

REVIEW OF THE TASMANIA LAW REFORM INSTITUTE

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Dear Professor Williams,

Many thanks for giving me the opportunity to contribute to the review being undertaken into the Tasmania Law Reform Institute (TLRI). I was a member of the TLRI Board from its inception in 2001 until 2015 when I became Director of the Institute until my retirement at the end of 2019. I worked as Assistant to the Tasmanian Law Reform Commissioner, the Hon Henry Cosgrove AM QC (former Justice of the Supreme Court of Tasmania), from 1988-1989 and I have also worked on reference groups to the Australian Law Reform Commission. Accordingly, I have experience of other Law Reform bodies, their work, objectives, structures, administration, and resourcing.

I note that the object of the review is “to ensure the continuing success and sustainability of [the] Institute in the ongoing improvement of Tasmania’s systems of law and justice.” I address the Terms of Reference (ToR) in turn, though my comments in relation to some ToR are relevant to others.

ToR 1: Whether the aims and objectives of the Institute, set out in its Founding Agreement, require modernisation, clarification or amendment.

The most recent iteration of the Institute’s Aims and Objectives is contained in the *Tasmania Law Reform Institute Renewal of Agreement 2019*. They replicate the Aims and Objectives of the original *Tasmania Law Reform Institute Founding Agreement* of 2001 with one addition under cl 2.2(e)(vi) – “optimising the operation of the law and facilitating access to justice” ...

The current aims and objectives are generally broad enough to enable the Institute to undertake wide-ranging and comprehensive law reform investigations. Nevertheless, clause 2.2 reflects a rather narrow historical perspective with its emphasis on the role of the Attorney-General. Accordingly, clauses 2.2(c), (d), & (f) should be amended by deleting references to the Attorney-General. These references potentially narrow the scope of the Institute’s work. Their removal would reflect the intention of the Agreement to make the Institute operate independently in receiving, accepting, and conducting references, in contrast to the Tasmanian Law Reform Commission of 1974-1989, which received

references solely from the Attorney-General. The recommendation made below about redrafting cl 2.2 resolves these problems.

Additionally, some aspects of Clause 2 sit uneasily with other clauses in the *TLRI Agreement* and raise questions of interpretation about how they work together. For example, Clause 2.2(a) (“to conduct reviews and research on areas specified by the Board”) does not sit entirely consistently with Clause 3.1 (“The Board of the Institute is established as an advisory body”). It is reasonable to assume that clause 2.2(a) would be read as subject to Clause 3.1. But revised drafting suggested below would remove this apparent anomaly.

I recommend that Clause 2.2 be revised as follows:

A. First, an overarching statement of the Institute’s objectives should be set out in a preliminary paragraph:

2.2.1 The objectives of the Institute are to consider matters of law reform, in order to propose what laws may be made more useful and effective and to prepare proposals for law reform with respect to the substantive and adjectival law and the administration of justice.¹

B. Additional detail should then be provided as follows:

2.2.2 Without narrowing the objectives of the Institute set down in para 2.2.1, the functions and objectives of the Institute include:

- a) to conduct independent reviews and research of the law with a view to providing independent advice and recommendations on:
 - i. the modernisation of the law; and**
 - ii. the elimination of defects and anomalies in the law; and**
 - iii. the simplification of the law; and**
 - iv. the consolidation of any laws; and**
 - v. the codification of laws;**
 - vi. the repeal of laws that are obsolete or unnecessary; and**
 - vii. optimising the operation of the law and facilitating access to justice; and**
 - viii. establishing uniformity with and between laws of other States of the Commonwealth.****
- b) To conduct these reviews and research, where appropriate on a consultancy basis, that is by consulting as widely as possible with the community and relevant stakeholders.**
- c) To publish reports, issues papers, research papers, conference papers and any other commentaries on the law relevant to law reform and law reform processes.**
- d) To submit recommendations for law reform to the government with a view to their implementation.**
- e) To work with other State, Territory and Commonwealth law reform agencies on proposals for law reform.**

¹ This clause is based on the Alberta Law Reform Institute’s statement of its aims and objectives: <https://www.alri.ualberta.ca/about/> The TLRI is modelled on the Alberta Law Reform Institute.

- f) To work with other bodies, agencies, and institutions (including but not limited to universities in other jurisdictions) on research relevant to the reform and operation of laws in Tasmania and other jurisdictions.
- g) To enter into research agreements and Memoranda of Understanding with other institutions including, but not limited to, Tasmanian Courts, for the purpose of facilitating the conduct of the Institute's work.²
- h) To provide advice on draft Bills and Legislation to Parliament and the Government.
- i) To disseminate the work of the Institute at local, national, and international levels and foster understanding of and participation in the work of the Institute at these levels.

ToR 2: Whether there are sufficient provisions for the protection and promotion of the institutional integrity and independence of the Institute

An essential characteristic of law reform bodies is their independence. It is a safeguard against interference. It ensures that law reform advice and recommendations are offered without fear or favour.

Independence is critical in demonstrating the legitimacy and authority of law reform bodies' findings and recommendations. Moreover, it makes their work of particular value to governments because it underpins the objectivity and impartiality of advice given and subsequently acted upon. It enhances the integrity and credibility of law reform bodies' work and, consequently, of law reforms advocated for or implemented on the basis of that work. It is the foundation of trust in their work by governments, the legislature, stakeholders and the community generally.

Independence encompasses independence in accepting references, in undertaking work, in coming to conclusions, in making recommendations and in publishing and disseminating work. It means independent of governments, founding members, the legal profession, funders, and those who make references.

There is no explicit provision in the *TLRI Agreement* for the protection and promotion of its institutional independence and integrity. The only mention of independence is in Division 5 of the 2019 *Renewal Agreement* which deals with the Director. Clause 5.3 dot point two states that the Director shall be responsible for "working to ensure the independence of the Institute". While necessary this is not sufficient to protect the Institute's independence.

It is recommended that independence should be recognised as a foundational principle for the Institute for which explicit provision is made in its Establishment provisions in Division 2 of the TLRI Agreement. This principle should be reinforced in Division 4 which deals with the Operation of the Institute (see below). A useful precedent for the former is s 5(3) of the Law Commission Act 1985 NZ which states that the Law Commission "must act independently in performing its statutory functions and duties and exercising its statutory powers." This might be reworded as follows to accommodate the Tasmanian non-

² In June 2016 the TLRI entered into five-year research Memoranda of Understanding with the Tasmanian Supreme Court and the Tasmanian Magistrates Court. These Memoranda of Understanding established a reference point and basis for TLRI research projects with the courts.

statutory model: “The Institute has a duty to act independently in performing all its functions and achieving its objectives and in undertaking its work and responsibilities.”

The independence of the Institute should be reinforced in Division 4 (Operation of the Institute) by provision to the effect that the Institute is to operate independently of the control, direction or interference of any other person, body or authority including but not limited to its Founding Members, the Government, funders, and those who make references to the Institute (for precedent in this regard see, s 136 of the Republic of Malawi Constitution 1994 and s 14 of Republic of Malawi Law Commission Act 1998.

Other changes to the *TLRI Agreement* that would reinforce and embed its independence relate to its funding, the appointment of the Director, acting Directors and Board members, the composition of the Board, the reception of law reform references, its publications and staffing and the removal of some anomalies and apparently otiose provisions relating to its establishment. These matters are dealt with in relation to ToR 5 and 6.

ToR 3: 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.

ToR 4: The position, role and relationship of the Institute to the Government of Tasmania, as represented by the Attorney-General.

My response to ToR number three assumes that it was intended to include mention of the Law Society of Tasmania (LST) as one of the Institute’s founding members. I will address ToRs number three and four together because they overlap.

The position, role and relationship of the TLRI to its founding members are not set out in any detail in its *Founding or Renewal Agreements*.

Since its establishment in 2001 the Institute has enjoyed very good relationships with all its Founding Members.

It is, nevertheless, recommended that to help “ensure the continuing success and sustainability of [the] Institute in the ongoing improvement of Tasmania’s systems of law and justice” the nature of the relationship between the Institute and its Founding Members should be placed on an explicit and detailed footing in the TLRI Agreement. Independence, continuity, adequate funding and other support, transparency, and communication should be the key features of the position, role and relationship of the Institute to its Founding Members.

Possibly, the most important aspect of that relationship is the independence of the Institute, which is discussed in relation to ToR number 2 above. The second critical aspect of their relationship is funding and support. Funding is discussed in relation to ToR number 6.

The composition of the TLRI Board, with each of the founding members appointing some, though not all, of its members, provides a key component in the relationship of the Institute to its Founding Members. The role of the Board is advisory (see cl 3.1 of the *Renewal Agreement*). This explicitly establishes the nature of the relationship between the Board and the Institute (and more particularly, the Director, see cls 3.3 and 5.4) and implicitly establishes the nature of the relationship of the Institute to its Founding Members. The advisory relationship with the Law Society of Tasmania is also reiterated in cl 6.2.³ It is through meetings with the Board and Founding Members that the work of the Institute is enriched and guided (see, in particular, cls 3.3 and 3.4). The explicit statement of the role of the Board as advisory is an important element in securing the Independence of the Institute.

I therefore recommend that the Board’s advisory relationship and function with the Institute be retained. I also recommend explicitly extending an advisory role to all Founding Members in the TLRI Agreement.

The Founding Members provide a valuable source of support to the Institute in promulgating its work, in providing references and making submissions to Institute consultations and in eliciting submissions on references from other key stakeholders and the general community. The supportive role of the Founding Members in this regard is not explicitly mentioned in the *TLRI Agreement*.

I recommend that the supportive role played by the Founding Members should be recognised in the TLRI Agreement in the terms detailed above both in acknowledgment of its value and to make it an explicit function of the relationship between the Institute and its Founding Members.

Since the establishment of the Institute, the Director has held regular meetings with the Vice Chancellor, the President of the Law Society and the State Attorney-General as representing the Government. It was my practice to hold these meetings, at the very least on a quarterly basis. Their purpose was to provide briefings on the TLRI’s work, to give and obtain relevant advice, to discuss issues of mutual importance like plans for future work, reports on the implementation of past work, funding, references, and the promulgation of the Institute’s work etc. This approach was adopted as a matter of courtesy and convention.

I recommend that it be placed on a more formal footing, either in the TLRI Agreement with the Founding Members or in Memoranda of Understanding with them.

Continuity is a desirable attribute of law reform bodies because it enables them to build expertise, experience, skills and knowledge across a broad range of areas of law and to build strong relationships with founding members, stakeholders and the community. To date, the *TLRI Agreement* has run for successive five-year periods except for the most recent 2019 *Agreement Renewal* which extended the Institute’s life for only a further three years.

³ The mention of cl 4.1(d) in cl 6.2 appears to be a drafting or typographical error in the *Renewal Agreement*. It should be clause 4.1(f). Clause 4.1(d) in the *Founding Agreement* related to the reception of law reform proposals and research projects from the legal profession. Clause 4.1 was amended in *Renewal Agreements*, but that amendment was not reflected in consequential amendments to clause 6.2. That consequential amendment should be made.

It would greatly improve the independence and sustainability of the Institute were it to be established as a standing body that can only be dissolved by agreement of all Founding Members and I recommend that this be set down in the TLRI Agreement. Nevertheless, the TLRI Agreement, should be discussed at four- or five-year intervals by all Founding Members and the Director and, where necessary, updated to ensure that it matches the current requirements of the Institute and ensures its sustainability. I recommend that provision be made in this regard in the TLRI Agreement.

It is not recommended that the Institute be established as a statutory body. The history of the Tasmanian Law Reform Commission, which ceased to exist in 1989, demonstrates that this does not necessarily increase its independence or continuity. Further the amended Institute model proposed here offers greater potential for flexibility and adaptation to the exigencies of circumstances than can be achieved with a statutory model. It also promotes the independence of the Institute.

Clause 2.1 and one aspect of clause 2.2 of the *Renewal Agreement* of 2019 introduces an **element of uncertainty** into the relationship of the Institute with the University and may diminish the Institute's independence. Clause 2.1 states that "The Institute was established as a Research Centre within the University of Tasmania in clause 2.1 of the Founding Agreement." Clause 2.2 states that the Institute is [to conduct its functions and objectives] "in accordance with the University's standard procedures for the operation of Research Centres." I have not been able to find any "standard procedures for the operation of Research Centres" on the University of Tasmania's website. Research Centres are referred to at <https://www.utas.edu.au/research/institutes-and-centres> but no separate information is provided about their operation or procedures. It may be that this was a term in common use at the University at the time of the Institute's establishment, but it does not appear to have any distinguishable meaning at the present time. The use of this term is therefore not elucidatory of the relationship between the Institute and the University nor of its role within the University. Therefore clauses 2.1 and 2.2 (to the extent that it uses the term) would appear to be obsolete.

If the intention of these clauses was to place the TLRI under the control of the University, then they offend the key principle of independence. Similarly, if their intention was to ensure that the Institute's work complies with "the research capacities and priorities of the University and the Law Faculty" (see ToR number three), then that too would offend the principle of independence. That principle means that the Institute should not be required to comply with "the research capacities and priorities of the University and Law Faculty". While there are mutual advantages to the University and the Institute from its physical location within the Law Faculty, primarily relating to the availability of scholarly advice and collaboration (where possible), and benefits to students from undertaking research with the Institute (where appropriate and manageable), such advantages should not be seen as bestowing any power on the University to encroach upon the independence of the Institute.

If the aim of these clauses is to require the Institute to comply with National Codes of Conduct for Ethical Research that apply to universities, then this can be achieved equally

well and less ambiguously by setting that requirement down in the *TLRI Agreement* with its Founding Members.

Accordingly, I recommend the removal of these clauses from the Agreement. They cannot be given any certain meaning and, in any event, contravene the principle of independence that is a cornerstone of law reform agencies' operation.

In conclusion, in relation to ToRs three and four, I suggest that the desirability of settling with precision the relationship of the Institute to its Founding Members in the *TLRI Agreement* is underscored by this review itself. This comment is made with the greatest respect to all involved and particularly to the Review Panel upon whom the following comments are not intended reflect negatively in any way. The history of this review, the lack of clear authority for it to be commissioned, the manner of its initiation, its changing scope and uncertainty over time, the lack of communication with and involvement of the Director and the Board in its commissioning and direction, the lack of a documented process for the review, the making of submissions to it and the publication of the Review Panel's report point to deficiencies in understandings of the relationship and roles of the Institute and the Founding Members. This should be remedied with the remedy being based first and foremost on securing the Institute's independence, its continuity, the transparency of Founding Members' decision-making, and the Institute's involvement from the outset in those decisions.

ToR 5: The adequacy and appropriateness of the Institute's current constitution, governance arrangements and reference process.

I have interpreted the 'Institute's current constitution and governance arrangements' to mean: the makeup and appointment of the Board, the role and appointment of the Director, the appointment of acting Directors and who should chair meetings of the Board.

The current makeup of the Board works well. It is clearly weighted in favour of relevant legal sectors, which is appropriate given that the focus of the Institute is on law reform. At the same time, there is the capacity to appoint members from non-law backgrounds. This is valuable as it enables other perspectives to inform the work of the Institute. ***In this regard, I particularly recommend the retention of the requirement that one member of the Board be a member of the Tasmanian Aboriginal Community (3.2(h)).***

One change I recommend to the Board membership is the replacement of the appointee of the University Council, with an appointee of the Law Faculty. This would bring the Agreement into line with practice because the Council appointee has always been a member of the law academic staff. It is not clear what the purpose is of having a University Council appointee.

As recommended in relation to TOR number three, the role of the Board should remain an advisory one (cls 3.1 & 3.3).

This does not mean that the Board cannot perform a powerfully influential role in relation to the Institute's work. Its power in this regard is confirmed in cls 3.3 and 5.4 of the *Renewal Agreement* of 2019. The former mandates the Board "to advise the Director with respect to

the conduct of business at the Institute, including making recommendations whether a particular reform project should be undertaken.” The latter requires the Director “to seek the advice of members of the Board and report on Institute activities at each meeting of the Board.” These clauses give the Board a strong oversight role in relation to the Institute. This assists in preserving the independence of the Institute and the integrity of its work.

Currently the Director of the Institute chairs meetings of the Board (cls 3.7 & 5.4 of the *Renewal Agreement* of 2019). One question that was initially raised by the Attorney-General early in this Review process was whether the Director and Chair of the Board roles should be separated. It is unclear whether and how this would improve the work of the Institute. On the contrary, the current arrangement of the Director chairing Board meetings has worked well, ensured efficient and effective lines of communication, and expedited the work of the Board and its meetings. To appoint a separate Chair of the Board may introduce inefficiencies into the Board’s and Director’s work, confuse communication lines and responsibilities within the Institute and potentially create conflict in relation to decision-making authority. Given the consistently harmonious relationships between the Board and the Director and the effective operation of the current arrangement, there is no evidence of a need for any change.

I therefore recommend that there be no separation in the roles of Director and Chair of the Board and that the Director continue the Chair Board meetings.

However, there is merit in changing the arrangement for appointing the Director. Currently, the Director is appointed by the Vice Chancellor of the University (cl 5.1 of the *Renewal Agreement* of 2019).

I recommend that this be changed and that the Board be given responsibility for appointing the Director.

Precedent for this model is provided by the Alberta Law Reform Institute⁴ upon which the TLRI is based. This model has the advantage of promoting the independence of the Institute and of giving all Founding Members an indirect and equal role in the appointment via their Board appointees. The process could involve calling for expressions of interest or calling for nominations from Board members.

The Director should be a member of the law academic staff of the University. At the present time, the Director can be any member of academic staff (cl 5.2 of the Renewal Agreement of 2019). This clause should be changed to bring the TLRI Agreement into line with what has, to date been the practice.

It is also important that the Director have law qualifications, as well as knowledge and experience in law reform. These qualifications should be stipulated in the TLRI Agreement.

There is also merit in retaining the current arrangement for the Board to appoint acting Directors during any period when the Director is temporarily absent or there is any vacancy in the Directorship (see currently cl 5.5 of the *Renewal Agreement* of 2019).

⁴ <https://www.alri.ualberta.ca/about/>

However, I recommend amending cl 5.5 to remove any doubt or potential argument about whether the Board has sole authority to appoint acting Directors.

The **reference process** is one of the key strengths of the Institute because it enables the Institute to receive proposals from a broad range of sources including members of the community (see cl 4.1 of the *Renewal Agreement* of 2019). This distinguishes the Institute from its predecessor, the Tasmanian Law Reform Commission, which could receive references only from the State Attorney-General. It also distinguishes it from those law reform bodies that receive references only from government sources (eg the Australian Law Reform Commission)⁵ and that do not have the power to decline such references. The ability to receive references from a wide range of sources ensures that the Institute's work is identified as relevant to the community and that it is not viewed as essentially a political institution. Accordingly, it protects its independence and the public perception of its independence.

The ability to decline references (cl 3.3 of the Renewal Agreement of 2019) is also a significant protection of the Institute's independence and should be retained.⁶ I recommend adding two further sources of law reform proposals to cl 4.1 – the Institute itself and independent statutory authorities and officers, like the Children's Commissioner and the Ombudsman. Additionally, I recommend rewording cl 4.1 slightly to improve its clarity so that it reads: The Institute may receive proposals for law reform and research projects from:

- a) The judiciary and members of the judiciary;***
- b) The Attorney-General;***
- c) The Legal Aid Commission of Tasmania;***
- d) Tasmanian government departments;***
- e) The Parliament and members of Parliament;***
- f) The legal profession and members of the legal profession;***
- g) Members of the community and community groups;***
- h) Independent statutory authorities and officers;***
- i) The Institute itself.***

ToR 6: The appropriateness and sustainability of the Institute's resourcing and staffing having regard to the size of the jurisdiction in which it operates.

It is fair to say that the Institute is experiencing an existential crisis as a result of inadequate funding.

The Institute's principal funding sources have been the Tasmanian Government, the University of Tasmania and individual grants from various sources but principally from the Law Foundation of Tasmania (LFT) and the Solicitors' Guarantee Fund (SGF).

The Government has provided \$50,000 per annum since the Institute's inception. The University's contribution was initially \$80,000 pa, provided predominantly in in-kind form but has increased over time so that in the 2019 *Renewal Agreement* it was set at \$206,000

⁵ The *Australian Law Reform Commission Act 1996* (Cth), s 20.

⁶ See also the Law Commissions in the United Kingdom, which appear to have the power to decline references: *The Law Commissions Act 1965* (UK) ss 3B & 3D.

per annum. Again, this was provided predominantly in in-kind form. Unfortunately, neither the SGF nor the LFT is a reliable source of on-going funding because their own funds fluctuate. For example, in the last two years no funds have been available from the SGF.

Despite the relatively large in-kind contribution from the University, the low baseline funding from the Government does not enable the Institute to discharge its remit. The baseline funding has not kept pace with increases in the CPI and has, in fact, effectively gone backwards. Consequently, the Director must expend considerable efforts in obtaining grants to cover the costs of individual references. Unfortunately, the grants received are often considerably less than the amounts applied for which affects the conduct and scope of references, and the Institute's communication of its research and recommendations. The Institute's low baseline funding impedes staff retention, constrains community consultations and communication, restricts the Institute's ability to participate in cross-jurisdictional, national, and international studies and limits Institute publications.

The need to apply for individual grants prevents long-term planning and leads to a piecemeal approach to the Institute's work. The administration of individual grants consumes time that would be better devoted to the core work of the Institute. Between 2015 and 2021 the TLRI obtained approximately \$800,000 for 16 individual projects. This indicates how seriously underfunded the TLRI has been in terms of core funding. The negative implications of having to apply for and administer separate grants for references are noted above.

The institute has had numerous discussions with Attorneys-General about increasing the Institute's baseline funding and made successive budget submissions in support of its case for increased funding. An example of a relevant submission in this regard is attached at Appendix A. (NB this submission was made for the 2019 State Budget. Accordingly, the \$ amounts there represent costs at that time).

In response, for two years (2016/17 and 2017/18), an additional \$100,000 per annum was approved by the Attorney-General from the Solicitors' Guarantee Fund. In 2019, an additional \$50,000 was approved from the Solicitors' Guarantee Fund. This funding enabled a massive expansion in the Institute's work and amplified the impact of that work. This program was underpinned by the employment of research and administrative staff on a more secure and continuing basis than had hitherto been possible.

Between 2016 - 2020 inclusive the Institute completed 13 references, which means that close to 37% of all its references were completed during those five years. The additional SGF funding enabled the Institute to:

- build a long-term programme,
- engage in more complex research and community engagement,
- engage support staff,
- create partnerships with researchers and law reform bodies in other jurisdictions,
- provide feedback on proposed government legislation (something that had not really been possible in preceding years),
- contribute to national enquiries and initiatives like the Royal Commission into Institutional Responses to Child Sexual Abuse, the Tasmanian Justice Disability

Strategy, the South Australian Justice Disability Symposium and the national Access to Justice Consortium,

- contribute to international law reform projects such as the New Zealand Evidence Law Reform Project,
- organise law events like the expert panel discussions and seminar on the High Court decision in *IMM v The Queen* and symposiums with key stakeholders on topics like access to justice for people with communication needs, elder abuse, and recidivist drink driving,
- work with other University of Tasmania Institutes and research units on areas of mutual interest like TILES (recidivist drink driving) and PEAT (elder abuse),
- host visits by international scholars and legal practitioners which achieved valuable interchanges of knowledge about developments in the law and practice elsewhere and programs to progress law reform,
- establish a researcher in residency program for Australian legal practitioners to work on Institute references,⁷
- work towards the creation of a TLRI scholarship (achieved in 2019 by the establishment of the Dr Vanessa Goodwin Law Reform Scholarship).
- participate as a key stakeholder in the bid to create a new Criminal Order Repository (COR) through the Justice Connect and digital transformation projects in the Department of Justice and associated agencies,
- work with the Tasmanian Office of the Department of Foreign Affairs and Trade to explore opportunities to contribute to law reform in the Asia Pacific Region.

Critically the increased funding allowed the TLRI to modernise measures for communicating with the Tasmanian community and key stakeholders to increase awareness of the Institute's work and, importantly, to enable people who might not otherwise be able to participate in or learn about the TLRI work, (including vulnerable people and people with intellectual and physical incapacity) to do so. This included establishing a Facebook platform, providing Easy Read versions of Issues Papers, Submission Templates and Final Reports and producing short videos and pictorial/cartoon versions of publications on relevant references to encourage widespread community engagement with Law Reform projects. The videos are available through the University of Tasmania YouTube page, the Institute's website, and the Institute's Facebook Page.

The Institute's expanded work program has largely ground to a halt since the temporarily increased baseline funding from the SGF ceased. Perhaps the saddest result of the decreased funding is that the Institute has no longer been able to offer diversified communication of its work through Easy Read publications and audio-visual presentations. The Institute had viewed the use of these mechanisms as enhancing equality of access to its work. The decreased funding has also reduced the Institute's research and administrative staff. Researchers can only be engaged on limited term contracts to work on references, funded from individual grants. This detracts from its ability to plan long-term and attract expert researchers.

⁷ This program has been successfully utilised for several references, for example, the Review of the Tasmanian *Guardianship Act*, Jurors and Social Media, Notional Estates and Court Intermediaries, Review of the *Judicial Review Act*.

As noted above, the lack of funding and decrease in support staff has created an existential crisis for the Institute. Unfortunately, law academic staff and students are not able to fill the staffing shortages resulting from the decreased funding. While it is valuable for law students to work with the Institute and they may provide some research assistance and undertake preliminary drafting of research papers etc, they are inevitably resource intensive because they require considerable supervision. Their written work also requires much rewriting to bring it to law reform publication standard. Accordingly, reliance upon them does not provide a solution to the Institute's current crisis.

Law Faculty academic staff workloads largely preclude their participation in the Institute's work. The classification of TLRI Issues Papers, Reports and Research Papers as 'contract reports' and their consequent low research ranking acts as a disincentive⁸ to academic staff participation in TLRI references. Together these factors mean that any work done by law academic staff for the Institute must effectively be done on a volunteer basis.

The increase in academic workloads for teaching and the commensurate decrease in allocations for administrative work and community engagement and consequential impact on time actually available for research have also affected the work that can be undertaken by the Director for the Institute. The Director's workload should be adjusted to take account of the complex, intertwined triumvirate of roles it involves – research, community engagement, and administration. The Director's role should have at least a 1.5 loading and this should not be taken from the Director's normal academic research workload allocation.

Funding recommendations:

- ***The Institute requires a sustainable funding model. Appropriate funding is necessary to support its independence and important work as the State's premier law reform body. Given the value to the entire community⁹ of the Institute's work, its core, baseline funding should be provided by the Government from its annual budget, with the University continuing to fund and supply the position of the Director and the Institute's premises and associated costs. As noted above, The Solicitors' Guarantee Fund is not a reliable source of funds because it fluctuates from year to year and, as the last two years demonstrate, it is unavailable in some years.***
- ***The Institute's baseline funding should be increased to the levels applied for in recent Institute budget submissions and briefing notes (updated to take account of increased costs), that is, to at least \$200,000 pa, an increase of \$150,000 pa (see Attached Appendix A). The funding should be reviewed at least every five years, and CPI indexed.***
- ***The sustainability and continuity of the Institute's work should also be ensured by funding one permanent research officer and one permanent administrative officer.***

⁸ Academic staff promotion is substantially based on classification and ranking of research work and publications.

⁹ As established clearly in its publications and annual reports: <https://www.utas.edu.au/law-reform/publications>

I recommend that the complexity of the Director's role and the heavy workload involved in its performance should be recognised in an adequate workload allocation. It should be accorded at least a .5 loading. This allocation should not be taken from the Director's normal research workload allocation.

The considerable body of work that the TLRI has completed since its establishment testifies to the value and necessity of having a local law reform agency – there is significant law reform work to be done. Tasmania has experimented with three different law reform models, a Law Reform Commission, a Law Reform Commissioner, and the current Institute model. Of all three models the Institute has operated on the most inclusive and consultative basis and been the longest enduring. It would not be appropriate to abandon a local law reform body and contract out Tasmanian law reform work to an agency in another jurisdiction. To do so would undermine trust in the resulting law reform process and potentially extinguish that process. Critically, a non-Tasmanian body would not have the necessary depth of local knowledge or connections to the community and key stakeholders.

Accordingly, my final recommendations are that if adequately resourced and staffed the Institute model as constituted by the TLRI is the most appropriate law reform model for Tasmania and, accordingly, the TLRI should be retained and adequately resourced.

Please do not hesitate to contact me if you have any queries about this submission or would like further information.

Yours faithfully,



KEY ASKS:

- Recurrent funding from the Tasmanian Government: **\$200,000** per annum.
- Continued in-kind support from the University of Tasmania, including the Director's salary, accommodation and operating costs and support from the Advancement Office
- Additional support from the University of Tasmania to appoint a Principal Researcher.
- Support from the Law Society to develop and promote a new CLE / CPD partnership program.
- Amending the objectives to explicitly recognise that the Institute is responsible to ensure the law operates in an optimal way and achieves access to justice.
- Clear description of the role and duties of the Director.¹¹

BACKGROUND

The Institute was established in 2001 by tripartite agreement between the University of Tasmania, the Tasmanian government and the Law Society of Tasmania.

The Institute operates as a Research Centre with the key objective of conducting reviews and research with a view to -

- modernising Tasmania's laws;
- eliminating defects in the law;
- simplifying the law;
- consolidating laws and repealing those that are obsolete or unnecessary;
- achieving greater uniformity with laws of other States and the Commonwealth.

The Institute has become a leader in high impact and engaged research, with a strong national reputation and growing international networks. It is a flagship institute within the University,

The Institute's founding agreement has been rolled over and renewed on a 5-yearly basis since 2001. The current renewal agreement expires in **November 2019**.

Since its inception, the Institute has received \$50,000pa baseline funding from the Tasmanian Government. In 2017, the Solicitors' Guarantee Fund granted an additional \$100,000 per annum for two years (2017 and 2018) to allow TLRI to elevate its law reform work.

The Institute also receives in-kind support from the University (including the salary of the Director, academic support, office facilities, administrative support etc). While the Agreement commits the

¹⁰ NB this submission was made for the 2019 State Budget. Accordingly, the \$ amounts there represent costs at that time.

¹¹ This occurred in the 2019 *TLRI Renewal Agreement*: cl 5.3.

university to provide “up to \$80,000” in in-kind support, the contribution is significantly higher. In 2018, in-kind support from the university was valued at \$112,500.

The renewal of the current Agreement provides an opportunity to revisit the terms of the agreement with a view to encapsulating the broader scope of work undertaken by the securing a more sustainable long-term funding base to expand TLRI’s capacity.

Current staffing

The Director is engaged directly by the University.

Funding under the Agreement part funds the employment of an Executive Officer (Research) and an Administrative Officer, with the shortfall made up in 2017-2018 from additional funding from the Solicitors’ Guarantee Fund.

The Institute engages part-time researchers on limited term contracts to work on references, generally funded from individual grants, with all work overseen by the Director. The Institute employed seven researchers throughout 2018.

Lack of permanent full-time researchers and administrative staff hampers the TLRI’s capacity to plan long-term in relation to large and complex projects and to respond in a timely manner to emerging or controversial issues.

SCOPE OF WORK

In addition to the standard work responding to formal references, the Institute undertakes a wide range of practical research activities. The Director and researchers have been called as expert witnesses to Parliamentary Inquiries and Royal Commissions. Institute staff are regularly contacted by lawyers, academics and policy makers in other jurisdictions for advice and invited to collaborate on reform projects.

The Institute is also called on by Members of Parliament and Departmental Policy and Legislative teams to provide expert advice on draft or introduced Bills and broader policy initiatives. Institute staff are members of numerous stakeholder groups advising on reform issues. The Institute also continues to be part of national and international law reform projects and has been called upon to host visiting scholars, supervise undergraduate, Masters and Research Higher Degree students.

From 2020, the Institute will also offer undergraduate law reform research opportunities through the Dr Vanessa Goodwin Law Reform Scholarship.

The terms of the founding agreement should be updated to ensure the agreement reflects the way the Institute currently operates, including a clear objective of improving access to justice in the operation of the law.¹²

FUNDING

Need for increased funding

Despite the expanded scope of work and impact, the Institute has not been able to secure additional funding from the Government or the University to ensure that it can sustainably meet research, advisory and reform demands.

The level of government funding has not kept pace with increases in CPI, let alone the greater demand for TLRI’s input. Current funding is insufficient to support the Institute’s advanced law reform research work plan.

¹² This was achieved in the 2019 *Renewal Agreement*, cl 2.2(e)vi. Nevertheless, I recommend that the TLRI Aims and Objectives be amended further as detailed in relation to ToR 1.

For the Institute to be able to continue to deliver quality law reform it is critical that the new agreement be updated to include the additional functions the Institute performs and to formally approve an increase to the annual funding both from the Government and the University.

Benefits of increased funding

Institute staff spend a significant amount of time seeking funding and reporting to funders. With limited resources, our work is often reactive and directed by the reform / research priorities of the State government. Over the course of the current 5-year agreement, approximately \$350,000 has been provided through the Solicitors' Guarantee Fund for government-initiated references, with an additional \$89,000 for references initiated by the profession or community.

There are obvious operational and strategic efficiencies arising from consolidated, rather than modular, funding. In particular, sustainable core funding would relieve the Institute of the burden of seeking ad hoc funding, facilitate longer-term work planning and coordination of research efforts with partner organisations, and allow the Institute to retain dedicated research staff to work across different references to implement our work plan.

Importantly, it would also allow the Institute to be more responsive to emerging law reform issues. Some unanticipated referrals will be enabled through associated funding, while some referrals made by the community or legal profession may raise significant issues that the Board is satisfied warrant attention but have no dedicated source of funding (for example, our completed review of the law relating to Consensual Assault, and the proposed review of conversion therapy practices).

Increased core funding would facilitate efficient oversight and delivery of key projects, but would also enhance the TLRI's capacity to retain staff researchers able to work on additional matters, including:

- Reviewing and responding to a wider range of legislative proposals, providing government with expert commentary on proposed laws or amendments and implications for the operation of the justice system
- Undertaking more empirical research to inform our reform recommendations (for example, the rigorous analysis undertaken in support of the Recidivist Drink Drivers reference and the Insanity and Fitness to Plead references provided invaluable data to guide policy responses)
- Strengthening partnerships with researchers and law reform bodies in other jurisdictions
- Contributing to national enquiries like the Royal Commission into Aged Care and any future Royal Commission into Disability
- Developing and implementing a communication strategy to increase the reach and impact of our work, including more accessible publications, community engagement, and trialling innovative consultation methodologies
- Monitoring implementation of Institute reform recommendations
- Strengthening opportunities for students to gain practical law reform experience (for example, progressing efforts to embed law reform projects in core and elective units within the LLB degree, building philanthropic support for a law reform scholarship programme)

The work carried out with the additional \$100,000 granted to the Institute in 2017 and 2018 demonstrates the benefits of a more sustainable funding base. That funding enabled the Institute to

engage support staff, formalise partnerships with researchers and law reform bodies in other jurisdictions, contribute to the Royal Commission into Institutional Responses to Child Sexual Abuse, and modernise communication approaches (Easy Read, videos, social media) to enable people who might not otherwise have been able to participate in law reform activities to do so.

PROPOSED REVISIONS

Having provided independent expert advice on law reform in Tasmania, nationally and globally for close to two decades without any new resources, the renewal of the TLRI Agreement is a timely opportunity to grow the funding base, reach and impact of the Institute's work in Tasmania and beyond. As part of these negotiations, the Institute is seeking a further five-year renewal on the following terms:

- An increase in recurrent funding from the Tasmanian Government to **\$200,000** per annum. The increased annual allocation would allow the Institute to:
 - budget \$25,000 for administration, including salaries the Executive Officer, travel, community engagement, conferences and events
 - undertake 1-2 additional complex research projects annually
- Continued in-kind support from the University of Tasmania, including the Director's salary at Professorial or equivalent level, accommodation within the University and associated running costs, as well as continued support from the Advancement Office to grow bequests and attract donations to enable additional law reform research and scholarships.
- Additional support from the University of Tasmania to appoint a Principal Researcher. This would significantly increase research output and engagement for the University and increase capacity to support PhD Supervision / Supervised Research work within the Institute.
- Support from the Law Society to develop and promote a new CLE / CPD partnership program aimed at improving engagement of the profession in law reform activities.
- Quarterly meetings to be held between all three parties to the Agreement.
- The objectives of the Agreement should explicitly provide that the Institute is responsible to ensure the law operates in an optimal way and achieves access to justice.
- The Agreement should describe the role and duties of the Director to ensure that any appointment to that role has a relevant legal background, experience in law reform, community consultation and stakeholder engagement. The description should confirm the independent nature of the Institute and facilitate applications from outside existing University staff.

SUMMARY

The recurrent funding of \$50,000 per annum received from the Tasmanian Government, even when coupled with in-kind contributions from the University of Tasmania, is insufficient to enable the Institute to maintain law reform research and community consultation in pace with demand or to implement long-term strategic reform priorities.

Increasing recurrent funding to \$200,000 per annum would allow the Institute to maintain a steady complement of research and administrative staff, undertake more complex projects, and to respond

in a timely manner to emerging or controversial issues. It would also allow the Institute to respond to complex government-initiated references without reliance on Solicitors' Guarantee Funding, and to facilitate greater engagement with the profession on law reform issues.

BUDGET FIGURES:

General operating expenses 2018 (i.e excluding project specific expenses)

Expenditure

Salary (including superannuation, payroll tax and workers' compensation insurance)	110,815.18
Subscriptions	14.09
Travel	1,054.66
Printing	7,112.00
Other	1,795.61
	120,791.54

* This included a 6-month period between the resignation of the Assistant Director and the appointment of the Executive Officer (Research). Staffing interruptions resulted in lower than expected salary expenses.

* Printing expenses relate to the printing of Issues Papers and Final Reports for publication. Project specific grants are rarely sufficient to cover editing and printing expenses, so these are generally met from general funds.

Project specific expenses for 2018: \$135,778.53 (as outlined in Annual Report 2018, attached).

Project specific income received during current 5-year agreement:

- **Court intermediaries** - \$21,482 from the Solicitors' Guarantee Fund
- **Responding to the Problem of Recidivist Drink Drivers** - \$16,482 from the Solicitors' Guarantee Fund, \$15,635.20 from the MAIB
- **Review of the Guardianship and Administration Act 1995** - \$120,000 from the Solicitors' Guarantee Fund.
- **Review of the Judicial Review Act 2000** - \$21,345 from the Law Foundation
- **Insanity and Fitness to Plead** - \$87,171 from the Solicitors' Guarantee Fund
- **Notional Estates Legislation for Tasmania** - \$65,022 from the Solicitors' Guarantee Fund
- **Review of the Tasmanian Constitution Act 1934** - \$40,449 from the Law Foundation
- **Social Media, Jurors and Fair Trials** - \$46,000 from the Law Foundation
- **Sex, Gender and Medical Treatment** - \$77,000 from the Solicitors' Guarantee Fund

- **Operation of the Special Hearing Scheme** - \$20,000 from the University of Tasmania (Deputy Vice Chancellor, Research), \$50,870 from the Solicitors' Guarantee Fund

TOTAL FROM SGF (which is allocated by the Attorney-General): \$438,027*

* The Guardianship review, Insanity & Fitness to Plead, Notional Estates and Sex and Gender references were initiated by the Government – contributions for those total \$349,193.

General costing for complex reference

Item	Unit cost (ex GST)	Total cost (ex GST)
Research officer	\$88,100pa ¹	\$62,000 ²
Supervision and oversight (Institute Director / Executive Officer (Research))	\$145,000pa \$88,100pa	\$0 (in kind)
Editing	\$47.20 / hr	\$2,500 ³
Video production		\$3,000 ⁴
Easy Read summary		\$3,500
Printing (Issues Paper and Final Report)	\$1,000	\$2,000
TOTAL		\$73,000

1. Salary based on the University Academic, CRA3, including on-costs
2. Full time for 9 months, part time for 12-18 months
3. Estimate based on similar projects, casual rates based on University Professional CRA2
4. Video explanations will not be appropriate for all references