



South Australian Law Reform Institute

LGBTIQ Reference

Fact Sheet 1 – General Information

Who are we?

The South Australian Law Reform Institute (SALRI) conducts inquiries—also known as references—into areas of law. The areas of law are determined by the SALRI Advisory Board and sometimes at the request of the Attorney-General of South Australia. Based on its research and consultations throughout an inquiry, SALRI makes recommendations to government so that government can make informed decisions about law reform. SALRI's recommendations do not automatically become law, but they may be acted upon by the government.

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.

LGBTIQ Reference

SALRI's latest reference is one that has relevance for the lives of many South Australians. It is about identifying the laws and regulations in South Australia that discriminate against - that is treat unfairly - people due to their sexuality or their sex and gender diversity. This includes laws that discriminate against lesbians, gays, bisexuals, transsexuals and transgender people and intersex people. SALRI has described this as its 'LGBTIQ Reference' (see Note on Terminology below).

The SALRI Advisory Board accepted this reference from the Attorney-General, The Hon. John Rau, MP. The reference was announced as part of His Excellency the Honourable Hieu Van Le AO's speech at the opening of Parliament on Tuesday 10 February 2015.

The first step in this large and challenging project is to work out which South Australian laws and regulations discriminate on the basis of sexual orientation, gender, gender identity or intersex status.

Your help is needed

SALRI has already identified a range of laws that fit this description, but is looking for your help to work out what laws have the biggest impact on the lives of LGBTIQ people.

We will let you know when the formal submission process will begin, but in the meantime if you have expertise or an experience to share, please email SALRI at salri@adelaide.edu.au so we can make sure that we hear from you.

What is the process?

When it starts inquiring into an area of law, SALRI has a number of objectives including to review the law and research on law reform options that would modernise the law, fix any problems in the law, consolidate areas of overlapping law, remove unnecessary laws, or bring South Australian law into line with other States and Territories. SALRI generally does this by consulting with experts and the community, preparing reports that set out what the law says, where the law may need to be improved, and developing options and recommendations for law reform.

SALRI is an independent body and its recommendations to the Government of the day reflect impartial research and consultation.

What do you need to do?

The public consultation process is now open and submissions close at 5.30pm on Monday 6 July 2015.

An [online feedback form](#) has been provided on the SA Government's [YourSAY website](#) for electronic submissions. Alternatively, you can send written feedback via email or post.

Email: salri@adelaide.edu.au

Post: South Australian Law Reform Institute
Adelaide Law School
University of Adelaide AUSTRALIA 5005

If you are interested in finding out more information about SALRI generally, please visit our webpage at: <https://law.adelaide.edu.au/research/law-reform-institute/>.

Note on Terminology

SALRI recognises that it is the right of individuals to identify their sexual orientation and sex and/or gender. SALRI also recognises that terminology is strongly contested, particularly terminology to describe sex and/or gender identity.

SALRI is interested in hearing your views about what terminology is appropriate as it undertakes its audit of South Australian law. In the meantime, SALRI intends to broadly follow the Australian Human Rights Commission's approach. Some key terms are explained below:

Gender: refers to the way in which a person identifies or expresses their masculine or feminine characteristics. Gender is generally understood as a social and cultural construction. 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 identity: refers to a person's deeply held internal and individual sense of gender.

Intersex: refers to people who have genetic, hormonal or physical characteristics that are not exclusively 'male' or 'female'. A person who is intersex may identify as male, female, intersex or as being of indeterminate sex.

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

Sex: refers to a person's biological characteristics. A person's sex is usually described as being male or female.

Sexual orientation: refers to a person's emotional or sexual attraction to another person, which can include the following identities: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted.

Trans: 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.

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

10 June 2015

SALRI acknowledges the assistance of the SA Attorney-General's Department in providing grant funding for this project.

LGBTIQ Reference

Fact Sheet 2 – Legal Protections Against Discrimination

The South Australian Law Reform Institute (SALRI) is compiling a list of South Australian laws and regulations that discriminate against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status (these terms are described in Fact Sheet 1). SALRI would like to hear from you about the current South Australian laws designed to protect against unlawful discrimination on these grounds. We hope this fact sheet helps you get started.

What does the law in South Australia say about discrimination on the grounds of sex, sexuality or gender identity?

Discrimination - or noting the difference between things - is part of making choices in everyday life. Discrimination is not always wrong but some discrimination is unfair and can be against the law. Under the *Equal Opportunity Act 1984* (SA), 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 (whether someone is male or female), sexuality (whether someone is gay, lesbian, bisexual or straight), or chosen gender.

Subsection 5(5) of the *Equal Opportunity Act 1984*, 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."

The test for what constitutes discrimination on these grounds is set out in [section 29 of the *Equal Opportunity Act 1984*](#).

To be unlawful, the discrimination must be unreasonable and must happen in an area of public life - like a workplace, school or when using a service. It must also cause the person some loss or humiliation.

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.

Discrimination that complies with another law or regulation (such as the requirement to indicate your sex as male or female on an official form) is unlikely to be considered unlawful. The onus is on the person making a complaint to show that the discrimination is unlawful.

If someone experiences discrimination that falls within these criteria, they can lodge a complaint with the South Australian Equal Opportunity Commission. 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. If this doesn't work, the person who made the complaint can take their case to the Equal Opportunity Tribunal for a hearing and decision.

CRICOS PROVIDER 00123M

Exceptions to the rules

South Australian equal opportunity law allows for some exceptions to the rules relating to discrimination (these are set out in sections 34-50 of the *Equal Opportunity Act 1984*). 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 (s.34(4)).
- > 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 (s.34(3)).
- > 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 (s.37(3)).
- > 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 (s.48);
- > 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 (s.49).

Exemptions in the *Equal Opportunity Act* also allow [special measures](#) which mean that organisations can discriminate in favour of a certain group (s.47), if it helps address past discrimination. Organisations can also apply to the [Equal Opportunity Tribunal](#) for a [temporary exemption](#) (s.92).

What do you think about these laws as they relate to the LGBTIQ communities?

We would like to know what you think about these current laws. To tell us your thoughts, complete the [online feedback form](#), or visit the [SA Government's YourSAy website](#) for other ways to get in touch.

Attempting to answer the following questions may help with your response:

- > Have you used or sought information about these laws?
- > Do you think these laws are working well to protect people from unlawful discrimination on the grounds of their sex, sexuality, or gender identity, or do they need reform?
- > Do you think the concept of 'chosen gender' is appropriate? Should other terms such as 'gender identity' be considered?
- > Should these laws include specific references to other personal attributes such as intersex status?
- > Are the tests for discrimination fair? Are the exceptions to the rules fair?
- > Is the current approach to burden of proof in the *Equal Opportunity Act* - that places the onus on the person making a complaint to show that the discrimination is unlawful - appropriate?
- > Are there any other issues related to this reference which you would like to bring to the attention of the Institute?

Where to go for further information

[Equal Opportunity Act 1984 \(SA\)](#) - Part 3 is particularly relevant

[South Australian Equal Opportunity Commission](#)

[Australian Human Rights Commission](#) - particularly its work in relation to sexual orientation and sex and gender identity

10 June 2015

SALRI acknowledges the assistance of the SA Attorney-General's Department in providing grant funding for this project.



The South Australian Law Reform Institute (SALRI) is compiling a list of South Australian laws and regulations that discriminate against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status. SALRI would like to hear from you about the current South Australian laws that apply to how a person's sex is legally registered, and the process for changing a person's sex once registered. We hope this fact sheet helps you get started.

How do you register your sex or change your registered sex under South Australian law?

Every State and Territory in Australia has a system for registering a person's birth, death, marriage, name and sex so that accurate records can be kept and to enable people to provide legally acceptable proof of their personal details.

The registration of a child's birth is a significant life event and a right protected by the United Nations Convention on the Rights of the Child, to which Australia is a party (Article 3).

A child becomes legally visible when their birth is registered and the child's parents can apply for a birth certificate. Birth certificates are important legal documents that we rely upon in many of our interactions with the state. They are usually required for school enrolments, Medicare, government benefits, passports and eventually, a driver's licence. Without a birth certificate a person can feel legally invisible and unable to invoke their full rights as a citizen.

In South Australia, this system is governed by the *Births Deaths and Marriages Registration Act 1996* (SA) ('BDM Act') and its regulations. The information is collected, registered and maintained by the Births, Deaths and Marriages Registration Office ('BDM Office').

Under the BDM Act, when a child is born, the parents of the child must register the birth with the BDM Office within 60 days by providing the information set out on the official form. This includes information about the child's sex. There is currently no way to indicate sex or gender diversity, such as intersex or trans* status, when registering a birth.

Once a person's sex is registered it is very difficult to change.

It is possible for a person to change their registered sex if the person has undergone a reassignment procedure under the *Sexual Reassignment Act 1988* (SA). Section 3 of this Act describes 'reassignment procedure' as a medical or surgical procedure (or combination of both) to alter the genitals and other sexual characteristics of a person, so that the person will be identified as a person of the opposite sex. The Act also requires hospitals and doctors to be approved by the Minister before they can undertake reassignment procedures (s6).

Once the approved procedure has occurred, the person can apply to the Magistrates Court of South Australia for a Recognition Certificate, recognising their (new) sex (this process is set out in section 7 of the *Sexual Reassignment Act 1988*). Importantly, these certificates cannot be issued to a

person who is married (s10). This means that a married person will need to be legally divorced if they want to have their (new) sex legally registered.

A Recognition Certificate allows the person to be recognised in their new sex without any change being made to their birth certificate (s8). It also allows the person to ask the BDM Office to have their sex altered on their birth certificate (providing their birth is registered in this State) (s9).

What do you think about these laws?

We would like to know what you think about these current laws. To tell us your thoughts, complete the [online feedback form](#), or visit the [SA Government's YourSAy website](#) for other ways to get in touch.

Attempting to answer the following questions might help with your response:

- > Is the current approach for registering sex under the BDM Act appropriate?
- > Should it be possible to register a person as something other than 'male' or 'female'?
- > Is the current approach to obtaining a Recognition Certificate under the *Sexual Reassignment Act 1988* (SA) appropriate?
- > Should Recognition Certificates be available to a person who is married?
- > Should alternative approaches to changing a person's registered sex be considered? For example, the process for changing a person's name under the BDM Act; or the approach adopted in the ACT that does not require reassignment surgery, but requires certain evidence to be provided before a person's sex can be changed on the Register.
- > Please provide your views on the current approach to sexual reassignment procedures under the *Sexual Reassignment Act 1988* (SA), including the requirement for hospitals and doctors to be approved by the Minister. What alternative processes for regulating sexual reassignment procedures should be considered? For example, what kind of evidence or proof should be required to demonstrate sexual reassignment?

Where to go for further information

[Births Deaths and Marriages Registration Act 1996 \(SA\)](#)

[Births Deaths and Marriages Registration Regulations 2011 \(SA\)](#)

[Sexual Reassignment Act 1988 \(SA\)](#)

Note: This Act is currently being reviewed by the Legislative Review Committee of the South Australian Parliament – [click here](#) for further information

[Births Deaths and Marriages SA, via Consumer and Business Services SA](#)

[Births Deaths and Marriages ACT - Changes of Sex](#)

10 June 2015

SALRI acknowledges the assistance of the SA Attorney-General's Department in providing grant funding for this project.



The South Australian Law Reform Institute (SALRI) is compiling a list of South Australian laws and regulations that discriminate against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status. SALRI would like to hear from you about the current South Australian laws that apply to the legal recognition of relationships, particularly same sex relationships or relationships involving sex and gender diverse people. We hope this fact sheet helps you get started.

What kinds of relationships are recognised under South Australian law?

South Australian law currently recognises a range of different relationships and attributes specific legal rights to these relationships. The relationship attracting the most legal rights is that of legal marriage as defined under the *Marriage Act 1961* (Cth) as between a man and a woman. Because the Marriage Act is a Commonwealth law, constitutional rules apply that limit the types of laws South Australia can make about marriage. In short, it is very difficult for a State or Territory to have a definition of 'marriage' that is inconsistent with the Commonwealth's definition of a heterosexual union.

South Australia can, with greater certainty, make laws about other types of relationships. For example, 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 as 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 partnership'.

Currently, 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 has had a child with that person.

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. 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.

Two people can have their domestic partnership legally recognised by going to Court and showing that the criteria mentioned above are met.

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. It can cover matters such as how joint property (including family home or superannuation) would be divided if the partners were to separate, or how

financial matters will be arranged during the relationship. A DPA can also cover non-financial matters, including the termination of the partnership.

As a result of these changes, same sex couples, or couples involving sex or 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 Fact Sheet 5). These reforms were followed by the enactment of the *Statutes Amendment (De Facto Relationships) Act 2011* (SA) that recognises same sex couples in asset forfeiture, property and stamp duty applications.

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. Other States, such as New South Wales, have made laws that recognise same sex marriages solemnised overseas.

What do you think about these laws?

We would like to know what you think about these current laws. To tell us your thoughts, complete the [online feedback form](#), or visit the [SA Government's YourSAy website](#) for other ways to get in touch.

Attempting to answer the following questions might help with your response:

- > Were the reforms to South Australian laws in the 2000s effective at removing discrimination against same sex couples?
- > Is the concept of 'domestic partners' appropriate legal recognition for same sex couples, or couples involving sex or gender diverse people? For example, is the requirement for two people to be living in a close personal relationship for three years appropriate?
- > Should other forms of relationship recognition, such as civil unions, be considered - keeping in mind the constitutional limits on South Australia in relation to laws about marriage?
- > Should South Australia register same-sex marriages solemnised overseas?
- > Are Domestic Partnership Agreements appropriate tools to govern the financial and other affairs of same sex couples or couples involving sex or gender diverse people?

Where to go for further information

[Domestic Partners Property Act 1996 \(SA\)](#)

[Family Relationships Act 1975 \(SA\)](#)

[South Australian Government's LGBTIQ Inclusion Strategy](#)

[Equal Opportunity Commission SA Fact Sheets on Legal Recognition of Same Sex Couples](#)

[Australian Human Rights Commission's Same Sex Same Entitlements Report](#)

10 June 2015

SALRI acknowledges the assistance of the SA Attorney-General's Department in providing grant funding for this project.

The South Australian Law Reform Institute (SALRI) is compiling a list of South Australian laws and regulations that discriminate against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status. SALRI would like to hear from you about some of the current South Australian laws that have an impact on whether, and how, LGBTIQ people can start a family, and whether they can be recognised as the legal parents of their child. We hope this fact sheet helps you get started.

Efforts to Recognise the Right to Start a Family for LGBTIQ people

For many years, efforts have been made to ensure that all South Australians, regardless of their sexuality or sex or gender identity, could legally access services to help them start a family. For example in 2011, State Parliament's Social Development Committee, chaired by the Hon. Ian Hunter MLC, held a year-long inquiry into same-sex parenting which attracted close to 700 submissions and led to limited, but important, legislative change. In tabling the report, Mr Hunter observed that:

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.

This principle is also reflected in the [SA Government's current LGBTIQ Inclusion Strategy](#). Some of these laws are outlined in this Fact Sheet.

Who is the parent under South Australian law?

The *United Nation's Convention on the Rights of the Child*, 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 right, as far as possible, to know and be cared for by their parents (Article 7).

The *Family Relationships Act 1975* (SA) sets out the rules for who is considered to be the legal parent of a child.

If the child is born to a woman who is legally married to a man, that woman will be the mother and that man will be the father. This also applies to a woman who is in a relationship with a domestic partner. For the purpose of this provision, 'marriage' includes a 'marriage like relationship' with a domestic partner (whether of the same or opposite sex). This means that lesbian couples can be presumed to be the parents of a child born to one of the women, provided their relationship meets the criteria of 'domestic partnership' (see Fact Sheet 4).

The Act also sets out the rules that apply to determining the father of a child born to a mother who is not married or not in a relationship with a domestic partner.

Special rules apply to children conceived following artificial reproductive treatment or as a result of a surrogacy agreement.

Access to Assisted Reproductive Technologies

In South Australia, access to assisted reproductive treatment (ART), such as IVF, is governed by the *Assisted Reproductive Treatment Act 1988* (SA).

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 (s3), and who can access and provide ART in SA (s5). 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) (s 5(2)).

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 (s 5(2)). In the case of other more invasive forms of ART, such as IVF, the person providing the ART must be registered under the Act (s 5).

Registered ART providers are subject to strict conditions and can only provide ART in limited circumstances (ss 6-9). 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 (s 9). There are also rules that apply where these circumstances would exist, but for the death of one of the partners.

This means that a lesbian couple would need to demonstrate that the woman seeking to carry the child is infertile before they would be eligible for ART, such as IVF, under the Act.

Under the *Family Relationships Act*, 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.

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.

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

This means that lesbian couples can be legally recognised as co-parents to a child born as a result of ART. This recognition is not available to gay couples that seek to start a family using ART and a surrogacy agreement, as discussed below.

Access to Surrogacy Agreements

Surrogacy arrangements made in South Australia are only lawful if they comply with by Part 2B of the *Family Relationships Act 1975*.

This Act makes it clear that a surrogacy *contract* (that is an arrangement that involves the transfer of money or reward) is illegal and will not have any legal effect.

However, it is possible to make a surrogacy *agreement* if it complies with a detailed list of criteria contained in the Act. This includes 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, surrogacy arrangements are not able to be made by same sex couples.

Adoption under South Australian law

Many children in South Australia live in families where the parents are a same-sex couple, or where one or more parents is sex or gender diverse. These are often situations where one of the parents is the birth (and legal) parent of the child and the other is the partner of the parent. Many partners seek to have full parental rights as a mother or father and only an adoption order can provide this legal status.

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 (s7).

This Act is currently subject to review by the Department of Education and Child Development (DECD).

The Adoption Act 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 Court can be made.

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 special circumstances apply). An adoption order can be made in respect of one person, but only 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 child.

Under the Adoption Act, a 'marriage relationship' means a relationship between two persons cohabiting as husband and wife or *de facto* husband and wife. South Australian law interprets this to mean the relationship between a man and a woman.

This means that same-sex couples are unable in any circumstances to apply to adopt a child in South Australia. The adoption of children from overseas will depend upon the laws in that overseas country, as well as the laws in the couple's home State or Territory.

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 on the Adoption Act explains, few locally born children are relinquished for adoption in South Australia each year; in 2013-14 only one locally born child was adopted.

Adopted children also have rights under South Australian and international law. For example, the law recognises that adopted persons have the right to know their origins and identity, and therefore provides for adult adopted persons to have access to their original birth record and other records associated with the adoption (*Adoption Act* Part 2A).

What do you think about these laws?

We would like to know what you think about these current laws. To tell us your thoughts, complete the [online feedback form](#), or visit the [SA Government's YourSAy website](#) for other ways to get in touch.

Attempting to answer the following questions might help with your response:

- What are the legal barriers faced by same sex couples and sex or gender diverse people when planning or starting a family?
- Are the current restrictions around access to assisted reproductive treatment in South Australia appropriate, or should some of the changes recommended by the Hunter Committee be adopted, such as allowing lesbian couples to access ART?
- Are the current rules governing who is the parent of a child appropriate? Should changes be made to allow gay couples to be recognised as co-parents of a child in certain circumstances? Should changes be made to recognise parents who are sex or gender diverse?
- Are the current rules governing adoption in South Australia appropriate - for this question you may wish to visit the [DECD 2015 Review of the Adoption Act](#), which is due to report in June 2015.

Where to go for further information

[Adoption Act 1988 \(SA\)](#)

[Assisted Reproductive Treatment Act 1988 \(SA\)](#)

[Family Relationships Act 1975 \(SA\)](#)

[DECD 2015 Discussion Paper on the Adoption Act](#)

[SA Parliament's Social Development Committee - 32nd Report into Same Sex Parenting](#)

[SA Health Website on Surrogacy](#)

[SA Health - Fact Sheet 3 – Assisted insemination, the law and you](#)

10 June 2015

SALRI acknowledges the assistance of the SA Attorney-General's Department in providing grant funding for this project.

LGBTIQ Reference

Fact Sheet 6 - How is Sex and Gender Defined Under SA law

The South Australian Law Reform Institute (SALRI) is compiling a list of South Australian laws and regulations that discriminate against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status. SALRI would like to hear from you about some of the current South Australian laws include or exclude terms and definitions that relate to sex, gender, sexuality and gender diversity. We hope this Fact Sheet helps you get started.

Binary Concepts of Sex and Gender in South Australian Laws

For many people, sex, gender and sexuality are static concepts that stay the same throughout a person's life. However, for a significant group within our community they can be fluid or subject to transition or change.

Currently, South Australian laws generally reflect a dominant norm and do not recognise the fluidity and diversity of sex, gender and sexuality. It remains constructed by binary notions of sex and gender, and presume heterosexuality as the norm.

Binary notions of sex and gender - 'man', 'woman', 'female' or 'male' - are common among South Australian laws, as are heterosexual concepts and terms - such as 'marriage', 'spouse', 'wife', 'husband'. Often these terms are not defined, although importantly 'marriage' is defined under federal law as being "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" (*Marriage Act 1961* (Cth) (s5(1))).

Over 90 current South Australian laws include these terms. As discussed in other Fact Sheets, some of these laws use these terms to provide legal recognition of a person's identity, or give people or couples rights or protections. Sometimes they are used to promote gender equality, such as a requirement to have a certain number of women on a Board, or to recognise the need for gender sensitivity, such as the requirement that a body search be conducted by a police officer of the same sex as the person being searched.

These terms also feature in official forms and documents, such as forms to register a birth, forms to apply for employment in the public service or school enrolment forms.

The *Acts Interpretation Act 1919* (SA) (AIA) is a law that sets out the rules for how to work out the meaning of terms and words in other laws. The AIA does not include definitions for terms like 'man', 'woman' or 'gender', but it does contain some rules that are relevant to the meaning given to some of these terms. For example, it contains a rule that provides that words that refer to 'man' or the 'masculine gender' should be understood as including the 'feminine gender' and vice versa. Historically, such rules were designed to prevent literal interpretations that would be used to exclude women.

Sex or Gender Diversity is Often Not Recognised

Non-binary concepts of sex and gender, such as 'intersex', 'transgender' or 'transsexual', are generally not recognised in South Australian laws. For example, these terms are not included in the *Acts Interpretation Act 1915* (SA), the *Equal Opportunity Act 1984* (SA), the *Births Deaths and Marriages Act* or the *Family Relationships Act 1996* (SA).

The concept of gender identity or gender diversity is also generally not recognised in South Australian law, although the *Equal Opportunity Act 1984* (SA) contains protections on the grounds of a person's 'chosen gender' which is defined to mean either "(a) a person who identifies on a genuine basis as a member of the opposite sex by assuming characteristics of the opposite sex ... or by living, or seeking to live, as a member of the opposite sex; or (b) a person of indeterminate sex who identifies on a genuine basis as a member of a particular sex by assuming characteristics of the particular sex ... or by living, or seeking to live, as a member of the particular sex" (s5(5)).

Non-heterosexual couples and families are slowly being recognised in South Australian laws, particularly following the reforms of the late 2000s and the introduction of the concept of 'domestic partnerships' which can include same sex couples (discussed in Fact Sheet 4). For example, the *Equal Opportunity Act* (EO Act) contains protections against discrimination on the grounds of 'marital or domestic partnership status' which is defined as including: being single, being married, being divorced, being widowed or being a 'domestic partner' (s5(1)). 'Domestic partner' is defined as two people, irrespective of their gender, who live together as a couple on a genuine domestic basis (s5(1)).

Despite these reforms, many South Australian laws still include references to 'spouse', 'husband', 'wife' and 'marriage-like relationship' which generally exclude same sex couples, or couples involving gender-diverse people. This has implications for a wide range of laws and services that affect the lives of families and individuals - including insurance schemes, rules of evidence, and aged care.

How has gender diversity been recognised in other Australian laws?

Non-binary concepts of sex and gender, and non-homosexual relationships, have been given legal recognition to varying degrees in other Australian jurisdictions, most commonly under anti-discrimination law. For example, the *Commonwealth Sex Discrimination Act 1984* (Cth) now includes protections against discrimination on the grounds of 'gender identity', which is defined to mean 'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth' (s4(1)). 'Intersex status' is also defined in this Act to mean 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' (s4(1)).

The Commonwealth also has *Guidelines on the Recognition of Sex and Gender* that recognise gender diversity and provide guidance to Commonwealth Government departments and agencies on the collection, use and amendment of sex and/or gender information in individual personal records. The *Guidelines* also standardise the evidence required for a person to establish or change their sex or gender in personal records held by Commonwealth Government departments and agencies.

In some jurisdictions, such as the ACT, non-binary concepts of sex and gender are recognised in the rules of interpretation. For example, 'intersex' is defined in the *Legislation Act 2001* (ACT), and an interpretive rule exists that provides that words indicating a gender include every other gender.

The courts have also grappled with the question of what 'sex' means, and whether it is limited to binary notions under particular laws. For example, in the 2014 case of *Norrie* the High Court found that the NSW Registrar of Births Deaths and Marriages permits the Registrar to register that a person's sex is "non-specific".

What do you think about these laws?

We would like to know what you think about these current laws. To tell us your thoughts, complete the [online feedback form](#), or visit the [SA Government's YourSAy website](#) for other ways to get in touch.

Attempting to answer the following questions might help with your response:

- > Are binary notions of sex and gender appropriate in the context of South Australian laws? Can you provide any examples of where this approach has caused discrimination against LGBTIQ people?
- > Are there examples of where binary concepts of sex and gender should be retained in South Australian law, for example to protect against gender based discrimination or to promote gender sensitivity or to collect gender-specific information?
- > Should non-binary notions of sex and gender be included as defined or recognised terms?
- > Should particular non-binary notions of sex and gender be specified in law (such as 'intersex' or 'transgender'), or should a broader, inclusive approach be adopted (such as 'gender identity or 'gender diversity').
- > What particular laws should contain definitions of sex and gender diversity, for example, the *Acts Interpretation Act* or the *Equal Opportunity Act*?
- > Should official forms and documents include the option to indicate a non-binary sex or gender, and/or sex or gender diversity? What might this look like?
- > Should the principles contained in the Commonwealth Guidelines on the Recognition of Sex and Gender be adapted for use in South Australia?
- > Do any other approaches in other places provide options for South Australia to consider?

Where to go for further information

[Acts Interpretation Act 1919 \(SA\)](#)

[Equal Opportunity Act 1984 \(SA\)](#)

[Sex Discrimination Act 1984 \(Cth\)](#)

[Commonwealth Guidelines on the Recognition of Sex and Gender \(2013\)](#)

[Legislation Act 2001 \(ACT\)](#)

[Summary of the High Court's Decision in *NSW Registrar of Births, Deaths and Marriages v Norrie* \[2014\] HCA 11](#)

10 June 2015

SALRI acknowledges the assistance of the SA Attorney-General's Department in providing grant funding for this project.