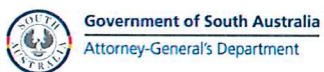


The South Australian Law Reform Institute

# ANNUAL REPORT

1 January 2016 – 31 December 2016

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# 2016 Annual Report of the South Australian Law Reform Institute

This Annual Report is for the period from 1 January 2016 to 31 December 2016.

## 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 2016 year saw completion of the Institute's sixth year of operation.

In 2016, 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.

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

Professor John Williams, Director (Dame Roma Mitchell Chair of Law; Dean of Graduate Studies and Pro Vice-Chancellor (Research Operations), University of Adelaide;

Dr David Plater, Deputy Director (Senior Lecturer, Adelaide Law School); and

Mrs Louise Scarman, Administrative Officer.

### 1.2 Advisory Board

Membership of the Institute's Advisory Board remained unchanged in 2016. 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;

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

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

During 2016, the Institute's Advisory Board met twice, on 5 May and 7 November.

## 2. Funding

In 2016, funding for the Institute was attributed from three sources.

Members of the Advisory Board 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 is 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 full-year elective subject of Law Reform.

During 2016, 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 communications with the media.

(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, 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) and work continued on this project during 2016.

(3) The Law Foundation of South Australia Incorporated

As noted in the Institute's 2014 Annual Report, the Institute secured a 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 current 2014 Law Foundation grant was due to expire on 30 June 2016, however, the Law Foundation generously agreed to extend the term of the grant for a further twelve months (to 30 June 2017) in order to allow the Institute to complete the projects for which the grant funding was provided.

### 3. Research

#### A. Casual researchers for project work

##### *2014 Law Foundation Grant*

Through its 2014 Law Foundation Grant funding, the Institute was able to complete Final Reports on two of its succession law projects during the Reporting Period, with the engagement of:

- Mr Mark Jordan and Mr Robert Park for the small estates project; and
- Mrs Dianne Gray and Mr Trang Phan for the wills register project.

The 2014 Law Foundation Grant funding also allowed Mrs Dianne Gray to co-ordinate a broad consultation effort in order to progress the Intestacy project during 2016.

#### B. Student research

An additional, 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 2016, Dr David Plater, the Institute's Deputy Director, taught and co-ordinated the Law Reform course. Various speakers from Government and the legal sector generously spoke to the course including the Hon John Rau MP (Attorney-General), Ms Aimee Travers (Parliamentary Counsel), Mr Matthew Goode (special counsel, Attorney-General's Department), Mr Michael O'Connell (Commissioner for Victims' Rights) and Ms Zita Ngor (Chief Executive of the Women's Legal Service of South Australia).

Students researched several of the Institute's current projects as part of their assessment. Topics included:

- Provocation and diminished responsibility as an alternative defence
- Provocation and the law of defensive homicide (Vic.)
- Commercial Surrogacy
- Family Provision / Testators Family Maintenance
- Disposal of Human Remains and implications for Indigenous communities
- Funeral Instructions and their non legally binding nature
- IT Law - Reform options and issues for expanded police powers regarding enforced access to secure, encrypted computer records
- Operation of the common law Forfeiture Rule in cases of family violence, suicide and mercy killings and non-intentional homicide

### 4. Law reform projects in 2016

Below is a summary of all of the law reform project work undertaken by the Institute during 2016.

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'.

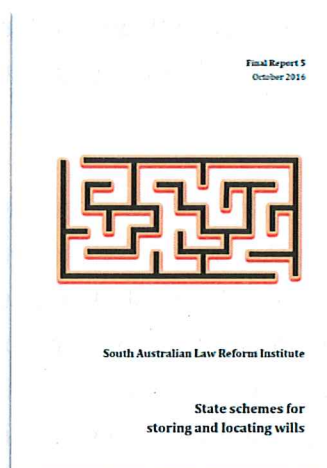
## 4.1 Succession law reform

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.

The succession law reform projects worked on during 2016 were:

### A. [Whether there should be a will register in South Australia](#)

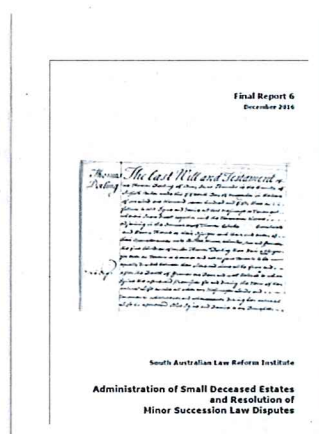
*Final Report 5: State schemes for storing and locating wills* was released on 31 October 2016.



Front cover: *Final Report 5 - State schemes for storing and locating wills*

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

*Final Report 6: Administration of small deceased estates and resolution of minor succession law disputes* was released on 15 December 2016.



Front cover: *Final Report 6 - Administration of small deceased estates and Resolution of minor succession law disputes*

### C. [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. The review proved to be much larger and complex than initially

expected and the Issues Paper was finally released in December 2015. In light of the scope and complexity of the topics raised for potential law reform, an extensive consultation period of almost seven months was undertaken during 2016. The Final Report on this topic is now being prepared, with expected release during mid-2017.

#### D. A review of the *Inheritance (Family Provision) Act 1972 (SA)*

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. As with the review of South Australian Intestacy laws, the Family Provision project proved to be more complicated and time consuming than initially thought and with the passing of the Institute's Deputy Director, Helen Wighton, in late 2014, the project stalled. The new Deputy Director, Dr David Plater, did not commence until August 2015.

Competing priorities and the decision to focus the Institute's limited resources on its LGBTIQ and Intestacy projects during 2016, meant that this project was temporarily paused. This project was resumed in late 2016. Plans for a wide consultation strategy including the use of online resources were implemented in late 2016 and work will continue in 2017. It is intended that this Report will be released in 2017.

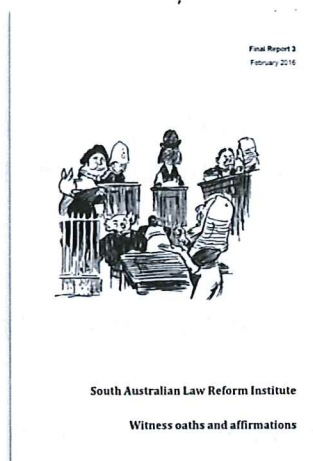
#### *4.2 Simplification of witness oaths and affirmations*

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.

*Final Report 3: Witness oaths and affirmations* was completed by the Honourable David Bleby QC in late 2015 and released in February 2016.



Front cover: *Final Report 3 –  
Witness oaths and affirmations*

### 4.3 A statutory cause of action for serious invasion of privacy

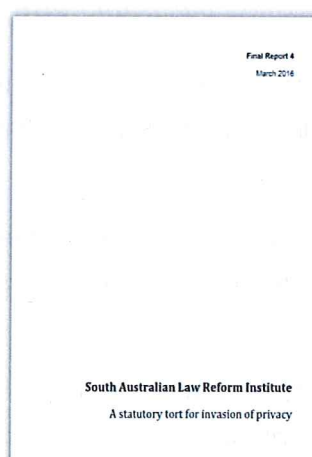
Encroachments on personal privacy by unauthorised digital publication of private images and personal details and technological advances have raised concerns around Australia about the adequacy of the present civil and criminal remedies for people who suffer serious harm or loss as a result. After consultation 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 during the second half of 2014 and the first half of 2015.

The Institute released *Final Report 4: A statutory tort for invasion of privacy* in March 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 is grateful to Ms Guy and Ms Sims for their valuable work as part of this project.



Front cover: *Final Report 4 – A statutory tort for invasion of privacy*

### 4.4 LGBTIQ discrimination

In early 2015, the South Australian Government invited the Institute 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 and in September 2015 released its Audit Paper, *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation*.

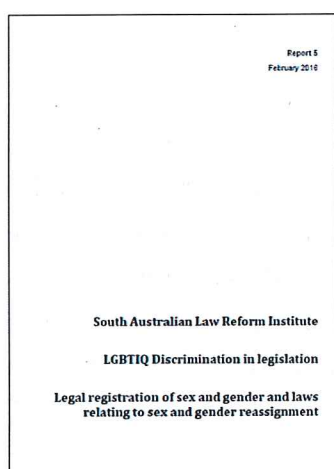
The Audit Paper identified over 140 South Australian Acts or Regulations that, on their face, discriminated against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status. The vast majority of the Acts or Regulations in this category discriminated by 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.

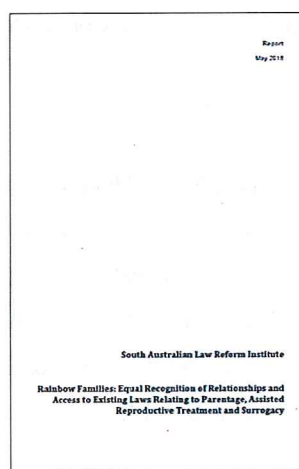
The Audit Paper contained a number of recommendations for immediate reform, as well as recommendations relating to five complex areas of law that had been identified as giving rise to discrimination, but which required further review and report. These areas included the registration of sex at birth and the change of sex; 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 the second stage of the project in late 2015 and in the first half of 2016, three Reports were delivered covering four of these areas:

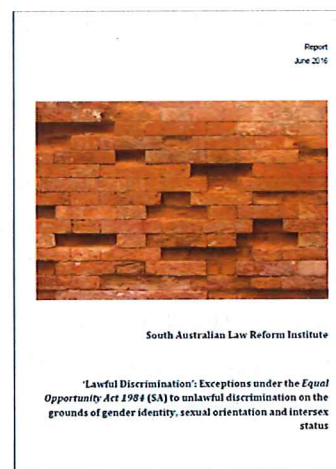
- a. *Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment* (released February 2016);
- b. *Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws relating to Parentage, Assisted Reproductive Treatment and Surrogacy* (released June 2016); and
- c. *'Lawful Discrimination': Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status* (released June 2016).



Front cover: *Legal registration of sex and gender and laws relating to sex and gender reassignment*



Front cover: *Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy*



Front cover: *'Lawful Discrimination': Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender, gender identity sexual orientation and intersex status*

The recommendations in these Reports were wide ranging in scope, including the establishment of a Relationships Register in South Australia enabling heterosexual and non-heterosexual relationships to be formally recognised and registered.

The Government swiftly responded to these various Reports and the recommendations were accepted, whether wholly or in part, by the Government and were incorporated or reflected in several Acts that passed Parliament during 2016.

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

The Institute wishes to thank Ms Meg Vedig (equal recognition of relationships) and Ms Sarah Brown (surrogacy) for their valuable assistance with this project. The Institute would especially like to express its appreciation to Ms Sarah Moulds for her exceptional contribution to this important project.

## **5. Other law reform projects**

### *5.1 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 South Australia's Attorney-General on the basis of some uniformity with Victoria's recommendations.

With Helen Wighton's passing in 2014, the delayed appointment of a new Deputy Director until August 2015 and a re-prioritisation of the Institute's work during 2016, the Institute intends to progress this project in 2017, drawing largely on the work of the Victorian Law Reform Commission.

### *5.2 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 and 2016. The Institute intends to re-visit this project in the second half of 2017.

## **6. Addresses, presentations and consultations**

During the Reporting Period, Institute staff and researchers consulted and presented widely:

- 15 February 2016: Professor John Williams, Dr David Plater and Ms Sarah Moulds held a Roundtable Consultation Forum in Adelaide on *Equal Recognition of Relationships and Removal of Discrimination with Respect to Parenting Rights*
- 23 February 2016: Professor John Williams, Dr David Plater and Ms Sarah Moulds held a Roundtable Consultation Forum in Adelaide on *Removal of Discrimination with Respect to Access to Surrogacy and Assisted Reproductive Treatment*
- 25 February 2016: Professor John Williams, Dr David Plater and Ms Sarah Moulds held a Roundtable Consultation Forum in Adelaide on *Family Violence and Reforming the Law of Provocation*

- 4 March 2016: Professor John Williams and Ms Sarah Moulds presented at the Australasian Law Reform Agencies' Conference in Melbourne, reflecting on SALRI's LGBTIQ consultation strategy
- 4 March 2016: Dr David Plater presented with Therese Henning (Tasmanian Law Reform Institute) at the Australasian Law Reform Agencies' Conference in Melbourne ('The challenges of law reform in smaller jurisdictions: Law reform on the smell of an oily rag')
- 11 May 2016: Professor John Williams, Dr David Plater and Ms Sarah Moulds held a Roundtable Consultation Forum for legal practitioners and academics in Adelaide on *Reforming the Law of Provocation*
- 12 May 2016: Dr David Plater and Ms Sarah Moulds held a Roundtable Consultation Forum for family violence service representatives and representatives of the LGBTIQ sector in Adelaide on *Reforming the Law of Provocation*
- 27 June 2016: Professor John Williams, Dr David Plater and Mrs Dianne Gray held a Roundtable Consultation Forum in Mount Gambier on Intestacy
- 1 August 2016: Professor John Williams, Dr David Plater and Mrs Dianne Gray held a Roundtable Consultation Forum in Adelaide on Intestacy
- 17 August 2016: Dr David Plater held a Roundtable Consultation Forum in Port Lincoln on Intestacy and succession as part of a combined visit with the Law Society
- 31 August 2016: Dr David Plater presented a Paper at the 'Sexting, 'Revenge Porn' and the Law' Professional Development Seminar at Flinders University on 'Revenge Porn and Privacy'
- 12 September 2016: Dr David Plater and Mrs Dianne Gray held a Roundtable Consultation Forum at the Office of the Public Trustee on Intestacy and succession
- 12 October 2016: Dr David Plater held a Roundtable Consultation Forum in Berri on Intestacy and succession as part of a combined visit with the Law Society
- 9 November 2016: Dr David Plater held a Roundtable Consultation Forum in Naracoorte and Mt Gambier on Family Provision and succession as part of a combined visit with the Law Society
- 28 November 2016: Dr David Plater, Dr Sylvia Villios and Ms Sarah Moulds attended the Law Society's Country Law Update at Wallaroo and presented on 'SALRI's Succession Law Reference and Succession Law Update'

## **7. Implementation of the Institute's recommendations**

### **7.1 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 commenced on 4 April 2016.

## 7.2 LGBTIQ Law Reform Related Legislation

The Audit Paper's recommendations for immediate reform were incorporated in the *Statutes Amendment (Gender Identity and Equity) Act 2016*, which received Royal Assent on 4 August 2016. This Act has now commenced operation.

The Institute's recommendations in its further LGBTIQ Reports were accepted, whether wholly or in part, by the Government and were subsequently incorporated or reflected in several Acts that passed Parliament during 2016, namely the *Births, Death and Marriage Registration (Gender Identity) Amendment Act 2016*, the *Relationship Register Act 2016* and the *Adoption Review Amendment Act 2016*. These Acts all received Royal Assent on 15 December 2016. The Institute's recommendations are also reflected in the *Statutes Amendment (Surrogacy Eligibility) Bill 2016* currently before the Legislative Council.



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

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Date:

21 August 2017