

The South Australian Law Reform Institute

ANNUAL REPORT

1 January 2018 – 31 December 2018

Adelaide Law School
Ligertwood Building
The University of Adelaide, SA 5005
Telephone: (08) 8313 5582
Facsimile: (08) 8303 4344
Email: salri@adelaide.edu.au



Government of South Australia
Attorney-General's Department



THE LAW SOCIETY
OF SOUTH AUSTRALIA

Table of Contents

1. About the South Australian Law Reform Institute.....	1
1.1 Staff	1
1.2 Advisory Board	1
2. Funding.....	2
2.1 The University of Adelaide.....	2
2.2 The South Australian Attorney-General's Department.....	2
3. Research Assistance	2
3.1 Casual paid researchers.....	2
3.2 Student research	3
4. South Australian Law Reform Institute projects.....	4
4.1 LGBTIQ	4
4.2 Surrogacy: A legislative Framework.....	5
5. Other law reform projects	6
5.1 Review of the common law forfeiture rule	6
5.2 A review of general police powers of search and seizure of electronic devices	6
5.3 Restrictive covenants.....	7
5.4 Juries, Social Media and Suppression Orders	7
5.5 Witness Competence	8
6. Addresses, presentations and consultations	8
7. References to the Institute in <i>Hansard</i>	10

2018 Annual Report of the South Australian Law Reform Institute

This Annual Report covers the period from 1 January 2018 to 31 December 2018.

1. About the South Australian Law Reform Institute

The South Australian Law Reform Institute ('the Institute') was established in December 2010 by a Memorandum of Understanding between the Attorney-General of South Australia, the Vice Chancellor and President of the University of Adelaide and the President of the Law Society of South Australia. The Institute completed its eighth year of operation in 2018.

Information about the Institute, including details of its functions and objectives may be found on the Institute's website at: <http://www.law.adelaide.edu.au/research/law-reform-institute/>.

In 2018, there were no changes to the functions and operations of the Institute.

1.1 *Staff*

- Professor John Williams, Director (Executive Dean, Faculty of the Professions, University of Adelaide and Dame Roma Mitchell Chair of Law);
- Dr David Plater, Deputy Director (Senior Lecturer, Adelaide Law School) @ 0.9 FTE; and
- Mrs Louise Scarman, Administrative Officer @ 0.5 FTE.

1.2 *Advisory Board*

Members of the Institute's Advisory Board for 2018 were as follows:

- Professor John Williams, Director of the Institute (Chair);
- The Hon David Bleby QC, nominee of the Vice Chancellor and President of the University of Adelaide;
- Mr Terry Evans, nominee of the Law Society of South Australia;
- The Hon Justice Tim Stanley, nominee of the Chief Justice of South Australia (new nominee);
- Mr Dini Soulio, nominee of the Attorney-General of South Australia (new nominee);
- Professor Melissa de Zwart, nominee of the Dean of the Adelaide Law School (new nominee);
- Mr Stephen McDonald, nominee of the South Australian Bar Association; and
- Ms Aimee Travers¹, additional member.

In accordance with its Memorandum of Understanding, the Institute's Advisory Board met three times during 2018: on 124 April, 10 October and 24 December (electronic meeting).

¹ In accordance with its Memorandum of Understanding, Ms Travers was selected jointly by the parties, and joined the Institute's Advisory Board on 30 July 2018 as an additional member.

2. Funding

It is noted that Members of the Advisory Board generously contribute their expertise and time without charge.

Funding (including in-kind contributions) was attributed from the following two sources during 2018:

2.1 *The University of Adelaide*

In accordance with the Institute's 2010 founding Memorandum of Understanding (MOU), as amended on 2 October 2012, the University of Adelaide paid the salaries of the Director, Professor John Williams and Deputy Director, Dr David Plater.

In 2018, Dr Plater was employed @ 0.9 FTE to conduct the work of the Institute, act as its principal researcher and writer, and coordinate and deliver the Adelaide Law School's full-year elective subject of Law Reform.

During 2018, the University continued to:

- provide accommodation, facilities and on-going support in the running of the Institute's office which is based at the Adelaide Law School;
- fund the publication of the Institute's reports and papers; and
- provide expert support for the Institute's communications with the media.

2.2 *The South Australian Attorney-General's Department (AGD)*

Under the MOU, the AGD is responsible for funding of the Administrative Officer position (@ 0.5 FTE) by tied grant to the University of Adelaide.

In addition, the sum of \$30,000 in funding was provided by the Attorney-General's Department in March 2018 to facilitate the Institute undertaking the reference on a legislative framework for surrogacy in South Australia (a review of Part 2B of the *Family Relationships Act 1975* (SA)).

3. Research Assistance

3.1 *Casual paid researchers for project work*

From time to time, and subject to funding, the Institute is able to engage casual staff to assist with its work. In 2018, the Institute was able to engage casual paid researchers for project work as follows:

AGD funding for LGBTIQ project

Residual funding from the South Australian Attorney-General's Department for the LGBTIQ discrimination reference facilitated the engagement of Dr Sarah Moulds to assist with research and preparation of the Institute's final report for this project titled *Report 11 - The Provoking Operation of Provocation: Stage 2*.

AGD funding for Surrogacy project

As mentioned above, the sum of \$30,000 in funding was provided by the Attorney-General's Department in March 2018 for the Institute to inquire into and report on a legislative framework for surrogacy in South Australia (a review of Part 2B of the *Family Relationships Act 1975* (SA)).

This funding enabled the Institute to engage Dr Sarah Moulds and Ms Madeleine Thompson to assist with research and preparation of the Institute's final report for this project titled *Report 12 – Surrogacy – A Legislative Framework: A review of part 2B of the Family Relationships Act 1975 (SA)*. Mr James Williams assisted with proofreading and editing.

3.2 Student research

An additional, important source of research assistance is from the Adelaide Law School's Law Reform elective subject, during which invited students undertake, under supervision of the Course Co-ordinator, high level research and analysis of an area of the law (often on aspects of the Institute's current or future projects) within its comparative and policy and legal dimensions and make reasoned findings and conclusions which can, at times, be used in the Institute's reports or utilised as the basis for further research. Former students are also hired as paid research assistants to assist projects if the opportunity arises.

In 2018, the Law Reform course was co-ordinated and taught by Dr David Plater, the Institute's Deputy Director.

As in past years, various speakers from Government, the judiciary and the legal sector generously contributed to the course in 2018 including the Hon Vickie Chapman MP (the present Attorney-General), the Hon John Rau MP (the former Attorney-General), Mr Robert Lawson QC, Mr Alastair McEwin (Commonwealth Disability Discrimination Commissioner), the Hon Geoffrey Muecke (Justice of the Supreme Court of Nauru and former Chief Judge of the District Court of South Australia), Dr Chris Bleby SC (State Solicitor-General), Ms Aimee Travers (Parliamentary counsel), Ms Jemma Holt (State DPP), Mr S 'Reece' Fursa (Crown Solicitor's Office), Ms Anita Brunacci (private practice) and former law reform students and recent law graduates. The Institute is grateful for the valuable input of the various guest speakers.

In 2018, students researched several of the Institute's current and forthcoming projects as part of their assessment. Topics included:

- Advance Care Directives
- Enduring Powers of Attorney and financial exploitation
- Common law forfeiture rule
- The defences of duress and marital coercion and their intersection with domestic violence
- Competence
- Extended joint criminal enterprise
- Familial DNA testing
- Juries and media: Fair trials in a digital age

- Traditional surrogacy and 'team baby'
- Non-commercial surrogacy in the United Kingdom
- Reasonable costs and counselling in surrogacy
- The trial and sentencing of children charged with homicide offences
- Restrictive covenants
- IT Law - data encryption and police powers of search and seizure for digital evidence

4. South Australian Law Reform Institute projects

All publications released by the Institute (for both current and past projects) are available to download free of charge from the Institute's website: <http://www.law.adelaide.edu.au/research/law-reform-institute/> under Other Resources > 'Publications: Reports and Papers'.

Below is a summary of the law reform project work undertaken by the Institute during 2018:

4.1 LGBTIQ

As part of its initial Audit Report released in September 2015, five complex areas of law were identified as giving rise to discrimination but which required further review and report. When the fifth and final part of this project on the discrimination aspect of provocation was commenced, it became apparent that the laws in this area could not be reviewed in isolation.

Consequently, the Institute sought approval from the then Attorney-General, the Hon John Rau MP, who agreed to widen the scope of this project to include provocation in general, and related matters.

As consultations were well advanced on the discrimination aspect of provocation, the Institute decided to report in two stages.

The Stage 1 Report, *The Provoking Operation of Provocation: Stage 1*, was released in May 2017 and made a number of recommendations to address the gender implications of the current law, notably to family violence and self-defence.

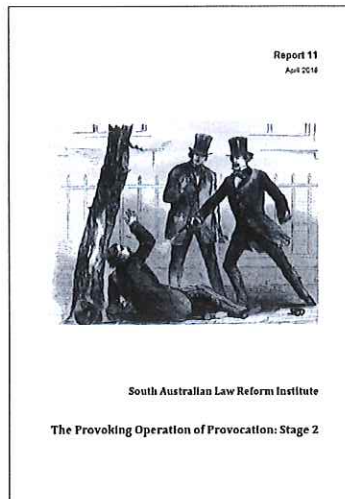
The Stage 2 Report, *The Provoking Operation of Provocation: Stage 2*, was released in June 2018 and examined provocation beyond 'gay panic', exploring the general issue of provocation and related matters including abolition of provocation, sentencing implications (led by the Hon David Bleby QC), diminished responsibility, duress, necessity and victim blaming, and domestic violence issues.

This project was undertaken in close consultation with the LGBTIQ community.

The Institute would especially like to thank Dr Sarah Moulds for her exceptional contribution in supporting this lengthy, but important, project and the Hon David Bleby QC for his erudite work in authoring the section of the Report on sentencing.

The Institute would also like to acknowledge the contribution of Ms Megan Lawson who generously assisted with background research for the Stage 2 Report and authored a related Background Research Paper on Homicide Sentencing which was released in conjunction with the Stage 2 Report.

The Institute also wishes to acknowledge Ms Lucy Line, Ms Amy Teakle and Ms Kate O'Connell who undertook background research and assisted with drafting for this project.



Front cover of Report 11 – *The Provoking Operation of Provocation: Stage 2*

4.2 *Surrogacy: A legislative Framework*

On 26 December 2017, the former South Australian Attorney-General, the Hon John Rau MP, wrote to the Institute inviting it to inquire into and report on certain aspects of the present law regulating surrogacy in South Australia contained in Part 2B of the *Family Relationships Act 1975* (SA) and to suggest a suitable regulatory framework for surrogacy for South Australia. The present South Australian Attorney-General, the Hon Vickie Chapman MP, supported the Institute undertaking this reference.

The Institute drew on the existing work in this area (notably of the Hon John Dawkins MLC) and undertook extensive research and consultation with interested parties and the community in relation to this reference, having careful regard to all the views it received in consultation. SALRI acknowledges the sincerity of the many, often conflicting, views that it received in this reference, including those who shared deeply personal and often painful accounts of their experiences.

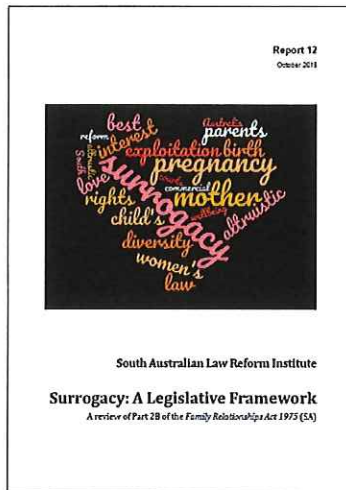
Surrogacy is a complex and sensitive subject that raises many ethical, legal and other issues and implications. It is a topic that attracts strong, and often conflicting, views. The two options of a commercial system of regulated surrogacy and banning or precluding any form of surrogacy in South Australia were not within the terms of reference. The result of both the Institute's consultation and research supports an intermediate approach within these two polarised views as the most appropriate way forward which best protects the interests of all parties and notably the best interests of the child, which must always be the primary consideration in any scheme.

The Report, titled *Report 12 – Surrogacy: A Legislative Framework, A review of Part 2B of the Family Relationships Act 1975* (SA), was released on 15 November 2018 and made 69 Recommendations. A draft Bill, *Surrogacy Bill 2018* (SA), was tabled by the Hon Vickie Chapman MP for consultation in the South Australian Parliament on the same day.

SALRI intends, in early 2019, to complete a short spin-off report into the civil issues which surrogacy gives rise to.

The Institute would like to acknowledge the valuable contribution to the consultation, research and writing of this Report of Dr Sarah Moulds, Ms Anita Brunacci and Mr Stephen McDonald.

The Institute would especially like to acknowledge the invaluable contribution to this reference of Ms Madeline Thompson. Ms Thompson had studied surrogacy as a law reform student and her tireless contribution and input to this reference as a recent graduate highlights the benefits of the student links to the role and work of the Institute.



Front cover of *Report 12 - Surrogacy: A Legislative Framework, A review of Part 2B of the Family Relationships Act 1975 (SA)*

5. Other law reform projects

5.1 *Review of the common law forfeiture rule*

Following a number of unavoidable delays, including the deferred appointment of a new Deputy Director until August 2015 and a re-prioritisation of the Institute's work from 2016 to 2018, this project will now be progressed as a priority in the first half of 2019 and will draw heavily on the work of the Victorian Law Reform Commission and the Tasmanian Law Reform Institute in this area. The Institute is keen to ensure the domestic violence and technical succession implications of this area are also addressed. Dr Sylvia Villios, succession law lecturer at Adelaide Law School, has kindly offered to lead this project.

5.2 *A review of general police powers of search and seizure of electronic devices*

The Institute was asked by the former Attorney-General, the Hon John Rau MP, to review general police powers of search and seizure for computer evidence and compelled access to encrypted computer records. The Attorney-General's Department subsequently decided to progress the encryption aspect as an internal Government project (leaving the Institute to still examine general police powers of search and seizure in relation to computer evidence) with the introduction of the Statutes Amendment (Child Exploitation and Encrypted Material) Bill 2017 to Parliament. This Bill lapsed with the end of Parliament prior to the March 2018 State election. The Statutes Amendment (Child Exploitation and Encrypted Material) Bill 2018 (SA)

was re-introduced on 8 November 2018 and is likely to pass in 2019. This Bill provides a means for the police to compel a suspect or third party to provide assistance that will allow access to encrypted, or other restricted-access, computer material that is reasonably suspected to relate to criminal activities.

The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) was passed by the Australian Parliament on 6 December 2018 and received Royal Assent on 8 December 2018. The Act is now in force. This Act applies to various crimes, including online child sexual abuse.

On 1 November 2018, SALRI staff attended an expert workshop held by the Australian Institute of Criminology (AIC) and the Australian Centre to Counter Child Exploitation. The purpose of this event was to examine strategies to detect and prevent online child sexual exploitation. This event was attended by the relevant Commonwealth Minister, police and law enforcement experts from New Zealand and all Australian jurisdictions, Government agencies, academics and representatives of the child protection sector. The IT sector was, perhaps surprisingly, absent.

Police powers were not raised as a concern at this event. The issue of general police powers of electronic search was also not regarded as a concern. Rather the problem was identified as one, not of legal powers, but rather of police technical and operational expertise, capacity and resources. The need for an IT solution was also raised.

The main item in SALRI's original reference was police access to encrypted data and this is both no longer within SALRI's reference and has been progressed elsewhere by major legislation at both a State and national level. The remaining item originally referred by the former Attorney, namely general police powers of search and seizure in relation to computer records, does not appear to be a major law reform issue. SALRI will consider in 2019 whether to proceed further with this reference.

5.3 Restrictive covenants

On 26 December 2017, the former Attorney-General, the Hon John Rau MP, wrote to the Institute inviting it to inquire into and report on whether South Australia should adopt changes to legislation in relation to restrictive covenants. Given other urgent commitments, the Institute is yet to progress this item.

This is a very technical area and has yet to be approved by the Institute's Advisory Board.

In addition, acceptance of this reference would be subject to confirmation (or any clarification) of the original terms of reference by the current Attorney-General, the Hon Vickie Chapman MP, and the Institute's ability to secure appropriate funding and support to progress the project.

5.4 Juries, Social Media and Suppression Orders

In January 2018, Professor John Williams and Dr David Plater visited the Tasmanian Law Reform Institute based at the University of Tasmania to discuss some of the challenges and opportunities for modern and effective law reform and consultation common to smaller jurisdictions such as Tasmania and South Australia, with a focus on suggestions for joint research and law reform collaboration and potential closer co-operation on projects of common interest. During the Institute's visit, Her Excellency Professor the Honourable Kate Warner AC, Governor of Tasmania, kindly hosted lunch at Government House on 19 January 2018 for the

Institute and the Tasmanian Law Reform Institute. Professor Warner is a former Director of the Tasmanian Law Reform Institute.

During the visit the common problem of ensuring a fair trial before a modern impartial jury with the impact of the internet and social media and the role and effectiveness of judicial directions and suppression orders was identified as a potential joint law reform project. This reference also aligns with the research expertise and current projects of the Institute and Law School staff. Preliminary work was undertaken during 2018. It is a topic to be progressed further as part of a joint collaborative research and law reform project with the Tasmanian Law Reform Institute in 2019.

5.5 Witness Competence

On 19 November 2018, the Attorney-General invited the Institute to consider receipt of a referral to inquire into and report on the utility of competence testing and the distinction between sworn and unsworn evidence pursuant to section 9 of the *Evidence Act 1929* (SA). This issue had been raised by the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse.

The Institute has agreed to progress this reference in 2019 at the earliest opportunity. It is an important issue. There are wide concerns over the role and operation of the present law and it has particular application for children and persons with intellectual disability. This reference also aligns with the research expertise and current projects of the Institute and Law School staff. It is also a topic to be potentially progressed as part of a joint collaborative law reform project with the Tasmanian Law Reform Institute in 2019.

6. Addresses, presentations and consultations

During the Reporting Period, Institute staff and researchers undertook the following interviews, addresses, presentations and consultations:

18-19 January 2018	Professor John Williams, Dr David Plater and Ms Lucy Line (Institute researcher) visit to Tasmanian Law Reform Institute based at the University of Tasmania to discuss research and law reform collaboration, including lunch at Government House with Professor Kate Warner, Governor of Tasmania and founding Director of the Tasmanian Law Reform Institute
14 February 2018	Dr David Plater, CPD Presentation to SA Attorney-General's Department, "Law Reform is not just for Lawyers": SALRI's Succession Reference and New Ways to Engage with Interested Parties'
22 March 2018	Dr David Plater, CPD Presentation to the SA Ombudsman's Office, 'Effective and Ethical Treatment and Questioning of Vulnerable Parties under the South Australian <i>Statutes Amendment (Vulnerable Witnesses) Act 2015</i> and <i>Disability Justice Plan</i> '
29 April 2018	Dr David Plater, Interviewed for article on vulnerable witnesses: 'Ineffective' system sees sexually abused children re-traumatised', <i>InDaily</i>

4 May 2018	Dr David Plater, Presentation at University of Adelaide Symposium on same-sex marriage and LGBTIQ rights in comparative perspective, 'An overview of SALRI's LGBTIQ project'
31 May 2018	Professor John Williams, Dr David Plater, Ms Sarah Moulds, Ms Madeleine Thompson and Ms Anita Brunacci held an Expert Legal Roundtable Consultation Forum in Adelaide on surrogacy law reform
5 June 2018	Dr David Plater and the Hon David Bleby QC, Interviewed on provocation: '"Gay panic' defence under fire again in SA, along with mandatory murder terms', <i>ABC News Radio</i>
5 June 2018	Dr David Plater, Interview on provocation, <i>ABC Drive Radio</i>
5 June 2018	Dr David Plater and the Hon David Bleby QC, Interviewed for article on provocation: 'End in sight for 'gay panic' murder defence', <i>The Australian</i>
5 June 2018	Dr David Plater and the Hon David Bleby QC, Interviewed for article on provocation: 'Murder defence to go', <i>The Advertiser</i>
6 June 2018	Dr David Plater, Interview on Provocation, <i>Radio Adelaide (The Wire)</i>
21 June 2018	Dr David Plater, Presentation to the 14 th Reintegration Puzzle Conference (Hobart), 'From Ideal to reality: An overview of the South Australian <i>Statutes Amendment (Vulnerable Witnesses) Act 2015</i> and Disability Justice Plan'
9 July 2018	Dr David Plater, Presentation to Adelaide Law School Review Panel on Innovative Undergraduate teaching, 'Student involvement in SALRI'
9 August 2018	Professor John Williams, Dr David Plater and Madeleine Thompson, Consultation visit to Sydney to speak to Chief Justice Pascoe of the Family Court on Surrogacy
30 August 2018	Dr David Plater and Madeline Thompson, Presentation to Adelaide Law School Anti-discrimination and Equality Law class, 'LGBTIQ and surrogacy law reform'
20 September 2018	Dr David Plater and Madeleine Thompson, Presentation to Adelaide Law School MedLaw Intensive class, 'Surrogacy'
26 October 2018	Madeleine Thompson, Presentation to Adelaide Law School Succession Law class, 'Surrogacy'
26 October 2018	Madeleine Thompson, consultation meeting with ReproMed, a leading South Australian fertility provider on surrogacy issues
7 November 2018	Dr Sarah Moulds, Presentation at Law Society of SA - CPD event: <i>Surrogacy</i>
15 November 2018	Madeleine Thompson, Interviewed for article on surrogacy: 'Draft SA bill would remove "discriminatory" restriction on surrogacy', <i>InDaily</i>
20 November 2018	Dr David Plater, Guest lecture at People's Public Security University of China (Beijing), '"The Digital Castle cannot be Impregnable": The Implications of Technology on the Criminal Law and Modern Law Reform'

- 29 November 2018 Professor John Williams, Dr David Plater, Madeleine Thompson and Anita Brunacci, All-party parliamentary briefing to MPs on SALRI's Surrogacy Report
- 12 December 2018 Dr David Plater, Presentation at Law and Society Conference, Wollongong, 'The wider role of modern law reform: More than lawyers and changing the law?'

7. References to the Institute in *Hansard*

During the Reporting Period, the Institute was referred to in *Hansard* on the following occasions:

Surrogacy reference	South Australia, <i>Parliamentary Debates</i> , Legislative Council, 31 May 2018, 319-320 (John Dawkins)
Provocation Report	South Australia, <i>Parliamentary Debates</i> , House of Assembly, 5 June 2018, 853-854 (Vickie Chapman, Attorney-General)
Surrogacy Report	South Australia, <i>Parliamentary Debates</i> , House of Assembly, 15 November 2018, 3733-3734 (Vickie Chapman, Attorney-General)
Surrogacy Report	South Australia, <i>Parliamentary Debates</i> , Legislative Council, 5 December 2018, 2418 (John Dawkins)



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Professor John Williams
 Director
 South Australian Law Reform Institute

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 Date:

9 April 2019