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

**Binary Concepts of Sex and Gender in South Australian Laws**

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

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

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

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

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

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

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

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

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

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

How has gender diversity been recognised in other Australian laws?

Non-binary concepts of sex and gender, and non-homosexual relationships, have been given legal recognition to varying degrees in other Australian jurisdictions, most commonly under anti-discrimination law. For example, the Commonwealth Sex Discrimination Act 1984 (Cth) now includes protections against discrimination on the grounds of ‘gender identity’, which is defined to mean ‘the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth’ (s4(1)). ‘Intersex status’ is also defined in this Act to mean having ‘physical, hormonal or genetic features that are: (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male’ (s4(1)).

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

In some jurisdictions, such as the ACT, non-binary concepts of sex and gender are recognised in the rules of interpretation. For example, ‘intersex’ is defined in the Legislation Act 2001 (ACT), and an interpretive rule exists that provides that words indicating a gender include every other gender.
The courts have also grappled with the question of what ‘sex’ means, and whether it is limited to binary notions under particular laws. For example, in the 2014 case of *Norrie* the High Court found that the NSW Registrar of Births Deaths and Marriages permits the Registrar to register that a person’s sex is “non-specific”.

**What do you think about these laws?**

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

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

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

**Where to go for further information**

- [Acts Interpretation Act 1919 (SA)](#)
- [Equal Opportunity Act 1984 (SA)](#)
- [Sex Discrimination Act 1984 (Cth)](#)
- [Commonwealth Guidelines on the Recognition of Sex and Gender (2013)](#)
- [Legislation Act 2001 (ACT)](#)
- [Summary of the High Court’s Decision in *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11](#)

10 June 2015

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