



South Australian Law Reform Institute

Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation

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 Adelaide University Law School.

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Abbreviations

AHRC	Australian Human Rights Commission
<i>BDM Act</i>	<i>Births, Deaths and Marriages Registration Act 1996</i> (SA)
DPA	Domestic Partnership Agreement
<i>EO Act</i>	<i>Equal Opportunity Act 1984</i> (SA)
Equal Opportunity Commission	South Australian Equal Opportunity Commission
HRLC	Human Rights Law Centre
Inclusion Strategy	South Australian Government's <i>Strategy for the Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People 2014-2016</i>
LGBTIQ	lesbian, gay, bisexual, trans, intersex and queer
Resilient Individuals Report	Australian Human Rights Commission, <i>Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights, Consultation Report</i> (2015)
National	
SALRI	South Australian Law Reform Institute
<i>SR Act</i>	<i>Sexual Reassignment Act 1988</i> (SA)

Executive Summary

In January 2015 the Attorney-General of South Australia, the Honourable John Rau MP, invited the South Australian Law Reform Institute (SALRI) to accept a reference to inquire and report on those South Australian laws that discriminated against particular members of the community.

The reference was announced as part of the speech of the Governor, His Excellency the Honourable Hieu Van Le AO, at the opening of Parliament on Tuesday 10 February 2015. In particular, the Governor stated that:

My Government will invite the South Australian Law Reform Institute to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status.

Their recommendations will then be considered in the South Australian Parliament.

This is an ambitious and important reference. South Australia's tradition in the area of law reform has been to be at the forefront of innovation to meet the changing times. Despite this commitment there are now areas where the law has fallen behind other jurisdictions. This reference is timely in its focus and scope.

SALRI approached the task by firstly undertaking a review of all current South Australian laws to ascertain whether, and to what extent, they discriminated against individuals from the Lesbian, Gay, Bisexual, Trans, Intersex and Queer (LGBTIQ) communities. In addition to this desktop audit, the Institute undertook targeted consultations with members of the community to ascertain which pieces of legislation or policies most impacted upon the lives of affected individuals.

The desktop audit has determined that there are over 140 pieces of legislation that, on their face, discriminate against individuals on the basis of sex or gender diversity. The vast majority of the legislation in this category discriminates by reinforcing the binary notion of sex ('male' and 'female') or gender ('man' or 'woman') or excludes members of the LGBTIQ communities by a specific or rigid definition of gender. Rigid, binary concepts of gender are also currently reinforced by the use of the term 'opposite' sex, which can easily be replaced with the more inclusive term 'different' sex without altering the meaning or purpose of the provision. Other laws require clarification to ensure that people who identify as a particular gender are treated with respect under the law, for example, when subject to official body searches. SALRI provides examples of this type of legislation and suggestions for how legislation in this category can be quickly amended or removed.

While SALRI was able to isolate legislation that, on paper, had a discriminatory effect, by far the most compelling evidence came from the consultations and submissions of individuals regarding the impact of current legislation upon their lives. The lived experience of individuals places, in stark relief, the operation of law on matters that are fundamental to all South Australians. The individuals consulted asked searching questions of 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? How can I have the relationship with the person I love recognised and

start to raise a family in South Australia? These and other questions only served to highlight the discriminatory barriers that members of the LGBTIQ communities face in their daily lives.

Through the targeted consultations, submissions and use of *YourSAy* – the South Australian government online consultation website – SALRI was able to determine legislation that was of particular concern for the LGBTIQ communities. This includes the *Adoption Act 1988* (SA) that excludes same sex couples' eligibility as prospective adoptive parents. The current terminology in Part 3 of the *Equal Opportunity Act 1984* (SA) includes the terms 'sexuality' and 'chosen gender', which have been described by many as outdated or inappropriate. This can be contrasted with the more inclusive, and in some cases greater, protections in the *Sex Discrimination Act 1984* (Cth) based on the attributes of 'sexual orientation', 'gender identity' and 'intersex status' as defined in the *Sex Discrimination Act 1984* (Cth).

On the basis of submissions and review of the current laws, SALRI further recommends that amendments be made to the regime governing the registration of sex at birth and the change of sex on the Births, Deaths and Marriages Register. This will necessitate the repeal of the *Sexual Reassignment Act 1988* (SA) and the development of a replacement system. These reforms will need to establish processes for registering the birth with a non-binary sex and establish a process to alter the Register to record a change of sex that does not require evidence of irreversible medical treatment.

SALRI heard that the current regime governing legal parentage provided significant barriers to members of the LGBTIQ communities. Despite important reforms in 2009 and 2011, the *Family Relationships Act 1975* (SA) continues to contain provisions that discriminate on the basis of marital status or sexual orientation. The interaction of the *Assisted Reproductive Treatment Act 1988* (SA), the *Assisted Reproductive Treatment Regulations 2010* (SA) and Part 2A of the *Family Relationships Act 1975* (SA), for example, can exclude same sex couples from accessing artificial reproductive technologies, leaving South Australia as one of the few Australian jurisdictions that restricts access to such technologies in this way. The current legal framework relating to recognised surrogacy arrangements has also been highlighted as being inconsistent with other regimes interstate. SALRI's recommendations address both of these issues and suggest alternative, less discriminatory models for reform.

SALRI also had submissions that highlighted the existing exemptions to otherwise unlawful discrimination on the grounds of sexual orientation, gender identity and intersex status under the *Equal Opportunity Act 1984* (SA). Opinions diverged on the necessity and appropriateness of such broad exemptions. SALRI recommends further consultation and review in this area to ascertain whether the continuing exemption regime is in keeping with the needs of the community.

The continued existence of the common law partial defence of provocation that permits a homosexual advance to constitute circumstance of provocation was highlighted by members of the LGBTIQ communities. A number of submissions made strong representation about the partial defence and, in particular, whether its retention was consistent with a non-discriminatory criminal law.

SALRI notes that there are currently a number of parallel inquiries into areas that have also been the subject of this Audit Report. There are, for example, two Parliamentary Committees of review considering the partial defence of provocation and the sexual reassignment regime. In addition, the Department of Education and Child Development is undertaking a review of the *Adoption Act 1988* (SA). SALRI proposes to make recommendation after considering, where possible, the conclusions of these other reviews.

Given the breadth of the area under consideration, SALRI has organised its Report into three thematic groups and recommends a phased approach to the reform. In Group One, SALRI recommends the amendment of the guiding interpretative Acts and removal of statutory language that tends to exclude members of the LGBTIQ communities. Much of this can be achieved by amendments to the *Acts Interpretation Act 1915* (SA) and removal of gendered language in various highlighted Acts. It is recommended that these amendments be made immediately.

Group Two proposes a series of recommendations that have been informed by the completed round of consultations with affected individuals. Reforms in this Group seek to address discrimination on the grounds of sexual orientation, gender identity or intersex status. Some of these reforms have been described as ‘Recommendations for Immediate Action’, such as the amendment of the *Adoption Act 1988* (SA) to clarify that same sex couples are eligible to be prospective adoptive parents and amendments to the *Assisted Reproductive Treatment Act 1988* (SA) to end discrimination against individuals on the basis of their sexual orientation or marital status. The amendment of the *Equal Opportunity Act 1984* (SA) to replace the terms ‘sexuality’ and ‘chosen gender’ with language that provides protection on the basis of attributes of ‘sexual orientation’, ‘gender identity’ and ‘intersex’ status also falls within this category.

Other recommendations in Group Two fall within the category of ‘Recommendations Requiring Further Review and Report’. These include the registration of sex at birth and the change of sex; the current laws governing legal parentage and surrogacy; the exemption regime under the *Equal Opportunity Act 1984* (SA) and the partial defence of provocation. In all of these areas, SALRI will be guided by a number of principles: the need to modernise and harmonise the law of the State, a commitment to legislative best practice, as well as the overarching focus of this reference in relation to the removal of discrimination. SALRI will continue to consult with the community in formulating these reports.

Group Three of the Report focuses on the discriminatory impact of certain South Australian laws that arises as a result of the different treatment under law of married couples and couples who choose not to, or cannot, be married. These include requirements that two people in a same sex relationship demonstrate evidence of three years cohabitation before they will be considered to be in a domestic partnership in the eyes of the law. SALRI acknowledges that these laws have a relationship to the *Marriage Act 1961* (Cth) and would be affected by any change to the definition of marriage at the Commonwealth level, but its focus remains on the impact of existing South Australian laws. In this Report, SALRI identifies a number of models of relationship recognition that have been implemented in other Australian jurisdictions and which removes or reduces the

discriminatory impact on non-married or same sex couples. Group Three proposes that SALRI will continue its research and issue further detailed reports in these areas.

In proposing a staged approach as part of this Audit Report, SALRI does wish to reiterate that a number of legislative reforms can be undertaken without the need for delay. There is a degree of urgency in relation to many of the areas covered by this Report as 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.

It should be noted that law reform provides but one response to the concerns of the LGBTIQ communities. Submissions to both SALRI and other organisations concerned with the state of the law, highlighted that access to health services such as access to hormone replacement treatment, and support for trans and intersex people and their families was a priority. So too the implementation of other reports and reviews applicable to the LGBTIQ communities will address issues beyond the legal aspects of discrimination.

SALRI wishes to thank those individuals and organisations who were consulted or made submissions. SALRI, in particular, wishes to acknowledge and thank those individuals who shared the details of their personal circumstances. Their day to day experiences highlight the discriminatory operation of a number of South Australian laws and the barriers that many have had to overcome in order to live their lives.

Summary of Recommendations

In line with the Reference it received from the Attorney-General, the Hon John Rau MP, SALRI has identified over 140 South Australian Acts and Regulations that discriminate (or potentially discriminate) on the grounds of sexual orientation, gender, gender identity and intersex status. These laws are set out in a Table at **Appendix 1**.

In order to assist the South Australian Government to prioritise its response to this Audit, SALRI makes the following recommendations. These are informed and assisted by the consultations it has conducted (described in detail in **Appendices 2 and 5**).

These recommendations are described as either: ‘Recommendations for Immediate Action’ or ‘Recommendations Requiring Further Review and Report by SALRI’, to correspond with the two phases of SALRI’s response to this Reference.

SALRI considers that Recommendations for Immediate Action can be implemented without the need for further major consultation and some are necessary to ensure that South Australian law complies with the relevant Commonwealth anti-discrimination provisions. Many of these recommendations also align with or complement recommendations made by recent or concurrent South Australian and Commonwealth inquiries into laws that discriminate on the grounds of sexual orientation, gender identity or intersex status. It is recommended that these reforms be undertaken as a matter of urgency.

Recommendations Requiring Further Review and Report by SALRI involve further research and consideration and the preparation of more detailed recommendations to the areas of law that have been identified as in need of reform. It is anticipated that this next phase will be complete by 30 June 2016.

SALRI’s recommendations are summarised below and presented in three thematic groups to correspond with the structure of the following Report.

Group One: Interpretive and Language Changes to Address Exclusion

Recommendations for Immediate Action

SALRI recommends that the South Australian Government introduce the following legislative reforms to Parliament:

- 1.1 Amend s 4 of the *Acts Interpretation Act 1915* (SA) to include the terms ‘gender identity’ and ‘intersex status’ in the dictionary section of the Act, to be defined by reference to or in identical terms as the relevant terms in the *Sex Discrimination Act 1984* (Cth).
- 1.2 Replace the existing gender-related rule in s 26 of the *Acts Interpretation Act 1915* (SA) with a new interpretative rule based on s 23(a) of the *Acts Interpretation Act 1919* (Cth) which provides that: ‘words importing a gender include every other gender’.

- 1.3 Amend the existing gender balance on board provision in s 36A of the *Acts Interpretation Act 1915* (SA) to make it clear that, for the purposes of this provision, a person who identifies as a woman should be included in the pool of possible appointments that are legislated to include a minimum number of female/women positions, regardless of the person's sex as legally recorded. Similarly, a person who identifies as a man should be included in the pool of potential appointments that are legislated to include a minimum number of male/men positions, regardless of the person's sex as legally recorded. SALRI notes that further changes may need to be considered to ensure that board composition provisions appropriately recognise people who do not identify as either male or female.
- 1.4 Remove or replace unnecessarily gendered terms in the following provisions: *Criminal Law Consolidation Act 1935* (SA) Part 3, Division 17 (abortion - remove reference to 'females' who are pregnant); *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA) Schedule 2 (replace reference to 'woman giving birth' with 'person giving birth'); *Payroll Tax Act 2009* (SA) s 53 (remove the term 'female' employee in connection to 'her pregnancy').
- 1.5 Replace the term 'opposite sex' with the term 'different sex' in the following provisions: *Equal Opportunity Act 1984* (SA) ss 5, 29; *Family Relationships Act 1975* (SA) s 10A; *Criminal Law (Forensic Procedures) Act 2007* (SA) s 21; *Sexual Reassignment Act 1988* (SA) s 3.
- 1.6 Repeal outdated provisions in *Landlord and Tenant Act 1936* (SA) s 44 and *Settled Estates Act 1880* (SA) ss 40, 49, 50.
- 1.7 Amend the *Criminal Law (Forensic Procedures) Act 2007* (SA) and the *Correctional Services Act 1982* (SA) to provide that, if reasonably practicable, a forensic procedure that involves exposure of sensitive areas should be carried out by a person of the same gender (other than at the request of the person on whom the forensic procedure is to be carried out). This change should be accompanied by the development of appropriate policies for conducting forensic procedures with respect to gender diverse people.

Group Two: Consultation Led Change to Address Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status

Recommendations for Immediate Action

SALRI recommends that the South Australian Government introduce the following legislative reforms to Parliament:

- 2.1 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.
- 2.2 Amend s 9 of the *Assisted Reproductive Treatment Act 1988* (SA) to (a) clarify that a person can access assisted reproductive treatment ("ART") if, in the person's circumstances, they are unlikely to become pregnant other than by an assisted reproductive treatment 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.

- 2.3 Amend the terminology in Part 3 of the *Equal Opportunity Act 1984* (SA) to replace the current protections against discrimination on the grounds of ‘sexuality’ and ‘chosen gender’ with similar protections based on the attributes of ‘sexual orientation’, ‘gender identity’ and ‘intersex status’ as defined in the *Sex Discrimination Act 1984* (Cth).

Recommendations Requiring Further Review and Report by SALRI

SALRI intends to conduct further research and issue further, more detailed recommendations with respect to the following more complex issues as part of the next phase of its response to this Reference:

- 2.4 South Australia’s current regime governing the registration of sex at birth and the change of sex on the Births, Deaths and Marriages Register, including the repeal of the *Sexual Reassignment Act 1988* (SA) and the amendment Part 3 of the *Births, Deaths and Marriages Registration Act 1996* (SA). Options for consideration include the *Births, Deaths and Marriages Registration Act 1997* (ACT), that sets out a process for registering a birth with a non-binary sex and includes a reformed process to alter the register to record a change of sex that does not require evidence of irreversible medical treatment.
- 2.5 South Australia’s current regime governing legal parentage, including amendment or repeal of those provisions in the *Family Relationships Act 1975* (SA) that discriminate on the basis of marital status or sexual orientation, for example by imposing strict cohabitation requirements on non-married parents who have children born as a result of assisted reproductive treatments.
- 2.6 The current legal framework relating to recognised surrogacy arrangements, including consideration of replacing Part 2B of the *Family Relationships Act 1975* (SA) with a separate Act regulating surrogacy in South Australia, similar to the Tasmanian *Surrogacy Act 2012* (Tas), that permits access to limited forms of altruistic surrogacy to same-sex couples provided all other qualifying criteria are met.
- 2.7 The scope of the existing exemptions to unlawful discrimination on the grounds of sexual orientation, gender identity and intersex status under the *Equal Opportunity Act 1984* (SA) with a view to determining whether the scope of each exemption remains necessary and appropriate having regard to its normative and practical impact on the promotion of equality.
- 2.8 The existing common law partial defence of provocation that permits homosexual advances to constitute circumstances of provocation, having regard to the full range of complex issues arising from this defence. SALRI will also consider any relevant recommendations of the

South Australian Legislative Review Committee, as well as relevant interstate reforms including the *Crimes Amendment (Provocation) Act 2014* (NSW).

Group Three: Changes to Relationship Recognition to Address Discrimination on the Grounds of Marital and Relationship Status

Recommendations for Immediate Action

SALRI recommends that the South Australian Government introduce the following legislative amendments into Parliament:

- 3.1 The amendment of the *Domicile Act 1980* (SA) s 7; *Wills Act 1936* (SA) ss 5, 20, 22; *Evidence Act 1929* s 34H; by either repealing the discriminatory provisions or replacing reference to ‘married’ or ‘husband’ and ‘wife’ with a term that includes ‘domestic partners’.

Recommendations Requiring Further Review and Report by SALRI

SALRI intends to conduct further research and issue further, more detailed recommendations with respect to the following issues as part of the next phase of its response to this Reference:

- 3.2 The introduction of a Relationships Register, such as that in NSW or Tasmania, that would allow heterosexual and homosexual couples to register as domestic partners without the need to demonstrate 3-4 years of cohabitation. The Relationships Register could also register same sex marriages solemnised overseas, provided other relevant criteria are met.
- 3.3 The current laws that seek to define ‘immediate family members’ or similar to ensure that they are culturally appropriate, particularly for Indigenous families, and do not discriminate on the grounds of sexual orientation, gender identity or marital or partnership status.

Policy Related Reforms to Consider

SALRI recommends that the South Australian Government identify options for conducting further consultations with representatives of the LGBTIQ communities on the following matters identified as raising concern in submissions received by both SALRI and the Australian Human Rights Commission as part of its 2015 Resilient Individuals Report:

- 4.1 A review of the health services currently available to trans people in South Australia, with a particular focus on access to hormone replacement treatment; access to services provided by the SA Gender Dysphoria Unit and the availability of public information and supports services for trans and intersex people and their families.
- 4.2 The development and implementation of policies on the placement of trans and gender diverse prisoners in correctional services and for access to hormone therapy to be based on medically-identified need, not discretion.

- 4.3 The implementation of the recommendations of the Australian Senate Community Affairs Committee's 2013 Report on the *Involuntary or Coerced Sterilisation of Intersex People in Australia*,¹ and the findings of the Family Law Council's 2013 *Report on Parentage and the Family Law Act*.²
- 4.4 The inclusion within family and domestic violence strategies of measures to address violence in same-sex relationships and toward trans and gender diverse people.

¹ Senate Standing Committees on Community Affairs, Parliament of Australia, *Report into the involuntary or coerced sterilisation of people with disabilities in Australia* (2013) (hereafter referred to as the 'Involuntary Sterilisation Report')

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index>.

² Family Law Council, *Parentage and the Family Law Act*, Report (2013)

<<http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/family-law-council-report-on-parentage-and-the-family-law-act-december2013.pdf>>.

Introduction

The South Australian Law Reform Institute

1. The South Australian Law Reform Institute (“SALRI”) was established in December 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide Law School.
2. SALRI’s function is to conduct reviews or research on areas of law and legal policy specified by the Advisory Board, often following a request to inquire into a certain area of law by the Attorney General.
3. 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
 - uniformity between laws of other States and the Commonwealth.
4. SALRI then provides reports to the Attorney-General or other authorities on the outcomes of reviews and/or research and to make recommendations based on those outcomes. When undertaking this work, SALRI often works with law reform agencies in other States and Territories on proposals for reform of the laws in any other jurisdiction or within the Commonwealth.

The Current Reference

5. SALRI’s latest reference is topical and important. It has relevance for the lives of many South Australians. It is about identifying the laws and regulations in South Australia that discriminate against people on the basis of their sexual orientation, gender, gender identity or intersex status. This includes laws that discriminate against lesbians, gays, bisexuals, trans and intersex people.

6. The SALRI Advisory Board accepted this reference from the Attorney-General, the Hon John Rau MP. The reference was foreshadowed as part of the speech of the Governor, His Excellency the Honourable Hieu Van Le AO, at the opening of Parliament on Tuesday 10 February 2015.³ His Excellency observed:

Some individuals and families are not able to participate fully in our democracy because of who they are, whether it be lesbian, gay, bisexual and transgender.

The strength of our society will be shaped by the extent to which we can guarantee access to these pillars of our democracy, education, health and justice, to all South Australians.

My Government will invite the South Australian Law Reform Institute to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status.

Their recommendations will then be considered in the South Australian Parliament.⁴

7. This recommendation forms part of the South Australian Government's broader vision for a South Australia where the presence and contributions of lesbian, gay, bisexual, trans, intersex and queer ('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.⁵
8. It also follows the release, in May 2014, of the South Australian Government's *Strategy for the Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People 2014-2016* ('the Inclusion Strategy').⁶ The Strategy was developed in response to findings that 80% of LGBTIQ people identified stigma and discrimination as major barriers to their participation in the wider community and 51.5% felt unsafe.⁷ The Strategy was developed in partnership with LGBTIQ communities and describes key criteria that should be met to address five priority areas for action: social and emotional health and wellbeing; employment and opportunities;

³ His Excellency the Honourable 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.

⁴ Ibid.

⁵ 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> (hereafter referred to as 'LGBTIQ State of Play'). This document was developed to assist in the SALRI's YourSAy consultation, discussed further below at [16].

⁶ Government of South Australia, Department for Communities and Social Inclusion, *South Australian Strategy for the Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People 2014-2016* (May 2014) (hereafter referred to as the 'Inclusion Strategy') < <http://publicsector.sa.gov.au/wp-content/uploads/20140501-DCSI-LGBTIQ-Strategy.pdf> >.

⁷ Ibid 7.

awareness and education; inclusive service delivery and engagement with LGBTIQ communities.⁸

9. The reference also coincides with the 40 year anniversary of South Australia becoming the first State in Australia to decriminalise male homosexuality - an important milestone that also offers the opportunity for reflection, and recognition that some individuals and families are still not able to fully participate in contemporary society because of their sexuality or their sex and gender diversity.

10. As the South Australian Government noted in its *LGBTIQ State of Play* document:

As a modern society, we have a responsibility to ensure that all people are treated equality, [sic] regardless of their sexual orientation, gender, gender identity or intersex status. Despite the leadership that South Australia has shown in working towards a non-discriminatory society, inequalities still exist for people who do not fit into the typical categories of 'straight man' and 'straight woman'. Basic human rights, such as legal recognition of relationships and the ability to parent a child are not always afforded to people who identify as lesbian, gay, bisexual, transgender, intersex or queer (LGBTIQ).⁹

11. South Australia's history of relevant law reform in this area is noteworthy and will be discussed below.

Methodology

12. When undertaking this Audit, SALRI has been assisted by the helpful guide prepared by the South Australian Government, 'Including You: A Practical Guide to Engaging with Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Communities and Developing LGBTIQ Inclusive Services'.¹⁰

13. The Audit undertaken by SALRI had four key steps. SALRI has endeavoured to consult with LGBTIQ South Australians at every phase of this Audit and is sincerely grateful for the generosity, thoughtfulness and expertise of each individual and organisation that it has worked with during this reference.

14. Step One comprised of a desktop review of all of South Australia's current statutes and relevant regulations, with a view to identifying laws that discriminate, or have the potential to

⁸ Ibid 15.

⁹ LGBTIQ State of Play, above n 5.

¹⁰ Government of South Australia, Department for Communities and Social Inclusion, *Including You: A Practical Guide to Engaging with Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Communities and Developing LGBTIQ Inclusive Services* (July 2014) <https://www.sa.gov.au/__data/assets/pdf_file/0006/59469/Including-You-Guide_FA-web.pdf>.

discriminate, on the grounds of sexual orientation, gender, gender identity and intersex status. A table of identified laws was prepared and can be found at **Appendix 1**.

15. Step Two of the Audit involved targeted consultations with community representatives and experts. The organisations and individuals involved in these targeted consultations are listed at **Appendix 5**. They included academics, Government officials, representatives of the LGBTIQ community and business leaders. These consultations assisted in the identification of the laws that had the most significant discriminatory impact on the lives of South Australians, as well as possible options for reform. As a result of feedback received during these consultations, SALRI produced a series of Fact Sheets that aim to outline in plain English the state of the current law in five key priority areas: 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. These Fact Sheets are attached to this Report at **Appendix 3**.
16. Step Three of the Audit involved a public submission and online feedback process facilitated by the South Australian Government's 'Your SAY' platform.¹¹ SALRI received 49 substantive submissions in response to its online feedback form and more traditional requests for submissions. These submissions are listed in **Appendix 2**. The *Your SAY* site also helped to facilitate further targeted consultations and group discussions, including a forum hosted by Feast's Queer Drop In Space on 23 July 2015 that provided an opportunity for SALRI to hear the views of young LGBTIQ people aged 15-26. This broader consultation assisted in distilling the laws and regulations that have the most significant discriminatory impact on the lives of South Australians, and identified further possible reform options.
17. Step Four saw the preparation of the current Report, following review by the specialist Advisory Group established by SALRI for this reference.¹² The Report also incorporates comparative research conducted by the students of the University of Adelaide's Law Reform Course.
18. The next phase of the Reference will involve further research and the preparation of more detailed recommendations with respect to more complex areas of law identified in this Audit

¹¹ 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>>.

¹² The specialist Advisory Group was assembled for this Reference, comprising of the Hon Catherine Branson QC, Emerita Professor Rosemary Owens AO and Professor Carol Johnson.

as being priority areas for law reform but requiring further detailed consideration by SALRI. These include the current regime governing the registration of sex at birth and the change of sex on the Births, Deaths and Marriages Register; legal parentage; recognised surrogacy arrangements; the scope of the existing exemptions to unlawful discrimination and the common law partial defence of provocation.

Limitations

19. Despite its efforts to provide multiple opportunities for interested persons to participate in this reference, SALRI had limited capacity to undertake extensive face to face public consultations, particularly in regional South Australia. SALRI is grateful for the assistance of a number of representative organisations that were able to share the views and experiences of a broader group of LGBTIQ South Australians.¹³ SALRI also benefited from the statistical information recently compiled by a number of national sources, including the Australian Human Rights Commission's (the AHRC) *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, National Consultation Report (2015) ('Resilient Individuals Report')¹⁴ which also provides an important overview of the issues of concern for LGBTIQ individuals in Australia.
20. The sheer magnitude of the reference also prevented SALRI from undertaking extensive, detailed analysis of every single South Australian Act or Regulation identified in the Audit Table at Appendix 1 and instead demanded a prioritisation approach. This Report aims to highlight those Acts and Regulations that SALRI considers demand priority consideration and action by the South Australian Government and Parliament. The Audit Table provides a more comprehensive overview of the full range of potentially discriminating laws.
21. SALRI also recognises that for those many South Australians who have experienced discrimination on the grounds of sexual orientation, gender, gender identity and intersex status, reforming the law is only part of a broader social and cultural change that is needed to achieve a truly inclusive society.

¹³ For example, SALRI received submissions from Telstra, South Australian Equal Opportunity Commission, Surrogacy Australia, Gay and Lesbian Health Alliance, Organisations of Intersex International Australia and Law Society of South Australia. SALRI also met with representatives from Feast's Queer Youth Drop in Centre (Adelaide), Shine SA, GenDASA and Mental Illness Fellowship South Australia.

¹⁴ 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>.

22. Indeed, access to appropriate health care, including mental health care, and being treated with dignity and respect by educators, service providers, employers, co-workers, police, correctional facilities and the broader community has been regularly identified as pressing issues facing LGBTIQ people in South Australia.¹⁵ Families involving same sex parents, or families including gender diverse or intersex people, also seek acceptance of, and respect for the loving and nurturing environment they can create for their children.¹⁶

Participant Quote:

The law has other functions than responding to concrete and demonstrated discrimination, though of course the law should so respond. Right now it sends a message of exclusion. [Submission 27]

23. SALRI's reference necessarily focuses only on identifying discriminatory laws and possible options for reform. While the normative impact of legislative change should not be underestimated, SALRI is conscious that the recommendations it makes are unlikely to be able to address the full range of barriers to equality faced by the LGBTIQ people in South Australia. As the South Australian Equal Opportunity Commission ('the Equal Opportunity Commission') has observed:

In the Commission's view, training and education, policies and strategies, support services and resources are all key in helping to break down the barriers that still exist for LGBTIQ individuals. The existence of legislative barriers, however, does send a message of social inequality that will be hard to overcome until these barriers are removed.¹⁷

24. SALRI also notes that a number of its recommendations for legislative and regulatory reform would be enhanced by corresponding policy changes at the State and Commonwealth level. To this end, SALRI encourages the South Australian Government to consult further with representatives of the LGBTIQ communities, particularly with representatives of transgender and intersex communities, with a view to implementing or exploring the following policy changes, that were also recently identified by the AHRC in its Resilient Individuals Report:

1. All states and territories to develop and implement policies on the placement of trans and gender diverse prisoners in correctional services and for access to hormone therapy

¹⁵ See, for example, South Australian Rainbow Survey <<https://www.sa.gov.au/topics/citizens-and-your-rights/rights-and-responsibilities/individuals-and-groups/lgbtiq/lgbtiq-inclusion-strategy>>. This was confirmed by many of the targeted consultations held by SALRI, including those conducted with Gay and Lesbian Health Alliance, Organisations of Intersex International Australia, Feast's Queer Youth Drop in Centre (Adelaide), Shine SA, GenDASA and Mental Illness Fellowship South Australia.

¹⁶ See, for example, Submissions 27 and 29. This experience was also confirmed by many of the targeted consultations held by SALRI, including those conducted with Gay and Lesbian Health Alliance, Organisations of Intersex International Australia, Shine SA, GenDASA and Mental Illness Fellowship South Australia.

¹⁷ South Australian Equal Opportunity Commission, public submission 10 to the Australian Human Rights Commission, *National SOGII Consultation*, 6 February 2015 <<https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/projects/sogii-rights>>.

to be based on medically-identified need, not discretion.

2. The establishment of a trans-specific policy stream across the health system to ensure that trans people do not face bureaucratic barriers to accessing healthcare, including:

the potential for rebates for necessary pharmaceutical and surgical treatments consistent with rebates enjoyed by all other Australians.

standardised treatment access and commencement policy for hormone therapy and gender affirmation procedures across state and territories.

3. Implement the recommendations of the Australian Senate Community Affairs Committee's 2013 *Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia*, as well as consult with LGBTI people in responding to the Family Law Council's 2013 *Report on Parentage and the Family Law Act*.

4. The inclusion within family and domestic violence strategies of measures to address violence in same-sex relationships, and toward trans and gender diverse people.

5. A review at the end of 2016 of complaints about [sexual orientation, gender identity and intersex - abbreviated in the report as 'SOGII'] issues lodged under the School Chaplaincy Program to establish whether concerns about allegations of harmful practice are based in evidence.

Further, any consideration of the nation-wide ban on commercial surrogacy should be pursued without discrimination against people on the basis of their SOGII status, and should be guided in seeking to protect the best interests of the child and the surrogate.¹⁸

25. SALRI further encourages the State Government to conduct a review of the health services currently available to trans people in South Australia, having received multiple submissions from trans people and their friends and family raising serious concerns relating to access to appropriate health care.¹⁹ Many of these concerns related to the requirement to receive a 'formal diagnosis' of gender dysphoria before having access to hormone replacement therapy; access to services available through the SA Gender Dysphoria Unit and a lack of targeted public information about supports services for trans and intersex people and their families.

26. Submissions received by SALRI suggest that difficulties associated with accessing these services and information can lead to people experiencing physical pain, psychological trauma, public humiliation and financial loss.²⁰ Experiences shared by attendees at a forum hosted by Feast's Queer Youth Drop In Space on 23 July 2015 were particularly compelling. Some of the young people SALRI spoke to clearly face barriers when seeking to access the

¹⁸ Resilient Individuals Report, above n 14, 3.

¹⁹ See, for example, Submissions 4, 5, 10 and 14.

²⁰ See, for example, Submissions 10 and 14.

information and support services they need to identify and access appropriate health care options. For some, lack of access to affordable, high quality health care (including hormone replacement therapy and gender reassignment surgery) was resulting in distress, dislocation, alienation and in some cases depression.

27. Although related to the current legal framework governing the legal recognition of sex, many of these issues cannot be addressed through legislative change. However, this should not prevent or delay efforts to address these pressing issues, particularly for young South Australians. For these reasons, SALRI encourages the South Australian Government to investigate these health care related concerns as a matter of urgency to ensure that existing services continue to meet the needs of gender diverse people in South Australia.
28. Some of these matters are discussed further below.

Outline of the Audit Report

29. This Audit Report is organised into three thematic Groups, identified from the more detailed Audit Table (at **Appendix 1**) following targeted and broader public consultations. As noted above, the recommendations contained in this report fall within two categories: Recommendations for Immediate Action and Recommendations Requiring Further Review and Report by SALRI.
30. **Group One:** This section of the report considers a large number of laws that have an identifiable but limited discriminatory impact on the lives of LGBTIQ South Australians. They include laws that use gendered language to refer to Board composition and certain services relating to pregnancy or maternity level. These laws currently ignore gender diverse people and people with intersex variations. The reform of these laws is an important and efficient way to address discrimination and can be pursued via omnibus legislation.
31. **Group Two:** This section of the report considers a smaller number of laws that have a profound impact on the lives of LGBTIQ South Australians. They include laws that affect how a person's identity is legally registered, whether they can access certain services, whether they have adequate protection against unlawful discrimination, and whether and how they might start a family. SALRI's targeted consultations and a public submissions process have highlighted an urgent need for reform of these laws. A consensus has emerged from among the submissions about which features of these laws need reform, and a number of recommendations for 'best practice' legislative responses have been identified. While some

recommended reforms can be pursued immediately, other areas require further and detailed consideration by SALRI to best identify what reform options might best meet the needs of the South Australian community. Further detailed recommendations will be made in the next phase of SALRI's work on this Reference.

32. **Group Three:** This section of the report considers laws that treat unmarried couples differently from married couples, and may have a particularly unfavourable impact on same sex couples. While changes in 2009 introduced the concept of 'domestic partnerships' and removed much of the marital-status based discrimination in South Australian laws, there remain laws that treat unmarried couples unfavourably. Reform of these laws may be affected by developments at the Commonwealth level relating to the *Marriage Act 1961* (Cth). While some recommended reforms that can, and in SALRI's view, should be pursued immediately, other areas require further detailed consideration by SALRI to identify what reform options might best meet the needs of the South Australian community. Further detailed recommendations will be made in the next phase of SALRI's work on this Reference.

Terminology

33. SALRI strongly supports the use of inclusive terminology and the right of people to identify their sexual orientation, gender identity or intersex status as they choose. SALRI also recognises that terminology is strongly contested, particularly terminology to describe gender identity.
34. SALRI is particularly conscious of the important distinction between 'gender identity' and 'intersex status' - or between gender diverse individuals and people with intersex variations. This distinction is outlined further below.
35. As part of its consultation process, SALRI set out its preliminary views on the appropriate terminology it would adopt when conducting its Audit and sought feedback as to whether this approach was appropriate and reflective of best practice and current usage. Feedback received strongly favoured the approach adopted by the AHRC in its Resilient Individuals Report. Utilising this approach, some of the terminology used in the Report is explained below:

Gender: The term 'gender' refers to the way in which a person identifies or expresses their masculine or feminine characteristics. A person's gender identity or gender expression is not always exclusively male or female and may or may not correspond to

their sex.

Gender expression: The term ‘gender expression’ refers to the way in which a person externally expresses their gender or how they are perceived by others.

Gender identity: The term ‘gender identity’ refers to a person’s deeply held internal and individual sense of gender.

Intersex: The term ‘intersex’ refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically ‘male’ or ‘female’. Intersex people have a diversity of bodies and identities.

LGBTIQ: An acronym that is used to describe lesbian, gay, bisexual, trans, queer and intersex people collectively. Many sub-groups form part of the broader LGBTIQ movement.

Sex: The term ‘sex’ refers to a person’s biological characteristics. A person’s sex is usually described as being male or female. Some people may not be exclusively male or female (the term ‘intersex’ is explained above). Some people identify as neither male nor female.

Sexual orientation: The term ‘sexual orientation’ refers to a person’s emotional or sexual attraction to another person, including, amongst others, the following identities: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted.

Trans: The term ‘trans’ is a general term for a person whose gender identity is different to their sex at birth. A trans person may take steps to live permanently in their nominated sex with or without medical treatment.²¹

36. SALRI also uses the term ‘**queer**’. This term was adopted by the South Australian Government in the development of its LGBTIQ Inclusion Strategy and is generally accepted among the individuals and groups that SALRI consulted as being an appropriate and often empowering term with which some individuals identify. In the Inclusion Strategy, the term ‘queer’ is used as ‘an umbrella term that includes a range of alternative sexual and gender identities, including gay, lesbian, bisexual and transgender’.²²
37. Like the AHRC, SALRI acknowledges that throughout different cultural contexts transgender identities have specific terms. In some Aboriginal and Torres Strait Islander communities, for example, some *Sistergirls* and *Brotherboys* are also trans people.
38. SALRI also acknowledges that some community members have expressed concern about the appropriateness of some of the terms outlined above, including LGBTIQ as an umbrella term and the term ‘gender identity’.

²¹ Resilient Individuals Report, above n 14, 5.

²² Inclusion Strategy, above n 6, 8.

39. SALRI frequently uses the phrase ‘**gender diversity**’ in its work. This term is used to refer to the whole spectrum of gender in our community. It aims to include all people regardless of whether they identify within or outside of the binary gender framework.

The important distinction between intersex and gender diversity

40. SALRI has received submissions about the distinction between the terms ‘intersex’ and ‘gender diverse’.²³ SALRI also understands that language regarding people with intersex traits continues to evolve, and that there appears to be no clear consensus by medical bodies or intersex rights advocates on the ‘correct’ or ‘acceptable’ language. What is clear is that language should enhance, rather than complicate or confuse, understandings of intersex traits, and acknowledge the inalienable right of every person to define their own identity.
41. One widely accepted definition of ‘intersex’, developed by Julie Greenberg, encompasses anyone ‘whose sex chromosomes, gonads, internal reproductive anatomy, or external sexual anatomy’ is ‘neither wholly male or female’.²⁴ A submission from Travis Wisdom suggests that while there remains no universally accepted term, ‘intersex’ is the most inclusive and least problematic term which should be used consistently in legislation and case law.²⁵
42. As part of its targeted consultation process, SALRI spoke with the President of the Organisation of Intersex International Australia (OIIA), Morgan Carpenter, who alerted SALRI to a wide range of domestic and international literature relating to the human rights of people with intersex variations, as well as the legal and health-related issues leading to experiences of exclusion and discrimination. The following bodies, for example, have recently issued reports that include discussion of, and recommendations relating to, the rights of people with intersex variations:
- The World Health Organization’s June 2015 Report on *Sexual health, human rights and the law*;²⁶
 - The AHRC's June 2015 Resilient Individuals Report;²⁷

²³ See, for example, Submission No 39, 1-2.

²⁴ See, for example, Submission No 39, 1-2, referring to Julie A Greenberg, 'Interacting in the Workplace with Individuals Who Have an Intersex Condition' in Christine Michelle Duffy and Denise M Visconti (eds), *Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide* (Bureau of National Affairs Inc, 2014).

²⁵ Submission No 39, 3.

²⁶ World Health Organization, *Sexual health, human rights and the law* (2015) <http://www.who.int/reproductivehealth/publications/sexual_health/sexual-health-human-rights-law/en/>.

²⁷ Resilient Individuals Report, above n 14.

- The United Nations Office of the High Commissioner for Human Rights' May 2015 Report *Discrimination and violence against individuals based on their sexual orientation and gender identity*;²⁸
- The Council of Europe's 2015 Issue Paper, *Human rights and intersex people*;²⁹ and
- The Commonwealth Senate Community Affairs Committee's 2013 Report, *The involuntary or coerced sterilisation of intersex people in Australia*.³⁰

43. As OIIA has explained, and as is consistent with the above reports, people born with intersex variations have as diverse a range of gender identities and sexual orientations as non-intersex people. The majority of intersex people are heterosexual and cisgender (not trans). What people with intersex variations share in common with each other are stigma and physical attributes associated with being born with atypical sex characteristics.

44. These observations suggest that it is neither helpful, nor accurate, to describe all people with intersex variations as necessarily 'gender diverse'. It is also unhelpful to presume that their experiences of exclusion and discrimination will be the same as non-heterosexual or gender diverse people. The failure to make this important distinction in past policies and studies has contributed to the general lack of awareness about the experiences of the intersex community.

LGBTIQ People in South Australia

45. LGBTIQ people in South Australia (who SALRI recognises are a diverse range of individuals that should not be viewed as homogenous group) make a significant contribution to the economic and social wealth of the community and actively participate in public life despite the many legal and other barriers to equality that they may encounter. SALRI's discussions with attendees at the Feast's Queer Drop In Space on 23 July 2015 highlighted the potential of young LGBTIQ people in South Australia and showcased one of the existing programs that is designed to promote equality and inclusion for LGBTIQ people.

²⁸ United Nations Office of the High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, Report, A/HRC/29/23 (4 May 2015) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/088/42/PDF/G1508842.pdf>>.

²⁹ Council of Europe Commissioner for Human Rights, *Human rights and intersex people*, Issue Paper, (April 2015) <<http://www.coe.int/t/dg4/lgbt/Documents/HR%20and%20Intersex%20People%20CoE%20Commissioner%20for%20HR.pdf>>

³⁰ Involuntary Sterilisation Report, above n 1.

46. LGBTIQ people in South Australia have been marginalised from Government policy making and remained largely invisible from data collection and other surveys. For example, while counts of same-sex couples living together in the same household have been compiled by the Australian Bureau of Statistics since 1996, it does not collect information regarding the sexuality or gender identity of individuals who are not in a relationship.³¹ A significant proportion of national population research provides no opportunity for individuals to identify diverse sex, sexual orientation, or gender identity.³²
47. Fortunately, in the last decade, efforts have been undertaken at both the State and national level to address the invisibility of LGBTIQ people in the community.
48. On 24 August 2012, in recognition of the levels of social exclusion experienced by those in the LGBTIQ communities, the State Government announced the development of a South Australian *LGBTIQ Inclusion Strategy* ('Inclusion Strategy').³³
49. There are no definitive figures on the size of the LGBTIQ population. The Strategy estimates that it is to range from 2% to 11% of the Australian population.³⁴ Recent international estimates suggest that between 1 in 500 and 1 in 11,500 people identify as transgender³⁵ and it is estimated that between 1 in 200 and 1 in 2000 people are born with physical variations that meet the definition for various intersex conditions.³⁶
50. The Strategy also notes that in the 2011 Census, 1,929 same sex couples were recorded as resident in South Australia.³⁷ The Strategy notes that same sex couples, both in numbers and as a proportion of all couples, have increased in every Census since 1996, when first recorded. The Strategy further notes:

While generally speaking, same sex couples are less likely to have children compared to opposite sex couples, Australia-wide, 22% of female same sex couples and 2.9% of male same sex couples reported having one or more children. It is important to note that

³¹ Inclusion Strategy, above n 6, 7.

³² Ibid.

³³ The development of the South Australian Strategy for the Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People 2014-2016 ('Inclusion Strategy') was led by the Department for Communities and Social Inclusion (DCSI) in partnership with the LGBTIQ communities.

³⁴ *Inclusion Strategy*, above n 6, 7; which uses data taken from Australian Government, Department of Health and Ageing, *National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy* (2012), 4; Gabi Rosenstreich, *LGBTI People Mental Health and Suicide*, Briefing Paper, National LGBTI Health Alliance (2011), 3.

³⁵ Rosenstreich, above n 34, 2.

³⁶ Ibid.

³⁷ Australian Bureau of Statistics, 'Same-sex couple families,' *Reflecting a Nation Stories from the 2011 census* (21 June 2012) <<http://bit.ly/1g6MReq>>.

these figures may underestimate the number of same sex couples, given that not all same sex couples are willing to identify as such.³⁸

51. During the period 24 August - 21 September 2012, the South Australian Government conducted an online survey, known as the 'South Australian Rainbow Survey' to obtain the views of the LGBTIQ communities on the Inclusion Strategy. This was supported by the establishment of the Rainbow Advisory Council in February 2013 to provide advice to State Government agencies regarding any policies, programs, services and processes affecting LGBTIQ people. This was accompanied by a number of LGBTIQ community forums held in Port Lincoln, Port Augusta, Mount Gambier, Salisbury, Noarlunga and the Adelaide Central Business District and a phone-in was held to solicit the views of LGBTIQ South Australians about the five priority areas for the strategy identified by the RAC and in previous consultations.³⁹
52. The results of the South Australian Rainbow Survey found that 80% of respondents identified stigma and discrimination as major barriers to their participation in the wider community and 51.5% identified feeling unsafe.⁴⁰ Over 90% of respondents to the survey identified freedom from discrimination, feeling safe and freedom from bullying and harassment as issues of importance to them.⁴¹
53. Stigma and discrimination were also identified as primary barriers that exclude LGBTIQ people from actively participating and engaging with the wider South Australian community.⁴² Other significant key priority actions commonly cited by respondents included health and wellbeing and cultural awareness and respect.⁴³
54. The laws dealing with unlawful discrimination and marriage were also identified as important issues by respondents. For example, when asked about ways in which the State Government could strengthen engagement with LGBTIQ communities and individuals, the issue of marriage equality emerged as the most common first priority and this was closely followed by consultation with the wider LGBTIQ communities.⁴⁴

³⁸ Inclusion Strategy, above n 6, 8.

³⁹ Government of South Australia, Department for Communities and Social Inclusion, *Results of the South Australian Rainbow Survey 2012* (2013) <https://www.sa.gov.au/__data/assets/pdf_file/0018/11826/Results-of-the-South-Australian-Rainbow-Survey-2012.pdf>.

⁴⁰ Ibid 16.

⁴¹ Ibid 16.

⁴² Ibid 16.

⁴³ Ibid 16.

⁴⁴ Ibid 16.

55. The Survey and other consultations undertaken in preparation for the Strategy resulted in the identification of the following five priority areas for action:

Social and Emotional Health and Wellbeing

Employment and Opportunities

Awareness and Education

Inclusive Service Delivery

Engagement with LGBTIQ Communities.

56. The Survey also highlighted the need to consider LGBTIQ people as distinct individuals, while also considering the diversity within the groups to which they belong.⁴⁵ For example, the concerns and needs of lesbian women may be quite different from those of Aboriginal gay men or transgender women.

57. Other recent national studies also shed important light on what it means to be gay, bisexual, trans, intersex or queer in Australia and the current barriers to equality and social inclusion. The findings include:

- Research has consistently identified higher than average rates of violence, harassment and bullying towards LGBTI people in Australia.⁴⁶
- The 2012 AHRC *Private Lives 2* report revealed 25.5% of survey respondents reported an experience of homophobic abuse or harassment in the previous 12 months. In addition, a further 8.7% of the total respondents reported experiencing threats of, or actual physical violence;⁴⁷ including approximately 40% of trans men and women who reported experiencing some form of verbal abuse, and almost a quarter reported some form of harassment. A further 64.8% of participants in the 2014 *First Australian National Trans Mental Health Study* reported experiencing discrimination or harassment.⁴⁸

⁴⁵ Inclusion Strategy, above n 6, 8.

⁴⁶ See, for example, William Leonard et al, *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*, Monograph Series Number 86 (Australian Research Centre in Sex, Health & Society, La Trobe University, 2012) <https://www.melbourneinstitute.com/downloads/hilda/Bibliography/Other_Publications/2012/Leonard_etal_Private_Lives_2_Report.pdf>; Australian Human Rights Commission, *Violence, Harassment and Bullying*, Fact Sheet (2011) <<https://www.humanrights.gov.au/what-bullying-violence-harassment-and-bullying-fact-sheet>>.

⁴⁷ See, for example, Leonard et al, above n 46.

⁴⁸ Zoë Hyde et al, *The First Australian National Trans Mental Health Study: Summary of Results* (School of Public Health, Curtin University, 2014) <https://www.beyondblue.org.au/docs/default-source/research-project-files/bw0288_the-first-australian-national-trans-mental-health-study---summary-of-results.pdf?sfvrsn=2>.

- Almost 75% of the respondents to the recent AHRC's online survey reported experiencing some type of bullying, harassment or violence on the basis of their SOGII status. Additionally, almost 90% reported knowing someone who had reported experiencing some type of bullying, harassment or violence on the basis of their SOGII status. Almost 25% of survey participants reported that they had experienced refusal of service on the basis of SOGII status
- Research has established a strong correlation between the experience of discrimination and lower enjoyment of health and wellbeing.⁴⁹ It also highlights that a lived experience of unjust discrimination can significantly limit an individual's sense of security to publicly participate in activities such as employment and sports.⁵⁰
- Studies show that aggregate social and economic welfare losses from a lack of respect for LGBTI people in societies similar to Australia can have an effect on healthcare, productivity rates and national economic growth figures.⁵¹
- Research suggests that the rate of suicide for LGBT people is from 3.5 to 14 times higher than the general population.⁵² LGBT people are also at a higher risk for a range of mental diagnoses and significantly more likely to be diagnosed with depression or anxiety.⁵³
- Studies highlight that despite high levels of education, trans and gender diverse people report substantially higher levels of unemployment.⁵⁴ Although there is a lack of empirical data, anecdotal contributions from submissions to the Australian Human

⁴⁹ See, for example, Ibid; Leonard et al, above n 46.

⁵⁰ Annaliese Constable et al, 'One Size Does Not Fit All: Gap analysis of NSW domestic violence support services in relation to gay, lesbian, bisexual, transgender and intersex communities' needs, Executive Summary and Recommendations (ACON, 2011) < http://static1.1.sqspcdn.com/static/f/471667/11432104/1301276576180/Gap+Analysis_V4-a2.pdf?token=Pp0vfaGBtQfW9h7xHUShfO3Y%2Bjs%3D>; Jude Irwin, 'The Pink Ceiling is Too Low', (Australian Centre for Lesbian and Gay Research (University of Sydney, 2003); Lynne Hillier et al, *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (Australian Research Centre in Sex, Health and Society, La Trobe University, 2010).

⁵¹ Andrea La Nauze, 'Sexual orientation-based wage gaps in Australia: The potential role of discrimination and personality' (2015) 26 *The Economic and Labour Relations Review* 60; M.V. Lee Badgett, et al, *The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economics* (The Williams Institute, UCLA School of Law, 2014) <<http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-inclusion-and-development-november-2014.pdf>>.

⁵² See William Leonard and Atari Metcalf, *Going upstream: a framework for promoting the mental health of lesbian, gay, bisexual, transgender and intersex (LGBTI) people* (National LGBTI Health Alliance, 2014) <<https://www.beyondblue.org.au/docs/default-source/default-document-library/bw0257-going-upstream-online-o-lgbti-mental-health-promotion-framework.pdf?sfvrsn=2>>.

⁵³ Ibid.

⁵⁴ See Hyde et al, above n 48.

Rights Commission's most recent consultation also reported that intersex people are disproportionately unemployed.⁵⁵

- The study, *Out on the Fields*, revealed that 70% of the 9,500 respondents across six countries reported thinking that youth team sporting environments were not safe for or supportive of LGB people.⁵⁶ The study also found that 80% of Australian participants believe that LGB athletes are either not accepted, accepted a little or only moderately accepted in sport.⁵⁷

58. This is the wider context in which SALRI sought to conduct its Audit of South Australian laws and regulations.

Previous Efforts to Address Discrimination in SA

59. The Inclusion Strategy provides a useful snapshot of major legal and policy reforms from the 1970s to the present that relate to LGBTIQ people. The following comprises the relevant entries for reform at the State level:

1975: South Australia was the first [S]tate to decriminalise sexual conduct between males.

1988: The *Sexual Reassignment Act 1988* (SA) came into effect.

2006: The *Statutes Amendment (Domestic Partners) Act 2006* (SA) amended 97 Acts, dispensing with the term 'de facto' and categorising couples as 'domestic partners'. This meant same-sex couples who lived together were now covered by the same laws.

2009: The *Equal Opportunity Act 1984* (SA) was amended to reflect more closely Commonwealth statutes of a similar nature. The amendments made it unlawful for people to be discriminated against on the grounds of their sexuality or chosen gender.

2011: The *Statutes Amendment (De Facto Relationships) Act 2011* (SA) that recognises same sex couples in asset forfeiture, property and stamp duty became law.

60. In addition to the Inclusion Strategy, during the last two years, a number of important reviews have been conducted by the South Australian Parliament and government agencies, including:

⁵⁵ Resilient Individuals Report, above n 14, 19.

⁵⁶ See Erik Denison and Alistair Kitchen, *Out on the Fields: the first international study on homophobia in sport*, Final Report (May 2015), <<http://www.outonthefields.com>>.

⁵⁷ Ibid.

- South Australian Legislative Review Committee's inquiry into the Sexual Reassignment Repeal Bill 2014;⁵⁸
- South Australian Legislative Review Committee's Review of the Report of the Committee into the Partial Defence of Provocation;⁵⁹
- South Australian Department of Education and Child Development's Review of the *Adoption Act 1988* (SA);⁶⁰ and
- South Australian Social Development Standing Committee's Inquiry into Same-Sex Parenting.⁶¹

61. A number of relevant Private Members Bills have also been introduced during the last three years with the objective of removing discrimination on the grounds of sexual orientation, gender identity and/or intersex status, including:

- Criminal Law Consolidation (Provocation) Amendment Bill 2015 (the Hon Tammy Franks MP);
- Family Relationships (Parentage Presumptions) Amendment Bill 2014 (the Hon Tammy Franks MP);
- Sexual Reassignment (Recognition Certificates) Amendment Bill 2014 (the Hon Tammy Franks MP);
- Same Sex Marriage Bill 2013 (the Hon Tammy Franks MP);
- Civil Partnerships Bill 2012 (the Hon Bob Such MP); and
- Marriage Equality Bill 2012 (the Hon Tammy Franks MP).

⁵⁸ South Australian Legislative Review Committee, Parliament of South Australia, *Inquiry into the Sexual Reassignment Repeal Bill 2014* <<https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CIId=301>>.

⁵⁹ South Australian Legislative Review Committee, Parliament of South Australia, *Review of the Report of the Committee into the Partial Defence of Provocation* <<https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CIId=301>>.

⁶⁰ Information about this review is available at the 'Your SAY' website (Government of South Australia), *Adoption Act Review* (2015) <<http://yoursay.sa.gov.au/yoursay/adoption-act-review>>.

⁶¹ South Australian Social Development Standing Committee, *Inquiry into Same-Sex Parenting* (2011) <<https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CIId=182>>.

62. Despite these efforts, there remain over 140 South Australian Acts and Regulations identified by SALRI (outlined in the Audit Table at **Appendix 1**) that continue to give rise to the potential for discrimination on the grounds of sexual orientation, gender, gender identity or intersex status.

Efforts to Address Discrimination in Other Jurisdictions

63. All Australian jurisdictions currently have laws prohibiting discrimination on the basis of sexual orientation and gender identity. In recent years the States and Territories have legislated to reduce the discrimination faced by LGBTIQ people in various respects, including concerning same-sex relationship recognition, adoption, surrogacy, IVF and the partial defence of provocation.⁶²
64. The Commonwealth has also been active. The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) now makes it illegal under Commonwealth law 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.⁶³
65. Although initially a leading jurisdiction in terms of promoting equality and addressing gender and sexual orientation based discrimination, in recent years South Australia is perceived to have fallen behind many other Australian jurisdictions in terms of legislative reforms to eliminate discrimination on the grounds of sexual orientation, gender identity and intersex status. South Australia, for example, is the only State that continues to require evidence of medical infertility before same sex couples can access fertility services, and apart from South Australia and Western Australia, all other States and Territories now allow same-sex couples to engage in altruistic surrogacy.⁶⁴

Relevant International Law Principles

66. Australia has signed and ratified a number of international conventions that are relevant to the rights enjoyed by its people, including LGBTIQ people. When Australia ratifies an

⁶² Appendix 4 sets out in detail current and recent reforms that the States and Territories have made to their laws in pursuit of eliminating discrimination against LGBTI people.

⁶³ For further information about these reforms, see **Appendix 4**.

⁶⁴ Resilient Individuals Report, above n 14, 29-30.

international human rights convention, for the rights the convention confers to have domestic effect, it must be implemented into Australian law through an Act of Parliament.⁶⁵

67. However, once Australia has signed an international convention, it can have an effect on the interpretation of legislation, even if has not been fully incorporated into domestic law.
68. For example, a presumption applies when courts are interpreting Australian laws that provides that if the meaning of the Australian law is unclear or ambiguous, the court must give the law a meaning that is consistent with any relevant international human rights obligations that Australia has assumed. As stated by High Court Chief Justice Mason and Justice Deane in the *Teob* case:

Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.⁶⁶

69. Examples of international law relevant to this Report are:

- *International Covenant on Economic, Social and Cultural Rights*; Australia ratified the Covenant in 1975. The Committee on Economic, Social and Cultural Rights has stated that it is prohibited to discriminate on the ground of gender identity.⁶⁷
- *International Covenant on Civil and Political Rights*; Australia ratified the Covenant in 1980. The Covenant enshrines the rights of all people to non-discrimination and equality before the law. The language of the Covenant is broad – it states ‘the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination *on any ground* such as race ... *or other status*’ (emphasis added). Relevantly, Article 23 of the Covenant sets out the right to marry and found a family.
- *Convention on the Elimination of All Forms of Discrimination against Women*; Australia ratified the Covenant in 1983. The Committee on the Elimination of Discrimination against

⁶⁵ South Australia has a particular Act that precludes recourse to international law in administrative decision making, the *Administrative Decisions (Effect of International Instruments) Act 1995* (SA).

⁶⁶ *Minister of State for Immigration and Ethnic Affairs v Teob* (1995) 183 CLR 273, 287. See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38.

⁶⁷ Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination*, Consultation Report (2011), 8 < https://www.humanrights.gov.au/sites/default/files/document/publication/SGI_2011.pdf>.

Women has called attention to discrimination against women on the basis of their sexual orientation and gender identity.

- *Convention on the Rights of the Child*; Australia ratified the Covenant in 1990. The Committee on the Rights of the Child interprets the right to non-discrimination in Article 2 of the Convention to include sexual orientation and gender identity.

70. 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 on the *Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (also known as the Yogyakarta Principles)⁶⁸ provide non-legally binding guidance as to how human rights obligations apply regarding sexually diverse and gender diverse people. The principles outline the right to recognition of people before the law regardless of gender identity, state that laws should uphold the principles of equality and non-discrimination, and state that legislative steps should be taken to prohibit and eliminate discrimination on the basis of sexual orientation and gender identity.

71. The above historical legal developments and international human rights principles provide a context for the current report within which the law may be viewed and reformed. This Section has highlighted the major Australian and international developments that provide important reference points when identifying and evaluating reform options for South Australian laws that discriminate on the grounds of sexual orientation, gender identity or intersex status. The South Australian laws identified as requiring priority attention are outlined in the next Sections of this Report.

⁶⁸ In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia, to outline a set of international principles relating to sexual orientation and gender identity. The result was the *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity* (*The Yogyakarta Principles*), a universal guide to human rights which affirm binding international legal standards with which all States must comply. A copy of these principles is available at <<http://www.yogyakartaprinciples.org/>>.

Group One - Interpretive and Language Changes to Address Exclusion

Overview

72. There are around 65 South Australian Acts and Regulations that explicitly distinguish between binary notions of sex (eg male and female) and gender (man and woman) but do not set out how the law applies to a person who is intersex or gender diverse.⁶⁹ This leaves open the possibility of discrimination, particularly if the law confers a right or provides or limits access to a particular service or entitlement.

73. Many of these provisions also place South Australia at risk of contravening the Commonwealth protections against discrimination on the grounds contained in the *Sex Discrimination Act 1984* (Cth). This has led the Human Rights Law Centre⁷⁰ to observe:

South Australia appears to be the least progressive of the Australian jurisdictions, in the sense that references to sex and gender in legislation are likely to be interpreted in a binary way, except where law in question lends itself to a more open interpretation.⁷¹

74. SALRI considers that reforming these laws can and should be progressed immediately for two reasons:

- the amendments required are of a minor, technical nature and could be achieved via omnibus legislation; and
- due to the number of laws in this category, reform would have real effect and would remove a substantial proportion of the South Australian laws that currently discriminate, or potentially discriminate, against individuals on the grounds of their sexual orientation, gender identity or intersex status.

75. In reaching this view, SALRI does not intend to suggest that the Group One laws have the most significant or deeply felt impact on the lives of LGBTIQ South Australians. Indeed, as discussed below, there are a much smaller number of laws that have a stronger discriminatory impact and that should also be reformed as a matter of priority, following further

⁶⁹ As noted earlier in this report, it is important not to conflate the terms 'intersex' and 'gender identity': intersex people are born with atypical sex characteristics. People born with intersex variations have as diverse a range of gender identities and sexual orientations as non-intersex people. The majority of intersex people are both heterosexual and cisgender (not trans).

⁷⁰ The Human Rights Law Centre is an independent, not-for-profit, non-government organisation. It is governed by a Board of Directors and also receives expert guidance and advice from a high-level Advisory Committee. Further information about the Centre is available at < <http://hrlc.org.au/about/what-we-do/>>.

⁷¹ Submission No 48.

consultation and consideration as to the most appropriate reform options. Group One laws, by contrast, are those that can be readily addressed by legislation without the need for further detailed public consultation.

76. The primary change recommended for Group One laws is to address the current interpretive rules that apply to laws and regulations that explicitly distinguish between sex (eg male and female) and gender (man and woman) but do not set out how the law is to apply to a person who is born with intersex variations or who is gender diverse.

Hypothetical Example: Jo is a long standing member of a community organisation that supports the protection of marine life in South Australia and wishes to nominate for a position on the Adelaide Dolphin Sanctuary Board. Jo's sex is registered as male on the Births Deaths and Marriages Register, but for many years, Jo has identified as trans woman. Jo's nomination for Board membership is refused on the basis that there are already the requisite number of 'men' on the Board and Jo is not recognised as a 'woman'.

This discrimination can be addressed by amending an existing interpretive rule to make sure that when it comes to Board composition, a person who identifies as a woman can be included in any prescribed quotas that were introduced to promote gender equality.

77. This change can be achieved by amending the *Acts Interpretation Act 1915* (SA) and by carefully reviewing each of the laws described below to confirm that it is appropriate to remove the existing potential discriminatory impact on intersex and gender diverse people.
78. In considering these amendments, there is a principle of statutory interpretation that provides that specific provisions in an Act override the general provisions to the extent of any inconsistency.⁷²
79. This means, for example, that it is unlikely to be sufficient to merely amend the *Acts Interpretation Act 1915* (SA) to insert a rule that a reference to one gender is a reference to any gender. This is because where another Act makes material and specific distinction on the basis of sex or gender - such as conferring a benefit only on a person of a particular sex - it may override the proposed new general interpretive principle.
80. For this reason, SALRI has recommended further changes to the *Acts Interpretation Act 1915* (SA) to specifically address gender distinctions in board composition provisions which

⁷² *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat & Livestock Corp (No 2)* (1980) 29 ALR 333, 347.

comprise the most common instance of specifying binary notions of sex and gender in the Group One laws.

81. These current board composition laws and regulations typically aim to facilitate equal representation of men and women on a particular board or committee, but do not include non-binary concepts of sex or gender, they potentially discriminate against gender diverse and intersex individuals.
82. SALRI recommends that these Group One laws be amended to recognise a person based on their gender identity. This approach is consistent with the principles of the Commonwealth's *Guidelines on the Recognition of Sex and Gender* and with the recent recommendations made by the Human Rights Law Centre when reviewing State and Territory laws for compliance with the *Sex Discrimination Act 1984* (Cth).⁷³
83. It also continues to advance the legitimate aim of the current laws namely to promote gender equality and address gender based discrimination in the appointment of board members.
84. In making these recommendations, SALRI recognises that a person's gender identity can include the adoption of no gender. This may apply particularly to some trans people who do not wish to identify as either a man or a woman. For these people, the changes proposed to the existing board composition provisions may not fully address the exclusion they experience, and alternative approaches to promoting gender diversity on boards – that does not specify 'woman' or 'man' - may need to be considered.
85. The incorporation of the term 'gender identity', based on the definition in the *Sex Discrimination Act 1984* (Cth), into the South Australian *Acts Interpretation Act 1915* (SA) will also assist in ensuring that South Australian law recognises gender identities beyond the binary constructions of male and female.

Addressing Exclusion of Gender Diverse and Intersex People

Interpretive Rules and Board Appointments

86. Reform is needed to ensure that references to particular sex and gender in South Australian law are inclusive of intersex people and are gender diverse wherever possible.

⁷³ Australian Government, Attorney-General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (2013) <<http://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>>.

87. This can be achieved by three amendments to the South Australian *Acts Interpretation Act 1915* (SA):

Group One: Recommendations for Immediate Action

1.1 Amend s 4 of the *Acts Interpretation Act 1915* (SA) to include the terms ‘gender identity’ and ‘intersex status’ in the dictionary section of the Act, to be defined by reference to or in identical terms as the relevant terms in the *Sex Discrimination Act 1984* (Cth).

1.2 Replace the existing gender-related rule in s 26 of the *Acts Interpretation Act 1915* (SA) with a new interpretative rule based on s 23(a) of the *Acts Interpretation Act 1919* (Cth) which provides that: ‘words importing a gender include every other gender’.

1.3 Amend the existing gender balance on board provision in s 36A of the *Acts Interpretation Act 1915* (SA) to make it clear that, for the purposes of this provision, a person who identifies as a woman should be included in the pool of possible appointments that are legislated to include a minimum number of female/women positions, regardless of the person’s sex as legally recorded. Similarly, a person who identifies as a man should be included in the pool of potential appointments that are legislated to include a minimum number of male/men positions, regardless of the person’s sex as legally recorded.

Unnecessary Binary Sex or Gender Based Distinctions

88. Further amendments should be made to Group One laws that contain unnecessary binary sex or gender based distinctions, for example, laws that refer to ‘women’ who are ‘pregnant’. These laws are designed to regulate services or bestow rights on people who have certain physical characteristics or biological experiences (eg breasts or pregnancy). While these experiences are shared by people with female sex characteristics, it is not necessary to include this gender reference in these provisions.
89. Amending these laws to replace the gendered term with a neutral term, such as ‘persons who are pregnant’, would remove potential discrimination against people who may be or have been pregnant, for example, but who do not identify as a ‘woman’. This would maintain the primary object of such a provision, namely to provide leave in recognition of pregnancy.

Group One: Recommendations for Immediate Action

1.4. Remove or replace unnecessarily gendered terms in the following provisions: *Criminal Law Consolidation Act 1935* Part 3, Division 17 (abortion - remove reference to ‘females’ who are pregnant); *Health Practitioner Regulation National Law (South Australia) Act 2010* Schedule 2 (replace reference to ‘woman giving birth’ with ‘person giving birth’); *Payroll Tax Act 2009* s 53 (remove the term ‘female’ employee in connection to ‘her pregnancy’).

Replacing 'Opposite Sex' with 'Different Sex'

90. There are currently a number of provisions that use the term 'opposite sex' to refer to heterosexual couples or to refer to the 'opposite' of a particular sex or gender (such as male/female or man/woman).⁷⁴ The use of the term 'opposite sex' infers a binary concept of sex with 'male' being the opposite of 'female' and vice versa. This can have a discriminatory impact on trans people or some people with intersex variants who do not identify as either male or female.
91. SALRI received submissions that called for the replacement of the term 'opposite sex' with the term 'different sex', which recognises the potential for people to identify as a sex other than 'male' or 'female'.⁷⁵ This approach, which does not alter the purpose of the relevant legislative provisions, is consistent with that adopted by the Commonwealth in the *Sex Discrimination Act 1984* (Cth) and the *Same-Sex Relationships (Equal Treatment In Commonwealth Laws--General Law Reform) Act 2008* (Cth).

Group One: Recommendations for Immediate Action

1.5 Replace the term 'opposite sex' with 'different sex' in: *Equal Opportunity Act 1984* (SA) ss 5, 29; *Family Relationships Act 1975* (SA) s 10A; *Criminal Law (Forensic Procedures) Act 2007* (SA) s 21 and the *Sexual Reassignment Act 1988* (SA) s 3.

Removal of Out-dated Sexist Provisions

92. In addition to the above recommendations, SALRI has identified two provisions that should be amended or removed on the grounds that they discriminate on the grounds of sex and are outdated and no longer appropriate.
93. These provisions are:
- *Landlord and Tenant Act 1936* s 44 - which provides that:

It shall not be lawful to distain any sewing machine, type writing machine, or mangle, the property of or under hire to any female person whether belonging to the tenant or otherwise, for any rent claimed in respect of the premises or place in which such sewing machine, typewriting machine or mangle may be ...
 - *Settled Estates Act 1880* ss 40, 49, 50 - which set out a process for 'a married woman applying to the court or consenting to be examined apart from her husband'.

⁷⁴ See *Equal Opportunity Act 1984* (SA) ss 5, 29; the *Family Relationships Act 1975* (SA) s 10A; the *Criminal Law (Forensic Procedures) Act 2007* (SA) s 21; the *Sexual Reassignment Act 1988* (SA) s 3.

⁷⁵ Submission No 38, 3.

Group One: Recommendations for Immediate Action

1.6. Repeal outdated sexist provisions in *Landlord and Tenant Act 1936* (SA) s 44 and *Settled Estates Act 1880* (SA) ss 40, 49, 50.

Gender Sensitive Body Searches by Police and Prison Officials

94. A number of Acts contain specific provisions relating to intrusive forensic procedures taken in respect of a 'female'. These provisions are designed to promote gender sensitivity, but in their current form may discriminate against gender diverse or intersex people who identify as female but may not be legally recognised as such.
95. The *Criminal Law (Forensic Procedures) Act 2007* (SA), for example, deals with the process of conducting and authorising forensic procedures, including body searches. Part 3 of the Act deals with how forensic procedures are carried out. Section 21 provides that forensic procedures are to be carried out humanely. Subsection 21(3) provides that if reasonably practicable, a forensic procedure that involves exposure of, or contact with, the genital or anal area, the buttocks or, in the case of a female, the breasts must not be carried out by a person of the opposite sex (other than at the request of the person on whom the forensic procedure is to be carried out).
96. The discriminatory impact of these provisions could be addressed by amending such provisions to provide that:
- if reasonably practicable, a forensic procedure that involves exposure of, or contact with, the genital or anal area, the buttocks or, the breasts must be carried out *by a person of the same gender identity* (other than at the request of the person on whom the forensic procedure is to be carried out).
97. Similar provisions are contained in the *Correctional Services Act 1982* (SA). Section 23 of the Act sets out the process for the initial and periodic assessment of prisoners. In carrying out such assessments regard must be had to a range of personal characteristics about the prisoner, including their 'sex' and their 'family ties' (s 23(3)). Section 37 sets out the process for searching a prisoner's person or property. Section 37(2)(a) provides that 'those present at any time during the search when the prisoner is naked, except a medical practitioner, must be of the same sex as the prisoner'. Searches can involve a prisoner being required to: open his or her mouth, strip, adopt particular postures or 'do anything else reasonably necessary for the purposes of the search'.

98. SALRI recommends that the discriminatory impact of these laws could be addressed by amending these provisions to provide for searches or assessments to be carried out by a person of the same gender identity (other than at the request of the person on whom the procedure or assessment is to be carried out), provided that this is reasonably practicable in the circumstances.
99. In making this recommendation, SALRI recognises that conducting body searches of gender diverse people or people with intersex variants can give rise to complex practical issues. In its submission to SALRI, the HRLC noted:
- changes to laws relating to body searches, forensic procedures and similar processes that impact on transgender, gender diverse and intersex people should be accompanied by more detailed policies and training that ensure that individuals are treated with respect and dignity when a search or procedures is undertaken.⁷⁶
100. For these reasons, SALRI recommends that changes to body searches should be accompanied by the development of appropriate policies for conducting forensic procedures with respect to gender diverse people.
101. As noted above, SALRI also recommends that the term ‘gender identity’ be defined in the *Acts Interpretation Act 1915* (SA) in the same terms as the *Acts Interpretation Act 1919* (Cth).

Group One: Recommendations for Immediate Action

1.7. Amend the *Criminal Law (Forensic Procedures) Act 2007* and the *Correctional Services Act 1982* (SA) to provide for invasive body searches or assessments to be carried out by a person of the same gender identity as the person subject to the search or assessment (other than at the request of the person subject to the search or assessment). This change should be accompanied by the development of appropriate policies for conducting forensic procedures with respect to gender diverse people.

⁷⁶ Submission No 48.

Group Two: Consultation-led Change to Address Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status

Overview

102. There are four areas that have been consistently identified through consultations and submissions as having a significant discriminatory impact on LGBTIQ South Australians.

These areas can be described as follows:

- laws regulating how a person's sex is recognised under the law, in particular, how a person's sex is recorded or changed on the Births Deaths and Marriages Register (key legislation includes the *Births, Deaths and Marriages Registration Act 1996* (SA) and the *Sexual Reassignment Act 1988* (SA));
- laws relating to parenting rights and starting a family, in particular laws regulating who can access assisted reproductive treatment, who can adopt, who can enter into surrogacy arrangements and who can meet the legal definitions of 'parents' (key legislation includes the *Assisted Reproductive Treatment Act 1988* (SA); *Family Relationships Act 1975* (SA) and the *Adoption Act 1988* (SA));
- laws prohibiting discrimination on the grounds of certain attributes, including marital status, sexuality and 'chosen gender', and the exceptions to these laws (key legislation includes the *Equal Opportunity Act 1984* (SA)); and
- laws relating to criminal law, in particular the partial defence of provocation to murder (known as the 'gay panic' defence) and the treatment of past convictions for the now repealed criminal offence of homosexuality.

103. These areas of law have a discriminatory impact on the lives of LGTBIQ South Australians in various ways, including:

- preventing a gender diverse or intersex person from registering their sex as anything other than 'male' or 'female' on the Births, Deaths and Marriages Register;
- prescribing extremely onerous and medically intrusive processes for changing a person's sex on the Births, Deaths and Marriages Register;
- preventing same sex couples from becoming eligible prospective adoptive parents;
- prescribing conditions on access to assisted reproductive treatment that can operate to exclude same sex couples;

- prohibiting same sex couples from entering into recognised surrogacy agreements as outlined in the *Family Relationships Act 1975* (SA);
- failing to provide adequate protection against discrimination, particularly on the grounds of intersex status and gender diversity;
- containing broadly framed exceptions to unlawful discrimination on the grounds of sexuality and chosen gender; and
- continuing to provide implicit endorsement of the so-called ‘gay panic’ defence.

104. Reforming these laws is deemed imperative by SALRI to addressing discrimination on the grounds of sexual orientation, gender identity and intersex status in South Australia.

105. During this Audit, the targeted consultations and public submissions process SALRI conducted have highlighted the need for reform of these laws and contributed to a number of provisional recommendations for ‘best practice’ legislative responses. Further consultation and consideration is now needed to identify the reform options that are most appropriate.

106. The main provisions giving rise to discrimination are summarised below, as are possible reform options. More detailed descriptions of the offending provisions and their discriminatory impact is contained in the Audit Table (**Appendix 1**).

Registration of sex and changes to registered sex

The Current Law

Registration of Births

107. The Victorian Law Reform Commission has aptly observed:

Birth registration is a significant life event. The registration of a birth is the first step in the process of formal recognition of an individual by the State. Obtaining a birth certificate is a further step in creating an individual's civil law identity. A certificate can only be issued once a birth is registered. Without a birth certificate, a person may not be able to take full advantage of their rights as a citizen. These rights include enrolling at school or to vote, obtaining a passport, a Medicare card (as an adult), driver's licence or tax file number, and accessing various government benefits.⁷⁷

108. The *Births, Deaths and Marriages Registration Act 1996* (SA) (the *BDM Act*) and the *Births, Deaths and Marriages Registration Regulations 2011* (SA) (the *BDM Regulations*) provide the statutory basis for the registration of births in South Australia (SA).⁷⁸

109. The Act requires that the Registrar be notified of all births occurring in South Australia.⁷⁹ Hospitals and midwives have a legislative obligation to provide notice of the birth to the Registry. The notification must provide specified information which includes the child's sex.⁸⁰

110. Under s 13 of the *BDM Act*, the birth of a child in South Australia must also be registered (as well as the birth of a child born during a flight to a South Australian airport, and of a child born outside Australia whose birth has not been registered in another country and who becomes a resident of the South Australia). It is an offence to not register the birth of a child born in South Australia within 60 days.⁸¹ The entry in the register must record the child's sex.⁸²

111. When a child is born in a hospital or birth centre, or the birth is attended by a qualified medical practitioner or midwife, the parents are provided with a birth registration statement

⁷⁷ Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, Report (2013), 13.

⁷⁸ The current South Australian *Births, Deaths and Marriages Registration Act* was enacted in 1996, replacing the repealed *Births, Deaths and Marriages Registration Act 1966* (SA). The original *Births, Deaths and Marriages Registration Act 1996* (SA) has since been amended by the *Coroners Act 2003* (SA); the *Statutes Amendment (Disposal of Human Remains) Act 2006* (SA); the *Statutes Amendment (Surrogacy) Act 2009* (SA); the *Statutes Amendment (Public Sector Consequential Amendments) Act 2009* (SA); the *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA) and the *Burial and Cremation Act 2013* (SA).

⁷⁹ *Births, Deaths and Marriages Registration Act 1996* (SA) s 12.

⁸⁰ *Births, Deaths and Marriages Registration Regulations 2011* (SA) reg 4.

⁸¹ *Births, Deaths and Marriages Registration Act 1996* (SA) s 16.

⁸² *Births, Deaths and Marriages Registration Regulations 2011* (SA) reg 6.

form.⁸³ The form currently requires that the sex of a child be marked as either ‘male’ or ‘female’.

112. There is currently no option under the *BDM Act* to notify or register the birth of a child with intersex variations.⁸⁴
113. Under s 42(1)(b) of the *BDM Act*, the birth register can be corrected by the Registrar General to bring an entry ‘into conformity with the most reliable information available’. However, this provision only applies in relation to a ‘registrable event’ - which means a birth, change of name, death or marriage and includes the making or discharge of a surrogacy order.⁸⁵ It does not include a change of sex.

Changing a person's sex on the register

114. The *BDM Act* does not set out a process for changing a person’s sex once registered. However, a person can change their sex on the Register following the receipt of a Recognition Certificate under the *Sexual Reassignment Act 1988* (SA) (the *SR Act*). Registration Certificates can only be issued by the Magistrates Court following evidence of ‘a sexual reassignment procedure’ (see further below).

Sexual reassignment Act 1998

115. The *SR Act* regulates the circumstances in which a person can undergo a sexual reassignment procedure, and sets out a process by which a person can obtain a Recognition Certificate, which can in turn be used to change the person’s sex as recorded on the Births, Deaths and Marriages Register.⁸⁶
116. For legal purposes, a Recognition Certificate is conclusive evidence that the person to whom it refers has undergone a reassignment procedure and is of the sex stated in the certificate.⁸⁷

⁸³ *Births, Deaths and Marriages Registration Act 1996* (SA) s 14, *Births, Deaths and Marriages Registration Regulations 2011* (SA) reg 5. The birth registration statement is in two parts and if the parents wish to obtain a birth certificate they must also complete the relevant section and pay the prescribed fee. At present the fee for a standard birth certificate is \$46.00.

⁸⁴ Under s 17(2) of the *Births, Deaths and Marriages Registration Act 1996* (SA) it is possible for the Registrar to register a birth ‘on the basis of incomplete particulars’. This permits the Registrar to complete an entry for a stillborn child whose sex cannot be medically determined. It appears that this mechanism has not been used to indicate the intersex status of a live child.

⁸⁵ *Births, Deaths and Marriages Registration Act 1996* (SA) s 4.

⁸⁶ Section 4 of the *Sexual Reassignment Act 1988* (SA) provides that a Recognition Certificate can be obtained by a person who has undergone a reassignment procedure, which certifies that the person is the sex to which the person has been reassigned.

⁸⁷ *Sexual Reassignment Act 1988* (SA) s 8.

If one of these Certificates is presented to the Registrar-General, the Registrar must register the reassignment of sex.⁸⁸

117. A 'reassignment procedure' is defined as:

a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other sexual characteristics of a person, identified by birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's sexual characteristics.⁸⁹

118. 'Sexual characteristics' are defined as 'the physical characteristics by virtue of which a person is identified as male or female'.⁹⁰

119. Only hospitals or medical practitioners that have been approved by the Minister can undertake a reassignment procedure.⁹¹ Penalties apply for those who have not been approved to undertake such a procedure and who attempt to do so.

120. The process for obtaining a Recognition Certificate is set out in s 7 of the *SR Act*. It requires the person who has undergone the reassignment procedure (or the parent or guardian if the person was a child) to apply to the Magistrates Court for a Recognition Certificate. The application must be in the prescribed form and be accompanied by the prescribed fee. Before granting the certificate the Magistrate must be satisfied that the person:

(i) believes that his or her true sex is the sex to which the person has been reassigned; and (ii) has adopted the lifestyle and has the sexual characteristics of a person of the sex to which the person has been reassigned; and (iii) has received proper counselling in relation to his or her sexual identity.⁹²

121. If the application relates to the child, the Magistrate must also be satisfied that it is in the best interests of the child that the certificate be issued.⁹³

122. Subsection 7(10) provides that a recognition certificate cannot be issued to a person who is married.

⁸⁸ A one month waiting period applies before a registration certificate can be presented to the Registrar for this purpose.

⁸⁹ *Sexual Reassignment Act 1988* (SA) s 3.

⁹⁰ *Ibid*.

⁹¹ *Ibid* s 6.

⁹² *Ibid* s 7(8).

⁹³ *Ibid* s 7(9).

123. The Act also empowers the Supreme Court to cancel a recognition certificate if it appears that the certificate was obtained by fraud or other improper means.⁹⁴
124. Section 8 of the *SR Act* sets out the circumstances in which certificates indicating a change of sex will be recognised under South Australian law.⁹⁵ It provides that South Australia accept as conclusive evidence of a person's sex a 'certificate in relation to a person who has undergone sexual reassignment surgery', issued in New South Wales, Northern Territory, Australian Capital Territory, Tasmania and Western Australia. Recognition of another form of certificate designed to provide evidence of change of sex is limited to certificates from Australian jurisdictions.
125. Regulations can be made under the *SR Act* relating to the maintenance of detailed records of sex assignments by hospitals and regulate access to those records.⁹⁶

Discriminatory Impact of Current Law

126. Equality and freedom from discrimination, under both Australian and international law, are fundamental human rights irrespective of sexual orientation, gender identity or intersex status. While not legally binding on Australia under domestic or international law, the Yogyakarta Principles⁹⁷ provide persuasive guidance on how international human rights treaties should be interpreted in relation to the protection of gender diversity. In particular, Yogyakarta Principle 3 outlines the right to recognition before the law for all people regardless of gender identity:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal

⁹⁴ Ibid s 10.

⁹⁵ Ibid s 8(2) provides that '[a]n equivalent certificate issued under a corresponding law has the same effect as a recognition certificate under [the *Sexual Reassignment Act 1988* (SA)]'. Regulation 4 of the *Sexual Reassignment Regulations 2000* (SA) provides that '[f]or the purposes of the Act, each of the following laws, as amended or substituted from time to time, is declared to be a corresponding law', the *Births, Deaths and Marriages Registration Act 1995* (NSW); the *Births, Deaths and Marriages Registration Act 1997* (ACT); the *Births, Deaths and Marriages Registration Act 1996* (NT); the *Births, Deaths and Marriages Registration Act 2003* (Qld); the *Births, Deaths and Marriages Registration Act 1996* (Vic); the *Births, Deaths and Marriages Registration Act 1999* (Tas) and the *Gender Reassignment Act 2000* (WA).

⁹⁶ *Sexual Reassignment Act 1988* (SA) s 16(2).

⁹⁷ *The Yogyakarta Principles*, above n 68. See also Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records: Concluding paper of the sex and gender diversity project* (2009), 12 ('*Sex Files*'), which outlines that '[t]he Yogyakarta Principles are not legally binding themselves, but are an interpretation of already binding agreements from the view point of sexual orientation and gender identity. Therefore, the Yogyakarta Principles are persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people who are sex and gender diverse.'

<https://www.humanrights.gov.au/sites/default/files/content/genderdiversity/SFR_2009_Web.pdf>.

recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.⁹⁸

127. The Principles also seek to outline how they should be implemented in practice. Some actions that are directly relevant to the legal recognition of sex include:

tak[ing] all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;

tak[ing] all necessary legislative, administrative and other measures to ensure that procedures exist whereby all state-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity;

ensur[ing] that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

ensur[ing] that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy.⁹⁹

128. The current *BDM Act* and the *SR Act* tend to suggest that South Australia has yet to take all necessary legislative, administrative and other measures to ensure that its procedures for obtaining identity papers which indicate a person's gender or sex reflect the person's profound self-defined gender identity.

129. Indeed, the consultations undertaken by SALRI suggest that the current South Australian laws relating to the registration of sex upon birth, and the procedures associated with changing sex on the Register, not only discriminate against people with intersex variations or sex or gender diverse but can place people at risk of unnecessary physical and psychological harm.

130. Many submission makers and individuals and groups consulted queried the rationale behind the law's focus on binary notions of sex and gender and questioned the need to register a child's sex at all.¹⁰⁰ Professor Margaret Davies, for example, submitted:

There should be no requirement and indeed no opportunity to register a child's sex on a birth certificate. The *Births Deaths and Marriages Registration Regulations 2012* should be changed to remove sex from the information that is recorded on a birth certificate. All the difficulties ... arise from simplistic and sometimes inaccurate registration of children

⁹⁸ *The Yogyakarta Principles*, above n 68, Principle 3.

⁹⁹ *Ibid.*

¹⁰⁰ See, for example, Submissions No 8 and 49.

as either male and female and would be avoided if sex was not recorded.

Sex is currently a legal status attaching to a person for which there is no longer any need or justification.¹⁰¹

131. Professor Davies further observed that many years ago, a person's race or ethnic origin formed part of the information collected by Births, Deaths and Marriages Registers – just as the registration of race now seems unnecessary and even abhorrent, so too does the registration of sex.

Participant Quote, describing the current system of legal recognition of sex in South Australia:

Here are two boxes and you must pick one. An easy choice for someone who feels comfortable picking one. The most stressful choice ever for someone that looks at those two boxes and can't see their option that makes them feel comfortable. ... Thus where is the my option to simply state not specified and be able to remove that dreaded marker from my record from the day I was born which I maintain was in error. [Submission 8 p. 2]

Participant Quote

I am of the view that neither sex or gender should be defined in legislation. As they appear in the Fact sheet. Most people use the words to mean the same thing in society despite the views of some bio-logic advocates and feminist theorists. There is far more to the make-up of a person's sex than karyotype, hormones and genital and reproductive organs as they appear at birth.

I consider my self innately male and that I have not changed sex but merely affirmed my sex identity. I do not like western compartmentalisation approaches to sex identity being used as they ignore the spiritual and holistic being. Rather I identify as a male with transsexualism. Transsexualism is not about sex change. A person with Transsexualism is innately the sex with which they identify. By (sic) the medical conditions vary nature the persons sex identity is fixed. [Submission 49]

132. Other submission makers drew attention to the fact that, unlike other changes to the BDM Registrar, changing sex is not contemplated by the *BDM Act* at all.¹⁰² This reflects a presumption in SA law that sex is binary and permanently assigned at birth. This presumption is at odds with the reality of human experience. It also denies sex and gender diverse people the right to have their sex or gender identity legally recognised, and in doing so, denies the legal and social legitimacy of sex or gender diversity.

¹⁰¹ Submission No 38, 2.

¹⁰² See, for example, Submission No 39.

133. The only way to change a person's sex on the Register is by providing evidence of a medical or surgical procedure (often impractical, medically dangerous and unnecessary) under the Minister's supervision and formally approved through a potentially adversarial and seemingly unnecessary court process. This process can be sharply contrasted with the process for changing other entries on the Register, such as name or marriage, that historically were also understood to be permanent aspects of a person's identity. The whole current process seems excessive and unnecessary. Such a range of requirements do not exist interstate.

134. The absence of a clear legal process for making changes to sex on the Registrar outside of the rigid requirements of the *SR Act* leads to severe experiences of discrimination and humiliation for certain groups in our community.

Participant Quote:

Although I have been classified as a transgender female by two psychiatrists qualified and expert in the field, and have been placed on appropriate hormone treatment and live publicly as a female (in my case with the public profile that I have), I cannot however be registered as a female in this State. The only basis upon which I can be registered as a female is by having gender reassignment surgery. This is both archaic and anachronistic. [Submission No 43]

135. The following are some recent complaints and enquiries received by the Equal Opportunity Commission in relation to personal records:

Equal Opportunity Commission Case Study 1:

Complainant (C) is transgender and identifies as female. She states that her telephone and internet provider (R) will not acknowledge her gender identity in her title and continue to refer to her as Mr in their correspondence despite C asking them repeatedly to refer to her as Ms.

The matter resolved without a conciliation conference with R agreeing to provide an apology to C and to review and change policy and procedures to ensure this doesn't happen to anyone else again. [Submission No 40 p. 8]

Equal Opportunity Commission Case Study 2:

Call from an educational institution about a transgender student. The student identifies as male and claims that the educational institution has previously told him all certificates and logins for online forums will use his (female) birth name. The caller expressed a willingness to accommodate but was concerned that the institution must use the student's legal name and gender.

Advised that it may constitute unlawful discrimination if the student cannot participate as their identified gender using their chosen name. They may argue, however, that his academic parchment must be issued in his birth name if student doesn't legally change his name. [Submission No 40 p. 8]

136. As the Equal Opportunity Commission submits:

By restricting gender recognition to individuals who have undergone reassignment surgery, many people who in every other way live as their identified gender have no choice but to present conflicting identification to employers, education providers, financial institutions, service providers, etc. This in turn may conflict with other legal documentation, such as their passport. The *Sexual Reassignment Act* also accordingly restricts people to a traditional male or female gender.

...

The existence of legislative barriers also sends a message of social inequality to transgender persons who have not undergone reassignment surgery, further exacerbating discrimination that many experience on a regular basis.¹⁰³

Discriminatory impact on people with intersex variations

137. The term 'intersex' refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically 'male' or 'female'. Intersex people have a diversity of bodies and identities and are often subject to discrimination as a result of this diversity. One of the common experiences of discrimination for people with intersex variants relates to how their biological diversity is treated at birth. This can involve non-consensual, non-therapeutic sex reassignment surgery to enable the infant to be categorised as 'male' or 'female'. As the President of the OIIA explained to the AHRC:

One of our key human rights issues is not really the existence of binary genders, but what is done medically to make us conform to those norms.

138. An entrenched binary gender norm provides the legal backdrop against which parents often make difficult and potentially life changing decisions about surgery for their children. These circumstances are exacerbated by the tight time frames in which parents must make decisions relevant to the registration of their child's birth.¹⁰⁴

Participant Quote:

Much is ignored of a person if they don't fit into the specified male or female buckets ... most of the issue starts at birth where a cursory glance is made, the umbilical cord cut, and the doctor says 'it's a

¹⁰³ Submission No 40, 8.

¹⁰⁴ *Resilient Individuals Report*, above n 14, 57 (footnotes omitted).

(insert gender here)' there is no consideration to the child made at this stage (which should be the more important thing) and there is a stigma if the child doesn't fit into one of those two buckets rather than be celebrated as simply a healthy child regardless of their gender (assumed defined or otherwise). If a person is intersex, why should they be treated any less of a person, should a person's rights be simply ignored or disregarded because of this or should they be recognised and protected under the same laws as everyone else. [Submission No 8 p.1]

139. Surgical intervention with respect to children with intersex variations has been recognised as a major domestic and international human rights concern. It formed the basis of the Senate Community Affairs Committee 2013 *Second Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia*, which recommended that:

... all medical treatment of intersex people take place under guidelines that ensure treatment is managed by multidisciplinary teams within a human rights framework. The guidelines should favour deferral of normalising treatment until the person can give fully informed consent, and seek to minimise surgical intervention on infants undertaken for primarily psychosocial reasons.¹⁰⁵

140. Participants contributing to the Resilient Individuals Report raised concerns that these recommendations remained outstanding, leading to ongoing concerns about the circumstances in which recommendations and decisions about surgical intervention were made. The OIIA expressed the following concern:

By law, Australia still allows the practice of cosmetic genital surgery on infants and children with intersex variations. Such practice is prohibited on non-intersex children, excluding the practice of male circumcision. The rationale for this procedure is essentially cultural and generally based on psychosocial reasoning such as minimising family concern and distress and mitigating the risks of stigmatisation and gender identity confusion.¹⁰⁶

141. The Resilient Individuals Report recommends that the Commonwealth work with the States and Territories to implement the recommendations of the Australian Senate Community Affairs Committee's 2013 *Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia*.¹⁰⁷

142. SALRI also received a submission that drew attention to the contrasting approach generally adopted with respect to sexual reassignment surgery performed on a child born with intersex

¹⁰⁵ Involuntary Sterilisation Report, above n 1, [3.130].

¹⁰⁶ M Carpenter, Organisation Intersex International Australia, public submission 6 to the Australian Human Rights Commission, *National SOGII Consultation*, 1 February 2015 [footnotes omitted]. <<https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/projects/sogii-rights>>.

¹⁰⁷ Resilient Individuals Report, above n 14, 3.

variants and female genital cutting.¹⁰⁸ It was noted that the former is almost exclusively viewed through a medical lens, even where sex reassignment is carried out for non-therapeutic reasons, whereas female genital cutting is viewed almost exclusively through a criminal lens.¹⁰⁹ This gives rise to whether female genital legislation can or should be used to protect people with intersex traits and/or whether a new regime should be enacted in order to regulate non-therapeutic, non-consensual sex reassignment surgery.¹¹⁰

143. These concerns have been repeated by international health and human rights experts including the World Health Organization in its June 2015 Report on *Sexual health, human rights and the law*;¹¹¹ the United Nations Office of the High Commissioner for Human Rights in its 2015 Report titled *Discrimination and violence against individuals based on their sexual orientation and gender identity*¹¹² and are also reflected in Yogyakarta Principle 18.
144. These issues have only recently been subject to detailed consideration by Australian law reform bodies and State and Territory Governments. In 2013, the ACT Law Reform Advisory Council conducted a detailed review of the ACT Births, Deaths and Marriages regime, having regard to discrimination against gender diverse people and people with intersex variations (discussed below) with a particular focus on their ability to easily change sex assignment. It recommended changes to allow a person to record their intersex status, or a parent to record the intersex status of their child, on the Births, Deaths and Marriages register. Some of these recommendations were adopted and implemented by the ACT Government.¹¹³
145. While these reforms have been identified by many as constituting ‘best practice’, the OIIA is not convinced that they will operate by themselves to remove the discrimination experienced by people with intersex variants or protect them from human rights abrogation, including non-consensual surgical intervention.¹¹⁴ OIIA explains that this is because including ‘intersex’ as part of a ‘third category’ of sex on the Register - particularly for both births - may (a) exacerbate the sense of urgency surrounding the birth of a child with intersex

¹⁰⁸ Submission 39, 7-8. These issues were also raised with SALRI by OIIA.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ World Health Organization, above n 26.

¹¹² United Nations Office of the High Commissioner for Human Rights, above n 28.

¹¹³ *Births, Deaths and Marriages Registration Amendment Act 2014* (ACT).

¹¹⁴ OIIA suggests that this is a position shared by a number of national and international reports. See, for example, Recommendation 5, *Sex Files*, above n 97, 33.

variants as parents rush to avoid an ‘intersex’ category and (b) place children at risk of discrimination, bullying and exclusion by identifying them as something other than the accepted gender norms.¹¹⁵ OIIA’s support for the ACT model of sex classification is therefore conditional upon it being registered only with the voluntary and informed consent of the person so classified.¹¹⁶

146. These views were also reflected in the recent Resilient Individuals Report that included discussion of the registration of sex and processes for changing a person's sex. The Report recommended:

In line with the High Court case of *AH & AB v the State of Western Australia*, all states and territories legislate to require that a self-identified legal declaration, such as a statutory declaration, is sufficient proof to change a person’s gender for the purposes of government records and proof of identity documentation.¹¹⁷

147. Having regard to these views, and the approaches adopted in other Australian jurisdictions, SALRI recommends that consideration be given to amending South Australia’s Births, Deaths and Marriages regime to enable a non-binary category of sex to be entered on the Register at birth, such as the term ‘not specified’, and to enable people to change their sex on the Register without requiring evidence of sexual reassignment surgery.
148. Submissions to SALRI have also raised concerns that the current South Australian laws fail to provide adequate protections for intersex children who may undergo sexual reassignment procedures under the *SR Act*. The Act currently sets out a process whereby a parent or guardian of a child may seek to access sexual reassignment surgery for the child under the Act, subject to authorisation by a Magistrate that such surgery would be in the ‘best interests of the child’.¹¹⁸
149. Similar concerns have also been raised with respect to young trans people seeking to access hormone replacement therapy and/or sexual reassignment surgery.¹¹⁹ There appears to be a lack of access to information and support services for young trans people and their families about their health care options, including the legal requirements relating to guardianship of young people under the age of 18 years.

¹¹⁵ Carpenter, above n 106.

¹¹⁶ Ibid.

¹¹⁷ Resilient Individuals Report, above n 14, 3.

¹¹⁸ *Sexual Reassignment Act 1988* (SA) ss 7(3), (9).

¹¹⁹ These views were expressed by attendees at the Feast's Queer Youth Drop In Centre Forum conducted by SALRI on 23 July 2015.

150. Some of these issues were briefly addressed in the Resilient Individuals Report:

There is an additional barrier for young people under the age of 18 years. The Family Court of Australia is required to approve oestrogen and testosterone treatment in some circumstances. Following the *Re Jaime* case it is no longer necessary to seek court authorisation for stage one treatment. However, in the case of stage 2 treatment, the court will allow the young person to make the decision only if they are found competent. The cost of obtaining a court order in this context is approximately \$30,000. The consultation heard from a large number of concerned parents experiencing distress about this process.¹²⁰

Discriminatory impact on married people who are sex and gender diverse

151. The current South Australian laws also have a discriminatory impact on married people who are sex and gender diverse. This is because, under s 7(10) of the *SR Act*, a Recognition certificate cannot be issued to a person who is married. This means that a married person will not be able to have a birth certificate that represents their true sex identity, unless they first cease to be married, such as by obtaining a divorce.

Case Study:

Because I will not divorce my wife, I am not able to change my birth certificate to my true sex. So my birth certificate still says male. However, Medicare and Centrelink know that I have undergone sex affirmation surgery and their records say that I am female. Therefore, we have been denied the PBS married safety net because we are seen as a same-sex couple. [AHRC *Sex Files* Report]¹²¹

Difficulties and risk of harm associated with reassignment surgery

152. There are various difficulties associated with undertaking a reassignment procedure in South Australia - which include financial and logistical difficulties in accessing a hospital or medical practitioner who has been approved by the Minister for the purposes of the *SR Act*. Indeed, SALRI understands that, at least for practical purposes, sexual reassignment surgery is not currently available in South Australia. SALRI received many submissions outlining the very limited number of medical practitioners that were available in South Australia to either diagnose a person with gender dysphoria, prescribe hormone replacement therapy or conduct gender reassignment surgery. Many submissions made by individuals,¹²² and discussions conducted at the forum hosted by Feast's Queer Youth Drop In Space on 23 July 2015, describe the particular difficulties that can arise when only a small handful of psychiatrists

¹²⁰ Resilient Individuals Report, above n 14, 54.

¹²¹ *Sex Files*, above n 97, 23 (quote from Queensland forum).

¹²² See, for example, Submissions No 4, 6, 10, 14 and 27.

and other medical practitioners are qualified and registered to deliver this very specialised treatment.

Participant Quote:

The requirement for doctors and hospitals to be approved by the Minister is puzzling. Why should not these procedures be treated like any other and regulated under the general law governing medical procedures? The limited availability that has resulted from this provision has led to profound problems, especially when the doctors approved are perceived as unethical or inappropriate by those who wish to access services, who may then have little or no choice of practitioner. Why should people seeking these procedures and not, for instance, general plastic surgery, face limited choice of practitioner or be forced to travel? [Submission 27]

153. SALRI also heard in its consultations of the many good reasons why a trans person may not wish to undertake invasive gender reassignment surgery. As the Equal Opportunity Commission submitted :

Many transgender persons will not undertake gender reassignment, or will only undertake partial surgery, for many reasons. It may not be an option due to a person's age or health issues, for example. Transitioning from female to male is also far more difficult, less likely to be successful and there appear to be no surgeons in Australia currently who carry out genital reconstructive surgery.

This means that for large numbers of transgender people in South Australia, obtaining a gender recognition certificate is impossible, leaving them with a birth certificate that is incompatible with their lives and identity.¹²³

154. Many of these issues were explored in detail by the AHRC when it examined this area of discrimination as part of its *Sex Files* report. The AHRC observed that the focus on genital surgery for the legal recognition of sex results in many problems, including:

- genital surgery is not covered by Medicare and some people cannot afford to undergo surgery;
- genital surgery impacts on a person's reproductive ability;
- the shape and functionality of genitals are only one aspect of how people identify and present as a particular sex;

¹²³ Submission No 40, 8.

- genital surgery is only one aspect of sex affirmation treatment and opinion varies in relation to how, when and if this treatment should be provided to a particular individual;
- any surgery involves risks;
- the process for legally changing a person's sex is inappropriately medicalised, and undermines the role of self-identification of sex and gender;
- the general community makes an assessment about a person's sex based on how that person presents not by questioning a person's genital makeup;
- where a person who presents as one sex is treated or classified as a person of another sex because of their genitals, this can place that person at risk of discrimination and violence.¹²⁴

155. Under the *SR Act*, a Recognition Certificate can only be obtained following an application that includes an affidavit sworn by a psychiatrist or psychologist in relation to sexual identity counselling received by the applicant. This requirement can be extremely difficult to satisfy. One participant in the AHRC's *Sex Files* inquiry who had undergone surgery almost 20 years previously was deemed not to have met this criterion because she did not receive appropriate counselling at that time.¹²⁵ SALRI also received numerous submissions attesting to the discriminatory, humiliating and archaic nature of the South Australian approach to changing a person's sex on the Births, Deaths and Marriages Register.

Participant Quote:

The surgery is expensive and not all transgenders would be able to afford it. Approval for such surgery also needs to be given by two psychiatrists (again, or by a clinical psychologist qualified in the field), one of whom is again your treating psychiatrist. The surgery requires taking at least six weeks out of your working life to travel to Melbourne, Thailand or the West Coast of the US. You need to be interstate or overseas paying for accommodation for at least 2-3 weeks of this, the remaining three weeks of further recovery is able to be conducted from home if you have not had any complications. The gender reassignment surgery is not available in South Australia.

¹²⁴ *Sex Files*, above n 97, 25.

¹²⁵ *Ibid.*

The surgery itself entails many potential health risks, some of which are serious. It also requires significant ongoing personal daily care from the day after the surgery on an ongoing basis.

The idea that, after years of treatment with a psychiatrist, endocrinologist, hormone treatment and major surgery, I am then required to demean myself by asking a Magistrate to be registered as a female is again archaic and anachronistic. It is also humiliating and insulting. [Submission No 43]

Other Concerns

156. A range of concerns were raised by submissions relating to the requirement to indicate sex as either male or female, or the requirement to indicate a gendered title (such as Mr or Ms) on official government or employment forms.¹²⁶ A number of trans South Australians have experienced discrimination, as well as inconvenience and financial expense, in seeking to either change their recorded sex or when requesting that a non-binary option be available.

Participant Quote:

A simple request to have a title or salutation removed from your name can turn into a demoralising argument with a company over the merits and priorities of a company over the basic rights of a person to be addressed as they ask. [Submission 8, 1]

157. The South Australian experience can be contrasted with the Commonwealth's approach to the collection of personal information, set out in the *Australian Government Guidelines on the Recognition of Sex and Gender* (discussed below).

158. SALRI also received submissions expressing concern that long-term same sex partners were unable to be acknowledged or recognised on their deceased partner's death certificate. This is because currently under Regulation 10(h) of the *Births, Deaths and Marriages Registration Regulations 2011* (SA), only details relating to a the deceased's marriage (or marriages) are recorded on the death certificate: no other relationships (outside of children and parents) are recorded regardless of length.

159. South Australian Parliament's Legislative Review Committee is currently considering a reference that relates to a proposed amendment to the *Births, Deaths and Marriages Registration Regulations 2011* to enable de facto relationships to be recognised on the register recording the death of a person (death certificate). This inquiry is relevant to a number of the issues and

¹²⁶ See, for example, Submissions No 8 and 31.

recommendations made in this Audit Report, including those relating to the possible establishment of a Relationships Register in South Australia based on the model currently in place in NSW or Tasmania (and discussed below). SALRI further notes that current Regulation 10 of the *Births, Deaths and Marriages Registration Regulations 2011* (SA), also requires a person's sex (limited to male or female) to be recorded on the person's death certificate - giving rise to similar issues of discrimination as those discussed above with respect to birth certificates.¹²⁷

160. SALRI also received a submission that raised concerns with respect to how a change of name is handled by the South Australian Births Deaths and Marriages Registry.¹²⁸ The submission explained that the current practice is to include the words 'please refer to amendments overleaf' on the front of the new certificate and listing all previous names of a person on the reverse side. It was noted that this:

... opens a transgender person up to possible discrimination by 'outing' them to prospective employers or anyone they need to show their birth certificate to.¹²⁹

161. The submission suggested that it would be better if the old birth certificate was 'locked away' by the Registry to be accessed by third parties only through court order.¹³⁰

Relevant Judicial Consideration

162. The High Court's decision in *Norrie v NSW Registrar of Births, Deaths and Marriages (Norrie)*¹³¹ is the latest development regarding legal recognition of transgender, intersex and gender diverse peoples. This case has been described as the 'first case in Australia which recognised that sex is not binary'.¹³² The High Court found that, as the NSW *Births Deaths and Marriages Registration Act* contains a process for a person changing their registered sex, it must also permit the registration of a person who does not identify as male or female.

163. The AHRC has recently described the implications of this decision as follows:

Broadly speaking, the implications of this decision are twofold. First, the implications

¹²⁷ South Australian Parliament Legislative Review Committee, Inquiry into an amendment to the Births, Deaths and Marriages Registration Regulations 2011 to enable de facto relationships to be recognised on the register recording the death of a person (death certificate) (2015), full terms of reference are available at <<http://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CIId=301>>.

¹²⁸ Submission No 2.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490.

¹³² Resilient Individuals Report, above n 14, 54.

are symbolic. By recognising that sex is non-binary, this ruling endorses the notion that sex is a fluid concept. Documents administered by the NSW Births, Deaths and Marriages are cardinal. The importance of having an identity document which matches a person's gender expression should not be underestimated. It provides empowerment, engenders respect, and mitigates potentially difficult situations for gender diverse individuals.

Notwithstanding this important symbolic change, the findings in *Norrie* are actually quite narrow. Although Sackville AJA briefly considers the existence of intersex, the decision only applies to transgender persons. Citing *AH & AB v the State of Western Australia* and *Secretary v SRA* the judgment makes it clear that intersexuality is not the same as transsexuality. The ruling thus affords no recognition to intersex people and, by creating an additional third category, may even entrench stigmatisation against intersex people.¹³³

164. The High Court's decision in *Norrie* also follows a number of other cases raising the issues of legal recognition of sex. Through cases such as *AB v Western Australia*¹³⁴ and *Kevin v Attorney-General (Cth)*¹³⁵ a body of jurisprudence is slowly being built that recognises that sex is more nuanced and complex than a simple 'male' and 'female' binary.
165. In the case of *AB v Western Australia*, the High Court upheld appeals relating to a refusal to issue recognition certificates to two applicants who had undertaken female to male gender reassignment under the *Gender Reassignment Act 2000 (WA)*.¹³⁶ This Act requires that the person applying for a recognition certificate has the 'gender characteristics' of the gender to which the person has been reassigned. 'Gender characteristics' is defined by s 3 of the Act as 'the physical characteristics by virtue of which a person is identified as male or female'.
166. The Board responsible for issuing the certificates was satisfied that the appearance of each of the appellants is that of a male person, but determined not to issue a certificate in each case because the appellants retained a female reproductive system. Following a review of the Board's decisions, the Tribunal set aside the decisions, granted each application for a certificate and directed the Board to issue such a certificate. The West Australian Court of Appeal allowed the appeals from those decisions and set aside the Tribunal's decision.
167. The High Court unanimously upheld the appeals and set aside the orders of the Court of Appeal, with the result that the decision and orders of the Tribunal were reinstated. The High Court held that, for the purposes of the Act, the physical characteristics by which a person is identified as male or female are confined to external physical characteristics that are

¹³³ Ibid [footnotes omitted].

¹³⁴ *AB v State of Western Australia; AH v State of Western Australia* (2011) 244 CLR 390.

¹³⁵ *Kevin v Attorney-General (Commonwealth)* (2001) 165 FLR 404

¹³⁶ *AB v State of Western Australia; AH v State of Western Australia* (2011) 244 CLR 390.

socially recognisable. Social recognition of a person's gender does not require knowledge of a person's remnant sexual organs.

168. Other judicial pronouncements in this area are persuasive. In the Family Court case of *In Re Alex*,¹³⁷ Nicholson J expressed his 'regret that a number of Australian jurisdictions require surgery as a prerequisite to the alteration of a transsexual person's birth certificate in order for the record to align a person's sex with his/her chosen gender identity'.¹³⁸

Developments in Legislative Reform

169. Reforms to address discriminatory aspects of Births, Deaths and Marriages regimes have been pursued around Australia (some of which are summarised in **Appendix 4**), including recently in the ACT. When recently inquiring into this area, the ACT Law Reform Advisory Council observed:

Previous reports, international developments, human rights considerations, the recent High Court case of *AB*, and submissions to and consultations by this inquiry leave the Council in no doubt that the requirement for sexual reassignment surgery as a prerequisite for legal recognition of a change of sex should be abolished. The surgery is expensive, invasive and discriminates against people who choose not to – or are unable to – have surgery. As well, the surgery is irrelevant to an intersex person who wants to correct the mis-assignment of sex. In any event, as evidence canvassed in the High Court case of *AB* makes clear, the surgery cannot fully re-assign sexual organs. The requirement that a person must undergo 'sexual reassignment surgery' to apply to alter the record of their sex can rightly be said to be 'inhumane'; it violates a person's human rights to privacy and to bodily integrity, the right to freedom from torture, and the right to equal legal status unless they submit to invasive medical procedures.

170. The ACT changes are discussed in further detail below.
171. The ACT changes followed changes made in 2011 at the Commonwealth level that allowed individuals greater ability to be issued a passport with an 'X' marker and recognised transgender people as their affirmed gender without the need for surgery. The Commonwealth has since expanded their passports policy to all government records under the *Australian Government Guidelines on the Recognition of Sex and Gender*.¹³⁹
172. The *Australian Government Guidelines on the Recognition of Sex and Gender* allow a person to request that their identified gender, including X (Indeterminate/Intersex/Unspecified) is used

¹³⁷ *Re Alex* (hormonal treatment for gender dysphoria) (2004) 31 Fam LR 503.

¹³⁸ *Ibid* [234].

¹³⁹ Commonwealth of Australia, *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013) available at <<http://www.ag.gov.au/Publications/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>>.

on their personal records). Under these Guidelines, the Australian Government will recognise any one of the following as sufficient evidence of their sex and/or gender:

a statement from a Registered Medical Practitioner or a Registered Psychologist

valid Australian Government travel document, such as a Valid Passport, which specifies their preferred gender, or

an amended State or Territory birth certificate, which specifies their preferred gender. A State or Territory Gender Recognition Certificate or recognised details certificate showing a State or Territory Registrar of Birth Deaths and Marriages has accepted a change in sex will also be seen as sufficient evidence.

173. Evidence of sex reassignment surgery and/or hormone therapy is not required.¹⁴⁰

174. The implications of these changes in Commonwealth policy are that transgender persons who were born in South Australia may have an Australian passport issued in their identified gender and a conflicting birth certificate.

175. In 2014, the Hon Tammy Franks introduced the Sexual Reassignment (Recognition Certificates) Amendment Bill 2014 to the South Australian Legislative Council. The Bill proposed the simple removal of s 7(10) of the *SR Act*. This current provision provides that a Recognition Certificate cannot be provided to a person who is married. In her Second Reading speech, the Hon Tammy Franks stated:

This bill will obviously be part of the marriage equality debate in this country—and, indeed, in this State—and I believe it is a bill whose time has come, because it does not respect the current lives of South Australians, particularly those who are married couples who are forced divorce if they wish to undertake a sex change. I know that the numbers are very small, but those marriages are very important to those few individuals who are directly affected by this legislation.¹⁴¹

176. The Hon Tammy Franks also referred to a case study provided by a constituent who had experienced discrimination as a result of the existing provision.

177. The Hon Tammy Franks later introduced the Sexual Reassignment Repeal Bill 2014, which led to the current broader parliamentary inquiry into the *Sexual Reassignment Act* by the South Australian Parliament's Legislative Review Committee.

178. The Legislative Review Committee's terms of reference were to inquire into and report on:

¹⁴⁰ Ibid Guidelines 21 and 22.

¹⁴¹ South Australia, *Parliamentary Debates*, Legislative Council, 4 June 2014, 327 (Hon Tammy Franks).

1. The operation of the *Sexual Reassignment Act 1988* (SA) to determine its effectiveness or otherwise, particularly as it relates to the transsexual, transgender, and intersex communities in South Australia;
2. Laws in other Australian states or territories, or overseas jurisdictions, which relate to gender identity and gender transition (including official recognition of the same), which possess characteristics with the potential for implementation in South Australia;
3. Options to provide for the South Australian Registrar of Births, Deaths and Marriages to register a person's gender as 'non-specific';
4. The potential cost and social implications of any reform, particularly from the perspective of affected members of the community; and
5. Any other relevant matter as the Committee sees fit.

179. SALRI understands that the oral hearings of the Committee in relation to this inquiry have now been concluded and the date for accepting written submissions is now closed.¹⁴² SALRI understands that the Committee intends to table its report later this year.

Possible options for reform

180. Many participants in the SALRI's consultations identified the ACT approach¹⁴³ to the registration (and change) of sex on the Births, Deaths and Marriages Register as the preferred or 'best practice' model for any reform in this area.

181. The Equal Opportunity Commission, for example, supports the option to provide for the South Australian Registrar of Births, Deaths and Marriages to register a person's gender as 'non-specific'. It commented:

adding a "non-specific" gender option for the South Australian Registrar of Births, Deaths and Marriages would provide an appropriate option for children born intersex, thereby reducing the need for parents and doctors to make unnecessary decisions in short timeframes. It could also provide an option for individuals who may wish to change their gender and do not identify as male or female. With more individuals expressing a need to not be identified as male or female this kind of legal recognition would, in addition, provide a necessary incentive for organisations to provide gender

¹⁴² Further information is available at South Australian Legislative Review Committee, above n 58.

¹⁴³ In 2011, the ACT Law Reform Advisory Council was asked to inquire into and report on steps necessary to provide for legal recognition of transgender and intersex people in the ACT, and to ensure that any such provision is compliant with the *Human Rights Act 2004* (ACT), with particular regard to the existing provisions of the *Births, Deaths and Marriages Registration Act 1997* (ACT), the potential implications of legal recognition of transgender and intersex people in the Territory for public functions or documentation under Territory and Commonwealth law, and the potential implications of legal recognition of transgender and intersex people in the Territory for mutual and other recognition of a person's sex by and among the States, Territories and Commonwealth. The inquiry was conducted by the ACT Law Reform Advisory Council, overseen by a sub-committee of experts. On 20 March 2014, the ACT Legislative Assembly passed the *Births, Deaths and Marriages Registration Amendment Act 2014* (the Amendment Act). The Amendment Act implemented a number of the ACT Council of Law Reform's recommendations relating to the legal recognition of sex and gender diverse people in the ACT community.

neutral (or no) titles in their records.¹⁴⁴

182. Support was also expressed for the ACT model of changing a person's registered sex on the Births, Deaths and Marriages Register.¹⁴⁵ This model requires medical evidence of the person's gender identity but does not require surgical intervention.

Participant Quote:

With respect the [SR Act] should be repealed. All that should be required is for two qualified psychiatrists or clinical psychologists to confirm in writing to the Registrar of Births, Deaths and Marriages that the individual applicant has gender dysphoria, that they identify as their chosen gender, that they are having appropriate hormone treatment, and that they live as their chosen gender. Given the involvement of psychiatrists, psychologists and endocrinologists to obtain such treatment, this should be sufficient. [Submission No 43]

183. However, others such as the OIIA, expressed the view that while some of the ACT reforms were welcome, other features - in particular the creation of a 'third category' of sex that refers to 'intersex' - may be problematic and operate to entrench rather than address discrimination, particularly for intersex people.

184. The policy of the Australian Passports Office was also identified as a possible model for reform. Both the ACT approach and the Passport's Office approach are summarised below.

185. As noted above, SALRI recommends that it be tasked with a further reference to undertake further research and report on the possible reform models to identify which model or parts of a model would be most appropriate for South Australia.

ACT Approach to Births Deaths and Marriages Registration

186. The recently reformed ACT approach has the following vital features that have been positively referred to by the ACT Council of Law Reform as operating to remove or limit discrimination on the grounds of sexual orientation, gender identity or intersex status:

187. The time period for the registration of the birth of a child born in the ACT is six months.¹⁴⁶ This is expected to reduce pressure on parents of babies who are not clearly male

¹⁴⁴ Submission No 40, 8.

¹⁴⁵ See, for example, Submissions No 27, 38 and 43.

¹⁴⁶ *Births, Deaths and Marriages Registration Act 1997* (ACT) s 10.

or female by allowing additional time to make complex decisions about the registered sex of their child.

188. Birth certificates can be issued listing a sex other than male or female such as by stating a sex of 'unspecified/indeterminate/intersex' or one of these three options.¹⁴⁷ The choice for what is included on the birth certificate will lie with the parents of the baby, although this must be consistent with the information provided by the Hospital.
189. Sexual reassignment surgery is no longer required in order to change a person's sex on the register. In place of the requirement for sexual reassignment surgery, a person born in the ACT who wishes to change their sex must provide evidence that they are either an intersex person or that they have received appropriate clinical treatment for alteration of their sex.¹⁴⁸
190. The required evidence is a statutory declaration by a doctor, or a psychologist, certifying that the person: has received appropriate clinical treatment for alteration of the person's sex or is an intersex person.¹⁴⁹ To change the sex of a child the application must also include a statement signed by the parents (or a person with parental responsibility) stating that the alteration is in the best interests of the child.¹⁵⁰

Australian Passport Office Approach

191. Australian passports are issued in accordance with the *Australian Passports Act 2005* (Cth). Further detail regarding what information is to be included on an Australian passport and how passports are issued is contained in the *Australian Passports Determination 2005* (Cth) and the International Civil Aviation Organisation (ICAO) standards. Detailed requirements for the issue of a passport, including a person's name and gender, are outlined in the policies that guide the implementation of this legal framework.
192. In accordance with these policies and standards, the Australian Passport Office allows passport holders to identify as male/female/X.¹⁵¹ This means that it is now possible for an eligible person to obtain an Australian passport (or Document of Identity) which shows their sex and gender identity when it is different from the sex recorded on their birth certificate,

¹⁴⁷ Ibid Form 201-BRS: Birth Registration Statement <<http://www.legislation.act.gov.au/af/2014-46/default.asp>>.

¹⁴⁸ Ibid s 25.

¹⁴⁹ Ibid s 25.

¹⁵⁰ Ibid s 24(2).

¹⁵¹ Australian Government, Australian Passport Office, *Sex and Gender Diverse Passport Applicants: Revised Policy* (website) <<https://www.passports.gov.au/web/sexgenderapplicants.aspx>>.

without requiring reassignment surgery, and which shows an 'X' for the sex of an intersex person.¹⁵² The Passport Office describes the relevant policy as follows:

Sex reassignment surgery is not a prerequisite to issue a passport in a new gender. Birth or citizenship certificates do not need to be amended for sex and gender diverse applicants to be issued a passport in their preferred gender. A letter from a medical practitioner certifying that the person has had, or is receiving, appropriate clinical treatment for gender transition to a new gender, or that they are intersex and do not identify with the sex assigned to them at birth, is acceptable. The letter will only be accepted from practitioners registered with the Medical Board of Australia (or equivalent overseas authority). 'Appropriate clinical treatment' does not have to be specified.

A full validity passport in a new sex may also be issued to applicants who have undergone sex reassignment surgery and have registered their change of sex with Registrars of Births, Deaths and Marriages (RBDM) or the Department of Immigration and Citizenship (DIAC). A passport may be issued to sex and gender diverse applicants in M (male), F (female) or X (indeterminate/unspecified/intersex).

Applicants must meet all other normal passport requirements, such as providing proof of identity documents to support their identity in the wider community.

The policy removes unnecessary obstacles to recording a person's preferred gender in their passport and was developed in close consultation with sex and gender diverse community organisations in Australia.¹⁵³

193. This initiative accords with the Commonwealth's commitment to remove discrimination on the grounds of sexual orientation or sex and gender identity (discussed below).

194. The ACT Council of Law Reform has praised this policy of the Passport Office as:

... a benchmark for all Australian jurisdictions on the burden to be met by a person applying to change the record of their sex. To the considerable extent to which a passport is accepted as a cardinal document, it can operate instead of a birth certificate as a statement of a person's sex and gender identity. As well, it is available to Australian citizens regardless of their place of birth.

As a result, many people now have access to a cardinal document – a passport – which recognises their sex and gender identity. The continuing relevance of a birth certificate as a statement of a person's sex and gender identity will be limited to those occasions when an agency chooses to rely on it and not on a passport, and when a person has not obtained or is not eligible for a passport.

It can be assumed that an eligible person who wants a cardinal document that states their changed sex and gender identity will apply for a passport. It seems likely that the policy of the Passport Office will be accepted as a standard for at least all Commonwealth agencies, and possibly nationally, for whenever a person wishes to

¹⁵² Australian Passport Office, Australian Government Department of Foreign Affairs and Trade, *Sex and Gender Diverse Passport Applicants: Revised Policy* (website) <<https://www.passports.gov.au/web/sexgenderapplicants.aspx>>.

¹⁵³ Ibid.

change their sex and gender identity.¹⁵⁴

195. The Australian Passport Office's approach is applicable to SALRI's consideration of this issue, given SALRI's explicit mandate to identify ways to improve the consistency of South Australian law with that in other Australian jurisdictions. When viewed in contrast to the Passport Office's approach to changing the way a person's sex is recorded, the South Australian approach gives rise to the inconsistent scenario where a person's legally recognised sex is different at the State and Commonwealth level. This can cause serious practical difficulties for gender diverse people, and exacerbate the experiences of discrimination.

Participant Quote:

The [discriminatory impact of the current South Australian approach] is compounded by the fact that the Federal Government (on receipt of a letter from my treating psychiatrist) issued me with a passport that states that I am female. I am therefore currently left in the ridiculous situation that to the Federal Government of this country I am female, but in the eyes of this State I am apparently still male. It is further complicated by the fact that while Births, Deaths and Marriages have classified me as male, to other government organisations such as the Department of Transport and the LTO, and organisations such as the Law Society and my bank I am classified as female or assumed to be female. [Submission No 43]

196. SALRI understands that self-identification based approaches to registering or changing sex on cardinal identity documents such as birth certificates and passports have recently been adopted in Malta¹⁵⁵ and Ireland,¹⁵⁶ leading to a growing international acceptance of this approach as 'best practice' from a human rights and anti-discrimination perspective.¹⁵⁷

SALRI intends to issue further more detailed recommendations with respect to:

2.3 South Australia's current regime governing the registration of sex at birth and the change of sex on the Births, Deaths and Marriages Register, including repealing the *Sexual Reassignment Act 1988* (SA) and amending Part 3 of the *Births Deaths and Marriages Registration Act 1996* (SA). Options for consideration include:

¹⁵⁴ ACT Law Reform Advisory Council, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT*, (2012), 39-40.

¹⁵⁵ See, for example, *Gender Identity, Gender Expression And Sex Characteristics Act 2015* (Malta) available to download in English at <<http://tgeu.org/gender-identity-gender-expression-sex-characteristics-act-malta-2015/>>.

¹⁵⁶ 'Ireland passes law allowing trans people to choose their legal gender' *The Guardian* (online), 16 July 2015, <<http://www.theguardian.com/world/2015/jul/16/ireland-transgender-law-gender-recognition-bill-passed>>.

¹⁵⁷ *Ibid.*

(a) Division 2.2 of the *Births Deaths and Marriages Registration Act 1997* (ACT), that sets out a process for recording non-binary sex on the register and allows a third category of sex to be indicated on the register.

(b) 'Part 4A Change of Sex' based on Part 4 *Births Deaths and Marriages Registration Act 1997* (ACT) that sets out a process to alter the register to record a change of sex that requires certain evidence but does not require evidence of irreversible medical treatment.

Regard will also be had to the relevant recommendations in the Resilient Individuals Report and the relevant decisions of the High Court.

197. A number of participants in SALRI's consultation process also highlighted the need for South Australia to carefully examine whether steps should be taken to prohibit irreversible medical treatment in respect of intersex children.¹⁵⁸ SALRI considers that, in response to these concerns, the South Australian Government should closely consider the findings of the Second Report of the Senate Standing Committees on Community Affairs, *Involuntary or coerced sterilisation of intersex people in Australia*, published in 2013.

Starting a Family and Parenting Rights

198. When discussing rights to start a family and parenting rights it is critical to observe that Australia is a party to the *Convention on the Rights of the Child*, and that every Australian jurisdiction has a role to play in ensuring that its laws relating to parentage and access to assessed reproductive treatments and/or surrogacy arrangements adhere to the principle that the best interests of the child must be a primary consideration.¹⁵⁹

199. The best interests of the child must be a primary consideration in all decisions relating to that child, which include decisions about the child's legal parents. However, this principle should not be used to justify discrimination against a person based on their sexual orientation or gender identity. A 2014 University of Melbourne study found that children of same-sex parents enjoy better levels of health and wellbeing than their peers from traditional family units.¹⁶⁰ These findings are similar to those following a 2013 Australian Government Report,

¹⁵⁸ See, for example, Submission 39.

¹⁵⁹ The United Nation's Convention on the Rights of the Child (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49), to which Australia is a party, provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (Article 3). The Convention also provides that children also have the right, as far as possible, to know and be cared for by their parents (Article 7).

¹⁶⁰ 'Children raised by same-sex couples healthier and happier, research suggests', *ABC News* (online), 5 July 2014 <<http://www.abc.net.au/news/2014-07-05/children-raised-by-same-sex-couples-healthier-study-finds/5574168>>. In what they described as the largest study of its type in the world, University of Melbourne researchers surveyed 315 same-sex parents and 500 children about their physical health and social wellbeing.

Same-sex parented families in Australia, which reviewed over 40 years over national and international research into the emotional and physical wellbeing of children from same-sex parent families, and found that the research supports positive outcomes for children in same-sex parented families.¹⁶¹ A range of other peer reviewed studies were also referred to SALRI to support the position that children in same sex families do just as well as those in heterosexual family arrangements.¹⁶²

200. It is difficult to accurately state how many same sex and gender diverse couples in South Australia have or wish to start a family. However it is clear from the submissions received and consultations undertaken by SALRI that there are many stable, happy, nurturing South Australian families involving same sex and gender diverse parents.
201. It is also clear that same sex and gender diverse couples in South Australia currently face a number of legal barriers when seeking to start a family, or when seeking to clarify or assert parenting rights in respect of the children they love and care for.
202. The past decade has witnessed increasing acknowledgement by all Australian governments of the need to reform laws that discriminate on the grounds of sex and gender diversity or sexuality. Comprehensive reforms have been implemented across Australia that recognise non-heterosexual people and same sex couples as parents and/or enable them to become parents by way of assisted reproduction, surrogacy and, in some jurisdictions, adoption.¹⁶³ However, LGBTIQ individuals and same sex couples continue to face a range of legal barriers when seeking to start a family (or be legally recognised as parents of their children) in South Australia.
203. Previous, unsuccessful legislative efforts have been made to ensure that all South Australians, regardless of their sexuality or sex or gender identity, can legally access services to help start a family. The South Australian Parliament's Social Development Committee, chaired by the Hon Ian Hunter, held a year-long inquiry in 2011 into same-sex parenting which attracted

¹⁶¹ Child Family Community Australia, Australian Institute of Family Studies, Australian Government, *Same-sex parented families in Australia*, (December 2013) <<https://aifs.gov.au/cfca/publications/same-sex-parented-families-australia/export> >.

¹⁶² The following studies were referred to SALRI by Submission 29: T J Biblarz and J Stacey 'How Does the Gender of Parents Matter?' (2010) 72(1) *Journal of Marriage and Family* 3; Simon R Crouch et al, 'Parent-reported measures of child health and wellbeing in same-sex parent families: a cross-sectional survey' (2014) 14(1) *BMC Public Health* 635; S Golombok et al, 'Children born through reproductive donation: a longitudinal study of psychological adjustment' (2013) 54(6) *Journal of Child Psychology and Psychiatry* 653.

¹⁶³ For an overview of these changes, see **Appendix 4**.

close to 700 submissions and led to limited, but important, legislative change.¹⁶⁴ In tabling the report, Mr Hunter observed:

Same-sex parents are no different than other parents in wanting the very best for their children. Removing legislative inequality is a very significant step in lessening the discrimination and social exclusion experienced by these parents and their children. All children, irrespective of the family units into which they are born or live, deserve the full protection of the law.¹⁶⁵

204. Seven recommendations for reform of South Australian laws were made by the Social Development Committee in 2011. However almost all remain outstanding, including the following:

RECOMMENDATION 2: Access to Assisted Reproductive Technology

The Committee recommends that the Minister for Health introduce legislation to amend the Assisted Reproductive Treatment Act 1988 (SA) to remove barriers that preclude lesbian and/or single women from accessing assisted reproductive technology. The amendments should seek to broaden the meaning of 'infertile' by replacing sections 9(1)(c)(i) and (ii) of the Act with the following wording: 'if, having regard to all of the circumstances of a particular woman, the woman would be unlikely to become pregnant other than by the use of assisted reproductive treatment'.

RECOMMENDATION 4: Adoption

The Committee recommends that the Minister for Families and Communities introduce legislation to amend the *Adoption Act 1988* (SA) to: extend eligibility for adoption to same-sex couples; and ensure that same-sex couples are subject to the same stringent eligibility criteria that apply to opposite sex couples.

RECOMMENDATION 6: Surrogacy

The Committee recommends that the Attorney-General introduce legislation to amend the *Statutes Amendment (Surrogacy) Act 2009* (SA) to extend eligibility for altruistic gestational surrogacy to same-sex couples and ensure that they are subject to the same stringent assessment criteria that apply to opposite sex couples.¹⁶⁶

205. These recommendations for reform remain applicable to this Audit, and many of the experiences of discrimination so thoroughly documented by the Social Development Committee in 2011 persist for LGBTIQ families in South Australian in 2015.

Participant Quote:

¹⁶⁴ *Statutes Amendment (De Facto Relationships) Act 2011* (SA).

¹⁶⁵ Social Development Committee, Parliament of South Australia, *Inquiry into Same-Sex Parenting* (2011) 4.

¹⁶⁶ *Ibid* 5-6.

Our children have to grow up in a society that appears not to equally value same sex parents. This discrimination in laws is clearly not justifiable with a large body of academic research showing that children of same sex parents do at least as well as children of heterosexual parents. The fact that the laws are discriminatory could have a negative impact on the emotional wellbeing of our children. For our family that already exists as a stable and happy family unit, this is the biggest direct concern for me. [Submission 25]

206. It may be possible to overcome or minimise some of the legal barriers facing LGBTIQ couples and parents in South Australia - particularly those relating to the authority to make parenting decisions and access to relevant financial benefits - by pursuing parenting orders in the Family Court.¹⁶⁷ It may be possible for a same sex partner of the legal parent of a child to obtain a parenting order.¹⁶⁸ These orders can deal with matters such as who the child will live with; how much time the child will spend with each parent and with other people, such as grandparents; the allocation of parental responsibility; how the child will communicate with a parent they do not live with, or other people and any other aspect of the care, welfare or development of the child.¹⁶⁹ Such orders may interact with the parentage provisions of the South Australian *Family Relationships Act 1975* (SA) and the *Adoption Act 1988* (SA) but they do not of themselves eliminate the discriminatory impact of the current South Australian laws.

Who can be recognised as a legal parent of a child in South Australia

207. The *Family Relationships Act 1975* (SA) sets out the rules for who is considered to be the legal parent of a child in South Australia. Part 2 of the Act deals with children and includes provisions governing legal parentage and ‘recognition of paternity’. Section 8 contains a presumption of paternity for children born within a marriage, or within 10 months of the dissolution of a marriage. This presumption extends to a couple in a ‘qualifying relationship’, which is defined in s 10A as including ‘a marriage-like relationship’ between two people who are domestic partners (whether of the same or opposite sex).

¹⁶⁷ See Part VII, Divisions 5-7, *Family Law Act 1975* (Cth). The person referred to a parenting order made under these provisions may include either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

¹⁶⁸ A parenting order is a set of orders made by a court about parenting arrangements for a child. A court can make a parenting order based on an agreement between the parties (consent orders) or after a court hearing or trial. When a parenting order is made, each person affected by the order must follow it. The status of a parenting order may be altered if a parenting plan is developed by both parties in the future.

¹⁶⁹ Federal Circuit Court of Australia, *Parenting orders – obligations, consequences and who can help* (1 March 2013) <<http://www.federalcircuitcourt.gov.au>>.

208. This means that lesbian couples who have a child through the use of assisted reproductive treatment can be presumed to be the parents of a child born to one of the women, provided their relationship meets the criteria of ‘qualifying relationship’ (see further discussion below). A similar presumption is not available to gay couples, due to the requirement that that the ‘qualifying relationship’ involve the birth mother as one of the partners, and because of the exclusion of same-sex couples from altruistic surrogacy (discussed further below).

Participant Quote:

The archaic laws surround[ing] parentage were clearly not designed to cope with modern assisted reproductive technology, and need to be changed much more broadly. Each of our children were born through the biological assistance of three people: one of their dads, who provided the sperm; and egg donor and a gestational surrogate. However each of the children were born to only two parents; their two dads. This was the clearly expressed intent of all parties involved, and should be respected as the truth of our children's parentage. The surrogates and egg donor are important people in our children's stories of coming to be born, and we would never take that from them. However, while the surrogate and egg donor are important people to our children they are not in any way parents. When it comes to the intent behind things such as the Convention on the Rights of the Child, it is their two dads that should have all the rights and responsibilities contained therein. [Submission 25]

209. Section 9 of the Act sets out a process for obtaining a declaration of a parentage, which can be obtained if there is a dispute or uncertainty as to the child’s father or ‘co-parent’.

210. Particular rules apply to the parentage of children conceived following a fertilisation procedure (Part 2A) or as a result of a recognised surrogacy agreement (Part 2B). These rules are discussed below.

Eligibility for Adoption

211. Adoption is the process by which a child ceases to be a member of one family and becomes, legally and permanently, a member of a new family.

212. Adoption of children in South Australia is governed by the *Adoption Act 1988* (SA) which operates in accordance with the general principle that, in all decisions relating to adoption, the welfare of the child must be the paramount consideration.¹⁷⁰

¹⁷⁰ *Adoption Act 1988* (SA) s 7.

213. The *Adoption Act 1988* (SA) is currently subject to review by the Department of Education and Child Development (DECD).¹⁷¹ This review coincides with the establishment in 2014 of a South Australian Royal Commission, headed by former Supreme Court Justice, the Honourable Margaret Nyland QC, to investigate the Safety and Welfare of ‘At Risk’ Children.¹⁷²
214. The *Adoption Act 1988* (SA) regime allows the Youth Court to make orders that displace the legal parenting rights of the birth parents of the child.¹⁷³ The *Adoption Act 1988* (SA) also sets out the rules for who can apply to adopt a child, and the criteria which has to be met before an adoption order from the Youth Court can be made.
215. Section 12 deals with the criteria applied to prospective adoptive parents. It requires adoptive parents to provide evidence of cohabitation in a ‘marriage relationship’, defined in s 4 as the relationship between two people cohabitating as husband and wife or defacto husband and wife.
216. The *Adoption Regulations 2004* (SA) are also relevant. Regulation 19(3) sets out criteria for who will be excluded from selection as an application for an order for adoption of a particular child, unless the Chief Executive is satisfied that special circumstances apply. These criteria include people who are ‘not cohabiting with another in a marriage relationship’.¹⁷⁴
217. As is clear from the Act, an adoption order can only be made in respect of two people who have been living together in a ‘marriage relationship’ for at least five years (or less where the court considers that special circumstances apply). An adoption order can be made in respect of one person, if that person is living in a ‘marriage relationship’ with the birth or adoptive parent of the child, for example a step father who is married to the birth mother of the

¹⁷¹ The review is considering matters including the 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. The review report is due to be provided to the Minister for Education and Child Development by 30 September 2015. See Department for Education and Child Development, Government of South Australia, *Review of the South Australian Adoption Act 1988 and Adoption Regulations 2004* (January 2015) <<http://yoursay.sa.gov.au>>.

¹⁷² Attorney-General’s Department, Government of South Australia, ‘Former Supreme Court Justice Nyland named as Royal Commissioner’ (Media Release, 15 August 2014) <<http://www.agd.sa.gov.au>>.

¹⁷³ *Adoption Act 1988* (SA) s 9(1).

¹⁷⁴ *Adoption Regulations 2004* (SA) reg 19(3)(c).

child¹⁷⁵ or if the Court is satisfied that there are special circumstances justifying the making of the order'.¹⁷⁶

218. Under the *Adoption Act 1988* (SA), a 'marriage relationship' means a relationship between two persons cohabiting as husband and wife or de facto husband and wife. This is interpreted to mean the relationship between a man and a woman.¹⁷⁷

219. In the case of a local adoption, the birth parents are able to state their preferences as to which family on the department's prospective adoptive parents' register may adopt their child, based on the child's needs and background. As the DECD Discussion Paper explains, few locally born children are made available for adoption in South Australia each year; in 2013-14 only one locally born child was adopted.¹⁷⁸

220. The current *Adoption Act 1988* (SA) provisions effectively restrict access to adoption in South Australia to people who are married, or heterosexual couples cohabiting as husband and wife.¹⁷⁹ This effectively excludes same sex couples, as well as couples involving gender diverse people. These criteria also indirectly discriminate against non-married couples, as they impose minimum time limits on non-marital heterosexual relationships.

221. The discriminatory impact of these provisions 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 with respect 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]

Participant Quote:

¹⁷⁵ *Adoption Act 1988* (SA) s 12(3)(a).

¹⁷⁶ *Adoption Act 1988* (SA) s 12(3)(b).

¹⁷⁷ Department for Education and Child Development, Government of South Australia, *Review of the South Australian Adoption Act 1988 and Adoption Regulations 2004* (January 2015) 17 <<http://yoursay.sa.gov.au>>.

¹⁷⁸ *Ibid* 18.

¹⁷⁹ *Ibid* 17.

I marry my finance (who is British, and we're getting married on British soil under UK Law) in October, and we then begin the long, difficult journey of pursuing surrogacy overseas in a foreign country because our laws in SA (and Australia) make pursuing a family and having children relatively impossible. [Submission 23]

222. SALRI received numerous submissions that highlighted the inconsistency in the legal and policy framework governing foster-parenting in South Australia. Unlike adoption, same sex couples are eligible to become foster parents provided the arrangement is in the best interests of the child and all other criteria, rigorous training and background checking processes are met.¹⁸⁰

Participant Quote:

[S]ame sex couples are allowed and even encouraged to foster children, why then, can these couples not go on to adopt their foster children and provide them with a loving and stable home and future? It's pure discrimination and should not be allowed. [Submission 22].

223. SALRI was also referred to numerous studies that consider whether the sexual orientation or gender identity of adoptive parents has a negative impact on the rights and wellbeing of the adopted child.¹⁸¹ These issues were also explored by the South Australian Parliamentary Committee in 2011¹⁸² and by the New South Wales Standing Committee on Law and Justice in 2009.¹⁸³

224. Similar inquiries have been conducted in South Australia, as noted by the Law Society of South Australia in its March 2015 submission to the DECD Review of the *Adoption Act 1988* (SA),¹⁸⁴ where it noted that permitting same sex couples to adopt would be consistent with the:

- recommendations of the South Australian Parliament's Social Development Committee's report tabled 17 May 2011;

¹⁸⁰ Pursuant to the *Family and Community Services Act 1972* (SA), same-sex couples are eligible to foster care.

¹⁸¹ See, for example, Susan Golombok et al, 'Adoptive Gay Father Families: Parent-Child Relationships and Children's Psychological Adjustment' (2014) 85(2) *Child Development* 456 (referred to SALRI by Submission No 29).

¹⁸² Above n 165.

¹⁸³ Standing Committee on Law and Justice, Parliament of New South Wales, *Adoption by same-sex couples* (2009) xv.

¹⁸⁴ This submission was provided to SALRI by the Law Society of South Australia as part of Submission No 44.

- adoption laws and practices of a growing number of other States and Territories of Australia;
- removal of laws and practices which have had the effect of discriminating against people in same sex marriages.¹⁸⁵

Best Practice Approaches to Regulating Adoption in Australia

225. Many participants in the SALRI consultations and submission processes expressed the view that the law regulating adoption in South Australia should consider objectively 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.¹⁸⁶ 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. This is a compelling argument.
226. Both the ACT and Tasmanian legal frameworks regulating adoption have been identified as an example of 'best practice' and provides a useful model for South Australia to consider, particularly given the fact that both regimes remove the large majority of discriminatory features of other regimes, such as that described above in South Australia.
227. The *Adoption Amendment Act 2013* (Tas) recently amended the *Adoption Act 1988* (Tas) to allow gay couples to adopt. The *Adoption Act 1988* (Tas) provides that the best interests of the child that is to be adopted is the paramount consideration at all times of the adoption process.¹⁸⁷ This Tasmanian approach accepts that it may be in the best interests of a child to be adopted by a LGBTI couple or individual regardless of their sexual orientation or gender identity.
228. Under the amended *Adoption Act 1988* (Tas), an adoption order can be made in favour of:
- couples who have been married or in a significant relationship which is a registered relationship subject to a deed of relationship, for three years. This allows gay couples who have registered their relationship and who have been together for the requisite period to adopt;¹⁸⁸

¹⁸⁵ Ibid.

¹⁸⁶ See also Submission No 4.

¹⁸⁷ *Adoption Act 1988* (Tas) s 8

¹⁸⁸ *Adoption Act 1988* (Tas) s20 (1).

- a spouse of a natural parent or of an adoptive parent, if the making of an order for the custody or guardianship of the child would not adequately provide for the child’s welfare and interests, an order for the child’s adoption would better serve the child’s welfare and interests, and special circumstances exist which warrant adoption.¹⁸⁹ The term ‘spouse’ in the Act includes those who are in a significant relationship that is a registered relationship subject to a deed of relationship.¹⁹⁰ This allows LGBTIQ step parents to adopt if the conditions set out above are satisfied;
- a single person, where the court is satisfied that exceptional circumstances exist in relation to the welfare or interests of the child which make it desirable for the adoption order to be made in favour of one person.¹⁹¹

Group Two: Recommendations for Immediate Action

2.1 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.

Eligibility for Assisted Reproductive Treatment and legal recognition of parentage

229. Access to assisted reproductive treatment (ART) is regulated in South Australia by the *Assisted Reproductive Treatment Act 1988* (SA), with the legal rights to parentage with respect to a child conceived by ART regulated by the *Family Relationships Act 1975* (SA).

230. ART can include a range of procedures - from assisted insemination through to other more invasive treatments such as in-vitro fertilisation (IVF). The Act sets out what ART is and who can access and provide ART in SA.¹⁹² The Act does not apply to self-insemination that occurs in a person's home without fee or reward (such self-insemination by a woman following a voluntary sperm donation from a male friend).¹⁹³

231. Under the Act, a person can only provide ART if they have been authorised to do so under the Act. In the case of assisted insemination (such as where donated sperm is screened for health risks and insemination occurs with the assistance of a doctor), this can be provided by a health professional that has been approved by the Minister.¹⁹⁴ In the case of other more

¹⁸⁹ *Adoption Act 1988* (Tas) s 20(6) and s 20(7).

¹⁹⁰ *Adoption Act 1988* (Tas) s 3.

¹⁹¹ *Adoption Act 1988* (Tas) s 20(4).

¹⁹² *Assisted Reproductive Treatment Act 1988* (SA) ss 3, 5.

¹⁹³ *Assisted Reproductive Treatment Act 1988* (SA) s 5(2).

¹⁹⁴ *Assisted Reproductive Treatment Act 1988* (SA) s 5(2).

invasive forms of ART, such as IVF, the person providing the ART must be registered under the Act.¹⁹⁵

232. Historically, South Australia laws governing access to ART were designed to benefit married couples where the husband or wife (or both) are or appear to be infertile, or there appears to be a risk that a genetic defect would be transmitted to a child conceived naturally.
233. In 1996, the South Australian Supreme Court found that the restriction of access to treatment on the basis of marital status contravened the *Sex Discrimination Act 1984* (Cth).¹⁹⁶
234. This led to the amendment of these provisions¹⁹⁷ in the *Assisted Reproductive Treatment Act 1988* (SA) to allow single women and those in domestic partnerships (including same sex couples) to access ART, provided that such treatment is provided by a registered ART provided and in accordance with the limited circumstances set out in ss 6-9 of the Act. These are where the intended birth mother is or appears to be infertile; where the man living with the intended birth mother (on a genuine domestic basis as her husband) is infertile; or where there is a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child conceived naturally.¹⁹⁸ There are also rules that apply where these circumstances would exist, but for the death of one of the partners.
235. A number of submission makers expressed concern at the ongoing discriminatory features of the ART Act, particularly for gay couples.¹⁹⁹ These concerns are closely related to the current provisions limiting access to altruistic surrogacy, discussed below.
236. Submissions received by SALRI suggest that questions have arisen as to whether the requirement of 'infertility' in s 9(1)(c)(i) refers to medical or social infertility.²⁰⁰ It appears that this provision has generally been understood to require evidence of medical infertility, having regard to s 9(1)(c)(v) which permits further conditions to be added by Regulation. Regulation 8(1) of the *Assisted Reproductive Treatment Regulations 2010* (SA) provides that, for

¹⁹⁵ *Assisted Reproductive Treatment Act 1988* (SA) s 5.

¹⁹⁶ *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

¹⁹⁷ 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).

¹⁹⁸ *Assisted Reproductive Treatment Act 1988* (SA) s 9.

¹⁹⁹ See, for example, Submissions No 34 and 38.

²⁰⁰ Submission No 34.

the purposes of s 9(1)(c)(v) of the *Assisted Reproductive Treatment Act 1988* (SA), assisted reproductive treatment may be provided in circumstances where:

(a) a woman who would be the mother of any child born as a consequence of the assisted reproductive treatment; or

(b) a man who is living with a woman (on a genuine domestic basis as her husband) who would be the mother of any child born as a consequence of the assisted reproductive treatment,

is suffering from an illness or other medical condition that may result in, or the appropriate treatment of which may result in, the woman or man becoming infertile at a future time.

237. Concerns were raised about the confusion these laws create for IVF providers. A family law practitioner, Stephen Page, submitted:

IVF doctors have reported to me that they have been confused about whether they can treat lesbian couples or single women in cases of ‘social’ infertility or whether there needs to ‘medical’ infertility. If the former, then treatment may not be provided. The women might be fertile but still need assistance from IVF doctors in supplying sperm. IVF clinics typically are able to access sperm either from local donors, or as often overseas donors, especially from the United States. Reading [ART Act] s 9(1)(c)(i) alone would seem to indicate that medical infertility is required, however, when read with s 9(1)(c)(v) and Reg 8(1) social infertility appears to be all that is needed.²⁰¹

238. Understood in this way, the *Assisted Reproductive Treatment Act 1988* (SA) effectively precludes access to assisted reproductive treatments such as IVF to medically fertile lesbian couples. Where one woman in the lesbian relationship is fertile and the other is not, these provisions can have the perverse effect of putting pressure on the infertile woman to undergo ART, even if her partner was better placed physically or otherwise to become pregnant.

239. This discriminatory aspect of the law can also give rise to the risk that same sex couples who wish to start a family will rely upon unsafe or unregulated fertilisation practices.

Participant Quote:

My wife had to undergo invasive medical procedures to see if she was ‘medically infertile’ and therefore able to access ART in SA. As it turned out, she did have fertility issues and therefore we were able to access it here, many of my friends in same sex relationships and don't have fertility issues are left with no option but to travel interstate to access ART or else use the 'turkey baster

²⁰¹ Submission No 34.

method' themselves at home with donor sperm from a friend which is unscreened. This then has legal (parentage) implications. [Submission 22]

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 ... [Submission 9].

240. Also relevant to considerations relating to access to ART are the rules governing the legal parentage of children born as a result of ART. These rules are contained in Part 2A of the *Family Relationships Act 1975* (SA).

241. Pursuant to s 10C of the *Family Relationships Act 1975* (SA), the woman who gives birth to any 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). 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.

242. Where the pregnancy occurs following ART to a woman who is not married or not in a qualifying relationship, the man who provides the sperm will not be taken to be the father of any child born as a result of the pregnancy.²⁰²

243. Certain rules apply in the case of the death of a partner or sperm donor.²⁰³

244. Before the *Family Relationships (Parentage) Amendment Act 2011*, South Australian law did not permit the birth mother's lesbian partner to be included on the birth record as a co-parent with respect to a child conceived following ART. These birth records only showed the birth mother as the child's parent.

²⁰² *Family Relationships Act 1975* (SA) s 10C.

²⁰³ *Family Relationships Act 1975* (SA) s 10C.

245. As a result of the *Family Relationships (Parentage) Amendment Act 2011* (SA), South Australian law now recognises a female same sex partner as a co-parent of the child in some cases. A woman is recognised as the co-parent if:

- at the time the child was conceived, the two women were living together as a couple on a genuine domestic basis and had been doing so for at least three years (or for a total period of three years out of the four years preceding conception); and
- the child was conceived through a fertilisation procedure. That includes medical procedures such as IVF and artificial insemination carried out by a doctor but it does not include self-insemination; and
- the partner consented to the procedure.

246. It is irrelevant whether the two women are still living together as domestic partners when the child is born or when they apply to change the record.

247. The current law also allows for pre-existing records to be amended to include the co-parent. It also provides for new-born babies to be registered with both birth mother and co-parent, that is, the mother's partner, listed as parents of the child when the baby is registered.

248. While a significant improvement on the earlier laws, the current framework governing legal parentage for children born as a result of ART continues to discriminate on the grounds of sexual orientation and marital status. This is because it continues to impose strict criteria on women in lesbian relationships who have a child through ART (such as the requirement for cohabitation for three years) that do not apply to a married couple who have a child through ART. These issues are explored further in Group Three of this Report, relating to recognition of relationships.

Victorian Approach to Accessing ART

249. The Victorian approach to accessing ART avoids the use of provisions that require evidence of medical infertility before a woman can access ART and contains a 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 features make it relevant to the current Audit.

250. The previous statute governing ART in Victoria, the *Infertility Treatment Act 1995* (Vic), stated that before a woman could receive an ART treatment procedure, she must be married and living with her husband, or be living in de facto relationship with a man.²⁰⁴ The Victorian Law Reform Commission also noted that the Victorian legislative requirement was contrary to the State's *Charter of Human Rights and Responsibilities*.²⁰⁵
251. The *Infertility Treatment Act 1995* (Vic) was repealed in 2010 by the *Assisted Reproductive Treatment Act 2008* (Vic), which sets out a more inclusive approach regarding who can avail themselves of ART.
252. The *Assisted Reproductive Treatment Act 2008* (Vic) sets out 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.²⁰⁶ This guiding principle must be given effect in administering the Act, in carrying out its functions and in carrying out the activities that the Act regulates.
253. Under the *Assisted Reproductive Treatment Act 2008* (Vic), a woman may undergo a treatment procedure if the woman and her partner (if any) have consented to the carrying out of that particular procedure and if either a doctor is satisfied on reasonable grounds that:
- in the woman's circumstances she is unlikely to become pregnant other than by a treatment procedure; or
 - the woman is unlikely to be able to carry a pregnancy or give birth to a child without a treatment procedure; or
 - the woman is at risk of transmitting a genetic abnormality or genetic disease to a child born as a result of a pregnancy, either from herself or from her partner as a carrier, unless the pregnancy is conceived by means of a treatment procedure;
 - or if the Patient Review Panel has decided there is no barrier to the woman undergoing a treatment procedure.²⁰⁷

²⁰⁴ *Infertility Treatment Act 1995* (Vic) s 8. The Victorian Law Reform Commission recommended in its 2007 report that the Act should be amended, it having been ruled in *McBain v State of Victoria* (2000) 99 FCR 116, that the provision was inconsistent with the *Sex Discrimination Act 1984* (Cth).

²⁰⁵ Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption Final Report* (2007) <<http://www.lawreform.vic.gov.au>>.

²⁰⁶ *Assisted Reproductive Treatment Act 2008* (Vic) s 5(e).

²⁰⁷ *Assisted Reproductive Treatment Act 2008* (Vic) s 10.

254. A woman may apply to the Patient Review Panel for review if she does not meet any of the above three criteria, if a presumption against treatment applies,²⁰⁸ or if a registered ART treatment provider or doctor has refused treatment because they believe a child that may be born would be at risk of abuse or neglect.²⁰⁹
255. Unlike under the previous Victorian approach, there is no requirement in the *Assisted Reproductive Treatment Act 2008* (Vic) that a woman seeking treatment be married or living in a de facto relationship with a man.

Options for Reform

256. Having regard to the submissions received and consultations conducted, SALRI recommends that the South Australian Government amend the *Assisted Reproductive Treatment Act 1988* (SA) to clarify that assisted reproductive treatment can be accessed by people in non-heterosexual relationships without the requirement to demonstrate medical infertility.
257. SALRI recommends that legislative amendments to the *Assisted Reproductive Treatment Act 1988* (SA) be based on those contained in the *Assisted Reproductive Treatment Act 2008* (Vic), including 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.
258. Such amendments would also promote compliance between South Australian laws and the Commonwealth protections against discrimination on the grounds of sexual orientation and marital status contained in the *Sex Discrimination Act 1984* (Cth).
259. In addition to these recommendations, SALRI intends, after further review, to issue further more detailed recommendations relating to Part 2A of the *Family Relationships Act 1975* (SA) that contains the rules governing legal parentage of children born as a result of ART.

Group Two: Recommendations for Immediate Action

2.2 Amend s 9 of the *Assisted Reproductive Treatment Act 1988* (SA) to (a) clarify that a person can access ART if, in the person's circumstances, they are unlikely to become pregnant other than by a assisted reproductive treatment 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

²⁰⁸ Such presumption against treatment would apply because of the woman's criminal history or that of her partner's, or if a child has previously been removed from her or her partner's custody or guardianship.

²⁰⁹ *Assisted Reproductive Treatment Act 2008* (Vic) s 15.

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 fertilisation services from the definition of ‘services’ in that Act.

Surrogacy Agreements

260. Surrogacy Australia noted that the use of surrogacy as a means of family formation has increased significantly in Australia in recent years, with over 90% of Australians seeking surrogacy heading overseas.²¹⁰ Australian Government data in 2011 indicates that over 300 babies born to surrogate mothers enter Australia each year. Surrogacy Australia also estimates that around half of the people participating in overseas surrogacy are same sex attracted men.²¹¹
261. In South Australia, surrogacy agreements are regulated by Part 2B of the *Family Relationships Act 1975* (SA). Section 10G provides that certain surrogacy agreements are illegal (namely a commercial agreement or surrogacy contract that involves the exchange of valuable consideration) and attract criminal penalties.
262. Section 10H sets out the criteria for legal surrogacy agreements that are recognised under the *Family Relationships Act 1975* (SA), which can in turn lead to legal recognition of parentage for the intended parents. These criteria include the voluntary consent of all parties involved, incidence of infertility and the requirement that the ‘commissioning parents’ are legally married or have cohabited continuously together as de facto husband and wife for at least three years. As a result, such recognised surrogacy agreements under Part 2B of the *Family Relationships Act* (SA) are currently not available to same sex or gender diverse intending parents.
263. Section 10HB of the *Family Relationships Act 1975* (SA) sets out the circumstances in which the Youth Court can make orders recognising the ‘commissioning parents’ as the legal parents of a child born as a result of a recognised surrogacy agreement or conceived as a result of a fertilisation procedure carried out in South Australia. An application for an order under this provision can be made by either or both commissioning parents when the child is between four weeks and six months old.²¹² Subsection 10HB(6) makes it clear than in deciding an application under this provision, the welfare of the child must be regarded as the

²¹⁰ Submission No 37 2-3.

²¹¹ Submission No 37 2-3.

²¹² *Family Relationships Act 1975* (SA) s 10HB(4)-(5).

paramount consideration. The Court must also be satisfied that the surrogate mother freely, and with a full understanding of what is involved, agrees to the making of the order (unless the surrogate mother is dead, incapacitated or uncontactable).²¹³ Other factors that the Court may take into account include whether the child is currently living with the commissioning parents; any submission made or on behalf of, the birth father and whether the commissioning parents are fit and proper persons to assume the role of parents of the child.²¹⁴

264. SALRI has received a submission from a family law practitioner, Stephen Page, with experience in providing advice to those seeking make a legal surrogacy agreement in South Australia that explains that a third category of surrogacy agreement is legally possible in South Australia: namely an non-commercial surrogacy arrangement that fails to meet the full range of criteria prescribed under the *Family Relationships Act 1975* (SA) (for example, where the intended parents are gay and the baby is conceived by the surrogate at home without use of ART). Such an arrangement may be considered legal, however it will not result in an order being made in the Youth Court to transfer legal parentage to the intended parents.²¹⁵ This means that same sex couples and single people who wish to pursue surrogacy will either have to move interstate or look overseas. As Mr Page explains:

The reality is that people are desperate to have children. The desire to reproduce is the most basic of instincts. This desire is felt whether the intended parent is heterosexual, gay, lesbian, in a couple relationship or married. To tell a person that they are banned from having a child under the law is one of the most painful statements I have had to make as a lawyer, but I have had to do so with intended parents who are single, gay, [and] lesbian from South Australia.

...

Why is it appropriate that the effect of the legislation is for people to go overseas to developing countries, where there is the possibility of exploitation of all involved: donor, donor's partner, intended parents, surrogate, her partner and above all the child?²¹⁶

265. Surrogacy Australia has described South Australian surrogacy laws as 'out of step with other jurisdictions' due to its specific exclusions of the LGBTIQ community from access to surrogacy arrangements.²¹⁷ It notes that South Australia is one of the only States that

²¹³ *Family Relationships Act 1975* (SA) s 10HB (7)-(8).

²¹⁴ *Family Relationships Act 1975* (SA) s 10HB (10).

²¹⁵ Submission No 34.

²¹⁶ Submission No 34, 3.

²¹⁷ Submission No 37, 4.

specifically excludes same sex families from the right to have recognition as legal parents by the requirement that commission parents have to be legally married or living as a de facto husband and wife.²¹⁸ Surrogacy Australia submits that this type of restrictions forces single men and gay couples to pursue surrogacy and egg donation overseas, possibly in a ‘commercial context’.²¹⁹ It further notes that the exclusion of same sex couples and singles from the surrogacy regime in South Australia is without factual foundation, citing studies that demonstrate that children of same sex parents and/or surrogacy arrangements are very well adjusted.²²⁰

Participant Quote:

The *Family Relationships Act* has had a negative impact on my family in a number of ways. By not allowing my partner and me to enter into a recognised altruistic surrogacy agreement in SA, our choices to start a family were unfairly reduced relative to heterosexual couples seeking surrogacy. While we were happy with our own choices and experiences of overseas surrogacy, being restricted from engaging in surrogacy locally could impact some same sex couples in their choice of the most appropriate way to form their family. Some families formed through surrogacy believe strongly in allowing an important and close relationship between the surrogate, the gamete donors, and the children born from the arrangement. By not allowing same sex couples the choice of the best way to form and nurture their families, not only the rights of the couples, but more importantly the rights of children are being impinged upon. [Submission 25]

266. Surrogacy Australia recommends that Part 2B of the *Family Relationships Act 1975* (SA) be amended to extend eligibility for altruistic gestational and international surrogacy to same sex couples and single gay men and single lesbian women (as well as heterosexual single people) to ensure that they are treated equally.²²¹ Surrogacy Australia also makes a number of other related recommendations for reform at the Commonwealth level to advance the legal recognition of parents of children born as a result of surrogacy arrangements.²²²

267. Some of these recommendations are reflected in a Private Member’s Bill, the Family Relationships (Surrogacy) Amendment Bill 2014 (SA), introduced by the Hon Tammy Franks.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Submission No 37, 4.

²²² See, for example, Submission No 37, 11.

268. SALRI notes that during the preparation of this Report, the South Australian Parliament enacted the *Family Relationships (Surrogacy) Amendment Act 2015* (SA). This Act aims to set up a State Framework for Altruistic Surrogacy for the recognition of certain altruistic surrogacy agreements entered into in accordance with the law of another Australian jurisdiction or a prescribed international surrogacy agreement. This Framework is to be established and maintained by the Minister. The 2015 Act also introduces a surrogate register for prospective South Australian surrogates. These changes are relevant to SALRI's ongoing consideration of the discriminatory impact of these laws on the grounds of sexual orientation, gender identity and intersex status, however they do not appear to address the concerns outlined above relating to the current requirement in s 10HA of the *Family Relationships Act 1975* that the commissioning parents to any surrogacy agreement be either married or living together as 'husband' and 'wife' (defined in heterosexual terms).
269. The Tasmanian approach to surrogacy, which sets up a separate legislative regime to other Acts regulating family relationships, has also been identified as 'best practice' in this area in terms of removing sexual orientation and relationship status based discrimination. The Tasmanian approach is summarised below.

Tasmanian Approach to Surrogacy

270. In 2012, the Tasmanian government passed the *Surrogacy Act 2012* (Tas) and the *Surrogacy (Consequential Amendments) Act 2012* (Tas), enabling couples, including gay and de facto couples, to use a surrogate to carry their child. Single men and women can also use a surrogate and apply for a parentage order in relation to the child born as a result of the surrogacy arrangement.
271. These laws permit only altruistic surrogacy. Commercial surrogacy, where the surrogate would receive a payment, reward or other material benefit or advantage (other than the reimbursement of their costs), remains prohibited.
272. Intended parent(s) must be at least 21 years old before entering into an arrangement.²²³ Surrogates must be at least 25 and already have given birth at least once previously.²²⁴ Both

²²³ *Surrogacy Act 2012* (Tas) s 16(1)(b).

²²⁴ *Surrogacy Act 2012* (Tas) s 16(2)(c) and s 16(2)(d).

the surrogate and the intended parent(s) must be Tasmanian residents.²²⁵ The intended parent(s) and surrogate must receive independent legal advice about the arrangement and its implications, and the implications of a parentage order.²²⁶ The intended parent(s) and surrogate must also receive counselling from an accredited counsellor about the arrangement and its social and psychological implications.²²⁷

273. The inclusiveness of the *Surrogacy Act 2012* (Tas) is reflected in its terminology. ‘Relationship status’ under the Act is broadly defined and includes a party to a significant relationship within the meaning of the *Relationships Act 2003* (Tas); a sexual partner of another person of either sex, and; unmarried, not a partner to a significant relationship within the meaning of the *Relationships Act* and not a sexual partner of another person of either sex.²²⁸ ‘Spouse’ is also defined so as to include those in a significant relationship within the meaning of the *Relationships Act 2003*.²²⁹

274. A guiding principle of the *Surrogacy Act* is that the wellbeing and best interests of a child born through a surrogacy arrangement are paramount.²³⁰

SALRI intends to conduct further research and issue further detailed recommendations with respect to:

2.6 The current legal framework relating to recognised surrogacy arrangements. Options for consideration include replacing Part 2B of the *Family Relationships Act 1975* (SA) with a separate Act regulating surrogacy in South Australia, similar to the *Surrogacy Act 2012* (Tas).

Protection from Discrimination

275. The Commonwealth and the States and Territories have laws relating to unlawful discrimination. Commonwealth laws and State and Territory laws generally cover the same grounds and areas of discrimination. However, there are some ‘gaps’ in the protection that is offered between different States and Territories and at a Commonwealth level. In addition, there are circumstances where only the Commonwealth law would apply or where only the State law would apply. This means that in some circumstances, a person will be able to

²²⁵ *Surrogacy Act 2012* (Tas) s 16(2)(g).

²²⁶ *Surrogacy Act 2012* (Tas) s 16(2)(a).

²²⁷ *Surrogacy Act 2012* (Tas) s 16(2)(f).

²²⁸ *Surrogacy Act 2012* (Tas) s 4.

²²⁹ *Surrogacy Act 2012* (Tas) s 4.

²³⁰ *Surrogacy Act 2012* (Tas) s 3(1).

choose whether to pursue a claim of unlawful discrimination under either Commonwealth or State law.

276. The relevant Commonwealth law in this context is the *Sex Discrimination Act 1984* (Cth). It is discussed in further detail below. The relevant South Australian law is the *Equal Opportunity Act 1984* (SA) (the *EO Act*).

What Constitutes Unlawful Discrimination

277. Under the *EO Act*, it is unlawful to discriminate against a person because of specific personal characteristics or because they belong to a certain group. These personal characteristics include a person's age or race - but also their sex (understood in this Act as whether someone is male or female), sexuality (whether someone is gay, lesbian, bisexual or heterosexual), or chosen gender. It is also unlawful to discriminate against a person based on their marital or domestic partner status.²³¹

278. Subsection 5(5) of the *EO Act*, defines 'chosen gender' as a circumstance where a person:

- (a) identifies on a genuine basis as a member of the opposite sex by assuming characteristics of the opposite sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the opposite sex;
- or (b) the person, being of indeterminate sex, identifies on a genuine basis as a member of a particular sex by assuming characteristics of the particular sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the particular sex.

279. To be unlawful, the discrimination must be unreasonable and must happen in an area of public life, which for the purposes of discrimination on the grounds of sex, sexuality and chosen gender include:

- discrimination at work;²³²
- discrimination by other bodies, such as associations or clubs;²³³

²³¹ Pursuant to the *Equal Opportunity Act 1984* (SA) s 5, 'marital or domestic partnership status' means the status or condition of (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. The term 'domestic partner' is also defined in the same terms as the *Family Relationships Act 1975* (SA) s 11, ie as two people a 'close personal relationship', which is defined to include a relationship between 2 adult persons (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis.

²³² Division 2 of Part 3 deals with discrimination on these grounds against workers. Section 30 deals with discrimination against applicants and employees. Section 31 deals with discrimination against agents and independent contractors. Section 32 deals with discrimination against contract workers. Section 33 deals with discrimination within partnerships.

²³³ Division 3 of Part 3 deals with discrimination by other bodies. Section 35 deals with discrimination by associations, making it unlawful for an association to discriminate against an applicant for membership on the ground of sex, chosen gender or sexuality, for

- discrimination in education, including schools and universities;²³⁴
- discrimination in relation to land, goods and services,²³⁵ including the provision of accommodation, but excluding certain assisted reproductive treatments.²³⁶

280. To be unlawful, the discrimination must also cause the person some loss or humiliation.

281. Discrimination can be direct - like not giving a person a job because of their sex - or indirect - like requiring someone to dress or act according to the sex identified on their birth certificate rather than in accordance with their 'chosen gender'.

282. Part 3 of the Act prohibits discrimination on ground of sex, chosen gender or sexuality. The test for what constitutes discrimination on these grounds is set out in s 29 of the *EO Act*.

283. Subsection 29(2) provides that a person discriminates on the ground of sex:

if he or she treats another unfavourably because of the other's sex; or

if he or she treats another unfavourably because the other does not comply, or is not able to comply, with a particular requirement and—

the nature of the requirement is such that a substantially higher proportion of persons of the opposite sex complies, or is able to comply, with the requirement than of those of the other's sex; and

the requirement is not reasonable in the circumstances of the case; or

if he or she treats another unfavourably on the basis of a characteristic that appertains generally to persons of the other's sex, or on the basis of a presumed characteristic that is generally imputed to persons of that sex; or

example, by refusing to admit the applicant to membership. Subsections 35(2) and (2a) provide exemptions for discrimination on the grounds of sex, sexuality and chosen gender in relation to certain aspects of association membership or benefits or service. For example, if it is not practicable for the service or benefit to be used or enjoyed simultaneously by both men and women, but the same, or an equivalent, service or benefit is provided for the use or enjoyment of men and women separately from each other or at different times (s 35(2)(a)).

²³⁴ Division 4 of Part 3 deals with discrimination on the grounds of sex, sexuality or chosen gender in the area of education. Section 37 deals with discrimination by educational authorities, such as refusing or failing to accept an application for admission as a student (s 37(1)(a)). Subsection 37(3) provides that this section does not apply to discrimination on the ground of sex in respect of an educational institution established wholly or mainly for students of the one sex; if the level of education or training sought by the person is provided only for students of the one sex; in respect of boarding facilities for students of the one sex.

²³⁵ Division 5 of Part 3 deals with discrimination in relation to land, goods, services and accommodation. Section 38 deals with discrimination by a person disposing of an interest in land. However, s 38(2) makes it clear that this section does not apply to the disposal of an interest in land by way of, or pursuant to, a testamentary disposition or gift. Section 39 deals with discrimination in provision of goods and services. Subsection 39(2) explains that if 'the nature of a skill varies according to whether it is exercised in relation to men or to women, a person does not contravene this section by exercising the skill in relation to men only, or women only, in accordance with the person's normal practice'. Section 40 deals with discrimination in relation to accommodation, making it unlawful to, for example, refuse an application for accommodation on the grounds of a person's sex, sexuality or chosen gender. Subsection 40 (3) makes it clear that this section does not apply to discrimination in relation to the provision of accommodation if the person who provides, or proposes to provide, the accommodation, or a near relative of that person, resides, and intends to continue to reside, in the same household as the person requiring the accommodation. Subsection 40 (4) further provides that this section does not apply to discrimination on the ground of sex in relation to the provision of accommodation by an organisation that does not seek to secure a pecuniary profit for its members, if the accommodation is provided only for persons of the one sex.

²³⁶ Subsection 5(2) also makes it clear that a reference in the Act to the provision of a service does not include 'the carrying out of either of the following fertilisation procedures: (a) artificial insemination; or (b) the procedure of fertilising an ovum outside the body and transferring the fertilised ovum into the uterus.'

if he or she treats another unfavourably because of an attribute of or a circumstance affecting a relative or associate of the other, being an attribute or circumstance described in the preceding paragraphs.

284. A similar test is included in s 29(2a) relating to discrimination on the ground of chosen gender and in s 29(3) relating to discrimination on the grounds of sexuality.

285. If a person experiences discrimination that falls within these criteria, they can lodge a complaint with the Equal Opportunity Commission.²³⁷ The Commission can then help resolve the complaint, by writing to the parties or by holding a conciliation meeting to try and work out an agreement between the parties.²³⁸ If this does not resolve the complaint, the person who made the complaint can take their case to the Equal Opportunity Tribunal for a hearing and decision.²³⁹

Exceptions to Unlawful Discrimination

286. South Australian equal opportunity law allows for some exceptions to the rules relating to discrimination. These are set out in ss 34-50 of the *EO Act*. Where these exceptions apply, the discrimination is not considered unlawful. For example:

- in a workplace, an employer can set reasonable dress standards, and it will not be unlawful discrimination on the ground of chosen gender to enforce these dress standards;²⁴⁰
- in employment, discrimination can be lawful if it is a 'genuine occupational requirement that a person be a person of a particular sex, a person of a chosen gender or a person of a particular sexuality';²⁴¹
- in employment at a religious school or university, an employer may discriminate on the ground of chosen gender or sexuality if the discrimination is founded on the precepts of the religion. In these circumstances the institution must have a written policy stating its

²³⁷See Equal Opportunity Commission, Government of South Australia, *Making a Complaint*, (October 2009) <<http://www.eoc.sa.gov.au>>.

²³⁸ Ibid. See also Equal Opportunity Commission, Government of South Australia, *Going to the Equal Opportunity Tribunal*, Fact Sheet (September 2012) <<http://www.eoc.sa.gov.au>>.

²³⁹ Ibid.

²⁴⁰ *Equal Opportunity Act 1984* (SA) s 34(4).

²⁴¹ *Equal Opportunity Act 1984* (SA) s 34(2).

position in relation to the matter and make this available to anyone who applies to work there, as well as prospective students and parents;²⁴²

- in education, if a school has been established wholly or mainly for students of the one sex, it will not be unlawful to exclude students of the opposite sex;²⁴³
- in sport, it will not be unlawful to have single sex competitions, where the sporting activity is one in which the strength, stamina or physique of the competitor is relevant to the outcome of the competition;²⁴⁴
- in insurance, a policy may discriminate on the ground of sex if the discrimination is based on actuarial or statistical data from a source on which it is reasonable to rely; and is reasonable having regard to that data;²⁴⁵
- in relation to the ordination or appointment of priests, ministers of religion or members of a religious order.²⁴⁶

287. The definition of ‘service’ under the *EO Act* specifically excludes fertilisation procedures from services such as IVF. It is lawful to discriminate on the basis of sex, gender, sexuality and relationships status in respect to those services.²⁴⁷ SALRI has recommended that this exclusion be removed, in accordance with its recommendations relating to access to ART.

288. Exemptions in the *EO Act* also allow special measures which mean that organisations can discriminate in favour of a certain group,²⁴⁸ if it helps address past discrimination.

²⁴² *Equal Opportunity Act 1984* (SA) s 34(3).

²⁴³ *Equal Opportunity Act 1984* (SA) s 37(3).

²⁴⁴ *Equal Opportunity Act 1984* (SA) s 48.

²⁴⁵ *Equal Opportunity Act 1984* (SA) s 49 deals with exemptions relating to insurance. It provides that the prohibitions on discrimination contained in Part 3 do not ‘render unlawful discrimination on the ground of sex in the terms on which an annuity, life assurance, accident insurance or other form of insurance is offered or may be obtained’, provided that the discrimination is based on actuarial or statistical data; and is reasonable having regard to that data. Section 89 sets out the process that is required when an insurance company proposes to discriminate against a person based on actuarial or statistical data. It requires that notification be given and that further details be provided upon request.

²⁴⁶ Section 50 deals with exemptions relating to religious bodies. It provides that Part 3 does not ‘render unlawful discrimination in relation to (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or (ba) the administration of a body established for religious purposes in accordance with the precepts of that religion; or (c) any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.’

²⁴⁷ *Equal Opportunity Act 1984* (SA) s 5.

²⁴⁸ *Equal Opportunity Act 1984* (SA) s 47 provides that Part 3 does not ‘render unlawful an act done for the purpose of carrying out a scheme or undertaking intended to ensure that persons of the one sex, persons of a chosen gender, or persons of a particular sexuality, have equal opportunities with, respectively, persons of the other sex, persons who are not persons of a chosen gender or persons of another sexuality, in circumstances to which this Part applies.’

Organisations can also apply to the Equal Opportunity Tribunal for a temporary exemption.²⁴⁹

289. Other relevant provisions of the *EO Act* include:

- Section 86 of the Act contains a general prohibition on victimisation, for example, by treating the victim unfavourably on the ground that the victim has brought proceedings under this Act against a person; or made allegations that the victim or some other person has been the subject of an act that contravenes this Act.
- Section 87 contains a prohibition on sexual harassment (which includes making a statement of a sexual nature to a person, or in the presence of a person) in a wide variety of circumstances including at the workplace, at an educational authority, or in the course of offering or supplying goods or services or providing accommodation.
- Section 87A contains a prohibition on refusing an application of accommodation on the grounds that the applicant intends to share that accommodation with a child.
- Section 87B contains specific protections against discrimination for a student who is breastfeeding.

Issues with the Scope and Content of the Current Protections

290. It has only been in the 20 years that Australian anti-discrimination law has recognised the need to provide protection against unlawful discrimination on the grounds of sexual orientation or gender identity. Prior to 2013, however, sexual orientation, gender identity and intersex status were not included in the Commonwealth *Sex Discrimination Act 1984* (Cth).

291. ‘Chosen gender’ was added to the South Australian *EO Act* in 2009, along with a number of other new grounds such as caring responsibilities and mental illness. Prior to the 2009 changes to the Act, ‘transexuality’ was covered as sexuality discrimination and defined as ‘a person of one sex who is assuming the characteristics of the other sex’.²⁵⁰

²⁴⁹ Part 7 of the *Equal Opportunity Act 1984* (SA) empowers the Tribunal to grant exemptions from a provision of the Act in relation to a person or group of people, or class of activity. Such an exemption can be conditional or apply unconditionally. The maximum period for such an exemption is 3 years. Subsection 92(6) provides that when determining an application under this section, the Tribunal may (a) have regard (where relevant) to the desirability of certain discriminatory actions being permitted for the purpose of redressing the effect of past discrimination; and (b) have regard to other factors that the Tribunal considers relevant.

²⁵⁰ Submission No 40, 2.

292. These examples highlight the evolving nature of this area of anti-discrimination law.
293. Where such discrimination occurs in South Australia, people are now also generally able to make a discrimination complaint under either the *EO Act* or under the *Sex Discrimination Act 1984* (to the AHRC).²⁵¹
294. The Equal Opportunity Commission advised SALRI that although it receives few complaints or enquiries related to discrimination on the basis of chosen gender or sexuality, this low rate of reporting could indicate that many LGBTIQ individuals feel marginalised and do not have confidence in formal complaint processes to resolve issues that they may be experiencing.²⁵²
295. The Equal Opportunity Commission notes, despite being small, numbers of complaints and enquiries are fairly consistent and the discrimination issues raised are often serious, indicating the ongoing need for discrimination legislation.²⁵³ The numbers of chosen gender and sexuality complaints and enquiries made to the Equal Opportunity Commission over the past five years are set out below:²⁵⁴

Complaints 2010-14

(count, as a % of all complaints lodged)

	2010-11	2011-12	2012-13	2013-14	2014-15
Chosen gender	1 (0.4%)	5 (1%)	2 (1%)	2 (1%)	2 (1%)
Sexuality	5 (2%)	8 (2%)	5 (2%)	6 (3%)	6 (3%)

Enquiries 2010-14

(count, as a % of all enquiries)

	2010-11	2011-12	2012-13	2013-14	2014-15
Chosen gender	12 (0.8%)	18 (1.2%)	22 (1.4%)	18 (1.3%)	14 (1.2%)
Sexuality	28 (2%)	25 (1.6%)	27 (1.8%)	23 (1.6%)	23 (1.9%)

(numbers include enquiries made by advocates, employers seeking advice, etc.)

²⁵¹ Submission No 40, 3.

²⁵² Submission No 40, 5-6.

²⁵³ Ibid.

²⁵⁴ Ibid.

296. The development of specific laws that prohibit discrimination on the grounds of sex, sexuality, and chosen gender have been seen as providing both a practical remedy for those experiencing harm as a result of discrimination, and a normative standard of behaviour for the broader community. However, these laws have also been subject to strong and sustained criticism - primarily related to the way personal characteristics have been defined, the burden that must be discharged by the complainant when seeking to establish a claim of unlawful discrimination and the exceptions that apply to unlawful discrimination under the Act.²⁵⁵
297. Many of these issues have also been examined in respect of similar laws in other Australian jurisdictions, including recently at the Commonwealth level prior to the introduction of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.²⁵⁶
298. The consultations undertaken by SALRI suggest that the following features of the South Australian *EO Act* raise considerable concern, particularly among the LGBTIQ community.

Inadequate protection for discrimination against intersex people

299. Concerns have been raised that currently, the South Australian provisions do not provide appropriate coverage for people with intersex variations.
300. The current *EO Act* does not specifically include provisions prohibiting discrimination on the basis of intersex status, although the term ‘sex’ is not defined in the Act and reference to ‘indeterminate sex’ is included within the definition of ‘chosen gender’.
301. The Equal Opportunity Commission told SALRI that the absence of a specific reference to ‘intersex status’ as a protected attribute in the *EO Act* gives rise to uncertainty for the Equal Opportunity Commission when dealing with complaints of discrimination on this ground. It noted:

On principle, the Commission might take up such a complaint but would have to advise the complainant that, should the complaint end up being referred to the Equal Opportunity Tribunal, the Tribunal could rule that intersex status is not covered under the Act.

Given this difficulty, the Commission may refer such a complaint to the Australian Human Rights Commission. It must be noted, however, that the *Sex Discrimination Act*

²⁵⁵ See, for example, Submissions 27, 40 and 48.

²⁵⁶ See Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (2013) <<http://www.aph.gov.au>>.

1984 (SDA) does not cover complaints made by public sector employees of any state if they are about the following (see s 13 (1) of the SDA):

- in the area of employment and/or superannuation benefits – any acts of alleged discrimination on the basis of a person’s sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities – Section 14 of the SDA refers.
- in employment, partnerships, contract etc., acts of alleged sexual harassment - Section 28B of the SDA refers.

The Commission considers, therefore, that it is important to add a ground of intersex (or a definition of sex added that includes intersex) to the *EO Act*.²⁵⁷

The use of the term 'chosen gender' and its defined meaning

302. Despite supporting the addition of the new ground and recognition that being transgender is not related to sexuality, the Equal Opportunity Commission still considers that the term ‘chosen gender’ is problematic for the following reasons:

The term is not consistent with comparable State and federal legislation.

The use of the word ‘chosen’ is problematic as gender identity is not considered by medical professionals or by transgender persons to be ‘a choice’. Transgender is the widely accepted term used in the LGBTIQ and wider community and would be more appropriate.

The definition of the term ‘chosen gender’ in the Act excludes persons who do not identify as a member of a particular sex. A complaint made to the Commission from a person who did not identify as such would need to be referred to the Australian Human Rights Commission to avoid possible legal rulings that the complaint did not fall under the Act.²⁵⁸

Participant Quote:

The concept of ‘chosen gender’ implies that I woke up one day and decided this was who I was going to be when the reality is more that I have known my gender is incongruent with my body, it wasn't a choice, it just was. Even gender identity trivialises what I am, the confusion comes into the need to define the difference between so called sex (based on the half second visual observation of a person at the beginning of one's life) and gender. I am simply a person, if I didn't have to deal with the concepts of sex and gender then I would be a much less uptight person I suspect.

[Submission 8].

²⁵⁷ Submission No 40, 3.

²⁵⁸ Submission No 40, 2-3.

303. However, the Equal Opportunity Commission also notes that, on a positive note, the *EO Act* does not restrict recognition of a person's transgender identity to persons who have undergone medical intervention.²⁵⁹ This means that people who have potentially been discriminated against by such policies or practice (although not legislation) to pursue a discrimination complaint.²⁶⁰

Equal Opportunity Commission Case study

An enquirer from a support organisation rang for advice on transgender provisions in the Act and in the federal Sex Discrimination Act (SDA). She is enquiring for parents of a six-year-old transgender child who plays mixed sport. The association is now saying that the parents will need to provide a medical report for the child to continue to play as their chosen gender. Advised her that this should not be required under the Equal Opportunity Act. Also referred to the Australian Human Rights Commission to discuss transgender provisions under the SDA.

[Submission No 40 3]

Burden of Proof in Unlawful Discrimination Actions

304. The Equal Opportunity Commission has submitted that issues can arise when determining whether or not a complaint falls under the *EO Act* due to the burden of proof.²⁶¹ As outlined in a 2011 Commonwealth Discussion Paper examining Anti-Discrimination Laws:

Under the tests for direct discrimination in all Commonwealth, State and Territory anti-discrimination laws, the burden of proving that the respondent treated the complainant less favourably because of their protected attribute falls entirely on the complainant.²⁶²

305. As the Equal Opportunity Commission advises, in South Australia, the burden of proof also remains on the complainant if the alleged discrimination is indirect – the complainant needs to show that the discriminatory condition was unreasonable.²⁶³ The Equal Opportunity Commission submitted that this can be a heavy onus for the complainant to bear:

... particularly in situations such as recruitment and dismissal where a respondent can

²⁵⁹ Submission No 40, 3.

²⁶⁰ Ibid.

²⁶¹ Submission No 40, 6.

²⁶² Commonwealth of Australia, Attorney General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, Discussion Paper (2011).

²⁶³ Submission No 40, 6.

give many reasons why a person was not hired or was dismissed.²⁶⁴

306. The Equal Opportunity Commission advises that while in most cases, it will take up complaints if, on the balance of probabilities, discrimination appears to be a contributing factor, meeting the requisite burden of proof can be more difficult if the matter proceeds to the Equal Opportunity Tribunal.²⁶⁵

Participant Quote:

The combination of the onus being on the person alleging discrimination, the low level of funding and support for complaints handling and the focus on mediated outcomes can combine to mean that people don't have a lot of confidence in using these laws. As a community activist over three decades I have heard many instances of discrimination and virtually none about using these processes. All of the data I have ever seen about discrimination/abuse/violence suggest that it is widespread, and no figure for usage of complaints handling ever comes close to the self report data. The data about discrimination, harassment and violence against LGBTIQ people suggest the vast majority of such experiences are never addressed using any legal mechanism. [Submission 27]

307. The South Australian experience can be contrasted with States such as Victoria, Queensland and the ACT, where, once a complainant has established the discriminatory impact of a condition, requirement or practice, the respondent must prove that the discriminatory condition was reasonable. Similarly, under the *Fair Work Act 2009* (Cth) the burden of proof for direct discrimination lies with the respondent – if a complainant alleges that a person took an action for a particular reason, this is presumed to be the reason for the action unless the respondent proves otherwise.²⁶⁶

308. In its submission to SALRI, the Equal Opportunity Commission noted that in a 1994 review of the *EO Act*, Brian Martin QC recommended a number of changes (some of which were implemented in 2009) including reversing the burden of proof for indirect discrimination.²⁶⁷

309. The Equal Opportunity Commission shares this view, and considers that reversing the onus of proof, at least for indirect discrimination, would much fairer to complainants and bring SA in line with a number of other States.²⁶⁸

²⁶⁴ Ibid.

²⁶⁵ Submission No 40, 6.

²⁶⁶ *Fair Work Australia 2009* (Cth) Part 3-1.

²⁶⁷ Brian Martin QC, *Review of the Equal Opportunity Act 1984* (SA) (1994).

²⁶⁸ Submission No 40, 6.

Equal Opportunity Commission Case study

C applied for a job. She has a previous back injury which has healed. She has transitioned from male to female. At the initial stages of the recruitment process she received a lot of positive feedback indicating that she would be selected. She understands that her medical indicated that she could perform the job safely, but also that it would have revealed about her transition from male to female. C believes this is why she was not hired.

R provided response that C had not been employed due to her failing one aspect of the medical assessment. The medical report recommended that C be offered the opportunity to submit a specialist report in this regard on the basis that her testing result was inconsistent with her physical presentation. R never offered C this opportunity and advised C that she would need to reapply.

A conciliation conference was held but the parties were unable to reach an agreement.

The complaint was referred to the Equal Opportunity Tribunal but was settled by negotiation.

Equal Opportunity Commission Case study:

Enquirer works for an organisation and believes he is being bullied because of his sexuality. When he has questioned this, they have said 'don't be so precious', etc. Advised that he could lodge a complaint for assessment but he would need to demonstrate a link between the bullying and his sexuality. Also referred to Safework SA to discuss workplace bullying.

Overbroad scope of exceptions for unlawful discrimination

310. Concerns were expressed in the SALRI Audit consultation process that permanent exceptions to anti-discrimination laws can act to protect traditional social structures and hierarchies and entrench unfair discrimination.²⁶⁹ Rather than allowing a nuanced balancing of rights in cases where particular rights conflict, to many participating in the SALRI Audit, permanent exceptions appear to be arbitrary, inflexible, broad, and unreasonable.

311. The exemptions available to religious bodies have raised particular concerns.

Participant Quote:

[S]ome of my friends employed at religious schools have lived with a constant fear of their sexuality being discovered. They have had to avoid public events held within the gay and lesbian community for fear of being seen there. They have had to restrict their social options and live a life of secrecy.

²⁶⁹ See, for example, submissions 27 and 38.

This has not been good for them or their friends. And it cannot be good for the community to have people living double lives like this. Additionally, it must have an appalling impact on LGBTI students at these schools. And it will enforce homophobic values in other students at these schools. [Submission 32].

312. The Equal Opportunity Commission has told SALRI that it receives enquiries and complaints where organisations rely upon the exemptions to discriminate in ways that could be considered to be in conflict with societal expectations.²⁷⁰ Examples of this include when students and employees in non-religious roles (such as administration and maintenance) are discriminated against at religious schools.

Equal Opportunity Commission Case study

A legal service called for advice. They are working with a family whose 14 year old daughter was boarding at a religious school on a scholarship. She and another girl recently told their supervisor that they are gay. Both girls were then expelled and lost their scholarships. There was no consultation with the parents, no warnings etc. and she has been flown home. Discussed complaint process but advised that the school may argue that they are covered under exemption (50(c)).

313. SALRI has been referred to the Tasmanian approach to exemptions to unlawful discrimination for religious bodies as 'best practice'.²⁷¹ Under the *Anti-discrimination Act 1998*, religious organisations are only permitted to discriminate in terms of employment based on religion (s 51) and participation in religious observance (s 52).

314. Not every submission to SALRI queried the ongoing appropriateness of the religious-based exemptions to unlawful discrimination. In a letter to the Attorney General and shared with SALRI,²⁷² the Association of Independent Schools South Australia ('the AISSA') strongly opposed any attempt to remove the protections for religious schools under ss 34(3) and 85Z(2) of the *EO Act*. It submitted:

For adherents of faith, matters of religious belief are of the highest personal significance. For many people, they rest at the very core of their existence, informing all of their conduct and decision making. While it is accepted that privately held religious views should not be imposed on individuals in the public sphere, the area of education of children is so inextricably linked with the right of parents to organise private family life in accordance with their religion or belief-system that both State and Federal equal

²⁷⁰ Submission No 40, 5.

²⁷¹ Submission No 33, 4.

²⁷² Submission No 45.

opportunity law has recognised that education is an area warranting special exemption.²⁷³

315. The AISSA described the exemption in s 34(3), relating to discrimination on the grounds of ‘chosen gender’ and sexuality’, as ‘crucial in enabling religious schools to employ staff with values and beliefs consistent with the ethos of the school’ and noted that the exemption is only available if the school satisfies other conditions including a requirement to have a written policy on the matter which must be provided to prospective employees.²⁷⁴ AISSA described the exemption in s 85Z, relating to same sex couples, as ‘an essential exemption for religious schools’.²⁷⁵

316. The AISSA further noted that the need for protections for religious bodies has been extensively discussed across a wide range of State and Commonwealth inquiries into equal opportunity legislation, including the 2004 South Australian inquiry into the Statutes Amendment (Relationships) Bill 2004.²⁷⁶

317. Another exemption in the Act that has raised some concerns is the exemption in s 79A of the *EO Act* relating to infectious diseases.²⁷⁷ This provision provides that discrimination will not be unlawful if it:

- (a) is directed towards ensuring that an infectious disease is not spread; and
- (b) is reasonable in all the circumstances.

318. While the *EO Act* prohibits discrimination on the basis of infection status (or presumed infection status),²⁷⁸ the Equal Opportunity Commission has explained that this exemption from the disability discrimination provisions in the Act can be used to treat people differently based on their sexuality in some scenarios, including, for example, the exclusion from blood donation of men who have had male-to-male sexual contact within the previous 12 months. The Equal Opportunity Commission has explained that this exclusion is based on statistics such as the following:²⁷⁹

HIV has been concentrated among gay men in Australia since the epidemic began; 75%

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Submission No 28.

²⁷⁸ *Equal Opportunity Act 1984* (SA) s 79A.

²⁷⁹ Submission No 40, 5.

of all HIV infections diagnosed in Australia with recorded exposure category are due to male homosexual contact.

HIV continues to predominantly affect gay and other MSM in Australia with 70% of all diagnoses in 2013 among this group.²⁸⁰

319. SALRI understands that the Australian Red Cross Blood Service established an independent expert Committee in 2010 to look at the rules related to blood donation that currently prevent donation from men who have had male-to-male sexual contact within the previous 12 months. The Committee released its report, *Review of Blood Donor Deferrals Relating to Sexual Activity*, in 2012, recommending that sexually active gay men should be able to donate blood after a six month wait which is in line with Japan and South Africa. The recommendation was, however, rejected by the Therapeutic Goods Administration.²⁸¹

320. The Equal Opportunity Commission explains:

the exemption in s 79A of the Equal Opportunity Act means that a person affected by the rule cannot make a complaint. While the Commission recognises that, if a complaint were to be lodged, it would likely be unsuccessful (previous complaints about this heard by anti-discrimination tribunals in other States have failed), it considers that it may be worth examining this exemption in light of other possible flow on effects for men based on their sexuality and a presumption that all gay men are at an increased risk of having or contracting HIV (in areas such as employment and healthcare, for example).²⁸²

321. Another exemption that has raised concern is that relating to transgender persons in sport.²⁸³ The Equal Opportunity Commission report noted, having been approached not only by transgender persons who believe that they have been discriminated against but also by organisations seeking guidance on how or if they should accommodate transgender applicants according to their gender identity.²⁸⁴

322. Both the *EO Act* and the *Sex Discrimination Act 1984* (Cth) includes exemptions for single-sex sporting competitions where strength, stamina or physique is relevant. In the *EO Act*, the exemption contained in s 48(a) provides that it is not unlawful to exclude a person from competing in a sporting activity on the ground of sex where strength, stamina or physique is relevant to the outcome of the competition. That section does not cover discrimination

²⁸⁰ The Kirby Institute, *HIV in Australia, Annual Surveillance Report 2014 Supplement*, (2014) The Kirby Institute, UNSW 1 <<https://kirby.unsw.edu.au>>.

²⁸¹ Submission No 40, 5. See also Australian Red Cross Blood Service, *Review of Blood Donor Deferrals Relating to Sexual Activity*, 2012.

²⁸² Submission No 40, 5.

²⁸³ South Australian Equal Opportunity Commission Submission to Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, National Consultation Report (2015).

²⁸⁴ *Ibid.*

based on a person's chosen gender. Therefore, where a person genuinely identifies as a member of the opposite sex (whether by means of medical intervention, style of dressing or otherwise), or by living or as a member of the opposite sex, and is treated unfavourably on this basis, then that is unlawful.

323. The Equal Opportunity Commission is aware that some sports governing bodies require that, particularly at a professional level, each contestant seeking registration must produce a birth certificate indicating their gender or a Recognition Certificate.²⁸⁵ It is arguable that this could amount to unlawful discrimination on the ground of chosen gender. However, the Equal Opportunity Commission acknowledges that the issues relating to participation in sport by transgender persons are complex and there remains a need to balance the right of individuals to participate in sport as their chosen gender against the right of individuals to compete in a fair competition which aligns with their strength, stamina and physique and in which other competitors do not have an unfair advantage in that sense. The Commission's view is that every reasonable effort should be made to facilitate fair participation in sporting competitions of a person's chosen gender and that in practice very few individuals will undergo gender reassignment surgery (in particular those transitioning from female to male).²⁸⁶

Vilification

324. A number of submission makers raised concerns with respect to the absence of vilification laws in South Australia.²⁸⁷ The Equal Opportunity Commission, for example, told SALRI that in recent years, it has been approached on a number of occasions regarding 'anti-gay' propaganda being distributed and persons preaching anti-gay messages in public spaces²⁸⁸ but has limited options to respond to such complaints because, unlike New South Wales and Tasmania, South Australian law does not contain prohibitions on vilification on the grounds of sexual orientation or gender identity.²⁸⁹

325. The City of Marion also raised concerns about the distribution of homophobic material in their local area in its submission to SALRI.²⁹⁰ The City of Marion expressed its concern that

²⁸⁵ Above n 283.

²⁸⁶ Above n 283.

²⁸⁷ For example see Submissions No 40 and 38.

²⁸⁸ Submission No 40, 5.

²⁸⁹ See *Ibid.* Anti-discrimination legislation in both New South Wales and Tasmania makes vilification on the basis of a person's sexuality unlawful. New South Wales covers public acts such as remarks in publications, graffiti, posters and speeches, among others. Tasmania covers any incitement, by a public act, hatred, serious contempt for, or severe ridicule on the basis of sexual orientation (as well as other grounds such as race).

²⁹⁰ Submission 41.

buildings and homes throughout the City of Marion had been ‘letterboxed’ with ‘gay hate’ material following the City of Marion’s decision in June 2015 to permanently fly the rainbow flag outside of its Administration building.²⁹¹ The City of Marion has since referred the matter to the South Australian police, and resolved to raise the issue with the Minister for Social Inclusion and the Equal Opportunity Commission with a view to seeking support to strengthen existing South Australian laws to provide improved protections against homophobic activities such as that experienced within their City.²⁹²

Participant Quote:

To put it bluntly, there is no justification whatsoever to have anti-vilification laws which protect people from racist vilification, but to simultaneously not have anti-vilification laws which apply to homophobia, biphobia, transphobia and intersexphobia.

Homophobia, biphobia, transphobia and intersexphobia are just as unacceptable, and, most importantly, just as harmful, as racism - with significant impacts on the mental health of young LGBTI people in particular. [Submission 33]

326. The Equal Opportunity Commission further notes that it appears that such acts also fall outside any criminal legislation which means that little can be done to curb this behaviour even if many in the community find it offensive. The Equal Opportunity Commission submitted that if the South Australian *EO Act* had similar provisions to New South Wales or Tasmania, it could allow the Commissioner to take some action such as that recently undertaken in Tasmania.²⁹³

The Commonwealth Sex Discrimination Act 1984 Approach

327. The Commonwealth’s approach to providing protection for discrimination on the grounds of sexual orientation, gender identity and intersex status has been widely identified as reflecting best practice by many submissions to SALRI.²⁹⁴

328. The Commonwealth model is also an attractive option for reform for South Australia as it would promote consistency between jurisdictions and limit the potential for ‘forum

²⁹¹ Ibid.

²⁹² Submission 41.

²⁹³ See ‘Tasmanian man who distributed anti-gay pamphlets ordered to apologise’ *ABC News* (online), 30 June 2015, <<http://www.abc.net.au/news/2015-06-30/anti-gay-pamphleteer-ordered-to-apologise-for-offending/6585264>>. Section 146 of the *Criminal Justice Act 2003* (Eng) provides for increases in sentences for aggravation in certain classes of offences related to either disability or sexual orientation. See further the CPS *Guidance on Prosecuting Cases of Homophobic and Transphobic Crime*, <http://www.cps.gov.uk/legal/h_to_k/homophobic_and_transphobic_hate_crime/>

²⁹⁴ See, for example, Submissions Nos 36, 40, 48 and 49.

shopping' for complaints. SALRI further notes that South Australia is currently subject to an exemption by the Commonwealth in respect of the *Sex Discrimination Act 1984* (Cth) to facilitate the amendment of discriminatory State laws until 31 July 2016 - a deadline that has already been extended and may well be enforced soon.

329. In 2013, the *Sex Discrimination Act 1984* (Cth) ('the SDA') was amended²⁹⁵ to provide protections against unlawful discrimination against a person on the basis of sexual orientation, gender identity and intersex status under Commonwealth law. Same-sex couples are now also protected from discrimination under the definition of 'marital or relationship status'.
330. The definitions and protections included in the 2013 Commonwealth changes were developed following extensive community consultation and public debate. They appear to address the concerns outlined above with respect to the existing South Australian provisions, and utilizing this model of reform would also promote consistency between the Commonwealth and State anti-discrimination regimes - improving efficiency and clarity for all users.
331. Under the amended SDA, 'sexual orientation' is identified as a protected attribute. It is defined to mean a person's sexual orientation towards:
- (a) persons of the same sex or
 - b) persons of a different sex or
 - c) persons of the same sex and persons of a different sex.
332. The new definition does not use labels such as 'gay, lesbian, homosexual, bisexual, straight, heterosexual', as these may be offensive or inaccurate; however, it is intended to cover these orientations.
333. Under the amended SDA 'gender identity' is also a protected attribute. It is defined to mean 'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person'.²⁹⁶ This includes the way people express or present their gender and recognises that a person's gender identity may be an identity other than male or female.

²⁹⁵ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

²⁹⁶ *Sex Discrimination Act 1984* (Cth) s 5.

334. Some terms used to describe a person's gender identity include trans, transgender and gender diverse. The SDA does not use these labels, however, it is intended to cover these identities and more. In this way, the SDA provides protection from discrimination for people who identify as men, women and neither male nor female. It does not matter what sex the person was assigned at birth, or whether the person has undergone any medical intervention.
335. Under the amended SDA 'intersex status' is also a protected attribute. It is defined to mean the status of having physical, hormonal or genetic features that are:
- a) neither wholly female nor wholly male or
 - b) a combination of female and male or
 - c) neither female nor male.
336. As the AHRC explains, being intersex is about biological variations, not about a person's gender identity. An intersex person may have the biological attributes of both sexes, or lack some of the biological attributes considered necessary to be defined as one or other sex. Intersex people typically also have a gender identity and sexual orientation.
337. The amended SDA also extends the definition of marital status to 'marital or relationship status' which includes de facto same-sex couples.

Specific Review of Exceptions to Unlawful Discrimination

338. All Australian jurisdictions contain specific exceptions or exemptions to unlawful discrimination, with a strong level of convergence as to the type of service, body or conduct that will be considered lawful, even though it otherwise meets the criteria for unlawful discrimination.
339. Undoubtedly the most controversial of the permanent exceptions are those that apply to religious groups. As the HRLC has observed, neither full religious freedom in all circumstances, nor complete disregard for religious autonomy is expected or accepted in Australia.
340. In light of the complexity of the issues arising from exemptions to unlawful discrimination under the *EO Act*, SALRI recommends that the South Australian Government provide SALRI with a separate reference to conduct an extensive public consultation on the continued necessity and appropriateness of the exceptions in the *EO Act* - including those in

Part 3 relating to discrimination on the grounds of sex, sexuality and chosen gender. This issue requires further review.

341. Similar reviews in other jurisdictions²⁹⁷ have identified a number of options for reform, including a model that would replace permanent exceptions to anti-discrimination laws with a general test which permits discrimination in circumstances where it is a reasonable and proportionate means of achieving a legitimate end, supplemented by appropriate guidelines and practice note.²⁹⁸ Under this approach, competing interests could be considered and balanced on a case-by-case basis. If a discriminatory policy or practice is explained and shown to be reasonable and proportionate then the discrimination would be allowed.

Group Two: Recommendations for Immediate Action

2.3 Amend ss 5 and 29 and Part 3 of the *Equal Opportunity Act 1984 (SA)* to: replace the term 'sexuality' with 'sexual orientation'; replace the term 'chosen gender' with 'gender identity' and insert a new provision 5(6) 'intersex status'- with new terms to be defined in accordance with s 4 of the *Sex Discrimination Act 1984 (Cth)*.

SALRI intends to undertake further research and make further detailed recommendations with respect to:

2.7 The current exceptions and exemptions to unlawful discrimination under the *Equal Opportunity Act 1984 (SA)* with a view to determining whether each exemption remains necessary and having regard to other application-based models of providing limited exemptions from unlawful discrimination.

Criminal Law and the Partial Defence of Provocation

The Partial Defence of Provocation

342. In South Australia, the law currently offers a partial defence to murder (which, if successful, can reduce a crime to manslaughter), when a person who is seriously provoked loses control and kills the person who has provoked them.²⁹⁹

343. The homosexual advance defence (sometimes referred to as the 'gay panic' defence),³⁰⁰ is one circumstance where the partial defence of provocation can apply in South Australia. It can

²⁹⁷ See, for example, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995* (2009).

²⁹⁸ See the Human Rights Law Resource Centre's submission to Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (submission no. 402) <<http://www.aph.gov.au>>.

²⁹⁹ *Lindsay v The Queen* (2015) 319 ALR 207.

³⁰⁰ This controversial 'defence' is not confined to Australia. It also existed in the UK where it was known as the 'Guard'sman's Defence'. See Kent Blore, 'The Homosexual Defence and the Campaign to Abolish it in Queensland: the Activist's Dilemma and the

result in a murder charge being downgraded to manslaughter if the accused was ‘provoked’ by the victim making unwanted homosexual advances towards to the accused. The High Court has recently clarified that this defence remains available as part of provocation under South Australian law.³⁰¹ However, South Australia likely will soon be the only jurisdiction in Australia that permits this aspect of the partial defence of provocation.³⁰²

344. A number of submissions made to SALRI expressed a strong view that the homosexual advance aspect of the partial defence clearly discriminates on the basis of sexual orientation.³⁰³ These submissions explained, implicit in the defence is the notion that being subjected to an unwanted homosexual advance is inherently degrading to the person propositioned. As discussed in the Resilient Individuals Report, the defence effectively sanctions or legitimises violence towards homosexuals when they express their homosexuality by propositioning others.³⁰⁴

345. As Justice Kirby powerfully observes in his dissent in *Green v R*, the defence may also be incongruent with modern attitudes regarding homosexuality:

In my view, the ‘ordinary person’ in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or inflict grievous bodily harm.

If every woman who was the subject of a ‘gentle’, ‘non-aggressive’ although persistent sexual advance ... could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation will be sorely tested and undesirably extended ... this court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent...³⁰⁵

346. The Equal Opportunity Commission has recently expressed similar views, noting:

[the] common law ‘gay panic’ defence is no longer reflective of community attitudes in

Politician’s Paradox’ (2012) 12 *University of Queensland of Technology Law and Justice Journal* 36, 37. See generally as to the ‘gay panic’ defence, Santo de Pasquale, ‘Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy’ (2002) 26 *University of Melbourne Law Review* 110; Ben Golder, ‘The Homosexual Advance Defence and the Law/Body Nexus towards a Poetic of Law Reform’ (2004) 11 *Murdoch Electronic Law Journal of Law* 15; Bronwyn Statham, ‘The Homosexual Advance Defence: “Yeah I killed him but he did worse to me” *Green v R*’ (1999) 20 *University of Queensland Law Journal* 301.

³⁰¹ *Lindsay v The Queen* (2015) 319 ALR 207.

³⁰² The Queensland Attorney General, Queensland being the only other State where the defence forms a part of the law, in April 2015 announced that amendments would be introduced to ensure a homosexual advance was no longer considered provocation for murder.

³⁰³ See, for example, Submissions No 40 and 39.

³⁰⁴ Above n 283, 64. See also David Mack, ‘But Words Can Never Hurt Me’: Untangling and Reforming Queensland’s Homosexual Advance Defence’ (2013) 35 *Sydney Law Review* 167.

³⁰⁵ *Green v R* (1997) 191 CLR 334, 415-416.

our society today and has no place in our justice system. The 'gay panic' defence established in *Green v The Queen* is a relic of a bygone era where homophobic attitudes were tragically rife and accepted in our community.³⁰⁶

347. These features of the defence led the AHRC to recommend that Queensland and South Australia legislate to abolish the 'homosexual advance' defence.³⁰⁷

348. The South Australian Legislative Review Committee considered this issue in 2014 and its *Report into the Partial Defence of Provocation* tabled on 2 December 2014, found that due to:

the South Australian Court of Criminal Appeal judgment of *R v Lindsay*, it is now very unlikely that a non-violent homosexual advance, of itself, will ever constitute sufficient grounds to establish a provocation defence.³⁰⁸

349. The South Australian Legislative Review Committee is currently conducting a second review into the partial defence of provocation, following the recent High Court Decision of *Lindsay v The Queen*³⁰⁹ setting aside the decision of the South Australian Court of the Criminal Appeal in *R v Lindsay*.³¹⁰ Prior to the High Court's decision many, including the South Australian Attorney General, the Hon John Rau, were of the view that the 'gay panic defence was a common law notion that no longer formed part of the law in South Australia'.³¹¹

350. The High Court's decision in *Lindsay v The Queen* has given rise to the need for the South Australian Legislative Review Committee to revisit this position and reconsider a Private Member's Bill introduced by the Hon Tammy Franks with a view to abolishing the homosexual advance defence as part of provocation in South Australia.³¹² The Bill proposes to prevent conduct of a sexual nature by one person towards another constituting provocation merely because the two people involved were of the same sex.

351. The Law Society of South Australia actively participated in the South Australian Parliament's Legislative Review Committee's previous inquiry into the partial defence of provocation, including by providing a number of written submissions and appearing to give evidence before the Committee.³¹³ In its May 2013 response to the Private Member's Bill, the Law

³⁰⁶ Submission No 40, 12.

³⁰⁷ Above n 283, 3 - Recommendation 6.

³⁰⁸ Legislative Review Committee, Parliament of South Australia, *Report into the Partial Defence of Provocation* (2014) 40 [8.1].

³⁰⁹ (2015) 319 ALR 207.

³¹⁰ (2014) 119 SASR 320.

³¹¹ Submission from Hon John Rau, Attorney-General, to the South Australian Parliamentary Legislative Review Committee's Inquiry into the Partial Defence of Provocation, 23 July 2014, 3.

³¹² The proposed Bill is called the Criminal Law Consolidation (Provocation) Amendment Bill 2013.

³¹³ See, for example, submission by the Law Society of South Australia to the Hon Tammy Franks, 23 June 2013 (particularly the

Society expressed the view that if enacted, it would 'confuse this area of law and alter the common law defence of provocation to exclude or otherwise limit the occasions in which a sexual advance may constitute provocation'. The Law Society drew the Committee's attention to the High Court's decision in *Masciantono v The Queen*³¹⁴ and also discussed the contentious case of *Green v The Queen*,³¹⁵ both of which set out the relevant common law principles at that time.

352. In its June 2015 submission, following the High Court's decision in *Lindsay*, the Law Society expressed the view that the decision in *Lindsay* demonstrated that the partial defence of provocation 'can and does have regard to contemporary community attitudes and standards.' The Law Society expressed regret that the decision had led to increased calls for the abolition of the 'regrettably coined "gay panic defence"'.³¹⁶ The Law Society submitted:

The common law partial defence has a rationale which, when properly explained to the community, would be seen to be acceptable and consistent with social norms. That is, that most right minded people would accept that ordinary people lose self-control and act in a way which renders them critically responsible but not to the extent of murder.

Importantly, the partial defence works to avoid an inappropriate murder conviction. There are two aspects to this. The first is the stigma associated with a conviction for murder. If, in truth, the unlawfully killing was a manslaughter in the sense it was devoid of the mental element for murder, that should be reflected in the verdict.

The second aspect is the penalty. There is currently a non-parole period for murder. No such minimum for murder. The Society does not believe the abolition of the minimum non-parole period (as has been suggested) to permit courts to have regard to the factual circumstances of provocation will result in sentences. In other words, it is likely sentences will accord with usual sentences for murder. This, the Society says, would be an unjust outcome for those who did not have the mental element for murder.³¹⁷

353. When appearing before the Legislative Review Committee to give evidence, the Law Society outlined an alternative position, to be considered only in the event that substantial reform of the partial defence of provocation was inevitable.³¹⁸ This option was based on the English model of the defence of 'loss of control' that is set out in ss 54 and 55 of the *Coroner's and*

letter from the Law Society of South Australia to the Hon Tammy Franks dated 29 May 2013, available at <<https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CId=301>>.

³¹⁴ (1995) 183 CLR 58.

³¹⁵ (1997) 191 CLR 334.

³¹⁶ Submission by the Law Society of South Australia to the South Australian Parliamentary Legislative Review Committee's Inquiry into the Partial Defence of Provocation, 2 June 2015 (provided to SALRI as part of Submission No 44).

³¹⁷ Ibid.

³¹⁸ Ibid.

Justice Act 2009 (Eng).³¹⁹ This provision, which abolishes the common law partial defence of provocation, focuses on the circumstances in which 'loss of control' can now amount to a partial defence and sets out certain 'qualifying triggers' that must be met before the defence is available.

354. The findings of the Legislative Review Committee's review will be relevant to this Audit.
355. SALRI also acknowledges the views of the Law Society of South Australia and concurs with the Equal Opportunity Commission's calls for a broader review of the law of provocation, to ensure the 'gay panic' defence is removed in the most equitable manner possible.³²⁰
356. SALRI further suggests that consideration also be given to the recent reforms in New South Wales following the enactment of the *Crimes Amendment (Provocation) Act 2014*, which reformed the law of provocation to provide a more limited partial defence of 'extreme provocation'.³²¹ The Act precludes the homosexual advance defence through the phrase, 'Conduct of the deceased does not constitute extreme provocation if: (a) the conduct was only a non-violent sexual advance to the accused, or (b) the accused incited the conduct in order to provide an excuse to use violence against the deceased.'³²² This amendment appears to deal with the circumstances that might otherwise give rise to the homosexual advance defence, without specifically confining the wording to a homosexual encounter.
357. However, SALRI also notes that against such an approach remains the larger question of the future of the general defence of provocation.
358. The defence of provocation is controversial and has been subject of extensive criticism (including that it applies unfairly to females accused of murder and unfairly assists males).³²³ SALRI notes that the whole defence of provocation is complex (including the interaction with mandatory sentences for murder). As a result the 'homosexual advance' defence requires detailed further review.

³¹⁹ Ibid.

³²⁰ Submission No 40, 12.

³²¹ Explanatory Note, *Crimes Amendment (Provocation) Bill 2014* (NSW).

³²² *Crimes Amendment (Provocation) Act 2014* (NSW) s 23(3).

³²³ See, for example, Stanley Yeo, 'Resolving Gender Bias in Criminal Defences' (1993) 19 *Monash University Law Review* 104; Graeme Coss, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18(1) *Current Issues in Criminal Justice* 51; Andrew Hemming, 'Provocation: a Totally Flawed Defence that has no place in Australian Criminal Law Regardless of Sentencing Regime' (2010) 14 *University of Western Sydney Law Review* 1; Victorian Law Reform Commission, *Defences to Homicide*, Final Report, October 2004, 26-30; Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64, September 2008, 331-332.

SALRI intends to undertake further research and make further detailed recommendations with respect to:

2.8 The aspect of the existing common law partial defence of provocation that permits homosexual advances to constitute circumstances of provocation, having regard to any relevant recommendations of the South Australia Legislative Review Committee and relevant interstate reforms, including the *Crimes Amendment (Provocation) Act 2014* (NSW).

Expungement of criminal record

359. Concerns were raised by a number of submission makers³²⁴ that despite being the first State to expunge historical gay sex convictions in 2013 with the *Spent Convictions (Decriminalised Offences) Amendment Act 2013* (SA), the process for expungement in South Australia is yet to be resolved.

360. These concerns were reflected in the Resilient Individuals Report.³²⁵

³²⁴ See, for example, Submission No 39.

³²⁵ Above n 283, 64.

Group Three: Legislative Change to Address Discrimination on the Grounds of Marital and Relationship Status

Overview

361. In addition to the laws identified as Group Three, there are a range of other South Australian laws that treat people differently, or convey different legal rights, on the basis of a person's marital or relationship status. These are described as 'Group Three laws' in this Audit Report. Consultations conducted by SALRI suggest that while important, the reform of these laws is not as urgent as those identified in Group Two. The concept of 'marriage equality' featured in many submissions to SALRI as being of symbolic and practical significance.
362. Consultations undertaken by SALRI suggest that, outside of reform to the *Marriage Act 1961* (Cth), the discrimination arising from many of these Group Three laws could be addressed by replacing references to 'marriage or married' with 'domestic partner', and/or removing references to 'husband and wife'. However, it is important to note certain criteria must be met before a couple can qualify as a 'domestic partner' that can give rise to discrimination on the grounds of sexual orientation, gender identity or intersex status. In particular, the requirement for cohabitation for a continuous period of three years in the absence of a child constitutes a form of unfavourable treatment, as similar criteria are not applied to married heterosexual couples. These issues, and possible options for reform, are discussed below.

The Marriage Act

363. 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'.³²⁶ This definition was inserted in 2004 by the *Marriage Amendment Act 2004* (Cth).
364. This requirement discriminates against same sex couples, and people who do not fit within the binary concepts of 'man' and 'woman', such as trans individuals, and some people with intersex variations who may not identify as either male or female, by denying these people access to the civil institution of marriage. For example, under current law, an established married couple, one of whom is a trans person, may be required to obtain a divorce in order

³²⁶ *Marriage Act 1961* (Cth) s 5.

for the trans person to amend their birth certificate. Similarly, a couple cannot access civil marriage if one party is legally recognised as a sex other than male or female.

365. 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,³²⁷ 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.

366. As noted by the Law Society of South Australia, the discriminatory impact of the *Marriage Act* can result in significantly social exclusion, particularly given that marriage is seen by many as an important institution that reflects a cultural understanding of relationship.

Participant Quote:

[I] once held a view of not having a view on this issue. [H]owever a very good friend of mine helped change this view by being open and showing the same compassion [I] would to other[s], just because he was gay doesn't mean he has any different views or feelings tha[n] [I] do about love, marriage and all the other stuff. [W]hy cant we recognise that they have the same views as us 'heterosexuals', they wish to marry the one they love, they wish to raise a family and they wish to have the same rights financially as any normal couple. [Submission 7].

Participant Quote:

[The prohibition on same sex marriage] made a section of my marriage just bit revolting - the celebrant had to define a marriage between a man and a woman out-loud. It was a slap in the face to those who were attending and identify as LGBTIQ. [Submission 28]

Participant Quote:

Not being able to get legally married impacts our lives also, as our relationship isn't taken as seriously by family or by society. While being recognised as a 'domestic partnership' gives us the same rights as a de-facto couple, the feeling of exclusion from the community - especially when attending weddings/engagements, watching television, going to family gatherings, organising

³²⁷ Law Society of South Australia, Council Resolution, 2 September 2013 (carried unanimously) (forming part of Submission No 44).

holidays etc is felt on a daily basis when surrounded by people who are not excluded from a basic cultural norm in our society. [Submission 21]

367. Because the *Marriage Act 1961* (Cth) is a Commonwealth law, constitutional rules apply that limit the types of laws South Australia can make about marriage.³²⁸
368. The Commonwealth Constitution provides Parliament the power to make laws with respect to marriage.³²⁹ In 2013, in a ruling relating to the validity of the *Marriage Equality (Same Sex) Act 2013* (ACT),³³⁰ the High Court held that the power to make laws with respect to marriage was a concurrent power to be shared by both the Commonwealth and the States. However, it further found that with the passage of the Commonwealth *Marriage Act 1961* (Cth) there was no scope for the valid operation of the *Marriage Equality (Same Sex) Act 2013* (ACT).³³¹ The High Court also found that the Commonwealth's power to legislate with respect to marriage was broad enough to encompass marriage for same-sex couples.³³²
369. Prior to this decision, reports released by the New South Wales Parliamentary Committee on Social Issues had found that a State parliament 'has the power to legislate on the topic of marriage, including same-sex marriage' however 'if New South Wales chooses to exercise that power and enact a law for same-sex marriage, the law could be subject to challenge in the High Court of Australia'.³³³ Similarly, the Tasmanian Law Reform Institute observed that there were, at that time, no absolute impediments to achieving state-based or Commonwealth marriage equality.³³⁴
370. While many legal commentators consider that the High Court's 2013 decision and the relatively broad scope of the 2004 amendment to the *Marriage Act 1961* (Cth) severely limits the capacity for States to legislate in the area of same sex marriage,³³⁵ others take the view that

³²⁸ *Australian Constitution* ss 51(xxi).

³²⁹ The High Court also unanimously held that the Commonwealth has the power to legislate with respect to marriage equality pursuant to s 51(xxii) of the Constitution (the marriage power). See *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

³³⁰ *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

³³¹ *Ibid* [55]-[62]

³³² *Ibid* [10].

³³³ Standing Committee on Social Issues, Parliament of New South Wales, *Same-sex Marriage Law in New South Wales* (2013) xii.

³³⁴ Tasmanian Law Reform Institute, *The Legal Issues Relating to Same-Sex Marriage*, Research Paper No 3 (2013).

³³⁵ See, for example, letter from Law Society of South Australia to Hon Tammy Franks, 5 March 2015 (provided to SALRI as part of Submission No 44).

‘there are a number of legal and policy reasons why a State parliament might again debate a Bill providing for same sex marriage’.³³⁶

371. For the purposes of this Audit, SALRI has focused its attention on identifying current areas of discrimination in South Australian law and possible options for reform that can be made within the current Commonwealth law (whilst accepting valid criticisms can be made of that law). SALRI is particularly focused on those options that would remove discrimination and also improve the consistency of South Australia's laws with that of other Australian jurisdictions. In so doing, it recognises the potential implications for South Australia should amendments be made to remove the current discrimination from the *Marriage Act 1961* (Cth).
372. As at 25 August 2015 there were five separate Bills³³⁷ before the Commonwealth Parliament relating to the amendment of the *Marriage Act*, including the Marriage Legislation Amendment Bill 2015 (Cth), a Private Member's Bill introduced on 17 August 2015 co-sponsored by Mr Entsch, Ms Gambaro, Ms TM Butler, Mr Ferguson, Mr Bandt, Ms McGowan and Mr Wilkie.
373. The meaning of ‘marriage’ remains a hotly contested issue at the parliamentary and community level.³³⁸ However polling suggests that there is a growing consensus of support for change. The recent Resilient Individuals Report, for example, cites an analysis by the firm Crosby Textor that suggests that from June 2004 to June 2014, public ‘support’ for same-sex couples being able to access the civil institution of marriage has risen from 38% to 72%.³³⁹ Reform of 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 this Audit Report. It is likely that should reform of that nature proceed, the South Australian Government would need to swiftly assess the laws identified in the Audit 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

³³⁶ George Williams, 'Same-Sex Marriage and the Australian States' (2015) 40(1) *Alternative Law Journal* 4.

³³⁷ Marriage Legislation Amendment Bill 2015 (Cth); Marriage Amendment (Marriage Equality) Bill 2015 (Cth); Marriage Equality Amendment Bill 2013 (Cth); Marriage Equality Plebiscite Bill 2015 (Cth), Recognition of Foreign Marriages Bill 2014 (Cth).

³³⁸ See, for example, Simon Mann, ‘The Case against Legalising same Sex Marriage’, *The Age*, 15 July 2012; Mark Brown, ‘Same-Sex Marriage driven by Deceit and Ignorance’, *Mercury*, 2 April 2015; Rowan Dean, ‘OPINION: The gay marriage debate is more about emotion and wording than legal impediment or discrimination’, *Courier-Mail*, 31 May 2015; Daniel Hurst, ‘Same-sex marriage: disappointment and anger as Coalition party room rejects free vote’, *The Guardian*, 11 August 2015; Editorial, ‘The Guardian view on Australia and gay marriage: all out of step except Tony Abbott’, *The Guardian* 29 August 2015.

³³⁹ During the same time period the number that ‘oppose’ has similarly decreased in a relatively linear fashion from 44% to 21%, and those ‘undecided’ dropped from 18% in June 2004 to six per cent in June 2007 and has hovered between eight and four per cent thereafter. Crosby Textor Group, *Public support for same-sex marriage in Australia* (15 Jul 2014), <percent com/news/record-support-for-same-sex-marriage/>

married couples.³⁴⁰ Further changes would be necessary address the full range of existing provisions that discriminate on the basis of marital status, as outlined in the detailed Table at **Appendix 1**.

Domestic Partnerships in South Australia

374. In the 2000s, South Australian Parliament introduced a number of legislative reforms to provide greater legal recognition for same sex couples and to remove some legislative provisions that discriminated against people on the basis of their marital status or sexuality, such a laws relating to superannuation. This included the *Statutes Amendment (Domestic Partners) Act 2006*, which made changes to 97 separate laws and replaced the term ‘de facto’, with the concept ‘domestic partnerships’.
375. Now, under the *Family Relationships Act 1975* (SA), a person will be in a ‘domestic partnership’ if he or she is living with another person in a ‘close personal relationship’ and has lived with that person for at least the last three years (or three out of the last four years), or has had a child with that person.³⁴¹
376. A ‘close personal relationship’ is defined as a relationship between two adults (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis.³⁴² It does not include two people where one is paid to care for the other, but it does not matter whether or not a sexual relationship exists, or has ever existed, between them.³⁴³
377. Two people can have their domestic partnership legally recognised by going to Court and showing that the required criteria are met.³⁴⁴
378. Domestic partners can also make a written agreement called a Domestic Partnership Agreement (DPA) about their living arrangements and joint property under the *Domestic Partners Property Act 1996* (SA). A DPA is like a contract between domestic partners about their shared life that can be certified by lawyers and enforced by a court.³⁴⁵ It can cover

³⁴⁰ 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>>.

³⁴¹ *Family Relationships Act 1975* (SA), s 11A.

³⁴² *Family Relationships Act 1975* (SA), s 11.

³⁴³ *Family Relationships Act 1975* (SA), s 11.

³⁴⁴ *Family Relationships Act 1975* (SA), s 11B.

³⁴⁵ *Domestic Partners Property Act 1996* (SA) s 6.

matters such as how joint property (including family home or superannuation)³⁴⁶ 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. Section 8 also gives the court the power to set aside or vary a DPA if it is satisfied that the enforcement of the DPA would result in serious injustice.

379. As a result of these changes, same sex couples, or couples involving gender diverse people, who were previously excluded from the definition of 'de facto' under many laws can now fall within the definition of 'domestic partners'. This can have flow on affects for other legal rights, including parenting rights (discussed in **Group Two**).

380. These reforms were followed by the introduction of the *Statutes Amendment (De Facto Relationships) Act 2011* that recognises same sex couples in asset forfeiture, property and stamp duty applications.

381. There have since been a number of unsuccessful attempts to introduce a system of civil unions for same sex couples in South Australia, as well as attempts to make South Australian laws that would permit or recognise same sex marriage. In February 2012, a Bill was tabled in the South Australian Legislative Council to legalise same-sex marriage and in July 2013, a same-sex marriage Bill was introduced into the South Australian House of Assembly. Both Bills were subsequently defeated.³⁴⁷

Protections Against Discrimination on the Grounds of Marital or domestic partnership Status

382. The *EO Act* has been described in some detail in the section of this report dealing with Group Two laws.

383. The *EO Act* contains protections against unlawful discrimination on the grounds of 'marital or domestic partnership' status. Section 5 of the *EO Act* defines 'marital or domestic partnership status' 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

³⁴⁶ See the definition of 'property' in the *Domestic Partners Property Act 1996* (SA) s 5.

³⁴⁷ Same Sex Marriage Bill 2013 (SA); see also the Marriage Equality Bill 2012 (SA).

384. The term ‘domestic partner’ is defined in s 5 in the same terms as the *Family Relationships Act 1975* (SA), described above.

385. Subsection 85T(2) of the *EO Act* sets out the criteria for establishing discrimination on the grounds of ‘marital or domestic partnership status’. It provides that a person discriminates on this ground:

(a) if he or she treats another unfavourably because of the other’s marital or domestic partnership status or past or proposed marital or domestic partnership status; or

(b) if he or she treats another unfavourably because the other does not comply, or is not able to comply, with a particular requirement and—

(i) the nature of the requirement is such that a substantially higher proportion of persons of a different marital or domestic partnership status comply, or are able to comply, with the requirement than of those of the other's marital or domestic partnership status; and

(ii) the requirement is not reasonable in the circumstances of the case; or

(c) if he or she treats another unfavourably on the basis of a characteristic that appertains generally to persons of that marital or domestic partnership status, or on the basis of a presumed characteristic that is generally imputed to persons of that marital or domestic partnership status; or

(d) if he or she treats another unfavourably because of an attribute of or a circumstance affecting a relative or associate of the other, being an attribute or circumstance described in the preceding paragraphs.

(3) For the purposes of this Act, a person discriminates on the ground of the identity of a spouse or domestic partner if he or she treats another unfavourably because of the identity of the other's spouse or domestic partner, or former or proposed spouse or domestic partner.

386. Part 5B of the *EO Act* sets out the circumstances in which unlawful discrimination on the grounds of ‘marital and domestic partnerships status’ can occur. These are:

- discrimination against workers, such as discrimination against applicants and employees when determining who should be offered employment or in terms or conditions on which employment is offered (s 85V);
- discrimination by other bodies, such as associations and clubs when determining membership - with the exception of an association specifically established for a persons of a particular marital or domestic partnerships status or associations administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion (s 85ZB);
- discrimination in education, such as discrimination by educational authorities by refusing to accept an application for admission as a student (s 85ZE); and

- discrimination in relation to land, goods, services and accommodation, such as refusing or failing to supply the goods or perform the services on the grounds of the person's marital or domestic partnership status (s 85ZG).

387. Division 6 of Part 5B sets out a range of general exemptions from discrimination on these grounds. For example, s 85Z contains a broad ranging exemption to unlawful discrimination. It provides:

This Part does not apply to discrimination on the ground of the identity of a spouse or domestic partner if the discrimination is, having regard to all the circumstances of the particular case, reasonably necessary to preserve confidentiality, avoid conflicts of interest or nepotism or reasonably apprehended conflicts of interest or nepotism or protect the health or safety of persons.

388. Section 85M contains a further, more specific exemption relating to religious bodies. It provides:

This Part does not render unlawful discrimination on the ground of marital or domestic partnership status in relation to—

- (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order.

389. In its submission to SALRI, the Equal Opportunity Commission explained that despite the above protections against unlawful discrimination on the grounds of marital or relationship status:

same-sex partners can still experience issues (with schools, medical services, and care facilities, for example) despite legal recognition of same-sex relationships in South Australia. One reason for this is that domestic partners still do not have the full legal standing of married partners and society still tends to view them as less 'committed' to each other.³⁴⁸

Equal Opportunity Commission Case Study

Enquirer changed her last name to her same-sex partner's name through Births, Death and Marriages. She changed her name everywhere except her mortgage because it would cost her \$1000. They are buying a house in her partner's name. She is borrowing money for renovations. The bank has said that it is not happy with the explanation that she has given about why she changed her

³⁴⁸ Submission No 40, 10.

name. Her loan was meant to be finalised by today. The house settles next week and they will not be able to proceed without the additional monies.

Advised that, if the decision of the bank was based on sexuality, it could be unlawful. If the bank has a different policy about name changes due to marriage then this could also be unlawful discrimination.

Discriminatory Impact of the Current Law

390. Outside of the laws discussed in Group Two, there are two categories of laws that discriminate or potentially discriminate on the basis of marital or domestic partnership status:

391. Laws that treat married couples differently (and generally more favourably) than couples or individuals who are not married. Such South Australian provisions include s 7 of the *Domicile Act 1980* (SA); s 22 of the *Trustee Act 1936* (SA); ss 5, 20 and 22 of the *Wills Act 1936* (SA); s 34H of the *Evidence Act 1929* (SA) and s 20 of the *Guardianship of Infants Act 1940* (SA).

392. Laws that define and give legal recognition to certain relationships, such as the provisions in the *Domestic Partnerships (Property) Act 1996* (SA) and the *Family Relationships Act 1975* (SA).

393. As the Audit Table in **Appendix 1** indicates, many laws also have the potential to discriminate on the grounds of marital status - or at the very least entrench the married heterosexual, binary couple as the legal norm - by the use of language such as 'husband', 'wife' and 'spouse'.

Laws that directly discriminate on the basis of marital status

394. Despite the efforts described above to remove provisions that treat domestic partners less favourably than married couples, there remain provisions in South Australian law that apply differently, and often unfavourably, towards domestic partners when compared with married couples. A number of examples are summarised below:

- Section 7 of the *Domicile Act 1980* (SA) provides that a person is capable of having an independent domicile if they are 18 years old or over, or if they have been married (subject to provisions relating to mental incapacity). No such right is attributed to a person who is in a domestic partnership.
- The *Wills Act 1936* (SA) contains a number of provisions that invest rights in people who are or have been legally married. For example, s 5 deals with the will of a minor. It provides that, subject to the Act, a minor cannot make, alter or revoke a will, however a minor who is or has been married may make, alter or revoke a will as if he or

she were an adult. Section 20 contains the general rule that every will made by a man or woman is revoked by his or her marriage. Section 22 sets out the cases in which wills may be revoked. This includes by marriage or termination of marriage. These provisions discriminate against same sex couples and sex and gender diverse people who cannot be lawfully married under the *Marriage Act 1961* (Cth). It is noted, however, that other provisions in the *Wills Act 1936* (SA) refer to ‘domestic partner’ as defined in the *Family Relationships Act 1975* (SA).

- Section 34H of the *Evidence Act 1929* (SA) provides that:

[i]n any proceedings a husband or wife may give evidence proving or tending to prove that he or she did or did not have sexual relations with his or her spouse, notwithstanding that any such evidence would prove or tend to prove that any child born to the wife during marriage was illegitimate.

395. While these references to ‘husband’ ‘wife’ and ‘illegitimate children’ may not convey any additional substantive rights to married couples than those enjoyed by other couples, they nonetheless entrench the notion of the married, heterosexual couple as the foundation of the family. In this way, they may operate to entrench discrimination on the grounds of marital status or sexual orientation.

- Another example can be found in the *Family and Community Services Act 1972* (SA) that contains references to a ‘child born outside marriage’ and defines ‘step-parent’ by reference to marriage relationships only, excluding family arrangements where the parents are not (and in some cases cannot be) married. These terms and definitions have broader implications for other provisions in this Act, including provisions relating to the maintenance and care of children.³⁴⁹ These binary, heterosexual-based terms and definitions can mean that gender diverse parents or relatives, and couples in non-heterosexual relationships can be excluded from obtaining maintenance orders or expense payments based on their sexual orientation, gender identity or marital status. SALRI recommends that these and like provisions be reviewed, with a view to their repeal unless any identified legitimate purpose can be shown to be proportionate in light of any discriminatory impact they may have.

396. The potential for discrimination on the grounds of marital status in provisions such as these could and should be addressed by either repealing the discriminatory provisions or replacing references to ‘spouses’ or married partners with a definition that includes ‘domestic partner’. The discriminatory impact of the laws could further be addressed by adopting a Relationships

³⁴⁹ For example, Part 6 deals with the maintenance of children. Subdivision 1 deals with orders with respect to children. It contains provisions relating to the liability of near relatives for the maintenance of a child (s 98) and issues of summons for maintenance of a child (s 99). Subdivision 2 deals with orders in affiliation cases. Division 4 contains provisions relating to the commencement and duration of orders and to evidentiary matters. Division 7 relates to the enforcement of orders and supplementary provisions.

Registration system based on the NSW model or the Tasmanian significant relationships and caring relationships model both briefly described below.

Laws that define and give legal recognition to certain relationships

397. The introduction of the framework for the making of DPAs has 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, discrimination may still arise when the process of becoming legally recognised or registered as a ‘domestic partnership’ is compared with the approach taken to married couples.

398. Under s 11A of the *Family Relationships Act 1975* (SA), a person is, on a certain date, the ‘domestic partner’ of another person if he or she is, on that date, living with that person in a close personal relationship and—

(a) he or she—

(i) has so 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).

399. The term ‘close personal relationship’ is defined in s 11 as the relationship between two adults (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis, but does not include—

(a) the relationship between a legally married couple; or

(b) a relationship where 1 of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind.

400. A note to the section explains:

Two persons may live together as a couple on a genuine domestic basis whether or not a sexual relationship exists, or has ever existed, between them.

401. This effectively requires a ‘waiting period’ of between 3-4 years, in addition to evidence of cohabitation on a genuine domestic basis, unless a child is born. However, it is noted that under s 11B of the *Family Relationships Act 1975* (SA) it is possible for a couple to apply to the

court for a declaration that they are domestic partners and such a declaration can be made in the absence of evidence of cohabitation for 3-4 years, provided that the court is satisfied that the couple are living together in a 'close personal relationship' and the interests of justice require that such a declaration be made. When considering whether to make a declaration under this section, the court must take into account all of the circumstances of the relationship, including its duration, the nature and extent of common residence, the degree of financial dependence and interdependence, or arrangements for financial support; the ownership, use and acquisition of property and the degree of mutual commitment to a shared life.

402. There are also South Australian laws that refer to the concept of 'putative spouse' - defined along similar lines as 'domestic partner' with the additional requirement of cohabitation as de facto 'husband and wife'. For example, s 4 of the *Superannuation Act 1988* (SA), defines 'putative spouse' as a person who is (on a certain date) cohabiting with the other person as his or her wife or husband de facto and the person has been cohabiting with the other person continuously for the preceding period of three years (or three years of cohabiting within the past four) or a child, of whom both persons are the parents, has been born (whether or not the child is still living).
403. Subsection 4A(1)(b) deals specifically with two persons of the same sex, providing that a person will be a 'putative spouse' if he or she is, on that date, cohabiting with the other person in a relationship that has the distinguishing characteristics of a relationship between a married couple (except for the characteristics of different sex and legally recognised marriage and other characteristics arising from either of those characteristics) and the person has been so cohabiting with the other person continuously for the preceding period of three years (or three years of cohabiting within the past four).
404. Subsection 4A(2) sets out a process for having a person declared by the District Court as a 'putative spouse' for the purposes of the Act.
405. In contrast, under s 42 the *Marriage Act 1961* (Cth), the effective 'waiting period' can be as short as 1 month (the minimum period of notice required notice to be served on the marriage celebrant prior to solemnising a marriage). Other criteria relating to marriage in Australia can be summarised as follows:
 - the couple must consist of a man and woman;

- not married to anyone else;
- not marrying a parent, grandparent, child, grandchild, brother or sister;
- be at least 18 years old, unless a court has approved a marriage where one party is aged between 16 and 18 years old;
- understand what marriage means and freely consent to becoming husband and wife; and
- use specific words during the ceremony.³⁵⁰

406. The SALRI consultations suggested that that these different criteria can result in unfavourable treatment for domestic partners, when compared with married couples. For example, while a couple can get legally married within days or weeks of meeting, to be registered as a ‘domestic partner’, or recognised under South Australian law as a ‘domestic partner’ a couple must demonstrate that they either: have a child together or have been continuously cohabitating on a domestic basis for three years (or for three out of four years).

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. [Submission 11]

407. This can mean that non-married couple who consider themselves to be in a serious, long term relationship for less than three years can be excluded from laws relating to the distribution of property, superannuation, succession and other entitlements that apply immediately to a married couple. The impact of these types of criteria can be particularly strongly felt by homosexual couples or couples involving gender diverse people as these couples are currently prohibited from becoming lawfully married under the *Marriage Act 1961* (Cth). Some non-heterosexual couples may also find the cohabitation requirements to be particularly difficult to comply with if they find themselves in social, cultural or other

³⁵⁰ Attorney General's Department, Australian Government, *Getting Married* <<http://www.ag.gov.au>>.

circumstances where they are not able to cohabit as a couple, due to fear of discrimination or exclusion from their cultural or social groups.

408. One of the flow-on, potentially discriminatory impact of laws that treat married couples differently to other couples, is the way that a person's 'family' or 'relatives' may be defined under South Australian law.
409. Certainly, the *Family Relationships Act 1975* (SA) provides the legal basis for identifying a recognising a child's parents. However, many other South Australian Acts have provisions that refer to and define a person's family or relatives - often based on the concept of marriage and/or domestic partnership - that can potentially discriminate against homosexual or gender diverse people. Discrimination can be direct - for example by only including people who are related by 'blood or marriage', or less direct, such as where 'parent' or 'relative' are defined in a way that relies on binary notions of sex and gender - and having regard to the different cohabitation criteria that applies domestic partners that does not apply to married couples.
410. In other jurisdictions, such as NSW, this unfavourable treatment has been addressed by the introduction of a Relationships Register (discussed below), that permits couples in serious, long term relationships to register as domestic partners without setting mandatory 'waiting periods' or prescribing certain cohabitation requirements.

Recognition of same sex marriages solemnised overseas

411. Currently, under the *BDM Act* only marriages solemnised in South Australia must be registered under the Act³⁵¹ and only those marriages certified under the *Marriage Act 1961* of the Commonwealth can be registered on the South Australian Registry.³⁵² This excludes marriages solemnised overseas, such as same sex marriages.
412. A number of submission makers queried why, if a same sex couple are legally married overseas, their marriage cannot be recognised under South Australian law.

Participant Quote:

I think it is somewhat bizarre that my husband and I had a civil partnership in the UK in 2006, and had it converted to marriage at the British Consulate in Melbourne in January this year, and have

³⁵¹ *Births Deaths and Marriages Registration Act 1996* (SA) s 30.

³⁵² *Births Deaths and Marriages Registration Act 1996* (SA) s 31.

been together for 15 years, yet as far as South Australia is concerned we are not recognised as married, civil partners or anything else without having to additionally prove we're a 'proper' couple to the courts. [Submission 12]

413. The NSW Relationships Register (discussed below) provides a possible model for the recognition of overseas marriages in Australian jurisdictions that could go some way to addressing these concerns.

NSW Relationships Register

414. The NSW Relationships Register commenced operation 1 July 2010, following the introduction of the *Relationships Register Act 2010* (NSW). It provides legal recognition for a couple, regardless of their sex, by registration of the relationship.³⁵³ Adults who are in a relationship as a couple, regardless of sex, can apply for registration of their relationship, provided at least one of them lives in NSW.³⁵⁴

415. To be eligible to register as a couple, the two people must be over 18, not married or in another registered relationship or in a couple with another person, and not related by family.³⁵⁵ The couple do not have to live together to be eligible to register their relationship.³⁵⁶

416. Couples who apply do not have to provide any further documentary evidence or proof of their relationship. However, 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.³⁵⁷ A registration will also be considered void if: the agreement of one or both persons in the relationship to registration was obtained by fraud, duress or other improper means, when the relationship was registered either party was mentally incapable of understanding the nature and effect of registration, or the relationship was prohibited (such as where one of the persons was already married).³⁵⁸

³⁵³ Registry of Births Deaths and Marriages, New South Wales Government, *Relationships Register* <<http://www.bdm.nsw.gov.au>>

³⁵⁴ *Relationships Register Act 2010* (NSW) s 5.

³⁵⁵ *Relationships Register Act 2010* (NSW) s 5.

³⁵⁶ Above n 352.

³⁵⁷ Penalties of up to seven years imprisonment may be imposed for making a false declaration for material gain.

³⁵⁸ *Relationships Register Act 2010* (NSW) s 14.

417. Once an application is made, there is a 28-day cooling off period in which either party can withdraw the application.³⁵⁹ 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.³⁶⁰
418. Couples in registered relationships in NSW will be recognised as ‘de facto partners’ for the purposes of most legislation in NSW, and will also be subject to certain obligations or restrictions under NSW law.³⁶¹ They can also use their certificate of registration to access various entitlements, services and records under NSW law and some service providers may choose to accept registration of a relationship as proof of the legitimacy of that relationship.³⁶²
419. Under the *Relationships Register Act 2010* (NSW), either or both parties can apply to revoke the registered relationship.³⁶³ If only one partner is revoking the registration, they must provide proof they have served notice on the other.³⁶⁴
420. There is then a cooling-off period of 90 days before the registration is revoked by the Registrar.³⁶⁵ Registration of a relationship may also be revoked by law on the death or marriage of a person in the relationship.³⁶⁶
421. In 2014, the registry policy was changed 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 lives in NSW.³⁶⁷ The registration of the relationship on the Relationships Register is not equivalent to registering the marriage in NSW, however, it does provide some legal recognition of the nature of the relationship.

Tasmanian Significant Relationships and Caring Relationships Approach

422. In Tasmania, two categories of relationships can be registered under Part 2 of the *Relationships Act 2003* (Tas): ‘significant relationships’ and ‘caring relationships’.

³⁵⁹ *Relationships Register Act 2010* (NSW) s 8.

³⁶⁰ Above n 352.

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ *Relationships Register Act 2010* (NSW) ss 11, 13.

³⁶⁴ *Relationships Register Act 2010* (NSW) ss 11, 13.

³⁶⁵ *Relationships Register Act 2010* (NSW) s 12.

³⁶⁶ *Relationships Register Act 2010* (NSW) s 10.

³⁶⁷ Above n 352.

- ‘Significant relationships’ are defined in s 4 of the *Relationships Act 2003* (Tas) as a relationship between two adults, regardless of sex, who are in a couple and who are not married to one another or related by family. There is no minimum requirement of cohabitation or other criteria to be satisfied if the relationship is registered under the Act. However, a couple may still be considered under law to be in a significant relationship even if not registered, having regard to factors that include cohabitation, duration of relationship and care and support of children.
- ‘Caring relationships’ are defined in s 5 of the Act as a relationship other than a marriage or significant relationship between two adults whether or not related by family, where one person provides the other with domestic support and personal care.

423. Both relationships can be registered pursuant to the requirements in Part 2 of the *Relationships Act 2003* (Tas), provided both adults are living in Tasmania.

424. Applications for significant or caring relationships can be registered by completing an application for a Deed of Relationship with the Tasmanian Registry of Births, Deaths and Marriages.

425. Registration under the *Relationships Act 2003* (Tas) has flow on implications for other rights and entitlements under Tasmanian law, including laws relating to superannuation, taxation, health care and property division.

426. Relationships registered under Tasmanian law are also considered ‘de facto’ relationships under Commonwealth law, regardless of the sex of the couples. Tasmania also recognises same sex unions registered in other Australian or international jurisdictions.

Group Three: Recommendations for Immediate Action

3.1 Amend the *Domicile Act 1980* (SA) s 7; *Trustee Act 1936* (SA) s 22; *Wills Act 1936* (SA) ss 5, 20, 22; *Evidence Act 1929* s 34H and the *Guardianship of Infants Act 1940* s 20 by either repealing the discriminatory provisions or replacing reference to ‘married’ or ‘husband’ and ‘wife’ with a term that includes ‘domestic partners’.

Group Three: Issues for Further Research and Review and Report

3.2 The introduction a Relationships Register. Options for consideration include Relationship Registers as in NSW or Tasmania that would allow heterosexual and homosexual couples to register as domestic partners without the need to demonstrate 3-4 years of cohabitation. The Relationships

Register could also register same sex marriages solemnised overseas, provided other relevant criteria are met.

3.3 The current laws that seek to define 'immediate family members' or similar to ensure that they are culturally appropriate, particularly for Indigenous families, and do not discriminate on the grounds of sexual orientation, gender identity or marital or partnership status, for example, by replacing gendered terms such as 'sister' and 'brother' with gender neutral terms such as 'siblings'.

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