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

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

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

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

This principle is also reflected in the SA Government’s current LGBTIQ Inclusion Strategy. Some of these laws are outlined in this Fact Sheet.

Who is the parent under South Australian law?

The United Nation’s Convention on the Rights of the Child, to which Australia is a party, provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (Article 3). The Convention also provides that children also have right, as far as possible, to know and be cared for by their parents (Article 7).

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

If the child is born to a woman who is legally married to a man, that woman will be the mother and that man will be the father. This also applies to a woman who is in a relationship with a domestic partner. For the purpose of this provision, ‘marriage’ includes a ‘marriage like relationship’ with a domestic partner (whether of the same or opposite sex). This means that lesbian couples can be presumed to be the parents of a child born to one of the women, provided their relationship meets the criteria of ‘domestic partnership’ (see Fact Sheet 4).
The Act also sets out the rules that apply to determining the father of a child born to a mother who is not married or not in a relationship with a domestic partner.

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

**Access to Assisted Reproductive Technologies**

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

ART can include a range of procedures - from assisted insemination through to other more invasive treatments such as in-vitro fertilisation (IVF). The Act sets out what ART is (s3), and who can access and provide ART in SA (s5). The Act does not apply to self-insemination that occurs in a person's home without fee or reward (such self insemination by a woman following a voluntary sperm donation from a male friend) (s5(2)).

Under the Act, a person can only provide ART if they have been authorised to do so under the Act. In the case of assisted insemination (such as where donated sperm is screened for health risks and insemination occurs with the assistance of a doctor), this can be provided by a health professional that has been approved by the Minister (s 5(2)). In the case of other more invasive forms of ART, such as IVF, the person providing the ART must be registered under the Act (s 5).

Registered ART providers are subject to strict conditions and can only provide ART in limited circumstances (ss 6-9). These are: where the intended birth mother is or appears to be infertile; where the man living with the intended birth mother (on a genuine domestic basis as her husband) is infertile; or where there is a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child conceived naturally (s 9). There are also rules that apply where these circumstances would exist, but for the death of one of the partners.

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

Under the *Family Relationships Act*, the woman who gives birth to any child conceived by ART is the mother of the child (whether or not the child was conceived by the fertilisation of an ovum taken from another woman).

If the woman is legally married or in a ‘qualifying relationship’ (that is a marriage-like relationship between two people who are domestic partners, whether of the same or opposite sex), her husband or domestic partner will be taken to be the father or co-parent of any child born as a result of the pregnancy.

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

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

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

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

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

However, it is possible to make a surrogacy agreement if it complies with a detailed list of criteria contained in the Act. This includes the voluntary consent of all parties involved, incidence of infertility and the requirement that the ‘commissioning parents’ are legally married or have cohabited continuously together as de facto husband and wife for at least three years.

As a result, surrogacy arrangements are not able to be made by same sex couples.

Adoption under South Australian law

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

Adoption of children in South Australia is governed by the Adoption Act 1988 (SA) which operates in accordance with the general principle that, in all decisions relating to adoption, the welfare of the child must be the paramount consideration (s7).

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

The Adoption Act sets out the rules for who can apply to adopt a child, and the criteria which has to be met before an adoption order from the Court can be made.

An adoption order can only be made in respect of two people who have been living together in a ‘marriage relationship’ for at least five years (or less where the court considers special circumstances apply). An adoption order can be made in respect of one person, but only if that person is living in a ‘marriage relationship’ with the birth or adoptive parent of the child, for example a step father who is married to the birth mother of the child.

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

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

In the case of a local adoption, the birth parents are able to state their preferences as to which family on the department’s prospective adoptive parents’ register may adopt their child, based on the child’s needs and background. As the DECD Discussion Paper on the Adoption Act explains, few locally born children are relinquished for adoption in South Australia each year; in 2013-14 only one locally born child was adopted.
Adopted children also have rights under South Australian and international law. For example, the law recognises that adopted persons have the right to know their origins and identity, and therefore provides for adult adopted persons to have access to their original birth record and other records associated with the adoption (*Adoption Act* Part 2A).

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

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

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

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

**Where to go for further information**

*Adoption Act 1988 (SA)*  
*Assisted Reproductive Treatment Act 1988 (SA)*  
*Family Relationships Act 1975 (SA)*  
*DECD 2015 Discussion Paper on the Adoption Act*  
*SA Parliament’s Social Development Committee - 32nd Report into Same Sex Parenting*  
*SA Health Website on Surrogacy*  
*SA Health - Fact Sheet 3 – Assisted insemination, the law and you*

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