The Roundtable

On 15 February 2016 the South Australian Law Reform Institute (‘the Institute’) hosted a Roundtable of community members 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 the equal recognition of relationships and removal of discrimination with respect to parenting rights with a proposal to introduce a relationship register.

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. 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 Report by close of business Friday 26 February 2016 and intends to finalise its Report to Government by June 2016.

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. The Institute's Audit Report found that there is a need for legislative reform to ensure that the current laws regulating legal recognition of relationships in South Australia do not contain features that discriminate on the grounds of sexual orientation and gender identity. The Institute considered that the New South Wales (NSW) approach to a relationship register, also employed in different guises in the Australian Capital Territory, Tasmania and Victoria,\(^1\) offered a possible model for reform.

2. The Roundtable discussed this model of reform in the context of the current South Australian laws relating to relationships, particularly those prescribing cohabitation criteria to be met before a couple is recognised as domestic partners, and Commonwealth laws restricting access to legal marriage to those in heterosexual relationships. These laws retain discriminatory features, some of which prevent some couples – whose relationships share the same level of love and

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\(^1\) Civil Unions Act 2012 (ACT); Relationships Act 2003 (Tas); Relationships Act 2008 (Vic).
commitment as other couples – from accessing important legal rights, including rights relating to parenting. As foreshadowed in the Audit Report, the Institute considered that the introduction of a relationship register would redress many of these inequalities in two main ways: (1) by establishing a clear, non-discriminatory, legal process for people to register their relationship that is accessible for all couples, regardless of sexual orientation, gender identity or length of cohabitation and (2) by creating a new legal category of relationship that can be used in other laws, such as the Family Relationships Act 1975 (SA), to systematically address any remaining discriminatory features in those laws. The introduction of such a register could also be accompanied by robust protections against fraud and misuse and clear processes for termination, as is the case in other Australian jurisdictions where such registers exist.

3. It was noted that the issue of marriage equality is front and centre in the national debate relating to the removal of discrimination on the grounds of sexual orientation, and is highly relevant to the lived experience of non-heterosexual couples in South Australia and their access to full legal rights, including parenting rights. Indeed, it is precisely because legal marriage is denied to non-heterosexual and gender diverse couples that the need for alternative relationship recognition laws in South Australia is so pressing. However, as noted in the Audit Report, marriage is regulated by the Commonwealth via the Marriage Act 1961 (Cth), putting it outside the scope of SALRI's current terms of reference, which are explicitly focused on removing discrimination in current South Australian laws.

Relationship Register

Question 1: Is the Relationship Register model the best way for South Australia to recognise heterosexual and non-heterosexual relationships?

4. Although it was acknowledged that a relationship register may not provide non-heterosexual couples with the equivalent social recognition of marriage, Roundtable participants agreed that a relationship register would fill a legal gap in South Australia and could provide non-heterosexual and unmarried heterosexual couples with access to equivalent legal rights as married couples, without requiring cohabitation criteria to be met. There was a general consensus that a registered relationship model was desirable and necessary in South Australia. The Roundtable discussed whether alternative language could be employed to describe the model, as is currently under consideration in other Australian jurisdictions. Some Roundtable participants expressed support for options that would facilitate an official ceremony at the time of registration, as is currently under consideration in other Australian jurisdictions.

Question 2: If a Relationships Register Model is explored, what could its key features be?

5. Roundtable participants considered that the features of the NSW relationship register generally provided a sound model for South Australia with some important considerations as follows:

a. It was noted that it was necessary that the model include criteria to ensure that neither individual applying to have their relationship registered in South Australia is in a legally recognised relationship elsewhere in Australia. However, it was noted that outside of this criteria, it was unnecessary to invite an inquiry as to whether an individual seeking to have their relationship registered, is 'in a couple' with another person.

b. It was proposed that the South Australian relationships register could include provisions that would enable automatic recognition of certain overseas marriages, specifically listed via regulation, as registered relationships. This would enable non-heterosexual marriages solemnised overseas to be automatically recognised as registered relationships in South Australia. By requiring the foreign law to be listed in regulation, this approach would ensure that automatic recognition was not provided to marriages solemnised in countries where duress or coercion may be used in relation to marriage.
These provisions could be modelled on those currently in force in Tasmania\(^\text{2}\) and Victoria.\(^\text{3}\) It was noted that any such legislation should contain a provision for the list of countries to be regularly updated. It was further noted that the South Australian model should also include some residual discretion to enable the Registrar to recognise an overseas marriage not solemnised under a law listed by regulation as a registered relationship in exceptional circumstances.

c. It was noted that the establishment of a relationship register in South Australia should enable mutual recognition of registered relationships (or equivalent) in other Australian states and territories.

Coexistence with the domestic partner regime

**Question 3:** How could a possible new category of ‘registered relationship’ co-exist with the domestic partnerships regime?

6. It was noted that the *Family Law Act 1975* (Cth) adequately deals with family law issues in relation to property and children, and that the definition of ‘de facto’ under that Act is very broad, currently incorporating ‘domestic partner’ and is well placed to incorporate ‘registered relationship’ if enacted in South Australia.

7. The Roundtable noted that the introduction of a relationship register in South Australia would not affect the operation of the current domestic partnerships regime or the legal rights of those meeting the definition of ‘domestic partner’. The proposed new category of ‘registered relationship’ would co-exist alongside the existing definition of ‘domestic partner’ - offering an additional legal pathway for couples to access legal recognition of their relationship.

8. It was agreed that any definition of a relationship which refers to a ‘marriage like relationship’ was problematic and difficult for courts to define and should be avoided and/or amended in any legislative reform recommended by the Institute. It was acknowledged that this definition was used in the recent *Family Relationships (Parentage Presumptions) Amendment Bill* 2015.

Coexistence with other laws that discriminate

**Question 4:** How could a possible new category of ‘registered relationship’ address discrimination arising in the context of access to parenting rights?

9. Roundtable participants agreed that the inclusion of the new category of ‘registered relationship’ within the *Family Relationships Act 1975* (SA) and related laws offered a sound basis for removing the features of these laws that discriminate on the basis of marital status and sexual orientation. The inclusion of ‘registered relationship’ also provided an important mechanism to remove discrimination relating to access to adoption, surrogacy and assisted reproductive treatment and related parenting rights under these laws.

10. However, Roundtable participants noted that further consideration of the laws relating to access to surrogacy and assisted reproductive treatment was required to ensure that all discriminatory elements were removed. The Institute noted that it is conducting separate consultations with respect to these matters and that the findings of this Roundtable would provide an important starting point for further discussions of these significant issues, including whether access to surrogacy and assisted reproductive treatment should be provided to singles and whether legal recognition should be provided to more than two parents.

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\(^2\) *Relationships Act 2003* (Tas) s65A.

\(^3\) *Relationships Amendment Act 2016* (Vic).
11. It was proposed that, in accordance with recommendations already made by the Institute, gendered language contained in the *Family Relationships Act 1975* (SA) and related laws should be amended or replaced with non-binary language.

**Property**

**Question 5: How could a possible new category of ‘registered relationship’ address discrimination in property rights?**

12. It was noted that the inclusion of the new legal category of ‘registered relationship’ offered a clear, legal pathway for non-married couples to enter into legal arrangements relating to property, and removed the discriminatory features of the existing South Australian regime governed by the *Domestic Partners Property Act 1996* (SA).

13. Roundtable participants discussed the Commonwealth and state options for non-married couples seeking to make legal arrangements relating to property and noted that the Commonwealth model, available under the *Family Law Act 1975*, provided an accessible and effective alternative to the South Australian *Domestic Partners Property Act 1996* regime. It was further noted that local experience suggests that non-married couples are far more likely to utilise the Commonwealth model than that available at the State level.

**Question 6: How could a possible new category of ‘registered relationship’ address discrimination in other laws?**

14. Roundtable participants agreed that the new category of ‘registered relationships’ offered important benefits for a range of other laws regulating the legal rights of couples, particularly due to its consent based application process and the legal certainty it offered when compared to the current domestic partnership definition.

15. It was noted that the new category had potential benefit and should be incorporated into State laws relating to inheritance, intestacy, compensation, insurance and access to other entitlements such as superannuation, subject to further consideration as to the practical implications of such reform. The Institute noted that it had received informal commentary addressing some of these matters.

16. Roundtable participants also noted that the new category should be reflected in criminal law, particularly those laws addressing aggravating circumstances relating to acts of a ‘family member’ or ‘de facto partner’. It was agreed that this should be given further consideration.

17. Roundtable participants noted that the current provisions of the *Equal Opportunity Act 1984* (SA) making discrimination on the basis of relationship or marital status unlawful should include explicit protection against discrimination on the grounds that a person is in a registered relationship.
Roundtable Participants

Professor John Williams, Director, South Australian Law Reform Institute
Dr David Plater, Deputy Director, South Australian Law Reform Institute
Sarah Moulds, Researcher, South Australian Law Reform Institute
Meg Vedig, Researcher, South Australian Law Reform Institute
Sarah Brown, Researcher, South Australian Law Reform Institute
Colleen Ross, Principal Policy Officer, Community Programs and Policy, Department for Communities and Social Inclusion
Karen Barnes, Mental Illness Fellowship, South Australia
Mary Heath, Biadelaide
Belinda Marsden, Rainbow Labor SA
Scott Cowen, Rainbow Labor SA

Trish Spargo, South Australian Equal Opportunity Commission
Anastasia Kaldi, South Australian Equal Opportunity Commission
Judith Cross, Chief Executive, Relationships Australia South Australia
Zoe Gill, Observer, Department for Health and Ageing
Anna Guthleben, Observer, Attorney-General’s Department
Zoey Campbell, Community Advocate
Mark Dodd, Gay Dads South Australia
Julie Redman, Alderman Redman

Input was also provided by Anna Brown of the Victorian Human Rights Law Centre, Marcus Patterson of the Men’s Australian Network, Morgan Carpenter of the Organisation of Intersex International and Dami Barnes.