the resource capacity and speed under which a small body can complete a reference. However, this concern is not borne out by SALRI's work. The ability of SALRI to undertake effective and major law reform references, with extensive research and consultation in complex and sensitive topics such as abortion (as discussed above), LGBTQIA+ discrimination or surrogacy law reform, is notable.

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164 South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2020, 2170–1 (Irene Pnevmatikos). This passage illustrates the breadth of SALRI's consultation.

165 Cameron (n 43) 7.

Despite its limited funding from the State Government, SALRI has been able to draw on support and input from various sources. The State Government provided the funding for SALRI to examine discrimination law, surrogacy and abortion. However, SALRI does not wholly rely on government for funding to undertake a specific reference. The Law Foundation of South Australia provided the funding for SALRI to examine succession law and the role and operation of powers of attorney.[166] The funding allowed SALRI to undertake its important recent reference into the role and operation of communication partners to support parties with complex communication needs to provide their best quality evidence, both in and out of court.[167]

As noted above, SALRI is ably supported by its expert Advisory Board. Not only does the Board act as a point of valuable advice and guidance, but its members actively contribute to SALRI's projects. David Bleby, Former Justice of the Supreme Court, for example, was a co-author of SALRI's reports into witness oaths and affirmations[168] and provocation and related issues (especially the sentencing context).[169] Terry Evans, the Law Society nominee, was a co-author of SALRI's report into the common law forfeiture rule in unlawful homicide.[170] Geoff Muecke, former Chief Judge of the District Court of South Australia, is a regular contributor to both SALRI and the linked Law Reform class and was a co-author of SALRI's recent report into communication partners.[171] Aimee Travers, the South Australian Parliamentary Counsel, provides sound advice on the drafting implications of any proposal.[172] SALRI is also able to draw on the expertise and contribution of colleagues both from the Adelaide Law School[173] and other disciplines.[174] SALRI

166 David Plater et al, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, South Australian Law Reform Institute, September 2021) ('*Providing a Voice to the Vulnerable*').

167 Ibid.

168 Wighton, Williams and Bleby (n 113).

169 David Plater et al, *The Provoking Operation of Provocation: Stage 2* (Report No 11, South Australian Law Reform Institute, April 2018) ('*The Provoking Operation of Provocation*').

170 Sylvia Villios et al, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, South Australian Law Reform Institute, February 2020) ('*Riddles, Mysteries and Enigmas*').

171 See Plater et al, *Providing a Voice to the Vulnerable* (n 166).

172 The value of such a link has been long recognised. See Gower (n 38) 260–1.

173 See, eg, Sylvia Villios et al, *Valuable Instrument or the Single Most Abused Legal Document in Our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, South Australian Law Reform Institute, December 2020).

174 Melissa Oxlad from the School of Psychology at Adelaide University was a co-author on SALRI's review of abortion. See Williams et al (n 150).

also draws on the input of interested colleagues from other universities[175] and practitioners. The benefit of the insight and input of knowledgeable volunteers cannot be underestimated.[176]

A particular benefit of SALRI is drawing on the Law Reform course whose background research is important to inform and support SALRI's work.[177] A number of students from the Law Reform course have acted as co-authors on various SALRI reports.[178] Madeleine Thompson, for example, drew on her work in class on SALRI's surrogacy reference and was a lead author on that SALRI report.[179]

A continuous challenge for smaller agencies is the natural inclination to narrow the focus of the reference towards technical law reform. The observation was made in relation to the South Australian Law Reform Committee in the 1960s and 1970s. Kirby directly questioned the ability of an institute type model to undertake major law reform references: 'The realities of small part-time bodies is that normally they will, effectively, be restrained from entering upon large-scale

[175] Kate Fitzgibbon of Monash University was a co-author on SALRI's two Provocation Reports. Martine Powell of the Centre of Investigative Interviewing at Griffith University was a co-author on SALRI's Communication Partner Report. Dr Kris Wilson, formerly of Flinders University, and Dr Xianlu Zeng, formerly of the University of South Australia, are regular contributors to SALRI reports. SALRI always invites comments from the other local Law Schools at Flinders University and the University of South Australia to a reference.

[176] Neave, 'Institutional Law Reform in Australia' (n 81) 354. Such former judges, 'leading practitioners and scholars, would never volunteer their services to an agency under the control of the executive': at 354. SALRI also draws on its collegial links in this context with the local Law Society and Bar Association.

[177] Moulds, 'Community Engagement in the Age of Modern Law Reform' (n 44) 457.

[178] Holly Nicholls, Simone Basso, Olga Pandos and Brooke Washusen, for example, were co-authors on Plater et al, *Providing a Voice to the Vulnerable* (n 178). Megan Lawson and Katherine O'Connell were co-authors on Plater et al, *The Provoking Operation of Provocation* (n 169).

[179] See South Australia, *Parliamentary Debates*, Legislative Council, 29 October 2019, 4742 where John Dawkins singled out Ms Thompson's contribution in the parliamentary debate:

> I will refer to the work of the South Australian Law Reform Institute in a moment, but I think Madeleine Thompson, from that organisation, who has done a lot of the work that SALRI was charged to do by the current Attorney-General, have read every word I have ever said in this place about surrogacy, and I feel sorry for her, because there have been a few. But it has been an issue that I have been passionate about since the days that Kerry Faggotter first came to see me when her little boy was one year old — he is now 15. I commend the Attorney for providing urgency to SALRI to examine this matter. Of course, that report was brought down in November last year. I appreciate the work of Madeleine Thompson but also, obviously, Professor John Williams and David Plater for the very broad way they examined all of the complex issues that are related to surrogacy.

projects that would involve social science research and questioning of fundamental values in the law.'[180]

There is some weight to this critique. Certainly, the expenditure on resource-intensive activities, such as attitudinal surveys, public opinion polling or paid focus groups are likely to prove unrealistic for small bodies such as SALRI. However, the use of social media, focusing on the consultation with representative groups and the allocation of resources towards targeted research has made it possible for SALRI to engage in references that extend well beyond technical law reform. The advantage of modern communications and resources is that comparative research is brought to a reference with relative ease. Unlike the 1960s and 1970s, consultation with other law reform bodies, many of whom were working on similar references can be instantaneous through video conferencing.

One advantage of a university-based law reform body, such as SALRI, is the access to leading researchers across an array of disciplines not limited to the University of Adelaide. A number of SALRI references have involved active contributions and/or expert commentary from the disciplines of medicine, health science, population health, history, politics, psychology as well as from legal researchers associated with the particulars of the reference.

There remains one final advantage which a smaller jurisdiction has in the area of law reform, relating to proximity and access. The relative size of South Australia means that access to organisations and individuals has proven to be a significant advantage. A shared commitment to references by the community sector has facilitated effective engagement.

C *Crossing the Line*

As discussed, independence, particularly structural independence, is identified as an essential feature for successful law reform.[181] However, independence can even be a double-edged sword if the law reform body gives no thought to what issues are relevant to government and society, or what issues may be on the government's reform radar screen.[182] Laura Barnett asserts that law reform agencies should always seek to 'push the envelope, but must learn to strike a practical balance between ensuring that a report is not totally ignored and attempting to bring hidden issues into the public domain'.[183]

There are dangers in agencies straying into an advocacy role. Law reform bodies may be seen by their critics to be an 'expensive luxury',[184] or even as potentially

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[180] Kirby, 'Reforming Law Reform: Summing Up' (n 73).

[181] Hennessy (n 119) 72–86.

[182] Barnett (n 80) 171.

[183] Ibid. See also Hughes (n 4) 803.

[184] Tilbury, 'Why Law Reform Commissions?' (n 96) 327. See also Roderick A MacDonald, 'Law Reform and Its Agencies' (2000) 79(1) *Canadian Bar Review* 99, 100.

'elitist and detached from [practice and] reality'.[185] There is a risk an agency may be rendered irrelevant or sidelined (or even abolished), 'due to what critics may perceive to be its irrelevant, extravagant or extremist approach to undertaking studies'.[186] Sir Grant Hammond, the late President of the New Zealand Law Commission, cautions that a law reform commission is one of law, not social reform.[187]

Rees argues that shifting from 'lawyer's law' or 'black letter law' to controversial projects may make it difficult for law reform bodies to distance themselves from assertions of political partisanship.[188] It is also difficult to 'resist the temptation to be didactic: to tell government and the broader community in emphatic and instructive terms what must be done about a particular issue'.[189] Rees notes that this approach is relatively harmless when a law reform agency is writing about technical legal problems; it is far more problematic when the topic is 'hotly contested issue within the community'.[190] It is also imprudent for a law reform agency to stray into an advocacy role or enter the political arena. As Rees observes:

> It is also important for commissions not to participate in debate about the correctness or otherwise of their recommendations. Once a report is finalised it is necessary, in my view, to withdraw from the stage and to allow others to debate what the response of government should be.[191]

The cautionary notes from Rees and Hammond are well made. SALRI has, since its inception, regularly briefed both the Attorney-General and the Shadow Attorney-General on its references.[192] It has been available to brief parliamentarians, across the chambers, about the findings and recommendations of reports. SALRI is well aware that once published, the implementation of any, or all, of the recommendations is a matter for government and parliament.[193]

D *Consultation: More Than Rounding Up the Usual Suspects?*

Kirby has spoken of the previous 'elitist' approach to law reform consultation, confined to lawyers, judges and public officials and how such an approach is now

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185 Barnett (n 80) 165; Roderick A MacDonald, 'Recommissioning Law Reform' (1997) 35(4) *Alberta Law Review* 831, 833.

186 Barnett (n 80) 171.

187 Grant Hammond, 'So Where Is It All Going?' (Conference Paper, Australasian Law Reform Agencies Conference, March 2016).

188 Rees (n 4) 14–15.

189 Ibid 15.

190 Ibid. See also SM Cretney, 'The Law Commission: True Dawns and False Dawns' (1996) 59(5) *Modern Law Review* 631, 633–4.

191 Rees (n 4) 14.

192 See also Kirby, 'The ALRC: A Winning Formula' (n 60) 58–9.

193 See also North, 'Law Reform: Problems and Pitfalls' (n 88) 45.

thoroughly outdated.[194] Wide consultation with public participation is 'an integral part'[195] of effective modern law reform and marks it out from the more limited scope of technical 'lawyers' law reform'. 'Commitment to widespread consultation is a hallmark of best practice law reform.'[196] Such consultation cannot be avoided. As Rees notes: 'Effective community consultation is one of the most important, difficult and time consuming activities of a law reform commission.'[197]

So why consult? There are various reasons for consultation.[198] In simple terms, 'law reform is too important to be left to the lawyers'.[199] In general, there are two main purposes of consultation: 'to gain responses and feedback; and to promote a sense of public ownership over the reform process'.[200]

A major aspect of gathering the evidence base to support the formulation of any recommendations for reform is wide consultation.[201] It helps ensure that, after gathering and considering evidence of how the relevant law operates in practice as well as the views of various sources and perspectives, any report is 'intellectually rigorous' and 'practical'; one 'that political decision-makers can accept as community tested, before consideration and hopefully implementation of the reform proposals'.[202]

There are a number of aspects to consultations. In terms of 'why consult', it is clear that effective consultation serves the purpose of obtaining an appreciation of the law in action in the lives of those it seeks to service. 'Limiting law reform deliberations to a judicial and administrative legal elite runs the risk of accepting unreal assumptions as to what happens and what is required.'[203] It is imperative to go beyond the 'usual suspects' in any examination of a topic with any issues of social policy and,

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194 Kirby, 'Are We There Yet?' (n 72) 436.

195 Barnes (n 86) 81. See also MacDonald, 'Law Reform and Its Agencies' (n 184) 115–18.

196 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (Final Report Nos 114 and 128, October 2010) vol 1, 53.

197 Rees (n 4) 15.

198 See Kirby, 'The ALRC: A Winning Formula' (n 60) 60 where Kirby provides at least four reasons: 'to gather information and opinion; to test preliminary ideas against interest groups and their perspectives; to protect the Commission from criticism of special interests; and to strengthen political decision'. See also: Moulds, 'Community Engagement in the Age of Modern Law Reform' (n 44) 444; North, 'Law Reform: Problems and Pitfalls' (n 88) 39–40; Sir Peter North, 'Problems of Law Reform' [2002] (3) *New Zealand Law Review* 393, 396.

199 North, 'Law Reform: Problems and Pitfalls' (n 88) 42.

200 Atkinson (n 87) 166. See also Barnes (n 86) 81–3.

201 Opeskin, 'Measuring Success' (n 7) 202.

202 Atkinson (n 87) 166.

203 Barnes (n 86) 77.

as Warner notes, 'there is little law reform that is policy free'.[204] As JN Lyon noted as long ago as 1974,

> [r]ealistic and responsive priorities cannot be established in isolation from the major points of contact between the legal order and the people. Inevitably, the process of reform must plant its feet firmly on the ground in the community, where all the messy, insoluble problems are found, if it is ever going to realize its potential. … [T]o get a sense of where and how the law might serve to alleviate and possibly overcome some of these injustices.[205]

Active consultation also provides an opportunity for the law reformer to test and shape alternative approaches and recommendations. In this sense, consultation may be an iterative process. As Croucher explains, it is important that law reformers enter into the process of consultation with an open mind:

> For a law reform agency, the outcome should never be known until the process has been worked through. This openness facilitates securing stakeholder engagement. This is so important when extensive public involvement in law reform is crucial to the integrity of the process — it is the *sine qua non* accepted among institutional law reform bodies internationally — because it is a demonstration of independence of mind.[206]

Beyond a better appreciation of the context of possible reform, consultation may serve a wider purpose.[207] It distributes information about the law or the public policy and promotes a sense of public 'ownership' over the process of law or public policy making.[208] It provides the community with a means to engage in a 'civic conversation' about the content of the relevant law[209] and promotes 'deliberative democracy'.[210] Such inclusive consultation contributes to social justice by giving members of traditionally marginalised groups, such as Aboriginal communities or people living with a disability, an opportunity to express their views and concerns and be taken seriously.[211] Peter Hastie KC of the Queensland Law

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204 Warner, 'Institutional Architecture' (n 32) 70.

205 Lyon (n 58) 431.

206 Croucher, 'Law Reform Agencies and Government' (n 7) 80. See also North, 'Problems of Law Reform' (n 199) 396.

207 Moulds, 'Community Engagement in the Age of Modern Law Reform' (n 44) 444; MacDonald, 'Law Reform and Its Agencies' (n 184) 115–18.

208 Atkinson (n 87) 166.

209 Marcia Neave, 'Law Reform and Social Justice' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 358, 366.

210 Hughes (n 5) 799; Neave, 'Institutional Law Reform in Australia' (n 72) 365–7; North, 'Problems of Law Reform' (n 199) 396.

211 Neave, 'Law Reform and Social Justice' (n 209) 365–8.

Reform Commission describes it as 'a way of ensuring that people feel a part of the process'.[212]

Moulds places such law reform within a broader democratic context:

> In order to overcome the cynicism and sense of disempowerment that at times threatens to overcome Western democracies, it is integral that law and policymakers of all stripes embrace community engagement with enthusiasm and rigour.[213]

Notwithstanding the significance of modern consultation to law reform bodies, consultation remains a challenging process.[214] Law reform bodies are expected to actively 'encourage, cajole or entice' members of the public to share their views on a particular law reform reference.[215] However, good intentions do not ensure a successful response. This is a state of affairs confronted by all law reform agencies as they seek to expand the involvement of the community. Howard Zelling, reflecting on attempts at consultation by the South Australian Law Reform Committee in the 1970s, noted that during a reference relating to defamation they wrote to all interested bodies and 'advertised extensively', but that the responses where 'practically nil'.[216]

It is now apparent that the community and key stakeholders have changed expectations about how they will be consulted. The ALRC, VLRC and other bodies such as SALRI have tried to increase public participation.[217] As Warner observes with her customary erudition:

> 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.[218]

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[212] Peter Hastie, 'Potential Means by Which Agencies Can Respond to Political Imperatives To Get Things Done' (Conference Paper, Australasian Law Reform Agencies Conference, March 2016) 40, quoted in Croucher, 'Law Reform Agencies and Government' (n 7) 81 n 10.

[213] Moulds, 'Community Engagement in the Age of Modern Law Reform' (n 44) 461.

[214] Ian Davis, 'Targeted Consultations' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 148, 152.

[215] Ibid 159.

[216] Andrew Ligertwood interviewed Justice Zelling on the role of the Committee and the process of law reform in 1977. See Ligertwood, 'An Interview with Mr Justice Zelling' (n 20) 180. See also Cretney, 'The Politics of Law Reform' (n 99) 505 for similar UK experiences.

[217] Davis (n 214) 148–59; Atkinson (n 87) 160–74. For further discussion of what constitutes 'effective' public participation, see Gene Rowe and Lynn J Frewer, 'A Typology of Public Engagement Mechanisms' (2005) 30(2) *Science, Technology, and Human Values* 251.

[218] Warner, 'Lessons from a Small University Based Law Reform Body' (n 116) 127.

SALRI places a high priority on active and inclusive consultation and reaching beyond the 'usual suspects', including regional[219] and Aboriginal communities.[220]

SALRI has found that the traditional detailed written Issues Paper,[221] though not without value for practitioners and experts, has limitations in modern effective law reform consultation. Many members of the community may lack the time and expertise to navigate and respond to such complex items. Many parties, notably overworked and underfunded interested parties such as Non-Governmental Organisations, suffer from 'consultation fatigue'.[222] SALRI has found that written materials prepared by a law reform body must be tailored to both the intended audience and the topic of a reference, whether as a guide to inform and promote submissions or to engage either online or support face-to-face discussions. A pithy, well targeted, plain English Fact Sheet (or series of Fact Sheets) may work as effectively as a lengthy, legally referenced Discussion Paper.[223] SALRI, drawing on the VLRC's example,[224] has also prepared consultation videos designed for

219 See, eg: Katrina Muhsin, 'South Australian Law Reform Institute Listens to Pirie Community in Consultation', *The Recorder* (online, 19 August 2020), <https://www.portpirierecorder.com.au/story/6886064/community-heard-in-consultation/>; Isabella Carbone, 'Eye on the Law', *Plains Producer* (online, 25 May 2022) <https://www.plainsproducer.com.au/news/eye-on-the-law>. SALRI, for example, as part of its powers of attorney reference visited Port Lincoln, Berri and Mt Gambier. As part of its abortion reference, SALRI visited Ceduna, Port Lincoln, Murray Bridge, Port Augusta and Whyalla.

220 See, eg: Shari Hams, 'Law Students Learn about Injustices for Aboriginal People in SA's Court System', *ABC News* (online, 30 July 2021) <https://www.abc.net.au/news/2021-07-30/law-students-learn-injustices-aboriginal-people-face/100336256>; Aidan Curtis, 'Elders Meet with SALRI on How the Law Can Better Include Aboriginal Communities', *The Transcontinental* (online, 25 May 2022) <https://www.transcontinental.com.au/story/7753043/elders-have-their-say-on-law-reform/?cs=1538>. There are a number of features to successful engagement with Aboriginal communities: see Janet Hunt, 'Engaging with Indigenous Australia: Exploring the Conditions for Effective Relationships with Aboriginal and Torres Strait Islander Communities' (Issues Paper No 5, Closing the Gap Clearinghouse, October 2013). SALRI has a particular focus on consultation with Aboriginal communities and including an Aboriginal context to a reference. See, eg: Williams et al (n 150) 351–6 for abortion; Villios et al (n 173) 369–404 for powers of attorney and Plater et al, *Providing a Voice to the Vulnerable* (n 166) 146–194 for communication partners references.

221 See, eg, Dianne Gray, *Cutting the Cake: South Australian Rules of Intestacy* (Issues Paper No 7, South Australian Law Reform Institute, December 2015) ('*Cutting the Cake*').

222 Kirby, 'Forty Years of the Alberta Law Reform Institute' (n 8) 838; Barnett (n 80) 165; North, 'Law Reform: Problems and Pitfalls' (n 88) 39, 42.

223 See also Moulds, 'Community Engagement in the Age of Modern Law Reform' (n 44) 447–8.

224 See the VLRC's engaging consultation video for its funeral and burial instructions reference: Victorian Law Reform, 'Funeral and Burial Instructions' (YouTube, 3 December 2015) <https://www.youtube.com/watch?v=SpwNWEh0sgQ>.

the community[225] and/or specialist practitioners[226] to support the consultation process.

Inclusive consultation is integral to modern law reform.[227] The consultation process cannot be merely token; it must provide individuals and interested parties with an active voice in the law reform process.[228] As Curran observes:

> If governments of any political persuasion want to remain connected with the public and stay in power, they need to listen to their public. On many occasions, politicians claim to be connected to their communities. Often in reality, this is not the case …[229]

It is possible for law reform processes to engage better with the communities often marginalised by society who are deeply affected by laws and their administration through innovative approaches.[230] Law reform bodies with their expertise can bring about a reality check by facilitating connected, realistic and practical policy responses that capture and channel voices into evidence-based research.

These themes were highlighted in SALRI's LGBTQIA+ discrimination reference.[231] SALRI's reference was linked to wider events such as a bipartisan parliamentary declaration to mark the 40th anniversary of the decriminalisation of homosexuality in South Australia in the aftermath of the violent homophobic death of Dr George

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225 See the community consultation video prepared for the powers of attorney reference: University of Adelaide – Business Law Economics, 'SALRI Power of Attorney' (YouTube, 19 January 2021) <https://www.youtube.com/watch?v=bQuVzRPRL0w>.

226 See the consultation video prepared for legal and health practitioners for the powers of attorney video: University of Adelaide – Business Law Economics , 'Intersection of Legal and Medical Roles for Powers of Attorney' (YouTube, 4 August 2020) <https://www.youtube.com/watch?v=pdpNVZ2N_KA&feature=youtu.be&ab_channel=UniversityofAdelaide-BusinessLawEconomics>.

227 Barnett (n 80) 172–81; Croucher, 'Law Reform Agencies and Government' (n 7) 80–3. See also Natalina Nheu and Hugh McDonald, *By the People, for the People?: Community Participation in Law Reform* (Access to Justice and Legal Needs, Law and Justice Foundation of New South Wales, November 2010).

228 Brian Opeskin, 'Engaging the Public: Community Participation in the Genetic Information Inquiry' [2002] (80) *Australian Law Reform Commission Reform Journal* 53.

229 Liz Curran, *Making the Legal System More Responsive to Community: A Report on the Impact of Victorian Community Legal Centre (CLC) Law Reform Initiatives* (Report, May 2007) 4.

230 Neave, 'Law Reform and Social Justice' (n 209) 366.

231 See generally Moulds, 'Community Engagement in the Age of Modern Law Reform' (n 44) 449–53, 458–9.

Ian Ogilvie Duncan[232] and the bipartisan apology to the LGBTQIA+ community for past state-sponsored discrimination.[233]

It is obviously not possible for any law reform body, let alone SALRI, to consult, or to seek to consult, with everyone (or even a large part of the community).[234] However, SALRI has committed itself to reaching well beyond the 'usual suspects' such as lawyers, judges and experts. In simple terms, what amounts to sound consultation in modern law reform is not just for lawyers or a purely legal standard.[235]

E *Tallying Up the Ledger*

There needs to be some measure, no matter how imprecise, of the effectiveness of a law reform body. Given the many demands on the public purse in a tight fiscal climate, 'it is only right that law reform agencies should be publicly accountable for their activities and that they should be expected to deliver value for money'.[236] Whilst both output and implementation are only partial guides to the 'success' of a law reform agency, SALRI has nevertheless had a prolific decade, especially noting its size. SALRI, despite Kirby's initial misgivings, has been able to undertake involved references with extensive research and wide and inclusive consultation.[237] It has produced reports covering various topics of both a technical nature as well as involving contentious and sensitive areas of policy. Many of these reports have either been implemented or are in the apparent process of implementation.

SALRI's first report considered evidence law and the impact of new technologies.[238] This report was accepted and implemented.[239] SALRI's subsequent report

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232 South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2457–66. The motion also acknowledged 'the ongoing and vital contribution to our community by members of its lesbian, gay, bisexual, transgender, intersex and queer community': at 2457.

233 South Australia, *Parliamentary Debates*, House of Assembly, 1 December 2016, 8312–17.

234 Davis (n 214) 152.

235 See, eg: *R v Brent London Borough Council; Ex parte Gunning* (1985) 84 LGR 168, 169; *R v Devon County Council; Ex parte Baker* [1995] 1 All ER 73; *R v London Borough of Islington; Ex parte East* [1996] ELR 74; *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, [108]; *Metgasco Ltd v Minister for Resources and Energy* [2015] NSWSC 453; *R (Derbyshire County Council) v Barnsley, Doncaster, Rottherham, and Sheffield Combined Authority* [2016] EWHC 3355 (Admin).

236 Opeskin, 'Measuring Success' (n 7) 204.

237 See above the discussion as to SALRI's abortion reference.

238 Wighton, *Modernisation of South Australian Evidence Law* (n 145). See also South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2012, 1799 (John Rau, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 8 May 2014, 98–9 (Gail Gago).

239 See *Evidence (Records and Documents) Amendment Act 2015* (SA).

examined oaths and affirmations in court.[240] This report is yet to be implemented.[241] SALRI's next report considered a right of privacy.[242] The draft Civil Liability (Serious Invasions of Privacy) Bill 2021 (SA), based on SALRI's Privacy Report, was circulated in 2021 for consultation.[243]

As part of its 'huge body of work' into succession law,[244] SALRI identified various topics for review and the following reports were produced:

1. *Dead Cert: Sureties' Guarantees for Letters of Administration*;[245]
2. *State Schemes for Storing and Locating Wills*;[246]
3. *Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes*;[247]
4. *South Australian Rules of Intestacy*;[248]
5. *Management of the Affairs of a Missing Person*;[249]

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240 Wighton, Williams and Bleby (n 113).

241 SALRI is reconsidering aspects of oaths and affirmations as part of its current reference into witness competence.

242 Kate Guy and Emily Sims, *A Statutory Tort for Invasion of Privacy* (Final Report No 4, South Australian Law Reform Institute, March 2016).

243 See 'Civil Liability (Serious Invasions of Privacy) Bill', *yourSAy* (Forum Post) <https://yoursay.sa.gov.au/privacy-laws>.

244 Vickie Chapman, 'Major Reform of South Australia's Succession Laws' (2020) 42(8) *Law Society of South Australia Bulletin* 22. See also South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2012, 1799 (John Rau, Attorney-General).

245 Helen Wighton, *Dead Cert: Sureties' Guarantees for Letters of Administration* (Issues Paper No 2, South Australian Law Reform Institute, December 2012); Helen Wighton, *Sureties' Guarantees for Letters of Administration* (Final Report No 2, South Australian Law Reform Institute, August 2013). This Report has been implemented: see *Administration and Probate (Removal of Requirement for Surety) Amendment Act 2014* (SA).

246 Helen Wighton and Trang Phan, *Losing It: State Schemes for Storing and Locating Wills* (Issues Paper No 6, South Australian Law Reform Institute, July 2014); Trang Phan and David Bleby, *State Schemes for Storing and Locating Wills* (Final Report No 5, South Australian Law Reform Institute, October 2016).

247 Helen Wighton and Robert Park, *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Disputes* (Issues Paper No 5, South Australian Law Reform Institute, January 2014); South Australian Law Reform Institute, *Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes* (Further Consultation Paper, November 2015); Mark Jordan and Robert Park, *Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes* (Final Report No 6, South Australian Law Reform Institute, December 2016).

248 Gray, *Cutting the Cake* (n 213); Dianne Gray, *South Australian Rules of Intestacy* (Final Report No 7, South Australian Law Reform Institute, July 2017).

249 Dianne Gray, *Management of the Affairs of a Missing Person* (Final Report No 8, South Australian Law Reform Institute, July 2017).

6. *Who May Inspect a Will*;[250] and

7. *'Distinguishing between the Deserving and the Undeserving': Family Provision Laws in South Australia*.[251]

On 23 June 2021, the Attorney-General introduced the Succession Bill 2021 (SA) to the State Parliament to implement the 'bulk'[252] of SALRI's many recommendations.[253] The Attorney-General described the Bill as representing the 'the most extensive reforms in this area of law for decades'.[254]

SALRI's surrogacy report received strong support and praise from all sides in Parliament.[255] The *Surrogacy Act 2019* (SA) passed with all party support and was based on SALRI's report.[256]

SALRI's 2020 report into the common law forfeiture rule in unlawful homicide[257] led to the tabling of a draft exposure Forfeiture Bill 2021 (SA) (largely based on SALRI's report) on 14 October 2021 for public consultation.[258]

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250 David Plater and Sylvia Villios, *Who May Inspect a Will* (Report No 10, South Australian Law Reform Institute, December 2017).

251 Nancy Detmold et al, *'Distinguishing between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, South Australian Law Reform Institute, December 2017).

252 Chapman (n 244) 22.

253 South Australia, *Parliamentary Debates*, House of Assembly, 23 June 2021, 6525–44 (Vickie Chapman, Attorney-General).

254 Ibid 6528.

255 South Australia, *Parliamentary Debates*, Legislative Council, 31 May 2018, 319 (John Dawkins); South Australia, *Parliamentary Debates*, House of Assembly, 15 November 2018, 3733 (Vickie Chapman, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 5 December 2018, 2418–19 (John Dawkins); South Australia, *Parliamentary Debates*, House of Assembly, 1 August 2019, 6967 (Vickie Chapman, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 17 October 2019, 4685–6 (Michelle Lensink, Minister for Human Services); South Australia, *Parliamentary Debates*, Legislative Council, 29 October 2019, 4742 (John Dawkins), 4744 (Ian Hunter), 4745 (Irene Pnevmatikos), 4747 (Emily Bourke), 4748–9 (Tammy Franks); South Australia, *Parliamentary Debates*, Legislative Council, 31 October 2019, 4807 (Connie Bonaros).

256 South Australia, *Parliamentary Debates*, House of Assembly, 1 August 2019, 6967 (Vickie Chapman, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 17 October 2019, 4685–6 (Michelle Lensink, Minister for Human Services).

257 Villios et al, *Riddles, Mysteries and Enigmas* (n 170). See also: *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147; *Re Hall* [1914] P 1; *Helton v Allen* (1940) 63 CLR 69; *Troja v Troja* (1994) 33 NSWLR 269.

258 South Australia, *Parliamentary Debates*, House of Assembly, 14 October 2021, 8149 (Vickie Chapman, Attorney-General).

SALRI also released a major report into the role and operation of powers of attorney.[259] A draft Bill broadly based on SALRI's report was circulated in 2021 for public consultation.[260]

SALRI undertook an ambitious reference 'to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status'.[261] The first stage of this reference reviewed legislative and regulatory discrimination and made initial recommendations.[262] As a follow-up, SALRI then issued reports examining: the more complex issues of the laws regulating sexual reassignment and the registration of sex and gender;[263] the introduction of a Relationships Register;[264] the potential discrimination in laws governing legal parentage and surrogacy;[265] discrimination under the *Equal Opportunity Act 1984* (SA);[266] and finally, the operation of the outdated so called 'gay panic' defence and the wider partial defence of provocation to murder[267] (as well

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259 Villios et al, *Riddles, Mysteries and Enigmas* (n 170).

260 See 'Draft Powers of Attorney Bill 2011', *yourSAy* (Forum Post) <https://yoursay.sa.gov.au/powers-of-attorney>.

261 South Australia, *Parliamentary Debates*, Legislative Council, 10 February 2015, 9 (Hieu Van Le, Governor).

262 Sarah Moulds, *Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (Audit Paper, South Australian Law Reform Institute, September 2015). SALRI identified over 140 South Australian Acts and Regulations that discriminate (or potentially discriminate) on the grounds of sexual orientation, gender, gender identity and intersex status. SALRI's recommendations were largely accepted: see *Statutes Amendment (Gender Identity and Equity) Act 2016* (SA); *Adoption Review Amendment Act 2016* (SA).

263 Sarah Moulds, *LGBTIQ Discrimination in Legislation: Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment* (Report No 5, South Australian Law Reform Institute, February 2016). These recommendations were largely accepted: see *Births, Deaths and Marriages Registration (Gender Identity) Amendment Act 2016* (SA).

264 Meg Vedig, Sarah Brown and Sarah Moulds, *Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy* (Report, South Australian Law Reform Institute, May 2016) ('*Rainbow Families*'). The report was accepted. See: *Relationships Register Act 2016* (SA); *Relationship Register Regulations 2017* (SA); *Statutes Amendment (Registered Relationships) Act 2017* (SA).

265 Vedig, Brown and Moulds (n 256). See *Statutes Amendment (Surrogacy Eligibility) Act 2017* (SA).

266 Sarah Moulds, *'Lawful Discrimination': Exceptions under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status* (Report, South Australian Law Reform Institute, June 2016). Some recommendations were implemented in the in the *Relationships Register Act 2016* (SA), but the majority remain with the government. See also below n 260.

267 David Plater, Lucy Line and Kate Fitz-Gibbon, *The Provoking Operation of Provocation: Stage 1* (Report, South Australian Law Reform Institute, April 2017); Plater et al, *The Provoking Operation of Provocation* (n 169).

as a number of linked issues).[268] It is significant that almost all of these reports and resulting far ranging recommendations were accepted by the government and Parliament and are now law.[269]

The landmark *Termination of Pregnancy Act 2021* (SA) to decriminalise abortion in South Australia was at least broadly based on SALRI's report.[270]

It is significant that only one of SALRI's reports, the oaths in court report, has been relegated to date by successive governments to 'sitting on the shelf'. It is clear that, on any measure, SALRI has had a prolific and effective decade with a number of its reports covering not just technical areas, but major and often sensitive areas of law and policy. The majority of these reports have been accepted by successive governments and parliaments.

V Conclusion

The value of an independent law reform body is an essential element in ensuring that the laws of the community meet the expectation of its peoples and the needs of modern society. The courts are limited in the judicial development of the law and their capacity for judicial law reform is restricted.[271] The path for law reform is no easy task requiring the bodies to navigate the 'narrow path' between independence and irrelevance.[272] Few would dispute Kirby's plea for law reform bodies to

268 These two reports also examined linked issues such as gender and family violence implications and the defences of self-defence, duress, necessity, marital coercion, and diminished responsibility as well as expert evidence as to the effects of family violence and increased flexibility in sentencing for homicide. The *Statutes Amendment (Abolition of Defence of Provocation and Related Matters) Act 2020* (SA) which passed Parliament with all party support and without a single dissenting voice was based on SALRI's two reports. See, eg: South Australia, *Parliamentary Debates*, House of Assembly, 23 July 2020, 2216–17 (Vickie Chapman, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 15 October 2020, 1988–90 (Michelle Lensink, Minister for Human Services); South Australia, *Parliamentary Debates*, House of Assembly, 1 December 2020, 3521–2 (Vickie Chapman, Attorney-General).

269 The main exception relates to SALRI's proposals as to discrimination under the *Equal Opportunity Act 1984* (SA), notably to clarify the lawful exceptions and limit the ability of religious schools to lawfully discriminate against LGBTQIA+ staff or students. A Bill based on SALRI's proposals was circulated in late 2020 for public comment. See 'Religious Exceptions: Anti-Discrimination Changes', *yourSAy* (Forum Post) <https://yoursay.sa.gov.au/religious-exceptions-anti-discrimination-changes>. However, it does not appear to have been progressed. Since 2019, the Commonwealth has been seeking to progress its own legislation in this complex area.

270 See above n 154.

271 Mason (n 35) 202–3; *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 628–9 (Stephen J), 633–4 (Mason J). See also Kirby, 'Changing Fashions and Enduring Values' (n 75).

272 Kirby, 'Law Reform: Ten Attributes for Success' (n 60) 16.

be 'strong, courageous and bold'.[273] However, this cannot be a licence to indulge in grandiose rhetoric or embrace the politics of the warm inner glow. Law reform bodies risk becoming irrelevant if too theoretical and impractical in their recommendations.[274] As Rees notes:

> The challenge is to be all of these things [strong, courageous and bold] without alienating segments of the community by appearing to be morally superior. Reports which are well researched, well argued and expressed in moderate language, no matter what the topic, are unlikely to generate calls for the continued existence of a law reform commission to be questioned.[275]

Law reform bodies must not lose touch with the 'practical feel' of the law.[276] As Peter North KC has observed:

> I have no doubt that practicable and workable solutions are what the law reformer must produce. It is no good looking for theoretical or ivory tower solutions to a problem if they cannot be clearly understood in the community at large by the people who have to operate the law.[277]

In the decade since its establishment, SALRI has steered the path between irrelevance and independence and has emerged as a respected institution within the South Australian reform landscape. SALRI has continued the work of such bodies as the South Australian Law Reform Committee and the ALRC. The initial pessimism expressed, notably by Kirby, for the institute model of law reform and SALRI have not been borne out. SALRI's considerable output and impact to date are notable and belie its resources. There is no one-size-fits-all model of law reform and the institute model, whilst not without issues, has certain advantages, especially for a jurisdiction like South Australia. The idea and prominence of law reform have become historical features of South Australia. Given its heritage and centrality of ensuring that the law serves it community, SALRI has had a significant and beneficial effect on law reform in the State. As the Governor observed, may SALRI 'continue well into the future'. However, as North also aptly comments, 'we should not be overly proud, because there is always more to be done'.[278]

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[273] Ibid 22.

[274] Barnett (n 80) 165, 190.

[275] Rees (n 4) 13.

[276] Sawer (n 50) 194.

[277] North, 'Law Reform: Problems and Pitfalls' (n 88) 43.

[278] Ibid 51–2. For those interested, all of SALRI's Reports and Issues Papers can be accessed at 'South Australian Law Reform Institute', *The University of Adelaide* (Web Page, 2 November 2022) <https://law.adelaide.edu.au/research/south-australian-law-reform-institute>.