

Submission to the Review of the Tasmania Law Reform Institute (TLRI)

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TLRI Review Terms of Reference

The Review Panel shall consider and make recommendations about the structure, form, governance and funding of the Tasmania Law Reform Institute, as the State's peak law reform body. The object of the review is to ensure the continuing success and sustainability of that Institute in the ongoing improvement of Tasmania's systems of law and justice. In particular, the Panel should consider:

- Whether the aims and objectives of the Institute, set out in its Founding Agreement, require modernisation, clarification or amendment;
- Whether there are sufficient provisions for the protection and promotion of the institutional integrity and independence of the Institute;
- The position, role and relationship of the Institute to its founding members, the Government of Tasmania, and the University of Tasmania (in particular its placement within the Law Faculty of UTAS), including specifically the research capacities and priorities of the University and the Law Faculty;
- The position, role and relationship of the Institute to the Government of Tasmania, as represented by the Attorney-General;
- The adequacy and appropriateness of the Institute's current constitution, governance arrangements and reference process; and
- The appropriateness and sustainability of the Institute's resourcing and staffing having regard to the size of the jurisdiction in which it operates.

Submission Overview

I appreciate the opportunity to provide input into this important review (the Review) of the Tasmanian Law Reform Institute (the TLRI).

This Review's stated aims are to consider the current structure, governance and funding of the TLRI, as well as the stated objectives of the TLRI and its relationship to its founding members, and to evaluate the extent to which the TLRI is able to meet those objectives within the context of securing its ongoing sustainability.

At the outset I wish to state my support for the TLRI, its work and significant contribution it makes to Tasmania's statutes, legislators and broader community.

I am aware that there will be those from academic law backgrounds and the legal profession who will be making submissions providing a more thorough and detailed analysis of the clauses contained in the TLRI's founding document, and its subsequent renewal agreement, within the context of the Review's stated objectives and terms of reference. This submission will instead focus on the TLRI's role and contribution from the perspective of key non-legal fraternity sectors who rely upon the TLRI's involvement and work: legislators and community organisations.

Role of the Tasmanian Law Reform Institute (TLRI)

Since the TLRI's establishment in 2001 it has played a pivotal and constructive role within both Tasmania's

social politic and specific significant areas of public policy development and implementation.¹

From the perspective of both a community services sector stakeholder and that as a state parliamentarian, I have had direct experience of both submitting potential references to the TLRI, as well as utilizing their research and publications to help inform my work.²

In this context it cannot be stressed enough, the appreciation of the rigor, quality and clear communication contained in TLRI produced analysis of specific Bills before the Parliament, as well as finalised reports on received references. These reports and analyses contribute substantially to the provision of a sound baseline of legal understanding of the nuances involved within a particular public policy debate, as well as the implications, strengths or otherwise of proposed legislative means of policy implementation. Access to such credible and reliable resources, materials and formal briefings is particularly important for parliamentarians who do not have a law background.

An important factor contributing to the TLRI's cross-sectoral credibility is its independence and recognized integrity.

The TLRI is not perceived as a creature of the government of the day, nor the legal profession, and nor that of the University of Tasmania. While it is recognized that these three entities have a clear interest in the TLRI's establishment, that interest is not perceived to be a 'controlling' one. This perception of the TLRI being at arm's length from its three founding entities when it comes to the execution and delivery of its work is crucial to the TLRI's credibility, and perceived integrity, within the Parliament (especially non-government members), the community sector and the broader community.

The TLRI's perceived credibility, integrity and independence is crucial to its capacity to deliver its functions and objectives as detailed in section 2.2 of the 2001 Founding Agreement.³ It is also arguable that the Institute's credibility is paramount to its ability to deliver on the specific objective of Section 2.2 (e) (vi) of the 2019 Renewal of Agreement, "optimizing the operation of the law and facilitating access to justice..."⁴ The public and professional trust earned over the decades since the TLRI's establishment encourages ongoing engagement with the Institute's activities by community stakeholders, including elected representatives, from proposing references to working through advice and recommendations received.

It is also worthwhile stressing within the context of the TLRI's role, that not any one sector, entity or individual has a monopoly on identifying whether and how laws are operating as intended, or access to justice is being impeded. While the experience and perspective of those legislating and administering the law is clearly important and valuable, so to is the experience and perspective of those impacted by those laws, as well as any gaps within those statutes.

The current capacity of the TLRI to consider references suggested by members of the community and community organisations, as provided by section 4.1 (g) of the 2019 Renewal Agreement is critical to the institute's delivery of its specified function of facilitating "access to justice" as discussed above.

¹ It is presumed the Review Panel is aware of the history of the TLRI's establishment as summarised on the Institute's home page and in its publicly available annual reports, (see: <https://www.UTAS.edu.au/law-reform/history>) hence that material is not duplicated here.

² I currently have a reference accepted by the TLRI yet to be completed: *Review of Privacy Laws in Tasmania*.

³ The *Tasmanian Law Reform Institute Founding Agreement 2001* as accessed via the website: https://www.UTAS.edu.au/data/assets/pdf_file/0003/302943/FoundingAgreement-1.pdf

⁴ The *Tasmanian Law Reform Institute Renewal of Agreement 2019* as accessed via the website: https://www.UTAS.edu.au/data/assets/pdf_file/0008/1338614/TLRI-Renewal-of-Agreement-2019.pdf

Commissioning and Scope of the Review

The 2019 Renewal Agreement expires in November this year, and in that context it is logical for a review to be undertaken prior that date as per constructive continual improvement practice to secure the best possible operational structure and resourcing of the TLRI into the future.

However, there are some concerns and confusion surrounding the origins and manner of this review (which I note is not the responsibility of the appointed Review Panel). However, given a specific task of the review is to evaluate the Institutes role in furthering law and justice, and also whether aspects of its operations require “modernisation”, the following comments are offered within the context, and spirit, of that modernisation to further good practice and justice.

Role of UTAS and the Reviews of Schools and Institutes Procedure

It is unclear, given the fact there are three founders: the University of Tasmania (UTAS), the State as represented by the Department of Justice, and the Tasmanian Law Society, why this review has been commissioned under the auspices of only one founder, UTAS. While this course of action may have been agreed to by the other two founding parties, it is not clear to other stakeholders – such as entities, community organisations and individuals - why it is the course taken.

There are also apparent inconsistencies between the conduct of this review commissioned by the University and review procedures for other University Centres and Institutes.

Despite section 2.2 of both the original 2001 Founding Agreement and the subsequent 2019 Renewal stating the TLRI operations are to be “in accordance with the University’s standard procedures for the operation of Research Centres”, those standard procedures do not appear to be available for inspection, at least not via the University website. It would be helpful to those making submissions responding to a terms of reference asking for comment and reflection specifically on the delivery of the Institute’s functions and objectives in accordance with specific procedures, to be provided access to those procedures to assist in making informed comment.

It may be that these procedures have since become redundant, and hence their unavailability, in which case this should be a simple matter of updating the wording of the Agreement document.

There also appears to be confusion regarding where the TLRI review sits within the review processes applicable to other UTAS Research Centres and Institutes, as detailed in the UTAS Reviews of Schools and Institutes Procedure, which falls under the auspices of the Provost.

Currently, it is my understanding, there is a review being conducted of the Australian Maritime College in accordance with the Reviews of Schools and Institutes Procedure. It may be that the unique founding arrangement between contracting parties, two of whom are external to the University is the basis for a different review approach, and should this be the case it would be useful to have that distinction clarified, particularly prior any future TLRI review, for the benefit of both the academic community and the broader public.

Demonstrating modern community involvement and transparency expectations

As noted in the discussion above, and also made apparent in both the 2001 Founding Agreement and the 2019 Renewal Agreement, the TLRI has a clear relationship with the Tasmanian community. In fact, it must do so if it is to deliver successfully on its stated objectives, especially that of “facilitating access to justice”. This relationship is further codified within the agreement documents by the provision for potential

references to be submitted from members of the community and community organisations, as well as the inclusion of community representatives on the Board.

However, it also must be recognized that there will be further community organisations and members of the public who feel invested in the TLRI's operations either due to particular research and/or law reform proposals undertaken, despite not having a direct role in submitting that particular reference. Further, many will consider their life has been impacted upon directly and improved in some way because Tasmanian policy settings and legislation has been influenced in some way by TLRI advice and recommendations which were then adopted by government and passed by the Parliament. There may also be other researchers and academics who have accessed and utilized TLRI publications to further other ongoing work. In that context, those community members and organisations would consider themselves stakeholders in the future and operations of the TLRI. However, it is unclear whether many of these stakeholders would even be aware this review is underway.

It appears the current review is inviting submissions from identified selected stakeholders – amongst whom I consider myself fortunate to be included – rather than initiate a broader public consultation process. It is acknowledged there is a legitimate place for lower level selected stakeholder involvement forms of review. However, given the timing of this review in relation to the November expiry of the TLRI's agreement between its contractual parties, and the all-encompassing nature of the review into the Institute's "continuing success and sustainability", it is arguable that the establishment of a broader public consultation process would have been appropriate.

To do so would be consistent with modern best practice community and stakeholder engagement – a goal to which both the University and the state government espouse.

Further there is a case that all submissions not requested to be treated confidentially, should be automatically provided to all founding parties, and also to the public. Currently it has been stated that the University will make any submissions available to the contracting partners "upon request". At face value, this appears out of step with current community expectations of transparency and accountability, particularly regarding matters raised, and/or materials received, instrumental to a decision making process which potentially has consequences for the public interest. Particularly the investment or otherwise of public funds.

The state government's 2018 Guidelines, 'Publication of Submissions Received by Tasmanian Government Departments in Response to Consultation on Major Policy Issues' specifies the public release of non-confidential and non-defamatory submissions is the default position for major policy consultation processes.⁵ It is stated this commitment reflects community expectations to have access to information informing and influencing Government decision-making on major policy matters. It is arguable that an all-encompassing review of an independent entity such as the TLRI, partially funded by state government public funds is a major policy matter.

The University of Tasmania has a current public strategy of developing enhanced community relationships. And as discussed, the stage government has a policy of public promotion of significant policy consultation processes and public release of submissions made to those processes.

In contrast, the current apparent selective in-house approach and obliqueness surrounding the commissioning and manner of this Review risks eroding the trust and confidence in the independence of

⁵ The Public Submissions Policy and Guidelines are accessible on the Department of Premier and Cabinet website: https://www.dpac.tas.gov.au/divisions/People_Performance_and_Governance/government_services/public_submissions_policy

the TLRI. It is an exclusive approach which fails to recognize the relationship between the Institute, its outreach work and the Tasmanian community. As such, it is arguably inconsistent with current community engagement and involvement policies held by at least two founding parties; UTAS and the state government.

Given the specified functions and objectives of the TLRI, and the specified capacity for members of the community to be involved in identifying potential references, future review processes for the TLRI should be updated to reflect contemporary best practice and community expectations of transparency and involvement.

Recommendation 1: Recognising the investment of public funds into the operations and administration of the TLRI, and in the interests of transparency and accountability any revised Renewal of Agreement is amended to include:

- a) a specified review timetable, i.e. every 5 years as per section 4.1 of the *UTAS Reviews of Schools and Institutes Procedure*;
- b) that such reviews are to be advertised publicly and call for public submissions consistent with established state government community consultation and submission policy;
- c) a clarification of the roles and responsibilities of the three founding parties in commissioning such specified reviews.

Recommendation 2: Ensure that all references in the revised Agreement document to operational procedures with which the TLRI is meant to conform, including but not limited to, standard procedures for Research Centres, and are also publicly available on the TLRI website.

Review Specific Terms of Reference

As stated above, given other submitters will be presenting detailed and analytical feedback on each specific Terms of Reference point and corresponding Agreement documentation, I will limit my feedback here to considerations informed by my professional interactions with the TLRI and its work.

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

The current aims and objectives as detailed in both the Founding and Renewed Agreement documents 'Establishment of the Institute' section appear to provide sufficient breadth of scope to enable the Institute to undertake wide-ranging and comprehensive law reform investigations.

However, it is unclear whether the TLRI can initiate its own reference under either section 2 or section 4. Section 2 (e) states the TLRI is to examine "an area of law with a view to..." which could be open to the interpretation that own motions are acceptable, as well as these are the guidelines to be applied when undertaking a submitted and approved reference. Similarly, Section 4 does not address the possibility of own motions.

The matter of own motions also points to the lack of any defining statement declaring the TLRI as an independent entity. This could be clarified within the Agreement's aims and objectives.

Having an unequivocal statement declaring the TLRI's functioning independence is also important in light of the list of sources from which potential research proposals can be proposed and accepted. Specifically, the

inclusion of 4.1. (g) of “members of the community and community groups” is important and should be retained.

A potential clarification, again highlighting the TLRI’s independence, is to amend 4.1 (e) to include “Parliament and Members of Parliament.” Currently this phrase could be open to the interpretation that a proposal needed to be provided by, and therefore subsequent to a vote, by Parliament as an entity, rather than provide for the involvement of individual members of parliament.

As mentioned above, section 2.2’s reference to University standard operating procedures for Research Centres is oblique and meaningless if such a reference document is then not broadly accessible.

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

As previously mentioned, the current Agreement document does not state explicitly that the TLRI is an independent law reform body. Therefore, there currently are not sufficient provisions for the protection and promotion of the institutional integrity and independence of the Institute.

Although clause 5.3 does include a requirement that the Director is to work to “ensure the independence of the Institute”, that in itself appears minimal and inadequate, and places the responsibility upon one role. The responsibility for protecting and promoting the TLRI’s independence must be explicitly allocated to, and shared amongst, the Founding Members, as well as the Board along with any staff.

A clear and unequivocal statement of independence within the Agreement’s operating principles would provide clarity, direction and protection to the TLRI and Board, and would also strengthen public and stakeholder perception of the TLRI’s integrity and legitimacy.

Additionally, as discussed below, resolving the long-outstanding need for a sustainable funding model must also be established upon the clear principles of independence, and should in turn reflect those principles of operational independence.

- ***The position, role and relationship of the Institute to its founding members, the Government of Tasmania, and the University of Tasmania (in particular its placement within the Law Faculty of UTAS), including specifically the research capacities and priorities of the University and the Law Faculty;***

As someone external to the TLRI’s relationship with its founding members including the state government and UTAS I have little to specifically contribute on this point. However as detailed in the Agreement, there are instances where the university’s role appears quite prescriptive, for example 5.1 where the university appoints the Director.

The potential for the Attorney General to be perceived as having a restrictive role regarding proposed references under the current wording, is discussed below in the next specific terms of reference point.

- ***The position, role and relationship of the Institute to the Government of Tasmania, as represented by the Attorney-General;***

There is a logical synergy between the TLRI and the state Attorney General, however I concur with concerns raised elsewhere of the apparent control the Founding and Review Agreements provide the Attorney-General, which could result in a restrictive and narrowing of the scope of the reference submission and selection process.

Historically, a justification of the abolishment of the former Tasmanian Law Reform Commissions was to depoliticize the source of references accepted, as the former Commission could only accept those proposed by the Attorney General. Amending section 2.2 of the Agreement, clauses (c), (d), (f) to delete references to the Attorney-General would modernize and rebalance the role of that state position.

Yet, as the state party's representative signatory on the Agreement – and presuming that remains the case in light of any future renewal agreement – the Attorney General's role should be further clarified to specify they are to table the TLRI's Annual Report in both Houses of Parliament. This point is discussed in further detail below in relation to funding arrangements.

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

The Board's make up, as currently defined under the Agreement, appears appropriate. Clearly it is heavily weighted towards the legal fraternity but it is pleasing to see that community and non-law based representatives are provided for. The inclusion of non-law, non-academic community representatives is vital to ensure the inclusion of diverse perspectives when seeking to deliver on the goal of furthering "access to justice" via law reform.

However, it is unclear how the non-law and community representatives are identified and upon what basis they are subsequently appointed. There may be scope to include provision for community representative, as nominated by community organisation stakeholders and/or individuals themselves.

As previously mentioned, under the current Agreement the Director is appointed by the University of Tasmania. It would strengthen the TLRI's independence from its Founding Members for the Agreement to be amended to instead provide for the Board to employ/appoint the Director. Further, the position of Director should be advertised broadly, ie not just within UTAS staff, upon it becoming vacant, with contemporary impartial selection processes employed by the Board to fill the role.

Regarding the adequacy and appropriateness of the reference process, the Agreement should be amended to clarify that the sole responsibility of accepting or rejecting proposed references lies with the TLRI, as opposed to its Founding Members. This is another vital aspect of ensuring, protecting and promoting the TLRI's independence, and particularly protecting the institute from the potential perception of undue influence from external parties.

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

The ongoing lack of financial sustainability and security of the TLRI and for its staff is of prime concern.

The fact the 2019 Renewal Agreement requires the Institute to operate with funding held on the same level as the original 2001 Agreement is clearly untenable. The TLRI's annual reports repeatedly detail funding not forthcoming, entirely or partially, and the ramifications of that both on staff retention and productivity output. The latest available annual report specifically states, "the 2001 funding level is not sustainable and undermines Tasmania's ability to eliminate defects in the law, and to undertake regular modernization, simplification and consolidation of its law compared to other jurisdictions in Australia."⁶

It is also quite apparent that the outdated, inadequate and insecure funding arrangements has created the unfortunate cycle where staff cannot be retained, positions are not filled, inevitably resulting in a backlog

⁶ TLRI *Annual Progress and Financial Report 2020*; pg 2.

of references uncompleted. For example, my reference to review Tasmania's Privacy laws was accepted in late 2019, was expected to be completed mid-2021, but is still pending. And I'm aware of others in a similar holding pattern. It must be emphasized that this is in no way a criticism of the TLRI's employed, student and volunteer staff, instead it reflects upon a gaping structural flaw that the founding parties have failed to address.

Annual report documents detail TLRI staff attempts to source additional income streams via grants and applications to other appropriate funds, such as the Solicitor Grants Fund. These alternative funding sources should not be considered viable alternatives to a dedicated and sustainable baseload funding which is CPI indexed. Grant applications consume valuable time and energy from the minimal TLRI team, with little to no guarantee of return upon that investment of time and energy – as such it is an inefficient and unsustainable mode by which to seek ongoing operational funding by which to undertake core business and responsibilities. Seeking to access such funds should be tailored to seeking additional funding, on top of baseline funding, for relevant specific projects.

Sustainable base-line funding for the TLRI must provide for the capacity for the institute to undertake necessary research and preparation of reports, and subsequent communication materials such as Easy to Read versions of Issues Papers and social media outreach, for more than one reference simultaneously.

For the TLRI to deliver its stated objectives and functions in a credible robust and sustainable manner, it must be resourced to provide staffing at a minimum of:

- a) A FTE Director
- b) A FTE permanent and dedicated Senior Researcher
- c) A FTE permanent and dedicated administrative officer.

It is also worth considering a Deputy-Director position, whether FTE or PTE, to assist in staff management, and particularly student researcher and scholarship supervision, as well as core research and publication functions. It is a core sustainability principle to plan for key personnel risk and management, something which has been glaringly absent from previous and current TLRI staffing structures.

Recommendation 3: the TLRI must be resourced to provide the following minimum staffing arrangements, including the provision for key personnel risk management,:

- a) A FTE Director
- b) A FTE dedicated Senior Researcher
- c) A FTE administrative officer
- d) Potential Deputy Director(s).

Recommendation 4:

- a) That a sustainable funding model is developed as a priority in which the state government provides CPI-indexed baseline funding commensurate with placing Tasmania's premier independent law reform body onto a secure footing, with the state government's contribution formalized as a dedicated state budgetary line item as if the TLRI is a statutory body. Equitable division of costs could be provided by UTAS formally accepting ongoing responsibility to continue to fund and supply the position of the Director and the Institute's premises and associated on-costs.
- b) As part of the modernization process, the Attorney General upon receipt of the TLRI's Annual Progress and Financial Report is required to table that report in both Houses of Parliament consistent with contemporary transparency and accountability of expenditure of public funds.

Concluding Comments

The points raised and discussed in this submission are provided within the context of this review's stated objective: "... to ensure the continuing success and sustainability of [the] Institute in the ongoing improvement of Tasmania's systems of law and justice."

The TLRI is the state's pivotal and premier law reform body, and as such provides a vital collaborative role across the parliament, government, university, the legal profession, and the broader community.

In order for it to continue to build upon those significant relationships and investments, the TLRI must maintain its reputation for independence, integrity rigor and public accessibility. The fundamental hurdle for the TLRI to maintain its established reputation, let alone its capacity to deliver its objectives and aims as specified under its Founding Agreement, is the lack of a suitable sustainable long-term funding model. The current inadequate, insecure and fluctuating financing of the TLRI's operations seriously jeopardises and undermines its ability to deliver on its objections, functions and responsibilities in a consistent and reliable manner.

The failure to provide such a sustainable funding model also risks exposing the Founding contractual parties to allegations of unfair and poor working environment practices.

The TLRI is to be congratulated for its current rigorous, impartial and professional high standard of work across a range of diverse projects and references despite the financial insecurity in which it operates. From the perspective of someone who utilizes extensively the TLRI's publications, reports, as well as specific legislative briefings as provided for by government or the parliament on specific matters being debated, I can attest unequivocally to the profound contribution the Institute has made, and continues to make, modernizing, and optimizing the operations of Tasmanian law while facilitating Tasmanians' access to justice in both the immediate and long-term. Once can only imagine how more comprehensively a TLRI underpinned by a modernised and clarified tripartite founding agreement, and a long term sustainability model could deliver on its stated objectives and aims on behalf of its stakeholders and the broader Tasmanian community.

Thank you for this opportunity to contribute to this important discussion seeking to secure the "continuing success and sustainability" of the Tasmanian Law Reform Institute.

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References

- [Tasmanian Government, Dept. Of Premier and Cabinet, 2018, 'Publication of Submissions Received by Tasmanian Government Departments in Response to Consultation on Major Policy Issues'.](#)
- *Tasmanian Law Reform Institute Founding Agreement 2001*
- *Tasmanian Law Reform Institute Renewal of Agreement 2019*
- [Tasmanian Law Reform Institute, Annual Progress and Financial Report 2020](#)