

**Report**

May 2016

**South Australian Law Reform Institute**

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

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the University of Adelaide Law School.

**Postal address:**

SA Law Reform Institute  
Adelaide Law School  
University of Adelaide  
North Terrace  
Adelaide SA 5005

**Contact details:**

(08) 8313 5582  
SALRI@adelaide.edu.au  
<http://www.law.adelaide.edu.au/research/law-reform-institute/>

**Publications**

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## **Participants**

### **South Australian Law Reform Institute**

<i>Director</i>	Professor John Williams
<i>Deputy Director</i>	Dr David Plater
<i>Advisory Board</i>	Professor John Williams (Chair)
	The Hon David Bleby QC
	Terry Evans
	The Hon Tom Gray QC
	Ingrid Haythorpe
	Emerita Professor Rosemary Owens AO
	Jonathan Wells QC
<i>Administrative Officer</i>	Louise Scarman

## **Acknowledgements**

This Report was written by Meg Vedig, Sarah Brown and Sarah Moulds. Louise Scarman, Dr David Plater and Professor John Williams provided proofreading and editorial assistance.

This Report draws upon the significant work and consultation undertaken by the Institute for its Audit Paper on the topic, published in September 2015.

The Institute acknowledges and relies upon previous research on this topic, and in particular upon the work of the Australian Human Rights Commission, the Human Rights Law Centre, the South Australian Equal Opportunity Commission and the South Australian Department for Communities and Social Inclusion.

The Institute is further grateful for the many insightful submissions so far received in relation to this reference.

**Abbreviations**

ART	Assisted Reproductive Treatment
Audit Paper	SALRI Audit Paper (September 2015)
DECD	Department of Education and Child Development
IVF	In vitro fertilisation
LGBTIQ	Lesbian, Gay, Bisexual, Trans, Intersex and Queer
SALRI	South Australian Law Reform Institute
SDC	Social Development Committee (South Australian Parliament)

## Executive Summary

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Through its research and consultation process, the South Australian Law Institute (SALRI) has reached the firm conclusion that loving, committed couples can be heterosexual or non-heterosexual and thriving families come in all shapes and sizes. The law should not discriminate on the basis of who a person loves or how their child came into being.

The modern South Australian community is generally accepting of diverse family structures and appears particularly comfortable with non-married couples and families. Yet, South Australia's laws do not always apply equally to non-heterosexual couples, particularly at critical points in a person's life, such as when starting a family or when making arrangements for the end of life.

In its 2015 Audit Paper, SALRI found that there is a need for legislative reform to ensure that the current laws regulating legal recognition of relationships in South Australia do not discriminate on the grounds of sexual orientation and gender identity.<sup>1</sup>

The Audit Paper outlined that a number of important reforms have been made over recent years in South Australia to address discrimination on the grounds of sexual orientation and to recognise non-heterosexual and unmarried couples. These include reforms in 2009 that introduced the concept of 'domestic partner' and attached a wide range of legal rights to this term. The 2009 reforms were particularly important and removed a wide range of previously discriminatory laws.<sup>2</sup> However, these reforms did not completely remove the discrimination experienced in South Australia by non-heterosexual couples, particularly when access to marriage is denied.

As a result of 2004 amendments to the *Marriage Act 1961* (Cth), non-heterosexual couples cannot be married in Australia. This leaves only one legal pathway in South Australia for such couples who seek legal recognition of their committed relationship. They must demonstrate that they are 'domestic partners' for the purpose of the *Family Relationships Act 1975* (SA). This means that they must show that they have lived together to cohabit for a period of three years (or three

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<sup>1</sup> South Australian Law Reform Institute, *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation*, Audit Paper (2015) 44 [102] ('Audit Paper'). A copy of the Audit Paper is available at SALRI Audit Paper and Appendices, <<https://law.adelaide.edu.au/research/law-reform-institute/>> (Current Projects).

<sup>2</sup> *The Family Relationships Act 1975* (SA) provides the legal framework for identifying and recognising a child's parents. The *Statutes Amendment (Domestic Partners) Act 2006* (SA) made changes to 97 separate Acts and replaced the term 'de facto' with the concept of 'domestic partnerships'. These amendments provided non-married heterosexual de facto couples with similar rights to legally married couples when it comes to presumptions of parentage, access to assisted reproductive technology and surrogacy agreements. At least one significant ongoing discriminatory feature remains, namely the need for non-married, childless couples to meet cohabitation requirements before they are eligible to access these rights. The *Statutes Amendment (de facto Relationships) Act 2011* (SA) recognised same sex couples in asset forfeiture, property and stamp duty applications.

years over a four-year period). This requirement, that does not apply to heterosexual couples seeking to marry, can be difficult for couples to meet — for example if one or both partners frequently work or travel overseas or interstate, or if the couple does not live together because of fear of homophobia or adverse reactions to their relationships.

Non-heterosexual couples who cannot satisfy this definition can be denied a range of rights applying to married couples, including parenting rights with respect to their children. Non-heterosexual couples who move to South Australia can also be denied these rights, even if their relationship was legally recognised overseas or interstate. While SALRI notes that it is possible for couples to seek a court order to have their partnership recognised as a ‘domestic partnership’, this is a costly, uncertain exercise that continues to include potentially discriminatory considerations of cohabitation. It also has evidentiary burdens which may not apply to heterosexual couples.

As has been seen from a number of recent distressing examples, these laws can work to prevent some loving and committed couples from accessing important legal rights or recognition in South Australia on the basis of their sexual orientation or gender identity. This scenario occurred recently when David Bulmer-Rizzi died in Adelaide while honeymooning with his husband, Marco Bulmer-Rizzi, from the United Kingdom. Though the two were legally married under UK law, their relationship was not recognised under local law and it was initially contemplated that the death certificate would show the description of ‘never married’.

The discriminatory impact of these laws on individuals such as Marco Bulmer-Rizzi and the South Australian community more broadly was recently described by the South Australian Premier, the Hon Jay Weatherill MP as follows:

The recent story of Marco Bulmer-Rizzi’s mistreatment by our State highlights the importance of these reforms and demonstrates that we still have a long way to go to ensure discrimination is a thing of the past.

I was deeply saddened to hear of the death of Mr David Bulmer-Rizzi, who tragically died in Adelaide while honeymooning with his husband Mr Marco Bulmer-Rizzi from the United Kingdom. Unfortunately, for Marco, David and their families, as a result of Australia’s out of date laws, their relationship was not appropriately recognised, causing embarrassing and disrespectful treatment at the most tragic time in their lives. Marco was left feeling as though he was a second-class citizen.

Upon hearing of their tragedy, I called Marco to express my condolences and to apologise for what he’d experienced. We were also able to stop the certificate with the description of ‘never married’ from being issued.

What happened to Marco is a clear example of why we need marriage equality in Australia — because discrimination in our laws flows through not just to the legal issues like certificates, but also how people treat other people.



The embarrassment highlighted by this tragedy has strengthened my resolve to ensure all South Australians enjoy the same rights. To that end, I have asked the South Australian Law Reform Institute to expedite their review.<sup>3</sup>

This concern has been expressed elsewhere. The Deputy Leader of the Opposition, the Hon Vickie Chapman MP, stated:

I applaud the work of the [South Australian Law Reform] Institute to audit the laws that we have and to recognise the diverse ways in which a person may identify their gender or intersex status. The [Audit Paper] also highlights a number of other areas of research which are currently underway, and they relate to consideration of the amendment of the *Births, Deaths and Marriages Act* to recognise sex and general reassignment laws. We have actually passed legislation in this house, and there is consideration to be given to recognising those subject to reassignment laws in our *Births, Deaths and Marriages Act*. ...

Then we have this question of what we do in relation to recognition of people who are cohabiting, who are not lawfully married and who have cohabited for less than three years —unless there is a child of the relationship, and where it is a heterosexual relationship that certainly can have occurred. However, at present there are a number of people who are cohabiting and whose status as a domestic partner is not recognised in any way until it crystallises upon the three years of cohabitation.

Certain responsibilities and entitlements flow at that point, but it is not recognised before. So, the question of whether we should have a relationships register is also an area of consideration by the Institute. Certainly, Victoria has looked at that, and as I understand it is progressing law reform there which allows for the registration of couples where they would not otherwise be eligible to be recognised at law.<sup>4</sup>

To address these discriminatory features of current South Australian law, SALRI recommends that a relationship register be introduced in South Australia with features similar to those employed in other Australian jurisdictions including New South Wales (NSW), Victoria, Tasmania and Queensland.<sup>5</sup>

The introduction of a relationship register would address the discriminatory features of current South Australian law in two main ways: (1) by establishing a clear, non-discriminatory, legal process for people to register their relationship that is accessible for all couples, regardless of sexual orientation, gender identity or length of cohabitation; and (2) by creating a new legal category of relationship that can be used in other laws, to systematically address any remaining discriminatory features in those laws. The model could also co-exist with the current definition of ‘domestic partners’, so as not to dilute or remove the positive features of the current law.

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<sup>3</sup> South Australia, *Parliamentary Debates*, House of Assembly, 10 February 2016, 4183 (Jay Weatherill, Premier).

<sup>4</sup> South Australia, *Parliamentary Debates*, House of Assembly, 24 February 2016, 4429.

<sup>5</sup> *Relationships Register Act 2010* (NSW); *Relationships Act 2008* (Vic); *Relationships Act 2003* (Tas); *Civil Unions Act 2012* (ACT); *Relationships Act 2011* (Qld).

The introduction of such a register should be accompanied by robust safeguards against fraud, misuse and multiple registrations and clear processes for the dissolution of registered relationships, as is the case in other Australian jurisdictions — including NSW, Victoria, Tasmania and Queensland where such registers exist.<sup>6</sup> The inclusion of the proposed new category of ‘registered relationship’ within the existing definition of domestic partner would also integrate well with the *Family Law Act 1975* (Cth) regime, which would provide couples with access to the Family Court for matters concerning children and spousal support.

A relationships register also provides a clear and accessible legal mechanism for non-heterosexual couples who have been married overseas in jurisdictions such as the United Kingdom and New Zealand to have their relationship automatically legally recognised in South Australia.

In SALRI’s view, these reforms are necessary to align South Australia with other Australian jurisdictions that have taken steps to remove discrimination against non-married heterosexual and non-heterosexual couples and individuals and to ensure compliance with the relevant Commonwealth anti-discrimination regime.<sup>7</sup> These changes would also help ensure that the rights of lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ) South Australians are recognised, promoted and protected. These changes, if carefully implemented, would also preserve the existing parenting regime in South Australia and reflect the modern realities of the community.

This Report sets out a legal framework for the introduction of a relationships register in South Australia and describes how such a framework could be implemented to remove discrimination arising from other related laws. Key among these laws is the *Family Relationships Act 1975* (SA) which is the source of discrimination for non-heterosexual couples seeking to start a family, for example, by assisted reproductive treatment or surrogacy, and to have their parentage of any child born as result of these processes recognised under law.

Since starting its current reference in February 2015, SALRI has heard many compelling stories of loving and committed non-heterosexual couples who have been arbitrarily excluded from the current *Family Relationships Act 1975* (SA) and who have been compelled to go interstate or overseas to start a family. Some couples have also faced serious legal uncertainty once they have a child together, particularly with respect to parenting rights. A relationships register model would address these issues by providing all couples (regardless of sexual orientation or marital

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<sup>6</sup> See s 14 of the *Relationship Register Act 2010* (NSW); s 30 of the *Relationships Act 2011* (Qld); ss 29 and 31 of the *Relationships Act 2008* (Vic); ss 18 and 26 of the *Relationships Act 2003* (Tas).

<sup>7</sup> South Australia is currently subject to an exemption by the Commonwealth in respect of the *Sex Discrimination Act 1984* (Cth). This exemption is due to expire on 31 July 2016.

status) with equal access to the current provisions relating to parenting presumptions, assisted reproductive treatment and surrogacy, provided all other criteria and safeguards are satisfied.

It is important to note that the application and benefit of a relationship register extends to both homosexual and heterosexual couples, and offers clarity and consistency for government agencies tasked with determining the legal status of non-married couples in a myriad of circumstances, from parenting to visa applications.

Other laws that could be improved by the introduction of a relationships register include those relating to stamp duty, worker's compensation and the disposition of property — all of which currently contain features which may prevent LGBTIQ couples from accessing the same legal entitlements as other South Australian couples.

This Report has been prepared following a broad consultation process, starting with the comprehensive Audit Paper consultation, and later by more specific and targeted consultation, written submissions and a Roundtable discussion with interested community members and experts. SALRI is particularly grateful for the generous contributions of all Roundtable participants, many of whom have direct experience in interacting with these laws. The Report was also informed by relevant developments in other Australian jurisdictions.

From its research and the extensive consultation that it has conducted, SALRI is confident that the introduction of a relationship register in South Australia will constitute a vital step towards achieving equality and in providing a clear, accessible legal pathway for committed couples to have their relationships recognised at law.

This area of the law is rapidly evolving. There are a number of recent legislative attempts to address discrimination against non-heterosexual couples in the area of relationships recognition, including the Births Deaths and Marriages Registration (Recognition of Same Sex Marital Status) Amendment Bill 2016 (SA), jointly introduced by the Hon Tammy Franks MLC and Mr Pisoni MP<sup>8</sup> and the previous Family Relationships (Parenting Presumptions) Amendment Bill (SA), also jointly introduced by Mr Pisoni MP and the Hon Tammy Franks MLC.<sup>9</sup> These Bills, and their relevance to the more comprehensive legislative reforms suggested by SALRI, are described in this Report.

Further legislative reforms may well be forthcoming in areas such as assisted reproductive treatment, surrogacy agreements and adoption in response to various reviews by government

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<sup>8</sup> This Bill was introduced as a Private Members Bill on 9 March 2016. See South Australia, *Parliamentary Debates*, Legislative Council, 9 March 2016, 3303-3306 (Tammy Franks).

<sup>9</sup> See South Australia, *Parliamentary Debates*, Legislative Council, 25 March 2015, 445-447 (Tammy Franks); South Australia, *Parliamentary Debates*, House of Assembly, 15 October 2015, 2998-3001 (Mr Pisoni). This Bill is presently between the Legislative Council and the House of Assembly to resolve differing amendments made in both Houses to the original Bill.

departments. For example, a review of the legislative regime governing assisted reproductive treatment (ART) in South Australia is currently being undertaken by Health SA.<sup>10</sup> The Department of Education and Child Development (DECD) has recently published an independent review of the *Adoption Act 1988* (SA) undertaken on its behalf by Dr Lorna Hallahan of Flinders University.<sup>11</sup> These reviews will also be considered in this Report, with particular regard to the common themes relating to the removal of discrimination on the grounds of sexual orientation and gender identity.

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<sup>10</sup> This Review is examining the significant changes made to the Act in 2010, which incorporate a statutory requirement for review after five years. The changes reduced the extent of regulation of Assisted Reproductive Treatment in South Australia and allowed for the establishment of a donor conception register.

<sup>11</sup> Lorna Hallahan, *Adoption Act 1988 (SA) Review* (Social and Policy Studies, Flinders University, 2015). The Review can be viewed at <<http://www.decd.sa.gov.au/docs/documents/1/AdoptionActReviewReport.pdf>>. This Review was completed in September 2015 and published in February 2016. The key issues of that review are adoption information vetoes, adoption of a person over the age of 18 years, retention of the child's birth names, same-sex couples and adoption, single person adoption and discharge of adoption orders in certain circumstances.

## **Recommendations**

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### **Recommendation 1: Relationships register for South Australia**

That South Australia legislate to introduce a relationship register based on the Relationship Register models that exist in New South Wales and Victoria. The South Australian Relationships Register should include strong safeguards against fraud and multiple registrations, as well as a clear process for the dissolution of registered relationships, based on the equivalent provisions currently in force in NSW and Victoria.

### **Recommendation 2: Recognition of relationships registered interstate**

A relationship register in South Australia should contain relationship recognition provisions to recognise interstate registered relationships, based on the Victorian model.

### **Recommendation 3: Recognition of overseas marriages**

A relationship register in South Australia should include provisions that would enable automatic recognition of certain overseas marriages (as registered relationships) provided the overseas marriage was either (a) made under a law prescribed by regulation or (b) meets a set of safeguarding criteria, similar to the provisions introduced by the *Relationships Amendment Act 2016* (Vic). These provisions would ensure that the South Australian Parliament maintains control over the types of overseas marriage that are recognised and guard against the accidental recognition of a marriage not made by freely consenting adults (such as the result of coercion of child brides forcibly taken overseas).<sup>12</sup>

A relationships register should also provide for the issue of a ‘Certificate of Recognition of Overseas Marriage as Registered Relationship’ to provide non-heterosexual couples who have been married overseas with documentary recognition of their legal relationships status in South Australia.

Regulation 10 of the *Births Deaths and Marriages Registration Regulations 2011* (SA) should be amended to include the relationship status of couples in a ‘registered relationship’ (such as those couples married overseas) in the details to be included in the death certificate issued by the Registrar under Part 6 of the *Births, Deaths and Marriages Registration Act 1996* (SA). This would ensure that couples such as Marco and David Bulmer-Rizzi would have their overseas marriage recorded in the tragic eventuality of death in South Australia.

### **Recommendation 4: Enactment of a separate *Relationships Act***

A relationship register in South Australia should be implemented through the enactment of a separate *Relationships Act* and could be administered by the Office of Births Deaths and

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<sup>12</sup> See the Statutes Amendment (Child Marriage) Bill 2016. See further South Australia, *Parliamentary Debates*, House of Assembly, 10 March 2016, 4679-4680 (Ms Sanderson).

Marriages. Alternative language could be used to describe the relationships register (such as ‘registered civil union’) provided the recommended legal framework remains unchanged.

Consideration should be given to provisions such as those in the *Relationship Amendment Act 2016* (Vic) that vest the Registrar with a power to enter into arrangements for other services including ceremonies.

**Recommendation 5: Recognition of power of registrar to register relationship**

A note should be made to the relevant provision in the proposed South Australian relationship register legislation to recognise the power vested in the Registrar to enter a relationship in the Register (similar to that contained in s 9 of the *Relationships Register Act 2010* (NSW)).

**Recommendation 6: Registered relationships and property**

Section 3 of the *Domestic Partners Property Act 1996* (SA) should be amended to include the new legal category of ‘registered relationship’.

**Recommendation 7: Registered relationships and the *Family Relationships Act***

The new category of ‘registered relationship’ should be included within the current definition of ‘domestic partner’ in s 11A of the *Family Relationships Act 1975* (SA). Under the proposed reform, a couple would meet the definition of ‘domestic partner’ in s 11A of the *Family Relationships Act 1975* (SA) if they were either (a) a couple in a close personal relationship continuously for three years (or three of the past four years), (b) a couple in a close personal relationship with a child together or (c) a couple in a registered relationship.

This should be combined with a more specific list of amendments to particular Acts and Regulations (such as those listed in Appendix 2) referring to ‘domestic partners’ to ensure a consistent and successful implementation of this reform.

**Recommendation 8: Consistent interpretation of key terms**

A paramount term equivalent to ‘de facto partners’ in s 21C of the *Interpretation Act 1987* (NSW) should be included in the *Acts Interpretation Act 1915* (SA) to ensure consistency across all South Australian laws. This definition should include both ‘domestic partnerships’ and ‘registered relationships’ and should be inserted into the definitions within the *Acts Interpretation Act 1915* (SA) to ensure consistency in South Australian legislation.

**Recommendation 9: Registered relationships and the *Equal Opportunity Act***

Having regard to Recommendation 7, corresponding amendments should be made to the *Equal Opportunity Act 1984* (SA) to (a) amend the definition of ‘domestic partner’ in s 5 of that Act to include those in a ‘registered relationship’ and, in the same section, the definition of ‘marital or domestic partnership status’ should be extended to include ‘being a domestic partner (or in a registered relationship)’ thereby providing protection against discrimination on the grounds of being in a ‘registered relationship’ under s 85T of that Act, and (b) amend the definition of an

‘immediate family member’ in s 5 to include families that include couples in a registered relationship, and (c) ensure that the Act applies to the provision of assisted reproductive treatment services by amending s 5 which currently excludes fertilisation services from the definition of ‘services’ in that Act.

**Recommendation 10: Removal of term ‘marriage like relationship’**

Any definition of a relationship which refers to a ‘marriage like relationship’ is inherently problematic and difficult for courts to define and should be amended to omit the words ‘marriage like’.

**Recommendation 11: Registered relationships and parenting presumptions**

In accordance with Recommendation 7, s 10A and s 10C of the *Family Relationships Act 1975* (SA) should be amended to make it clear that:

- (a) where a child is born as a result of ART, the ‘qualifying relationship’ required before a couple is presumed to be the parents of the child includes couples in a registered relationship. This can be achieved by changing the definition of ‘domestic partner’ to include ‘registered relationship’ as recommended above. This would mean that non-married couples in a registered relationship who have a child as a result of ART will both be presumed to be the legal parents of that child.
- (b) introduce transitional provisions to ensure that couples who have had a child as a result of ART since the commencement of the *Family Relationships (Parentage) Amendment Act 2011* (SA)<sup>13</sup> (but prior to the establishment of the recommended relationships register provisions) who subsequently meet the amended definition of ‘qualifying relationship’ are presumed to be the parents of the child, pursuant to s 10C. This would mean that non-married couples who have already had a child as a result of ART since 2011 will have two legal options for gaining retrospective access to parenting rights: either registering their relationship, or meeting the cohabitation criteria required for ‘domestic partners’.

**Recommendation 12: Use of non-gendered language**

In accordance with the recommendations already made by SALRI in its Audit Paper, gendered language contained in the *Family Relationships Act 1975* (SA) and related laws should be amended or replaced with non-binary language (for example, replacing ‘woman’ or ‘man’ with ‘person’). The introduction of the relationship register should also be accompanied by replacing gender specific references to ‘paternity’ and ‘father’ with gender-neutral terms such as ‘parentage’ and ‘co-parent’.<sup>14</sup>

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<sup>13</sup> The *Family Relationships (Parentage) Amendment Act 2011* (SA) commenced on 15 December 2011.

<sup>14</sup> See, for example, the heading in s 7 ‘Recognition of paternity’ could be amended as ‘Recognition of parentage’. That section describes where a person shall be recognised as a ‘father’ of a child born outside of marriage. These

### **Recommendation 13: Access to assisted reproductive treatment**

In accordance with the recommendations made by SALRI in the Audit Paper, SALRI recommends that s 9 of the *Assisted Reproductive Treatment Act 1988* (SA) be amended to:

- clarify that a person can access ART if, in the person's circumstances, they are unlikely to become pregnant other than by an assisted reproductive treatment procedure; and
- include the guiding principle that people seeking to undergo ART procedures must not be discriminated against on the basis of their sexual orientation, marital status or religion.

Regard should also be had to the findings of the ongoing statutory review of the *Assisted Reproductive Treatment Act 1988* (SA), particularly if any recommendations are made relating to donor conception registers and the regulation of fertility services and ART providers (including any relevant considerations relating to 'social egg freezing').

In accordance with Recommendations 7 and 11 above, SALRI recommends that the parenting presumptions contained in Part 2A of the *Family Relationships Act 1975* (SA) be amended to reflect the recommended changes to the definition of 'domestic partner' in s 11A, to include couples in a 'registered relationship'. This would mean that the non-heterosexual parents of a child born as a result of ART would both be recognised as the legal parents of the child, provided they are either in a registered relationship or met the cohabitation requirements of 'domestic partner'.

### **Recommendation 14: Access to surrogacy for non-heterosexual couples**

In accordance with Recommendation 7, access to the lawful surrogacy agreement provisions contained in Part B of the *Family Relationships Act 1975* (SA) should be extended to include non-heterosexual couples.

### **Recommendation 15: Access to surrogacy for domestic partners**

In accordance with Recommendation 7, the definition of 'commissioning parents' for a recognised surrogacy agreement in s 10HA(2) of the *Family Relationships Act 1975* (SA) should be amended to include 'commissioning parents' who are legally married or in a 'domestic partnership'.

### **Recommendation 16: Consistent approach to surrogacy agreements and resulting parenting orders**

Ensure that the amended definition of 'commissioning parents' in Part 2B of the *Family Relationships Act 1975* (SA) is consistent in its application for both a recognised surrogacy agreement under a recognised surrogacy agreement (s 10HA) and an order for parentage (s 10HB) of the Act.

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gender specific terms could be amended to 'co-parent' and marriage could be extended to include 'domestic partnership'.



**Recommendation 17: Access to surrogacy for singles**

In keeping with the changes in other Australian jurisdictions, South Australia should provide access to Part 2B of the *Family Relationships Act 1975* (SA) to single people, as well as couples.

**Recommendation 18: Access to adoption for non-heterosexual couples**

Remove the discriminatory impact of s 12 of the *Adoption Act 1988* (SA) that currently excludes same sex couples from eligibility as prospective adoptive parents, as supported by the recent DECD Review of the *Adoption Act*.

## Introduction

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The South Australian Law Reform Institute ('SALRI') was established in December 2010. Based at the Adelaide University Law School, SALRI was formed by an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia.

When conducting reviews and research on proposals from the Attorney General, SALRI focuses on the modernisation of the law; the elimination of defects in the law; the consolidation of any laws; the repeal of laws that are obsolete or unnecessary and where possible uniformity between the laws of other States and the Commonwealth.

SALRI provides reports to the Attorney-General or other authorities on the outcomes of reviews and/or research and makes recommendations based on those outcomes. Ultimately, it is up to the State Government and the Parliament to implement any recommended changes to South Australian law.

This Reference is about identifying the laws and regulations in South Australia that discriminate against individuals and families on the basis of their sexual orientation, gender, gender identity or intersex status.<sup>15</sup> This includes laws that discriminate against lesbians, gays, bisexuals, trans, intersex and queer people.

The wider context for these recommendations is the South Australian Government's stated policy for a South Australia where the presence and contributions of LGBTIQ people are welcomed and celebrated and where their ability to participate fully in all aspects of social and economic life, free from discrimination and prejudice, is maximised.<sup>16</sup>

On 7 September 2015, SALRI completed the first part of its work with respect to this Reference by publishing an Audit Paper entitled *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation* (the 'Audit Paper'). The Audit Paper outlines in some detail the current South Australian legislative regime, as well as the discriminatory effect of some aspects of this regime on the lives of LGBTIQ people in South Australia. The Audit Paper argues a strong case for reform.

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<sup>15</sup> For the full text of the Reference see His Excellency, the Hon Hieu Van Le AO, 'Speech to the Fifty-Third Parliament of South Australia' (Speech delivered at the Opening of the Second Session of the Fifty-Third Parliament of South Australia, 10 February 2015) <<http://www.premier.sa.gov.au/images/govern/GovernorSpeech100215.pdf>>, 20-21.

<sup>16</sup> Government of South Australia, *LGBTIQ State of Play: Equality for Lesbian, Gay, Transgender, Intersex and Queer (LGBTIQ) People* (2015) <<http://yoursay.sa.gov.au/documents/lgbtiq-state-of-play.pdf>>.

## The Audit Paper

The Audit Paper was prepared following an extensive desktop review of all South Australian laws, followed by extensive consultation by SALRI with LGBTIQ individuals and community organisations and included a public submission process facilitated by the State Government's YourSAy website.<sup>17</sup>

The individuals and organisations consulted asked pertinent questions about the law and the values it enshrines. How does the law assist me to be the person I am? How does it support me to engage, free from discrimination, in the community in which I live? These and other questions served to highlight the discriminatory barriers that members of the LGBTIQ communities often encounter in their daily lives.

The desktop review identified over 140 Acts or Regulations that, on their face, discriminate against individuals on the basis of sex or gender diversity. The vast majority of the Acts or Regulations in this category discriminate 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.<sup>18</sup>

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. These included a lack of adequate legal protection against discrimination, particularly on the grounds of gender identity and intersex status; legal barriers to relationship recognition and exclusion through a number of regimes designed to help couples start a family and raise children, such as access to artificial reproductive treatments.

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 that require further review and reporting.<sup>19</sup> These areas include the registration of sex at birth and 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 to the offence of murder.

In the Audit Paper, SALRI found that a strong case for reform had been made in respect to the current law governing legal parentage and that changes to the legal recognition of relationships

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<sup>17</sup> The YourSAy website is described in the Audit Paper, above n 1, 19.

<sup>18</sup> The Statutes Amendment (Gender Identity and Equity) Bill 2016 addresses these concerns raised in the Audit Paper. See further South Australia, *Parliamentary Debates*, House of Assembly, 19 February 2016, 4209-4213.

<sup>19</sup> See Audit Paper above n 1, 11-15, for a summary of those recommendations regarding the five areas which include legal recognition of sex; legal recognition of relationships; starting a family and parenting rights; protections against unlawful discrimination and legal definitions of sex and gender.

are necessary to address discrimination on the grounds of marital and relationship status.<sup>20</sup> This Report considers these laws and the relevant regulations in more detail and makes specific recommendations for legislative change in relation to relationship equality with respect to parenting rights.

## **Methodology**

The preparation of this Report has involved several stages. First, following a detailed desktop review of all South Australian laws and regulations, and the provision of plain English ‘Fact Sheets’ on key issues, SALRI undertook extensive community consultation with the South Australian LGBTIQ community to identify laws that discriminated on the grounds of sexual orientation, gender identity and intersex status. SALRI then utilised the Government’s YourSAY website and invited interested parties and members of the public to provide submissions or request meetings with SALRI to discuss its work.<sup>21</sup> Secondly, SALRI considered submissions made, legislative regimes in other jurisdictions, and relevant law reform and government reports. This work, reflected in the Audit Paper, gave rise to the clear finding that the current South Australian laws in this area discriminate on the grounds of relationship recognition. It was recommended that further review be undertaken to evaluate the potential models for reform in this area, specifically recommending consideration of the NSW relationships register model.

Following the release of the Audit Paper, SALRI released two Discussion Papers and hosted two separate Roundtables to facilitate discussion among interested community members and experts about how to progress law reform frameworks that would remove the discriminatory features of the existing South Australian laws, including the relationships register model.<sup>22</sup> A number of shared views were expressed at the Roundtables as to the best options for law reform. These views were summarised in two Roundtable Reports (attached as Appendix 1) which were then made publicly available for comment on SALRI’s website.

The final step was to call for and receive additional written submissions relating to the issues raised in relation to the present Report and the questions posed in the Roundtable Reports. No further written submissions were received.

The information gained at each of these stages has informed the options evaluated and recommendations contained in this Report.

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<sup>20</sup> Ibid 13 [2.4].

<sup>21</sup> Government of South Australia, *Your SAY: LGBTIQ – Removing Discrimination from SA laws* (2015) <<http://yoursay.sa.gov.au/yoursay/lgbtiq-removing-discrimination-from-sa-laws>>.

<sup>22</sup> The Roundtables were held on 15 February 2016 and 22 February 2016 at the Adelaide University Law School, Adelaide, South Australia, hosted by the South Australian Law Reform Institute. The Roundtable was conducted under Chatham House rules. A list of Roundtable participants is contained in Appendix 1.

## Terminology

Consistent with the Audit Paper, this Report adopts the following terminology, informed by that used by Australian Human Rights Commission in its 2015 *Resilient Individuals* Report.<sup>23</sup>

**Gender:** refers to the way a person identifies or expresses their masculine or feminine characteristics.

**Gender identity:** refers to a person's deeply held internal and individual sense of gender. A person's gender identity is not always exclusively male or female and may or may not correspond to their sex.

**Intersex:** refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically 'male' or 'female'.

**LGBTIQ:** an acronym used to refer to lesbian, gay, bisexual, trans, intersex and queer people collectively.

**Sex:** refers to a person's biological characteristics. A person's sex is usually described as being male or female, however some people may not be exclusively male or female (intersex).

**Trans:** is a general term for a person whose gender identity is different to their sex at birth.

SALRI appreciates that the meaning and use of the terms 'sex' and 'gender' are contentious. SALRI remains of the view that the terminology adopted in the Audit Paper and preferred by the Australian Human Rights Commission is sufficiently inclusive and clear for the purposes of this Report.

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<sup>23</sup> Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights, National Consultation Report* (2015) ('Resilient Individuals Report') <[https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015\\_Web\\_Version.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf)>.

## **PART 1: EQUAL LEGAL RECOGNITION OF NON-HETEROSEXUAL RELATIONSHIPS**

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### **1.1 The Need for Reform**

1.1.1 The need to change South Australia’s laws relating to legal recognition of relationships and parenting rights arises from the following factors, each summarised below and discussed in further detail in the Audit Paper:

- the need to ensure South Australian laws are not inconsistent with the relevant provisions of the *Sex Discrimination Act 1984* (Cth);
- the discriminatory impact of the *Marriage Act 1961* (Cth); and
- the discriminatory impact of the existing South Australian laws on the lives of non-heterosexual couples and their families.

Each of these factors are summarised below and discussed in further detail in the Audit Paper.

#### **a. The Commonwealth Sex Discrimination Act Protections**

1.1.2 In 2013, the Commonwealth made it illegal to discriminate against people on the basis of their gender identity, sexual orientation, or intersex status.<sup>24</sup> LGBTIQ people are now able to complain to the Australian Human Rights Commission about discrimination on any of those grounds. South Australia is currently subject to an exemption by the Commonwealth in respect of the *Sex Discrimination Act 1984* (Cth). This exemption is due to expire on 30 June 2016.<sup>25</sup> There is clearly a degree of urgency and a compelling need to reform those laws in South Australia that continue to operate differently — and detrimentally — with respect to non-heterosexual couples, such as those laws that bestow immediate legal rights (such as parenting presumptions) on married couples, but require evidence of cohabitation for those who cannot access marriage due to their sexual orientation or gender identity.<sup>26</sup>

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<sup>24</sup> *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

<sup>25</sup> All Australian Government departments and agencies are expected to progressively align their existing and future business practices by 1 July 2016.

<sup>26</sup> Section 5 of the *Equal Opportunity Act 1984* (SA) also prohibits discrimination on the basis of sexual orientation and gender identity and provides protection against unlawful discrimination on the grounds of ‘marital or domestic partnership’ status. Section 5 defines ‘marital or domestic partnership’ as: (a) being single; or (b) being married; or (c) being married but living separately and apart from one’s spouse; or (d) being divorced; or (e) being widowed; or (f) being a domestic partner. A ‘domestic partner’ is described in the same terms as in the *Family Relationships Act 1975* (SA). Section 85T(2) sets out the criteria for establishing discrimination on the grounds of ‘marital or domestic partnership status’.

**b. The Marriage Act 1961 (Cth)**

1.1.3 Marriage is defined under the *Marriage Act 1961* (Cth) as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.<sup>27</sup> This definition was inserted in 2004 by the *Marriage Amendment Act 2004* (Cth). This requirement discriminates against same sex couples, and people who do not fit within the binary concepts of ‘man’ and ‘woman’.

1.1.4 The discriminatory features of the *Marriage Act 1961* (Cth) have been well documented, including by a 2013 Resolution of the Council of the Law Society of South Australia, which argued:

Marriage is a legal and social relationship. Exclusion from participation in the state of marriage may carry legal and social disadvantage.

The Society therefore supports the removal of discrimination against, and the legal recognition of, marriage equality.<sup>28</sup>

1.1.5 As noted by the Law Society of South Australia, the discriminatory impact of the *Marriage Act 1961* (Cth) can result in significant social exclusion, particularly given that marriage is widely perceived as an important institution that reflects a cultural understanding of relationships.

1.1.6 As noted in the Audit Paper, the *Marriage Act 1961* (Cth) is a Commonwealth law and constitutional rules apply that limit the types of laws South Australia can make about marriage.<sup>29</sup> For the purposes of this Report, SALRI has focussed its attention on identifying and removing current areas of discrimination in South Australian law and on the possible options for reform that can be made within the current Commonwealth law (whilst accepting that valid criticisms can be made of that law).

1.1.7 SALRI is aware that the issue of marriage equality is central in the national debate relating to the removal of discrimination on the grounds of sexual orientation, and is highly relevant to the lived experience of non-heterosexual couples in South Australia and their access to full legal rights, including parenting rights. Indeed, it is precisely because legal marriage is denied to non-heterosexual and gender diverse couples that the need for alternative relationship recognition laws in South Australia is so pressing (though the benefits of such laws is not confined to non-heterosexual and gender diverse couples).

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<sup>27</sup> *Marriage Act 1961* (Cth) s 5.

<sup>28</sup> Law Society of South Australia, Council Resolution, 2 September 2013 (carried unanimously) (forming part of Submission No 44).

<sup>29</sup> *Australian Constitution* s 51 (xxi) and s 109.

1.1.8 The interaction of any changes to South Australian relationship recognition laws and the *Marriage Act 1961* (Cth) are limited as the proposed relationship register would introduce into South Australia a completely separate relationship category that exists independently of marriage and does not impinge on that the definition of marriage. The two schemes co-exist without dispute in other Australian jurisdictions. There is no constitutional obstacle to such a State law.

1.1.9 Any reform to the definition of marriage under *Marriage Act 1961* (Cth) could have significant consequences for South Australian laws, particularly those laws identified in Groups Two and Three of the Audit Paper. It is likely that should any reform of this nature proceed, the South Australian Government would need to swiftly assess the laws identified in the Audit Paper to determine whether reform is needed, for example, to remove references to ‘husband’ and ‘wife’, or to clarify whether adoption and surrogacy is available to same sex married couples.<sup>30</sup> Further, changes would be necessary to address the full range of existing provisions that discriminate on the basis of marital status, as outlined in the Table at Appendix 1 of the Audit Paper (a detailed Table outlining the 140 South Australian Acts and Regulations that are discriminatory against the LGBTIQ community).

## **1.2 Discriminatory Features of the Current Law**

1.2.1 Many of the South Australian laws relating to parenting and starting a family (such as those in the *Family Relationships Act 1975* (SA)) require certain ‘qualifying relationships’ between parents that either draw upon marriage or marriage-like relationships, or require cohabitation periods to recognise domestic partnerships (known as de facto relationships in South Australia until 2006, and still known as such in other States). Not only do these provisions add unnecessary complexity and uncertainty to South Australian laws, they also may exclude many non-heterosexual or unmarried couples from important parenting rights.

1.2.2 For example, as a result of the *Marriage Act 1961* (Cth), non-heterosexual couples cannot get legally married in Australia. This leaves only one legal pathway under South Australian law for such couples who seek legal recognition of their committed, loving relationship. They must demonstrate that they are ‘domestic partners’ for the purpose of the *Family Relationships Act 1975* (SA). This means that they must show that they have lived together to cohabit for a period of three years (or three years over a four-year period). Non-heterosexual couples who cannot satisfy the criteria can then be denied a range of rights applying to married couples, including parenting rights with respect to their children. Non-heterosexual couples who move to South Australia can also be denied these rights, even if their relationship was legally recognised overseas or interstate. While SALRI notes that it is possible for couples to seek a court order to have their partnership

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<sup>30</sup> See, for example, Terry Barnes ‘We’re ignoring the flow-on effects in the rush to say “I do” on same-sex marriage’, *The Drum* (online), 2 June 2015 <<http://www.abc.net.au/news/2015-06-02/barnes-were-ignoring-the-flow-on-effect/6513690>>.



recognised as a ‘domestic partnership’,<sup>31</sup> this is a costly, uncertain exercise that continues to include potentially discriminatory considerations of cohabitation.

1.2.3 The full range of discriminatory features of South Australian laws relating to access to parenting rights are explored in detail in the Audit Paper, but for convenience a number of examples including assisted reproductive treatment, adoption, surrogacy and, in particular, those relating to parenting rights are summarised in this Report.

1.2.4 For example, SALRI has heard how the current South Australian laws present serious barriers for committed non-heterosexual couples who regularly spend time overseas or interstate for work or family reasons to meet the cohabitation requirements in the current definition of ‘domestic partner’. SALRI has also heard about the acute difficulties facing committed non-heterosexual couples who have not been able to live together due to non-acceptance by family members or other discriminatory attitudes or practices that preclude them from potentially satisfying the three year cohabitation requirement.

Participant Quote:

My (female) partner and I have been together for two years. We live together. We want to start a family together and are engaged to be married (even though it isn’t legal). We feel that we are a defacto couple. Our finances are shared and we are committed for life. According to SA law our relationship does not have this status because we have not been living together for 3 years. The cut off point is arbitrary and has implications for us financially and whether I as the non birth mother can be named on the birth certificate. [Audit Paper, Submission 11]

1.2.5 The situation of non-heterosexual couples married overseas or registered interstate who have not had their relationship recognised in South Australia has gained recent prominence.<sup>32</sup>

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<sup>31</sup> See *Family Relationships Act 1975* (SA) s 11B. See also Legal Services Commission, *Law Handbook* <<http://www.lawhandbook.sa.gov.au/ch21s05s04.php>> which provides: ‘If the relationship was for less than three years and there is no child of the relationship, either of the former partners may seek a declaration from the Court that they were domestic partners, on the basis that they were living together in a close personal relationship and that the interests of justice require that a declaration be made. This application is made under the *Family Relationships Act 1975* (SA), which sets out what the court must consider when making its decision. An application for a declaration must be supported by an *affidavit* indicating the names and addresses of anyone whose interests may be affected by the declaration [*Magistrates Court (Civil) Rules 37(6)*] and served on all these persons [r 37(7)].’

<sup>32</sup> This includes the highly publicised situation in January 2016 in Adelaide (described in the introduction) of David Bulmer-Rizzi whose marital status was not initially recognised on his death certificate. See further Daisy Dumas, ‘Australian authorities refuse to recognise same-sex marriage of man who died on honeymoon’, *Sydney Morning Herald* (online), 21 January 2016, <<http://www.smh.com.au/national/australian-authorities-refuse-to-recognise-samesex-marriage-of-man-who-died-on-honeymoon-20160120-gma114.html>>; Australian Broadcasting Corporation (ABC), *SA Premier to apologise after David Bulmer-Rizzi’s same-sex marriage not recognised on death certificate* (21 January 2016) ABC News, <<http://www.abc.net.au/news/2016-01-20/authorities-fail-recognise-same-sex-marriage-death-certificate/7102164>>.

One local media report described the tragic recent case of David and Marco Bulmer-Rizzi as follows:

David Bulmer-Rizzi, 32, was killed in a freak accident in Adelaide, while honeymooning there with his husband Marco. The couple were married in the United Kingdom last year, but under South Australian law their marital status was not recognised. It means David Bulmer-Rizzi's death certificate was stamped "never married". "When the funeral director came that's when I was told that because Australia doesn't recognise same-sex marriage, it [the death certificate] will say 'never married'," Marco Bulmer-Rizzi told BuzzFeed News.

"I asked at that point whether it was possible to say nothing [about his marital status], and I was told, 'No, that's not one of the drop down options on the computer'... "I couldn't refuse. There was nothing I could have done. They wouldn't say married. They wouldn't leave it blank. They would only say, 'never married'. This was confirmed by email because we complained afterwards." ...

Australian Human Rights Commissioner Tim Wilson said it was disappointing South Australia was behind other states in removing discrimination against same sex couples from its legislation.

"It's also disappointing that it's taken a man's death and the shock and horror that must be going through the minds of the father and of this man's husband that their relationship will never be fully recognised in the documents and records related to end of his life," Mr Wilson said.<sup>33</sup>

1.2.6 As discussed below, SALRI is of the view that the introduction of a relationships register in South Australia would address the discrimination arising from the current South Australian laws relating to the legal recognition of both non-married heterosexual and non-heterosexual couples. Such a register would address discrimination experienced by non-heterosexual South Australian couples who have not been able to access marriage, as well as providing legal recognition for non-heterosexual couples who have been married in overseas jurisdictions. For example, as discussed below, it would address the discrimination arising in the case of David and Marco Bulmer-Rizzi by providing a legal mechanism for the automatic legal recognition of a same-sex marriage solemnised overseas.

### **1.3 Benefits of Adopting a Relationships Register Model**

1.3.1 SALRI considers that the inclusion of the new category of 'registered relationship' within the *Family Relationships Act 1975* (SA) would provide an opportunity to remove the features of the current laws that discriminate on the basis of marital status and sexual orientation. In the absence of any change to the *Marriage Act 1961* (Cth), SALRI considers that the proposed registered relationship model provides the following distinct benefits:

- a. A registered relationship model does not discriminate on the basis of sexual orientation or gender identity, thereby providing legal recognition and the right for *all* South Australians to have their relationship recognised. This is consistent with Australia's

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<sup>33</sup> Ibid.

relevant human rights obligations,<sup>34</sup> Commonwealth anti-discrimination law<sup>35</sup> and South Australia's equal opportunity law<sup>36</sup> (in relation to which several Bills have been introduced into South Australian Parliament).<sup>37</sup>

- b. A registered relationship model establishes an accessible and reliable administrative system of formal relationship recognition and documentary proof of a committed relationship that does not hinge on arbitrary cohabitation criteria. It would overcome the difficulties that non-heterosexual couples experience under the current *Domestic Partnerships Act 1996* (SA), by offering a readily accessible relationship category which allows couples to have their relationship legally recognised and legally dissolved. This system also contains important safeguards, similar to those relating to marriage, to guard against fraud or misuse.
- c. A registered relationship model creates a clear and simple new category of legal relationship that can be referred to in other laws, such as the *Family Relationships Act 1975* (SA), to systematically address any remaining discriminatory features in those laws. For example, if 'registered relationship' is added to the current definitions of 'qualifying relationship' under the *Family Relationships Act 1975* (SA), it would mean that non-heterosexual (and non-married heterosexual) couples who have gone through the

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<sup>34</sup> These include the *International Covenant on Economic, Social and Cultural Rights* in 1975; the *International Covenant on Civil and Political Rights*; the *Convention on the Elimination of All Forms of Discrimination against Women*; and the *Convention on the Rights of the Child*. The United Nations Human Rights Council has also issued a number of statements concerning the rights of all people regardless of their sexual orientation and gender identity. Additionally, principles in the *Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (also known as the Yogyakarta Principles) provide non-legally binding guidance and outline the right to recognition of people before the law regardless of gender identity, and state that laws should uphold the principles of equality and non-discrimination and that legislative steps should be taken to prohibit and eliminate discrimination on the basis of sexual orientation and gender identity.

<sup>35</sup> In 2013, the Commonwealth made it illegal to discriminate against people on the basis of their gender identity, sexual orientation, or intersex status. LGBTIQ people are now able to complain to the Australian Human Rights Commission about being discriminated against on any of those grounds. South Australia is currently subject to an exemption by the Commonwealth in respect of the *Sex Discrimination Act 1984* (Cth). This exemption is due to expire on 31 July 2016.

<sup>36</sup> Section 5 of the *Equal Opportunity Act 1984* (SA) also prohibits discrimination on the basis of sexual orientation and gender identity and provides protections against unlawful discrimination on the grounds of 'marital or domestic partnership' status. Section 5 defines 'marital or domestic partnership' as: (a) being single; or (b) being married; or (c) being married but living separately and apart from one's spouse; or (d) being divorced; or (e) being widowed; or (f) being a domestic partner. 'Domestic Partner' is described in the same terms as in the *Family Relationships Act 1975* (SA). Section 85T(2) sets out the criteria for establishing discrimination on the grounds of 'marital or domestic partnership status'.

<sup>37</sup> See, for example, the Family Relationships (Parentage Presumptions) Amendment Bill 2015; Same Sex Marriage Bill 2013 (SA); Marriage Equality Bill 2012 (SA) and the Civil Partnerships Bill 2012 (SA). See also the South Australian Department of Education and Child Development's Review of the *Adoption Act 1988* (SA) (see Hallahan, above n 11); South Australian Social Development Standing Committee's Inquiry into Same-Sex Parenting.

registration process could access the full range of parenting rights under that Act, providing a clear and consistent solution to the current ad hoc approach to recognising the parenting rights of unmarried parents under that Act.

- d. A registered relationships model provides a framework for the immediate legal recognition of non-heterosexual marriages solemnised overseas or non-heterosexual relationships recognised under interstate laws<sup>38</sup> (while noting that the *Marriage Act 1961* (Cth) prevents the recognition of overseas marriages between non-heterosexual couples in Australia and that those foreign marriages do not become a marriage for Commonwealth purposes). This model can also be tailored to ensure that safeguards exist to protect against the recognition of overseas marriages that may have been solemnised in circumstances of lack of consent, coercion, duress or where one party is a child.<sup>39</sup>
- e. A registered relationship model could operate effectively alongside the existing domestic partnerships regime in South Australia that works well in many areas to provide protection for unmarried couples. For example, a 'registered relationship' can simply be added to the definition of 'domestic partner' in all or most laws currently referring to 'domestic partners' without creating legal uncertainty for couples already meeting the criteria for domestic partnership or diluting the protective aspects of the existing regime. Retention of the domestic partnership regime is necessary to protect parties who either do not wish for whatever reason to register their relationships or for couples who are not sufficiently informed about the legislation and are unaware of the possibility of having their relationships recognised on a register.<sup>40</sup>
- f. A registered relationship model can be based on existing models currently working well in other Australian jurisdictions such as New South Wales and Victoria, with these jurisdictions providing a legislative and administrative template for South Australia to adjust where necessary. These models contain provisions that set out eligibility requirements for applicants, powers of the registrar to request particular information from applicants, circumstances where a registered relationship will be revoked by events or considered void, processes for the dissolution of registered relationships and offences for the provision of false or misleading information.

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<sup>38</sup> See, for example, *Relationships Amendment Act 2016 (Vic)* which inserts a new Chapter 2A into the *Relationships Act 2008* (Vic).

<sup>39</sup> See, for example, s 7 of the *Relationships Amendment Act 2016* (Vic) which introduces a new s 33B which provides that recognised overseas marriages must be between two adult persons; entered into consensually; not be between persons who are related by family; and not be entered into by a person who is already married and not be entered into by a person who is already in a relationship that is registered or formally recognised under that law.

<sup>40</sup> New South Wales Law Reform Commission, *Relationships*, Report No 113 (2006) 77, [4.6].

- g. The inclusion of the proposed new category of ‘registered relationship’ within the existing definition of domestic partner would integrate well with the resolution of disputes under the *Family Law Act 1975* (Cth) regime, and provide safeguards for the determination of disputes relating to children born to couples in registered relationships.<sup>41</sup>

1.3.2 SALRI is of the view that the registered relationship model offers an opportunity for South Australia to remove discriminatory features of its laws in a way that promotes consistency and clarity. This view is supported by comparative research and community consultation.

#### **1.4 Key Features of the Relationship Register Model**

1.4.1 Noting its similarities to the relevant laws in Victoria,<sup>42</sup> the Australian Capital Territory<sup>43</sup> (which refers to ‘civil unions’) and Tasmania<sup>44</sup> (which refers to ‘significant relationships’), SALRI considers that both the *Relationships Register Act 2010* (NSW) and the *Relationships Act 2008* (Vic) provide useful models for any reform in South Australia. A similar model was contemplated in a Private Member’s Bill, the Civil Partnerships Bill, introduced by the Hon RB Such to the South Australian Parliament in 2012.<sup>45</sup>

1.4.2 The NSW Relationships Register commenced operation in July 2010, and the Victorian model, introduced in 2008, was amended in 2016.<sup>46</sup> Under these regimes, adults who are in a relationship as a couple, regardless of sex or gender, can apply for registration of their relationship, provided at least one of them lives in the requisite State.<sup>47</sup> To be eligible to register as a couple, the two people must be over 18, not married or in another legally recognised or registered relationship, and not related by family.<sup>48</sup> The couple do not have to live together to be eligible to register their relationship. In NSW, applicants must complete a statutory declaration to

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<sup>41</sup> *Family Law Act 1975* (Cth) s 4AA contains a definition of ‘de facto’ partner that includes consideration of whether a person was in a ‘registered relationship’ under the laws of a State or Territory. The Family Court and the Federal Circuit Court deal with issues related to the children of de facto relationships in the same way as the children of married couples. For further information see Family Court of Australia Website, ‘De facto Relationships’ (20 February 2015) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/separation-and-divorce/defacto-relationships/>>.

<sup>42</sup> *Relationships Act 2008* (Vic).

<sup>43</sup> *Civil Unions Act 2012* (ACT).

<sup>44</sup> *Relationships Act 2003* (Tas).

<sup>45</sup> See further South Australia, *Parliamentary Debates*, House of Assembly, 18 October 2012, 3275-3276.

<sup>46</sup> Following the passage of the Relationships Register Bill 2010 (NSW) on 1 July 2010 and the passage of the Relationships Bill 2007 (Vic) on 15 April 2008.

<sup>47</sup> *Relationships Register Act 2010* (NSW) s 5; *Relationships Act 2008* (Vic) s 6.

<sup>48</sup> *Relationships Register Act 2010* (NSW), s 5; *Relationships Act 2008* (Vic) ss 6, 7.

register the relationship, and can find the particular form on the NSW registry of the Births, Deaths and Marriages website. Relevant proof of identification must be provided and certified.

1.4.3 Couples who apply do not have to provide any further documentary evidence or proof of their relationship. However, it remains a serious and solemn process, with serious consequences for frivolous applications or attempted fraud. For example, in NSW it is an offence to wilfully make a false statutory declaration knowing its contents to be untrue or to provide false and misleading information in such a context.<sup>49</sup> A registration will also be considered void if the agreement of one or both persons to register was obtained by fraud, duress or other improper means; if at the time of registration either party was intellectually incapable of understanding the nature and effect of registration or if the relationship was prohibited (such as where one of the persons is already married).<sup>50</sup>

1.4.4 Once an application is made, there is a 28-day cooling off period in which either party can withdraw the application.<sup>51</sup> After that time, the Registrar will register the relationship and issue the couple with a certificate recording the event if the appropriate application has been submitted and the fee paid.<sup>52</sup> It is argued that it is desirable to have a safe-guarding ‘cooling off’ period as it allows time for parties to contemplate the significance of their decision and allows the Registrar some time should any concerns arise relating to duress or false statutory declarations.<sup>53</sup> A party can apply to the Civil and Administrative Tribunal for a review of any decision made by the Registrar under this Act.<sup>54</sup>

1.4.5 Couples in registered relationships in NSW are recognised as ‘de facto partners’ for the purposes of most NSW Acts, and are subject to certain obligations or restrictions under NSW law. This means that wherever ‘de facto’ couples can access legal rights, a couple in a registered

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<sup>49</sup> Penalties of up to seven years imprisonment may be imposed for making a false declaration for material gain.

<sup>50</sup> *Relationships Register Act 2010* (NSW) s 14.

<sup>51</sup> *Ibid* s 8. *Relationships Act 2008* (Vic) s 10.

<sup>52</sup> *Relationships Register Act 2010* (NSW) s 9; *Relationships Act 2008* (Vic) s 10.

<sup>53</sup> See further New South Wales, *Parliamentary Debates*, Legislative Council, 12 May 2010, 22489 (John Hatzistergos, Attorney General): ‘It is important to recognise that in order to be able to be registered it is necessary to swear a statutory declaration ... Once that registration takes effect, those persons are unable to register in another relationship. We do not have a requirement that people wishing to get married have to be in a relationship for 12 months. In fact, a couple can meet one day and get married in a month’s time... I do not believe people who sign a statutory declaration saying that they are in an exclusive relationship, with all the penalties that can flow from signing a false statutory declaration, will do so lightly. This is about ensuring dignity and fairness to individuals who choose to live their lives differently from the way some of us would. It is about respecting the decision they have made and ensuring they can access the various entitlements that governments provide without having to go through the indignity of establishing their relationship.’

<sup>54</sup> *Relationships Register Act 2010* (NSW) s 18. Any review would be conducted according to the *Administrative Decisions Review Act 1997* (NSW).

relationship can do so too.<sup>55</sup> This applies to parenting rights such as access to in vitro fertilisation (IVF), presumptions of parentage for children born as a result of IVF and access to surrogacy arrangements.<sup>56</sup> In Victoria, couples are recognised as in a ‘domestic relationship’.<sup>57</sup> In both cases, the registered relationship falls within the definition of ‘de facto’ relationship under the *Family Law Act 1975* (Cth)<sup>58</sup> with important implications for the administration of family law and family court related proceedings including those relating to parentage orders, maintenance orders, property settlements and family violence.

1.4.6 Registered couples can also use their certificate of registration to access various entitlements, services and records under relevant laws and some service providers may choose to accept registration of a relationship as proof of the legitimacy of that relationship.

### **Revocation and Dissolution of Registered Relationships and Protections Against Multiple Registered Relationships**

1.4.7 The NSW and Victorian models also provide a clear legal process for dissolving a registered relationship. Under both Acts, either or both parties can apply to revoke the registered relationship.<sup>59</sup> If only one partner is revoking the registration, they must provide proof they have served notice on the other.<sup>60</sup> If the partner cannot serve notice the Registrar has discretion to dispense with the notice requirement. Revocation is an administrative procedure and there is no need to engage lawyers or go to court. There is then a cooling off period of 90 days before the registration is revoked by the Registrar.<sup>61</sup> Registration of a relationship is also revoked by law on the death or marriage of a person in the relationship.<sup>62</sup> As discussed further below, the inclusion of the proposed new category of ‘registered relationship’ within the existing definition of

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<sup>55</sup> The definition of ‘de facto partners’ in s 21C of the *Acts Interpretation Act 1987* (NSW) was amended to include a person in a registered relationship (whether of the same sex or different sex).

<sup>56</sup> For the purpose of reproductive technologies in NSW, the definition of ‘spouse’ as defined in s 4 of the *Assisted Reproductive Technology Act 2007* (NSW) includes the person’s ‘de facto partner’. As noted above, s 21C of the *Acts Interpretation Act 1987* (NSW) defines ‘de facto partners’ and includes a person in a registered relationship (whether of the same sex or different sex). Same sex couples are recognised in the *Status of Children Act 1996* (NSW) under s 14(1A) which provides that when a woman who is the de facto partner of another woman undergoes and becomes pregnant from a fertilisation procedure, the other woman is presumed to be a parent of any child born as long as they consented to the procedure.

<sup>57</sup> *Relationships Act 2008* (Vic) Part 2.2.

<sup>58</sup> *Family Law Act 1975* (Cth) s 4AA(2)(g) provides that being in a registered relationship under a State or Territory law is a factor taken into consideration when determining whether a couple is in a ‘de facto’ relationship for the purposes of the *Family Law Act 1975* (Cth).

<sup>59</sup> *Relationships Register Act 2010* (NSW) ss 11, 13; *Relationships Act 2008* (Vic) s 12(1).

<sup>60</sup> *Relationships Register Act 2010* (NSW) ss 11, 13; *Relationships Act 2008* (Vic) s 12 (2).

<sup>61</sup> *Relationships Register Act 2010* (NSW) s 12; *Relationships Act 2008* (Vic) s 15.

<sup>62</sup> *Relationships Register Act 2010* (NSW) s 10; *Relationships Act 2008* (Vic) s 11.

domestic partner would integrate well with the *Family Law Act 1975* (Cth) regime,<sup>63</sup> and provide safeguards for the determination of matters relating to children born to couples in registered relationships, including arrangements for care of children and child support and spousal support. Property matters arising from the dissolution of registered relationships could also be dealt with under State legislation — for instance under a Domestic Partnership Agreement made under the *Domestic Partners Property Act 1996* (see [1.7.1]–[1.7.11] for further detail).

1.4.8 The NSW and Victorian models also contain a number of provisions that guard against the registration of multiple relationships involving the same person, or the registration of a relationship by a person who is married to another person. For example:

- Section 5 of the *Relationships Register Act 2010* (NSW) provides that a couple will not be eligible to have their relationship registered if (a) either adult is married, or (b) either adult is in a registered relationship or an interstate registered relationship, or (c) either adult is in a relationship as a couple with another person, or (d) the adults are related by family. Section 6 of the NSW Act requires the couple to make a statutory declaration to this effect and s 7 empowers the Registrar to require applicants for registration of a relationship to provide any further information that the Registrar requires to determine the application. Similar provisions exist in Victoria.<sup>64</sup>
- Section 14 of the *Relationships Register Act 2010* (NSW) also sets out the circumstances in which a registered relationship will be void. This includes (a) when the relationship was registered, registration under this Act was prohibited, or (b) the agreement of one or both of the persons in the relationship to the registration was obtained by fraud, duress or other improper means, or (c) when the relationship was registered, either party was mentally incapable of understanding the nature and effect of the registration. Section 14 also provides that any court may, of its own motion, make an order declaring the registration of a registered relationship void by operation of this section if a question arises in proceedings as to the registration. A registered relationship is also revoked upon marriage.
- Section 29 of the *Relationships Act 2008* (Vic) provides that it is an offence for a person to knowingly make a false or misleading representation in an application to register their relationship, prescribing a maximum penalty of 20 penalty units.

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<sup>63</sup> Section 4AA provides a definition of a ‘de facto relationship’ and lists circumstances which assist to determine whether a persons have a relationship as a couple person including ‘...whether the relationship is or was registered under a prescribed law of a State or Territory...’ Section 60EA of that Act also provides a definition of ‘de facto partner’ in regard to how the Act applies to children: ‘for the purposes of this Subdivision, a person is the *de facto* of another person if (a) a relationship between the person and the other person (whether of the same sex or a different sex) is registered under a law of a State or Territory...’

<sup>64</sup> *Relationships Act 2008* (Vic) ss 6-8, 18.



1.4.9 SALRI considers that these features of the NSW and Victorian models should also be included in the proposed South Australian regime. It is noted that there is no equivalent criminal offence to bigamy<sup>65</sup> that applies to the domestic partnership regime in South Australia, or to similar partnership regimes in other Australian jurisdictions. However, under both the *Family Relationships Act 1975* (SA) and the *Domestic Partners Property Act 1996* (SA), the court retains the power to set aside a domestic partnership agreement or to declare a domestic partnership void. This power, combined with the provisions described above, would guard against a scenario where a person seeks to enter into multiple domestic partnerships under the proposed registered relationships regime.

1.4.10 These models also provide for the recognition of interstate registered relationships<sup>66</sup> and, in the case of Victoria, for non-heterosexual marriages entered into overseas. For example, the *Relationships Amendment Act 2016* (Vic) inserts Chapter 2A 'Recognition of corresponding law relationships' into the *Relationships Act 2008* (Vic). This Part provides automatic recognition of an overseas marriage but only if it was (a) made under a law prescribed by regulation or (b) meets a set of safeguarding criteria. These criteria are set out in new s 33B as follows:

- (a) a relationship must be between two adult persons; and
- (b) a relationship must be entered into consensually; and
- (c) a relationship must not be between persons who are related by family; and
- (d) a relationship must not be entered into by a person who is already married; and
- (e) a relationship must not be entered into by a person who is already in a relationship that is registered or formally recognised under that law.

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<sup>65</sup> *Marriage Act 1961* (Cth) s 94.

<sup>66</sup> See, for example, *Relationships Register Act 2010* (NSW) s 16 which states: 'The regulations may declare that a class of relationships registered or recognised under a corresponding law are interstate registered relationships for the purposes of the Act.' See also Regulation 4 of the *Relationships Register Regulations 2015* (NSW): '(1) The following laws are prescribed as corresponding laws for the purpose of the definition of "corresponding law" in section 4(1) of the Act: (a) the *Civil Unions Act 2012* of the Australian Capital Territory, (b) the *Relationships Act 2011* of Queensland, (c) the *Relationships Act 2003* of Tasmania, (d) the *Relationships Act 2008* of Victoria. (2) The following classes of relationships are declared to be interstate registered relationships for the purposes of the Act: (a) civil unions entered into and in force under the *Civil Unions Act 2012* of the Australian Capital Territory, (b) relationships for which registration as a registered relationship is in force under the *Relationships Act 2011* of Queensland, (c) significant relationships for which deeds of relationship have been registered, and are in force, under the *Relationships Act 2003* of Tasmania, (d) registered domestic relationships within the meaning of the *Relationships Act 2008* of Victoria.' In addition to this legislative system, the registry policy was changed in 2014 to enable persons who have been married overseas in a same sex marriage to register their relationship in NSW, provided that at least one member of the couple resides in NSW. The registration of the relationship on the Relationships Register is not equivalent to registering the marriage in NSW, however it does provide important legal recognition of the nature of the relationship.

### **Recommendation 1: Relationships register for South Australia**

That South Australia legislate to introduce a relationship register based on the Relationship Register models that exist in New South Wales and Victorian. The South Australian Relationships Register should include strong safeguards against fraud and multiple registrations, as well as a clear process for the dissolution of registered relationships, based on the equivalent provisions currently in force in NSW and Victoria.

1.4.11 As discussed below, consequential amendments should be made, for example to the laws outlined in the Appendix to this Report, to ensure the comprehensive implementation of this reform.

## **1.5 Issues raised in consultation**

1.5.1 As noted above, SALRI's primary recommendation to introduce a relationships register in South Australia has been supported by both its comparative research and its community consultation. The community consultation, particularly the outcome of the Roundtable discussion with experts and community members, strongly supported the implementation of a relationships register in South Australia as a model to address the currently discriminatory features of the law, and raised the following issues to consider when implementing the NSW or Victorian model here.

### **a. Language used to describe the 'Relationships Register': 'Civil Unions' or 'Civil Partnerships'**

1.5.2 While SALRI found a general consensus amongst those consulted, that a registered relationship model is desirable and necessary in South Australia, it also received some comments that queried whether 'registered relationship' and 'relationship register' is the most appropriate language to describe the legal framework these terms describe.

1.5.3 For example, it was noted that for many non-heterosexual couples, social recognition of their relationship is equally important as legal recognition — and that alternative language, such as 'civil union' or 'civil partnership' may better convey the social recognition that should flow from the legal recognition of a loving and committed relationship in South Australia.

1.5.4 Some Roundtable participants expressed support for provisions that would allow an official ceremony at the time of registration, as is currently under consideration in other Australian jurisdictions. It is noted that the South Australian Births, Deaths and Marriages Registration Office (Consumer and Business Services) currently provides a room for a marriage to be conducted at the Registry and it is possible that these facilities could be extended to those registering a relationship subject to negotiation with the Office. The *Relationship Amendment Act*

2016 (Vic) vests the Registrar with the power to enter into arrangements for other services including ceremonies.<sup>67</sup>

1.5.5 Other Roundtable members supported the use of the terms ‘registered relationship’ and ‘relationship register’, noting that social recognition could continue to be gained by ceremonies or celebrations conducted by couples to mark the legal registration of their relationship.

1.5.6 SALRI does not express a view as to the merits of the alternative language that could be used to describe the legal framework implemented in NSW and Victoria under the term ‘registered relationship’. SALRI’s focus has been on evaluating the key features of those frameworks and their capacity to address the discriminatory features of the South Australian law. In this respect, SALRI recommends the adoption of the ‘registered relationship’ model, but would not oppose a re-naming of the model provided the key legal features as recommended in this Report are maintained.

### **b. Recognition of Interstate Relationships**

1.5.7 SALRI recognises that it is necessary for any relationships register model introduced in South Australia to include criteria that ensures neither individual applying to have their relationship registered in South Australia is in a legally recognised relationship elsewhere in Australia. SALRI’s consultation suggests that the Victorian model, which requires that a person be not married or in a relationship that could be registered under the *Relationships Act 2008* (Vic), is the preferable model.

1.5.8 The ACT, NSW and Tasmanian Acts all contain a provision enabling regulations to specify that a relationship registered under a corresponding law should be treated as a relationship registered under the relevant jurisdiction.<sup>68</sup> In the interest of uniformity, it is proposed that any provisions for a South Australian relationship register should contain a relationship recognition provision. Any registered relationship entered into in accordance with corresponding law of the Commonwealth, or of another State or Territory, should thereby be recognised. Similarly, South Australia should ensure that relationships registered under the recommended model are legally recognised under corresponding State and Territory laws.

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<sup>67</sup> Section 27 of the *Relationships Act 2008* (Vic) states: ‘The Registrar may enter into an arrangement for the provision of additional services in connection with the provision of services relating to the registration of a registrable relationship, including, but not limited to... additional services in connection with any ceremony to celebrate the registration of a registrable domestic relationship as amended by s 27(1) (ab).’

<sup>68</sup> See, for example, *Relationships Register Act 2010* (NSW) ss 4(1), 16.

## **Recommendation 2: Recognition of relationships registered interstate**

A relationship register in South Australia should contain relationship recognition provisions to recognise interstate registered relationships, based on the Victorian model.

### ***c. Recognition of Overseas Same Sex Marriage***

1.5.9 As noted in the Executive Summary, the current inadequacies of South Australian law in relation to recognised non-heterosexual marriages solemnised overseas is a source of discrimination on the grounds of sexual orientation. As the Hon Tammy Franks observed in her Second Reading Speech on the Births Deaths and Marriages Registration (Recognition of Same Sex Marital Status) Amendment Bill 2016 (SA) (described below), this discrimination can manifest itself in various ways, including by denying non-heterosexual couples recognition of their overseas marriage on death certificates.<sup>69</sup>

1.5.10 The Hon Tammy Franks quoted from a letter that she had received from Dr Liz Coates and Dr Kim Petersen, two South Australian women who have been in a committed relationship since 2000 but needed to travel to Montreal in Canada in 2005 to be legally married. They wrote described:

For the past 10 years, travelling has been eventful, with recognition of our status in some countries but not others. The best experience during these times was at immigration in the United States of America in 2015 replying we are married when questioned as to what relationship we were to each other. The immigration officer then treated us respectfully as a devoted couple.

Their letter continues:

How disappointing then to return home and not have the same respect and acceptance shown towards us. How much worse it is to know if one of us were to die that we could not be registered on the death certificate in this state as a spouse. How much worse that property cannot be jointly held without resorting to expensive legal contracts, unlike a heterosexual marriage.<sup>70</sup>

1.5.11 It is proposed that the South Australian relationships register should include and enable automatic recognition of certain overseas marriages as registered relationships. This would enable non-heterosexual marriages legally solemnised in jurisdictions such as the Republic of Ireland, New Zealand or the United Kingdom to be automatically recognised as registered relationships in South Australia. Safeguards should be included to ensure automatic recognition is not provided to marriages solemnised in jurisdictions where there are insufficient legal

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<sup>69</sup> South Australia, *Parliamentary Debates*, Legislative Council, 9 March 2016, 3303-3306 (Tammy Franks).

<sup>70</sup> *Ibid.*

safeguards to guard against child marriage or the use of duress or coercion.<sup>71</sup> This would provide valuable protection. Such provisions could be based on those recently introduced in Victoria.

1.5.12 Section 7 of the *Relationships Amendment Act 2016* (Vic) provides a very useful general overview of what constitutes a corresponding law:<sup>72</sup>

33A Definitions. In this Chapter corresponding law means a law (a) that is a prescribed law; or (b) that is a law of a State, a Territory or another country that in accordance with the general requirements provides for the registration of or the formal recognition of a relationship; corresponding law relationship means a relationship registered or formally recognised under a corresponding law; general requirements means the requirements under section 33B.

33B General requirements, corresponding law. The general requirements for a corresponding law are that to be registered or formally recognised under that law (a) a relationship must be between two adult persons; and (b) a relationship must be entered into consensually; and (c) a relationship must not be between persons who are related by family; and (d) a relationship must not be entered into by a person who is already married; and (e) a relationship must not be entered into by a person who is already in a relationship that is registered or formally recognised under that law.

1.5.13 A slightly different approach is adopted in Tasmania, where overseas marriages can also be automatically recognised, but only if listed via regulation.<sup>73</sup>

1.5.14 Under the approach supported by SALRI, a ‘Certificate of Recognition of Overseas Marriage as Registered Relationship’ could be obtained under the recommended *Relationships Act*. While such a certificate would not legally equate to a Marriage Certificate, due to the operation of the Commonwealth *Marriage Act 1961* (Cth), it would provide non-heterosexual couples with documentary recognition of their legal relationships status in South Australia, and provide an opportunity for social recognition of their overseas marriage.

1.5.15 SALRI further recommends that reg 10 of the *Births Deaths and Marriages Registration Regulations 2011* (SA) should be amended to include those couples in a ‘registered relationship’,

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<sup>71</sup> The Statutes Amendment (Child Marriage) Bill 2016 (SA) introduced by Ms Sanderson MP proposes to amend the *Children’s Protection Act 1993* (SA) and the *Criminal Law Consolidation Act 1935* (SA) to make it an offence for a person to take a child interstate or overseas to be forced into marriage. The Bill was prompted by at least two cases raised with Ms Sanderson of South Australian girls feared at risk of being taken out of South Australia to be married. The Bill amends the *Children’s Protection Act* to enable either the police or the head of the State’s child protection agency, Families SA, to apply to a court to prevent a child from being taken out of the State, temporarily remove the child’s passport or interview the child if it is suspected that he or she is at risk of forced marriage. The Bill also makes it an offence to bring a child into South Australia for a forced marriage. The Bill applies to anyone aged under 18 years of age. See South Australia, *Parliamentary Debates*, House of Assembly, 10 March 2016, 4679-4680 (Ms Sanderson).

<sup>72</sup> *Relationships Amendment Act 2016* (Vic). These sections to be inserted after Chapter 2 in a new Chapter 2A. The Act received Royal Assent on 16 February 2016.

<sup>73</sup> *Relationships Act 2003* (Tas) s 65A. Recognised countries include New Zealand, the UK and several Provinces of Canada as listed in reg 9 of the *Relationships Register Regulations 2013* (See Appendix 7).

including those couples married overseas, in the details to be included in the death certificate issued by the Registrar under Part 6 of the *Births, Deaths and Marriages Registration Act 1996* (SA). This would ensure that couples such as Marco and David Bulmer-Rizzi would have their overseas marriage recorded in the eventuality of death in South Australia.

***d. Births Deaths and Marriages Registration (Recognition of Same Sex Marital Status) Amendment Bill 2016 (SA)***

1.5.16 SALRI notes that on 9 March 2016, the Hon Tammy Franks MLC and David Pisoni MP jointly introduced the Births Deaths and Marriages Registration (Recognition of Same Sex Marital Status) Amendment Bill 2016 (SA).<sup>74</sup> This Bill seeks to address discrimination against same sex couples who have married overseas, and who under current South Australian law are unable to have that overseas marital status recognised on a South Australian death certificate. The Bill recognises overseas same sex marriages for the sole purpose of recording that marital status in the case of the death of a spouse.

1.5.17 The Bill proposes an addition to Part 6 of the Act:

If, in relation to a deceased person (a) this Part requires details of the person's marital status to be stated or recorded (whether in a statement to the Registrar or in an entry made in the Register); and (b) the person's marriage was solemnised as a marriage between two persons of the same sex under the law or custom of an overseas country and is recognised as a valid marriage under that law or custom, the person's marital status must be stated, or recorded in the Register, as 'married overseas'.

1.5.18 At the time of the introduction of the Bill, it was noted that such laws exist in NSW, Queensland, Tasmania and now Victoria.<sup>75</sup>

1.5.19 SALRI acknowledges that this Bill provides a solution to discrimination in the area of recognition of overseas (and particularly non-heterosexual) marriage on death certificates in South Australia, and thus addresses the specific discrimination experienced by Mr Bulmer-Rizzi described above.

1.5.20 SALRI suggests that the relationship register model provides a more comprehensive and complete legal framework to ensure those same sex couples who are legally married overseas are able to have their marriage recognised and all associated legal rights granted — and not merely confined to the recognition of the overseas marriage for the purpose of a death certificate.

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<sup>74</sup> See South Australia, *Parliamentary Debates*, Legislative Council, 9 March 2016, 3303-3306 (Tammy Franks). See also Tom Fedorowytch, *Recognition of overseas same-sex marriages introduced in new bill from SA Political Foes*, (8 March 2016) ABC News <<http://www.abc.net.au/news/2016-03-08/political-foes-foes-fight-for-recognition-of-same-sex-marriages/7230602?section=sa>>.

<sup>75</sup> South Australia, *Parliamentary Debates*, Legislative Council, 9 March 2016, 3304 (Tammy Franks).

### **Recommendation 3: Recognition of overseas marriages**

A relationship register in South Australia should include provisions that would enable automatic recognition of certain overseas marriages (as a registered relationship) provided the overseas marriage was either (a) made under a law prescribed by regulation or (b) meets a set of safeguarding criteria, similar to the provisions introduced by the *Relationships Amendment Act 2016* (Vic). These provisions would ensure that the South Australian Parliament maintains control over the types of overseas marriage that are recognised and guard against the unwitting or accidental recognition of a marriage not made by freely consenting adults.

A relationships register should also provide for the issue of a ‘Certificate of Recognition of Overseas Marriage as Registered Relationship’ to provide non-heterosexual couples who have been married overseas with documentary recognition of their legal relationships status in South Australia.

Regulation 10 of the *Births Deaths and Marriages Registration Regulations 2011* (SA) should be amended to include the relationship status of couples in a ‘registered relationship’ (such as those couples married overseas) in the details to be included in the death certificate issued by the Registrar under Part 6 of the *Births, Deaths and Marriages Registration Act 1996* (SA). This would ensure that couples such as Marco and David Bulmer-Rizzi would have their overseas marriage recorded in the tragic eventuality of death in South Australia.

#### **e. Administrative Issues**

1.5.21 SALRI’s consultation and comparative research suggest that a relationship register in South Australia should be implemented through the enactment of a separate *Relationships Act*, as is the case in NSW, Victoria and Tasmania.

1.5.22 This would promote practical effectiveness and allow for the relationships register to be governed by a separate legal framework to that of the *Births, Deaths and Marriages Registration Act 1996* (SA), which is appropriate given the quite different purposes of the two registers. For example, it needs to be clear that a certificate acknowledging the registration of a relationship under the proposed *Relationships Act* is legally distinct from a certificate of marriage registered under the *Births, Deaths and Marriages Registration Act 1996* (SA).

1.5.23 However, SALRI suggests that it would appear to be appropriate for the relationships register to be *administered* by the Office of Births Deaths and Marriages, as is the case in other States. It may be necessary to make further changes to the practices, processes and public information provided by the Office of Births Deaths and Marriages to make it clear to the public that it is responsible for administering the proposed Relationships Register. Such changes — including changes to the Office of Births Deaths and Marriages website and forms — have been made in other jurisdictions where relationships registers are in force, such as New South Wales and Victoria.

1.5.24 For example, the NSW model is administered by the Births Deaths and Marriages Registry. All relevant information is provided by the Registry and is available on their website, as are the application and revocation forms. Three forms of identification must be certified and an authorised witness (who takes and receives a statutory declaration in NSW) must confirm the applicant's identity. Completed forms are then received by the Registrar and a Certificate may be issued after completing these requirements. It is envisaged that the introduction of a relationship register in South Australia would have similar administrative requirements. This would enable any searches to be undertaken by searching the Register, for example, in circumstances of a deceased estate.

1.5.25 One submission queried how a relationship register would be funded and remarked that the cost should be contained or else it would be a disincentive to those wishing to register. It is noted that there is an administrative fee for those who register in other States; in NSW the fee is currently \$156 and an application to revoke is \$78.<sup>76</sup> The Registrar may, in appropriate cases, waive or refund the whole or part of a fee for an application.<sup>77</sup> In Victoria the application cost is \$180.<sup>78</sup> It is worth noting that all current applications to the Births, Deaths and Marriages Registry in South Australia require the payment of a fee, for instance a fee of \$47 exists for the issuing of a marriage certificate and \$104 for the lodgement or re-lodgement of a Notice of Intent of Marriage. The South Australian Registry does not offer any concessions but is vested with a discretion to waive the whole or part of a fee.<sup>79</sup>

1.5.26 Another issue raised was whether a 'protected person' under the *Guardianship and Administration Act 1993* (SA) could register a relationship and whether this would be a matter for the Public Trustee or the Office of the Public Advocate. It is noted that the proposed register requires both parties to make a statutory declaration and that the proposed model would make void any registration in the event either party was intellectually incapable of understanding the nature and effect of the registration.<sup>80</sup> Alternatively, it is possible that this could be addressed explicitly in the relationship register statute regarding void registrations, but SALRI considers the proposed registration provisions are adequate.<sup>81</sup>

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<sup>76</sup> Regulation 5 of the *Relationships Register Regulations 2015* (NSW).

<sup>77</sup> Ibid.

<sup>78</sup> Section 75 of the *Relationships Act 2008* (Vic).

<sup>79</sup> As stated on their website: see Consumer and Business Services, *Forms and fees for births, deaths and marriages* (2016) Government of South Australia, Attorney-General's Department <<http://www.cbs.sa.gov.au/forms-fees-for-births-deaths-marriages/>>.

<sup>80</sup> See s 14 of the *Registered Relationship Act 2010* (NSW).

<sup>81</sup> A similar provision was in clause 29 of the *Civil Partnerships Bill 2012* (SA):

'A civil partnership is void if—

- (a) either party did not meet the eligibility criteria when the partnership was registered; or
- (b) either party did not freely enter into the civil partnership because—



1.5.27 Some Roundtable participants expressed support for a provision that would allow an official ceremony at the time of registration, as is currently under consideration in other Australian jurisdictions. Consideration should be given to provisions such as those in the *Relationship Amendment Act 2016* (Vic) that vest the Registrar with a power to enter into arrangements for other services including ceremonies.<sup>82</sup>

1.5.28 SALRI acknowledges the proposed model is limited in its ability to recognise a ‘caring relationship’ — such as a familial relationship where one adult cares for another. For this reason, as discussed elsewhere in this report, SALRI recommends an approach that would see the new category of ‘registered relationship’ co-exist with the definition of ‘domestic partner’, that currently includes two persons in a ‘close personal relationship’ that can include non-sexual relationships, wherein one partner provides domestic support or personal care (or both).<sup>83</sup> Appendix 2 provides further detail with respect to how this recommended change would affect other South Australian laws, including the *Carer’s Recognition Act 2005* (SA) and the *Advance Care Directives Act 2013* (SA).

#### **Recommendation 4: Enactment of a separate Relationships Act**

A relationship register in South Australia should be implemented through the enactment of a separate Relationships Act and could be administered by the Office of Births Deaths and Marriages. Alternative language could be used to describe the relationships register (such as ‘registered civil union’) provided the recommended legal framework remains unchanged.

Consideration should be given to provisions such as those in the *Relationship Amendment Act 2016* (Vic) that vest the Registrar with a power to enter into arrangements for other services including ceremonies.

#### **Recommendation 5: Recognition of power of registrar to register relationship**

A note should be made to the relevant provision in the proposed South Australian relationship register legislation to recognise the power vested in the Registrar to enter a relationship in the Register (similar to that contained in s 9 of the *Relationships Register Act 2010* (NSW)).

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1. the party’s agreement to enter into the partnership was obtained by duress or fraud; or
  2. the party was mistaken about the identity of the other party or the nature of the declaration; or
  3. the party did not have the capacity within the meaning of the *Guardianship and Administration Act 1993* to enter into the civil partnership.’

<sup>82</sup> Section 27 of the *Relationships Act 2008* (Vic) states: ‘The Registrar may enter into an arrangement for the provision of additional services in connection with the provision of services relating to the registration of a registrable relationship, including, but not limited to... additional services in connection with any ceremony to celebrate the registration of a registrable domestic relationship as amended by s 27(1) (ab).’

<sup>83</sup> *Family Relationships Act 1975* (SA) s 11.

## 1.6 Interaction with Commonwealth Laws

1.6.1 In many instances, family law issues and financial matters relating to the breakdown of de facto relationships and parental responsibility of children are dealt with under the *Family Law Act 1975* (Cth) and in the Commonwealth jurisdiction. That Act defines a de facto relationship as a couple living together on a genuine domestic basis, and takes into account a number of factors when determining if persons have a relationship as a couple, including whether a relationship is or was registered under a prescribed law of a State or Territory.<sup>84</sup> The definition of ‘de facto’ under that Act is very broad, currently incorporating ‘domestic partner’ and is well placed to incorporate ‘registered relationship’ if enacted in South Australia.<sup>85</sup> SALRI’s consultation suggests that the introduction of a relationships register would assist couples in establishing a de facto relationship for the purposes of proceedings under the *Family Law Act 1975* (Cth), which could in turn assist access to the comprehensive family law regime at the Commonwealth level, including dispute resolution by the Family Court.

1.6.2 The Tasmanian *Relationships Act 2003* recognises that a local Court may adjourn any proceedings for an application for an order with respect to property if proceedings are commenced before the Family Court of Australia.<sup>86</sup> It is noted that Court Rules in each jurisdiction prescribe jurisdictional limitations and that such a provision may therefore be unnecessary in South Australia.

1.6.3 It is possible that this recognition could also extend to other subjects dealt with by the Commonwealth such as immigration — for instance the registration of a relationship could support a de facto visa application to the Commonwealth Immigration Department by demonstrating the couple have a mutual commitment to a shared life to the exclusion of others, and that the relationship is genuine and continuing, even where a couple has not cohabited for 12 months as required under relevant legislation. This issue was discussed in the Second Reading Speech for the *Relationships Register Act 2010* (NSW). The NSW Attorney-General explained:

This Bill will stop people from having to go through the indignity of proving their relationship to every bureaucrat who will make a decision about their entitlements. They will not have to go before some desk clerk and say, “I’m entitled to a pension because I’m living with X” and explain the nature of their relationship. They do not have to go to the immigration department. They do not have to go to agencies that provide benefits to those individuals and tell them, from go to woe, the nature of their relationship. Is that the sort of society we want to live in? Do we want to humiliate people by having them explain their life history in order to get basic entitlements that every citizen who lives in a heterosexual relationship can get? That is what this Bill is about.<sup>87</sup>

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<sup>84</sup> *Family Law Act 1975* (Cth) ss 4AA(1), (2)(g).

<sup>85</sup> *Ibid.*

<sup>86</sup> *Relationships Act 2003* (Tas) s 42.

<sup>87</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 12 May 2010, 22489 (John Hatzistergos, Attorney General).

## 1.7 Interaction with State Laws

### a. *Family Relationships Act 1975 (SA)*

1.7.1 From its consultation, SALRI anticipates that the major impact the introduction of a new category of ‘registered relationship’ will be on other South Australian laws relating to parenting rights and, in particular, the *Family Relationships Act 1975 (SA)*.

1.7.2 In particular, SALRI suggests that the registered relationship model reform as adopted in Victoria, NSW, Tasmania and the ACT will have distinct advantages over current efforts to reform specific provisions of the *Family Relationships Act 1975 (SA)* to facilitate access to assisted reproductive treatment and surrogacy provisions, and to the legal recognition of non-heterosexual parents.<sup>88</sup> Unlike other proposed reforms, which share the same anti-discrimination objective,<sup>89</sup> the registered relationship model could:

- be consistently applied throughout the *Family Relationships Act 1975 (SA)* by way of simple definitional change, rather than focused only on specific provisions;
- promote clarity in the law by introducing a clear, objective, legal category of ‘registered relationship’;
- eliminate the need to rely on out-dated or subjective relationship criteria (such as ‘marriage-like’ relationship);
- be based on an informed consent model, where both partners make a serious legal undertaking to consent to registering their relationship and assume the legal rights and responsibilities this then entails; and
- coexist with the existing ‘domestic partnership’ regime. The retention of the domestic partnership regime is necessary to protect parties who either do not wish to register their relationships or for couples who are not sufficiently informed about the legislation and are unaware of the possibility of having their relationships recognised on a register.

1.7.3 For these reasons, it is recommended that a new category of ‘registered relationships’ be incorporated into the definition of ‘domestic partners’ in the *Family Relationships Act 1975 (SA)*. That is, under the proposed reform, a couple would meet the definition of ‘domestic partner’ in s 11A of the *Family Relationships Act 1975 (SA)* if they were either (a) a couple in a close personal relationship continuously for three years (or three of the past four years), (b) a couple in a close personal relationship with a child together or (c) a couple in a registered relationship.

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<sup>88</sup> See, for example, the Hon Tammy Franks MLC’s Private Members Bill, the Family Relationships (Parentage Presumptions) Amendment Bill 2015.

<sup>89</sup> See, for example, Family Relationships (Parentage Presumptions) Amendment Bill 2015.

1.7.4 The legal implications of this recommendation for the other provisions of the *Family Relationships Act 1975* (SA) are discussed in detail below.

### **b. Property Rights**

1.7.5 The disposition of property is another area of law that would significantly benefit from the introduction of the category of ‘registered relationship’ as a way to remove existing discrimination on the basis of sexual orientation or gender identity.

1.7.6 SALRI proposes that the inclusion of the new legal category of ‘registered relationship’ offers a clear, legal pathway for non-married couples to enter into legal arrangements relating to property, and would remove the discriminatory features of the existing South Australian regime governed by the *Domestic Partners Property Act 1996* (SA).

1.7.7 The *Domestic Partners Property Act 1996* (SA) allows ‘domestic partners’ to make a written agreement (called a Domestic Partnership Agreement or a ‘DPA’)<sup>90</sup> about property and living arrangements, and enables a court to make orders for the division of property if the partnership has existed for at least three years or there is a child of the relationship.<sup>91</sup> The introduction of making domestic partnership agreements has clearly improved the rights of non-heterosexual couples and families to manage their property and to form agreements as to how matters should be handled in the event of the termination of the relationship. However, as outlined above, this regime remains inaccessible for couples in serious, committed relationships who for many varied and legitimate reasons may not be able to meet the required cohabitation criteria. It also gives rise to discrimination on the grounds of gender identity, sexual orientation and relationship status, as unlike heterosexual couples (who can get married), non-heterosexual or gender diverse couples have no other legal option to have the relationship recognised under South Australian laws without cohabitation criteria.

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<sup>90</sup> A DPA is like a contract between domestic partners about their shared life that can be certified by lawyers and enforced by a court. It can cover matters such as how joint property (including a family home or superannuation) would be divided if the partners were to separate, or how financial matters will be arranged during the relationship. A DPA can also cover non-financial matters, including the termination of the partnership and subsequent care of children. A DPA cannot, however, be made unless the partners have lived together for three years or have a child together.

<sup>91</sup> A ‘domestic partner’ is a person who lives in a close personal relationship and includes a person about to enter such a relationship or those who have previously lived in such a relationship (s 3). A ‘close personal relationship’ is defined in the same terms as under the *Family Relationships Act 1975* (SA) (i.e. includes two adult persons, whether or not related by family and irrespective of their gender, who live together as a couple on a genuine domestic basis). After a domestic partnership ends, either of the domestic partners may apply to a court for the division of property subject to the condition that the domestic partnership existed for at least three years or there is a child of the domestic partners. Section 9 sets out these conditions and also requires that the applicant or respondent must be a resident in the State at the time of the application, that the parties were residents of the State for the substantial part of the relationship, that an application for the division of property must be made within one year.

1.7.8 Following its research and consultation, SALRI is of the view that the relationships register model could address these discriminatory features in a way that does not detract from the protective qualities of the existing domestic partnership regime.

1.7.9 For example, under the registered relationships model, the definition of a ‘domestic partner’ in s 3 of the *Domestic Partnerships Property Act 1996* (SA) could be amended to clearly include a person in a ‘registered relationship’. This inclusion would not otherwise alter the existing definition of ‘domestic partner’. In other words, there would be two pathways a couple could take to being recognised under law as a ‘domestic partner’: either by meeting the ‘close personal relationship’ criteria *or* by being a ‘registered relationship’. This would also ensure that two people who had not either taken the serious formal step of registering their relationship or had not lived together for three years could not take advantage of the domestic partnership agreement related provisions. It could only be accessed either by meeting the ‘close personal relationship’ criteria *or* by being in a ‘registered relationship’.

1.7.10 These changes would allow couples who have taken the serious legal step to be registered to make ‘domestic partnership agreements’ without having to meet any minimum cohabitation period. As noted above, a relationships register would introduce necessary legal safeguards to protect people’s rights and resolve disputes when a registered relationship breaks down, in contrast to the current situation where couples who do not meet the cohabitation requirements of ‘domestic partner’ or who have not sought a court declaration, have no clear statutory pathway to dissolve their relationship and financial affairs. A relationship registry would enable a clear and consistent approach to resolving property and financial disputes at the end of a relationship, without the costly and more protracted process of going to court to demonstrate the existence of a relationship as required under the domestic partner regime. It could also have benefit in the context of succession law and practice.

1.7.11 SALRI notes that both Commonwealth and State options exist for non-married couples seeking to make legal arrangements relating to property and that the Commonwealth model, available under the *Family Law Act 1975*, provides an accessible and effective alternative to the South Australian *Domestic Partners Property Act 1996* regime. Local experience shared with SALRI at one of its Roundtable consultation sessions also suggests that non-married couples are far more likely to utilise the Commonwealth model than that available at the State level.

**Recommendation 6: Registered relationships and property**

Section 3 of the *Domestic Partners Property Act 1996* (SA) should be amended to include the new legal category of ‘registered relationship’.

### **c. Other South Australian Laws**

1.7.12 The above recommendations also have important implications for other South Australian laws that rely upon the current definition of ‘domestic partner’, and thus would benefit from the inclusion of ‘registered relationship’ within this definition.

1.7.13 A preliminary list of other South Australian laws affected or potentially affected by the introduction of the recommended relationships register model is provided at Appendix 2.

1.7.14 Some examples of these laws include:

- laws concerning inheritance, intestacy and succession, compensation, insurance and access to other entitlements such as superannuation and distribution of property;

**Examples:**

(1) If an employee is killed at work and their partner, as defined under s 4(1) of the *Return to Work Act 2014* (SA), or the employee's children were wholly or partially dependent on the employee, then the partner and children can make a claim under the *Return to Work Act 2014* (SA) (ss 59 and 61). The definition of a domestic partner under the *Return to Work Act 2014* (SA) is the same as that under the *Family Relationships Act 1975* (SA), except for the following additional provision: if the person has been living with the worker for a substantial part of the preceding three or four years and Return to Work considers it is fair and reasonable that the person be regarded as the domestic partner of the worker for the purposes of the Act, then the person can make a claim as a domestic partner.

(2) Domestic partners or former domestic partners are not required to pay stamp duty for the transfer of an interest in their shared principal place of residence or transfer of motor vehicle registration between them (see s 71CB of the *Stamp Duties Act 1923* (SA)). Note that if the requirement of being together for three years or three out of the last four years or having a child together is not met, it is possible to seek a declaration from the court that the partners are ‘domestic partners’ (and therefore that the exemption from stamp duty is available) on the basis that the interests of justice require such a declaration to be made (separate provisions exist for married or formerly married partners).<sup>92</sup>

- criminal law, particularly those laws addressing aggravating circumstances relating to acts of a ‘family member’ or ‘de facto partner’;

**Examples:**

Under the *Victims of Crime Act 2001* (SA) a partner, as defined under the *Family Relationships Act 1975* (SA), is able to claim compensation for the death of their partner resulting from a homicide. If a partner died as the result of a criminal injury the surviving partner has a right to be represented as a dependant of the deceased in order to collect compensation.<sup>93</sup>

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<sup>92</sup> These examples were adapted from Legal Services Commission, *Law Handbook* <<http://www.lawhandbook.sa.gov.au>>.

<sup>93</sup> Ibid.

- current provisions of the *Equal Opportunity Act 1984* (SA) making discrimination on the basis of relationship or marital status unlawful should include explicit protection against discrimination on the grounds that a person is in a registered relationship. The amendments required include:
  - (a) amend the definition of ‘domestic partner’ in s 5 to include those in a ‘registered relationship’ and in the same section the definition of ‘marital or domestic partnership status’ should be extended to include ‘being a domestic partner (or in a registered relationship)’ thereby providing protection against discrimination on the grounds of being in a ‘registered relationship’ under s 85T of that Act; and
  - (b) amend the definition of ‘immediate family member’ in s 5 to include families that include couples in a registered relationship; and
  - (c) ensure that the Act applies to the provision of assisted reproductive treatment services by amending s 5 which currently excludes fertilisation services from the definition of ‘services’ in that Act.

1.7.15 Some of the other currently discriminatory impacts of these laws on unmarried couples include:<sup>94</sup>

- A partner, as defined under the *Family Relationships Act 1975* (SA), who has not been adequately provided for under the deceased partner’s estate may be ineligible under the *Inheritance (Family Provision) Act 1972* (SA) to make a claim against the estate, unless they have first obtained a declaration from the court that he or she was a ‘domestic partner’ on the date of the deceased’s death.<sup>95</sup>
- If the deceased did not leave a will, a surviving partner is entitled to share in the distribution of the estate, but only if the partner has first have obtained a declaration from the court that he or she was a ‘domestic partner’ on the date of death.<sup>96</sup>
- If the death was caused by the negligent act of a third party (for example, in a road accident), the surviving partner, may claim damages from the third party. These damages will cover both economic loss (that is, loss of future financial support) and solatium (emotional loss). Before this claim can be made, the partner must first have obtained a declaration from the court that he or she was a ‘domestic partner’ on the date of death.

1.7.16 Changing the definition of ‘domestic partner’ in the *Family Relationships Act 1975* (SA) to include a couple in ‘registered relationship’ could be a useful model to remove the discriminatory features of the laws described above. An example is s 3 of the *Public Trustee Act 1995*, which

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<sup>94</sup> Ibid <<http://www.lawhandbook.sa.gov.au/ch21s05s04.php>>.

<sup>95</sup> *Inheritance (Family Provision) Act 1972* (SA) s 6(a).

<sup>96</sup> *Administration and Probate Act 1919* (SA) s 72H(1).

currently refers to the definition of ‘domestic partner’ in s 11A of the *Family Relationships Act 1975* (SA). If this definition is amended to include a registered relationship, any similar discriminatory provisions of the *Public Trustee Act* (SA) would also need to be addressed.

1.7.17 It may be that a combination of an amendment to the definition of ‘domestic partner’ in the *Family Relationships Act 1975* (SA) to include a couple in a ‘registered relationship’, combined with a more specific list of amendments to particular Acts and Regulations referring to ‘domestic partners’ would be most appropriate to ensure a successful implementation of this reform.

1.7.18 In similar circumstances, both the *Relationships Register Act 2010* (NSW) and the *Relationship Act 2008* (Vic) listed a number of Acts that were to be amended (see Appendix 4 for the Victorian example).<sup>97</sup>

1.7.19 SALRI further recommends that to ensure consistency within South Australian legislation and to remove all instances of discrimination on the grounds of sexual orientation, gender identity and marital status, all statutory references to ‘domestic partner’ should be extended to include ‘registered relationship’. Other States including NSW, the ACT and Queensland have inserted definitions into their statutory interpretative legislation (corresponding to the *Acts Interpretation Act 1915* (SA)) as an efficient measure to redress discriminatory laws.<sup>98</sup> Such an amendment could be included in definitions contained in s 4 of the *Acts Interpretation Act 1915* (SA):

A reference in an Act or statutory instrument to a domestic partner or spouse will be taken to be a reference to a person who is a party to a relationship registered under the *Relationships Register Act 2016* (SA).<sup>99</sup>

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<sup>97</sup> As listed in Schedule 1 of the *Relationships Act 2008* (Vic).

<sup>98</sup> Section 21C(1) of the *Interpretation Act 1987* (NSW) states that ‘for the purposes of any Act or instrument a person is the “de facto partner” of another person (whether of the same sex or a different sex) if: (a) the person is in a registered relationship or interstate registered relationship with the other person within the meaning of the Relationships Register Act 2010’. Section 169 of the *Legislation Act 2001* (ACT) states that: ‘(1) In an Act or statutory instrument, a reference to a person’s domestic partner is a reference to someone who lives with the person in a domestic partnership, and includes a reference to a spouse, civil union partner or civil partner of the person. (Note The Macquarie dictionary, (1997) defines spouse as “either member of a married pair in relation to the other; one’s husband or wife”.) (2) In an Act or statutory instrument, a domestic partnership is the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis.’ Schedule 1 of the *Acts Interpretation Act 1954* (Qld) provides a definition of spouse which includes domestic partner and registered partner.

<sup>99</sup> Similar to the proposed amendment in Sch 1, s 2 of the *Civil Partnerships Bill 2012* (SA) which stated: ‘After subsection (4) insert: (5) A reference in an Act or statutory instrument to a **spouse** will be taken to be a reference to a person who is a party to a civil relationship registered under the *Civil Partnerships Bill 2012* (SA).’



**Recommendation 7: Registered relationships and the *Family Relationships Act***

The introduction of the new category of ‘registered relationship’ should be included within the current definition of ‘domestic partner’ in s 11A of the *Family Relationships Act 1975* (SA). Under the proposed reform, a couple would meet the definition of ‘domestic partner’ in s 11A of the *Family Relationships Act 1975* (SA) if they were either (a) a couple in a close personal relationship continuously for three years (or three of the past four years), (b) a couple in a close personal relationship with a child together or (c) a couple in a registered relationship.

This should be combined with a more specific list of amendments to particular Acts and Regulations (such as those listed in Appendix 2) referring to ‘domestic partners’ to ensure a successful implementation of this reform.

**Recommendation 8: Consistent interpretation of key terms**

A paramount term equivalent to ‘de facto partners’ in s 21C of the *Interpretation Act 1987* (NSW) should be included in the *Acts Interpretation Act 1915* (SA) to ensure consistency across all South Australian laws. This definition should include both ‘domestic partnerships’ and ‘registered relationships’ and should be inserted into the definitions within the *Acts Interpretation Act 1915* (SA) to ensure consistency in South Australian legislation.

## **PART 2: Legal Parentage and Access to Lawful Surrogacy and Assisted Reproductive Treatment**

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2.1.1 The *International Covenant on Civil and Political Rights* recognises the fundamental right to found a family.<sup>100</sup> Diverse family structures with children, including those headed by non-heterosexual couples, have gained greater social acceptance,<sup>101</sup> and led to gradual legal recognition in Australia.<sup>102</sup> However, for non-heterosexual couples, or individuals, the opportunity to start their own family is fundamentally impeded by biology. Alternatives to overcome ‘involuntary childlessness’<sup>103</sup> and turn the impossible into reality include assisted reproductive treatment (ART), adoption, and surrogacy; however these options are limited or not legally available to non-heterosexual couples in South Australia.<sup>104</sup>

2.1.2 The materials provided to SALRI (as well as its own research) confirm that discrimination against non-heterosexual parents on the basis of their sexual orientation has no scientific basis.<sup>105</sup> Information provided to SALRI confirms that the ‘beliefs’ about same-sex parents are often ‘culturally transmitted’ rather than determined by personal experience.<sup>106</sup> Being heterosexual does not make someone a suitable parent.<sup>107</sup>

2.1.3 Non-heterosexual parents are also legally acknowledged and supported in many forms in South Australia. For example, in 2008, the Commonwealth removed legislative discrimination

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<sup>100</sup> *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23(2) (‘ICCPR’).

<sup>101</sup> Deborah Dempsey, *Same-sex parented families in Australia* (December 2013) Australian Institute of Family Studies, 2 <<https://aifs.gov.au/cfca/publications/same-sex-parented-families-australia>>; Investigation into Altruistic Surrogacy Committee, Parliament of Queensland, *Investigation into the decriminalisation and Deregulation of Altruistic Surrogacy in Queensland* (2008) 6.

<sup>102</sup> Adiva Sifris, ‘Gay and lesbian parenting, the legislative response’ in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law Selected essays on contemporary issues for Australia* (Australian Institute of Family Studies, Commonwealth of Australia, 2014) 89.

<sup>103</sup> Merryn Elizabeth Ekberg, ‘Ethical, legal and social issues to consider when designing a surrogacy law’ (2014) 21 *Journal of Law and Medicine* 728, 729.

<sup>104</sup> *Family Relationships Act 1975* (SA) s 10HA(2)(iii); *Assisted Reproductive Treatment Act 1988* (SA) s 9(1)(c) – unless infertile; *Adoption Act 1988* (SA) s 12(1).

<sup>105</sup> See, for example, Jimi Adams and Ryan Light, ‘Scientific Consensus, the Law, and Same-Sex Parenting Outcomes’ (2015) 53 *Social Science Research* 300; S R Crouch et al, ‘The health perspectives of Australian adolescents from same-sex parent families: a mixed methods study’ (2015) 41(3) *Child: Care, Health and Development* 356, 361-362; American Psychological Association, *Lesbian & Gay Parenting* (2005) 15.

<sup>106</sup> American Psychological Association, above n 105, 51.

<sup>107</sup> Stephen Page, Submission to SALRI, No 34, 2 quoting Chief Judge Pascoe, Federal Circuit Court of Australia at House of Representatives Social Policy and Legal Affairs Committee *Roundtable on Surrogacy* (5 March 2014).

between non-heterosexual and heterosexual couples and families in 85 Commonwealth Acts.<sup>108</sup> As a result of these amendments, non-heterosexual couples can now receive child-support and superannuation benefits. Implicit in these recognised rights is that non-heterosexual individuals are fully competent to be parents. South Australia also recognises non-heterosexual couples as competent foster parents.

2.1.4 SALRI further notes that in 2007, an Inquiry by the Social Development Committee (“SDC”) of the South Australian Parliament identified the current heterosexual restriction in the *Family Relationships Act 1975* (SA) as discriminatory, and recommended extending access to surrogacy to non-heterosexual couples.<sup>109</sup> The SDC heard no evidence to suggest that either marital status or sexual preference predicates an individual to be a good parent.<sup>110</sup> Nor has SALRI during its comprehensive consultation or research as part of this Reference found any such evidence.

2.1.5 SALRI’s research and consultation strongly suggest it is in the area of legal parentage and access to lawful surrogacy and assisted reproductive treatment that discrimination on the basis of sexual orientation and gender identity is most acutely felt in South Australia. This is well documented in the case studies and quotes contained in the Audit Paper.

Participant Quote:

I believe this law creates a situation whereby I am required to use risky, unchecked sperm from a male (known to me by friendship or via a website set up to provide sperm to people) rather than being able to access IVF. The lack of sperm in my relationship (as we are both women) is not considered to be enough reason to justify why we need to use IVF to have a baby. I believe this is unfair — as we should not have to use sperm from a donor, whom we may not know about his HIV status or STI risk. ... I think [the current law] discriminations [sic] against people and unfairly privileges those who are [in] heterosexual relationships ... [Audit Paper, Submission 9].

2.1.6 Such discrimination has been highlighted by the recent media and public debate in relation to same-sex couples and their families. The most prominent case involved a South Australian same-sex couple, Elsie Duffield and Sally Amazon, who were unable to gain equal recognition under the existing law as parents. This example prompted the Family Relationships (Parenting Presumptions) Amendment Bill 2015. One media report describes the background to this Bill as follows:

Elise Duffield gave birth to a son Tadhg on Mother’s Day in 2014, but a rule prevented her partner Sally Amazon from also being on the birth certificate. The rule required the couple to

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<sup>108</sup> *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-General Law Reform) Act 2008* (Cth); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Act 2008* (Cth).

<sup>109</sup> SDC, South Australia Legislative Council, *Inquiry into Same-Sex Parenting* (May 2011) 59.

<sup>110</sup> SDC, South Australia Legislative Council, *Inquiry into Gestational Surrogacy* (2007) 64, 65.

prove they had lived together for three years, a time frame which would not be applied to heterosexual couples who were able to legally marry.

“I read the fine print, it said we had to have lived together for three years before conception, which we hadn’t,” Ms Duffield said.

Ms Amazon agreed the couple could have lied, but said they chose not to. Ms Amazon said she had been worried her lack of legal status as Tadhg’s parent would later become an issue...<sup>111</sup>

2.1.7 As noted above, combined with the recommendations already made by SALRI in its Audit Paper,<sup>112</sup> the registered relationships model could address the unsatisfactory situation confronted by Elsie Duffield and Sally Amazon and also address the wider discriminatory impact of the current provisions regulating access to ART, lawful surrogacy, adoption and legal parentage. The following section of the report examines each of these areas in light of the recommended ‘registered relationship’. It also considers the further reforms necessary to remove discrimination arising when non-heterosexual couples, gender diverse people or singles seek to access the existing provisions relating to ART and lawful surrogacy.

## **2.2 Family Relationships Act 1975 (SA)**

2.2.1 The *Family Relationships Act 1975* (SA) provides the legal framework for identifying and recognising a child’s parents. Changes made in 2006 repealed the concept of ‘de facto’ and introduced the concept of ‘domestic partnerships’,<sup>113</sup> and much of the marital-status based discrimination in South Australian laws was removed. Same sex couples, or couples involving sex or gender diverse people, who were previously excluded from the definition of ‘de facto’ are now

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<sup>111</sup> Tom Fedorowytch, *Female same-sex parents win right for both to be on child’s birth certificate as SA Parliament backs rule change* (11 February 2016) ABC News <<http://www.abc.net.au/news/2016-02-11/same-sex-parents-sa-win-right-for-both-on-birth-certificate/7157912>>. See also Lauren Novak, ‘Lesbian Mothers to be automatically recognised on birth certificates in SA’, *The Advertiser* (online) 11 February 2016, <<http://www.adelaidenow.com.au/news/south-australia/lesbian-mothers-to-be-automatically-recognised-on-birth-certificates-in-sa/news-story/7bdda95a27276df61ae2e23dcf9675a2>>.

<sup>112</sup> For example, SALRI has already recommended that in relation to ART, s 9 of the *Assisted Reproductive Treatment Act 1988* (SA) should also be amended to (a) clarify that a person can access ART if, in the person’s circumstances, they are unlikely to become pregnant other than by an ART procedure and (b) include the guiding principle that people seeking to undergo ART procedures must not be discriminated against on the basis of their sexual orientation, marital status or religion. These amendments should be based on the relevant provisions of the *Assisted Reproductive Treatment Act 2008* (Vic). Corresponding amendments should be made to s 5 of the *Equal Opportunity Act 1984* (SA) which currently excludes artificial fertilisation services from the definition of ‘services’ in that Act.

<sup>113</sup> The *Statutes Amendment (Domestic Partners) Act 2006* (SA) made changes to 97 separate Acts and replaced the term ‘de facto’, with the concept ‘domestic partnership’.

included in the definition of ‘domestic partners’. In some instances, this has had flow on effects for other legal rights, including parenting rights.<sup>114</sup>

2.2.2 These amendments also provided non-married heterosexual de facto couples with similar rights to legally married couples when it comes to presumptions of parentage, access to ART and surrogacy agreements.

2.2.3 However, as outlined above, these laws continue to be defined by at least one significant ongoing discriminatory feature — the need for non-married, childless couples to meet cohabitation requirements before they are eligible to access these rights. The results can be profound for non-heterosexual couples desperate to start a family, as noted in the Audit Paper:

Participant Quote:

My (female) partner and I have been together for two years. We live together. We want to start a family together and are engaged to be married (even though it isn't legal). We feel that we are a defacto couple. Our finances are shared and we are committed for life. According to SA law our relationship does not have this status because we have not been living together for 3 years. The cut off point is arbitrary and has implications for us financially and whether I as the non birth mother can be named on the birth certificate. [Audit Paper, Submission 11]

2.2.4 For these reasons, it is proposed that the additional category of a ‘registered relationship’ should be included in the *Family Relationships Act 1975* (SA). This could take the form of an amended s 11A as follows (changes underlined):

11A—Domestic Partners

A person is, on a certain date, the domestic partner of another person if he or she is, on that date, in a “registered relationship” with that person OR living with that person in a close personal relationship and –

(a) he or she –

(i) has also lived with that other person continuously for the period of 3 years immediately preceding that date; or

(ii) has during the period of 4 years immediately preceding that date so lived with that other person for periods aggregating not less than 3 years; or

(b) a child, of whom he or she and the other person are the parents, has been born (whether or not the child is still living at that date).

“registered relationship” is to have the meaning as defined by the [proposed] *Registered Relationships Act 2016* or relevant Part of the *Births Deaths and Marriages Registration Act 1986*.

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<sup>114</sup> These reforms were followed by the enactment of the *Statutes Amendment (De Facto Relationships) Act 2011* (SA) that recognises same sex couples in asset forfeiture, property and stamp duty applications. See fact Sheet 5 for more information.

2.2.5 Including ‘registered relationship’ in the definition of ‘domestic partner’ in this way could address the discriminatory features of the parenting presumptions in the *Family Relationships Act 1975* (SA) by extending presumptive parental status to couples in a registered relationship. Such a change would not need to alter the current domestic partner cohabitation test for non-married couples, however it would provide non-married couples with an alternative legal option to having their relationship recognised. For example, a non-heterosexual couple in a committed relationship who wanted to start a family could have that relationship legally registered, much like a heterosexual couple could get legally married, rather than providing evidence of cohabitation for three years. This would then mean that the parenting presumptions in the *Family Relationships Act 1975* (SA) could be applied to the registered couple, just as they are to a married couple.

2.2.6 Parenting presumptions, particularly in so far as they relate to children born as a result of ART, are discussed in further detail below.

2.2.7 Legislative protection to prevent discrimination should also be provided for those in a ‘registered relationship’ in the *Equal Opportunity Act 1984* (SA).

### **Recommendation 9: Registered relationships and the *Equal Opportunity Act***

Having regard to Recommendation 7, corresponding amendments should be made to the Equal Opportunity Act 1984 (SA) to (a) amend the definition of ‘domestic partner’ in s 5 of that Act to include those in a ‘registered relationship’ and, in the same section, the definition of ‘marital or domestic partnership status’ should be extended to include ‘being a domestic partner (or in a registered relationship)’ thereby providing protection against discrimination on the grounds of being in a ‘registered relationship’ under s 85T of that Act, and (b) amend the definition of an ‘immediate family member’ in s 5 to include families that include couples in a registered relationship, and (c) ensure that the Act applies to the provision of assisted reproductive treatment services by amending s 5 which currently excludes fertilisation services from the definition of ‘services’ in that Act.

## **2.3 Parenting Presumptions**

2.3.1 Legal parentage, such as that conveyed or presumed by the provisions of the *Family Relationships Act 1975* (SA), is significant given the legal obligations, responsibilities and entitlements for the parent(s) and the child.<sup>115</sup> This is not elucidated in the *Family Relationships Act 1975* (SA), but under the *Family Law Act 1975* (Cth) parental responsibility means ‘all the legal duties, powers, responsibility and authority that parents have in relation to the child’.<sup>116</sup> The

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<sup>115</sup> Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 62.

<sup>116</sup> *Family Law Act 1975* (Cth) s 61B.

importance of legal parentage is more obvious in relation to the consequences of non-recognition, which may impact the parent's ability to consent to medical treatment, register with Medicare, apply for school or a passport, affect the child's rights to an intestacy and superannuation, and entitlements to child support or a right on injury or death of a parent.<sup>117</sup>

2.3.2 The introduction of 'registered relationship' as an additional category in the existing definition of 'domestic partner' in s 11A of the *Family Relationships Act 1975* (SA) would allow the registered partner of a woman who undergoes ART to be recognised as a parent of any child born as a result. This is because, by extending the definition of a domestic partner, the prerequisite 'qualifying relationship'<sup>118</sup> is also extended to the 'rules relating to parentage' of children conceived following fertilisation procedures such as IVF<sup>119</sup> (described below).

2.3.3 Only couples in a 'marriage like' relationship have current access to the parenting presumptions that apply when a child is born as a result of ART, such as through IVF.<sup>120</sup> Under the current provision the female partner of a woman who gives birth to a child conceived through a 'fertilisation process' is recognised as the child's co-parent if the partner consented to the procedure and the couple were in a 'qualifying relationship' at the time the child was conceived. This means that non-married couples who wish to have children born as a result of ART must include one woman who is infertile, and must have been in a qualifying relationship for at least three years if they both want to be recognised as the legal parent of the child under the *Family Relationships Act 1975* (SA).

2.3.4 SALRI's proposed change to s 11A of the *Family Relationships Act 1975* (SA), to include a registered relationship, would ensure that couples in a registered relationship would have access to parenting presumptions with respect to a child born as a result of ART. In this respect it would be unnecessary to amend the rules of parentage governing ART as provided by s 10C of the *Family Relationships Act 1975* (SA) (except in so far as is necessary to implement transitional provisions to cover non-married couples who have already had children as a result of ART, as discussed below). Such an approach has been employed in NSW, where under the *Status of*

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<sup>117</sup> *Dudley & Chedi* [2011] FamCA 502 [22].

<sup>118</sup> Section 10A defines this as a marriage-like relationship between two people who are domestic partners (whether of the same or opposite sex. Following the enactment of the *Family Relationships (Parentage) Amendment Act 2011* (SA), the female partner of a woman who gives birth to a child conceived through a 'fertilisation process' is recognised as the child's co-parent if the partner consented to the procedure and the couple were in a 'qualifying relationship' at the time the child was conceived. Non-married parents who wish to have children born as a result of assisted reproductive treatments must be infertile and have been in a qualifying relationship for at least three years.

<sup>119</sup> Section 10C of the *Family Relationships Act 1975* (SA).

<sup>120</sup> Section 10A defines this as a marriage-like relationship between two people who are domestic partners (whether of the same or opposite sex).

*Children Act 1996* (NSW), a couple in a registered relationship will be presumed to be the legal parent of a child born as a result of IVF.<sup>121</sup>

## **2.4 Assisted Reproductive Treatment (ART)**

2.4.1 This section of the Report examines how the ‘registered relationships’ model could address the discrimination arising from the current restrictions relating to access to ART and to the parenting presumptions relating to a child born as a result of ART.

2.4.2 The South Australian Government has recently commissioned a statutory review of the *Assisted Reproductive Treatment Act 1988* (SA) (*‘ART Act’*). This ongoing review focuses on the operation and effectiveness of the *ART Act* in relation to:

- the requirement that the welfare of any child born as a consequence of ART is to be treated as being of paramount importance, and accepted as a fundamental principle, in respect of the operation of the Act, as well as in the provision of assisted reproductive treatment;
- the replacement of the previous licensing scheme with a registration scheme for ART clinics;
- the dissolution of the SA Council on Reproductive Technology and its Code of Ethical Clinical Practice;
- amending eligibility for access to ART services — noting that such conditions relate to the circumstances in which, and to whom, ART may be provided;
- allowing for the establishment of a donor conception register; and
- provisions for record keeping and confidentiality.

2.4.3 This Review is relevant to SALRI’s work in this area, particularly insofar as it covers issues relating to access to ART. SALRI has closely liaised with the officers responsible for this Review in an effort to ensure that SALRI’s work complements and supports, but does not duplicate, that of the Review.

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<sup>121</sup> For the purpose of reproductive technologies in NSW, the definition of ‘spouse’ as defined in s 4 of the *Assisted Reproductive Technology Act 2007* (NSW) includes the person’s ‘de facto partner’. Section 21C of the *Acts Interpretation Act 1987* (NSW) defines ‘de facto partners’ and includes a person in a registered relationship (whether of the same sex or different sex). Same sex couples are recognised in the *Status of Children Act 1996* (NSW) under s 14(1A) which provides that when a woman who is the de facto partner of another woman undergoes and becomes pregnant from a fertilisation procedure, the other woman is presumed to be a parent of any child born as long as they consented to the procedure.



**a. Legal Landscape: Regulating Access to ART in South Australia**

2.4.4 Assisted Reproductive Treatment is any medical procedure that enables artificial fertilisation of a human ovum, including IVF.<sup>122</sup> Access to ART is governed by its own legislation, namely the *ART Act* and the *Assisted Reproductive Treatment Regulations 2010* (SA). These laws govern access to ART by regulating the registration of ART providers. Once authorised, a provider is subject to strict conditions that limit who they can service with ART.

2.4.5 Historically, ART laws were designed to benefit an infertile married couple or mitigate the risk of transmission of a genetic defect if a child were to be conceived naturally. In 1996, the marital status restriction was successfully challenged as contravening the *Sex Discrimination Act 1984* (Cth).<sup>123</sup> Subsequent amendments allowed for single women and those in domestic partnerships (including non-heterosexual couples) to access ART<sup>124</sup> where they meet one of the following circumstances:<sup>125</sup>

- i. The intended birth mother is, or appears to be, infertile;
- ii. The man living with the intended birth mother on a genuine domestic basis is, or appears to be, infertile;
- iii. There is a risk a serious genetic defect could be transmitted to the child if conceived naturally;
- iv. Where the donor of semen has died and antecedent conditions are met.

2.4.6 A number of submissions received by SALRI during its Audit Paper process raised concern at the continuing discrimination within the *ART Act*, as the ‘infertility’ requirement is understood to refer to ‘medical’ infertility. This effectively precludes access to ART for a lesbian couple who are medically fertile. The perverse effect of this legislation is that currently, where one partner in a lesbian relationship is infertile and the other is not, the infertile partner can access ART, even if her partner is better placed medically or otherwise to become pregnant.

2.4.7 In the Audit Paper, SALRI concluded that the current ART laws in South Australia are discriminatory in two ways:

- by requiring proof of ‘medical infertility’ before ART can be provided and;
- by refusing to recognise a non-birth mother as a legal parent of a child born as a result of IVF.

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<sup>122</sup> *Assisted Reproductive Treatment Act 1988* (SA) s 3.

<sup>123</sup> *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

<sup>124</sup> The relevant provisions of the *Assisted Reproductive Treatment Act 1988* (SA) and the *Reproductive Technology (Clinical Practices) Act 1988* (SA) were amended by the *Reproductive Technology (Clinical Practices) (Miscellaneous) Amendment Act 2009* (SA) and the *Statutes Amendment (Surrogacy) Act 2009* (SA).

<sup>125</sup> *Assisted Reproductive Treatment Act 1988* (SA) s 9(c).

2.4.8 By not recognising ‘social infertility’, the current laws discriminate against couples or singles who are unlikely to become pregnant other than by a treatment procedure, on the basis of their sexual orientation and/or relationship status, but may not be medically infertile. This situation was described in a submission to SALRI as unfairly privileging those in heterosexual relationships as it forces a lesbian couple interstate where access to ART for ‘social infertility’ is permitted; or to engage in unsafe or unregulated fertilisation procedures like self-insemination with unscreened donor sperm. Further examples of this discrimination are contained in the Audit Paper.<sup>126</sup>

### **b. Parenting Rights Following ART**

2.4.9 The *Family Relationships Act 1975* (SA) governs ART. Part 2A of the Act applies with regards to parental rights.

2.4.10 Under the *Family Relationships Act 1975* (SA), the woman who gives birth to a child conceived by ART is the mother of the child (whether or not the child was conceived by the fertilisation of an ovum taken from another woman).

2.4.11 If the woman is legally married or in a ‘qualifying relationship’ (that is a marriage-like relationship between two people who are domestic partners, whether of the same or opposite sex), her husband or domestic partner will be taken to be the father or co-parent of any child born as a result of the pregnancy.

2.4.12 As noted above, this means that non-married couples who wish to have children born as a result of assisted reproductive treatments must include one woman who is infertile, and must have been in a ‘qualifying relationship’ (that is, provide evidence of cohabitation for at least three years) if they both want to be recognised as the legal parent of the child under the *Family Relationships Act 1975* (SA).

2.4.13 As outlined in detail in the Audit Paper, this gives rise to discrimination on the grounds of sexual orientation (because non-heterosexual couples cannot get legally married) and can have a devastating impact on families, particularly on lesbian couples who are able to access ART and successfully have a child, but then are denied access to parenting rights for both women due to a failure to meet the three year cohabitation rule, despite being in a committed, long term relationship.<sup>127</sup>

2.4.14 For this reason, SALRI recommends that the term ‘domestic partners’ in the *Family Relationships Act 1975* (SA) be amended as recommended above to include a couple in a registered relationship. This simple definitional change would provide non-heterosexual couples

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<sup>126</sup> Audit Paper, above n 1, 79-86.

<sup>127</sup> Ibid 81-83.

who do not meet the three year cohabitation criteria with a clear legal option to enable them to be recognised as the legal parents of a child born as result of ART.

2.4.15 The meaning given to ‘qualifying relationship’ in s 10A could be further improved by removing the term ‘marriage like’ relationship. This would address the discriminatory features of s 10C for *future* non-heterosexual couples who seek to have a child via ART. Such an approach has been employed in NSW, where under the *Status of Children Act 1996* (NSW), a couple in a registered relationship will be presumed to be the legal parents of a child born as a result of IVF.

2.4.16 For non-heterosexual couples who have accessed the ART provisions in Part 2A since their enactment in 2011 and *already* have a child born as a result of ART, such as Elsie Duffield and Sally Amazon, transitional amendments are required to ensure that they can access the parenting presumptions described above.

2.4.17 This could take the form of a transitional provision that provides that couples who have had a child as a result of ART since the commencement of the *Family Relationships (Parentage) Amendment Act 2011* (SA)<sup>128</sup> (but prior to the enactment of the recommended relationships register provisions) who subsequently meet the amended definition of ‘qualifying relationship’ are presumed to be the parents of the child, pursuant to s 10C. This would mean that non-heterosexual couples (such as such as Elsie Duffield and Sally Amazon) who have already had a child as a result of ART since 2011 will have two legal options for gaining retrospective access to parenting rights: either registering their relationship, or meeting the cohabitation criteria required for ‘domestic partners’.

2.4.18 Further transitional provisions<sup>129</sup> may also be required to ensure that parents seeking to utilise these new provisions do not encounter legal barriers when seeking to make the requisite changes on the Births Deaths and Marriages Register.

2.4.19 As discussed further below, recent efforts have been made to address this issue, including the introduction of the Family Relationships (Parentage Presumptions) Amendment Bill 2015 (SA) by the Hon Tammy Franks, which, following amendment,<sup>130</sup> appears to have

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<sup>128</sup> The *Family Relationships (Parentage) Amendment Act 2011* (SA) commenced on 15 December 2011.

<sup>129</sup> See, for example, the transitional provision contained in the Family Relationships (Parentage Presumptions) Amendment Bill 2015, Schedule 1—Transitional provision 1—‘Immunity Despite a provision of the *Births, Deaths and Marriages Registration Act 1996*, no liability attaches to a person for a failure to provide to the Registrar particulars of the person who is the father or co-parent of a child in the case where— (a) the child was born before the commencement of this clause; and (b) the person is only taken to be father or co-parent of the child by virtue of Part 2A of the *Family Relationships Act 1975* (as amended by this Act).’

<sup>130</sup> The amendment requires that the birth registration statement must include the identity (if known) of the biological parents of the child — although this does not grant any parenting presumptions. The clause is to expire on the day on which a donor conception register is established. It is noted that any detailed discussion of this particular issues lies beyond the scope of this Report. See further South Australia, *Parliamentary Debates*,

broad support and is likely to shortly pass both Houses of Parliament. While SALRI acknowledges the laudable intention behind these efforts, it suggests that the relationships register model offers a number of benefits over this approach.

**c. Family Relationships (Parentage Presumptions) Amendment Bill 2015**

2.4.20 Clause 4 of the Family Relationships (Parentage Presumptions) Amendment Bill 2015 seeks to remove the cohabitation threshold to recognise the lesbian partner of a woman who undergoes a fertilisation procedure as the co-parent.

2.4.21 Whilst this Bill remedies the noted discrimination in relation to recognising a non-birth mother as a legal parent of a child born through ART, the relationship between the relevant partners is described as a ‘marriage-like relationship’. As already noted, such a phrase is itself inherently problematic and potentially discriminatory, as marriage is only recognised for heterosexual couples under current Commonwealth law.

2.4.22 In addition, such an approach is consent based and avoids an inquiry being made by the court as to the level of commitment required to be demonstrated between a non-heterosexual couple. The relationships register approach also allows for non-binary language to be used to describe the couples seeking to access these provisions. For example, rather than referring to ‘women’ accessing the provisions, or limiting the parenting presumptions to lesbian couples, the registered relationship approach recognises that non-heterosexual couples accessing ART can include gender diverse people, not just women. The importance of this approach is outlined in detail in the Audit Paper, and SALRI’s more recent report on *Legal Recognition of Sex and Gender*.

2.4.23 SALRI also notes that the Family Relationships (Parentage Presumptions) Amendment Bill has been subject to various amendments in the House of Assembly relating to the recording of information about any relevant ART donors in the birth registration statement of the child born as a result of the ART.<sup>131</sup> While this issue is of great interest to many of the participants of SALRI’s Roundtable consultation, it falls outside SALRI’s current Reference. SALRI notes that the ART Act already contains provision for the establishment of a Donor Conception Register, and this aspect of the Act forms part of the South Australian Government’s ongoing statutory review of the *Assisted Reproductive Treatment Act 1988* (SA).

**Recommendation 10: Removal of term ‘marriage like relationship’**

Any definition of a relationship which refers to a ‘marriage like relationship’ is inherently problematic and is difficult for courts to define and should be amended to omit the words ‘marriage like’.

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House of Assembly, 10 February 2016, 4216-4225; South Australia, *Parliamentary Debates*, Legislative Council, 9 March 2016, 3316-3322.

<sup>131</sup> See South Australia, *Parliamentary Debates*, House of Assembly, 10 February 2016, 4222-4225.

### **Recommendation 11: Registered relationships and parenting presumptions**

In accordance with Recommendation 7, s 10A and s 10C of the *Family Relationships Act 1975* (SA) should be amended to make it clear that:

- (a) where a child is born as a result of ART, the ‘qualifying relationship’ required before a couple is presumed to be the parents of the child includes couples in a registered relationship. This can be achieved by changing the definition of ‘domestic partner’ to include ‘registered relationship’ as recommended above. This would mean that non-married couples in a registered relationship who have a child as a result of ART will both be presumed to be the legal parents of that child.
- (b) introduce transitional provisions to ensure that couples who have had a child as a result of ART since the commencement of the *Family Relationships (Parentage) Amendment Act 2011* (SA)<sup>132</sup> (but prior to the enactment of the recommended relationships register provisions) who subsequently meet the amended definition of ‘qualifying relationship’ are presumed to be the parents of the child, pursuant to s 10C(3).

### **Recommendation 12: Use of non-gendered language**

In accordance with the recommendations already made by SALRI in its Audit Paper, gendered language contained in the *Family Relationships Act 1975* (SA) and related laws should be amended or replaced with non-binary language (for example, replacing ‘woman’ or ‘man’ with ‘person’). The introduction of the relationship register should also be accompanied by replacing gender specific references to ‘paternity’ and ‘father’ with gender-neutral terms such as ‘parentage’ and ‘co-parent’.

#### **d. Recommendations Already Made by SALRI: Access to ART**

2.4.24 In its Audit Paper, SALRI recommended immediate change to ensure that non-heterosexual couples can access ART and be recognised under the law as the legal parents of a child born as a result of ART. Modelled on the provisions of the *Assisted Reproductive Treatment Act 2008* (Vic), SALRI recommended:

Section 9 of the *Assisted Reproductive Treatment Act 1988* (SA) be amended to:

clarify that a person can access ART if, in the person’s circumstances, they are unlikely to become pregnant other than by an assisted reproductive treatment procedure, and include the guiding principle that people seeking to undergo ART procedures must not be discriminated against on the basis of their sexual orientation, marital status or religion.<sup>133</sup>

<sup>132</sup> The *Family Relationships (Parentage) Amendment Act 2011* (SA) commenced on 15 December 2011.

<sup>133</sup> Audit Paper, above n 1, 85.

2.4.25 The Audit Paper explained that such amendments would conform to the Commonwealth protections contained in the *Sex Discrimination Act 1984* (Cth), which prevent discrimination on the grounds of sexual orientation and marital status.

2.4.26 The Audit Paper also noted that corresponding amendments should be made to s 5 of the *Equal Opportunity Act 1984* (SA), which currently excludes fertilisation services from the definition of ‘services’ in that Act.<sup>134</sup>

### **e. Implications of SALRI’s Recommendations**

2.4.27 SALRI appreciates that its recommendations in the Audit Paper relating to access to ART alter the threshold for accessing ART from one of ‘medical infertility’ to one of ‘social infertility’. SALRI considers that such a reform is necessary and appropriate to address discrimination on the grounds of sexual orientation and gender identity and notes a similar approach is adopted in other jurisdictions, including Victoria.

2.4.28 However, SALRI appreciates that such a change will have implications for the type of fertility services being provided in South Australia and potentially for the demand on those services. This is particularly the case if SALRI’s recommendations are implemented so as to permit what is known as ‘social egg freezing’ — that is services accessed by potentially fertile but single women to preserve their future fertility options.

2.4.29 As part of the Audit Paper consultation process, SALRI received submissions highlighting what is perceived to be a level of sex based discrimination in the *ART Act* regarding the preservation of human gametes — with a different regulatory approach adopted for sperm, to that with respect to ovum.

2.4.30 Fertility SA described the ensuing impediment for women who wish to freeze (cryopreserve) their eggs while they are fertile, which is the logical and optimum time to do so (known as ‘social egg freezing’), but are precluded because such a procedure is defined as an ‘in vitro fertilisation procedure’, and ART is defined to include an ‘in vitro fertilisation procedure’. Fertility SA explained that therefore freezing eggs is only available once a woman meets the limited circumstances for accessing ART, such as being infertile, which runs counterproductive to the purpose of cryopreservation in the first place.<sup>135</sup> In contrast, there is no such legal restriction for men to store (cryopreserve) their fertile sperm for future use. This situation is inequitable and poses a significant disadvantage to women. Other Australian jurisdictions permit social egg freezing.<sup>136</sup>

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<sup>134</sup> Ibid 86.

<sup>135</sup> Letter from Fertility SA to South Australian Law Reform Institute dated 11 June 2015.

<sup>136</sup> See, for example, s 10 of the *Assisted Reproductive Treatment Act 2008* (Vic).

2.4.31 At the Surrogacy Roundtable, participants considered the implications of SALRI's recommendations to allow 'socially infertile' couples and individuals access to ART.

2.4.32 Participants acknowledged the existence of other ART access issues that affect the experience of non-heterosexual couples seeking to start a family in South Australia, but agreed that these issues fell outside the scope of SALRI's reference. It was noted that views on these matters, such as the legal recognition of ART donors and access to donor information, regulation of fertility clinics, and 'social egg freezing', should be directed to the State Government's ongoing statutory review of the *Assisted Reproductive Treatment Act 1988* (SA) for its consideration.

### **Recommendation 13: Access to assisted reproductive treatment**

In accordance with the recommendations made by SALRI in its Audit Paper, SALRI recommends that s 9 of the *Assisted Reproductive Treatment Act 1988* (SA) be amended to:

- clarify that a person can access ART if, in the person's circumstances, they are unlikely to become pregnant other than by an assisted reproductive treatment procedure, and
- include the guiding principle that people seeking to undergo ART procedures must not be discriminated against on the basis of their sexual orientation, marital status or religion.

Regard should also be had to the findings of the ongoing statutory review of the *Assisted Reproductive Treatment Act 1988* (SA), particularly if any recommendations are made relating to donor conception registers and the regulation of fertility services and ART providers (including any relevant considerations relating to 'social egg freezing').

In accordance with Recommendations 7 and 11 above, SALRI recommends that the parenting presumptions contained in Part 2A of the *Family Relationships Act 1975* (SA) be amended to reflect the recommended changes to the definition of 'domestic partner' in s 11A, to include couples in a 'registered relationship'. This would mean that the non-heterosexual parents of a child born as a result of ART would both be recognised as the legal parents of the child, provided they are either in a registered relationship or met the cohabitation requirements of 'domestic partner'.

## **2.5 Access to Surrogacy**

### **a. Legal Landscape: Regulating Surrogacy in South Australia**

2.5.1 The laws governing access to surrogacy in South Australia were identified in the SALRI Audit Paper as requiring further review.<sup>137</sup> Part 2B of the *Family Relationships Act 1975* (SA)

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<sup>137</sup> Audit Paper, above n 1, 13, 86-90.

discriminates against non-heterosexual couples and individuals by restricting access to surrogacy to married or heterosexual de facto couples.<sup>138</sup>

2.5.2 Surrogacy is defined as an understanding or agreement by which a woman — the surrogate mother — agrees to bear a child for another person or couple, and relinquishes the child to the ‘commissioning or intended parents’ shortly after birth.<sup>139</sup> It is an ‘age-old practice’ that finds reference in the Bible.<sup>140</sup>

2.5.3 Whilst surrogacy is not a commonly used procedure,<sup>141</sup> the amalgam of reproductive advances, such as ART, with novel social and legal considerations that challenge the hetero-normal family unit, has enlivened a role for surrogacy amongst non-heterosexual couples.<sup>142</sup> Nevertheless, surrogacy is not without contention. The junction of legal, regulatory, scientific and ethical challenges regarding surrogacy create significant questions for policy and law makers.<sup>143</sup>

2.5.4 Surrogacy is a complex and far from resolved issue. The growing relevance of surrogacy has not escaped government and academic scrutiny, as reflected in the numerous enquires undertaken across Australia in the last 30 years.<sup>144</sup>

### **b. Scope of this Report**

2.5.5 SALRI found in its Audit Paper that a strong case for reform had been made with respect to addressing the existing discriminatory regime that limits access to surrogacy and ART on the basis of relationship status and/or sexual orientation.

2.5.6 The Audit Paper noted that, for example, South Australia is one of the few jurisdictions that excludes access to surrogacy arrangements for non-heterosexual couples.<sup>145</sup> Therefore, non-heterosexual couples living in South Australia who choose surrogacy look interstate or overseas,

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<sup>138</sup> *Family Relationships Act 1975* (SA) s 10HA(2)(b)(iii).

<sup>139</sup> SDC, above n 109, 58.

<sup>140</sup> South Australia, *Parliamentary Debates*, Legislative Council, 9 April 2008, 2365 (Sandra Kanck); Legislative Council Select Committee, Parliament of Tasmania, *Report on Surrogacy* (2008) 3.

<sup>141</sup> SDC, above n 110, 64; Investigation into Altruistic Surrogacy Committee, above n 101, 57.

<sup>142</sup> See Legislative Council Select Committee, above n 140, 3.

<sup>143</sup> Katie O’Byrne and Paula Gerber, ‘Surrogacy and Human Rights: Contemporary, Complex, Contested and Controversial’ in Paula Gerber and Katie O’Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate, 2015) 1.

<sup>144</sup> See Appendix 5 for a non-exhaustive list of the many inquiries that have considered surrogacy.

<sup>145</sup> See Appendix 6 for a summary of the comparative law in other Australian jurisdictions. See Appendix 6 for a summary of the law in other Australian jurisdictions.



with the latter the choice for over 90% of Australians seeking surrogacy, half of these being gay men.<sup>146</sup>

2.5.7 SALRI is aware that inconsistencies exist across all Australian jurisdictions in relation to access to surrogacy and acknowledges that a national model may be the ideal framework in future given the lack of uniformity, complexity and extra-territorial restrictions that are experienced in accessing surrogacy in Australia, albeit in absence of constitutional power.<sup>147</sup> This is an important and complex issue, but one that falls outside SALRI's current mandate.

2.5.8 SALRI further acknowledges that some have advocated for a review of the laws with regards commercial surrogacy that would regulate rather than criminalise such a procedure. At present, commercial surrogacy is illegal in all Australian jurisdictions (with the possible exception of the Northern Territory). SALRI recognises the relevance of such a review but the complex issue of commercial surrogacy currently falls outside SALRI's current mandate.

### **c. Concurrent Reviews and Inquiries**

2.5.9 As noted above, the South Australian Government is currently undertaking a statutory review of the *Assisted Reproductive Treatment Act 1988* (SA).

2.5.10 The Commonwealth Standing Committee on Social Policy and Legal Affairs is also currently inquiring into the regulatory and legislative aspects of international and domestic surrogacy arrangements. Its report is expected by the end of June 2016.<sup>148</sup> The NSW Attorney General is currently conducting a review of the *Surrogacy Act 2010* (NSW) to determine whether the policy objectives of the Act remain valid and whether the Act's terms remain appropriate to secure those objectives.<sup>149</sup>

2.5.11 Both of these reviews have terms of reference that extend well beyond the scope of SALRI's Reference, albeit both reviews have a degree of overlap with SALRI's work in terms of their consideration of issues relating to access to domestic, altruistic surrogacy in Australia. SALRI suggests that careful consideration should be given to the outcomes of each of these reviews when considering any reforms relating to access to surrogacy in South Australia. However, SALRI notes that, unlike the other two reviews, the reforms that SALRI recommends

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<sup>146</sup> Surrogacy Australia, Submission to SALRI, No 37, 2-3.

<sup>147</sup> In *Lowe & Barry and Anor* [2011] FamCA 625, [20], Benjamin J stated that the Commonwealth lacks the constitutional power to legislate on surrogacy. A national solution requires the referral of power by the States or an agreement to enact consistent legislation.

<sup>148</sup> See further, Standing Committee on Social Policy and Legal Affairs, *Current Inquiries: Inquiry into Surrogacy*, Parliament of Australia <<http://www.aph.gov.au/spla>>.

<sup>149</sup> See further: Justice, *Statutory Reviews: Review of Surrogacy Act 2010* (14 April 2016) NSW Government <[http://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd\\_consultation/lpclrd\\_stat\\_reviews.aspx#ReviewofSurrogacyAct2010](http://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/lpclrd_stat_reviews.aspx#ReviewofSurrogacyAct2010)>.

are *solely* directed at access to lawful surrogacy agreements under the *Family Relationships Act 1975* (SA).

#### **d. Current Law in South Australia**

2.5.12 In South Australia, ‘altruistic gestational surrogacy’<sup>150</sup> was legalised in November 2009<sup>151</sup> (as now amended by the *Family Relationship (Surrogacy) Amendment Act 2015* (SA)). Part 2B of the *Family Relationships Act 1975* (SA) regulates access to surrogacy and the subsequent parentage order from the Youth Court for transfer of legal parental recognition of the child.

2.5.13 Surrogacy is currently only lawful in South Australia if it occurs under a ‘recognised surrogacy agreement’. Under such an agreement, the ‘commissioning parents’ must be either (a) legally married or (b) a heterosexual de facto couple who have cohabitated for three years.<sup>152</sup> There is also a requirement that the female commissioning parent bears some ‘dysfunction’, such as infertility or, medical or genetic grounds that discourage pregnancy.<sup>153</sup>

2.5.14 Uniformly with all Australian jurisdictions, South Australia prohibits commercial surrogacy.<sup>154</sup>

2.5.15 Whilst the delivery of a baby is the purpose of engaging a surrogacy agreement, central to the recognition of the new family structure is the ability to sever and transfer the legal relationship from the birth mother to the commissioning parents.<sup>155</sup>

2.5.16 The welfare of the child is the paramount consideration for the Court to grant an order recognising the commissioning parents as the child’s legal parents.<sup>156</sup> The Court must also be satisfied that the child’s surrogate mother freely and fully understands the effect of making the

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<sup>150</sup> Commercial surrogacy should be distinguished from ‘altruistic gestational surrogacy’ which refers to a surrogacy arrangement whereby the surrogate receives reimbursement for medical costs (‘altruistic’ cf. ‘commercial’ where the surrogate receives a fee) and the woman carries the pregnancy but does not provide the ovum (‘gestational’ cf. ‘traditional’ where the surrogate provides the ovum).

<sup>151</sup> *Statutes Amendment (Surrogacy) Act 2009* (SA), inserting s 10HA into *Family Relationships Act 1975* (SA).

<sup>152</sup> *Family Relationships Act 1975* (SA) s 10HA(2)(ii)-(iv).

<sup>153</sup> *Ibid* s 10HA(2)(v) (emphasis added).

<sup>154</sup> *Ibid* s 10H. The *Family Relationship (Surrogacy) Amendment Act 2015* (SA) makes certain amendments to surrogacy law and practice in South Australia and does not allow commercial surrogacy but it does allow wider scope for incidental costs.

<sup>155</sup> Sifris, above n 102, 95.

<sup>156</sup> *Family Relationships Act 1975* (SA) s 10HB(6).

order,<sup>157</sup> the commissioning parents are regarded as ‘fit and proper persons’ to be parents, and any other consideration the Court deems relevant.<sup>158</sup>

2.5.17 The effect of the order is the commissioning parents are treated as the parents and the birth parent is no longer a legal parent.<sup>159</sup> The Court will notify the Birth, Deaths and Marriages Registrar of the order.<sup>160</sup>

2.5.18 Legal parentage is significant given the legal obligations, responsibilities and entitlements for the parent(s) and the child.<sup>161</sup>

2.5.19 SALRI notes that, notwithstanding that a parenting order in South Australia requires a recognised surrogacy agreement, it is not illegal for a couple to enter into non-commercial surrogacy agreement in South Australia that fails to meet the requirements of the *Family Relationships Act 1975* (SA), however, this will result in non-transfer of parentage. An example is a gay couple who engage a surrogate to self-inseminate without the use of ART.<sup>162</sup>

### **e. Discriminatory Features of the Current Provisions: Couples**

2.5.20 Section 10HA of the *Family Relationships Act 1975* (SA) explicitly discriminates against non-heterosexual couples. Surrogacy laws limit access to ‘commissioning parents’ who are either a married couple (which is restricted to those in heterosexual relationships by Commonwealth laws), or a heterosexual de facto couple who meet a cohabitation threshold.

2.5.21 These laws prevent non-heterosexual couples from being ‘commissioning parents’ and legally accessing rights that would allow them to have a child. For many non-heterosexual couples, the desire to start a family is the same as for heterosexual couples, albeit impeded fundamentally by biology. This may have a greater impact on gay men who have fewer parenting options compared to women.

2.5.22 Further, there is a requirement that the female commissioning parent is infertile or medically unfit to carry a pregnancy,<sup>163</sup> recognisably preventing a non-heterosexual male couple engaging in a surrogacy arrangement.

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<sup>157</sup> Ibid s 10HB(7).

<sup>158</sup> Ibid s 10HB(10)-(11).

<sup>159</sup> Ibid s 10HB(13).

<sup>160</sup> Ibid s 10HD.

<sup>161</sup> Family Law Council, above n 115, 62.

<sup>162</sup> Audit Paper, above n 1, 87 citing Stephen Page, Submission to SALRI, No 34, 2.

<sup>163</sup> *Family Relationships Act 1975* (SA) s 10HA(2)(b)(v).

2.5.23 In light of the inconsistency between the South Australian approach and those of other Australian jurisdictions, (that all provide for some form of access by non-heterosexual couples and singles), SALRI recommends that the relevant South Australian law should be reformed.

2.5.24 This approach appears to also align with the reasoning behind the SDC's initial recommendation to legalise surrogacy for heterosexual couples in 2007.<sup>164</sup> At the time, the Hon Ian Hunter MLC raised the issue of surrogacy for non-heterosexual couples by foreshadowing amendments to the proposed Bill.<sup>165</sup> The amendments ultimately gained insufficient support in the Legislative Council.<sup>166</sup> Despite the practical effect of the Bill, Dr McFetridge MP stated that the intention was 'to give heterosexual couples the opportunity to have children, not to discriminate against same-sex couples'.<sup>167</sup>

#### **i. Addressing discriminatory features of current law by inclusion of 'registered relationship'**

2.5.25 As surrogacy is an accepted, legal procedure for heterosexual couples, extending the domestic arrangements in South Australia to non-heterosexual couples, removes the present discrimination in Part 2B of the *Family Relationships Act 1975* (SA).

2.5.26 Participants at the Surrogacy Roundtable discussion<sup>168</sup> were clear in their acknowledgment that the restriction of 'commissioning parents' to heterosexual couples who are either legally married or a heterosexual de facto couple who satisfy a cohabitation requirement should be extended to allow surrogacy access to non-heterosexual couples.

2.5.27 The recommended relationships register model outlined in this Report was strongly supported by the Roundtable as a means to address the omission in the relevant South Australian provisions relating to access to lawful surrogacy agreements by non-heterosexual couples.

2.5.28 As described above, a 'registered relationship' would be recognised as an additional form of 'domestic partnership' under s 11A of the *Family Relationships Act 1975* (SA). This means that a person could be a 'domestic partner' for the purpose of South Australian law irrespective of their gender, by *either* (a) meeting the cohabitation criteria; *or* (b) the partners are the parents of a child born; *or* (c) the partners are in a *registered relationship*.

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<sup>164</sup> SDC, above n 109, 59.

<sup>165</sup> South Australia, *Parliamentary Debates*, Legislative Council, 18 June 2008, 3369-3370 (Ian Hunter).

<sup>166</sup> South Australia, *Parliamentary Debates*, Legislative Council, 18 June 2008, 3380-3383.

<sup>167</sup> South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2008, 927 (Dr Duncan McFetridge).

<sup>168</sup> See Appendix 1 for the shared views in the Report to this Roundtable.

2.5.29 Under such an approach, the definition of ‘commissioning parents’ for a surrogacy agreement would be subsequently amended to require the commissioning parents — (a) are legally married; or (b) in a *domestic partnership* (as amended to include ‘registered relationship’).

**Recommendation 14: Access to surrogacy for non-heterosexual couples**

In accordance with Recommendation 7, access to the lawful surrogacy agreement provisions contained in Part B of the *Family Relationships Act 1975* (SA) should be extended to include non-heterosexual couples.

**Recommendation 15: Access to surrogacy for domestic partners**

In accordance with Recommendation 7, the definition of ‘commissioning parents’ for a recognised surrogacy agreement in s 10HA(2) of the *Family Relationships Act 1975* (SA) should be amended to include ‘commissioning parents’ who are legally married or in a ‘domestic partnership’.

**ii. Addressing discriminatory features by removing the restriction of ‘commissioning parents’**

2.5.30 In the event that the recommended Relationships Register outlined in this Report is not implemented, an alternative drafting option, supported by the Surrogacy Roundtable participants, is to repeal the restrictive definition of ‘commissioning parents’ in s 10HA(2)(iii) of the *Family Relationships Act 1975* (SA).

2.5.31 An inclusive definition of ‘commissioning parents’ was added to the ‘Interpretation’ section of Part 2B (s 10F), effective mid 2015:

*Commissioning parents*, in respect of a recognised surrogacy agreement, means the 2 persons to whom custody of any child to whom the agreement relates is, or is to be, surrendered.<sup>169</sup>

2.5.32 However, this definition is then specifically restricted when applied to a ‘recognised surrogacy agreement’ in s 10HA(2)(iii) of the *Family Relationships Act 1975* (SA), which effectively excludes non-heterosexual couples.

2.5.33 An option to remove this discrimination is to repeal the restricting provision (s 10HA(2)(iii)) and to leave any reference to commissioning parents for a recognised surrogacy agreement to mean the inclusive definition (see s 10F), which contains no discrimination on the basis of marital status or sexual orientation or gender identity, and does not require a cohabitation threshold.

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<sup>169</sup> Inserted by the *Family Relationships (Surrogacy) Amendment Act 2015* s 3(1).

2.5.34 In terms of uniformity between State laws, the inclusive definition of ‘commissioning parents’ corresponds with the term used in Victoria,<sup>170</sup> the expression ‘intended parents’ (NSW, Queensland and Tasmania),<sup>171</sup> ‘substitute parents’ (ACT)<sup>172</sup> and ‘arranged parents’ (WA).<sup>173</sup>

2.5.35 For these reasons, SALRI suggests that, if there is no introduction in South Australia of a ‘registered relationship’, the restrictive definition of ‘commissioning parents’ in s 10HA(2)(iii) of the *Family Relationships Act 1975* (SA) should be repealed by using the inclusive, non-discriminatory definition in s 10F.

### **iii. Need for consistency of ‘commissioning parents’ across both recognised surrogacy agreement (s 10HA) and order for parentage (s 10HB)**

2.5.36 Regardless of whether ‘commissioning parents’ is expanded to include a registered relationship option, or ‘commissioning parents’ is repealed to reinstate the inclusive definition, it is critical that the same definition is consistently applied in both provisions governing who can enter a recognised surrogacy agreement (s 10HA) and those governing who can apply for order for parentage (s 10HB).

2.5.37 Currently, there is the potential for the two sections to embrace different categories of ‘commissioning parents’, suggesting an inconsistent policy approach to whether non-heterosexual couples should be able to access lawful surrogacy.

2.5.38 For example, s 10F of the *Family Relationships Act 1975* (SA) provides that an order applies to ‘a recognised surrogacy agreement’, which includes a ‘surrogacy agreement ... entered into in accordance with a prescribed corresponding law of the Commonwealth, or of another State or Territory’ (s 10F). Because all other Australian jurisdictions allow some form of non-heterosexual couples/individuals to legally access surrogacy, this means that the current South Australian law recognises the rights of non-heterosexual couples who have entered into a surrogacy agreement interstate to apply for a parenting order, but the same laws refuse to allow non-heterosexual couples to enter into a lawful surrogacy agreement in South Australia.

2.5.39 This inconsistency suggests that there may be an increasing acceptance of surrogacy agreements in general, as well as the fact that non-heterosexual couples can and do engage in surrogacy agreements in Australia and elsewhere.

2.5.40 This is further indicated by the recent passage of the *Family Relationships (Surrogacy) Amendment Act 2015* (SA). This Act intends to improve the current regime in terms of the welfare

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<sup>170</sup> *Assisted Reproductive Treatment Act 2008* (Vic) ss 3, 40.

<sup>171</sup> *Surrogacy Act 2010* (NSW) s 5; *Surrogacy Act 2010* (Qld) ss 7(1)(b), 9; *Surrogacy Act 2012* (Tas) s 5.

<sup>172</sup> *Parentage Act 2004* (ACT) s 24.

<sup>173</sup> *Surrogacy Act 2008* (WA) s 14.

of children born through surrogacy, widen the accessibility of surrogacy in South Australia and to limit (but not prohibit) the use of overseas commercial surrogacy.<sup>174</sup> The main amendments include allowing for reimbursement to the birth mother for reasonable out of pocket expenses; establishing a framework that sets out the permitted circumstances for surrogacy and establishing a Surrogate Register for willing surrogates to make it easier for prospective parents to find a birth mother. The Act also seeks to regulate access to overseas surrogacy arrangements, by creating a framework that recognises where it is appropriate to go overseas, rather than criminalising the practice.

2.5.41 Under the new provisions, the responsible Minister can approve access to a proposed overseas surrogacy agreement. This is in contrast to NSW, Queensland and the ACT, which have a territorial restraint on their residents engaging in any commercial surrogacy.<sup>175</sup> Before approving, the Minister would consider the security and welfare of a child born through this process. Any ‘unsuitable parents’ would be discouraged from using an overseas arrangement.<sup>176</sup> It is contemplated that Regulations will be made to provide for the practical operation of these changes (SALRI understands these Regulations are under current consideration). Such Regulations could enable the Minister to approve an overseas surrogacy agreement involving a non-heterosexual couple.

2.5.42 This recent legislative activity in the area of surrogacy demonstrates the need to ensure that the South Australian laws regulating who can enter into a lawful surrogacy agreement in South Australia are clearly amended to provide access to non-heterosexual couples.

**Recommendation 16: Consistent approach to surrogacy agreements and resulting parenting orders**

Ensure that the amended definition of ‘commissioning parents’ in Part 2B of the *Family Relationships Act 1975* (SA) is consistent in its application for both a recognised surrogacy agreement (s 10HA) and an order for parentage (s 10HB) of the Act.

**f. Addressing Discriminatory Features: Singles**

2.5.43 The lawful surrogacy provisions in Part 2B of the *Family Relationships Act 1975* (SA) are only available to heterosexual couples.

2.5.44 A number of the Surrogacy Roundtable participants agreed that surrogacy should be available to a single ‘commissioning parent’. While it lies outside of the Reference for the

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<sup>174</sup> South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2014, 1597-1598 (John Dawkins).

<sup>175</sup> See *Surrogacy Act 2010* (NSW) ss 8, 11; *Surrogacy Act 2010* (QLD) ss 54, 56; *Parentage Act* (ACT) ss 40, 41, 45.

<sup>176</sup> South Australia, *Parliamentary Debates*, House of Assembly, 4 June 2015, 1526 (Adrian Pederick).

purpose of this Report, it was identified as an important issue by Roundtable participants and therefore will be addressed.

2.5.45 It was noted that allowing singles to access surrogacy could be supported on the basis of the decisions in *Pearce*<sup>177</sup> and *McBain*,<sup>178</sup> where under South Australian and Victorian law, the restriction of IVF treatment on the basis of marital status was declared to be inconsistent with the *Sex Discrimination Act 1984* (Cth). As a result of these cases, ART provisions were subsequently amended to allow access to single women.

2.5.46 Notably, nearly all other Australian jurisdictions allow for a single commissioning parent in a surrogacy agreement.<sup>179</sup>

2.5.47 SALRI is of the view that if single people are seeking to make surrogacy arrangements, it is far preferable that they be permitted access to the lawful surrogacy provisions in Part 2B of the *Family Relationships Act 1975* (SA), that include a range of important legal protections for the rights of the child and the surrogate, rather than making unlawful or lawfully precarious arrangements with surrogates in Australia or overseas.

2.5.48 Such a change would also remove discrimination on the grounds of marital or relationship status and promote consistency with the provisions of the *Sex Discrimination Act 1984* (Cth).

### **Recommendation 17: Access to surrogacy for singles**

In keeping with the changes in other Australian jurisdictions, South Australia should provide access to Part 2B of the *Family Relationships Act 1975* (SA) to single people, as well as couples.

### **g. Consequential Reforms Needed to Address Discrimination**

2.5.49 It was noted that, in addition to the principal discriminatory provisions in Part 2B of the *Family Relationships Act 1975* (SA), there are other, less obvious provisions that also need to be amended to remove gendered or discriminatory language. These include:

- Section 10(2)(b)(v) – references to ‘*the* female commissioning parent’, which supposes that one of the commissioning parents is a female. It is preferable to refer to ‘*where a* female commissioning parent...’
- Section 11A and 11B – references to ‘he or she’. It is preferable to refer to ‘...that person...’

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<sup>177</sup> *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

<sup>178</sup> *McBain v State of Victoria* (2000) 99 FCR 116.

<sup>179</sup> See Appendix 6.



2.5.50 It may also be necessary to amend s 22A of the *Births, Deaths and Marriages Registration Act 1996* (SA) relating to surrogacy orders.<sup>180</sup>

## 2.6 Adoption

2.6.1 As noted in the Audit Paper,<sup>181</sup> the *Adoption Act 1988* (SA) and the *Adoption Regulations 2004* currently exclude non-heterosexual couples from being eligible for consideration as prospective adoptive parents.

2.6.2 The *Adoption Act 1988* (SA) requires adoptive parents to provide evidence of cohabitation in a ‘marriage relationship’ (interpreted in practice under s 12 of the Act to mean the relationship between a man and a woman). The discriminatory impact of this law on the lives of LGBTIQ South Australians can be profound, particularly for those who are unable to start a family by alternative means, or for those who are currently caring for a child (for example, a child of their partner or a child under a foster-parent arrangement) and wish to obtain full parenting rights to that child.

Participant Quote:

The impact on our lives is that we cannot start a family. I would prefer to adopt instead of donor insemination, as I was a donor conceived child myself and know very little of my biological ancestry. ... We are thinking of uprooting our lives and moving to another country where we are able to adopt ... so we could think about starting a family. [Submission 21]

2.6.3 Many participants in the SALRI consultation and submission process expressed the view that the law regulating adoption in South Australia should objectively consider the prospective parent’s fitness, ability and commitment to provide the care and nurture required by each particular child, regardless of the prospective parent’s sexuality or marital status.<sup>182</sup> For these submissions, it was the principle of the ‘best interests of the child’ that should be at the centre of any legal framework regulating adoption — rather than the sexual orientation, gender identity or marital status of the prospective adoptive parents. SALRI agrees that the best interest of the child remains the paramount consideration.

2.6.4 Both the ACT and Tasmanian legal frameworks regulating adoption have been identified as an example of ‘best practice’ and provide a useful model for South Australia to consider,

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<sup>180</sup> Whilst a successful parentage order application can be made following a recognised surrogacy agreement in another State or Territory (*Family Relationships Act* s 10HB(2)(a)), if the birth is registered in that other State or Territory, it appears the Births, Deaths and Marriages Registrar may not be able to register the change of details. Section 22 A of the *Births, Deaths and Marriages Registration Act 1996* (SA) only gives the Registrar the power to register the details for a child whose birth is registered in South Australia (see s 22A(1)).

<sup>181</sup> Audit Paper, above n 1, 12, 74-79.

<sup>182</sup> See also Submission No 4.

particularly given the fact that both regimes remove most of the discriminatory features of other regimes, such as that described above in South Australia.

2.6.5 The *Adoption Amendment Act 2013* (Tas) recently amended the *Adoption Act 1988* (Tas) to allow non-heterosexual couples to adopt. The *Adoption Act 1988* (Tas) provides that the paramount consideration that is to be employed at all times in the adoption process is the best interests of the child.<sup>183</sup> The Tasmanian approach accepts that it may be in the best interests of a child to be adopted by a LGBTIQ couple or individual regardless of their sexual orientation or gender identity. Further detail about the Tasmanian model is contained in the Audit Paper.<sup>184</sup>

2.6.6 The *Adoption Act 1988* (SA) has been the subject of a recent review undertaken by Dr Hallahan of Flinders University on behalf of the Department of Education and Child Development (DECD).<sup>185</sup> In February 2016, DECD published this Review. The most relevant finding of the Review is that adoption is driven by the consideration of the relationship rights, best interests, needs and welfare of the child and not by the desires or characteristics of potential adoptive parents and that same sex couples should not be excluded from being adoptive parents. The Review recommends that there should be no distinction made within the *Adoption Act 1998* (SA) regarding the marital status of potential adoptive parents, and that relevant provisions in the Act should be changed to remove references to husband and wife and should include references to two persons cohabiting. The Review also recommended that the special circumstance provision be removed to allow single persons to adopt.<sup>186</sup>

2.6.7 The Review's reasoning and recommendations are persuasive. The Review's recommendations are consistent with those previously made by SALRI. In its Audit Paper,<sup>187</sup> SALRI also recommended the removal of the discriminatory impact of s 12 of the *Adoption Act 1988* (SA) that currently excludes same sex couples from eligibility as prospective adoptive parents.

2.6.8 Combined with this recommendation, the registered relationship model could also be used to remove the discriminatory features of South Australia's adoption regime. For example,

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<sup>183</sup> *Adoption Act 1988* (Tas) s 8.

<sup>184</sup> Audit Paper, above n 1, 78-79.

<sup>185</sup> Hallahan, above n 11. The key issues of the Review are adoption information vetoes, adoption of a person over the age of 18 years, retention of the child's birth names, same-sex couples and adoption, single person adoption and the discharge of adoption orders in certain circumstances.

<sup>186</sup> *Ibid* 13, 42-45.

<sup>187</sup> SALRI recommended that the Government remove the discriminatory impact of s 12 of the *Adoption Act 1988* (SA) that currently excludes same sex couples from eligibility as prospective adoptive parents, subject to any relevant findings and recommendations made following the DECD *Adoption Act* Review. See further Audit Paper, above n 1, 12, 74-79.

the criteria affecting prospective adoptive parents in s 12 of the Act could be expanded in a similar way to the Tasmanian Act to include a registered relationship.

2.6.9 The DECD Review also recommends that the requirement that single persons may adopt in ‘special circumstances’ (which may relate to a child’s cultural background, language of origin, or family background) according to the *Adoption Regulations 2004* (SA). The Review recommends that for single men and women to be equally treated with couples, both the Act and the Regulations will need to be amended to remove the ‘special circumstances’ requirement.<sup>188</sup>

**Recommendation 18: Access to adoption for non-heterosexual couples**

Remove the discriminatory impact of s 12 of the *Adoption Act 1988* (SA) that currently excludes same sex couples from eligibility as prospective adoptive parents, as supported by the recent DECD Review of the *Adoption Act*.

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<sup>188</sup> See Hallahan, above n 11, 43.

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## Appendix 1 – Roundtable Reports



### The Roundtable

On 15 February 2016 the South Australian Law Reform Institute ('the Institute') hosted a Roundtable of community members and representatives from relevant Government agencies to discuss the issues identified in the Institute's September 2015 Report *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation* ('the Audit Report') concerning South Australian laws relating to the equal recognition of relationships and removal of discrimination with respect to parenting rights with a proposal to introduce a relationship register.

The Roundtable was conducted under Chatham House rules. The Institute is grateful for the time and valuable contributions of all participants.

The following report contains the shared views of the Roundtable. These views are not the confirmed views of the Institute, however, they provide an important framework for further consultation and research.

### We want to hear from you

The Institute welcomes written submissions in response to the questions or issues raised in this Report **by close of business Friday 26 February 2016** and intends to finalise its Report to Government by June 2016.

Further information about the Institute, this Reference, its approach to terminology and its Audit of South Australian laws that discriminate on the grounds of gender, sexual orientation, gender identity and intersex status can be found in its Audit Report available for download at <https://law.adelaide.edu.au/research/law-reform-institute/>.

### Shared Views of the Roundtable

#### Case for reform has been made

1. The Institute's Audit Report found that there is a need for legislative reform to ensure that the current laws regulating legal recognition of relationships in South Australia do not contain features that discriminate on the grounds of sexual orientation and gender identity. The Institute considered that the New South Wales (NSW) approach to a relationship register, also employed in different guises in the Australian Capital Territory, Tasmania and Victoria,<sup>1</sup> offered a possible model for reform.
2. The Roundtable discussed this model of reform in the context of the current South Australian laws relating to relationships, particularly those prescribing cohabitation criteria to be met before a couple is recognised as domestic partners, and Commonwealth laws restricting access to legal marriage to those in heterosexual relationships. These laws retain discriminatory features, some of which prevent some couples – whose relationships share the same level of love and

<sup>1</sup> *Civil Unions Act 2012* (ACT); *Relationships Act 2003* (Tas); *Relationships Act 2008* (Vic).

commitment as other couples – from accessing important legal rights, including rights relating to parenting. As foreshadowed in the Audit Report, the Institute considered that the introduction of a relationship register would redress many of these inequalities in two main ways: (1) by establishing a clear, non-discriminatory, legal process for people to register their relationship that is accessible for all couples, regardless of sexual orientation, gender identity or length of cohabitation and (2) by creating a new legal category of relationship that can be used in other laws, such as the *Family Relationships Act 1975* (SA), to systematically address any remaining discriminatory features in those laws. The introduction of such a register could also be accompanied by robust protections against fraud and misuse and clear processes for termination, as is the case in other Australian jurisdictions where such registers exist.

3. It was noted that the issue of marriage equality is front and centre in the national debate relating to the removal of discrimination on the grounds of sexual orientation, and is highly relevant to the lived experience of non-heterosexual couples in South Australia and their access to full legal rights, including parenting rights. Indeed, it is precisely because legal marriage is denied to non-heterosexual and gender diverse couples that the need for alternative relationship recognition laws in South Australia is so pressing. However, as noted in the Audit Report, marriage is regulated by the Commonwealth via the *Marriage Act 1961* (Cth), putting it outside the scope of SALRI's current terms of reference, which are explicitly focused on removing discrimination in current South Australian laws.

### Relationship Register

#### **Question 1: Is the Relationship Register model the best way for South Australia to recognise heterosexual and non-heterosexual relationships?**

4. Although it was acknowledged that a relationship register may not provide non-heterosexual couples with the equivalent social recognition of marriage, Roundtable participants agreed that a relationship register would fill a legal gap in South Australia and could provide non-heterosexual and unmarried heterosexual couples with access to equivalent legal rights as married couples, without requiring cohabitation criteria to be met. There was a general consensus that a registered relationship model was desirable and necessary in South Australia. The Roundtable discussed whether alternative language could be employed to describe the model, as is currently under consideration in other Australian jurisdictions. Some Roundtable participants expressed support for options that would facilitate an official ceremony at the time of registration, as is currently under consideration in other Australian jurisdictions.

#### **Question 2: If a Relationships Register Model is explored, what could its key features be?**

5. Roundtable participants considered that the features of the NSW relationship register generally provided a sound model for South Australia with some important considerations as follows:
  - a. It was noted that it was necessary that the model include criteria to ensure that neither individual applying to have their relationship registered in South Australia is in a legally recognised relationship elsewhere in Australia. However, it was noted that outside of this criteria, it was unnecessary to invite an inquiry as to whether an individual seeking to have their relationship registered, is 'in a couple' with another person.
  - b. It was proposed that the South Australian relationships register could include provisions that would enable automatic recognition of certain overseas marriages, specifically listed via regulation, as registered relationships. This would enable non-heterosexual marriages solemnised overseas to be automatically recognised as registered relationships in South Australia. By requiring the foreign law to be listed in regulation, this approach would ensure that automatic recognition was not provided to marriages solemnised in countries where duress or coercion may be used in relation to marriage.

These provisions could be modelled on those currently in force in Tasmania<sup>2</sup> and Victoria.<sup>3</sup> It was noted that any such legislation should contain a provision for the list of countries to be regularly updated. It was further noted that the South Australian model should also include some residual discretion to enable the Registrar to recognise an overseas marriage not solemnised under a law listed by regulation as a registered relationship in exceptional circumstances.

- c. It was noted that the establishment of a relationship register in South Australia should enable mutual recognition of registered relationships (or equivalent) in other Australian states and territories.

### Coexistence with the domestic partner regime

#### **Question 3: How could a possible new category of 'registered relationship' co-exist with the domestic partnerships regime?**

6. It was noted that the *Family Law Act 1975* (Cth) adequately deals with family law issues in relation to property and children, and that the definition of 'de facto' under that Act is very broad, currently incorporating 'domestic partner' and is well placed to incorporate 'registered relationship' if enacted in South Australia.
7. The Roundtable noted that the introduction of a relationship register in South Australia would not affect the operation of the current domestic partnerships regime or the legal rights of those meeting the definition of 'domestic partner'. The proposed new category of 'registered relationship' would co-exist alongside the existing definition of 'domestic partner' - offering an additional legal pathway for couples to access legal recognition of their relationship.
8. It was agreed that any definition of a relationship which refers to a 'marriage like relationship' was problematic and difficult for courts to define and should be avoided and/or amended in any legislative reform recommended by the Institute. It was acknowledged that this definition was used in the recent *Family Relationships (Parentage Presumptions) Amendment Bill 2015*.

### Coexistence with other laws that discriminate

#### **Question 4: How could a possible new category of 'registered relationship' address discrimination arising in the context of access to parenting rights?**

9. Roundtable participants agreed that the inclusion of the new category of 'registered relationship' within the *Family Relationships Act 1975* (SA) and related laws offered a sound basis for removing the features of these laws that discriminate on the basis of marital status and sexual orientation. The inclusion of 'registered relationship' also provided an important mechanism to remove discrimination relating to access to adoption, surrogacy and assisted reproductive treatment and related parenting rights under these laws.
10. However, Roundtable participants noted that further consideration of the laws relating to access to surrogacy and assisted reproductive treatment was required to ensure that all discriminatory elements were removed. The Institute noted that it is conducting separate consultations with respect to these matters and that the findings of this Roundtable would provide an important starting point for further discussions of these significant issues, including whether access to surrogacy and assisted reproductive treatment should be provided to singles and whether legal recognition should be provided to more than two parents.

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<sup>2</sup> *Relationships Act 2003* (Tas) s65A.

<sup>3</sup> *Relationships Amendment Act 2016* (Vic).

11. It was proposed that, in accordance with recommendations already made by the Institute, gendered language contained in the *Family Relationships Act 1975* (SA) and related laws should be amended or replaced with non-binary language.

## Property

### **Question 5: How could a possible new category of 'registered relationship' address discrimination in property rights?**

12. It was noted that the inclusion of the new legal category of 'registered relationship' offered a clear, legal pathway for non-married couples to enter into legal arrangements relating to property, and removed the discriminatory features of the existing South Australian regime governed by the *Domestic Partners Property Act 1996* (SA).
13. Roundtable participants discussed the Commonwealth and state options for non-married couples seeking to make legal arrangements relating to property and noted that the Commonwealth model, available under the *Family Law Act 1975*, provided an accessible and effective alternative to the South Australian *Domestic Partners Property Act 1996* regime. It was further noted that local experience suggests that non-married couples are far more likely to utilise the Commonwealth model than that available at the State level.

### **Question 6: How could a possible new category of 'registered relationship' address discrimination in other laws?**

14. Roundtable participants agreed that the new category of 'registered relationships' offered important benefits for a range of other laws regulating the legal rights of couples, particularly due to its consent based application process and the legal certainty it offered when compared to the current domestic partnership definition.
15. It was noted that the new category had potential benefit and should be incorporated into State laws relating to inheritance, intestacy, compensation, insurance and access to other entitlements such as superannuation, subject to further consideration as to the practical implications of such reform. The Institute noted that it had received informal commentary addressing some of these matters.
16. Roundtable participants also noted that the new category should be reflected in criminal law, particularly those laws addressing aggravating circumstances relating to acts of a 'family member' or 'de facto partner'. It was agreed that this should be given further consideration.
17. Roundtable participants noted that the current provisions of the *Equal Opportunity Act 1984* (SA) making discrimination on the basis of relationship or marital status unlawful should include explicit protection against discrimination on the grounds that a person is in a registered relationship.

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### Roundtable Participants

Professor John Williams, Director, South Australian Law Reform Institute

Dr David Plater, Deputy Director, South Australian Law Reform Institute

Sarah Moulds, Researcher, South Australian Law Reform Institute

Meg Vedig, Researcher, South Australian Law Reform Institute

Sarah Brown, Researcher, South Australian Law Reform Institute

Colleen Ross, Principal Policy Officer, Community Programs and Policy, Department for Communities and Social Inclusion

Karen Barnes, Mental Illness Fellowship South Australia

Mary Heath, Biadelaide

Belinda Marsden, Rainbow Labor SA

Scott Cowen, Rainbow Labor SA

Trish Spargo, South Australian Equal Opportunity Commission

Anastasia Kaldi, South Australian Equal Opportunity Commission

Judith Cross, Chief Executive, Relationships Australia South Australia

Zoe Gill, Observer, Department for Health and Ageing

Anna Guthleben, Observer, Attorney-General's Department

Zoey Campbell, Community Advocate

Mark Dodd, Gay Dads South Australia

Julie Redman, Alderman Redman

Input was also provided by Anna Brown of the Victorian Human Rights Law Centre, Marcus Patterson of the Men's Australian Network, Morgan Carpenter of the Organisation of Intersex International and Dami Barnes.



## The Roundtable

On 23 February 2016 the South Australian Law Reform Institute ('the Institute') hosted a Roundtable of community members and representatives from relevant Government agencies to discuss the issues identified in the Institute's September 2015 Report *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation* ('the Audit Report') concerning the removal of discrimination on the grounds of sexual orientation, gender identity and relationship status, from South Australian laws regulating access to Surrogacy and Assisted Reproductive Treatment, and the ensuing parenting rights.

The Roundtable was conducted under Chatham House rules. The Institute is grateful for the time and valuable contributions of all participants.

The following report contains the shared views of the Roundtable. These views are not the confirmed views of the Institute, however they provide an important framework for further consultation and research.

## We want to hear from you

The Institute welcomes written submissions in response to the questions or issues raised in this Report **by close of business Friday 4 March 2016** and intends to finalise its Report to Government by June 2016.

Further information about the Institute, this Reference, its approach to terminology and its Audit of South Australian laws that discriminate on the grounds of gender, sexual orientation, gender identity and intersex status can be found in its Audit Report available for download at <https://law.adelaide.edu.au/research/law-reform-institute/>.

## Shared Views of the Roundtable

### Case for reform has been made

1. The Institute's Audit Report found that there is a need for legislative reform to ensure that the current laws regulating access to Surrogacy and Assisted Reproductive Treatment (ART) in South Australia do not contain features that discriminate on the grounds of sexual orientation, gender identity and relationship status.
2. The Roundtable discussed the South Australian laws relating to Surrogacy, which limit access to 'commissioning parents' who are either a married couple, which is restricted to those in heterosexual relationships by federal laws; or a heterosexual *de facto* couple who meet a three year (or three of four year) cohabitation threshold. These laws prevent non-heterosexual couples from being 'commissioning parents' and legally accessing rights that would allow them to have a child. The Roundtable agreed that for many non heterosexual couples the desire to start a family is the same as heterosexual couples, albeit impeded fundamentally by biology.

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3. As stated in the Audit Report, South Australia's laws relating to Surrogacy and ART are out of step with other Australian jurisdictions, which allow some form of access to non-heterosexual couples and/or singles.
4. A concurrent proposal by the Institute to introduce a 'relationship register', may offer a remedy to allow non-heterosexual couples access to Surrogacy and ART by creating a new legal category of relationship under 'Domestic Partnerships' (as defined in the *Family Relationships Act 1975* (SA) s 11A). This new category (registered relationship) would coexist with the current definition of 'domestic partner', which requires a minimum cohabitation criteria to be met.
5. It was noted that the issue of marriage equality is front and centre in the national debate relating to the removal of discrimination on the grounds of sexual orientation, and is highly relevant to the lived experience of non-heterosexual couples in South Australia and their access to full legal rights, including access to Surrogacy and ART and subsequent parenting orders. However, as noted in the Audit Report, marriage is regulated by the Commonwealth via the *Marriage Act 1961* (Cth), putting it outside the scope of SALRI's current terms of reference, which are explicitly focused on removing discrimination in current South Australian laws.

### Commissioning Parents

#### **Question 1: Can the restriction of 'commissioning parents' for the purposes of surrogacy be redrafted to accommodate non-heterosexual relationships?**

6. Roundtable participants were unequivocal in their acknowledgement that the restriction of 'commissioning parents' to heterosexual couples who are either (A) legally married or (B) a de facto couple who met a cohabitation requirement (*Family Relationships Act* s 10(2)(b)(iii)), must be broadened to allow access to non-heterosexual couples.
7. The option to repeal the specific restriction on 'commissioning parents' (s 10HA(2)(b)(iii)) and thereby instate the inclusive definition of 'commissioning parents' given under s 10F, received constructive support. This places no restriction on sexual orientation or gender identity; and does not require a cohabitation threshold. Such an inclusive definition corresponds with the term used in Victoria, the expression 'intended parents' (NSW, Queensland and Tasmania), 'substitute parents' (ACT), and 'arranged parents' (WA).

Please note:

- a. Positive discussion about a single 'commissioning parent' is summarised under Question 3 (from paragraph [10]).
- b. Whilst repealing s 10(2)(b)(iii) is a discrete action, participants highlighted additional provisions that require amendment to remove the implications that access is only available to heterosexual couples. These are detailed under Question 5 (from paragraph [13]).

#### **Question 2: Could the proposed new category of 'registered relationship' provide access to surrogacy for non-heterosexual couples?**

8. As confirmed at the earlier Roundtable, the legal recognition of a new category of relationship - a 'registered relationship' - would fill a gap in South Australian law and provide non-heterosexual couples with access to legal rights equivalent to married couples. A 'registered relationship' would be recognised as an additional form of 'domestic partnership' (*Family Relationships Act* s 11A). This means that a person could be a 'domestic partner' for the purpose of South Australian law irrespective of their gender, by *either* meeting the cohabitation criteria, or by registering their relationship. This approach would have the benefit of promoting legal certainty and consistency across the Family Relationships Act.
9. The alternative to repealing s 10(2)(b)(iii) is to amend 'commissioning parents' for a surrogacy agreement to be (A) legally married or (B) in a domestic partnership (as amended to include 'registered relationship'). This would mean couples who were *either* married, living together for three years (or three of four years), or in a registered relationship could access the surrogacy provisions. This was noted by some participants as a progressive step to remove the



cohabitation requirement that is inherently discriminatory to couples who cannot legally marry. It was also noted that such an amendment was welcomed as it speaks in non-gendered language.

**Question 3: Should the surrogacy provisions be redrafted to include for a single 'commissioning parent'?**

10. A number of participants agreed that Surrogacy should be available to a single 'commissioning parent'. It was noted that allowing singles to access Surrogacy could be predicated on the decisions in *Pearce*,<sup>1</sup> and *McBain*,<sup>2</sup> where under respective State legislation, the restriction of in vitro fertilisation (IVF) treatment on the basis of marital status was declared inconsistent with the *Sex Discrimination Act 1984* (Cth). As a result of these cases, ART provisions were subsequently amended to allow access to single women. A priority for the Institute is to ensure any recommendations are not constitutionally invalid.
11. It was noted that nearly all other jurisdictions allow a single commissioning to become a parent under a surrogacy agreement.

**Question 4: Should *Family Relationships Act Part 2B* be repealed and a separate legislation regime be created to provide for surrogacy and the transfer of parentage in relation to non-commercial surrogacy arrangements?**

12. For a number of participants, there is a strong argument for a new separate Surrogacy Act. Reasons in support of this argument include (a) the assorted purposes currently engaged within the *Family Relationships Act*, and (b) the increasingly long and complex provisions relating to surrogacy in Part 2B of the *Family Relationships Act*, including amendments made in 2015. Other participants emphasised the need to remove the discriminatory features of the existing provisions and were less ambitious about delivering reform in a separate Act.

**Question 5: Other reform options**

13. It was noted that in addition to the principal discriminatory provisions in the *Family Relationships Act*, there are other, less obvious sections that also need to be amended to remove gendered or discriminatory language. These include:
  - a. Section 10(2)(b)(v) - references to 'the female commissioning parent', which supposes that one of the commissioning parents is a female;
  - b. Section 10HB(9)(d) - reference to the 'birth father';
  - c. Section 11A and 11B - references to 'he or she';
14. A participant noted that the *Birth, Deaths and Marriages Registration Act 1996* (SA) s 22A relating to Surrogacy orders does not enable a change of entry from an interstate order.

**Assisted Reproductive Treatment**

15. Participants discussed the Institute's consideration of discrimination arising from the existing provisions of the *Assisted Reproductive Treatment Act* and the *Family Relationship Act* as outlined in the Audit Report. Participants noted the recommendations made in the Audit Report:

*Section 9 of the Assisted Reproductive Treatment Act 1988 (SA) be amended to:*

*clarify that a person can access ART if, in the person's circumstances, they are unlikely to become pregnant other than by an assisted reproductive treatment procedure, and*

*include the guiding principle that people seeking to undergo ART procedures must not be discriminated against on the basis of their sexual orientation, marital status or religion.*

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<sup>1</sup> *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

<sup>2</sup> *McBain v State of Victoria* [2000] FCA 1009.

*Corresponding amendments should be made to s 5 Equal Opportunity Act 1984 (SA) which currently excludes fertilisation services from the definition of 'services' in that Act.*

*Such amendments would also conform to Commonwealth protections contained in the Sex Discrimination Act 1984 (Cth), which guard against discrimination on the grounds of sexual orientation and marital status.*

16. Participants also discussed the role and scope of the external, independent legislated review of the *Assisted Reproductive Treatment Act*, which includes consideration of matters such as access to ART, and the establishment a donor conception register.
17. Participants also noted the recent parliamentary consideration of the Family Relationships (Parentage Presumption) Amendments Bill, that amends *Family Relationships Act* s 10C, removing the cohabitation requirement to recognise lesbian co-parents.

**Question 5: Are further changes to law governing ART needed to remove discrimination?**

18. Participants agreed that the earlier recommendations made by the Institute in relation to allowing access to ART for socially infertile couples and individuals, was a positive and welcome action. No further reforms were identified as necessary to remove the discriminatory features of the existing provisions.
19. Participants acknowledged the existence of other ART access issues that impact on the experience of non-heterosexual couples seeking to start a family in South Australia, but agreed that these matters fell outside the scope of the Institute's reference. It was noted that views on these matters, such as the legal recognition of ART donors and access to donor information, regulation of fertility clinics, and 'social egg freezing', should be directed to the external, independent legislated review of the *Assisted Reproductive Treatment Act* for consideration.

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### Roundtable Participants

Professor John Williams, Director, South Australian Law Reform Institute

Dr David Plater, Deputy Director, South Australian Law Reform Institute

Sarah Moulds, Researcher, South Australian Law Reform Institute

Meg Vedig, Researcher, South Australian Law Reform Institute

Sarah Brown, Researcher, South Australian Law Reform Institute

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Karen Barnes, Mental Illness Fellowship South Australia

Mary Heath, Biadelaide

Belinda Marsden, Rainbow Labor SA

Joseph Scales, Australian Services Union and Rainbow Labor SA

Trish Spargo, South Australian Equal Opportunity Commission

Julie Potts, Fertility SA

Anastasia Kaldi, South Australian Equal Opportunity Commission

Judith Cross, Chief Executive, Relationships Australia South Australia

Dr Zoe Gill, Observer, Department for Health and Ageing

Anna Guthleben, Observer, Attorney-General's Department

Zoey Campbell, Community Advocate

Mark Dodd, Gay Dads South Australia

Julie Redman, Alderman Redman

Stephen Page, Harrington Lawyers

Dr Ronli Sifris, Monash University

Emma Angel, Repromed

Dr Damien Riggs, Flinders University

Input was also provided by Marcus Patterson of the Men's Australian Network, Morgan Carpenter of the Organisation of Intersex International and Dami Barnes

## Appendix 2 – Recommended Consequential Amendments to Other South Australian Acts

Name of Act	Already contains reference to 'domestic partner' as defined in the <i>Family Relationships Act 1975</i> (SA) – no further amendments necessary (beyond Recommendation 8) to encompass 'registered relationship'	Alternative reference to 'defacto' or 'putative spouse' or other relationships such as 'parent'.
1. <i>Adelaide Dolphin Sanctuary Act 2005</i>	Yes	No
2. <i>Acts Interpretation Act 1915</i>	Yes	No
3. <i>Administration and Probate Act 1919</i>	Yes	No
4. <i>Advance Care Directives Act 2013</i>	No	Reference to 'parent', but inclusive definition that includes 'step parents'. Further amendments may be considered necessary to clarify full range of parents recognised under the <i>Family Relationships Act</i> .
5. <i>Aged and Infirm Persons' Property Act 1940</i>	Yes	No
6. <i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981</i>	No	S 29C allows entry to Mintabe precious stones field to specified list of persons, including the domestic partner of a person with a prospecting permit, however defines 'domestic partner' as one in a 'close personal relationship' (i.e. 2 adults who live together as a couple on a genuine domestic basis). Further amendments may be necessary to encompass domestic partners.
7. <i>ANZAC Day Commemoration Act 2005</i>	Yes	No
8. <i>Associations Incorporation Act 1985</i>	Yes	No
9. <i>Authorised Betting Operations Act 2000</i>	Yes	No

Appendix 2: Recommended Consequential Amendments to Other South Australian Acts

10. <i>Births, Deaths and Marriages Registration Act 1996</i>	No	'Adult' is defined as someone who is over 18 or has been or is married. Further amendments may be necessary to encompass domestic partners.
11. <i>Burial and Cremation Act 2013</i>	Yes	No
12. <i>Carer's Recognition Act 2005</i>	Yes	No
13. <i>Casino Act 1997</i>	Yes	No
14. <i>Civil Liability Act 1936</i>	Yes	No
15. <i>Commonwealth Powers (De Facto Relationships) Act 2009</i>	No	This Act refers certain financial matters (e.g. maintenance and distribution of property etc) from a 'companion couple relationship' after the breakdown of that relationship. Similar to a 'caring relationship' and is distinguished from the Cth definition of de facto and not relevant to this reform.
16. <i>Community Titles Act 1996</i>	Yes	No
17. <i>Consent to Medical and Palliative Care Treatment Act 1995</i>	Yes	Reference to 'parent', but inclusive definition. Further amendments may be considered necessary to clarify full range of parents recognised under the <i>Family Relationships Act</i> .
18. <i>Conveyancers Act 1994</i>	Yes	No
19. <i>Cooperatives National Law (South Australia) Act 2013</i>	No	Refers to a spouse or de facto (as defined in s 2F of the <i>Cth AIA</i> , which includes reference to partners in a 'registered relationship' under State or Territory law in s 2E.) Further amendments not necessary.
20. <i>Correctional Services Act 1982</i>	Yes	No
21. <i>Criminal Assets Confiscation Act 2005</i>	Yes	No

22. <i>Criminal Law Consolidation Act 1935</i>	Yes	NB Both spouses and domestic partners are recognised in the 'Aggravated Offences' section. S 269A also recognises a domestic partner as next of kin. Consideration may need to be given to extending definition of 'close family member', in s 72 relating to incest to include domestic partners and registered relationships, however it is noted that the current definition does not extend to those related by marriage or adoption alone.
23. <i>Criminal Law (Forensic Procedures) Act 2007</i>	Yes	No
24. <i>Criminal Law (Sentencing Act) 1988</i>	No	S 9c relating to the sentencing of Aboriginal defendants defines domestic partners as those who live together on a genuine domestic basis. Further amendments may be necessary to encompass domestic partners.
25. <i>Development Act 1993</i>	Yes	No
26. <i>Domicile Act 1980</i>	No reference to 'domestic partner'.	Consideration may be needed to use of gendered language with respect to parentage
27. <i>Electoral Act 1985</i>	Yes	No
28. <i>Environment Protection Act 1993</i>	Yes	No
29. <i>Equal Opportunity Act 1984</i>	No	S 5 defines a person as a domestic partner if she or he lives with another in a close personal relationship. Consideration should be given to replacing this provision with a reference to 'domestic partner' as defined in the <i>Family Relationships Act</i> .
30. <i>Evidence Act 1929</i>	Yes	No
31. <i>Fair Work Act 1994</i>	Yes	No
32. <i>Family and Community Services Act 1972</i>	No reference to 'domestic partner'.	Consideration may be needed to use of gendered language with respect to parentage
33. <i>Firearms Act 2015</i>	Yes	No
34. <i>Fire and Emergency Services Act 2005</i>	Yes	No

Appendix 2: Recommended Consequential Amendments to Other South Australian Acts

35. <i>First Home and Housing Construction Grants 2000</i>	No	S 6 defines a person as a domestic partner if she or he lives with another in a close personal relationship. Consideration should be given to replacing this provision with a reference to 'domestic partner' as defined in the <i>Family Relationships Act</i> .
36. <i>Flinders University of South Australia Act 1966</i>	Yes	No
37. <i>Gaming Machines Act 1992</i>	Yes	No
38. <i>Genetically Modified Crops Management Act 2004</i>	Yes	No
39. <i>Gift Duty Act 1968</i>	No	Refers to 'spouse' (meaning legal marriage, as implied in s 11A(5) of the Act). Further amendments may be necessary to encompass domestic partners.
40. <i>Governors' Pensions Act 1976</i>	Yes	No
41. <i>Ground Water (Qualco-Sunlands) Control Act 2000</i>	Yes	No
42. <i>Guardianship and Administration Act 1993</i>	Yes	No
43. <i>Health Care Act 2008</i>	Yes	No
44. <i>Health Practitioner Regulation National Law (South Australia) Act 2010</i>	Yes	No
45. <i>Heritage Places Act 1993</i>	Yes	No
46. <i>Inheritance (Family Provision) Act 1972</i>	Yes	No
47. <i>Judges' Pensions Act 1971</i>	Yes	No
48. <i>Juries Act 1927</i>	Yes	No

49. <i>Land Tax Act 1936</i>	No	S 5 grants exemptions from land tax to specified persons and 5(13) defines a domestic partner as a person who lives with another in a close personal relationship. Consideration should be given to replacing this provision with a reference to 'domestic partner' as defined in the <i>Family Relationships Act</i> .
50. <i>Liquor Licensing Act 1997</i>	Yes	No
51. <i>Legal Practitioners Act 1981</i>	Yes	No
52. <i>Local Government Act 1999</i>	Yes	No
53. <i>Members of Parliament (Register of Interests) Act 1983</i>	Yes	No
54. <i>Mental Health Act 2009</i>	Yes	No
55. <i>Motor Vehicle Accidents (Lifetime Support Scheme) Act 2013</i>	No definition provided but reference made to <i>Civil Liability Act 1936</i> (See above)	No
56. <i>Natural Resources Management Act 2004</i>	Yes	No
57. <i>Parliamentary Superannuation Act 1974</i>	No	S 7A defines 'putative spouse' as a de facto relationship with cohabitation requirements. Consideration should be given to replacing this provision with a reference to 'domestic partner' as defined in the <i>Family Relationships Act</i> .
58. <i>Partnership Act 1891</i>	Yes	No
59. <i>Payroll Tax Act 2009</i>	Yes	No
60. <i>Police (Complaints and Disciplinary Proceedings) Act 1985</i>	Yes	No
61. <i>Problem Gambling Family Protection Orders 2004</i>	No	S 3 defines a domestic partner as one who lives with the respondent in a close personal relationship. Consideration should be given to replacing this provision with a reference to 'domestic partner' as defined in the <i>Family Relationships Act</i> .
62. <i>Public Corporations Act 1993</i>	Yes	No



Appendix 2: Recommended Consequential Amendments to Other South Australian Acts

63. <i>Public Intoxication Act 1984</i>	No	S 4 defines a domestic partner as one who lives with the respondent in a close personal relationship. Consideration should be given to replacing this provision with a reference to 'domestic partner' as defined in the <i>Family Relationships Act</i> .
64. <i>Public Sector (Honesty and Accountability) Act 1993</i>	Yes	No
65. <i>Public Trustee Act 1995</i>	Yes	No
66. <i>Racing (Proprietary Business Licensing) Act 2000</i>	Yes	No
67. <i>Retirement Villages Act 1987</i>	Yes	No
68. <i>Return to Work Act 2014</i>	No	S 4 defines a domestic partner as one who lives with another in a close personal relationship, and contains cohabitation requirement. Consideration should be given to replacing this provision with a reference to 'domestic partner' as defined in the <i>Family Relationships Act</i> .
69. <i>River Murray Act 2003</i>	Yes	No
70. <i>South Australian Public Health Act 2011</i>	Yes - this would enable those in registered relationships to meet the definition of 'relative' in s 99 and be eligible under that provision to access confidential health information about their partner in certain circumstances.	No
71. <i>Southern State Superannuation Act 2009</i>	No	S 7 defines putative spouse as de facto with cohabitation requirements. Consideration should be given to replacing this provision with a reference to 'domestic partner' as defined in the <i>Family Relationships Act</i> .
72. <i>Stamp Duties Act 1923</i>	Yes	No

73. <i>Superannuation Act 1988</i>	No	S 4A: currently defines putative spouse' as de facto with reference to cohabitation requirement. Consideration should be given to replacing this provision with a reference to 'domestic partner' as defined in the <i>Family Relationships Act</i> .
74. <i>Superannuation Funds Management Corporation of South Australia Act 1995</i>	Yes	No
75. <i>Supported Residential Facilities Act 1992</i>	Yes	No
76. <i>Supreme Court Act 1935</i>	Yes	No
77. <i>Transplantation and Anatomy Act 1983</i>	Yes	No
78. <i>University of Adelaide Act 1971</i>	Yes	No
79. <i>University of South Australia Act 1990</i>	Yes	No
80. <i>Urban Renewal Act 1995</i>	Yes	No
81. <i>Veterinary Practices Act 2003</i>	Yes	No
82. <i>Victims of Crime Act 2001</i>	Yes	No
83. <i>Will Act 1936</i>	Yes	No
84. <i>Young Offenders Act 1993</i>	Yes	No

## Appendix 3 – Family Relationships (Parenting Presumptions) 2015 Bill (SA)

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### Part 2—Amendment of *Family Relationships Act 1975*

#### 4—Amendment of section 10C—Rules relating to parentage

Section 10C—after subsection (3) insert:

(3a) If—

(a) a woman is living with another person (her *partner*) in a marriage-like relationship (whether they are of the same or opposite sex); and

(b) the woman undergoes, with the consent of her partner, a fertilisation procedure in consequence of which she becomes 20 pregnant; and

(c) the woman and her partner elect, in accordance with the requirements prescribed by the regulations, to have the parentage of any child born (whether before or after that election) as a result of the pregnancy determined in accordance with this subsection, 5

then, for the purposes of the law of the State, the woman's partner—

(d) will be conclusively presumed to have caused the pregnancy; and

(e) will be taken to be—

(i) in the case of a male partner—the father; or 10

(ii) in any other case—a co-parent,

of any child born as a result of the pregnancy.

## **Appendix 4 – Relationships Act 2008 (Vic) Schedule 1**

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### SCHEDULE 1—Consequential Amendments to other Acts

- 1 Accident Compensation Act 1985
- 2 Administration and Probate Act 1958
  - 51A Distribution if more than one partner
- 3 Alcoholics and Drug-dependent Persons Act 1968
- 4 Births, Deaths and Marriages Registration Act 1996
- 5 Catchment and Land Protection Act 1994
- 6 Children, Youth and Families Act 2005
- 7 Confiscation Act 1997
- 8 Conservation, Forests and Lands Act 1987
- 9 Conveyancers Act 2006
- 10 Co-operative Housing Societies Act 1958
- 11 Coroners Act 1985
- 12 Corrections Act 1986
- 13 Country Fire Authority Act 1958
- 14 Crimes (Family Violence) Act 1987
- 15 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997
- 16 Crimes Act 1958
- 17 Duties Act 2000
- 18 Education and Training Reform Act 2006
- 19 Emergency Services Superannuation Act 1986
- 20 Equal Opportunity Act 1995
- 21 Estate Agents Act 1980
- 22 Fair Trading Act 1999
- 23 Firearms Act 1996
- 24 First Home Owner Grant Act 2000
- 25 Freedom of Information Act 1982
- 26 Gambling Regulation Act 2003
- 27 Guardianship and Administration Act 1986

- 28 **Health Act 1958**
- 29 **Health Records Act 2001**
- 30 **Health Services Act 1988**
- 31 **Human Tissue Act 1982**
- 32 **Land Acquisition and Compensation Act 1986**
- 33 **Land Act 1958**
- 34 **Land Tax Act 2005**
- 35 **Landlord and Tenant Act 1958**
- 36 **Legal Profession Act 2004**
- 37 **Liquor Control Reform Act 1998**
- 38 **Local Government Act 1989**
- 39 **Magistrates' Court Act 1989**
- 40 **Meat Industry Act 1993**
- 41 **Motor Car Traders Act 1986**
- 42 **Municipalities Assistance Act 1973**
- 43 **Parliamentary Salaries and Superannuation Act 1968**
- 44 **Partnership Act 1958**
- 45 **Payroll Tax Act 2007**
- 46 **Perpetuities and Accumulations Act 1968**
- 47 **Police Assistance Compensation Act 1968**
- 48 **Port Services Act 1995**
- 49 **Prostitution Control Act 1994**
- 50 **Racing Act 1958**
- 51 **Residential Tenancies Act 1997**
- 52 **Retirement Villages Act 1986**
- 53 **Road Safety Act 1986**
- 54 **Sale of Land Act 1962**
- 55 **Second-Hand Dealers and Pawnbrokers Act 1989**
- 56 **Sentencing Act 1991**
- 57 **State Employees Retirement Benefits Act 1979**

- 58 **State Superannuation Act 1988**
- 59 **Superannuation (Portability) Act 1989**
- 60 **Transport Accident Act 1986**
- 61 **Transport Superannuation Act 1988**
- 62 **Trustee Companies Act 1984**
- 63 **Victorian Workers' Wages Protection Act 2007**
- 64 **Victims of Crime Assistance Act 1996**
- 65 **Water Act 1989**
- 66 **Wills Act 1997**
- 67 **Witness Protection Act 1991**
- 68 **Wrongs Act 1958**
- 69 **Consumer Credit (Victoria) Act 1995**

## **Appendix 5 – Reports Considering Surrogacy (non-exhaustive)**

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1. Family Law Council, *‘Creating Children: A Uniform Approach to the Law and Practice of Reproductive Technology in Australia’* (AGPS, Canberra 1985).
2. Australian Health Ministers Advisory Council Reproductive Technology Working Group report considered by the Joint Meeting of The Australian Health Minister’s Conference and The Council of Social Welfare Ministers (1991).
3. National Bioethics Consultative Committee, *‘Surrogacy Report 1 & 2’* (1990).
4. NSW Law Reform Commission *Surrogate Motherhood*, Report No. 60 (NSW Government Printer, 1988).
5. Victorian Committee to consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation, *‘Report on the Disposition of Embryos Produced by In Vitro Fertilisation (the Waller Report)’* (Victorian Government Printer, 1984).
6. Report of the Special Committee Appointed by the Queensland Government to Inquire into the Laws Relating to Artificial Insemination, *‘In Vitro Fertilisation and Other Related Matters’*, (Queensland Government Printer, 1984).
7. Final Report: *Committee to Investigate Artificial Conception and Related Matters*, (Tasmanian Government Printer, 1985).
8. Report of the Committee Appointed by the Western Australian Government to Inquire into the Social, Legal and Ethical Issues Relating to In Vitro Fertilisation and its Supervision, (1986).
9. Report of the Select Committee of the Legislative Council on Artificial Insemination by Donor, *‘In Vitro Fertilisation and Embryo Transfer Procedures and Related Matters in South Australia’*, (South Australian Government Printer, 1987).
10. ACT Attorney-General’s Department, Discussion Paper: *Surrogacy Agreements in the ACT*, (1993).
11. Select Committee on the *Human Reproductive Technology Act 1991*, Legislative Assembly, Parliament of Western Australia (1999).
12. Victorian Law Reform Commission, *Assisted Reproductive Technology, surrogacy and Legal Parentage – A Comparative Legislative Review: Occasional Paper* (2004).
13. Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report* (2007).
14. Social Development Committee, South Australian Legislative Council, *Inquiry into Gestational Surrogacy* (2007).
15. Human Rights and Equal Opportunity Commission, *Same Sex: Same Entitlements, National Enquiry into Discrimination against People in Same Sex relationships and Work-Related Entitlements and Benefits* (2007).
16. Federal Ministerial Standing Committee of Attorneys-General (SCAG), *Legal recognition of parentage achieved by surrogacy arrangements* (2008).
17. Standing Committee on Legislation, Western Australia Legislative Council, *Report in relation to the Surrogacy Bill 2007*, Report No. 12 (2008).
18. Investigation into Altruistic Surrogacy Committee, Parliament of Queensland, *Investigation into the decriminalisation and Deregulation of Altruistic Surrogacy in Queensland* (2008).
19. Legislative Council Select Committee, Parliament of Tasmania, *Report on Surrogacy* (2008).

20. Social Development Committee, South Australian Legislative Council, *Inquiry into Same-Sex Parenting* (2011).
21. Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, National Consultation Report (2015).



## Appendix 6 – Surrogacy Legislation in Australia\*

		SA	NSW	VIC	QLD	TAS	ACT	WA
<b>Legislation</b>		<i>Family Relationships Act 1975</i>	<i>Surrogacy Act 2010</i>	<i>Assisted Reproductive Treatment Act 2008</i>	<i>Surrogacy Act 2010</i>	<i>Parentage Act 2004</i>	<i>Surrogacy Act 2012</i>	<i>Surrogacy Act 2008</i>
<b>Parties to agreement</b>		Commissioning parents	Intended parent(s)	Commissioning parents	Intended parent(s)	Intended parent(s)	Substitute parents	Arranged parent(s)
<b>Relationship status of parents</b>	<i>Married</i>	✓	✓	✓	✓	✓	✓	✓
	<i>Heterosexual de facto</i>	✓	✓	✓	✓	✓	✓	✓
	<i>Non-heterosexual de facto</i>	✗	✓	✓	✓	✓	✓	✓ (females only)
	<i>Single</i>	✗	✓	✓	✓	✓	✗	✓
<b>Eligibility of same-sex couples</b>		Not eligible.	Permitted. Both female non-heterosexual partners must be infertile.	Permitted. At least one female non-heterosexual partner must be infertile.	Permitted. Both female non-heterosexual partners must be infertile.	Permitted. Both female non-heterosexual partners must be infertile.	Permitted.	One female non-heterosexual partner must be infertile. Male couple not eligible.
<b>Residency</b>	Surrogate	Non-resident	Non-resident	Non-resident	Non-resident	Resident	Non-resident	Non-resident
	'Parents'	Resident	Resident	Resident	Resident	Resident	Resident	Resident
<b>Transfer of parentage</b>	Legislation	<i>Family Relationships Act 1975</i>	<i>Status of Children Act 1996</i>	<i>Status of Children Act 1974</i>	<i>Status of Children Act 1978</i>	<i>Status of Children Act 1974</i>	<i>Parentage Act 2004</i>	<i>Artificial Conception Act 1985</i>
	Parentage Order through	Youth Court	Supreme Court	Supreme or County Court	Children's Court	Magistrate's Court (Children's Div.)	Supreme Court	Family Court

\* Not legislated in NT.

## **Appendix 7 – Relationship Regulations 2013 (Tas)**

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### **9. Classes of relationships for purpose of section 65A of Act**

The following classes of relationships are prescribed for the purpose of section 65A of the Act:

- (a) civil partnerships for which registration is in force under the Domestic Relationships Act 1994 of the Australian Capital Territory;
- (b) registered relationships under the Relationships Register Act 2010 of New South Wales;
- (c) registered civil partnerships within the meaning of the Civil Partnerships Act 2011 of Queensland;
- (d) registered domestic relationships under the Relationships Act 2008 of Victoria;
- (e) civil unions solemnised under the Civil Union Act 2004 of New Zealand;
- (f) civil partnerships within the meaning of the Civil Partnership Act 2004 of the United Kingdom;
- (g) marriage of two persons of the same sex under the Marriage Act, R.S.A. 2000, c. M-5 of Alberta, Canada;
- (h) marriage of two persons of the same sex under the Marriage Act, R.S.B.C. 1996, c. 282 of British Columbia, Canada;
- (i) marriage of two persons of the same sex under the Marriage Act, R.S.O. 1990, c. M.3 of Ontario, Canada;
- (j) marriage of two persons of the same sex under the Marriage Act, R.S.Y. 2002, c. 146 of Yukon, Canada;
- (k) marriage of two persons of the same sex under the Marriage Act, C.C.S.M. c. M50 of Manitoba, Canada;
- (l) a common-law relationship within the meaning of the Vital Statistics Act, C.C.S.M. c. V-60 of Manitoba, Canada which is registered under section 13.1 of that Act;
- (m) marriage of two persons of the same sex under the Marriage Act, R.S.N.W.T. 1988, c. M-4 of the Northwest Territories, Canada;
- (n) marriage of two persons of the same sex under the Marriage Act, R.S.P.E.I. 1988, c. M-3 of Prince Edward Island, Canada;

- (o) marriage of two persons of the same sex solemnised and declared under Book 2 of the Civil Code of Quebec, S.Q. 1991, c. 64 of Quebec, Canada;
- (p) a civil union solemnised under Title I.1 of Book 2 of the Civil Code of Quebec, S.Q. 1991, c. 64 of Quebec, Canada;
- (q) marriage of two persons of the same sex under the Marriage Act, S.N.L. 2009, c. M-1.02 of Newfoundland and Labrador, Canada;
- (r) marriage of two persons of the same sex under the Marriage Act, R.S.N.W.T. (Nu.) 1988, c. M-4 of Nunavut, Canada;
- (s) marriage of two persons of the same sex under the Solemnization of Marriage Act, R.S.N.S. 1989, c. 436 of Nova Scotia, Canada;
- (t) marriage of two persons of the same sex under the Marriage Act, R.S.N.B. 1973, c. M-3 of New Brunswick, Canada;
- (u) marriage of two persons of the same sex under the Marriage Act, 1995, S.S. 1995, c. M-4.1 of Saskatchewan, Canada.