Equality Building

Professor John Williams
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Dear Professor Williams

Review of the Tasmanian Law Reform Institute

Thank you for the opportunity to provide input to this current review. I look forward to the opportunity to meet with members of the review team in Hobart later this month.

Yours sincerely

Robin Banks
Director

ENCL: Submission

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Submission of Robin Banks to the review of the Tasmanian Law Reform Institute

Key points

The value of the Tasmanian Law Reform Institute ('TLRI') to the Tasmanian community and to robust and evidence-based policy development and decision making at the State level cannot be overstated.

Central to its value is its independence from government, stakeholders and the University.

Its capacity is currently significantly undermined by the lack of appropriate levels of stable funding and resourcing. It relies far too heavily on the generosity and passion for evidence-based research and law reform of many people, in recent time most particularly the former Director and Acting Director,.

This submission

The following responds to the terms of reference of the review. It focuses on these from my perspective of a legal and policy practitioner who has engaged with law reform bodies at the state and territory level in several jurisdiction, as well as federally, including as a member of an advisory committee on at least one federal reference, a submission maker and a consulted expert.

Terms of reference

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

The Tasmanian Law Reform Institute Founding Agreement dated 23 July 2001 ('the Original Agreement') and the Renewal of Agreement (undated, but executed in 2019) ('the Renewed Agreement') sets out functions and objectives of the TLRI in clause 2.2. These functions and objectives have to date enabled to TLRI to undertake a range of references and inquiries into issues proposed by a diversity of stakeholders (expressly enabled by clause

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4.1). Clause 2.2 is largely appropriate but could usefully be amended in several ways.

Firstly, an amendment could usefully be made to remove the emphasis on references from the Attorney-General. Such references are an important part of the TLRI's work, but are just one of a range of sources and this could be better reflected in this clause.

Second, I note the reference in clause (e)(vii) to 'uniformity between the laws of other States and the Commonwealth'. There are two aspects of this that could usefully be reviewed with a view to amendment.

The first aspect of clause 2.2(e)(vii) is that the concept of uniformity can be a double-edged sword in law reform and policy development. While such uniformity potentially reduces complexity for those who are required to comply with laws across multiple jurisdictions, focus on uniformity can result in technical uniformity, rather than uniformity of underlying principles, and undermine the legislative authority of the State Parliament. It is important in a modern federation that the parliaments of states (and territories) be free to improve their laws to respond to the particular and emerging needs of their jurisdiction and lead the way for other jurisdictions. We have seen this in the operation of, for example, discrimination laws, where the states and territories have, in more recent years, led the way in ensuring that discrimination protections are extended to marginalised groups and in implementing innovative compliance mechanisms. The rate of reform in this area of law at the federal level lags badly and uniformity with federal laws, or the laws of several of the states that have been static, would cause significant reduction in protection of the right to equality and non-discrimination.

The second aspect of clause 2.2(e)(vii) is the reference only to other states and the Commonwealth. To exclude, by implication, the territories is to exclude consideration of leadership in legislation from the legislatures of those territories. It is notable, for example, that it was the ACT that led Australia in the area of human rights through the enactment of the *Human Rights Act 2004* (ACT).

A more useful clause could refer to harmonisation of principles with the laws of other states, territories and the Commonwealth.

Third, I note section 24 of the *Australian Law Reform Commission Act 1996* (Cth) which frames the performance of that Commission's functions within Australia's human rights obligations and the importance of ensuring effective review of actions that impact on rights and freedoms. Australia's international human rights obligations apply to the states and territories and a provision setting out such a context for the performance of the functions of the TLRI could usefully be considered.

I also note the reference in clause 2.2 to the 'University's standard procedures for the operation of Research Centres'. It appears that the University does not have such standard procedures and it is, in my view, unhelpful to (a) refer to procedures that don't appear to exist, and (b) require an independent centre established by three entities to undertake its work in accordance with procedures determined (and changeable) by one of those three entities that are the parties to the agreement without reference to the other parties or to the Board. It would be more appropriate for the TLRI to be required to establish, under the Board's governance, operating procedures. In relation to the procedures impacting on employees of the University or its students, the procedures could defer to the relevant University rules, policies and procedures.

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

This is the most important consideration in the review of the TLRI. Such independence ensures that the TLRI's work is done impartially and results in robust evidence-based research and law reform proposals. I note the submission of former Director Adjunct Associate Professor Terese Henning in response to this issue and endorse it. I also note and support the recommendation of Community Legal Centres Tasmania that the independence and impartiality of the institute be explicitly set out in the agreement.

There are two further aspects of independence that I consider relevant: resourcing and appointments.

We are currently seeing the status of the Australian Human Rights Commission ('AHRC') and an internationally accredited National Human

Rights Institution being threatened in part by inadequate and uncertain funding. The current funding and resourcing situation of the TLRI needs to be remedied as a matter of urgency to avoid such undermining of its independence and integrity.

The current arrangement whereby the Vice-Chancellor determines the appointment of the Director is arguably inconsistent with the institute's independence and lacks transparency in terms of process. Again, the current widely-reported situation of the Australian Human Rights Commission provides an important cautionary tale, with appointments made by the Attorney-General without any transparency of process being another key factor in the AHRC's status as an internationally accredited National Human Rights Institution coming under serious threat.

A more appropriate approach that would enhance the institute's independence would be to empower the Board to determine the appointment of the Director with a clear process for seeking expressions of interest from within the senior academic staff of the Faculty of Law and then considering those against criteria based on the responsibilities of the Director set out in clause 5.3. I note the Board is currently empowered to appoint an acting Director under clause 5.5.

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 capabilities and priorities of the University and the Law Faculty

I note the absence of reference in this term of reference to the Law Society of Tasmania, which is one of the three parties to the agreement. Presumably this is an oversight and am responding on this basis.

It is, however, notable that the current review report is to be provided to the Vice-Chancellor and that he will make submissions available to the other founding parties on request. This appears to place the University in a preferential position in regard to the review and does not indicate that the three parties will receive the report.

In addition, the covering letter I received inviting my input noted that it was 'not expected that there will be provision for anonymous submissions', yet there is no commitment to making submissions publicly available. This is disappointing and is inconsistent with principles of transparency and accountability. I urge the panel to seek support to implement a mechanism for the publication of all of the submissions.

I note with concern the potential implication of the latter aspect of this term that the TLRI should have research priorities that have some relationship with those of the University and/or the Law Faculty. Such a situation would seriously undermine the TLRI's independence and impartiality and its capacity to impartially consider proposals for research and law reform from the spectrum of stakeholders identified in clause 4.1.

The agreement under which the TLRI operates should much more explicitly set out the independence of the institute from its founding entities and their commitment to this, the TLRI's research priorities being independent from those of the University and of the Faculty of law, the founding entities' commitment to the TLRI's ongoing existence and adequate resourcing (both in funds and in-kind support), and the transparency of its operations to its founding members.

It is hoped that the TLRI achieves this transparency to some extent through the current composition of its Board.

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

There is no apparent rationale to separate out this relationship of the institute to one of its founding members from its relationship with the other two. It is vital that this relationship not be seen as more or less important than the relationship with the other parties.

The adequacy and appropriateness of the Institute's current constitution, governance arrangements and reference processes

The only aspect of the governance arrangements that I wish to comment on is the express inclusion of a member of the Tasmanian Aboriginal community as

a community member of the Board. This is a welcome addition made in the Renewal Agreement and should be retained.

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

It is this aspect of the review that I hope will have the greatest positive impact.

The current arrangements for funding and resourcing of the TLRI are clearly unsustainable, with no increase in funding—$50,00 per annum—from the Government of Tasmania since the Original Agreement, despite the increase of the University's contribution from 'up to $80,000' in that agreement to 'up to $206,000' in the renewal agreement, and 20 years of increases in CPI. In neither case is the funding level indexed and, as such, will continue to fall behind the required funds to operate the TLRI consistent with its functions and objectives and the central principle of independence and impartiality.

Consideration could usefully be given to identify a mechanism that would ensure a guaranteed funding stream to the TLRI. An example I am aware of from elsewhere are a fixed call on the Solicitor's Guarantee Fund, although this has become a less reliable source of funding under the current low interest rates and changes in electronic banking practices.

I note again the reference in both agreements to the 'University's standard procedures for the operation of Research Centres'. This appears, in the absence of such procedures, to provide no useful guidance to the Director or the Board.