

The South Australian Law Reform Institute

ANNUAL REPORT

1 January 2017 – 31 December 2017

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
3. Research	3
4. Law reform projects in 2017	4
4.1 Succession law reform	4
4.2 LGBTIQ	6
5. Other law reform projects	7
5.1 Review of the common law forfeiture rule	7
5.2 A review of general police powers of search and seizure of electronic devices	7
5.3 A suitable Regulatory Framework for Surrogacy in South Australia	7
5.4 Restrictive covenants	8
6. Addresses, presentations and consultations	8
7. Implementation of the Institute's recommendations	9
7.1 LGBTIQ Law Reform Related Legislation	9

2017 Annual Report of the South Australian Law Reform Institute

This Annual Report covers the period from 1 January 2017 to 31 December 2017.

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. 2017 saw completion of the Institute's seventh year of operation.

In 2017, there were no changes to the functions and operations of the Institute which 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.

From time to time, and subject to funding, the Institute is able to engage casual researchers to assist with its work. In 2017, the Institute engaged Mrs Nancy Detmold, Mrs Dianne Gray, Ms Megan Lawson, Ms Lucy Line, Ms Sarah Moulds, Ms Amy Teakle and Ms Natalie Williams.

1.2 *Advisory Board*

Following completion of a second tenure, some membership of the Institute's Advisory Board changed at the commencement of 2017.

Members of the Institute's Advisory Board for 2017 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); and

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

The Institute saw the departure of:

The Hon Tom Gray QC (as nominee of the Chief Justice of South Australia);

Ms Ingrid Haythorpe (as nominee of the Attorney-General of South Australia); and

Emerita Professor Rosemary Owens AO (as nominee of the Dean of the Adelaide Law School).

As inaugural Members of the Advisory Board, the Institute is most grateful to these three colleagues for their support and service during their respective tenures.

In accordance with its Memorandum of Understanding, the Institute's Advisory Board met three times during 2017: on 16 May, 20 June and 8 November.

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 three sources during 2017:

A. [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.

Dr Plater 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 full-year elective subject of Law Reform.

During 2017, 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.

B. [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 \$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 2017.

C. *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) to complete work on its large succession project.

This 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

With funding from its 2014 Law Foundation Grant, the Institute was able to complete the remaining succession projects with the engagement of:

- Mrs Dianne Gray for the Intestacy project; and
- Mrs Nancy Detmold, Ms Sarah Moulds and Ms Natalie Williams for the Family Inheritance project.

The Intestacy Report titled *Report 7: South Australian Rules of Intestacy* was released in July 2017. The Family Inheritance Report titled *Report 9: 'Distinguishing between the Deserving and the Undeserving': Family Provision Laws in South Australia* was released in December 2017.

Two short, but related, reports were also prepared: *'Report 8: Management of the Affairs of a Missing Person'* (released concurrently with the Intestacy Report in July 2017) and *'Report 10: Who May Inspect a Will'* (released concurrently with the Family Inheritance Report in December 2017).

In addition to payment of salaries for casual researchers, the 2014 Law Foundation Grant funding allowed the Institute to consult widely for the Intestacy and Family Inheritance projects, including Roundtable Expert Consultation Forums in Adelaide as well as visits to the Riverland (Berri) and the South East (Mount Gambier) for legal and community consultation sessions. These visits were well received and allowed the Institute to consider the views of legal practitioners and community concerns from regional areas.

AGD funding for LGBTIQ project

Residual funding from the South Australian Attorney-General's Department facilitated the engagement of Ms Megan Lawson, Ms Lucy Line and Ms Amy Teakle 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*.

The Institute was also able to facilitate an Expert Consultation Roundtable in Adelaide as a result of this funding.

B. Student research

An additional, important source of research assistance is from the Adelaide Law School's elective subject of Law Reform, during which invited students undertake research on aspects of the Institute's projects under supervision.

In 2017, the Law Reform course was taught and co-ordinated by Dr David Plater, the Institute's Deputy Director.

Various speakers from Government and the legal sector generously contributed to the course without charge, including the Hon John Rau MP (the then 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 (SA) Inc.).

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.)
- The defences of duress and necessity and their intersection with domestic violence
- Mandatory sentencing for murder in South Australia
- 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 2017

Below is a summary of all of the law reform project work undertaken by the Institute during 2017.

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'.

4.1 *Succession law reform*

In 2011, the South Australian Attorney-General at the time, 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 final succession topics in this project were completed during 2017. As mentioned above, these were:

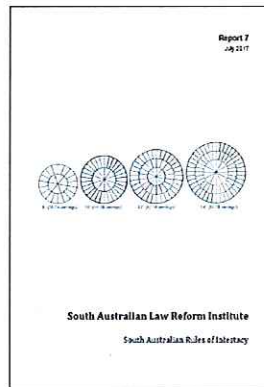
A. [A review of South Australian Intestacy Laws](#)

This review proved to be much larger and more complex than initially anticipated with an Issues Paper 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, *Report 7: South Australian Rules of Intestacy* was released in July 2017.

The Institute is grateful to Mrs Dianne Gray for her tireless work and expertise in authoring this Report.

B. [Management of the Affairs of a Missing Person](#)

A separate, but related report titled *Report 8: Management of the Affairs of a Missing Person* was prepared and released in conjunction with the Intestacy Report in July 2017. The Report was prepared as a stand-alone report because it has much wider application than intestacy in isolation.



Front cover - Report 7:
South Australian Rules of Intestacy



Front cover - Report 8: *Management of the Affairs of a Missing Person*

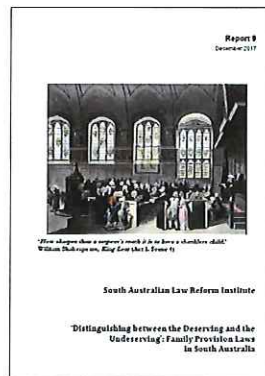
C. [A review of the Inheritance \(Family Provision\) Act 1972 \(SA\)](#)

Following a temporary hiatus in 2015 and 2016, this project was resumed in late 2016 with the implementation of a wide consultation strategy including the use of online resources and a number of consultation events during 2017 both in Adelaide and regional areas, including Mount Gambier and Berri. The Final Report, *Report 9: 'Distinguishing between the Deserving and the Undeserving': Family Provision Laws in South Australia* was released in December 2017.

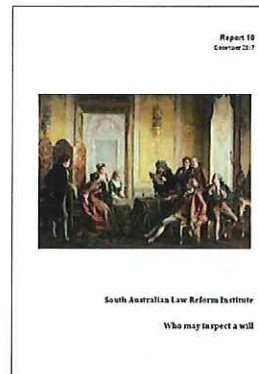
The Institute acknowledges the expert assistance of Mrs Nancy Detmold, Dr Sylvia Villios and Ms Natalie Williams in completing this project.

D. Who may Inspect a Will

A separate, but related, report titled *Report 10: Who May Inspect a Will* was released concurrently with the Family Inheritance Report in December 2017.



Front cover - Report 9:
*'Distinguishing between the Deserving and the Undeserving':
Family Provision Laws in South Australia*



Front cover - Report 9:
Who May Inspect a Will

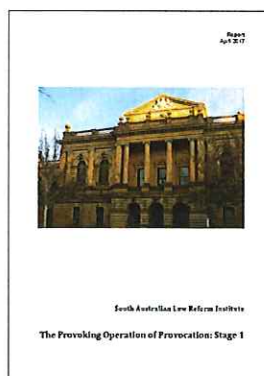
4.2 LGBTIQ

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. The Report made a number of recommendations to address the gender implications of the current law, notably to family violence and self-defence.



Front cover of Report – *The Provoking
Operation of Provocation: Stage 1*

The Stage 2 Report was commenced in the second half of 2017 and will consider the broader application of the common law partial defence of provocation (such as the gender bias of the present law, its implications in a family violence context and sentencing implications).

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

The Institute would like to acknowledge the contributions of Ms Megan Lawson, Ms Lucy Line and Ms Amy Teakle for their important background research and drafting.

The Institute would especially like to express its appreciation to Ms Sarah Moulds for her exceptional contribution in driving this important project.

5. Other law reform projects

5.1 Review of the common law forfeiture rule

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 during 2016 and 2017, saw this project put on hold for an extended period, however, the Institute intends to progress this project in the second half of 2018, drawing largely on the work of the Victorian Law Reform Commission.

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

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, 2016 and 2017.

The Attorney-General's Department subsequently chose to examine the encryption aspect of its own accord with drafting of a Bill (Statutes Amendment (Child Exploitation and Encrypted Material) Bill 2017) put before Parliament (but which lapsed with the end of Parliament prior to the March 2018 election).

The Institute intends to re-visit the remaining part of this project regarding general police powers of search and seizure of electronic devices in the second half of 2018.

5.3 A suitable Regulatory Framework for Surrogacy in South Australia

On 26 December 2017, the then Attorney-General, the Hon John Rau MP, wrote to the Institute inviting it to inquire into and report on a suitable regulatory framework for surrogacy in South Australia.

The Institute's Advisory Board is required to approve the acceptance of any references and this project will be discussed with Advisory Board members early in 2018.

5.4 Restrictive covenants

On 26 December 2017, the then Attorney-General, the Hon John Rau MP, also 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.

The Institute's Advisory Board is required to approve the acceptance of any references and this project will be discussed with Advisory Board members early in 2018.

6. Addresses, presentations and consultations

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

17 February 2017	Dr David Plater and Ms Sarah Moulds, Presentation at SA Law Society Forum, Adelaide: <i>'Who is SALRI and How Can You Be Involved in our Family Inheritance Law Reference?'</i>
23 February 2017	Ms Sarah Moulds, Interview on review of SA's family inheritance law, 5AA
23 February 2017	Dr David Plater, interview on provocation, Buzzfeed
23 February 2017	Ms Sarah Moulds, Interview on Provocation and LGBTIQ issues, ABC
2 March 2017	Ms Sarah Moulds, Interview on provocation, ABC RADIO ADELAIDE
5 March 2017	Professor John Williams, Interview on review of provocation laws, ABC RADIO ADELAIDE
16 March 2017	Dr David Plater, Presentation at SA Attorney-Generals Department Research Seminar, Adelaide: 'Succession Law and the Role of SALRI'
31 March 2017	Professor John Williams, Dr David Plater, Dr Sylvia Villios, Ms Sarah Moulds and Ms Natalie Williams held an Expert Legal Roundtable Consultation Forum in Adelaide on Family Inheritance Law
7 April 2017	Dr David Plater, Dr Sylvia Villios and Ms Sarah Moulds held Legal and Community Roundtable Consultation Forums in Mount Gambier on Family Inheritance Law
10 April 2017	Dr David Plater, Dr Sylvia Villios and Ms Sarah Moulds held Legal and Community Roundtable Consultation Forums in Berri on Family Inheritance Law
27 April 2017	Dr David Plater and Ms Sarah Moulds, Presentation at Australian Institute of Administrative Law (SA) seminar, Adelaide: <i>'SALRI and its Succession and Family Inheritance Law Reference and the Role of Consultation to Modern Law Reform'</i>
4 May 2017	Professor John Williams, Provocation laws, <i>InDaily</i>
4 May 2017	Professor John Williams, Interview on provocation, ABC Radio
12 May 2017	Dr David Plater and Ms Sarah Moulds an Expert Roundtable Consultation Forum at the Adelaide Law School on provocation (stage 2)

17 May 2017	Ms Sarah Moulds, Dr David Plater and Dr Sylvia Villios, Presentation at Adelaide Law School Continuing Professional Development Seminar, University of Adelaide: <i>'An outdated charter for greed and entitlement? Reforming The Inheritance (Family Provision) Act 1972'</i>
3 July 2017	Professor John Williams and Dr David Plater, Presentation to Law Society Council on SALRI's role and work
7 September 2017	Dr David Plater, Conference Paper at 2017 National Victims of Crime Conference, Griffith University, Brisbane: <i>'Prosecutorial Discretion, Accountability and Victims' "Rights"? Timely Reform or Unhelpful Chimera?'</i>
20 September 2017	Dr David Plater, Interview with Rebecca Le Tourneau, 'Sunday Night' program (Channel 7) on victims and prosecution discretion
23 September 2017	Professor John Williams, Catalyst Foundation Forum: <i>'Know Your Rights – Changes to legislation affecting SA's LGBTIQ Community'</i>
21 November 2017	Dr David Plater, Keynote Speaker, 'New Approaches to Legislative Reform' Conference, Canberra: <i>'Demonstrating New Ways to Engage with Interested Parties'</i>
13 December 2017	Dr Sylvia Villios, Interview with ABC on family inheritance law

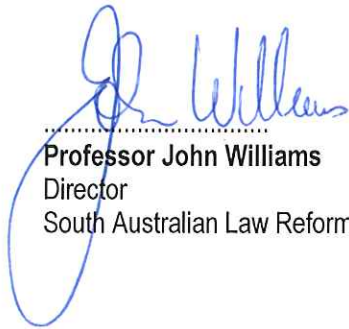
7. Implementation of the Institute's recommendations

7.1 LGBTIQ Law Reform Related Legislation

The Institute's recommendations in several of its LGBTIQ Reports were accepted, whether wholly or in part, by the Government and were subsequently incorporated or reflected in the following Acts which commenced operation in 2017 at various times, as noted below:

- *Adoption (Review) Amendment Act 2016* (received Royal Assent on 15 December 2016 and commenced operation on 17 February 2017);
- *Births, Death and Marriage Registration (Gender Identity) Amendment Act 2016* (received Royal Assent on 15 December 2016 and commenced on 23 May 2017); and
- *Relationships Register Act 2016* (received Royal Assent on 15 December 2016 and commenced on 1 August 2017, in conjunction with the *Relationship Register Regulations 2017*)
- *Statutes Amendment (Surrogacy Eligibility) Act 2017* (received Royal Assent on 10 March 2017 and commenced on 21 March 2017); and

- *Statutes Amendment (Registered Relationships) Act 2017* (which received Royal Assent 26 April 2017 and commenced on 1 August 2017).



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

.....
Date: 30 July 2018