The Roundtable

On 29 October 2015, the South Australian Law Reform Institute (‘the Institute’) hosted a Roundtable of community members, medical and legal experts, and representatives from relevant Government agencies to discuss the issues identified in the Institute’s September 2015 Report Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation (‘the Audit Report’) concerning South Australian laws relating to sexual reassignment surgery and the legal recognition of sex and/or gender.

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

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

We want to hear from you

The Institute welcomes written submissions in response to the questions or issues raised in this Roundtable Report by 22 November 2015 and intends to finalise its Report to Government by December 2015.

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

Shared Views of the Roundtable

Case for reform has been made

1. There is a need to reform the current South Australian laws relating to sexual reassignment surgery and the legal recognition of sex and/or gender on the Births Deaths and Marriages Register to remove discrimination on the grounds of gender identity and intersex status. Moreover, the operation of the current law is not consistent with the current practices in South Australia.

Note: The discriminatory aspects of the existing legal framework are outlined in the Institute’s Audit Report and have also been recognised under international human rights law, comparative European jurisdictions and by other Australian jurisdictions.

At the Roundtable it was also noted that to date, there have been no requests to the Births Deaths and Marriages to register a birth as something other than male or female, and cases involving medical intervention with respect to infants born with an indeterminate sex or intersex variants have been rare.
2. The assumption that a person’s sex and/or gender should be required to be recorded on the Births Deaths and Marriages Register should not be accepted without challenge. For some participants, sex and gender are characteristics of a person that are important (and sometimes changeable) matters of self identity but are not necessary to identify a person for the purposes of the Register. For others, recording sex or gender provides an opportunity to publicly affirm their gender identity. There are also legitimate data collection, social planning and medical reasons for including this information on the Register, although it may be possible to develop alternatives forms of reliable data collection for these purposes. Having expressed these views, participants agreed that in light of the apparent acceptance of the registration of information about sex and/or gender on Register within the broader South Australia community, it would be useful for the Institute to develop recommendations for reform that assume that sex and/or gender information will be continued to be registered.

Inclusion of non-binary categories of sex and/or gender

3. The Births Deaths and Marriages Registration regime should include at least one non-binary category. Ideally, there should be two non-binary options: one based on the principle of self-identification (such as ‘Other [with option to self describe]’ or ‘Please specify [with option to self describe]’) and one based on the principle of non-specification (such as ‘Unspecified’ or ‘Non-specified’ or ‘Undeclared’). There is a need to engage in further consultation about the precise language used. It was noted that in other contexts, the term ‘non-binary’ has received support. It was also noted that the use of the terms ‘intersex’ and ‘indeterminate’ have been strongly opposed by some community groups and may be contrary to relevant international human rights statements concerning the rights of people with intersex variants.

Question 1: What term/s should be used to describe the proposed non-binary category of sex and/or gender available for registration? If there was no capacity for multiple self-descriptors what would be the preferred single descriptor?

Longer timeframes for registering sex and/or gender information about the birth of a child

4. The current time frame of 7 days during which the hospital (or other responsible person) must notify the Births Deaths and Marriages Registry of the birth of child is appropriate, however it may not be appropriate to require the sex and/or gender of the child to be indicated within this time frame. The current time period of 60 days for the formal registration of the birth of the child (including information about sex and/or gender) should be lengthened to somewhere between 90 days and 6 months.

Question 2: What time period is appropriate for the registration of a child’s sex and/or gender [following official notification of the birth within 7 days], presuming a non-binary option is available?

Question 3: Should there be a process for allowing further time for parents to provide information about the child’s sex and/or gender beyond 6 months if sex and/or gender has yet to be determined or self-identified by the child?

Clear, simple process for changing registered sex and/or gender on the Register

5. There should be a clear, simple process for changing a person’s registered sex and/or gender, based on the self identification model. Different considerations may apply for children.

a. For adults, the process for changing registered sex and/or gender should be similar to that currently in place for change of name - requiring a written declaration by the person and including provisions to guard against fraud. Evidence of medical intervention or surgery should not be
required. There should be no requirement that the person be unmarried and no prohibition on making a further application for change of sex and/or gender (subject to protections relating to fraud).

**Question 4:** Noting the view above that evidence of medical intervention or surgery should not be *required*, should the process include the *option* of providing supporting medical evidence (for example a letter of support from a treating doctor)?

b. 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 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.

**Question 5:** What criteria should govern when and how a child should be permitted to initiate an application to change their registered sex and/or gender? Should court orders be required before a change is made to a child's registered sex and/or gender? What additional/alternative safeguards should apply?

**Protections against non-consensual surgery on infants or minors for gender affirmation purposes**

6. 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, without demonstrating a clear medical need. Further views should be sought as to the best model to advance these protections.

**Question 6:** 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?

**Repeal of the Sexual Reassignment Act and Regulations**

7. The Sexual Reassignment Act 1988 (SA) and its Regulations should be repealed. While well intended at the time of enactment, the regulatory regime established by these laws is discriminatory, dysfunctional and rarely used.

8. Subject to the above reforms being advanced, there is no need to replace the Sexual Reassignment Act with a new legislative regime regulating sexual reassignment surgery in South Australia. The ethical, professional and legal framework governing the provision of medical treatment in South Australia is sufficient to ensure that any medical treatment that has an impact on a person's gender identity can be undertaken safely and in line with best practice.

9. It would be useful, however, to preserve the requirement for interdisciplinary medical teams to provide advice whenever medical treatment may have an impact on a person's gender identity, particularly where infants or children are concerned. This could be advanced via regulation, Guidelines, standards or policies. Further advice should be sought from the medical profession on this matter.
**Question 7:** What mechanism should be employed to preserve the requirement for interdisciplinary medical teams to provide advice whenever medical treatment may have an impact on a person's gender identity?

10. In the absence of the Sexual Reassignment Act, the Family Court process for facilitating a child’s access to hormone replacement therapy and other gender reassignment treatments would apply. This process requires careful review to determine whether it remains appropriate for the court to be involved in making these determinations, however this is beyond the scope of the Institute’s current reference.

**Important administrative considerations**

11. If advanced the above changes would have administrative 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 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 need to ensure the integrity and consistency of the data collected in the Registry over time,
> the need to consider how the South Australian regime should recognise non-binary sex and/or gender information contained in interstate registries;
> the preparation of and costs associated with new official Forms and software; and
> the broader implications of the above reforms for other official Government forms and data collection.

**Question 8:** How should any administrative implications arising from the above reforms be best addressed?
Roundtable Participants

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