

The South Australian Law Reform Institute

# ANNUAL REPORT

1 January 2015 – 31 December 2015

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# 2015 Annual Report of the South Australian Law Reform Institute

This Annual Report is for the period from 1 January 2015 to 31 December 2015.

## 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 2015 year saw completion of the Institute's fifth year of operation.

In 2015, the functions and operations of the Institute were carried out by the Director and Deputy Director with the assistance of a half-time Administrative Officer. The position of Deputy Director was vacant until August 2015, when Dr David Plater took up the role, following the sudden passing of the previous position-holder, Ms Helen Wighton, in August 2014.

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/>.

### 1.1 *Staff of the Institute*

Professor John Williams, Director (Dean of Law, Adelaide Law School);

Dr David Plater, Deputy Director (Senior Lecturer, Adelaide Law School) - commenced August 2015; and

Ms Louise Scarman, Administrative Officer.

### 1.2 *Advisory Board*

For the 2015 calendar year, the membership of the Advisory Board remained unchanged from 2014. Its members were:

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 Tom Gray QC, nominee of the Chief Justice of South Australia;

Ms Ingrid Haythorpe, nominee of the Attorney-General of South Australia;

Professor Rosemary Owens, nominee of the Dean of the Adelaide Law School;

Mr Jonathan Wells QC, nominee of the South Australian Bar Association.

In 2015, the Institute's Advisory Board met three times: on 18 March, 25 August and 9 December.

### 1.3 Funding

As noted below, funding for the Institute in 2015 was attributed from three sources. Members of Advisory Board and the Institute's Reference Groups generously contribute their expertise and time without charge.

#### (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 pays the salaries of the Director, Professor John Williams and Deputy Director, Dr David Plater. Dr Plater commenced in August 2015 and was employed @ 0.5 FTE to conduct the work of the Institute, act as its principal researcher and writer, and coordinate and deliver the Adelaide Law School's elective subject of Law Reform (commencing in Semester 1, 2016).

During 2015, the University continued to:

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

#### (2) The South Australian Attorney-General's Department (AGD)

Under the MOU, the AGD remains responsible for funding of the administrative officer position (@ 0.5 FTE) by tied grant to the University of Adelaide.

In addition, on 10 February 2015, His Excellency, Hieu Van Le AO, Governor of South Australia, announced at the opening of State Parliament that the Government had invited the Institute to

*Review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status.*

The sum of \$150,000 in funding was provided to the Institute (in July 2015) by the Government to undertake this reference (LGBTIQ project).

The AGD also assisted the Institute with the secondment of two lawyers from the Attorney-General's Department (Ms Kate Guy and Ms Emily Sims) to undertake research and assist with the drafting of the Privacy Final Report.

#### (3) The Law Foundation of South Australia

As noted in the Institute's 2014 Annual Report, the Institute secured a further grant of \$78,710 from the Law Society of South Australia in July 2014 (2014 Law Foundation Grant).

During 2015, this funding enabled the Institute to continue to engage casual researchers with a view to preparing Final Reports on a number of succession review projects funded by a previous Law Foundation grant (2012 Law Foundation Grant which expired in June 2014). The 2014 Law Foundation grant is due to expire on 30 June 2016.

## 1.4 *Casual and student research*

### 1. Casual researchers

#### a) *2012 Law Foundation grant*

As mentioned in 1.3(3) above, the 2012 Law Foundation grant expired on 30 June 2014. On expiry, a small amount of funding remained and the Institute sought approval from the Law Foundation to use these funds to Mrs Dianne Gray who had kindly continued work on the Intestacy issues paper for a lengthy period past 30 June 2014 on a pro bono basis.

#### b) *2014 Law Foundation grant*

Through its 2014 Law Foundation grant, the Institute was able to commence preparation of Final Reports on two of its succession law projects during 2015 with the ongoing engagement of:

- Mr Robert Park for the administration of small estates project; and
- Mr Trang Phan for the wills register project.

Due to there being no Deputy Director to coordinate this work until August 2015, progress on these projects was slow during the first half of the year. These projects are expected to be completed in 2016.

### 2. Student research

As with past years, another important source of research assistance is from the Adelaide Law School's elective subject of Law Reform, during which students undertake research on aspects of the Institute's projects under supervision. In 2015, Ms Sarah Moulds co-ordinated the Law Reform course and students researched several aspects of the Institute's LGBTIQ project (discussed further at 2.6 below). Topics included:

- Legal recognition of sex (eg: *Births Deaths and Marriages Registration Act*);
- Legal recognition of relationships (eg: *Family Relationships Act*, *Domestic Partnerships Act*);
- Legal recognition of parentage (eg: *Family Relationships Act*);
- Adoption, surrogacy and Assisted Reproductive Treatment (or any one of these topics); and
- Criminal law related issues (eg: the partial defence of provocation).

## 2 **Law reform projects in 2015**

In the absence of a Deputy Director for the first seven months of 2015, the Institute's law reform projects were managed by its Director, Professor John Williams, until Dr David Plater took up the role in August 2015.

Below is a summary of the law reform project work undertaken by the Institute during 2015.

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 'Publications: Reports and Papers'.



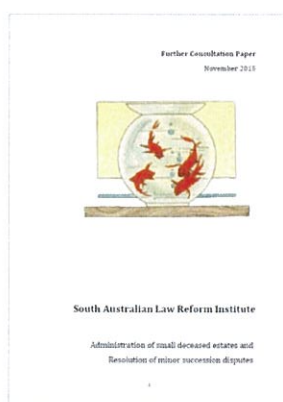
## 2.1 Succession law reform

In 2011, the South Australian Attorney-General, the Hon John Rau MP, asked the Institute to identify the areas of succession law that were most in need of reform in South Australia, to review each area and to recommend reforms. The Institute's Advisory Board identified a number of topics for review and established a Succession Law Reference Group consisting of the Hon Justice Tom Gray (Supreme Court of South Australia, Steve Roder (Registrar of Probates) and Ray Frost (Senior Partner, Treloar and Treloar) to assist the Institute in this work.

The succession law reform projects worked on during 2015 were:

(1) [Simplifying the administration of small deceased estates and the resolution of minor succession disputes in South Australia](#)

An Issues Paper was released on 3 March 2014. A public consultation period followed, however, the number of responses received was disappointing. As a result, a Further Consultation Paper was prepared during the latter half of the year and was released in November 2015. The Institute met with several key interested parties to discuss outstanding issues raised in the Further Consultation Paper and a Final Report is currently being prepared.



Front cover: *Further Consultation Paper - Administration of small deceased estates and Resolution of minor succession law disputes*

(2) [Whether there should be a wills register in South Australia](#)

An Issues Paper for this project was released on 30 July 2014. A public consultation period followed and a Final Report was prepared and submitted to the Institute's Advisory Board at its meeting on 9 December 2015, with a view to being released in early 2016.

(3) [A review of South Australian family provision laws](#)

In November 2013, Mrs Nancy Detmold began work on an Issues Paper for this project, with the original aim to release it by mid-2014. The project proved to be more complicated and time consuming than initially thought. As a result, funding from the 2012 Law Foundation Grant was exhausted and the project stalled at the end of June 2014. Ms Wighton had intended to finalise the Issues Paper during the second half of 2014 but circumstances meant this did not eventuate. Competing priorities in late 2015 meant that this project was temporarily paused. The Institute will continue this project at the conclusion of its current review of South Australia's intestacy laws.

#### (4) *A review of South Australian intestacy laws*

Mrs Dianne Gray began work on an Issues Paper for this project in March 2014, with the aim of releasing it by mid-to-late 2014. As was the case with the family provision project, this review also proved to be much larger and complex than initially expected. Funding from the 2012 Law Foundation Grant was exhausted at the end of June 2014, however Mrs Gray generously continued to work on the project on a pro bono basis. The Issues Paper was released in December 2015 and in light of the scope and complexity of the topics raised for potential law reform, will be followed by extensive consultation with interested parties and an extended public consultation period. The Institute acknowledges the commitment and input of Mrs Gray.

#### *2.2 Review of the common law forfeiture rule*

In 2011, the Attorney-General asked the Institute to examine and report on the application of the common law forfeiture rule and whether it should be mitigated in certain circumstances. In 2012, students of the Adelaide Law School's elective of Law Reform commenced research for this project. Work was paused to enable priority to be given to other projects with the aim of releasing an Issues Paper in mid-2014. Meanwhile, the Victorian Law Reform Commission (VLRC) released a Consultation Paper on the same topic in March 2014 with a number of issues and views relevant to South Australia. The Institute's Advisory Board decided at its Board Meeting on 30 April 2014 that it was a better use of the Institute's limited resources to wait for the VLRC's Final Report and then make recommendations to the South Australia's Attorney-General on the basis of some uniformity with Victoria's recommendations. With Helen Wighton's passing in 2014, and the delayed appointment of a new Deputy Director until August 2015, the Institute intends to progress this project in 2016, drawing on the work of the Victorian Law Reform Commission (which has now delivered its Final Report).

#### *2.3 Simplification of witness oaths and affirmations*

In February 2012, the Attorney-General invited the Institute to inquire into whether the wording and administration of witness oaths and affirmations in South Australia are appropriate and to make recommendations. Research by students of the Adelaide Law School's elective of Law Reform in 2012 informed the Institute's Issues Paper (*Issues Paper 3 – Nothing but the truth: Witness oaths and affirmations*), released on 23 October 2013. A public consultation period followed in early 2014 and a Final Report was commenced in early 2015 by a number of academics of the Adelaide Law School. The Final Report was completed by the Honourable David Bleby QC in late 2015. Plans are in place for its public release in February 2016.

#### *2.4 A statutory cause of action for serious invasion of privacy*

Encroachments on personal privacy by unauthorised digital publication of private images and personal details and technological advances have raised concerns around Australia about the adequacy of the present remedies for people who suffer serious harm or loss as a result. After consultation with the Attorney-General, the Institute decided to undertake preliminary research to ascertain whether it would be feasible for the Institute to review current South Australian laws on this topic and investigate the possibility of a statutory cause of action in South Australia for serious invasions of personal privacy.



The Institute's Advisory Board commissioned a scoping study and, on the strength of that study, decided in October 2012 to proceed with a full review. An Issues Paper (*Issues Paper 4—Too much information: A statutory cause of action for serious invasion of privacy*) was released for public consultation on 19 December 2013.

As with other projects, work stalled on this project with a lack of resources during the second half of 2014 and the first half of 2015. The Final Report was circulated to the Institute's Advisory Board for its meeting on 9 December 2015. With minor changes required, the Institute intends to release it in early 2016.

The Institute is grateful to the Attorney-General's Department for the continued secondment of Ms Kate Guy and Ms Emily Sims to see this significant project through to completion. The Institute especially acknowledges the commitment and input of Ms Guy and Ms Sims in delivering this Final Report.

## 2.5 *A review of certain police powers*

In February 2012, the Attorney-General asked the Institute to review general police powers of search and seizure for computer evidence and police powers to compel access to encrypted computer records. This is a complex project that involves technical issues and will involve close consultation with interested parties. Student research was conducted in 2013 and 2014, however, due to resourcing issues and extenuating circumstances, preparation of a paper on this project was put on hold during 2015. The Institute intends to re-visit this project in the second half of 2016.

## 2.6 *LGBTIQ discrimination*

As mentioned briefly at 1.3(2) above, the Government invited the Institute in early 2015 to undertake a review of legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status.

The Institute engaged the services of Ms Sarah Moulds to conduct this review. This has proved a major project. During 2015, with the assistance of students from the Adelaide Law School's elective of Law Reform, Ms Moulds identified over 140 South Australian Acts or Regulations that, on their face, discriminated against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status. The vast majority of the Acts or Regulations in this category discriminated by reinforcing the binary notion of sex ('male' and 'female') or gender ('man' or 'woman') or by excluding members of the LGBTIQ communities by a specific or rigid definition of gender. However, a smaller number of laws were identified to have a more acute discriminatory impact on the lives of LGBTIQ South Australians and their families.

The Institute released in September 2015, its Audit Paper, *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation*. The Audit Paper contained a number of recommendations for immediate reform, as well as recommendations relating to five complex areas of law that had been identified as giving rise to discrimination, but requiring further review and report. These areas include the registration of sex at birth and the change of sex; the current laws governing legal parentage and surrogacy; the exemption regime under the *Equal Opportunity Act 1984* (SA) and the partial defence of provocation.

Work commenced on this second stage in late 2015 and will continue in the first half of 2016. It is expected that the Reports will be delivered in these areas in the first half of 2016.



The Audit Paper's recommendations for immediate reform were incorporated in the *Statutes Amendment (Gender Identity and Equity) Bill 2015*, tabled in the House of Assembly by the Premier by way of a Ministerial statement on 1 December 2015.



Front cover: *Audit Paper - Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation*

### 3. Addresses, presentations and consultations

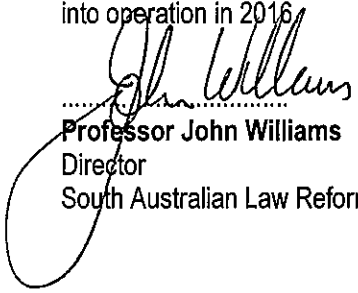
- 23 July 2015: Hutt Street Drop-In Centre, as part of the Institute's LGBTIQ consultations
- 20 November 2015: Dr David Plater spoke at the Law Society's Annual Succession Law Conference about the Institute's succession law reform work
- 26 November 2015: Professor John Williams contributed to *In Daily*, 'Anti-Discrimination law reform must continue', discussing the Institute's LGBTIQ law reform project
- 10 December 2015: Professor John Williams attended and spoke of the Institute's LGBTIQ law reform work at the Equal Opportunity Commission's Human Rights Day Event - 'On the Couch: Rainbow Rights in South Australia', hosted by Equal Opportunity Commissioner Anne Gale

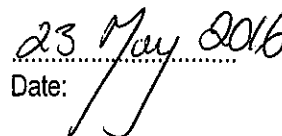
### 4. Implementation of the Institute's recommendations

#### 3.1 *Evidence (Records and Documents) Amendment Act 2015*

In 2013, the Institute released its *Final Report 1: Modernisation of South Australian evidence law to deal with new technologies*, which recommended that South Australian legislation be amended to provide for the 'proof and admission of information that is generated, stored, reproduced or communicated by a technological process or device that reflects modern technologies and can accommodate future, as yet unknown, technologies'.

The *Evidence (Records and Documents) Amendment Act 2015* was passed in Parliament with all party support on 19 November 2015 and received Royal Assent on 26 November 2015. The Act is due to come into operation in 2016.

  
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**Professor John Williams**  
Director  
South Australian Law Reform Institute

  
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Date: