



THE UNIVERSITY
of ADELAIDE

Review of the Tasmania Law Reform Institute

June 2022

**make
history.**

[This page has been intentionally left blank]

Table of Contents

Acknowledgements	1
List of Acronyms	1
Executive Summary	2
Part 1 - Background to the Review	4
1.1 History of the Tasmania Law Reform Institute	4
1.2 Appointment of Review Panel and Terms of Reference	4
Part 2 - The Value of the Tasmania Law Reform Institute	7
2.1 An Overview	7
Part 3 – TOR I: Aims and Objectives	9
3.1 Introduction	9
3.3 Recommendations	11
Recommendation 1: An opening framing statement	11
Recommendation 2: An additional framing provision referring to human rights	11
Recommendation 3: Amending the list of objectives in clause 2.2(e)	12
Recommendation 4: Removing inconsistencies	12
Recommendation 5: Clarifying the meaning of ‘consultancy basis’ in clause 2.2(b)	13
Recommendation 6: Deleting unnecessary and redundant provisions	14
Recommendation 7: A more exhaustive statement of the scope/functions of the work of the Institute	14
Part 4 - TOR II: Independence and Institutional Integrity	15
4.1 Submissions	15
<i>The importance of independence and integrity</i>	15
<i>Insufficient protections</i>	16
<i>What is needed</i>	16
<i>A broad statement of the TLRI’s independence</i>	16
<i>Appointment of the Director</i>	17
<i>Financial independence</i>	17
<i>Clarifying the reference process</i>	17
<i>Removing references in the Agreement to University ‘Research Centres’</i>	17
<i>The risk to the perception of independence and integrity by small staff numbers</i>	17

4.2	Recommendations	18
	<i>Appointment of the Director</i>	18
	<i>Clarifying the reference process</i>	18
	<i>Financial independence</i>	18
	<i>Removing references in the Agreement to Research Centres</i>	18
	Recommendation 8: Explicit statement of independence	18

Part 5 – TOR III: The Institute’s Position, Role and Relationship to its Founding Partners **20**

5.1	Submissions	20
	<i>The appropriateness of the ‘Alberta model’ of law reform</i>	20
	<i>Advantages and potential of TLRI’s placement at the Law School</i>	21
	<i>Relationship with Founding Partners</i>	22
	<i>The Board’s relationship with the Founding Partners</i>	23
	<i>The Review Process</i>	24
5.2	Recommendations	24
	Recommendation 9: The non-statutory Law School-located agreement model be retained	24
	Recommendation 10: A standing body which can only be dissolved by agreement	25
	Recommendation 11: Provision for a review process in the Agreement	25
	Recommendation 12: The Agreement explicitly recognises the supportive role of each of the Founding Partners and ensures the parties communicate regularly	26

Part 6 – TOR IV: The Institute’s Position, Role and Relationship to the Government **27**

6.1	Submissions	27
6.2	Recommendations	27

Part 7 – TOR V: The Institute’s Current Constitution, Governance Arrangements and Reference Process **28**

7.1	Current constitution and governance arrangements	28
7.2	Submissions: <i>Current constitution and governance arrangements</i>	29
	<i>Board composition</i>	29
	<i>Separating the role of Chair and Director</i>	29
	<i>Board role</i>	30
	<i>Appointment of the Director</i>	31
	<i>Acting Director</i>	32
7.3	Recommendations: <i>Current constitution and governance arrangements</i>	32

Recommendation 13: Increase the number of co-opted members	32
Recommendation 14: Provide for the appointment of an independent Chair of the Board if deemed necessary by the Board	33
Recommendation 15: The position of the Director should be a University appointment made in consultation with the Founding Partners and the Board	33
Recommendation 16: Provision for the appointment of an Acting Director	34
7.4 Adequacy and appropriateness of the reference process	34
7.5 Submissions: <i>Adequacy and appropriateness of the reference process</i>	34
7.6 Recommendations: <i>Adequacy and appropriateness of the reference process</i>	35
Recommendation 17: Clarifying the Agreement’s provision on references	35
Part 8 – TOR VI: Appropriateness and Sustainability of the Institute’s Resourcing and Staffing	37
8.1 History of resourcing and staffing	37
8.2 Submissions	38
<i>Lack of resources and disparity in contributions</i>	38
<i>The problem of low baseline funding and reliance on grants</i>	38
<i>Problems at the Law School</i>	39
<i>Alternative funding sources</i>	40
<i>What is required to appropriately resource the Institute?</i>	40
8.3 Recommendations	41
Recommendation 18: The University continue to fund the Director’s position and provide facilities and support for the TLRI	42
Recommendation 19: An increase in annual baseline or recurrent funding to at least \$200,000 per annum	42
Recommendation 20: The University give consideration to reviewing the workload allocation	43
Appendix A: The 2019 Agreement	44
Appendix B: List of Written Submissions	52
Appendix C: List of Meetings	53

Acknowledgements

This Review was first proposed in late 2019. Events intervened to postpone the commencement of the work of the Review Panel until the beginning of 2022.

We wish to acknowledge the support and assistance of a number of individuals and organisations. First, the University of Tasmania, College of Arts, Law and Education (CALE) and the Law School who assisted the Review Panel in its work with the provision of resources, space and logistical support. We particularly wish to acknowledge Professors Tim McCormack and Michael Stuckey, the two Deans of the Law School, who have been involved in the establishment of the review.

The Review Panel was greatly assisted by the written and oral submissions from individuals and organisations. The care and focus of the submissions provide the Review Panel with a wealth of material to consider. The engagement by a wide range of participants underscored to the Review Panel the importance with which the Tasmania Law Reform Institute (TLRI) is held by the community, the State Government, the University (which includes the Law School) and the legal profession.

The Review Panel would like to acknowledge and thank Ms Krista Brinckman for her outstanding support and professionalism during the conduct of the review, and Mr Joseph Haddon who prepared a helpful report for us on the written submissions. Ms Louise Scarman from the South Australian Law Reform Institute provided invaluable support throughout the Review and particularly during the process of writing the report and obtaining consent for publication and quoting of submissions. She also assumed responsibility for editing and formatting the report and we are grateful for her competence and efficiency.

List of Acronyms

ALRC	Australian Law Reform Commission
ALRI	Alberta Law Reform Institute
CALE	College of Arts, Law and Education
CLC Tas	Community Legal Centres Tasmania
DPP	Director of Public Prosecutions
OPCAT	Optional Protocol to the Convention Against
PEAT	Preventing Elder Abuse Tasmania
SALRI	South Australian Law Reform Institute
SGF	Solicitors' Guarantee Fund
TasCOSS	Tasmanian Council of Social Service Inc
TILES	Tasmanian Institute of Law Enforcement Studies
TLRI	Tasmania Law Reform Institute
TOR	Terms of Reference
TULS	Tasmania University Law Society
UTAS	University of Tasmania

Executive Summary

Since its formation in 2001 the Tasmania Law Reform Institute (TLRI) has established itself to be the premier law reform agency in the State. The approach of basing the TLRI within a University environment was unique for Australia and has been subsequently emulated by others.

This Review was initiated by the Vice-Chancellor of the University of Tasmania and was conducted with the support of the Law School. The Panel has been fortunate to have the active engagement of the Founding Partners to the Agreement that established the TLRI: the University of Tasmania, the Tasmanian Government and the Law Society of Tasmania.

The Review comes at a pivotal moment for the TLRI. The current agreement is due for renewal in November 2022 and it is clear that recent challenges and issues have emerged in relation to the TLRI and its capacity. The panel hopes that its recommendations will provide an opportunity to reinvigorate the relationship between the Founding Partners and place the TLRI on a secure and sustainable footing into the future.

Working within the agreed Terms of Reference, and considering carefully the detailed and informative submissions, the Panel makes 20 recommendations to the Founding Partners. For ease, the recommendations may be grouped into three broad categories:

Aims, Objectives and Operation of the Founding Agreement

- Recommendation 1: An opening framing statement.
- Recommendation 2: An additional framing statement referring to human rights.
- Recommendation 3: Amending the list of objectives in clause 2.2(e).
- Recommendation 4: Removing inconsistencies.
- Recommendation 5: Clarifying the meaning of ‘consultancy basis’ in clause 2.2(b).
- Recommendation 6: Deleting unnecessary and redundant provisions.
- Recommendation 7: A more exhaustive statement of the scope/functions of the work of the Institute.

Strengthening Independence and Governance

- Recommendation 8: Explicit statement of independence.
- Recommendation 9: The non-statutory Law School-located agreement model be retained.
- Recommendation 10: A standing body which can only be dissolved by agreement.
- Recommendation 11: Provision for a review process in the Agreement.
- Recommendation 12: The Agreement explicitly recognises the supportive role of each of the Founding Partners and ensures the parties communicate regularly.
- Recommendation 13: Increase the number of co-opted members.
- Recommendation 14: Provide for the appointment of an Independent Chair of the Board if deemed necessary by the Board.

- Recommendation 15: The Director should be a University appointment made in consultation with the Founding Partners and the Board.
- Recommendation 16: Provision for the appointment of an Acting Director.
- Recommendation 17: Clarifying the Agreement's provisions on references.

Sustainability and Resources

- Recommendation 18: The University continue to fund the Director's position and provide facilities for the TLRI.
- Recommendation 19: An increase in annual baseline or recurrent funding to at least \$200,000 per annum.
- Recommendation 20: The University give consideration to reviewing the work-load allocation.

The reasoning behind each recommendation is contained in the following report and highlights the various themes contained in the submissions. The first two categories reflect an opportunity for the Founding Partners to refine the Agreement in light of the twenty years of operation of the TLRI. Recent experience has brought into sharper relief some of the omissions and ambiguities within the Agreement and the need to anticipate the future evolution of the TLRI.

By far the most challenging set of recommendations relates to the sustainability of the TLRI. The Institute's achievements are all the more remarkable given the relatively small budget it commands. Placing the TLRI on a stronger financial basis will require the Founding Partners acknowledging that the original 'pilot' funding has run its course. We should acknowledge, as one submission colloquially put it, the solution does not require investment approaching 'sheep stations'. However, even in these difficult financial times, all efforts should be made to direct resources towards the TLRI at a level commensurate with the founders' ambition for it.

The panel was reassured that all parties consulted were unanimous in their view that there was an ongoing need for a strong and vibrant TLRI. Moreover, the submissions highlighted the significant and lasting contribution to the laws of the State and how the TLRI had facilitated an informed and impartial discussion about the role law can make to improve the lives of all Tasmanians. Long may it be so.

Professor John Williams AM (Chair)

Emeritus Professor Kate Warner AC

Associate Professor David Plater

Part 1 - Background to the Review

1.1 History of the Tasmania Law Reform Institute

1.1.1 The Tasmania Law Reform Institute (TLRI) was established as an independent law reform body by an agreement between the University of Tasmania, the Government of Tasmania and the Law Society of Tasmania in 2001. It was established at the instigation of the then Dean of Law, Professor Donald Chalmers, to fill the law reform hiatus created by the demise of the statutory Law Reform Commissioner in 1997, the successor of the Tasmanian Law Reform Commission.¹ The Agreement located the TLRI at the University with the Director appointed by the Vice-Chancellor. The five-year Agreement was renewed for three- or five- year terms, most recently on 24 December 2019 for a term of three years. The most recent agreement (the 2019 Agreement) is reproduced in Appendix A. The model for the TLRI was inspired by the Canadian Alberta Law Reform Institute (ALRI), a law reform body based at a University Law School and created by agreement between the legal profession, the University and the Alberta Government. The South Australian Law Reform Institute is also based on this model.

1.2 Appointment of Review Panel and Terms of Reference

1.2.1 This review of the TLRI was commissioned by the Vice-Chancellor, Professor Rufus Black, with the support of the other Founding Partners, namely the Tasmanian Government and the Law Society of Tasmania. The Review Panel consists of the Chair, Professor John Williams, Emeritus Professor Kate Warner and Associate Professor David Plater. Professor Williams is the Director of the South Australian Law Reform Institute (SALRI) and Dr Plater its Deputy Director. Both work at the University of Adelaide's Law School where SALRI is based. Professor Warner was the Director of the TLRI from 2001-2014. The members of the Review Panel have undertaken this Review on a voluntary basis.

1.2.2 A review of the Tasmania Law Reform Institute (TLRI) was first raised prior to the renewal of the 2019 Agreement in a letter from the Attorney-General to the then Dean of Law, Professor Tim McCormack, in November 2019. Shortly after, Professor Williams and Dr Plater were invited to conduct the review. Due to the resignation of Professor McCormack as Dean in June 2020 and the COVID-19 lockdown and travel restrictions, no progress was made on the review in 2020. It was not until late 2021 that the terms of reference were settled, and a panel appointed.

1.2.3 The Chair of the Review Panel forwarded letters to key stakeholders and the TLRI Board in March 2022, seeking their submissions and attaching the terms of reference as detailed below.

¹ The *Law Reform Commission Act 1974* (Tas) created the multi-member Tasmanian Law Reform Commission, which operated until its abolition by the *Law Reform Commissioner Act 1988* (Tas).

Review of the Tasmania Law Reform Institute (TLRI)

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.

1.2.4 The letter indicated that the Review Panel would be available in Hobart to discuss submissions and/or receive oral submissions in April 2022. The Review Panel received 16 written submissions (see list in Appendix B) and met in Hobart for 22 meetings with an individual or group from Tuesday 26 April to Friday 29 April 2022. An additional Zoom meeting was held on 16 May (see list of meetings in Appendix C).

1.2.5 In addition to the formal submissions and consultations, the Review Panel had the benefit of background material including the Annual Reports of the Tasmania Law Reform Institute, a Briefing Paper for the TLRI Board, 2022 and Briefing Notes for UTAS Management 2019 (prepared in relation to 2019 Renewal of TLRI Agreement).

1.2.6 The Review Panel are grateful for the care taken in formulating submissions and preparing for meetings, for the constructive, co-operative and respectful way respondents engaged with the Panel and for the candid expression of views. As explained later in this report, we swiftly became aware that concerns were held by some respondents about the motives for commissioning the Review, whether its future was in doubt, and whether or not the Review had been properly authorised. The Review Panel Members were able to convey their view that the Founding Partners to the Agreement strongly support the continued

existence of the TLRI and that this review represents a timely opportunity to consider the important role and operation of the TLRI.

1.2.7 The first part of the report summarises the views expressed to us about the value of the TLRI before we address each of the six terms of reference (TOR) in turn, first reporting on the views of the respondents before making our recommendations in relation to each TOR.

1.2.8 The letter soliciting submission to the Review stated, ‘Submissions may be given on a confidential basis and parties may wish to provide information to the review which is to be treated as entirely confidential.’ It also stated, ‘The Vice-Chancellor, in commissioning the review, will receive the Final Report, but it is also expected that any submissions, and especially those made confidentially, will be treated and held in a way which respects that status.’ On the advice of the Review Panel, and after consultation between the University, the Attorney-General and the Law Society, it was agreed that the Final Report would be published on the TLRI website, together with those written submissions for which consent had been obtained.

Part 2 - The Value of the Tasmania Law Reform Institute

2.1 An Overview

2.1.1 At the outset, it should be noted that all submissions strongly supported preserving the Tasmania Law Reform Institute (TLRI) given its current positive impact on the broader Tasmanian community. Indeed, none of the submissions took a negative view of the role of the TLRI in Tasmanian society, nor argued for a curtailment of its broad responsibilities.

2.1.2 The Hon Alan Blow, Chief Justice, noted his concern that the TLRI might ‘wither on the vine’ and highlighted the fact that the TLRI has carried out ‘such a lot of good work on such a wide range of issues over 20 years.’ Professor Margaret Otowski noted that she had been at the Law School at the time of the TLRI’s inception and has been proud of the TLRI’s role and impact. The Tasmanian Commissioner for Children and Young People (the Children’s Commissioner) highlighted the ‘wonderful’ work of the TLRI and noted that its work and research is integral in the considered formulation of law and policy, and that bodies such as her Office are simply unable to engage in such a level of analysis and legal research as is carried out by the TLRI. The Department of Justice reiterated this theme, noting the value of the work of the TLRI and that it has the ability to undertake independent and detailed law reform projects with a depth of research and consultation that could not be conducted within Government.

2.1.3 Significantly, each of the Founding Partners spoke highly of the value of the TLRI. The Vice-Chancellor referred to the TLRI as ‘the jewel in the University’s crown’ and noted its important contribution to the State and its relevance to the University’s mission. The Vice-Chancellor asserted that it would ‘not be defunded on his watch’. The Executive Dean of the College of Arts, Law and Education (CALE), Professor Kate Darian-Smith, emphasised the impact of the TLRI, explaining you ‘can’t get a sharper impact on the law and legal system’. The President and Executive Director of the Law Society declared the Society’s strong support for the TLRI and commented that the Government gets value for money (‘bang for their buck’) from the TLRI.

2.1.4 Submissions generally noted the TLRI’s positive role in the improvement and modernisation of the law in Tasmania through evidenced-based and impartial advice. As expected, the role of the respondent conditioned their views of the Institute. Chief Justice Alan Blow and Justice Helen Wood noted the use of TLRI Reports by judges and in judgments. Justice Wood also referred to the profound impact the Institute’s Court Intermediaries Report² has had on the law³ and court practice. Michael Hill, the former Chief Magistrate, noted that the TLRI ‘plays a vital role in Tasmania in both law reform and access to justice on its innovative, lucid and well-reasoned research and recommendations and it is essential that the TLRI should have the resources and capacity to continue to play this role.’ Chief Magistrate Catherine Geason noted the support of the Magistrates Court for the role and work of the TLRI. Barrister Kim Baumeler said the TLRI has shaped the way the law has developed in Tasmania. The Director of Public Prosecutions, Daryl Coates SC, (the DPP), highlighted the Institute’s work in bringing about significant reforms to the evidentiary laws in sexual offence cases.

In short, the TLRI has been a key driver in setting the policy agenda for law reform in Tasmania, particularly in relation to the development and reform of the criminal law.

Daryl Coates SC, Director of Public Prosecutions

² *Facilitating Equal Access to Justice: An Intermediary/Communication Assistance Scheme for Tasmania?* Final Report No 23, January 2018.

³ *Evidence (Children and Special Witnesses) Amendment Act 2020* (Tas).

2.1.5 Members of Parliament noted the Institute’s role in informing legislators and guiding and shaping their work (Cassy O’Connor MP and Rosalie Woodruff MP; The Hon Meg Webb MLC). Ms O’Connor and Dr Woodruff told the Panel of ‘their incredible esteem’ for the work of the TLRI and its role in providing a source of reliable and impartial evidence and advice to legislators. The Shadow Attorney-General, Ella Haddad MP, also spoke of her appreciation for the role and work of the TLRI. The Tasmanian Council of Social Service Inc (TasCOSS) and Equality Tasmania (formerly known as the Tasmanian Gay and Lesbian Rights Group) said changes to laws have been particularly relevant for the LGBTQIA+ community. Jane Hutchison, the Chair of Community Centres Tasmania (CLC Tas), spoke of the strength of the TLRI’s work in relation to the most vulnerable members of society.

2.1.6 Submissions regarded the work of the TLRI as a deeply important organisation to the wider Tasmanian community. The erudite Distinguished Emeritus Professor Chalmers referred to the TLRI’s record of ‘highly productive sustained law reform work with over 40 major reports on diverse areas of Tasmanian law, particularly our laws on crime, property, commissions of enquiry and guardianship and administration’. In addition to the benefits to the State, he referred to the benefits to the University – its positive contribution to the public profile and impact of both the Law School and the University, its research profile and output and its track record of affording opportunities for undergraduate and postgraduate involvement in its research, consultation and report preparation work.

2.1.7 Above all, respondents recognised the importance of the TLRI’s impartiality and lack of a political agenda. The remit of the Institute in accepting references from sources other than the Attorney-General was important in this perception, particularly when compared with bodies such as the Australian Law Reform Commission (ALRC). Indeed, several submissions emphasised the importance of the TLRI and its reports to the wider national – and even international – legal fraternity. Equality Tasmania asserted that the TLRI has been transformative by improving the quality of public debate, educating the public and proposing innovative solutions and lateral thinking to questions of law reform.

The TLRI’s role in Tasmania’s transformation was not driven by the agendas of its founding members or sectional interests, but by community consultation about gaps and inequities in the law and by meticulous and objective research into how to rectify these problems. The transformation is important in itself, but it is also important as an example of how the TLRI’s combination of independence, academic freedom, access to expertise and community consultation has resulted in locally led, world-class solutions to complex legal problems.

...

Over the last generation, the TLRI has proven itself an immense asset to Tasmania’s society, governance and reputation. It has improved the lives of countless Tasmanians, including those who are traditionally stigmatised and treated unequally (Equality Tasmania, pp 4, 9).

2.1.8 In summary, submissions and consultations affirmed the value of the TLRI and the desire that it should continue its role as the premier law reform body of the State.

What is the value of the TLRI? It has made Tasmania a better place.

Rodney Croome, President, Equality Tasmania

Part 3 – TOR I: Aims and Objectives

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

3.1 Introduction

3.1.1 The ‘functions and objectives’ of the Institute are stated in clause 2.2 of the 2019 Renewal of Agreement as follows:

- a) To conduct reviews and research on areas specified by the Board; and
 - b) To conduct these reviews and research, where appropriate on a consultancy basis;
 - c) To consider proposals from the Attorney-General for the reform of the law;
 - d) To conduct reviews and research on proposals for reform of the law referred by the Attorney-General; and
 - e) To review an area of law with a view to:
 - i. the modernisation of the law; and
 - ii. the elimination of defects in the law; and
 - iii. the simplification of the law; and
 - iv. the consolidation of any laws; and
 - v. the repeal of laws that are obsolete or unnecessary; and
 - vi. *optimising the operation of the law and facilitating access to justice; and*
 - vii. uniformity between laws of other States and the Commonwealth; and
 - f) To make reports to the Attorney-General or other authorities arising out of any review and, in those reports, to make recommendations; and
 - g) To work with the law reform agencies in other states and territories on proposals for law reform of the laws in any other jurisdiction or within the Commonwealth;
- in accordance with the University’s standard procedures for the operation of Research Centres.

2.3 The performance of the Institute’s functions and objectives is subject to funding being made available for the purposes of the Institute.

2.4 The University is entitled to make a reasonable charge for undertaking the Institute’s functions and objectives if the funding is not otherwise available to enable the Institute to undertake those functions and objectives. *The University will provide the Department of Justice with notice of any intention to charge the state.*

3.1.2 Other than the matters in italics, the aims and objectives are in accordance with the Founding Agreement. This list in clause 2.2(e) is very similar to the list of functions of other law reform bodies such as the Australian Law Reform Commission and the New South Wales Law Reform Commission.⁴

3.2 Submissions

3.2.1 The majority of submissions were broadly satisfied that the list of functions and objectives in clause 2.2 provides sufficient breadth and scope to enable the Institute to conduct effective, wide-ranging and comprehensive law reform inquiries. The TLRI Board, for example, had no concerns with the functions and objectives in clause 2. However, there were some suggestions from other parties for additions, clarification and deletions, including suggesting the need for an over-arching statement that clearly sets out the Institute as an independent, impartial and non-partisan law reform body (The Hon Rob

⁴ *Australian Law Reform Commission Act 1996* (Cth) s 21(1); *Law Reform Commission Act 1967* (NSW) s 10(1)(a).

Valentine MLC;⁵ The Hon Meg Webb MLC and the Children’s Commissioner). The former Director, Terese Henning, suggested a preliminary paragraph that sets the scene such as: ‘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.’ Those not wishing to engage in the detail of the suggestions for additions, clarification and deletions of the aims and objectives may like to skip the remainder of the discussion of this TOR and move on to TOR II.

3.2.2 There were recommendations for additions to the list of objectives in clause 2.2 (e) including:

- ‘adopting new or more effective means for administering the law and dispensing justice’ as in the ALRC Act, which would embrace the consideration of innovations such as alternative dispute resolution and problem-solving courts (Community Legal Centres Tasmania); and
- an explicit reference to promoting equality before the law and social inclusion before the law to officially acknowledge that the Institute’s work does embrace these objectives (Equality Tas).

3.2.3 It was also submitted that the aims and objectives in clause 2 could usefully include an explicit reference to community-initiated proposals so that members of the public are aware of this (Martin Clark); and to the ability of the Institute to initiate its own references (Meg Webb MLC). The source of references will be dealt with in more detail under the fifth term of reference, which covers appropriateness of the reference process.

3.2.4 It was submitted that there should be a provision which states that the functions of the Institute are to be performed within the context of Australia’s human rights obligations and the importance of ensuring effective review of actions that impact on rights and freedoms (Robin Banks). The *Australian Law Reform Commission Act 1996* s 24(1) provides a precedent for such a framing provision in a section on how the Commission is to perform its functions, rather than in the list of functions in s 21.

3.2.5 Some aspects of clause 2.2 which require clarification or amendment were pointed out in submissions:

- inconsistency between clause 2.2(a) requiring the Institute to ‘conduct reviews and research on areas specified by the Board’ and clause 3.1 which refers to the Board as an advisory body (Terese Henning);
- the meaning of conducting reviews on a consultancy basis in clause 2.2(b), which is unclear and could be interpreted to mean that the Institute can be paid for work by an external organisation, which would compromise its independence (Law Society);
- superfluous emphasis on the role of the Attorney-General in clause 2.2 (Terese Henning; Robin Banks) and the possibility of interpreting clause 2.2(d) as requiring the TLRI to accept references from the Attorney-General (Law Society);
- the reference to the University’s standard procedures for the operation of Research Centres in clause 2.2, which is unhelpful if such a reference document either is not broadly available (Meg Webb MLC) or does not exist (Robin Banks), and, in any event, is inappropriate if it allows one of the parties to determine such procedures rather than them being determined by the TLRI itself under the Board’s governance (Robin Banks);

⁵ He also suggested a broader positioning statement setting out What we do; Who we are; Our law reform process following the New South Wales Law Reform Commission’s statement on its website. These are excellent suggestions for a website rather than the content of a founding document.

- the objective of reviewing an area of the law with a view to uniformity in clause 2.2(e)(vii) should be amended to refer to harmonisation instead of uniformity (which can be reactionary rather than progressive), and to include the territories as well as the states and the Commonwealth (Robin Banks).

3.2.6 Terese Henning proposed an amended clause 2 which includes a statement of the functions of the Institute beyond para (f) making reports and recommendations arising out of a review, and (g) working with law reform agencies in other jurisdictions (Terese Henning). These functions include:

- working with other agencies and bodies on research relevant to law reform;
- entering into research agreements and memoranda of understanding to facilitate the Institute's work;
- providing advice on draft bills and legislation to Parliament;
- disseminating the work of the Institute and fostering understanding of it.

3.2.7 Rob Valentine MLC suggested clause 2 should include the provision by the Institute of non-partisan briefings to Parliament on subjects with which they have demonstrated expertise when required.

3.3 Recommendations

3.3.1 The review has provided the opportunity for the terms of the agreement to be carefully scrutinised. While submissions showed general satisfaction with the list of functions and objectives in clause 2 of the agreement, there have been many useful suggestions for changes and improvements which we consider should be implemented.

Recommendation 1: An opening framing statement

3.3.2 It would be useful to have an opening framing statement in clause 2 as suggested by Terese Henning.

Recommendation 1

It would be useful to have an opening framing statement in clause 2, such as:

‘The functions and objectives of the Institute include to conduct impartial and independent reviews or research on areas of law and legal policy in order to provide independent advice and recommendations on the area investigated, with a view to, or for the purposes of’ (then follows the list of objectives in (e) with ‘and/or’ between each objective).

Recommendation 2: An additional framing provision referring to human rights

3.3.3 The Australian Law Reform Commission Act 1996 s 24(1) provides:

In performing its functions, the Commission must aim at ensuring that the laws, proposals and recommendations it reviews, considers or makes:

- do not trespass unduly on personal rights and liberties or make the rights and liberties of citizens unduly dependent on administrative rather than judicial decisions; and
- are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter.

As this relates to how the functions should be performed rather than what the functions are, it would fit more appropriately after enumerating the list of functions and objectives.

Recommendation 2

There should be an additional framing position referring to human rights such as that contained in s 24(1) of the *Australian Law Reform Commission Act 1996*.

Recommendation 3: Amending the list of objectives in clause 2.2(e)

3.3.4 It is recommended that the current list of objectives in clause 2.2(e) be amended by:

- adding ‘the codification of laws’ (Terese Henning);
- adding ‘promoting equality before the law and social inclusion’ (Equality Tasmania);
- replacing ‘(vi) optimising the operation of the law and facilitating access to justice’ with two items, namely ‘adopting new or more effective methods for administering the law and dispensing justice’ and ‘providing improved access to justice’, as in the *ALRC Act*, s 21(a)(iv) and (v) (CLC Tas). The existing provision’s reference to optimising the operation of the law is wide enough to cover more effective methods of administering the law but explicitly stating this and separating it from facilitating access to justice would give each added emphasis;
- remedying the oversight of ‘territories’ in (vii) (the uniformity between laws provision) by including them (Robin Banks).

3.3.5 While noting Robin Banks’ reasons for the term ‘harmonisation’ over ‘uniformity’, we consider that uniformity is the commonly used and well-understood term in the context of law reform objectives and need not be changed.

Recommendation 3

The current list of objectives in clause 2.2(e) should be amended by:

- adding ‘the codification of laws’;
- adding ‘promoting equality before the law and social inclusion’;
- replacing ‘(vi) optimising the operation of the law and facilitating access to justice’ with two items, namely ‘adopting new or more effective methods for administering the law and dispensing justice’ and ‘providing improved access to justice’, as in the *ALRC Act*, s 21(a)(iv) and (v); and
- including ‘territories’ in (vii).

Recommendation 4: Removing inconsistencies

3.3.6 As was pointed out by Terese Henning, there is an inconsistency between 2.2(a) which requires the Institute ‘to conduct reviews and research on areas specified by the Board’ and clause 3.1, which states the Board is an advisory body. We therefore recommend that clause 2.2(a) be omitted and replaced by the framing statement proposed in Recommendation 1. No party suggested that the role of the Board should be other than advisory, and without in any way diminishing the valuable role and input of the Advisory Board, we believe it should remain so.

3.3.7 As was pointed out in the Law Society’s submission, clause 2.1(d) could be read as suggesting that Attorney-General’s proposals must be accepted. This is inconsistent with clause 3.3, which implies that the Director, on the advice of the Board, may reject any proposal. We recommend that this should be clarified by omitting clause 2.1(c) and by adding a provision (to clause 2 or clause 4) to the effect that the Institute may reject any proposal.

Recommendation 4

It is recommended that clause 2.2(a) be omitted and replaced by the framing statement proposed in Recommendation 1.

Further, the ability of the Institute to reject a proposal should be clarified by omitting clause 2.1(c) and by adding a provision to clause 4 to the effect that the Institute may reject any proposal.

Recommendation 5: Clarifying the meaning of ‘consultancy basis’ in clause 2.2(b)

3.3.8 The meaning of clause 2.2(b) is ambiguous. As the Law Society submitted, it could be read as meaning that the TLRI could charge the body or person referring a project a fee for the work, which, in the Law Society’s view, could compromise its independence. Alternatively, clause 2.2(b) could simply mean that the Institute may employ a consultant to work on a reference. The *Victorian Law Reform Commission Act 2000* s16 has a provision empowering the Chair to engage persons with ‘suitable qualifications and experience as consultants’. The Western Australian Law Reform Commission outsources all of its research and project writing to external researchers, and this is authorised by s 14 of the *Law Reform Commission Act 1972* (WA) s14(2). A third alternative is that it means the Institute may consult with members of the community in conducting its reviews. Terese Henning’s suggested clarification of clause 2.2(b) in her proposal for the rewording of clause 2 gives it this interpretation. Her interpretation is supported by the fact the Director is given the power to appoint researchers in clause 6.3 of the agreement, making clause 2.2(b) redundant if it means the Institute may employ consultants.

3.3.9 However, our view is that the first interpretation is the most plausible. While we understand the point made by the Law Society that accepting money for a reference could be seen as compromising the independence of the Institute in the case of a controversial topic, we believe that the opportunity of accepting funding for a worthwhile reference should not necessarily be lost for this reason. A possible example could be accepting funding from the Australian Medical Association on a medico-legal subject. Disclosing the source of funding, adopting appropriate terms of reference and making it clear to the referring body or person that the work will be undertaken independently and impartially, should allay concerns about the work being improperly influenced. Accordingly, we recommend the retention of clause 2.2 (b) of the Agreement, which provides that the Institute is to ‘conduct these reviews and research, where appropriate on a consultancy basis’. However, this should be supplemented by adding paragraph (b) to clause 6.5 (which deals with funding), providing that ‘The Institute may, as indicated in clause 2.2(b), accept funding from any body or person for a particular reference, after receiving the advice of the Board as to the appropriateness of doing so’.

Recommendation 5

We recommend the retention of clause 2.2 (b) of the Agreement, which provides that the Institute is to ‘conduct these reviews and research, where appropriate on a consultancy basis’.

This should be supplemented by adding paragraph (b) to clause 6.5 (which deals with funding), providing that ‘The Institute may, as indicated in clause 2.2(b), accept funding from any body or person for a particular reference, after receiving the advice of the Board as to the appropriateness of doing so’.

Recommendation 6: Deleting unnecessary and redundant provisions

3.3.10 The provision in clause 2.2(c) that the Institute is bound ‘to consider proposals from the Attorney-General’ is unnecessary in light of provisions in clause 3.3, 3.4 and 3.5. These provisions in clause 3 strongly suggest that the Institute is bound to consider all proposals before deciding whether to accept them. It is therefore recommended that clause 2.2(c) be either omitted or amended to state that the Institute is bound to consider and report to the Board all proposals received for law reform projects.

3.3.11 The original agreement provided in clause 2.1 that ‘the Institute is established as a Research Centre’; quite what this means two decades later is unclear. Clause 2.2 provides that the functions and objectives are to be performed ‘in accordance with the University’s standard procedures for the operation of Research Centre’s [sic]’. Given that the University does not have a standard set of procedures for the operation of Research Centres, this provision seems to be redundant. It is recommended that the references to Research Centres in clause 2 be omitted.

Recommendation 6

It is recommended that:

- (a) clause 2.2(c) be either omitted, or amended to state that the Institute is bound ‘to consider and report to the Board all proposals received for law reform projects’; and
- (b) all references to Research Centres in clause 2 be omitted.

Recommendation 7: A more exhaustive statement of the scope/functions of the work of the Institute

3.3.12 As discussed above, Terese Henning suggested a more exhaustive statement of the functions of the Institute beyond 2.2(f) making reports and recommendations on projects and (g) working with law reform agencies in other jurisdictions.

3.3.13 We suggest that at least the following be added:

- (h) working with other agencies and bodies on research in relation to law reform; and
- (i) providing advice on draft bills and legislation to Parliament.

These are functions that the Institute has undertaken in recent years and provide a broader understanding of the scope of the Institute’s work than the current provision.

Recommendation 7

It is recommended that a more exhaustive statement of the scope/functions of the work of the Institute be made, by including the following additional functions at clause 2.2:

- (h) working with other agencies and bodies on research in relation to law reform; and
- (i) providing advice on draft bills and legislation to Parliament.

Part 4 - TOR II: Independence and Institutional Integrity

TOR II - Whether there are sufficient provisions for the protection and promotion of the institutional integrity and independence of the Institute.

By independence, I mean most obviously independence from the government of the day and from party politics, but I also mean independence from the legal profession, academics, the judiciary and all others. In other words, independence could be a recipe for unpopularity! Where we draw the line is independence in our recommendations.

Michael Sayers, (former) Secretary of the Law Commission of England and Wales

4.1 Submissions

The importance of independence and integrity

4.1.1 All submissions, both written and oral, referred to the importance of independence, impartiality and institutional integrity of the Institute. As the Law Society stated, ‘The independence of the TLRI is of the utmost importance. If it were otherwise, the research and review results of the TLRI may be called into question.’ The former Director, Associate Professor Terese Henning, elaborated on this essential quality of a law reform body:

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.

4.1.2 Robin Banks specifically endorsed this statement adding that independence and institutional integrity was the most important consideration in the review of the TLRI. Ella Haddad MHA and Shadow Attorney-General submitted:

[T]he independence of the operation of the TLRI as well as the impartiality of its research and advice is the Institute’s strength. The ability of the Institute to operate independently is a measure of its ability to effectively serve the Tasmanian community. To date, the Institute has operated with a high level of independence partly based on good will between the three partners and the Institute.

...

It is fundamental to the independent operation of any law reform institute that they can conduct research and provide advice that is evidence based and impartial, which may not necessarily align with government or university policy and priority.

4.1.3 In addition to reiterating the Institute’s independence in accepting or refusing references (e.g. Equality Tasmania; Fletcher Clarke), other important aspects of independence mentioned included the

fact that the Institute was not limited to taking references from the Government, and the diversity of the Board's composition (Ella Haddad MHA; TasCOSS).

Insufficient protections

4.1.4 There was broad consensus that the Agreement contained insufficient protections to ensure the independence and integrity of the Institute, and that some of its provisions were problematic in terms of their potential to undermine independence. While independence had not been an apparent problem in practice for most of the Institute's life, it was submitted by the Institute's Board that more recently it has had 'concerns about intrusions upon the independence of the Institute'. In the submission of the Board, the independence of the TLRI was compromised by the way this current review was handled by the University and its failure to inform the Board of the reason or ambit of the review until March 2022. Kim Baumeler, barrister and Board member, spoke of the attempts of both the University and the Government to control and influence the Institute and the Board, beginning with the Births, Deaths and Marriages reference in 2019-2020.⁶

4.1.5 Moreover, the Board has also been concerned about interferences by the University's media office with the content and timing of media releases accompanying issues papers and final reports (TLRI Board, p 4). This appears to have been a particular concern in relation to the conversion practices reference. These concerns were shared by Rodney Croome from Equality Tasmania, the body referring this project, which was funded by the University through the Vice-Chancellor's Office. The Issues Paper was completed in November 2020 and some amendments were made by the media office which were accepted by the Acting TLRI Director. However, the Head of Corporate Affairs and the Executive Dean became involved with more suggested changes and the planned release postponed by two days to the Friday allowing less time for media interviews and suspicions that distribution to outlets may have been restricted. There were similar difficulties leading up to the release of the Final Report on Conversion Practices. However, Rodney Croome advised that the report launch itself went smoothly and there were no problems with the media office's involvement.

4.1.6 The Review Panel notes these concerns although it has not attempted to investigate the matters raised. What is evident is that there is a perception that a stronger statement of independence may be useful to alleviate such concerns.

What is needed

4.1.7 The following changes to the Agreement were suggested to enhance the impartiality, independence and integrity of the Institute:

A broad statement of the TLRI's independence

4.1.8 Other than the statement in clause 5.3 that the Director shall be responsible for 'working to ensure the independence of the Institute', it was pointed out that there is no explicit provision in the TLRI agreement in relation to institutional independence and integrity. Such an explicit provision was widely supported in discussions and submissions (Terese Henning; CLC Tas; Equality Tasmania; Meg Webb MLC; Robin Banks; TasCOSS; and in meetings e.g. Cassy O'Connor MP and Rosalie Woodruff MP). Meg Webb MLC asserted that an unequivocal statement of independence would provide clarity, direction and

⁶ This reference from the Attorney-General in late 2018 was completed in June 2020 with the publication of *Legal Recognition of Sex and Gender*. Final Report No 31. Tensions in relation to this particular project are referred to under TOR IV.

protection to the TLRI and Board, and would also strengthen public and stakeholder perception of the TLRI's integrity and legitimacy.

4.1.9 Terese Henning advised that independence should be a foundational principle in clause 2 and referred to the *Law Commission Act 1985* (NZ) s 5(3) as a useful precedent that could be modified to suit a non-statutory body. It provides that the Law Commission must act independently 'in performing its functions and achieving its statutory functions and duties and exercising its statutory powers'. The *Commissioner for Children and Young People Act 2016* (Tas) s8(3) was offered as another useful precedent (CLC Tas). It provides that the Commissioner 'must act independently, impartially and in the public interest'. Terese Henning recommended that the foundational principle be reinforced by a provision in clause 4 (Operation of the Institute) 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 Partners, the Government, funders and those who make references to the Institute.

Appointment of the Director

4.1.10 The fact that the Agreement provides that the Director is appointed by the Vice-Chancellor (clause 5.1) was regarded by many parties as compromising the independence of the Institute (TLRI Board; Equality Tasmania; Elise Haddad MP; Robin Banks; TasCOSS). This point was also raised in other submissions under the fifth term of reference (dealing with governance) and is dealt with there.

Financial independence

4.1.11 The need for the Agreement to include a guarantee of funding to secure its independence and integrity was repeatedly raised in the submissions (TLRI Board; Equality Tasmania; Robin Banks; Rob Valentine MLC; Meg Webb MLC). Equality Tasmania, for example, pointed to the risks of promises of more or less funding being used to influence the Institute if it did not have a guaranteed funding source. The TLRI Board, Rikki Mawad and Robin Banks argued that the current funding and resourcing situation needs to be remedied as a matter of urgency to avoid undermining its independence and integrity.

Clarifying the reference process

4.1.12 The lack of clarity around who decides to accept or reject references was alluded to in discussing the first of the terms of reference. To enhance the independence of the Institute it was submitted that it should be made clear that the TLRI has the sole decision-making power to accept or reject a reference (Equality Tasmania; Ella Haddad MP; Terese Henning; Meg Webb MLC; TasCOSS) although Ella Haddad suggested the authority should rest with the Director and/or the Board.

Removing references in the Agreement to University 'Research Centres'

4.1.13 It was submitted that if being a University Research Centre means that the TLRI is under the University's control, this offends the key principle of independence and should be removed (Terese Henning).

The risk to the perception of independence and integrity by small staff numbers

4.1.14 Martin Clark, a former member of the academic staff at the University and TLRI researcher, submitted that having only one or two people responsible for the bulk of the Institute's research and writing leaves it open for the community to question whether the views of those people are too strongly

reflected in the activities and conclusions of the Institute. This risk would be avoided by increasing staff numbers.

4.2 Recommendations

4.2.1 As indicated above, there was broad consensus that the Agreement contained insufficient protections of the independence and integrity of the TLRI. The Panel agrees, noting that a regular theme relayed to the Review Panel was the need to ensure the TLRI's independence is protected, both in relation to the University and the Government. The submissions provided valuable advice on ways in which the Agreement could be improved to enhance this vital attribute of any law reform body. A number of these suggestions also relate to other terms of reference:

Appointment of the Director

4.2.2 We agree that requiring the Director to be appointed by the Vice-Chancellor could be seen as compromising the independence of the TLRI from the University. This will be discussed further under TOR V, which covers the adequacy of the Institute's constitution, governance arrangements and reference process.

Clarifying the reference process

4.2.3 Suggestions in relation to clarifying the reference process as something that would enhance the independence of the Institute will also be dealt with under TOR V, which explicitly mentions the reference process.

Financial independence

4.2.4 We also agree that adequate and guaranteed core funding is essential to the Institute's integrity and independence. This will be dealt with under TOR VI dealing with resources. The risk to the perception of independence and integrity by small staff numbers is also related to resources and will be addressed under TOR IV.

Removing references in the Agreement to Research Centres

4.2.5 The Panel agrees that stating the Institute as a University Research Centre could be read as suggesting the Institute is under the control of the University, thus detracting from the core principle of independence. This is an additional reason to support the removal of the redundant references to University Research Centres (see Recommendation 5). It should be noted that both the Vice-Chancellor and Professor Kate Darian-Smith were clear that the TLRI has a separate and independent role and is not limited to the University's research aims and priorities.

4.2.6 In addition to changes relating to these issues, the Panel also makes the following recommendation for the protection and promotion of the independence and integrity of the Institute.

Recommendation 8: Explicit statement of independence

4.2.7 For the protection and promotion of the independence of the Institute, the Panel recommends including an explicit statement of the TLRI's independence in clause 2 (Establishment of the Institute) such as, 'The Institute has a duty to act independently and impartially in performing all of its functions and achieving its objectives.' We also recommend (as suggested by Terese Henning) that this be reinforced

in clause 4 (Operation of the Institute) with a provision requiring the Institute to operate independently of the control, direction or interference of any person, body or authority including but not limited to its Founding Partners, the Government, funders, and those who give references to the Institute.

4.2.8 The Panel also notes that one of the advantages of placing the Institute within a University is that the protection of academic freedom remains a paramount value within the University sector. While the subject of ongoing debate, the integrity and freedom accorded to a university academic complements the independence of the work of the Institute and contributes to its reputation for independence and impartiality.

Recommendation 8

For the protection and promotion of the independence of the Institute, the Panel recommends including an explicit statement of the TLRI's independence in clause 2 (Establishment of the Institute) such as: 'The Institute has a duty to act independently and impartially in performing all of its functions and achieving its objectives.'

We also recommend that this be reinforced in clause 4 (Operation of the Institute) with a provision requiring the Institute to operate independently of the control, direction or interference of any person, body or authority, including but not limited to its Founding Partners, the Government, funders, and those who give references to the Institute.

Part 5 – TOR III: The Institute’s Position, Role and Relationship to its Founding Partners

TOR III - 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.⁷

5.1 Submissions

5.1.1 This Term of Reference overlaps with TOR IV, which deals with the ‘position, role and relationship of the Institute to the Government of Tasmania, as represented by the Attorney-General’. For this reason, some submissions dealt with TOR III and IV together. We have distilled the submissions relating to this term of reference into five themes.

The appropriateness of the ‘Alberta model’ of law reform

5.1.2 None of the terms of reference explicitly addressed the question whether the TLRI’s law reform model, namely, a non-statutory law reform body established by an agreement with the Government, the University and the Law Society and based at the Law School, is the appropriate model for Tasmania. Nevertheless, the question is implicit in the introduction to the terms of reference referring to a review of the ‘structure, form, governance and funding of the Tasmania Law Reform Institute, as the State’s peak law reform body’. It is also implicit in TOR II, III, IV, and V. Most particularly it is at the heart of ‘the relationship of Institute to its founding members’ and ‘its placement within the Law Faculty’ (TOR III). Perhaps because it was not explicitly referred to, many of the written submissions did not directly address the appropriateness of the model. Nevertheless, there were comments made on the model in both the written and oral submissions that will be summarised here. Most submissions strongly supported the retention of the current model, including all three Founding Partners.

5.1.3 The TLRI Board observed that the Alberta model has proved an excellent one for the TLRI until recently, but the collapse of support from Law School staff and the University’s delay in appointing a Director put the viability of the model in question. Terese Henning recommended against replacing the Alberta model with a statutory model, noting that the history of the Tasmanian Law Reform Commission demonstrates that a statutory model does not necessarily increase independence or guarantee continuity. Professor Chalmers made a similar point.

5.1.4 Rodney Croome strongly supported the current University-based model, arguing that the recent problems experienced by the TLRI were not its fault. He preferred the Law School model over a statutory body such as the ALRC or the Victorian Law Reform Commission, citing the advantages of greater independence from Government because of its ability to determine its own references, and greater credibility and respect because of its reliance on the academic expertise of legal academics. He also considered that the TLRI, with its greater independence, had a much greater impact on public debate and

⁷ As a number of submissions noted, the Law Society was not mentioned as a Founding Partner. The Panel treated this as an unintentional oversight.

public opinion than its predecessor, the statutory Law Reform Commission. The Chief Justice also supported the current model over a statutory model, as did Professor Tim McCormack, who noted that Tasmanian Government was unlikely to fund a stand-alone statutory law reform body.

5.1.5 A minority of submissions supported an alternative model. Tasmanian Legal Aid (TLA) considered that the authorising framework, its membership, staffing and funding, limit the capacity of the TLRI and instead it should be a statutory body with members appointed by the Governor on the recommendation of a panel of representatives of key justice agencies including TLA. Professor Stuckey was not opposed to a statutory model, nor was Dr Martin Clark if it were appropriately resourced, although he preferred a University and Law School based law reform body with its advantages of expertise and institutional distance from Government. However, as did the TLRI Board submission, Dr Clark highlighted the current failure of the Law School to fulfill the expertise requirement and added that recent criticisms of the University may adversely affect the work of the TLRI and public confidence in its activities. Rob Valentine MLC supported the TLRI remaining in the Faculty of Law but advocated a model with a constitution reviewable at 5 yearly intervals through a parliamentary process.

5.1.6 While there was unanimous support for locating the TLRI at the Law School, and the suitability of the Alberta model for a small jurisdiction such as Tasmania, a recurring theme was that the challenges that are currently facing the Law School (and the wider University) pose a real threat to the model. This point, referred to above, is addressed in more detail in TOR VI.

Advantages and potential of TLRI's placement at the Law School

5.1.7 Some of the submissions detailed the advantages of locating the TLRI at the Law School. Access to the legal expertise of legal academics and other experts was one of these factors. It was noted that a real strength of the TLRI is drawing on the expertise and input of colleagues who have an interest in the relevant subject matter. For example, the TLRI's most recent report on Conversion Practices relied on assistance from academics from the Menzies Institute for Medical Research and from Sociology (Dr Martin Clark and Professor Tim McCormack). The DPP spoke of the importance of the Institute having access to academics with expertise in Tasmanian Criminal Law, which, with its own Criminal Code, requires a deep understanding of how potential reforms will operate in this particular Code jurisdiction. It's not merely a matter he said, of 'plug and play', meaning that adopting changes from other jurisdictions will not necessarily work appropriately with the Tasmanian Criminal Law.

5.1.8 Professor Nicole Asquith, Director of the Tasmanian Institute of Law Enforcement Studies (TILES), spoke of the strong synergies between the TLRI and TILES and the opportunities this presented for fruitful collaboration. She referred to the decade long collaboration on recidivist drink drivers and the work with the TLRI on commenting on the OPCAT⁸ implementation legislation, which resulted in the Government accepting the changes proposed in their submission. Professor Asquith said that if the TLRI were not re-funded adequately, she would be devastated. She highlighted the distinctive value of the TLRI within the Law School and was not in favour of a merger with TILES, which she described as both impracticable and undesirable.

5.1.9 Professor Kate Darian-Smith also spoke of the mutual benefits of suitably qualified University staff supporting and taking part in appropriate TLRI projects. She also highlighted that this was premised on the TLRI's retention as a separate and standalone body, and she was not in favour of the TLRI being merged with another research centre.

⁸ OPCAT is the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* which was ratified by Australia and required implementation by the States.

5.1.10 Engaging law and other students in the Institute's work was also seen as an advantage for both the Institute that benefited from their work and the students who were encouraged to gain a broader perspective beyond what the law is (Rodney Croome, oral submission; Professor Margaret Otlowski; Professor Don Chalmers). Fletcher Clarke, the President of Tasmanian University Law Society (TULS), spoke of the role of the TLRI from a student's perspective as 'fundamental' and 'a mark of distinction'. He explained that having a law reform institute embedded in the Law School was of significance and a draw card for the School, providing students with important opportunities for professional and career development. He cited the internships provided to final year students by the Preventing Elder Abuse Tasmania (PEAT) Scholarship and the Vanessa Goodwin Scholarship.

5.1.11 Offering an undergraduate unit in law reform, as a means of engaging and involving students in law reform, was raised by Dr David Plater in a number of meetings with consultees. Dr Plater teaches and co-ordinates such a unit in the undergraduate programme at the University of Adelaide. The Law Reform class plays a valuable role to inform and support SALRI's work. The former Dean, Professor Stuckey, responded that a small law reform unit with restricted numbers was a possibility and he also favoured engaging the research skills of postgraduate students in the Institute's work. While she has been supportive of a law reform unit in the past, Professor Margaret Otlowski expressed reservations about introducing one in the immediate future on the ground that there would likely be resistance to curriculum change so soon after recent changes. Fletcher Clarke, President of TULS, strongly supported the idea of a law reform unit similar to the unit at Adelaide Law School, as well as using the Honours programme for law reform references. Professor Kate Darian-Smith thought that the TLRI could engage more with students. Her suggestions included a teaching summer scholarship for PhD students, and she was supportive of introducing a law reform unit. The Vice-Chancellor spoke of the need for the TLRI to expand and be more central to the work of the Law School.

5.1.12 Professor Kate Darian-Smith, Executive Dean of CALE, reported that CALE was reviewing guidelines for authorship and what counted as research outputs and the resulting changes could assist law academics gain recognition for work for the Institute. The Provost also referred to progress that was being made in relation to this issue.

Relationship with Founding Partners

5.1.13 Commenting on the relationship of the Institute with its Founding Partners, Terese Henning noted that, since its establishment in 2001, the Institute had enjoyed very good relationships with its Founding Partners, but suggested that the nature of the relationship should be made more explicit and detailed in the Agreement, in the words of the terms of reference, 'to ensure the continuing, sustainability and success of [the] Institute'. She added:

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.

5.1.14 In addition to recommendations ensuring independence (TOR II) and adequate funding (TOR VI), she suggested that the new Agreement explicitly recognise the supportive role of each of the Founding Partners in promulgating TLRI's work, in providing references, and in making and soliciting submissions on references. She also suggested that the practice of the Director holding regular meetings with the Vice-Chancellor, the President of the Law Society and the Attorney-General be formalised in the TLRI Agreement or in Memoranda of Understanding with them. In terms of the attribute or feature of continuity, she recommended that this be guaranteed by the new Agreement making the Institute a standing body that can only be dissolved by agreement of all Founding Partners.

5.1.15 Echoing Terese Henning's comments on independence, external stakeholders such as Equality Tasmania, TasCOSS and Ella Haddad stressed the importance of the attribute of independence for a law reform body when commenting on the relationship of the TLRI with its Founding Partners:

While the ongoing support of all three founding partners is imperative, equally important is that none of the partners have either perceived or actual 'ownership' of the work of the TLRI. .. the independence of the operation of the TLRI as well as the impartiality of its research and advice is the Institute's strength (Ella Haddad MP).

After twenty years the TLRI is an adult. It was given birth by its foundational members, but it does not belong to them. It must set its own course as a full citizen of the Tasmanian polity. Neither the Government nor the University of Tasmania Law School should expect special treatment by, or compliance from, the TLRI. The Government should not expect the TLRI to adapt uncritically its law reform agenda. The University should not expect the TLRI to reflect its research priorities. They should simply be happy that the great achievements of their child reflect well on them (Equality Tasmania).

5.1.16 The reference in TOR III to 'the research capacities and priorities of the University and the Law School' was noted in some submissions, and the implication that University or Law School priorities should guide the selection of references by the TLRI objected to (e.g. Terese Henning, Robin Banks, TasCOSS). TasCOSS submitted such alignment would give disproportionate power to the University. Terese Henning linked this with the references in clause 2 of the Agreement to the University Research Centres, references which she recommended removing because they could be interpreted as encroaching on the Institute's independence (see TOR 1 and Recommendation 7). The Vice-Chancellor and the Provost, as well as Professor Kate Darian-Smith, dismissed the suggestion that either the University or Law School research priorities should have any influence on the selection of references by the Institute.

5.1.17 Another aspect of the agreement said to indicate that the University's role in the relationship with the Institute was overly prescriptive, was the appointment of the Director by the Vice-Chancellor (Meg Webb MLC).

After twenty years the TLRI is an adult. It was given birth by its foundational members, but it does not belong to them. It must set its own course as a full citizen of the Tasmanian polity.

Rodney Croome, President, Equality Tasmania

The Board's relationship with the Founding Partners

5.1.18 In addressing TOR III, the TLRI Board observed that its relationship with its founders is impaired by the current financial situation facing the Institute, specifically with the Government because of the inadequate baseline annual funding and diminished funding for specific projects; and with the University because of the staffing situation at the Law School, reducing the availability of law academics to engage with the Institute's work, and delays with regard to the Director's position. The University's failure to ensure the Director has adequate time for the role and its delay in appointing a permanent replacement for Terese Henning suggested to the Board that the University lacks commitment to the Institute. Indeed, in the Board's view, its relationship with the University has deteriorated to the point that it has questioned the viability of the university-based law reform model for Tasmania.

5.1.19 Three of the current Board members made additional oral submissions. Kim Baumeler, a leading defence lawyer, referred to the apparent breakdown in the relationship between the Board and the Government and the University. She described the relationship between the Board and the Law Society as 'non-existent'. Justice Wood referred to the workload changes for the Law School's academic staff, which had increased their teaching load at the expense of community engagement or ability to participate

in TLRI projects. This, together with the exodus of staff, meant that the most recent Director had no one with expertise to assist with the age of criminal responsibility reference. In a discussion questioning the reduction of time for community engagement in the standard academic workload, Justice Wood said 'Our Law School has a very privileged place in our State – it is our think tank, it is integral to our intellectual life.' Justice Wood described the Institute as a win-win for the University, a point of difference and a draw card to have it embedded in the Law School.

The Review Process

5.1.20 The process of this review was said to illustrate deficiencies in the relationship between the Institute and the Founding Partners and particularly with the University (Terese Henning and Robin Banks). Terese Henning stated:

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.

5.1.21 Robin Banks noted the preferential position that the University appears to have in relation to the review, stating that, according to the letter soliciting input to the review, the Vice-Chancellor will receive the review report, but there was no indication that the Founding Partners will.

5.1.22 The TLRI Board, Equality Tasmania and Meg Webb MLC also raised concerns about the review process, although not specifically linked to TOR III and the relationship of the Institute with the Founding Partners. The Board asserted that it had neither been informed of the reason for the review, nor of the terms of reference, nor invited to be involved until March 2022. This was related to assertions of intrusions on the independence of the Institute (and was referred to under TOR II). Board member Justice Helen Wood reported that the Board were initially concerned about the review, why it was being held, and under what authority. However, once they learnt the composition and expertise of the Review Panel and were informed of the terms of reference, their concerns were allayed. The former Dean, Professor Michael Stuckey, attributed the disquiet about the review process to poor communication with the Board and the fact that the Attorney-General had been slow to respond to the University.⁹ The Executive Dean admitted that relationships between the University and the Board could have become strained because of delays in appointing a new Director and getting the review underway.

5.2 Recommendations

Recommendation 9: The non-statutory Law School-located agreement model be retained

5.2.1 The Review Panel notes that the terms of reference do not appear to question the appropriateness of the 'Alberta model' for Tasmania. For this reason, it may not be within the terms of reference to recommend the retention of this model. Nevertheless, the Panel wishes it to be noted that it endorses this model as the most appropriate one for Tasmania. It has proved to have been the most economic, productive, independent, and long-lasting law reform body in the State, and it is not surprising that it has

⁹ Professor Stuckey stood aside on 4 May 2022, shortly after making a submission to the Panel on 26 April, 2022.

been so comprehensively supported in submissions to the review. Other options such as an ALRC-type standing commission, or a single Commissioner, are unrealistic and/or inappropriate. However, the Agreement needs to protect the viability of the TLRI by ensuring it is properly resourced and supported (see TOR VII) so that it can take advantage of the full potential of a law school-located model, and we make the following recommendation on this basis.

Recommendation 9

It is recommended that the non-statutory Law School-located agreement model be retained.

Recommendation 10: A standing body which can only be dissolved by agreement

5.2.2 Rather than an agreement for a five- or three-year term with a provision that the agreement may be extended (the current position in clause 8), it is recommended that the new agreement provide that it can only be dissolved by agreement of the three Founding Partners. As proposed by Terese Henning, this would greatly enhance the independence and sustainability of the Institute, strengthening the desirable attribute of a law reform body of permanence.¹⁰

Recommendation 10

It is recommended that the new agreement provide that it can only be dissolved by agreement of the three Founding Partners in writing.

Recommendation 11: Provision for a review process in the Agreement

5.2.3 The period of agreement provision (currently clause 8) should also provide that the parties should review the terms of the Agreement at specified intervals (4- or 5-yearly) to ensure that it meets the current requirements of the Institute. It should also provide that if a formal review process is deemed necessary by the parties to the Agreement, the Director, or the Board, the terms of reference and appointment of the Review Panel should be determined after consultation. Such a provision would avoid the concerns and suspicion that surrounded the current review.

Recommendation 11

It is recommended that the period of agreement provision (currently in clause 8) should also provide that the parties should review the terms of the Agreement at specified intervals (4- or 5-yearly) to ensure that it meets the requirements of the Institute at that time.

The period of agreement provision should also provide that if a formal review process is deemed necessary by the parties to the Agreement, the Director, or the Board, that the terms of reference and appointment of a Review Panel should be determined after consultation between them.

¹⁰ For a discussion of the attributes of a modern law reform body, see Brian Opeskin and David Weisbrot, *The Promise of Law Reform*, Federation Press, 2005, 22-38.

Recommendation 12: The Agreement explicitly recognises the supportive role of each of the Founding Partners and ensures the parties communicate regularly

5.2.4 The submissions, both written and oral, demonstrate the commitment and support of each of the Founding Partners to the continuing viability of the Institute and the Panel is satisfied that they are so committed, despite recent events which may suggest otherwise.

5.2.5 There is merit in Terese Henning's suggestion that the Agreement explicitly recognise the supportive role of each of the Founding Partners in promulgating its work, in providing references, and in making and soliciting submissions on references, and this we recommend.

5.2.6 It would also be of benefit to formalise in the Agreement the practice of the Director holding regular meetings with the Vice-Chancellor, the Attorney-General and the Law Society.¹¹ Together with the Agreement's requirement of regular meetings of the Board, and Recommendation 11 (a provision for a review process), the tensions in relation to this review may have been avoided. The Panel hopes that the parties, in the spirit we have observed of recommitting themselves to the TLRI, will increase communication and co-operation to support the Institute and its valuable contribution to Tasmania.

Recommendation 12

The Agreement should explicitly recognise the supportive role of each of the Founding Partners and ensure the parties communicate regularly.

¹¹ This was also suggested by Terese Henning, p 5.

Part 6 – TOR IV: The Institute’s Position, Role and Relationship to the Government

TOR IV - The position, role and relationship of the Institute to the Government of Tasmania, as represented by the Attorney-General.

6.1 Submissions

6.1.1 Robin Banks asserted there was no rationale for separating the Institute’s relationship with one of the Founding Partners from its relationship with the other two. Some external stakeholders, who dealt with the TOR IV separately, referred to the reference process and the importance of clarifying the power of the Institute to accept or reject references from the Attorney-General (Equality Tasmania; Meg Webb MLC). The reference process is dealt with under TOR V. Two other issues canvassed under this term of reference were a requirement that the Attorney-General table the TLRI annual reports in Parliament (Equality Tasmania, who suggested this should be a statutory requirement, and Meg Webb MLC) and the current relationship between the Attorney-General and the TLRI.

6.1.2 The TLRI Board observed that the relationship between the Board and the Attorney-General had declined with respect to funding and referrals, with no new referrals since the transgender and intersex law reform project in October 2018. Martin Clark commented that the TLRI had been overlooked by the Attorney-General and recent law reform projects referred elsewhere. He urged that the reasons for this should be explored and remedied. Others commented on the reasons for the lack of recent references from the Attorney-General. Equality Tasmania explained this in terms of ‘an attempt by the Government to punish the TLRI for not doing what it wanted [in relation to the way it dealt with the sex and gender recognition reference], and/or an attempt to pressure the TLRI into being more compliant to the Government’s wishes in the future.’ The submissions indicated that there was a broad perception that the Attorney-General was uneasy with some of the references or unhappy with the TLRI’s handling of the legal recognition of sex and gender reference (e.g. Professor Margaret Otowski; Professor Tim McCormack).

6.1.3 Putting differences about the Institute’s handling of the transgender and intersex project to one side, there was universal support in consultations that the TLRI should function as an impartial and independent law reform body, and the Agreement should clearly reflect this fact. The Children’s Commissioner, for example, emphasised that the TLRI’s practices and the Agreement should reinforce its impartial and independent role. This would strengthen an understanding of the TLRI’s actual role and help avoid misconceptions that, for example, it is an advocacy body. The former Chief Magistrate, Michael Hill, said ‘the TLRI must remain an impartial and nonpartisan and independent law reform body and avoid advocacy.’

6.2 Recommendations

6.2.1 The Review Panel has no specific comments or recommendation relating to this TOR. However, it again notes the level of concern that was expressed in relation to the motives and intentions of the Founding Partners regarding this review.

Part 7 – TOR V: The Institute’s Current Constitution, Governance Arrangements and Reference Process

TOR V - The adequacy and appropriateness of the Institute’s current constitution, governance arrangements and reference process.

7.1 Current constitution and governance arrangements

7.1.1 Discussion of this TOR assumes that the basic model of the TLRI should continue to be a non-statutory law reform body established by an agreement with the three Founding Partners.¹² Following the majority of submissions, we have interpreted constitution and governance arrangements to cover the composition of the Board and its responsibilities, the qualifications, appointment and responsibilities/role of the Director, and the position of the Acting Director. The reference process is addressed separately in 7.4.

The Board

7.1.2 Clause 3 of the Agreement deals with the Board of the Institute. It provides that the ‘Board’ is established as an advisory body (clause 3.1). Its membership is set out in clause 3.2 and consists of:

- (a) The Director (who is to act as Chair according to 3.7)
- (b) The Dean of the Faculty of Law
- (c) 1 person appointed by the Chief Justice
- (d) 1 person appointed by the Attorney-General
- (e) 1 person appointed by the Law Society
- (f) 1 person appointed by the Council of the University
- (g) 1 person appointed by the Tasmanian Bar
- (h) No more than 3 co-opted members, one of whom shall be a member of the Tasmanian Aboriginal Community.

7.1.3 The role of the Board includes advising the Director with respect to the conduct of business of the Institute, including making recommendations as to the acceptance of law reform proposals (3.3); identifying the extent of recommended projects, time for completion, expected outputs and the cost of the project (3.4); recording all proposals received (3.5); and appointment of an acting Director if the Director is likely to absent for more than one month (5.5).

7.1.4 Currently, the Board has co-opted a member of the Aboriginal Community, a community member, and a member of Tasmanian Women Lawyers. When the Review Panel began its work, the (Acting) Director was the Dean of Law, Professor Michael Stuckey.¹³ He was described to the Panel by the Executive Dean as being ‘a place holder only’ as there needed to be someone overseeing the TLRI until a new Director was appointed following the departure of the Acting Director, Associate Professor Brendan Gogarty, who resigned from the University in March 2022. Dr Gogarty had been appointed Acting Director following the retirement of Terese Henning in December 2019. The appointment of an Acting Director was intended to be for one semester only, pending recruitment of a new Director, which was to be advertised externally. In May 2020, the Board was advised that Covid-related financial issues had led to a freeze on new appointments and that Brendan Gogarty had been asked to stay on as Acting Director.

¹² Submissions in relation to the appropriateness of the model are discussed under TOR III.

¹³ The Vice-Chancellor informed the Board of this appointment: Briefing paper for the TLRI Board, p 6-7, attached to the Board’s submission.

Professor Michael Stuckey stepped down from this position on 4 May 2022. It is understood that an Acting Director of the TLRI is still to be appointed.

The Director

7.1.5 Clause 5 deals with the Director's appointment and responsibilities. It provides that the Director is appointed by the Vice-Chancellor of the University (5.1) and shall be a member of the academic staff of the University (5.2). The original Founding Agreement merely provided that the Director shall be responsible for the day-to-day administration of the Institute (5.3) and shall report on activities at each meeting of the Board (5.4). The current Agreement elaborates on the duties in nine dot points (see Appendix A).

7.1.6 Clause 5.5 of the Agreement provides that if the Director is likely to be absent for more than one month, the Board may appoint an acting Director for the period of absence.

7.2 Submissions: *Current constitution and governance arrangements*

Board composition

7.2.1 There was wide support for the present composition of the Board. The former Director, Terese Henning, stated that the current make-up 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 capacity to appoint members from non-law backgrounds. This is valuable because it enables other perspectives to inform the work of the Institute.

7.2.2 There was express support for retaining a member of the Aboriginal community in some submissions (CLC Tas; Terese Henning; TLA; Robin Banks). CLC Tas submitted this was important because the criminal law in particular has a disproportionate impact on Aboriginal people.

7.2.3 Despite general satisfaction with the composition of the Board, there were some suggestions for additional positions and minor changes including:

- a representative of stigmatised and minority communities to complement the TLRI's role in fostering equity and inclusion (Equality Tasmania);
- specifically providing for a community representative nominated by community organisation stakeholders (Meg Webb MLC);
- past Directors on the grounds the TLRI would benefit from their formal input (Martin Clark); and
- replacing the appointee of the University Council with an appointee of the Law Faculty to align with the practice of always appointing a member of the academic staff of the Law School (Terese Henning).

7.2.4 There was some unease with the number of University appointees on the Board, with the Director appointed by the Vice-Chancellor, University Council nominating a position and the Dean of the Faculty of Law a member ex officio (Martin Clark).

Separating the role of Chair and Director

7.2.5 It appears that when the possibility of a review in late 2019 was first raised between the then Dean, Professor Tim McCormack, and the Attorney-General, the issue of separating the role of Chair and Director was mentioned (Terese Henning). For this reason, it was referred to in some of the written submissions, and the Panel raised it in its face-to-face meetings. There was some support for the

appointment of an independent Chair rather than the Board meetings being chaired by the Director. Martin Clark argued that a Chair or President would be able to act as an additional advisor for the Director and relieve the Director of the tasks of calling and running Board meetings. He also suggested former Directors would be appropriate in this role. In oral submissions the appointment of an independent Chair was also supported by Professor Don Chalmers, Robin Banks, and Simon Gates and Luke Rheinberger (Law Society President and Executive Director respectively). The latter suggested it as an assurance measure to make the Director accountable to ensure the Board was putting the correct questions to the Director. Justice Department staff commented that if there were to be a separate chair, this would ‘complement the skills of the Director’ and assist in negotiating with outside stakeholders. Professor Chalmers suggested that, in the current situation, an independent chair appointed by the Board and the parties to the agreement could be a ‘circuit breaker’ or ‘game-changer’. This was currently necessary as the Institute had been run down to such an extent that it needed to be ‘re-energised, restructured and re-engaged’. Robin Banks recounted that she had seen the benefits of having an independent chair as a sounding board when she was the Chief Executive Officer of the Public Interest Advocacy Centre. She added that the Chair would need to be a person of high standing in the community and be non-partisan, and that the Board should have the responsibility of exploring potential candidates with the final say given to the three Founding Partners. Professor Kate Darian-Smith also supported separating the role of Director and Chair, as did Professor Stuckey, on the grounds that the independence of the Director can be questioned as this position is funded by the University.

7.2.6 Some were more ambivalent. Ben Bartl (from CLC Tas) saw no harm in having an independent Chair and considered it could provide some useful assurance to the Government of the TLRI’s independence while Professor Tim McCormack, although not opposed to the concept of a designated Chair of the Advisory Board, considered that an independent Chair, if appointed by the Attorney-General or any of the Founding Partners, could compromise the independence of the TLRI.

7.2.7 Others opposed separating the roles of Director and Chair. Equality Tasmania suggested this was an unnecessary complication and would put needless distance between the Board, Director, and other staff, setting up the possibility that the work of the TLRI would be obstructed and its independence and integrity compromised, particularly if the Chair was a non-academic. This theme was emphasised by Terese Henning. She noted that the Board has run very well, in her wide experience, with the Director acting as the Chair. 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. Rohan Foon, the Law Society nominee on the Board, also considered an independent Chair was unnecessary under the current model. Running the Board and leading it through discussion on drafts would require extensive work to be totally across the issues and the position would need to be paid. Professor Margaret Otlowski also questioned the need for an independent Chair and asked, ‘What is that trying to fix?’ The Chief Justice, who served on the TLRI Board for twelve years, queried the necessity for such a position. Rosalie Woodruff also opposed the appointment of an independent Chair on the grounds the position is ‘clean at the moment’ and there is less chance of the Institute being politicised.

Board role

7.2.8 There were very few comments on the Board’s role other than to expressly support its oversight functions (e.g. CLC Tas; Equality Tasmania). Terese Henning supported the role of the Board remaining an advisory one and stressed its ‘powerfully influential role in relation to the Institute’s work’, highlighting the inclusion of advising the Director with respect to the conduct of the business of the Institute, including recommending whether a particular reform project should be undertaken (3.3), and the duty of the

Director to seek the advice of members of the Board and report on Institute activities at each meeting of the Board (5.4).

Appointment of the Director

7.2.9 The need to change the Vice-Chancellor's sole responsibility for the appointment of the Director emerged as a common theme in the submissions to the Review. As indicated above in relation to TOR II, the fact that the Vice-Chancellor appointed the Director was regarded by some respondents as compromising the Institute's integrity and its independence from the University.

7.2.10 In its submission, the Board outlined some of the history of the appointment process. It acknowledged that the appointment of the first two Directors by the Vice-Chancellor had occasioned no difficulties. However, following the retirement in late 2019 of Terese Henning, the Vice-Chancellor's delay in appointing a permanent replacement has led to uncertainty and instability. Currently, because of the loss of senior academics from the Law School, the University is undertaking a recruitment process at a national level, highlighting the fact that selection lies entirely with the University.

7.2.11 The Board submitted that the Director should be appointed from senior academic staff at the Law School by a panel selected by the Board, with representation from each of the Founding Partners. That the Director should be appointed by the Board was supported by Terese Henning; Equality Tasmania; Meg Webb MLC; Robin Banks and Kim Baumeler. Robin Banks submitted that, despite the fact that the Director needs to be a university academic, the appointment as Director must be a Board appointment for a fixed term. This is consistent with the independence of the Institute and the fact that the Institute is not an entity of the University but a shared entity of a tri-partite agreement. She said it is much more important that the Director have a good relationship with the Board than with the Vice-Chancellor.

7.2.12 The Law Society suggested that there should be a requirement of formal consultation with the Board in relation to the appointment. When the appointment of the Director was raised by the Panel in meetings, a requirement of consultation by the University with the Founding Partners and/or the Board was strongly supported (Professor Don Chalmers; Professor Tim McCormack; Professor Margaret Otłowski; Jane Hutchinson and Ben Bartl, CLC Tas; Cassy O'Connor and Rosalie Woodruff). Professor Kate Darian-Smith agreed that there should be consultation with the Board about the position description (and added it had been given a draft of this for the soon to be advertised position), but she warned that having too much involvement from the Founding Partners could make it difficult to agree on the successful candidate. Rohan Foon, the Law Society nominee on the Board, considered that the University should appoint the Director after consultation with the Board if the Director continued to be a university academic with the Institute embedded in the Law School. The DPP's view was that the Director of the TLRI should be appointed by the Attorney-General as the State's first law officer, after consultation with the Founding Partners and the Board.

7.2.13 One view relayed to the Panel by more than one party was that if the University funds the Director's position, it is unrealistic to expect any party other than the University to have the ability to select the Director. As Professor Michael Stuckey, the former Dean, noted: 'Who pays the piper, should call the tune.' However, this view was not necessarily at odds with those who suggested that the Founding Partners and/or the Board should be 'consulted' as to the crucial appointment of a new Director.

7.2.14 There were different opinions about the appointment process. Terese Henning submitted (as did Robin Banks) that the Board should call for expressions of interest or nominations from staff members; that the Director should be an academic with legal qualifications and knowledge and experience of law reform, and not merely an academic at the University; and the agreement should be changed to reflect this

practice. Meg Webb MLC said the position should be advertised broadly and not just within the University. The Board suggested that selection criteria should be based on the responsibilities of the Director. The Executive Dean pointed out that anyone in the role will need to meet UTAS requirements as they will be a UTAS employee. Professor Stuckey stated that the role needs to be well-defined and to have clear reporting line to the Provost or Dean as it is the University 'paying the bill'.

7.2.15 Submissions and discussions also covered the proportion of a full-time load (FTE) that should be devoted to the position. The demanding nature of that role was often noted, including by Justice Wood. A frequent theme was that the Director must not be burdened with other university roles and commitments, notably in teaching, to the extent that it is unrealistic for the Director to have the time and capacity to effectively act as the Director. Professor Otlowski noted that you 'can't rely on someone's goodwill in their own time'. The DPP observed that the Director 'can't do it off the side of their desk'. The DPP advised the role should be full-time, adding that it should be an eminent academic who can attract references and focus on producing reports and promoting the Institute to attract funding. If not full-time, other responsibilities in the Law School would tend to encroach on the role. Professor Chalmers also supported a full-time Director's position. Terese Henning and Professor McCormack suggested the Agreement state that it be between 0.5 and 0.8 FTE. Others said the position should be at least a 0.5 position (Professor Kate Darian-Smith, Professor Michael Stuckey and Professor Margaret Otlowski). Such balance was seen as allowing the Director the necessary time and capacity to manage the TLRI, but also usefully pursue other University interests and roles (such as their personal research interests outside the TLRI).

Acting Director

7.2.16 In its written submission, the Board referred to the unsatisfactory situation following the retirement of Terese Henning when Dr Brendan Gogarty was appointed as Acting Director, initially for just six weeks, which dragged on for two years. This the Board said, 'suggests a lack of commitment by the University to ensuring optimal arrangements for the Institute'.

7.2.17 Terese Henning suggested that clause 5.5 be amended to make it clear that the Board has the authority to appoint an Acting Director when there is a vacancy, as well as when the Director is temporarily absent. The Chief Justice also raised the lack of guidance in the Agreement on the appointment of an Interim or Acting Director.

7.3 Recommendations: Current constitution and governance arrangements

7.3.1 The Review Panel makes the following recommendations in relation to the composition and powers of the Board, and the appointment of the Director and Acting Director. As indicated in Recommendation 4, it supports the role of the Board remaining an advisory one.

Recommendation 13: Increase the number of co-opted members

7.3.2 The Panel notes the submissions made in relation to the composition of the Board. Rather than specifically requiring an additional member or members of a particular constituency, it would prefer leaving this to the Board itself by increasing the maximum number of co-opted Board members in clause 3.2(h) of the Agreement.

Recommendation 13

It is recommended that the maximum number of co-opted Board members be increased in clause 3.2(h) of the Agreement.

Recommendation 14: Provide for the appointment of an independent Chair of the Board if deemed necessary by the Board

7.3.3 The Panel notes the valid arguments raised both for and against separating the role of Director and Chair of the Board. The Panel is aware that for 20 years, the Director has chaired meetings of the Board without this causing any problems. It also notes that this arrangement has worked perfectly well with the SALRI. It has proved to be effective and efficient, and the Panel considers that separating the positions may prove an unhelpful complication and confuse lines of communication and create conflict. There are issues in relation to the appointment, role and possible remuneration of such a Chair. The Panel understands that chairing meetings that take Board members through drafts of papers and reports requires considerable preparation, and this would no doubt require extensive briefing of an independent Chair by the Director and Institute staff prior to such meetings. For all of these reasons, the Panel considers that *requiring* an independent Chair is likely to be counterproductive to the Institute's work, rather than of assistance to it. However, it acknowledges that, as Professor Chalmers and others pointed out to the Panel, in the current situation, an independent Chair appointed by the Board and the parties to the Agreement could be a 'circuit-breaker', assisting to re-energise the Institute. As was pointed out, having an eminent person as Chair can be of assistance to the organisation. For this reason, it is recommended that the Board be given the power to appoint a person, other than the Director, to chair meetings of the Board, if it deems this to be necessary and with the consent of the parties to the Agreement to that appointment. The Board could decide in its discretion to appoint the Director to chair the Board or someone else. The Panel is of the view that this decision is best left to the Board.

Recommendation 14

It is recommended that the Agreement make provision for the Board to have the power to appoint an independent Chair if the Board deems this to be necessary and with the consent of the parties to the Agreement to such appointment.

Recommendation 15: The position of the Director should be a University appointment made in consultation with the Founding Partners and the Board

7.3.4 The Panel is of the view that the appointment of the Director should continue to be by the Vice-Chancellor, as the Director is a member of staff of the University and the University is paying the Director's salary. Their employment is governed by the University staff agreement and policies in relation to such things as promotion and eligibility for external study leave programmes. However, the new TLRI Agreement should amend clause 5.1 to provide that the Vice-Chancellor of the University shall consult with the Board and the parties to the Agreement in relation to the Director's appointment. We do not think it is necessary to be more prescriptive. If the appointment is made from currently employed staff, a brief discussion with the Board and the parties may be all that is necessary. However, if the Director's position is to be advertised, it would be appropriate to include representation, as was suggested to the Panel by various consultees, from the Board, the Government, and the Law Society on the selection committee.

Recommendation 15

It is recommended that clause 5.1 of the Agreement be amended to provide that the position of Director should be a University appointment made by the Vice-Chancellor of the University, in consultation with the Founding Partners and the Board.

Recommendation 16: Provision for the appointment of an Acting Director

7.3.5 The uncertainty caused by the delay in appointing a new Director following the retirement of Terese Henning was clearly unsatisfactory for both the Acting Director and the work of the Institute. To avoid this situation, it is recommended that the Board's power in clause 5.5 of the Agreement, to appoint an acting Director if the Director is likely to be absent for more than one month, be extended to appoint an acting Director on the resignation or retirement of the Director.

Recommendation 16

It is recommended that the Board's power in clause 5.5 of the Agreement (to appoint an Acting Director if the Director is likely to be absent for more than one month) be extended to provide for the appointment by the Board of an Acting Director on the resignation or retirement of the Director.

7.4 Adequacy and appropriateness of the reference process

7.4.1 The agreement provides the following in relation to the reference process:

- that the Institute's functions include to conduct reviews and research on areas specified by the Board (2.2(a)), to consider proposals from the Attorney-General for reform of the law (2.2(c)) and to conduct reviews and research proposals for reform of the law referred by the Attorney-General (2.2(d));
- that the Board is to advise the Director with respect to ... making recommendations as to whether a particular reform project should be undertaken (3.3);
- that the Board is to record in its minutes of proceedings all proposals received for law reform projects (3.5);
- that the Institute may receive proposals for law reform or research projects from:
 - (a) the judiciary;
 - (b) The Attorney-General;
 - (c) Legal Aid Commission of Tasmania;
 - (d) Tasmanian government departments;
 - (e) the Parliament;
 - (f) the Legal Profession; and
 - (g) members of community groups (4.1).

7.5 Submissions: *Adequacy and appropriateness of the reference process*

7.5.1 Submissions which commented on the reference process strongly supported retaining the power to accept proposals from any person or organisation, rather than restricting references to those from the Attorney-General. This was regarded as a key strength of the TLRI and a hallmark of its independence. For example:

The ability to accept proposals from a wide range of stakeholders provides the TLRI with a degree of independence that most other Australian law reform bodies lack. It also means that the TLRI is able to undertake cutting-edge law reform of national and even international significance without fear or favour (CLC Tas).

and

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 (Terese Henning).

7.5.2 However, a number of suggestions were made to clarify the reference process:

- an express power to accept or refuse references (Ella Haddad MP; Meg Webb MLC; TasCoss) and to accept or reject, amend, prioritise or delay references from Government (Equality Tasmania); the President and Executive Director of the Law Society spoke of the importance of the power to amend the terms of reference to avoid a skewing of issues;
- expressly providing for a power to self-refer projects in clause 4.1 (Terese Henning; Meg Webb MLC; TasCoss; CLC Tas);
- adding to 'Parliament' in clause 4.1(e) 'and members of Parliament' to avoid the interpretation that a proposal needed to be supported by a vote of Parliament as an entity (Meg Webb MLC) and similarly adding 'and members of the judiciary' to clause 4.1(a) and 'and members of the legal profession'; to clause 4.1(f);
- adding 'statutory officers' to the list in clause 4.1 (Terese Henning; Ella Haddad MP; Meg Webb MLC; TasCoss; CLC Tas).

7.5.3 Equality Tasmania suggested that a set of criteria should be developed for reference selection and prioritisation and that the criteria should include the importance of equality and inclusion for minorities that experience stigma and discrimination.

7.6 Recommendations: *Adequacy and appropriateness of the reference process*

7.6.1 The Review Panel agrees that the Institute's power to accept references from a wide range of stakeholders is a key strength and should be retained. Similarly, its power to accept or reject references including references from the Attorney-General is integral to its ability to set its own agenda. The submissions made useful suggestions in relation to clarifying and thereby strengthening the reference process.

Recommendation 17: Clarifying the Agreement's provision on references

7.6.2 It has already been recommended that clause 2.2(a), which requires the Institute 'to conduct reviews and research on areas specified by the Board', be omitted because it is inconsistent with the advisory nature of the Board (see para 3.3.6 and Recommendation 4). It has also been recommended that clause 2.1(d) be omitted because it could be read as suggesting the Attorney-General's proposals must be accepted (para 3.3.7). As discussed, the Institute's power to reject references, including those from the Attorney-General, is implied in clause 3.3 and in practice has been assumed and exercised. For the removal of any doubt, it has been recommended that this should be included as an express power in clause 4 (see Recommendation 4). We recommend that this express power be framed more widely to include the power to accept or reject, amend, prioritise or delay any proposal received under clause 4.1. We also support

expressly including the power to self-refer, and to make it clear that statutory officers (such as the Children’s Commissioner), individual judges, members of parliament and members of the legal profession can also refer a project.

7.6.3 While there is wisdom in the suggestion that the Institute should develop a transparent and formal set of criteria to guide the selection process and prioritise references, including such considerations as resources, capacity, urgency of reference and balancing subject matter, we make no formal recommendation as to this.

Recommendation 17

It is recommended that Clause 4.1 be amended as follows:

- Amend 4.1(a) to read ‘members of the judiciary’;
- Amend 4.1(e) to read ‘members of Parliament’;
- Amend 4.1(f) to read ‘members of the legal profession’; and
- Add ‘statutory officers’ as a new category to clause 4.1.

Clause 4 should be amended to add, after clause 4.1, a new express provision stating that the Institute may accept or reject, amend, prioritise or delay any proposal received under clause 4.1.

Further, clause 4 should include a new provision that makes it clear that the Institute can initiate its own proposals.

Part 8 – TOR VI: Appropriateness and Sustainability of the Institute’s Resourcing and Staffing

TOR VI - The appropriateness and sustainability of the Institute’s resourcing and staffing, having regard to the size of the jurisdiction in which it operates.

8.1 History of resourcing and staffing

8.1.1 The TLRI’s Founding Agreement provided that funding for the Institute would be \$50,000 per annum from the Government’s Department of Justice; and up to \$80,000 per annum, including in kind contributions from the University (clause 6.1). It also provided that the University would provide office premises for the Institute as part of its in-kind contribution (clause 6.7). No specific amount was specified for the Law Society, but the agreement stated that the Law Foundation of Tasmania, which is administered by the Law Society, ‘may provide annual grants, subject to available funds for the operations of the Institute’ (clause 6.3).

8.1.2 The \$50,000 from the Department of Justice was regarded as seed funding with possibilities for increase once the Institute was up and running. Indeed, the following year the Government, through the Justice Department, increased the payment to \$65,000 for that particular year.¹⁴ During the five-year term of the first Agreement, the University made no cash contribution to the Institute, but its in-kind support included the work of the Director and the contributions of other members of the Law School staff, in particular the members of staff on the Board, namely the University Council’s appointee (Terese Henning) and the Dean (Professor Chalmers). Within the University’s workload allocation, the Director’s role was not given a specific FTE proportion. It was considered to be part of the academic service role (a balanced academic position was 40% teaching, 40% research and 20% service). In the annual reports, in-kind contributions of the Director and Law School staff were expressed in terms of hours.

8.1.3 In the three years from 2006 to 2008, the core funding from the Justice Department increased to \$75,000 per annum, but from 2009 it was again \$50,000.¹⁵ From 2013 to 2020, the Institute was successful in applying for additional funding for specific projects from the Solicitors’ Guarantee Fund (SGF) and the Law Foundation, and in 2017 the Institute was granted an additional \$100,000 per annum from the SGF for two years (2017 and 2018) to allow the TLRI to elevate its law reform work. This allowed the appointment of a Deputy Director/Executive Officer – Research (limited term contract 0.5 FTE) and an Executive Officer – Administration (0.6 FTE).¹⁶ No funds have been obtained from these sources since 2020.

8.1.4 The University’s in-kind support through payment of the Director’s salary has never been expressed in the agreements in terms of a proportion of their position. Nor did the Institute’s Annual Reports express it this way¹⁷ until the 2019 report where 0.5 of a FTE level D position is reported at a cost

¹⁴ See Annual Report 2002.

¹⁵ The 2005 Agreement was extended for three years by way of an exchange of letters. In 2008 the Director wrote to the Attorney-General requesting that the base funding be increased to \$85,000. This was refused and the new agreement signed in December 2009 specified \$50,000.

¹⁶ TLRI Board Submission, Appendix 1, Briefing Notes for UTAS Management – 2019 renewal of agreement, p 1.

¹⁷ The University’s in-kind support from the Director and staff was calculated on a consultancy basis. For example, in 2007 the Director devoted 70 days to the TLRI costing at \$127,540 and the University’s total in-kind support was calculated at \$251,444.

of \$92,453 (in 2020 it was 0.4 of level C position at \$64, 575). In terms of the Law School's internal workload allocation, from 2015 to 2019 between 0.5 and 0.8 FTE was allocated to the Director's role.

8.1.5 The latest agreement¹⁸, which commenced on 23 November 2019, provides for Government funding of \$50,000 per annum and for the University to provide funding of up to \$206,000 (including in-kind contributions) per annum (clause 6.1). Attempts by the Institute to have the core funding increased in this agreement again failed.

8.2 Submissions

Lack of resources and disparity in contributions

8.2.1 There was broad agreement that the TLRI is under-resourced and had been for the last few years, and that it needs a secure and guaranteed funding stream. Ms O'Connor MP and Dr Woodruff MP noted the 'enormous benefit' of the TLRI and that \$50,000 represents a 'pittance'. Respondents such as CLC Tas and the Children's Commissioner similarly noted the disparity between the low funding received and the benefit provided by the Institute. The Law Society submission noted that the TLRI is 'chronically under-resourced'. The DPP also noted the lack of adequate funding for the TLRI and that '\$50,000 does not even buy a Level 1 lawyer'. The Vice-Chancellor observed that the Government gets a good deal from the University in relation to the TLRI and that a new funding model is required to support it.

8.2.2 A recurring theme in discussing resources was the disparity in support between the contributions of the University and the Government,¹⁹ with the Government's commitment to core or baseline funding remaining at the same amount as in the Foundation Agreement (e.g. Law Society). CLC Tas provided a table showing that University in-kind contributions between 2011 and 2019 regularly exceeded the agreed maximum of \$80,000, which was the amount indicated in the Agreements until the latest (November 2019) Agreement. Professor Otlowski said it was vital to put the TLRI on a secure, sustainable and balanced financial foundation. Professor Michael Stuckey, the former Dean of Law, asserted that funding law reform is primarily a governmental responsibility which the government has failed to meet, leaving it to the University to provide nearly 90% of resources. Professor Stuckey added that, without the University quarantining resources for the TLRI, the responsibility fell to the Law School and that was not sustainable in the current climate. The Executive Dean of CALE, Professor Kate Darian-Smith, also indicated that the University would like to see the Government increasing its share of the recurrent funding.

The problem of low baseline funding and reliance on grants

8.2.3 Submissions indicated that a lack of resources has led to slow completion of projects, such as the conversion practices project (Martin Clark), and a backlog of work with references, such as Tasmania's Privacy Laws, 'placed in a holding pattern' (Meg Webb MLC, who submitted this reference to the TLRI). Many of the submissions linked the need for appropriate and sustainable funding to the issue of independence, arguing that without it the Institute's independence was compromised (see TOR II). Others, including the Board, went further and voiced concerns about the long-term viability of the Institute unless it was appropriately funded and the situation in relation to the unavailability of experienced and specialist staff to undertake and lead research was addressed.

¹⁸ See Appendix A.

¹⁹ The role and perceived lack of support from the Law Society to the TLRI was raised by several parties. Professor Stuckey described the Law Society as a 'silent partner' in the running of the TLRI. The Law Society noted its support for the TLRI to the Review Panel, but made clear it was not in a position to financially support the TLRI.

8.2.4 While submissions noted the success of grant applications to the Solicitors' Guarantee Fund and the Law Foundation over many years, primarily for funding individual projects, the problems of reliance on grants were highlighted. First, available funds from the SGF and the Law Foundation fluctuate, making them a precarious source of funding – a situation which is unlikely to improve in the future (Law Society; Robin Banks; Ella Haddad MP).²⁰ The need for the TLRI to be on a secure and sustainable financial foundation and to not have to depend on such insecure funding was made clear by many parties.

8.2.5 Terese Henning elaborated on the problems of relying on grants, explaining that writing grant applications is very time consuming, not always successful, and detracts from the time spent working on projects, as does the administration of individual grants (a point reiterated by Meg Webb MLC, TasCOSS, and CLC Tas). The Board submitted that success or failure to attract a project specific grant from the SGF can depend on whether it relates to a reference from the Attorney-General. Grants received are often considerably less than the amounts applied for, which affects the conduct and scope of the references, and the Institute's communication of its research recommendations. The need to apply for individual grants prevents long term planning and leads to a piecemeal approach to the Institute's work. It impedes staff retention as staff can only be engaged on limited term contracts funded from individual grants. This detracts from the ability to attract long term researchers (The Board; Terese Henning).

8.2.6 Terese Henning submitted that the advantages of increased core funding can be demonstrated by the Institute's performance between 2016 and 2019, when an additional \$250,000 was approved by the Attorney-General for the TLRI without it being tied to a particular reference. This contributed to the Institute's most productive period in its history and enabled it to considerably expand its work, including engaging in more complex work and community engagement; active consultation; providing feedback on proposed government legislation; and engaging with other Institutes and research units on areas of mutual interest, such as recidivist drink driving and elder abuse. Importantly, increased funding allowed the TLRI to modernise measures for communicating with the Tasmanian community and key stakeholders, increase awareness of the Institute's work, and encourage widespread community engagement. Measures 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 on relevant references.

8.2.7 Terese Henning contrasted the productive period between 2016 and 2019 with the current situation, which she characterised as an 'existential crisis', with a collapse in funding from the SGF and Law Foundation and a decrease in support staff.

8.2.8 Former Deputy Director Rikki Mawad also highlighted this productive period for the TLRI and described events since late 2019 as 'going south' and a 'perfect storm', with the collapse in funding from the SGF and Law Foundation and a decrease in support staff and the absence of a permanent Director.

Problems at the Law School

8.2.9 As discussed earlier, particularly in relation to TOR III, many of the submissions, including from the Chief Justice, Justice Helen Wood and the Director of Public Prosecutions, indicate that wider issues at the Law School have exacerbated the Institute's funding crisis. Those from the Board and the Law School elaborated on how this has affected the Institute.

8.2.10 It was submitted that an increase in academic workloads for teaching and the commensurate decrease in allocations for administrative work and community engagement largely preclude their

²⁰ In expanding on its written submission in relation to the precariousness of reliance on funding from the Law Foundation, the President and Executive Director explained to the Review Panel that due to record low interest rates the SGF had not declared an excess in recent years and was unlikely to declare an excess for some time.

participation in the Institute's work.²¹ The classification of TLRI Issues Papers, Reports and Research Papers as 'contract reports', and their consequent low research ranking, acts as a disincentive to academic staff participation in TLRI references. Together, these factors mean that any work done by academic staff for the Institute must effectively be done on a volunteer basis (Terese Henning). In addition, the resignation of a significant number of academic staff from the Law School has had an impact on the availability of staff to support the Institute's work. According to Dr Martin Clark, a former UTAS/TLRI staff member, the Law School no longer has appropriately qualified subject matter experts in the areas of criminal law, administrative law, contract law, property law and other areas that are relevant to the TLRI's work. And he added:

Now that Dr Gogarty has left and I will shortly leave, TLRI has no staff with any expertise in designing, researching, consulting or delivering law reform inquiries or reports, either elsewhere or within the TLRI and Tasmania. Most of the law staff that had been involved in the TLRI's activities in the past have now also left. This raises an extremely serious question of whether TLRI can continue its activities at all. It is a very severe — indeed complete — loss of institutional experience and memory, which was already a problem when I began in August 2020.

8.2.11 Professor Michael Stuckey disagreed that changes to the workload for academics from the standard 40:40:20 had affected the availability of staff to contribute to law reform projects and asserted that it was a matter of unwillingness to contribute rather than inability. He suggested that a perception that law reform projects are not valued as research outputs had a bearing on this, but this was countered by the recent promotion of Dr Brendan Gogarty based on his law reform work. The Provost and Executive Dean also highlighted that research performance is measured in a more nuanced manner and specifically law reform outputs are now recognised for workload and promotion, as shown by the recent promotion of Dr Brendan Gogarty.

Alternative funding sources

8.2.12 During consultation, there was some discussion about alternative sources of funding to help support the TLRI with suggestions of conducting research on a contractual basis and obtaining funds from the Victims Fund, which is derived from forfeiture of the proceeds of crime and compensation levies from offenders.²² Robin Banks raised the possibility of a capital fund but added that it was onerous to manage such an investment fund.

What is required to appropriately resource the Institute?

'In the scheme of things, this is not sheep stations.'

8.2.13 There was universal agreement that the Institute requires a sustainable funding model with a significant increase in the baseline funding from the Government (e.g. TLRI Board; Terese Henning; Vice-Chancellor and Provost; Professor McCormack; Ella Haddad MP; Meg Webb MLC; CLC Tas; Cassy O'Connor MP and Rosalie Woodruff MP; Rikki Mawad).

8.2.14 Terese Henning suggested that baseline funding should be increased to at least \$200,000 in line with levels applied for in recent Institute budget submissions and briefing notes. This should be reviewed at least every five years and CPI indexed. The University should continue to provide premises and fund the position of Director at least at a 0.5FTE position, none of which should come from the Director's research workload allocation, and there should be funding for a permanent research officer and an

²¹ This point was made in a number of other submissions, including by Rikki Mawad, former Deputy Director (2017-2018).

²² This would require an amendment to the *Victims of Crime Assistance Act 1976*, s 38.

administrative officer. Rikki Mawad also suggested \$200,000 in a four-year rolling agreement timed to match the election cycle Government terms. Equality Tasmania submitted that Government funding should be increased to \$500,000 per annum, with a guaranteed minimum number of references from the State Government, each with its own funding. Board Member Rohan Foon did not nominate a specific figure but stated that it should be enough to cover adequate staff and adequate funding for projects, and specifically mentioned that funding for references from outside the Government should be covered in the guaranteed core funding because funding law reform should be primarily the Government's responsibility.

8.2.15 Legal Aid submitted that the TLRI requires sufficient funding to employ full-time staff – at a minimum the Director and a full-time researcher, with the capacity to contract staff where required to complete a reference. Meg Webb MLC considered minimum staffing levels to be a FTE Director, a FTE dedicated Senior Researcher, a FTE administrative officer and potential Deputy Director(s). In Professor Michael Stuckey's view, a minimum complement of staff was a Director (at least 0.5FTE), a 0.5 Level C researcher and administrative support. As discussed under TOR V, while some submissions supported the Director's role being a full-time position (DPP; CLC Tas), others nominated a 0.5-0.8 FTE position (e.g. TLRI Board; Professor Kate Darian-Smith; Professor Margaret Otlowski). Professor Kate Darian Smith stated that it is difficult because it is generally unsustainable for the University to fund positions that do not have a teaching component, and Professor Tim McCormack thought it would be difficult to get University support for more than a 0.5 position. Robin Banks considered three full-time staff to be a minimum and explained that, to take advantage of student interns, there needs to be someone in place to manage them.

8.3 Recommendations

8.3.1 The lack of resources, financial and staffing, is an existential challenge currently facing the Institute. After operating successfully for two decades, the Institute has no Director, no researchers, and only an administrative officer in a 0.6 FTE position.²³ Work on its four ongoing references has ground to a halt, as has all other work such as engaging with law reform bodies in other jurisdictions, contributing to inquiries, commenting on draft legislation and engaging students in law reform projects. The student recipient of the 2022 Vanessa Goodwin Law Reform Scholarship has had no mentor or meaningful work from the Institute, until this was remedied by the recently appointed Acting Dean.²⁴

8.3.2 This situation has occurred due to what was aptly noted to the Panel by Rikki Mawad as a 'perfect storm', namely a combination of factors – primarily, grossly inadequate base-line funding, the decline in available funds from the SBF and the Law Foundation, and a staffing crisis at the Law School. We are of the view that given the State's population, the Alberta, non-statutory, agreement-based model with the Institute housed at the Law School, is the appropriate one. An ALRC type standing law commission is unrealistic and unnecessary in Tasmania. However, it is a partnership model and, as well as adequate financial support from its partners, it depends upon a vibrant, well-functioning and appropriately staffed Law School so that the advantages of a Law School based law reform body can be realised. Without this, there will be no staff with the capacity and expertise to assist in the Institute's work by taking part in law reform references, advising and supervising researchers and students working on references, and providing commentary on draft legislation. For this reason, as well as making recommendations in relation to financial resources and staffing, we also make some recommendations in relation to the Law School that relate to the resourcing and sustainability of the Institute.

²³ The Panel wishes to acknowledge the commitment and diligence of the present TLRI administrative officer, Kira White.

²⁴ Emeritus Professor Kate Warner is supervising Isabelle Dadswell's project for the TLRI on recently announced amendments to the Criminal Code in relation to child sexual abuse.

Recommendation 18: The University continue to fund the Director’s position and provide facilities and support for the TLRI

8.3.3 This is implicit in the previous recommendations (see Recommendations 9 and 15) but is reiterated here. More explicitly, it is recommended that the Director’s position be at least a 0.5 FTE to ensure that they have the capacity to effectively carry out that role. In terms of facilities, it is noted that the TLRI currently has a spacious room with four workplaces adjoining the Director’s office in the Law School building. When the Law School is relocated to the city, this will have to be replicated. The TLRI is also supported by Law School administrative staff, has library access, computers and IT support, printing, postage and stationery. The University also provides media support and web management. Currently, clause 6.1 of the Agreement provides that the University agrees to provide funding up to \$206,000 (including in-kind contributions per annum). This should be increased to \$220,000 in the new agreement.²⁵

Recommendation 18

It is recommended that the University continue to fund the Director’s position at least at a 0.5 FTE, and provide facilities and support for the TLRI. The funding amount provided by the University (including in-kind contributions per annum) in clause 6.1(b) should be increased to \$220,000 in the new Agreement.

Recommendation 19: An increase in annual baseline or recurrent funding to at least \$200,000 per annum

8.3.4 All of the submissions that addressed the issue of baseline funding agreed that the sum of \$50,000 per annum from the State is quite inadequate to support the Institute’s work. Had this been indexed to inflation, it would have been \$80,016 for the 2021 calendar year, but still grossly inadequate to support the Institute’s operating expenses. The annual baseline funding should be separate from specific project funding for Attorney-General’s references. We have not attempted to work out precisely how this budget should be spent but are of the view that \$200,000 is needed to pay for such items as a permanent research officer and an administrative position, as well as such items as non-project related community and stakeholder engagement costs.²⁶ There also needs to be some capacity to support referrals from persons or organisations that come without funding. A further advantage of proper funding, as identified to the Panel by various parties such as Rikki Mawad, Ms O’Connor MP and Dr Woodruff MP, and the Children’s Commissioner, is that it will support the Institute in conducting the wide and inclusive community consultations that are integral to modern law reform, such as travelling to the more remote parts of the State and engaging with the disability community.

8.3.5 The Director needs to be supported by a permanent research officer with strong research and writing skills, and an administrative officer. These positions should be permanent or long-term contracts in order to attract the best candidates. Without these positions, the Institute will only limp along and lack the capacity to complete projects in an appropriate timeframe as well as supervise researchers and students employed to work on specific projects. While changes at the Law School could, in part, assist with advice and supervision, a permanent research officer is also necessary. Until the last couple of years, the Institute always had a dedicated research officer position (funded partly from baseline funding and top-up funding from the Department of Justice or the SGF) in addition to researchers employed on limited term contracts or on a casual basis for specific projects. In the Panel’s view, these three core positions (Director, Research

²⁵ The annual cost to the University of a Level D position (step 1) at 0.8 FTE is \$149,446 and a Level E position (step 1) at 0.8 FTE is \$184,800.

²⁶ A 0.5 FTE administrative position would cost approximately \$50,000 (HEO 5) and a 0.5 FTE Research Fellow position, \$65,000 (Level B).

Officer and Administrator) are necessary to plan and conduct the Institute's work programme and to respond in a timely and effective manner to emerging and controversial issues.

Recommendation 19

It is recommended that the annual baseline or recurrent funding from the Government be increased to at least \$200,000 per annum to support the Institute's work programme.

Recommendation 20: The University give consideration to reviewing the workload allocation

8.3.6 The Panel is aware that the financial pressures placed on universities has led to reviews of the standard academic workload and increases in teaching workloads. This has affected time for research and for the ability of law academics to devote time to assist with law reform references, collaborations with other bodies on law reform issues and respond to requests for feedback on draft legislation. We recommend that consideration be given to allowing an allocation for support for the TLRI in academic workloads in annual workload reviews.

Recommendation 20

It is recommended that the University give consideration to a review of academic workloads in annual workload reviews to allow for a workload allocation which can support the work of the Institute.

Appendix A: The 2019 Agreement²⁷

Tasmania Law Reform Institute

Renewal of Agreement

THIS AGREEMENT is made this day of 2019
BETWEEN the parties

THE STATE OF TASMANIA (represented by the Department of Justice)

AND

THE UNIVERSITY OF TASMANIA

AND

THE LAW SOCIETY OF TASMANIA

RECITALS:

1. On 23 July 2001 an agreement was made between the Government of Tasmania, the University of Tasmania and the Law Society of Tasmania for the establishment of the Tasmania Law Reform Institute for a term of three years.
2. In 2005, this agreement was extended in accordance with clause 8.3 of the founding agreement for a further term of three years expiring on 31 December 2008.
3. On the expiration of the extension period, the Government of Tasmania, the University of Tasmania and the Law Society of Tasmania agreed to continue the operation of the Tasmania Law Reform Institute.
4. For this purpose the parties entered into a renewal agreement on the 23 November 2009 for a period of 5 years.
5. Following the expiration of the renewal agreement, the parties agreed on 15 April 2015 to continue the operation of the Tasmania Law Reform Institute for a further term of five years.
6. Following the expiration of the renewal agreement on 23 November 2019, the parties have agreed to continue the operation of the Tasmanian Law Reform Institute by entering into this agreement for a further term of three years from the current expiration date.

²⁷ The Founding Agreement can be found at https://www.utas.edu.au/__data/assets/pdf_file/0003/302943/FoundingAgreement-1.pdf.

1. THE PARTIES AGREE AS FOLLOWS:

1.1 In this Agreement, unless the context otherwise requires:

- a) "Attorney-General" means the Attorney-General of the State of Tasmania;
- b) "Board" means the Board established under clause 3(1);
- c) "Commencement Date" means 23 November 2014;
- d) "Director" means the Director appointed under clause 5;
- e) "Founding Agreement" means the agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania dated 23rd July 2001.
- f) "Institute" means the Tasmania Law Reform Institute established by this Agreement;
- g) "Law Society" means the Law Society of Tasmania; and
- h) "University" means the University of Tasmania.

2. ESTABLISHMENT OF THE INSTITUTE

2.1 The Institute was established as a Research Centre within the University of Tasmania in clause 2.1 of the Founding Agreement.

2.2 The functions and objectives of the Institute are:

- a) To conduct reviews and research on areas specified by the Board; and
- b) To conduct these reviews and research, where appropriate on a consultancy basis;
- c) To consider proposals from the Attorney-General for the reform of the law;
- d) To conduct reviews and research on proposals for reform of the law referred by the Attorney-General; and
- e) To review an area of law with a view to-
 - i. the modernisation of the law; and
 - ii. the elimination of defects in the law; and
 - iii. the simplification of the law; and
 - iv. the consolidation of any laws; and
 - v. the repeal of laws that are obsolete or unnecessary;
 - vi. optimising the operation of the law and facilitating access to justice; and

- vii. uniformity between laws of other States and the Commonwealth; and
- f) To make reports to the Attorney-General or other authorities arising out of any review and, in those reports, to make recommendations ; and
- g) To work with the law reform agencies in other states and territories on proposals for reform of the laws in any other jurisdiction or within the Commonwealth;

in accordance with the University's standard procedures for the operation of Research Centres.

- 2.3 The performance of the Institute's functions and objectives is subject to funding being made available for the purposes of the Institute.
- 2.4 The University is entitled to make a reasonable charge for undertaking the Institute's functions and objectives if the funding is not otherwise available to enable the Institute to undertake those functions and objectives. The University will provide the Department of Justice with notice of any intention to charge the State.

3. BOARD OF THE INSTITUTE

- 3.1 The Board of the Institute, entitled the "Board", is established as an advisory body.
- 3.2 The membership of the Board shall consist of:
 - a) The Director appointed under clause 5.
 - b) The Dean of the Faculty of Law at the University.
 - c) 1 person appointed by the Honourable the Chief Justice of Tasmania.
 - d) 1 person appointed by the Attorney-General.
 - e) 1 person appointed by the Law Society.
 - f) 1 person appointed by the Council of the University.
 - g) 1 person appointed by the Tasmanian Bar.
 - h) No more than 3 co-opted members, one of whom shall be a member of the Tasmanian Aboriginal Community.
- 3.3 The Board is to advise the Director with respect to the conduct of business at the Institute, including making recommendations as to whether a particular reform project should be undertaken.
- 3.4 At the time of recommending the selection of a project to the Institute, the Board will identify the extent of the project, the time for completion, the expected output and the cost of the project.
- 3.5 The Board shall record in its minutes of proceedings all proposals

received for law reform projects.

- 3.6 The Board should meet at least four times each year.
- 3.7 The Director shall act as Chair for meetings of the Board.
- 3.8 The right to appoint persons under Clause 3.2 includes the right to revoke an appointment or to substitute another for a person appointed.
- 3.9 Board members will not be entitled to any additional remuneration on account of their being a member of the Board.

4. OPERATION OF THE INSTITUTE

- 4.1 The Institute may receive proposals for law reform or research projects from:
 - a) the judiciary;
 - b) the Attorney-General;
 - c) Legal Aid Commission of Tasmania;
 - d) Tasmanian government departments;
 - e) the Parliament;
 - f) the legal profession; and
 - g) members of the community or community groups
- 4.2 The Institute must hold and maintain the reports and papers of the former Law Reform Commission and Law Reform Commissioner.
- 4.3 The Institute may publish any of the following:
 - (a) Research Papers: These papers contain the results of a research projects.
 - (b) Issues Papers: These papers outline the key issues in relation to a problem, the existing law, the questions to be investigated, the different views and opinions on the topic, outlines of the working papers or reports of other law reform agencies and possible tentative proposals. Issues Papers are intended to be distributed for assessing expert and public opinion on the issues to be addressed.
 - (c) Final Reports: These documents formulate the position taken by the Institute after consultation and deliberation by the Board. Each report contains an executive summary and may include draft legislation. Each report will be provided to the Hon. the Attorney- General of Tasmania.
 - (d) Annual Reports: These are provided for under Clause 7.
- 4.4 Where the Institute has received a proposal under clause 4.1 from the Attorney-General, Legal Aid Commission of Tasmania, a Tasmanian Government department, or Parliament, the final report will be provided to

that person or agency four weeks prior to it being published.

- 4.5 The University owns the copyright in all publications produced by the Institute. The University grants to the State a non-exclusive, perpetual, royalty free licence in the copyright of all publications produced by the Institute to enable any proper use by the State in its discretion.

5. DIRECTOR

- 5.1 There shall be a Director of the Institute who shall be appointed by the Vice-Chancellor of the University.
- 5.2 The Director shall be a member of the academic staff of the University.
- 5.3 The Director shall be responsible for:
- providing leadership, strategic direction and oversight of the work of the Institute;
 - working to ensure the independence of the Institute;
 - speaking publicly on behalf of the Institute and providing leadership and guidance on law reform and the work of the Institute to the Tasmanian community;
 - providing advice on draft bills and legislation;
 - communicating with key stake holders, the Government, the University, the Law Society of Tasmania and the Tasmanian Community, including leading community consultation and engagement in law reform, to advance the work of the Institute ;
 - disseminating the work of the TLRI at the local, national and international levels and to encourage participation in and engagement with law reform work generally and more specifically the work of the TLRI at these levels;
 - collaborating with national and international bodies in promulgating law reform and supporting law reform and reform projects elsewhere that are consistent with the objectives of the TLRI;
 - the day to day administration of the Institute including the selection and appointment of researchers and administrative staff of the Institute and management of researchers and administrative staff in connection with the research, drafting and settling of Issues Papers and Final Reports;
 - negotiating all agreements and funding grants as and where necessary;
- 5.4 The Director shall chair the meetings of the Board, seek the advice of the members of the Board and report on Institute activities at each meeting of the Board.
- 5.5 If the Director is likely to absent for more than one month, the Board may appoint an acting Director for the period of absence.

6. FUNDING FACILITIES AND STAFF

- 6.1 Funding for the Institute shall be provided on an annual basis as

follows:

- a) The State agrees to provide funding of \$50,000 per annum.
 - b) The University of Tasmania agrees to provide funding of up to \$206,000 (including in-kind contributions) per annum.
- 6.2 The Law Society will support the operation of the Institute by the provision of advice on proposals for research projects under clause 4.1(d) and the provision of funding on a case by case basis.
- 6.3 The Law Society will support the implementation and promotion of a secondment program facilitating the placement of members of the legal profession to work on specific law reform proposals under the auspices of the Institute.
- 6.4 The Law Foundation of Tasmania may provide annual grants, subject to available funds for the operations of the Institute.
- 6.5 The Institute shall investigate other funding avenues, particularly from external research grants and donations.
- 6.6 The Institute shall review its funding on an annual basis. At the request of the Institute, the annual funding from the State may be increased during the term of the agreement. The Institute may also request additional funding in the course of any year during the term of this Agreement. With any request for increased funding, the Institute must provide the State with a business case outlining why additional funds are required and why those funds cannot be sourced by other means. The State does not by this clause commit to any additional funding.
- 6.7 The Institute may employ administrative staff to support the operation of the Institute within its available annual funding.
- 6.8 The University shall provide office premises suitable for the operation of the Institute, as part of the University's in kind contribution.
- 6.9 All funding will be accounted for in accordance with the University's standard procedures for the operation of Research Centres.
- 6.10 The Tasmanian Government may, by notice in writing, demand that the Institute repay any funding that is used, or applied by the Institute, for a purpose other than in accordance with the provisions of this Agreement.

7. ANNUAL REPORTS

- 7.1 The Institute shall at the end of each calendar year prepare a report on its operations for the Council of the University, the Hon. Chief Justice of Tasmania, the Hon. Attorney-General, the Law Society of Tasmania and the Law Foundation of Tasmania.
- 7.2 The Institute shall prepare an Annual Financial Statement of the source and application of funds for the year of report.
- 7.3 The Annual Report shall be made available to the public.

8. PERIOD OF AGREEMENT

- 8.1 The term of this Agreement will be three years from the Commencement Date.
- 8.2 The Agreement may be extended by the written agreement of the parties.

SIGNED, SEALED and DELIVERED

THE GOVERNMENT OF TASMANIA as represented by

A handwritten signature in blue ink, appearing to be 'Elise Archer', with a stylized flourish at the end.

Hon Elise Archer MP
Attorney-General

THE UNIVERSITY OF TASMANIA by its authorised representative

A handwritten signature in blue ink, appearing to be 'Rufus Black', with a stylized flourish at the end.

Prof Rufus Black
Vice-Chancellor

THE LAW SOCIETY OF TASMANIA

A handwritten signature in blue ink, appearing to be 'Luke Rheinberger', with a long horizontal flourish extending to the right.

Mr Luke Rheinberger
Executive Director

Appendix B: List of Written Submissions

The Review Panel received written submissions from the following parties:

- Ms Robin Banks
- Professor Rufus Black, Vice Chancellor, University of Tasmania
- The Honourable Alan Blow AO, Chief Justice
- Board of the Tasmania Law Reform Institute
- Mr Vincenzo Caltabiano, Tasmania Legal Aid
- Distinguished Emeritus Professor Donald Chalmers AO
- Dr Martin Clark
- Mr Daryl Coates SC, Director of Public Prosecutions
- Community Legal Centres - Tasmania
- Equality Tasmania
- The Honourable Catherine Geason, Chief Magistrate
- Ms Ella Haddad MP, Shadow Attorney-General
- Law Society of Tasmania
- Ms Adrienne Picone, Chief Executive Officer, Tasmanian Council of Social Service Inc.
- The Honourable Rob Valentine MLC
- The Honourable Meg Webb MLC

Appendix C: List of Meetings

The Review Panel met with the following parties, either in-person or via online means:

- The Honourable Elise Archer MP, Attorney-General
- Professor Nicole Asquith, TILES, University of Tasmania
- Ms Robin Banks, University of Tasmania
- Ms Kim Baumeler, Barrister, TLRI Board Member
- Professor Rufus Black, Vice Chancellor and Professor Jane Long, Provost, University of Tasmania
- The Honourable Alan Blow AO, Chief Justice
- Distinguished Emeritus Professor Donald Chalmers AO
- Dr Martin Clark
- Mr Fletcher Clarke, President, Tasmania University Law Society
- Mr Daryl Coates SC, Director of Public Prosecutions
- Mr Rodney Croome AM, Equality Tasmania
- Professor Gino Dal Pont, Law School, University of Tasmania
- Professor Kate Darian-Smith, Executive Dean, CALE, University of Tasmania
- Mr Rohan Foon, Douglas & Collins Lawyers, TLRI Board Member
- Mr Simon Gates, President, and Mr Luke Rheinberger, Executive Director, Law Society of Tasmania
- Ms Ella Haddad MP, Shadow Attorney-General
- Mr Michael Hill, former Chief Magistrate
- Ms Jane Hutchison and Mr Ben Bartl, Community Legal Centres - Tasmania
- Ms Rikki Mawad
- Professor Tim McCormack, Law School, University of Tasmania
- Ms Leanne McLean, Commissioner for Children and Young People
- Ms Cassy O'Connor MP and Dr Rosalie Woodruff MP
- Professor Margaret Otlowski, Law School, University of Tasmania
- Professor Michael Stuckey, Law School, University of Tasmania
- Ms Ginna Webster, Secretary, Ms Kristy Bourne, Deputy Secretary and Mr Bruce Paterson, A/Director - Strategic Legislation and Policy, Department of Justice
- The Honourable Justice Helen Wood, TLRI Board Member