



## THE GAY AND LESBIAN HEALTH ALLIANCE OF SOUTH AUSTRALIA (GLHA) SUBMISSION

### LEGISLATIVE REVIEW COMMITTEE

### SOUTH AUSTRALIAN SEXUAL REASSIGNMENT ACT 1988

The Gay and Lesbian Health Alliance of South Australia (GLHA) are pleased to be able to make a submission to the Legislative Review Committee with regard to the SA Sexual Reassignment Act 1988.

The Alliance was formed over 18 months ago from LGBTIQ community members who are concerned with the ongoing health, justice and social inequality, dis-enfranchisement, lack of representation and lack of involvement of the broader LGBTIQ community when proposing, developing and implementing health and social welfare reforms that impact our community.

We applaud the South Australian Government for upholding its pre-election commitment to reviewing and removing legislation that is discriminatory in its nature or intent.

The Sexual Reassignment Act of 1988 states:

***“An Act to allow the reassignment of sexual identity; to regulate the performance of reassignment procedures; and for other purposes.”***

The 1988 Act endeavours to prescribe the sexual identity of a person, to impose restrictions on healthcare facilities and practitioners carrying out and providing surgical procedures to those individuals who wish to reassign their gender identity and limit the control of minors over the future of their sexual identity.

It is the firm belief of GLHA that this legislation is discriminatory by its intent to impose a gender on an individual, imply and prescribe gender specific identifiers on an individual undergoing gender reassignment and sexual identity assignment or reassignment on individuals whose sexual identity is not clarified at birth or individuals who change / alter their sexual identity later.

#### **RECOMMENDATIONS TO THE TERMS OF REFERENCE:**

1. ***“The operation of the Sexual Reassignment Act 1988 (SA) to determine its effectiveness or otherwise, particularly as it relates to the transsexual, transgender, and intersex communities in South Australia”***

That the Sexual Reassignment Act 1988 and Regulations be repealed. It is our belief that the Act does not, by its enactment, protect, uphold, advocate or support individuals who identify as transgender, transsexual or intersex. An inherent failure within the Act is the notion that gender can be prescribed by certain characteristics or identifiers and that the Act relies upon the Magistrates to determine if an individual meets the criteria laid out by the Act to determine if they truly portray the characteristics of the gender they are transitioning to. This is potentially wholly subjective and open to interpretation dependent on what an individual determines are the correct characteristics of a specific gender.

Further the Act prescribes that the Minister responsible should approve which medical practitioners and facilities can conduct surgical processes and we believe that this provision should be repealed. It does not enhance the process neither does it protect the individual concerned and could lead to unnecessary delays or cessation in treatments. No other Australian jurisdiction has implemented a specific gender diverse targeted approval process for hospitals or practitioners.

The Act is inherently prescriptive, determining how gender characteristics should be displayed and identified and with particular regard to the requirement of Recognition Certificates to amend a birth certificate based on such information. To enshrine in law that a particular gender should display certain characteristics IE for male to female transgender to have completed surgical reassignment, thereby having the external appearance of a female is enforcing gender stereotypes and discrimination. Genders are not all similar and for the Act to prescribe that to amend a birth certificate an individual must convince a Magistrate via their appearance that they conform to a certain identifier is not only a flawed process but enforces the historical view of how genders should or should not be seen and identified.

2. ***“Laws in other Australian states or territories, or overseas jurisdictions, which relate to gender identity, and gender transition (including official recognition of the same), which possess characteristics with the potential for implementation in South Australia”***

Currently there is very limited national legislation with regard to recognition of gender reassignment. Currently the nearest legislation that has been reviewed is the ACTs Births, Deaths and Marriages Registration Act 1997, amended in 2014. This legislation does contain many of the features and language that the transgender community have been advocating for. Further, internationally there are models of legislation for example in Argentina, where the Gender Identity Law 2012 identifies the right of the individual to their own gender identity, the freedom in development of gender identity and for a person to be accorded the gender identity they chose without having to conform to changes in body appearance, facial features or their marital status.

Amending the current SA Births, Deaths and Marriages Act 1996 and the Equal Opportunity Act 1984 removing the term “chosen gender” and replacing it with definition of gender identity similar to Argentina’s legislation that does not prescribe how a gender should

appear but rather how the individual perceives their gender and how modification can lend itself to gender identity providing it is freely chosen.

Within the European Union, legislation reviews have been undertaken with regard to recognition of and protection of transgender people. According to the jurisprudence of the Court of Justice of the European Union, the only transgender persons covered by the European legislation so far are the ones who have undergone a gender reassignment. This covers only about 10 % of the transgender population. The European Union's Agency for Fundamental rights (FRA) study on "Homophobia and discrimination on grounds of sexual orientation in the EU Member States" concluded that there is no reason "not to extend the protection from discrimination beyond the persons who had gender reassignment, to cover cross dressers, and transvestites, people who live permanently in the gender 'opposite' to that of their birth certificate without any medical intervention and all those people who simply wish to present their gender differently".

This position has been adopted by the Finnish Ombudsman for Equality, the Dutch Equal Treatment Commission, and the Swedish Inquiry Commission set up by the Swedish Government.

Further the UN Yogyakarta Principle states: ***“The UN Yogyakarta Principle number 3 states: “everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity...No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity”***

International legislation has moved further than the current SA state model or broader Australian models and can lend themselves to the formation of new state legislation within South Australia that enshrines the legality of gender recognition, protects the gender identity of an individual and accords the individual the status of their gender without having to meet the current gender identity requirements such as surgical reassignment, and adoption of lifestyle characteristics.

3. ***“Options to provide for the South Australian Registrar of Births, Deaths and Marriages to register a person’s gender as ‘non-specific’”***

The Current SA Births Deaths and Marriages Act 1996 should be amended to permit specifications of the gender on a birth certificate. Currently the ACT legislation recognises Female, Male, Intersex and indeterminate, although this is limited to still births only. We believe that the ACT model enables for the protection of gender identity at birth but also that the Registrar has options via the definition of gender identity as outlined in the Argentinian and UN legislation to amend the certificate to meet the requirements of the

individual. Further the 1996 Act should be amended to allow the registration of the birth of an intersex child to occur up to six months post birth. Currently this is permitted in the ACT, this then reduces pressure on parents to potentially falsely interpret the gender of their child.

However we do not advocate for surgical intervention on minors to alter the gender at such an early age as we believe that this is an intervention that should only be taken under instructions from the child directly.

4. ***“The potential cost and social implications of any reform, particularly from the perspective of affected members of the community; and Any other relevant matter as the Committee sees fit.”***

We believe that there should be no additional financial burden attributed to members of the transgender community. Current fees in place for amendments to birth certificates should be reduced in recognition that the original fee was paid at the time of registration of the birth.

The Legislative Review committee should note that it is already unlawful to discriminate against transgender and gender diverse individuals, as per the SA Equal Opportunities Act 1984 and that the repeal of the Sexual Reassignment Act 1988 and replacement with legislation that reflects the legal right to recognition of gender identity is consistent with existing EO legislation both at state level and nationally. Further support can be found internationally within the EU.

Legislation within the EU currently states:

***“In 2006, the European Union adopted the so called "Recast Directive" (2006/54/EC) aimed at consolidating the existing provisions on the implementation of the principle of equal treatment between women and men. Recital 3 of the Preamble to the Directive introduced an explicit reference in relation to discrimination based on "gender reassignment" for the first time in EU law. The Recast Directive has taken into account the Court of Justice of the European Union's jurisprudence on gender identity. The Court affirmed that equal treatment legislation in matters of employment and occupation, on equal pay and social security benefits, is applicable to transgender people. In addition, the Court pronounced that equal treatment for transgender people has to be applied on the basis of the acquired gender after a gender reassignment and not the sex given at Birth.”***

Further we would advocate for new legislation within the state that should include the right to bodily integrity and physical autonomy. This would ensure that those within the transgender community have their chosen gender recognised, without undergoing surgical reassignment or having to conform to gender identifiers. Current Legislation in Argentina, Malta, The Netherlands and Denmark for example no longer require compulsory surgery, hormone treatment or sterilisation.

The Committee should also further note that currently only South Australia and Western Australia jurisdictions require the issuing of Recognition Certificates. Amendment of gender in all other jurisdictions is included under the Births, Deaths and Marriages Act and is made directly upon application to the Registrar.

On behalf of GLHA I would like to thank the Legislative Committee for the opportunity to provide a response to the Review of the Sexual Reassignment Act 1988. We look forward to the outcome of the review and any potential changes to current legislation or recommendations for implementation of new legislation as it pertains to the transgender and gender diverse community of South Australia.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian Purcell', is centered below the text 'Yours sincerely'.

Ian Purcell AM  
GLHA Chairperson  
April 2015