The Roundtable

On 23 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 the removal of discrimination on the grounds of sexual orientation, gender identity and relationship status, from South Australian laws regulating access to Surrogacy and Assisted Reproductive Treatment, and the ensuing parenting rights.

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 4 March 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/](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 access to Surrogacy and Assisted Reproductive Treatment (ART) in South Australia do not contain features that discriminate on the grounds of sexual orientation, gender identity and relationship status.

2. The Roundtable discussed the South Australian laws relating to Surrogacy, which limit access to ‘commissioning parents’ who are either a married couple, which is restricted to those in heterosexual relationships by federal laws; or a heterosexual *de facto* couple who meet a three year (or three of four year) cohabitation threshold. These laws prevent non-heterosexual couples from being ‘commissioning parents’ and legally accessing rights that would allow them to have a child. The Roundtable agreed that for many non heterosexual couples the desire to start a family is the same as heterosexual couples, albeit impeded fundamentally by biology.
3. As stated in the Audit Report, South Australia’s laws relating to Surrogacy and ART are out of step with other Australian jurisdictions, which allow some form of access to non-heterosexual couples and/or singles.

4. A concurrent proposal by the Institute to introduce a ‘relationship register’, may offer a remedy to allow non-heterosexual couples access to Surrogacy and ART by creating a new legal category of relationship under ‘Domestic Partnerships’ (as defined in the Family Relationships Act 1975 (SA) s 11A). This new category (registered relationship) would coexist with the current definition of ‘domestic partner’, which requires a minimum cohabitation criteria to be met.

5. 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 access to Surrogacy and ART and subsequent parenting orders. 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.

Commissioning Parents

Question 1: Can the restriction of ‘commissioning parents’ for the purposes of surrogacy be redrafted to accommodate non-heterosexual relationships?

6. Roundtable participants were unequivocal in their acknowledgement that the restriction of ‘commissioning parents’ to heterosexual couples who are either (A) legally married or (B) a de facto couple who met a cohabitation requirement (Family Relationships Act s 10(2)(b)(iii)), must be broadened to allow access to non-heterosexual couples.

7. The option to repeal the specific restriction on ‘commissioning parents’ (s 10HA(2)(b)(iii)) and thereby instate the inclusive definition of ‘commissioning parents’ given under s 10F, received constructive support. This places no restriction on sexual orientation or gender identity; and does not require a cohabitation threshold. Such an inclusive definition corresponds with the term used in Victoria, the expression ‘intended parents’ (NSW, Queensland and Tasmania), ‘substitute parents’ (ACT), and ‘arranged parents’ (WA).

Please note:

a. Positive discussion about a single ‘commissioning parent’ is summarised under Question 3 (from paragraph [10]).

b. Whilst repealing s 10(2)(b)(iii) is a discrete action, participants highlighted additional provisions that require amendment to remove the implications that access is only available to heterosexual couples. These are detailed under Question 5 (from paragraph [13]).

Question 2: Could the proposed new category of ‘registered relationship’ provide access to surrogacy for non-heterosexual couples?

8. As confirmed at the earlier Roundtable, the legal recognition of a new category of relationship - a ‘registered relationship’ - would fill a gap in South Australian law and provide non-heterosexual couples with access to legal rights equivalent to married couples. A ‘registered relationship’ would be recognised as an additional form of ‘domestic partnership’ (Family Relationships Act s 11A). This means that a person could be a ‘domestic partner’ for the purpose of South Australian law irrespective of their gender, by either meeting the cohabitation criteria, or by registering their relationship. This approach would have the benefit of promoting legal certainty and consistency across the Family Relationships Act.

9. The alternative to repealing s 10(2)(b)(iii) is to amend ‘commissioning parents’ for a surrogacy agreement to be (A) legally married or (B) in a domestic partnership (as amended to include ‘registered relationship’). This would mean couples who were either married, living together for three years (or three of four years), or in a registered relationship could access the surrogacy provisions. This was noted by some participants as a progressive step to remove the
cohabitation requirement that is inherently discriminatory to couples who cannot legally marry. It was also noted that such an amendment was welcomed as it speaks in non-gendered language.

**Question 3: Should the surrogacy provisions be redrafted to include for a single ‘commissioning parent’?**

10. A number of participants agreed that Surrogacy should be available to a single ‘commissioning parent’. It was noted that allowing singles to access Surrogacy could be predicated on the decisions in *Pearce* \(^1\) and *McBain* \(^2\), where under respective State legislation, the restriction of in vitro fertilisation (IVF) treatment on the basis of marital status was declared inconsistent with the *Sex Discrimination Act 1984* (Cth). As a result of these cases, ART provisions were subsequently amended to allow access to single women. A priority for the Institute is to ensure any recommendations are not constitutionally invalid.

11. It was noted that nearly all other jurisdictions allow a single commissioning to become a parent under a surrogacy agreement.

**Question 4: Should *Family Relationships Act* Part 2B be repealed and a separate legislation regime be created to provide for surrogacy and the transfer of parentage in relation to non-commercial surrogacy arrangements?**

12. For a number of participants, there is a strong argument for a new separate Surrogacy Act. Reasons in support of this argument include (a) the assorted purposes currently engaged within the *Family Relationships Act*, and (b) the increasingly long and complex provisions relating to surrogacy in Part 2B of the Family Relationships Act, including amendments made in 2015. Other participants emphasised the need to remove the discriminatory features of the existing provisions and were less ambitious about delivering reform in a separate Act.

**Question 5: Other reform options**

13. It was noted that in addition to the principal discriminatory provisions in the *Family Relationships Act*, there are other, less obvious sections that also need to be amended to remove gendered or discriminatory language. These include:

   a. Section 10(2)(b)(v) - references to ‘the female commissioning parent’, which supposes that one of the commissioning parents is a female;
   b. Section 10HB(9)(d) - reference to the ‘birth father’;
   c. Section 11A and 11B - references to ‘he or she’;

14. A participant noted that the *Birth, Deaths and Marriages Registration Act 1996* (SA) s 22A relating to Surrogacy orders does not enable a change of entry from an interstate order.

**Assisted Reproductive Treatment**

15. Participants discussed the Institute’s consideration of discrimination arising from the existing provisions of the *Assisted Reproductive Treatment Act* and the *Family Relationship Act* as outlined in the Audit Report. Participants noted the recommendations made in the Audit Report:

   *Section 9 of the Assisted Reproductive Treatment Act 1988 (SA) be amended to:*

   - clarify that a person can access ART if, in the person’s circumstances, they are unlikely to become pregnant other than by an assisted reproductive treatment procedure, and

   - include the guiding principle that people seeking to undergo ART procedures must not be discriminated against on the basis of their sexual orientation, marital status or religion.

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Corresponding amendments should be made to s 5 Equal Opportunity Act 1984 (SA) which currently excludes fertilisation services from the definition of ‘services’ in that Act.

Such amendments would also conform to Commonwealth protections contained in the Sex Discrimination Act 1984 (Cth), which guard against discrimination on the grounds of sexual orientation and marital status.

16. Participants also discussed the role and scope of the external, independent legislated review of the Assisted Reproductive Treatment Act, which includes consideration of matters such as access to ART, and the establishment a donor conception register.

17. Participants also noted the recent parliamentary consideration of the Family Relationships (Parentage Presumption) Amendments Bill, that amends Family Relationships Act s 10C, removing the cohabitation requirement to recognise lesbian co-parents.

**Question 5: Are further changes to law governing ART needed to remove discrimination?**

18. Participants agreed that the earlier recommendations made by the Institute in relation to allowing access to ART for socially infertile couples and individuals, was a positive and welcome action. No further reforms were identified as necessary to remove the discriminatory features of the existing provisions.

19. Participants acknowledged the existence of other ART access issues that impact on the experience of non-heterosexual couples seeking to start a family in South Australia, but agreed that these matters fell outside the scope of the Institute’s reference. It was noted that views on these matters, such as the legal recognition of ART donors and access to donor information, regulation of fertility clinics, and ‘social egg freezing’, should be directed to the external, independent legislated review of the Assisted Reproductive Treatment Act for consideration.
Roundtable Participants

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Dr David Plater, Deputy Director, South Australian Law Reform Institute
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Karen Barnes, Mental Illness Fellowship South Australia
Mary Heath, Bauldale
Belinda Marsden, Rainbow Labor SA
Joseph Scales, Australian Services Union and Rainbow Labor SA
Trish Spargo, South Australian Equal Opportunity Commission

Julie Potts, Fertility SA
Anastasia Kaldi, South Australian Equal Opportunity Commission
Judith Cross, Chief Executive, Relationships Australia South Australia
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Anna Guthleben, Observer, Attorney-General's Department
Zoey Campbell, Community Advocate
Mark Dodd, Gay Dads South Australia
Julie Redman, Alderman Redman
Stephen Page, Harrington Lawyers
Dr Ronli Sifris, Monash University
Emma Angel, Repromed
Dr Damien Riggs, Flinders University

Input was also provided by Marcus Patterson of the Men’s Australian Network, Morgan Carpenter of the Organisation of Intersex International and Dami Barnes