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SUBMISSION
ROUNDTABLE CONSULTATION
29 October 2015

on

LAWS GOVERNING SEXUAL REASSIGNMENT AND SEX AND/OR GENDER REGISTRATION

SOUTH AUSTRALIAN LAW REFORM INSTITUTE
UNIVERSITY OF ADELAIDE 2015

Introduction:

The Gay and Lesbian Health Alliance of South Australia Inc (GLHA) is a community-based organisation which advocates for the health and welfare concerns of lesbian, gay, bisexual, trans, inter-sex and queer (LGBTIQ) people, and for positive change to related laws and policy issues affecting the ability of LGBTIQ people to live happy and fulfilled lives in the wider community.

This submission will advance the case for non discriminatory legislation for gender recognition explicitly based on the human rights of the trans, gender diverse and inter-sex communities.

GLHA believes the appropriate framework for such legislation should be the Yogyakarta Principles[1] and International Human Rights Conventions. The South Australian Law Reform Institute (the Institute) has referred to the human rights based legislation in this area as the European "self identification" model.

The relevant legal examples are laws of Argentina, Malta, Denmark and Ireland. These in our view provide a superior legislative model to any currently in force in Australia.

GLHA supports the repeal of the *Sexual Reassignment Act, 1988* (SR Act) *and* the amendment of South Australia's *Births, Deaths and Marriages Registration Act, 1996* and its Regulations, to permit gender recognition (including for non-binary persons) primarily based on self identification.

This submission also proposes development of a new Act or amendment of existing legislation to achieve a qualified prohibition on gender normalising surgery on inter-sex minors for social rather than medical purposes, and to establish legal obligations to provide equitable and non-discriminatory healthcare for the trans, gender diverse and inter-sex communities of South Australia.

Submission:

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?

GLHA proposes four preferred descriptors for gender registration:

- **Male** or **Female**
- "**Unspecified**" as a new option for birth registration and for self identification by adults and persons over the age of 16 years
- "**Other with associated option to self describe**" for non-binary adults and persons over the age of 16 years

  or

[1]The Yogyakarta Principles: http://www.yogyakartaprinciples.org/index.html!

"**Non-binary**" as a general single option if "Other with the option to self describe" is not preferred by the Institute for adults and persons over the age of 16 years.

Comments:

- GLHA supports the availability of non-binary gender registrations as being non-discriminatory and compatible with the human rights of gender diverse communities as stated by the Yogyakarta Principle (particularly Principle 3.)

- The descriptor of "unspecified" as the only available non-binary option for birth notification and registration and for minors until the age of 16 is recommended to ensure the privacy of minors in line with the concerns on these matters recently raised by the organisation Inter-sex International Australia (OIIA) in its submission to the Australian Human Rights Commission in 2015.[2]

- "Non-binary" as a compromise single descriptor, although not preferred, is suggested as being both meaningful and respectful.

- Other South Australian legislation should be amended to recognise the preferred non-binary descriptor. *The Equal Opportunity Act 1984* should be amended to address more effectively these matters.

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?

GLHA proposes the legislation be amended to allow *birth registration* to occur within six months consistent with current legislation in the ACT.

- GLHA recognises the merit of the findings reported in the ACT Law Reform Council's report *Beyond the Binary*. These findings concluded that an extended period for birth registration should be allowed for parents to receive advice, sort out their emotional responses, and avoid rushing towards gender normalising surgery.

- GLHA has no proposal to suggest on the current legislative scheme of Birth Notification (7 days) followed by Birth Registration at a later time (currently 60 days), other than to note that the current deadlines for both notification and registration are too short to allow accuracy with regards to the gender identification of trans, gender diverse or inter-sex infants, and that therefore a further process for later amendment of the registration of minors is required.

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?**

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[2] Carpenter M, Organisation Intersex International Australia, public submission 6 to the Australian Human Rights Commission, *National SOGII Consultation*, 1 February 2015

GLHA proposes that a reformed law should include several processes to allow further time for parents/guardians and minors themselves to amend the birth registration for accuracy.

GLHA proposes there should be three procedures in place: one for parents/guardians for minors between the ages of 3 and 16, another for self initiated applications by minors under the age of sixteen years, and the procedure for adults and youths over the age of sixteen.

- The parent/guardian procedure should be available for families with minors between the ages of 3 and 16, and application should be made direct to the Registrar with the only evidence required being a supporting statement by a minor (10 years or older), affirming their gender. The requirement that the contribution and interests of the minor ought to be considered is stated by Articles 8 and 12 of the UN" Convention on the Rights of the Child (the CRC). The lower application age of 3 is proposed on the basis of evidence provided by developmental psychology.

- Developmental psychology suggests that gender identity develops usually between the second and third years of life, but may reflect physiological variations determined *in utero*[3], and that it becomes effectively stabilised for most people between the ages of six and seven years[4]. Recent research findings have suggested that this pattern also applies to transgender children, contradicting earlier procedurally flawed research[5].

- Provision for a parent or guardian to apply to amend a birth registration is seen as a response to the interim nature of earlier notifications and registrations. Such corrections should be as simple and easy for parents/guardians as possible, without expensive evidentiary red-tape.

- Consistent with the CRC, we propose that a minor of any age under 16 years should be entitled to independently seek representation to have their birth registration amended and that such a procedure permits compatibility with Articles 8 and 12 of the CRC. We propose that in this one instance Court approval by a Magistrate should be required in the best interest of the minor, and that the facilitating legislation make explicit the duty of the Magistrate to comply with the CRC.

- The age of sixteen as the age when the minor may be assumed to be competent to 'self identify' on the same legal basis as an adult, is proposed based on two considerations: firstly the precedent for that age provided by the provisions of the *Consent to Medical Treatment and Palliative Care Act 1995,* which permits persons of that age to consent to medical treatment as if an adult, and the evidence of developmental psychology that by

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[3] Saraswat MD, Weinand BA BS, Safer MD, Evidence Supporting the Biologic Nature of Gender Identity ENDOCRINE PRACTICE, Vol 21 No 2, 2015, pp 199-204

[4]Ages and Stages, Purdue University https://extension.purdue.edu/providerparent/child%20growth-development/AgesStages.htm
Also: Gender Identity, accessed: https://en.wikipedia.org/wiki/Gender_identity

[5] Transgender Kids Show Consistent Gender Identity Across Measures, Association for Psychological Science; accessed. http://www.psychologicalscience.org/index.php/news/releases/transgender-kids-show-consistent-gender-identity-across-measures.html

the age of 16, gender identity, including gender diverse variants have stabilised, for the great majority of people.

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)?**

LGHA does not support legislation that would require medical evidence to be provided for an application to amend a person's registration.

As well as being incompatible with the human rights of the trans, gender diverse and inter-sex communities, as stated by Yogyakarta Principle 3, such a requirement for medical evidence would have a direct discriminatory practical effect.

Doctor Robert Lyons, former president of the Australian and New Zealand Professional Association for Transgender Health (ANZPATH) and a South Australian practitioner with decades of experience in the field, addressed these matters in his submission to the Legislative Review Committee in a submission of the *Sexual Reassignment Act, 1988*

> "*The present mechanism of gender change does not compare well with other more progressive jurisdictions. Nor is it helpful for those involved. Most jurisdictions now simply have a bureaucratic procedure by which this can be done via application from the person concerned.*
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> *"In my view this would be best administered by Births, Deaths and Marriages and should be by application from the person involved. That person should make a statement as to their gender and the gender in which they have been living for the last year or so (M, F or X). This should not be conditional on either hormonal or surgical procedures. For some people these are unnecessary and for others medically dangerous. There is also the group who cannot access them for financial or other reasons.*"

Many individuals with established gender identities that diverge from their natal sex registration are unable, or unprepared because of economic, health grounds or other reasons to undertake hormone therapy or gender confirmation surgeries or other relevant clinical procedures, including gender counselling. Those persons should be able to have their gender identity legally recognised. To retain the current barriers that prevent this human right, even in a moderated form, would retain real discrimination against a significant cohort in the trans, gender diverse and intersex communities.

GLHA therefore advocates 'self identification' as the appropriate procedure to avoid practical discrimination.

It is proposed that the procedure might be loosely based on section 4 of the *Gender Identity, Gender Expression and Sex Characteristics Act (2015) Malta* (the Maltese Act). In particular, the application should be made to the Registrar on a prescribed form with the following documents attached: a copy of an original birth certificate and a statutory declaration by the applicant stating that their gender does not match the sex assigned at

birth, and details of their authentic gender identity. For adults the unspecified or non-binary category should be available should be available.

It is usually understood that medical evidence is imposed to avoid personal error and confusion leading to disruption of an individual's life. Although it is not the preferred position of the GLHA, the example of Danish *Gender Recognition Law 2014* (the Danish Act) should be noted for permitting self identification, whilst requiring that the initial application, be held and renewed after 6 months. Danish law-makers have justified this provision as offering protection to persons from making hasty or otherwise poor decisions.[6] Should the Institute be convinced that a safeguard should be recommended, the Danish model, despite being non-preferred, might be considered.

One further matter, with regard to legislative safeguards, it is recommended that there be no restriction imposed on an individual making further applications for amendments.

The evidence for trans transition regret supports that it is extremely rare. Transgender surgical regret has been found to be between 2 and 4 percent by a number of studies.[7] That small percentage of individuals who conclude they have made an error should not be distressed further by their inability to correct their legal gender status quickly.

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?

GLHA supports legislation that provides the capacity for an independent application to be initiated at the behest of a child under the age of 16 years. This is the only procedure supported that recommends a Court hearing rather than direct application to the Registrar. Court procedures would be unnecessary red tape in cases where the application is made by parents/guardian.

The proposed safeguards applicable to this proposal include:

- a hearing for approval before a Magistrate
- explicit inclusion in the legislation for compatible obligations of the Magistrate in hearing these matters pursuant to the CRC.
- A non-preferred additional safeguard that the Institute might consider, is a requirement for a letter confirming a supportive 'assessment' by a psychologist or psychiatrist. It is proposed that only an assessment should be required rather than evidence of ongoing treatment. This non-preferred safeguard might also be deemed relevant to applications made by parents/guardians.

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[6] TGEU, Historic Danish Gender Recognition Legislation comes into force - http://tgeu.org/tgeu-statement-historic-danish-gender-recognition-law-comes-into-force/ (01/09/2014)

[7] Tannehill B, Myths about Transition Regrets: Accessed 25 March 2015, http://www.huffingtonpost.com/brynn-tannehill/myths-about-transition-regrets_b_6160626.html

An additional non-preferred safeguard for youths 16 years or older, or adults, might be the adoption of a two-part application process similar to the one that applies under the Danish *Gender Recognition Act*.

GLHA further recommends that to reduce practical discrimination, legal provision be made to ensure that the fees for independent minors should be affordable for such minors. A quarter of the adult fees might be appropriate. The Court approval process is not meant to be a token, as a measure to prevent such applications or to re-establish institutional discrimination. Its place is to recognise society's concern for the interests of the child in a human rights context provided by the CRC.

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?

GLHA is aware that the inter-sex community regards gender normalising surgery as an abuse of physical integrity and bodily autonomy. These concerns have also been acknowledged by the Commonwealth Senate.

A joint, cross-party Senate report, "*Involuntary or coerced sterilisation of intersex people in Australia*", was published on 25 October 2013. It raised major concerns about medical ethics and the human rights of people with intersex variations in Australia. It included the following:

> 'Recommendation 3:
> *The committee recommends that all medical treatment of intersex people take place under guidelines that ensure treatment is managed by multidisciplinary teams within a human rights framework. The guidelines should favour deferral of normalising treatment until the person can give fully informed consent, and seek to minimise surgical intervention on infants undertake for primarily psychosocial reasons.'*

This recommendation was warmly welcomed by the organisation Inter-sex International Australia (OIIA) at the time. This organisation has continued to call for the systematic implementation of the Senate's recommendations in Australia, without success.

GLHA supports both national and state level action to implement this recommendation. Given the slow progress on this matter, GLHA supports a qualified legislative prohibition on gender normalisation surgery in South Australia, similar in scope to the one contained in sections 15 (1) & (2) of the Maltese Act. Such a prohibition is both appropriate to the practice and more certain of achieving the result. The relevant section of the Maltese Act prohibits gender normalisation for purely social reasons whilst leaving open the option for legitimate medical procedures to protect the health of the infant.

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?

GLHA understands that whilst South Australia's health system has the capacity to, and on occasion does, address the medical treatment concerns of the trans, gender diverse and inter-sex community as they present, no interdisciplinary medical team for gender reassignment has existed in South Australia since 1988, when the Flinders team was shut

down. Important medical and surgical procedures for sexual reassignment have been unavailable for decades in South Australia. What interdisciplinary consultations that occur, reflect more on the professionalism and protocols of particular hospitals, rather than any contribution made by the archaic SR Act.

Further, the submission by Dr Robert Lyons to the Legislative Reform Committee on the SR Act suggests this failure to provide medically essential treatments associated with sexual reassignment may have been a deliberate political decision.

To quote from Dr Lyons submission:

> *"In discussions with the bureaucracy of the South Australian Department of Health between 1990 and 1996, I queried why services for transgendered individuals were not being supplied by either State hospitals or their facilities. The answer at that stage was that the Minister had banned all Government agencies from servicing this community. 'After all, what would the public say when we could be using the money for triple bypasses?' Although one may think this attitude was acceptable at that time, unfortunately it has continued.*
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> *"In 2012 I contacted the then Minister for Health, in an attempt to have bilateral mastectomy and other surgeries performed at the Royal Adelaide Hospital. There was a considerable delay in response. When finally received, the response was that the Minister had banned all transgendered related services in public hospitals because the condition was 'too rare' … however, if such were the case State Hospitals would have to stop treating testicular cancer and many other conditions."*

Whilst the case for the archaic nature of the SR Act can easily be made, and that its misguided provisions originally proposed to ensure quality healthcare have been destructive, the repeal of the SR Act (supported by GLHA), is not by itself any guarantee that medical care will be provided in South Australia on an equitable basis to a small stigmatised community by the public health system.

GLHA therefore proposes that new legislation is required, be it a new Act or amendment to other Acts or Regulations to encourage non-discriminatory healthcare access.

The following matters for such legislation are identified:

1. A qualified prohibition on gender normalising surgery on minors similar in scope to Sections 15 (1) & (2) of the Maltese Act to protect the rights of inter-sex minors to bodily integrity and physical autonomy.

2. A requirement for each major public and private hospital to form a multidisciplinary gender treatment & ethics committee. This team would make decisions on appropriate surgery for inter-sex children, within the guidance provided by the law, and establish/ review treatment protocols for trans, gender diverse and inter-sex care.

3. The right to fair access to treatments (such as orchidectomy, hysterectomy and other surgeries and procedures associated with gender transition) for transgender, gender diverse and inter-sex patients in public hospitals on a completely equal, non-discriminatory footing.

4. A statement of principles applicable to trans, gender diverse and inter-sex healthcare, including the right to bodily integrity, physical autonomy and equal, non-discriminatory access.

5. Annual reports to the Minister of Health on compliance with the new legislation, to be published for public access in the South Australian Government Gazette.

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

"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'"

Response:

- This matter may only be resolved by a non-discriminatory amendment to the Commonwealth's *Marriage Act 1961*. Such an amendment should be framed to make no presumption as to the gender of adults entering a marriage.

- Information on marriage, and other legal options for the recognition of partnerships should be available to celebrants and members of the community.

- Legislation for improved recognition of partners, such as introduction of a Relationships Register is supported.

"The need to ensure the integrity and consistency of the data collected in the Registry over time"

Response:

- The key features of the current legislation are retained by this submission, in particular notification and separate registration (though it is proposed with an extended deadline of 6 months).

- The category 'Other, with associated self descriptors', is preferred for adults and those of 16 years of age. However, use of 'non-binary' in the place of 'Other' has been recommended, should 'self description' be rejected as administratively problematic.

- Whilst data collection is an important concern, it is not a matter that should stand in the way of progress.

"The need to consider how the South Australian regime should recognise non-binary sex and/or gender information contained in interstate registries"

Response:

- Interstate non-binary registrations should be recognised.

- A provision equivalent to section 66 of the *Births, Deaths and Marriages Registration Act 1997* (ACT) that would allow the Registrar to enter into an agreement with interstate Registries should be enacted.

"The preparation of and costs associated with new official forms and software"

Response:

- Care should be taken to recognise the costs of reform, but not to exaggerate them.

- Normal government practice would be to allocate an extended timeline for introduction so as to distribute costs between several financial years. A two or three year timeline might be appropriate.
- Further, many departments have significant existing capacity to proceed with the innovations being discussed. That capacity means that often only very minor additional costs will accrue to the Government beyond existing budgets.

"The broader implications of the above reforms for other official Government forms and data collection"

Response:

- There should be an across-government policy to recognise interstate certificates in all instances where gender information is collected for any matter (including matters such as licensing, for example). Non-binary registrations should be accepted according to the legally available options available to South Australians, subject to the individual confirming the most appropriate available option.

- There should be an across-government policy that, where there is no practical purpose served, gender data no longer be collected or requested (other than for birth registration).

- The recommendations of the *Australian Government Guidelines on the Recognition of Sex and Gender* should be considered for potential guidance on these matters in South Australia.