

insurmountable administrative difficulties, alternative suggestions for describing the third option are ‘non-binary’ or ‘unspecified’.

Applications made on behalf of children, or made directly by a child, would include protections to ensure that the change is in the best interests of the child and that the child understands and consents to the change. There would be no requirement to demonstrate that the applicant had undergone intrusive medical procedures or that the applicant is unmarried, however the Registrar would have the discretion to request further information for the purposes of establishing identity and ruling out fraud. These changes would mean that for the first time, gender diverse South Australians would be able to have their authentic gender identity registered on the Births Deaths and Marriages Register.

These reforms would be supported by changes that would provide more flexibility when it comes to recording sex on the Birth Registration Statement, including providing parents with the option of indicating the child’s sex as ‘unspecified’, as an alternative to ‘male’ and ‘female’. These will be particularly important reforms for children born with intersex variants and their families.

When making these recommendations, SALRI recognises the need to maintain the integrity and administrative functioning of the Births, Deaths and Marriages Registry and to collect statistical information about South Australians in line with relevant national standards. For this reason, SALRI has attempted to ensure that where possible its recommendations align with the standards advanced by the Australian Bureau of Statistics and with the existing protections against fraud or frivolity applying with respect to applications to change a name. In particular, SALRI has recommended the proposed new process for changing registered sex and/or gender be accompanied by provisions that would empower the Registrar to request further information from an applicant to verify identity, or to ensure that the application is not motivated by fraud. These provisions would also provide the Registrar with the discretion to refuse to register a description of gender identity that would be obscene, offensive or contrary to the public interest. Offence provisions would apply to the provision of false or misleading information. While privacy protections would be in place, the Registrar would be continue to be authorised to share information about historical records with law enforcement agencies.

The necessary repeal of the *Sexual Reassignment Act 1988* (SA) also gives rise to the need to look carefully at whether the ethical, legal and professional framework governing the provision of medical treatment in South Australia will be sufficient to ensure access to specialist health care for gender diverse and intersex South Australians, and to guard against non-consensual gender affirmation procedures being undertaken, particularly with respect to children born with intersex variants. SALRI heard from a number of submission makers concerned about what they consider to be the current and historical inadequate provision of specialist health care for gender diverse and intersex South Australians.

While SALRI is not in a position to make general recommendations about access to health care, it has considered the regulatory options available in this area and recommends that Ministerial Guidelines be developed to ensure that gender affirmation or reassignment procedures only take

List of Recommendations

SALRI recommends that the Government:

Removal of current sexual reassignment laws

1. Repeal the *Sexual Reassignment Act 1988* (SA).

Provide flexibility to register a non-binary birth in South Australia

2. Amend Part 1 of the *Births Deaths and Marriages Registration Act 1996* (SA) as follows:
 - a. Amend s 3 (Objects) to include: “(ba) the registration of changes of sex and/or gender”.
3. Amend *Births Deaths and Marriages Registration Regulations 2011* (SA) as follows:
 - a. Amend Regulation 5 to remove ‘sex’ from the particulars required in notification of birth and replace this with the phrase ‘if the sex of the child is determinable—the sex of the child’.
 - b. Amend Regulation 5(c) to refer to ‘sex and/or gender’ as prescribed information to be included in Birth Registration Statement.
4. Amend the online and hard copy Birth Registration Statements Form as follows:
 - a. Include the option of ‘unspecified’ in addition to ‘male’ and ‘female’ when specifying the sex and/or gender of the child.

Enact a direct application process for adults to change their registered sex or gender

5. Insert a new Part 4A ‘Change of Sex and/or Gender’ into the *Births Deaths and Marriages Registration Act 1996* (SA) to provide:
 - a. A process for an adult whose birth is registered in South Australia, or who is domiciled or ordinarily resides in South Australia, to apply directly to the Registrar to change their registered sex and/or gender on the Births Deaths and Marriages Register, based on s 24 of the *Births Deaths and Marriages Registration Act 1996* (SA).
 - b. The Forms developed to facilitate an application for change of registered sex and/or gender for an adult should include the following categories: ‘Male’, ‘Female’, and ‘Other, please specify’ with an option to indicate additional information as to the person’s self-described gender identity. Should the prospect permitting applicants to self-describe their gender identity give rise to insurmountable administrative difficulties, alternative suggested options for describing the third option are ‘non-binary’ or ‘unspecified’.

requirement that the Court be satisfied that the change is in the best interests of the child and that the child consents to the change. There should be no requirement for the applicant to provide evidence that the child is (a) unmarried or (b) has undergone sexual or gender reassignment treatment.

c. A process for a child to make an application to the Magistrate's Court for a change of their registered sex and/or gender. This process should include a requirement that the Court be satisfied that the change is in the best interests of the child and that the child understands and consents to the change. There should be no requirement for the applicant to provide evidence that they are (a) unmarried or (b) have undergone sexual or gender reassignment treatment.

7. The Forms developed to facilitate an application for change of registered sex and/or gender for a child should include the following options 'Male', 'Female', 'Other, please specify'. The selected option should be included on the child's new Birth Certificate. Consideration should be given as to the administrative implications of including the additional self-describing information on the Register. As noted above, the terms 'non-binary' or 'unspecified' are recommended alternative options.

Enact related provisions to facilitate these reforms

8. Include within new Part 4A of the *Births Deaths and Marriages Registration Act 1996* (SA):
 - a. A provision to provide that a person who has an entitlement under a will or trust or under a State or Territory law does not lose the entitlement only because the person's sex and/or gender has been altered on the register, unless the will, trust or territory law provides otherwise, based on based on s 29 of the *Births, Deaths And Marriages Registration Act 1997* (ACT).
 - b. A provision that grants the Minister the power to enter into agreements with other States and Territories about how the new Part 4A is to interact with corresponding laws in other jurisdictions, based on s 66 of the *Births, Deaths and Marriages Registration Act 1997* (ACT).
 - c. A requirement that the new birth certificate only shows the altered record of sex and/or gender, and does not include any word or statement to the effect that the person to whom the certificate relates has changed sex, based on s 27 of the *Births, Deaths and Marriages Registration Act 1997* (ACT).
 - d. A general prohibition on accessing a birth certificate showing a person's sex and/or gender before the alteration of the record to anyone other than the person, a child of the person or a prescribed person; based on s 27 of the *Births, Deaths and Marriages*

The Audit Report

18. The Audit Report was prepared following an extensive desktop review of all South Australian laws, followed by extensive consultation by SALRI with LGBTIQ individuals and community organisations and included a public submission process facilitated by the Government's YourSay website.⁴
19. The individuals and organisations consulted asked pertinent 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? These and other questions served to highlight the discriminatory barriers that members of the LGBTIQ communities often encounter in their daily lives.
20. The desktop review found 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 Acts or Regulations in this category discriminate by reinforcing the binary notion of sex ('male' and 'female') or gender ('man' or 'woman') or by excluding members of the LGBTIQ communities by a specific or rigid definition of gender. However a smaller number of laws had a more acute discriminatory impact on the lives of LGBTIQ South Australians and their families. These included a lack of adequate legal protection against discrimination, particularly on the grounds of gender identity and intersex status; legal barriers to relationship recognition and exclusion through a number of regimes designed to help couples start a family and raise children, such as access to artificial reproductive treatments.
21. The Audit Report contained a number of recommendations for immediate reform, as well as recommendations relating to five areas of law that had been identified as giving rise to discrimination, but requiring further review and report.⁵ One of these areas was legal recognition of gender on the South Australian Births Deaths and Marriages Register (the Register) and the related area of sexual reassignment laws.⁶
22. In the Audit Report, SALRI found that a strong case for reform had been made with respect to both the existing regime for registering and changing sex or gender on the Births Deaths and Marriages Register and for regulating sexual reassignment surgery. SALRI noted that the Australian Capital Territory (ACT) approach to the registration of births and the change of recorded sex on the Births Deaths and Marriages Register offered a possible model for reform. It also noted the strong support for the repeal of the *Sexual Reassignment Act 1988* (SA).

⁴ The YourSay website is described in the Audit Report, above n 3, 19.

⁵ Ibid.

⁶ Ibid 13 [2.4].

23. This Report contains SALRI's findings and recommendations in relation to these issues. Further separate reports will be prepared with respect to the remaining outstanding areas of law identified in the Audit Report as requiring further review and report.

The Parliamentary inquiry

24. Also in 2015, the Legislative Review Committee (LRC) of the South Australian Legislative Council began an inquiry into a Private Members Bill designed to remove the existing regulatory regime governing sexual reassignment procedures in South Australia: the *Sexual Reassignment Repeal Bill 2014* (SA).⁷ The LRC received written submissions and testimonial evidence from 18 individuals and organisations about the regulation of sexual reassignment surgery and treatment in South Australia, as well as the way sex and gender are recognised under South Australian law.⁸ As at December 2015 the LRC had yet to table its findings in Parliament. Without wishing to pre-empt the LRC's findings in any way, SALRI understands that the issues addressed by SALRI in this Report will accord with those examined by the LRC and similar themes will be considered by both bodies.
25. This report draws on the prior research and consultations undertaken by both SALRI and the LRC when evaluating and recommending options for law reform in this area.

Methodology

26. The preparation of this report has involved several stages. First, submissions made to SALRI and to the LRC during its inquiry into the Sexual Reassignment Repeal Bill 2014 were considered, as was case law, legislative regimes in other jurisdictions, and relevant law reform and government reports. This work, reflected in the Audit Report, gave rise to the clear finding that the current South Australian laws in this area discriminated on the grounds of gender identity and intersex status and required reform. It was recommended that further review be undertaken.
27. Following the release of the Audit Report, SALRI hosted a Roundtable to facilitate discussion among interested community members and experts about a framework for law reform in this area.⁹ A number of shared views were expressed at the Roundtable as to the best options for law reform. These views, along with a series of outstanding

⁷ South Australian Legislative Review Committee, Parliament of South Australia, *Inquiry into the Sexual Reassignment Repeal Bill 2014* (2015) <<https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CIId=301>>.

⁸ Ibid.

⁹ The Roundtable was held on 29 October 2015 at the Adelaide University Law School, Adelaide, South Australia, hosted by the South Australian Law Reform Institute. The Roundtable was conducted under Chatham House rules. A list of Roundtable participants is contained in Appendix 1. The Shared Views of the Roundtable are contained in Appendix 2.

behaviour (ie, whether they are masculine, feminine, some mix of the two, or neither).¹¹

32. Marcus Patterson further submitted that:

It must be recognised that genital appearance at birth, gonads and chromosomes are not the determinants of an individual's sex. In most people they are congruent with the innate sex however in transsexualism as with a number of other conditions...these commonly used predictors of a person's sex are ineffective.¹²

33. SALRI appreciates these comments and acknowledges that the meaning and use of the terms 'sex' and 'gender' are contentious. It is noted for example, that the question of whether or not sex *and* gender should be included in the Births Deaths and Marriages Register was explored by the LRC in its inquiry. However, SALRI remains of the view that the terminology adopted in the Audit Report and preferred by the Australian Human Rights Commission is sufficiently inclusive and clear for the purposes of this report. Where appropriate, SALRI also adopts the practice of referring to 'sex and/or gender' as a way to acknowledge, for example, that the terms 'male' and 'female' can mean more than a description of a person's reproductive organs and may instead describe a person's gender identity (that is a person's inner sense of being a 'man' or a 'woman') which may be the same as or different to how a person may express gender on a 'feminine' to 'masculine' scale.

The Need for Reform

Current Law

34. The current law governing the legal recognition of sex and gender in South Australia is outlined in detail in the Audit Report,¹³ and briefly summarised below. A comparative table of the relevant laws in other Australian jurisdictions is provided at **Appendix 3**.

Births, Deaths and Marriages Registration Act 1996 (SA)

35. The *Births, Deaths and Marriages Registration Act 1996* (SA) (the BDMR Act) and the *Births, Deaths and Marriages Registration Regulations 2011* (SA) (the BDMR Regs) provide the statutory basis for the registration of births in South Australia.¹⁴

¹¹ Beyond Blue 'The First Australian National Trans Mental Health Study: Summary of Results 2013' (Western Australian Centre for Health Promotion Research, 2003) 3 <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 >

¹² Additional Written Submission No 1, Marcus Patterson.

¹³ Audit Report, above n 3, 46-49.

¹⁴ The current *Births, Deaths and Marriages Registration Act 1996* (SA) replaced 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).

36. The Births, Deaths and Marriages Registrar (“the Registrar”) must be notified of all births in South Australia.¹⁵ The notification must include an indication of the child’s sex as either male or female. This must take place within seven days, and is usually undertaken by the hospital at which the child is born. The birth must also be formally registered on the Births Deaths and Marriages Register, again in a prescribed form that requires an indication of the child’s sex as either male or female.¹⁶ This must occur within 60 days.¹⁷ The Registrar has the discretion to Register a birth even where these details are incomplete,¹⁸ but SALRI understands that this discretion has only been exercised with respect to still born children, and has not been used to avoid recording the sex and/or gender of an intersex child.¹⁹
37. The BDMR Act does not prescribe a process for changing a person’s sex on the Register. However, the *Sexual Reassignment Act 1988* (SA) (SR Act) contains a process for obtaining a ‘recognition certificate’ that can then be presented to the Registrar who must then make the required change on the Register (but only within the categories of ‘male’ and ‘female’).

Sexual Reassignment Act 1988 (SA)

38. The SR Act provides the only means for a person to change their registered sex and/or gender on their South Australian Birth Certificate. To do this, the SR Act requires that a person obtain a ‘recognition certificate’ from the Magistrates Court.²⁰ A recognition certificate identifies a person as being of the sex to which they have been reassigned, by way of a ‘reassignment procedure’.²¹ A reassignment procedure defined in the Act 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.²²

¹⁵ *Births, Deaths and Marriages Registration Act 1996* (SA) (*BDMR Act*) s 12; *Births, Deaths and Marriages Registration Regulations 2011* (SA) (*BDMR Regulations*) reg 4(c).

¹⁶ *BDMR Act* s 16(1). *Births, Deaths and Marriages Registration Regulations 2011* (SA) (*BDMR Regulations*) reg 4.

¹⁷ *Ibid* s 16(1).

¹⁸ *Ibid* s 17(2).

¹⁹ Audit Report, above n 3, 47 [112].

²⁰ *SR Act* s 9.

²¹ *Ibid* s 4.

²² The High Court considered a similar definition of reassignment procedure in *AB v Western Australia* (2011) 244 CLR 390. It noted that a reassignment procedure could alter genitals or other gender characteristics, whether by medical or surgical procedure. The High Court found that the Western Australian provision did not require a person to take “all possible” steps to have undergone a reassignment procedure (at 404 [32]). This would suggest that non-surgical treatment, such as hormonal therapy, could constitute a reassignment procedure in South Australia.

certificate is issued, the person may present it to the Registrar of Births, Deaths and Marriages to register the reassignment, and alter the gender on their birth certificate.³⁵ This costs a further \$50.50.³⁶

³⁴ Ibid s 8(1)(a), (b).

³⁵ Ibid s 9(1), (2).

³⁶ *SR Regulations* reg 6.

68. This approach is consistent with the relevant international statements in this area⁶⁶ and is based around the self-identification model of gender identity.
69. The use of the term ‘Other, please specify’ has also been recently endorsed by the Australian Bureau of Statistics following a review of their collection of sex and gender information.⁶⁷ This review, which involved consultation with interested parties, has resulted in the development of a new Sex and Gender Identity Standard that provides the basis for the ABS and other organisations to collect data about sex in surveys and administrative collections, due to be released in December 2015.⁶⁸ The ABS has told SALRI that when developing the new standard the ABS undertook a consultation process that focused on three areas:
- (i) The capacity and need to distinguish the concept of sex from the concept of gender for different types of statistical collections and output. Whilst the terms sex and gender are often used interchangeably, they are separate concepts and are important for different types of statistics. It is recognised that a person’s sex is not necessarily consistent with their gender.
 - (ii) The capacity and need to collect information on gender/sex for those that do not identify themselves as either male or female.
 - (iii) The practicality of what can be collected and output in different types of statistical collections.⁶⁹
70. The ABS found that the majority of the population identifies both their sex and gender as either male or female and describe themselves as such, with only a very small proportion of the population identifying their sex and/or gender as other than male or female.⁷⁰ On this basis it was recommended in the new ABS Standard use the label of ‘Other’ to describe this third category of sex and gender given that a more descriptive term has not been widely agreed to within the community.⁷¹
71. In its submission to SALRI, the ABS set out what a ‘standard question’ should look like in relevant forms under the new draft Standard. It includes the following three choices ‘male’, ‘female’ or ‘other, please specify’, and asks the person to mark one box. The ABS explained that:

Including the ‘please specify’ write-in facility for ‘Other’ provides relevant respondents with the opportunity to accurately describe their sex in a way that they are comfortable

⁶⁶ Yogyakarta Principles, above n 39. These principles are available at <<http://www.yogyakartaprinciples.org/>>, discussed in detail at Audit Report, above n 3, 36, 49.

⁶⁷ Additional Submission No 9, ABS.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Additional Submission No 9, ABS.

with, whilst also maximising the potential for analysis of the responses provided.

If required the following explanatory information may be included as an information pop-up box in web forms or included immediately before the Sex question on paper forms.

72. SALRI considers that the use of the term ‘Other, please specify’ is the preferred optional category for the recording of changes of sex and gender on the South Australian Births Deaths and Marriages Register as this language conforms with the self-identification principle supported by the Roundtable and has been reflected in developments elsewhere, including in the proposed new ABS standard. In expressing this view, SALRI acknowledges that the creation of appropriate administrative and electronic systems to capture the information recorded under the category ‘Other, please specify’ in a consistent way may prove to be difficult, particularly when regard is had to the range of agencies and bodies that may rely upon BDMR data. If these difficulties are considered insurmountable, then SALRI suggests that the terms ‘non-binary’ or ‘unspecified’ could be used to describe the proposed new third category of sex and/or gender.
73. In suggesting these alternative options, SALRI notes that the Gay and Lesbian Health Alliance of South Australia (GLHA) supported the use of ‘non-binary’ as a gender single option if a self-description based option was not recommended.⁷² The Organisation Intersex International Australia (OIIA) described the term ‘non-binary’ as ‘a broad and neutral description with widespread support’.⁷³
74. SALRI also received a copy of a recent joint submission to the Commonwealth Attorney General’s Department by A Gender Agenda, National LGBTI Health Alliance, OIIA, Transformative and Transgender Victoria (‘the Joint Submission’).⁷⁴ The Joint Submission demonstrates a broad consensus among these groups that, at least in the context of the Commonwealth Guidelines on the Recognition of Sex and Gender, the use of the marker ‘X’⁷⁵ should be replaced with the term ‘non-binary’ and not ‘Indeterminate/intersex/unspecified’. It explains that the word ‘non-binary’ is preferred as it simplifies the third classification, while also being respectful both to people with non-binary gender identities, and to intersex people who are men or women.⁷⁶

⁷² Additional Submission No 6, Gay and Lesbian Health Alliance of South Australia (GLHA).

⁷³ Additional Submission No 3, OIIA.

⁷⁴ A Gender Agenda, National LGBTI Health Alliance, OIIA, Transformative and Transgender Victoria, Joint submission on recognition of non-binary gender in federal sex/gender guidelines Commonwealth Attorney General’s Department (12 October 2015) <<https://oii.org.au/30043/joint-submission-federal-sexgender-guidelines/>>. This Joint Submission was made in the context of the Department’s review of the use of the gender and sex category [x] for data collection purposes.

⁷⁵ SALRI notes that the use of the marker [X] is also currently adopted by the Australian Passports Office and South Australian Service’s policy on Changing Gender on Drivers’ Licenses.

⁷⁶ Additional Submission No 3, OIIA.

75. However, in a submission to SALRI, the ABS advised that the *Commonwealth Guidelines on the Recognition of Sex and Gender* have now been updated to recommend the following:

Where sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified).

If the X descriptor set out at paragraph 19 is too lengthy for collection forms or data systems, the Australian Government's preference is to use either 'unspecified' or 'indeterminate'. This classification system is consistent with the Australian Government passports policy for applicants who are sex and gender diverse and Australian Standard AS4590 – Interchange of client information.

76. As noted above, the Roundtable did not support the use of the terms 'indeterminate or intersex', that are also currently used in the relevant forms in the ACT.⁷⁷ These terms were also strongly opposed by the OIIA and in the Joint Submission. OIIA explained that the vast majority of people with intersex variants identify as either male or female, and the creation of what they describe as an 'arbitrary third sex' operates to entrench binary norms and can exacerbate discrimination against people with intersex variants.⁷⁸ OIIA also observe that the introduction of this category may exacerbate concerns associated with non-consensual surgery on babies born with intersex variants.⁷⁹
77. For these reasons, SALRI does not recommend including the terms 'indeterminate or intersex' as a third category for the registration of sex and/or gender on the South Australia Births Deaths and Marriages Register.
78. As noted above, in addition to a category such as 'Other, please specify', the Roundtable supported the inclusion of a non-specific category, such as 'unspecified', particularly for children born with intersex variants. The South Australian Equal Opportunity Commission (EOC) supports such an approach and has observed that the category 'unspecified':

This may be a more suitable option for children born intersex as it provides time for an individual to determine their gender identity as they grow older. It would also provide an option for individuals who do not wish to record a specific sex or gender.⁸⁰

⁷⁷ ACT Government 'Forms for Changing Sex on the Register' Website, https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/2214/session/L2F2LzEvdGltZS8xNDQzMzQ4NDQwL3NpZC9xSDZUKnZ4bQ%3D%3D, (accessed 19 November 2015); see also ACT Government 'Births Deaths and Marriages Registry Website and information for change of sex on the register' Website, https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1691 (accessed 19 November 2015).

⁷⁸ Additional Submission No 3, OIIA. See also A Gender Agenda, National LGBTI Health Alliance, OIIA, Transformative and Transgender Victoria, *Joint submission on recognition of non-binary gender in federal sex/gender guidelines Commonwealth Attorney General's Department* (12 October 2015) <<https://oii.org.au/30043/joint-submission-federal-sexgender-guidelines/>>.

⁷⁹ Additional Submission No 3, OIIA

⁸⁰ Additional Submission No 7, EOC.

79. Similarly, OIIA has also recommended that only adults giving voluntary and informed consent should be able to register their sex and/or gender as a non-binary gender and that registration of birth include an option of ‘unspecified’. In the view of the OIIA, placing children in a non-binary gender category (such as ‘Other, please specify’) when a binary concept of gender continues to predominate Australian society places children at the risk of discrimination, bullying and exclusion by identifying them as something other than the accepted gender norms.⁸¹ OIIA told SALRI that:

we do not support assignment of infants and children to a non-binary classification, as they are unable to provide informed consent for a status that does not confer rights to participate equally in social life. Examples include school sports, marriage, and many other situations.⁸²

80. SALRI shares the views of the EOC and the Roundtable and supports an approach that provides parents with the option of describing sex and/or gender at birth as ‘unspecified’, which is also consistent with the principles underlying the approach adopted in the ACT and with the Australian Government Guidelines on the Recognition of Sex and Gender.

Recommendation

Having regard to these views, and in light of the information contained in the Audit Report, SALRI recommends that there should continue to be a legal requirement to register the sex and/or gender of a child born in South Australia, however a non-binary category of sex and/or gender should be available.

For adults and children who apply to have their registered sex and/or gender changed, this category should be described as ‘Other, please specify’ with the option to provide an additional description of gender identity. This category would align with the principle of self-identification supported by the Roundtable and would also be consistent with the proposed new ABS Sex and Gender Identity Standard.

For the registration of births in South Australia, the non-binary category of ‘unspecified’ should be available (rather than ‘Other, please specify’) as an option for children born with intersex variants. This would provide much needed flexibility for parents of intersex children to obtain interdisciplinary and specialist advice before registering their child’s sex as either male or female.

If, contrary to this primary recommendation, these options are not considered administratively feasible, then SALRI notes that the terms ‘unspecified’ and ‘non-binary’ have received support, particularly in the context of adult applications for change of sex and/or gender, and could be used a single third option for the registration of sex and/or gender.

⁸¹ Ibid.

⁸² Ibid.

Option C. Extend existing timeframes for registering the sex or gender of a child

81. As noted above, currently in South Australia, when a child is born, the hospital must notify the Births Deaths and Marriages Registry within seven days (48 hours for still births)⁸³ and provide prescribed information, including the child's sex (to be indicated as 'male' or 'female'). The parents or person legally responsible for the child must then register the child's birth within 60 days and include prescribed information, including information as to the child's sex.⁸⁴ As outlined in **Appendix 3**, the South Australian time frames for notification and registration of birth are consistent with the majority of other Australian jurisdictions, with the exception of the ACT, which has recently enacted various reforms designed to remove discrimination on the grounds of gender identity and intersex status.⁸⁵
82. Under the ACT approach, a similar time frame for notification of births applies under the amended ACT legislation, which must also be in the prescribed form (which now includes non-binary options of 'unspecified/indeterminate/intersex').⁸⁶ The ACT Regulations also provide that the child's sex need only be indicated on the notification of birth if it is 'determinable'.⁸⁷ In the ACT, registration of birth can occur within six months, again in the prescribed form, where an indication of sex and/or gender is required, but non-binary options are provided.⁸⁸
83. These changes reflect findings made by the ACT Law Reform Advisory Council designed to provide parents of children with intersex variants more time to obtain professional and multidisciplinary advice before making potentially irreversible decisions about their child's sex and gender identity.⁸⁹
84. The ACT approach has received support from a number of submission makers and Roundtable participants including the GLHA who noted that these reforms allow parents time to 'receive advice, sort out their emotional responses and avoid rushing to gender normalising surgery'.⁹⁰ Similar views have been expressed by the OIIA, who explain that tight time frames may encourage rapid surgery to remove gender

⁸³ *BDMR Act* (SA) s 12.

⁸⁴ *Ibid* s 16.

⁸⁵ *Births, Deaths and Marriages Registration Act 1997* (ACT); Beyond the Binary Report, above n 61.

⁸⁶ *Births, Deaths and Marriages Registration Act 1997* (ACT) s 5.

⁸⁷ *Births, Deaths and Marriages Registration Regulations 1998* (ACT) reg 5(b).

⁸⁸ *Births, Deaths and Marriages Registration Act 1997* (ACT) s 10.

⁸⁹ Beyond the Binary Report, above n 61.

⁹⁰ Additional Submission No 5, GLHA.

ambiguities, particularly if parents are keen to avoid their child being classed as ‘intersex’ under the law.⁹¹ The EOC also submitted that:

[I]t is crucial that there is flexibility regarding the recording of information about sex and/or gender of a child where the child’s gender is yet to be determined. One reason for this is to remove any impetus for unnecessary medical intervention.⁹²

85. Views differed, however, as to the appropriate time period that should be provided for the registration of this information. Some participants in the SALRI consultations and LRC process expressed the view that a 90 day time period would be appropriate.⁹³

86. Others were of the view that a much longer time frame should be provided. For example, in a recent submission the OIIA have recommended that if, contrary to their primary submission, a deadline is to be opposed wherein the sex or gender of a child must be legally registered, parents be given an extended period of up to three years to declare the sex of their child.⁹⁴ Similar, Zoey Campbell submitted that:

Developmental psychology suggests that gender identity develops usually between the second and third years of life but may reflect physiological variations determined in utero, and that is becomes effectively stabilised for most people between the ages of six and seven years. Recent research findings have confirmed that this pattern also applies to transgender children, contradicting earlier procedurally flawed research.

...

It should be noted that whilst the psychological evidence supports a particular time frame, there are multiple factors, stresses and social pressures arising from discriminatory cis gender and hetero-normative belief systems that will defer the ability or willingness of families or individuals to seek legal recognition or medical intervention to affirm their authentic gender identity.⁹⁵

87. However, not all submission makers supported an extension of time for registration of births. For example, medical practitioners participating in the SALRI’s Roundtable strongly cautioned against an approach that allows an open ended time frame for parents to provide information about the child’s sex and/or gender beyond six months if sex and/or gender has yet to be determined or self-identified by the child. They explained that self-identification of gender in a child is a complex process and is part of the child’s broader development so it would not be appropriate to incorporate a time frame based on these criteria.

⁹¹ Additional Submission No 3, OIIA.

⁹² Additional Submission No 6, EOC.

⁹³ See, for example, Additional Submission No 3, OIIA.

⁹⁴ Ibid.

⁹⁵ Additional Submission No 4, Zoey Campbell .

88. The ABS did not support any extension of the current 60 day time period for registration of births in South Australia, noting that:

Lengthening the timeframe to register from 60 to 90 days–6 months would have a direct impact on the RBDMs ability to provide timely vital statistics for the production of Australia’s quarterly estimated resident population estimates. Any increase on the current lag in registrations would be unacceptable from both the ABS’ and key users of our data as it will undermine the quality of Australia’s population estimates.

The ABS therefore could therefore not support a change to legislation to enable a longer time frame for registration unless sex is medically identified as indeterminate at which point we could consider a 90 day registration period.⁹⁶

89. Discussion of time frames for registration of birth also featured in the hearings conducted by the LRC in its inquiry into the *Sexual Reassignment Act 1988* (SA).⁹⁷
90. Having considered these views, and having regard to the need to consider consistency across Australian jurisdictions where appropriate and the requirement for South Australia to continue to contribute to the timely collection of statistical information by the ABS, SALRI is reluctant to extend the current 60 day time frame for registration of births in South Australia.
91. However, SALRI does support reforms that would provide parents of a child born with intersex variants with more time than at present to obtain professional and multidisciplinary advice and support. To this end, SALRI recommends that the current requirement in BDMR Regulation 5 which requires the Birth Registration Statement to include the child’s ‘sex’ be replaced with a requirement that the child’s sex be included ‘if determinable’.
92. This approach would be supported by the option for parents to indicate the sex and/or gender of the child as ‘unspecified’ in the Birth Registration Statement. It would further be supported by a streamlined process for parents to change the registered sex and/or gender of their child (discussed below).
93. SALRI notes that OIIA also support the continuation of an option to correct a registration of a birth, if information available shows that the registration at birth was in error, including the sex registration. It notes that the process of demonstrating an initial error may justify the provision of medical evidence, however this process should be in addition to the proposed path to reassignment of sex.⁹⁸

⁹⁶ Additional Submission No 9, ABS.

⁹⁷ LRC Inquiry, above n 7.

⁹⁸ Additional Submission No 3, OIIA.

Recommendation

SALRI recommends that BDMR Regulation 5 be amended so as to replace the current requirement to include the child's sex within the Birth Registration Statement, with a requirement that the child's sex be included 'if determinable'. This would provide important flexibility for the parents of children born with intersex variants to obtain appropriate advice and support outside of the 60 day time frame if required.

No further changes to the time frames for notification or registration of births should be made.

2. Changing registered sex and/or gender on the Register

94. Currently, the BDMR Act does not set out a framework for changing sex or gender on the register, outside of the limited correction powers available to the Register.⁹⁹ Instead, if a person wants to change their legally registered sex, they must obtain a recognition certificate under the SR Act and present this to the Registrar who must then make a change on the Registry.¹⁰⁰ As noted above, currently the only two categories for registering sex and/or gender on the Register are 'male' and 'female'.
95. As documented in some detail in the Audit Report, the normative and practical impact of these discriminatory laws can be profound for gender diverse and intersex South Australians.¹⁰¹ Their right to assert their authentic gender identity is denied, their personal relationships – including marriage and parenting rights - can be put at risk, and they face ongoing barriers to accessing the basic services the rest of the South Australian community takes for granted.¹⁰² SALRI has also heard how these and other discriminatory features of South Australian laws can put gender diverse and intersex people at risk of serious physical and mental health conditions and prevent them from fully participating in and contributing to public life.¹⁰³
96. The following options for reform to the process of changing a person's registered sex and/or gender information on the Births Deaths and Marriages Register are considered below:
- Option A. Adopt the ACT Approach to changing sex or gender on the Births Deaths and Marriages Register

⁹⁹ *BDMR Act* s 17.

¹⁰⁰ A useful summary of the current approach to changing sex or gender on the Births Deaths and Marriages Register in South Australia is provided in the Births Deaths and Marriages Registry Office's submission to the South Australian Parliament's Legislative Review Committee's inquiry into the *Sexual Reassignment Act 1988* (SA).

¹⁰¹ *SR Act* s 9.

¹⁰² Audit Report, above n 3, 49-61.

¹⁰³ *Ibid.* See also Additional Submissions Nos 1-4.

- Option B. Enact a simplified, self-affirmation approach to changing sex and/or gender on the Births Deaths and Marriages Register, based on the existing change of name process
- Option C. Enact a simplified process for changing the registered sex and/or gender information for children, with protections to ensure that the best interests of the child are taken into account and that the child consents to the change.

97. For the reasons outlined below, SALRI recommends adopting Options B and C.

98. When considering these options, SALRI emphasises the need to also consider provisions that would operate to preserve and protect the integrity of the Register, such as those that would empower the Registrar to develop practices and policies to guard against misuse or fraud. These provisions are described below.

Option A. Adopt the ACT Approach to changing sex or gender on the Births Deaths and Marriages Register

99. Under the *Births, Deaths and Marriages Registration Act 1997* (ACT), an adult whose birth is registered in the ACT can apply to change their registered sex or gender directly to the Register of Births Deaths and Marriages.¹⁰⁴ The application must be accompanied by 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.¹⁰⁵ Applications can also be made on behalf of a child. The application must include a statement signed by the parents (or a person with parental responsibility) stating that the alteration of the registered sex or gender is in the best interests of the child.¹⁰⁶ This 'ACT model' is outlined in further detail in the Audit Report.¹⁰⁷

100. Other than the ACT, Australian States and Territories require restrictive processes for changing registered sex and/or gender.¹⁰⁸ For example, many of these jurisdictions require evidence of a gender and/or sexual reassignment procedure¹⁰⁹ and only permit applications to be made by adults who are unmarried. In Western Australia, applications must be accompanied by prescribed medical evidence and are determined by a specialist board.¹¹⁰ However, unlike the South Australian laws, no other jurisdictions require medical practitioners to be specifically approved under the relevant Act, and none

¹⁰⁴ *Births, Deaths and Marriages Registration Act 1997* (ACT) s 24 (1).

¹⁰⁵ *Ibid*, s 25.

¹⁰⁶ *Ibid* s 24(2).

¹⁰⁷ Audit Report, above n 3, 65-67.

¹⁰⁸ For a Table summary of relevant Australian laws, see Appendix 3 below.

¹⁰⁹ Though what may be necessary varies between States – most States require a surgical procedure such as the *Births, Deaths and Marriages Registration Act 2003* (Qld) Schedule 2 (definition of 'sexual reassignment surgery'), while others will accept a medical procedure alone, as is likely the case in South Australia (see discussion of the Western Australian laws at **Error! Reference source not found.** above).

¹¹⁰ See *Gender Reassignment Act 2000* (WA) s 14.

require an adult applicant to appear in front of a magistrate before being issued with a Recognition Certificate.

101. As noted in the Audit Report, SALRI received a number of submissions in supporting adoption of the ACT model in South Australia.¹¹¹ These submissions explain that the ACT model provides a direct, accessible legal process for changing sex or gender on the Births Deaths and Marriages Register that does not require evidence of irreversible medical treatment or surgery and/or a court-supervised application process.¹¹² The requirement to provide some medical evidence in support of an application to change the sex or gender on the Register was considered by some to be appropriate and not overly onerous.¹¹³ Some pointed to the importance of seeking professional support and advice when transitioning between genders, and considered the ACT requirement to provide medical evidence to have a beneficial side effect of encouraging gender diverse people to seek out such services.¹¹⁴

102. However, other submission makers were critical of the ACT model on a number of grounds, including its use of the term ‘intersex’ as a specified non-binary category of sex or gender.¹¹⁵ For these submission makers, the requirement to provide medical evidence in support of an application to change sex or gender on the Register was discriminatory and unnecessary.¹¹⁶ It was submitted that from a human rights perspective, an adult should be free to determine his or her gender identity and have their authentic gender identity registered without the requirement for additional, third party evidence.¹¹⁷ As Zoey Campbell submitted:

[M]any individuals with established gender identities that diverge from their natal sex registration are unable or unprepared because of economic, health grounds or other reasons to undertake hormone therapy or gender confirmation surgeries or other relevant clinical procedures, including gender counselling. Those persons should be able to have their gender identity legally recognised. To retain the current barriers that prevent this human rights, even in a moderated form, would continue existing discrimination against a significant cohort in the trans, GD, and IN communities.¹¹⁸

103. This was also the shared view of the Roundtable.¹¹⁹

¹¹¹ Audit Report, above n 3, 65.

¹¹² Ibid 65-67.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ See, for example, Additional Submission Nos 1-4. See also Roundtable Report at Appendix 2.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Additional Submission No 4, Zoey Campbell.

¹¹⁹ Roundtable Report at Appendix 2.

Option B. Enact a simplified, self-affirmation approach to changing sex and/or gender on the Births Deaths and Marriages Register, based on the existing change of name process

104. Currently, pursuant to Part 4 of the BDMR Act, an adult whose birth is registered in South Australia, or is domiciled or ordinarily resides in South Australia, can apply directly to the Registrar to change their name.¹²⁰ The application must be in the prescribed form (which includes the requirement to indicate the applicant's sex).¹²¹ An application can also be made by the parents of a child living or born in South Australia (and in certain circumstances by one parent).¹²² Before making the change, the Registrar can seek further information about the applicant to determine age, identity and consent and to ensure that the change is not motivated by fraud or other improper purpose.¹²³ The Registrar can also refuse to register a change of name that would be contrary to the public interest, obscene or offensive and has developed a policy of not considering more than one application for a change of name within a 12 month period.¹²⁴
105. Many of the participants in the SALRI consultation process supported this model as the preferred model for changing registered sex or gender in South Australia.¹²⁵ They informed SALRI that this model avoids the requirement to provide medical evidence in support of an application and is consistent with the principle of self-affirmation approach recently adopted in a number of European jurisdictions.¹²⁶ The principle of self-affirmation of gender identity is set out in the Yogyakarta Principles which are cited as a guide to best international practice in this area.¹²⁷ In particular, Principle 3 provides:

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 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

¹²⁰ *BDMR Act* ss 23, 24.

¹²¹ *BDMR Regulations* reg 7.

¹²² *Ibid* s 26.

¹²³ *Ibid* s 27.

¹²⁴ Government of South Australia, Consumer and Business Services, *Change of Name*, undated, accessed 7 December 2015, <http://www.cbs.sa.gov.au/wcm/births-deaths-marriages/change-of-name/>

¹²⁵ See, for example, Roundtable Report at Appendix 2.

¹²⁶ *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) translation available at <https://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/GIGESC/70%20-%202014%20-%20GIGESC%20-%20EN.pdf>, *Gender Recognition Act 2015* (Ireland) <http://tgeu.org/wp-content/uploads/2015/08/IRELAND_Gender-Recognition-Act-2015.pdf>.

¹²⁷ Yogyakarta Principles, above n 39. The significance of these principles is discussed in, David Brown, 'Making Room For Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles' (2009) 31(1) *Michigan Journal of International Law* 821. SALRI understands that the LRC is also taking into account these principles in its Inquiry.

conceal, suppress or deny their sexual orientation or gender identity.

106. Dr Robert Lyons, former President of the Australian and New Zealand Professional Association for Transgender Health (ANZPATH) and experienced South Australian practitioner, addressed these matters in his submission to the LRC noting that:

The present mechanism of gender change does not compare well with other more progressive jurisdictions. Nor is it helpful for those involved. Most jurisdictions now simply have a bureaucratic procedure by which this can be done via application from the person concerned.

In my view this would be best administrated by Births, Deaths and Marriages and should be by application from the person involved. That person should make a statement as to their gender and the gender in which they have been living for the last year or so (M, F or X). This should not be conditional on either hormonal or surgical procedures. For some people these are unnecessary and for others medically dangerous. There is also the group who cannot access them for financial reasons.¹²⁸

107. The self-affirmation based model, based on the current change of name provisions, would also be consistent with the administrative structure of the BDMR Act. It would also move South Australia closer to the process for applying for a change of sex or gender on an Australian Passport.¹²⁹

108. Unlike the SR Act, an approach modelled on the change of name provisions in the BDMR Act would not need to include the requirement for a person to be unmarried before an application for change of sex or gender could be made. Nor would it need to restrict an individual from making further applications for amendments, provided appropriate protections against potential fraud were included.

Option C. Enact a simplified process for changing the registered sex and/or gender information for children, with protections similar to the existing change of name process

109. At the Roundtable, participants expressed the view that additional considerations apply when determining the appropriate process for changing the registered sex and/or gender for children, particularly if the parents of the child disagree or if different medical advice has been received.¹³⁰ The Roundtable expressed the view that:

For children, the process for changing registered sex and/or gender should be based on the principles of self identification and the rights of the child. The application to change sex and/or gender on the register could be undertaken by the child's parents or guardian, accompanied by a declaration that the application is in the best interests of the

¹²⁸ LRC Inquiry, above n 7.

¹²⁹ 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>>.

¹³⁰ Roundtable Report at Appendix 2.

child and is made with the consent of the child. Some participants considered that there may be role for the courts in this process. The process could include the option to provide supporting medical evidence (for example a letter of support from a treating doctor), but evidence of medical intervention or surgery should not be required. The child should not be required to be a certain age, however capacity to consent would need to be considered.¹³¹

110. The GLHA submitted that a parent/guardian procedure should be available for families with minors between the ages of 3-16, that should involve an application being made directly to the Register ‘with the only evidence required being a supporting statement by a minor (10 years or older), affirming their gender’.¹³² It was submitted that a statement of this nature by the minor would be consistent with Articles 8 and 12 of the *United Nations Convention on the Rights of the Child*.¹³³
111. As discussed later in this report, the Family Court of Australia has developed an approach that the court’s approval of certain more invasive treatments for gender dysphoria in children may be required, particularly where the child cannot be shown to have independent capacity to consent.
112. SALRI considers that the current process for changing the name of a child under the South Australian BDMR Act provides a model that meets many of the features recommended by the Roundtable and the additional submissions received. For example:
- Subsection 25(1) of the BDMR Act provides that the parents of a child who is domiciled or ordinarily resides in South Australia, or whose birth is registered in South Australia, can apply to the Registrar for registration of a change of the child’s name.
 - Subsection 25(2) of the BDMR Act provides that an application for registration of a change of a child’s name may be made by one parent if approved by the Magistrates Court, if the Court is satisfied that the change is in the child’s best interests.
 - Section 26 provides that a change of a child’s name must not be registered unless the child consents to the change of name; or the child is unable to understand the meaning and implications of the change of name.
 - Section 27 provides the Registrar with the power to request further evidence to establish the applicant’s identity and age and to determine that the change of name is not sought for a fraudulent or other improper purpose. The Registrar can also refuse to register a change of name that would be contrary to the public interest, obscene or offensive and has developed a policy of not considering more than one application for a change of name within a 12 month period.¹³⁴ This provision also provides that if the Registrar is satisfied that the name of a person whose birth is registered in South

¹³¹ Ibid.

¹³² Additional Submission No 5, GLHA.

¹³³ Additional Submission No 5, GLHA.

¹³⁴ Government of South Australia, Consumer and Business Services, *Change of Name*, undated, accessed 7 December 2015, <http://www.cbs.sa.gov.au/wcm/births-deaths-marriages/change-of-name/>

Australia has been changed under another law or by order of a court, the change of name may be registered under this Act.

- Section 51 makes it an offence to include a false or misleading information in a change of name application.

113. SALRI considers that this model could be readily adapted to apply to applications to register a change in the child's sex and/or gender identity. It not only provides an accessible and non-discriminatory process for applicants, but also contains the type of protections against fraud and misuse that are necessary to accompany any proposed change of registered sex and/or gender process.
114. This model could be supplemented by an additional provision that would permit a child to make an application directly to the Magistrates Court for the registration of a change of sex and/or gender. Safeguards such as those incorporated into ss 25 and 26 to ensure that the Court has regard to the best interests of the child and that the child understands and consents to the change should be included.
115. This would recognise the reality that young people – just like adults – have the right to express their authentic gender identity and to have their identity recognised by the law, even in circumstances where they may not have the support of their parents. As researcher and practitioner Associate Professor Damien Riggs has submitted:

I believe that it is important to acknowledge that not all young people will have parents who support their need to change their gender marker or name on official documentation. I would strongly advocate for a mechanism whereby young people are able to register both a change of name and a change of gender without the written or verbal support of their parents.¹³⁵

116. While Dr Riggs does not support a Court based process, a number of other submission makers supported a role for the Court in child-initiated applications for changing sex and/or gender on the Registrar to ensure that the rights of the child were adequately protected. For example, the GLHA recommended an approach to self-initiated applications by minors under 16 that would include: a hearing from approval before a Magistrate; and explicitly including in the legislation for compatible obligations of the Magistrate in hearing these matters pursuant to the [*Convention on the Rights of the Child*].¹³⁶
117. Many submission makers highlighted the importance of ensuring a provision was included to ensure that the child consented to the change or sex and/or gender. The EOC, for example, submitted:

[c]onsent of the child is critical, particularly where parents or guardians may not have a united view. The Court could play a role here to ensure that the child has consented

¹³⁵ Additional Submission No 7, Dr Riggs.

¹³⁶ Additional Submission No 5, GLHA.

and is not being influenced by a parent or guardian's wishes.¹³⁷

118. SALRI notes that it may be appropriate to include minimum age requirements for such applications to be made, or to provide the Court with the relevant discretion to determine the child's evolving capacity to consent. Dami Barnes, for her example, in her submission observes:

The age at which the child can make a decision for themselves would be ideal. For me, my feelings of incongruity occurred around the age of 12 for instance.¹³⁸

119. Zoey Campbell submitted that if a court-based process is pursued for applications by children, that children of all ages should have the capacity to initiate independent applications to change their registered sex or gender to a Magistrate. Zoey Campbell further submitted that such an approach is broadly consistent with s 8(2) of the Maltese Act, that also explicitly requires procedures that comply with the Convention on the Rights of the Child.¹³⁹

120. The GHLA and Zoey Campbell submitted that 16 years of age should be the appropriate age at which a person should be entitled to independently seek a change in their registered sex or gender, on the same legal basis as an adult.¹⁴⁰ These submission makers noted that 16 is the age at which a person can consent to medical treatment as if an adult under the *Consent to Medical Treatment and Palliative Care Act 1995* (SA). GLHA further noted that:

[t]he evidence of developmental psychology [suggests] that by the age of 16, gender identity, including gender diverse variants have stabilised, for the great majority of people.¹⁴¹

121. Having considered these views and having regard to SALRI's general mandate to promote consistency of laws wherever appropriate, it recommends that for the purpose of the proposed new Part 4A of the BDMR Act, a 'child' should mean a person under the age of 18 years. This would be consistent with the current process for changing a person's name under the BDMR Act regime in South Australia, as well as BDMR regimes around Australia and the *Family Law Act 1975* (Cth). It is particularly important that the proposed change of sex and/or gender regime aligns with the change of name regime in this respect, as it is likely an applicant will want both aspects of their birth registration changed.

¹³⁷ Additional Submission No 6, EOC.

¹³⁸ Additional Submission No 2, Dami Barnes.

¹³⁹ Additional Submission No 4, Zoey Campbell.

¹⁴⁰ Additional Submissions No 4, Zoey Campbell and No 5, GLHA.

¹⁴¹ Additional Submission No 5, GLHA.

122. SALRI considers that the age of 18 years to be considered an adult for the purpose of the proposed new Part 4A is appropriate. The definition of a child as a person under the age of 16 years (to accord with the age to consent to medical treatment under the *Consent to Medical Treatment and Palliative Care Act 1995* (SA)) or the age of 17 years (to accord with the age to consent to sexual conduct under the Criminal Law Consolidation Act) is inappropriate in the present context. Having regard to the fact that the new provisions recommended by SALRI would permit children to apply to change their registered sex and/or gender *without* the need to provide medical evidence, SALRI is confident that the concerns raised by some submission makers as to the age of consent to medical treatment will largely dissipate. SALRI does not recommend prescribing a minimum age for a child to make an application directly to the Magistrate's Court to change their registered sex and/or gender, however the Court would be required to consider the child's evolving capacity to understand and consent to the change, as well as the best interests of the child.

Recommendation

Having regard to the considerations above, and those outlined in the Audit Report, SALRI recommends that a new Part 4A of the BDMR Act be enacted to introduce a process for applying for registered sex and/or gender to be changed, based on that currently contained in Part 4 of the Act relating to change of name. The new Part 4A should provide:

A process for adults whose birth was registered in South Australia or who are domiciled in South Australia to apply directly to the Registrar to change their registered sex and/or gender on the BDM Register, based s 24 of the BDMR Act. The Forms developed to facilitate an application by an adult should include the following options 'male', 'female', 'Other, please specify' with an option to indicate additional information as to the person's self-described gender identity. As noted above, if this proposed new category presents insurmountable administrative difficulties, alternative categories of either 'non-binary' or 'unspecified' should be included.

A further provision, based on existing s 27 of the BDMR Act, should be included to provide that the Registrar may require the applicant to provide evidence to establish to the Registrar's satisfaction (a) the identity and age of the person whose sex and/or gender is to be changed; and (b) that the change of sex and/or gender is not sought for a fraudulent or other improper purpose. This provision should also specifically provide that, subject to the above provisions, the Registrar must not require evidence that the applicant (a) is unmarried or (b) has undergone a sexual or gender reassignment procedure. The Registrar should also retain the power to refuse to register self describing gender information that is offensive, obscene or contrary to the public interest, and to develop policies to limit the number of applications made in a 12 month period. Offences should apply to the provision of misleading or false information.

A provision based on s 28 of the BDMR Act should also be included, setting out the process for the Registrar to record the changed sex and/or gender and for the issue of new Birth Certificate that must show the person's sex and/or gender as changed under this Part.

The new Part 4A should also contain a process for the parents of a child whose birth was registered in South Australia or who is domiciled in South Australia to apply on behalf of the child to the Registrar to change the child's registered sex and/or gender, based on s 25(1) of the BDMR Act.

Provision should be made for one of the child's parents to apply for the child's sex and/or gender to be changed based on s 25(2) of the BDMR Act, which involves an application to the Magistrates Court and a process that incorporates considerations by the Court of the best interests of the child. A further provision based on s 26 of the BDM Act should be included to ensure that a change of a child's sex and/or gender must not be registered unless the child consents to the change.

An additional provision should be included to enable a child to apply directly to the Magistrate's Court to change their registered sex and/or gender. There should be no requirement for the applicant to provide evidence that they (a) are unmarried or (b) have undergone sexual or gender reassignment treatment. The Court should be required to consider (a) whether the proposed change is in the best interests of the child and (b) that the child understands and consents to the change.

The Forms developed to facilitate an application for change of registered sex and/or gender for a child should include the following options 'male', 'female', 'unspecified'. The selected option should be included on the person's new Birth Certificate. For the purposes of the proposed new Part 4A of the BDMR Act, 'child' should have the same meaning as that in the remainder of the BDMR Act, that is, a person under 18 years of age.

3. Laws Governing Sex and/or Gender Reassignment Procedures

123. The existing South Australian sexual reassignment laws are summarised above and outlined in more detail in the Audit Report.¹⁴²

124. This section of the Report considers reform options beginning with the repeal of the SR Act. It also considers the issue of non-consensual surgery or medical treatment on children born with intersex variants for gender affirmation purposes.

A. Repeal of current sexual reassignment laws

125. A strong consensus emerged from SALRI's research and consultation that the SR Act, whilst a well-intentioned reform at the time of its introduction in 1988,¹⁴³ is now

¹⁴² Audit Report, above n 3, 46-49.

¹⁴³ The *Sexual Reassignment Act 1988* (SA) was the first of its kind in Australia. The Attorney-General noted that while the Act would not necessarily solve all the problems faced by a transgender persons (such as the issue of marriage which was for the Commonwealth), the Act, nevertheless, provided a legal recognition which had been previously lacking in South Australia and was 'an important step in adopting a more realistic and sensitive approach to persons who undergo sexual reassignment surgery' (South Australia, *Parliamentary Debates*, Legislative Council, 2 December 1987, 2373 (C Sumner, Attorney-General)). See also South Australia,

outdated and should be entirely repealed.¹⁴⁴ A summary of the reasons in favour of repeal is contained in the Audit Report.¹⁴⁵ A similarly strong consensus emerges in the submissions made to the LRC and SALRI understands that this will be explored in some detail in the LRC's report.¹⁴⁶ Repeal of the SR Act has also been recommended by the AHRC in its *Resilient Individuals Report*.¹⁴⁷ In light of the above, SALRI recommends that the SR Act be entirely repealed.

126. The next question becomes whether it should be replaced by a new regulatory regime regulating access to and the provision of sexual reassignment procedures in South Australia.

B. The need for a replacement regulatory regime for sex and gender reassignment procedures?

127. SALRI's current reference does not extend to making general recommendations about the provision of health care to gender diverse and intersex South Australians. For this reason, despite having received numerous well documented submissions pointing to the inadequacies in the provision of appropriate and specialist health services to gender diverse and intersex people, SALRI has confined its recommendations to the relevant legal framework. It encourages the Government and submission makers to look for opportunities to continue to explore these broader health care issues.
128. At the Roundtable discussions, a number of participants expressed the view that it was not necessary to replace the SR Act with a new legislative regime, however careful consideration should be given to how to ensure that specialist, interdisciplinary medical care is available to gender diverse South Australians and children born with intersex variants.¹⁴⁸
129. A number of other submission makers strongly questioned the assumption that there is currently in place an adequate ethical, professional and legal framework when it comes

Parliamentary Debates, Legislative Council, 16 February 1988, 2745-2746 (R Griffin).

¹⁴⁴ See South Australia, *Parliamentary Debates*, Legislative Council, 15 October 2014, 1193 (Tammy Franks). 'I know that this Act, which is 26 years old and has never been reviewed, has never worked, not even in that first year of its operation. In fact, community standards and scientific understandings have come a long way from when this bill was first introduced and implemented, as have attitudes. This certainly needs to be better reflected in this state's legislation, but we also need to recognise that this Bill, while well meaning and of its time, does not serve the transgender community, the broader community, or the medical health professionals of this State.' See also South Australia, *Parliamentary Debates*, Legislative Council, 3 December 2014, 1962 (Kelly Vincent). 'I think it is important to acknowledge at this point that at the time the original Act was passed in 1988, it was a progressive and modern piece of legislation. It seems that many of the matters now arising from that act seem to be largely unintended consequences. As our understanding of gender identity has evolved, the Act has simply failed to keep pace. Regardless of an individual member's views on gender identity politics, I believe it is incumbent on all of us to at least recognise that when people directly affected by legislation tell us that there is a problem, there probably is a problem.'

¹⁴⁵ Audit Report, above n 3, 49-70.

¹⁴⁶ LRC Inquiry, above n 7.

¹⁴⁷ Resilient Individuals Report, above n 10.

¹⁴⁸ Roundtable Report at Appendix 2.

to the delivery of and access to appropriate health care for gender diverse and intersex South Australians. For example, Associate Professor Riggs observed that it may be:

... overly optimistic to suppose that current ethical, professional, and legal frameworks governing the provision of medical treatment in South Australian will suffice. From both my empirical research and clinical practice there has historically been, and continues to exist, forms of gatekeeping that in some cases restrict people from accessing services.¹⁴⁹

130. SALRI was also referred to the evidence given to the LRC that illustrates that the well-intentioned but misguided provisions of the SR Act have put sexual reassignment procedures out of reach for many, if not most, South Australians.¹⁵⁰

131. With this experience in mind, a number of submission makers were sceptical as to whether the repeal of the SR Act would by itself provide any guarantee that appropriate medical care would be provided in South Australia to gender diverse and intersex people. Both Zoey Campbell and the GLHA recommended that new legislation addressing ‘medical treatment of trans, GD and IN persons’ be adopted.¹⁵¹ It was submitted that such an Act should include:

A qualified prohibition on gender normalising surgery on minors similar in scope to Sections 15(1) & (2) of the Maltese Act to protect the rights of inter-sex minors to bodily integrity and physical autonomy.

A requirement for each major public and private hospital to form a multidisciplinary gender treatment & ethics committee. This team would make decisions on appropriate surgery for intersex children, within the guidance provided by the law, and establish/review treatment protocols for trans, gender diverse and inter-sex care.

The right to fair access to treatments (such as orchidectomy, hysterectomy and other surgeries and procedures associated with gender transition) for transgender, gender diverse and inter-sex patients in public hospitals on a completely equal, non-discriminatory footing.

A statement of principles applicable to trans, gender diverse and inter-sex healthcare, including the right to bodily integrity, physical autonomy and equal non-discriminatory access.¹⁵²

132. Dr Riggs also supports adopting measures to ensure the provision of accessible, high quality health care and recommended the adoption of Guidelines based on the latest

¹⁴⁹ Additional Submission No 7, Dr Riggs.

¹⁵⁰ Dr Lyons submission to LRC Inquiry, above n 25.

¹⁵¹ Ibid.

¹⁵² Additional Submission No 5, GLHA.

*World Professional Association for Transgender Health (WPATH) Guidelines.*¹⁵³ Dr Riggs explains:

These guidelines do not require a diagnosis in order for people to access services such as those related to gender affirming hormones and surgeries, yet in many cases in South Australia a diagnosis is still treated as a requirement. An even more affirming approach would be to consider developing guidelines that affirm the rights of people to self-determination. Whilst the WPATH Guidelines are both affirming and non-pathologising, they still require clinical assessment in order to access either hormones or surgery. They still potentially place health care professionals in a gatekeeping role. Other models such as that of Informed Consent (see <http://www.icath.org>) would be more likely to minimise gatekeeping and increase self-determination.¹⁵⁴

133. The OIIA has also suggested looking at the Maltese *Gender Identity Gender Expression and Sex Characteristics Act 2015* with a view to incorporating, within a new regulatory regime, a specific prohibition on non-consensual interventions based on psychosocial factors, as well as the principle about the right health, physical integrity and development of identity.¹⁵⁵ The OIIA further submits that a system of oversight be included from persons with backgrounds in community organisations and human rights law, a focus on interdisciplinary teams (rather than privileging the position of clinicians).¹⁵⁶
134. Dr Riggs further explained how the adoption of Guidelines based on the WPATH may help open up the provision of health services to a wider range of experienced and skilled clinicians.¹⁵⁷
135. SALRI understands that the LRC is also considering issues relating to access to publicly funded specialist and interdisciplinary medical care for gender diverse South Australians in the context of its inquiry.

C. The need for special protections for non-consensual gender affirmation procedures on children

136. A number of submission makers to SALRI have expressed concern at the incidence of non-consensual medical procedures on minors (for example in response to infants born

¹⁵³ World Professional Association for Transgender Health Inc, Ethical Guidelines concerning the care of patients with gender identity disorders (November 2000) available at <http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=4233?> WPATH is an international, inter-disciplinary non-profit organization devoted to promoting evidence based care, education, research, advocacy, public policy and respect in transgender health.

¹⁵⁴ Additional Submission No 7, Dr Riggs.

¹⁵⁵ Additional Submission No 3, OIIA.

¹⁵⁶ Ibid.

¹⁵⁷ Additional Submission No 7, Dr Riggs.

with intersex variants), and the impact this can have on the lives of people who are denied the right to self-identify their sex or gender.¹⁵⁸

137. As noted by the Australian Senate Community Affairs Committee's 2013 *Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia* (the Senate Committee Report),¹⁵⁹ intersex can include circumstances where the person will benefit from – indeed require – medical intervention, and intersex conditions are classified by the World Health Organisation as endocrine disorders.¹⁶⁰ However, as the OIIA told the Senate Committee, intersexuality does not necessarily involve a medical condition:

Intersex is not a medical condition or a disorder or a disability or a pathology or a condition of any sort. Intersex is differences in the same way height, weight, hair colour and so on are differences. Only a very few ways of being intersex have links to differences that might cause illness.¹⁶¹

138. The Senate Committee also observed:

Some intersex people are naturally fertile. Others may be infertile, however their gonads—whether ovaries or testes—are capable of producing hormones. There are also some intersex people who, while not capable of unassisted reproduction, may be able to have children with medical support, either with existing reproductive assisting technologies, or as new scientific advances occur.¹⁶²

139. This leads to scenarios where the parents of a child born with intersex variants may require advice from specialist, multidisciplinary medical teams as to whether medical intervention is required for their child.

140. In South Australia, the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) currently provides a legal framework for consent to medical procedures for minors. For example, s 6 of the Act provides that a person of or over 16 years of age may make decisions about his or her own medical treatment as validly and effectively as an adult. Section 12 of the Act provides that a medical practitioner may administer medical treatment to a child if (a) the parent or guardian consents; or (b) the child consents and (i) the medical practitioner who is to administer the treatment is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interest of the child's health and well being; and (ii) that opinion is supported by the written opinion of at least one other medical

¹⁵⁸ See, for example, Additional Submissions Nos 1-4.

¹⁵⁹ 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>.

¹⁶⁰ Ibid 4.

¹⁶¹ OIIA Submission to Senate Committee, above n 159, 4.

¹⁶² Senate Committee, above n 159, 4.

practitioner who personally examines the child before the treatment is commenced. No specific reference is made to sexual or gender affirmation or reassignment procedures.

141. A number of submission makers expressed the view that specific protection should be added to the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) or elsewhere to specifically guard against non-consensual gender affirmation or reassignment surgery being undertaken with respect to children.¹⁶³
142. SALRI was referred to the approach adopted under Maltese law, where it is unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor where such treatment and/or intervention can be deferred until the person to be treated can provide informed consent, for example through the person exercising parental authority with respect to the minor.¹⁶⁴ In exceptional circumstances treatment may be effected once agreement is reached between the interdisciplinary team and the persons exercising parental authority with respect to a minor who is still unable to provide consent.¹⁶⁵
143. SALRI further notes that the AHRC has recommended that all States and Territories implement the recommendations of the Senate Committee Report and this has been reflected in SALRI's findings and recommendations in the Audit Report. SALRI notes in particular, Senate Recommendation 3 that provides:

The committee recommends that all medical treatment of intersex people take place under guidelines that ensure treatment is managed by interdisciplinary 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.¹⁶⁶

144. The case for South Australia to implement these recommendations was noted by a number of submissions to SALRI and was also expressed during the Roundtable where the following shared view was recorded:

There is a need to ensure that non-consensual surgery is not undertaken with respect to infants and children purely for gender affirmation purposes. This could be achieved through a variety of mechanisms, including amendments to the *Consent to Medical Procedures and Palliative Care Act* or its relevant Regulations or through policies or guidelines regulating the medical profession. For example, clarifying that parents cannot consent to surgery on behalf of their child purely for gender affirmation purposes,

¹⁶³ Additional Submission No 3, OIIA and 4, Zoey Campbell and 9, National LGBTI Health Alliance. See also Audit Report, above n 3, 26 (referring to submission from Travis Wisdom).

¹⁶⁴ *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta), above n 126.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid Recommendation 3.

without demonstrating a clear medical need.¹⁶⁷

145. The Senate Committee also recommended that:

- The Commonwealth government provide funding to ensure that multidisciplinary teams are established for intersex medical care that have dedicated coordination, record-keeping and research support capacity, and comprehensive membership from the various medical and non-medical specialisms. All intersex people should have access to a multidisciplinary team [*Recommendation 4*].
- In light of the complex and contentious nature of the medical treatment of intersex people who are unable to make decisions for their own treatment, the committee recommends that oversight of these decisions is required [*Recommendation 5*].
- All proposed intersex medical interventions for children and adults without the capacity to consent require authorisation from a civil or administrative tribunal or the Family Court [*Recommendation 6*].

146. Following the Roundtable discussions, the question remained as to what would be the best legislative or non-legislative model to provide protections against non-consensual surgery on infants or minors for non-medical gender affirmation purposes.

147. Marcus Patterson in his submission recommended that consideration should be given to amending the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) to make direct reference to medical interventions with respect to infants and children for the purposes of sex or gender assignment:

In my view to assist in the avoidance of non-consensual medical procedures on minors in relation to assigning a sex identity I feel it is necessary to stipulate in the CMTPA such a requirement when repealing the SRA so that children can be legally assigned a sex/gender identity without a requirement for medical intervention before the age where they can provide informed consent.

Making a clear reference to this in the CMTPA would be educative for the medical profession in my view and also is supported by the recent laws in Malta etc.¹⁶⁸

148. Marcus Patterson also told SALRI that, in his view:

it is better to acknowledge that doctors cannot change a person's core sex identity and that all children should have the right to grow and self determine this identity free from surgical intervention without their consent.¹⁶⁹

¹⁶⁷ Roundtable Report at Appendix 2.

¹⁶⁸ Additional Submission No 1, Marcus Patterson.

¹⁶⁹ Ibid.

Recommendation:

Having regard to these views, and those outlined in the Audit Report, SALRI recommends that South Australia consider the implementation of the findings of the Senate Committee's extensive 2013 *Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia*.

As a starting point, SALRI recommends that the Government insert a new provision into the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) to clarify that the administration of medical treatment for 'gender affirmation or reassignment purposes' must only occur with the consent of the child or adult subject to the treatment and in accordance with Guidelines developed by the Minister under this provision.

'Gender affirmation or reassignment purposes' should be defined by Regulation following consultation with the medical profession and the gender diverse and intersex communities and having regard to the relevant recommendations of the Senate Committee Report and the WPATH Guidelines.

D. Family Court Approval for Treatment of Gender Dysphoria for Children

149. Although SALRI's role and reference does not permit it to make findings and recommendations relating to the Commonwealth jurisdiction, it is important to note that some forms of medical treatment for gender dysphoria in children may require the approval of the Family Court.

150. SALRI notes that access to these treatments remains a matter of great importance for young trans and gender diverse South Australians, with potentially significant consequences for their health. SALRI heard many young people speak directly about these experiences at the Feast's Queer Youth Drop In Centre Forum conducted by SALRI on 23 July 2015.¹⁷⁰ Dr Riggs has also observed:

At present, young people in South Australia are prescribed hormone blockers for periods of time that far exceed their recommended application. This can have deleterious impacts upon their physical development. Furthermore, in the absence of legal pathways to accessing hormones, young people are finding other ways to access hormones. Again, this can be deleterious for their wellbeing. Moving approval for hormones for young people out of the Family Court is thus a vital issue that requires serious consideration in the near future.¹⁷¹

151. As noted above, South Australia has legislation which confers full capacity for decision making about medical treatment on persons aged 16 years and over and deals with the provision of medical treatment for children under 16.¹⁷² However, due to Australia's federal structure, there are circumstances where the Family Court continues to have

¹⁷⁰ For further information about this Forum see Audit Report, above n 3, 22.

¹⁷¹ Additional Submission No 7, Dr Riggs.

¹⁷² *Consent to Medical Treatment and Palliative Care Act 1995* (SA).

jurisdiction over the provision of medical treatment to children. As Dessau J in *Re: Jamie* at first instance observed:

It is generally within the bounds of a parent's responsibility to be able to consent to medical treatment for and on behalf of their child. There are however certain procedures, referred to in the authorities as "special medical procedures", that fall beyond that responsibility and require determination by the court, as part of the court's *parens patriae* or welfare jurisdiction....¹⁷³

152. Certain medical procedures undertaken on children (under 18) require the Family Court's authorisation under this welfare jurisdiction.¹⁷⁴ These include medical treatment for children and adolescents 'gender dysphoria'.¹⁷⁵
153. No clear line can be readily drawn between the type of medical procedures that fall within the realm of parental responsibility and those which require Family Court authorisation, however the principles for identifying the type of medical procedures requiring authorisation were considered by the High Court of Australia in *Re: Marion*.¹⁷⁶ The majority of the court in *Re: Marion* endorsed the decision of the House of Lords in *Gillick v West Norfolk and Wisbech Health Authority* ('Gillick')¹⁷⁷ that a child is capable of providing his or her own consent to medical treatment where he or she is found to be of sufficient intelligence and maturity to fully understand what is involved. This is what has been referred to in subsequent cases as 'Gillick competency'.
154. In a 2013 Full Court of the Family Court of Australia decision known as *Re: Jamie*, the Court found that court authorisation for 'Stage 1 treatment' for gender dysphoria was not required.¹⁷⁸ The differences between 'Stage 1' and 'Stage 2' treatments for gender dysphoria were described by Justice Strickland of the Family Court as follows:

¹⁷³ [2011] FamCA 248, [33]. When determining matters under this 'welfare jurisdiction', the child's best interests is the paramount consideration. This includes any views expressed by the child and any factors (such as the child's maturity and level of understanding) that the court thinks is relevant to the weight it should give to the child's views. The 'welfare' jurisdiction is found in *Family Law Act 1975* (Cth) s67ZC ; see also *Family Law Act 1975* (Cth), s 60CC. As the Full Court of the Family Court found in *Re: Bernadette* (2011) FLC 93-463, the Court's powers under 67ZC are limited to making orders for people under the age of 18 years.

¹⁷⁴ As the Full Court of the Family Court found in *Re: Bernadette* (2011) FLC 93-463, the court's powers under s 67ZC are limited to making orders for people under the age of 18 years. As a matter of practice, applications for consent to authorise medical treatment are made to the Family Court rather than the Federal Circuit Court.

¹⁷⁵ See *Secretary of Department of Health and Community Services; JWB and SMB* (known as '*Marion's Case*' or '*Re: Marion*') (1992) 175 CLR 218. The Family Court decisions that have involved applications for treatment of gender dysphoria have used different terms to describe the condition. Following *Re Jamie*, for a child to be diagnosed with gender dysphoria, there must be a 'marked incongruence between one's experienced/expressed gender and assigned gender, of at least six months' duration, as manifested by at least six identified criteria'. The condition must also be associated with clinically significant distress or impairment in social, school, occupational or other important areas of functioning. See also Justice Steven Strickland, Judge of the Appeal Division and Chair, Law Reform Committee, Family Court of Australia, 'To treat or not to treat: legal responses to transgender young people' (Speech given at the Association of Family and Conciliation Courts 51st annual conference, Navigating the Waters of Shared Parenting: Guidance from the Harbour, Toronto, Canada, 28 – 31 May 2014)

¹⁷⁶ *Marion's Case* (1992) 175 CLR 218, 249-250.

¹⁷⁷ [1985] 3 All ER 402.

¹⁷⁸ *Re: Jamie*, [2013] FamCAFC 110. In *Re Jamie*, the Full Court considered the application of principles developed by the High Court of Australia in *Marion's Case* (1992) 175 CLR 218 and *Re: Alex*, (2004) FLC 93-175 where it was found that court authorisation for the

Stage 1 of the treatment – the suppression of puberty – is fully reversible. Stage 2 of the treatment – the administration of testosterone or oestrogen – has irreversible features. For testosterone use in females transitioning to males, these include hair growth, voice deepening and muscle growth. There is also a risk of impaired liver function, polycystic ovaries and ovarian cancer. For oestrogen use in males transitioning to female, these include breast development, testicular shrinkage and growth height maturation. There is also a risk of impaired liver function and thromboembolism.¹⁷⁹

155. In a subsequent 2014 decision *Re Colin (Gender Dysphoria)*,¹⁸⁰ the Family Court clarified that it has jurisdiction to hear and determine an application for authorisation of Phase 1 treatment if there is a dispute about the proposed course of treatment, for example between the views of the child, their parents or guardians and their treating medical practitioners.¹⁸¹ The case further confirmed that, in the absence of such a dispute, the court’s authorisation is not required for Phase 1 treatment.¹⁸²
156. In relation to Phase 2 treatment, *Re Colin (Gender Dysphoria)* confirmed that if the court is satisfied that the child is *Gillick* competent, then in the absence of any controversy the child can consent to the treatment and no court authorisation is required.¹⁸³ The question of whether a child is *Gillick* competent is a question to be determined by the court; and if the court is not satisfied that the child is *Gillick* competent, then court authorisation for ‘Phase 2’ treatment is required.¹⁸⁴

Recommendation

The current process Family Court process for authorising access to ‘Stage 2’ medical treatment for gender dysphoria in children (or for determining disputes relating to ‘Stage 1’ treatments) should be taken into account in the process of developing the Guidelines relating to gender affirmation procedures recommended above.

condition was required, for both the reversible (Stage 1) and partly irreversible (Stage 2) stages of treatment. The Full Court also considered the issue of whether people under the age of 18 years were able to give their own consent to medical treatment (the test of *Gillick* competency), and in what circumstances. See Strickland above n 175.

¹⁷⁹ Ibid.

¹⁸⁰ [2014] FAMCA 449.

¹⁸¹ Dr Andrew Lu and Jarman McKenna 'Gillick competence and gender dysphoria treatment - Re Colin' (2014) *Australian Health Law Bulletin* (October 2014) 198. <http://www.academia.edu/9084753/Gillick_competence_and_gender_dysphoria_treatment_-_Re_Colin>

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

4. Other Matters to Consider

157. If advanced, the above recommended changes would have important implications for the Births Deaths and Marriages Registry and other agencies and individuals that rely on the information and data contained in the Registry. These implications need to be carefully considered and include:

- the need to preserve the legal rights of people who have changed their sex and/or gender under the proposed reform framework;
- the need to restrict access to the historical information relating to sex and/gender and provide protection for personal privacy, as well as the need to be able to continue to provide law enforcement agencies with relevant information as to identity when appropriate;
- the need to consider how the South Australian regime should recognise non-binary sex and/or gender information contained in interstate registries;
- the ambiguity and/or difficulties that could confront marriage celebrants who are required to comply with the provisions of the *Marriage Act 1961* (Cth) that only permit marriage between a ‘man and a woman’.
- the implications of changed sex and gender identity for South Australia records;
- statistical categories of sex and gender identity; and
- successful implementation of the proposed reforms.

Consequential protections

158. The jurisdictions that have amended their Births Deaths and Marriages regimes to facilitate change of sex or gender have also included a range of related provisions to protect the rights of applicants and the integrity of the Register. These include a provision that clarifies that a person who has an entitlement under a will or trust or under a State or Territory law does not lose the entitlement only because the person’s sex has been altered on the register.¹⁸⁵

159. SALRI recommends that similar protection be incorporated into the proposed new Part 4A of the BDMR Act.

Access to the record of sex and/or gender identity

160. Under the reforms proposed above that are based on the current change of name process in the BDMR Act, after a person has changed the record of their sex, the Registrar-General will retain a record of the person’s sex as it was recorded in the register before the alteration.

¹⁸⁵ *Births, Deaths and Marriages Registration Act 1997* (ACT), s 29.

161. Personal privacy is important to many South Australians, particularly those who may make an application to change their registered sex or gender pursuant to the proposed reforms.
162. Currently, s 43 of the BDMR Act sets out the conditions in which the Registrar may grant individuals or organisations access to the Registry. Subsection 43(3) provides that:
- In deciding the conditions on which access to the Register, or information extracted from the Register, is to be given under this section, the Registrar must, as far as practicable, protect the persons to whom the entries in the Register relate from unjustified intrusion on their privacy.
163. It may be that further privacy protections are necessary in light of the reforms proposed above. SALRI notes that under the amended *Births, Deaths and Marriages Registration Act 1997* (ACT) a range of provisions are included to protect privacy protections for those who have a new sex or gender registered. These are:
- the requirement that the new birth certificate only shows the altered record of sex, and does not include any word or statement to the effect that the person to whom the certificate relates has changed sex;¹⁸⁶
 - general prohibition on accessing a birth certificate showing a person's sex before the alteration of the record to anyone other than the person, a child of the person or a prescribed person;¹⁸⁷ and
 - provisions that prohibit the use of old birth certificates that shows a person's sex before the record was altered with the intent to deceive.¹⁸⁸
164. SALRI recommends that similar provisions be included in the proposed new Part 4A of the BDMR Act.
165. In making these recommendations, SALRI notes that the Registrar would still retain the authority to share relevant information with law enforcement authorities, which could be readily prescribed for the purposes of these provisions.

Interaction between the South Australian Births Deaths and Marriages Registration Regime and interstate regimes

166. A number of submission makers have drawn attention to the need to consider how any South Australian reform framework would interact with interstate regimes.¹⁸⁹ Three existing regimes offer possible models for addressing this issue:

¹⁸⁶ Ibid s 27.

¹⁸⁷ Ibid s 27.

¹⁸⁸ Ibid s 28.

¹⁸⁹ Roundtable Report at Appendix 2.

- Under the *Births, Deaths and Marriages Registration Act 1996* (Vic), gender recognition certificates issued in interstate jurisdictions are recognised in Victoria (however, currently such certificates require evidence of medical intervention or surgery) ss 30H and 30G;
- Under s 66 of the *Births, Deaths and Marriages Registration Act 1997* (ACT) the Minister is given the power to enter into agreements with other States and Territories about how the laws are to interact with corresponding laws in other jurisdictions.
- Under the present s 27 of the South Australian BDRM Act, if the Registrar is satisfied that the name of a person whose birth is registered in South Australia has been changed under another law or by order of a court, the change of name may be registered under the SA Act.

167. SALRI recommends that a combination of the last two approaches be employed so as to ensure that South Australians who change their registered sex or gender interstate can have that change recognised in South Australia, and so that people whose births were registered in other jurisdictions and have changed their registered sex and/or gender, can have that change recognised in South Australia.

168. SALRI further notes that in its 2013 Report *Beyond the Binary* the ACT Law Reform Advisory Council recommended that the ACT laws should also empower the Registrar to

accept an Australian passport or Document of Identity, in addition to an ‘interstate recognition certificate’, as evidence that the person mentioned is of the sex as stated in it.¹⁹⁰

169. SALRI recommends that consideration be given to incorporating a similar provision into any reformed South Australian law.

Implications of changed sex and gender identity for South Australia records

170. SALRI is aware that a person’s change of sex and gender identity may have implications for status, entitlements and benefits that a person holds because of their previously registered sex. One example of these implications was outlined by the ACT Law Reform Council in its *Beyond the Binary* Report as follows:

[T]he Office of Regulatory Services has noted that registration of a birth in the ACT requires recording of the name of the child’s ‘mother’. A person whose birth sex was female, but whose changed registered sex is male may be able to give birth, because reassignment surgery – which results in sterility – is not a requirement for their having changed the registration of their sex. In those circumstances, a person whose registered sex is male could give birth and be registered as the ‘mother’.¹⁹¹

¹⁹⁰ Beyond the Binary Report, above n 61, 47.

¹⁹¹ Ibid 45.

171. A similar scenario could arise in South Australia if the recommended reforms are implemented. SALRI notes that referring to a ‘parent’ rather than to a ‘mother or ‘father’ will largely avoid this anomaly. For this reason, SALRI suggests that consideration should be given to amending BDMR Regulation 5 to refer to ‘parent’ rather than ‘mother’ or ‘father’, but notes that until such reforms are progressed, the existing law and policy framework (such as the general power of the Registrar to correct the Register in s 24) may provide sufficient flexibility to address these types of scenarios if and when they arise. Change of sex and/or gender and marriage under the *Marriage Act 1961* (Cth).
172. The issue of same sex marriage and access to marriage by gender diverse people was noted in the Audit Report but, having regard to SALRI’s jurisdictional limitations, will not be discussed in detail in this Report. As noted in the Audit Report, a separate Report will be prepared by SALRI to explore the option of a Relationships Register in South Australia.
173. SALRI notes that certain proposed reforms to the existing Births Deaths and Marriages regime in South Australia may give rise to questions as to whether a person who was party to a valid marriage who subsequently changes their sex on the Register remains legally married pursuant to the *Marriage Act 1961* (Cth).
174. SALRI notes that ACT Law Reform Advisory Council obtained legal advice from the Commonwealth on this matter and concluded that ‘in the view of the Commonwealth, a marriage remains valid despite one party to the marriage changing their sex and gender identity’ on a State or Territory Births Deaths and Marriages Registry.¹⁹² A similar view was expressed by the ACT Human Rights Commissioner in her advice to the Law Reform Advisory Council.¹⁹³ A similar view was expressed by Senator Pratt when launching the 2009 AHRC’s *Sex Files* Report:¹⁹⁴

Whatever your views on same sex marriage – it is not necessary for State laws to insist on divorce before gender is recognised.

Successive Federal Attorneys-General have confirmed that there is nothing in our Federal marriage laws to impede the ongoing recognition of such a marriage – it is legal provided that the couple was an opposite-sex couple when the marriage began.¹⁹⁵

¹⁹² Beyond the Binary Report, above n 61, 48.

¹⁹³ Human Rights and Discrimination Commissioner: ACT Human Rights Commission *Human Rights Advice on the Births Deaths and Marriages Registration Act 1997 (ACT)* 12 <http://cdn.justice.act.gov.au/resources/uploads/Advice_Gender_Identity_and_BDM_2010.pdf> (accessed 15 November 2015).

¹⁹⁴ 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.

¹⁹⁵ Senator Louise Pratt, Labor Senator for Western Australia ‘Sex Files: the legal recognition of sex on documents and government records’ (Speech delivered at Parliament House, Canberra, 17 March 2009) <<https://www.humanrights.gov.au/sex-files-launch-speech-by-senator-louise-pratt-2009>>.

175. These views are supported by Chisholm J in *Re Kevin*¹⁹⁶ who stated that:

[f]or the purpose of ascertaining the validity of a marriage under Australian law, the question whether a person is a man or a woman is to be determined as of the date of the marriage.¹⁹⁷

176. SALRI notes that in most Australian jurisdictions that prescribe a regime for changing a person's sex on the Births Deaths and Marriages Register, there is a legislative requirement that the person be unmarried. Given the discriminatory nature of this requirement, SALRI does not intend to incorporate this requirement into any proposed reform framework.

Statistical categories of sex and gender identity and national standards

177. It is important to consider how changes recommended by SALRI relating to the removal of discrimination on the grounds of gender diversity and intersex status may impact on national standards for the collection of population statistics in Australia.

178. The current national framework for the collection of statistics about Australia's population relies upon information being provided to Australian Bureau of Statistics (ABS) on a regular basis by each State and Territory's Registry of Births, Deaths, and Marriages, including South Australia. As the ABS informed SALRI in its submission:

This administrative data, along with the ABS's 5-yearly Census of Population and Housing, are the basis of Australia's population counts, including future estimates. Biological characteristics of the population are also required to accurately determine national Cause of Death statistics used to inform Australia's death and disease prevention strategies, and funding for the health sector.¹⁹⁸

179. The ABS also explained that relevant international frameworks and guidelines need to be considered when assessing whether sex or gender identity information should be included in data collections. It noted that the United Nation's Statistical Division's Principles and Recommendations for a Vital Statistics System, Revision 3 (2014) requires all births and deaths be recorded by 'sex'. 'Gender identity' is not considered an appropriate variable.¹⁹⁹ The ABS also observed that

Whilst the terms sex and gender are often used interchangeably, they are separate concepts and are important for different types of statistics. The ABS recognises that a person's sex is not necessarily consistent with their gender, and additionally acknowledges the capacity and need to collect information on gender/sex for those that

¹⁹⁶ *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158, [303]

¹⁹⁷ *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158, [303]; affirmed in *Attorney-General for the Commonwealth v Kevin and Others* (2003) 30 Fam LR 1.

¹⁹⁸ Additional Submission No 9, ABS.

¹⁹⁹ *Ibid.*

do not identify themselves as either male or female.²⁰⁰

180. For these reasons, and as noted above, the ABS has recently developed a Sex and Gender Identity Standard that provides the basis for the ABS and other organisations to collect data about sex in surveys and administrative collections, due to be released in December 2015.

181. The new ABS Standard is said to align with the *Australian Government Guidelines on the Recognition of Sex and Gender* (the Commonwealth Guidelines)²⁰¹ and be consistent with Commonwealth anti-discrimination law. The Commonwealth Guidelines are referred to in the Audit Report and aim to standardise the evidence required for a person to change their sex/gender in personal records held by Australian Government departments and agencies. These Guidelines apply to all Australian Government departments and agencies that maintain personal records (including employee records) and/or collect sex and/or gender information and:

recognise that individuals may identify as a gender other than the sex they were assigned at birth, or may not identify as exclusively male or female, and that this should be reflected in records held by the government'.²⁰²

182. The Guidelines also provide that:

all departments and agencies that collect sex and/or gender information must not collect information unless it is necessary for, or directly related to, one or more of the agency's functions or activities. Where such information is necessary, it may only be collected by lawful and fair means. Departments and agencies can only collect information about an individual from that individual if consent is given, it is required or authorised by law or it is unreasonable or impracticable to do so. Where such information is not necessary, this category of information should be removed from forms or documents.²⁰³

183. In its submission to SALRI, the ABS stressed the importance of considering how information collected by the South Australian Births Deaths and Marriages Register is relied upon by the ABS and others for a range of important and legitimate public purposes. It noted, for example, that:

estimates of the resident population (ERP) for the states and territories of Australia are published by sex and age groups. This is the official measure of the population of states and territories of Australia, and it is used for a range of key decisions such as resource and funding distribution and apportioning seats in the House of Representatives to each state and territory. Any changes in time frames for general birth and death registration would directly affect the quality of these estimates and therefore could not be supported

²⁰⁰ Ibid.

²⁰¹ *Australian Government Guidelines on the Recognition of Sex and Gender*, July 2013 (Commonwealth Attorney- General's Department, 2013).

²⁰² Ibid 2.

²⁰³ Ibid 29.

by the ABS.²⁰⁴

184. At the Roundtable, SALRI heard views regarding whether and how to record a person's sex and gender identity. It was noted that sex and gender is recorded for both statistical and operational reasons that give rise to different considerations as to the need to collect and use this information.²⁰⁵ As the ACT Law Reform Council has observed:

.. the former requires simple and useful categorisation to enable the recording of social profile and activity; the latter requires more detail to enable the respectful and appropriate provision of a service. As well, whether for statistical and or operational reasons, information about sex and gender is sometimes provided by the person, and is sometimes 'allocated' or described by a third party. Further, when the information is provided by the person, they sometimes do so remotely by form, and sometimes directly in a conversation. These different circumstances and means of collection complicate attempts at simple categorisation.²⁰⁶

185. For these reasons, SALRI has recommended the inclusion of additional categories of sex and/or gender identity that align with the proposed new ABS Sex and Gender Identity Standard. It has also acknowledged the potential administrative and technical challenges that may arise from the collection of self-describing gender identity information.

186. While it appears from developments in the ACT, the Commonwealth and in overseas jurisdictions that these administrative and technical challenges can be overcome, SALRI recognises that this might not immediately be the case in South Australia. For these reasons, it has suggested two alternative categories of sex and /or gender that do not include the option to self describe: 'unspecified' and 'non-binary'. These options would, however, depart from the ABS Sex and Gender Identity Standard and would not adhere as closely to the principle of self-description so valued by many in the gender diverse and intersex communities.

Implementation

187. SALRI accepts that the reforms proposed in this Report will not in themselves remove or necessarily reduce discrimination on the grounds of gender identity or intersex status in South Australia. Whilst acknowledging that such wider measures are outside SALRI's remit, the importance of accompanying non-legislative measures to support the South Australian LGBTIQ Inclusion Strategy²⁰⁷ should not be overlooked. The ACT Law

²⁰⁴ Additional Submission No 9, ABS.

²⁰⁵ Roundtable Report at Appendix 2.

²⁰⁶ Ibid 44.

²⁰⁷ 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) < <http://publicsector.sa.gov.au/wp-content/uploads/20140501-DCSI-LGBTIQ-Strategy.pdf>> 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.

Reform Advisory Council, for example, recommended that legislative reform in this area be accompanied by investment in public authorities for:

- programs of education and training about sex and gender diversity;
- the conversion of systems and documents to reflect the formal recognition of sex and gender diversity;
- provision of support and advisory services to sex and gender diverse people and their families;
- recurrent education and training programs should be provided to service providers, employers, workplaces and educational institutions.²⁰⁸

188. SALRI considers that the legislative reforms recommended in this Report are both timely and necessary. These recommendations are fully in accordance with SALRI's reference and SALRI notes that the recommended legislative reforms above would help to ensure that all South Australians enjoy equality before the law and have access to the full range of legal rights enjoyed by our society regardless of sexual orientation, gender, gender identity or intersex status.²⁰⁹

²⁰⁸ Beyond the Binary, above n 61, Recommendations 31-33, 49-50.

²⁰⁹ 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.

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