Rodney Croome AM
President, Equality Tasmania
[redacted]

Professor John Williams
Director, South Australian Law Reform Institute

Re: Review of the Tasmanian Law Reform Institute

Dear Professor Williams,

Please accept this submission to your review of the Tasmanian Law Reform Institute (TLRI). We appreciate the opportunity to submit our views a few days after the deadline.

Yours Sincerely,
Rodney Croome

Equality Tasmania

Equality Tasmania (formerly the Tasmanian Gay and Lesbian Rights Group) is Tasmania's leading advocacy group for LGBTIQ+ people and the oldest such organisation in the nation, having been formed in 1988. Since that time we have advocated successfully for a range of reforms, including the decriminalisation of homosexuality, Tasmania's strong Anti-Discrimination Act, Tasmania's ground-breaking relationship laws, improved policies in schools, health and policing, and marriage equality. We regularly consult with the Tasmanian LGBTIQ+ community to determine our campaign priorities and to inform submissions like this one.

Concerns about the review

We do not understand the authority by which this review was initiated. It was initiated by only one of the Tasmanian Law Reform Institute's three foundational bodies, the University of Tasmania, seemingly without formal input from the other two. It was initiated outside the usual procedure for the review of University institutes. It is a responsibility of the review panel to explain to us what authority it acts under.

We do not understand why the TLRI is being reviewed. The Institute is functioning well under the circumstances. It is doing its work as best it can. The problems it faces are lack of funding, which is chiefly the fault of the State Government, and a lack of moral support from the Government and the University of Tasmania, as shown by the failure of the Government to provide the TLRI with any references since 2019 and questions about the TLRI's role and relevance from within the University arising from the Government's stance. If a review is to be conducted, surely it should be into why these bodies have let the TLRI down, not whether the TLRI needs to change.

Given the lack of a clear mandate for this review, and a focus on the TLRI rather than the problems more powerful bodies are causing it, we fear this review has been initiated to suit the powers that be, not those disadvantaged Tasmanians who have benefitted from the TLRI's excellent law reform work over many years.

Reinforcing this fear is the unfortunate decision not to open the review to the public and not to publish all submissions online. This sets a standard below that set by the TLRI itself. It has always put a premium on community input and transparent processes.

We urge the review to be clear about its mandate, to explain how it will address the real problems facing the TLRI and to be more transparent.

The TLRI and Tasmania's transformation

Since its foundation in 2001 the TLRI has conducted six inquiries with direct impacts on the LGBTIQ+ community. They have been:

Same-sex adoption (2003)
A Charter of Rights (2007)
Same-sex marriage (2013)
Sex and gender recognition (2019)
Conversion practices (2022)
Revisiting a Charter of Rights (2022)

These inquiries have benefitted the LGBTIQ+ community, and Tasmania more broadly, in a number of ways.

They have improved the quality of public debate by introducing objective information and dispelling myths. This is particularly important in public debate about LGBTIQ+ issues because of the way in which our legitimate calls for justice and equality are met with campaigns of fear and loathing by those with an ideological opposition to our rights and sometimes our very existence. An example is the debate on same-sex adoption where the TLRI was able to examine and present scientific research on same-sex parenting that showed children raised by same-sex couples fare as well as other children on a range of social, emotional and educational scales, and suffer no ill-effects because of their parent's sexual orientation.

The TLRI inquiries have also been important for proposing innovative solutions and applying lateral thinking to questions of law reform. This is important because too often law-makers consider LGBTIQ+ law reform a low priority and are satisfied with models adopted wholly from elsewhere rather than improving on what has gone before, or taking old paths rather than exploring new ones. An example is the debate on same-sex marriage where the TLRI was able to explore what had until then been the novel idea of state same-sex marriage laws as an alternative to federal reform.

Another benefit of the TLRI inquiries has been the community consultation they involve and their role in educating the public. Consultation has ensured that a wide range of views are heard, not just those for or against a particular reform. This is important because LGBTIQ+ law reforms can become unnecessarily divisive. Public education has ensured that necessary but new law reforms are understood and accepted more widely. This is particularly important for LGBTIQ+ law reform, applying, as it does, to a minority population that can still be invisible and misunderstood. The positive impact of law reform can be equally invisible and misunderstood. New laws can be ignored unless the public understands the importance of respecting them.

The above benefits have been magnified by the high esteem the TLRI is held in because of its expertise and independence.

Since the decriminalisation of homosexuality in May 1997 Tasmania has gone from having Australia's worst LGBTIQ+ laws, policies and attitudes on LGBTIQ+ people to having some of the world's best[1].

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[1] https://tasmaniantimes.com/2020/02/rodney-croome-another-word-for-hope/
https://qnews.com.au/lessons-from-the-rainbow-isle-rodney-croome-on-advocacy/

It is not an exaggeration to say the TLRI and its inquiries into LGBTIQ+ law reform have played a critical role in this transformation. To validate this claim one need look no further than the decade prior to decriminalisation. Tasmania was the last state to decriminalise homosexuality and debate on this reform was hateful and divisive, destructive of LGBTIQ+ people and our families, and ruinous to Tasmania's international reputation. During that time progress was made by appealing to outside bodies such as the UN Human Rights Committee and the High Court.

Since the formation of the TLRI in 2001 Tasmania has not returned to the kind of endless corrosive debate involving outside bodies we suffered in the 1990s. Instead, Tasmania has moved rapidly to become a leader in LGBTIQ+ equality, drawing on local expertise to do so.

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.

The TLRI and its antagonists

Given the role outlined, it's no surprise the TLRI has antagonists, including those who oppose LGBTIQ+ equality and inclusion.

For example, during the TLRI's inquiry into same-sex adoption a body was formed to put an alternative view to that of the TLRI. It was called the Tasmanian Family Institute and was represented by Michael Ferguson who is now deputy premier. It accused the TLRI's report of not being balanced[2]. It issued its own report which suffered greatly from the fault it accused others of. The TFI's report did not influence law reform whereas the TLRI's became the basis for legal equality for same-sex couples and their families.

Exactly the same situation exists today. The credibility of the TLRI is under attack from those who oppose transgender equality. These attacks have taken place in the context of the sex and gender inquiry and the conversion practices inquiry. Like the TFI before them, today's opponents of the TLRI feel they must undermine the TLRI as an institution in order

[2] https://www.abc.net.au/news/2003-06-15/family-institute-wants-debate-on-adoption-laws/1870250

to block the reforms they oppose. This is partly because they know the weight of public and expert opinion is not on their side. It is partly because the TLRI is held in such high esteem.

The difference between 2003 and today is that today attacks on the TLRI find greater sympathy among those who decide the TLRI's fate. This in turn is because we are in the midst of a local and global backlash against LGBTIQ+ equality. This backlash began in the United States in the wake of marriage equality in 2015 and took hold in Australia in the final two years of our marriage equality debate. It takes the form of rolling back discrimination protections in the name of "religious freedom", attacking transgender inclusion in the name of "women's rights" and challenging LGBTIQ-inclusive school programs in the name of "parental rights". This backlash means that TLRI inquiries into LGBTIQ+ rights will create more ill-feeling, unease and political consternation, than we have seen since 2003. Magnifying the problem is the fact that two of the key foci of the anti-LGBTIQ+ backlash are the legal recognition of gender and bans on conversion practices, two of the issues the TLRI has investigated in recent years.

Another less obvious element of the antagonism to the TLRI is a growth, locally, globally and across the political spectrum, of soft authoritarianism. This soft authoritarianism seeks to concentrate power in the hands of small groups of government leaders and remove all checks and balances on their exercise of that power. One feature of soft authoritarianism is that independent law reform and human rights bodies that advocate for minority human rights are spurned, disparaged and deprived of funds. An obvious example is the Australian Human Rights Commission. The TLRI has suffered a similar fate. Evidence for this is the failure of the State Government to increase core funding for the TLRI and its failure to provide the TLRI with any references since the sex and gender recognition reference in 2019 despite numerous requests from the TLRI backed up by the Law Society and despite the urgency of law reform in areas like the prevention of conversion practices.

The failure of the State Government to provide funded references is an example of both of the trends cited above: increasing anti-transgender prejudice and rising soft authoritarianism. The problem arose when the TLRI did not deal with the Government's sex and gender recognition reference in the highly politicised manner the Government wished. The Government opposed sex and gender recognition legislation. It said its antagonism was due to concerns about the "unintended consequences" of the legislation. However, it was not able to adequately explain what these "unintended consequences" might be. It seemed more likely the Government was acting out of prejudice, out of fear of prejudice in the electorate, out of a desire to exploit prejudice in the electorate, or a combination of all three. This seemed to be confirmed when successive

State Liberal councils passed motions against transgender equality and inclusion, and when the State Liberal Party deliberately stirred up prejudice against trans and gender diverse people at the 2019 Legislative Council and Federal elections. Unfortunately for the Government, it did not have the support in Parliament to stop the legislation it opposed, so it sought to slow down, and cast doubt over, the legislation by asking the TLRI to conduct an inquiry into the aforementioned "unintended consequences". This was despite a previous inquiry into the issues at stake by the Anti-Discrimination Commission. The TLRI rightly waited until after the parliamentary process was complete so it could examine legislation in its final form and recommend any amendments if necessary. The Government's request, motivated as it seems to have been by prejudice and subversive as it was of parliament's proper role as our supreme law-making body, was an inappropriate abuse of the TLRI's role that the TLRI rightly abstained from. The absence of references since that time have the appearance of an attempt by the Government to punish the TLRI for not doing what it wanted, and/or an attempt to pressure the TLRI into being more compliant to the Government's wishes in the future. Either way, it fits the pattern of soft authoritarianism; governments not tolerating dissent from independent bodies and withdrawing support for them.

The political and cultural developments I have outlined are not the TLRI's fault and it should not be blamed for them. Indeed, at a time when LGBTIQ+ equality and democratic values are under threat the TLRI is more important than ever.

As indicated above, we fear that current the review of the TLRI has been promoted by those who are either aligned to the anti-LGBTIQ+ backlash and the growth of soft authoritarianism, or are afraid of these movements and seek to appease them. That's why we want an assurance that the motives of the review are pure, that it is conducted in good faith, and that the work of the TLRI will be assessed in a way that is disinterested.

To end, it has been suggested to us that the TLRI has focussed too much on LGBTIQ+ issues and not enough on other urgent areas of law reform. This sounds to us like the constant complaint made by opponents of marriage equality, or other important LGBTIQ+ law reforms, that there are more important issues to deal with. It is simply a way to marginalise our legitimate claim on justice. This criticism also ignores a) the central place LGBTIQ+ repression and emancipation have had in Tasmanian society since colonial times concerns, and b) the immense benefits to Tasmanian society of the transformation we outlined above.

But leaving aside Tasmanian particularlity, when we compare the TLRI to the South Australian Law Reform Institute we see the latter has also had a focus on LGBTIQ+ law reform. The difference is that the TLRI's inquiries

are spread out over a longer period and are in response to a broader range of issues. This may be part reason Tasmania is well ahead of South Australia on LGBTIQ+ equality and why South Australia trails a number of other states[3]. We recommend the Tasmanian approach to LGBTIQ+ inquiries over the South Australian.

Terms of Reference

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

It should be clear from the LGBTIQ+ inquiries conducted by the TLRI that two of its priorities are promoting equality before the law and social inclusion through the law, particularly for those social groups that endure inequality and exclusion.

We recommend that the reality of the TLRI's work be officially recognised and that legal equality and social inclusion be added to the list of TLRI aims and objectives.

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

Independence and impartiality are the foundations upon which the TLRI's reputation and the credibility of its work are built. The principles of independence and impartiality, and what that principle means in effect, are not clearly written into the documents governing the TLRI. We recommend they are.

Three important aspects of independence are that no one founding body appoints the director, the TLRI has sole decision-making power over which references it receives and rejects, and there are guaranteed funding sources so promises of more or less funding cannot be used to influence the Institute.

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

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[3] https://qnews.com.au/lessons-from-the-rainbow-isle-rodney-croome-on-advocacy/

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 to 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.

To illustrate the point, how could the Government or the Law School possibly know what law reforms matter to minority communities? Neither were in a position to comprehend, let alone prioritise, the importance of gender recognition or a ban on intersex surgeries. If the TLRI was bound to defer to them these issues would have slid well down the list.

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

The TLRI replaced the former Tasmanian Law Reform Commission because the latter was seen as too politically compromised.

As noted, the TLRI should be free to accept or reject references from the Attorney-General. For the sake of transparency, a set of criteria should be developed to guide the process for reference selection and prioritisation. These criteria should cite the importance of equality and inclusion for minorities that experience stigma and discrimination.

The Attorney-General should be bound by legislation to table the TLRI's annual report in Parliament within a specified time of receiving it.

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

We broadly support the existing structure including the role of the board and the director. However, we believe the director should be chosen by the board. The successful candidate should be from academic staff at the University of Tasmania and they should have academic qualifications in law.

Given the Institute's role in fostering equity and inclusion we recommend the appointment to the board of a representative of stigmatised and minority communities. This person would be selected on the basis of their acquaintance with the legal and social challenges facing a range of stigmatised and minority Tasmanian communities, and their participation in one or more of those communities.

We do not agree with the creation of a new position of board chairperson. The director's participation in board meetings means the board and staff work more closely and cooperatively together. The appointment of a separate chairperson would put unnecessary distance between the board, director and other staff, setting up the possibility that the work of the TLRI could be unnecessarily obstructed and its independence and integrity compromised. The TLRI's reputation is built on its academic expertise. This would be compromised by a powerful position like chairperson being in the hands of a non-academic.

Section 2 of the Tasmania Law Reform Institute Renewal of Agreement 2019 should recognise the reality that references should and do emerge from more parties other than just the government or other foundation bodies. The government was not prepared to give the TLRI a reference on conversion practices despite the importance and urgency of that reform. It was vital for law reform in this area that the TLRI was able to accept such a reference from the LGBTIQ+ community.

It must be crystal clear that the TLRI has the power not only to accept references from more than government, but also the power to refuse, amend, prioritise or delay references from government, particularly if these references are motivated by politics or partisanship.

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

We do not understand what Tasmania's size has to do with the work or funding of the TLRI, unless Tasmania's unique qualities require the TLRI to receive disproportionately more funding than other equivalent bodies.

As noted, Tasmania has become a global leader in LGBTIQ+ legal rights thanks in part to the TLRI's work. Insofar as Tasmania can be a natural leader on law reform and human rights because of our geography, history and small interconnected community, a case could be made that more resources should be made available to the TLRI than to similar bodies in other jurisdictions. This would mean the TLRI is more able to take advantage of Tasmania's "size" and other assets to set even higher, globally-acclaimed law reform standards.

Clearly, inadequate funding has plagued the TLRI in recent years. This has not compromised the quality of its work, but it has slowed that work down.

We recommend that the government increase the core funding of the TLRI to at least $500,000 per year and that the funding agreement

guarantee a minimum number of references to the TLRI from the State Government, each with its own separate funding.

We recommend that core funding and funding for individual references be included as a separate line item in the State Budget, that the amounts concerned be CPI indexed and that this funding arrangement be reviewed every five years.

Conclusion

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.

Any changes to the TLRI's objectives, structure and funding must sustain and reward its good work, and allow it to do more of the same.