

**SOUTH AFRICAN LAW REFORM COMMISSION**

**PROJECT 118**

**REPORT ON**

**DOMESTIC PARTNERSHIPS**

**MARCH 2006**



**TO MS BS MABANDLA, MP, MINISTER FOR JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act 19 of 1973 (as amended), for your consideration, the Commission's report on domestic partnerships.

**Y MOKGORO**

**CHAIRPERSON: SOUTH AFRICAN LAW REFORM COMMISSION**

**2006**



## INTRODUCTION

The South African Law Reform Commission was established by the South African Law Commission Act 19 of 1973

The members of the Commission are –

The Honourable Madam Justice Y Mokgoro (Chairperson)  
The Honourable Madam Justice L Mailula (Vice-Chairperson)  
Adv JJ Gauntlett  
The Honourable Mr Justice CT Howie  
Prof I Maithufi  
Ms Z Seedat  
The Honourable Mr Justice W Seriti

The Secretary of the South African Law Reform Commission is Mr W Henegan. The Commission's offices are on the 12th floor, Sanlam Centre c/o Pretorius and Schoeman Street, Pretoria. Correspondence should be addressed to:

The Secretary  
South African Law Reform Commission  
Private Bag X 668  
PRETORIA  
0001  
Telephone: (012) 392 – 9540  
Fax: (012) 320 – 0936  
E-mail: [analouw@justice.gov.za](mailto:analouw@justice.gov.za)  
[capienaar@justice.gov.za](mailto:capienaar@justice.gov.za)  
Website: <http://www.doj.gov.za/salrc/index.htm>

The members of the Project Committee for this investigation are –

The Honourable Mr Justice Craig Howie  
Ms Beth Goldblatt  
Prof Cora Hoexter  
Prof Ronald Louw  
Prof Tshepo Mosikatsana

The project leader responsible for the investigation is the Honourable Mr Justice Craig Howie. The researchers are Ms Ananda Louw and Ms Carien Pienaar. Prof Ronald Louw sadly passed away in July 2005.

**TABLE OF CONTENTS**

	<b>PAGE</b>
<b>INTRODUCTION</b>	<b>v</b>
<b>SUMMARY OF RECOMMENDATIONS</b>	<b>xi</b>
<b>LIST OF SOURCES AND MODE OF CITATION</b>	<b>xviii</b>
<b>TABLE OF CASES</b>	<b>xliv</b>
<b>SELECTED LEGISLATION</b>	<b>xlvii</b>
<b>CHAPTER 1: INTRODUCTION</b>	
1.1 History of investigation	<b>1</b>
1.2 Exposition of the problem	<b>3</b>
1.3 Scope of investigation	<b>7</b>
1.4 Definitions and terminology	<b>10</b>
a) Domestic partnership	<b>10</b>
b) Domestic partnership agreement	<b>13</b>
c) Registration	<b>13</b>
d) Dependence/Dependant	<b>13</b>
e) Permanent	<b>14</b>
f) Spouse	<b>15</b>
g) Unjustified enrichment	<b>15</b>
h) Common-law marriage	<b>15</b>
1.5 Consultation process	<b>16</b>
<b>CHAPTER 2: THE SOCIAL AND POLITICAL CONTEXT OF DOMESTIC PARTNERSHIPS</b>	
2.1 Incidence of domestic partnership	<b>19</b>
2.2 Reasons for the existence of domestic partnerships	<b>24</b>
a) Parties have chosen not to marry	<b>24</b>

b)	Parties are unable to marry	<b>29</b>
c)	Customary marriage	<b>30</b>
d)	Trial marriage	<b>31</b>
e)	Ignorance of the law	<b>31</b>
f)	HIV/Aids	<b>33</b>
2.3	Forms of domestic partnership	<b>33</b>
a)	Casual relationships of convenience	<b>34</b>
b)	Extension of affectionate dating and courtship or trial marriage	<b>34</b>
c)	Permanent alternative to marriage	<b>34</b>
2.4	Various policy arguments regarding the legal recognition and regulation of domestic partnerships	<b>35</b>
a)	The legal recognition and regulation of domestic partnerships threaten marriage as a sacred and stable institution	<b>35</b>
b)	The legal recognition and regulation of domestic partnerships threaten the autonomy of partners	<b>67</b>
c)	The legal recognition and regulation of domestic partnerships will protect the victims of domestic partnership breakdown	<b>79</b>
d)	The legal recognition and regulation of domestic partnerships will reinforce the stereotyped notions of female dependence	<b>83</b>
e)	Traditional marriage is oppressive by nature and should not be extended to same-sex couples	<b>89</b>
f)	Legal recognition of domestic partnerships will legitimise polygamous relationships	<b>91</b>
g)	Public opinion will not allow the legal recognition of domestic partnerships	<b>99</b>

### **CHAPTER 3: THE LEGAL POSITION REGARDING DOMESTIC PARTNERSHIPS IN SOUTH AFRICA**

3.1	Prior to the inception of the Interim Constitution in 1994	<b>108</b>
a)	No specific family law protection for domestic partners	<b>108</b>
b)	Ordinary rules and remedies of the law	<b>110</b>

3.2	Legal developments regarding domestic partnerships in South Africa after 1994	<b>125</b>
	a) A constitutional dispensation	<b>125</b>
	b) Judicial intervention since 1994	<b>127</b>
	c) Legislative intervention since 1994	<b>148</b>
3.3	Current legal position of domestic partnerships	<b>153</b>
	a) Legal duty of support	<b>154</b>
	b) Proprietary matters	<b>159</b>
	c) Children	<b>161</b>
	d) Insolvency	<b>162</b>
	e) Succession/Inheritance	<b>163</b>
	f) Insurance	<b>164</b>
	g) Immigration	<b>164</b>

#### **CHAPTER 4: COMPARATIVE SURVEY**

4.1	The Netherlands	<b>166</b>
4.2	United Kingdom of Great Britain and Northern Ireland	<b>175</b>
4.3	Sweden	<b>192</b>
4.4	Canada	<b>207</b>
4.5	Australia	<b>230</b>
4.6	United States of America	<b>249</b>
4.7	African countries	<b>263</b>

#### **CHAPTER 5: MARITAL RIGHTS FOR SAME-SEX COUPLES**

5.1	Introduction	<b>274</b>
5.2	Options for reform set out in the Discussion Paper	<b>276</b>
	a) Extension of the common-law definition of marriage	<b>277</b>
	b) Separation of civil and religious marriage	<b>281</b>
	c) Civil unions	<b>285</b>
5.3	Submissions received on the proposals in the Discussion Paper	<b>288</b>
	a) Extension of the common-law definition of marriage	<b>288</b>
	b) Separation of civil and religious marriage	<b>290</b>
	c) Civil union	<b>292</b>



5.4	Evaluation of the proposed models: An additional option proposed	<b>293</b>
5.5	Minister of Home Affairs v Fourie; Gay and Lesbian Equality Project v Minister of Home Affairs	<b>296</b>
5.6	Recommendation of the Commission	<b>305</b>

## **CHAPTER 6: REGISTERED PARTNERSHIPS**

6.1	Introduction	<b>314</b>
6.2	Registered partnership model	<b>315</b>
6.3	Scope of the Act	<b>321</b>
6.4	Establishing partnerships	<b>324</b>
	a) Registration procedure	<b>324</b>
	b) Property regime	<b>328</b>
6.5	Legal consequences of a registered partnership during its existence	<b>334</b>
	a) Duty of support	<b>335</b>
	b) Limitation on the disposal of joint property	<b>338</b>
	c) Right to occupy the family home	<b>339</b>
6.6	Termination of partnership	<b>341</b>
6.7	Legal consequences of the termination of registered partnerships	<b>347</b>
	a) Maintenance after termination or death	<b>348</b>
	b) Intestate succession	<b>355</b>
	c) Delictual claims	<b>356</b>
	d) Property division	<b>358</b>
6.8	Other matters	<b>361</b>
	a) Interests of third parties	<b>361</b>
	b) The children of registered partners	<b>363</b>

## **CHAPTER 7: UNREGISTERED PARTNERSHIPS**

7.1	Introduction	<b>366</b>
7.2	Unregistered partnership models	<b>366</b>
7.3	Scope of the Act	<b>379</b>
	a) Polygamous-like relationships	<b>379</b>
	b) Non-conjugal relationships	<b>384</b>

7.4	Establishing the existence of an unregistered partnership: judicial discretion	387
7.5	Legal consequences of having lived as a couple	395
	a) Duty of support	395
	b) Maintenance	398
	c) Intestate succession	403
	d) Property division	406
	e) Property division between multiple partners	417
7.6	Other matters	420
	a) Interests of third parties	420
	b) The children of unregistered partners	422

## **LIST OF ANNEXURES**

<b>ANNEXURE A: LIST OF RESPONDENTS TO ISSUE PAPER NO 17</b>	<b>424</b>
<b>ANNEXURE B: LIST OF RESPONDENTS TO DISCUSSION PAPER 104</b>	<b>429</b>
<b>ANNEXURE C: RECOMMENDED AMENDMENTS TO MARRIAGE ACT 25 OF 1961</b>	<b>436</b>
<b>ANNEXURE D: RECOMMENDED ORTHODOX MARRIAGE ACT</b>	<b>438</b>
<b>ANNEXURE E: RECOMMENDED DOMESTIC PARTNERSHIPS ACT</b>	<b>451</b>

## SUMMARY OF RECOMMENDATIONS

This investigation deals with the question of the lack of legal recognition and regulation of domestic partnerships *ie* established marriage-like relationships between people of the same- or opposite-sex.

Opposite-sex marriage is currently the only legally recognised intimate partnership. Same-sex marriage and domestic partnerships between people of the same or opposite sex are virtually unrecognised. Partners in such established relationships are excluded from the rights and obligations which attach automatically to marriage despite the fact that they often function in a manner similar to traditional married families. They have to make use of the ordinary rules and remedies of the law, such as those relating to property, contract, unjustified enrichment and estoppel. Some ad hoc legislative developments and case law has created some rights and duties for domestic partners.

The inception of the interim Constitution and its Bill of Rights in 1994 was the start of a new era in South African legal history, especially in so far as human rights are concerned. Section 9 of the Constitution of the Republic of South Africa, 1996 states that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3), in particular, prohibits discrimination on the grounds of marital status and sexual orientation. This is, however, not an absolute provision and the right may be limited in terms of section 36 of the Constitution if the limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The number of people living in domestic partnership relationships has increased worldwide and also in South Africa. It has therefore become necessary to harmonise family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity.

The judgments of the Constitutional Court in **Volks N.O. v Robinson**<sup>1</sup> and **Minister of Home Affairs v Fourie**<sup>2</sup> have furthermore informed the Commission's final recommendations. In **Volks** both the majority and minority judgments referred to the

---

<sup>1</sup> 2005 (5) BCLR 446 (CC).

<sup>2</sup> 2006 (1) SA 524 (CC).

need to regulate permanent life partnerships through legislation. Similarly, both the majority and minority judgments in **Fourie** stated clearly that the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status accorded to heterosexual couples through marriage is discriminative. In both cases the majority judgments left it to the legislature to correct the defects in the law.

In its comparative study the Commission researched various models in other jurisdictions. These models varied from civil marriage for both same- and opposite-sex couples (The Netherlands, Belgium), civil partnerships for same-sex partners (UK, Vermont) de facto recognition and registered partnerships (Sweden), and de facto recognition for opposite- and same-sex couples and civil marriage for opposite- and same-sex couples (Canada).

None of the models researched, however, emanated in a constitutional dispensation with specific protection of sexual orientation in an equality clause similar to section 9(3) of the Constitution, indicating the opportunity for a uniquely South African solution.

During its investigation the Commission identified the following options for reform:-

The first four options aimed to afford same-sex couples the same rights currently afforded to opposite-sex partners in marriage.

- \* The first option was to **extend the common-law definition of marriage** to same-sex couples by inserting a definition to that effect in the Marriage Act of 1961.
- \* The second option was to **extend the common-law definition of marriage in the current Marriage Act** to apply to same- and opposite-sex couples, and **enact another Marriage Act** to apply to opposite-sex marriages only.
- \* The third option entailed the **separation of the civil and religious aspects of marriage** by separating the ceremonies and then regulating only the civil aspects of marriage in the Marriage Act.

- \* The fourth option was to accord legal protection to same-sex couples in a separate institution, equal to marriage in all respects, but called a **civil union**.

The last three options involved unmarried couples and included both same- and opposite-sex couples.

- \* The fifth option was a **registered partnership** proposal and was aimed at those couples of the same- and opposite-sex who prefer not to get married but still desire some protection. Formal commitment by the parties would result in some of the basic rights and obligations associated with civil marriage.
- \* The sixth option was a **de facto unregistered partnership** under which unmarried partners in conjugal relationships would automatically be awarded certain rights and obligations during the existence of the relationship. Provision was also made for property division and maintenance after the relationship ended.
- \* The seventh option was an **ex post facto unregistered partnership** which would allow former partners in a relationship to apply to court for a property division or maintenance order in the event that they could not reach an agreement after the relationship had ceased to exist.

It was clear that the challenge facing the Commission would be to reconcile the constitutional right to equality of same- and opposite-sex couples on the one hand with religious and moral objections to the recognition of these relationships on the other.

The legislative proposals of the Commission can be summarised as follows:

**A) Same-sex relationships** (See discussion in chapter 5.)

**The Commission recommends the following legal reform for couples (same- and opposite-sex) who want to get married:**

**a) Generic Marriage Act**

The Commission recommends as its first choice the amendment of the Marriage Act of 1961 by the insertion of a definition of marriage that makes the Act applicable to all couples wanting to get married, irrespective of their religion, race, culture or sexual orientation. (See Annexure C for the recommended text of this Act.)

This amendment will give effect to the equality provision set out in section 9 of the Constitution.

**b) Orthodox Marriage Act**

The Commission furthermore considers it advisable from a policy viewpoint not to disregard the strong objections against such recognition. The concern for these objections is an important consideration in the strive to accommodate religious sentiments, to the extent that it is constitutionally possible.

The Commission therefore recommends, as its second choice, the enactment of an Orthodox Marriage Act (in addition to the amended Marriage Act). This Act will be applicable to opposite-sex couples only. The Commission is of the opinion that section 15(3)(a)(i) of the Constitution, which allows legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law, supports this approach.

The Orthodox Marriage Act will be enacted in the same format as the current Marriage Act of 1961 with a definition of marriage that limits the application of the Act to opposite-sex couples only. The wording of the Orthodox Marriage Act would otherwise remain the same as the Marriage Act of 1961 and the status quo for opposite-sex couples in terms of this Act would be retained in all respects. (See Annexure D for the recommended text of this Act.)

Ministers of religion (or religious institutions) will have the choice to decide in terms of which Act they wish to be designated as marriage officers. The State will designate its civil marriage officers in terms of the generic Marriage Act.

Should the legislature decide to dismiss the strong religious objections against same-sex marriage as prejudice and prefer to adopt the simplest option by merely amending the Marriage Act of 1961, the recommendation for the enactment of the Orthodox Marriage simply falls away.

**B) Registered partnerships** (See discussion in chapter 6.)

**The Commission recommends the following legal reform for couples (same- and opposite-sex) who do not wish to get married, but nevertheless want to formally commit themselves to support and assist each other:**

A Domestic Partnerships Act must be enacted to provide for the legal recognition and regulation of registered partnerships. (See Annexure E for the recommended text in chapter 2 of the Domestic Partnerships Act.)

A registered partnership is established through a simple registration procedure before a registration officer (clause 6) and ends upon death of one or both partners (clause 12), termination before a registration officer (clause 13) or in terms of a court order (clause 15).

Registered partners who have minor children from the registered partnership and who intend to terminate the registered partnership must apply to the court for a termination order (clause 15).

The requirements for registered partners (clause 4) and registration officers (clause 5), the registration procedure (clause 6) and the default property regime (clause 7) are prescribed. Provision is made for the conclusion of a registered partnership agreement to regulate the financial matters of the partnership (clause 8).

The following legal consequences of registering a relationship are regulated: a reciprocal duty of support (clause 9), a limitation on the disposal of joint property

without the consent of the other partner (clause 10) and a right of occupation of the family home during the existence of the partnership (clause 11).

The following legal consequences of the termination of a registered partnership are regulated: maintenance after separation or death upon a court application (clauses 18 and 19), intestate succession as per the Intestate Succession Act (clause 20) and the right to institute delictual claims based on the wrongful death of a partner (clause 21).

In the event of a dispute regarding the division of property after a registered partnership has terminated, one or both registered partners may apply to a court for an order to divide their joint or separate property (clause 22).

Where a child is born into a registered partnership between persons of the opposite sex, the male partner in the registered partnership is deemed to be the biological father of that child (clause 17).

**C) Unregistered partnerships** (See discussion in chapter 7)

**The Commission recommends the following legal reform for couples (same- and opposite-sex) who do not want to get married/ registered or who are not in agreement as to the idea of marriage/ registration:**

Chapter 3 of the Domestic Partnerships Act provides for the regulation of the consequences of the termination of unregistered partnerships through the judicial discretion model. (See Annexure E for the recommended text of the Domestic Partnerships Act.)

In the absence of agreement, partners who have not registered their relationship can approach a court (clause 26) after the relationship has been terminated by death or separation for a maintenance order (clause 27 – 29), an intestate succession order (clause 31) and a property division order (clause 32). A court deciding such an application must have regard to all the circumstances of the relationship.

The following legal consequences of the termination of certain multiple domestic partnerships are regulated: maintenance after separation (clause 28(2)(e)), maintenance of a surviving partner (clause 29(3)(c)), intestate succession (clause 31(3)); property division (clause 32(4)(d)) and in general, clause 34.





## LIST OF SOURCES AND MODE OF CITATION

### Alternatives to Marriage Project **Annual Report 2001**

Alternatives to Marriage Project Organisation **Annual Report 2001** available at [www.unmarried.org](http://www.unmarried.org) (accessed on 8 September 2005).

### BC Booklet **Living Common Law 2005**

Legal Services Society for British Columbia **Living Common Law – Your Rights and Responsibilities** Booklet January 2005 available at <http://www.familylaw.lss.bc.ca/subjectareas/samesex.asp> (accessed on 12 September 2005).

### Bailey-Harris **International Journal of Law and the Family 1995**

R Bailey-Harris "Financial Rights in Relationships Outside Marriage: A Decade of Reforms in Australia" (1995) 9 **International Journal of Law and the Family** 233.

### Bailey-Harris **Child and Family Law Quarterly 1996**

R Bailey-Harris "Law and the Unmarried Couple - Oppression or Liberation?" (1996) Vol 8 No.2 **Child and Family Law Quarterly** 137.

### Bailey-Harris **Dividing Assets 1998**

R Bailey-Harris ed **Dividing the Assets on Family Breakdown** Bristol: Jordan 1998.

### Bala **Canadian Journal of Family Law 2000**

N Bala "Alternatives for Extending Spousal Status in Canada" (2000) 17 (1) **Canadian Journal of Family Law** 167.

### Bamford **Law of Partnership 1982**

B R Bamford **Bamford on the Law of Partnership and Voluntary Association in South Africa** 3<sup>rd</sup> edition Cape Town: Juta 1982.

Banks "Homosexuality in Ancient Africa"

A Banks "Homosexuality in Ancient Africa" available at <http://www.geocities.com/ambwww/GAYS-IN-AFRICA.htm> (accessed on 24 January 2006).

Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999

A Barlow & R Probert "Addressing the Legal Status of Cohabitation in Britain and France: Plus ça change...?" 1999 available at [webjcli.ncl.ac.uk/1999/issue3/barlow3.html](http://webjcli.ncl.ac.uk/1999/issue3/barlow3.html) (accessed on 24 July 2005).

Barlow *et al* "Marriage and Cohabitation" 2001

A Barlow, S Duncan, G James and A Park "Just a Piece of Paper? Marriage and Cohabitation" 2001 available at <http://oneplusone.ntd.co.uk/marriedornot/PDF/ChangingMarriage.pdf> (accessed on 15 January 2006).

Barnard, Cronje and Olivier **Persons and Family Law** 1990

A H Barnard, D S P Cronje & P J J Olivier **The South African Law of Persons and Family Law** Durban: Butterworths 1990.

Benschop "Women's Rights in East Africa" 2002

M Benschop "Are Women's Equal Rights to Land, Housing and Property Implemented in East Africa?" April 2002 available at [www.unhabitat.org](http://www.unhabitat.org) (accessed on 24 January 2006).

Bonthuys "Equal Choices" 2001

E Bonthuys "Equal Choices for Women and Other Disadvantaged Groups" Paper delivered at the Conference on Equality – Theory and Practice in South Africa and Elsewhere Cape Town January 2001.

Boshoff **SALJ** 2001

A Boshoff "The Fractured Landscape of Family Law" (2001) 118 (2) **South African Law Journal** 312.

Bosman & Eckard **Welsynsreg** 1982

F Bosman and M M Eckard **Welsynsreg** Johannesburg: Lex Patria 1982.

Boswell **Christianity, Social Tolerance, and Homosexuality** 1980

J Boswell **Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century** Chicago: University of Chicago Press 1980.

Boyd "Marriage & Divorce> Marriage"

J P Boyd "Marriage & Divorce> Marriage" available at <http://www.bcfamilylawresource.com/08/0801body.htm> (accessed on 7 September 2005).

Bradley **Modern Legal Studies** 1996

D Bradley **Modern Legal Studies – Family Law and Political Culture** London: Sweet & Maxwell 1996.

Brumby **Georgia Journal International and Comparative Law** 1999

E Brumby "What's in a Name: Why the European Same-Sex Partnership Acts Create a Valid Marital Relationship" (1999) 28 **Georgia Journal of International and Comparative Law** 145.

CALS Report 2001

Centre for Applied Legal Studies, University of the Witwatersrand **Cohabitation and Gender in the South African Context – Implications for Law Reform** Gender Research Project Report November 2001.

Cachalia **THRHR** 1993

F Cachalia "Citizenship, Muslim Family Law and a Future South African Constitution: A Preliminary Enquiry" (1993) Vol 56 **Tydskrif vir Hedendaagse Romeins Hollandse Reg** 392.

Cameron **SALJ** 2002

E Cameron "Constitutional Protection of Sexual Orientation and African Conceptions of Humanity" (2002) 118 (4) **South African Law Journal** 642.

Canada Department of Justice **Marriage and Same-Sex Unions** 2002

Canada Department of Justice **Marriage and Legal Recognition of Same-Sex Unions** Discussion Paper November 2002 available at

<http://canada.justice.gc.ca/en/dept/pub/mar/index.html> (accessed on 9 September 2005).

Canada Department of Justice Newsroom "Civil Marriage Act" 2005

Canada Department of Justice Newsroom "Civil Marriage Act" 2005 available at [http://canada.justice.gc.ca/en/news/nr/2005/doc\\_31376.html](http://canada.justice.gc.ca/en/news/nr/2005/doc_31376.html) (accessed on 29 December 2005).

Canada **Hansard** 1999

Parliament of Canada House of Commons Debates 8 June 1999 **Hansard**, 36<sup>th</sup> Parl. 1<sup>st</sup> Sess. Number 240 available at [www.parl.gc.ca/36/1/parlbus/chambus/house/debates/240-1999-06-08/han240-e.htm](http://www.parl.gc.ca/36/1/parlbus/chambus/house/debates/240-1999-06-08/han240-e.htm) (accessed on 18 August 2005).

Canada Law Commission **Beyond Conjuality** 2001

Law Commission of Canada **Beyond Conjuality - Recognizing and Supporting Close Personal Adult Relationships** Report December 2001 available at [http://www.lcc.gc.ca/about/conjuality\\_toc-en.asp](http://www.lcc.gc.ca/about/conjuality_toc-en.asp) (accessed on 12 September 2005).

Canada Law Commission **Briefing to the Standing Committee** 2003

Law Commission of Canada **Briefing to the Standing Committee on Justice and Human Rights on the Issue of Same-Sex Marriage** January 2003 available at <http://www.lc.gc.ca/en/pc/speeches/sp20030130.asp> (accessed on 23 March 2003).

Canada Law Commission **Legal Regulation of Adult Personal Relationships** 2000

Law Commission of Canada **The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation** Research Paper May 2000 available at <http://www.lcc.gc.ca/> (accessed on 9 September 2005).

Canada Law Commission **Marriage and Marriage-Like Relationships** 2000

Law Commission of Canada **Marriage and Marriage-like Relationships** Research Paper June 2000 available at <http://www.lcc.gc.ca/> (accessed on 9 September 2005).

Casswell **Canada Bar Review** 2001

D G Casswell "Moving Towards Same-Sex Marriage" (2001) Vol 80 **The Canadian Bar Review** 810.

**Catholic Encyclopaedia**

"Banns of Marriage Par VIII: The Civil Law of Banns" **Catholic Encyclopaedia** available at <http://www.newadvent.org/cathen/02255a.htm> (accessed on 9 September 2005).

Caudill and Gold **Radical Philosophy of Law** 1995

D S Caudill and S J Gold ed **Radical Philosophy of Law** New Jersey: Humanities Press 1995.

Chaney "Why Marriage Deserves No Legal Recognition" 2001

J Chaney "Why Marriage Deserves No Legal Recognition" March 2001 available at <http://www.unc.edu/student/orgs/boiling/march2001/The%20State%20of%20Matrimony.html> (accessed 16 September 2002).

Church **Fundamina** 2003

J Church "Same-Sex Unions – Different Voices" 2003 (9) **Fundamina** 44.

Clark **CILSA** 1998

B Clark "Competing Custody Rights: New Concepts of 'Family' and the Best Interests of the Child" (1998) Vol 31 **The Comparative and International Law Journal of Southern Africa** 288.

Cockrell **SAJHR** 1996

A Cockrell "Rainbow Jurisprudence" (1996) 12 **South African Journal on Human Rights** 1.

Compactlaw "Adoption and Children Act"

Compactlaw "The Adoption and Children Act 2002" available at [http://www.compactlaw.co.uk/free\\_legal\\_information/adoption\\_law/adoptf16.html](http://www.compactlaw.co.uk/free_legal_information/adoption_law/adoptf16.html) (accessed on 3 August 2005).

Cooke **SALJ** 2005

A Cooke "Choice, Heterosexual Life Partnerships, Death and Poverty" (2005)  
122 (3) **South African Law Journal** 542.

Cretney & Masson **Family Law** 1990

S M Cretney and J M Masson **Principles of Family Law** 5<sup>th</sup> edition London:  
Sweet and Maxwell 1990.

De Bruyn & Snyman **SA Mercantile Law Journal** 1998

J H de Bruyn & E Snyman "Universele Vennootskap: Oplossing vir Ryland v  
Edros?" (1998) 10 **SA Mercantile Law Journal** 368.

De Vos **SAPL** 1996

P de Vos "Same-Sex Marriage, the Right to Equality and the South African  
Constitution" (1996) Vol 11 Nr 2 **South African Public Law** 355.

De Vos "Sexual Orientation and Family Law" 2002

A-M de Vos "Sexual Orientation and Family Law in South Africa" Paper  
delivered at the Miller Du Toit and the Law Faculty of the University of the  
Western Cape Family Law Conference Cape Town March 2002.

De Waal *et al* **Bill of Rights Handbook** 2001

J De Waal, I Currie and G Erasmus **Bill of Rights Handbook** 4<sup>th</sup> edition Cape  
Town: Juta 2001.

De Waal & Schoeman **Succession** 2003

M J de Waal and M C Schoeman **Introduction to the Law of Succession** 3<sup>rd</sup>  
edition Cape Town: Juta 2003.

Demczuk *et al* "Recognition of Lesbian Couples" 2002

I Demczuk, M Caron, R Rose and L Bouchard "Recognition of Lesbian Couples:  
An Inalienable Right" January 2002 available at  
[www.swc-cfc.gc.ca/pubs/pubspr/0662312813/200201\\_0662312813\\_1\\_e.html](http://www.swc-cfc.gc.ca/pubs/pubspr/0662312813/200201_0662312813_1_e.html)  
(accessed on 9 September 2005).

Demian "Marriage Traditions" 2002

Demian "Marriage Traditions in Various Times and Cultures" January 2002 available at <http://www.buddybuddy.com/mar-trad.html> (accessed on 9 September 2005).

Devlin **Enforcement of Morals** 1965

P Devlin **The Enforcement of Morals** London: Oxford University Press 1965.

Divorce.co.uk "Myth of Common-law Wife"

Divorce.co.uk "The Myth of the Common-Law Wife" and "Cohabitants Beware: Who Will Get the House if We Split Up?" available at <http://www.divorce.co.uk/hottopics/articles/cohabitants.htm> (accessed on 2 July 2002).

Du Plessis **SAJHR** 2002

M du Plessis "Between Apology and Utopia – The Constitutional Court and Public Opinion" (2002) 18 **South African Journal on Human Rights** 1.

East African Law "Women in Kenya"

"The Status of Women in Kenya" available at <http://www.eastafricanlaw.com?LawArticle> (accessed on 15 May 2005).

Eskridge **Virginia Law Review** 1993

W N Eskridge Jnr "A History of Same-Sex Marriage" (1993) No 7 Vol 79 **Virginia Law Review** 1419.

Ettelbrick "Marriage a Path to Liberation?" 1989

P L Ettelbrick "Since When is Marriage a Path to Liberation?" 1989 available at [www.ibiblio.org/gaylaw/issue5/coombs.html](http://www.ibiblio.org/gaylaw/issue5/coombs.html) (accessed on 2 July 2003).

Evangelical Fellowship of Canada "Marriage and Family Status in Canada" 1996

Evangelical Fellowship of Canada "Marriage and Family Status in Canada" Position paper 1996 available at <http://www.evangelicalfellowship.ca/pdf/Marriage%20andFamily%20Status%20.pdf> (accessed on 16 September 2002).



Equal Marriage for Same-Sex Couples "Quebec Civil Union Bill" 2002

Equal Marriage for Same-Sex Couples Organisation "Quebec Unanimously Passes Civil Union Bill" 7 June 2002 available at

<http://www.samesexmarriage.ca/legal/qc.html> (accessed on 12 August 2005).

FAMILYFACTS.CA "B.C. is Safe Place for Polygamists" 2001

FAMILYFACTS.CA "B.C. is Safe Place for Polygamists" August 2001 available at <http://www.fotf.ca/familyfacts/tfn/2001/082801.html> (accessed on 7 September 2005).

Forder **Canadian Journal of Family Law** 2000

C Forder "European Models of Domestic Partnership Laws: The Field of Choice" (2000) 17 (1) **Canadian Journal of Family Law** 371.

Freeman & Lyon **Cohabitation** 1983

M D A Freeman and C M Lyon **Cohabitation Without Marriage** Aldershot, Hants England: Gower Publishing 1983.

Gay and Lesbian Advocates and Defenders "Civil Marriage for Same-Sex Couples"

Gay and Lesbian Advocates and Defenders "Civil Marriage for Same-Sex Couples: The Facts" available at <http://www.marriageequalityca.org/home.php> (accessed on 9 September 2005).

Gevisser and Cameron **Gay & Lesbian Lives** 1994

M Gevisser and E Cameron ed **Defiant Desire, Gay and Lesbian Lives in South Africa** Johannesburg: Ravan Press 1994.

Glendon **State, Law and Family** 1977

M Glendon **State, Law and Family: Family Law in Transition in the United States and Western Europe** New York: North-Holland Publishing 1977.

Glezer **Family Matters** 1999

H Glezer "Cohabitation" (1999) No 30 **Family Matters** available at <http://www.aifs.org.au/institute/pubs/fm1/fm30/hg.html> (accessed on 9 September 2005).

Goldblatt **SAJHR** 2000

B Goldblatt "Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 (4) SA 1319 (SCA)" (2000) 16 **South African Journal on Human Rights** 138.

Goldblatt "Law Recognise 'New' Families" 2002

B Goldblatt "Law Starting to Recognise 'New' Families" October 2002 **Gender Research Project Bulletin** Centre for Applied Legal Studies available at <http://www.law.wits.ac.za/cals/gender/bulletins.htm> (accessed on 25 January 2006).

Goldblatt **SALJ** 2003

B Goldblatt "Regulating Domestic Partnerships – A Necessary Step in the Development of South African Family Law" (2003) 120 (3) **South African Law Journal** 610.

Goldblatt "A Sad Day for Unmarried Women" 2004

B Goldblatt "A Sad Day for Unmarried Women the Constitutional Court's Judgment in the Robinson Case" (2004) Vol 4 **Gender Research Project Bulletin** Centre for Applied Legal Studies available at <http://www.law.wits.ac.za/cals/gender/bulletins.htm> (accessed on 25 January 2006).

Graycar **Law Society Journal** 2001

R Graycar "Law Reform: Concept of 'Family' under Review" (2001) 39 (3) **Law Society Journal** 64 available at <http://www.lawsociety.com.au/page.asp?partid=3935> (accessed on 9 September 2005).

Graycar & Millbank **Canadian Journal of Family Law** 2000

R Graycar and J Millbank "The Bride Wore Pink... to the Property (Relationships) Legislation Amendment Act 1999: Relationships Law Reform in New South Wales" (2000) 17 (1) **Canadian Journal of Family Law** 230.

Hahlo **Husband and Wife** 1985

H R Hahlo **The South African Law of Husband and Wife** 5<sup>th</sup> edition Kenwyn: Juta 1985.

Hahlo & Kahn **SA Legal System** 1968

H R Hahlo and E Kahn **The South African Legal System and Its Background**  
Cape Town: Juta 1968.

Harrison **Family Matters** 1991

M Harrison "The Legal System and De Facto Relationships" (1991) No. 30  
**Family Matters** available at  
[www.aifs.gov.au/institute/pubs/fm1/fm30/fm30.html](http://www.aifs.gov.au/institute/pubs/fm1/fm30/fm30.html) (accessed on 8 September  
2005).

Hawkins *et al* **Revitalizing the Institution of Marriage** 2002

A Hawkins, L Wardle and D Coolidge ed **Revitalizing the Institution of  
Marriage for the Twenty-First Century** Westport, Connecticut: Praeger 2002.

Hayes *et al* **Religion and Sexuality** 1998

M Hayes, W Porter and D Tombs ed **Religion and Sexuality** Sheffield:  
Academic Press 1998 available at  
<http://thewitness.org/archive/april2000/marriage.html> (accessed on 1 May 2003).

Heaton "Family Law and the Bill of Rights" 1996

J Heaton "Family Law and the Bill of Rights" in **The Bill of Rights Compendium**  
Durban: LexisNexis Butterworths 1996.

Holland **Canadian Journal of Family Law** 2000

W Holland "Intimate Relationships in the New Millennium" (2000) 17 (1)  
**Canadian Journal of Family Law** 114 also available at  
<http://www.familylawcentre.com/ccholland.html> (accessed on 8 September  
2005).

Hurley "Bill C-38"

M C Hurley "Bill C-38: The Civil Marriage Act" Legislative Summaries available  
at  
[http://www.parl.gc.ca/common/Bills\\_ls.asp?lang=E&Parl=38&Ses=1&ls=C38&so  
urce=Bills\\_House\\_Government](http://www.parl.gc.ca/common/Bills_ls.asp?lang=E&Parl=38&Ses=1&ls=C38&source=Bills_House_Government) (accessed on 1 August 2005).

Hutchings & Delport **De Rebus** 1992

S Hutchings & E Delport "Cohabitation: A Responsible Approach" (1992) **De Rebus** 121.

ILGA "World Legal Survey – Kenya" 2000

International Lesbian and Gay Association "World Legal Survey – Kenya" 31 July 2000 available at [http://www.ilga.info/Information/Legal\\_survey/africa/kenya.htm](http://www.ilga.info/Information/Legal_survey/africa/kenya.htm) (accessed on 26 January 2006).

International Environmental Law Research Centre "Women in East Africa" 1995

International Environmental Law Research Centre "Women, Laws, Customs and Practices in East Africa – Laying the Foundation" 1995 available at [www.ielrc.org/africa/gender.php](http://www.ielrc.org/africa/gender.php) (accessed on 8 September 2005).

Janz "Canadian Families" 2000

T Janz "The Evolution and Diversity of Relationships in Canadian Families" September 2000 available at [http://www.lcc.gc.ca/research\\_project/00\\_diversity\\_1-en.asp](http://www.lcc.gc.ca/research_project/00_diversity_1-en.asp) (accessed on 12 September 2005).

Jensen "Gay and Lesbian Partnerships in Europe"

S Jensen "Recognition of Gay and Lesbian Partnerships in Europe" available at <http://www.steff.suite.dk/partner.htm> (accessed on 12 September 2005).

Juel **Boston College Third World Law Journal** 1993

E J Juel "Non-Traditional Family Values: Providing Quasi-Marital Rights to Same-Sex Couples" 1993 13 **Boston College Third World Law Journal** 317.

Kabir "Swedish Legal System" 2001

I Kabir "A Guide to the Swedish Legal System" June 2001 available at <http://www.llrx.com/features/swedish2.htm> (accessed on 12 September 2005).

Kahn **Fiat iustitia** 1983

E Kahn ed **Fiat iustitia: Essays in Honour of Oliver Deneys Schreiner** Cape Town: Juta 1983.

Kenya Constitution Review Commission 2001

Constitution of Kenya Review Commission "Gender Considerations in Constitution-Making" December 2001 available at <http://www.kenyaconstitution.org/docs/09cd003.htm> and <http://www.kenyaconstitution.org/docs/09cd004.htm> (accessed on 12 September 2005).

Kenya Law Reform Commission **Law of Marriage Act** 1971

Kenya Law Reform Commission **Law of Marriage Act** Report No. 5. 1971 available at <http://www.lrct-tz.org/pdf/marriage.pdf> (accessed on 4 January 2006).

Kingdom **International Journal of the Sociology of Law** 1990

E Kingdom "Cohabitation Contracts and Equality" (1990) 18 **International Journal of the Sociology of Law** 287.

Kirby "Australian Legal Developments" 1999

The Honourable Mr Justice M Kirby "Same-Sex Relationships - Some Australian Legal Developments" Paper delivered at the Conference on Legal Recognition of Same-Sex Partnerships London July 1999 available at [http://www.lawfoundation.net.au/resources/kirby/papers/19990703\\_samesex3july99.html](http://www.lawfoundation.net.au/resources/kirby/papers/19990703_samesex3july99.html) (accessed on 12 September 2005).

**Kortmann Committee Report** 1997

Netherlands Ministry of Justice **Report by the Committee on Opening up Civil Marriage to Same-Gender Partners** (Commissie inzake openstelling van het burgerlijk huwelijk voor personen van hetzelfde geslacht) October 1997.

Labuschagne E **TSAR** 1985

E Labuschagne "Die Universele Vennootskap in die De Facto Samewoningsverhouding" (1985) 2 **Tydskrif vir die Suid Afrikaanse Reg** 219.

Labuschagne E **TSAR** 1989

E Labuschagne "Die Lotgevalle van die Konkubinaatverhouding in die Romeinse Reg tot by Justinianus" (1989) 4 **Tydskrif vir die Suid Afrikaanse Reg** 649.

Labuschagne **TSAR** 1989

J M T Labuschagne "Nietige en Vernietigbare Huwelike: Opmerkinge oor die Deregulering van die Huwelik" (1989) 3 **Tydskrif vir die Suid Afrikaanse Reg** 370.

Lauw **Murdoch University Electronic Journal of Law** 1994

I Lauw "Recognition of Same-Sex Marriage - Time for Change?" 1994 Vol 1 No 3 **Murdoch University Electronic Journal of Law** available at <http://www.murdoch.edu.au/elaw/issues/v1n3/lauw131.html> (accessed on 15 September 2005).

LaViolette "Registered Partnerships Model" 2001

N LaViolette "Registered Partnerships: A Model for Relationship Recognition" August 2001 (For the Law Commission of Canada) available at [http://www.lcc.gc.ca/research\\_project/01\\_partnership\\_1-en.asp](http://www.lcc.gc.ca/research_project/01_partnership_1-en.asp) (accessed on 12 September 2005).

**LAWSA Vol 19**

W A Joubert ed **Law of South Africa** 1st Reissue Vol 19 Durban: Butterworths 1997.

Law Commission Discussion Paper **Sharing Homes** 2002

Law Commission **Sharing Homes** Discussion Paper November 2002 available at <http://www.lawcom.gov.uk/pubs.htm> (accessed on 12 September 2005).

Law **Wisconsin Law Review** 1988

S A Law "Homosexuality and the Social Meaning of Gender" (1988) **Wisconsin Law Review** 187.

Law Society Report **Cohabitation** 1999

Law Society **Cohabitation Proposals for Reform** Report September 1999 available at <http://www.lawsociety.org.uk/home.law> (accessed on 12 September 2005).

Law Society Follow-up Report **Cohabitation** 2002

Law Society **Cohabitation the Case for Clear Law –Proposals for Reform** Follow-up Report July 2002 available at <http://www.lawsociety.org.uk/home.law> (accessed on 12 September 2005).

Law Society Press Release "Cohabitation" 2002

Law Society "Cohabitation Must be Recognised in Law" Press Release July 2002 available at <http://www.lawsociety.org.uk/home.law> (accessed on 12 September 2005).

Legal Information Access Centre "Relationships" 1999

Legal Information Access Centre "Relationships" 24 October 1999 available at [http://beta.austlii.edu.au/au/other/liac/hot\\_topic/hottopic/1999/4/](http://beta.austlii.edu.au/au/other/liac/hot_topic/hottopic/1999/4/) (accessed on 12 September 2005).

Letourneau "Gay Partnership Rights" 2003

L Letourneau "Gay Partnership Rights – 'It's a Couple Thing'" February 2003 available at <http://www.gayfinance.info/news/partnership-rights.htm> (accessed on 30 June 2003).

Lifesite "Sweden Allows Homosexual Adoptions" 2002

Lifesite "Sweden Allows Homosexual Couples to Adopt Children Even for Foreign Adoptions" 6 June 2002 available at <http://www.lifesite.net/ldn/2002/jun/02060604.html> (accessed on 2 August 2002).

Lind **SALJ** 1995

C Lind "Sexual Orientation, Family Law and the Transitional Constitution" (1995) 112 (1) **South African Law Journal** 481.

Lind **Acta Juridica** 2005

C Lind "Domestic Partnerships and Marital Status Discrimination" 2005 **Acta Juridica** 108.

Louw **SAJHR** 2000

R Louw "Gay and Lesbian Partner Immigration and the Redefining of Family" (2000) 16 **South African Journal on Human Rights** 313.

Maithufi "The Constitution, Marriage and Family Law in South Africa" 2002

I P Maithufi "The Constitution, Marriage and Family Law in South Africa" Paper presented at the 11<sup>th</sup> World Conference of the International Survey of Family Law Copenhagen, Oslo August 2002.

Mapleleafweb.com "Legal Recognition of Same Sex Unions" 2005

Mapleleafweb.com "Legal Recognition of Same Sex Unions - Civil Marriage Act: An Overview" July 2005 available at [http://www.mapleleafweb.com/features/general/same\\_sex/civil-marriage-act.html](http://www.mapleleafweb.com/features/general/same_sex/civil-marriage-act.html) (accessed on 4 August 2005).

Marco "Gay Protected Class Status" 2000

T Marco "Gay Protected Class Status Would Undermine Traditional Family Values and Structures" 13 July 2002 available at <http://www.leaderu.com/marco/special/spc23.html> (accessed on 2 September 2005).

Maxwell **Electronic Journal of Comparative Law** 2000

N Maxwell "Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison" (2000) Vol 4.3 **Electronic Journal of Comparative Law** available at <http://law.kub.nl/ejcl/43/art43-1.html> (accessed on 17 March 2002).

McK Norrie **Juridical Review** 1995

McK Norrie "Proprietary Rights of Cohabitants" (1995) **Juridical Review** 209.



Meyerson **Freedom of Expression, Religion** 1997

D Meyerson **Rights Limited: Freedom of Expression, Religion and the South African Constitution** Cape Town: Juta 1997.

Millbank **Australasian Gay and Lesbian Law Journal** 1999

J Millbank "The De Facto Relationships Amendment Bill 1998 (NSW): The Rationale for Law Reform" (1999) 8 **Australasian Gay and Lesbian Law Journal** 1.

Millbank & Sant **Sydney Law Review** 2000

J Millbank and K Sant "A Bride in Her Every-Day Clothes: Same-Sex Relationship Recognition in NSW" (2000) Vol 22 **Sydney Law Review** 181 available at <http://www.law.usyd.edu.au/~slr/v22/n2/millbank.pdf> (accessed on 6 August 2002).

Mosikatsana **SAJHR** 1996

T L Mosikatsana "The Definitional Exclusion of Gays & Lesbians from Family Status" (1996) 12 (1) **South African Journal on Human Rights** 549.

NSW Community Legal Centres "New Law Recognises Same-Sex Relationships"

New South Wales Community Legal Centres "New Law Recognises Same-Sex Relationships" Campaign Issues available at <http://www.nswclc.org.au/whatshot/11.html> (accessed on 6 June 2003).

NSW Law Reform Commission **De Facto Relationships** 1983

New South Wales Law Reform Commission **De Facto Relationships** Report 36 1983 available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R36CHP5> (accessed on 28 January 2006).

NSW Law Reform Commission **Review of the Property (Relationships) Act 1984** 2002

New South Wales Law Reform Commission **Review of the Property (Relationships) Act 1984 (NSW)** Discussion Paper 44 2002 available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp44toc> (accessed on 31 January 2006).

NSW Social Issues Report **Domestic Relationships** 1999

The New South Wales Standing Committee on Social Issues **Domestic Relationships: Issues for Reform – Inquiry into De Facto Relationships Legislation** Report 2 December 1999 available at

<http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/E7BEDC88D5811798CA256BB90004893F#Reports> (accessed on 26 January 2006).

Netherlands Ministry of Justice Fact Sheets "Same-Sex Marriages" 2001

Netherlands Ministry of Justice "Same-Sex Marriages" Fact Sheets 2001 available at

[http://www.justitie.nl/english/publications/factsheets/same-sex\\_marriages.asp](http://www.justitie.nl/english/publications/factsheets/same-sex_marriages.asp) (accessed on 27 December 2005).

Netherlands Second Chamber Debates 1999-2000

Netherlands Parliament Second Chamber Debates 1999-2000, 26 672, nr 5 available at <http://www.emancipatie.nl/documenten/emb/tk/26/26672/nr05.pdf> (accessed on 7 September 2005).

New Zealand Law Commission **Adoption** 1999

New Zealand Law Commission **Adoption: Options for Reform** Preliminary Paper 38 1999 available at

[http://www.lawcom.govt.nz/UploadFiles/Publications/Publication\\_72\\_143\\_PP38.pdf](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_72_143_PP38.pdf) (accessed on 31 January 2006).

New Zealand Law Commission **Same-Sex Relationships** 1999

New-Zealand Law Commission **Recognising Same-Sex Relationships** Study Paper 4 1999 available at

[http://www.lawcom.govt.nz/UploadFiles/Publications/Publication\\_108\\_277\\_SP4.pdf](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_108_277_SP4.pdf) (accessed on 31 January 2006).

Nicholson "Australian Judicial Approaches" 2002

The Honourable Chief Justice A Nicholson "Australian Judicial Approaches to International Human Rights Conventions and 'Family Law'" Paper delivered at the Miller Du Toit and the Law Faculty of the University of Western Cape Family Law Conference Cape Town March 2002.

Nkosi **Codicillus** 2000

G Nkosi "The Status of African Women: Has it Really Changed?" (2000) Vol XXXXI No 2 **Codicillus** 48.

Northern Ireland Law Reform Advisory Committee **Matrimonial Property** 2000

The Northern Ireland Law Reform Advisory Committee **Matrimonial Property** Report No. 10 LRAC No.8, 2000 available at [http://www.olrni.gov.uk/consult\\_Uploads/MatrimonialPropertyLRAC.pdf](http://www.olrni.gov.uk/consult_Uploads/MatrimonialPropertyLRAC.pdf) (accessed on 29 January 2006).

O'Regan **Potchefstroom Electronic Law Journal** 1999

K O'Regan "The Best of Two Worlds? Some Reflections on the Interaction Between the Common Law and the Bill of Rights in our New Constitution" (1999) Vol 1 **Potchefstroom Electronic Law Journal** available at [http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/99v1\\_oreg.pdf](http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/99v1_oreg.pdf) (accessed on 31 January 2006).

Pantazis **SALJ** 1997

A Pantazis "An Argument for the Legal Recognition of Gay and Lesbian Marriage" (1997) 114 (1) **South African Law Journal** 555.

Parker **Family Law** 1984

S Parker "Cohabitants, Their Homes and the Winds of Change" (1984) **Family Law** 40.

Parker **Informal Marriage and Cohabitation** 1990

S Parker **Informal Marriage, Cohabitation and the Law 1750-1989** New York: St Martin's Press 1990.

Parker **Cohabitees** 1991

S Parker **Cohabitees** 3<sup>rd</sup> edition England: Longman Group UK 1991.

Parker, Parkinson & Behrens **Australian Family Law** 2001

Parker, Parkinson & Behrens **Australian Family Law in Context: Commentary and Materials** 2<sup>nd</sup> edition Sydney: Law Book Company 2001.

Pienaar "Equality in Marriage" 2002

J M Pienaar "Equality in Marriage: The Case of African Customary Wives in South Africa" Paper delivered at the 11<sup>th</sup> World Conference of The International Society of Family Law Copenhagen, Oslo August 2002.

Polikoff **Virginia Law Review** 1993

N D Polikoff "We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Gender in Every Marriage' (1993) **Virginia Law Review** 1535.

Posner **Sex and Reason** 1992

R Posner **Sex and Reason** Cambridge: Harvard University Press 1992.

Puplick "Sexual Apartheid Australia" 2001

C Puplick "Sexual Apartheid in Australia: Recognition of Same-Sex Relationships" October 2001 available at [http://www.lawlink.nsw.gov.au/adb.nsf/pages/speech1\\_2001](http://www.lawlink.nsw.gov.au/adb.nsf/pages/speech1_2001) (accessed on 12 July 2002).

Rautenbach and Goolam **Introduction to Legal Pluralism** 2002

C Rautenbach and N M I Goolam ed **Introduction to Legal Pluralism in South Africa Part II** Durban: Butterworths 2002.

Robinson "Changes in Marriage" 2002

A B Robinson "Changes in Marriage: Past, Present and Future" July 2002 available at [http://www.religioustolerance.org/hom\\_mar2.htm](http://www.religioustolerance.org/hom_mar2.htm) (accessed on 2 September 2005).

Rodriguez "Cohabitation" 1998

H Rodriguez "Cohabitation: A Snapshot" May 1998 Center for Law and Social Policy Inc Washington D.C. available at [http://www.clasp.org/publications/cohabitation\\_snapshot.pdf](http://www.clasp.org/publications/cohabitation_snapshot.pdf) (accessed on 31 January 2006).

Rwezaura **Journal of African Law** 1998

B Rwezaura "The Proposed Abolition of De Facto Unions in Tanzania: A Case of Sailing against the Social Current" (1998) 42 **Journal of African Law** 187.

Rydström **Current Sweden** 2000

J Rydström "The Ombudsman for Gays and Lesbians: The Swedish Welfare State and its Tolerance of Deviation" (2000) No 427 **Current Sweden** available at [http://www.historia.su.se/safari/artiklar/ombudsman\\_e.pdf](http://www.historia.su.se/safari/artiklar/ombudsman_e.pdf) (accessed on 18 August 2003).

Sandor "Legislating in Australia for Love Outside of Marriage" 2002

D Sandor "Legislating in Australia for Love Outside of Marriage" Paper delivered at the Miller Du Toit and the Law Faculty of the University of Western Cape Family Law Conference Cape Town March 2002 available at <http://www.familycourt.gov.au/papers/html/sandor.html> (accessed on 8 March 2004).

Sant "Overview of Property (Relationships) Legislation Amendment Act, 1999" 1999

K Sant "Overview of Property (Relationships) Legislation Amendment Act, 1999" 1 July 1999 available at <http://www.girl.org.au/pdf/legislati.PDF> (accessed on 8 March 2004).

Sarantakos **Alternative Law Journal** 1999

S Sarantakos "Same-Sex Marriage: Which Way to Go? Options for Legalizing Same-Sex Relationships" (1999) 24 **Alternative Law Journal** 79.

Schwellnus "The Legal Implications of Cohabitation in South Africa" 1994

T Schwellnus "The Legal Implications of Cohabitation in South Africa - A Comparative Approach" Thesis for the degree Doctor Legum at the Rijksuniversiteit of Leiden December 1994.

Schwellnus **Obiter** 1995

T Schwellnus "The Value of Swedish Law on Cohabitation as a Basis for Legal Reform in South Africa" (1995) **Obiter** 229.

Schwellnus **Obiter** 1996

T Schwellnus "Patrimonial Consequences of Cohabitation in England as Basis for Legal Reform in South Africa" (1996) **Obiter** 42.

Scotland White Paper **Parents and Children** 2000

Scottish Executive **Parents and Children** White Paper September 2000 available at <http://www.scotland.gov.uk/justice/familylaw/pac-01.asp> (accessed on 12 February 2006).

Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002

M Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** Research paper 02/17 for House of Commons March 2002 available at <http://www.parliament.uk/commons/lib/research/rp2002/rp02-017.pdf> accessed on 31 January 2006).

Sinclair **Acta Juridica** 1983

J Sinclair "Marriage: Is it Still a Commitment for Life Entailing a Lifelong Duty of Support?" (1983) **Acta Juridica** 75.

Sinclair **Marriage Law** 1996

J Sinclair assisted by J Heaton **The Law of Marriage** Vol 1 Kenwyn: Juta 1996.

Singh **CILSA** 1996

D Singh "Cohabitation Relationships Revisited: Is it not Time for Acceptance?" (1996) Vol 29 **The Comparative International Law Journal of Southern Africa** 317.

Skolander "ILGA Report: Sweden" 1998

B Skolander "Report of the International Lesbian and Gay Association - Europe - Country Reports: Sweden" June 1998 available at <http://www.steff.suite.dk/report.htm#SWEDEN1> (accessed on 18 December 2005).

Solicitor's Family Law Association **Reforming the Law on Cohabitation**

Solicitor's Family Law Association **Reforming the Law on Cohabitation** Fact Sheets available at <http://www.sfla.org.uk/factsheetdisplay.php?id=11> (accessed on 31 January 2006).

South African Law Reform Commission Report **Review of the Marriage Act 2001**  
South African Law Reform Commission **Review of the Marriage Act, 1961**  
Report Project 109 2001 available at <http://www.doj.gov.za/salrc/index.htm>.

South African Law Reform Commission Report **Review of the Child Care Act 2002**  
South African Law Reform Commission **Review of the Child Care Act** Report  
Project 110 2002 available at <http://www.doj.gov.za/salrc/index.htm>.

South African Law Reform Commission Report **Islamic Marriages 2003**  
South African Law Reform Commission **Islamic Marriages and Related  
Matters** Report Project 59 2003 available at  
<http://www.doj.gov.za/salrc/index.htm>.

Stanton "What's Marriage Got to Do with It?" 1998  
G T Stanton "What's Marriage Got to Do with It?" 1 October 1998 available at  
<http://www.family.org/cforum/> (accessed on 7 September 2003).

Steiner **Child and Family Law Quarterly** 2000  
E Steiner "The Spirit of the New French Registered Partnership Law –  
Promoting Autonomy and Pluralism or Weakening Marriage?" (2000) 1 Vol 12  
No 1 **Child and Family Law Quarterly** 7.

Steyn **TSAR** 1998  
E Steyn "From Closet to Constitution: The Gay Family Rights Odyssey" (1998) 1  
**Tydskrif vir die Suid Afrikaanse Reg** 97.

Steyn **TSAR** 2001  
E Steyn "Women Who Love Women - A Female Perspective on Gay Family  
Law" (2001) 2 **Tydskrif vir die Suid Afrikaanse Reg** 340.

Sweden **Family Law** 2000  
Ministry of Justice **Family Law** Brochure 2000 available at  
<http://www.sweden.gov.se/content/1/c6/01/62/92/841de2e6.pdf> (accessed on 28  
December 2005).

Sweden **Custody of Children** 2002

Ministry of Justice **Custody of Children** Brochure 2002 available at <http://www.sweden.gov.se/sb/d/2707/a/15193> (accessed on 28 December 2005).

Sweden **Cohabitees** 2003

Ministry of Justice **Cohabitees and their Joint Homes** Brochure 2003 available at <http://www.sweden.gov.se/sb/d/2707/a/15193> (accessed on 28 December 2005).

Thomas **THRHR** 1984

Ph Thomas "Konkubinaat" (1984) 47 **Tydskrif vir die Hedendaagse Romeins Hollandse Reg** 155.

UK "Civil Partnership"

Women and Equality Unit: Lesbian and Gay Issues "Civil Partnership" available at <http://www.womenandequalityunit.gov.uk/lgbt/partnership.htm> (accessed on 29 July 2005).

UK "Explanatory Notes to Civil Partnership Act 2004"

"Explanatory Notes to Civil Partnership Act 2004 (c. 33)" 2004 available at <http://www.opsi.gov.uk/acts/en2004/2004en33.htm> (accessed on 27 December 2005).

Van Der Burght **De Jure** 2000

G van der Burght "Registered Partnerships in the Netherlands" (2000) 33 Vol 1 **De Jure** 76.

Van Eeden "State Involvement and Religion in Marriage" 2001

M Van Eeden "State Involvement and Religion in Marriage: Its Effect on the Recognition of Same-Sex Marriage" Submission for the Ismael Mahomed Essay Competition of the South African Law Reform Commission August 2001.



Van Heerden "Family and Human Rights" 2002

B J Van Heerden "Family and Human Rights" Paper delivered at the 11<sup>th</sup> World Conference of The International Society of Family Law Copenhagen, Oslo August 2002.

Van Niekerk **Guide to Patrimonial Litigation** 1999

P A van Niekerk **A Practical Guide to Patrimonial Litigation in Divorce Actions** Durban: Butterworths 1999.

Visser **Essays on the History of Law** 1989

D P Visser ed **Essays on the History of Law** Cape Town: Juta 1989.

Visser **THRHR** 1995

P J Visser "Enkele Gedagtes oor Fundamentele Regte en die Familie Reg" (1995) 58 **Tydskrif vir die Hedendaagse Romeins Hollandse Reg** 702.

Vlaardingerbroek "Influence of Human Rights Conventions" 1997

P Vlaardingerbroek "(In)equality in Netherlands Family Law, the Influence of Human Rights Conventions on Netherlands Family Law" **Equality in Family Law** (1997) 153 available at <http://arno.uvt.nl/show.cgi?fid=5011> (accessed on 31 January 2006).

Waldijk "Lesbian Partners in the Netherlands Get Full Responsibility for Children" 2001

K Waldijk "And after Nine Months... Lesbian Partners in the Netherlands Get Full Responsibility for Children" 20 November 2001 available at <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=76&garb=0.5024022285421146&session=> (accessed on 31 January 2006).

Waldijk "Latest News about Same-Sex Marriage" 2002

K Waldijk "Latest News about Same-Sex Marriage in the Netherlands (and What it Implies for Foreigners)" 9 June 2002 available at <http://ruljis.leidenuniv.nl/user/cwaldij/www/NHR/news.htm> (accessed on 31 January 2006).

Waaldijk "Marriage Open for Same-Sex Couples in Belgium" 2003

K Waaldijk "Marriage Open for Same-Sex Couples in Belgium" January 2003  
available at

<http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=76&garb=0.6111333404419461&sessio> (accessed on 28 December 2005).

### **Wikipedia**

**Wikipedia** - the free encyclopedia available at <http://en.wikipedia.org/wiki/>  
(accessed on 27 July 2005).

Wildenboer **Codicillus** 2000

H Wildenboer "The Status of Same-Sex Unions in South Africa" (2000) Vol  
XXXXI No 2 **Codicillus** 54.

Wildenboer **SAPL** 2005

L Wildenboer "Marrying Domestic Partnerships and the Constitution: A  
Discussion of *Volks v Robinson* 2005 (5) BCLR 446 (CC)" (2005) 20 (2) **South  
African Public Law** 459.

Wintermute & Andenæs **Same-Sex Partnerships** 2001

R Wintermute and M Andenæs ed **Legal Recognition of Same-Sex  
Partnerships** Oregon: Hart 2001.

Women's Legal Centre Report **Litigation and Law Reform: Domestic Partnerships**  
2000

Women's Legal Centre **Developing Strategy for Litigation and Law Reform:  
Domestic Partnerships** Report 3 July 2000 available at  
[http://www.wlce.co.za/advocacy/doc\\_dom\\_partnership.php](http://www.wlce.co.za/advocacy/doc_dom_partnership.php) accessed on 15  
November 2004).

### **World Factbook**

CIA - **The World Factbook** available at

<http://www.cia.gov/cia/publications/factbook/geos/nl.html> (accessed on 10  
November 2005).

Wriggins **Boston College Law Review** 2000

J Wriggins "Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender" (2000) 41 **Boston College Law Review** 265.

Zemljak & Stone "Legal Recognition of Same-Sex Relationships" 2001

F Zemljak and A Stone "The Legal Recognition of Same-Sex Relationships – Only the Beginning" 4 September 2001 available at <http://home.vicnet.net.au/~vglrl/> (accessed on 23 August 2002).

## TABLE OF CASES

### SOUTH AFRICA

**Ally v Dinath** 1984 (2) SA 451 (T)

**Amod v Multilateral Motor Vehicle Accident Fund** 1999 (4) SA 1319 (SCA)

**Annabhay v Ramlall and Others** 1960 (3) SA 802 (N)

**Beaumont v Beaumont** 1987 (1) SA 967 (A)

**Chaplin v Gregory** 1950 (3) SA 555 (C)

**Daniels v Campbell N.O. and Others** 2004 (5) SA 331 (CC)

**Dawood and Others v Minister of Home Affairs** 2000 (8) BCLR 837 (CC)

**Du Plessis v Road Accident Fund** 2004 (1) SA 359 (SCA)

**Du Toit and Another v Minister for Welfare and Population Development and Others** 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC)

**Esterhuizen v Esterhuizen** 1999 (1) SA 492 (C)

**Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA 1996** 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC)

**Farr v Mutual & Federal Insurance Co Ltd** 2000 (3) SA 684 (C)

**Fink v Fink and another** 1945 WLD 226

**Fourie and Another v Minister of Home Affairs and Others** 2005 (3) SA 429 (SCA)

**Fraser v Children's Court, Pretoria North** 1997 (2) BCLR 153 (CC); 1997 (2) SA 261 (CC)

**Harksen v Lane N.O. and Others** 1998(1) SA 300 (CC)

**Hoffmann v South African Airways** 2001 (1) SA 1 (CC)

**In re Certification of the Constitution of the RSA, 1996, Ex Parte Chairperson of the Constitutional Assembly** 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC)

**Isaacs v Isaacs** 1949 (1) SA 960 (C)

**Ismail v Ismail** 1983 (1) SA 1006(A)

**J v Director General, Department of Home Affairs** 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC)

**Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere** 1994 (3) SA 283 (A)

**Langemaat v Minister of Safety and Security** 1998 (3) SA 312 (T)

**Minister of Home Affairs and Others v Fourie and Another** 2006 (1) SA 524 (CC)

**Muhlman v Muhlman** 1981 (4) SA 632 (W)

**Muhlman v Muhlman** 1984 (3) SA 102 (A)

**National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1998 (2) SACR 102 (W)

**National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1998 (12) BCLR 1517 (CC), 1999 (1) SA 6 (CC)

**National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others** 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC)

**Nkambula v Linda** 1951 (1) SA 377 (A)

**Nortje and Another v Pool N.O.** 1966 (3) SA 96 (A)

**Plum v Mazista Ltd** 1981 (3) SA 152 (A)

**Robinson and Another v Volks N.O. and Others** 2004 (6) SA 288 (C)

**S v H** 1995 (1) SA 120 (C)

**S v M** 1990 (2) SACR 509 (E)

**S v Makwanyane** 1995 (3) SA 391 (CC)

**Satchwell v President of the Republic of South Africa and Another** 2002 (6) SA 1 (CC)

**Seedat's Executors v The Master (Natal)** 1917 AD 302

**Thompson v Model Steam Laundry Ltd** 1926 (TPD) 674

**Union Government v Warneke** 1911 AD 657

**V v De Wet NO** 1953 (1) SA 612 (O)

**V v V** 1998 (4) SA 169 (C)

**Van Onselen N.O. v Kgengwenyane** 1997 (2) SA 423 (B)

**Van Rooyen v Van Rooyen** 1994 (2) SA 325 (W)

**Volks N.O. v Robinson and Others** 2005 (5) BCLR 446 (CC)

**W v W** 1976 (2) SA 308 (W)

## CANADA

**Andrews v Law Society of British Columbia** [1989] 1 S.C.R. 143

**EGALE Canada Inc. et al. v Att. Gen. of Canada et al.** 2001 B.C.S.C. 1365

**Egan v Canada** [1995] 2 S.C.R. 513

**Halpern et al. v Canada (A.G.) et al** [2002] O.J. No. 2714 (Q.L.), (Ont. Sup. Ct. Justice (Div. Ct.)) Court File No.: 684/00

**M v H** [1999] 2 S.C.R. 3 affirming (1996), 142 D.L.R. (4th) 1, 31 O.R. (3d) 417 (Ont. C.A.)

**McEachern v Fry Estate** [1993] O.J. No. 1731 (Ont C.J. GenDiv.)

**Miron v Trudel** (1995), 13 R.F.L. (4<sup>th</sup>) 1 (S.C.C.)

**Reference re Same-Sex Marriage** 2004 SCC 79

## EUROPEAN COURT OF HUMAN RIGHTS

**Marckx v Belgium** 68833/74 of 13/06/1979

## HAWAII

**Baehr v. Lewin** 852 P.2d 44 (Haw. 1993) later known as **Baehr v Miike** 1996 WL 694235 (Haw. Cir. Ct.)

## VERMONT

**Baker v. State of Vermont** 744 A.2d 864, 1999 WL 1211709 (Vt. 1999)

## **SELECTED LEGISLATION**

### **SOUTH AFRICA**

Aliens Control Act 96 of 1991

Basic Conditions of Employment Act 75 of 1997

Child Care Act 74 of 1983

Children's Status Act 82 of 1987

Civil Proceedings Evidence Act 25 of 1965

Compensation for Occupational Diseases Act 61 of 1997

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Constitution of the Republic of South Africa, 1996

Criminal Procedure Act 51 of 1977

Divorce Act 70 of 1979

Divorce Amendment Act 7 of 1989

Domestic Violence Act 116 of 1998

Employment Equity Act 55 of 1998

Estate Duty Act 45 of 1955

Government Employees Pension Law, Proclamation 21 of 1996

Housing Act 107 of 1997



Identification Act 68 of 1997

Immigration Act 13 of 2002

Immorality Amendment Act 57 of 1969

Immorality Amendment Act 2 of 1988

Independent Broadcasting Authority Act 153 of 1993

Independent Media Commission Act 148 of 1993

Insolvency Act 24 of 1936

Intestate Succession Act 81 of 1987

Judges Remuneration and Conditions of Employment Act 88 of 1989

Lotteries Act 57 of 1997

Maintenance of Surviving Spouses Act 27 of 1990

Marriage Act 25 of 1961

Matrimonial Property Act 88 of 1984

Mediation in Certain Divorce Matters Act 24 of 1987

Medical Schemes Act 131 of 1998

Military Pensions Act 84 of 1976

Natural Fathers of Children Born out of Wedlock Act 86 of 1997

Pension Funds Act 24 of 1956

Prohibition of Mixed Marriages Act 55 of 1949

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Recognition of Customary Marriages Act 120 of 1998

Rental Housing Act 50 of 1999

Road Traffic Management Corporation Act 20 of 1999

Security Officers Act 92 of 1987

Sexual Offences Act 23 of 1957

South African Civil Aviation Authority Act 40 of 1998

Special Pensions Act 69 of 1996

Taxation Laws Amendment Act 5 of 2001

## **AUSTRALIA**

Commonwealth of Australia Constitution Act 1900 (UK)

Family Law Act of 1975 (Cth)

Property (Relationships) Legislation Amendment Act of 1999

## **CANADA**

British North America Act of 1867 (also cited as the Constitution Act, 1867)

Canadian Charter of Human Rights and Freedoms, Schedule B of the Constitution Act of 1982

Civil Marriage Act of 2005, S.C. 2005, chap 33

Definition of Spouse Amendment Act of 2000, S.B.C. 2000, chap 24

Modernisation of Benefits and Obligations Act of 2000, S.C. 2000, chap 12

## **DENMARK**

Danish Registered Partnership Act, 1989 (Act No. 373 of 1989)

## **ICELAND**

Act on Recognised Partnerships of 1996

## **NETHERLANDS**

Act on the Opening up of Marriage, Act of 21 December 2000

## **NEW SOUTH WALES**

Property (Relationships) Act of 1984

Property (Relationships) Legislation Amendment Act of 1999

## **NEW ZEALAND**

Property (Relationships) Act of 1976

## **NORWAY**

Registered Partnership Act, 1993 (Act No. 40 of 1993)

## **QUEBEC**

Act Instituting Civil Unions and Establishing New Rules of Filiation of 2002

## **SWEDEN**

Cohabitees (Joint Homes) Act of 1987 (SFS 1987:232)

Cohabitees Act of 2003 (SFS 2003:376)

Homosexual Cohabitees Act of 1988 (SFS 1987:813; SFS 1987:814)

Registered Partnership (Family Law) Act of 1994 (SFS 1994:1117)

## **TANZANIA**

Law of Marriage Act of 1971

## **UNITED KINGDOM**

Children Act of 1989 Chap 41

Civil Partnership Act of 2004 Chap 33

Family Law Act of 1996, Chap 27

Inheritance (Provision for Family and Dependents) Act of 1975 Chap 27

Fatal Accidents Act 1976, Chap 30

Social Security Contributions and Benefits Act of 1992, Chap 4

**UNITED STATES OF AMERICA**

Defense of Marriage Act 28 U.S.C.1738(c) 100 Stat. 2419 (Sep.21, 1996)

**VERMONT**

Act Relating to Civil Unions, 2000 (Act No. 91 of 2000)

## CHAPTER 1: INTRODUCTION

### 1.1 History of investigation

1.1.1 The Department of Home Affairs approached the Commission during 1996 with a request to investigate and recommend legislation relating to a new marriage dispensation for South Africa. The Minister of Justice approved the inclusion of the investigation in the Commission's programme on 27 January 1997. The investigation focused mainly on whether the provisions contained in the Marriage Act of 1961 were adequate or whether they had to be amended.<sup>3</sup>

1.1.2 The Commission issued a media statement in January 1998 requesting interested parties and bodies to comment on the adequacy of the Marriage Act of 1961. Numerous comments were received. Among the issues addressed in the comments was the question of legal recognition in respect of "cohabitation" and of "same-sex marriages". Some respondents argued that same-sex marriages had to be recognised by legislation, whereas others pleaded against such recognition.

1.1.3 At the same time media reports suggested that "urgent" consideration be given by Parliament to the adoption of legislation relating to the recognition in South Africa of same-sex partnerships. The matter was further highlighted by the media after the judgment in **Langemaat v Minister of Safety and Security**,<sup>4</sup> in which Roux J held *ultra vires* certain provisions of Polmed (the medical aid scheme of the South African Police Service) on grounds related to perceived discrimination in its provisions on the basis of sexual orientation.<sup>5</sup>

---

<sup>3</sup> Project 109: Review of the Marriage Act 25 of 1961.

<sup>4</sup> 1998 (3) SA 312 (T).

<sup>5</sup> Section 9 of the Constitution of the Republic of South Africa of 1996 ("the Constitution"), the so-called equality clause, prohibits discrimination on the basis of sexual orientation. See chap 3 below for a discussion of the constitutional imperatives.

1.1.4 In its original memorandum the Department of Home Affairs had furthermore drawn the Commission's attention to the fact that it was experiencing ever-increasing demands from the gay community for the recognition of gay marriages as valid marriages.

1.1.5 On 17 April 1998 the Commission considered and approved the inclusion in its programme of an investigation into "domestic partnerships" (heterosexual and homosexual).<sup>6</sup> It was held that the investigation could not be performed fairly with reference to sexual orientation only, and that it should also have regard to the extent to which domestic partnerships generally should receive legal recognition.<sup>7</sup> The inclusion of the investigation on the law-reform programme of the Commission was affirmed by the Minister of Justice on 16 July 1998.

1.1.6 The investigation into the Review of the Marriage Act was therefore divided into two separate projects: the original project (Project 109) which was dealt with first and which was concerned entirely with technical issues,<sup>8</sup> and a new project (Project 118) which was concerned with domestic partnerships.

1.1.7 The Minister appointed a Project Committee at the request of the Commission to assist the Commission in its task. The Chairperson of the Committee is the Honourable Mr Justice Craig Howie and the other members are Prof Cora Hoexter, Ms Beth Goldblatt, Prof Ronald Louw, Prof Tshepo Mosikatsana and Ms Lebogang Malepe.<sup>9</sup>

1.1.8 During the period of the investigation several important judgments were handed down. Two judgments of particular importance were the Constitutional Court rulings in **Volks N.O. v Robinson**<sup>10</sup> and **Minister of Home Affairs v Fourie**.<sup>11</sup> Both judgments informed the final recommendations of the Commission since they

---

<sup>6</sup> 63<sup>rd</sup> Meeting of the Working Committee held in Pretoria on 17 April 1998.

<sup>7</sup> Commission Paper 487.

<sup>8</sup> In May 2001 the Commission published the Report on the Review of the Marriage Act 25 of 1961.

<sup>9</sup> Ms Malepe subsequently resigned as a member of the Project Committee in June 2002 and Prof Louw sadly passed away in July 2005.

<sup>10</sup> 2005 (5) BCLR 446 (CC).

<sup>11</sup> 2006 (1) SA 524 (CC).

indicated the Court's views on the need for and content of the legal reform regarding domestic partners.

## 1.2 Exposition of the problem

1.2.1 For many years opposite-sex marriage was the only legally recognised family form, and it carried with it a plethora of legal rights and obligations.<sup>12</sup> It was regarded as the cornerstone of society - a fixed traditional structure essential for the raising of children and a healthy family.<sup>13</sup>

1.2.2 However, to say that marriage is a constant would be untrue. Over the past thirty years the institution of marriage has gone through significant changes - a general movement away from reliance on fault, for example, in the recognition of "no fault" divorce, and revolutionary changes in matrimonial property laws. Many of the features of marriage which are assumed to have been present from time immemorial are actually of more recent origin. What is clear, though, is that marriage in its many forms has enjoyed a uniquely privileged status.<sup>14</sup>

1.2.3 Domestic partnerships, on the other hand, were virtually unrecognised. Opposite-sex partners were a largely invisible group as far as the legal system was concerned: any acknowledgment of their existence tended to be characterised by scathing references to their attempts to "masquerade as husband and wife". They were excluded from the rights and obligations which attached automatically to marriage and it was not even clear whether any agreements which they entered into in order to create parallel rights and obligations, were legally enforceable.<sup>15</sup>

---

<sup>12</sup> Holland **Canadian Journal of Family Law** 2000 at 6.

<sup>13</sup> Hutchings & Delport **De Rebus** 1992 at 121.

<sup>14</sup> Holland **Canadian Journal of Family Law** 2000 *ibid*.

<sup>15</sup> Holland **Canadian Journal of Family Law** 2000 *ibid*. Labuschagne E **TSAR** 1985 at 222 stated that the general position in South Africa is that the law does not acknowledge or protect contracts which will encourage immoral relationships. See also C Nathan "Samewoning of Samehuising" in Bosman & Eckard **Welsynsreg** 1982 at 245 and Devlin **Enforcement of Morals** 1965 where he submits: "The modern state concerns itself with promoting institutions which are beneficial to society, the legislator has to consider how the law can best be used to help marriage and discourage alternatives".



1.2.4 As far as same-sex partners were concerned, the position was even more problematic. South African society was characterised by a strong degree of hostility towards homosexuals and homosexual conduct.<sup>16</sup> Since homosexual conduct was to a large extent criminalised,<sup>17</sup> the recognition of a same-sex marriage or partnership of any kind was completely out of the question.

1.2.5 The tumultuous years after World War II, however, heralded a dissipation of social disapproval towards cohabitation.<sup>18</sup> It was perhaps the decade of the swinging sixties that established the domestic partnership as a socially acceptable institution.<sup>19</sup> This was the position specifically as far as opposite-sex couples were concerned, although the phenomenon of same-sex couples living together discreetly was not unknown.

1.2.6 Over the years, there has been an increasing focus on the rights of opposite- and same-sex partners as domestic partnerships have come to be perceived as functionally similar to marriage.<sup>20</sup> The increased recognition of intimate relationships outside of marriage started with the imposition of support obligations created in domestic partnership agreements and continued with the use of principles of unjustified enrichment to provide property rights and to extend statutorily defined benefits for similar partnerships. Initially the extension was rather grudging and seemed primarily designed to "pass the buck" from welfare authorities to the family.<sup>21</sup>

1.2.7 The number of people living in non-marriage relationships has, however, increased worldwide and also in South Africa.<sup>22</sup> The dissatisfaction with the current laws can be seen in the activities of lawmakers and law reform bodies across the globe.

---

<sup>16</sup> Steyn **TSAR** 1998 at 97.

<sup>17</sup> Lesbianism was never criminalised.

<sup>18</sup> Bosman & Eckard **Welsynsreg** 1982 at 252.

<sup>19</sup> Hutchings & Delport **De Rebus** 1992 *ibid.*

<sup>20</sup> See further Labuschagne **TSAR** 1989 at 371, where he refers to Scholnik who states that marriage and the family has not disappeared but it has been deregulated.

<sup>21</sup> Holland **Canadian Journal of Family Law** 2000 *ibid.*

<sup>22</sup> In research on marriage conducted by Statistics South Africa, approximately 40 percent of African and Coloured women indicated that they were in marriages of one kind or another (religious, customary or civil). This suggests that large numbers of South Africans live with their intimate partners without marrying.

1.2.8 In France there is evidence of restructuring away from marriage on a large scale, a process termed "de mariage".<sup>23</sup> Britain and Denmark recognise same-sex partnerships while the Netherlands, Belgium, Canada and Spain recognise same-sex marriage.<sup>24</sup> In Tanzania, if two persons of the opposite sex have lived together for at least two years and have acquired a reputation of being married, they are presumed to be married and the ordinary consequences of marriage attach to their union until the presumption is rebutted.<sup>25</sup>

1.2.9 South Africa is, however, behind other countries in its development of appropriate legislation.

1.2.10 Given South Africa's conservative and Calvinistic background, it was not surprising that acceptance of domestic partnerships occurred at a slower and more reluctant pace than in countries like Sweden, Canada, England and the United States of America.<sup>26</sup> There was, however, mounting dissatisfaction with the failure of the law to adapt to changing patterns of domestic partnership. More and more legal problems associated with domestic partners and their families were coming to the attention of the courts and of lawyers generally. Partners were increasingly likely to bring disputes over such matters as property and custody before the courts. A number of Constitutional and High Court cases dealing with challenges in terms of section 9 of the Constitution of 1996 (the so-called equality clause) were brought forward.<sup>27</sup> Most notable of these were the cases of **Volks N.O. v Robinson**<sup>28</sup> and **Minister of Home Affairs v Fourie**<sup>29</sup> in which challenges were based on the right not to be discriminated against on the basis of marital status and sexual orientation.

---

<sup>23</sup> I Thery, (1997) 'Droit, Justice et "Demande des Familles": Reflexions sur un Objet Introuvable', chap 1 in M-T.Meulders-Klein (ed.) familles et Justice (Bruxelles:Brutlant) referred to in Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999 at 2.

<sup>24</sup> See comparative study in chap 4 below.

<sup>25</sup> Tanzania Law of Marriage Act of 1971 s 160 referred to by Sinclair **Marriage Law** 1996 at 297 fn 108.

<sup>26</sup> Hutchings & Delport **De Rebus** 1992 *ibid*.

<sup>27</sup> See discussion in chap 3 below.

<sup>28</sup> 2005 (5) BCLR 446 (CC).

<sup>29</sup> 2006 (1) SA 524 (CC).

1.2.11 It was clear that social customs had changed radically in recent years, outdating early notions of marriage as the only form of acceptable relationship. In light of the growing number of domestic partnerships, the following questions needed to be answered: Had the time come to provide legal recognition to people in domestic partnerships? Should people in a domestic partnership have the same rights and obligations or some of the same rights and obligations as people who are married? If so, how should these be regulated? Should the law of marriage be extended to include same-sex couples?

1.2.12 One argument was that lawmakers should abandon archaic, moralistic rules and confer legal status upon such relationships, for if anything seemed certain, it was that these living arrangements would not disappear simply because we refused to acknowledge them.<sup>30</sup> In a country espousing democracy, equality and change, the question had to be asked - was it not time to stop marginalising this relationship simply because it did not conform to the majoritarian morality of the past?<sup>31</sup>

1.2.13 These questions were answered in **Volks N.O. v Robinson**<sup>32</sup> and **Minister of Home Affairs v Fourie**.<sup>33</sup> In **Volks** both the majority and minority judgments referred to the need to regulate permanent life partnerships through legislation. Similarly, both the majority and minority judgments in **Fourie** stated clearly that the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law under section 9(1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution. In both cases the majority judgments left it to the legislature to correct the defects in the law.

1.2.14 The increasing social acceptability of non-marriage relationships and the absence of structure and formality in these relationships appear to make them

---

<sup>30</sup> Singh **CILSA** 1996 at 317. See also P J Bailey "Legal Recognition of De Facto Relationships" 1987 **Australian Law Journal** 174 at 185 referred to by Labuschagne **TSAR** 1989 at 370 where he says: "Faced with the existence of stable de facto relationships, the law can no longer afford to turn its back but must decide whether or not they are to be given recognition comparable to marriage."

<sup>31</sup> Singh **CILSA** 1996 at 318.

<sup>32</sup> 2005 (5) BCLR 446 (CC).

<sup>33</sup> 2006 (1) SA 524 (CC).

increasingly popular, yet it is precisely these perceived advantages which create the greatest potential for problems.<sup>34</sup> The dissolution of a valid marriage carries significant legal effect which does not extend to the domestic partnership irrespective of its permanence. The major disadvantage of the domestic partnership is the absence of structured protection for the parties when the relationship ends.<sup>35</sup>

1.2.15 Three factors should, however, be noted in regard to domestic partners.<sup>36</sup> Firstly, partners who discuss and record their respective rights tend to be in a better position than those who simply trust the other person. Secondly, evidence that contributions were made out of love and affection tends to be fatal to a claim, as it is assumed that this implies a willingness to make the contributions regardless of any expectation of an interest in the property. Thirdly, little weight is given to domestic contributions, as opposed to financial contributions or work to which a commercial value can readily be ascribed. Thus, partners who exchange or reduce their labour market role for an unpaid domestic role receive no financial compensation from their partner on relationship breakdown.

1.2.16 The Commission contends that some degree of regulation is essential to clarify the legal position of opposite-sex domestic partnerships.<sup>37</sup> As far as same-sex relationships are concerned, the guidance of the Constitutional Court in **Fourie** needs to be followed to enable same-sex couples to enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage.

### 1.3 Scope of investigation

1.3.1 Increasingly diverse kinds of living arrangements occur in society and different needs arise out of such relationships. As stated above, the investigation deals with the question of the legal recognition and regulation of all domestic

---

<sup>34</sup> Singh **CILSA** 1996 at 317.

<sup>35</sup> Singh **CILSA** 1996 at 318.

<sup>36</sup> Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999 at 2.

<sup>37</sup> Hutchings & Delport **De Rebus** 1992 at 124; De Bruyn & Snyman **SA Mercantile Law Journal** 1998 at 368 *et seq.* Labuschagne **TSAR** 1989 concludes at 389 that marriage should be deregulated and that legal recognition be extended to factual marriages. See also Singh **CILSA** 1996 at 321 where he states: "In addition to steps taken by the parties inter se, there is a crying need for legislative reform to bolster the rights of cohabiting partners".

partnerships - that is, established marriage-like relationships between people of the same or opposite sex.

1.3.2 It could, however, be argued that any legislation which is introduced should also include domestic relationships where people live under one roof without necessarily having a sexual relationship, *ie* non-conjugal relationships. Examples are parents moving into the home of a child or asking children to move into their home, friends or siblings living together, students sharing a house, etc.

1.3.3 There are also many reported incidents of domestic partnerships where one of the partners is already married to someone else. Although this phenomenon is not unique to South Africa, it is especially relevant here since it is in many cases the product of the history and character of our society: many men live in a domestic partnership in an urban area while having a wife in a rural area.

1.3.4 The investigation does not deal, however, with marriages that are not recognised by law by reason of the fact that they are potentially polygynous, or with marriages that do not comply with the requirements of the Marriage Act of 1961.<sup>38</sup> Persons in this category are couples married by African customary law and couples married by Muslim or Hindu rights. The consequences of customary marriages are governed by the indigenous law formalised by statute in the Recognition of Customary Marriages Act of 1998. The Report on Islamic Marriages and Related Matters<sup>39</sup> recommended legislation regarding Islamic marriages.

1.3.5 In view of the mandate of the Commission to reform the applicable family law to comply with the provisions of the Bill of Rights, the following issues have been considered in this investigation:

- \* whether domestic partnerships should be legally recognised and regulated;
- \* whether marital rights and obligations should be further extended to domestic partnerships;

---

<sup>38</sup> Marriages where one party was, or both parties were, unaware of a defect rendering the marriage void may be "putative." A putative marriage is a void marriage to which the law attaches some specific consequences.

<sup>39</sup> Project 59: Report published in July 2003.

- \* whether a scheme of registered partnerships should be introduced;
- \* which marital rights, obligations and benefits should require registration or marriage and which should depend only on the existence of a domestic relationship;
- \* how legislation should provide for same-sex marriage; and
- \* whether marital rights and obligations should be further extended to people living in interdependent relationships having no sexual element.

1.3.6 In striving to achieve its aims, the Commission considered the following guidelines:

- \* The constitutionality of the legislative proposals to create marital rights for same-sex couples and legal recognition for cohabiting couples had to be ensured.
- \* A balance had to be struck between the interests of vulnerable parties who are in need of protection and the autonomy of partners who prefer not to legalise their relationship formally.
- \* The interests of third parties who, through the legal recognition of domestic partnerships, would incur liabilities as service and benefit providers towards partners in these relationships needed to be protected adequately.
- \* The legislative measures created had to be accessible and practicable.
- \* Finally, the Commission's aim with the recommended legislative reform could never be to appease specific interest groups.

## 1.4 Definitions and terminology

1.4.1 It is important to explain the terms and concepts that were used throughout the investigation.

### a) Domestic partnership

1.4.2 A domestic partnership may assume many forms. Traditionally "domestic partnership" or "cohabitation", as it is sometimes called, refers to the relationship of a man and a woman who live together, ostensibly as man and wife, without having gone through a legal ceremony of marriage.<sup>40</sup>

1.4.3 In terms of a more modern definition it refers to the stable, monogamous living together as husband and wife of persons who do not wish to, or are not allowed to marry.<sup>41</sup> However, the domestic partnership is not the sole prerogative of unmarried, opposite-sex persons; it may also encompass relationships between two men or between two women as well as between persons in non-conjugal relationships.

1.4.4 It must be made clear that the relationships under discussion in this investigation are those with a considerable degree of permanence and stability, not those of a casual or intermittent character. These relationships are not valid marriages or domestic partnerships, nor do they become so by the lapse of time.<sup>42</sup>

1.4.5 Other terms used worldwide to denote the domestic partnership include shacking-up, living together, concubinage, association libre, Verhältnis, common-law marriage, de facto marriage, quasi-marriage, and putative marriage.<sup>43</sup> Also registered partnership, universal partnership and private marriage. For the purposes of this investigation the term "domestic partnership" will, however, be used throughout.

---

<sup>40</sup> Hahlo **Husband and Wife** 1985 at 36; also referred to by Sinclair **Marriage Law** 1996 at 268. See also Hahlo in Kahn **Fiat iustitia** 1983 at 244 referred to by Hutchings & Delport **De Rebus** 1992 at 121.

<sup>41</sup> Thomas **THRHR** 1984 at 455 referred to by Hutchings & Delport **De Rebus** 1992 at 122.

<sup>42</sup> Sinclair **Marriage Law** 1996 at 268.

<sup>43</sup> Sinclair **Marriage Law** 1996 *ibid.*

1.4.6 Defining "domestic partnership" or "cohabitation" has been attempted often. The definitions inevitably resort to arbitrary characteristics that are restrictive and often harsh. In the English case of **Helby v Rafferty**<sup>44</sup> Stamp J required<sup>45</sup>

such a degree of apparent permanence and stability that the ordinary man would say that the parties live together as man and wife.

1.4.7 Although there are difficulties in defining domestic partnerships (including establishing an appropriate period of cohabitation), the problems are not insurmountable. The Commission is of the opinion that it is possible to improve on the present definitions, get closer to the essence of the term and capture those relationships to which status should be attached while at the same time excluding casual, uncommitted relationships without interdependency.

1.4.8 The domestic partnership relationship must furthermore be distinguished from the 'mistress-patron' relationship. In **Davis v Johnson**<sup>46</sup> Lord Kilbrandon described a mistress as

a woman installed in a clandestine way, by someone of substance, normally married, for his intermittent sexual enjoyment.<sup>47</sup>

1.4.9 The Concise Oxford Dictionary defines a mistress as "a man's female lover with whom he has a continuing illicit sexual relationship".

1.4.10 The mistress relationship carries clear connotations of a deliberate variation of the monogamous ideal because a mistress appears to co-exist with her lover's spouse in a form of quasi-polygamy, which actively undermines the conventional marriage.<sup>48</sup>

1.4.11 The same cannot be said of the domestic partnership relationship. However, the failure of the lawmakers to perceive the distinction between these two

---

<sup>44</sup> [1979]1 WLR 13.

<sup>45</sup> Referred to by Sinclair **Marriage Law** 1996 at 295 fn 101.

<sup>46</sup> [1979] AC 264.

<sup>47</sup> At 338 referred to by Sinclair **Marriage Law** 1996 at 268 fn 7.

<sup>48</sup> M Welstead "Mistresses in Law: Deserving of Protection" (1990) **Family Law** 20 at 72 referred to by Singh **CILSA** 1996 at 324.



relationships has resulted in an excessively rigid conceptualisation of all extra-marital relationships.<sup>49</sup>

1.4.12 There is furthermore a great deal of confusion in the minds of the public and of partners themselves about the exact nature of their obligations. In the minds of many, the domestic partnership is treated as the equivalent of a "common-law marriage" with partnerships attracting all the rights and obligations of marriage. This is, however, a misconception since there is no such thing as a "common-law marriage" in South African law.

1.4.13 In this investigation the term domestic partnership will refer to established, conjugal or non-conjugal relationships between unmarried people of the same or opposite sex.

1.4.14 In order to explain the different kinds of domestic partnerships, the marriage model may in some instances be used as a benchmark to compare one model with the other. However, it is not the intention to use marriage as the standard against which the intrinsic values of these relationships are measured. Rather, it is recognised that there are distinct family arrangements in a society where a plurality of family forms appear.

1.4.15 Domestic partnerships can furthermore be subdivided into two categories, namely registered domestic partnerships and unregistered domestic partnerships.

1.4.16 The first category refers to relationships that receive some form of legal recognition through a formal registration process. The second category refers to people who find themselves in domestic partnerships but who do not want to are not allowed to register the relationship.

1.4.17 Couples in the second category sometimes conclude a contract to regulate some of the consequences of their shared lives. Non-conjugal domestic partnerships are also found in the second category.

---

<sup>49</sup> Singh **CILSA** 1996 at 325. See also Sinclair **Marriage Law** 1996 at 268 fn 7. Equally unsatisfactory are the labels "concubinage" and "paramour".

1.4.18 Although couples in domestic partnerships as a rule cohabit, it is not a distinctive feature of these relationships. In **McEachern v Fry Estate**<sup>50</sup> Sheppard J wrote:<sup>51</sup>

In today's world where often both spouses work, sometimes in different cities and where work can keep them apart for often long periods of time, one must look at the relationship generally and not specifically item by item to see if the parties were in fact cohabiting in the legal sense or merely living together for the time being for whatever purpose.

**b) Domestic partnership agreement**

1.4.19 A domestic partnership agreement is a contract which says exactly what must happen to property and assets of a couple if and when a relationship breaks down. If one partner refuses to follow the agreement, the other partner can approach a court for assistance.

**c) Registration**

1.4.20 Registration refers to a legally prescribed procedure by which a couple publicly commit to their relationship in order to obtain certain rights and obligations which to some extent mirror marital legal consequences. Through the registration process a public record is created of the existence of the domestic partnership.

**d) Dependence/Dependant**

1.4.21 Dependence does not arise upon need only and the applicant should not have to prove that without the support of his or her partner during the period of cohabitation he or she would have been seriously deprived or even destitute. The language should be interpreted in the context of equality between the spouses and to give effect to the realities of our current society. These include the desirability of not only the male but also the female partner in a common-law relationship, as indeed in

---

<sup>50</sup> [1993] O.J. No. 1731 (Ont C.J. GenDiv.).

<sup>51</sup> Para 21 referred to by Holland **Canadian Journal of Family Law** 2000 fn 71.

a marriage, being financially and economically independent and having the ability to enjoy a fulfilling life in the marketplace as well as to rear children, if so desired.

1.4.22 It is therefore enough if the couple co-operate in assisting each other so that they are dependent upon one another for the improvement of their life. The economic support may go to a better lifestyle because each is co-operating in the meeting of expenses.

1.4.23 Thus, even a fairly stringently worded statutory provision requiring proof of "dependence" will be liberally interpreted. In the end the question is whether an applicant's lifestyle was "substantially enhanced" by reason of his or her relationship with the other partner.

#### e) Permanent

1.4.24 "Permanent" means an established intention of the parties to live their lives together on a permanent basis.<sup>52</sup> Whether a partnership is permanent will have to be decided on the totality of the facts presented. Without purporting to provide an exhaustive list, such facts would include the following:<sup>53</sup>

the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership; what the nature of that ceremony was and who attended it; how the partnership is viewed by the reactions and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another.

1.4.25 None of these considerations is indispensable on its own for establishing a permanent partnership.

---

<sup>52</sup> **National Coalition for Gay and Lesbian Equality v The Minister of Home Affairs** 2000 (2) SA 1 CC at [86].

<sup>53</sup> *Op cit* at [88].

### f) Spouse

1.4.26 The definition of "spouse" in South African legislation does not, as a general rule, at present include same-sex life partner.<sup>54</sup> Its ordinary meaning connotes "a married person, a wife, a husband".<sup>55</sup> See, however, the *ad hoc* amendments made in legislation regarding the definition of spouse.<sup>56</sup> It is of course also true that marriage represents but one form of life partnership.

### g) Unjustified enrichment

1.4.27 Unjustified enrichment is the general principle that one person should not be able to benefit unfairly at the expense of another.

### h) Common-law marriage

1.4.28 A common-law marriage arises when a couple agree between themselves to be married, hold themselves out to be married, and live together for a substantial period of time. The common-law marriage was, and still is, recognised in some states of America.<sup>57</sup>

1.4.29 One should, however, distinguish the common-law marriage in a handful of American jurisdictions where the informal consent marriage is still recognised as a legal marriage on the one hand, and the popular use of the word on the other hand. Common-law marriages are not recognised in South Africa.<sup>58</sup>

---

<sup>54</sup> *Op cit* at [25]-[26].

<sup>55</sup> **New Shorter Oxford English Dictionary** Clarendon Press 1993 referred to in **National Coalition for Gay and Lesbian Equality v The Minister of Home Affairs** *op cit* at [23].

<sup>56</sup> Para 3.2.97 below.

<sup>57</sup> Sinclair **Marriage Law** 1996 at 282.

<sup>58</sup> Hahlo in Kahn **Fiat Iustitia** 1983 at 245.

## 1.5 Consultation process

1.5.1 In accordance with the Commission's policy of consulting as widely as possible, every effort was made to publicise the investigation and to elicit responses from interested groups and organisations as well as from members of the public.

1.5.2 In October 2001 the Commission published an Issue Paper in the form of a questionnaire.<sup>59</sup> The Commission distributed approximately five hundred of these questionnaires to identified interested bodies and persons. A copy of the Issue Paper was also made available on the Commission's website. In addition, an interactive site was set up to enable respondents to answer the questions on-line and to submit their inputs directly to the Commission.

1.5.3 The Issue Paper elicited a lively and widespread response. One hundred and forty-five respondents acted on the Commission's invitation and submitted written comment. Submissions received came from various organisations as well as from ordinary members of the public. There were submissions that included published material and the Commission also received two petitions. A list of names of respondents is enclosed as **Annexure A**.

1.5.4 Submissions on the Issue Paper ranged from passionate calls for legal recognition of same-sex marriage and cohabiting relationships to outright condemnation of any act associated therewith. These submissions informed the Commission's further research.

1.5.5 A Discussion Paper was subsequently published in August 2003 for general information and comment.<sup>60</sup> In the Discussion Paper the Commission presented the position and context regarding domestic partnerships in South Africa and described the way in which partnerships are regulated in a number of other countries. The Commission further proposed several options for legislative reform to regulate different forms of domestic partnership.

1.5.6 During October 2003 the Commission held workshops in Pretoria, Durban, East London, Bloemfontein, Cape Town, Pietermaritzburg, Pietersburg and Nelspruit.

---

<sup>59</sup> Issue Paper no 17 (Project 118) available at <http://www.doj.gov.za/salrc/index.htm>

<sup>60</sup> Discussion Paper no 104 (Project 118) available at <http://www.doj.gov.za/salrc/index.htm>.

At the workshops the various options for law reform were discussed with reference to extensive worksheets compiled for this purpose.

1.5.7 Attendees were invited to distribute these worksheets among their institutions and to submit them to the Commission. Worksheets were also distributed by mail or via e-mail upon request. The closing date for comments on the Discussion Paper was extended (on public request) from 1 December 2003 to the end of May 2004. A total of 219 submissions and 50 worksheets were received. See **Annexure B** for the list of respondents to the Discussion Paper.

1.5.8 The respondents to the Discussion Paper could be divided into two main categories: The first category of respondents was totally opposed to the legal recognition of same-sex relationships and other domestic partnerships. These respondents either did not submit any further comment on the proposals or submitted negative comments on the proposals. The second category was either in favour of the legal recognition of same-sex relationships and other domestic partnerships or accepted that legal recognition was unavoidable. Respondents in this category had specific preferences and many of them submitted comments on the detail of the various proposals.

1.5.9 Many of the submissions included constructive criticism and helpful suggestions as to how the proposals of the Commission could be improved. The Commission duly considered each contribution and incorporated the ideas put forward where appropriate. The Commission would like to thank all who responded to the Issue and Discussion Papers.

1.5.10 In October 2004 the Project Committee held focus group meetings with stakeholders in government and the private sector. The further development of the original legislative proposals was considered. The Commission then formulated its final recommendations for legislative reform after due consideration of the recent Constitutional Court judgments on same-sex marriage and cohabiting relationships.<sup>61</sup>

1.5.11 In this report the social and political context of domestic partnerships in South Africa will be discussed (chapter 2). Thereafter the legal position of domestic

---

<sup>61</sup> Rulings of the Constitutional Court up until December 2005 were considered in the compilation of this Report.

partnerships before and after the new constitutional dispensation will be stated (chapter 3). This will be followed by a comparative study of the legal position regarding domestic partnerships in other jurisdictions (chapter 4). Thereafter, each element of the new family law dispensation will be discussed, namely marriage for same-sex couples (chapter 5), registered partnerships (chapter 6) and unregistered partnerships (chapter 7). In each case the position as set out in the Discussion Paper will be stated, followed by an overview and evaluation of the submissions received and, in conclusion, the recommendations of the Commission.

## CHAPTER 2: THE SOCIAL AND POLITICAL CONTEXT OF DOMESTIC PARTNERSHIPS

### 2.1 Incidence of domestic partnerships

2.1.1 The domestic partnership is not a new concept. An early form of opposite-sex domestic partnership was the concubinage.

2.1.2 The Roman concubinage was a union short of marriage, which was usually entered into between a man of rank and a woman of lower status. Marriageable age and consent were required, and a man who had a concubine could not have a legal wife or another concubine, but there was no *dos*, as in marriage.<sup>1</sup> The main distinguishing factor between the two institutions lay in the *maritalis affection*, viz the intention to be married.<sup>2</sup> Unlike a promiscuous union, the *concubinatus* carried no social stigma. Children were natural children, not bastards.<sup>3</sup>

2.1.3 The Christian emperors did not look upon concubinage in a favourable light. They accepted its existence without recognising its legality. Justinian regarded concubinage as an *inaequale coniugium* or second-rate marriage with legal consequences, if certain requirements were met.<sup>4</sup>

2.1.4 The concubinage relationship was abolished in the Byzantine kingdom by Basilius the Macedonian and given the death-blow by Emperor Leo VI, the philosopher, in his 91<sup>st</sup> Novellae where he stated:

It shall not be lawful to keep Concubines. The law which authorised men who did not blush at such a connection to keep concubines was conducive to

---

<sup>1</sup> Hahlo in Kahn **Fiat Iustitia** 1983 at 245.

<sup>2</sup> Labuschagne E **TSAR** 1989 at 662.

<sup>3</sup> Hahlo in Kahn **Fiat Iustitia** 1983 at 260 fn 66.

<sup>4</sup> Labuschagne E **TSAR** 1989 *ibid.*



neither modesty nor virtue. Hence we do not permit the error of former legislators to disgrace our government, and we hereby repeal this law forever. For, in accordance with the precepts which we have received from God, and which are becoming to Christians, we prohibit such a practice as being injurious not only to religion but also to nature. And, indeed, if you have a spring and the Divine Law invites you to drink from it, do you prefer to resort to a muddy pool, when you can obtain pure water? And even though you have no such a spring, you still should not make use of what is forbidden. It is not difficult to find a consort for life. (See Scott XVII The Civil Law 276).<sup>5</sup>

2.1.5 In so far as same-sex domestic partnerships are concerned, we know that at all stages of human existence there have been people of the same sex who have been erotically and emotionally attracted to each other and have found affinity and bonding and commitment with each other - on all continents, in all peoples, amongst all cultures and at all times and all places.<sup>6</sup>

2.1.6 Roman society did not distinguish between homosexual and heterosexual persons and until the thirteenth century Christianity did not display disapproval of homosexuality.<sup>7</sup> The Canon law that spread through Western Europe in the Middle Ages, however, carried with it the disdain for homosexuality and profoundly influenced the law of the countries reached. It is submitted that it is this remnant of a religion-based legal system that still influences most countries' refusal to recognise same-sex marriages.<sup>8</sup>

2.1.7 In recent times the patterns of marriage, divorce, and living together without marriage have been changing. That the incidence of domestic partnership is growing throughout the world is not a disputed proposition.<sup>9</sup> Family lawyers across the globe will tell of the increase in the number of palimony suits. In America forty-five per cent of all couples living together are unmarried.<sup>10</sup> In Sweden, nine out of ten couples

---

<sup>5</sup> Labuschagne E **TSAR** 1989 at 661-662.

<sup>6</sup> Cameron **SALJ** 2002 at 649.

<sup>7</sup> Pantazis **SALJ** 1997 at 559.

<sup>8</sup> Van Eeden "State Involvement and Religion in Marriage" 2001 at 9.

<sup>9</sup> See for example Sinclair **Marriage Law** 1996 at 269; Demographics in Rodriguez "Cohabitation" 1998; Labuschagne **TSAR** 1989 at 371 and Labuschagne E **TSAR** 1989 at 649.

<sup>10</sup> J Haskey and K Kiernan "Cohabitation in Great Britain - Characteristics and Estimated Numbers of Cohabiting Partners" 1989 **Population Trends** 58 referred to by Singh **CILSA** 1996 at 317. See also Sinclair **Marriage Law** 1996 at 270 fn 13 and the references therein: In the United States of America the number of people cohabiting increased from just over 500 000 in 1970 to more than 1,1 million in 1978, 1,9 million in 1983 and more than 2,8 million in 1990.

marrying for the first time already live together, while in Denmark, more than one-third of women in their early twenties are living with a partner without the ties of marriage. The Scandinavian pattern appears to be emerging in Austria, Belgium, France and across the channel, in Scotland and Wales as well.<sup>11</sup> As a rough estimate, around one million heterosexual couples are living together without being married in Britain,<sup>12</sup> while in France the number has reached two and a half million.<sup>13</sup>

2.1.8 It should be noted that reference is not merely being made to what Kiernan has termed 'nubile' cohabitation: there has been an increase in the number of partners living together across all age categories and domestic partnerships are more common among the divorced than among those who have never married.<sup>14</sup> Overall, national statistics show that one in five of all couples cohabit in France as compared with 27% of never-married women and 32% of divorced women between 18 and 49 in Britain.<sup>15</sup>

2.1.9 South African statistics also demonstrate the rising trend in domestic partnerships. Even conservative statistics indicate that a very large number of people live in domestic partnerships in South Africa. The census of 1996 found that 1, 268, 964 people described themselves as living together with a partner<sup>16</sup> while the 2001 Census estimated that nearly 2.4 million individuals were living in domestic

---

<sup>11</sup> "No Frontiers" (1992) 22 **Family Law** 177 referred to by Singh **CILSA** 1996 at 317.

<sup>12</sup> See Sinclair **Marriage Law** 1996 at 270 fn 12 and the references therein: In 1986/7 in the age group 16-59, 12% of men and 14% of women were cohabiting, making up about 900 000 cohabiting couples.

<sup>13</sup> Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999.

<sup>14</sup> Singh **CILSA** 1996 *ibid*.

<sup>15</sup> L'Insee **Social Trends 1999** referred to by Singh **CILSA** 1996 *ibid*.

<sup>16</sup> This is approximately 5% of the total population over the age of 14 (25,691,803). This is probably a significant undercount for the following reasons: Firstly, many people both cohabit and are married. When asked, they are likely to describe themselves as married rather than as cohabiting because marriage is regarded as more socially acceptable. Secondly, people may not be willing to admit that they are cohabiting because of the (perceived) social stigma attached to cohabitation. It is also important to note that the percentage of cohabitation is based on total population over the age of 14. If only the adult population were included, the percentage would increase significantly.

partnerships, almost doubling the figures of 1996.<sup>17</sup> Statistical data show that only about 40% of African and Coloured women are married.<sup>18</sup>

2.1.10 In the 1996 Census the figures for people living together in the different population groups were as follows: African: 1 056 992; Coloured: 132 180; Indian/Asian: 7119; White: 84 027; Unspecified: 8181.<sup>19</sup>

2.1.11 Even allowing for imprecision, one must recognise that there are large numbers of people in dependence-producing relationships who are ignored by the law.<sup>20</sup> The significant numbers involved mean that the Napoleonic adage that “cohabitants ignore the law and the law ignores them” is no longer acceptable.<sup>21</sup>

2.1.12 The increase in cohabitation is indicative of changing mores. Domestic partnership has come to be accepted by many people and although the moral and social stigma attached to domestic partnership has not disappeared completely, it has diminished substantially.

2.1.13 Domestic partnerships are found under:

- \* young, never-married (sometimes tertiary educated) persons, who seek freedom from the legal, financial and social constraints of marriage;
- \* the poorer sections of the population (this is a trend especially noticeable in South Africa);
- \* older people choosing the life-style in response to legal, financial, emotional and religious problems; and
- \* same-sex couples who are not allowed to marry.

<sup>17</sup> Statistics SA 2001 Census <http://www.statssa.gov.za/census> 2001.

<sup>18</sup> It is assumed that while many of the remaining 60% of these women live without men, a significant number cohabit with men but do not marry. The figures for Indian and White women show that more than 60% of them are married.

<sup>19</sup> **Population Census Report** No 03-01-11 (1996).

<sup>20</sup> Sinclair **Marriage Law** 1996 at 271.

<sup>21</sup> Hutchings & Delport **De Rebus** 1992 at 122.

2.1.14 In **Volks N.O. v Robinson**<sup>22</sup> Mokgoro and O' Regan JJ, in their minority judgment, commented as follows on the phenomenon of domestic partners:<sup>23</sup>

However, not every family is founded on a marriage recognised as such in law. Yet members of such families often play the same roles as in families which are founded on marriage and provide companionship, support and security to one another.

2.1.15 Similarly, Sachs J, in his minority judgment in the same case, submitted:<sup>24</sup>

... if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them.

2.1.16 There is also recognition that the nucleus model of a single-generation, heterosexual, civilly married couple with children born within wedlock is neither the norm nor the only form of family that deserves legal recognition.<sup>25</sup> In response to the Discussion Paper, some respondents still submitted that a family should be defined as a father and a mother with their children. However, other respondents acknowledged that this is not necessarily true any longer.

2.1.17 One respondent submitted that our family law is still largely structured around marriage and the nuclear family as the central unit of society, although marriage in fact no longer operates as the central point of families.<sup>26</sup> Cohabitation and the sharing of lives and a home should be seen as features of the marriage contract rather than being the source of the rights and duties themselves.<sup>27</sup>

---

<sup>22</sup> 2005 (5) BCLR 446 (CC).

<sup>23</sup> *Op cit* at [107].

<sup>24</sup> *Op cit* at [156].

<sup>25</sup> CALS Report 2001 at 11. See also Sinclair **Marriage Law** 1996 at 271.

<sup>26</sup> Women's Legal Centre.

<sup>27</sup> The Women's Legal Centre submitted that the definition of family should include people who are not only blood related, but also those who share their daily lives and experiences. Eg succession and maintenance law should pertain to both blood and legal relatives.

## 2.2 Reasons for the existence of domestic partnerships

2.2.1 Although there is a dearth of empirical data on this point it is assumed that couples cohabit for a number of reasons including the following:

### a) Parties have chosen not to marry

2.2.2 People choose not to marry for many reasons. Some are unique to South Africa. The issue of domestic partnership has a particular meaning in South Africa, given our history and socio-economic context. Whereas in a number of developed countries a domestic partnership is a middle class-choice, in South Africa it is a real problem outside of the control of most poor women.<sup>28</sup> The following reasons for the existence of domestic partnerships have been noted:

#### (i) Migrant labour and apartheid

2.2.3 In South Africa a battery of apartheid legislation in many instances shattered families and family life. Influx control, group areas and forced removals, coupled with overcrowding caused by rapid urbanisation and inadequate housing, all had an enormous impact on the intimate relationships of black people, often resulting in cohabitation for socio-political and economic reasons.<sup>29</sup>

2.2.4 Migrant labour has led to the breakdown of many traditional family arrangements and many couples live together for most of the year in the urban area without marrying (the man often has a rural wife). These women have little legal protection of their property interests.<sup>30</sup>

2.2.5 In some urban areas domestic partnerships have developed specifically to meet the needs of the isolated migrant men and women. For them living together is cheaper than maintaining separate households. It protects the partners against

---

<sup>28</sup> Goldblatt "Law Recognise 'New' Families" 2002 at 3.

<sup>29</sup> Sinclair **Marriage Law** 1996 at 273.

<sup>30</sup> Goldblatt "Law Recognise 'New' Families" 2002 *ibid*.

destitution in times of illness, unemployment or pregnancy. Furthermore, it is considered unnatural, particularly for male migrant workers, to "be alone".<sup>31</sup>

2.2.6 Research suggests that the cohabitation relationship which the migrant worker builds up in town is supposed to be temporary in the same sense that town life itself is supposed to be temporary for migrants. Therefore, the urban woman partner must accept the temporary nature of the relationship and must respect the fact that the other partner's main obligation is to support his family in his rural village or town.<sup>32</sup>

2.2.7 More recently it has also become necessary for some women to leave their families behind to search for work. This has resulted in her living in two separate places as well. According to a report by the Gender Research Project of the Centre for Applied Legal Studies ("CALS"), the fact that children have been forced to live separately from their fathers (and often their mothers as well) causes them to suffer greatly and has significant consequences for stable family life.<sup>33</sup>

## (ii) Poverty and unemployment

2.2.8 Women need men to support them and their children since men usually have better access to jobs, income and accommodation. Women rely on them for their basic needs. Women accept the man's refusal to marry them as well as economic and physical abuse because their material needs are so great. Women remain in these relationships despite the insecurity they feel.<sup>34</sup>

2.2.9 In research conducted it was found that, generally speaking, domestic partnerships were less common in settled townships and in the formal housing areas

---

<sup>31</sup> Motshogolane "Cohabitation among Blacks" in **Marriage and Family Life** Pretoria: Human Sciences Research Council 1987 at 197 -8 referred to by Sinclair **Marriage Law** 1996 at 273 fn 23.

<sup>32</sup> Motshogolane *ibid.*

<sup>33</sup> See CALS Report 2001 at 4. The full Report is available from the Centre for Applied Legal Studies Documentation Centre. For more information see <http://wwwserver.law.wits.ac.za/cals/gender/genderindex.htm>.

<sup>34</sup> CALS Report 2001 at 40.

and more common in the back rooms and shacks. The prevalence of domestic partnerships seems to be partly related to poverty.<sup>35</sup>

2.2.10 There also appears to be a link in people's perceptions between proper housing and marriage as opposed to informal housing and domestic partnership. In an interview in Pimville two married women said: "People who own formal houses or concrete houses do not cohabit. Once people move to solid houses they get married."<sup>36</sup>

2.2.11 Lack of money for lobola was sometimes cited as a reason for the domestic partnership. A man in Vryberg said: "If I want to marry her it means I have to pay lobola. Marriage is a commitment. You cannot marry if you won't be able to provide for wife and children".<sup>37</sup>

2.2.12 An elderly widow in Vryberg said the following about the problems of poverty and unemployment as causes of domestic partnerships:

People cohabit rather than marry because of unemployment. Most of the young people are unemployed. It could have been different if people, especially women, were employed. They could be independent and not depend on a man for anything. She could buy her own things and a house and look after her own children .... In the past there was a strong community network and people had land to plough on. There was less hunger and people helped each other. Those who were employed in the cities brought something home and those at home worked the fields. There was an exchange of goods and responsibilities. These days things are different. We all rely on money which is difficult to get.

### (iii) Economic conditions

2.2.13 In the past, in South Africa, couples may have elected to live together in a domestic partnership (rather than marry) because of the obvious tax benefits at a time when married women were the most heavily burdened citizens, or because

---

<sup>35</sup> CALS Report 2001 at 36: A woman in Pimville said: "Some girls cohabit because of poverty. The girl will go to cohabit with a man so that she gets something to eat and clothes to wear. These girls find it difficult to leave because they are already used to wearing expensive clothes and a meal everyday." Another woman said: "People cohabit because if they do not share a place with the fathers of their children, then the man would not pay maintenance. So people cohabit so that the fathers can maintain their children."

<sup>36</sup> CALS Report 2001 *ibid*.

<sup>37</sup> CALS Report 2001 at 37.

married women were immediately excluded from the many State or other work-related subsidies. This has changed, yet getting married still has an effect on the woman's chances of a permanent position or promotion<sup>38</sup> and evidence indicates that a domestic partnership remains a popular lifestyle despite the lack of legal rules regulating the rights of partners.<sup>39</sup>

2.2.14 Further, a divorced person or surviving spouse<sup>40</sup> who receives maintenance, pension or income from an annuity may choose a domestic partnership rather than lose the financial benefits of maintenance, pension or annuity on remarriage.<sup>41</sup>

#### (iv) The avoidance of the traditional obligations of marriage<sup>42</sup>

2.2.15 An increase in domestic partnerships can be seen in young, tertiary educated, never-married couples. These groups are likely to see domestic partnerships as being free from the legal and social constraints and financial obligations imposed by formal marriage.<sup>43</sup>

2.2.16 People seek companionship and intimacy, and wish to share their domestic lives with each other even where they do not wish to marry.<sup>44</sup> Men benefit from the lack of legal protection of domestic partnerships as they are able to enter and leave

---

<sup>38</sup> Hutchings & Delpont **De Rebus** 1992 at 122.

<sup>39</sup> Singh **CILSA** 1996 at 318.

<sup>40</sup> Respondents in the CALS Report 2001 said that widows formed relationships with men in their village. A man would then contribute in some way to a woman's household by bringing food that she would cook and then they would eat together. From his side he would help her with agricultural work or chop wood for her. Although they do not actually live together they may even have children together. The widow would benefit from his assistance and enjoy a relationship. She would, however, not remarry or live with him because according to custom she will lose the use of the house in which she lives, which had been the property of her husband. Also, anecdotally, it is well known that women with husbands in the cities have "boyfriends" who help out around the house.

<sup>41</sup> Sinclair **Marriage Law** 1996 at 272.

<sup>42</sup> Holland **Canadian Journal of Family Law** 2000 at 22.

<sup>43</sup> Hutchings & Delpont **De Rebus** 1992 *ibid*; Sinclair **Marriage Law** 1996 *ibid*.

<sup>44</sup> CALS Report 2001 at 39.



relationships very freely and have no obligations to support women or share their property with them.<sup>45</sup>

2.2.17 It is furthermore easier to end a cohabiting relationship than to end a marriage. Domestic partners expect fewer "exit costs" to ending the relationship.<sup>46</sup> However, most couples do not engage in crystal-ball gazing at the inception of the relationship and do not have a clear idea which obligations they are consciously choosing to avoid. If they did, one would expect such couples to have entered into a domestic contract rather than risking subsequent claims based on support or unjustified enrichment.<sup>47</sup>

#### (v) Avoidance of traditional roles

2.2.18 The position of women in society has improved dramatically over the past few years and the growing trend towards individualism has led to the woman's economic, social and sexual independence. Independence and equality are of the utmost importance to modern women. Marriage is often associated with male domination.

2.2.19 The traditional marriage is seen to enforce inequality. Domestic partnership, on the other hand, represents a more flexible, free and equal relationship. This has become an important factor in choosing domestic partnership above marriage.<sup>48</sup> Holland refers to women who reject marriage because of the patriarchal assumptions upon which many believe it to be based as the "marriage resisters".<sup>49</sup>

2.2.20 These women want to avoid the stereotyped role-allocation attendant upon marriage.<sup>50</sup> The current philosophy of human autonomy, individual freedom and individuality in so far as the family is concerned also plays a role.<sup>51</sup>

---

<sup>45</sup> CALS Report 2001 at 40.

<sup>46</sup> See Rodriguez "Cohabitation" 1998.

<sup>47</sup> Holland **Canadian Journal of Family Law** 2000 at 22. The fact that partners by and large do not use contracts suggests that the fear of liability does not play a major role in their decision to cohabit.

<sup>48</sup> Hutchings & Delport **De Rebus** 1992 *ibid.*

<sup>49</sup> Holland **Canadian Journal of Family Law** 2000 *ibid.*

<sup>50</sup> Sinclair **Marriage Law** 1996 at 272; Labuschagne **TSAR** 1989 at 371 fn 8.

2.2.21 On the other hand it was found that some men also want to avoid their traditional role as husbands. Women who want to get married often depend on men to ask them to marry and consider it inappropriate to make such a suggestion. Generally, women want the security and status of marriage while men prefer the freedom of domestic partnerships. A woman from Pimville expressed the insecurity of living in a domestic partnerships as follows:

People should marry but then it depends on the man. You cannot push him to marry you. He has to say it. So sometimes they choose to cohabit with you and tell you that they will get married to you later. You have to be patient. Cohabiting is not safe. He can kick you out of the house at any time.

2.2.22 Respondents to the Issue Paper reflected contradicting views: Many wanted to be married because of the status, security and property, but also saw marriage as entailing lack of freedom, slavery and a restriction on their ability to leave.

2.2.23 See also the discussion in par 2.4 below on the stereotyped notions of female dependence and the perceived oppressive nature of marriage.

## **b) Parties are unable to marry**

### **(i) Same sex unions**

2.2.24 Our common law defines marriage as a union between a man and a woman. This leaves parties in same-sex unions without legal recourse.<sup>52</sup>

---

<sup>51</sup> Labuschagne **TSAR** 1989 at 374 and fn 33:

The family in historical times, and at present, is in transition from an institution to a companionship. In the past, the important factors unifying the family have been external, formal and authoritarian, as the law, the mores, public opinion, tradition, the authority of the family head, rigid discipline, and elaborate ritual. At present, in the new emerging form of the companionship family, its unity inheres less and less community pressures, and more in such interpersonal relationships as the mutual affection, the sympathetic understanding, and the comradeship of its members.

<sup>52</sup> See discussion in chap 5 on same-sex marriage and the judgment in **Minister of Home Affairs v Fourie** 2006 (1) SA 524 (CC).

**(ii) Prohibited degree of blood-relationship (consanguinity)**

2.2.25 Persons within the prohibited degree of blood-relationship or affinity are not allowed to marry. Examples are a woman and her ex son-in-law or father-in-law or a man and his stepchild. Consanguinity entails incest and criminal prosecution if parties have a sexual relationship.

**(iii) Married already**

2.2.26 Prior to the Divorce Act of 1979 it was difficult to obtain a divorce if one of the parties refused to cooperate. Today the spouse wishing to obtain a divorce may take the initiative without the other spouse's cooperation.<sup>53</sup> Factors such as the division of matrimonial property, however, may still prevent spouses from seeking a divorce. See also above for the example of the city woman living with the man who already has a rural wife.

**c) Customary marriage**

2.2.27 A customary marriage may be incomplete or defective in some way. The new Recognition of Customary Marriages Act of 1998 has not provided complete assistance to people who believe they are married but do not have a marriage certificate. For example, a woman may try to make use of the protections that the Act offers and her partner may deny that there is a marriage. It remains to be seen how the Courts will deal with a situation where the parties differ on whether they are married. Many men are likely to deny the existence of a marriage because they realise that the customary law provides married women with greater rights than those of men.<sup>54</sup>

---

<sup>53</sup> Hutchings & Delport **De Rebus** 1992 at 122.

<sup>54</sup> Also referred to as putative customary marriages. Goldblatt "Law Recognise 'New' Families" 2002 at 3.

In its comments on the Discussion Paper, the Directorate: Gender Issues (Department: Justice and Constitutional Development) (hereafter referred to as "the Directorate") also referred to the precarious position of a discarded wife.

•The term "discarded wife" is used for a women (wife X) in a customary marriage which has been abandoned by her husband as a result of his subsequent civil marriage to another woman (wife Y).

#### d) Trial marriage

2.2.28 Another reason for the existence of the domestic partnership is that parties may use the domestic partnership as a precursor to marriage, the so-called "trial marriage".<sup>55</sup> Whereas just 11% of marriages in the USA between 1965 -1974 were preceded by domestic partnerships, 44% of all marriages between 1980 and 1984 involved at least one spouse who had cohabited. It is estimated that half of all couples who married after 1985 began their relationships as domestic partners.<sup>56</sup>

#### e) Ignorance of the law

2.2.29 Even today many people believe that simply living with another person for a continuous period of time establishes legal rights and duties between them.<sup>57</sup>

---



---

•Prior to the Recognition of Customary Marriages Act of 1998 and according to the judgment in **Nkambula v Linda** 1951 (1) SA 377 (A), the subsequent civil marriage to wife Y nullified the former customary marriage to wife X. Wife X was usually ignorant about the legal consequences of her husband's subsequent civil marriage and continued to stay in her marital home as a wife and saw her "husband" every year during the December holidays when he was back from the city. In practice wife X continued to be regarded as the customary wife. In terms of the common law however, recognition of both marriages would amount to recognising polygamous civil marriages, a highly contentious issue.

•The Directorate submitted that s 2(1) of the Recognition of Customary Marriages Act of 1998 may be interpreted in two different ways. In terms of s 2(1) a marriage that is valid under customary law that existed at the time of the commencement of the Recognition of Customary Marriages Act of 1998 is for all purposes recognised as a marriage. The Directorate proposed that a just and fair interpretation of this section would be that the customary marriage with wife X is therefore indeed a valid customary marriage.

•The Directorate, however, argued that a second interpretation of s 2 is also possible, namely that under common law the first customary marriage was nullified as a result of the subsequent civil marriage with wife Y. Therefore, the marriage with wife X is not a valid customary marriage existing at the time of the commencement of the marriage and can not continue as such under the Act.

•The latter interpretation implies that a perceived customary marriage may later turn out to be only a cohabitation partnership. The legal recognition of such a relationship as a domestic partnership would therefore be of significance to these discarded wives.

<sup>55</sup> Holland **Canadian Journal of Family Law** 2000 at 22.

<sup>56</sup> See Demographics in Rodriguez "Cohabitation" 1998.

<sup>57</sup> Research showed that a woman from Eldorado Park believed that the period was three months while others in Vryberg thought it was six months or two years. CALS Report 2001 at 35.

Jackson notes that the regular reference to "common-law husband or wife" appears to lend credibility to this notion.<sup>58</sup>

2.2.30 Many different perceptions exist about the law. Some believe that the duration of the relationship creates legal protection while others think that having children together entitles the domestic partners to legal protection. Some parties do not know that there is no legal recognition of domestic partnerships.

2.2.31 This lack of awareness of legal rights may in part be due to the still prevalent belief in the existence of common-law marriage, despite the fact that this concept has been abolished worldwide. Common-law marriage is conceptually very different from domestic partnership. The latter conveys an impression of freedom from responsibility, implying also that this is the result of a deliberate choice. The former implies that "common-law spouses" will be awarded the same rights as married couples after a certain period of time without any affirmative action being needed by the parties, although ironically even some of the forms of common-law marriage that existed required some affirmative action.<sup>59</sup>

2.2.32 It should, however, not be overlooked that many people are remiss about directing their lives. They drift into and remain in relationships without consciously considering the implications of failure and termination. The difficulty of formulating policy for those who do not marry is therefore compounded by the fact that within the group of domestic partners there are many who have not made any real choice.<sup>60</sup>

2.2.33 Some people furthermore believe that marriage is unnecessary or irrelevant if no children are involved.<sup>61</sup>

---

<sup>58</sup> J Jackson "People Who Live Together Should Put Their Affairs in Order" (1990) 20 **Family Law** 439 referred to by Singh **CILSA** 1996 at 318.

<sup>59</sup> L Stone **Uncertain Unions** Oxford: OUP 1992 and R B Outhwaite **Clandestine Marriage in England 1500-1850** London: The Hambledon Press 1995 referred to by Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999 at 22.

<sup>60</sup> Sinclair **Marriage Law** 1996 at 274 and references made therein.

<sup>61</sup> Labuschagne **TSAR** 1989 at 371 fn 8.

## f) HIV/Aids

2.2.34 Besides the historic reasons for the massive breakdown in families and social dislocation, current problems relating to HIV/Aids have a profound impact on social relations and family forms. The fact that the Aids epidemic has left thousands of children orphaned has resulted in young children having to act as heads of families of even younger children, and has increased the numbers of grandparents taking care of their orphaned grandchildren, and other children living in adoptive families. Millions of people find themselves in these types of family relationships which directly affect their proprietary (and other) interests.<sup>62</sup>

2.2.35 Seen against this background, the law and social policy reforms should aim to provide for both cohabiting couples in general as well as these new family types.<sup>63</sup> This must be done whilst acknowledging gender inequality and serious levels of violence against women.

## 2.3 Forms of domestic partnership

2.3.1 When account is taken of the family and family arrangements of couples in order to categorise domestic partnerships, the following main types can be identified:<sup>64</sup>

---

<sup>62</sup> The practical reality of the existence of these types of family relationships confirms the need for developing a functional definition of family in order to provide legal protection to all in need thereof.

<sup>63</sup> For a discussion of legal recognition of new families, see Goldblatt "Law Recognise 'New' Families" 2002. In principle, our Constitution requires the law to ensure the rights to equality and dignity of all families and their members. Addressing discrimination is a key priority of our new democracy. Such recognition must be accompanied by legal regulation since the existing law contains inadequate mechanisms to address disputes arising from cohabitation relationships.

<sup>64</sup> Labuschagne **TSAR** 1989 at 372 and the references therein. See also Mokgoro and O' Regan JJ in **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) at [120]:

Of course, the circumstances of cohabitants can vary significantly. Some may be living together with no intention of permanence at all, others may be living together because there is a legal or religious bar to their marriage, others may be living together on the firm and joint understanding that they do not wish their relationship to attract legal consequences, and still others may be living together with the firm and shared intention of being permanent life partners. Moreover, one cohabiting relationship may change its joint character and purpose so that partners who may originally not intend to be living together as permanent life partners may over time alter that intention and intend to live together as permanent life partners.

**a) Casual relationships of convenience**

2.3.2 This relationship is also sometimes referred to as "easy come, easy go". It is seen as an impermanent arrangement of convenience that arises from material and other needs. This type of relationship occurs between people of the same or opposite sex and usually (though not exclusively) among young people. Often, in an opposite-sex relationship, the woman would like the relationship to become more stable or even lead to marriage but does not have major expectations of the man seeing it this way. It is also found where men bring girlfriends to town to look after them.

2.3.3 In the poorer sections of the community the women often squirrel away money and then hide their purchases such as cutlery and crockery. A number of domestic workers indicated that they no longer cohabit as men use them to get free accommodation, food and money.<sup>65</sup>

**b) Extension of affectionate dating and courtship or trial marriage**

2.3.4 This is also seen as a temporary alternative to marriage. This type of relationship was found to be common in the Coloured community where there are no rural ties. Variations of this were found in the African community where there is an intention to marry but lobola has not been paid.

**c) Permanent alternative to marriage**

2.3.5 The couple often has children together and both partners contribute towards a joint household. Generally the woman depends on the man for accommodation in this type of domestic partnership but there are exceptions, for example where (women) domestic workers provide accommodation for men.

2.3.6 A variation of this arrangement was also found in the middle-class second "marriage", where the couple was older, had children from the first marriage and regarded re-marriage as inappropriate.

---

<sup>65</sup> CALS Report 2001 at 30: A female respondent who is also a domestic worker described her arrangement as follows: "We are only keeping each other company. There is not much in the relationship".

2.3.7 Most of the respondents in the Coloured township of Joe Slovo Park confirmed that domestic partnership rather than marriage was the norm in the area, even where people had been together for many years. A number of respondents said that while most Coloured people cohabit, their Xhosa neighbours were more likely to marry because "they have a tradition that they follow".<sup>66</sup>

2.3.8 As was indicated in the discussion of rural wives, there are conflicting interests between the rural wife and the urban woman partner over resources. The death of the man poses particular problems in that the wife and the urban woman may have competing claims to inherit. Following separation (usually when the man leaves his cohabiting partner), the ongoing maintenance of the two households is an area of conflict over property.

2.3.9 From a law reform point of view, these categories suggest the need for a solution to the problem of de facto "polygamy"<sup>67</sup> and a workable definition or test of domestic partnership that captures the essential elements of those relationships that are deserving of legal protection. Similarly, while many same-sex couples may desire the option of getting married, there is also a definite need for an alternative to marriage for same-sex couples.

## **2.4 Various policy arguments regarding the legal recognition and regulation of domestic partnerships**

### **a) The legal recognition and regulation of domestic partnerships threaten marriage as a sacred and stable institution<sup>68</sup>**

<sup>66</sup> CALS Report 2001 at 29: A female respondent from Vryberg said cohabitation was prevalent outside of rural areas: "In Vryberg it is only 'vat en sit'. Everyone does it even though they do not always feel free to tell that they cohabit."

<sup>67</sup> See discussion in chap 7 below.

<sup>68</sup> In **Minister of Home Affairs v Fourie** 2006 (1) SA 524 (CC) Doctors for Life International and the Marriage Alliance of South Africa were joined as amici before the Court. They submitted a number of arguments from a religious point of view in support of the view that the marriage institution cannot sustain the intrusion of same-sex unions. See also para 3.2.64 *et seq* below for a discussion of these arguments by the Court. For the Court's response to this argument see [88] *et seq*.



(i) **Marriage as a sacred and stable institution**

2.4.1 The current definition of marriage in South African law<sup>69</sup> is the western Judeo-Christian concept of marriage as referred to in **Hyde v Hyde & Woodmansee**.<sup>70</sup> It reads as follows:<sup>71</sup>

Marriage is the legally recognised voluntary union of a man and a woman for life to the exclusion of all others.<sup>72</sup>

2.4.2 From this definition it follows that the South African law has always regarded marriage as an opposite-sex, monogamous institution.

2.4.3 Marriage is, furthermore, an institution which, for many people, carries with it strong religious connotations.<sup>73</sup> Religious interest groups contend that the marital relationship is the foundation of the family.<sup>74</sup> According to these interest groups,

---

<sup>69</sup> The definition of marriage discussed in this section will only be valid until 1 December 2006 at the latest. In **Minister of Home Affairs v Fourie** 2006 (1) SA 524 (CC) the Constitutional Court declared this definition to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status, benefits and responsibilities that it accords to heterosexual couples. The Court suspended the declaration of invalidity until 1 December 2006 to allow Parliament to correct this defect.

<sup>70</sup> (1866) LR 1 P & D 130 at 133. The concept of marriage has been judicially, but not statutorily defined in South Africa. Apart from the judicial definition of what constitutes a marriage under South African law, pre-constitutional legislation provides for the formalities that need to be complied with. Under the Marriage Act of 1961 only those marriages that are celebrated before a State marriage officer or religious officer recognised under that Act, are valid. The legal consequences arising from such a marriage are determined by the common law and statute.

<sup>71</sup> Referred to by Sinclair **Marriage Law** 1996 at 305 fn 1. See also **W v W** 1976 2 SA 308 (W) where the Court held that the marriage of a post-operative transsexual was invalid on the basis that the operation did not change the plaintiff's sex and that a valid marriage could only be contracted by parties of the opposite-sex.

<sup>72</sup> A further element, "while it lasts", has been added by writers as a result of the changes brought about by divorce laws. See eg Sinclair **Marriage Law** 1996 at 307: "The assertion that marriage is 'for life' is thus simply not true" the references in fn 10 and 11. See also in general Sinclair **Acta Juridica** 1983 at 75 *et seq.*

<sup>73</sup> Holland **Canadian Journal of Family Law** 2000 at 7.

<sup>74</sup> See Genesis 2: 18 –

Then the Lord God said, 'It is not good for man to live alone. I will make a suitable companion to help him.'

and Matthew 19: 5 -

And God said, 'For this reason a man will leave his father and mother and unite with his wife, and the two will become one.'

marriage was established for the purpose of companionship and partnership with a view to procreation and for fulfilling a steward responsibility for the earth.<sup>75</sup>

2.4.4 Those who believe marriage to be a sacred, biblical institution also regard it as the only way to create a stable environment for the raising of children. In this regard it has often been said that family is the basic building block of society.<sup>76</sup> On the premise that marriage equals healthy family structures, marriage plays an important role in promoting social stability and good order which makes it the cornerstone of society.

2.4.5 In this context it is said that the most significant relationships to which the law attaches enforceable consequences are those established by marriage (wife and husband) and procreation (blood relations); both relationships recognised in society at large as family relationships.<sup>77</sup> Marco states that marriage “undergirds all of American society”.<sup>78</sup> The institution of marriage is sometimes regarded as a religious ceremony to legalise the union of the spouses in the eyes of God.<sup>79</sup>

2.4.6 Closely linked to the religious views on marriage is the South African common law, which determines that a marriage “creates a physical, moral and spiritual community of life, a *consortium omnis vitae*”.<sup>80</sup> The *consortium* has been described as:

...an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage .... These embrace intangibles, such as loyalty and sympathetic care and affection, concern ... as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in supporting-generating business.<sup>81</sup>

<sup>75</sup> The Evangelical Fellowship of Canada (at 2) indicates that marriage is regarded (even by some who are not necessarily religiously inclined) as a publicly recognised covenanting together for life of a man and a woman who live together in a relationship characterised by truth and fidelity for the purpose of lifelong companionship, mutual interdependence and responsibility for each other and potential procreation.

<sup>76</sup> See Robinson "Changes in Marriage" 2002.

<sup>77</sup> Lind **SALJ** 1995 at 482.

<sup>78</sup> See Marco "Gay Protected Class Status" 2000.

<sup>79</sup> I McMahon, a respondent to the Issue Paper.

<sup>80</sup> **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000 (2) SA 1 (CC) at [64] referring to Sinclair **Marriage Law** 1996 at 422 and the authorities cited there.

<sup>81</sup> Sinclair **Marriage Law** 1996 *ibid* referring in fn 21 to *ia* Erasmus J in **Peter v Minister of Law**

2.4.7 Sinclair points out that the duties of cohabitation and fidelity flow from this relationship. In **Grobbelaar v Havenga**<sup>82</sup> it was held that

companionship, love, affection, comfort, mutual services, sexual intercourse – all belong to the married state. Taken together, they make up the *consortium*.

2.4.8 Part of the idea of religious approval is also the desire for societal approval. Many couples believe their relationship will acquire societal approval only if they get married. These couples want to make a public commitment and receive public recognition for that commitment. In some cultures being married makes the difference between being accepted in the community or suffering stigma.<sup>83</sup>

2.4.9 The Constitutional Court in its judgment in **Satchwell v President of the Republic of South Africa and Another**<sup>84</sup> acknowledged the role of marriage in society:

[I]n terms of our common law, marriage creates a physical, moral and spiritual community of life which imposes reciprocal duties of cohabitation and support. The formation of such relationships is a matter of profound importance to the parties, and indeed to their families and is of great social value and significance.

2.4.10 In **Volks N.O. v Robinson**<sup>85</sup> Skweyiya J remarked that:<sup>86</sup>

Marriage and family are important social institutions in our society. Marriage has a central place, and forms one of the important bases for family life in our society.

2.4.11 Ngcobo J confirmed this view in the same case as follows:<sup>87</sup>

---

and Order 1990 (4) SA 6 (E) at 9.

<sup>82</sup> 1964 (3) SA 522 (N) referred to in **National Coalition for Gay and Lesbian Equality v The Minister of Home Affairs** at [46].

<sup>83</sup> K L Karst "The Freedom of Intimate Association" (1979-80) 89 **Yale Law Journal** 624 at 651 and 684 referred to by Mosikatsana **SAJHR** 1996 at 556. See also the reference in CALS Report 2001 at 27 where a man explained that cohabitation is common in townships but not in rural areas. "People in rural areas like tradition. If you want to live with a woman that you love you have to get married. People living in the township know their tradition but it is not important to them".

<sup>84</sup> 2002 (6) SA 1 (CC).

<sup>85</sup> 2005 (5) BCLR 446 (CC).

<sup>86</sup> At [52].

... both the Constitution and international instruments impose an obligation on our country to protect the institution of marriage.<sup>88</sup>

2.4.12 In the recent case of **Minister of Home Affairs v Fourie**<sup>89</sup> the Constitutional Court once again referred to the significance of marriage and the impact of exclusion from it.<sup>90</sup> Sachs J concluded that given the centrality attributed to marriage and its consequences in our culture, the exclusion of same-sex couples from it is all the more significant.<sup>91</sup>

2.4.13 The rights and obligations associated with marriage are vast and all-encompassing. Besides the religious and social importance of marriage, marriage as an institution is at present mostly the source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.<sup>92</sup> Marriage is also important in regulating the legitimacy of children and the financial relationship between the parties on breakdown of the relationship.<sup>93</sup>

2.4.14 Respondents to the Discussion Paper opposed to legal reform of domestic partnerships in general submitted that traditional marriage differs from domestic partnerships and deserves special and exclusive legal protection above all other relationships to encourage the longevity and performance of biblical marriage.<sup>94</sup> Their objection to the legal recognition of domestic partnerships has a strong religious basis.

---

<sup>87</sup> At [85].

<sup>88</sup> However, as will be seen in this report, these remarks must be read in context. Marriage can not be protected at the cost of other relationships which function similar to married families, in particular if extending the protection to other relationships does not affect marital rights negatively.

<sup>89</sup> 2006 (1) SA 524 (CC).

<sup>90</sup> At [63] *et seq.*

<sup>91</sup> At [72].

<sup>92</sup> Mosikatsana **SAJHR** 1996 at 556. See also Steyn **TSAR** 1998 at 107 for a more extensive list of relevant family benefits.

<sup>93</sup> Holland **Canadian Journal of Family Law** 2000 at 25 fn 9.

<sup>94</sup> Eg N Neame, Evangelical Fellowship of Congregational Churches of South Africa, E N Maanda (Department of Social Development), Adv G Wright (Society of Advocates, Free State).

2.4.15 A strong argument was also made that partners who want legal protection should get married<sup>95</sup> and that those who don't should not be able to acquire the privileges and advantages of marriage.<sup>96</sup> In fact, to enforce the legal consequences of marriage would infringe on the autonomy of individuals who choose not to get married.<sup>97</sup>

2.4.16 In marriage a man and a woman constitute a community of the whole of life which is ordered by its very nature to the good of the spouses and the generation and up-bringing of offspring. In marriage, different from cohabitation, commitments and responsibilities are taken on publicly and formally that are relevant for society and exigible in the juridical context.<sup>98</sup>

### (ii) The perceived threat

2.4.17 The recognition of domestic partnerships is widely seen as a threat to the institution of marriage. In this context domestic partnerships are defined as established relationships between people of the same or opposite sex.

2.4.18 It has been argued that to grant domestic partnerships the same rights and duties as married spouses would undermine the institution of marriage and lead to a decline in the frequency of opposite-sex marriages.<sup>99</sup> It is has furthermore been noted that the orientation of some political communities today of discriminating against marriage by attributing an institutional status to unmarried cohabitants that is similar, or even equivalent to marriage and the family, is a serious sign of the contemporary breakdown in the social moral conscience.<sup>100</sup>

---

<sup>95</sup> G Vice, M Vice, D Scarborough (Evangelical Fellowship of Congregational Churches).

<sup>96</sup> Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), ChristianView Network.

<sup>97</sup> R Krüger (Rhodes University).

<sup>98</sup> Pontifical Paper.

<sup>99</sup> Hahlo **Husband and Wife** 1985 at 262 and Hutchings & Delpont **De Rebus** 1992 at 121.

<sup>100</sup> Along the same line of principles, the Pontifical Paper argued that it is good to keep in mind the distinction between public interest and private interest. Regarding the former, society and the public authorities must protect and encourage it; as to the latter, the State must only guarantee freedom. Whenever a matter is of public interest, public law intervenes, and what, on the contrary, corresponds to private interests must be referred to the private sphere. Marriage and the family are of public interest; they are the fundamental nucleus of society and the State and should be recognized and protected as such. Two or more persons may decide to live together,

2.4.19 The fear furthermore exists that the rights of the legal spouse may be adversely affected by the improved legal position of domestic partners. If the consequences of marriage are not distinguished from those of domestic relationships, the theme runs, marriage will die out.<sup>101</sup> Whether based on particular religious grounds or not,<sup>102</sup> proponents of the preferential status of marriage are concerned that the demise of marriage will inevitably have, as a consequence, the downfall of our stable society.<sup>103</sup>

2.4.20 Submissions received by the Commission from individuals and interest groups in the community on the Issue Paper and Discussion Paper also reflected these concerns.<sup>104</sup>

2.4.21 Objections against any legislative reform for same-sex relationships in particular were also based on religious grounds.<sup>105</sup> According to the views of these

---

with or without a sexual dimension but this cohabitation is not for that reason of public interest. The public authorities can not get involved in this private choice.

<sup>101</sup> Sinclair **Marriage Law** 1996 at 291.

<sup>102</sup> Nock in Hawkins *et al* **Revitalizing the Institution of Marriage** 2002 at 1 states that marriage as a social institution provides a template for family relationships. This template reflects the boundaries that are commonly understood to be allowable limits of behaviour in a marriage. According to him, a married couple must adhere to this template and this fact distinguishes marriage from other kinds of relationships. He argues that although there may be justifiable legal and moral reasons for treating married and unmarried adults alike, there are enormous social costs associated with doing so and that these costs are sufficiently great to justify granting married couples significant legal, economical and social benefits. As such marriage is a relationship defined by legal, moral and conventional assumptions that, rather than originating in marriage, precede and influence it.

<sup>103</sup> Human Life International reflected on the influence that the recognition of domestic partnerships may have on the state. It was submitted that acknowledging domestic partnerships will "lead to instability of the State since the weakening of the institution of marriage weakens the State".

<sup>104</sup> Eg an article by Dr James Dobson of Focus of the Family, submitted by Archdeacon Colin Peattie, P & B Anderson, L Very, E M le Roux, R S Malan, M Lewis, B Mnyamana, F F Stander, J T Coetzee - (Christians for Truth), D Scarborough (Evangelical Fellowship of Congregational Churches), P & M Gunning, I & A Charleston, Fr P Peeraer, R J K Papenfus, S Davies, H Viljoen, G Field-Buss, H Rehders, J McGill (Africa Christian Action), Rev J G Liebenberg, Africa Christian Action, Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa (majority submission), Fr H Ennis (St Francis House of Studies).

<sup>105</sup> A S van Deventer (Moderator Full Gospel Church of God in South Africa), D Strydom, M Mocke, D Erasmus, Past G Lowe (His People Christian Church, Grahamstown), M L Reynolds, D A Davies, N Burgoyne, M Hawthorn, L Dennis, D & C Dennis, A Corrigan, D de Kock, Bishop V & Mrs N Fabre (Meadowridge Ward Cape Town), C Webber, W Ernst, S A Lupnow, The Baptist Union of South Africa, Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa (majority submission), Past S Raath (Lewende Waters Bediening, Strand), P A September (Calvyn Protestant Church), S Sonntag, T Bester, M Bester, H Rademan, E Davids, B Lewis, B Zelie, P Pienaar, Rev T J de Wet, M Classen, Mr & Mrs Vermeulen - (Christians for Truth), J Gerber, E A Harmer, R Collett, A E Els, M Lancellas, L Stephan, P de Bod, D Thomas,

respondents, same-sex relationships represent the opposite of what they hold dear and will desecrate<sup>106</sup> the sacred institution of marriage.

2.4.22 It was argued that despite changes in socially acceptable behaviour and continual changes in culture, politics, economics and technology, morality should not change.<sup>107</sup> The concern is that legislative approval of domestic partnerships, and in particular same-sex marriage,<sup>108</sup> will lead to moral and societal approval of these relationships.<sup>109</sup>

2.4.23 Likewise, it was commented that “[l]egally married heterosexual couples may feel threatened by the favours granted to ‘domestic partners’ and thus they may feel that their vital and primary importance to the State and its future well-being might be down-played or discriminated against.”<sup>110</sup>

---

K Stenger, M White, S Le Fleur, A & N Ross, F Hultzer, Michelle (Valley Christian Church), A Samuel, Rev Dr P Smit (Ebenezer Church), H Viljoen, Dr M A E Brien, S Rhodes, K Blond, B Gaven, R Gaven, I Lee, N Lee, P Gaven, A Gaven, M Wagener, L Green, M Kriel, P & B Anderson, H Greyling, K Turnbull, Rev T Verreyne, P & J McGough, A Kleinhans, A B du Preez (Strubens Valley Family Church), ChristianView Network, D & J Thorpe, A van Tonder (Christians for Truth), A & N Ross.

<sup>106</sup> D Scarborough (Evangelical Fellowship of Congregational Churches), an article by Dr James Dobson of Focus of the Family, submitted by Archdeacon Colin Peattie, P & B Anderson, L Very, E M le Roux, R S Malan, M Lewis, B Mnyamana, F F Stander, J T Coetzee - (Christians for Truth), P & M Gunning, I & A Charleston, Fr P Peeraer, R J K Papenfus, S Davies, H Viljoen, G Field-Buss, H Rehders, J McGill (Africa Christian Action), Rev J G Liebenberg, Africa Christian Action, Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa (majority submission). Fr H Ennis (St Francis House of Studies) submitted a Paper entitled "Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons" Vatican Paper of the Congregation for the Doctrine of the Faith available at [http://www.vatican.va/roman.../rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.htm](http://www.vatican.va/roman.../rc_con_cfaith_doc_20030731_homosexual-unions_en.htm) (accessed on 28 November 2003), hereafter referred to as "Vatican Paper".

The minority submission of the Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa disagreed with the majority submission on the legal recognition of same-sex unions. The minority submission nevertheless emphasised that it is opposed to "the wilder gay activists" (in the USA) and particularly their campaign for a general lowering of sexual standards.

<sup>107</sup> G Vice submitted that there is a bedrock of non-negotiable morals and traditional opposite-sex marriage is such a non-negotiable standard.

<sup>108</sup> Doctors for Life International, Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa (majority submission), P Pienaar (Christians for Truth – Western Cape).

<sup>109</sup> The law is a powerful tool and shapes behaviour. An article by Dr James Dobson of Focus of the Family, submitted by Archdeacon C Peattie. Pontifical Paper, The Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa (majority submission), Africa Christian Action. According to Evangelical Alliance of South Africa same-sex and domestic partnerships have only been recognised in a few places on other continents and only for a few years. The long term effects of it on society are unknown.

<sup>110</sup> Fr H Ennis (St Francis House).

2.4.24 Concern was also expressed for children born out of the non-committed relationships.<sup>111</sup> Promoting domestic partnership by awarding it legal recognition would make children the innocent victims of unstable and whimsical relationships.<sup>112</sup> Therefore, governments must afford marriage differential treatment which it should deny other forms of relationships.<sup>113</sup>

2.4.25 The view is therefore held that only those who comply with the current definition of marriage are entitled to the rights and obligations attached to marriage and that only a legally valid marriage can create a family<sup>114</sup> worthy of legal protection. This is referred to as the **definitional argument**.<sup>115</sup>

2.4.26 In **Minister of Home Affairs v Fourie**<sup>116</sup> the Court considered the proposition that the inclusion of same-sex marriage would undermine the institution of marriage where it was advanced as justification for the violation of the quality and dignity of same-sex couples. Sachs J concluded that:<sup>117</sup>

---

<sup>111</sup> C Carradice held the belief that "marriage indicates some type of permanence and stability which is what children thrive on" and was concerned that domestic partners can "just up and away at their whim".

<sup>112</sup> See Marco "Gay Protected Class Status" 2000. Although his statement was made only in relation to same-sex marriages, the underlying sentiment is equally applicable to the view opposing legitimizing opposite-sex cohabitants.

<sup>113</sup> As Posner **Sex and Reason** 1992 has put it "marriage is a status rich in entitlements", many of which were not designed with same-sex couples in mind. Supporters of this view may want to add: nor with uncommitted cohabitants in mind. See also Eskridge **Virginia Law Review** 1993 at 1431 in this regard.

<sup>114</sup> Respondents to the Issue and Discussion Papers had different views on who should be included in the definition of family and, for that purpose, receive legal protection. According to some the traditional nuclear family is a married father and a mother with their children, with an extended family including other blood relatives and people added as in-laws. This could also include children from previous unions, adopted and foster children. Eg J Tau (Methodist Church of SA), J McGill (Africa Christian Union), A McGill, Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), D Scarborough (Evangelical Fellowship of Congregational Churches).

<sup>115</sup> Eskridge **Virginia Law Review** 1993 at 1429 fn 25 refers to the American Federal Court where it made such a definitional argument and said "there has been for centuries a combination of scriptural and canonical teaching under which 'marriage' between persons of the same-sex was unthinkable and, by definition, impossible" in **Adams v Howerton** 486 F.Supp.1119 (C.D. Cal 1980). The Court went on to say that limiting the definition in such a way is morally justified to preserve family values and traditional ethical notions. In this regard reference is often made to the anti-homosexual teachings of the Old Testament. See also Eskridge **Virginia Law Review** 1993 at 1430.

<sup>116</sup> 2006 (1) SA 524 (CC).

<sup>117</sup> At [111].



Granting access to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenet of their religion.

### (iii) Response

2.4.27 There are basically three different arguments that can be posed in response to the idea that the recognition of domestic partnerships will threaten the sanctity and stability of marriage:<sup>118</sup>

- \* In terms of the first category the opinion is held that that an analysis of history refutes the arguments used to back up the limited common-law definition of marriage with its religious origin. It is argued that marriage is a social construction and as such is continuously being constructed by society, as opposed to being a fixed and sacred institution set in stone. “Religious marriage” is but one version of marriage as it has presented itself over time. This argument will be referred to as the **historical response**.
- \* The second argument is an extension of the first category and emanates from the argument that marriage changes over time. Supporters of this view say the time has come to redefine marriage. They propose a functional definition for marriage which highlights the attributes of marriage that the proponents of the first view are advocating to protect. This will be referred to as the **functional response**.
- \* The third category of respondents argues that, regardless of one’s views on the history of marriage and the common-law definition, the exclusions brought about by that definition are no longer acceptable in a heterogeneous society and nor are they justifiable under our Constitution. This will be referred to as the **constitutional response**.

2.4.28 These three responses will be discussed in what follows.

---

<sup>118</sup> Pantazis **SALJ** 1997 at 556 *et seq.*

**(aa) The historical response**

2.4.29 When the dominant class in society promotes its interests in, and maintains control of the marriage issue, the impression is created that “the traditional family notion” (and the concepts such as heterosexuality, sacredness and covenantal nature of marriage implicated in it) is the dominant concept of reality. This leads to the perception that the values and interests of the white, middle-class middle-aged heterosexual male are the norm and anything else would amount to a morally unacceptable deviation.<sup>119</sup>

2.4.30 However, historical research proves that there is no coherent tradition of long-term monogamous, procreation-oriented marriage among heterosexuals. Rather, an ideal of long-term, monogamous, procreation-orientated marriage is created against which many other variations of relationships are measured. Ironically same-sex couples (and for that matter, opposite-sex cohabiting couples) are measured against this contrived ideal, found wanting and on that basis denied entry into marriage and the legal consequences of it.<sup>120</sup>

2.4.31 Proponents of the historical approach state that the common perception that historically marriage was, and has always been, the legally recognised voluntary union of a man and a woman for life to the exclusion of all others, is proved wrong by history itself.

2.4.32 History reveals that the arguments based on Judeo-Christian tradition are hypocritical given, on the one hand, early Christianity’s tolerance of same-sex intimacy and on the other, the total lack of formalities set for the earliest opposite-sex unions. They say that a study of its history reveals that marriage was available in many versions over the ages.<sup>121</sup> The following discussion merely touches on some of the events related by those who have made an in-depth study of the topic to illustrate the view that history belies the common-law definition of marriage.<sup>122</sup>

---

<sup>119</sup> Mosikatsana **SAJHR** 1996 at 554.

<sup>120</sup> Pantazis **SALJ** 1997 at 562 and the sources referred to in fn 45.

<sup>121</sup> Two prominent historians Boswell and Eskridge in particular researched this topic and followers of this viewpoint continuously refer to their work.

<sup>122</sup> For a comprehensive discussion on the history of marriage see Farlam JA in **Fourie v Minister of Home Affairs** 2005 (3) SA 429 (SCA) at [68] *et seq* and Church **Fundamina** 2003 (also referred to with approval by Farlam JA) at 46 *et seq*.

### History of heterosexual marriage<sup>123</sup>

2.4.33 Matrimony in the Germanic period<sup>124</sup> had features of the African lobolo marriage, being a covenant between two families. Negotiations between the prospective bridegroom's family and that of the girl were followed by a wedding feast, whereafter consummation set the seal upon the union.

2.4.34 Roman marriage during the period of classical Roman law<sup>125</sup> was not a legal relationship at all, but was a social fact with the legal effects being merely a reflection of that fact. The act, which brought the marriage into existence, was a purely private one with no involvement of a State official.<sup>126</sup> The marriage did not have to be registered: indeed no public record of any kind was required. Even after Christianity became the official religion of the Roman Empire in 313 AD, no religious or ecclesiastical rite or prescribed form was required. Even cohabitation was not required.<sup>127</sup>

2.4.35 In the Frankish period<sup>128</sup> important changes took place in the law of marriage, mainly under the influence of the church.<sup>129</sup> In addition to her father's consent, the bride's consent was now required for the first time. This was declared in the presence

<sup>123</sup> A few interesting examples by Demian "Marriage Traditions" 2002 will show that the form marriage takes varies widely in both law and custom. Sumerian marital law of ancient Mesopotamia about 4 600 years ago, permitted the king to have sex with brides before their husbands were allowed. For centuries in Ancient Europe, marriage began and was consummated with a sometimes secret betrothal and the public wedding only following a confirmed pregnancy, or after the birth of a child. In Marche, a district of Medieval France, the bride-to-be had sex with every man she encountered on the way to the church. In the Hutu and Tutsi Tribes of East Africa premarital sex is forbidden, but, once married, a woman may have sex with whomever she wishes.

<sup>124</sup> This period stretches from the dawn of history to the end of the 5<sup>th</sup> Century A.D., ie it includes the pre-Roman period as well as the period of Roman occupation of Gaul. See Hahlo & Kahn **SA Legal System** 1968 at 330.

<sup>125</sup> The first two and a half centuries of the Christian era.

<sup>126</sup> M Kaser **Roman Private Law** 3 ed (1980) translated by Professor R Dannenbring at 284 referred to by Farlam JA in **Fourie v Minister of Home Affairs** 2005 (3) SA 429 (SCA) at [69].

<sup>127</sup> Farlam JA *ibid*. Consent not cohabitation made the marriage.

<sup>128</sup> Frankish Empire 5<sup>th</sup> Century to 9<sup>th</sup> Century. See Hahlo & Kahn **SA Legal System** 1968 at 330.

<sup>129</sup> After the disintegration of the Western Roman Empire during the fifth century, the conversion of the Franks to Christianity took place. There was no separation between State and Church and the latter participated in secular government.

of their relations. Only towards the end of the Frankish period did it become the practice to have the marriage blessed by the parish priest, usually the morning after the wedding.<sup>130</sup>

2.4.36 During the Middle Ages<sup>131</sup> the regulation of marriage passed under the jurisdiction of the church. Under canon law the status of marriage could be created with almost complete absence of formality.<sup>132</sup> The doctrine of the early Church was that consummation was the essential factor in the creation of marriage.<sup>133</sup> By the twelfth century it became accepted that a valid marriage could be formed by an exchange of consents with no need for any other ceremony. The declaration of consent by the parties to marry each other was initially made outside the church and was followed by benediction in the church.<sup>134</sup>

2.4.37 In the thirteenth century the Roman Catholic Church made marriage sacramental. During the performance of this sacrament at the church altar, Holy Communion was also celebrated.<sup>135</sup> Although it had become customary to hold the whole ceremony in the church by the sixteenth century, marriages resting on the consent of the parties alone, so called 'irregular' marriages, were nevertheless valid.<sup>136</sup>

---

<sup>130</sup> Hahlo & Kahn **SA Legal System** 1968 at 384.

<sup>131</sup> Middle Ages 9<sup>th</sup> Century to 16<sup>th</sup> Century. See Hahlo & Kahn **SA Legal System** 1968 at 330.

<sup>132</sup> The Church's control over marriage was manifested in the fact that, from the tenth century, the Church's tribunals had exclusive jurisdiction regarding questions relating to marriage. See Farlam JA *op cit* at [70].

<sup>133</sup> Cretney & Masson **Family Law** 1990 at 5. The text relied on was Genesis 2:24 "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they will be one flesh." This doctrine, however, gave rise to problems with regard to the marriage of Joseph and Mary.

<sup>134</sup> If the consent was expressed in the future tense and sexual intercourse subsequently took place, the parties immediately became husband and wife. Thereby the church reconciled its own primitive doctrine that consummation was necessary to form marriage with the doctrine of Roman law that consent was the vital factor. See Cretney & Masson **Family Law** 1990; Hahlo & Kahn **SA Legal System** 1968 at 448.

<sup>135</sup> Marriage as a sacrament was regarded by the church as indissoluble, except by decree of the Pope. The church encouraged the parties to declare their consent before a priest and to receive a blessing; what was referred to as the *benedictio ecclesiae* (the blessing of the church). These marriages were regarded as 'regular' marriages. See Farlam JA *ibid*. See also Eskridge **Virginia Law Review** 1993 and his reference to Boswell **Christianity, Social Tolerance, and Homosexuality** 1980 at 1452 *et seq*.

<sup>136</sup> Secret or clandestine marriages, which often gave rise to great scandal, were thus valid although parties thereto were subject to ecclesiastical and secular penalties. See Farlam JA *op cit* at [71].

2.4.38 Eventually, in 1563 the Council of Trent passed the famous *Decretum Tametsi*, which declared that in future all marriages should be deemed invalid unless banns were published and the parties declared their consent before a priest and at least two witnesses. The principles of the *Decretum Tametsi* were adopted in the various provinces of the Northern Netherlands after 1795 when it became the Batavian Republic.<sup>137</sup>

2.4.39 In 1753 Lord Hardwicke's Act did away with formless common-law marriages in England. The Act stipulated a public church ceremony after the calling of banns on three successive Sundays.<sup>138</sup> Parents' consent was required for minors, and entries were made in an official register. The Act applied to all except the Royal Family, Quakers and Jews. This meant that Protestant dissenters and Roman Catholics had to get married according to the Anglican rite or not at all.

2.4.40 In 1836 the law changed again and it became possible to marry either in the Church of England (with the requirements similar to the Hardwicke Act) or under the 1836 Act. The latter could either be purely secular (a registry office ceremony) or with certain formalities in a non-Anglican place of worship. Subsequent marriage legislation of England still followed this pattern established in 1836.<sup>139</sup>

2.4.41 When the Cape was under the control of the Batavian Republic between 1803 and 1806, marriage was a secular institution that could be concluded before magistrates and civil servants. However, after the second British occupation in 1806, a proclamation prohibited civil marriages and provided that all marriages were "to be performed ... by an ordained clergyman or minister of the Gospel, belonging to the settlement".<sup>140</sup>

2.4.42 This position was again altered by an Order in Council dated 1838. This order made detailed provision for the publication of banns, the issuing of special licences, the establishment of a marriage register and the appointment of civil marriage

<sup>137</sup> After 1809 this became the legal position in the whole of the Kingdom of Holland. See Farlam JA *op cit* at [75].

<sup>138</sup> It was possible to dispense with banns under specified circumstances.

<sup>139</sup> Cretney & Masson **Family Law** 1990. For a discussion of the history of the civil marriage concept in countries such as the Netherlands and France, see Farlam JA *op cit* at [71] – [82] and chap 4 below.

<sup>140</sup> Farlam JA *op cit* at [76] fn 74.

officers where there was "not a sufficient number of ... ministers [of the Christian religion] to afford convenient facilities for marriage". In 1860 magistrates were made marriage officers and the Governor was empowered to appoint marriage officers for Jews and Muslims.<sup>141</sup>

2.4.43 The current Marriage Act of 1961 consolidated the laws governing the formalities of marriage and the appointment of marriage officers and repealed some Union and pre-Union statutes from the Marriage Order of 1838 onwards.<sup>142</sup> A study of the provisions of the Marriage Act of 1961 indicates that it builds on the foundations laid by the Council of Trent in 1563 and by the States of Holland in 1580. Although the Act does not go as far as the French did in 1791 and 1792 and the Dutch legislature did thereafter, in requiring all marriages to be solemnised by a civil official and not allowing clerics to solemnise them, is solely concerned with marriage as a secular institution. As such it clearly constitutes ministers of religion who are appointed as marriage officers, to be State officials for the purpose of bringing into being a marriage relationship between the intending spouses which is recognised by the state.<sup>143</sup>

2.4.44 In **Fourie v Minister of Home Affairs**,<sup>144</sup> Farlam JA considered the history of the institution of marriage in our law as set out above and concluded that although it is true that marriage is seen by many to have a religious dimension, the law, however, is only concerned with marriage as a secular institution.<sup>145</sup>

2.4.45 Besides the above historical changes, polygamy, which was common in Biblical times and is still practiced in some modern societies, is incompatible with the common-law definition in so far as it prescribes marriage "to the exclusion of all others".<sup>146</sup> Another change belying the common-law definition of marriage is the altered divorce laws which have the effect that marriage is no longer necessarily a commitment "for life".

---

<sup>141</sup> The Marriage Act 16 of 1860. See Farlam JA *op cit* at [77].

<sup>142</sup> Farlam JA *op cit* at [74].

<sup>143</sup> Farlam JA *op cit* at [78].

<sup>144</sup> 2005 (3) SA 429 (SCA).

<sup>145</sup> At [80].

<sup>146</sup> Western culture did not view monogamy as essential to marriage until Modestinus, a fourth century non-Christian Roman lawyer, defined the institution as such.

2.4.46 Factors indicated to have played a role in bringing these changes about over time are the process of industrialisation and, in its wake, the ideology of individualism and the emancipation of women. These changes have occurred over different time spans in different places and have not been completed yet.<sup>147</sup>

2.4.47 In 1988 the English Law Commission expressed itself as follows on these factors and its influence on the marriage concept:<sup>148</sup>

Socio-economic developments seem to have led to a change in the nature of marriage in Western Society. What has been called 'institutional' marriage which largely entails economic functions and the provision of domestic services has been replaced by what may be called 'companionate' marriage, which requires a continuing successful emotional relationship.

#### History of same-sex unions in western culture

2.4.48 Generally it is said that at least until the thirteenth century homosexual practice and interest were regarded as an ordinary part of the range of human eroticism.<sup>149</sup>

2.4.49 Evidence has been found<sup>150</sup> that pre-modern cultures, considered to be important antecedents for Western culture, like early Egyptian and Mesopotamian societies, recognised same-sex relationships in their culture, literature and mythology.<sup>151</sup> Eskridge shows that proof exists that classical Greek culture developed cultural norms to govern same-sex relationships<sup>152</sup> and of documented cases of same-sex marriage ceremonies dating back to 2,400 B.C. in Egypt.<sup>153</sup>

---

<sup>147</sup> Sinclair **Marriage Law** 1996 at 12 -14.

<sup>148</sup> The English Law Commission Report 1988 "Facing the Future: A Discussion Paper on the Ground for Divorce" quoted by Sinclair **Marriage Law** 1996 at 12. Sinclair indicates that these changes are ongoing at variable rates in different countries.

<sup>149</sup> Boswell **Christianity, Social Tolerance, and Homosexuality** 1980 at 333 referred to by Pantazis **SALJ** 1997 at 560.

<sup>150</sup> Eskridge **Virginia Law Review** 1993 at 1422 emphasises that this early evidence of marriage between same-sex partners is at best indirect.

<sup>151</sup> See the complete discussion with examples in Eskridge **Virginia Law Review** 1993 at 1437-1453.

<sup>152</sup> Greek men celebrated homosexuality, ideally as elder-to-younger lovers. Opposite-sex marriage, however, was a business deal; men married women for their household services. Demian

2.4.50 Stronger and more direct evidence exists of same-sex marriages in early Roman culture, in imperial Rome and in Western Europe for much of the Christian Middle Ages.<sup>154</sup>

2.4.51 Modern historians are in agreement that republican Rome was tolerant of same-sex relationships and accorded some same-sex unions the legal and cultural status of marriage, but that the late Roman Empire grew less tolerant of it. According to Foucault, imperial Rome's opposition of same-sex relations related to the institution of companionate marriage during which procreation became a focal point of opposite-sex relationships.<sup>155</sup>

2.4.52 A connection is suggested between the increasing influence of Christianity after Constantine's conversion to that religion in 312 A.D., and the anti-homosexual disposition. The Justinian Code of 533 A.D. eventually outlawed same-sex intimacy and placed it in the same category as divorce and adultery, all of which violated the Christian ideal of companionate opposite-sex marriage.

2.4.53 During the early and high Middle Ages<sup>156</sup> the criticism of the church towards same-sex intimacy focussed strongly on the fact that it could not result in procreation and constituted sex outside the then established ideal of companionate marriage. Paradoxically, in practice the church remained tolerant of same-sex unions, especially within its own clergy. Ceremonies creating so-called brotherhood liturgies were sometimes performed for male missionaries before they embarked on missions or for other males who wished to formalise their friendship.<sup>157</sup> The main difference

---

"Marriage Traditions" 2002. Examples of both companionate and transgenerational same-sex relationships are found in Plato's **Symposium** which was written in the 4<sup>th</sup> Century B.C. referred to by Eskridge **Virginia Law Review** 1993 at 1441.

<sup>153</sup> New Zealand Civil Union Bill Cabinet Memorandum available at <http://www.timbarnett.org.nz/civilunions/marriage.htm> (accessed on 17 September 2003) with reference to Eskridge and Boswell.

<sup>154</sup> Eskridge **Virginia Law Review** 1993 *ibid*.

<sup>155</sup> M Foucault **The History of Sexuality** Harmondsworth: Penguin 1984 referred to by Eskridge **Virginia Law Review** 1993 at 1419 fn 98. By the end of the 2<sup>nd</sup> Century the propriety of such relationships gradually became a matter of controversy, the collapsing Roman Empire grew increasingly inhospitable towards same-sex unions.

<sup>156</sup> The 9<sup>th</sup> Century to 16<sup>th</sup> Century. See Hahlo & Kahn **SA Legal System** 1968 at 330.

<sup>157</sup> Throughout its history, the Catholic Church developed over 100 liturgies for same-sex marriage and approved of same-sex marriage for over 1500 years, only ceasing to perform them in the



between the brotherhood liturgy and the one originally used to wed opposite-sex couples was that the former emphasised the companionate, rather than the procreative nature of the relationship.<sup>158</sup> It is therefore argued that the blanket assertion that same-sex marriage offends religious values is not sustained.

2.4.54 In what is regarded as a turning-point in the West's attitudes towards same-sex unions, many secular governments enacted their first laws prohibiting sodomy in the thirteenth century. Coinciding with an increased intolerance of other minority groups and other non-conformists (such as non-Christians, especially Jews), intolerance towards gays and lesbians became noticeable.<sup>159</sup> Following this trend the church also began to take a stronger stand against same-sex intimacy.<sup>160</sup>

2.4.55 During the nineteenth century the West went even further, with sexologists categorising homosexuality as a sexual deviation from "normal" sexual orientation.<sup>161</sup>

2.4.56 An interesting point made by Pantazis with reference to Boswell's research is that heterosexual matrimony (until the fourteenth century) tended to be viewed as

---

nineteenth century. J L Dorrell "Gay Marriage: It's Not Such a New Idea After All" 13-19 August 1993 **This Week in Texas** referred to by Lauw **Murdoch University Electronic Journal of Law** 1994 at fn 15.

<sup>158</sup> See the discussion by Eskridge **Virginia Law Review** 1993 *ibid* regarding the question whether or not these ceremonies indeed contemplated sexual unions.

<sup>159</sup> Pantazis **SALJ** 1997 *ibid*. Before 1200 no systematic theory explained why certain acts like sodomy were occasionally regarded as unacceptable and proscribed randomly. Such conduct was penalised mildly and only episodically. However, after 1200, medieval thinkers purposefully started developing such theories with the result that societies began regarding nonconforming behaviour to be alarming and threatening, gradually insisting on penalising this conduct in a systematic and harsh way. Thus, whereas during the Middle Ages same-sex unions were at some point regarded as problematic to a minor extent, in the early modern period the belief that it constituted a severe threat to the social order and the State took root.

<sup>160</sup> Leading scholastic thinkers like Albertus Magnus and Thomas Aquinas began to formulate systematised theological arguments against such behaviour. This shift in attitude is tentatively ascribed to urbanisation that, on the one hand allowed many men to enter into and enjoy same-sex relationships but, on the other, rendered these activities more prominent and potentially destabilising. Eskridge **Virginia Law Review** 1993 at 1470 points out that same-sex relationships formerly practiced primarily in the discreet closets of nunneries, monasteries and royal courts were less likely to remain unobserved in this bustling urban environment, becoming more open or apparent and thereby more troubling. Another interesting point made by Eskridge is that urbanization forced society also to face other "aberrations" like spinsters and religious non-conformists and he shows that Jews, heretics, witches and homosexuals encountered similar historical patterns of identification, segregation and harassment.

<sup>161</sup> Declaring homosexuality a disease caused a new wave of hysteria and persecution during the middle part of the twentieth century, with a particularly strong reaction in the United States of America. This hostile reaction and State sanctioned suppression of same-sex unions affected the attitudes of other cultures towards such unions. For a discussion see Eskridge **Virginia Law Review** 1993 at 1473 *et seq*.

dynastic or business arrangements with love arising only after the coupling, if at all.<sup>162</sup> Same-sex unions, on the contrary, were from the beginning primarily emotional commitments, which, because of this difference were not then perceived as a threat to opposite-sex unions. In modern times opposite-sex marriage generally now also involves a similar emotional commitment, hence the sentiment that same-sex marriage holds a corresponding threat.<sup>163</sup>

2.4.57 Despite the threat to same-sex relationships and marriages, Western condemnation did not succeed in eradicating them, neither in Europe nor in the rest of the world. Eskridge demonstrates how same-sex unions not only survived but flourished throughout the modern period, albeit in different ways at different times.<sup>164</sup>

#### History of same-sex unions in other cultures<sup>165</sup>

2.4.58 Eskridge's research reveals strong evidence of the existence of same-sex unions, including legally recognised marriages, in Native American,<sup>166</sup> African and Asian cultures in the period prior to the domination of those cultures by Western Europe.<sup>167</sup>

2.4.59 In the history of African cultures specific reference is made to transgenerational same-sex unions (typical man-boy and the analogous mother-baby relationships), transgenderal unions (marriage between individuals of the same sex)

---

<sup>162</sup> Boswell **Christianity, Social Tolerance, and Homosexuality** 1980 referred to by Pantazis **SALJ** 1997 at 560. This fact is also confirmed by Nock in his arguments in support of the first view. See Nock in Hawkins *et al* **Revitalizing the Institution of Marriage** 2002 at 7 where he states that historically family alliances were the main purpose of marriage, being the central economic institution and love was not seen as a stable basis for such important considerations.

<sup>163</sup> Pantazis **SALJ** 1997 at 561 fn 31.

<sup>164</sup> For a discussion of "Boston marriages" (romantic unions between women that were usually monogamous but not necessarily sexual and which flourished in the late 19<sup>th</sup> Century) and "passing women" (a term from lesbian studies meaning women who pass as men) see Eskridge **Virginia Law Review** 1993 at 1474.

<sup>165</sup> See Church **Fundamina** 2003 at 50 *et seq* also referred to by Farlam JA in **Fourie v Minister of Home Affairs** 2005 (3) SA 429 (SCA) at [113].

<sup>166</sup> See also Demian "Marriage Traditions" 2002 with reference to **America's Fascinating Indian Heritage** from the Reader's Digest Association Inc. Pleasantville NY 1978.

<sup>167</sup> Eskridge **Virginia Law Review** 1993 at 1453. See his discussion of the recognition of the *berdaches* in Native American cultures who were regarded by many to be a third sex and who married individuals of the same-sex.

and the uniquely African variant of female-husbands, (woman to woman marriage).<sup>168</sup>  
Banks has proposed that the first homosexual humans were African.<sup>169</sup>

2.4.60 Institutionalised same-sex unions historically also existed throughout Asian cultures in one or more of the forms already described.<sup>170</sup> In some cultures, including Chinese society, all three of these types of same-sex relationships have flourished.<sup>171</sup>

2.4.61 In summary, history shows that many versions of marriage have been available over the ages. It has not always been only an opposite-sex union or valid only once certain legal prescriptions had been complied with. As such marriage is not a natural given, but is constructed by society, making it a dynamic institution that is amenable to change.<sup>172</sup> Hahlo remarked in 1985 that changes in societal values could not but affect the law.<sup>173</sup>

2.4.62 Sinclair's remark in this context is also noteworthy.<sup>174</sup>

[I]f marriage were going to be eclipsed by other lifestyles it would have happened somewhere in the two thousand years since concubinage was practised by the Romans. It has not. Furthermore, if the popularity of marriage is declining, ways should be sought to make it more attractive, not cohabitation punitively unattractive.

---

<sup>168</sup> For a detailed discussion, see Eskridge **Virginia Law Review** 1993 at 1458.

<sup>169</sup> Banks "Homosexuality in Ancient Africa". She submits that there are at least 33 different cultures in Africa where marriages between women are recognised and that academics who deny that lesbianism has a role in those arrangements do so despite considerable evidence to the contrary.

<sup>170</sup> *Berdache* tradition existing in Native American culture, companionate same-sex marriage from Classical Greece and pre-Christian Rome or transgenerational tradition of boy-wives.

<sup>171</sup> Eskridge **Virginia Law Review** 1993 at 1462 and the sources referred to in his fn 156.

<sup>172</sup> Pantazis illustrates that the value of the historical research lies in the fact that it shows that marriage is not State conferred, but rather that it is "a fundamental relationship that precedes the state", merely given recognition by the state. Pantazis **SALJ** 1997 at 561 with reference to S K Homer "Against Marriage" 1994 29 **Harvard Civil Rights-Civil Liberties Law Review** 505 at 514.

<sup>173</sup> At 36, with reference to a statement by L J Bridge in **Dyson Holdings Ltd v Fox** [1976] QB 503 at 512-13 that between 1950 and 1975 there has been a complete revolution in society's attitude to domestic partnerships as the social stigma that attached to them has mostly disappeared.

<sup>174</sup> Sinclair **Marriage Law** 1996 at 291.

### (bb) The functional response

2.4.63 Those who cherish the traditional marriage concept argue that one of the most certain ways to improve the health and wellbeing of the world's population is to encourage and support the idea of marriage.<sup>175</sup> In this regard reference is made to social science research which continually reveals that married people are generally physically healthier, happier, live longer, enjoy better mental health, are more fulfilled and less likely to suffer physical abuse.

2.4.64 The question asked by proponents of the functional definition of marriage is: What logic says that these benefits only accrue to those who comply with the current narrow legal definition of marriage? They advocate the definition of marriage according to the functions it serves and argue that other relationships can also fulfil the functions that are traditionally conceived to be attributes of marriage only.<sup>176</sup>

2.4.65 Such an approach looks beyond biology and the legal requirements of marriage by considering the way in which a group of people function. Minow states that certain groups of people may not fit the definition of a family because they did not formally get married but may share affection and resources and regard themselves as a family, and may be regarded by broader society as family members.<sup>177</sup>

2.4.66 Mosikatsana holds it to be a misconception that there is consensus about family life and the role of family in society.<sup>178</sup>

---

<sup>175</sup> Stanton "What's Marriage Got to Do with It?" 1998.

<sup>176</sup> Families are social groupings of which we all have a very personal, often idiosyncratic, perception. Our perception often involve a significant emotional and material relationship (whether adults or children) born of a genetic or sexual relationship. See Lind **SALJ** 1995 at 482.

Many respondents acknowledged that the traditional notion of the family is not the norm any more and promoted the functional view of family. These respondents submitted that family need not be biologically related and said that they regard dependency as indicative of a family relationship. A family could therefore be two people living together who are committed to love and support each other and their children. Eg Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), E Naidu (Durban Lesbian and Gay Community and Health Centre), S Moller (FAMSA, Welkom), Adv G J van Zyl (Family Advocate), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S F Boshielo (Department of Justice), F Muller (Lifeline/Rape Crisis), C Cetchen (Society for the Physically Disabled) A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein).

<sup>177</sup> M Minow "Redefining Families: Who's In and Who's Out?" 1991 62 **Colorado Law Review** 269 at 270, referred to by Goldblatt **SAJHR** 2000 at 143.

<sup>178</sup> Mosikatsana **SAJHR** 1996 at 550 where he quotes K Franklin "A Family Like Any Other Family:

Families have long been viewed as among the most essential and universal units of society. This sense of the shared experience of family has led to an often unexamined consensus regarding what exactly constitutes a family.

2.4.67 The Constitutional Court expressed itself about the omission of marriage and family rights as basic human rights from the 1996 Constitution in **Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA, 1996**.<sup>179</sup>

Families are constituted, function and are dissolved in such a variety of ways and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutional terms. They thereby avoid disagreements over whether the family to be protected is a nuclear family or an extended family, or over which ceremonies, rites or practices would constitute a marriage deserving of constitutional protection..... . These are seen as questions which relate to the history, culture and special circumstances of each society permitting of no universal solutions.

2.4.68 In **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** the Constitutional Court also commented on this topic:<sup>180</sup>

[O]ver the past decades an accelerating process of transformation has taken place in family relationships as well as in societal and legal concepts regarding the family and what it comprises.

2.4.69 According to Sachs J in **Volks N.O. v Robinson**<sup>181</sup> government policy seems committed towards dealing with families in functional rather than definitional terms. He refers to the following definition of family used by the Department of Population and Welfare Development:

Family: Individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system. The family is the primary social unit which ideally provides care, nurturing and socialisation for its members. It seeks to provide them with physical, economic, emotional, social, cultural and spiritual security.<sup>182</sup>

---

Alternative Methods of Defining Family in Law" (1990-91) 18 **New York University Review of Law and Social Change** 1027.

<sup>179</sup> 1996 (4) SA 744 (CC) at [99].

<sup>180</sup> 2000 (2) SA 1 (CC).

<sup>181</sup> 2005 (5) BCLR 446 (CC) at [180].

<sup>182</sup> The Department of Population of Welfare Development **Draft White Paper** (1996) at 156 as quoted in Du Plessis and Pete **Constitutional Democracy in South Africa 1994 - 2004** Essays

2.4.70 When supporters of the definitional argument assume that couples who have made a public commitment by way of marriage are the only ones who have a legal responsibility to each other, and would be more likely to provide a child with stability and security, they are under a wrong impression.

2.4.71 On the one hand, even married relationships are not guaranteed for life and do end with inevitable accompanying negative consequences. On the other, it is an unjustified generalisation to contend that unmarried couples of the same or opposite sex are not committed to their relationships.

2.4.72 Therefore, to regard marriage as a guarantee that the family created thereby would have certain characteristics is a misrepresentation. These characteristics could also be present in other relationships or missing in married relationships.

2.4.73 With regard to the argument that the main purpose of traditional marriage is to procreate, which same-sex couples are not biologically able to do, and that this inability threatens the survival of the human race, Pantazis<sup>183</sup> notes two points. Firstly, same-sex desire is a minority preference and could thus not factually threaten the survival of humankind. Secondly, many same-sex couples do have children through marriages that previously ended in divorce, donor insemination, adoption or as de facto step-parents. In addition, it is not a condition for opposite-sex couples that they must bear children. In fact, they often are incapable of bearing children and sometimes just do not care to.<sup>184</sup>

2.4.74 Another objection against same-sex marriages is that if homosexuals are allowed to marry and raise children, such children will be more inclined to be homosexual and that society has the right to protect the welfare of children against same-sex partners.<sup>185</sup>

---

in Honour of the Howard College School of Law Durban: Butterworths 2004 at 72 and referred to by Sachs J *ibid*.

<sup>183</sup> Pantazis **SALJ** 1997 at 561.

<sup>184</sup> Lauw **Murdoch University Electronic Journal of Law** 1994 at 4 says that the fact that there has never been an attempt to prohibit unions between a sterile woman and a fertile man or vice versa and that legislation does not oblige a married couple to have children suggests that procreation is not the primary concern it is made out to be.

<sup>185</sup> North American Courts have denied custody of children to same-sex couples on the ground that the children will develop homosexual preferences when exposed to the homosexual parents and

2.4.75 In response to this, Pantazis refers to social science research on the effect of same-sex parenthood on children. Regarding the effect on the sexual identity of children, he states that empirical evidence shows that the children of same-sex parents are not more likely than the children of opposite-sex parents to grow up to be homosexual.<sup>186</sup>

2.4.76 Concerning the emotional wellbeing of children of same-sex parents, studies have shown that the quality of parenting is the main influence and have rejected the notion that homosexuals are mentally or emotionally unbalanced.<sup>187</sup>

2.4.77 A third consideration favoured by the proponents of the traditional definition is called the "pragmatic argument" and raises the practical difficulties faced by employers if same-sex marriages are to be legalised.<sup>188</sup> The point is made that such legalisation will necessitate substantial reforms in employment, health and other areas. It is contended that both private and public employers would be forced to reassess benefits currently available to married couples in order to determine a scheme which will be economically efficient and that on a cost-benefit analysis, society cannot afford the extra cost. Pantazis' response to this is that discrimination can never be permitted only because the alternative is too costly.<sup>189</sup>

---

their partners. Clark **CILSA** 1998 at 301 fn 71. Some even argue that allegations of gender discrimination under the Bill of Rights can be fended in that recognition of same-sex marriage gives legal sanction to and will encourage abnormal behaviour. See the references by Heaton "Family Law and the Bill of Rights" 1996 at 3C par 8. For a strong worded argument about the abnormality of homosexuality, see Visser **THRHR** 1995 at 705. See also Steyn **TSAR** 1998 at 114 where she refers to a case where a North Carolina Court considered exposure to improper influences that could damage two boys emotionally and socially as grounds to remove them from the custody of their father who had been living with his male lover. An argument with the same purview is that recognising same-sex relationships as marriage would be widely interpreted as placing a stamp of approval on homosexuality. With that the social value of being married would be reduced as the term then refers to a wider category of relationship types. See also Posner **Sex and Reason** 1992 at 311-13 referred to by Eskridge **Virginia Law Review** 1993 at 1431.

<sup>186</sup> Pantazis **SALJ** 1997 at 569 fn 90. Pantazis makes the point that, in any case, unless one concedes that homosexual children suffer from societal prejudice from which one would want to protect them, there can not be an objection to them growing up to be gay or lesbian. Lauw **Murdoch University Electronic Journal of Law** 1994 states that a more serious concern is the possibility that children raised by a same-sex couple will be subjected to discrimination and prejudice from members in society who are quick to ridicule and ostracize any one perceived to be "different" in any way. See in this regard also the discussion by Lind **SALJ** 1995 at 497-499.

<sup>187</sup> Pantazis **SALJ** 1997 at 568 fn 88 and 89. See also the research referred to by Lauw **Murdoch University Electronic Journal of Law** 1994 at fn 24 and 25.

<sup>188</sup> Lauw **Murdoch University Electronic Journal of Law** 1994 at 5 with reference to Posner **Sex and Reason** 1992 at 313.

<sup>189</sup> Lauw **Murdoch University Electronic Journal of Law** 1994 *ibid* shares this opinion and says

2.4.78 In his search for a functional definition, Pantazis has identified four attributes of marriage<sup>190</sup> considered to be deserving of protection:

- \* Marriage has the potential for creating a parent-child relationship and is a primary site for the socialisation of children.
- \* Spouses usually cohabit; there is a sharing of residence, economic co-operation and sexual relations between the partners, all of which heighten the significance of the relationship for the individual.
- \* The marital commitment has elements of permanence and formality, leading to stability for the individuals concerned and subsequently for society which is based on these family units.
- \* The psychological support and emotional involvement in longstanding, intimate family relationships make them more important for the individual than any other attribute.

2.4.79 Pantazis then goes on to argue that same-sex relationships, too, have the potential to function in this manner and that the formal recognition of those relationships would actually strengthen these attributes to the same extent that formal recognition does for opposite-sex marriage. He refers to research<sup>191</sup> that refutes the myths regarding same-sex relationships that:

- \* Gays and lesbians are unhappy individuals who cannot develop enduring same-sex relationships and do not want to;
- \* Same-sex relationships are unhappy, dysfunctional and deviant;
- \* Husband and wife roles are universal in intimate relationships, and

---

that this is just a convenient excuse used not to permit legal recognition of same-sex relationships.

<sup>190</sup> Pantazis **SALJ** 1997 at 571.

<sup>191</sup> *Op cit* at 572 fn 110.



- \* Gays and lesbians have impoverished social support networks.

2.4.80 Pantazis disposes of the arguments against same-sex marriage in order to protect the family by showing that same-sex relationships are just as capable of creating an intimate union for emotional and financial support, child-bearing and rearing, and participation in social and kinship relations, otherwise known as family. In other words, same-sex families can function in exactly the same way as opposite-sex married families and the legal recognition of this fact can only contribute to the well-being of these families and enhance their contribution to society.

2.4.81 Lauw submits that a comparison of the features of successful same- and opposite-sex relationships will not reveal any differences which justify the restriction of the marital status to heterosexual couples. The factors contributing to successful heterosexual relationships apply equally to homosexual relationships.<sup>192</sup> The same could be said of opposite-sex cohabitants. The way these couples and their families function should entitle them to rights and obligations and not the label the (outdated) law is giving them.

2.4.82 Mosikatsana's formulation of this view affords an appropriate summary of the functional approach:<sup>193</sup>

[B]ecause the exclusive nature of the common-law definition of marriage does not reflect social reality, it has become necessary under certain legislation to adopt a functional approach to defining family status, with the result that couples who do not fit the traditional family model may be deemed spouses of one another....

2.4.83 It has been argued that South African Courts (and the legislature) should determine whether or not to extend common law and other legal protections to family members on this basis. Such an approach will lead to greater fairness, will bring the law in line with reality and is more likely to harmonise the law with the values underlying the Constitution.<sup>194</sup>

---

<sup>192</sup> Lauw **Murdoch University Electronic Journal of Law** 1994 at 3.

<sup>193</sup> *Ibid* at 550.

<sup>194</sup> Goldblatt **SAJHR** 2000 at 143.

### (cc) The constitutional response

2.4.84 Proponents of the constitutional response submit that changes to the South African marriage laws are unavoidable in light of the new constitutional dispensation, notwithstanding the merits that the above arguments may have.

2.4.85 Freedom of marriage as a basic civil right is recognised under natural law<sup>195</sup> and marriage and family rights are protected in international human rights documents.<sup>196</sup> Although there is no express right to marry in the Constitution, this does not mean that the conclusion can be drawn that such a right is not worthy of entrenchment. Early on in the constitutional dispensation the Constitutional Court expressed itself as follows on the omission of the legislature to include provisions expressly protecting the rights to marry and to experience family life:<sup>197</sup>

[T]he absence of marriage and family rights in the constitutions of many African and Asian countries reflects the multi-cultural and multi-faith character of such societies. Families are constituted, function and are dissolved in such a variety of ways and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms. They thereby avoid disagreements over whether the family to be protected is a nuclear family or an extended family, or over which ceremonies, rites or practices would constitute a marriage deserving of constitutional protection... These are seen as questions which relate to history, culture and special circumstances of each society permitting of no universal solutions.

2.4.86 The omission of the legislature should not be interpreted to mean that the Constitutional Court did not regard marriage as important enough to define it or the right to a family as not important enough to entrench it. Indeed, it seems that the Constitutional Court preferred to leave the definition of marriage open rather than to define it in a way that may be too limiting in view of the equality clause, which

---

<sup>195</sup> Sinclair **Marriage Law** 1996 at 312.

<sup>196</sup> See for example art 16 of the Universal Declaration of Human Rights (1948), art 23 of the International Covenant on Civil and Political Rights (1966), art 10 of the International Covenant on Economic, Social and Cultural Rights (1966), art 18 of the African Charter on Human and Peoples' Rights (1981), art 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and art 16 of the European Social Charter (1961), referred to by Lind **SALJ** 1995 at 500 fn 110. The Constitution requires that regard be had to international law, in particular international treaties which South Africa has ratified when interpreting the Constitution, other legislation and developing the common law. See also the discussion in **Minister of Home Affairs v Fourie** 2006 (1) SA 524 (CC) at [99] *et seq.*

<sup>197</sup> **Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA, 1996** 1996 (4) SA 744 (CC) at [99].

expressly prohibits discrimination on the basis of sexual orientation and married status.

2.4.87 To the extent that marital status ensures important legal and social consequences, the loss of material benefits for both unmarried opposite- and same-sex couples can be directly ascribed to the exclusive definitional approach to marriage.<sup>198</sup> This view was confirmed by Sachs J in **Minister of Home Affairs v Fourie**<sup>199</sup> where he submitted that<sup>200</sup>

given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.

2.4.88 It is furthermore said that the exclusive nature of the common-law definition of marriage does not reflect the social reality. Various other partners in eg same-sex relationships, African customary marriages, Hindu, Jewish and Muslim marriages<sup>201</sup> function in the same way as married couples, although they do not comply with the traditional family model.<sup>202</sup>

2.4.89 A matter that was considered is the question whether the limitations resulting from the definitional approach are not justifiable in view of the importance of marriage as a sacred institution. For this purpose two arguments were proposed.

2.4.90 Firstly it was said that opposite-sex couples do have the right to marry but choose not to. The reply is that "forcing" opposite-sex couples to marry in order to get benefits exclusively available to married couples, amounts to a violation of their right not to be discriminated against on the basis of their marital status. The proponents of the constitutional response therefore conclude that the exclusion of unmarried

---

<sup>198</sup> It is also true that some same-sex couples desire the status and public recognition associated with the public commitment of marriage. Lind **SALJ** 1995 at 486.

<sup>199</sup> 2006 (1) SA 524 (CC).

<sup>200</sup> At [136].

<sup>201</sup> Mosikatsana **SAJHR** 1996 at 554. See also Lind **SALJ** 1995 at 483 "Where a national society demonstrates the kind of social and cultural diversity that is evidenced in South Africa, the imposition of a limited but universally applicable family definition on a diffuse population cannot continue to satisfy the expectations and aspirations of all the citizens of society."

<sup>202</sup> The common denominator of the traditional family and these other groupings is a significant emotional and material relationship between the members. It may be born of a genetic connection or a sexual relationship. Lind **SALJ** 1995 at 482.

opposite-sex couples from marital benefits is not justifiable.<sup>203</sup> In the case of same-sex couples, who do not have the option to marry in order to appropriate the consequences of marriage, justification will be even harder to demonstrate.<sup>204</sup>

2.4.91 The second argument proffered was this context is that homosexuals are free to marry a person of the opposite sex. If they choose not to, it is their own preference. This correlates with the view that homosexuality is a matter of choice.<sup>205</sup> In this regard Lauw refers to the substantial agreement among international scientific researchers that sexual orientation is largely a result of genetic factors and is determined at a very young age.<sup>206</sup> This fact, if accurate, significantly refutes the argument that homosexuals are "free" to marry a person of the opposite sex.<sup>207</sup>

2.4.92 Advocates of the constitutional response opine that it would ultimately defy the object of demonstrating the equal worth of all individuals if the legal consequences of marriage were not available to a minority group (same-sex couples), while others were persuaded to do so against their will by denying them the social and economical benefits (cohabiting couples).<sup>208</sup>

2.4.93 In view of the above, these proponents argued, quite rightly, that South African family policy will no longer be able to ignore the existing cultural diversity and

<sup>203</sup> Heaton "Family Law and the Bill of Rights" 1996 at 3C2. In **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) the Constitutional Court found at [54] and [87] that the law may in appropriate circumstances accord benefits to married couples which it does not accord to unmarried couples and as such the exclusion of unmarried opposite-sex couples from marital benefits may be justifiable. Nevertheless, at [65] and [95] the Court suggested that there is a need to regulate permanent life partnerships through legislation to ensure that a vulnerable partner in such a relationship is not taken advantage of.

<sup>204</sup> Heaton "Family Law and the Bill of Rights" 1996 *ibid.* The Constitutional Court found in **Minister of Home Affairs v Fourie** 2006 (1) SA 524 (CC) at [110] *et seq* that the arguments presented to the Court in justification of the exclusion of same-sex couples from marriage, could not serve as justification.

<sup>205</sup> Steyn **TSAR** 1998 at 114.

<sup>206</sup> Lauw **Murdoch University Electronic Journal of Law** 1994 at fn 20 and 29.

<sup>207</sup> This approach to the matter was expressly rejected by Ackermann J in **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000 (2) SA 1 (CC) at [38] where he said:

The respondents' submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to express that orientation in a relationship of their own choosing.

<sup>208</sup> Heaton "Family Law and the Bill of Rights" 1996 *ibid.*

the emerging values of pluralism of the constitutional era. The ethic of tolerance of the new Constitution supports a diverse family law which treats individuals equally and permits them to choose their family relationships and to bestow State sanction on their preference.<sup>209</sup>

2.4.94 The Constitutional Court confirmed this view when it declared the common-law definition of marriage unconstitutional in **Minister of Home Affairs v Fourie**.<sup>210</sup> Sachs J remarked as follows:<sup>211</sup>

[94] In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy ....

[95] The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held views and lifestyles in a reasonable and fair manner. The object of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.

2.4.95 Responding to constitutionality arguments, some respondents to the Discussion Paper submitted that the view that opposite-sex marriage discriminates against same-sex couples is exaggerated.<sup>212</sup> Many of these respondents commented that even if there is an infringement<sup>213</sup> on the rights of same-sex couples there are good reasons for it which makes the infringement justifiable.<sup>214</sup>

<sup>209</sup> Mosikatsana **SAJHR** 1996 at 554.

<sup>210</sup> 2006 (1) SA 524 (CC).

<sup>211</sup> At [94].

<sup>212</sup> The solution proposed by many of these respondents is that the Constitution should be amended to remove the term "sexual orientation" from the equality clause and to maintain the protected status of traditional marriage. Since it is not the mandate of the investigation to consider the amendment of the equality clause of the Constitution, but rather to give effect to it, this proposal cannot be considered.

<sup>213</sup> These respondents argued that there is no discrimination. Eg E Poulter, D v d Heever (Executive Chairman: Focus on the Family), Vatican Paper. Evangelical Alliance of South Africa contended that if Constitutional assembly intended to make any change to existing law as major as the re-definition of the nature of marriage, they would have stated this explicitly in the text.

<sup>214</sup> Eg Doctors for Life International, Satinover, M D Staver, Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa (majority submission), Evangelical Alliance of South Africa, A McGill. Some of these objectors contended that if the motivation for the proposal is the

2.4.96 In response to the view that the withholding of legal protection from unmarried couples will constitute discrimination under the Bill of Rights, it was argued that the Constitution is a flawed document which is founded on moral relativism rather than on clear standards of right and wrong. Being morally flawed, it was said that the Constitution contributes to the disintegration of norms and mores that have hitherto contributed to social order, stability and security.<sup>215</sup>

2.4.97 It was submitted that the principle of equality before the law would be violated if unmarried cohabitants were to be treated in a similar or equivalent manner to spouses in a marriage. It was held that marriage and de facto unions are neither similar nor equivalent in practice and cannot be similar or equivalent in their juridical status.<sup>216</sup>

2.4.98 The Constitutional Court thoroughly considered arguments like the above in **Minister of Home Affairs v Fourie**.<sup>217</sup> On the matter of the importance of protecting marriage the Court said, with reference to its earlier judgment in **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs**<sup>218</sup> that<sup>219</sup>

protecting the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership.

2.4.99 A further view expressed by respondents was that same-sex marriage will in reality discriminate against traditional marriage and its followers.<sup>220</sup> This argument

---

Constitutional imperative for equality, the Constitution should be amended. D v d Heever (Executive Chairman: Focus on the Family), E W Appleby, A ter Morshuizen, Africa Christian Action, Evangelical Alliance of South Africa, A W Shearing (Port Alfred Christian Centre), J Marais, Rev Dr P Smit (Ebenezer Church), Past R George (Highway Community Church, East London), M Kriel, Evangelical Alliance of South Africa submitted that after such amendment of the Constitution, other laws promoting acceptance of homosexuality such as the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 should accordingly be amended to remove words like "sexual orientation", C & B Burgoyne, C Sparg (Network of Community Churches), B & D Bosse, G Vice, M Vice, ChristianView Network, Africa Christian Action.

<sup>215</sup> E Poulter.

<sup>216</sup> Pontifical Paper.

<sup>217</sup> 2006 (1) SA 524 (CC).

<sup>218</sup> 2000 (2) SA 1 (CC).

<sup>219</sup> At [54] and [55].

<sup>220</sup> D Scarborough (Evangelical Fellowship of Congregational Churches), S W de Wet, K Chambers,

was also considered by the Court in **Minister of Home Affairs v Fourie**. In this regard Sachs J said:<sup>221</sup>

Granting access to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenets of their religion.

2.4.100 He furthermore said that the assertion that permitting same-sex couples into the institution of marriage would devalue the institution is objectively speaking demeaning to same-sex couples.<sup>222</sup>

2.4.101 Sachs J continued to say that however strongly and sincerely-held the beliefs may be, they cannot through the medium of State-law be imposed upon the whole of society and in a way that denies the fundamental rights of those negatively affected. He said the belief that bringing same-sex couples under the umbrella of marriage law would taint those already within its protection can only be based on a prejudgment or prejudice against homosexuality.<sup>223</sup>

2.4.102 The Constitutional Court therefore found the common-law definition of marriage to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with the responsibilities it accords to heterosexual couples. The omission from section 30(1) of the Marriage Act of 1961 after the words "or husband" of the words "or spouse" was also declared to be inconsistent with the Constitution and the Marriage Act declared to be invalid to the extent of this inconsistency.<sup>224</sup> Following the suspension of the order of unconstitutionality, the final say is likely to be that of Parliament who has been given until 1 December 2006 to correct these defects. See chapter 5 for the Commission's recommendations in this regard.

---

M Mocke, ChristianView Network, Christian Democratic Party.

<sup>221</sup> *Op cit* at [111].

<sup>222</sup> *Op cit* at [112].

<sup>223</sup> *Op cit* at [113].

<sup>224</sup> *Op cit* at [94].

**b) The legal recognition and regulation of domestic partnerships threaten the autonomy of partners**

**(i) Respect for autonomy of individuals**

2.4.103 A popular argument against reforming the law to give domestic partners the same rights as married couples is that regulation of these relationships would be oppressive to those cohabitants who may be deliberately trying to avoid marriage-like regulation.<sup>225</sup> This is called the private autonomy approach.<sup>226</sup> This approach postulates the view that those partners who cohabit have chosen not to marry and the law should respect that freedom of choice by preserving their autonomy and not attempt to treat them as if they were married.

2.4.104 Hahlo, placing a high premium on individual autonomy, is of the view that no reason exists to create a special legal status for couples in domestic partnerships. His proposal entails that a couple who elects not to marry but to cohabit, makes that choice deliberately and should not complain if the consequences of marriage do not attach to their union.<sup>227</sup>

2.4.105 Sinclair also submits that respect for the autonomy of individuals who choose not to marry is, compared to the view that domestic partnerships would damage marriage as an institution, a more powerful argument against the intervention to regulate.<sup>228</sup> The freedom of choice and of intimate association of

---

<sup>225</sup> Barlow *et al* "Marriage and Cohabitation" 2001-02 at 21.

<sup>226</sup> Freeman & Lyon **Cohabitation** 1983 at 189.

<sup>227</sup> Hahlo is prepared to accept two exceptions to this pronouncement namely for a delictual claim where a breadwinner was killed by the unlawful act of a third party and for purpose of intestate succession, but only in cases of longstanding relationships. Although acknowledging that protection may arguably be needed in these instances, Hahlo feels that it should not be through statutory intervention. The fact that the couple was not married may be considered when quantification of the claim is done. See argument in H R Hahlo "The Law of Concubinage" **SALJ** 1972 321 at 331 *et seq* referred to by SchwelInus **Obiter** 1996 at 46.

<sup>228</sup> As Sinclair puts it "[I]f marriage were going to be eclipsed by other lifestyles it would have happened somewhere in the two thousand years since concubinage was practised by the Romans. It has not. Furthermore, if the popularity of marriage is declining, ways should be sought to make it more attractive, not cohabitation punitively unattractive." Sinclair **Marriage Law** 1996 at 291.



cohabiting couples should be protected and the law should not foist on the couple a status of marriage as a punishment for their lifestyle.<sup>229</sup>

2.4.106 Deech, writing on statutory intervention in English law and a strong advocate for individualism, feels that the dignity, autonomy, privacy and self-development of an individual should be recognised and protected. She submits that the fact that a couple chose not to marry should be recognised as significant as they had specific expectations when doing so. Both Deech and Samuels see the solution of problems faced by cohabiting couples in the law of contract.<sup>230</sup>

2.4.107 Similarly, Freeman and Lyon strongly argue that marriage is a voluntary institution; whether the parties are completely cognisant of all the legal effects of such a commitment is immaterial. Since domestic partners do not make that same commitment, the same rights and duties should not follow. Imposing marital rights and obligations will be a denial of their freedom of choice.<sup>231</sup>

2.4.108 From a constitutional perspective, Heaton submits to oblige couples (be they of the same or opposite sex) to get married in order to receive the same benefits as spouses, would amount to an unacceptable violation of their right to equality and freedom from unfair discrimination on the ground of marital status.<sup>232</sup>

2.4.109 The importance of the protection of autonomy was also reflected in the responses received on the Issue and Discussion Paper. Some of the respondents opposing the legal regulation of domestic partnerships motivated their response with reference to the parties' explicit election not to get married. Some respondents were of the opinion that if those couples want the same legal protection of a married couple, they should simply get married<sup>233</sup> since it is a fairly simple procedure.<sup>234</sup>

---

<sup>229</sup> W A Reppy Jr "Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status" (1984) 44 **Louisiana Law Review** 1677 at 1713 referred to by Sinclair **Marriage Law** 1996 at 292 fn 91.

<sup>230</sup> This view poses a problem as ordinary people do not usually go to the trouble to formally arrange their affair by means of such a contract. R Deech "The Case Against Legal Recognition of Cohabitation" in **Marriage and Cohabitation in Contemporary Societies** edited by J M Eekelaar and S N Katz Toronto: Butterworths 1980 at 300 and A Samuels "The Cohabitee's Home" 1984 **Family Law** 282 at 285 both referred to by Schweltnus **Obiter** 1995 at 215 fn 1519 and 1520.

<sup>231</sup> *Op cit* at 191.

<sup>232</sup> Heaton "Family Law and the Bill of Rights" 1996 at 3C2 fn 7.

<sup>233</sup> Legal Services, Office of the Premier, Northern Province.

2.4.110 Other respondents, although not opposed to recognising domestic partnerships, said the legislature should not create a default system which will result in legal obligations for a partner who is actively seeking to avoid them.<sup>235</sup> It was also pointed out that domestic partners may not be in agreement about committing to the relationship.<sup>236</sup> Similarly, it was submitted that it may be assumed that people in domestic partnerships do not get married because they do not wish the rights and the obligations that arise out of a marriage to apply to their arrangement.<sup>237</sup> To regulate such a domestic partnership would be to superimpose rights and obligations that the parties do not want to apply to their situation.

2.4.111 The relevance of acknowledging the autonomy of partners in such a relationship was also reflected in the reasons afforded by respondents for couples living together without marrying: that today's younger couples do not want to live with the same "labels" as all the generations before them and that marriage is nothing more than a tradition being forced on people in order to obtain certain rights.<sup>238</sup> It was submitted, in particular, that couples cohabit because people have come to find pride in self- and individual identity.<sup>239</sup>

2.4.112 It should, however, be remembered that the proposal made in support of individual autonomy namely "they would get married if they want the legal consequences of marriage" does not solve the problem of same-sex couples because they do not have the option to marry.

2.4.113 Individualistic concepts of self-determination and autonomy have also been used in favour of same-sex marriage. In this regard, the advocates of same-sex marriage argue that preventing same-sex partners from marrying interferes with the fundamental freedoms of personal choice and intimate association underlying marriage. According to this view the legal recognition of same-sex relationships is

---

<sup>234</sup> Unofficial submission of the Christian Lawyers Association of South Africa.

<sup>235</sup> Adv G J van Zyl (Family Advocate), R Krüger (Rhodes University).

<sup>236</sup> The Christian Lawyers Association of South Africa.

<sup>237</sup> Ditz Incorporated Attorneys.

<sup>238</sup> J Grobler.

<sup>239</sup> R Sewpersad.

justified on the grounds that sexual orientation is a fundamental aspect of one's own personality and individuality.<sup>240</sup>

## (ii) The role of the State

2.4.114 Throughout history human sexuality has manifested itself in the formation of publicly avowed and socially recognised relationships intended to be enduring.<sup>241</sup> One of the roles of the State is to provide legal mechanisms for people to be able to achieve stability and security in these personal relationships – to provide a framework in which people can express their commitment to each other and voluntarily assume a range of legal rights and obligations in an orderly fashion.<sup>242</sup> Legal paternalism<sup>243</sup> in this context sees the proper role of the law as ensuring fairness and justice between family members.<sup>244</sup>

2.4.115 Marriage does not belong only to the realm of individual needs and desires and the sphere of private agreement. By creating a status to which the law assigns a number of legal consequences, marriage is transferred into the realm of the public domain.<sup>245</sup>

---

<sup>240</sup> In response to this contention, Steiner points out that the recognition of same-sex relationships has the effect of projecting sexual orientation into the public sphere, thereby interfering with the social dimension of marriage and family law. Subsequently, the French scholar Gaudu questions the appropriateness of a situation whereby, through the formality of legal registration, society is invited to witness and condone the sexual behaviour of same-sex minority groups. F Gaudu **A Propos Du Contract d'Union Civile: Critique d'un Profane** 1998 Recueil Dalloz 2<sup>nd</sup> Cahier at 20 referred to by Steiner **Child and Family Law Quarterly** 2000 at 12. Steiner further submits that autonomy arguments applied in this context to justify the legal recognition of same-sex partnerships are neither helpful nor conclusive because they leave unresolved the particular difficulty of where to draw the line between what is acceptable in terms of sexual conduct and what not. If it is argued that the State should support this particular conduct on the basis that people are free to choose relationships they want for themselves, then on the same basis, should recognition not be extended without limits to all other types of sexual behaviour and practices between consenting adults, with the possibility that they may involve infliction of physical harm, violence, or other reprehensible conduct? *Op cit* at 11 *et seq.*

<sup>241</sup> New Zealand Law Commission **Same-Sex Relationships** 1999 at para 9.

<sup>242</sup> These legal mechanisms must simultaneously respect the values of equality, autonomy and choice. See Canada Law Commission **Beyond Conjugal** 2001 at chap 4.

<sup>243</sup> Legal paternalism suggests that the government knows what is better for the individual and on that basis has the right to restrict the liberty of individuals for their own sake.

<sup>244</sup> It is proper for the law to redress any power imbalance or inequality between the partners, whether the inequality is physical, emotional or financial.

<sup>245</sup> Steiner **Child and Family Law Quarterly** 2000 at 11.

2.4.116 The intervention by the State of imposing preconditions on those citizens who wish to marry has made marriage an institution with public relevance.<sup>246</sup> Legal recognition of domestic relationships will have a similar effect, *ie* transfer the relationships from the private sphere into the public domain.

2.4.117 For a long time the State has focussed on marriage as the vehicle of choice for adults to express their commitment. Marriage provides parties with the ability to State their intentions toward one another publicly and officially. Ex lege, marriage is entered into voluntarily and, since it cannot be terminated without legal procedure, it provides for certainty and stability.<sup>247</sup>

2.4.118 However, marriage no longer suffices as the only model for the variety of relationships of our time. Many modern relationships outside of marriage are characterised by emotional and economic interdependence, mutual care and concern and the expectation of some duration.<sup>248</sup> The law cannot turn its back on the social reality and should acknowledge the fact that these relationships can also benefit from legal frameworks to support partners' needs for certainty and stability.

2.4.119 The right to choose whether and with whom to form an intimate relationship is a fundamental right in democratic societies.<sup>249</sup> This right to associate freely *ia* entails that the State does not, directly or indirectly, interfere with adults' freedom to choose their intimate relationships. It would amount to indirect interference if financial pressure were put on partners to abandon their personal relationships of caring and commitment or if privileged status were to be accorded to certain kinds of relationships without reference to their qualitative attributes.<sup>250</sup>

---

<sup>246</sup> It is within this perspective that same-sex marriages as well as, in western society, under-age, polygamous and incestuous marriages have been outlawed. Also, marriage does not only affect the two spouses and their relationship, but also includes the joint upbringing of children. Steiner **Child and Family Law Quarterly** 2000 at 11.

<sup>247</sup> Canada Law Commission **Beyond Conjugal** 2001 *ibid*.

<sup>248</sup> Statistics show that incidence of cohabitation outside marriage has risen dramatically in recent years while marriage rates are at their lowest since 1889. Bailey-Harris **Child and Family Law Quarterly** 1996 at 138.

<sup>249</sup> K L Karst "The Freedom of Intimate Association" (1979-80) 89 **Yale Law Journal** 624 puts it as follows: "it is the choice to form an intimate association that permits full realisation of the associational values we cherish most" namely companionship, caring, commitment, intimacy and self realisation" referred to in Canada Law Commission **Legal Regulation of Adult Personal Relationships** 2000 at par C.1(b) and fn 95.

<sup>250</sup> Canada Law Commission **Legal Regulation of Adult Personal Relationships** 2000 *ibid*.

2.4.120 The right to associate freely does not mean that the State should have no role to play. The respect accorded to individual self-determination requires that the choice to be different should also be given legal meaning.<sup>251</sup> Accordingly the State has an obligation to ensure that autonomy can be exercised in a manner not compromising the equal right to autonomy of others.<sup>252</sup>

2.4.121 This sentiment was also reflected in the response to the Issue Paper by the Women's Legal Centre. It was submitted that respect for the autonomy of individuals should not come at the expense of women who will continue to suffer at the end of the domestic relationship owing to a lack of legal protection. In similar manner, it was said that women are often unable to assert their interests and may sign away their rights out of powerlessness and ignorance.<sup>253</sup> The Gender Research Project of the Centre for Applied Legal Studies was of the same opinion and said that the law's protective role should be given priority over autonomy concerns in this instance.

2.4.122 As soon as diverse family forms are recognised in principle, the next question is how to strike the balance between individuals' rights to self-determination and legal paternalism. On the one hand, it is argued that diversity demands that individuals be free to agree amongst themselves which consequences they want to attach to the relationships of their choice. On the other hand, there are at least two roles ascribed to family regulation that justify limiting this freedom of individual determination.<sup>254</sup> These roles are the following:

- \* In its protective role, the law prevents exploitation of one family member by the other where there is a power imbalance in the relationship. The law must particularly protect children, but an adult partner may be just as vulnerable to exploitation, whether emotional, physical or financial.

---

<sup>251</sup> Bailey-Harris **Child and Family Law Quarterly** 1996 at 138.

<sup>252</sup> For example, the State must take steps to protect adults who are vulnerable to economic or physical/emotional abuse in these relationships. Canada Law Commission **Legal Regulation of Adult Personal Relationships** 2000 *ibid*. According to Parker, an English writer, it is the duty of the law to protect the vulnerable and that the law should play a paternalistic role in awarding relief against exploitation particularly to those who have been willingly exploited by electing to cohabit. See Parker 1984 **Family Law** at 43, referred to by Schweltnus "The Legal Implications of Cohabitation in South Africa" 1994 at 214.

<sup>253</sup> R Jewkes.

<sup>254</sup> Bailey-Harris **International Journal of Law and the Family** 1995 at 234.

- \* In its remedial role, once a relationship has broken down, the law aims to resolve the parties' rights and obligations with fairness and in a manner that minimises hostility. The law in its remedial form should be sufficiently flexible to permit the outcome to be tailor-made to meet the justice of a particular case and to take account of the myriad ways in which a couple can arrange their lives.<sup>255</sup>

2.4.123 In addition, the facilitative function of the law entails that it must "help people to organise their lives and affairs in the ways they prefer",<sup>256</sup> not only amongst themselves, but also between them and the State or other third parties. Indeed, many of the laws concerning marriage perform a facilitative function. For example, taxation law allows spouses to transfer property between them without subjecting it to gift tax.

2.4.124 Domestic partners are currently left out of these facilitative provisions. Such couples can attempt to order their material arrangements through individual devices such as wills or written contracts. However, these devices may not be enforceable in the specific circumstances and often are not affordable to many. In addition it must be remembered that the entirety of legal responsibilities and benefits cannot be constructed from individuals' contracts. For example, an individual may try and negotiate with his employer for health insurance of his or her life partner, but is not guaranteed to be successful.<sup>257</sup>

2.4.125 If the argument is correct that giving cohabitants the same rights as married couples would be oppressive, it is logical to conclude that cohabitants would be opposed to such regulation. This is, however, not necessarily the case. Barlow, with

<sup>255</sup> Bailey-Harris submits that once the remedial function of the law has been acknowledged, a distinction between different types of relationships according to their legal status or even the sexual orientation of the parties concerned can not be justified. Put differently, if the purpose of the law is to respond to what actually happened in the relationship and to correct imbalances, the classification of the relationship is irrelevant. What is relevant is how the role-division assumed within a relationship has determined the different contributions made by each party and has affected their respective financial futures. Bailey-Harris **Child and Family Law Quarterly** 1996 at 141. See also in this regard Bailey-Harris **International Journal of Law and the Family** 1995 at 234 *et seq.*

<sup>256</sup> C E Schneider "The Channeling Function in Family Law" 1992 20 **Hofstra Law Review** 495 at 497, referred to by Wriggins **Boston College Law Review** fn 240.

<sup>257</sup> C W Christensen "If not Marriage? On Securing Gay and Lesbian Family Values by a 'Simulacrum of Marriage'" 1998 66 **Fordham Law Review** 1699 at 1733 fn 213 referred to by Wriggins **Boston College Law Review** fn 247.

specific reference to the views of Bailey-Harris, Freeman and Deech, has done research on this aspect.<sup>258</sup>

2.4.126 The research showed that in relation to financial support on marital breakdown and property inheritance, domestic partners were actually keener than others that domestic partners should have the same rights as married couples.

2.4.127 It was also found that 70 percent of current cohabitants thought that a cohabiting woman should have the same rights to financial support on relationship breakdown as a married woman. A near 97 percent of cohabitants thought that a woman should have the same rights as a married woman to remain in a house bought in the man's name after his death without a will. The various responses of men and women did not differ significantly.

2.4.128 The conclusion of the survey on this point is that the majority of subjects believe the law should treat long-standing cohabitants in the same way as married couples and that this is particularly true among people who are themselves cohabiting.<sup>259</sup>

2.4.129 Concern for the victims of the breakdown of these relationships suggests that non-interference is unjust. In most countries it is accepted that the protection of domestic partners cannot be left entirely to the initiatives of parties.

### (iii) Freedom of choice and informed choice

2.4.130 Bailey-Harris directs attention to the fact that arguments about individualism and party autonomy assume freedom of choice and, indeed, of informed choice. This assumption is not universally justified when these relationships are formed. Bailey-Harris submits that people drift into these relationships, often with misconceptions of the legal consequences.<sup>260</sup>

---

<sup>258</sup> Barlow *et al* "Marriage and Cohabitation" 2001-02.

<sup>259</sup> *Op cit* at 22.

<sup>260</sup> Bailey-Harris *Child and Family Law Quarterly* 1996 at 138.

2.4.131 Kingdom points out that one of the main attractions of cohabitation is thought to be its potential as a means of establishing genuinely egalitarian relationships between the partners, free from the jurisdiction and unwanted intrusion of marriage law. However, in practice they are likely to find themselves in a position of uncertainty about their legal position in that they may be treated as married and their respective legal positions are constructed by analogy with those of married persons, irrespective of their choice not to marry.<sup>261</sup>

2.4.132 The decision not to marry may not be joint, but may be imposed by one cohabitant on the other. One partner may be deceiving the other or stringing him or her along with promises of future marriage. Furthermore, although the parties may have the freedom to regulate their property and other relationships to some extent, in practice they do not exercise that freedom.<sup>262</sup>

**(iv) Balancing of autonomy on the one hand and legal paternalism on the other**

2.4.133 Statutory regulation of domestic partnerships does not mean total denial of autonomy. Nor is the opposite true. The aim of regulation should be to maximise the scope for individual autonomy across all spheres of life while preventing a situation where one person is unacceptably disempowered by the individual exercise of autonomy by another.<sup>263</sup> This is particularly relevant in view of the developing sensitivity for the potential for power imbalance in personal relationships.

2.4.134 The conclusion by the Australian Law Reform Commission in its **Discussion Paper on Multiculturalism and the Law** is informative in this regard. It states that:

...generally speaking, the law should not inhibit the formation of family relationships and should recognise as valid the relationships people choose for themselves. Further, the law should support and protect those relationships. However, the law should restrict a person's choice to the extent that it is necessary to protect the fundamental rights of others and should not support

---

<sup>261</sup> Kingdom **International Journal of the Sociology of Law** 1990 at 287.

<sup>262</sup> See Barlow *et al* "Marriage and Cohabitation" 2001-02 at 18.

<sup>263</sup> N Bamforth **Sexuality, Morals and Justice: A Theory of Lesbian and Gay Rights Law** London Continuum: 1997 as referred to in New Zealand Law Commission "Same-Sex Relationships" 1999 at par 10.



relationships in which the fundamental rights and freedoms of others are violated. Instead it should intervene to protect them.<sup>264</sup>

2.4.135 Once the expediency of regulation is accepted, the question must be considered to what extent the legal consequences of domestic partnerships should mirror those attached to marriage.

2.4.136 It is frequently argued that the freedom of individuals to choose a domestic partnership as alternative to marriage would be undermined if the legal consequences of the two were assimilated.

2.4.137 The opposite argument is that to blur the legal distinction between marriage and unmarried cohabitation undermines the sanctity of the former as an institution.

2.4.138 Although for different reasons, proponents of both arguments would prefer distinctly different dispensations for marriage and domestic partnerships.<sup>265</sup> In this regard Raz submits that pluralism presupposes that individuals are not only given an adequate range of options but also that the options available must differ in respects which may rationally affect choice.<sup>266</sup>

2.4.139 On the premise that there must be distinctive dispensations, the practical question of how they should come into being arises. Two basic models mirror the “competing” interests of autonomy and legal paternalism. On the one hand there is a regime that applies ex lege to relationships as defined,<sup>267</sup> also referred to as ascribed status. On the other hand, an opt-in system would require specific actions to be taken

---

<sup>264</sup> Australian Law Reform Commission Discussion Paper No. 47: Multiculturalism and the Law (1991) para 24 referred to by Bailey-Harris **International Journal of Law and the Family** 1995 at 235.

<sup>265</sup> Steiner **Child and Family Law Quarterly** 2000 discusses the French PACS as an example of an unsuccessful attempt to create such a diverse dispensation. PACS is the **Du Pacte Civil de Solidarité et du Concubinage** which was created by Law no 99-944 of 15 November 1999 and which added a new part to the chapter of the French Civil Code devoted to marriage. Despite its original intention, the legislation has effectively fashioned PACS in the image of legal marriage. Thus, far from promoting legal pluralism, resembling marriage as it does, PACS effectively shuts the door on alternative ways for couples to organize their personal domestic lives. See Steiner’s comparison in particular *op cit* at 7.

<sup>266</sup> J Raz **The Morality of Freedom** Clarendon Press: 1988 at 398 referred to by Steiner **Child and Family Law Quarterly** 2000 at 7 fn 42.

<sup>267</sup> The definition may, for example, refer to the duration of the relationship or the presence of children.

to bring the relationship within the operation of the law,<sup>268</sup> also referred to as registered partnerships.

2.4.140 The objection against the form of domestic partnership protection where the legal implications emanate automatically when two people are living together in circumstances resembling marriage (as in Sweden and British Columbia), is that it is not right to impose a legal regime upon a couple who has deliberately chosen to avoid marriage as it denies individual autonomy.<sup>269</sup> This objection could, however, be refuted by the provision of an opt-out clause.<sup>270</sup>

2.4.141 This means that cohabiting parties not wanting the legal implications in the Swedish Cohabitees (Joint Homes) Act of 1987 may follow the prescribed instructions to escape its application.

2.4.142 Ideally, contracting out of a general regime must not impose unrealistically onerous formalities on parties, nor must the Court's powers of ultimate variation be so wide as to remove the attraction of agreements.<sup>271</sup>

2.4.143 The form of domestic partnership where specific actions must be taken to bring the couple within applicable regulation, leaves one with the same objections mentioned throughout namely protection of weaker parties and the fact that in practice couples do not take those steps to bring the relationship within the scope of the applicable act.<sup>272</sup>

---

<sup>268</sup> Bailey–Harris favours the first model, as the alternative model makes legal protection dependent on the consent of both parties to registration. Her objection is that such a model provides no safeguard to the position of the more vulnerable and less empowered party. Bailey-Harris **Dividing Assets** 1998 at 83.

<sup>269</sup> This argument is the main reason given in, for example, Finland and Denmark for the choice not to enact cohabitation legislation. In Catalonia, a progressive province of Spain the consequences of the Stable Couples Act 10 of 1998 apply automatically to a couple of the opposite sex once they have lived together for two years or more or have a child together. The fact that these couples are subject to this act regardless of any initiative taken by them is very controversial. Forder 2000 **CJFL** at par 11.

<sup>270</sup> The Swedish Cohabitees (Joint Homes) Act of 1987. See also Forder 2000 **CJFL** at par 91:

Individual autonomy is better safeguarded by a clear legislative system than with a case-law system, the outcome of a case may be difficult to predict. Individual autonomy is even better safeguarded if the cohabitation scheme provides an opt out clause ...

<sup>271</sup> Forder 2000 **CJFL** *ibid*.

<sup>272</sup> Forder 2000 **CJFL** at par 21.

2.4.144 In the absence of legislative protection, case law is invariably relied on to give a greater or lesser degree of proprietary protection in the event of the breakdown of the relationship. This result is inevitable since disputes are bound to end before the Courts with unpredictable and inconsistent outcomes.

2.4.145 In the search for balance between the autonomy of the individual and the protection of the vulnerable, the following arguments have been raised:<sup>273</sup>

- \* The legal regulation of partner rights by judicial decision can run counter to individual autonomy of the parties but has the benefit of providing protection for the vulnerable partner.
  
- \* A system like the Swedish, on the other hand, which lays down the rules for the judiciary in a statute but offers the opportunity to opt out of the provisions to a great degree, is more respectful of the couple's individual autonomy.

2.4.146 It is submitted that the solution to the problem should perhaps be sought in a combination of elements of the two options. This can be done by allowing vulnerable partners to initiate the Court proceedings for a fair and equitable conclusion whilst at the same time provide for the conclusion of a partnership agreement in order to allow partners to determine the outcome of their choice. In the absence of such a Court application and a partnership agreement, it may be concluded that the partners have reached an amicable settlement.

2.4.147 An interesting point advanced by Bailey-Harris is that the degree of free choice exercised at the time of entering a relationship is in many cases exaggerated. This, she says, is so because the intentions of the partners at the commencement of the partnership are hardly relevant. When the law is fulfilling its remedial function upon termination of the relationship, the purpose of property adjustment is to respond to what actually happened in the relationship, rather than what was hoped for or promised initially.<sup>274</sup>

---

<sup>273</sup> Forder 2000 **CJFL** at par 11.

<sup>274</sup> See Bailey-Harris **International Journal of Law and the Family** 1995 and the authorities referred to by her in support of this view at 236 fn 13 and 14.

**(v) Pluralism**

2.4.148 In order for people to be free to enter into the relationship of their choice, a pluralistic legal context is required. Such a pluralistic legal context will be able to facilitate more than one model of legally regulated relationship.<sup>275</sup> A pluralist society expects of the law to recognise and support a diversity of family formations.

2.4.149 As South Africa is a legally pluralistic society,<sup>276</sup> South African law must find the best way to accomplish the support of relationships of caring and commitment while at the same time respecting basic individual rights to autonomy, privacy, equality and security associated with the legal prohibitions on discrimination on the basis of sex, marital status and sexual orientation<sup>277</sup>

**c) The legal recognition and regulation of domestic partnerships will protect the victims of domestic partnership breakdown**

2.4.150 Historically women have often found themselves in a weaker bargaining position than men when negotiating the terms of a relationship. This is the case in both marriage and domestic partnerships.<sup>278</sup>

2.4.151 Some of the reasons for these women's vulnerability are:<sup>279</sup>

---

<sup>275</sup> Steiner **Child and Family Law Quarterly** 2000 at 4.

<sup>276</sup> Legal pluralism means that various legal systems apply throughout the country. Personal legal pluralism entails following the legal system of one's culture and personal background. If a person's background is regulated by tribal and traditional customs, it forms part of that person's culture and tradition and results in the application of customary law. Religious based legal systems (Muslim, Jewish and Hindu) are other examples of this phenomenon. Pienaar "Equality in Marriage" 2002 at fn 2. On legal pluralism in South African law see Maithufi "The Constitution, Marriage and Family Law in South Africa" 2002 at par 6, and O'Regan **Potchefstroom Electronic Law Journal** 1999 at par 1.

<sup>277</sup> Canada Law Commission **Legal Regulation of Adult Personal Relationships** 2000. In principle, State policy should not interfere with choices of intimate companions and decisions regarding conclusion and termination of personal relationships in the absence of violence or exploitation.

<sup>278</sup> See discussion in paras a) and b) above. See also chap 3 below for a discussion of the current position regarding the consequences of domestic partnerships in South Africa and the problems faced by all domestic partners on the breakdown of the relationship.

<sup>279</sup> According to the CALS Report 2001 many women find themselves in a situation where the law

- \* Women are economically weaker since they are often responsible for housework and child care while men are earning an income and accumulating property. Upon termination of the relationship, the women are often left without a share of the property that they indirectly helped to accumulate through supporting the man, his home and their children.
- \* Unequal gender relations in society and the family compound women's poverty. In these households men often maintain their control in the domestic sphere by violence or the threat of violence.
- \* Since welfare services in South Africa are insufficient, the State is unable to protect the victims of intimate relationships.

2.4.152 However, the legal protection enjoyed by married couples acknowledges that the social function and economic consequences of the relationship justify State intervention to protect the economically weaker party.

2.4.153 Even though couples in a domestic partnership may function in exactly the same way and for the same reasons, they do not have that legal protection.<sup>280</sup> Risks are therefore noticeably higher for them. In the context of relationship break-up, women in domestic partnerships are particularly vulnerable when the division of assets and debts of a former relationship must be arranged and enforced.

2.4.154 The solution to the problem of vulnerability is to address the dearth of remedies that exists for those who are unaware of, or cannot afford alternative remedies such as domestic partnership agreements. Bailey-Harris regards the following weaknesses of the law as it is currently made applicable to domestic partnerships as responsible for the predicament of the victims of domestic partnership breakdown. These observations are largely applicable to the South African position.

---

affords them no protection at all. Black women, are uniquely vulnerable. They and their children are the victims of a system that deliberately destroyed African family life. Statistics show that most domestic partners are Black (and poor). See also Sinclair **Marriage Law** 1996 at 301 and the references made therein.

<sup>280</sup> Barlow *et al* "Marriage and Cohabitation" 2001-02 at 17. See also the discussion on the functional approach in par 2.4.63 *et seq* above.

- \* The complexity and the uncertainty of the alternative remedies result in a lack of clarity and contribute to the remedies being inaccessible.<sup>281</sup>
- \* Trust law gives inadequate recognition of non-financial contributions to the relationship and continues to favour the wage-earning, property acquiring partner in a family relationship.<sup>282</sup>
- \* Despite its formal neutrality, in practice the law operates with gender bias. Firstly it undervalues non-financial contributions in the determination of beneficial interests. Secondly it makes stereotyped assumptions about the roles assumed by women and men respectively.<sup>283</sup>
- \* Equity's primary focus is retrospective, asking what happened in the past and if intentions can be inferred from actual agreements or contributions. The aim of the law should be to equalize the economic effects which the relationship (through the roles assumed by the parties) had, and this must involve consideration of their future economic prospects.<sup>284</sup>

2.4.155 There are furthermore a host of situations that cannot be regulated through contracts between the domestic partners, eg medical benefits where a third party is involved. In addition, a contract is of no use to someone who wants to dispute its terms but cannot afford to take the matter to court. It is furthermore unrealistic to expect the sophistication to negotiate a domestic partnership agreement from a population denied basic education.<sup>285</sup>

---

<sup>281</sup> Bailey-Harris **Dividing Assets** 1998 at 76 *et seq.*

<sup>282</sup> Bailey-Harris **Dividing Assets** 1998 at 81. Lord Denning M R highlighted the inadequacies of traditional trusts doctrines in recognizing the role of the homemaker and parent in determining entitlements to assets on breakdown of a relationship. **Wachtel v Wachtel** [1973] Fam 72 referred to by Bailey-Harris **Dividing Assets** 1998 *op cit* fn 52.

<sup>283</sup> Bailey-Harris **Dividing Assets** 1998 at 81.

<sup>284</sup> Bailey-Harris **Dividing Assets** 1998 at 82.

<sup>285</sup> Sinclair **Marriage Law** 1996 at 301.

2.4.156 In the context of maintenance for surviving partners, Skweyiya J in **In Volks N.O. v Robinson** said that the effects of vulnerability are more pronounced in the case of the very poor and the illiterate but that<sup>286</sup>

[t]he answer lies in legal provisions that will make a real difference to vulnerable women at a time when both partners to the relationship are still alive.

2.4.157 Many respondents to the Issue and Discussion Paper supported the legal recognition of domestic partnerships. Some said that the law on marriage should simply be made applicable to domestic relationships older than six months and that a maintenance duty similar to that of married couples should follow.<sup>287</sup> Others suggested that liability for maintenance should depend on the provisions of the domestic partnership agreement,<sup>288</sup> while another view was that maintenance should be considered with specific factors in mind.<sup>289</sup>

2.4.158 Ostensibly people are quite willing to make decisions about their relationships in both moral and social terms but regard the legal position as part of the external environment to be regulated by the State - the general expectation is for the law to provide fair and appropriate remedies for all family situations.<sup>290</sup> Singh submits that this proves the need for legislative reform to bolster the rights of domestic partners.<sup>291</sup>

2.4.159 Any legal framework aiming to protect family relationships will, however, need to take into account the highly disorganised and uncontrolled structure of society in the rural areas of South Africa. Many people fall outside the structure of the

---

<sup>286</sup> 2005 (5) BCLR 446 (CC) at [66] and [68].

<sup>287</sup> M Nel.

<sup>288</sup> Director, Legislation and Legal Services, Department of Education.

<sup>289</sup> Charmane Pillay & Co Attorneys. These factors are the duration of the relationship; the ability or not of the former partner to be self-supporting; secure employment, considering his or her age, health, education and previous employment history; and the contributions made by each party to the couple's estate.

<sup>290</sup> M Hibbs, C Barton and J Beswick "Why Marry? Perceptions of the Affianced" 2001 31 **Family Law** 197-207 referred to in Barlow *et al* "Marriage and Cohabitation" 2001-02.

<sup>291</sup> Singh **CILSA** 1996 at 321.

present legal framework and cannot seek help of the law because their “marriage” does not fit the narrow defined legal pattern.<sup>292</sup>

**d) The legal recognition and regulation of domestic partnerships will reinforce the stereotyped notions of female dependence<sup>293</sup>**

2.4.160 The definition of marriage as the union of a man and a woman is based on sex in the context of a biological category. In reality, it is argued, the definition is based on gender, a social category.<sup>294</sup> In this regard the social meaning ascribed to gender see men as strong, women as subservient; men as not responsible for family care, women as nurturing; men as sexually aggressive, and women as the passive victims.<sup>295</sup> In terms of this representation, one’s status as either husband or wife determines all one's duties and obligations in the marriage relationship.

2.4.161 Under this traditional view of marriage, marriage is often experienced to be an oppressive institution.

2.4.162 A historical analysis shows that all cultures have been male-dominated<sup>296</sup> throughout the ages, because of women’s economic dependence on men.<sup>297</sup> The degree and expression of female subordination has, however, varied greatly.<sup>298</sup> Mead stresses that although the conventions by which the sexes are differentiated vary

---

<sup>292</sup> Dr R M Garratt, FRCS Trainer in Rural Surgery and Anaesthesia in Nongoma in his submission re South African Law Reform Commission Review Marriage Act.

<sup>293</sup> Women should therefore strive to be independent without feeling the need to marry in order to obtain protection. Seen from another perspective the Evangelical Alliance of South Africa reflected the view that the status of women would be lowered even more by encouraging more women to agree to cohabitation as an alternative to marriage.

<sup>294</sup> Hunter in Caudill and Gold **Radical Philosophy of Law** 1995 at 224. Hunter illustrates this point with the example of race as a biological category that is also susceptible to a social definition. With reference to **Loving et Ux. v. Virginia** 388 US 1, 18 L ed 2d 1010, 87 S Ct 1817, 1967 Hunter submits "What changed between the time of the slave codes and the decision in *Loving* was not the biological but the social aspects of race." In this case the U.S. Supreme Court decided that the Fourteenth Amendment of the Constitution requires that the freedom of choice to marry may not be restricted by invidious racial discriminations; the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

<sup>295</sup> Law **Wisconsin Law Review** 1988 at 209.

<sup>296</sup> Law **Wisconsin Law Review** 1988 at 197.

<sup>297</sup> Janz "Canadian Families" 2000 at par IV.C.1.

<sup>298</sup> Law **Wisconsin Law Review** 1988 at 197.



from society to society, the differentiation in every society is accompanied by a value hierarchy. According to this hierarchy the activities and characteristics defined as "male" are regarded as superior to or more important than the activities and characteristics defined as "female". Only the man who was by law and custom the head of the family is validated as an individual.<sup>299</sup>

2.4.163 This social reality is also reflected in customary marriages:<sup>300</sup>

The cultural allocation of functions in most black South African rural communities consigns women to menial domestic chores with little or no economic value. Thus, in most rural households the wife or wives are expected to tend to the raising of children, tilling of the soil and the gathering of wood and fetching of water for fuel and domestic use, respectively. Men on the other hand have allocated themselves the pleasurable roles of supervision, acquiring an education and working for real incomes in the western establishments.

2.4.164 Besides the role that women's economic dependence on men played in the development of marriage as a hierarchical institution, Nkosi refers to the way in which religion and biological differences between men and women have been exploited to justify gender discrimination. She submits that traditional as well as universal religions have been invoked whenever roles were assigned:<sup>301</sup>

Patently gender neutral verses from the Bible and Koran are time and again manipulated through biased interpretation by patriarchal figures to preserve for themselves and those who can challenge them favourable placements in the socio-economic scheme of things.

2.4.165 In the nineteenth century, industrialisation and urbanisation altered family circumstances and values and feminist movements began objecting to gender stereotyping.

2.4.166 Despite different approaches, an underlying similarity of feminist perspectives is that they all assume that sexism privileges men and leads to discrimination against women.<sup>302</sup>

---

<sup>299</sup> M Mead **Male and Female** 1968 at 349 referred to by Law **Wisconsin Law Review** 1988 at 197 fn 46. According to Mead "every known society creates and maintains artificial occupational divisions and personality expectations for each sex that limit the humanity of the other sex."

<sup>300</sup> Nkosi **Codicillus** 2000 at 49.

<sup>301</sup> *Ibid.*

<sup>302</sup> Janz "Canadian Families" 2000 at par II.B.

2.4.167 When these feminist theories are contextualised in family and relationships research, it is generally concluded that marriage is more beneficial for men.<sup>303</sup> It is said that marriage provides men with emotional support that is typically not available to them elsewhere and that men's occupational progress is enhanced through the direct and indirect support of the wives.<sup>304</sup>

2.4.168 Women, on the contrary, are generally oppressed and disadvantaged by traditional marriage and family relationships. Women receive fewer emotional benefits from marriage than men and their occupational achievement is slowed. One of the reasons given for this is that women are responsible for the majority of work in the family such as caring for the family members and doing routine housework tasks that are generally devalued and unpaid.<sup>305</sup>

2.4.169 Thus feminist and gay/lesbian scholars conclude that the traditional nuclear family associated with traditional marriage is not functional to society because it discriminates against women and privileges men.<sup>306</sup> Enouncements like the following are made: "marriage is a rotten institution";<sup>307</sup> marriage as constructed by the West involves hierarchies that have systematically subordinated women's personal, economic and social interests to those of men;<sup>308</sup> and marriage as it is structured at

---

<sup>303</sup> However, see the result of an analysis of 93 separate studies by Dr W Wood of Texas A & M University, where it was found that the benefits of marriage "proved stronger for women than men". Dr Wood and her colleagues explain this contradicts the "picture of the 'grim mental health' of wives popularised by feminists. See Stanton "What's Marriage Got to Do with It?" 1998.

<sup>304</sup> Janz "Canadian Families" 2000 at para II.E.

<sup>305</sup> Radical feminist theorists go as far as to say that families and intimate relationships are unsafe for women and children with reference to the high occurrence of men's violence and sexual assault. See Janz "Canadian Families" 2000.

<sup>306</sup> Even today most heterosexual relationships are not egalitarian and men tend to benefit more from marriage than women. Social norms and the disparity of resources between women and men influence the distribution of power in heterosexual relationships. Men tend to be more powerful in relationships because they generally have access to more sources of power. They tend to earn more money, have higher status or prestigious jobs, and higher levels of education relative to women. Studies indicate that those with greater personal resources such as higher income, more education and higher social status are more likely to make important decisions. Relative income remains an important factor because many women still depend on their husbands for financial support and wives who have no paid employment tend to have the least power of all women in heterosexual relationships. Power imbalances also result from disparities in unpaid work. Housework and caring for the family is generally perceived as a woman's responsibility. See Janz "Canadian Families" 2000.

<sup>307</sup> See reference by Eskridge **Virginia Law Review** 1993 at 1486 fn 244.

<sup>308</sup> Eskridge **Virginia Law Review** 1993 at 1486.

the moment is a problematic institution since it facilitates the oppression of women and subordinates men and women who choose not to marry.<sup>309</sup>

2.4.170 The focus of women's movements since the early nineteenth century has been the achievement of equality for woman in the workplace and in the family, envisaging women leading safe and satisfying lives.<sup>310</sup>

2.4.171 The objection against legal regulation of domestic partners based on the marriage model is that it will reinforce the stereotyped notion of female dependence associated with marriage. Legal regulation of the consequences of domestic partnerships will mean a relapse to the myth of the weak woman in need of protection by the laws of the state, whereas it is said that most women have made a lot of progress towards establishing social and economic independence.

2.4.172 In reply to this objection, it is argued that the potential for oppression is principally a feature of all opposite-sex relationships, and is not restricted to the formal marriage relationship. In addition, marriage laws have been amended to address these oppressive issues with the result that these laws do not rely on these stereotyped notions any more. Major successes have been achieved regarding formal equality by querying the legitimacy of patriarchal hierarchies and oppressive prerogatives of husbands in respect of their wives. This has led to reforms in the law of persons to recognise the separate legal personality of married woman with the result that they are able to *ia* own property and conduct business. In addition, parental relationships have been formally equalised so that parents of both sexes have similar parental authority over their children. Developments in divorce laws have made it more gender-neutral. These reforms were principally aimed at increasing gender equality in the family domain.<sup>311</sup>

---

<sup>309</sup> De Vos **SAPL** 1996 at 359.

<sup>310</sup> The social exchange theory suggests that those with the most resources in a relationship will have the most influence. Thus, this theory predicts that when individuals in a relationship have equal resources, the distribution of power in the relationship will be equal. Contrary to this prediction, research showed that even when women earn more than men, relationships remain unequal, with women continuing to have more responsibility for nurturing the family and doing the housework. Such findings are explained by the fact that traditional beliefs and social norms favour men, and the influences of these beliefs are strong. Janz "Canadian Families" 2000 at par IV.C.1.

<sup>311</sup> Boshoff **SALJ** 2001 at 316.

2.4.173 Therefore, instead of excluding women in domestic relationships from these benefits, they should rather be allowed to avail themselves of the same protective measures available to married women.

2.4.174 Furthermore, while acknowledging that some women have made a lot of progress towards establishing social and economic independence, it is unfortunately true that in the South African heterogenic society the majority of women are still socially and economically disadvantaged and in need of legal protection. This need is particularly visible at the time of breakdown of the relationship, and these women should be allowed to benefit from legislative intervention.

2.4.175 Submissions received on the Issue Paper mirror these views.<sup>312</sup> The Gender Research Project of the Centre for Applied Legal Studies at the University of the Witwatersrand has undertaken primary research into the reasons people cohabit without marrying and the following was submitted regarding women's position in relationships:

Women, who may wish to marry, often feel unable to insist on this because they are dependent on men. Many of the men are reluctant to marry because of the freedom this affords them to come and go as they please and to remain outside of legal regulation of their relationship while benefiting from the domestic labour of women. Women depend on men because of their unequal position in society, their relative lack of access to income, their responsibilities to children and their inability to resist physical abuse by men.

2.4.176 It was also stated that the idea of strong, economically independent women may apply to middle-class women, but for the majority of South African women who are poor, financial dependence on men is a reality.

2.4.177 Formal gender equality may therefore not be enough. The existence of individual rights for women is worthless if the systematic subordination of women makes the enforcement of these rights untenable. The formal protection of legal rights becomes meaningless in an environment where women as a group are socially and financially disempowered. The example used is that of the battered wife who may have the legal right to send her abusive husband to jail, but lacks the economic

---

<sup>312</sup> A respondent opposed to extending the law of marriage to include same-sex couples referred to marriage as "an institution that failed miserably in the heterosexual world".

and social power to do so. Changing the law alone would not necessarily result in change of social practice.<sup>313</sup>

2.4.178 In order to prevent the reinforcement of female stereotyping, the supplementing of formal equality with substantive equality is necessary. For example, if one wants to protect the rights of a party to a marriage contract or divorce settlement who is not on an equal footing with the other party, it is not enough that the law put them on an equal footing theoretically. The real remedy lies in empowering the weaker party to negotiate equally.<sup>314</sup>

2.4.179 While more couples recognise the value of endorsing equality, two social forces in the familial context make it difficult to develop egalitarian relationships: the gender gap in wages and in the responsibility for household chores and childrearing. Until these social inequalities are addressed, change is unlikely.<sup>315</sup> Any new policy supporting relationships should actively aim not to reinforce traditional patriarchal values that oppress women and to take positive measures to correct this distorted disposition.

2.4.180 While relationships based on dominance and subordination can be destructive and abusive, people in egalitarian relationships tend to use effective

---

<sup>313</sup> Bonthuys "Equal Choices" 2001 submits the following reasons for this discouraging conclusion. The function of the law is to adjudicate between competing legal rights. In order to do that certain facts and issues must be excluded from influencing decisions about these competing rights. These factors which are generally excluded from influencing the decision may be exactly those that are definitive of the benefit or detriment of the legal measures to oppressed groups. Formal equality will not address the problem satisfactorily unless the law also takes account of these social and cultural forces. Where oppressed groups (as women are alleged to be) are presented with a choice, for example, to adopt their husbands' surnames, the implicit inference is that this choice reflects a voluntary decision. This inference is strengthened by the fact that some women in fact do choose not to adopt their husbands' surnames. Such an inference negates the context of women's decisions and assumes that all women are in the position of those who are most advantaged. Further to the example: women who choose not to assume their husbands' surnames are typically highly educated, aware of political issues around gender stereotypes and often have established themselves in professions or in business prior to their marriages. This, however, does not accurately reflect the position of most women and in particular not of most disadvantaged women. In other words, what is structured as a choice for women is more often than not no choice at all due to oppressive social systems which sometimes cause women to choose the least beneficial alternative. Where the legal rule was intended to be beneficial, it now has a negative effect and in this sense such legal rules add to the disadvantage already experienced. In addition to the fact that no social value emanates from the legal intervention an additional burden may be incurred and the social value of the "choice" fade away. The foregoing emphasizes that the removal of directly discriminatory measures does not necessarily lead to substantial equality since social contexts often prevent members of oppressed groups from sharing in the opportunities which have formally been provided for them.

<sup>314</sup> Boshoff **SALJ** 2001 at 317.

<sup>315</sup> Janz "Canadian Families" 2000 at par IV.C.2.

conflict resolution skills and, as a result, such relationships are less violent. Egalitarian relationships are also based on sharing, caring, trust, friendship, appreciation and mutual respect. Such relationships are also more common when individuals are equally involved in the relationship and have less traditional attitudes toward the assignment of gender roles. Individuals in an egalitarian relationship are more likely than other couples to be similarly situated with respect to financial, educational and occupational status.<sup>316</sup>

2.4.181 Domestic partnership laws should, however, be sufficiently flexible in order to protect those in need of protection whilst not affecting those in more equal relationships negatively.

2.4.182 See also the discussion on the protection of the victims of relationship breakdown in par 2.4.150 *et seq* above.

**e) Traditional marriage is oppressive by nature and should not be extended to same-sex couples**

2.4.183 Mosikatsana is of the opinion that by applying the feminist critiques of marriage as a patriarchal institution to same-sex marriages, it may be argued that asserting the right to marry has the potential for reinforcement of marriage as an oppressive institution.<sup>317</sup>

2.4.184 The arguments regarding the oppressive nature of traditional marriage have also been raised in the gay and lesbian community in so far as the desirability of same-sex marriage is concerned. Some homosexuals regard marriage as a patriarchal institution not worth aspiring to, while others predict that same-sex marriage has the potential to change the stereotyped nature of the institution.

2.4.185 Divergent views exist with regard to the suggested transference of stereotypes of marriage to same-sex domestic partnerships.

---

<sup>316</sup> Janz *ibid.*

<sup>317</sup> Mosikatsana **SAJHR** 1996 at 549 and 557 referring to A Woolley "Excluded by Definition: Same-Sex Couples and the Right to Marry" (1995) 45 **University of Toronto Law Journal** 473.

2.4.186 On the one hand Polikoff opines that most examples of same-sex relationships in other times and places in fact replicate gender hierarchies.<sup>318</sup> Based on Eskridge's research<sup>319</sup> she observes that most of the same-sex relationships reported was in fact gendered. Notwithstanding the fact that the partners in a same-sex relationships are biologically of the same sex, one partner tended to assume the characteristics and responsibilities of the opposite gender with the result that both partners then acted out traditional gender roles.<sup>320</sup> She predicts that same-sex marriages will be assimilated in the marriage institution by accepting, rather than challenging it.

2.4.187 Janz, on the other hand, argues that same-sex relationships, especially those formed by two women, tend to be more egalitarian than heterosexual relationships because most gay and lesbian couples do not adhere to traditional heterosexual scripts or masculine-feminine role-playing. They cannot "assign the breadwinner role on the basis of gender". Instead they tend to negotiate issues regarding the division of labour, communication and power, which leads to more equitable decisions that are not restricted to a normative or traditional script.<sup>321</sup>

2.4.188 In response to the marriage-is-rotten argument, Hunter proposes that same-sex marriage would in itself change the institution. Hunter has analysed both marriage and domestic partnership against the feminist inquiry of how law reinforces power imbalances within the family. She argues that same-sex marriages cannot recreate the hierarchy (man as breadwinner, woman as housekeeper) and thereby the gender-based power differentials to which the feminists object in traditional marriages.<sup>322</sup> Hunter also refers to evidence that same-sex couples in America are less likely to follow the traditional breadwinner-housekeeper division.<sup>323</sup>

---

<sup>318</sup> Polikoff **Virginia Law Review** 1993 at 1535.

<sup>319</sup> He states that gender roles and attitudes towards women are deeply embedded in our society and that merely introducing a new institution like same-sex marriage will not necessarily change those roles and attitudes but rather that in the long term the old attitudes might absorb the new institution. Eskridge **Virginia Law Review** 1993 at 1488.

<sup>320</sup> Polikoff **Virginia Law Review** 1993 at 1539.

<sup>321</sup> Janz "Canadian Families" 2000 at par IV.C.2.

<sup>322</sup> Hunter in Caudill and Gold **Radical Philosophy of Law** 1995 at 225.

<sup>323</sup> The Mendola Report referred to by Eskridge **Virginia Law Review** 1993 fn 237. See also Pantazis **SALJ** 1997 at 566 where he refers to research by L A Peplau "Lesbian and Gay Relationships" in **Homosexuality: Research Implications for Public Policy** edited by J Gonsiorek and J D Weinrich Sage: 1991 177 which indicates that American gays and lesbians

2.4.189 She argues that even if one partner does the breadwinning and the other partner does the housekeeping, the essence of same-sex marriage refutes the inevitable stereotyping of men in the first role and women in the second. At the very least, same-sex marriage will dramatically strengthen and illuminate the claim that marriage partners are presumptively equal.<sup>324</sup>

2.4.190 Like Hunter, Tripp also claims that same-sex marriage would change marriage as an institution that subordinates women, and states:

In interacting with each other, men and women are guided by traditional social mores as to what to expect of each other in terms of division of labour and leadership. In gay relationships these arrangements have to be individually worked out.<sup>325</sup>

2.4.191 Pantazis argues that most gays and lesbians are said to be in "dual-worker" relationships, with each partner having some economic independence and neither partner being the exclusive breadwinner. Household tasks are not divided and sexual behaviour and decision-making do not occur along husband-wife, clear-cut lines. Pantazis submits that although some measure of specialisation of activities exists it would rarely happen that one partner perform most of the traditionally female activities and the other the traditionally male activities. In this regard specialisation seems to be based on more individualistic factors such as skills and interests.<sup>326</sup>

**f) Legal recognition of domestic partnerships will legitimise polygamous relationships**

2.4.192 A person may become involved in more than one relationship at a time, eg after being alienated and separated from his or her married spouse, without ever getting a divorce. If domestic partnership status is presumed to develop when

---

actively reject traditional husband-wife or masculine-feminine roles.

<sup>324</sup> Hunter in Caudill and Gold **Radical Philosophy of Law** 1995 *ibid*.

<sup>325</sup> C A Tripp **The Homosexual Matrix** 2<sup>nd</sup> edition Englewood Cliffs NJ: Prentice Hall 1987 150 referred to by Pantazis **SALJ** 1997 at 566 fn 79.

<sup>326</sup> *Ibid*.



couples live together, it is possible that a person may find that he or she is a party to two legally recognised relationships simultaneously.

2.4.193 It is a social reality that married migrant workers, working in urban areas, often see their wives (who stay behind in the rural area) only once a year, but lives with their urban partners for the rest of the year. These urban relationships may be stable and of long duration and often there are children born to them. At the same time, though, the marriage with the wife in the rural areas is still valid and may not even be compromised. What should be the respective legal positions of these two "wives"?

2.4.194 In these circumstances it is correct to say that the legal recognition of domestic partnerships has the potential to lead to the recognition of polygamous relationships.

#### **(i) The international approach**

2.4.195 To illustrate how this potential can either be curtailed or left to transpire, certain aspects of the current legal position of domestic partnerships in the Netherlands and British Columbia will briefly be compared. A comparison shows that the various models of relationship regulation tend to favour either strict monogamy or a relaxed approach towards polygamy. Of relevance is the manner in which the particular relationship came into being and the regulatory limitations, if any, on multiplicity that were instituted in this regard in these two countries.

2.4.196 It is interesting to note that the Dutch courts were unwilling to grant judicial recognition to unmarried relationships, saying that it is the task of the legislature to remedy any lacunae that may exist in the existing legislation. Contrary to this, the British Columbian courts played a much more active role in bringing about the changes in the law by giving judicial recognition to these relationships.<sup>327</sup>

2.4.197 The relevant legislation in the Netherlands established a system of registered partnerships for both same- and opposite-sex couples by making the

---

<sup>327</sup> Maxwell **Electronic Journal of Comparative Law** 2000.

provisions relating to marriage applicable to registered partnerships.<sup>328</sup> Similarly, the definition of marriage in the Dutch Civil Code was amended to include same-sex couples.

2.4.198 As a result of this form of legislative amendment, the general conditions of marriage are made applicable to both registered partnerships (be they of the same or opposite sex) and same-sex marriage. Since the Dutch Civil Code provides that a marriage has to be monogamous, both same-sex marriage and registered partnerships must, therefore, also be monogamous.<sup>329</sup>

2.4.199 Partners who want the registered partnership dispensation to apply to their relationship must register their partnership as prescribed in the relevant legislation.<sup>330</sup> When a couple takes specific steps to bring their relationship within the scope of the legislation, it is called an opt-in model.<sup>331</sup>

2.4.200 The British Columbian legislature has specifically re-defined "spouse" in applicable legislation as a person who is, or was, married to another person or living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, in order to give effect to several Court decisions.<sup>332</sup> In addition to the prescribed definition, to qualify as a spouse in a marriage-like relationship, most British Columbian laws require that the couple must have been living together for two or more years. The effect is that employment benefits, pension benefits, social assistance, medical services coverage, etc attach to a marriage-like relationship automatically after the prescribed period. This is also referred to as the ascription model and means that the regime

<sup>328</sup> For more information on the legislation see chap 4.1 below.

<sup>329</sup> In the parliamentary debate on the opening up of marriage to same-sex couples, it has been argued by the gay rights movement that the Dutch government should also consider introducing legislation to recognise relationships of three or more persons. The government replied by showing that there is no need to legislate for this since multiple partnerships can be concluded by means of a notarial cohabitation contract. It was submitted by the government that enquiries showed that this does not often happen in practice, indicating that no real need for it existed. In view of the fact that it can not be argued that the equality principle in sec 1 of the Constitution extends to bigamous marriages, the government also pointed out that marriage between more than two people is unlikely to be acceptable in the Dutch culture. See Netherlands Second Chamber Debates 1999-2000 at 28-29.

<sup>330</sup> Article 80a(5) of the Dutch Civil Code.

<sup>331</sup> See also the discussion on the various models in chap 6 below.

<sup>332</sup> Definition of Spouse Amendment Act of 2000, S B C 2000, chap 24. For a discussion of the British Columbia legal position see chap 4.4.55 *et seq* below.

applies automatically to all relationships falling within the scope of the applicable legislation.

2.4.201 It must be noted that these rights only attach automatically to the relationship as long as neither of the partners nor a third party, for example a medical service provider, disputes the status of the relationship. In the event of such a dispute, be that during or upon termination of the relationship, the matter must be decided by a Court which will evaluate the circumstances of the relationship to make a determination. As such, in the event of a dispute about the presumed status of the relationship, the rights and obligations of the parties are determined ex post facto and may have retrospective effect.

2.4.202 One of the requirements of a valid marriage in British Columbian law is that both spouses must be unmarried at the time of their marriage<sup>333</sup> and polygamy in marriage is a Criminal Code offence. However, British Columbian authorities have ostensibly decided not to enforce the prohibition on polygamy on the basis that the legislation prohibiting it is regarded as unconstitutional.<sup>334</sup> Notably, the legislation that included domestic partnership under the definition of spouse did not limit the status of "marriage-like" partners to those in monogamous relationships. Subsequently, British Columbia has gained a reputation as being a haven for polygamists.<sup>335</sup> It is thus not surprising to learn that it is not illegal in British Columbia to be living in a common-law relationship while being legally married to another person.<sup>336</sup>

2.4.203 In an opt-in system parties must take specific steps to formalise their relationship and will be confronted with the question of an existing marriage or registered partnership at some point before registration. They will thus be forced to consider whether any prior relationships have been properly terminated before being allowed to formally initiate a new relationship.

2.4.204 However, when people drift into a relationship without contemplating the legal consequences and do not formalise the relationship, it could easily happen that

---

<sup>333</sup> Boyd "Marriage & Divorce> Marriage".

<sup>334</sup> In a jurisdiction where the Courts are at liberty to question the constitutionality of legislation, the public would be aware of this decision not to enforce.

<sup>335</sup> FAMILYFACTS.CA "B.C. is Safe Place for Polygamists" 2001.

<sup>336</sup> BC Booklet **Living Common Law** 2005 at 5.

a partner who is still married but separated, eventually moves in with the new partner and they start amassing goods together.<sup>337</sup>

2.4.205 The relationship develops over time and may only be tested for compliance with the relevant legislation in the event of a dispute when the status of the relationship needs to be formally determined. Therefore, a couple in a presumed domestic partnership may only be forced to consider the question whether either of them is still married to a third party at the point when the subsequent domestic partnership breaks up. Both parties in such a relationship are vulnerable to the unfavourable legal outcome. For example, since the previous marriage was not terminated in law, the former spouse still has all the legal rights of marriage and may lay claim to goods that the domestic partners may have expected to have sole title in.

2.4.206 The Court would be called upon to settle the dispute. If the enabling legislation prescribes that the outcome of the case must be decided on an equitable basis, the Court may rule in favour of the second relationship if the marriage has, for all practical purposes, ceased to exist and the second relationship has all the qualities of a marriage. Such an outcome would however result in the judicial recognition of bigamy.

2.4.207 Against this background, it is submitted that there is potential for recognition of multiple relationships under an ascription model, more so than under a registration system. It is not submitted that any formal or definite correlation exists between the model of recognition of unmarried relationships and non-monogamous relationships. It is further not submitted that an ascription model indicates social goodwill towards bigamous relationships. It is, however, possible that it may work out that way in practice, as has been the case in British Columbia.

2.4.208 Proponents of legal recognition of domestic partnerships often refer to the vulnerability of the partners as motivation for their cause. As will be seen in reference to the South African scenario,<sup>338</sup> a partner who cannot convince the other partner to commit to the relationship formally often stays in the relationship despite their vulnerable and uncertain position. Following this view, domestic relationships in an

---

<sup>337</sup> Bailey-Harris **Child and Family Law Quarterly** 1996 at 138.

<sup>338</sup> See para (ii) below.

ascription system will be regarded as deserving of protection despite the fact that one or both of the partners may still be married to other people.<sup>339</sup>

2.4.209 Consider, for example, also the French Pacte Civil de Solidarité (PACS). Here the parties are subject to formal registration at the local court, which has the same legal significance as a marriage celebration. The relevant legislation specifically provides, as with marriage, that no one may enter a PACS prior to the dissolution of a previous marriage or when already bound by another PACS. This means that a civil marriage and PACS can not legally co-exist.

2.4.210 However, another type of personal relationship, namely *concubinage*, exists in the French legal system. *Concubinage* refers to the legal recognition of the fact that two persons are living together as spouses. It comes into existence at a special ceremony without the expression of the will of the parties. Nevertheless, both French legislation and case law are tolerant with regard to polygamy in this context. For example, both a female spouse and a female concubine can simultaneously be beneficiaries of the social security of the same insured man.<sup>340</sup> Concurrent *concubinage* relationships and marriage are thus given legal recognition by both the French courts and legislation.

2.4.211 In view of this, it is submitted that the degree of tolerance by both society and the legal system for non-monogamous relationships will play a role in determining the model of, as well as requirements for, recognition of unregistered domestic partnerships.

<sup>339</sup> Referred to by Singh **CILSA** 1996 at 322. Problems may also arise with the enforcement of a cohabitation agreement – express or implied – where the partner being sued is still legally married to a third party. It has been argued that in such cases pre-cohabitation contracts are *contra bonos mores* (violate public policy) to the extent that they impair the community of property rights of the lawfully married spouse. This defence was raised in **Marvin v Marvin** 1976 18 Cal 3d 660 where the defendant claimed that any alleged arrangement between himself and his cohabiting partner purporting to transfer to her a half interest in their community of property, could not be upheld on the ground that the arrangement was *contra bonos mores* since it infringed on the property rights of his lawful wife. *In casu* the defendant's argument was not upheld for the reason that even if the agreement with the partner was improper, an improper transfer of community property was merely voidable and not void *ab initio*. It may therefore be possible to uphold a claim by a former domestic partner against the communal estate of a marriage that was not officially terminated. It must, however, be kept in mind that the claim in the Marvin case was contractual.

<sup>340</sup> Steiner **Child and Family Law Quarterly** 2000 at 4 and Borillo in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 477 fn 7.

**(ii) The South African scenario**

2.4.212 According to the Centre for Applied Legal Studies of the University of the Witwatersrand there are three types of multiple relationships in South Africa, namely multiple domestic partnerships; customary marriage and domestic partnership; and civil marriage and domestic partnership.<sup>341</sup>

2.4.213 The legal recognition of polygamous customary marriages for some members of the population, but not the rest, is peculiar to South Africa.<sup>342</sup> Therefore, not unexpectedly, the responses to the Issue Paper and Discussion Paper regarding the possible recognition of multiple relationships were divided.

2.4.214 The Centre for Applied Legal Studies suggested that it would be unrealistic and unfair to the parties involved to ignore these relationships as many of these partners are in dire need of protection as a result of the unequal power relations in these relationships.

2.4.215 With reference to African traditions<sup>343</sup> it was submitted that multiple relationships were traditionally accepted when men could afford to keep two families but that this type of polygamy should not be encouraged.<sup>344</sup>

2.4.216 Opposing respondents generally referred to the sanctity of marriage which would be violated if polygamous domestic partnerships were legitimised. The concern was expressed that such protection will open the door for further exploitation of women and that it would in fact be protecting adultery.<sup>345</sup> Another submission stated that bigamous relationships harm both families and that marriage should be given preference.<sup>346</sup>

---

<sup>341</sup> CALS Report 2001 *ibid*.

<sup>342</sup> Sections 2 and 3 of the Recognition of Customary Marriages Act of 1998.

<sup>343</sup> M Garth.

<sup>344</sup> P Knox.

<sup>345</sup> Rhema Ministries and His People Church.

<sup>346</sup> Pretorius\_ark. The United Christian Church found the concept disgusting.

2.4.217 In the motivation for its view that the law of marriage should not be extended to include same-sex couples, the United Christian Action expressed concern for the fact that it will become all the more difficult to draw the line on which relationships to recognise.<sup>347</sup>

2.4.218 Noticeably, respondents who favoured the recognition of polygamous domestic partnerships are either individuals who acknowledge polygamy in their culture or are institutions who deal with the problems of these individuals during the existence or subsequent to the termination of these relationships. They submitted that polygamous relationships are a factual reality in our heterogeneous society and that it would result in untold hardships for many women if they are not afforded legal protection in such relationships.<sup>348</sup>

2.4.219 On the other hand, respondents opposed to the possibility of polygamous relationships are those respondents to whom the concept of polygamy is unknown and unacceptable in their culture and religion.

2.4.220 The Commission's Report on Customary Marriages<sup>349</sup> submits that many of the objections to polygyny are based on previous moral and religious objections whereas the main charge today is that polygyny discriminates against women. An evaluation of the current sentiment about polygyny leads the Report to conclude that overall public sentiment no longer supports polygyny.

2.4.221 Nonetheless, the Commission submits that allowing a gradual process of disuse of the institution of polygyny is preferred to an outright ban of it. The Commission further contends that from the emerging constitutional jurisprudence on issues of culture, customary law and religion it appears that the Courts are not prepared to strike down a customary practice merely because it is controversial or is under attack from various interest groups. According to the Report it is now unsafe to assume that a kind of hegemonic western orthodoxy will prevail over African customs

---

<sup>347</sup> "If we allow two men to marry, what will prevent three men marrying, or a bisexual marrying both his sexual partners in future?"

<sup>348</sup> Under customary law a man may take as many wives as he wishes. A migrant black male worker with a customary wife in the rural area often cohabits with another woman in the city where he works. Women's Legal Centre, the Directorate: Gender Issues Department: Justice and Constitutional Development and Centre for Applied Legal Studies.

<sup>349</sup> Chap 6 at 84 *et seq*

which do not fit comfortably within the dominant cultural frame.<sup>350</sup> There are, at least for the time being, cultures where polygamy (or rather polygyny) is still practiced.

**g) Public opinion will not allow the legal recognition of domestic partnerships**

2.4.222 In a constitutional dispensation the government derives its powers from a written constitution. Section 2 of the South African Constitution<sup>351</sup> provides that the Constitution is the supreme law of the country and that law or conduct inconsistent with it is invalid. For a supreme constitution to be effective the judiciary must have the power to enforce it.<sup>352</sup>

2.4.223 The question that follows is why unelected judges should have the power to strike down decisions of a democratic legislature and a democratic and representative government. The answer lies in the fact that democracy is not simply "the rule of the people", but always "the rule of the people within certain predetermined channels, according to certain prearranged procedures."<sup>353</sup>

2.4.224 The Constitution is therefore a democratic pre-commitment to a government that is constrained by certain rules, including the rule that a decision of the majority may not violate the fundamental rights of the individual, a principle that strengthens rather than weakens democracy.<sup>354</sup>

---

<sup>350</sup> The South African Law Reform Commission found in its Report on Islamic Marriages that a substantial number of respondents were opposed to the strict regulation of polygyny as proposed in the Discussion Paper. These respondents generally considered the proposed preconditions to be too stringent and said that it would effectively close the door on polygyny in the Islamic culture. In its final recommendations, the Commission retained the regulation clause but eliminated the objectionable preconditions to be consistent with Islamic law. South African Law Reform Commission Report **Islamic Marriages** 2003 at para 3.185.

In the Hindu religion polygamy does exist although monogamy is the approved Hindu norm. See Rautenbach and Goolam **Introduction to Legal Pluralism** 2002 at 41.

<sup>351</sup> Constitution of the Republic of South Africa, 1996, adopted on May 8 1996, hereafter referred to as "the Constitution".

<sup>352</sup> De Waal *et al* **Bill of Rights Handbook** 2001 chap 1 at 8.

<sup>353</sup> S Holmes "Precommitment and the Paradox of Democracy" in J Elster & R Slagstad eds **Constitutionalism and Democracy** (1988) 231 referred to in De Waal *et al* **Bill of Rights Handbook** 2001 chap 1 at 9 fn 28.

<sup>354</sup> De Waal *et al* **Bill of Rights Handbook** 2001 chap 1 at 9.



2.4.225 It was always expected that proposals for the legal recognition of domestic partnerships would elicit strong public reaction. Comments received from respondents from certain groups in society to the Issue and Discussion Papers reflect their opposition to proposed legislation granting unmarried couples legal recognition and even more so, to legislation granting same-sex couples the right to marry.

2.4.226 Since the Constitutional Court is the institution which adjudicates the constitutionality of legislation regulating such recognition, it is necessary to consider the Court's handling of matters that involved public opinion. Public opinion in this sense can be defined as the shared and accepted morality of a given social group.<sup>355</sup>

2.4.227 It is generally accepted that the Constitutional Court has an important role to play as a guardian of minority rights. A more sensitive issue is, however, how the Court should deal with the question of protecting minority rights against the will of the public.<sup>356</sup>

2.4.228 In an article about the jurisprudence of the Constitutional Court after its first year of existence, Cockrell drew the conclusion that public opinion is of little relevance in a constitutional argument about the interpretation of the Bill of Rights.<sup>357</sup> In **S v Makwanyane**<sup>358</sup> the Constitutional Court made it clear that if public opinion were to be decisive, there would not be a need for constitutional adjudication.<sup>359</sup> This statement is of particular importance especially since this case, in which the constitutionality of the death penalty was decided, attracted much interest amongst

<sup>355</sup> H L A Hart **Law, Liberty and Morality** Oxford University Press 1963 at 17 – 24 referred to by Du Plessis **SAJHR** 2002 at 2.

<sup>356</sup> Also known as the counter-majoritarian dilemma.

<sup>357</sup> Cockrell **SAJHR** 1996 at 1 referred to by Du Plessis **SAJHR** 2002 at 1, noted that the Court had moved from a formal to a substantive vision of law. This was a result of the fact that the foundational values incorporated in the Bill of Rights demanded a substantive as opposed to a formal approach of the Court. An aspect of the Court's adoption of a substantive reasoning involves the matter of public opinion.

<sup>358</sup> 1995 (3) SA 391 (CC).

<sup>359</sup> At [88] per Chaskalson P referred to by Du Plessis **SAJHR** 2002 *ibid*:

The protection of rights could then be left to Parliament..... The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in our courts, was to protect the rights of minorities and others who cannot protect their rights through the democratic process.

the general public. This was a topic on which the general public held very strong opinions, a large majority of which were opposed to the abolition of the death penalty, despite the fact that the right to life is expressly entrenched in the Bill of Rights.

2.4.229 Whereas public opinion is precarious and susceptible to change over time, it is the Court's place to uphold individual rights against the sway of public opinion in controversial issues where individual rights are threatened by laws or policies which have large public support.<sup>360</sup>

2.4.230 An overview of the Constitutional Court judgments<sup>361</sup> shows, however, that the Court does not just negate public opinion. If it is to retain its legitimacy as an institution, the Court must provide persuasive reasons why it chooses to reject public opinion. Thus the Court solves this problem through the use of critical morality.<sup>362</sup>

2.4.231 Critical morality seeks to exhibit and lay bare the value assumptions implicit in public opinion, to reassess these and render them coherent and thus to develop critical principles by reference to which we can reappraise and re-orient our ordinary day-to-day judgments and standards of judgment. Critical morality therefore reflects on the way we pass judgment on behaviour and the standards we use in doing so.<sup>363</sup>

2.4.232 This modus operandi is particularly visible in the way the Court handled the **Makwanyane** case.<sup>364</sup> In this case it was argued on behalf of the Attorney-General that the death sentence has the greatest deterrent effect and meets the need for retribution that is demanded by the majority of society in response to South Africa's exorbitant crime figures. These arguments of the Attorney-General also reflected the public's opinion about the role of the death sentence.

---

<sup>360</sup> Du Plessis **SAJHR** 2002 at 2.

<sup>361</sup> Unless otherwise indicated the discussion of these cases was gleaned from Du Plessis **SAJHR** 2002.

<sup>362</sup> As Du Plessis **SAJHR** 2002 suggests, the identification of the problem in the public opinion is only the beginning of the Court's task in this respect. The Court runs the risk of losing legitimacy if it stops at merely criticizing the public opinion and finds against it.

<sup>363</sup> If we do not reorient them, that will show what we have merely entertained and understood, but not accepted, the critical principle in question. Definition for critical morality by N MacCormick available at [www.ethics.bun.kyoto-u.ac.jp/~kodama/ethics/wordbook/positive\\_morality.html](http://www.ethics.bun.kyoto-u.ac.jp/~kodama/ethics/wordbook/positive_morality.html).

<sup>364</sup> 1995 (3) SA 391 (CC).

2.4.233 The Court, however, ruled that the death sentence is unconstitutional, despite the fact that it was made clear to the Court that public opinion favoured the death sentence. However, the Court did so only after bringing critical morality to bear on the deterrence argument and concluding that the deterrence argument no longer deserves "further homage" since the "premise underlying and accounting for it is fallacious or unfounded".<sup>365</sup>

2.4.234 The Court's approach entailed an investigation into the validity of the premise for the public's opinion on this issue. After finding that this premise is "fallacious and, at the least, highly speculative and rationally unconvincing", the Court was in a position where it could give good reasons for refusing to rely on the public opinion.<sup>366</sup>

2.4.235 The Court, therefore, did not merely stop at the statement that the right to life is entrenched in the Bill of Rights and since the Constitution is the superior law of the country, the State may not execute dangerous criminals. On the contrary, through critical morality, the Court questioned the basis for the public opinion, found the underlying arguments to be incorrect and, in giving its ruling explained why it could not make a ruling in accordance with the public opinion.

2.4.236 Another example in the context of the minority rights of homosexuals and where the public's opinion clearly differed from the Court's view on a moral issue, is found in **National Coalition for Gay and Lesbian Equality v Minister of Justice**<sup>367</sup> which dealt with the decriminalization of sodomy. The Court's official position as a guarantor of minority rights made it an obvious place for gays and lesbians to turn to for support.<sup>368</sup> In this case the Court was very alert to the fact that there is

---

<sup>365</sup> Per Didcott J at [188].

<sup>366</sup> Per Mohamed DP at [287]-[294]; With reference to the high crime rate at the time the case was heard, Chaskalson P pointed out that it could not exclusively be attributed to the moratorium that was placed on executions at the time, but that other factors also played a role. He referred to the conflict associated with the political change during 1990-1994, homelessness, unemployment, poverty and the police's inability to cope with the surge in crime. Consequently, the Court argued that the greatest deterrent to crime was the likelihood of being caught, convicted and sentenced and that the missing ingredient in the fight against crime is effective policing and an effective Court system, not the death sentence. Regarding the public's call for retribution, the Court said that this could be translated into a demand for vengeance. On this point Chaskalson P said that there are other ways than capital punishment that moral outrage could be shown, like incarcerating someone for a very long time. He said that the State need not engage in the calculated killing of murderers in order to express moral outrage at their conduct.

<sup>367</sup> 1999 (1) SA 6 (CC).

<sup>368</sup> Du Plessis **SAJHR** 2002 at 19.

considerable public opposition to the expression of homosexuality. Ackermann J, writing the Court's judgment referred to the private morals of a section of the community which are based "on nothing more than prejudice" and "religious views".<sup>369</sup>

The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would not wish to have the physical expression of sexual orientation differing from their own proscribed by the law. It is nevertheless equally important to point out that such views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation.

2.4.237 Sachs J, in his separate but concurring judgment, concluded that the public's prejudice is not so much against the act of sodomy (the act can also be performed in a heterosexual relationship) but more against the homosexual person who performs it, and that this fact brings the right to equal treatment into play. Ackermann J pointed out that it also influences their rights to dignity and privacy. By using critical morality the Court showed that the public's opinion on this issue is an emotional and biased reaction against homosexuals simply because they are different, and as such is nothing more than prejudice.<sup>370</sup>

2.4.238 Regarding the public's religious views and influences on the matter of homosexuality, Sachs J approached the matter from a different angle by suggesting that those who disagree with homosexuality or condemn it for religious or other reasons are free to hold those beliefs and even to express them. But he appealed to all people in South Africa to recognise the vitality of difference and encouraged them to strive for an ethical identity which accepts difference. In this context he relied on the constitutional values and said:

The invalidation of anti-sodomy laws will mark an important moment in the maturing of an open democracy based on dignity, freedom and equality...The Constitution acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.<sup>371</sup>

---

<sup>369</sup> *Op cit* at [37] – [38].

<sup>370</sup> Du Plessis **SAJHR** 2002 at 21.

<sup>371</sup> Sachs J *op cit* at [132].

2.4.239 Of particular relevance to the topic of this investigation is the conclusion to Sachs' J judgment:

In my view, the decision of this Court should be seen as part of a growing acceptance of difference in an increasingly open and pluralistic South Africa. It leads me to hope that the emancipatory effects of the elimination of institutionalized prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the human kind.<sup>372</sup>

2.4.240 A third example of how the Constitutional Court deals with matters where public opinion differs from the Court's view is found in the **Hoffmann v South African Airways** case.<sup>373</sup>

2.4.241 In this case the South African Airways had the opinion that all people with HIV/AIDS were unsuitable to work as flight attendants, based on the common perception that such people are debilitated, sickly and liable to contract opportunistic diseases. In this case the Court used medical evidence to show that the public opinion is unsubstantiated prejudice and pointed out that it was necessary to distinguish between the various stages of HIV. Hoffmann was in the asymptomatic stages of infection and could perform his task normally. By using critical morality Ngcobo J stated that

[f]ear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits. Our treatment of people who are HIV positive must be based on reasoned and medically sound judgments.

2.4.242 The Court ruled that Mr Hoffmann's constitutional right not to be unfairly discriminated against could not be limited by ill-informed public perception of persons with HIV or even the policies of airlines.

2.4.243 As was seen above, critical morality as applied by the Constitutional Court has involved the Court's scrutiny of the public's morality on a given issue. Such scrutiny has often revealed that the public's opinion is informed by false information,

---

<sup>372</sup> Sachs J *op cit* at [138].

<sup>373</sup> 2001 (1) SA 1 (CC).

fraught with prejudice or mired in sentiment. In each of these cases it was necessary for the Constitutional Court to expose the errors in those opinions.<sup>374</sup>

2.4.244 In **Volks N.O. v Robinson**<sup>375</sup> Sachs J emphasised in his minority judgment that the issue is not whether members of religious or cultural communities should as a matter of faith be free to regard marriage as a sacred institution. He continued that it is also not to query the corollary right of such believers to condemn those who are guilty of what they may regard as fornication and adultery. He submitted that their entitlement as part of their religious belief to criticise what they regard as misconduct, remains unchallenged. However, it does not per se mean that the State should be bound by such concerns.

2.4.245 In the recent judgment by the Constitutional Court in **Minister of Home Affairs v Fourie**,<sup>376</sup> Sachs J confirmed this view emphatically. Under the pertinent heading "Respect for religious arguments" he said that although under our Constitution the rights of non-believers and minority faiths must be respected, the religious beliefs held by the great majority of South Africans must be taken seriously. After referring to the importance of their relationship with God for many believers and the important role played by religious bodies in society he submitted that

it would be wrong and unhelpful to dismiss opposition to homosexuality on religious grounds simply as an expression of bigotry to be equated to racism.<sup>377</sup>

2.4.246 However, Sachs J continued to say that despite the acknowledgment by the Court of the important role that religion plays in our public life, religious doctrine can not be used as a source for interpreting the Constitution.

From a constitutional point of view, what matters is for the Court to ensure that [a religious person] be protected in his right to regard his marriage as sacramental, to belong to a religious community that celebrates marriages according to its own doctrinal tenets,....<sup>378</sup>

---

<sup>374</sup> Du Plessis **SAJHR** 2002 at 21 *et seq.*

<sup>375</sup> 2005 (5) BCLR 446 (CC) at [204].

<sup>376</sup> 2006 (1) SA 524 (CC).

<sup>377</sup> *Op cit* at [91].

<sup>378</sup> *Op cit* at [93].

2.4.247 Then, at a later stage, when considering the possible justification of the infringement of the right to equality of same-sex couples, he remarks that however strongly held the beliefs are that permitting same-sex couples into the institution of marriage would devalue that institution -

these beliefs cannot through the medium of state-law be imposed upon the whole of society and in a way that denies the fundamental rights of those negatively affected. The express or implied assertion that bringing same-sex couples under the umbrella of marriage law would taint those already within its protection can only be based on a prejudgment, or prejudice against homosexuality. This is exactly what section 9 of the Constitution guard against. It might well be that negative presuppositions about homosexuality are still widely entertained in certain sectors of society. **The ubiquity of a prejudice cannot support its legitimacy.** (Own emphasis.)

2.4.248 The Constitutional Court also refers to the public morality that is found in the Constitution itself. The Court refers to the Constitution as a reflection of the nation's soul, demonstrating that the reason for rejecting the opinion of citizens is found in the constitutional morality of those same citizens and that the Court's role is only to show it to them.<sup>379</sup>

2.4.249 In this context and with reference to the Constitutional Court's regard to public opinion, Cameron discusses constitutional protection of sexual orientation in particular within the context of the African concept of humanity *ie ubuntu*.<sup>380</sup> Ubuntu embraces all forms of expressive human flourishing that contribute to society and that does not harm other humans. In **S v Makwanyane**, Langa J articulated the value of ubuntu as follows:<sup>381</sup>

It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of.

2.4.250 The entitlement to respect has a corresponding duty, namely to give the same respect, dignity, value and acceptance to each member of that community. In

---

<sup>379</sup> Cameron **SALJ** 2002 at 643.

<sup>380</sup> *ibid.* He points out that the controversy about the place of homosexuality in our society raises real and important questions for us as Southern Africans. Who are we as a people, and what sort of society do we wish to live in? To whom, and to which groups, does our concept of African humanity extend? Is Africa big enough, and is African society, as it should be, large and generous enough to include variant minority groups like gays and lesbians within it?

<sup>381</sup> 1995 (3) SA 391 (CC) at [224] as referred to by Cameron **SALJ** 2002 at 646.

regulating the exercise of rights, emphasis is also put on the sharing and co-responsibility and the mutual enjoyment of rights by all.<sup>382</sup>

2.4.251 In the constitutional context ubuntu entails constitutional protection for the strong and the powerful, for the influential and the popular, for the weak and the unprotected and the socially vulnerable alike. The view of the majority as reflected in public opinion is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provision without fear or favour.<sup>383</sup>

2.4.252 Cameron puts it as follows:<sup>384</sup>

[T]he very basis of all constitutionalism, and the foundation of the constitutional State itself, is the protection of unpopular minorities who are unable to assert their entitlement to dignity and equality through the electoral process. To rely on popular expressions of distaste, dislike or hatred for unpopular minorities as a justification for withholding constitutional protection from them is, therefore, to misunderstand the very essence of constitutionalism.

2.4.253 The jurisprudence of Chaskalson P and Langa J demonstrates that the constitutional protection of minorities in South Africa is based on a commitment to a more mature society, which relies on moral persuasion rather than force. The test for the integrity of a legal system is not the popular cases, but the unpopular and politically inexpedient cases where protection of disfavoured minorities puts principle to its most vigorous test.

---

<sup>382</sup> Referred to by Cameron **SALJ** 2002 *ibid*.

<sup>383</sup> Chaskalson P in Makwanyane *op cit* at [88] referred to by Cameron **SALJ** 2002 *ibid*.

<sup>384</sup> *Ibid*.



## **CHAPTER 3: THE LEGAL POSITION REGARDING DOMESTIC PARTNERSHIPS IN SOUTH AFRICA**

### **3.1 Prior to the inception of the Interim Constitution in 1994**

#### **a) No specific family law protection for domestic partners**

3.1.1 Marriage laws in South Africa have traditionally provided the parties to a marriage with a variety of legal protections.<sup>1</sup> These laws governed what happened to the property of the parties during the marriage and on its dissolution, either by divorce or death. Being married also meant that many State and other benefits were automatically acquired, such as membership of medical aid funds, pension funds etc. Married couples also had a reciprocal duty of support under the common law.

3.1.2 To be legal a marriage had to be entered into in accordance with the Marriage Act of 1961. Marriages under this Act, known as civil marriages, did not include Muslim and African customary marriages (partly because these marriages are potentially polygamous). Prior to 1994, no provision was made for partners in other kinds of intimate relationships.

3.1.3 Over the last few decades significant reforms of South Africa's marriage laws have taken account of the context of gender inequality and the need for a fair system for the control of marital property. However, the protections they offer have tended to benefit only some of the couples who needed assistance.<sup>2</sup>

3.1.4 Domestic partnerships have never been prohibited by South African law, but nor have they enjoyed any noteworthy recognition or protection by the law.<sup>3</sup> Simply

---

<sup>1</sup> Barnard, Cronje and Olivier **Persons and Family Law** 1990 at 164 *et seq.*

<sup>2</sup> Goldblatt "Law Recognise 'New' Families" 2002 at 2.

<sup>3</sup> Women's Legal Centre Report **Litigation and Law Reform: Domestic Partnerships** 2000.

stated, a man and a woman living together have not had the rights and duties of a married couple.<sup>4</sup> The relationship has not been recognised by law as a marriage with the concomitant and participatory rights and duties that marriage confers.<sup>5</sup> That has been the case irrespective of the duration of the relationship.<sup>6</sup>

3.1.5 If one compares this with the situation in other countries, it is evident that there is scarcely a country left in the world that does not afford some measure of recognition to a domestic partnership, always provided that the relationship is not of a casual or intermittent character.<sup>7</sup>

3.1.6 With specific reference to same-sex partnerships, South African society, prior to 1994 was characterised by a strong degree of hostility towards homosexuals and homosexual conduct.<sup>8</sup> The South African legislature and judiciary entrenched a system of "sexual policing" in terms of which homosexual conduct was prosecuted.<sup>9</sup> The treatment was historically founded and did not generally include any explicit punishment for lesbian behaviour.<sup>10</sup>

3.1.7 As far as the judiciary's attitude is concerned, it may be noted that in 1956, 30 men were arrested on charges of indecent assault in Durban. In handing down sentences from six to fifteen months, the magistrate declared:<sup>11</sup>

your type is a menace to society and likely to corrupt and bring about degradation to innocent and unsuspecting, decent-living young men and so spell ruin to their future.

<sup>4</sup> Hutchings & Delpont **De Rebus** 1992 at 121.

<sup>5</sup> Singh **CILSA** 1996 at 325.

<sup>6</sup> Sinclair **Marriage Law** 1996 at 274; Hahlo in Kahn **Fiat iustitia** 1983 at 246.

<sup>7</sup> Hahlo in Kahn **Fiat iustitia** 1983 *ibid.*

<sup>8</sup> Steyn **TSAR** 1998 at 97; Wildenboer **Codicillus** 2000 at 58.

<sup>9</sup> In terms of the common law sodomy and other "unnatural offences" between men were punished. See also the 1969 amendment (Immorality Amendment Act of 1969 to the Sexual Offences Act of 1957) which criminalised behaviour between male persons at a party which is calculated to stimulate sexual passion to give sexual gratification. A "party" was defined as any occasion where more than two persons were present.

<sup>10</sup> The Immorality Amendment Act of 1988 did, however, prohibit "immoral and indecent acts" between women and girls under 19. See also the discussion of **Van Rooyen v Van Rooyen** 1994 (2) SA 325 (W) below.

<sup>11</sup> Gevisser and Cameron **Gay & Lesbian Lives** 1994 at 18 fn 6 referred to by Steyn **TSAR** 1998 at 98.

3.1.8 Even in 1990, in the case of **S v M**,<sup>12</sup> one still found reference to the term "normal heterosexual relationships".

3.1.9 The case of **Van Rooyen v Van Rooyen**<sup>13</sup> concerned the access rights of a lesbian mother to her two minor children. The Court explicitly rejected the idea that "the relationship created on the basis of two females" could be called a family<sup>14</sup> and attacked a statement by the family counsellor that homosexuality was no longer regarded as a mental illness or a sin, listing the "wrong signals" to which the children would be exposed in a lesbian household.<sup>15</sup> The outcome was an intrusive order, effectively forcing the mother to choose between her lesbian lifestyle and unencumbered access to her children.<sup>16</sup>

3.1.10 It is therefore clear that since homosexuality was criminalised and lesbian behaviour was frowned upon, the recognition of a same-sex marriage or partnership of any kind would have been out of the question.

3.1.11 Gay rights formed part of the broader spectrum of human rights that were negated by the apartheid system. The government's divisive strategy that was integral to the concept of apartheid would, however, prove to be a crucial link in the subsequent development of human rights and gay consciousness.<sup>17</sup>

## **b) Ordinary rules and remedies of the law**

3.1.12 No family-law consequences flowed automatically from domestic partnerships. Partners could not invoke any of the protective, adjustive and supportive measures available to spouses. In order to find protection, partners

---

<sup>12</sup> 1990 2 SACR 509 (E).

<sup>13</sup> 1994 (2) SA 325 (W).

<sup>14</sup> At 326J.

<sup>15</sup> At 329B-330B.

<sup>16</sup> At 329F-G. See also Steyn **TSAR** 2001 at 346.

<sup>17</sup> Gevisser and Cameron **Gay & Lesbian Lives** 1994 at 4-5 fn 4 referred to by Steyn **TSAR** 1998 at 99 fn 17.

(mainly opposite-sex, but, to the extent that it was possible, same-sex partners as well) had to make use of the ordinary rules and remedies of the law, such as those relating to property and contract, unjustified enrichment and estoppel.<sup>18</sup>

3.1.13 It is important to note that these remedies are still available to partners today but are no longer the sole remedies. Although these common-law rules have the potential to regulate the rights of parties upon the termination of a cohabitation relationship, they do not provide a comprehensive, certain and coherent set of principles to protect cohabitants, no matter how long-standing that relationship.<sup>19</sup> See the discussion on the post-constitutional developments in para 3.2 below.

### (i) Contract

3.1.14 The South African Courts have on occasion come to the assistance of formerly married couples and couples in domestic partnerships by deciding that an express or implied universal partnership exists between the couple.<sup>20</sup>

3.1.15 The concept of universal partnership is one of contract law. A universal partnership is a contract in which the parties agree to bring into the community of property all their property, *ie* what is currently owned and what is still to be acquired, for their joint benefit.

3.1.16 Two types of universal partnership are distinguished. Firstly, there is the *universorum bonorum* whereby all current and future assets **whether acquired from**

<sup>18</sup> Sinclair **Marriage Law** 1996 at 274 with references made therein. See also Mokgoro and O'Regan JJ in **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) at [125].

<sup>19</sup> In **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) at [127] Mokgoro and O' Regan JJ in their minority judgment submitted that this is still the position today:

Moreover, there are no express statutory provisions at all to regulate the affairs of cohabitants upon termination of their relationship by the death of one party. Accordingly at termination by the death of one of the parties, the surviving partner is left without effective legal recourse, unless she or he can formulate a claim based on the principles of the common law described above. This situation arises, despite the fact that it is clear that the relationship of cohabitation was one in which the parties had undertaken mutual duties of support and one in which patterns of vulnerability and dependence had been established, such that the death of one party may put the other in great difficulty.

<sup>20</sup> Schweltnus "The Legal Implications of Cohabitation in South Africa" 1994 at 6; See also De Bruyn & Snyman **SA Mercantile Law Journal** 1998 at 10 where the case is argued that the universal partnership could be the answer to the problems relating to property division between former domestic partners.

**commercial undertakings or otherwise** are put in common. Secondly, there is a *universorum quae ex quaestu veniunt* whereby the parties contract a partnership of all future assets that they may acquire during the continuance of the partnership from **any commercial activity**.<sup>21</sup> The former is particularly relevant for purposes of providing a basis for the division of property in the family law context since parties do not necessarily engage in commercial activities during their relationship.

3.1.17 When the universal partnership is terminated, the parties' assets are divided between them. In terms of the common law there is no presumption of equality of shares in the partnership, but the shares are divided in proportion to what each party has contributed, whether in capital, stock, labour or services. If it is impossible to say that one party has contributed more than the other, then they are entitled to share equally.<sup>22</sup>

3.1.18 In the family law context, the concept of universal partnership was originally used in divorce cases, prior to the introduction of the judicial discretion to redistribute property in certain instances. It assisted women married out of community of property to achieve a sharing of the assets accumulated by the joint efforts of spouses.<sup>23</sup>

---

<sup>21</sup> Bamford **Law of Partnership** 1982 at 1; R J Pothier **A Treatise on the Contract of Partnership with the Civil Code and the Code of Commerce Relating to that Subject in the Same Order** translated from the French with Notes referring to decisions of the English Courts by Tudor London, Butterworths, 1854 24 as quoted by De Bruyn & Snyman **SA Mercantile Law Journal** 1998 at 370; **LAWSA Vol 19** 266 fn 7.

See also **Isaacs v Isaacs** 1949 (1) SA 952 (C) 955 where the Court stated that a partnership *universorum bonorum* covers all the partners' acquisitions whether from commercial undertakings or otherwise, whereas under the *universorum quae ex quaestu veniunt* the partners contract a partnership of all they may acquire during its continuance, from every kind of commerce.

Cf the discussion on the two types of universal partnerships by Mokgoro and O' Regan JJ in **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC), fn 44 where no specific reference has been made to the commercial nature of the partnership activities:

There are in fact two types of universal partnership known in our law, the *societas universorum bonorum* and the *universorum quae ex quaestu veniunt*. ... The former is an agreement in terms of which the parties agree to pool all their existing and future property, and the latter is an agreement in which the parties agree to pool all property they receive during the term of the partnership.

<sup>22</sup> **Fink v Fink** 1945 WLD 226 at 241. See also the discussion in Women's Legal Centre Report **Litigation and Law Reform: Domestic Partnerships** 2000 at par 5.3.

<sup>23</sup> Sinclair **Marriage Law** 1996 at 279.

3.1.19 At a later stage it was brought to the fore again to achieve a fair distribution of assets where parties were either not married,<sup>24</sup> or were married under a marriage regime not recognised by the law.<sup>25</sup>

3.1.20 A universal partnership can arise from an express or a tacit agreement, the latter leading to an implied contract. Although evidence may present a problem in such cases, the Court may find that a partnership exists between persons who cohabit and that each is entitled to share equally in the profits.<sup>26</sup>

### (aa) Implied contract

3.1.21 Although it was accepted that the *societas universorum quae ex quaestu veniunt* could be established implicitly,<sup>27</sup> the *societas universorum bonorum* had to be concluded expressly.<sup>28</sup>

<sup>24</sup> In **Mograbi v Mograbi** 1921 AD 274 the parties intended to be married in community of property, but the marriage ceremony was discovered to have been invalid. In **V v De Wet** 1953 (1) SA 612 (O) the parties cohabited for 21 years. See also the discussion in Women's Legal Centre Report **Litigation and Law Reform: Domestic Partnerships** 2000 at par 5.3.

<sup>25</sup> **Ally v Dinath** 1984 (2) SA 451 (T); **Isaacs v Isaacs** 1949 (1) SA 960 (C). See also the discussion in Women's Legal Centre Report **Litigation and Law Reform: Domestic Partnerships** 2000 at par 5.3.

<sup>26</sup> Hutchings & Delpont **De Rebus** 1992 at 122.

<sup>27</sup> In **Fink v Fink** 1945 WLD 226 at 228 Ramsbottom J held that the relationship between the parties, who were married out of community of property and ran a dairy business together, established a *societas universorum quae ex quaestu veniunt* notwithstanding the fact that there was no express agreement to that effect. In this case the Court ascertained the intention of the parties from their words and conduct and was satisfied that an implied contract came into existence.

In **Isaacs v Isaacs** 1949 (1) SA 960 (C) the parties were married and divorced in terms of Islamic Law, being aware at all times that the marriage was not legally recognised. Both parties had engaged in commercial activities, and in addition the plaintiff had run the household and raised the children. Plaintiff claimed a half share of the fixed property, representing the sole unconsumed profits of their years together. The Court held (at 961) that a tacit *societas universorum quae ex quaestu veniunt* had existed between the parties. The Court also found (at 962) that the plaintiff's labours in the home as a mother and housewife formed her contribution to the partnership, and that this contribution allowed the defendant more time to devote to the actual moneymaking side of their ventures. As the Court found that it was impossible to hold that the defendant had contributed more than the plaintiff, it was held that the parties' shares were equal.

In **V v De Wet N.O.** 1953 (1) SA 612 (O) there was no marriage, whether putative, customary or religious. The couple had been living together for 21 years and had a business together. The Court inferred from the conduct of the parties that a partnership existed (at 615) and confirmed that the applicant's contribution included her household duties and the raising of the two children (at 616). The Court held that V was entitled to half the estate.

<sup>28</sup> **V v De Wet N.O.** 1953 (1) SA 612 (O) 614 with reference to Pothier, *Verhandeling van*

3.1.22 In **Ally v Dinath**<sup>29</sup> the next important development took place. The parties in this case lived together as man and wife in an Islamic relationship for fifteen years before the relationship broke down. The plaintiff alleged that they had shared a joint household, pooled their assets, income and labours for their joint benefit, and therefore had tacitly, or alternatively by implication, entered into a universal partnership (a partnership *universorum bonorum*) in equal shares and accumulated a joint estate for the benefit of both parties. She also sought a half share in the immovable property which had been their common home but which was registered only in the name of the defendant.

3.1.23 Relying on the decision in **Annabhay v Ramlall and Others**<sup>30</sup> the defendant raised two points in his defence. He stated that there were no allegations of an express agreement to enter into a universal partnership, and nor were there any allegations that the object of the partnership was to make a profit.

3.1.24 Eloff J dismissed the exceptions. He disagreed with the interpretation of Voet in **Annabhay's** case, where it was stated "that a universal partnership of all present and future goods cannot be entered into by implied consent and circumstances."<sup>31</sup> He also disagreed with the Tudor translation of Pothier on Partnership which stated that "partners are not considered, in the absence of express contract, to have entered into this kind of partnership".<sup>32</sup>

3.1.25 Eloff J preferred to rely on Kotze's translation of Van Leeuwen's treatise on Roman Dutch Law where it states

---

Societeiten (Bk. 2, sec. 2) and van der Linden, Koopman's Handboek (Bk. IV, pt. 1, sec. 12). See also **LAWSA Vol 19** 266 fn 7 and 25.

<sup>29</sup> 1984 (2) SA 451 (T). For a discussion of this case see Singh **CILSA** 1996 at 325; Hutchings & Delpont **De Rebus** 1992 at 122; Sinclair **Marriage Law** 1996 at 279; Labuschagne E **TSAR** 1985 at 219 and Women's Legal Centre Report **Litigation and Law Reform: Domestic Partnerships** 2000 at par 5.3.

<sup>30</sup> 1960 (3) SA 802 N.

<sup>31</sup> Eloff J stated that Voet was not laying down a principle of general application; he merely intended to convey that one does not readily infer from a tacit partnership that the partners intended to include all the assets in the community, but only such assets as they in fact dealt with. It has of course to be borne in mind that one cannot infer from the conduct of parties a contract with a greater scope than is intended by conduct.

<sup>32</sup> He held that this passage should not be interpreted to mean other than that a clear contract is required, not that a tacit agreement may not establish a universal partnership.

...sometimes it happens that this (contracting of community of property) is also understood to have taken place tacitly, and the community is created by conduct. For it is considered that the existence of something may be established not only by express words but also by conduct.

3.1.26 He held that it would be contrary to well settled principles if it were to be said that a particular contract could not be created tacitly. The principle is firmly established that any contract can be brought about by conduct.<sup>33</sup>

3.1.27 In relation to the second point raised, namely that the object of the partnership was not to make a profit, Eloff J held that a purely pecuniary profit motive is not required. He stated that the achievement of other material gain, such as a joint exercise for the purpose of saving costs, will suffice. In the present case the objective of this accumulation of an appreciating joint estate was sufficient.

3.1.28 Subsequent to **Ally v Dinath**,<sup>34</sup> in **Muhlman v Muhlman**<sup>35</sup> the requirements for a partnership which had been set out in previous case law, were reiterated.<sup>36</sup> They are that:

- \* each party should bring something into the partnership, or bind himself or herself to bring something into it;
- \* the venture should be carried on for the joint benefit of the parties;
- \* the object should be to make a profit; and
- \* the partnership contract should be valid.

3.1.29 Although these requirements were confirmed on appeal,<sup>37</sup> Hoexter JA agreed with the applicant that the Witwatersrand Local Division had set the requirement regarding the degree of proof required to establish the existence of a tacit agreement

---

<sup>33</sup> At 454 F.

<sup>34</sup> 1984 (2) SA 451 (T).

<sup>35</sup> 1981 (4) SA 632 (W).

<sup>36</sup> See also Van Niekerk **Guide to Patrimonial Litigation** 1999 at 3.5.2.

<sup>37</sup> **Muhlman v Muhlman** 1984 (3) SA 102 (A).



too high. Hoexter JA held that the true enquiry was simply whether it was more probable than not that a tacit agreement had been reached,<sup>38</sup> and emphasised that it would not be easy to prove a tacit agreement. Therefore, a Court would not easily be persuaded to infer a tacit agreement of partnership where the claimant (wife) had been working in the husband's business without remuneration, unless she had rendered services manifestly exceeding those ordinarily expected of a wife in her situation.<sup>39</sup>

3.1.30 Similarly, Hoexter JA said that where a wife enters an established and flourishing business, it will be more difficult for her to establish that a partnership must be inferred.<sup>40</sup>

3.1.31 Ironically, in a case of domestic partnership, it may be easier than in the case of a marriage to show a contribution to a universal partnership as there may not be the same societal assumptions about the role of a woman as a dutiful wife.<sup>41</sup>

3.1.32 De Bruyn and Snyman propagate the use of the universal partnership institution to regulate the patrimonial consequences of domestic partnerships after they have ended, in so far as the law does not provide for them. They refer to **Robson v Theron**<sup>42</sup> where the Court described the benefit of flexibility of the remedy:

A court has a wide equitable discretion in respect of the mode of distribution of partnership assets, having regard, inter alia, to particular circumstances, what is most to the advantage and what they prefer.

3.1.33 Although an implied contract justifies consideration as a potential solution to the problem of distribution of property between former domestic partners, evidentiary

---

<sup>38</sup> *Op cit* at 124; see also **Plum v Mazista Ltd** 1981 (3) SA 152 (A) 166 where it was held that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion is that a contract (being offer, acceptance and consensus) came into existence.

<sup>39</sup> *Ibid.* See also Hahlo **South African Law of Husband and Wife** 4th ed at 290 referred to by the Court in the WLD-case of **Muhlmann**, where he submits that there must be something to indicate that the parties intended to operate as a partnership.

<sup>40</sup> *Ibid.*

<sup>41</sup> Women's Legal Centre Report **Litigation and Law Reform: Domestic Partnerships** 2000 at 15.

<sup>42</sup> 1978 (1) SA 841 (A) at 856 F-G, De Bruyn & Snyman **SA Mercantile Law Journal** 1998 at 372. This approach was confirmed in **Van Onselen N.O. v Kgengwenyane** 1997 (2) SA 423 (B).

problems can limit its effectiveness as a remedy.<sup>43</sup> The person relying upon the agreement bears the onus of proof, not only of the existence of the agreement itself, but also as to the terms of the agreement showing a universal partnership. The notion of "equity" in our law remains undefined save to say that it will be based upon the intentions of the parties which must be proved directly or inferred from their conduct.<sup>44</sup>

3.1.34 The universal partnership concept also does not solve the problem of providing a legal basis for maintenance between former domestic partners.

### (bb) Express Contract

3.1.35 Although domestic partners who enter into express cohabitation agreements are the minority, they do sometimes choose to regulate various aspects of their relationship by means of a domestic partnership agreement.<sup>45</sup> Such an agreement clarifies the expectations of the partners and it could also serve as an early warning of future problems.<sup>46</sup>

3.1.36 A contract (domestic partnership agreement) will determine what would happen to property and assets of the couple if they should separate. The agreement is, however, not enforceable in so far as third parties are concerned.

3.1.37 The contracts will often contain terms and provisions similar in intent to a nuptial agreement. To rely on the contract and ensure that it fulfils its purpose, the contract should ideally be reduced to writing, witnessed and signed, either by the parties acting on their own, or preferably with the assistance of a competent legal advisor.

---

<sup>43</sup> Hutchings & Delpont **De Rebus** 1992 at 122.

<sup>44</sup> Women's Legal Centre Report **Litigation and Law Reform: Domestic Partnerships** 2000 at 12. See also Singh **CILSA** 1996 at 325: Working together to accumulate assets will not automatically or easily imply the creation of a universal partnership. The test of a tacit universal partnership as set out in the cases is onerous and in absence of any other remedy, provides no definite protection for the cohabiting parties. The principle would work well where there has been a long-standing relationship, but it may fall short when one considers shorter (1 or 2 year) relationships. In the latter cases, the claimant may find it difficult to prove the tacit agreement.

<sup>45</sup> Hutchings & Delpont **De Rebus** 1992 *ibid*.

<sup>46</sup> See Hutchings & Delpont **De Rebus** 1992 *ibid* for a discussion of clauses in the contract.

3.1.38 The contract should cover liability and ultimate responsibility for the parties' reasonable and anticipated expenses and include consensus regarding, amongst others, payment of all daily household expenses, together with allocating responsibility for other household costs, maintenance and repairs.

3.1.39 Parties to the relationship would be advised to stipulate their joint assets as separate and specific from their individual assets since the latter will remain the property of the initial owner.<sup>47</sup>

3.1.40 However, it is important to note that, especially in the past, unlike marriage, extra-marital relationships were not recognised as "social institutions". Therefore a major concern with advising reliance on a pre-cohabitation contract was that the Courts would refuse to uphold it for being *contra bonos mores*.<sup>48</sup>

3.1.41 A conservative Court might have found the partnership contract to be tainted with immorality - the underlying idea being that a contract by which one person is compensated for sexual favours is null and void because it promotes immorality and is thus against public policy.

3.1.42 The basic rules are as follows:

- \* in accordance with the *ex turpi causa non oritur actio* doctrine, an immoral contract will not be enforced; and
- \* a "money for sex" contract falls within this category.

3.1.43 A change in judicial attitudes has occurred in relation to the approach of the Courts in determining whether a contract is a "money for sex" contract.<sup>49</sup> On the one hand, it has been argued<sup>50</sup> that such contracts are so closely linked to the supposed

<sup>47</sup> Singh **CILSA** 1996 at 321.

<sup>48</sup> Labuschagne E **TSAR** 1985 at 222.

<sup>49</sup> Hahlo in Kahn **Fiat Iustitia** 1983 at 256 with references made therein.

<sup>50</sup> **Fender v St John-Mildmay** [1938] AC 1 (HL) at 42: "The law will not enforce an immoral promise, such as a promise between a man and a woman to live together without being married or to pay a sum of money or to give some other consideration in return for immoral association." Referred to by Hahlo in Kahn **Fiat Iustitia** 1983 *ibid*.

'immoral' character of the relationship between the cohabiting parties that the enforcement of the contract would violate public policy.

3.1.44 On the other hand, the counter-argument is simple: the fact that a man and a woman live together without marriage and engage in a sexual relationship cannot and should not, in itself, invalidate agreements between them relating to their earnings, property or expenses.<sup>51</sup> Nor should such an agreement be invalid merely because the parties may have contemplated the creation or continuation of a non-marital relationship when they entered into it.<sup>52</sup>

3.1.45 It has therefore been suggested that by virtue of changed societal mores, and in line with the softening of the approach to this question in other jurisdictions, our Courts should accept the view that express and implied contracts between partners should be enforced.<sup>53</sup>

3.1.46 The Courts recognised that just as there is more to a legal marriage than sex - love, companionship, mutual support in sickness and health - so sex is only one element, and not necessarily the most important one, in a common-law union.<sup>54</sup>

3.1.47 Adults who live together in a consensual relationship and engage in sexual relations are as competent as any other persons to order their economic affairs by contract and no policy should preclude a Court from enforcing such an agreement. An agreement between non-marital partners is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services.<sup>55</sup>

3.1.48 Thomas<sup>56</sup> states that a contract of this nature is not *contra bonos mores* in light of the decision in **Ally v Dinath**<sup>57</sup> and that it could thus be enforced between the

---

<sup>51</sup> Hahlo in Kahn **Fiat Iustitia** 1983 at 247.

<sup>52</sup> Singh **CILSA** 1996 at 324.

<sup>53</sup> Sinclair **Marriage Law** 1996 at 281.

<sup>54</sup> Hahlo in Kahn **Fiat Iustitia** 1983 at 256 with references made therein.

<sup>55</sup> **Marvin v Marvin** 1976 18 Cal 3d 660 referred to by Singh **CILSA** 1996 at 323.

<sup>56</sup> Thomas **THRHR** 1984 at 456 referred to in Hutchings & Delport **De Rebus** 1992 at 122.

<sup>57</sup> 1984 (2) SA 451 (T).

cohabitants (in the above case no reference was made to the question of *boni mores*).

3.1.49 In **Hewitt v Hewitt**,<sup>58</sup> on facts very similar to the British case of **Windeler v Whitehall**,<sup>59</sup> the Appeal Court held that, based on the fact that the parties had outwardly lived a conventional married life, the plaintiff's conduct had not "so affronted public policy that she should be denied any and all relief".

3.1.50 In the case of **Ismail v Ismail**<sup>60</sup> the Court was precluded from enforcing the terms of the contractual agreement between the parties as it was void because of public policy (in this case because it could lead to polygamy).

3.1.51 Problems arise with the enforcement of a domestic partnership agreement - express or implied - where the partner being sued is still legally married to a third party. It has been argued that in such cases domestic partnership agreements violate public policy to the extent that they impair the community of property rights (where applicable) of the lawful married spouse.

3.1.52 This defence was raised in the USA in **Marvin v Marvin**.<sup>61</sup> Here the defendant claimed that any alleged arrangement between himself and his cohabitating partner purporting to transfer to her a half interest in their community of property, could not be upheld on the ground that the arrangement was *contra bonos mores* since it infringed the property rights of his lawful wife.

3.1.53 The Court decided that whether or not the defendant's contract with the plaintiff exceeded his rights in the community of property between himself and his wife, defendant's argument could not be upheld for the reason that an improper transfer of community of property is not void *ab initio* but merely voidable.

3.1.54 This argument would be equally acceptable in South African law as the provisions of section 15 of the Matrimonial Property Act of 1984 are similar in effect.

---

<sup>58</sup> 1979 77 Ill 2d 49 referred to by Singh **CILSA** 1996 *ibid*.

<sup>59</sup> [1990] 2 FLR 505 referred to by Singh **CILSA** 1996 *ibid*.

<sup>60</sup> 1983 (1) SA 1006 (A).

<sup>61</sup> 1976 18 Cal 3d 660.

3.1.55 Consequently, it is possible for a domestic partner to create a community of property with his or her partner to whom he or she is not married which has no effect on the community of property established with his spouse.<sup>62</sup>

3.1.56 It should not be forgotten that drawing up a contract is not the panacea for the problem of regulating domestic partnership. Contractual regulation is reserved largely for the sophisticated, literate middle class. It rarely caters effectively for the most vulnerable members of society. And even if partners do enter into a contract, it may turn out to be unsatisfactory.

3.1.57 Firstly, many couples who enter into domestic partnership agreements at an early stage of their relationship are unlikely or unwilling to think of the consequences of possible breakdown and choose to concentrate on governing an ongoing relationship.

3.1.58 Secondly, a contract concluded at the outset of a relationship may not make provision for changed circumstances, or may be framed in a way which makes it difficult to adapt it to the changing circumstances of the union, such as the birth of children.

3.1.59 Furthermore, it is an unfortunate but persisting reality that partners in intimate relationships seldom bargain on an equal footing. Agreements between them are commonly used to insulate the position of the economically stronger partner (usually the man); women are often more risk-averse than men and often do not have the same access to legal representation and expertise.<sup>63</sup>

3.1.60 Owing to ignorance of the law, lack of access to lawyers, poverty and unequal power relations between the partners, contract law is not a practical solution to the existing problem.<sup>64</sup>

---

<sup>62</sup> Singh **CILSA** 1996 at 324.

<sup>63</sup> Sinclair **Marriage Law** 1996 at 283.

<sup>64</sup> CALS Report 2001 at 11.

## (ii) Proprietary estoppel

3.1.61 As an alternative, a disadvantaged partner may rely on the doctrine of proprietary estoppel as a defence. Here again, he or she faces the onus of proving that the legal titleholder created a situation from which it could be reasonably inferred that some right or legal interest in or over the property had been accorded to the non-owner. Further, the party raising the defence bears the onus of proving precisely how he or she acted to his or her prejudice by relying on the alleged promise.<sup>65</sup>

3.1.62 If the opposite-sex couple held themselves out as husband and wife, they will be bound by each other's contracts for household necessities to the same extent as if they were legally married because they will be estopped from denying a contract of agency.<sup>66</sup> There exists an evidentiary presumption that parties who live openly together as man and wife are legally married.<sup>67</sup>

## (iii) Unjustified enrichment

3.1.63 Unjustified enrichment is the general principle that one person should not be able to benefit unfairly at the expense of another.

3.1.64 If the relationship of an unmarried couple breaks up during the parties' joint lives, an individual who has rendered him/herself financially dependent on her partner will only be entitled to a contribution for services rendered on the grounds of unjustified enrichment in order to achieve justice between the two of them. The latter remedy is available to a person unjustly impoverished at the expense of another person.

3.1.65 The same principle would apply if the partner had made a genuine financial contribution, for example, in the case where the owner of a house and his/her partner

---

<sup>65</sup> Singh **CILSA** 1996 at 319.

<sup>66</sup> Sinclair **Marriage Law** 1996 at 284 referring to **Thompson v Model Steam Laundry Ltd** 1926 (TPD) 674 in fn 64.

<sup>67</sup> Labuschagne **TSAR** 1989 at 375 fn 38 and the references to **Ex parte Azar** 1932 OPD 107 at 109; **Ex parte L** 1947 (3) SA 50 (K) 55; **Ex parte Soobiah** 1948 (1) SA 873 (N) 881.

contributed jointly to the purchase of a house which is registered only in the owner's name.<sup>68</sup>

3.1.66 For many years it was thought that the law on unjustified enrichment only applied to certain recognised categories and that the domestic partnership was not one of these. Our law had no general enrichment claim.<sup>69</sup>

3.1.67 This view was based on the judgment in **Nortje v Pool N.O.**<sup>70</sup> in which the Appellate Division denied the existence of such a claim and held that a plaintiff had to bring his or her cause of action within the recognised *condictiones*.

3.1.68 In the decision of **Kommissaris van Binnelandse Inkomste v Willers**,<sup>71</sup> however, the Appellate Division decided that the judgment in **Nortje** does not exclude extension of liability on the ground of unjustified enrichment cases where such liability has not existed in the past. Botha JA held that **Nortje** does not preclude the Court from finding that there is enrichment in a particular case merely because liability has not previously been recognised in the same, or similar, circumstances. In each case the Court will have to consider whether extension of liability on the grounds of enrichment is necessary or desirable.<sup>72</sup>

3.1.69 This decision augured well for domestic partners: although the Appellate Division did not overturn the decision in **Nortje v Pool NO**,<sup>73</sup> it has clearly acknowledged the need for a general unjustified enrichment claim in our law and might well on particular facts recognise one.

3.1.70 The law is, however, still not clear - relying on these laws is risky and unpredictable. Courts are very concerned about certainty and if there is any doubt and a judge is unclear, he or she might be unwilling to make any decision.

---

<sup>68</sup> Hutchings & Delpont **De Rebus** 1992 at 121.

<sup>69</sup> Sinclair **Marriage Law** 1996 at 277.

<sup>70</sup> 1966 (3) SA 96 (A).

<sup>71</sup> 1994 (3) SA 283 (A).

<sup>72</sup> At 333 C-E.

<sup>73</sup> At fn 70.



#### (iv) Constructive trust

3.1.71 The readiness of English, American, Canadian and Australian Courts to find a resultant or constructive trust in favour of a common-law wife who has contributed money, money's worth or labour to the acquisition of property by her paramour is significant.<sup>74</sup>

3.1.72 The South African law of trusts, for technical and historical reasons, is unlikely to be the vehicle for the results that have been achieved in other jurisdictions. In our law a trust<sup>75</sup>

exists when the creator of the trust [the founder], ... has handed over or is bound to hand over to another the control of property which, or the proceeds of which, is to be administered or disposed of by the other (the trustee or administrator) for the benefit of some person other than the trustee as beneficiary, or for some impersonal object.

3.1.73 An intention on the part of the founder to create a trust is a central requirement. Normally the intention has to be express. The Court will infer an intention to create a trust only if it is clear from all circumstances that this was the common intention of the founder and the trustee.

3.1.74 Thus, unlike in Anglo-American law, a trust cannot be created if the persons who are bound by it have no clear intention to create it. For these reasons there is little scope for the development in South African law of the resulting, implied or constructive trust of Anglo-American law.<sup>76</sup>

---

<sup>74</sup> Hahlo in Kahn **Fiat Iustitia** 1983 at 259 and the references made therein.

<sup>75</sup> Sinclair **Marriage Law** 1996 at 277.

<sup>76</sup> Sinclair **Marriage Law** 1996 *ibid* and the references therein.

## 3.2 Legal developments regarding domestic partnerships in South Africa after 1994

### a) A constitutional dispensation

3.2.1 In December 1993, after many years of parliamentary supremacy, South Africa adopted an interim Constitution.<sup>77</sup> The final Constitution, the Constitution of the Republic of South Africa, 1996,<sup>78</sup> followed in May 1996.

3.2.2 Section 2 of the Constitution, embodying the so-called principle of constitutional supremacy, states that the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid. It is therefore binding on all branches of government and has priority over any other rules made by government.<sup>79</sup>

3.2.3 The Constitution contains a Bill of Rights<sup>80</sup> which enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. South Africa's history of inequality and oppressive injustice motivated the constitution-makers to prevent irrelevant and stigmatising criteria from being used as a basis for judging people and their legitimate place in society. The Constitution aims to reflect an expansive norm, one that includes people of all colours, races and backgrounds. It has been described as a brave and important experiment in committing South Africans to an inclusive conception of our own variety and richness as a nation.<sup>81</sup>

3.2.4 One of the rights enshrined in the Bill of Rights is the right to equality. Section 9 of the Constitution states that everyone is equal before the law and has the right to

<sup>77</sup> Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

<sup>78</sup> Adopted on May 8 1996, hereafter referred to as "the Constitution".

<sup>79</sup> See also **Executive Council of the Western Cape Legislature v President of the Republic of South Africa** 1995 (4) SA 877 (CC) at [62] as referred to in De Waal *et al* **Bill of Rights Handbook** 2001 chap 1 at 8. See also s 8 of the Constitution dealing with the supremacy of the Bill of Rights.

<sup>80</sup> Chap 2, s 7 - 39 of the Constitution.

<sup>81</sup> Cameron **SALJ** 2002 at 4.

equal protection and benefit of the law. Neither the State nor any other person may unfairly discriminate directly or indirectly against anyone on the grounds stated in section 9.<sup>82</sup>

3.2.5 The achievement of equality is one of the founding premises of the South African constitutional order hence the emphatic list of prohibited grounds of discrimination in the equality clause.<sup>83</sup>

3.2.6 All these grounds have a bearing on the development of family law towards a more inclusive and pluralistic system.<sup>84</sup> They have two factors in common. They are grounds on which people in fact discriminate against others and yet, as a basis of decision-making, they stand in the way of a proper appreciation of the human capacities of the person in question. Such discrimination damages the dignity of the person and violates the public good in that it impedes the proper distribution of social goods and services. Irrelevant and stigmatising criteria should not be used as a basis for judging people and their legitimate place in society.<sup>85</sup>

3.2.7 Both "sexual orientation" and "marital status" are expressly prohibited grounds of discrimination in terms of section 9 of the Constitution.<sup>86</sup>

---

<sup>82</sup> Section 9 of the Constitution states:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal treatment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

<sup>83</sup> See s 9(3) of the Constitution.

<sup>84</sup> See CALS Report 2001 at 12.

<sup>85</sup> Cameron **SALJ** 2002 at 645.

<sup>86</sup> Steyn **TSAR** 1998 at 100 (with references made therein) explains that the inclusion of "sexual orientation" in this fashion was largely due to the lobbying work of the Organisation of Lesbian and Gay Activists (OLGA) that led to the inclusion in the ANC's draft Bill of Rights of a clause outlawing discrimination on the basis of sexual orientation. This clause also found its way into

3.2.8 Even though there is a presumption in section 9(5) of the Constitution that discrimination on the enumerated grounds is unfair, this is not an absolute provision and it may therefore be limited where the limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as provided for in terms of section 36 of the Constitution<sup>87</sup>. Section 36(1) describes the relevant factors in deciding the issue of circumscribing a right. These include an examination of the nature of the right, the importance of the purpose of the limitation, the relation between the limitation and its purpose and whether there exist a less restrictive means of achieving the purpose.

### **b) Judicial intervention since 1994**

3.2.9 The enactment of the Constitution and the Bill of Rights has led to a number of important developments in the field of family law which point to an awareness by our Courts that the constitutional imperative of equality requires wider legal recognition of various family forms.

---

proposals of the Inkatha Freedom Party and the Democratic Party. The National Party furthermore agreed with the proposal that lesbians and gays should be seen as a "natural group" and that discrimination on the basis of a "natural characteristic" should be prohibited. A "natural group" is one with characteristics that the members did not choose themselves; See also Cameron **SALJ** 2002 at 644 *et seq.*

<sup>87</sup> Section 36 of the Constitution provides as follows:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

(i) **Changes in social perceptions towards homosexuals**

3.2.10 It is significant that South Africa is the first country in the world to protect sexual orientation formally as a basic human right in its Constitution.<sup>88</sup> The fact that sexual orientation is entrenched in the Constitution of 1996 as an enumerated ground of non-discrimination constitutes a major policy change based on an altered perception of social reality. It is significant enough in the Western context, but for an African State this type of libertarian jurisprudence is unheard of.<sup>89</sup>

3.2.11 Arguably the most decisive factors behind changed social perceptions as reflected by our Courts are the constitutional imperatives of equality and dignity.<sup>90</sup> The change was already apparent from the approach in **S v H**,<sup>91</sup> where the Court stated:<sup>92</sup>

There is a growing body of opinion, in South Africa as well, which questions fundamentally the sociological, biological, religious and other premises on which the proscription of homosexual acts between consenting adult men which takes place in private, have traditionally been based.

3.2.12 The Court furthermore criticised the phrase "normal heterosexual relationships" as employed in **S v M**<sup>93</sup> on the basis that it "implies that homosexual relationships are abnormal in a sense other than the mere fact that they are statistically in the minority."<sup>94</sup> The Court concluded:<sup>95</sup>

In my respectful view the use of the word "normal" in this context is unfortunate, as it might suggest a prejudgement of much current psychological and sociological opinion which is critical of various conventions and assumptions regarding human society. It may also suggest a wrong line of enquiry when coming to re-evaluate the status of homosexual relationships. I would suggest that a more fruitful legal enquiry might be directed at concepts of privacy and autonomy and the issue whether private sexual intimacy per se

<sup>88</sup> Steyn **TSAR** 1998 at 100; Wildenboer **Codicillus** 2000 at 59.

<sup>89</sup> Steyn **TSAR** 1998 at 97. See chap 4.7 below for a discussion on Africa's legal position.

<sup>90</sup> Louw **SAJHR** 2000 313.

<sup>91</sup> 1995 (1) SA 120 (C).

<sup>92</sup> *Op cit* at 122.

<sup>93</sup> 1990 (2) SACR 509 (E).

<sup>94</sup> Steyn **TSAR** 1998 at 99.

<sup>95</sup> 1995 (1) SA 120 (C) at 124.

between consenting male adults can ever cause harm to society any more than private heterosexual intimacy between consenting adults.

### 3.2.13 In **National Coalition for Gay and Lesbian Equality v Minister of Justice**<sup>96</sup>

the Court found that the common-law offence of sodomy<sup>97</sup> was unconstitutional as violating the rights of equality, dignity and privacy. Ackermann J stated as follows:<sup>98</sup>

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy.

3.2.14 It was emphasised that the determining factor regarding the unfairness of discrimination is, in final analysis, the impact of the discrimination on the complainant or the members of the affected group.<sup>99</sup>

3.2.15 This was a groundbreaking judgment regarding the nature of gay identity in South Africa. It is said to have laid a solid foundation, relying principally on the right to equality, but also on dignity and privacy, on which further developments in gay and lesbian rights have been and can be based.<sup>100</sup>

<sup>96</sup> 1998 (2) SACR 102 (W) upheld by the Constitutional Court in 1999 (1) SA 6 (CC).

<sup>97</sup> See in this regard the inclusion of sodomy in the Schedules to the Criminal Procedure Act 51 of 1977, the Security Officers Act 92 of 1987 and the Sexual Offences Act 23 of 1957.

<sup>98</sup> 1999 (1) SA 6 (CC) at [32].

<sup>99</sup> The approach to this determination is a nuanced and comprehensive one in which various factors come into play which, when assessed cumulatively and objectively, will assist in elaborating and giving precision to the constitutional test of unfairness. Important factors to be assessed in this regard (which do not constitute a closed list) are:

- the position of complainants in society and whether they have suffered in the past from patterns of disadvantage;

- the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance at impairing the complainants in their fundamental human dignity or in a comparably serious respect, but is aimed at achieving a worthy and important societal goal as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.

- with due regard to the first two points above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

<sup>100</sup> Louw **SAJHR** 2000 at 319.

3.2.16 The case points to a profound shift in our law towards gay men and lesbians. It suggests that legislation based on a heterosexual norm which assumes that only heterosexuality is normal or natural, will inevitably be problematic from a constitutional perspective. It also implies that traditional legal principles and constructs - including the notion of the exclusive heterosexual marriage and family - are in need of revision.<sup>101</sup>

3.2.17 Another important aspect of this case is the fact that Ackermann J noted the anti-homosexual sentiment in society.<sup>102</sup> For this purpose he distinguished between the "private moral views" and the "religious views and influences" of members of the community.

3.2.18 Ackermann J found that the enforcement of the private moral views of a section of the community are based to a large extent on nothing more than prejudice; an emotional and biased reaction against homosexuals simply because they are different. Such private moral views do not qualify as a legitimate purpose as there is nothing in the proportionality enquiry to weigh against the extent of the limitation and its harmful impact on gays.<sup>103</sup>

---

<sup>101</sup> De Vos "Sexual Orientation and Family Law" 2002.

<sup>102</sup> The following are reasons that are given for differentiating between people on the basis of the sexual orientation. See Heaton "Family Law and the Bill of Rights" 1996 par 3J20.

- Marriage and the family are by definition and naturally heterosexual in nature and any exclusionary legal provisions therefore merely endorse the natural State of the world;

- Even if marriage and family are not by definition heterosexual in nature, both marriage and family perform an important social function exclusively associated with heterosexual unions – especially in the reproduction and rearing of children – and the State has a responsibility to provide a legal framework to strengthen these institutions;

- Homosexuality is morally reprehensible and the State has a duty to signal its disapproval of homosexual conduct and homosexuality in general;

- Christian and other religious teachings disapprove of homosexuality and the State may legitimately enforce these religiously inspired moral teachings in its laws; and

- Homosexuality is unnatural and dangerous and vulnerable individuals, especially children will be "converted" to homosexuality if the State fails to protect them against exposure to it.

<sup>103</sup> Ackermann J remarked at [23]-[24] that the legally enforced prohibition on homosexual conduct reinforce the already existing societal prejudices against homosexuals. This entrenches stigma, encouraging discrimination, increasing anxiety and feelings of guilt, impacting on their personal and self-esteem, and encouraging such peripheral discrimination as blackmail, violence and police entrapment. See Du Plessis **SAJHR** 2002 at 21. Similarly, in the case of **Hoffman v South African Airways** 2001(1) SA 1(CC) Ngcobo J exposed the commonly held perception that people with HIV are not suitable to do the work of a flight attendant on the basis that they are debilitated, sickly and liable to contract opportunistic diseases as nothing more than an unsubstantiated prejudice. See again Du Plessis **SAJHR** 2002 at 23.

3.2.19 Ackermann J further said that unlike the case of these private moral views, the Court is faced with a far more difficult task of persuasion in the case of religious objections since they touch on deep convictions and evoke strong emotions.<sup>104</sup> Nonetheless, however honestly and sincerely held, religious objections cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation.<sup>105</sup>

3.2.20 In similar vein, Ackermann J said in **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs**<sup>106</sup> that the exclusion of lesbians and gays by the provision in question was reinforcing stereotypes. The misconceptions derived from the sexual orientation of homosexuals resulted in their being classified as exclusively sexual beings. As such they are reduced to one-dimensional creatures that are defined by their sex and sexuality.<sup>107</sup>

3.2.21 Ackermann J concluded that such false classifications must be rejected.<sup>108</sup>

Our law has never proscribed consensual sexual acts between women in private and the laws criminalising certain consensual sexual acts between males in private and certain acts in public have been declared constitutionally invalid.

3.2.22 In the same context in the recent case of **Minister of Home Affairs v Fourie**<sup>109</sup> Sachs J said that our Constitution represents a radical rupture with a past based

---

<sup>104</sup> He commented that “[I]t must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would not wish to have the physical expression of sexual orientation differing from their own proscribed by the law.” *Op cit* at [38] referred to by Du Plessis **SAJHR** 2002 at 21 fn 81.

<sup>105</sup> *Op cit* para 48. The protection of institutions based on prejudice and religious beliefs – even when they are widely and sincerely supported institutions – does not constitute justifiable grounds for the limitation of the right to equality. Even Western traditional values and institutions that are viewed as natural and unchanging manifestations of our world must be recognised by the Courts as merely the product of power relations at a given moment in history and as such are not fixed and inevitable but contingent and ever-changing. Heaton "Family Law and the Bill of Rights" 1996 par 3J20.

<sup>106</sup> 2000 (2) SA 1 (CC).

<sup>107</sup> At [49].

<sup>108</sup> *Ibid.*

<sup>109</sup> 2006 (1) SA 524 (CC).



on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all.<sup>110</sup>

3.2.23 The judge stated as follows:<sup>111</sup>

Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference.

**(ii) The family concept**

3.2.24 The concept of family in the new constitutional dispensation has been the subject of a number of Court cases.

3.2.25 In **National Coalition for Gay and Lesbian Equality v The Minister of Home Affairs**,<sup>112</sup> Ackermann J made the following statement regarding the current context of the family:<sup>113</sup>

It is important to emphasise that over the past decade an accelerating process of transformation has taken place in family relationships as well as in societal and legal concepts regarding the family and what it comprises.

3.2.26 In this case the Court found section 25 of the Aliens Control Act of 1991 to be inconsistent with the provisions of section 9 of the Constitution of 1996 and therefore invalid. The provision facilitated the granting of immigration permits to spouses of South African citizens or permanent residents.

3.2.27 The Court found that section 25 conferred benefits exclusively on spouses, thereby discriminating against same-sex life partners. The Court found that the provision in the Act constituted unfair discrimination and an unjustifiable limitation of the right to equality and to dignity of gay and lesbian persons who are in permanent same-sex life partnerships with foreign nationals.

---

<sup>110</sup> At [59].

<sup>111</sup> *Ibid.*

<sup>112</sup> 2000 (2) SA 1 CC.

<sup>113</sup> At [47].

3.2.28 The Court unanimously found that gay and lesbian relationships can constitute a family, whether nuclear or extended. The Court stated that these relationships establish, enjoy and benefit from family life in similar ways as heterosexual spouses. The Court emphasised that lesbians and gays are capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running a common household.<sup>114</sup>

3.2.29 In **Farr v Mutual & Federal Insurance Co Ltd**<sup>115</sup> the applicant, who was living with his gay partner, was involved in a motor vehicle accident. His partner was a passenger and had a limited claim on the Multilateral Motor Vehicle Fund. This made the applicant liable for the remainder of his partner's claim and accordingly the applicant relied on his own insurer, the respondent. The respondent repudiated the claim. The Court held that two gay men living together in a domestic relationship constituted a family and therefore upheld the repudiation on the basis that the applicant's partner was a family member.<sup>116</sup>

3.2.30 Referring to domestic partnerships in general, O'Regan J said the following in **Dawood v Minister of Home Affairs**:<sup>117</sup>

... families come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.

3.2.31 In **Du Toit v Minister of Welfare and Population Development**<sup>118</sup> Skweyiya J emphasised that family life as contemplated by the Constitution could be provided in different ways, and that legal conceptions of the family and what constituted family should change as social practices and traditions changed. He further said that the

---

<sup>114</sup> At [53].

<sup>115</sup> 2000 (3) SA 684 (C).

<sup>116</sup> See discussion by Louw **SAJHR** 2000 at 316.

<sup>117</sup> **Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs**, 2000 (8) BCLR 837 (CC) at [31].

<sup>118</sup> 2003 (2) SA 198 (CC).

number of recent cases which broadened the scopes of "family", "spouse" and domestic relationship" to include same-sex relationships was significant.<sup>119</sup>

3.2.32 In the recent Constitutional Court case of **Volks N.O. v Robinson**<sup>120</sup> Mokgoro and O'Regan JJ, remarked, in their minority judgment, that not every family is founded on a marriage recognised as such in law.<sup>121</sup>

### (iii) Duty of support

3.2.33 The duty of support entails the provision of accommodation, food, clothing, medical and dental attention, and whatever else the partners reasonably require.<sup>122</sup> At common law there is no such reciprocal duty of support between parties who do not qualify as married spouses during their relationship.

3.2.34 In a series of cases our Courts have developed the common law to extend the duty of support as far as same-sex couples are concerned.

3.2.35 In **Langemaat v Minister of Safety and Security**<sup>123</sup> the applicant, a lesbian, had lived with her partner for almost twelve years. They owned a house, operated joint finances and had named each other beneficiaries in their respective insurance policies. The applicant requested that her partner be registered as her dependant with Polmed.

3.2.36 The Transvaal High Court declared regulation 30(2)(b) of the South African Police Services Regulations and Polmed's Rule 4.2 to be in conflict with the

---

<sup>119</sup> At [19] and [32].

<sup>120</sup> 2005 (5) BCLR 446 (CC).

<sup>121</sup> At [106].

<sup>122</sup> Spouses in a legally valid marriage, whether in or out of community of property, owe each other a duty of support according to their means. This duty is reciprocal and entails that each spouse is obliged to contribute pro rata to his or her means. The duty of support between spouses is enforceable through legal proceedings eg a claim for patrimonial damages because of the wrongful act of a third party. See also Hutchings & Delpont **De Rebus** 1992 at 121; Hahlo in Kahn **Fiat Iustitia** 1983 at 246; M Collins "Cohabiting? Then Mind Your Own business" Electronic Mail and Guardian March 9, 1998; CALS Report 2001 at 10; Sinclair **Marriage Law** 1996 at 285 and 443 – 445.

<sup>123</sup> 1998 (3) SA 312 T.

Constitution and thus invalid. The reason was that the Polmed's regulations defined "dependant" as the legal spouse or widower or the dependant child of the member.

3.2.37 By declaring the regulation unconstitutional the Court extended the common-law duty of support after finding that the principles in our law as to who is under such a duty are not clear. The Court found that a same-sex couple who had lived together in an intimate and stable relationship for many years owed a duty of support to each other,<sup>124</sup> although it seems that this is a prima facie right only.<sup>125</sup>

3.2.38 In **Satchwell v President of the Republic of South Africa**<sup>126</sup> the Constitutional Court said that in a society where the range of family formations has widened, a duty of support may be inferred as a matter of fact in certain cases of persons involved in a permanent same-sex life partnership.<sup>127</sup> The Court declared unconstitutional, and hence extended, certain provisions of the Judges Remuneration and Conditions of Employment Act of 1989<sup>128</sup> and corresponding regulations so as to confer "spousal" benefits - pension rights, travelling and subsistence allowances - upon the same-sex life partners of judges.<sup>129</sup>

3.2.39 Although the Constitutional Court mainly confirmed the orders made by Kgomo J of the Transvaal High Court,<sup>130</sup> Madala J added the following qualification:<sup>131</sup>

<sup>124</sup> Unfortunately the argument and reasoning for the extension in the judgment is not very comprehensive. See Women's Legal Centre Report **Litigation and Law Reform: Domestic Partnerships** 2000 at 17.

<sup>125</sup> At 316D as referred to by Wildenboer **Codicillus** 2000 at 59.

<sup>126</sup> 2002 (6) SA 1 (CC). In this case a High Court judge took the Minister of Justice to Court for failing, despite undertakings to do so, to effect necessary changes to the law that determines the remuneration and conditions of service of judges. The Judges Remuneration and Conditions of Employment Act of 1989 provides for certain benefits for the spouses of judges. The judge, a partner in a long standing same-sex relationship, claimed that her partner was unfairly discriminated against because she was not eligible for these benefits.

<sup>127</sup> At [37] at 14G - 15D/E.

<sup>128</sup> Act 88 of 1989.

<sup>129</sup> See discussion of the **Satchwell** case in Van Heerden "Family and Human Rights" 2002 at 21.

<sup>130</sup> **Satchwell v President of the Republic of South Africa** 2001 (12) BCLR 1284 (T).

<sup>131</sup> At [24], [25] and [34]. The respondent submitted before the Constitutional Court that the orders made by the Transvaal High Court were invalid in that they failed to make provision for unmarried heterosexuals in permanent relationships. Madala J, on behalf of a unanimous court, declined to consider the latter argument, pointing out that it raised questions of fact and law not raised by the applicant and not considered by the High Court.

I should emphasise however that section 9 generally does not require benefits provided to spouses to be extended to all same-sex partners where no reciprocal duties of support have been undertaken. The Constitution cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations ... In my view the order by the High Court reading in the words "or partner in a permanent same-sex life partnership" to remedy the constitutional wrong that is the impugned provisions, omits an important requirement. It fails to have regard to the requirement of a reciprocal duty of support. That is addressed in the order I make. Such partners must have undertaken and committed themselves to reciprocal duties of support.

3.2.40 A claim for damages resulting from loss of support after the death of a breadwinner relies on the pre-existence of the duty of support which, at common law, only exists between married spouses.<sup>132</sup>

3.2.41 In **Du Plessis v Road Accident Fund**<sup>133</sup> the SCA dealt with a same-sex dependant's claim for loss of support following his partner's unlawful killing by another. The Court once again said that in a society where the range of family formations had widened, such a duty might be inferred in permanent, same-sex life partnerships. Whether such a duty of support existed or not depended on the circumstances of each case. On the facts the Court found that the deceased owed the plaintiff a contractual duty of support.

3.2.42 As far as opposite-sex couples are concerned the Court has, however, refused to extend the duty of support. **Robinson v Volks N.O.**<sup>134</sup> was concerned with the possibility of a duty of support between opposite-sex domestic partners. The Cape High Court held that the provisions of the Maintenance of Surviving Spouses Act of 1990, which fail to include domestic partners in the definition of "survivor" and "spouse", were unconstitutional in that they contravened the rights to equality and

<sup>132</sup> In **Union Government v Warneke** 1911 AD 657 it was held that a claim for damages resulting from loss of support lies only if the duty to support exists by operation of the law. See also Sinclair **Marriage Law** 1996 at 285. Since at common law, this duty must exist by operation of law, there is no action for damages for the unlawful death of a person who was supporting his/her domestic partner.

<sup>133</sup> 2004 (1) SA 359 (SCA). The plaintiff was in a conjugal relationship with someone of the same sex who was killed in a motor accident. It was the plaintiff's case that the common-law action for damages for loss of support should be developed to include a person such as himself. He claimed that he should be placed in the same position as a widow who was legally married to the deceased and who was entitled to bring an action for the loss of support for the unlawful killing of her husband.

<sup>134</sup> 2004 (6) SA 288 (C). In the Cape High Court Davis J questioned the justification for distinguishing between the approach adopted by our Courts for permanent same-sex life partnerships and permanent opposite-sex life partnerships.

dignity enshrined in our Constitution. This decision was appealed to the Constitutional Court, where it was reversed.

3.2.43 According to the majority decision of the Constitutional Court the payment of maintenance to a surviving spouse relies on the pre-existence of the duty of support which, at common law, only exists between married spouses. Although this implies discrimination against unmarried life partners, the failure of the Maintenance of Surviving Spouses Act of 1990 to include domestic partners in the definition of "survivor" does not constitute unfair discrimination.<sup>135</sup>

3.2.44 Skweyiya J emphasised the significance of the choice to get married, thereby creating an ex lege duty of support which extends beyond the termination of marriage, even after death. The law does not attach such an obligation to a domestic partnership neither during the partners' lifetimes or after either of them dies. He found that it is not unconstitutional not to impose a duty of support upon the deceased's estate where none arose ex lege during his or her lifetime.<sup>136</sup>

3.2.45 Ngcobo J referred to the importance of the decision to enter into a marriage relationship and to sustain such a relationship. He said that the decision signifies a willingness to accept the moral and legal obligations, in particular, the reciprocal duty of support.<sup>137</sup>

[94] People involved in a relationship may choose not to marry for a whole variety of reasons, including the fact that they do not wish the legal consequences of a marriage to follow from their relationship.

3.2.46 He concluded that it would be unacceptable for the law to step in and impose the will of one party upon the other.<sup>138</sup>

---

<sup>135</sup> 2005 (5) BCLR 446 (CC). For critical discussions of the judgment see Lind **Acta Juridica** 2005 at 108, Cooke **SALJ** 2005 at 542, Wildenboer **SAPL** 2005 at 459 and Goldblatt "A Sad Day for Unmarried Women" 2004 at 4. Critique on the judgement is based on the fact that the Constitutional Court did not use the opportunity to come to the aid of (mostly vulnerable) parties in opposite-sex domestic partnerships, but left that task to the legislature.

<sup>136</sup> In a separate but concurring judgment, Ngcobo J emphasised the fact that if the law were to impose the legal consequences of marriage on people who chose not to marry, it would undermine the right freely to marry and the nature of agreement inherent to a marriage. Both Skweyiya J and Ngcobo J emphasised the importance of marriage and family and society as social institutions in our society and internationally.

<sup>137</sup> At [91].

<sup>138</sup> At [94].

(iv) **Custody and adoption of children of domestic partners**

3.2.47 With regard to custody of children by lesbian mothers, there has been significant shifts away from the **Van Rooyen**<sup>139</sup> case in the past couple of years. In **V v V**<sup>140</sup> the Court found that the homosexuality of the mother was not necessarily a bar to joint custody. In addition, there have been at least two unreported judgments where the Court has found in favour of a lesbian mother in a custody matter.<sup>141</sup>

3.2.48 In **Du Toit v Minister for Welfare and Population Development**<sup>142</sup> the arguments adduced in support of an application to allow two lesbian women to adopt two children, focussed on both the rights of the adult same-sex applicants and the best interests of the children involved. The Constitutional Court was of the view that a situation where only one partner to the same-sex union would have a legal relationship with the adopted children was not in the best interests of those children. The Court struck down as unconstitutional the provisions of the Child Care Act of 1983 prohibiting the joint adoption of children by same-sex couples.

3.2.49 In the matter **J v Director General, Department of Home Affairs**<sup>143</sup> the applicants were two women in a permanent same-sex relationship. In 2001 the one applicant gave birth to twins as a result of in vitro fertilisation, using the oocytes of the other applicant and the sperm of an anonymous donor.

3.2.50 The High Court in this case ordered that section 5 of the Children's Status Act of 1987 was unconstitutional in providing for the legal status of children born in

<sup>139</sup> 1994 (2) SA 325 (W). The case of **Van Rooyen v Van Rooyen** concerned the access rights of a lesbian mother to her two minor children. The Court explicitly rejected the idea that "the relationship created on the basis of two females" could be called a family and attacked a statement by the family counsellor that homosexuality is no longer regarded as a mental illness or a sin; listing the "wrong signals" to which the children would be exposed in a lesbian household. The outcome was an extremely intrusive order, effectively forcing the mother to choose between her lesbian lifestyle and unencumbered access to her children.

<sup>140</sup> 1998 (4) SA 169 (C).

<sup>141</sup> **Mohapi v Mohapi** (WLD 1998 unreported) and **Greyling v Minister of Welfare and Population Development** (WLD case no 98/8297 unreported) referred to by Louw **SAJHR** 2000 at 315.

<sup>142</sup> 2002 (10) BCLR 1006 (CC).

<sup>143</sup> 2003 (5) SA 621 (CC).

consequence of artificial insemination, but not for these rights in case of permanent same-sex relationships. The Court said that this fact violated the applicants' rights to human dignity as well as the children's rights to family and parental care.

3.2.51 The Constitutional Court confirmed that section 5 of the Children's Status Act of 1987 was unconstitutional. It ordered that it should be read to provide that the status of children born from artificial insemination should not be influenced by the fact that their parents were either same-sex permanent life partners or heterosexual married couples.<sup>144</sup>

3.2.52 In **Fraser v The Children's Court, Pretoria North**<sup>145</sup> the Constitutional Court found discriminatory legislation that failed to require the consent of a biological father to the adoption of a child born into an opposite-sex domestic partnership.

#### (v) Legal recognition of relationships

3.2.53 While all the developments referred to above provided important relief to many members of domestic partnerships, no general legal recognition of their relationships exists as yet. It is submitted that the solution lies in a comprehensive reform of the law so as to recognise and regulate domestic partnerships.<sup>146</sup>

3.2.54 In **Langemaat v Minister of Safety and Security**<sup>147</sup> the Court remarked with regard to same-sex relationships that:

The stability and permanence of their relationships is no different from the many married couples I know. Both types of relationships are deserving of respect and protection. If our law does not accord protection to the type of union I am dealing with, then I suggest it is time it does so.<sup>148</sup>

<sup>144</sup> The Constitutional Court remedied the unconstitutionality by striking out the word "married" wherever it appeared and reading in the words "or permanent same-sex life partner" after the word "husband" wherever it appeared. Chapter 15 of the Children's Bill 70D of 2003 deals with adoption and replaces *ia* the relevant provisions of the Children's Status Act of 1987.

<sup>145</sup> 1997 (2) SA 261 (CC).

<sup>146</sup> CALS Report 2001 at 11.

<sup>147</sup> 1998 (3) SA 312 T.

<sup>148</sup> The Court did indicate at 316 that the relationship between a couple in a same-sex union will be recognised only if it has existed for some time. Couples will have to prove that their relationships are stable and permanent.



3.2.55 Thereafter, in five consecutive decisions, the Constitutional Court highlighted at least four unambiguous features of the context in which the prohibition against unfair discrimination must be analysed.<sup>149</sup>

3.2.56 In one of these, **Du Toit v Minister of Welfare and Population Development**,<sup>150</sup> Skweyiya J remarked that there had been a number of recent cases, statutes and government consultation documents which broadened the scope of "family", "spouse" and "domestic relationship" to include same-sex life partners. He said that these legislative and jurisprudential developments indicated the growing recognition afforded to same-sex relationships.<sup>151</sup>

3.2.57 After this build up, the Constitutional Court in **Minister of Home Affairs v Fourie**<sup>152</sup> finally got the opportunity to address the matter that would lead to general legal recognition of same-sex relationships, namely the question of the constitutionality of the common-law definition of marriage and section 30(1) of the Marriage Act of 1961.

3.2.58 The State and the amici before the Court<sup>153</sup> contended that respect for the traditional institution of marriage requires that any recognition of same-sex unions must be accomplished outside of the law of marriage. They submitted four main arguments in support of the proposition that whatever remedy is adopted must acknowledge the need to leave traditional marriage intact.<sup>154</sup>

<sup>149</sup> These cases are: **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1999 (1) SA 6 (CC); **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000 (2) SA 1 (CC); **Satchwell v President of the Republic of South Africa** 2002 (6) SA 1 (CC); **Du Toit v Minister of Welfare and Population Development** 2003 (2) SA 198 (CC); **J v Director General, Department of Home Affairs** 2003 (5) SA 621 (CC). For a discussion of these cases see **Minister of Home Affairs v Fourie** 2006 (1) SA 524 (CC) at [47] - [59].

<sup>150</sup> **Du Toit v Minister of Welfare and Population Development** 2003(2) SA 198 (CC).

<sup>151</sup> At [32].

<sup>152</sup> 2006 (1) SA 524 (CC). See also discussion in para 5.5 *et seq* below.

<sup>153</sup> Doctors for Life International, John Jackson Smyth and the Marriage Alliance of South Africa.

<sup>154</sup> *Op cit* at [84]. See also discussion in para 5.5.11 below.

3.2.59 The Court found that the procreation argument cannot defeat the claim of same-sex couples to be accorded the same degree of dignity, concern and respect that is shown to opposite-sex couples.<sup>155</sup>

3.2.60 With reference to the need to respect religion, the Court found that the constitutional claims of same-sex couples cannot be negated by invoking the rights of believers to have their religious freedom respected, as "the two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity."<sup>156</sup>

3.2.61 The Court furthermore concluded<sup>157</sup>

that while it is true that international law expressly protects heterosexual marriage it is not true that it does so in a way that necessarily excludes equal recognition being given now or in the future to the right of same-sex couples to enjoy the status, entitlements, and responsibilities accorded by marriage to heterosexual couples.

3.2.62 As far as the family law pluralism argument is concerned, the State and the amici relied on section 15 of the Constitution which deals with freedom of religion, belief and opinion. They particularly relied on section 15(3)<sup>158</sup> and submitted that it presupposes special legislation governing separate systems of family law to deal with different family situations. It was submitted that the ability to cater for same-sex couples through legislation adopted under section 15(3) showed that the Constitution envisaged their rights being protected through special laws which would not interfere with the hallowed institution of marriage.<sup>159</sup>

---

<sup>155</sup> *Op cit* at [87].

<sup>156</sup> *Op cit* at [98].

<sup>157</sup> *Op cit* at [105].

<sup>158</sup> Section 15(3) provides as follows:

- (a) This section does not prevent legislation recognising-
  - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
  - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

<sup>159</sup> *Op cit* at [106].

3.2.63 After discussing the importance and interpretation of section 15(3), Sachs J concluded that that section does not in itself provide a gateway or compulsory path to enable same-sex couples to enjoy the status, entitlements and responsibilities which marriage accords to heterosexual couples. He said that section 15(3) "does not in itself provide the remedy claimed for it by the state and the amici, let alone constitute a bar to the claims of the applicants."<sup>160</sup>

3.2.64 In relation to the possibility of justification in terms of section 36 for the violation of the equality and dignity of same-sex couples by the traditional concept of marriage, the following arguments were put forward by the amici.<sup>161</sup> Firstly, they contended that the inclusion of same-sex couples would undermine the institution of marriage. Secondly, they contended that the inclusion of same-sex couples would intrude upon and offend against strong religious susceptibilities of certain sections of the public.

3.2.65 On the first contention Sachs J (referring to Ackermann J in **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs**<sup>162</sup>) found that<sup>163</sup>

Granting access to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenets of their religion.

3.2.66 Sachs J furthermore found that the second contention is based on the assertion derived from particular beliefs that permitting same-sex couples into the institution of marriage would devalue that institution.

Whatever its origin, objectively speaking this argument is in fact profoundly demeaning to same-sex couples, and inconsistent with the constitutional requirement that everyone be treated with equal concern and respect.

---

<sup>160</sup> *Op cit* at [109].

<sup>161</sup> The State made the submission that there was justification without advancing considerations different from those it had referred to in relation to unfair discrimination.

<sup>162</sup> 2000 (2) SA 1 (CC) at [59].

<sup>163</sup> *Op cit* at [111].

3.2.67 With regard to the arguments tendered in support of justification Sachs J concluded that<sup>164</sup>

[T]he factors advanced might have some relevance in the search for effective ways to provide an appropriate remedy that enjoys the widest public support, for the violations of the rights involved. They cannot serve to justify their continuation.

3.2.68 Sachs J subsequently ruled that the common-law definition of marriage is inconsistent with the Constitution and ordered that the definition is invalid to the extent that it does not permit same-sex couples to enjoy the same status and benefits coupled with responsibilities it accords to opposite-sex couples. He further declared the omission from section 30(1) of the Marriage Act of 1961 after the words "or husband" of the words "or spouse" to be inconsistent with the Constitution, and declared the Marriage Act to be invalid to the extent of this inconsistency.<sup>165</sup>

3.2.69 Sachs J found that given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way. Sachs J went on to say that the negative impact of the exclusion of same-sex couples from marriage is not only symbolic but also practical, and each aspect has to be responded to. Thus, it would not be sufficient merely to deal with all the practical consequences of exclusion from marriage. It would also have to accord to same-sex couples a public and private status equal to that which heterosexual couples achieve from getting married.<sup>166</sup>

3.2.70 However, Sachs J suspended the declarations of invalidity of the common-law definition of marriage and of section 30(1) of the Marriage Act until 1 December 2006 to allow Parliament to correct the defects.

3.2.71 As far as opposite-sex domestic partnerships are concerned, various moral and religious objections are used to justify the exclusion of and subsequent discrimination against unmarried couples. Generally, these reasons relate to the role

---

<sup>164</sup> *Op cit* at [113].

<sup>165</sup> *Op cit* at [81].

<sup>166</sup> *Ibid.*

played by marriage to create a “normal family” which forms the basic building block of society.<sup>167</sup>

3.2.72 From a legal standpoint this is also not a simple issue. The judgment in **Robinson v Volks N.O.**<sup>168</sup> concerned the question of maintenance of a surviving opposite-sex domestic partner.

3.2.73 In the Cape High Court, Davis J found that to ignore the arrangement between the opposite-sex domestic life partners and impose a particular religious view on their world is to undermine the dignity of difference and to render the guarantee of equality illusory insofar as a significant percentage of the population is concerned.

3.2.74 However, Davis J's ruling was reversed on appeal by the Constitutional Court.<sup>169</sup> The Court was divided and rendered a three-way split decision. Both minority judgments (one by Mokgoro and O'Regan JJ and the other by Sachs J) held that the distinction made by the law between the right of a surviving spouse to extended maintenance, on the one hand, and a surviving domestic partner's, on the other hand, was unfair and unjustifiable.

3.2.75 However, both judges handing down separate majority judgments took the opportunity to address the importance of marriage and family in society. On this basis

---

<sup>167</sup> The moral and religious objections of respondents to domestic partnerships included the following:

- The commitment of parties in a traditional marriage has a public dimension which makes it relevant to ensure a lasting relationship and stability.
- The State should strengthen these families by giving them special protection.
- Religious objections further included that it is sinful to live in a conjugal relationship without getting married.
- The argument was also made that the legal recognition of unmarried relationships will encourage people to cohabit which in turn would lead to an increase in immoral behaviour. In this context reference was made to the vulnerable position of children born to an unmarried couple.
- It was said that opposite-sex couples who cohabit choose not to marry and therefore do not deserve legal protection.

<sup>168</sup> 2004 (6) SA 288 (C). The judgment of the Cape High Court was successfully appealed to the Constitutional Court in **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC).

<sup>169</sup> **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC).

Skweyiya J ruled that the law may distinguish between married and unmarried people and in appropriate circumstances accord benefits to married people which it does not accord to unmarried people.<sup>170</sup>

3.2.76 Focussing on the question whether a duty of support exists between partners, Skweyiya J found that in the context of the provision for maintenance of the survivor of a marriage by the estate of the deceased, it is appropriate not to impose an obligation posthumously that did not exist before death.<sup>171</sup>

3.2.77 In a separate but concurring judgment, Ngcobo J stated that the constitutional recognition of the right to marry freely and the institution of marriage is consistent with the obligations imposed on our country by international and regional human rights instruments which impose obligations upon states to respect and protect marriage. He was also of the view that it is a logical consequence of the recognition of the institution of marriage that the law may, in appropriate circumstances, distinguish between married and unmarried people.<sup>172</sup>

3.2.78 Ngcobo J's concern was that if the law would impose the legal consequences of marriage on people where one or both of them did not want to get married, it would undermine the right to marry freely as well as the nature of agreement inherent in a marriage.<sup>173</sup>

3.2.79 Nevertheless, Skweyiya J expressed concern for a partner who is vulnerable and economically dependant on the other partner:

[63] Structural dependence of women in marriage and in relationships of heterosexual unmarried couples is a reality in our country and in other countries. Many women become economically dependent on men and are left destitute and suffer hardships on the death of their male partners.

3.2.80 With reference to the judgment of Sachs J, he stated as follows:

---

<sup>170</sup> *Op cit* at [54].

<sup>171</sup> *Op cit* at [60].

<sup>172</sup> *Op cit* at [87].

<sup>173</sup> "Indeed it would amount to an imposition of the will of one party upon the other. This is equally unacceptable." *Op cit* at [94]

[64] Much of the argument and many of the passages of the judgment of Sachs J express concern for the plight of vulnerable women in cohabitation relationships. This concern arises because women remain generally less powerful in these relationships. They often wish to be married, but the nature of the power relations within the relationship makes a translation of that wish into reality difficult. This is because the more powerful participants in the relationship would not agree to be bound by marriage. The consequences are that women are taken advantage of and the essential contributions by women to a joint household through labour and emotional support is not compensated for.

3.2.81 However, he expressed a clear view that the onus to address these inequities is on the legislature:

[65] I agree that the women in this category suffer considerably. But it is not the under-inclusiveness of section 2(1) which is the cause of their misery. The plight of a woman who is the survivor in a cohabitation relationship is the result of the absence of any law that places rights and obligations on people who are partners within relationships of this kind during their lifetimes. I accept that laws aimed at regulating these relationships in order to ensure that a vulnerable partner within the relationship is not unfairly taken advantage of are appropriate.

[66] In the case of the very poor and illiterate the effects of vulnerability are more pronounced. The vulnerability of this group of women is, in my view, part of a broader societal reality that must be corrected through the empowerment of women and social policies by the legislature. ...It needs more than the extension of benefits under section 2(1) to survivors who are predeceased by their partners.

[68] .... The answer lies in legal provisions that will make a real difference to vulnerable women at a time when both partners to the relationship are still alive. Once provision is made for this, the legal context in which section 2(1) falls to be evaluated will change drastically.

3.2.82 Ngcobo J also addressed this important matter but referred to the practical difficulty in establishing the existence of, as he referred to it, a permanent life partnership. He emphasised that the point at which such partnerships come into existence is not determinable in advance and that the consequences are determined by agreement between the parties.

[95] Unless these have been expressly agreed upon, they have to be inferred from the conduct of the parties. What happens at the dissolution of such partnerships is far from clear. All of this points to the need to regulate permanent life partnerships. This does not mean that a law designed to regulate marriage is unconstitutional simply because it does not regulate permanent life partnerships.

3.2.83 Noticeably, however, despite the divided judgement in this case, all the judges agreed that some legal regulation of unmarried partnerships is necessary and the majority were in agreement that such measures are best left to the legislature.

3.2.84 According to the minority judgments, the following should be considered when amending the law:

- \* Choice must be respected but also understood contextually. In South Africa, gender inequality, disempowerment of women, poverty and ignorance of the law contribute towards removing real choice from many people, especially poor women.<sup>174</sup>
- \* The moral and religious objections against legal recognition of same-sex marriage and domestic partnerships are not shared by everyone in a heterogeneous society such as ours. The aim of the law should be to regulate legal relationships and not to be prescriptive about morality.<sup>175</sup>

---

<sup>174</sup> See also the minority judgments of Mokgoro and O' Regan JJ and Sachs J in **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) on the needs of vulnerable parties in relationships.

<sup>175</sup> In this context Mokgoro and O' Regan JJ, in their minority judgment, remarked as follows at [136]:

... To the extent that the purpose of providing legal protection to a surviving spouse but not to a surviving cohabitant might be to preserve the religious attributes of marriage, this cannot be an acceptable purpose in terms of our Constitution. While marriage plays an important role in our society, and most religions cherish it, the Constitution does not permit rights to be limited solely to advance a particular religious perspective.

Sachs J made a similar comment at [204]:

It is important to stress at this point that the issue is not whether members of religious or cultural communities should as a matter of faith be free to regard marriage as a sacred contract which constitutes the only acceptable gateway to legitimate sexual intimacy and cohabitation. Nor is it to query the corollary right of such believers to condemn those who are guilty of what they may regard as fornication and adultery. Clearly their entitlement as part of their religious belief to criticise what they regard as misconduct remains unchallenged. The question, rather, is whether the State should be bound by such concerns. Going further, it is whether the State is required or entitled by these, or by more secular considerations, to give exclusive recognition for purposes of spousal maintenance to married survivors only.



### c) Legislative intervention since 1994<sup>176</sup>

3.2.85 There has been a number of important legal developments in the field of family law since the enactment of the Constitution. These developments point to a recognition by the lawmakers and the courts that the notion of family is influenced by culture and changes over time. There is also recognition that the nucleus model of a single-generation, heterosexual, civilly married couple with children born within wedlock is neither the norm nor the only form of family that deserves legal recognition.<sup>177</sup>

3.2.86 Legislation which has been passed or amended following the introduction of the interim and final Constitutions is therefore indicative of a new legislative approach,<sup>178</sup> and has shown a growing acknowledgement and recognition of domestic partnerships.<sup>179</sup>

3.2.87 The legislation enacted in terms of section 9(4) of the Constitution,<sup>180</sup> so-called constitutional legislation, is particularly relevant. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000<sup>181</sup> gives greater effect to the constitutional guarantee of equality. The Act prohibits discrimination against any person and the prohibited grounds for discrimination include marital status and sexual orientation.<sup>182</sup>

---

<sup>176</sup> It should be noted that the legislative developments discussed below all took place in the absence of marital rights for same-sex couples and no general recognition for domestic partners with the aim to accommodate these relationships. It would thus be imperative to revisit these ad hoc legislative provisions with the view to determine which of the relationships in the family dispensation recommended by the Commission, fall in the category that was originally intended to benefit from the legislative developments.

<sup>177</sup> CALS Report 2001 at 11.

<sup>178</sup> Sachs J in **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) at [178].

<sup>179</sup> Women's Legal Centre Report **Litigation and Law Reform: Domestic Partnerships** 2000 at 4.

<sup>180</sup> Section 9(4) of the Constitution states that "national legislation must be enacted to prevent or prohibit unfair legislation".

<sup>181</sup> Act 4 of 2000. See also the discussion of these Acts by Sachs J in **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) paras [176] and [177].

<sup>182</sup> Section 6 reads as follows:

#### **6 Prevention and general prohibition of unfair discrimination**

Neither the State nor any person may unfairly discriminate against any person.

3.2.88 The Act further states that all Ministers must implement measures within available resources which are aimed at the achievement of equality in their areas of responsibility, *ia* by eliminating any form of unfair discrimination or the perpetuation of inequality in any law, policy or practice for which those Ministers are responsible.<sup>183</sup> The Act furthermore refers to the possible inclusion of the grounds of "family responsibility" and "family status" within the listed grounds of discrimination.<sup>184</sup>

3.2.89 The Employment Equity Act of 1998<sup>185</sup> is also important since it specifically prohibits unfair discrimination on the ground of family responsibility over and above the other grounds of discrimination such as race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.<sup>186</sup>

3.2.90 An example of legislation which was amended to comply with the new constitutional dispensation is the Medical Schemes Act of 1998.<sup>187</sup> The new Act prohibits the registration of any medical scheme unless the Council is satisfied that the medical scheme does not or will not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds including, *ia* sexual orientation. This implies that a medical aid scheme is now required by law to provide individuals in same-sex relationships with the same opportunities it affords opposite-sex married and unmarried couples to register their dependants, including their partners, on the medical aid scheme.

---

<sup>183</sup> Section 25(4).

<sup>184</sup> Section 34.

<sup>185</sup> Act 55 of 1998.

<sup>186</sup> Section 6 reads as follows:

**6 Prohibition of unfair discrimination**

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

<sup>187</sup> Medical Schemes Act 131 of 1998 regulates the management of medical schemes in order to protect the public from exploitation and abuse. Institutions that carry on the business of a medical aid scheme are required by the Act to lodge an application to register the medical scheme with the Registrar of Medical Aid Schemes. See discussion by De Vos "Sexual Orientation and Family Law" 2002 at 5.

3.2.91 The rules of pensions and provident funds often provide benefits to the "spouse" or "widow/er" of a member, where these terms are explicitly or implicitly defined with specific reference to marriage. At present the Pension Funds Act of 1956<sup>188</sup> does not prescribe rules as to when the partner in a same-sex relationship should be accommodated by pension fund rules and when not. However, the Pension Funds Adjudicator has confirmed that such accommodation may be required.

3.2.92 The Adjudicator was called upon to consider the validity of a decision by a pension fund to refuse to pay spousal benefits to the same-sex life partner of one of its members. He found that the definition of marriage in the relevant Pension Fund's rules differentiated between opposite-sex and same-sex domestic partnerships and thus discriminated against the latter. He found furthermore that the discrimination was unfair. In light of his finding the adjudicator declared that the definition of marriage had to be reworked to make provision for all couples irrespective of their sexual orientation.<sup>189</sup>

3.2.93 A domestic partner may therefore receive pension fund benefits as a nominee. A domestic partner may also receive pension benefits as a factual dependant if he or she qualifies as such under the definition of "dependant" in the regulations or conditions of that particular fund. In the event of a dispute it would be essential to prove that the relationship is a "committed cohabitation relationship" or "universal partnership". Proving this is not always easy. Courts examine whether partners have made "a public commitment to each other", for example if they share finances.<sup>190</sup>

---

<sup>188</sup> Act 24 of 1956.

<sup>189</sup> See discussion by De Vos "Sexual Orientation and Family Law" 2002 at 6.

<sup>190</sup> Schweltnus **Obiter** 1996 at 49. The Government Employees Pension Law of 1996 in s 1 also defines dependant to mean any person in respect of whom the member or pensioner, although not legally liable for maintenance, was, in the opinion of the Board at the time of death in fact dependent upon such member or pensioner for maintenance. Another example is where spouse in s 31 of the Special Pensions Act of 1996 is defined to mean 'the partner ... in a marriage relationship', which latter relationship is defined to include 'a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least five years'. Cohabitation has in general no effect on the receipt of social pensions. An exception is the definition of wife in the Military Pensions Act of 1976 to include a woman who is the natural mother of a child under the age of eighteen years who is regularly maintained by the member, and a woman with whom the member lived together as man and wife for a period of at least five years immediately prior to the commencement of his military service within the meaning of s 2(3).

3.2.94 Under the Compensation for Occupational Diseases Act of 1997<sup>191</sup> a surviving domestic partner does have a claim for compensation if a partner died as a result of injuries received during the course of work, if he or she was a person with whom the employee was at the time of the employee's death living as "husband and wife". However, by referring to husband and wife, this definition ostensibly excludes same-sex relationships.

3.2.95 The Domestic Violence Act of 1998<sup>192</sup> appears to confer a (at least temporary) right of occupation upon a partner/cohabitant. Section 1(vi) of the Act defines a domestic relationship in numerous ways, including that the partners:

- \* live or lived together in a relationship in the nature of a marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- \* are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- \* are or were in an engagement, dating or customary relationship which includes but is not limited to an actual or perceived romantic, intimate or sexual relationship of any duration;
- \* share or shared the same household or residence.

3.2.96 The Act also provides remedies for violence, including orders preventing the owner of the common home from entering or living in it, and from ejecting the non-owning domestic partner.<sup>193</sup>

3.2.97 The Acts listed below show further examples of the wide range of circumstances in which the law currently expressly recognises domestic

---

<sup>191</sup> Act 61 of 1997, subsection (c) of the definition of dependent.

<sup>192</sup> Act 116 of 1998.

<sup>193</sup> Section 7 of the Act. See also Sinclair **Marriage Law** 1996 at 286 and references therein.

partnerships, including other unions in the ambit of marriage. These instruments of recognition are limited to the specific purposes of each statute.<sup>194</sup>

- \* the use of the expressions "spouse, partner or associate" in section 6(1) (f) of the Independent Media Commission Act of 1993 and sections 5(1) (e) and (f) of the Independent Broadcasting Authority Act of 1993 and the fact that, for purposes of these provisions, "spouse" includes a "*de facto* spouse";
- \* "life-partner" in sections 3(7)(a)(ii), 3(8) and 7(5) of the Lotteries Act of 1997;
- \* section 27 (2)(c)(i) of the Basic Conditions of Employment Act of 1997 provides for family responsibility leave in the event of the death of a "spouse or partner";
- \* the definition of "spouse" in section 31 of the Special Pensions Act of 1996 to mean "the partner ... in a marriage relationship" which latter relationship is defined to include "a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years";
- \* the definition of "family responsibility" in section 1 of the Employment Equity Act of 1998 which includes "responsibility of employees in relation to their spouses or partner, their dependent children or other members of their immediate family who need their care and support";
- \* the definition of "spouse" in section 8(6)(e)(iii)(aa) of the Housing Act of 1997 which includes "a person with whom the member lives as if they were married or with whom the member habitually cohabits";
- \* sections 9(4) and 11(5)(b) of the South African Civil Aviation Authority Act of 1998;

---

<sup>194</sup> **The National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000 (2) SA 1 (CC). See also Sachs J in **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) at [175] and fn 44. The list does not profess to be exhaustive.

- \* "life partners" in sections 10(2) and 15(9) of the Road Traffic Management Corporation Act of 1999;
- \* section 35 of the Constitution of 1996, dealing with the rights of arrested, detained and accused persons, provides that such people have the right to communicate with and to be visited by his or her spouse or partner;
- \* clarity for unmarried fathers on their rights of access and custody. Natural Fathers of Children Born out of Wedlock Act of 1997;
- \* section 21(13) of the Insolvency Act of 1936 states that for purposes of that section the word "spouse" means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another;
- \* legislation recently passed extending the definition of "spouse" for the purpose of estate duty provisions to domestic partners (Amendment of the definition of spouse in section 1 of the Estate Duty Act of 1955 in terms of section 3 of the Taxation Laws Amendment Act of 2001).

### 3.3 Current legal position of domestic partnerships

3.3.1 The legal position regarding both same-sex and opposite-sex couples has been set out above. The consequences flowing from this position for partners in these relationships in various areas of their lives, are as follows:<sup>195</sup>

---

<sup>195</sup> To be noted that, in terms of the judgment in **Minister of Home Affairs v Fourie**, partners in same-sex relationships have the prospect that they will acquire full legal recognition of their unions should they so require by 1 December 2006 at the latest. The effect would be that formal registration of same-sex unions would automatically extend the common law and statutory legal consequences to same-sex couples that flow to heterosexual couples from marriage. In contrast with the prospects of same-sex couples wanting to get married, the current legal position of same- and opposite-sex couples who prefer not to get married is still uncertain.

### a) Legal duty of support

3.3.2 A married couple have a legal duty to support each other during the subsistence of their marriage. There is no such legal duty of support between same- and opposite-sex partners in permanent domestic partnerships during its existence. Neither party may bind the other in contract for household necessities, unless the one has appointed the other as his or her agent.<sup>196</sup>

3.3.3 In the absence of a legal duty of support during the existence of the relationship, the partners cannot be held liable to provide each other with accommodation, food, clothing, medical and dental attention or other reasonable requirements.<sup>197</sup> There are, however, a few exceptions where ad hoc legislative developments and case law has created some rights and duties for domestic partners.<sup>198</sup> These rights are enforceable in terms of those specific provisions or precedents and are not based on a general duty of support.

#### (i) Medical aid benefits

3.3.4 The Medical Schemes Act of 1998<sup>199</sup> was amended in accordance with the new constitutional dispensation.<sup>200</sup> The new Act prohibits the registration of any medical scheme unless the Council is satisfied that the medical scheme does not or will not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds, including sexual orientation. This implies that a medical aid scheme is now required by law to provide individuals in same-sex relationships with the same opportunities it affords opposite-sex married and unmarried couples to register their dependants (including their partners) on the medical aid scheme.

<sup>196</sup> Hutchings & Delpont **De Rebus** 1992 at 121; Hahlo in Kahn **Fiat iustitia** 1983 at 246; M Collins "Cohabiting? Then Mind Your Own business" *Electronic Mail and Guardian* March 9, 1998; CALS Report 2001 at 10, **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC).

<sup>197</sup> Sinclair **Marriage Law** 1996 at 284 and references made therein.

<sup>198</sup> See para 3.2 above.

<sup>199</sup> Act 131 of 1998.

<sup>200</sup> See discussion of De Vos "Sexual Orientation and Family Law" 2002 at 5. See also paras 3.2.35 and 3.2.90 above.

## (ii) Pension benefits

3.3.5 Another example of how legislative developments have benefited domestic partners is found in the area of pension funds. Despite the fact that the rules of pensions and provident funds often define "spouse" or "widow/er" of a member with specific reference to marriage, the Pension Funds Adjudicator has confirmed that same-sex relationships have to be accommodated as well.<sup>201</sup>

3.3.6 A domestic partner may therefore receive pension fund benefits as a nominee. A domestic partner may also receive pension benefits as a factual dependant if he or she qualifies as such under the definition of "dependant" in the regulations or conditions of that particular fund.<sup>202</sup>

## (iii) Statutory claim for damages

3.3.7 Under the South African Compensation for Occupational Diseases Act of 1997<sup>203</sup> a surviving domestic partner may claim for compensation if a partner died as a result of injuries received during the course of work.<sup>204</sup>

---

<sup>201</sup> See para 3.2.91 *et seq* above.

<sup>202</sup> In the event of a dispute it would be essential to prove that the relationship is a "committed cohabitation relationship" or "universal partnership". Proving this is not always easy. Courts examine whether partners have made "a public commitment to each other", for example if they share finances. See also Schweltnus *Obiter* 1996 at 49 in this regard. The Government Employees Pension Law, Proclamation 21 of 1996 in s 1 defines dependant to also mean any person in respect of whom the member or pensioner, although not legally liable for maintenance, was, in the opinion of the Board at the time of death in fact dependent upon such member or pensioner for maintenance. Another example is where spouse in s 31 of the Special Pensions Act 69 of 1996 is defined to mean 'the partner ... in a marriage relationship', which latter relationship is defined to include 'a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least five years'. Cohabitation has in general no effect on the receipt of social pensions. An exception is the definition of wife in the Military Pensions Act 84 of 1976 to include a woman who is the natural mother of a child under the age of eighteen years who is regularly maintained by the member, and a woman with whom the member lived together as man and wife for a period of at least five years immediately prior to the commencement of his military service within the meaning of s 2(3).

<sup>203</sup> Subsection (c) of the definition of dependent in the Compensation for Occupational Diseases Act 61 of 1997.

<sup>204</sup> See para 3.2.94 above.



#### (iv) Maintenance after separation

3.3.8 At common law, the duty of support between husband and wife terminates when the marriage ends. However, for deep-rooted social, religious and economic reasons, and because women are unequally burdened with child-care responsibilities, they often do not enjoy the same capacity to earn as men and therefore often cannot support themselves after the marriage ends.

3.3.9 To address this situation section 7 of the Divorce Act of 1979 extends the duty of support between married spouses to continue as a maintenance liability after divorce under prescribed circumstances.<sup>205</sup> The Divorce Amendment Act of 1989 furthermore provides for the accumulated pension interests of a party to be regarded as an asset in that party's estate. Thus pension interests will now form an asset to be taken into account upon the distribution of the matrimonial property after divorce.<sup>206</sup>

3.3.10 However, the problems experienced by women are not unique to a marriage relationship. Notwithstanding this reality, owing to the absence of a legal duty of support during the existence of the relationship, there is no maintenance liability or pension redistribution after the former domestic partners have separated, despite the fact that they may find themselves in comparably vulnerable positions.

---

<sup>205</sup> Sinclair **Marriage Law** 1996 at 148.

The Divorce Act of 1979 provides as follows regarding maintenance after divorce:

#### **7 Division of assets and maintenance of parties**

(1) A Court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the Court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the breakdown of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the Court should be taken into account, make an order which the Court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

<sup>206</sup> Hutchings & Delport **De Rebus** 1992 at 121.

(v) **Delictual claim for damages**

3.3.11 Similarly, owing to the absence of a legal duty of support during the existence of the relationship, there is no action for damages for the unlawful death of a person who was supporting his/her partner.<sup>207</sup>

3.3.12 This is so even if the couple has undertaken contractually to support each other. In **Union Government v Warneke**<sup>208</sup> it was held that a claim for damages resulting from loss of support lies only if the duty to support exists by operation of the law.<sup>209</sup>

(vi) **Intestate succession**

3.3.13 The Intestate Succession Act of 1987 extends the common-law duty of support between married spouses by conferring that duty on the estate of the deceased and as a result married spouses automatically inherit from each other where no will has been made. The rules of intestate succession as set out in the Intestate Succession Act of 1987 determine that in absence of a valid testamentary document, the beneficiaries are, in the first instance, a spouse or descendants or both. In the event of there being neither spouse nor descendants, the estate devolves upon other more distant members of the bloodline.<sup>210</sup>

3.3.14 There is no right of intestate succession between domestic partners, no matter how long they have lived together.<sup>211</sup> A partner is not automatically regarded as an heir or dependant.<sup>212</sup> Should the deceased partner have failed to make a will favouring the other, the survivor could be faced with the monstrous task of having to prove his or her specific contribution to the joint estate before entitlement will be forthcoming. Proving actual contribution is often extremely difficult, especially after

---

<sup>207</sup> CALS Report 2001 *ibid.*

<sup>208</sup> 1911 AD 657.

<sup>209</sup> Sinclair **Marriage Law** 1996 at 285.

<sup>210</sup> Act 81 of 1987. This Act does not define "spouse".

<sup>211</sup> Sinclair **Marriage Law** 1996 at 289; Hahlo in Kahn **Fiat iustitia** 1983 at 246.

<sup>212</sup> Hutchings & Delport **De Rebus** 1992 at 121; CALS Report 2001 at 11.

one partner has died. Litigation is usually lengthy and costly and obviously unwelcome, particularly at a time already fraught with emotional trauma. This problem is exacerbated if the deceased has not divorced a previous spouse. In law, the first spouse clearly has the leverage to proceed and claim the entire estate.<sup>213</sup>

### (vii) Maintenance of a surviving partner

3.3.15 The Maintenance of Surviving Spouses Act of 1990 places a spouse in a better position than a partner by providing for the reasonable maintenance needs of a surviving spouse to be met by the estate of the deceased spouse.<sup>214</sup> In this Act, which is also an extension of the common-law duty of support between spouses, "survivor" is defined as "the surviving spouse in a marriage dissolved by death".<sup>215</sup>

3.3.16 In **Volks N.O. v Robinson**<sup>216</sup> the majority of the Constitutional Court found that this definition of "survivor" does not include a surviving domestic partner and that this exclusion does not amount to unfair discrimination. Skweyiya J motivated his ruling that a surviving domestic partner is not entitled to survival maintenance with reference to the absence of a pre-existing legal duty of support during the existence of the domestic partnership.

3.3.17 Since a legal duty of support is clearly the basis of a whole range of rights and obligations during the relationship as well as after termination by separation or death, the absence of a suitable alternative for domestic partnerships needs to be addressed.

---

<sup>213</sup> Singh **CILSA** 1996 at 318.

<sup>214</sup> Hutchings & Delport **De Rebus** 1992 *ibid.*

<sup>215</sup> The Act provides as follows regarding maintenance after death of a spouse:

#### **2 Claim for maintenance against estate of deceased spouse**

(1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.

<sup>216</sup> 2005 (5) BCLR 446 (CC).

## b) Proprietary matters

3.3.18 The common law provides little protection for the property rights of a domestic partner. The law of unjustified enrichment or the concept of universal partnership within contract law might be used to assist partners in a property dispute, but is not suitable to resolve disputes in the family law context. The absence of proper legal recognition and regulation of domestic partnerships is the reason why former partners cannot achieve a fair distribution of joint property after the relationship has ended.

3.3.19 The practical result of establishing a permanent relationship is often the sharing of a joint home and household goods. If both parties are separate homeowners, the (not unusual) result is for one of them to give up and sell his or her home and move in with the other. Over time the proceeds of the sale may be used up, applied for the benefit of the new family, or be invested in the new joint household.

3.3.20 It is important in any domestic partnership to be specific about the respective parties' interests, particularly where immovable property is involved.<sup>217</sup> Even if the joint home is paid for by both parties but not registered in the names of both partners, a domestic partner has no protected right to occupy the common home<sup>218</sup> or to share in the proceeds of the sale of the home.<sup>219</sup>

3.3.21 Where women and men live together, men often earn more or are the sole breadwinners. Women look after the children. Women are therefore particularly vulnerable. When the relationship is terminated and the man has paid towards the house, he will be entitled to keep it and the woman may be left with the children and

---

<sup>217</sup> Singh **CILSA** 1996 at 321.

<sup>218</sup> Sinclair **Marriage Law** 1996 at 286. The only possible recourse for the non-owner is for him or her either to claim the existence of a universal partnership between the parties, or compensation on the ground of unjustified enrichment. See paras 3.1.14 *et seq* and 3.1.63 above for a discussion of these concepts.

<sup>219</sup> Where property is already registered in the name of one of the partners as sole titleholder, the entitled holder could consent to the necessary amendment to the deed of property to facilitate the transfer of the property into their joint names. Alternatively, the parties could enter into a partnership agreement or for a trust with both parties as trustees. A further option would be for them to create a company with the two parties as shareholders. Should the parties intend the property to be divided in shares other than equally, this must be specifically recorded. These alternatives are often financially prohibitive which raises the question who will be liable to pay for the necessary procedures.

no home. Where the one partner dies the surviving partner may well find herself evicted from the family home.<sup>220</sup>

3.2.22 Couples leasing a home also find themselves in a predicament. In terms of the South African Rental Housing Act of 1999 a "tenant" means the lessee of a dwelling which is leased by a landlord. No reference is made to a spouse or dependant of such a lessee, thus a former domestic partner has no legal basis for redress if he or she was not a party to the lease contract. Although such a partner would also not be legally liable to pay rent during the relationship, it may happen in practice that he or she has indeed paid the rent or contributed in some other way to the household expenses. However, upon termination of the relationship no certain ground exists to consider such contribution and he or she is not protected by the law.<sup>221</sup>

3.3.23 Even if the couple stay in a rented home leased in the name of both domestic partners, problems may occur when a decision must be made about who is to stay on in the home after termination of the relationship. Tenants face difficult decisions about which partner should retain the home and what accommodation alternatives are available for the outgoing partner. Often the circumstances in which these decisions are made are not amicable.

3.3.24 Ancillary to the "house owner" dilemma are the problems that arise with regard to accumulated household goods and furniture. Division of property in a prescribed and organised fashion, as is found in the case of divorce, does not take place where domestic partners split up.<sup>222</sup>

3.3.25 Another example of discrepancy is the matter of estate duty. If a couple is married the estate duty that is due after the death of the first party, is deferred on property willed to the surviving spouse.<sup>223</sup> Such duty is only payable at the time of the surviving spouse's death. When a domestic partnership is ended by death of one of

---

<sup>220</sup> **Weekly Mail and Guardian** "Untying the Legal Love Knots" 24 April 1998.

<sup>221</sup> Once again the uncertainty and high costs of the alternative recourses disqualify them as real remedies.

<sup>222</sup> Hutchings & Delport **De Rebus** 1992 at 121.

<sup>223</sup> Submission from G I Neke received regarding the Review of the Marriage Act Discussion Paper.

the partners, any estate duty that is payable on a bequest in terms of a will has to be paid in full immediately.

### c) Children

3.3.26 Historically a child born of a domestic partnership would have been regarded as illegitimate but the distinction between "legitimate" and "illegitimate" children has been abolished in South Africa.

3.3.27 The law does not distinguish between married and unmarried parents in regard to the obligation to support children. Decisions regarding custody and access are based on what is in the best interests of the child. Children are protected if the couple is not married since both biological parents are responsible for their children. The father and mother are both still liable for maintenance if the couple splits up.<sup>224</sup>

3.3.28 However, a father of a child born out of wedlock does not automatically have any rights over such a child. Rights to custody and access will only be accorded to a father of a child on application by a court of law and if it is in the best interests of the child.<sup>225</sup> This means that for financial responsibilities there is automatic recognition of fatherhood, but for the more general parenthood responsibilities an unmarried father must take positive steps to obtain a court order to that effect. The Constitutional Court has found that there was discrimination against fathers of illegitimate children in legislation that failed to obtain their consent to the adoption of the child.<sup>226</sup>

3.3.29 The law only recognises the relationship between parent and child based on biology or marriage. If a child is adopted by one domestic partner and the child is raised by both partners as its parents, the partner who has custodianship of the child can refuse access to the other partner in the event of the relationship's breaking up. If the custodial parent dies, the other partner would not automatically assume custody of the child.

---

<sup>224</sup> M Collins "Cohabiting? Then Mind Your Own business" Electronic Mail and Guardian March 9, 1998 *ibid*.

<sup>225</sup> Section 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997.

<sup>226</sup> **Fraser v The Children's Court, Pretoria North an Others** 1997 (2) SA 261 (CC).

3.3.30 The Child Care Act of 1983<sup>227</sup> provides for the adoption of children by a wide variety of individuals, including unmarried and divorced persons. In principle it is therefore possible for domestic partners to adopt children, but only as individuals.<sup>228</sup>

#### d) Insolvency

3.3.31 The Insolvency Act of 1936<sup>229</sup> is one of the statutory provisions in our law which makes specific provision for the position of domestic partners. Section 21 of this Act provides that if the separate estate of one of two spouses who are not living apart is sequestrated, the estate of the solvent as well as that of the insolvent spouse vests, first in the Master, and then in the trustee.

3.3.32 It further provides that the estate of the solvent spouse has to be released if he or she proves that it was acquired by him or her by a title which cannot be assailed by the creditors of the insolvent spouse.

3.3.33 Section 21(13) provides that a woman who is living with a man as his wife, and a man who is living with a woman as her husband are included in the definition of spouse. In **Chaplin v Gregory**,<sup>230</sup> however, the insolvent lived with another woman, apart from his wife, and the court held that the estate of his wife and not of his domestic partner vested in the trustee. The decision seems not to be in accord with the statutory provisions.<sup>231</sup>

---

<sup>227</sup> Act 74 of 1983. See also the new Children's Act, currently the Children's Bill 70D of 2003.

<sup>228</sup> Until very recently same-sex couples could not adopt children as couples - only married couples were allowed to adopt jointly since the Act only provided for the legally married spouse of a parent to adopt that parent's child by another person. This effectively excluded homosexuals from adopting the children of their domestic partners, even where they shared a family life. However, in the recent decision of **Du Toit v Minister of Welfare and Population Development** 2003 (2) SA 198 (CC), the Constitutional Court found these provisions to be unconstitutional.

<sup>229</sup> Act 24 of 1936.

<sup>230</sup> 1950 (3) SA 555.

<sup>231</sup> Sinclair **Marriage Law** 1996 *ibid.*

### e) Succession/Inheritance

3.3.34 Married couples automatically inherit from each other where no will has been made. There is, however, no right of intestate succession between domestic partners, no matter how long they have lived together.<sup>232</sup> A partner is not automatically regarded as an heir or dependant.<sup>233</sup>

3.3.35 The rules of intestate succession as set out in the Intestate Succession Act of 1987<sup>234</sup> are very clear. In the event of there being no valid testamentary document the beneficiaries are, in the first instance, a spouse or descendants or both. In the event of there being neither a spouse nor descendants, the estate devolves upon other more distant members of the bloodline.<sup>235</sup>

3.3.36 If a couple is married the estate duty after the death of the first party is furthermore deferred on property willed to the surviving spouse.<sup>236</sup> It is, of course paid at the time of the surviving spouse's death. This does not, however, happen when the domestic partnership is one of permanence but not marriage. Full estate duty has to be paid immediately.

3.3.37 There is, however, no obstacle to making specific provision for a domestic partner by will.<sup>237</sup> Nothing precludes a partner from leaving his or her estate to the other partner in the relationship. He or she may do so even to the exclusion of his or her spouse.<sup>238</sup> The testator will, however, have to make it plain that he or she wants to benefit the domestic partner.<sup>239</sup>

---

<sup>232</sup> Sinclair **Marriage Law** 1996 at 289; Hahlo in Kahn **Fiat iustitia** 1983 at 246.

<sup>233</sup> Hutchings & Delpont 1992 **De Rebus** *ibid*; CALS Report 2001 at 11.

<sup>234</sup> Act 81 of 1987.

<sup>235</sup> Singh **CILSA** 1996 at 314.

<sup>236</sup> Submission from G I Neke received regarding the Review of the Marriage Act Discussion Paper.

<sup>237</sup> Hutchings & Delpont 1992 **De Rebus** *ibid*.

<sup>238</sup> Hahlo in Kahn **Fiat iustitia** 1983 at 246.

<sup>239</sup> Sinclair **Marriage Law** 1996 at 289 and references therein.



## f) Insurance

3.3.38 Either partner in a partnership may name the other as beneficiary under a life insurance policy. The nomination will, however, have to be clear, for a clause in an insurance policy which confers benefits on members of the insured's "family" may cause problems. And if a policy, for instance a motor-car insurance policy, covers (or excludes) passengers who are members of the insured's family, this provision does not operate to the benefit (or detriment) of the insured's partner.<sup>240</sup>

3.3.39 In **Farr v Mutual & Federal Insurance Co Ltd**<sup>241</sup> the court held that two gay men living together in a domestic relationship constituted a family. In this case the applicant was involved in a motor vehicle accident. His passenger was his partner with a limited claim on the Multilateral Motor Vehicle Fund. This made the applicant liable for the remainder of his partner's claim and accordingly the applicant relied on his own insurer, the respondent. The respondent repudiated the claim. The court upheld the repudiation in finding that the applicant's partner was a member of his family.<sup>242</sup>

## g) Immigration

3.3.40 In **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs**<sup>243</sup> the constitutional validity of section 25(5) of the Aliens Control Act of 1991,<sup>244</sup> dealing with permanent residence permits, was successfully challenged. The Court subsequently ordered that the constitutional defect in section 25(5) could be cured by reading in, after the word "spouse", the following words: "or partner in a permanent same-sex life partnership". The Court said that "permanent" in this context meant an established intention of the parties to cohabit with one another

---

<sup>240</sup> Sinclair **Marriage Law** 1996 at 290.

<sup>241</sup> 2000 (3) SA 684 (C).

<sup>242</sup> See discussion by Louw **SAJHR** 2000 at 16.

<sup>243</sup> 2000 (2) SA 1 (CC).

<sup>244</sup> Act 1996 of 1991.

permanently.<sup>245</sup> Section 25(5) subsequently grants recognition to foreign same-sex life partnerships in the same way as it does to opposite-sex foreign partners.

---

<sup>245</sup> At [86] and [97].

## CHAPTER 4: COMPARATIVE SURVEY

### 4.1 The Netherlands<sup>1</sup>

#### a) Background

4.1.1 The Netherlands has a constitutional monarchy, with a Constitution adopted in 1814, and a civil law legal system. The basic rules on family law in the Netherlands can be found in Book 1 of the Dutch Civil Code.<sup>2</sup> This code, enacted in 1838, is based on a mixture of Roman, French and old National Dutch law. Although this code has been modernised several times owing to the growing influence of human rights on the Dutch legal system in the last few decades,<sup>3</sup> the Dutch legislator has constantly been confronted with challenges to adjust the code to the jurisprudence, especially in the field of family law.<sup>4</sup> The Constitution does not permit judicial review

<sup>1</sup> The Netherlands is a small but densely populated country: more than 15 million people live on 41.548 km<sup>2</sup>. The population does not constitute a homogeneous cultural whole. The ethnic groups found in the Netherlands are Dutch: 91%; Moroccans, Turks and other: 9%. Diversity in terms of religious values (Roman Catholic 31%, Protestant 21%, Muslim 4.4%, other 3.6% and unaffiliated 40%) and professional activity is an outstanding characteristic of the inhabitants. See "Ethnic Groups and Religion" in the Netherlands in **World Factbook**. Very conservative (eg orthodox religious) and modern groups can be found living next to each other peacefully. See in this regard the Vlaardingerbroek "Influence of Human Rights Conventions" 1997.

<sup>2</sup> Hereafter referred to as the "DCC". Title 5 of Book 1 deals with marriages. Section 1 of Title 5 prescribes the conditions for conclusion of a marriage, s 2 the formalities, s 3 the grounds on which a marriage may be barred, s 4 the consummation of marriages and s 5 the annulment of marriages. Besides this part of the Civil Code, family law can also be found in other codes.

<sup>3</sup> At a *supra*-national level the activities of the Council of Europe and the United Nations play an important role since Dutch law can be superseded by international law. The impact of international conventions, such as the European Convention on Human Rights and Fundamental Freedoms, on Dutch Law has been enormous. Articles 8 and 14 of that Convention have been particularly influential. Article 8 provides for respect for private and family life and Article 14 guarantees the enjoyment of rights without discrimination on sexual grounds. See also **Marckx v Belgium** 68833/74 of 13/06/1979, a decision of the European Court of Human Rights available at [www.worldlii.org/eu/cases/ECHR/1979/2.html](http://www.worldlii.org/eu/cases/ECHR/1979/2.html) (accessed on 10 November 2005).

<sup>4</sup> These challenges to the marriage laws have generally been unsuccessful up to now. Dutch judges have been unwilling to find that same-sex couples have the right to marry, saying it is not up to the judiciary to remedy claims of inequality between same- and opposite sex-couples, deferring the problem, instead, to Parliament. However, although Dutch law is based on statute, it is interesting to note that judge-made law is becoming more important. For an overview of the jurisprudence on this topic see Maxwell **Electronic Journal of Comparative Law** 2000.

of acts of the Staten Generaal.<sup>5</sup> This fact makes the Courts reluctant to amend pieces of legislation which are argued to be unconstitutional on the basis of discrimination.<sup>6</sup>

4.1.2 Prior to 1998 there was no general legal recognition<sup>7</sup> of the rights of unmarried couples.<sup>8</sup> Marriage law provided that a man and a woman were allowed to get married when they were 18 years or older, and a marriage had to be monogamous and between opposite-sex partners.<sup>9</sup>

4.1.3 Only a civil marriage was regarded as being legally valid, a church ceremony alone was insufficient.<sup>10</sup> This is still the case, even today.

4.1.4 Some couples were, however, for various reasons not inclined to marry and others, such as same-sex couples, were not allowed to marry. Apart from the piecemeal provision in public law legislation regarding taxes and social security,<sup>11</sup> these couples were left to create their own rules by entering into a cohabitation contract. The terms of the contract were in most cases drafted by a civil notary<sup>12</sup> and to a large extent copied the statutory provisions of the matrimonial property law. This

---

<sup>5</sup> The legislative branch.

<sup>6</sup> Compare the role that the Courts play in South Africa and Canada (and even the UK with an unwritten Constitution) in developing the laws recognising domestic partnerships where constitutions allow judicial scrutiny of legislation in order to establish its constitutionality.

<sup>7</sup> See however fn 15 below for the liberal views held by the population itself.

<sup>8</sup> In the early eighties tax legislation provided that couples living together in a common household for more than 5 years, after attaining the age of 22 years, were considered married partners and treated as such. Later in the eighties, many legislative enactments and social security legislations were adjusted so as to consider the factual situation parties lived in rather than their formal legal position. See Van Der Burght **De Jure** 2000 at 80. In 1992 the Dutch government's Advisory Commission for Legislation proposed the development of the private law. See the discussion in para 4.1.6 below.

<sup>9</sup> Art 1:33 DCC. Under Art 1:81-85 DCC spouses owed each other fidelity, help and support and they were obliged to supply each other with the necessities of life. They had the duty to bring up and educate their children and to cohabit after deciding together on a place to live. Both spouses had to bear the household expenses and liabilities. Both parties had to provide each other with housekeeping money. The law did not differentiate between husband and wife in so far as mutual marital obligations were concerned.

<sup>10</sup> Art 1:30 DCC. The wedding normally consisted of a ceremony in both the town hall and in the church. A wedding in the church could not take place before the civil wedding before the Registrar. Because of the secularisation of society church ceremonies were becoming less common.

<sup>11</sup> Referred to in fn 8 above.

<sup>12</sup> Notaries are generally experts in matrimonial property and inheritance law.

notarial agreement was, and still is, commonly accepted in business spheres as proof of the existence of a "real" partnership.<sup>13</sup>

4.1.5 Besides the formal notary cohabitation contract, the facts could also indicate the existence of at least a tacit contractual relationship. For these couples the Courts and legal scholars developed valuable arguments to protect them from unfair results.<sup>14</sup>

## **b) Development of relational status<sup>15</sup>**

### **(i) Registered partnerships**

4.1.6 In 1992, the Dutch government's Advisory Commission for Legislation issued a report recommending the adoption of registered partnership legislation similar to that in Danish Law.<sup>16</sup> In 1994 a partnership Bill for same-sex couples was submitted to Parliament.<sup>17</sup> In September 1995, before this Bill became law, a controversial

---

<sup>13</sup> Employees with notarial cohabitation contracts are sometimes treated as married couples for purposes of pensions, public transportation, discount schemes etc. See Van Der Burght **De Jure** 2000 at 80.

<sup>14</sup> Van Der Burght **De Jure** 2000 at 78 states that in the absence of a contract, the facts regarding the legal content of the relationship had to be assessed and then the rules of matrimonial property law with reference to the parties' general behaviour and reasonable expectations had to be applied.

<sup>15</sup> The legislative development in the Netherlands regarding same-sex relationships should be seen in the context of the social status of same-sex couples in that country. The Netherlands has been liberal in recognising and protecting the rights of lesbians and gay men. Public opinion polls about homosexuality show that the majority of Dutch citizens believe in recognising and protecting the rights of sexual minorities. On the issue of opening civil marriage to same-sex couples, a poll conducted in 1996 found that fifty-two percent of those polled agreed that same-sex couples should be allowed to marry and have the same rights and obligations as married opposite sex couples. In the same poll thirty-five percent of persons over fifty-five - the most conservative individuals interviewed - agreed that same-sex couples should be allowed to marry. As early as 1990, opinion polls of the Social and Cultural Planning Office suggested that 95 percent of the Dutch population believed that one should let homosexuals be as free as possible to live the way they choose. The same poll suggested that 89 percent believed that homosexuals should have the same housing rights as married couples, 93 percent believed that they should have the same inheritance rights, and 47 percent that they should have the same adoption rights. See Sociaal en Cultureel Rapport 1992 (Rijswijk: Sociaal en Cultureel Planbureau, 1992) at 465.

<sup>16</sup> The Scandinavian legislation then provided for registered partnerships for same-sex couples only.

<sup>17</sup> Bill nr 23761.

amending memorandum proposing that partnership registration be opened to opposite-sex couples<sup>18</sup> was published.

4.1.7 In 1997, the Dutch Parliament approved two separate Acts amending the DCC and more than 100 other statutes. These Acts came into operation on 1 January 1998 and established a system of registered partnerships for both same- and opposite-sex couples by making the provisions relating to marriage applicable to registered partnerships.<sup>19</sup>

## (ii) Same-sex marriage

4.1.8 In the meantime, in April 1996 a resolution of the Lower Chamber of Parliament was passed demanding the preparation of a Bill to allow same-sex couples to marry.<sup>20</sup> In a separate resolution the same forum demanded a Bill to allow same-sex couples to adopt children as a couple.<sup>21</sup>

4.1.9 In October 1997 a Dutch Parliamentary Committee gave its support, in principle, to same-sex marriages and child adoption by gay couples. The majority position was that:

... same-sex couples can only be afforded equal treatment if they are allowed to enter into civil marriages. These members do not view the new type of

<sup>18</sup> It was controversial because the Scandinavian legislation on registered partnership limited registration to same-sex couples whereas this proposal intended a dual system for Dutch opposite sex couples enabling them to choose between traditional marriage and registered partnership.

<sup>19</sup> Act of 16 July 1997, Staatsblad 1997, 324 and Act of 17 December 1997, Staatsblad 1998, 600. Wijzigingswet Boek 1 Burgerlijk Wetboek en Wetboek van Burgerlijk Rechtsvordering (opneming van bepalingen voor het geregistreerd partnerschap). The Advisory Commission for Legislation (Leefvormen) recommended in 1991 that registration should be the deciding factor for conferring rights and obligations on cohabitants. This Commission recommended that cohabitants should have two types of registration to choose from: "lichte registratie" and "zware registratie". The former would confer social security, tax, subsidy and accommodation rights and duties on the couple and create a maintenance duty between them. De-registration would take place at the mere request of either or both parties. The latter would more or less have the same legal consequences of marriage and de-registration would have to be done by notarial deed. See Sinclair **Marriage Law** 1996 at 295 fn 100. None of these concepts featured in the subsequent legislation.

<sup>20</sup> Parliamentary Papers 1995/96, 22700/18 (replacing 22700/9); proposed by Ms Van der Burg (labour) and Mr Dittrich (democrats); adopted on April, 16, 1996 (81 votes in favour, 60 against; see Handelingen II 1995/96, pp. 4883-4884).

<sup>21</sup> Parliamentary Papers 1995/96 22700/14 proposed by Mr Dittrich (democrats) and Ms Van der Burg (labour) (83 votes in favour, 58 against).

marriage as a break with tradition; after all, marriage has always been a flexible institution which has kept pace with changes in society. They feel that their proposal represents a step towards recognising homosexual relationships, and might in fact inspire other countries to extend proper recognition to homosexual couples.<sup>22</sup>

4.1.10 In February 1998 the House of Representatives passed yet another resolution, demanding that the Dutch government prepare such legislation by January 1999. The Dutch Cabinet subsequently approved a Bill in December 1998 which led to the amendment of Article 30 of Book 1 of the DCC to change the definition of marriage to include same-sex couples.<sup>23</sup>

4.1.11 This Act came into operation on 1 April 2001, making the Netherlands the first country in the world to allow same-sex couples to marry.

4.1.12 Being one of only a few countries that currently recognises same-sex marriage, same-sex married couples must, however, be aware of the fact that their marriage and its legal consequences will not always be accepted in other countries.

### c) Current legal position

4.1.13 Same- and opposite-sex unmarried couples wanting to formalise a relationship now have three options, namely registered partnership, civil marriage or cohabitation contract.<sup>24</sup>

4.1.14 Registered partnership is in many ways equal to marriage. A cohabitation agreement, however, is very different, since it only covers items which the parties

---

<sup>22</sup> Kortmann Committee: Unanimous When It Comes to Protecting Children, Divided Over Legal Form for Couples, Oct. 28, 1997, [http://www.minjust.nl:8080/c\\_actual/persber/pb0176.htm](http://www.minjust.nl:8080/c_actual/persber/pb0176.htm) as referred to by Maxwell **Electronic Journal of Comparative Law** 2000 at para 2.2.2. The minority of committee members favoured an option in which the two types would be heterosexual marriage and registered partnership.

<sup>23</sup> Act of 21 December 2000 (Staatsblad 2001, nr 10) amending Book 1 of the DCC (Act on the Opening up of Marriage) of 16 July 1997, Staatsblad 1997, 324 and Act of 17 December 1997, Staatsblad 1997.

<sup>24</sup> See in this regard the "Introduction" in Netherlands Ministry of Justice Fact Sheets "Same-Sex Marriages" 2001.

themselves want it to cover. With marriage and registered partnership, most of the rights and obligations are laid down by law.<sup>25</sup>

4.1.15 Marriage and registered partnership, furthermore, have legal consequences for the partners themselves and their relationship with others. A cohabitation agreement only has legal consequences for the parties who have signed it.<sup>26</sup>

4.1.16 There is no special regime for registered partners – by virtue of Article 1:80a of the DCC all provisions relating to marriage are automatically applicable to registered partnerships. This principle applies to all fields of law: social security law, taxation law, administrative law, penal law etc.<sup>27</sup>

4.1.17 There is furthermore no separate provision for same-sex marriage parallel to that of opposite-sex marriage. The definition of marriage in Article 30(1) of Book 1 of the DCC was merely changed to include same-sex couples.

4.1.18 Therefore, the differences between registered partnership and marriage, and between same- and opposite-sex marriage are negligible.<sup>28</sup>

4.1.19 A marriage can only be terminated through divorce proceedings by the court. Registered partnerships can be terminated either through a Court procedure or, as an alternative, the partners can have their relationship terminated out of Court by mutual consent. Termination of a registered partnership through the Courts follows the same procedure as divorce proceedings in the case of marriage.<sup>29</sup>

---

<sup>25</sup> Eg married couples and the parties to a registered partnership are obliged to support each other. This obligation only applies to the parties to a cohabitation agreement if they have included a provision to this effect.

<sup>26</sup> The discussion to follow does not relate to cohabitation contracts since contract law and jurisprudence determine the effects of the particular contract on its own merits.

<sup>27</sup> Van Der Burght **De Jure** 2000 at 84 criticises this transplanting of all provisions developed for marriage to registered partnerships. He states that the majority of couples who choose a registered partnership above a marriage do so because they do not want to be married. In addition, he argues that terms used in the (former marriage) legislation, such as "loyalty, help and assistance" being primarily a moral stipulation, have a specific meaning in the context of a marriage. He asks if "reasonableness and fairness" in a marriage have the same contents when transplanted to registered partnerships.

<sup>28</sup> See in this regard "Similarities and Differences between Marriage and Registered Partners" in Netherlands Ministry of Justice Fact Sheets "Same-Sex Marriages" 2001.

<sup>29</sup> The Court's decision is entered in the Register of Births, Marriages and Deaths.



4.1.20 A registered partnership can be converted into marriage and a marriage can be converted into a registered partnership. The latter conversion would, for example, be used when the married couple is keen on the idea of terminating their relationship by mutual consent out of court.<sup>30</sup>

4.1.21 The opposite would also be possible where partners in a registered partnership desire the security of a marriage, or a same-sex couple in a registered partnership would like to be married. A registered couple wanting to get married to each other would either have to convert their partnership into marriage or terminate it before getting married.<sup>31</sup> A registered partner would not be allowed to marry someone else without terminating the existing partnership.

4.1.22 There are a few minor differences between the marriage ceremony and the ceremony for registering partnerships.

#### d) Conditions for recognition

4.1.23 The general conditions of marriage referred to in paragraphs 4.1.2 above are still applicable, except that marriage is open to both same- and opposite-sex couples.

4.1.24 Both marriage covenants and partnership covenants must be entered into by a notarial deed. Registered partnership covenants may, in general, be formulated according to the partners' own wishes; they may deviate from the full community of property and also, to some extent, from the stipulations of the DCC.<sup>32</sup>

4.1.25 If foreigners want to marry or register their partnership in the Netherlands, at least one of the partners must either have Dutch citizenship or have his or her domicile and habitual residence there.<sup>33</sup>

---

<sup>30</sup> The civil registrar draws up a record of conversion. In principle, conversion has no effect on the consequences of what was formerly the marriage or the registered partnership. Conversion does have the effect of terminating the converted partnership and commencing the marriage.

<sup>31</sup> See Van Der Burght **De Jure** 2000 at 90 for comments on this procedure.

<sup>32</sup> Those prescribed in chap 6 of Book 1.

<sup>33</sup> The Act of 21 December 2000 made this rule also applicable to partnership registrations and replaced the requirement that both partners should either have Dutch citizenship or lawful residency. This Act entered into force on 1 April 2001 (Staatsblad 2001, nr 11). See also Waaldijk in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 437.

**e) Legal consequences of recognition<sup>34</sup>**

4.1.26 The consequences of (same-sex) marriage and registered partnerships are similar. Both married and registered partners have a maintenance obligation towards each other, sharing the costs of the household. In principle, all possessions and debts are joined. As with marriage, registered partners can make different arrangements before or during the marriage, executed in a notarial deed before a notary public. The rights to old-age pension acquired during a registered partnership, as with a marriage, must be divided upon separation unless different arrangements have been made. Equally, a "survivor's pension" goes to the longest surviving partner.

4.1.27 Registered partners and married couples require each other's permission to enter into certain commitments, for example selling of a home they jointly own and occupy. Upon the death of one of the partners, if a will to that effect has been made, the entire estate can accrue to the other partner. This is the same with married couples.

4.1.28 Registration of a partnership creates an official family relationship and the family members become "related by marriage" to the other partner or spouse in a similar way as with married couples. These "in-laws" have specific rights and are, for example, not obliged to act as witnesses against their relative's partner or spouse in certain Court cases.

4.1.29 Differences exist, however, between married and registered partners' legal position towards children born to or adopted by the couple.<sup>35</sup>

4.1.30 A husband and wife are by law the parents of any children born of their marriage. The woman who bears the child is the mother and her husband is regarded

---

<sup>34</sup> See in this regard "Consequences" in Netherlands Ministry of Justice Fact Sheets "Same-Sex Marriages" 2001 available at [http://www.justitie.nl/english/publications/factsheets/same-sex\\_marriages.asp](http://www.justitie.nl/english/publications/factsheets/same-sex_marriages.asp) (accessed on 27 December 2006).

<sup>35</sup> See in this regard "No Consequences for the Relationship with Children" in Netherlands Ministry of Justice Fact Sheets "Same-Sex Marriages" 2001.

as the father. Marriage creates a family that binds a married couple to their child, with all the rights and obligations created by family law.

4.1.31 These rights and obligations do not automatically apply when two women marry. If a child is born during the marriage, the woman that bears the child is the mother. But the law only regards her spouse as the other parent if she adopts the child. Same-sex marriage as such has no automatic consequences for the relationship between this woman and the child. The same applies to two men bringing up a child of whom one is the legal (biological or adopted) father.

4.1.32 Nonetheless, though he or she is not the biological parent, the spouse in the example given above is the step-parent of all the children who form part of the family. As such he or she is obliged to support them throughout the marriage.

4.1.33 When a child is born into a same-sex marriage or registered partnership, be that gay or lesbian, the partner who wants to have the complete status of a legal parent will have to adopt the child.<sup>36</sup> In most cases, the child will be adopted by its step-parent, *i.e.* by the partner or new partner of the child's mother or father.<sup>37</sup> Step-parents wanting to adopt their partner's children need to have lived with the partner for at least three years, and cared for the child for at least a year.<sup>38</sup>

---

<sup>36</sup> *Ibid.*

<sup>37</sup> Adoption Act of 21 December 2000. Under the new adoption rules children who are adopted and raised by same-sex couples are given judicial protection *ie* becoming lawful heirs of their adoptive parents. A new condition also became applicable to all adoptions namely that adoption may only be granted if the judge decides that the child has nothing more to expect from its original parent(s). Euro-letter No. 93 November 2001, available at [http://www.steff.suite.dk/eurolet/eur\\_93.pdf](http://www.steff.suite.dk/eurolet/eur_93.pdf) (accessed on 24 April 2002). See also Waaldijk "Lesbian Partners in the Netherlands Get Full Responsibility for Children" 2001 *op cit.* A separate Adjustment Act of 8 March 2001 (Staatsblad 2001, nr. 128) provided for various consequential amendments to other legislation that have become necessary as a result of the opening up of marriage and adoption. This Act also came into effect on 1 April 2001. It introduced gender-neutral formulations into those laws that still use gender-specific words for parents and spouses (e.g. in definitions of polygamy, half-orphans, etc.). However, it specified that an inter-country adoption would only be possible by an opposite-sex married couple or by one individual since opening up inter-country adoption to same-sex couples would not be useful, as the authorities in the original country of the child would not allow it to be adopted by Dutch same-sex partners. It also replaced the old rule that child benefits would be paid to the mother in case of disagreement between father and mother, by a gender-neutral rule: in future the benefit office will decide to whom to pay the benefit in such circumstances. Finally, it prescribed the costs for converting an existing registered partnership into a marriage (or vice versa). Waaldijk "Latest News about Same-Sex Marriage" 2002.

<sup>38</sup> Anyone adopting a child becomes its legal parent and all family-law ties with the birth parent are severed. This is a radical step that can only be taken under strict conditions. The interests of the child come first. An important new condition is that the child has nothing more to expect from its birth parent or parents in their capacity as parent. The couple wanting to adopt must be able to prove that they have lived together for at least three years and have cared for the child for at least a year.

4.1.34 There is another option that is less radical and sometimes proves more practical. Where there is a close relationship between one spouse and the other spouse's child, an application for parental responsibility can be submitted to the Court. In that case, each has the same rights and obligations arising from parental responsibility and has equal responsibility for its care and upbringing. The Court can also be requested to change the child's surname to that of the parent or his/her spouse.

4.1.35 Parents with parental authority may be financially responsible for the child until he or she is 21 years of age, but only have authority over the child until he or she is 18 years of age. A child cannot automatically inherit from a person with parental authority (unless mentioned in that person's will) or from such a person's relatives.

4.1.36 Whereas a legal (biological or adopted) parent automatically has full legal and financial rights and responsibilities towards the child, parental authority is a lesser status and applicable legislation refers to such a person as "the other person" or "the non-parent".<sup>39</sup>

## 4.2 United Kingdom of Great Britain and Northern Ireland<sup>40</sup>

### a) Background

4.2.1 The United Kingdom<sup>41</sup> has a constitutional monarchy with an unwritten constitution found in statutes, the common law and practice.<sup>42</sup> The common law

<sup>39</sup> For example, the title of para 3A of the DCC.

<sup>40</sup> The United Kingdom has a population of almost 60 million living on 245.820 km<sup>2</sup>. According to the 2001 census the ethnic groups found in the United Kingdom are white (English 83.6%, Scottish 8.6%, Welsh 4.9%, Northern Irish 2.9%) 92.1%, Black 2%, Indian 1.8%, Pakistani 1.3%, mixed 1.2%, other 1.6%. Almost 50% of the population is Anglican and the remainder is Roman Catholics (9 million), Muslims, Presbyterians, Methodist, Sikh, Hindu, Jewish and others. See "Ethnic Groups and Religion" UK in **World Factbook**.

<sup>41</sup> Hereafter referred to as the "UK".

<sup>42</sup> The country has a common-law tradition with early Roman as well as modern continental influences. Judicial review of Acts of Parliament exists under the Human Rights Act of 1998. The

tends to favour incremental reform, dealing with particular problems on a piecemeal basis.<sup>43</sup>

4.2.2 Cohabitation, the term used for unmarried couples in domestic partnerships, has always existed in the UK,<sup>44</sup> and recent studies indicate that its incidence is continuously increasing.<sup>45</sup>

4.2.3 Historically the following factors determined the incidence of cohabitation in the UK:

- \* Up until the mid-18<sup>th</sup> century various informal ways of marriage were legally recognised which gave rise to the term "common-law wife/husband". Cohabitation during the period after betrothal but before the wedding ceremony used to be common. During the Middle Ages and up to the 18<sup>th</sup> century it was the Christian view that marriage began with betrothal and that sexual cohabitation was permitted after such betrothal. Betrothal was then later followed by the marriage ceremony once fertility had been established.<sup>46</sup>
- \* However, the Hardwicke Marriage Act of 1753<sup>47</sup> changed the definition of marriage and required a marriage to be conducted in a church or public chapel. This change brought about by the Act meant that marriage now

---

judicial branch consists of the House of Lords (highest Court of appeal) and the Supreme Courts of England, Wales and Northern Ireland. Scotland has a Court of Session and Court of the Judiciary. The British Courts are increasingly subject to review by European Union courts. See "Government: Legal System" UK in **World Factbook**.

<sup>43</sup> Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999 at 2.

<sup>44</sup> Parker **Informal Marriage and Cohabitation** 1990 referred to by Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 at 10.

<sup>45</sup> See the figures and studies referred to by Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 at 9. See also the Law Society Report **Cohabitation** 1999 at para 4.

<sup>46</sup> Once a pregnancy was confirmed, the couple would formally get married. Thatcher "Before or After the Wedding?" in Hayes *et al* **Religion and Sexuality** 1998 and Law Society Report **Cohabitation** 1999 at para 4.

<sup>47</sup> Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 at 11 and the Law Society Report **Cohabitation** 1999 at paras 5-10. This Act further required registration of all marriages in England and Wales. Verbal contracts were no longer regarded as binding.

only began with a wedding in the church or chapel,<sup>48</sup> which caused a decrease in cohabitation.<sup>49</sup>

- \* With changing social circumstances in the 19<sup>th</sup> century and the recognition of non-Christian religions, the concept of marriage expanded and registry office weddings became recognised. This development also reflected growing secularisation,<sup>50</sup> and cohabitation increased with this trend.
- \* During the 19<sup>th</sup> century the Industrial Revolution increased the economic independence of women and the mobility of the population, which led to a further increase in cohabitation.<sup>51</sup>

4.2.4 Since the sixties the number of cohabiting women in the UK has risen from 6 percent to 70 percent.<sup>52</sup> It is suggested that the reasons couples cohabit in modern times are either because they do not wish to marry or want to test the long-term viability of their relationship.

4.2.5 The following factors influence present-day cohabitation in the UK.<sup>53</sup>

- \* The increase in divorce and separation cause people to change their views on the permanent nature of marriage and the marriage commitment.

---

<sup>48</sup> This was not so much a religious or theological, but a class matter. One of the main aims of the 1753-Act was to regulate the increase in marriages between families that had derived their wealth from agriculture and commerce. Parker **Informal Marriage and Cohabitation** 1990. The upper and middle classes used their political clout to enforce the social respectability of the new marriage laws. Thatcher "Before or After the Wedding?" in Hayes *et al* **Religion and Sexuality** 1998.

<sup>49</sup> While the working classes continued to practice alternatives to legal marriage, the stigma of illegitimacy now attached to children whose parents had not been through a wedding ceremony. Thatcher "Before or After the Wedding?" in Hayes *et al* **Religion and Sexuality** 1998.

<sup>50</sup> Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 at 11.

<sup>51</sup> Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 *ibid*.

<sup>52</sup> See Divorce.co.uk "Myth of Common-law Wife". Statistics of 2000 indicate that 11 percent of separated women and 35 percent of divorced women were cohabiting after termination of their marriages.

<sup>53</sup> Northern Ireland Law Reform Advisory Committee **Matrimonial Property** 2000 at para 4.5.

- \* The perceived lack of any great financial advantage in marriage as opposed to cohabitation.
- \* Cohabitants often wrongly believe that they will acquire rights after living with each other for a certain time.
- \* Women gradually became active in the labour market, thereby increasing their economic independence and contributing to their being less dependent on the security a marriage was perceived to provide.
- \* Same-sex partners cohabit because marriage is impossible under statute law.<sup>54</sup>

#### b) Legal position of cohabiting couples

4.2.6 Although no special legal status exists for a couple who merely cohabits without any formal commitment, couples living together in stable relationships are often in lay terms referred to as "common-law spouses". These couples are often unaware of the fact that this concept has not been recognised in England and Wales since Hardwicke's Marriage Act abolished informal marriages in 1753. Consequently they are unaware that they have no vested rights.<sup>55</sup>

4.2.7 Although the position regarding common-law marriages is the same in Northern Ireland as in England and Wales, the Scottish Courts do have limited power to recognise an informal common-law marriage arising from "habit and repute". This form of common-law marriage gives the same rights as regular marriage but is extremely rare, partly owing to difficulties experienced by the partners in proving its existence.<sup>56</sup>

---

<sup>54</sup> See discussion below on legal developments in this regard.

<sup>55</sup> See Divorce.co.uk "Myth of Common-law Wife". Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill 2002** at 12 also refers to the latest report from the National Centre for Social Research which shows that more than half of the population falsely believe there is something called a "common-law marriage" giving cohabiting couples the same rights as married couples.

<sup>56</sup> To be so married the couple must have behaved in a way compatible with marriage and must prove that their nearest friends and relatives believed that they were indeed married. Only about 50 applications per year are made to the Court of Session to have such marriages recognised. See Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill 2002** at

4.2.8 The dearth of remedies available to former cohabiting partners upon termination of the relationship has compelled them to seek relief in general legal principles.<sup>57</sup> Since mere cohabitation does not give rise to automatic property rights, the ordinary rules of contract, property and unjustified enrichment have on occasion been invoked by cohabitants to enforce rights acquired in or to each other's property.<sup>58</sup> In England, in particular, implied or constructive trusts have been used to achieve a fair division of property between cohabitants.<sup>59</sup> The English Courts have also used proprietary estoppel to give cohabitants a share in the other's property upon termination of the relationship.<sup>60</sup>

### c) Consequences of cohabitation

4.2.9 Case law and piecemeal legislative developments have established the following consequences of cohabitation:<sup>61</sup>

---

49.

<sup>57</sup> The results were often inappropriate since these general legal principles have no regard for the emotional relationship between the parties.

<sup>58</sup> Sinclair **Marriage Law** 1996 at 274. This approach has led to judge made law playing an active and important role in the development of rights for unmarried cohabitants. Compare this with the role Dutch Courts play in a system that does not allow judicial scrutiny of parliamentary legislation.

<sup>59</sup> **Cook v Head** [1972] ALL ER 38 (CA); [1972] 1 WLR 518; **Eves v Eves** [1975] 3 ALL ER 768 (CA); [1975] 1 WLR 1338 and **Grant v Edwards** [1986] 2 ALL ER 426, [1986] 3 WLR 114, [1986] referred to and discussed by Sinclair **Marriage Law** 1996 at 275. This has not succeeded in Scotland and the failure to recognise this remedy has been ascribed to the common misunderstanding that a constructive trust cannot arise unless the conditions in the Blank Bonds and Trusts Act of 1696 are satisfied. McK Norrie **Juridical Review** 1995 at 225. See Sinclair **Marriage Law** 1996 at 274 fn 24. See also discussion by Schweltnus **Obiter** 1996 at 52.

<sup>60</sup> According to Sinclair **Marriage Law** 1996 at 275 fn 24, for such a claim to succeed, the plaintiff must prove he or she incurred expenditure or committed some detrimental act and that he or she did so in the belief, encouraged by the defendant, that the plaintiff already owned or would be given some proprietary interest in a specific asset. See also Schweltnus **Obiter** 1996 at 57.

<sup>61</sup> Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 at 12-51.



(i) **Property Rights**<sup>62</sup>

4.2.10 Upon the separation of the couple, the basis for division of their property is strictly according to ownership of the property. The Courts have no overriding power to divide the property equitably as they may do on divorce.

4.2.11 Property bought jointly by the two partners may, upon breakdown of the relationship, be divided in appropriate shares, provided that the basis and share percentages of joint ownership are clear.

4.2.12 Where property is registered in the sole name of one of the partners, the Court may, in very special circumstances, where the technical rules of the law of trusts or proprietary estoppel can be made applicable, determine that the other cohabitant has a share in that property.<sup>63</sup>

4.2.13 Cohabiting couples may enter into a contract to regulate their relationship and in particular their property rights. The validity of general cohabitation contracts has not yet been established.<sup>64</sup> In practice, a series of legally enforceable agreements on specific matters is made.<sup>65</sup>

4.2.14 When the cohabiting couple has children, the Court has the power under Schedule 1 of the Children Act of 1989<sup>66</sup> to make transfers of capital<sup>67</sup> for the children's benefit with incidental benefit to the other former cohabitant. Same-sex cohabitants sharing a home are treated as unconnected individuals as regards home ownership.<sup>68</sup>

---

<sup>62</sup> For a general discussion see Schwelonus **Obiter** 1996 at 43 *et seq.*

<sup>63</sup> The party who has no legal interest in the home may be found to have a beneficial or equitable interest in the property. The apparent intentions of the parties are relevant to decide the portion of each party. For a detailed summary of the current law position see the Law Society Report **Cohabitation** 1999 para 17 *et seq.*

<sup>64</sup> Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999 at 3.

<sup>65</sup> To be valid such contract must comply with the general formalities of contract law.

<sup>66</sup> Available at [http://www.opsi.gov.uk/acts/acts1989/Ukpga\\_19890041\\_en\\_1.htm](http://www.opsi.gov.uk/acts/acts1989/Ukpga_19890041_en_1.htm) (accessed on 11 November 2005).

<sup>67</sup> Irrespective of whether the capital is in the form of property or a lump sum.

<sup>68</sup> The same would apply for example to an elderly parent sharing a home with a child *ie* a non-

## (ii) Transfer of Tenancies

4.2.15 Under Schedule 7 of the Family Law Act of 1996<sup>69</sup> the Court may, in the case of an opposite-sex couple living together as husband and wife, order that a tenancy in the name of one of the cohabitants be transferred into the name of the other after breakdown of the relationship.

4.2.16 The right to succeed to a tenancy upon the death of a cohabiting partner varies depending on the nature of the tenancy, namely private or council tenancy.<sup>70</sup>

- \* Statutory provision<sup>71</sup> is made for couples living together as married couples and who have exclusive occupation of private rented accommodation, to be treated in the same way as married couples for succession purposes, ie cohabitants would succeed to a statutory tenancy.<sup>72</sup>
- \* In the case of a council tenancy the tenant's family may succeed to the tenancy if they resided with the deceased tenant for at least 12 months before his or her death. For the purposes of succession that includes "persons living together as husband and wife".<sup>73</sup>

---

conjugal relationship. The Law Commission Discussion Paper **Sharing Homes** 2002 for a current review by the Law Commission for England and Wales which covered a broad range of relationships where people, including friends and relatives, share a home.

<sup>69</sup> Available at <http://www.opsi.gov.uk/acts/acts1996/1996027.htm> (accessed on 11 November 2005).

<sup>70</sup> For a detailed discussion see Parker **Cohabitees** 1991 at 101 *et seq.*

<sup>71</sup> Para 2 of Schedule 1 to the Rent Act of 1977 and s 87 and 88 of the Housing Act of 1988. Referred to by Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 at 14.

<sup>72</sup> In the appeal of **Fitzpatrick v Sterling** [2000] 1 FLR 271 the House of Lords upheld such a claim for succession by a surviving partner in a same-sex cohabitation relationship. Referred to by Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 at 15.

<sup>73</sup> Section 113 of the Housing Act of 1985. The majority of local authorities are reported to allow same-sex partners to succeed to tenancies as a matter of policy. See "We are family" **Inside Housing** 5 November 1999 referred to by Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 *ibid.*

### (iii) Domestic Violence<sup>74</sup>

4.2.17 The Family Law Act of 1996 allows cohabitants as home-sharers and former home sharers to apply for non-molestation and other Court orders regulating the occupation of the family home.<sup>75</sup> Same-sex cohabitants are included, but have fewer rights as "associated persons" than opposite-sex couples, being defined as "cohabitants under the Act".<sup>76</sup>

### (iv) Death and Inheritance

4.2.18 No automatic inheritance right exists for unmarried partners. Under the Inheritance (Provision for Family and Dependents) Act of 1975,<sup>77</sup> opposite-sex cohabitants may claim against the estate of the deceased partner if inadequate provision has been made for the surviving partner, either by will or as a result of the operation of the rules of intestate succession.<sup>78</sup> Such a cohabitant may make a claim only if he or she was living as the husband or wife of the deceased in the same household for the two years immediately before his or her death.<sup>79</sup>

---

<sup>74</sup> For a general discussion on cohabitants and domestic violence, see Parker **Cohabitees** 1991 at 65 *et seq.*

<sup>75</sup> However, s 41 of this Act requires judges to "have regard to the fact that [cohabitants] have not given each other the commitment involved in marriage" when considering the parties' relationship for purposes of a domestic violence order. This involuntarily creates the impression of the legislator's disapproving view of cohabitation. Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999 at 8.

<sup>76</sup> The definitions allowing same-sex couples to claim protection from domestic violence have been de-sexualised. Under s 62(3)(c) of the Family Law Act of 1996, any person who lives or has lived "in the same household" is an associated person and as such entitled to claim a non-molestation order under s 42. Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999 at 8.

<sup>77</sup> As amended by the Law Reform (Succession) Act of 1995 and referred to by Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 at 14.

<sup>78</sup> See in this regard the discussion by SchwelInus **Obiter** 1996 at 61.

<sup>79</sup> Section 1(1)(1A) of the Law Reform (Succession) Act of 1995 referred to by Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999 at 4 and 8.

4.2.19 A same-sex cohabitant who wishes to make such a claim would have to establish, in addition to the above, that he or she was a dependant of the deceased and was being maintained by the deceased immediately before his or her death.<sup>80</sup>

4.2.20 Same-sex cohabitants are not allowed to claim bereavement damages for the wrongful death of a partner since a condition that partners should have lived as "husband and wife" forms part of the definition of "dependant" in the Fatal Accidents Act of 1974.<sup>81</sup>

#### (v) Maintenance

4.2.21 Although unmarried parents both have a duty to support their children financially,<sup>82</sup> no such obligation exists between the partners themselves.<sup>83</sup>

#### (vi) Social Security

4.2.22 There is no entitlement to contributory benefits based on the status of cohabitation outside marriage. Moreover, under social security law<sup>84</sup> the unit of claim for means-tested-benefits is a "family". "Family" is then defined to include an unmarried couple, meaning that their resources will be aggregated when the benefit is calculated. An "unmarried couple" is interpreted as referring only to opposite-sex couples living together as husband and wife.<sup>85</sup>

<sup>80</sup> Thus same-sex cohabitants have fewer inheritance rights than opposite-sex cohabitants. Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill 2002** at 17; see also Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999 at 4.

<sup>81</sup> As referred to by Parker **Cohabitees** 1991 at 189.

<sup>82</sup> Parker **Cohabitees** 1991 at 5 and Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill 2002** *ibid*. See also the Law Society Report **Cohabitation** 1999 at para 37 and Schweltnus **Obiter** 1996 at 60. Maintenance Enforcement Act of 1991 (c.17).

<sup>83</sup> **Windeler v Whitehall** [1990] 2 FLR 505 referred to by Parker **Cohabitees** 1991 at 4.

<sup>84</sup> For example s 137 of the Social Security Contributions and Benefits Act of 1992 and s 35 of the Jobseekers Act of 1995 referred to by Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill 2002** *ibid*.

<sup>85</sup> Section 80(7) of the Social Security Contributions and Benefits Act of 1992. See also Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill 2002** at 17 and Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999 at 4. The latter says that this results in a double penalty for opposite sex couples. See also Parker **Cohabitees** 1991 at 21 in this regard.

### (vii) Pensions

4.2.23 Contrary to the position of a widow, widower or divorcee, a cohabitant cannot rely on the former partner's contributions for the purposes of a State retirement pension. Entitlement to other pension benefits will depend on the rules of the scheme concerned.<sup>86</sup>

### (viii) Taxation

4.2.24 Cohabiting couples are treated as unconnected individuals for tax purposes. Transfer of property between cohabiting partners is thus not exempted from inheritance tax and capital gains tax.<sup>87</sup>

### (ix) Immigration and Nationality

4.2.25 Immigration law currently provides that a cohabiting partner cannot immigrate to the UK despite the fact that his or her partner is a British citizen. The government has introduced a concession to allow unmarried, long-term cohabiting partners to apply for leave to enter/remain in the United Kingdom. One of the criteria for permitting these cohabitants to enter is that there must be a legal prohibition on marriage. This means that in practice it is not possible for opposite-sex cohabitants to take advantage of this concession.

4.2.26 The basic rule in the British Nationality Act of 1981, when trying to ascertain whether or not a child is British, is that the child cannot acquire British nationality by virtue of his or her father's British nationality or settled immigration status, unless the child's parents were married to each other at the time of the child's birth (or, if the family is resident in Britain, became married after the child's birth).<sup>88</sup>

---

<sup>86</sup> Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill 2002** *ibid.*

<sup>87</sup> Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill 2002** *ibid.* See in general on taxation of cohabitants Parker **Cohabitees** 1991 chap 4.

<sup>88</sup> Law Society Report **Cohabitation** 1999 at paras 90 and 91.

## (x) Adoption

4.2.27 The Adoption and Children Act of 2002 overhauled and modernised the legal framework for domestic and inter-country adoption. This Act now provides for adoption orders to be made in favour of single people, married couples and unmarried couples.<sup>89</sup>

### d) Reform for cohabiting couples

4.2.28 From the above it is clear that the legal position relating to cohabitation in the UK is complex, arbitrary and uncertain.<sup>90</sup> Marriage is generally regarded as playing an important role in English society.<sup>91</sup> Nevertheless, it was acknowledged that the law needs to recognise and respond to the increasing diversity of living arrangements in the UK.

4.2.29 The Law Commission (of England and Wales) has, since 1993, been examining the property rights of all persons who share a home.<sup>92</sup> The Commission was of the view that the adoption of legislation providing for the registration of certain "civil partnerships" and the imposition of legal rights and obligations on persons in relationships outside marriage should be considered.

---

<sup>89</sup> Compactlaw "Adoption and Children Act". See also the discussion of the new Civil Partnership Act of 2004 Chapter 33 at para e) below.

<sup>90</sup> Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 at 13.

<sup>91</sup> Barlow & Probert "Legal Status of Cohabitation in Britain and France" 1999 at 5 suggested that this approach ignores the fact that the increase in cohabiting outside marriage leaves an increasing percentage of the population without legal remedy. The Law Commission Discussion Paper **Sharing Homes** 2002 pertinently pointed out that marriage is a status deserving of special treatment and that an attempt to define another status that would lead to the vesting of rights and obligations would amount to interference in questions of social policy which are essentially matters for Government.

<sup>92</sup> Including married couples, cohabitants, relations and friends. The Law Commission Discussion Paper **Sharing Homes** 2002 looks at people who are living together in relationships bearing the hallmarks of intimacy and exclusivity, but who are not married to each other or who have not formed a civil partnership. Civil partnership is the status currently available to same-sex couples who register their relationship - see para e) below. A final report with recommendations for reform will be published in 2007. See <http://www.lawcom.gov.uk/192.htm> (accessed on 11 November 2005).

4.2.30 The Law Society (of England and Wales) proposed wider reform than the Law Commission.<sup>93</sup> In its report, the Law Society made substantial recommendations with regard to the definition of cohabitation, financial provision on separation, pensions and succession with the aim to protect the vulnerable on relationship breakdown.

4.2.31 The Law Society, however, emphasised that some cohabitants do not marry because they wish to avoid the legal consequences of marriage. To recreate marriage would thus be inappropriate and would concomitantly undermine marriage.<sup>94</sup>

4.2.32 According to the Law Society's report, the approach to any reforms should be to provide those cohabitants who need it with greater protection within a more rational system than the current one without derogating from the pertinence of marriage in society. This would also leave scope for increasing the protection offered to same-sex cohabitants so that it equates with what is available to opposite-sex cohabitants.<sup>95</sup>

4.2.33 The Northern Ireland Law Reform Advisory Committee on Matrimonial Property<sup>96</sup> similarly proposed law reform of the law relating to cohabiting couples. The Committee came to the conclusion that before parties to a cohabitation relationship should be allowed to rely on the recommended benefits in chapter 6 of its report, they must either have lived together in the same household for a continuous period of two years within the last three years or have lived together in the same household and have had a child together irrespective of the duration of the relationship. In addition they must have been cohabitating on the date of the relevant transaction ie transfer of the property concerned.<sup>97</sup>

---

<sup>93</sup> The Law Society Report **Cohabitation** 1999 at paras 13 and 14 states that the policy underlying the ad hoc developments that have taken place has been neutral and attempted to protect cohabitants from the worst excesses of the law which would otherwise apply to them, without equating cohabitation with marriage.

<sup>94</sup> The Law Society Report **Cohabitation** 1999 at 10.

<sup>95</sup> See the Law Society Follow-up Report **Cohabitation** 2002 at 6 where the registration of partners in same-sex relationships are recommended in order to give partners rights and responsibilities analogous to those for married couples.

<sup>96</sup> See fn 53 above. In this Report reference is also made to the importance of Articles 8 and 14 of the European Convention on Human Rights and Fundamental Freedoms when assessing the validity of the present law and considering proposals for reform. See also in this regard fn 3 of the discussion of the Netherlands above.

<sup>97</sup> Northern Ireland Law Reform Advisory Committee **Matrimonial Property** 2000 at para 4.15 with

4.2.34 The Scottish Executive published a white paper proposing legislative reform of the law relating to cohabitants in September 2000.<sup>98</sup>

4.2.35 Two Private Members' Bills<sup>99</sup> on this issue were introduced in Parliament in October 2001 and January 2002 in response to the inadequacy of the law and the lack of legal recognition for unmarried cohabiting couples. These Bills were broadly similar in that they sought to introduce a system of partnership registration for same- and opposite-sex partners with ensuing legal responsibilities and benefits.<sup>100</sup>

4.2.36 In view of an undertaking by the Government to conduct an investigation to consider the implications of the proposals, the forementioned two Bills were not moved for further debate.<sup>101</sup>

4.2.37 Subsequent to this undertaking and following a cross-departmental review on the impact of the reforms proposed by different role-players, the Government published a consultation paper on 30 June 2003.<sup>102</sup> This paper, entitled "Civil Partnership: a framework for the legal recognition of same-sex couples", set out its proposals for civil partnership for gays and lesbians that would be parallel to the existing system of opposite-sex marriages. After a three-month consultation period,<sup>103</sup> a report summarising the consultation findings was published in November 2003. An intention to bring forward a Civil Partnership Bill was announced in the

---

reference to Australian legislation on this topic.

<sup>98</sup> Scotland White Paper **Parents and Children** 2000 referred to by Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 at 49. See Part 3 of the Civil Partnerships Act of 2004 for the provisions regarding Scotland. See para 4.2.38 below for further developments.

<sup>99</sup> The Relationships (Civil Registration) Bill introduced by Jane Griffiths (the member for Reading, East) on 24 October 2001, Bill 36 of 2001-02 available at [www.publications.parliament.uk/pa/cm200102/cmbills/036/2002034.pdf](http://www.publications.parliament.uk/pa/cm200102/cmbills/036/2002034.pdf) and The Civil Partnerships Bill introduced in the House of Lords on 11 February 2002 by Lord Lester of Herne Hill, HL Bill 41 of 2001-02 available at [www.publications.parliament.uk/pa/1d200102/1dbills/041/2002041.pdf](http://www.publications.parliament.uk/pa/1d200102/1dbills/041/2002041.pdf).

<sup>100</sup> Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 at 24.

<sup>101</sup> Shaw **The Relationships (Civil Registration) Bill and the Civil Partnerships Bill** 2002 *ibid*.

<sup>102</sup> "Background" in UK "Explanatory Notes to Civil Partnership Act 2004".

<sup>103</sup> Over three thousand responses were received during this period.



Queen's Speech on 26 November 2003.<sup>104</sup>

4.2.38 On 10 September 2003, the Scottish Executive announced that in the event that civil partnership registration was introduced in England and Wales, same-sex couples should similarly be able to form a civil partnership in Scotland in order to access a comprehensive package of rights and responsibilities in both reserved and devolved areas. The Scottish Executive published a consultation document on 30 September 2003 and an analysis of the consultation responses on 5 February 2004. On 3 June 2004 the Scottish Parliament agreed to the inclusion of Scottish provisions in a Westminster Bill.<sup>105</sup>

4.2.39 On 19 December 2003, Northern Ireland published a consultation document setting out its policy intentions on civil partnership. This document announced Northern Ireland's support for the introduction of civil partnership in Northern Ireland and the inclusion of provisions for Northern Ireland in the Westminster Bill. After the consultation period closed Northern Ireland established a civil partnership registration scheme for Northern Ireland by including the necessary provisions in the Civil Partnership Bill.<sup>106</sup>

4.2.40 On 30 March 2004, the Government introduced the Civil Partnerships Bill into Parliament.<sup>107</sup> This Bill creates a legal status for same-sex couples who register their relationship formally. Registration gives them parity of treatment with married couples and reflects the important commitment they are making to one another.

4.2.41 The Civil Partnerships Bill was supported by all the major political parties and demonstrates the Government's commitment to underlining the inherent value of committed same-sex relationships and supportive, stable families. It shows that the diversity of the society is valued.<sup>108</sup>

---

<sup>104</sup> "Background" in UK "Explanatory Notes to Civil Partnership Act 2004".

<sup>105</sup> "Background" in UK "Explanatory Notes to Civil Partnership Act 2004".

<sup>106</sup> *Ibid.*

<sup>107</sup> Bill 53 of the 2003-2004 session.

<sup>108</sup> Background in UK "Explanatory Notes to Civil Partnership Act 2004".

4.2.42 Although these proposals represented an enormous advance for the rights of same-sex couples, they were criticised for excluding cohabiting opposite-sex couples. The Government argued that cohabiting opposite-sex couples did not need additional legal rights because they could attain them by getting married. Opponents of this view submitted that it forced people to marry in order to qualify for legal protection.<sup>109</sup>

4.2.43 The Bill also faced criticism on several other fronts - from people concerned that marriage would be diluted by extending marital rights to same-sex partners; from people who felt the government should simply extend marriage itself to include same-sex relationships and from opposite-sex couples who wished to have the right to enter into a civil partnership.<sup>110</sup>

4.2.44 The Civil Partnerships Bill received Royal Assent on 18 November 2004 and entered into force on 5 December 2005. The Civil Partnership Act of 2004 covers the whole of the UK.<sup>111</sup>

#### **e) Civil partnerships for same-sex couples**

4.2.45 The Civil Partnership Act enables same-sex couples to obtain legal recognition of their relationship by forming a civil partnership. They may do so by registering as civil partners of each other provided that:<sup>112</sup>

- \* they are of the same sex;

<sup>109</sup> See N Tweedie "Legal Rights for Homosexual Couples Attacked – by Gays" **News.telegraph.co.uk** 30 June 2003 available at <http://news.telegraph.co.uk> and also Letourneau "Gay Partnership Rights" 2003.

<sup>110</sup> An amendment to extend eligibility for civil partnership to blood relatives who had lived together for a minimum period of time was initially approved by the House of Lords. However, the House of Commons removed this amendment and the Lords accepted the House of Commons' version. See "Civil Partnership – A Framework for the Legal Recognition of Same-Sex Couples" 11 January 2006 Same-Sex Civil Partnerships: In England, Scotland, Northern Ireland & Wales available at [http://www.religioustolerance.org/hom\\_maruk.htm](http://www.religioustolerance.org/hom_maruk.htm) (accessed on 31 January 2006).

<sup>111</sup> The Civil Partnership Act of 2004 Chapter 33. Part 2 deals with civil partnership in England and Wales, part 3 with civil partnerships in Scotland and part 4 with civil partnerships in Northern Ireland.

<sup>112</sup> "Background" in UK "Explanatory Notes to Civil Partnership Act 2004".

- \* they are not already in a civil partnership or lawfully married;
- \* they are not within the prohibited degrees of relationship;
- \* they are both aged sixteen or over (and, if either of them is under 18 and the registration is to take place in England and Wales or Northern Ireland, the consent of the appropriate people or bodies has been obtained).

4.2.46 A civil partnership is formed when each partner has signed the civil partnership document in the presence of a civil partnership registrar and in the presence of each other and two witnesses. There is to be no religious service during the registration and the registration must not take place in any premises that are either designed for or are in use mainly or solely for religious purposes. The partners are able to celebrate their civil partnership in any way they choose after the registration process.<sup>113</sup>

4.2.47 The legal consequences of civil partnerships in relation to financial arrangements largely mirror that of spouses.<sup>114</sup>

4.2.48 In any dispute between civil partners as to title or possession of property, either partner may apply to the court. The court may then make any order in relation to the property as it thinks fit, including an order to sell the property. Contributions by either partner to property improvement are recognised if the contributions are substantial and in money or money's worth.<sup>115</sup>

4.2.49 Similarly, the laws governing wills, administration of estates, family provisions, financial relief under Part 2 of the Matrimonial Causes Act 1973 and the Domestic Proceedings and Magistrates' Court Act 1978 largely apply to civil partners as they would to spouses.<sup>116</sup>

---

<sup>113</sup> Chap 1 of Parts 2 and 4, and chap 2 of Part 3 of the Civil Partnership Act 2004. See also "Registration" in "Civil Partnerships in the United Kingdom" in UK - **Wikipedia**.

<sup>114</sup> Eg s 11 of the Married Women's Property Act of 1882 will apply to civil partnerships. Thus, money payable to a partner under a policy of assurance effected by the other partner for his/her own life will no longer form part of the deceased partner's estate. See "Legal Effect" in "Civil Partnerships in the United Kingdom" in UK **Wikipedia**.

<sup>115</sup> See "Legal Effect" in "Civil Partnerships in the United Kingdom" in UK **Wikipedia**.

<sup>116</sup> *Ibid*.

4.2.50 Tax exemptions available to spouses under section 18 of the Inheritance Tax Act 1984 are available to civil partners under the Civil Partnership Act. Other areas of the law that were also amended by the Civil Partnership Act to equalise the position of civil partners include certain parts of the law relating to housing and tenancies and the Fatal Accidents Act 1976.<sup>117</sup>

4.2.51 The Act also provides for the making of, dissolution, nullity, separation and presumption of death orders.<sup>118</sup> These provisions broadly mirror those governing marriage. Like marriage, irretrievable breakdown is the only ground on which a court may make a dissolution order. Also, unless the applicant satisfies the court as to certain facts which are similar to those under the Matrimonial Causes Act of 1973, the court may not make a dissolution order. If so satisfied, the court must make a dissolution order unless all the evidence shows that the partnership has not broken down irretrievably.<sup>119</sup>

4.2.52 When the court is dealing with an application for dissolution, nullity or separation and there is a child of the family, it must consider whether it should exercise its powers under the Children Act of 1989.<sup>120</sup>

4.2.53 The Adoption and Children Act of 2002 is also amended to treat civil partners in the same way as married couples.<sup>121</sup> Civil partners may acquire parental responsibilities as step-parents, and the right to apply for financial provision for children under schedule 1 of the Children Act of 1989 is extended to civil partners.

---

<sup>117</sup> *Ibid.*

<sup>118</sup> Chap 2 of Parts 2 and 4, and chap 3 of Part 3 of the Civil Partnership Act 2004. See in this regard also "Ending the Partnership" in "Civil Partnerships in the United Kingdom" in UK **Wikipedia**.

<sup>119</sup> Section 49 of the Civil Partnership Act of 2004.

<sup>120</sup> Section 75 amends the definition of "a child of the family" accordingly. See "Children" in "Civil Partnerships in the United Kingdom" in UK **Wikipedia**.

<sup>121</sup> Section 79 of the Civil Partnership Act of 2004 amended the Adoption and Children Act of 2002 (c. 38). See "Children" in "Civil Partnerships in the United Kingdom" in UK **Wikipedia**.

### 4.3 Sweden<sup>122</sup>

#### a) Background

4.3.1 Sweden has a constitutional monarchy with a Constitution dating back to January 1975. The civil law system, influenced by customary law, has a continental legal tradition with its dependence on statutory law.<sup>123</sup>

4.3.2 The Scandinavian countries have a reputation for having a liberal approach to the regulation of domestic relationships or cohabitation, the term used for couples in unmarried domestic partnerships. It is said that cohabitation was hardly ever condemned in Sweden and Denmark.<sup>124</sup>

4.3.3 In Sweden the recognition of unmarried relationships was influenced by conventions relating to the elements which constituted marriage. These conventions differed over time and between particular regions, classes and social groups. Sexual relations and betrothal were often regarded as the start of marriage, and a subsequent religious ceremony merely as the confirmation thereof.<sup>125</sup> The relatively weak influence exerted by the Church in Sweden enhanced secular sentiments towards religious marriage.<sup>126</sup>

<sup>122</sup> Sweden has a population of almost 9 million people living on 450.000 km<sup>2</sup>. The indigenous ethnic compilation is Swedes, Finns and Sami minorities. Almost 80% of the population is followers of the Lutheran religion. "Ethnic Groups and Religion" Sweden in **World Factbook**.

<sup>123</sup> The close communication between scholars of Sweden and the European continent in the eighteenth century led to a strong influence from the German Roman tradition. See Kabir "Swedish Legal System" 2001.

<sup>124</sup> L Roussel "Living Together out of Wedlock" in "Legal Problems Concerning Unmarried Couples" the Proceedings of the Eleventh Colloquy on European Law July 1981 Strasbourg, 1982 Council of Europe 124 referred to by Bradley **Modern Legal Studies** 1996 at 95.

<sup>125</sup> J Frykman "Sexual Intercourse and Social Norms" 1975 *Ethnologia Scandinavia* 110 at 146 referred to by Bradley **Modern Legal Studies** 1996 at 4. Prior to and after the Reformation and under the Ecclesiastical Law of 1686, betrothal or promise of marriage and subsequent cohabitation had been sufficient to constitute a relationship which qualified for legal recognition. Only in 1734, under the General Code, did a religious marriage ceremony become a pre-requisite for acquisition of marital status. At that stage the church, however, seemed to have been faced with institutionalised opposition, resulting in the condonation of non-compliance with the requirement for a religious ceremony in sections of Swedish society. On one assessment, pre-marital sexual relations have been the norm for couples in Scandinavia during the entire Protestant era. See Bradley *ibid*.

<sup>126</sup> Christianity was established late in Sweden and considerable remnants of paganism existed until the late sixteenth century. Bradley **Modern Legal Studies** 1996 at 5. J W F Sunberg "Recent changes in Swedish Family Law: Experiment Repeated" 1975 **American Journal of Comparative Law** 38 referred to by Schweltnus **Obiter** 1995 at 229 fn 1 ascribes the popularity

4.3.4 Industrialisation and urbanisation provided an additional stimulus for the so-called "Stockholm-marriage", ie pre-marital cohabitation amongst unskilled workers and poor women in nineteenth-century Stockholm. For many of these people civil marriage was unavailable owing to the accompanying expenses and intricate and costly procedures if a previous marriage had to be dissolved.<sup>127</sup>

4.3.5 Despite the influence of secular liberalism on early twentieth-century laws, religious elements in the Swedish Marriage Code of 1920 were not eliminated completely and some remained until the late sixties. For example, restrictions on marital capacity, which includes degrees of affinity, and provisions for annulment reflect religious values.<sup>128</sup> A religious ceremony is an alternative to civil marriage even today.

#### b) Development of relational status

4.3.6 During the late sixties cohabitation outside marriage increased markedly and the marriage rate declined significantly.<sup>129</sup> Cohabitation became the norm to such an extent that it could be seen as a social institution.<sup>130</sup> But, although this appears to be a liberal development, it may simply be adherence to the pre-Christian betrothal and marriage forms under Ecclesiastical Law.<sup>131</sup>

4.3.7 In 1969 Sweden began developing "an irreligious, ahistorical, anti-national concept of society" (the Neutrality Principle),<sup>132</sup> resulting in directives for family law

---

of cohabitation in Sweden to the negative view held by socialist ideologists with respect to the bourgeois church marriage, thereby favouring, as a matter of principle, free partnerships based on conscience.

<sup>127</sup> Bradley **Modern Legal Studies** 1996 at 4.

<sup>128</sup> Bradley **Modern Legal Studies** 1996 at 65.

<sup>129</sup> Bradley **Modern Legal Studies** 1996 at 94. In 1979 more than 99% of the couples who got married in Sweden had cohabitated in marriage-like conditions prior to the marriage. Schwellnus **Obiter** 1995 at 230.

<sup>130</sup> Schwellnus **Obiter** 1995 *ibid.*

<sup>131</sup> Bradley **Modern Legal Studies** 1996 at 96 and further where he qualifies this view by stating that it is not argued that there are complete parallels between the pre-Christian betrothal and the current situation.

<sup>132</sup> The Ministry of Justice Protocol on Justice Department Matters (1969) at 4 as referred to by

reform attacking religious values expressed in laws relating to the family.<sup>133</sup> The Social Democratic government in 1969 approved these directives for family law reform. Although religious values were renounced, the central position of marriage was still recognised in principle.<sup>134</sup>

4.3.8 Over the same period, separate from the above reform initiative, a comprehensive and comparatively liberal statute on transsexualism, enacted in 1972,<sup>135</sup> led to the liberation of the institution of marriage from requirements for actual or potential capacity to have children. From then on marriage in Sweden was no longer based on procreation.<sup>136</sup> This major development debilitated the traditional religious marriage institution as the exclusive domain of opposite-sex couples and would eventually ease the facilitation of same-sex cohabitation.<sup>137</sup>

4.3.9 By 1973 the Swedish parliament accepted the proposition that cohabitation by two persons of the same sex was considered by society to be a perfectly acceptable form of cohabitation although same-sex marriage as such was still not acceptable.<sup>138</sup>

4.3.10 The reform which followed, mainly resulting from the work of three government commissions, gradually altered what remained of the concept of marriage known to Swedish family law up to that time. The trend was to create equality regarding public law rights of spouses and cohabitants (initially for opposite-

---

Bradley **Modern Legal Studies** 1996 at 97 fn 11 stated as follows:

New legislation ought (so far as possible) to be neutral in relation to the different forms of living together and different moral views. Marriage has and ought to have a central position in the family law, but one should try to see that the family law legislation does not create any provisions which create unnecessary hardships or inconveniences for those who have children and build families without marrying.

<sup>133</sup> According to Schweltnus **Obiter** 1995 at 231 this indicated more than a reluctant endorsement of extra-marital relationships or concern to minimise tax advantages and limit social security benefits. The notion of neutrality is an explicit rejection of a moral code and laws which restrictively defined the legitimacy of sexual relations by confining it to marriage.

<sup>134</sup> Bradley **Modern Legal Studies** 1996 at 64.

<sup>135</sup> Lag om Wasteland agv Könstillhörighet i Vissa Fall (English title not available) Swedish Code of Statutes SFS 1972:119 referred to by Bradley **Modern Legal Studies** 1996 at 67.

<sup>136</sup> Infertile opposite-sex couples were still regarded as complying with the essentialia of the ideal marriage since they at least had the potential to procreate.

<sup>137</sup> Bradley **Modern Legal Studies** 1996 at 67.

<sup>138</sup> Bradley **Modern Legal Studies** 1996 at 68 submits that this approach was based on contemporary public opinion, rather than any commitment to religious values.

but soon also for same-sex couples) but to retain the distinction in their status in private law.<sup>139</sup>

4.3.11 In 1981 proposals for extensive rights for opposite-sex cohabitants were included in a report on the review of matrimonial property and succession law entitled "The Commission Report on Matrimonial Property, Inheritance Law and Cohabitation without Marriage."<sup>140</sup> This report reflected the trend of avoiding full equation of cohabitation and marriage (private law status) but of proposing legislation that would protect the weaker party in the cohabitation relationship (equality in public law).<sup>141</sup>

4.3.12 Subsequent to this review of matrimonial property and succession law, a report entitled "The Commission Report on Homosexuality and Society"<sup>142</sup> was published in 1984 and provided a thorough review of the conditions governing homosexuality in Swedish society.<sup>143</sup> This State-sponsored study, initiated in 1978, was the starting-point for the movement to create concrete legal protection for gays and lesbians. An important recommendation was that the Swedish Constitution, which protects fundamental rights and freedoms, had to be amended to protect homosexuals.<sup>144</sup>

4.3.13 The Commission Report on Partnerships<sup>145</sup> which followed in 1993, also took up this theme of commitment to a better dispensation for same-sex couples. The Commission rejected arguments that registered partnerships would cause

---

<sup>139</sup> Bradley **Modern Legal Studies** 1996 at 95 *et seq.*

<sup>140</sup> Swedish Government Official Reports 1981:85 as referred to by Bradley **Modern Legal Studies** 1996 at 76. See also Schwellnus **Obiter** 1995 at 232.

<sup>141</sup> Schwellnus **Obiter** 1995 at 232.

<sup>142</sup> Swedish Government Official Reports 1984:63 as referred to by Bradley **Modern Legal Studies** 1996 at 101.

<sup>143</sup> The work of this Commission revealed two facts which emerged from surveys of the general public and of homosexuals. Firstly, homosexuality was not a recognised social or cultural institution. Secondly, disapproval of homosexuality by the public centred on perceptions of homosexuality as being only about sex, rather than anything that can be compared to a heterosexual love relationship. The Commission was required to make recommendations to eradicate social discrimination. Recommendations of the Commission included improved information and education on anti-discrimination provisions. Providing legal rights to persons in same-sex relationships were also seen as a way to improve the social standing of homosexuals. See Bradley **Modern Legal Studies** 1996 at 101.

<sup>144</sup> Bradley **Modern Legal Studies** 1996 at 101 *et seq.*

<sup>145</sup> Swedish Government Official Reports 1993:98 as referred to by Bradley **Modern Legal Studies** 1996 at 68 *et seq.*



decadence and crime or threaten civilisation, society, marriage, heterosexuality or young people, and reported that predictions of harm were unfounded on the basis that no justification for such allegations could be found.

4.3.14 The recommendations in the reports of the three commissions referred to above<sup>146</sup> eventually led to the following legislation addressing the discrimination in domestic partnerships:<sup>147</sup> the Cohabitees (Joint Homes) Act in 1987,<sup>148</sup> the Homosexual Cohabitees Act in 1988<sup>149</sup> and the Registered Partnership (Family Law) Act in 1994.<sup>150</sup>

4.3.15 The Cohabitees Act of 2003 replaced the Cohabitees (Joint Homes) Act of 1987.

### c) Current legal position

4.3.16 Under current Swedish legislation the following relationships are recognised:

- \* cohabitation or marriage for opposite-sex couples and
- \* cohabitation or registered partnership for same-sex couples.

Same-sex couples may not get married.

---

<sup>146</sup> Paras 4.3.11-13.

<sup>147</sup> See Bradley **Modern Legal Studies** 1996 *op cit*.

<sup>148</sup> Swedish Code of Statutes 1987:232. This Act followed on The Commission Report on Matrimonial Property, Inheritance Law and Cohabitation without Marriage and was replaced in 2003 by the Cohabitees Act of 2003.

<sup>149</sup> Swedish Code of Statutes SFS 1987:813 and SFS 1987:814. This Act followed on The Commission Report on Homosexuality and Society.

<sup>150</sup> Swedish Code of Statutes SFS 1994:1117. This Act followed on The Commission Report on Partnerships. The political and public debate on the issue of registered partnerships began in 1990 when a proposal for same-sex registered partnerships was presented in Parliament. In 1994, despite firm opposition from conservative and Christian factions, a law establishing registered partnership status was finally approved in the Riksdag (Swedish Parliament) (1994:1117). The parliament passed the law on 7 June 1994 with a parliamentary vote of 171 to 141 with 5 abstentions and 32 absences, and it came into force on 1 January 1995.

4.3.17 Cohabitation may be a staging post on the way to marriage (for opposite-sex partners) or to a registered partnership (for same-sex partners). It may, however, also be a permanent lifestyle.

4.3.18 The Cohabitees (Joint Homes) Act of 1987 initially applied to "relationships in which an unmarried woman and an unmarried man live together in circumstances resembling marriage". Same-sex cohabiting partners were also brought within the scope of this legislation by the Homosexual Cohabitees Act of 1988.<sup>151</sup>

4.3.19 On 1 July 2003 the Cohabitees Act of 2003 came into force and replaced the Cohabitees (Joint Homes) Act of 1987. The new Act corresponds largely with the Act of 1987 but contains a generally applicable and clearer definition of the concept of cohabitees. The new Act also specifies when a cohabitee relationship will be considered to have ended.<sup>152</sup>

4.3.20 The automatic protection provided for cohabitees under this Act is limited when compared with the protection for married couples and registered partners. The Cohabitees Act of 2003 applies only to the joint home and joint property.<sup>153</sup>

4.3.21 The Registered Partnership (Family Law) Act of 1994<sup>154</sup> came into force on 1 January 1995.<sup>155</sup> Official documentation of the Ministry of Justice indicates that this system was primarily intended for same-sex couples, although the law does not explicitly require or limit its availability to such a sexual disposition.<sup>156</sup>

4.3.22 In contrast with the legislation regulating cohabitation relationships, this Act does not apply automatically and the partners must actively take steps in order to

---

<sup>151</sup> The Homosexual Cohabitees Act of 1988 contained a provision whereby all the provisions applying to cohabitants in accordance with specified enactments and provisions, would also apply to two persons who live together in a homosexual relationship. The Cohabitees (Joint Homes) of 1987 is one of those specified Acts.

<sup>152</sup> Sweden **Cohabitees** 2003 at 2. The full text of the Cohabitees Act of 2003 can be found in the Swedish Code of Statutes, SFS 2003:376.

<sup>153</sup> Sweden **Cohabitees** 2003 at 3.

<sup>154</sup> Swedish Code of Statutes SFS 1994:1117.

<sup>155</sup> A survey done in 1998, indicated 1015 men and 481 women to be registered under this new partnership status (only residents of Sweden were included in this statistic, thus the uneven numbers. See Rydström **Current Sweden** 2000 at 3.

<sup>156</sup> Sweden **Family Law** 2000 at 25.

bring the relationship within the scope of the Act. There are also a number of provisions applicable to lawful spouses that do not apply to registered partners.<sup>157</sup>

4.3.23 Despite the limited application of the Cohabitees Act of 2003 and the Registered Partnership (Family Law) Act of 1994, the social significance of these statutes lies in the confirmation that any negative attitude there might have been to unmarried relationships has been abandoned.

#### d) **Conditions for recognition**

##### (i) **Cohabitation**

4.3.24 Cohabitation refers to two people who live together on a permanent basis as a couple and who have a joint household. Whether the cohabitees are of opposite sex or of the same sex is of no importance.

4.3.25 To qualify as cohabitees for purposes of the legislation the following criteria must be fulfilled.

- \* The cohabitees must live together on a permanent basis and a relationship of short duration does not qualify.<sup>158</sup>
- \* The cohabitees must live together as a couple, *ie* in a partnership which would normally include sexual relations.<sup>159</sup> Two siblings living together are not considered to be cohabitees.
- \* The cohabitees must share the household chores and expenses.
- \* Neither of the cohabitees may be married or in a registered partnership.

---

<sup>157</sup> Sweden **Family Law** 2000 chap 4.6 on Registered Partnership.

<sup>158</sup> Relationships with children will always qualify. SchwelInus **Obiter** 1995 at 235.

<sup>159</sup> The Act does not apply for example if one of the partners is less than 15 years old, as sexual intercourse with him or her would be illegal.

- \* Both cohabitantes must be over 18 years.

4.3.26 A relationship complying with the above criteria is automatically regulated by the Cohabitantes Act of 2003. Rights do not depend on arbitrary requirements regarding the duration of cohabitation<sup>160</sup> and no special ceremony or registration is required to make cohabitation official or to bring it within the scope of the Act.

4.3.27 According to Fawcett,<sup>161</sup> although seemingly uncertain and too flexible, these rules are not overly troublesome in Sweden, this being a very homogenous society.

#### (ii) Registered partnerships<sup>162</sup>

4.3.28 As was indicated in paragraph 4.3.20 above, the Registered Partnership (Family Law) Act of 1994 does not explicitly limit the scope of the Act to same-sex couples, but it is generally accepted that it was intended to apply to same-sex couples. It is also interesting that the legislation does not specifically require that the partners cohabit (*ie* that they are registered at the same address) or have a sexual relationship.

4.3.29 The following persons may register a partnership under the Registered Partnership (Family Law) Act of 1994:<sup>163</sup>

- \* Persons over the age of 18;
- \* Persons who are not already married or registered as a partner;
- \* Persons who are not related to each other as direct ascendants or descendants.

<sup>160</sup> Parliamentary debates leading to the Cohabitantes (Joint Homes Act) of 1987 indicate that only relationships that lasted longer than 6 months were intended to be included. Schwellnus **Obiter** 1995 at 235.

<sup>161</sup> M Fawcett "Taking the Middle Path: Recent Swedish Legislation Grants Minimal Property Rights to Unmarried Cohabitants" 1990 24 **Family Law Quarterly** 179 at 186 referred to by Schwellnus **Obiter** 1995 *ibid* fn 44.

<sup>162</sup> Unless otherwise indicated the source for the information in this section is the report by Skolander "ILGA Report: Sweden" 1998.

<sup>163</sup> Sweden **Family Law** 2000 at 25.

4.3.30 In July 2000 the Registered Partnership (Family Law) Act of 1994 was amended to allow foreigners who have lived in Sweden for at least two years to register their relationship.<sup>164</sup> The Registered Partnership (Family Law) Act of 1994 also applies to Swedish citizens living abroad. The second partner need not have any connection to Sweden in order to be eligible to register a partnership with a Swedish citizen.<sup>165</sup>

4.3.31 Partnerships are registered by a judge at a district Court or by a person appointed by the county administrative board to do so. The ceremony resembles a civil marriage ceremony.<sup>166</sup> Both partners have to be present at the ceremony, which takes place in the presence of two witnesses.

#### e) Legal consequences of recognition

##### (i) Cohabitation<sup>167</sup>

4.3.32 The purpose of both the replaced Cohabitees (Joint Homes Act) of 1987 and the subsequent Cohabitees Act of 2003 is to establish a property regime for unmarried cohabitants. Whereas community of property in a marriage establishes an economic partnership for spouses, the scheme for cohabitees merely provides a safety net to limit basic unfairness.<sup>168</sup>

4.3.33 The Cohabitees Act of 2003 applies only to the cohabitees' joint home and joint property. For the purposes of the Act, home means all types of permanent

<sup>164</sup> Before this amendment it was a condition that at least one of the partners be a Swedish citizen domiciled in Sweden. This condition was exclusive to registered partnerships and was for that reason obviously discriminatory. See Jensen "Gay and Lesbian Partnerships in Europe".

<sup>165</sup> Skolander "ILGA Report: Sweden" 1998.

<sup>166</sup> The Swedish Church has not yet allowed for this civil status to be reflected in a religious church rite. It does permit ministers to administer an informal, non-church blessing of the civil ceremony. After the ceremony, the registrar gives the couple a registration certificate and enters the partnership in the official register of marriages and registered partnerships. See Rydström **Current Sweden** 2000.

<sup>167</sup> Except where otherwise indicated, the source for this information is Sweden **Cohabitees** 2003.

<sup>168</sup> Schwellnus **Obiter** 1995 at 234.

dwellings (houses, apartments) and the equipment which is normally part of the home, such as furniture and household goods.<sup>169</sup>

4.3.34 Similar to the case of married couples or registered partnerships, a cohabitee may not, without the consent of the other cohabitee, give away, sell, mortgage/pledge or let the joint home or joint household goods. Joint consent or judicial authorisation for certain dispositions is required if the property in question falls in a category which would be subject to division or transfer upon termination of cohabitation as provided under the Act.

4.3.35 If the cohabitees live in property of which one of the cohabitees is the registered owner or holds the lease, they may enter in the register that the property is their joint home by applying to the registration authority. A note to this effect in the register can be a guarantee that the cohabitee who owns the property does not sell or mortgage it without the consent of the other cohabitee.

4.3.36 Upon termination of the cohabitation, parties have the right to ask a Court for the division of joint property which was intended and acquired for joint use. The basic principle is equal division after deduction of debts. It is irrelevant who paid for the property.<sup>170</sup> Exceptions to equal division are accepted, particularly if it is unreasonable in view of the duration of the relationship. In special cases, adjustment can be made so that each party simply retains his/her property. Another exception to this division is the so-called base amount rule. It only applies in the event of the death of one cohabitee and means that out of the property to be divided, the surviving cohabitee always – if there is sufficient property – receives an amount equivalent to twice the so-called base amounts.<sup>171</sup> If neither party requests a division of property, each retains his/her own property.

---

<sup>169</sup> Since the Act only applies to the home and furniture it does not cover other property such as bank assets, shares, cars and boats. Nor does it apply to summer houses. Such assets fall outside the division of property and the cohabitee that owns the property keeps it after a separation.

<sup>170</sup> Objects acquired prior to cohabitation are presumed not acquired for joint use and all objects acquired after the relationship began are presumed acquired for mutual use. Household goods used exclusively by one cohabitant and property mainly used for recreational purposes are excluded. Schweltnus **Obiter** 1995 at 234. This system is comparable to a regime in the Swedish Marriage Code 1987 known as a deferred property regime and applies to specified property intended to be the joint home and chattels for that home. Bradley **Modern Legal Studies** 1996 at 98.

<sup>171</sup> The National Insurance Act of 1961, referred to by Schweltnus **Obiter** 1995 at 242 fn 93, provides for an amount which is indexed and forms the "base amount" for calculation of various social insurance benefits.

4.3.37 Before the division of property takes place, a deduction is made to cover debts. What remains is in principle divided equally between the cohabittees. If this is reasonable, the cohabitee most in need of the dwelling or household goods is entitled to receive the property. If the other cohabitee does not receive other property from the joint home to the same value, the cohabitee taking over the dwelling or household goods must pay the corresponding sum of money.

4.3.38 The rules on division of property as set out in the Cohabitees Act do not apply if one of the parties has moved into the other party's dwelling, even if the couple shared debts and other costs. If, however, such a dwelling has been sold and the money used for a new joint home, the new dwelling will be included in the division of property.

4.3.39 If the relationship ends as a result of the death of one of the cohabittees, only the surviving cohabitee may request a division of property. The heirs of the deceased do not have the right to make such a request.

4.3.40 A request for division of property may not be made later than one year after the relationship has ended. If a cohabitee relationship ends following the death of one of the cohabittees or if a cohabitee dies within one year of the end of a relationship, a request must be made before the estate inventory is drawn up.

4.3.41 During the relationship each cohabitee owns and manages his/her own property and is responsible for his/her own debts.

4.3.42 A cohabitee relationship ends if

- \* one or both cohabittees enter into matrimony or a registered partnership,
- \* one of the cohabittees dies,
- \* one of the cohabittees applies to the District Court for the appointment of an executor to divide the property or for the right to remain in a joint home included in the division of property, or

- \* one of the cohabitees institutes an action to be allowed to take over a joint home not included in the division of property.

4.3.43 Cohabitees have no legal obligation to pay maintenance to each other during or after the termination of the relationship, and have no intestate succession right to inherit from one another.

4.3.44 By making a written agreement, cohabitees can agree that division of property will not take place or that certain property will not be included in the division of property as provided by the Cohabitees Act. However, the right of one cohabitee to take over the dwelling of the other cohabitee, in certain cases, cannot be waived by an agreement between them. If no agreement is concluded, the assumption is that they intend to share the home and household items which they acquire as prescribed by law.<sup>172</sup>

4.3.45 If a cohabiting opposite-sex couple has a child, the mother automatically gets sole custody of the child. Parents are responsible for the maintenance of their children, irrespective of their marital status. The male cohabitant of an unmarried mother is not deemed to be the father. However, the parents may apply to the tax authority or social services committee for confirmation of paternity and to register joint custody of a child.

4.3.46 Same-sex cohabiting partners do not have any rights or obligations towards their partner's biological children and cohabitees cannot jointly adopt a child.

## (ii) Registered partnerships<sup>173</sup>

4.3.47 Under the Registered Partnership (Family Law) Act of 1994, the majority of the provisions of the Swedish Marriage Code also apply to registered partnerships.<sup>174</sup> The provisions concerning the surname of the parties, maintenance obligations

<sup>172</sup> Bradley **Modern Legal Studies** 1996 at 100.

<sup>173</sup> Except where otherwise indicated the source for this information is Skolander "ILGA Report: Sweden" 1998.

<sup>174</sup> Sweden **Family Law** 2000 at 25 comments that partners are offered freedom and increased security to live in a relationship other than marriage, whilst imposing responsibilities and obligations.



between the partners, the assets and debts of the parties and also the dissolution of a registered partnership are the same as those that apply to marriage. The parties also inherit from each other in the same manner that spouses do.<sup>175</sup>

4.3.48 The property of registered partners is divided into partnership property and separate property. Property becomes separate by agreement, as a result of conditions in a will or of conditions attached to a gift. The rest is principally partnership property.<sup>176</sup>

4.3.49 During the registered partnership, each registered partner has a responsibility for his or her own and the other's maintenance. If one partner cannot maintain him or herself, the other is liable to contribute. Both registered partners assume responsibility for finances and chores at home. Registered partners are in principle entitled to half the partnership property held by the other partner.<sup>177</sup>

4.3.50 Each registered partner is personally responsible for his or her debts. A partner's creditors are thus not entitled to obtain payment out of property of the other partner, irrespective of whether the property comprises marital property or separate property.

4.3.51 For the duration of the registered partnership each partner controls his or her own separate property. There are certain limitations on a partner's ability to control the joint dwelling and household goods, even if that partner is the sole owner of the property. Consent of the other partner is, for example, needed to alienate the joint home and other immovable property.

4.3.52 If one of the registered partners dies, the surviving partner has the right to a pension for a limited period of time, generally 12 months after death. If a registered partner dies as the consequence of an accident at his or her job, the surviving partner is entitled to a life annuity.

---

<sup>175</sup> Sweden **Family Law** 2000 at 24.

<sup>176</sup> Sweden **Family Law** 2000 at 25.

<sup>177</sup> Skolander "ILGA Report: Sweden" 1998.

4.3.53 Registered partnerships terminate automatically when one of the partners dies. A division of property takes place, with the deceased's heirs conducting the division with the surviving partner.

4.3.54 Registered partnerships can also be dissolved by a Court order. Applications for dissolution must be handled by a lawyer. An application may be filed by one or both partners and must be submitted to the local district court.<sup>178</sup>

4.3.55 In case of a dispute regarding the division of the property upon dissolution of the registered partnership (or after death of one of the partners), the Courts apply rules that are similar to those governing marriages to resolve these disputes.<sup>179</sup>

4.3.56 The parties must, not later than at the registration, choose between having one of their surnames as joint surname or retaining the surname they had immediately before registration.<sup>180</sup>

4.3.57 Registered partners cannot get joint custody of children, and cannot be appointed jointly as guardians of children.<sup>181</sup> However, the biological children of one of the partners would be considered stepchildren of the other partner. A stepparent refers to a person who permanently lives with someone who is the parent with custody of a child and as such has some responsibility for the support of that stepchild. The stepparent may claim certain entitlements related to child benefits instead of the biological parent. These entitlements include parent subsidies, parental leave and the right to work three-quarter time for a limited period.<sup>182</sup>

4.3.58 On 1 February 2003, the Partnership and Adoption Act of 2003 came into operation. After the Swedish parliament overwhelmingly voted to allow gay couples to adopt children jointly, becoming just the fourth European State to grant homosexuals

---

<sup>178</sup> This Court will then decide whether to grant the dissolution immediately or after a six-month trial period. In most cases where both partners agree and no children below the age of 16 are involved, the partners are granted immediate dissolution of the partnership.

<sup>179</sup> For a detailed discussion see Sweden **Family Law** 2000.

<sup>180</sup> A partner who has taken the surname of the other spouse can retain his or her former surname as middle name. Notice of this choice must be given to the relevant authorities.

<sup>181</sup> Custody involves the caring for a child's physical and mental needs, whereas guardianship mainly refers to the child's financial needs.

<sup>182</sup> Skolander "ILGA Report: Sweden" 1998.

such rights.<sup>183</sup> Under the new law, gay couples who are registered in a legal partnership are able to adopt children both within the country and from abroad.<sup>184</sup> It provides for what is termed "second parent adoptions", which means that one partner has the right to adopt the other's child. The Act also permits gay and lesbian couples to adopt from abroad.

4.3.59 Initially registered partners were excluded from the right to artificial insemination since the law regulating insemination stated that it was available to women who are married or live together with a man in circumstances resembling marriage, ie opposite-sex relationships only.<sup>185</sup> However, from July 2005 gay women couples in Sweden have the right to fertility treatment in the form of assisted or artificial insemination at Swedish hospitals.<sup>186</sup>

4.3.60 In 2004, discussions on the extension of marriage to same-sex partners began when the government appointed a committee to investigate the question whether Sweden ought to change the marriage law to make it "gender neutral".<sup>187</sup> On 31 October 2005 Radio Sweden reported that delegates of Sweden's ruling Social Democrat Party voted in favour of gender-neutral marriage at their party congress.<sup>188</sup>

<sup>183</sup> The law was passed by the parliament by 198 votes to 38, with 71 abstentions, "Sweden Legalises Gay Adoption" 6 June 2002 **BBC News** available at <http://news.bbc.co.uk/1/hi/world/europe/2028938.stm> (accessed on 3 August 2005). Previously, a homosexual person could only adopt a child as an individual and only with the permission of the court.

<sup>184</sup> See Lifesite "Sweden Allows Homosexual Adoptions" 2002.

<sup>185</sup> Artificial insemination is governed by the law only if it is done by a hospital. Since the law does not regulate private insemination, it remained an option to gay men and lesbians wanting to become parents other than by adopting a child. See Jensen "Gay and Lesbian Partnerships in Europe". On 6 June 2002, the Swedish parliament postponed proposals in this regard for further investigation, see S Andersson "Swedish Parliament Says Yes to Same-Sex-Couples Possibility to Apply for Adoptions" 6 June 2002 (Press release from the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights) available at <http://outrage.nabumedia.com/pressrelease.asp?ID=154> (accessed on 5 July 2002).

<sup>186</sup> See L Sizoo "No More Trips to Finland for Lesbian Couples" 27 May 2005 **The Local** available at <http://www.thelocal.se/article.php?ID=1502&date=20050527> (accessed on 10 August 2005).

<sup>187</sup> The only party which voted against the motion was the small Christian Democratic Party which holds 33 of 349 seats, while the conservative Moderates, which hold 55 seats, abstained. See Gmax.co.za "Sweden to Consider Gay Marriage Law" 30 April 2004 available at <http://www.gmax.co.za/look04/04/30-sweden.html> (accessed on 3 August 2005).

<sup>188</sup> See **gaymarriagenews.com** available at <http://www.gaymarriagenews.com/> (accessed on 28 December 2005).

4.3.61 Although registered partnerships are not recognised by most foreign countries, partnerships registered in Denmark and Norway are valid in Sweden.<sup>189</sup>

#### 4.4 Canada<sup>190</sup>

##### a) Background

4.4.1 Canada has been a self-governing dominion since 1867 and its form of government is a confederation of four provinces with a parliamentary democracy.<sup>191</sup> Canada's legal system is based on the English common law, except in Quebec, where the civil law system, based on French law, prevails.<sup>192</sup>

<sup>189</sup> Sweden **Family Law** 2000 at 27.

<sup>190</sup> Canada is the second-largest country in the world (after Russia) with a population of 31 592 805. The population originates from the British Isles 28%, France 23%, other European countries 15%, Amerindian 2%, African, Asian and Arab 6% and from a mixed background 26%. The religions adhered to are Catholic 42%, Protestants 40% and others 18%. Canada has 10 provinces and three territories. See "Ethnic Groups and Religion" Canada in **World Factbook**.

<sup>191</sup> See "Background" Canada in **World Factbook**.

<sup>192</sup> The judicial branch consists of the Supreme Court of Canada, the Federal Court of Canada; the Federal Court of Appeal and the Provincial Courts. The latter are called Court of Appeal, Court of Queens Bench, Superior Court, Supreme Court and Court of Justice respectively. See "Judicial System" Canada in **World Factbook**. In view of the important role played by the judiciary to develop relational status in Canada, an understanding of the hierarchy of the court system is necessary.

- Each province and territory has superior courts. These courts are known by various names, including Superior Court of Justice, Supreme Court (not to be confused with the Supreme Court of Canada), and Court of Queen's Bench. The superior courts have "inherent jurisdiction," which means that they can hear cases in any area except those that are specifically limited to another level of court. The superior courts also act as a court of first appeal for the underlying court system that provinces and territories maintain. Each province and territory has a court of appeal or appellate division that hears appeals from decisions of the superior courts and provincial/territorial courts. The courts of appeal also hear constitutional questions that may be raised in appeals involving individuals, governments, or governmental agencies.

- The Federal Court and Federal Court of Appeal are essentially superior courts with civil jurisdiction. However, since the Courts were created by an Act of Parliament, they can only deal with matters specified in federal statutes (laws). In contrast, provincial and territorial superior courts have jurisdiction in all matters except those specifically excluded by a statute. The Federal Court is the trial-level court; appeals from it are heard by the Federal Court of Appeal.

- The Supreme Court of Canada is the final court of appeal from all other Canadian courts. The Supreme Court has jurisdiction over disputes in all areas of the law including constitutional law.

Department of Justice Canada: "How the Courts are Organised" available at <http://canada.justice.gc.ca/en/dept/pub/trib/page3.html> (accessed on 29 December 2005).

4.4.2 The Canadian Constitution is made up of unwritten and written acts, customs, judicial decisions and traditions. The written part of the Constitution consists of the Constitution Act of 29 March 1867, which created a federation, and the Constitution Act of 17 April 1982, which transferred formal control over the constitution from Britain to Canada. The Canadian Charter of Human Rights and Freedoms is found in Schedule B of the Constitution Act of 1982.<sup>193</sup>

4.4.3 The 1867 Constitution provides that legislative jurisdiction is shared between the federal and provincial governments.<sup>194</sup> Section 91(26) of the Constitution Act, 1867 authorises Parliament to legislate in relation to "marriage and divorce," while section 92(12) gives provincial legislatures the power to enact laws in respect of "the solemnisation of marriage in the province" and "property and civil rights in the province". It is, therefore, settled law that the federal Parliament has exclusive jurisdiction to regulate the legal capacity to enter into marriage, or matters of its essential validity. Similarly, the provinces enjoy exclusive competence over matters of formal validity.<sup>195</sup>

4.4.4 The provinces may therefore not legislate to make marriage available to same-sex couples. The provinces would, however, be in a position to regulate the property and civil rights of couples in relationships other than marriage.

4.4.5 Over the past decade or so the federal and provincial Courts have gradually begun to recognise the rights of same-sex partners as well as unmarried opposite-sex partners. This was possible by implementing section 15 of the Charter, which came into effect in 1985.<sup>196</sup>

---

<sup>193</sup> Hereafter referred to as "the Charter". Under the constitutional model of Canada the two Constitutions are read together in determining constitutional issues.

<sup>194</sup> Under the original British North America Act of 1867 (also cited as the Constitution Act, 1867) the federal Parliament has exclusive legislative jurisdiction with respect to some matters and the provincial legislatures have exclusive jurisdiction with respect to other matters. With respect to a third category of matters, the federal Parliament and the provincial legislature share jurisdiction and would have to cooperate in enacting constitutionally valid legislation. Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 chap 11 at 214.

<sup>195</sup> Federal legislation relating to marriage includes the Marriage (Prohibited Degrees) Act. Marriage itself is not defined. Provincial and territorial statutes concern matters of a ceremonial nature such as the issuance of licences, the publication of banns, the qualifications of celebrants and similar "formal" rules. On occasion, the Courts have sanctioned other provincial rules less clearly associated with the marriage ceremony, leading to some concern that, in the absence of national standards, requirements for entering into a valid marriage would become a matter of concurrent jurisdiction, see Hurley "Bill C-38".

<sup>196</sup> The equality guarantees in this section came into force on 17 April 1985. The Charter was to a

4.4.6 Section 15(1) of the Charter provides that every individual is equal before and under the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical ability.

4.4.7 Judicial reform has been instrumental in the development of provincial and federal legislation in that both the federal and provincial Courts gradually began to recognise the rights of unmarried opposite-sex partners as well as same-sex partners.

4.4.8 Section 1 of the Charter provides that the rights (such as the right to equality in section 15(1)) and freedoms set out therein are subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

4.4.9 In **Andrews v. Law Society of British Columbia**<sup>197</sup> the Supreme Court of Canada relied on the words "in particular" which precede the enumerated prohibited grounds of discrimination, to hold unanimously that protection is also afforded against discrimination on the basis of grounds analogous to those enumerated.<sup>198</sup> Therefore, although "sexual orientation" and "marital status" are not included in the prohibited grounds of discrimination enumerated in section 15, it could be argued that they too are analogous grounds.

---

large extent used as a source of reference by the drafters of the South African Constitution which means that this modus operandi of the Courts is of particular relevance to the development of the South African legal position.

<sup>197</sup> [1989] 1 S.C.R. 143.

<sup>198</sup> This case did not involve a claim based on sexual discrimination or marital status but a claim based on discrimination against non-citizens. See Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 219 fn 18.

## b) Development of relational status

### (i) Same-sex and opposite-sex cohabitants

4.4.10 In the sixties marriage was the only officially recognised family form and opposite-sex cohabitants, the term used for unmarried couples in domestic partnerships, were excluded from the rights and obligations which attached automatically to marriage. At that time it was also uncertain whether agreements between partners attempting to create marriage-like rights and obligations for partners would be legally enforceable.<sup>199</sup>

4.4.11 Ad hoc legislative and judicial recognition of the rights of opposite-sex couples began with the imposition of support obligations and provisions,<sup>200</sup> the use of principles of undue enrichment to provide rights in property<sup>201</sup> and the extension of statutorily defined benefits<sup>202</sup> for such cohabitants.

4.4.12 In 1995 the Supreme Court of Canada came close to equating marriage and cohabitation in **Miron v. Trudel**.<sup>203</sup> The Court held, by a five to four majority, that

<sup>199</sup> Holland **Canadian Journal of Family Law** 2000 para 3(c).

<sup>200</sup> See the Family Reform Act of 1987 S.O. 1978 chap 2. The then Attorney General for Ontario made it clear during the second reading of the Bill that those in "no strings attached" relationships would not be covered. See Holland **Canadian Journal of Family Law** 2000 fn 15.

<sup>201</sup> *Sorochan v Sorochan* [1986] 2 S.C.R. 834 referred to by Holland **Canadian Journal of Family Law** 2000, fn 14.

<sup>202</sup> For example the Ontario Equality Rights Statute Law Amendment Act of 1986, S.O.1986 chap 44 referred to by Holland **Canadian Journal of Family Law** 2000 fn 17.

<sup>203</sup> (1995), 13 R.F.L. (4<sup>th</sup>) 1 (S.C.C.) available at [http://www.droit.unmontreal.ca/doc/csc-scc/en/pub/1995/vol2/html/1995scr2\\_0418.html](http://www.droit.unmontreal.ca/doc/csc-scc/en/pub/1995/vol2/html/1995scr2_0418.html) (accessed on 7 July 1998).

The appellants lived together with their children. While they were not married, their family functioned as an economic unit. In 1987, M was injured while a passenger in an uninsured motor vehicle driven by an uninsured driver. After the accident, the appellant M could no longer work and contribute to his family's support. He made a claim for accident benefits for loss of income and damages against V's insurance policy, which extended accident benefits to the "spouse" of the policy holder. The respondent insurer denied his claim on the ground that M was not legally married to V and hence not her "spouse". The appellants sued the insurer. The insurer brought a preliminary motion to determine whether the word "spouse", as used in the applicable portions of the policy, includes unmarried common law spouses.

The lower court found that "spouse" meant a person who is legally married. The appellants appealed the decision to the Court of Appeal, arguing that the policy terms discriminate against him in violation of s 15(1) of the Canadian Charter. The Court of Appeal for Ontario dismissed their appeal. On appeal to the Supreme Court of Canada, the appeal was upheld.

marital status was an analogous ground of discrimination within section 15(1) of the Charter.<sup>204</sup> The Court further held that the exclusion of unmarried opposite-sex cohabitants from the accident benefits available to married spouses violated section 15(1) and was not saved under section 1 of the Charter.<sup>205</sup>

4.4.13 Provincial and federal legislatures, although not opposed to extending rights and obligations to unmarried cohabitants, nevertheless seemed anxious that this extension should not undermine marriage and seemed to believe that it was necessary to maintain a definite distinction between the two types of relationships.<sup>206</sup>

4.4.14 In 1999 the Supreme Court of Canada held in **M. v. H.**<sup>207</sup> (by a majority of eight Justices) that the definition of "spouse" in the part of Ontario's Family Law Act of 1990, which deals with partner support, was unconstitutional since it included unmarried opposite- but not same-sex partners. This judgment gave one partner of a

<sup>204</sup> Another example of the important role played by s 15 in the development of the rights of opposite-sex unmarried couples is the Ontario Human Rights Code. Marital status was included in the Ontario Human Rights Code as a ground of discrimination on the assumption that marital status would be found to be an analogous ground of discrimination within s 15(1) of the Charter. Furthermore, an omnibus Bill covering over thirty statutes, the Equality Rights Statute Law Amendment Act of 1986, S.O. 1986 chap 64 was passed by the Ontario government, again on the assumption that marital status was covered under s 15(1) of the Charter. See in this regard Holland **Canadian Journal of Family Law** 2000.

<sup>205</sup> Although the decision related to uninsured motorist coverage and loss of income accident benefits, there was no indication that the judgment was intended to be narrow in scope. Holland **Canadian Journal of Family Law** 2000 at para 3(c)(ii).

<sup>206</sup> Holland **Canadian Journal of Family Law** 2000 at para 3(c)(i). As an example, cohabitants were still excluded from provisions dealing with matrimonial property. While the support provisions of the Ontario Family Law Reform Act of 1990 R.S.O. 1990, chap F.3, s 29 (later it became the Family Law Act) were extended to opposite sex partners, other provisions of the Act dealing with division of assets and the matrimonial home were confined to those who are married. Holland **Canadian Journal of Family Law** 2000 *ibid*. This is still the case under the British Columbia Family Relations Act of 1994.

<sup>207</sup> [1999] 2 S.C.R. 3, affirming (1996), 142 D.L.R. (4th) 1, 31 O.R. (3d) 417 (Ont. C.A.) available at [http://www.lexum.unmontreal.ca?csc-scc/en/pub/1999/vol2/html/1999scr2\\_0003.html](http://www.lexum.unmontreal.ca?csc-scc/en/pub/1999/vol2/html/1999scr2_0003.html) (accessed on 29 December 2005).

M and H, two women, lived together in a same-sex relationship beginning in 1982, during which time they occupied a home which H. had owned since 1974. In 1992 the relationship had deteriorated. In an application to claim for support under the Ontario Family Law Act of 1990, M challenged the constitutionality of the definition of "spouse" in s 29. The definition included a person who is actually married and also "either of a man and woman who are not married to each other and have cohabited "continuously for a period of not less than three years". Section 1(1) defines "cohabit" as "to live together in a conjugal relationship, whether within or outside marriage".

H appealed the decision of the lower Court that the definition was unconstitutional and was joined in the appeal by the Attorney General for Ontario. The Court of Appeal upheld the decision. Neither M. nor H. appealed this decision. Leave to appeal to this Court was ultimately granted to the Attorney General for Ontario. The appeal was dismissed and s 29 of the Family Law Act was declared of no force or effect.



same-sex couple the right to claim support from the other upon the breakdown of their relationship. The pace of legislative reform accelerated significantly following the Supreme Court of Canada's decision in **M. v. H.**<sup>208</sup>

4.4.15 Although the decision in **M. v. H.** concerned only Ontario legislation, it had an effect on almost every other Canadian jurisdiction. Legislators in British Columbia, Saskatchewan, Manitoba, Ontario, Newfoundland and Labrador, and Nova Scotia thereafter enacted a wide but non-uniform range of legislative measures providing for various same-sex rights.

4.4.16 In 1999 the federal Government responded to the judgment in **M. v. H.** with the first federal legislation to provide unambiguously for same-sex benefits, the Public Sector Pension Investment Board Act<sup>209</sup> by replacing opposite-sex "surviving spouse" benefits with gender-neutral "survivor" entitlements.

4.4.17 In 2000 the federal Government further enacted the Modernisation of Benefits and Obligations Act of 2000.<sup>210</sup> This Act inserted a definition of "common-law partner" in 68 federal statutes, thereby extending benefits and obligations to same-sex partners to put them on par with unmarried opposite-sex partners. A "common-law partner" was defined as a person who is cohabitating with (another) individual in a conjugal relationship, having so cohabited for a period of at least one year.

4.4.18 The result of this Act was that the 68 federal statutes that were amended now referred to "spouses" (who at common law are limited to married spouses) and to "common-law partners" (who may be either same- or opposite-sex cohabiting partners) respectively.<sup>211</sup>

4.4.19 By doing so, the Act actually went further than was required by **M. v. H.** and extended benefits to both same- and opposite-sex partners that had previously been

---

<sup>208</sup> Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 214, submits that while the Court's decision strictly applies to this particular definition of "spouse", it has precedential significance with regard to all definitions of "spouse" and all other family relationship signifiers in all Canadian legislation.

<sup>209</sup> Statutes of Canada, 1999 chap 34.

<sup>210</sup> Statutes of Canada, 2000 chap 12.

<sup>211</sup> The Act effectively "demoted" unmarried opposite sex partners who previously had been "spouses" under many federal statutes to the status of "common-law partners".

available only to married spouses.<sup>212</sup> In this regard Parliament responded to **Miron v. Trudel**,<sup>213</sup> which required the Court to compare unmarried opposite-sex partners with married spouses.

## (ii) Marriage

4.4.20 In 1974, despite the absence of a statutory definition of marriage or of any statutory provisions barring same-sex marriage, the provincial Court of Manitoba upheld an administrative refusal to register the “marriage” of a same-sex couple in the pre-Charter case of **North v. Matheson**.<sup>214</sup> The judge considered the 1866 British ruling in **Hyde v. Hyde and Woodmansee**,<sup>215</sup> which defined the institution of marriage, “as understood in Christendom”, as the voluntary union for life of one man and one woman, to the exclusion of all others.

4.4.21 In 1993 this definition was again unsuccessfully challenged in **Layland v. Ontario (Minister of Consumer and Commercial Relations)**,<sup>216</sup> where the majority relied heavily on the decision in **North v Matheson**. The dissenting judge held that the precedents relied upon by the majority did not apply in view of section 15 of the Charter and commented that “the common law must grow to meet society’s expanding needs”.

4.4.22 Despite these unsuccessful challenges to the opposite-sex definition of marriage, calls increased to extend marriage to same-sex couples on the basis of constitutional equality.

4.4.23 In 1995, following **Andrews v. Law Society of British Columbia**,<sup>217</sup> the Supreme Court of Canada in **Egan v. Canada**<sup>218</sup> unanimously held that sexual

<sup>212</sup> Casswell **Canada Bar Review** 2001 at 818.

<sup>213</sup> [1995] 2 S.C.R. 418. See para 4.4.12 above.

<sup>214</sup> (1974), 24 R.F.L. 112 (Man. Co. Ct) as referred to by Hurley “Bill C-38”.

<sup>215</sup> (1866), L.R. 1 P & D 130 as referred to by Hurley “Bill C-38”.

<sup>216</sup> (1993), 104 D. L.R. (4<sup>th</sup>) 214 (Ont. Ct. Gen. Div.) at 234 as referred to by Hurley “Bill C-38”.

<sup>217</sup> [1989] 1 S.C.R. 143.

<sup>218</sup> [1995] 2 S.C.R. 513. See also Casswell in Wintermute & Andenæs **Same-Sex Partnerships** *ibid*

orientation was an analogous ground of discrimination under section 15 and, therefore, that discrimination on the basis of sexual orientation was prohibited under the Charter.

4.4.24 As a result of this decision, applicants in a case dealing with discrimination based on sexual orientation now only had to show that the impugned legislation or government action<sup>219</sup> actually discriminates on the basis of sexual orientation and that the discrimination is not justified under section 1 of the Charter.<sup>220</sup>

4.4.25 Another important case was **M. v. H.**<sup>221</sup> in which the Supreme Court of Canada held in that the definition of "spouse" in the part of Ontario's Family Law Act of 1990, which deals with partner support, was unconstitutional since it included unmarried opposite- but not same-sex partners. As a result, a patchwork of rights was in effect across the country. In addition, some provincial schemes reserved the term "spouse" for married partners, some for married and unmarried opposite-sex couples, and some extended the meaning of spouse to include same-sex partners.<sup>222</sup>

---

fn 19 and Holland **Canadian Journal of Family Law** 2000 at para 3(c).

<sup>219</sup> Section 32 of the Charter provides that the Charter applies "to the Parliament and government of Canada ... and ... to the legislature and government of each province ..." There is thus no horizontal application of the Charter.

<sup>220</sup> In **Egan v. Canada** the applicants' claim was turned down on the facts by a five to four majority decision of the Supreme Court.

<sup>221</sup> [1999] 2 S.C.R. 3, affirming (1996), 142 D.L.R. (4th) 1, 31 O.R. (3d) 417 (Ont. C.A.) available at [http://www.lexum.unmontreal.ca?csc-scc/en/pub/1999/vol2/html/1999scr2\\_0003.html](http://www.lexum.unmontreal.ca?csc-scc/en/pub/1999/vol2/html/1999scr2_0003.html) (accessed on 29 December 2005).

M and H, two women, lived together in a same-sex relationship beginning in 1982, during which time they occupied a home which H. had owned since 1974. In 1992 the relationship had deteriorated. In an application to claim for support under the Ontario Family Law Act of 1990, M challenged the constitutionality of the definition of "spouse" in s 29. The definition included a person who is actually married and also "either of a man and woman who are not married to each other and have cohabited "continuously for a period of not less than three years". Section 1(1) defines "cohabit" as "to live together in a conjugal relationship, whether within or outside marriage".

H appealed the decision of the lower Court that the definition was unconstitutional and was joined in the appeal by the Attorney General for Ontario. The Court of Appeal upheld the decision. Neither M. nor H. appealed this decision. Leave to appeal to this Court was ultimately granted to the Attorney General for Ontario. The appeal was dismissed and s 29 of the Family Law Act was declared of no force or effect.

<sup>222</sup> In response to the Court's ruling, the federal and several provincial governments undertook to examine their legislation to determine whether amendments to recognise same-sex partnerships were required. **CBC News** 21 May 1999 "Most Premiers ready to make Changes after Same-Sex Ruling" available at <http://cbc.ca/news> referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 *ibid* fn 3.

Eg Nova Scotia and Manitoba created civil registration schemes for unmarried heterosexual and

4.2.26 In 2000 the federal Government further enacted the Modernisation of Benefits and Obligations Act of 2000.<sup>223</sup> This Act extended benefits and obligations to same-sex partners to put them on a par with unmarried opposite-sex partners.

4.4.27 Following a resolution of the House of Commons to retain a definite distinction between marriage and partnerships, Parliament included the following words in section 1.1 of the Modernisation of Benefits and Obligations Act of 2000, under the title "interpretation":

For greater certainty, the amendments made by this Act do not affect the meaning of the word "marriage", that is, the lawful union of one man and one woman to the exclusion of all others.

4.4.28 This provision reaffirmed the common-law definition of "marriage" with respect to the Modernisation of Benefits and Obligations Act of 2000 and the 68 statutes amended by it.

4.4.29 Against the background of the case law and in view of section 52(1) of the Constitution Act of 1982,<sup>224</sup> which provides that any law that is inconsistent with the Charter is of no force or effect, it could be argued that this restrictive common-law definition of marriage was susceptible to constitutional challenge.

4.4.30 In this regard reference must also be made to section 33 of the Charter,<sup>225</sup>

---

homosexual couples; Quebec created a civil union regime governed by the same rules that apply to solemnisation of marriage, entailing the rights and obligations of marriage and subject to formal dissolution rules; Alberta created a legislated status of "adult interdependent partner" for purposes of several family-related provincial statutes which provides for rights and obligations of persons in various unmarried and not necessarily conjugal relationships involving interdependency. Initiatives in New Brunswick and the Northwest Territories were fewer and narrower in scope.

<sup>223</sup> Statutes of Canada, 2000 chap 12.

<sup>224</sup> Section 52(1) reads as follows:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The Supreme Court of Canada has interpreted this provision as enabling the Courts to strike down unconstitutional legislation or effectively amend it by "reading in" or "reading down" the legislation as enacted. *Schachter v Canada* [1982] 1 S.C.R. 679 referred to by Casswell in *Wintermute & Andenæs Same-Sex Partnerships* 2001 at 218 fn 13.

<sup>225</sup> Section 33 reads as follows:

which permits the federal Parliament or a provincial legislature to enact legislation which expressly declares that it will operate "notwithstanding" that it may, or even patently does, violate certain provisions of the Charter.<sup>226</sup>

4.4.31 It is significant that Parliament did not, however, invoke the "notwithstanding clause" to insulate this affirmation of the restrictive common-law definition of "marriage" from Charter-based judicial scrutiny.

4.4.32 The restrictive common-law definition of marriage could, therefore, still be constitutionally challenged by arguing that it constitutes discrimination on the basis of sexual orientation, thereby violating the right to equality guaranteed by section 15 of the Charter, and that it cannot be saved by either section 1 or 33 of the Charter.

4.4.33 In July 2001 the constitutionality of the exclusion of same-sex partners from the right to marry legally was challenged before the Supreme Court of British Columbia in **Egale Canada v. Attorney General of Canada**.<sup>227</sup> The Court dismissed the challenge stating that, although the legal character of "marriage" as defined infringes on the petitioners equality rights, such infringement is reasonable and demonstrably justifiable in a free and democratic society and therefore saved by section 1 of the Charter.

---

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

<sup>226</sup> The equality rights guaranteed by s 15 are among those provisions that may be overridden using the s 33 "notwithstanding clause". Such a declaration only has effect for five years, but may be re-enacted. Casswell **Canada Bar Review** 2001 at 812. This section has only very rarely been invoked and only once in the context of lesbian and gay rights. This was the instance where the Alberta legislature in reaction to **M. v. H.** referred to above, amended the Alberta Marriage Act to define "marriage" as "a marriage between a man and a woman" declaring that the Act operates notwithstanding the Charter. See Marriage Act of 1980, R.S.A. 1980, chap M-6 s 1(chap1), 1.1(a) as amended by Marriage Amendment Act, 2000, S.A. 2000, chap 3, s 4, 5 referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 218 fn 14.

<sup>227</sup> **EGALE Canada Inc. et al. v. Att. Gen. of Canada et al.** 2001 B.C.S.C. 1365. See also Casswell **Canada Bar Review** 2001 at 813.

4.4.34 In the same period, similar challenges were brought before the Courts of some of the other provinces and over the next two years eventually led to the sanction of same-sex marriage by the provincial Courts of eight provinces and one territory. Ontario and Quebec are two of these provinces.<sup>228</sup>

4.4.35 However, the crucial breakthrough came when the ruling of the British Columbia Supreme Court in **Egale Canada v. Attorney General of Canada**<sup>229</sup> was appealed to the British Columbia Court of Appeal. In the appeal, cited as **Barbeau v. British Columbia (Attorney General) et al**,<sup>230</sup> the Appeal Court found that the common-law bar to same-sex marriage contravenes section 15 of the Charter and that it cannot be justified under section 1 of the Charter.

4.4.36 The Court reformulated the common law definition of marriage to mean "the lawful union of two persons to the exclusion of all others", thereby endorsing the right of gay and lesbian couples to marry. The order was suspended until July 2004 to give the federal<sup>231</sup> and provincial Government time to review and revise legislation with the view to comply with the decision of the Court.

---

<sup>228</sup> In July 2002 three judges of the Ontario Superior Court of Justice found unanimously that the existing common-law rule defining marriage in opposite-sex terms represented an unjustified infringement of section 15 of the Charter in **Halpern et al. v Canada (A.G.) et al** [2002] O.J. No. 2714 (Q.L.), (Ont. Sup. Ct. Justice (Div. Ct.)) Court File No.: 684/00 referred to by Hurley "Bill C-38".

In June 2003, the Ontario Court of Appeal's unanimous decision upheld the Superior Court of Justice's conclusions. The Court declared the existing common-law definition of marriage constitutionally invalid and reformulated it to refer to the "voluntary union for life of two persons". The Court suspended the declaration of invalidity for a two-year period. **Halpern v. Canada (Attorney General)** (2003), 36 R.F.L. (5th) 127 (Ont. C.A.), affirming [2002] O.J. No. 2714 (Q.L.), (Ont. Sup. Ct. Justice (Div. Ct.)) referred to by Hurley "Bill C-38".

In September 2002, the Superior Court of Quebec became the second Canadian Court to allow a same-sex marriage application in **Hendricks c. Québec (Procureur général)**. Quebec: [2002] R.J.Q. 2506 as referred to by Hurley "Bill C-38".

The Superior Court of Quebec declared the opposite-sex language in s 5 of the Federal Law-Civil Law Harmonisation Act of 2001 contrary to s 15 and of no force and effect. The Court suspended the declaration of invalidity for a two-year period. Other provinces where similar rulings were issued are Yukon, Nova Scotia, Manitoba, Saskatchewan, Newfoundland, Labrador, New Brunswick, and the Northwest Territories. See Hurley "Bill C-38".

<sup>229</sup> Referred to in para 4.4.33 and fn 231 above. See also Casswell **Canada Bar Review** 2001 at 813.

<sup>230</sup> 2003 B.C.C.A. 251, available at <http://www.courts.gov.bc.ca/jdb-txt/ca/03/02/2003bccca0251.htm> (accessed on 29 December 2005).

<sup>231</sup> The Federal government, represented by the Attorney General of Canada, was a party before the Court.

4.4.37 In July 2003 the federal Government referred draft legislation to the Supreme Court of Canada in a constitutional reference,<sup>232</sup> requesting an opinion on the constitutionality of a draft Bill it was preparing. The Court was *ia* requested to consider whether the extension of the capacity to marry to same-sex couples was consistent with the Charter on the one hand and the freedom of religion guarantee of religious officials on the other.

4.4.38 The Court heard arguments on these and other matters during October 2004, and issued its ruling on 9 December 2004.<sup>233</sup> On the issue of extending the capacity to marry, the Court found that the provision authorising same-sex marriage was consistent with the Charter.<sup>234</sup>

4.4.39 On the matter of the guarantee of religious freedom in section 2(a) of the Charter, the Court found that that subsection is sufficiently broad to protect religious officials from State compulsion to perform same-sex marriages against their religious beliefs.<sup>235</sup>

4.4.40 The Court furthermore considered the argument that legalising same-sex marriage would be discriminatory against the religious groups who are opposed to it and that it would result in a conflict between equality rights and freedom of religion guarantees. The Court found that the draft legislation did not withhold any benefits, nor did it impose burdens on a differential basis and as such did not meet the threshold requirements of a section 15(1) analysis.<sup>236</sup> In the Court's view, "[t]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another".<sup>237</sup>

4.4.41 The Court declined to deal with an alleged conflict of rights in the abstract, in the absence of a factual context. It did not rule out the possibility that such a conflict

---

<sup>232</sup> In terms of s 53 of the Supreme Court Act, R.S.C. 1985, c. S-26.

<sup>233</sup> **Reference re Same-Sex Marriage** 2004 SCC 79, 9 December 2004.

<sup>234</sup> *Op cit* para 43 *et seq.*

<sup>235</sup> *Op cit* para 60.

<sup>236</sup> *Op cit* para 45 *et seq.*

<sup>237</sup> *Op cit* para 46.

could occur should legislation recognising same-sex marriage become law, adding that

[c]onflicts of rights do not imply conflict with the Charter; rather, the resolution of such conflicts generally occurs within the ambit of the Charter itself.<sup>238</sup>

4.4.42 The Court further noted that.<sup>239</sup>

The protection of freedom of religion afforded by s. 2(a) of the Charter is broad and jealously guarded in our Charter jurisprudence. We note that should impermissible conflicts occur, the provision at issue will by definition fail the justification test under s. 1 of the Charter and will be of no force or effect under s. 52 of the Constitution Act, 1982. In this case the conflict will cease to exist.

4.4.43 Subsequent to this finding of the Supreme Court of Canada, the federal Government introduced the Civil Marriage Act<sup>240</sup> as Bill C-38 in the first session of the 38th Canadian Parliament on 1 February 2005.<sup>241</sup>

4.4.44 The enactment extends the legal capacity for marriage for civil purposes to same-sex couples in order to reflect the values of tolerance, respect and equality, consistent with the Canadian Charter of Rights and Freedoms.<sup>242</sup>

4.4.45 The purpose and objects of the Civil Marriage Act are as follows:<sup>243</sup>

- \* The Act recognises that many provincial Courts have found that equality rights, under section 15 of the Charter, include the right to marriage without discrimination based on sexuality. Accordingly, the Act recognises that same-sex couples should have the same access to marriage as opposite-sex couples.
- \* The Act states that only equal access to marriage, for civil purposes, would respect the equality rights of same-sex couples. The civil union, as

---

<sup>238</sup> *Op cit* para 52.

<sup>239</sup> *Op cit* para 53.

<sup>240</sup> Full title: "An Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes".

<sup>241</sup> See "Civil Marriage Act" in Canada **Wikipedia**.

<sup>242</sup> Official legislative summary of Civil Marriage Act. See "Civil Marriage Act" in Canada **Wikipedia**.

<sup>243</sup> See Mapleleafweb.com "Legal Recognition of Same Sex Unions" 2005.



an institution other than marriage, would not offer same-sex couples equal access and would violate their human dignity.

- \* The Act makes explicit reference to the "notwithstanding clause" of the Charter by asserting that the Parliament of Canada's commitment to uphold the right to equality without discrimination precludes the use of the Charter's "notwithstanding clause" to deny the right of same-sex marriage.
- \* The Act explicitly provides for the freedom of religion for churches and religious groups. Under the Act, it is recognised that officials of religious groups are free to refuse to perform marriages that are not in accordance with the religious views of their respective faiths.

4.4.46 The Bill passed the House of Commons on 28 June 2005 and the Senate on 19 July 2005 with a 46-22 vote and 3 abstentions. It became law when it received Royal Assent on 20 July 2005.

4.4.47 Sections 5 to 15 of the Act set out the consequential amendments to eight federal Statutes. These amendments were made to ensure the equal treatment within federal law of opposite-sex and same-sex married couples, and include the following:<sup>244</sup>

- \* Federal Law-Civil Law Harmonisation Act, No. 1 (2001, c. 4). This amendment re-enacts section 5 of the Act, which was earlier struck down by the Quebec Courts, and remedies its unconstitutionality. The provision sets out the consent requirement for marriage in Quebec as the free and enlightened consent of two persons to be the spouse of the other.
- \* Marriage (Prohibited Degrees) Act (1990, c. 46). This amendment extends the existing prohibitions on marriages between opposite-sex closely related persons in subsection 2(2) of the Act to same-sex closely related persons.

---

<sup>244</sup>

Canada Department of Justice Newsroom "Civil Marriage Act" 2005.

- \* Modernisation of Benefits and Obligations Act (2000, c. 12). This amendment repeals section 1.1 of the Act, an interpretation provision that restated the opposite-sex requirement for marriage in the common law.
- \* Canada Business Corporations Act (R.S. 1985, c. 44). The amendment to section 237.5 of the Act is to clarify that the group of individuals considered to be related to each other for purposes of family-held investments equally includes both same- and opposite-sex married couples, their children and related persons.
- \* Canada Cooperatives Act (1998, c. 1). The amendment to section 337.5 of the Act was made for the same reason as for the Canada Business Corporations Act.
- \* Income Tax Act (R.S.C. 1985, c. 1 (5th Supp.)). The amendments to sections 56.1 and 60.1 of the Act replace the existing term “natural parent” with the term “legal parent” to ensure that support amounts paid under a court order or written agreement involving both same- and opposite-sex couples and their children will be recognised equally in federal law.
- \* Divorce Act (R.S. 1985, c. 3 (2nd Supp.)). The amendment to section 2 of the Act extends the existing definition of “spouse” and “enfant à charge” to ensure that the protections of the Act apply equally to both same- and opposite-sex married couples and their children.
- \* Civilian War-related Benefits Act (R.S. 1985, c. 31). This amendment repeals section 36 of the Act. As this provision no longer has effect on new claimants, there was no need to change references to “husband” and “wife” to equally include marriages between same-sex partners

4.4.48 The reaction to the introduction of Bill C-38 has been mixed, both within and outside Parliament. On the one hand those campaigning for the traditional family have described the Bill as an experiment that threatens the family unit and many religious organisations are highly critical of the Bill’s purpose and effects. On the other hand, advocacy groups for gay and lesbian rights and human rights

organisations have welcomed the Bill as landmark equality rights legislation that will end exclusion of and discrimination against gay and lesbian conjugal couples. Spokespersons of some religious organisations have also expressed support for the legislation.<sup>245</sup>

**c) The current legal position**

**(i) Same- and opposite-sex cohabitants<sup>246</sup>**

4.4.49 As stated above<sup>247</sup> the position of same- and opposite-sex couples in cohabiting relationships under federal legislation is regulated by the Modernisation of Benefits and Obligations Act of 2000. This Act distinguishes between:

- \* married spouses (who may now be same- or opposite-sex couples) and
- \* common-law partners (who may be same- or opposite sex cohabiting partners).

As far as benefits and obligations under the 68 federal statutes amended by Modernisation of Benefits and Obligations Act of 2000 are concerned, common-law partners are practically put on a par with married couples after cohabiting for **one year**.

4.4.50 The Governments of provinces including Ontario, Manitoba, Quebec, Nova Scotia and Saskatchewan enacted omnibus legislation to address discrimination against cohabiting partners in provincial Acts.<sup>248</sup> By enacting omnibus legislation

---

<sup>245</sup> See "Civil Marriage Act" in Canada **Wikipedia** .

<sup>246</sup> Note that cohabitation is the term used for unmarried couples living together in domestic partnerships.

<sup>247</sup> See para b) above.

<sup>248</sup> The Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act of 1999, S.O. 1999, chap 4. New Brunswick and Newfoundland responded by amending only their family relations law concerning partner support to include same-sex partners thereby dealing only with the specific issue considered in the case. Other examples are: An Act to Amend the Family Services Act of 2000, S.N.B., 2000 chap 59; and An Act to Amend the Family Law Act of 2000, S.N. 2000, chap 29. See Casswell **Canada Bar Review** 2001 at 815 fn 20.

recognising same-sex partnerships, the provincial legislatures responded to the Supreme Court's indication that it might be preferable to address the issues in a more comprehensive fashion, rather than leaving them to be resolved "on a case-by-case basis at great cost to private litigants and the public purse".<sup>249</sup>

4.4.51 One example is British Columbia, where the Definition of Spouse Amendment Act of 2000<sup>250</sup> defined "spouse" in 35 British Columbia statutes as a person who is, or was,<sup>251</sup>

- \* married to another person or
- \* living and cohabiting with another person for **two years** in a marriage-like relationship, including a marriage-like relationship between persons of the same gender.

4.4.52 By including them in the definition of spouse in the enumerated Acts, marriage and marriage-like relationships were principally equalised and the distinction between same- and opposite-sex cohabiting couples negated for purposes of 35 provincial statutes.

4.4.53 Thus, the status quo for cohabiting couples is that under the federal Modernisation of Benefits and Obligations Act of 2000 their relationship is equal to common-law marriage after cohabiting for one year, while under the British Columbia

---

Since this legislation does not involve capacity to marry it does not exceed the provinces' legislative power as provided for in the British North America Act of 1867. See para 4.4.3 and fn 194 above.

<sup>249</sup> See **M. v. H.** at para 147. See Casswell **Canada Bar Review** 2001at 815 fn 20.

<sup>250</sup> Definition of Spouse Amendment Act of 2000, S.B.C. 2000, chap 24 referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 222 fn 27.

<sup>251</sup> This method of recognition of same-sex partnerships differs from the methods used in Quebec and Ontario. In a similar manner as the federal Modernisation of Benefits Act of 2000, Quebec grouped same-sex partners and unmarried opposite sex partners together as "de facto spouses" or "common-law partners". Ontario's legislation created a separate category altogether for same-sex partners as "same-sex partners" whilst leaving unmarried opposite-sex partners in various extended definitions of "spouse". As a result the plaintiff in **M. v. H.** applied to the Supreme Court of Canada for a rehearing concerning remedy, arguing that the Ontario legislation did not satisfy the Court's 1999 order. The Court dismissed the application without reasons. See this ruling at <http://www.lexum.umontreal.ca/csc-scc/en/bul/2000/html/00-05-24.bul.html> (rehearing) (No. 25838) referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 223 fn 31.

Definition of Spouse Amendment Act of 2000, they are spouses after cohabiting for two years.

4.4.54 This discrepancy between the federal and provincial legislation has the result that unmarried partners in British Columbia will qualify as "spouses" in 35 British Columbia statutes, but not as "spouses" in federal legislation. Under the 68 federal statutes they are "common-law partners" and would thus only benefit from legislation awarding them rights and obligations in that capacity.

4.4.55 The legal position in British Columbia is discussed below to serve as an example of the legislative response to judicial findings of discrimination based on marital status within the legislative jurisdiction of a province.<sup>252</sup>

#### Conditions for recognition

4.4.56 The British Columbia Definition of Spouse Amendment Act of 2000 does not prescribe any conditions for recognition of a partnership other than living together in a marriage-like relationship. Most British Columbia statutes require in addition that a partner must have been living with the same partner (whether same- or opposite-sex) for two or more years to be recognised as such. If they have lived together in a marriage-like relationship for two or more years they automatically become entitled to the rights and obligations of spouses provided for in any of the 35 Acts that have been amended by the Definition of Spouse Amendment Act of 2000.<sup>253</sup>

4.4.57 There is no condition prohibiting a person who is still married from living in a marriage-like relationship with another person.<sup>254</sup>

---

<sup>252</sup> A decade ago none of the approximately 500 statutes in British Columbia recognised same-sex partnerships. The subsequent change in the law is the result of the Charter, the decisions of the Supreme Court of Canada and the pro lesbian and gay provincial government who was in office over this period. The New Democratic Party was elected in 1991 and re-elected in 1994. Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 215.

<sup>253</sup> Eg Pension Benefits Standards Act of 1996, R.S.B.C. 1996, chap 352, s 1(1)(b). Compare this with the legal position under the Swedish Cohabitees (Joint Homes) Act, 1987 para 4.3 above and the New South Wales Property (Relationships) Act of 1984 para 4.5 below. As was indicated above some Acts have been amended to include these marriage-like relationships before the promulgation of the Definition of Spouse Amendment Act of 2000. Those Acts merely included these relationships in the scope of the particular Act.

<sup>254</sup> BC Booklet "Living Common Law" 2005 at 5.

Legal consequences of recognition<sup>255</sup>

4.4.58 British Columbia was the first province of Canada to provide that same-sex partners were eligible to receive spousal pension benefits after living together for at least two years.<sup>256</sup> This was previously only available to opposite-sex unmarried partners. Similar legislation followed relating to all private pension plans<sup>257</sup> in which an employer contributes to employee pension funds.<sup>258</sup>

4.4.59 The legal responsibility to support (maintain) a partner financially in a marriage-like relationship starts only after the partners have been living together for two years or more. This responsibility continues after the relationship ends. In the event of a dispute regarding the payment of support between the partners or former partners, the Court can make a support order upon application.<sup>259</sup>

4.4.60 The Insurance Corporation of British Columbia will pay the "no-fault" death benefits to a partner who has been in a marriage-like relationship for two years and whose partner is killed in a car crash, regardless of who was at fault in the accident.

4.4.61 A surviving partner may be eligible to workers' compensation death benefits when his or her partner is killed on the job and they have been living together in a marriage-like relationship for at least three years before the death and the former partner was dependent on the latter. If they had a child together, the minimum

---

<sup>255</sup> Unless otherwise indicated the source for this information is BC Booklet "Living Common Law" 2005. This booklet reflects the changes in federal and provincial laws that give unmarried cohabiting couples the same rights and obligations as married couples.

<sup>256</sup> With the enactment of the Pension Statutes Amendment Act of 1998 (No.2), 1998, S.B.C. 1998, chap 40, referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 224 fn 33. This legislation regulated pensions of members of the Legislative Assembly, college instructors, municipal workers, members of the provincial public service and teachers.

<sup>257</sup> Pension Benefits Standard Amendment Act of 1999, S.B.C. 1999, chap 41, as referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 224 fn 34. These amendments were done even before the Definition of Spouse Amendment Act of 2000.

<sup>258</sup> The Canada pension plan allows common-law couples to share a retirement pension after living together for at least one year. This arrangement is called an "assignment" and could reduce the amount of income tax payable on the pension received. After the Definition of Spouse Amendment Act of 2000, unmarried same-and opposite-sex couples receive the same benefits as couples in marriage-like relationships.

<sup>259</sup> Family Maintenance Enforcement Act of 1996, R.S.B.C. 1996, chap 127, as amended by the Definition of Spouse Amendment Act of 2000, S.B.C. 2000, chap 24. This application must be made within a year after separation.

required time for living together before death is one year.

4.4.62 The various British Columbia statutes that deal with social assistance provide that a person's eligibility for such assistance be determined by the financial situation of an applicant's household. The Definition of Spouse Amendment Act of 2000 did not amend the definitions of "spouse" for these Acts. The Acts on social assistance therefore do not recognise same-sex cohabiting partners as "spouses". However, pursuant to administrative policy, persons who live together in a "marriage-like relationship" are treated as "spouses" and, therefore, as members of the same "household".<sup>260</sup>

4.4.63 Amendments to the relevant legislation provide for the British Columbia Medical Services Plan to cover partners without any minimum limits on living together.<sup>261</sup>

4.4.64 Pursuant to legislation that has been in force since February 2000,<sup>262</sup> a person may make treatment decisions on behalf of his or her same-sex partner. A same-sex partner may also be appointed as a partner's proxy to make decisions concerning personal or health care in the event of incapacitation.

4.4.65 Many private and public sector employers, in particular the British Columbia Government, provide benefits to their employees' cohabiting partners and their families.<sup>263</sup>

4.4.66 The British Columbia Adoption Act of 1996<sup>264</sup> provides that a child may be

---

<sup>260</sup> This is an example of a situation where recognition of same-sex partnerships may work against the financial interest of such partners. See Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 225.

<sup>261</sup> In 1991, following the decision by the British Columbia Supreme Court in **Knodel v British Columbia**, (1991), 58 (B.C.L.R.) (2d) 356 the British Columbia government amended the Medical and Health Services Act of 1992, S.B.C. 1992, chap 76, s 1. The Court found in the Knodel case that the omission of same-sex partners in the definition of spouse in medical services legislation violated the Charter and ordered that same-sex partners be included in the definition. See Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 225.

<sup>262</sup> Health Care (Consent) and Care Facility (Admission) Amendment Act of 1994.

<sup>263</sup> Human Resources Development Canada administers the Employment Insurance program and considers partners to be in a marriage-like relationship if they have been living together as a couple for one year. The same principles that apply to married couples are also applicable to them. See Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 223.

<sup>264</sup> R.S.B.C. 1996, chap 5, s 5, 29, referred to by Casswell in Wintermute & Andenæs **Same-Sex**

adopted by "one adult alone or two adults jointly". The Act also provides that an adult "may apply ... to jointly become a parent of a child with a birth parent of the child".<sup>265</sup>

### Partnership breakdown

4.4.67 Part 5 of the British Columbia Family Relations Act of 1996<sup>266</sup> determines property and pension division when a marriage ends. This part has not been amended by the Definition of Spouse Amendment Act of 2000 and does not apply to unmarried cohabiting relationships.<sup>267</sup> Thus, unmarried partners do not have automatic access to the remedies provided for in the Family Relations Act of 1996 concerning property and pension division.<sup>268</sup>

4.4.68 It is, however, possible under the Family Relations Act of 1996 for couples who have lived together in a "marriage-like" relationship for two years or more to enter into an agreement that the provisions of that Act governing property and pension division apply to them, and this agreement will be judicially enforceable.<sup>269</sup>

---

**Partnerships** 2001 at 228. British Columbia is the second province after Quebec to amend its adoption legislation to permit such adoptions. This was done following the decision of the Ontario Provincial Court in **Re K. & B.** (1995), 125 D.L.R. (4<sup>th</sup>) 653, which held that the provisions of Ontario's adoption legislation restricting stepparent adoption to opposite sex partners were unconstitutional. See Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 229.

<sup>265</sup> "Birth parent" is defined as "birth mother" or "birth father", which in turn are defined as "biological mother" or "biological father". The latter two terms are not defined.

<sup>266</sup> Family Relations Act of 1996, R.S.B.C. 1996, chap 128, s 120.1 as amended by the Family Relations Amendment Act of 1997, S.B.C. 1997. See Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 *ibid*.

<sup>267</sup> See Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 227.

<sup>268</sup> Following **M v H** British Columbia was the first province to amend its family relations legislation to include same-sex partners in the definition of "spouse". Family Relations Amendment Act of 1997, S.B.C. 1997, chap 20, s.1. Family Maintenance Enforcement Amendment Act of 1997, S.B.C. 1997, chap 19. This amended definition did not apply to the provisions dealing with property division in the Family Relations Act of 1996. See Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 *ibid*.

<sup>269</sup> Family Relations Act of 1996, R.S.B.C. 1996, s.120.1. Before the legislation was amended to provide for these agreements to be enforceable, the British Columbia Supreme Court held that at common law such a contract was judicially enforceable. However, enforcing it in practice was difficult and sometimes impossible. **Sleeth v Wasserlein** (1991) 36 R.F.L. (3d) 278 (B.C.S.C.) referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 *ibid* fn 49. In the absence of a property and pension division agreement, a former cohabiting partner who is left in a financially disadvantaged position may, after separation, claim division of property based on the common-law judicial remedy of constructive trust. **Anderson v Luoma** (1986), 50 R.F.L. (2d) 127 (B.C.S.C) referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 227 fn 48.



4.4.69 With respect to custody of and access to children and child- and partner support, cohabiting partners have access to the same judicial remedies as married partners.<sup>270</sup> All biological (natural) parents have a legal obligation to support their children financially until the age of 19 or after that if the child remains dependent. A legal parent is someone who has lived with a partner for at least two years and has contributed regularly to the support of that partner's child for at least one year. Such a legal parent has a legal obligation to help support the child, just like a natural parent.

4.4.70 Parents who live together share custody. Upon the break-up of the relationship, anybody who has a connection with the child may apply to the Court for custody, for example, natural or legal parents and grandparents. The Court makes a decision on the basis of the best interests of the child.

### Miscellaneous

4.4.71 Refusal to render artificial insemination treatment to a lesbian couple has been ruled to be discrimination on the basis of sexual orientation and a violation of the British Columbia Human Rights Act of 1995.<sup>271</sup> This decision by the British Columbia Human Rights Council was affirmed by the British Columbia Supreme Court in **Potter v Korn**.<sup>272</sup>

4.4.72 A person may designate any person as beneficiary under a will, and thus also an unmarried partner.

4.4.73 Since same-sex marriage-like partners were included in the definition of "spouse" by the amendment of the Estate Administration Act of 1996,<sup>273</sup> they have

<sup>270</sup> See Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 227.

<sup>271</sup> (1995) 23 C.H.R.R. D/319 (B.C. Human Rights Council) referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 229.

<sup>272</sup> (1996), 134 D.L.R. (4<sup>th</sup>) 437 (B.C.S.C.) referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 229 fn 57.

<sup>273</sup> Estate Administration Act of 1996, R.S.B.C. 1996, chap 122 as amended by Definition of Spouse Amendment Act of 1999, S.B.C. 1999, chap 29, s 4, which was repealed and replaced by Definition of Spouse Amendment Act of 2000, S.B.C. 2000, chap 24, s 11 referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 229 fn 58.

been able to inherit a spouse's portion of the deceased partner's estate on intestacy, just like opposite-sex marriage-like partners.

4.4.74 Similarly, the British Columbia's Wills Variation Act of 1996<sup>274</sup> was amended to include in its scope a same-sex marriage-like partner who was financially dependent on the deceased and who was inadequately provided for in the deceased's will. Such a partner may apply for judicial variation of the will to make adequate provision, just like opposite-sex marriage-like partners.

#### (ii) Opposite- and same-sex married couples

4.4.75 The new legal definition of marriage under the Civil Marriage Act reads as follows:

Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

4.4.76 In addition to expanding the definition of marriage to include same-sex couples, the Act also extends full legal benefits and obligations of marriage to same-sex couples through a series of consequential amendments. Through the new definition of marriage and the consequential amendments in the Civil Marriage Act, same-sex married couples will now receive equal treatment to that received by married opposite-sex couples under Canada's business corporation and cooperatives laws, and with regard to veterans' benefits, divorce, and income taxes.<sup>275</sup>

---

<sup>274</sup> R.S.B.C. 1996, chap 490, as amended by Definition of Spouses Amendment Act of 1999, S.B.C. 1999, chap 29, s 17, which was repealed and replaced by Definition of Spouse Amendment Act of 2000, S.B.C. 2000, chap 24, s 13 referred to by Casswell in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 229 fn 59.

<sup>275</sup> Canada Department of Justice Newsroom "Civil Marriage Act" 2005 and "Civil Marriage Act" in Canada **Wikipedia**.

## 4.5 Australia<sup>276</sup>

### a) Background

4.5.1 Australia became a Commonwealth of the British Empire on 1 January 1901 when the Act to Constitute the Commonwealth of Australia of 1900 (hereafter referred to as the Constitution) came into effect.<sup>277</sup> Australia has since been governed by a democratic federal system recognising the British Monarchy as sovereign.<sup>278</sup>

4.5.2 The Constitution divides the lawmaking power in Australia between the Commonwealth and the States on the principle that powers not expressly granted to the federal Parliament remain with the States.

4.5.3 In this regard the Constitution provides that the federal Parliament has the power to legislate with respect to "marriage" and "divorce and matrimonial cause".<sup>279</sup> Other areas of family law, such as the rights and duties of unmarried couples, remain within the powers of the States.<sup>280</sup>

---

<sup>276</sup> Australia is a country slightly smaller than the USA with a population of almost 19,5 million people living on 7,5 million km<sup>2</sup>. The ethnic groups living in Australia are 92 percent Caucasian, 7 percent Asian and 1 percent aboriginal and others. Twenty six percent of the population subscribe to the Anglican religion, 26 percent to Roman Catholic and 24 percent to other Christian religions. The rest are non-Christians. See "Ethnic Groups and Religion" Australia in **World Factbook**.

<sup>277</sup> Commonwealth of Australia Constitution Act 1900 (UK) is available at <http://foundingdocs.gov.au/places/cth/cth1.htm> (accessed on 5 August 2002).

<sup>278</sup> Australia is divided into 6 States (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) and 2 territories (Australian Capital Territory and Northern Territory). See "Administrative Divisions" Australia in **World Factbook** Australia has a population of over 20 million living on 7 686. 850 km<sup>2</sup>. According to a 2001 Census the ethnic groups are Caucasian 92%, Asian 7%, and aboriginal and other 1%. The Religions that they adhere to are Catholic 26.4%, Anglican 20.5%, other Christian 20.5%, Buddhist 1.9%, Muslim 1.5%, other 1.2%, unspecified 12.7% and none 15.3%. See "Ethnic Groups and Religion" Australia in **World Factbook**.

<sup>279</sup> Section 51 (xxi) and (xxii) of the Constitution. For a discussion of the role of the Constitution in this type of legislation, see Harrison **Family Matters** 1991.

<sup>280</sup> Graycar & Millbank **Canadian Journal of Family Law** 2000 at 234.

4.5.4 Since the English common law applies in Australia,<sup>281</sup> the concept of marriage as defined in the English case **Hyde v Hyde and Woodmansee**,<sup>282</sup> "the union of one man and one woman", became part of the adopted common law of Australia.

4.5.5 The common law was partially substituted in 1961 when the federal Parliament followed the Constitutional direction and enacted the Marriage Act of 1961 (Cth) (providing who may marry and prescribing the requirements for a legal ceremony) and the Family Law Act of 1975 (Cth)<sup>283</sup> (governing divorce and other consequences of marriage breakdown).

4.5.6 Although the Marriage Act of 1961 (Cth) did not prescribe the sex of the parties to a marriage, the marriage formula as set out in section 46(1) provides that the marriage officer must state the following when performing the ceremony:

Marriage, according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

4.5.7 This section has been interpreted to limit marriage to heterosexual couples.<sup>284</sup>

4.5.8 The Family Law Act of 1975 (Cth) did not define marriage either, but section 43 of that Act stated as a principle to be applied by the courts, that the Family Court shall have regard to the

need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others ...<sup>285</sup>

4.5.9 Since same-sex couples are excluded from the definition of marriage and thus from the federal legislative jurisdiction, it has been argued that State

---

<sup>281</sup> **Catholic Encyclopaedia.**

<sup>282</sup> [1861-1873] All ER Rep 175.

<sup>283</sup> Which repealed the Matrimonial Causes Act of 1959 (Cth).

<sup>284</sup> NSW Social Issues Report **Domestic Relationships** 1999.

<sup>285</sup> See also the reference to this section in **Hosking v Hosking** [1995] FLC 92 referred to by Parker, Parkinson & Behrens **Australian Family Law** 2001. This provision was held to be merely directory. However, present attitudes towards homosexuals make it unlikely that the ambit of marriage will be extended beyond the traditional notion as found in s 43 of the Family Law Act of 1975 (Cth). See eg "Howard Rejects Gay Marriage" **Herald Sun** 24 August 2001, where Prime Minister John Howard was reported to have said that he did not believe that "homosexual relationships should be given the same place in our society as concepts such as marriage." referred to by Zemljak & Stone "Legal Recognition of Same-Sex Relationships" 2001. See also the Marriage Legislation Amendment Act as referred to in para 4.5.12 *et seq.*

Parliaments are at liberty to enact legislation to recognise their relationships<sup>286</sup> as long as the effect s not to allow marriage.<sup>287</sup>

## b) Development of relational status

### (i) Cohabitation

4.5.10 Although the phenomenon of unmarried cohabitation has always existed, its incidence became more frequent from the late sixties with a marked increase after 1974. Some of the reasons suggested for the increase are:

- \* A revival in the popularity of informal marriage historically associated with poorer people in insecure employment;
- \* The difficulty and expense of divorce;
- \* Recent changes in attitudes to marriage; and
- \* Deterioration in economic conditions.<sup>288</sup>

4.5.11 In response to these circumstances, legislation was introduced gradually to ensure that certain legal protections were extended to those in de facto relationships.<sup>289</sup> These protections were, however, mostly limited to rights concerning

<sup>286</sup> Graycar & Millbank **Canadian Journal of Family Law** 2000 *ibid*. See also Sandor "Legislating in Australia for Love Outside of Marriage" 2002. So called de facto relationships fall under the jurisdiction of the Commonwealth Family Law Act of 1975 only when there are disputes concerning children involved. This is the result of the referral by the States of legislative power in respect of illegitimate children to the Commonwealth, leading to the application of the Family Law Act of 1975 to all private law disputes concerning children.

<sup>287</sup> Studies that have been conducted in Australia to sample the opinion of same-sex partners indicate that the majority surveyed (80 percent) do not consider that marriage or marriage equivalence is desirable in their cases. They do want legal protection against discrimination and the removal of discriminatory provisions. See also Kirby "Australian Legal Developments" 1999 and Millbank & Sant **Sydney Law Review** 2000 at 185 fn 28.

<sup>288</sup> For figures and detailed discussions, see Glezer **Family Matters** 1999. NSW Law Reform Commission **De Facto Relationships** 1983 chap 3. See also NSW Social Issues Report **Domestic Relationships** 1999 par 2.3 "Growth of De Facto Relationships: Statistical and Other Evidence".

<sup>289</sup> In the Discussion Paper the Commission proposed two alternative options to regulate unmarried

property, with the effect that unmarried couples were treated differently from married couples in many remaining respects.<sup>290</sup>

4.5.12 The absence of a Bill of Rights and other constitutional or statute-based guarantees of equality and fundamental rights in Australia has resulted in the recognition of unmarried relationships in a manner that differs from that in other countries, eg the Netherlands and Canada.<sup>291</sup> Through the enactment of State legislation that amends the interpretation of terms like spouse and dependant, specific statutes are made applicable automatically to unmarried relationships. The relevant legislation applies to all those relationships that meet the criteria for recognition under the enabling statute, as opposed to providing that they comply with a prescribed definition which would enable registration.<sup>292</sup>

4.5.13 New South Wales became the first Australian State to enact such enabling legislation and will be discussed as an example of the legislation in Australia. It deals with the rights and duties of couples in unmarried relationships in the De Facto Relationships Act of 1984.<sup>293</sup>

---

and unregistered family relationships. The first alternative provided for a de facto option and must not be confused with the term "de facto relationships" as used in the New South Wales legislation. Discussion Paper no 104 (Project 118) available at <http://www.doj.gov.za/salrc/index.htm>.

<sup>290</sup> Eg the Widows' Pension Act of 1942 (Cth) which included within the terms of eligibility for pension, certain classes of de facto wives whose husbands had died. The NSW Social Issues Report **Domestic Relationships** 1999 proposed that this legislative recognition of de facto wives for the purposes of Commonwealth pension programs more than 60 years ago, suggests that recent increases in de facto relationships may be merely an extension of a well-established pattern in Australia. See also the legislation referred to by Mr Justice Hutley in **Seidler v Schallhofer** [1982] 2 NSWLR 80 at 101 as quoted in the NSW Law Reform Commission **De Facto Relationships** 1983 para 4.8 and chap 4 of that Report in general.

<sup>291</sup> The International Treaties to which Australia has subscribed became a means of supporting the constitutional validity of federal legislation outside traditional federal fields. Eg Australia's obligations under the International Covenant on Civil and Political Rights enabled the federal Parliament to enact the Human Rights (Sexual Conduct) Act of 1994 (Cth). See Kirby "Australian Legal Developments" 1999. For a detailed discussion see Nicholson "Australian Judicial Approaches" 2002.

<sup>292</sup> Graycar & Millbank **Canadian Journal of Family Law** 2000 *et seq*.

<sup>293</sup> Several of the other States have since enacted similar legislation; Queensland and Western Australia also recognise same-sex de facto relationships. South Australia has legislation before its Parliament to enact same-sex de facto relationships. In January 2004, Tasmania became the only State so far to recognise same-sex civil unions. Since January 1, 2004, The Relationships Act of Tasmania allows same-sex couples to register their union with the State's Registry of Births, Death and Marriages. The Act gives homosexuals rights in making decisions about their partner's health, provides for guardianship when a partner is incapacitated, and equal access to their partner's public sector pensions. The Act also allows homosexuals to adopt the biological child of their partner. See Same-Sex Marriage in Australia **Wikipedia**.

4.5.14 The De Facto Relationships Act of 1984 ("DFRA") closely followed the recommendations made by the New South Wales Law Reform Commission ("NSW LRC") in its Report on De Facto Relationships.<sup>294</sup> The DFRA created the designation of a de facto partner and defined it in relation to a man as:

a woman who is living or has lived with the man as his wife on a bona fide domestic basis although not married to him;

and in relation to a woman as:

a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.

4.5.15 The DFRA was designed to meet some of the needs of opposite-sex couples who were not legally married but whose relationships were marriage-like.<sup>295</sup> However, it did not create a definition of de facto relationships with general application which would effectively equate married and unmarried couples. On the contrary, the DFRA dealt primarily with the division of property on termination of an opposite-sex unmarried relationship and had no effect on legislation not specifically referred to in the DFRA. The definition of de facto relationship also did not include same-sex couples.

4.5.16 The effect of the DFRA was that a statutory differentiation was created between unmarried and married opposite-sex couples; with the former often being worse off when compared with their married counterparts.<sup>296</sup>

---

<sup>294</sup> In 1981 the NSW LRC received a reference to review the law relating to family and domestic relationships. The approach of the NSW LRC was to avoid the equation of unmarried relationships with marriage in order to prevent both the undermining of the marriage institution and the imposing of legal consequences on unmarried couples who may have deliberately chosen to avoid the legal consequences of marriage. See NSW Law Reform Commission **De Facto Relationships** 1983.

<sup>295</sup> The premise of the NSW Law Reform Commission **De Facto Relationships** 1983 and the subsequent DFRA was that marriage was a fixed benchmark against which other relationships had to be compared and effectively ranked. The Commission noted in its Report that the de facto relationships resemble marriage to a certain extent, although not in all respects and that other domestic relationships bear less resemblance to marriage. See Graycar **Law Society Journal** 2001 at 64.

<sup>296</sup> The following differences remained between married and de facto couples (de facto refers to unmarried opposite sex couples):

- A number of statutory provisions relating to the breakdown of marriage was not found in the Acts specifically governing de facto relationships with the effect that de facto partners seeking similar redress had to commence proceedings at common law and equity, which was more expensive, complex and unpredictable.

- Under the FLA, the Family Court had jurisdiction to settle property and maintenance matters

4.5.17 In 1992 the Gay and Lesbian Rights Lobby of New South Wales began lobbying the recognition of relationships of same-sex couples. In 1993 the Gay and Lesbian Rights Lobby published a draft Discussion Paper entitled "The Bride Wore Pink", which explored different methods of relationship recognition.<sup>297</sup> This Discussion Paper strongly recommended that the recognition of both live-in sexual relationships and other forms of important interdependent relationships should take place simultaneously, but distinctly.<sup>298</sup> This document resulted in ad hoc amendments to various statutes relating to same-sex couples.<sup>299</sup>

---

between parties to a marriage or former marriage. This Court only acquired jurisdiction to determine property matters between former parties to de facto relationships as a side-effect of the actual dispute being about the care of children of such parties.

- When making a property adjustment order under the DFRA, a Court was confined to compensation for past contributions to the property and welfare of the family. Under the FLA the Court, when making such an order, could consider the future circumstances of the parties and the differences in the parties' financial positions on the breakdown of their relationship.

- Maintenance under the DFRA was ordered in much more limited circumstances than under the FLA.

- Enforceable financial agreements between de facto couples were permissible under the DFRA but similar agreements between married partners were not recognised under the FLA. NSW Social Issues Report **Domestic Relationships** 1999 par 2.3. See also Graycar & Millbank **Canadian Journal of Family Law** 2000 at 235.

<sup>297</sup> (1993) 3 Austral. Gay & Lesbian L.J. 67. This paper was followed by a revised version in 1994, 2<sup>nd</sup> ed (Sydney:GLRL, 1994) available at <http://www.rainbow.net.au/~glrl> under Discussion Papers (for a summary of the recommendations see Millbank & Sant **Sydney Law Review** 2000 at 197). This revised version recommended broad based presumptive recognition of relationships of same-sex couples who lived together and a more limited recognition of other relationships, which need not be couple based and the partners need not cohabit. Presumptive recognition does not require any steps to be taken or formal acknowledgement of relational status, and operates to recognise the relationship automatically when the parties have satisfied certain criteria such as living together as a couple for a certain period. The opposite of presumptive recognition would be the opt-in registration system which requires a formal declaration of some kind from the couple such as lodging a document, before a relationship will be formally recognised. For a discussion of these models see Millbank **Australasian Gay and Lesbian Law Journal** 1999.

<sup>298</sup> Millbank & Sant **Sydney Law Review** 2000 at 194.

<sup>299</sup> This was acknowledged by Attorney General Jeff Shaw QC. See J Shaw "Same-sex Relationships: Law Reform Happens" (1999) 24 **Alternative Law Journal** 247 referred to in Graycar & Millbank **Canadian Journal of Family Law** 2000 at 261 fn 74.

- In 1996, amendments to the criminal procedural legislation and new victims' compensation legislation both defined family victim as "the victim's de facto spouse, or partner of the same-sex, who has cohabitated with the victim for the last two years". Criminal Procedure Act of 1986 (NSW) s 23A and Victims Compensation Act of 1996 (NSW) s 9 referred to by Millbank & Sant **Sydney Law Review** 2000 at 187.

- In 1998 amendments to the Workplace Injury Management and Workers' Compensation Act of 1998 s 4 introduced an ungendered definition of de facto partners as "the relationship between two unrelated adult persons: (a) who have a mutual commitment to a shared life, and (b) whose relationship is genuine and continuing, and (c) who live together, and who are not married to one another" referred to by Millbank & Sant **Sydney Law Review** 2000 at 187. Millbank & Sant



4.5.18 In 1998 the Australian Democrats (NSW) introduced a Bill into the NSW Legislative Council (Upper House). The Bill proposed amendments to 53 Acts, intending to enact the recommendations of the revised version of "The Bride Wore Pink". The Bill was referred to a parliamentary committee. Shortly after the NSW government was re-elected in 1999,<sup>300</sup> it introduced its own Bill entitled the Property (Relationships) Legislation Amendment Bill. This Bill was limited and foresaw amendments to only 20 Acts.

4.5.19 When this Bill became the Property (Relationships) Legislation Amendment Act of 1999, ("PRLA") it had the following effect:<sup>301</sup>

- \* The PRLA amended the DFRA and renamed it the Property (Relationships) Act of 1984.<sup>302</sup>
- \* The PRLA also created an umbrella term, namely "domestic relationship", to cover two kinds of relationships. The first is a "de facto relationship" which has been redefined to include same-sex couples. The second is a "close personal relationship" in which the parties live together and the one provides the other with domestic support and personal care.

---

suggest that these amendments indicate a trend to move away from defining de facto relationships as "marriage-like" to focus more on purposive and less overtly gendered and heterosexually based criteria.

<sup>300</sup> Thereby government complied with an election promise of the Labour Party made before the 1995 election. See Millbank & Sant **Sydney Law Review** 2000 at 200 fn 77 and 78. This was a watered down version of the legislation foreseen by "The Bride Wore Pink" with more traditional relationship definition and a limited scope. For an interesting discussion of the parliamentary debate before approval of this Act and the orchestrated underplaying of it as dealing primarily with property rights and not equality or lesbian and gay rights, see Millbank & Sant **Sydney Law Review** 2000 at 201 *et seq* and Graycar & Millbank **Canadian Journal of Family Law** 2000 at 250 *et seq*.

<sup>301</sup> NSW Social Issues Report **Domestic Relationships** 1999 at 35.

<sup>302</sup> While the Property (Relationships) Legislation Amendment Act of 1999 amended some 20 pieces of legislation, the legislation proposed by the Gay and Lesbian Rights Lobby would have amended 53 separate Acts. Notable omissions were in areas of employment law, provision of death or injury benefits to the partner of an employee or insured person and access to unpaid parental leave. See the legislation referred to by Millbank & Sant **Sydney Law Review** 2000 at 206 fn 110-112. The result is that there are over twenty statutes in which specifically gendered definitions are still being used, about twenty statutes where the 1999 (ungendered) definition is used, three more where same-sex partners are included but the language used is different from that in the PRA, while several others statutes use the category of de facto relationship with no definition. See Millbank & Sant **Sydney Law Review** 2000 at 207 fn 117 and 118.

- \* The PRLA also made consequential amendments to a number of Acts containing provisions which confer rights or privileges, afford concessions to or impose obligations on partners in the newly defined de facto and close personal relationships which are normally associated with marriage.

4.5.20 Since the substantive provisions of the DFRA have been retained, the discrepancies referred to in footnote 294 above remain.<sup>303</sup>

## (ii) Marriage

4.5.21 Until recently most gay rights activists in Australia did not regard the legal recognition of same-sex marriage as a high priority as compared with other issues, such as abolishing discriminatory laws relating to superannuation, adoption, and other matters. Under the influence of events in the United States and Canada,<sup>304</sup> however, the issue has become more prominent, although some gay rights activists still take the traditional view that marriage is an opposite-sex institution in which gay men and lesbians should not participate.

4.5.22 The real possibility of a challenge to the common-law definition of marriage arose when same-sex marriage became legal in Ontario, Canada, in 2003. In view of the fact that the Ontario legislation does not restrict the right to marry to residents or Canadian citizens, the possibility arose that Australian citizens would contract same-sex marriages in Ontario and then return to seek recognition of those marriages before Australian courts.<sup>305</sup>

4.5.23 In order to counter this possibility the Marriage Legislation Amendment Bill, aiming to incorporate the common-law definition of marriage into the Marriage Act of 1961 (Cth) and the Family Law Act of 1975 (Cth), was introduced by the Attorney-

---

<sup>303</sup> In that sense the PRA is seen as not going far enough and leaving certain issues unaddressed. See in this regard the NSW Social Issues Report **Domestic Relationships** 1999 para 5.3 "Response to the Passage of the Property (Relationships) Legislation Amendment Act 1999".

<sup>304</sup> See the discussion in paras 4.4 and 4.6 above and below.

<sup>305</sup> "Same-Sex Marriage in Australia" in Australia **Wikipedia**.

General in May 2004. This Bill intended to preclude the possibility that a Court could overturn the common-law definition and recognise the validity of a same-sex marriage legally contracted in another country.<sup>306</sup>

4.5.24 In addition to defining marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life", the amendment specified that unions of a man and another man, or a woman and another woman solemnised in a foreign country, are not a valid marriage.<sup>307</sup>

4.5.25 In June 2004 the Bill passed the House of Representatives and during August 2004 the Senate passed the amendment by 39 votes to 7. On December 21, 2005 the Australian Federal and State governments were urged to introduce a national civil union scheme for gay relationships similar to the arrangement newly introduced in Britain.<sup>308</sup> However, the Prime Minister, John Howard, insisted on keeping the status quo.<sup>309</sup>

### c) Current legal position<sup>310</sup>

<sup>306</sup> The Labour opposition party argued that the amendment did not affect the legal situation of same-sex relationships, merely putting into statute law what was already common law. The Liberal Party argued that the Bill was necessary to "protect the institution of marriage" against what they said was the "threat" of same-sex marriage, by ensuring that the common law definition was put beyond legal challenge. The Australian Democrats and the Australian Greens opposed the legislation in the Senate, but the support of the Labour party ensured that it was passed through both houses. See Same-Sex Marriage in Australia **Wikipedia**.

<sup>307</sup> "Same-Sex Marriage in Australia" in Australia **Wikipedia**.

<sup>308</sup> On 2 December 2005 the Australian Capital Territory Government announced that it was drafting legislation to provide for civil unions in the ACT, paving the way for same-sex couples to have their relationships formally recognised for the first time. "Same-Sex Marriage in Australia" in Australia **Wikipedia**.

<sup>309</sup> See "Same-Sex Marriage in Australia" in Australia **Wikipedia**.

<sup>310</sup> Since the release of the NSW Law Reform Commission **Review of the Property (Relationships) Act 1984** 2002, New South Wales has referred its legislative powers over de facto couples (both opposite and same sex couples) to the federal government, with the aim of applying uniform legislation to property matters for both married and de facto couples. The federal government has not yet taken up this referral of powers, and has indicated that, when it does so, it will only take up the State's reference of powers with respect to opposite sex de facto couples, not same sex couples. At the moment, the PRA continues to apply to both opposite- and same-sex de facto couples, in the same form as it was at the time of release of Discussion Paper 44. It is anticipated that, once the federal government takes up the State's reference of powers, the PRA will apply only to people in same sex and close personal relationships. As a consequence, the NSW LRC's report focuses predominantly on the application of the PRA to people in same sex and close personal relationships. Preparation of the report is in its final stages, and it should be ready for delivery to the Attorney General by the beginning of 2006. Correspondence with [Rebecca\\_Kang@agd.nsw.gov.au](mailto:Rebecca_Kang@agd.nsw.gov.au) dated 18 November 2005.

### (i) Cohabitation

4.5.26 The Property (Relationships) Act of 1984 (PRA) defines a domestic relationship as:<sup>311</sup>

- \* a de facto relationship: or
- \* a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

4.5.27 A de facto relationship is in turn defined<sup>312</sup> in a non-gendered fashion as a relationship between two adults who live together as a couple<sup>313</sup> and are not married or related by family.

4.5.28 Domestic relationships therefore include both de facto (conjugal relationships) and close personal relationships (non-conjugal relationships).<sup>314</sup>

4.5.29 For purposes of determining the legal status of each category, the following should be noted. The PRA, after being amended by the PRLA, provides *ia* for proceedings for financial adjustment on relationship breakdown before a court. In this

<sup>311</sup> Section 5(1) of the PRA. This concept was introduced by the PRA for the first time into NSW laws and was intended to cover other forms of close relationships in a smaller number of NSW laws, ie those concerning statutory property division, family provision, bail and stamp duty. These Acts are generally amended in the Schedule to the PRLA with reference to the new definition. For a table of the amended Acts see Millbank & Sant **Sydney Law Review** 2000 at 189 and further.

<sup>312</sup> Section 4(1) of the PRA.

<sup>313</sup> This is the heart of the new definition with no reference to "marriage-like" or "as his wife/her husband". During the Second Reading Debate of the PRA, the Attorney-General made it clear in his speech that the non-gendered definition of de facto spouse was intended to include lesbian and gay couples. The Honourable J W Shaw, Legislative Council of NSW, Parliamentary Debates (Hansard) 13 May 1999 at 22 referred to by Millbank & Sant **Sydney Law Review** 2000 at 190.

<sup>314</sup> See also Graycar **Law Society Journal** 2001 at 64 *et seq* and Millbank & Sant **Sydney Law Review** 2000 at 188 fn 45. According to Millbank & Sant *op cit* 208 the exclusion of non-cohabitants from the definition of domestic partnership has been referred to as the greatest flaw of the PRA, since it could mean that nothing is gained for people in non-traditional relationships who often do not cohabit.

regard a distinction is made between property division and maintenance between the former partners. These provisions apply to domestic partnerships, ie both de facto and close personal relationships.

4.5.30 Numerous areas of NSW law were involved in the consequential amendments made as a result of the newly defined categories of relationships that were brought about by the PRLA. The laws concerning family provision, intestacy, accident compensation, stamp duty and decision-making in illness and upon the death of one partner were most affected. Following these amendments, de facto relationships and close personal relationships were included in the scope of the enumerated Acts.<sup>315</sup> Close personal relationships were covered in a smaller number of NSW laws, notably those concerning statutory property division, family provision, bail and stamp duty.<sup>316</sup>

### Conditions for recognition

#### *De facto relationships*

4.5.31 The threshold requirement for a de facto relationship in section 4(1) of the PRA is that the partners must be living together as a couple. To determine whether two persons are in a de facto relationship, all the circumstances of the relationship must be taken into account by a Court who considers an application for maintenance or property division upon relationship breakdown. Under section 4(3) a Court determining whether such a relationship exists is entitled to have regard to the matters enumerated in section 4(2):

- \* Duration of the relationship
- \* Nature and extent of common residence
- \* Whether a sexual relationship exists

---

<sup>315</sup> Some laws only included de facto relationships.

<sup>316</sup> Millbank & Sant **Sydney Law Review** 2000 at 189

- \* Degree of financial dependence or interdependence and arrangements for financial support
- \* Ownership, use and acquisition of property
- \* Degree of mutual commitment to a shared life
- \* Care and support of children
- \* Performance of household duties
- \* Reputation and public aspects of the relationship.

4.5.32 Section 4(3) of the PRA makes it clear that these factors are indications of, and not requirements for, the existence of a de facto relationship. As such, none of these factors is essential or decisive and the Court may attach such weight to any matter as may seem appropriate in the circumstances of the case.

#### *Close personal relationship*

4.5.33 Section 5(1)(b) of the PRA defines a close personal relationship as two adult persons who are not married, not in a de facto relationship and not related, who live together in order for one or each of them to provide the other with domestic support and personal care. A relationship where the domestic support and personal care is rendered for a fee or reward or on behalf of another does not qualify as a close personal relationship.<sup>317</sup>

#### Consequences of recognition of domestic partnerships

4.5.34 The PRA provisions regarding property division<sup>318</sup> and maintenance in the event of relationship breakdown<sup>319</sup> apply to all domestic relationships, both the

---

<sup>317</sup> Section 5(2) of the PRA.

<sup>318</sup> Part 3, Division 2 of the PRA.

<sup>319</sup> Part 3, Division 3 of the PRA.

redefined de facto relationships and close personal relationships. The PRA also makes provision for couples who do not wish the PRA to apply to their relationships to conclude a domestic relationship agreement in accordance with the prescripts.<sup>320</sup>

*Property division on relationship breakdown*

4.5.35 Domestic partners may apply to a Court for an order for the adjustment of interests with respect to the property of the parties to the relationship.<sup>321</sup> The PRA restricts the Court's jurisdiction to make such an order to relationships of duration of two years or longer, unless the Court is satisfied that the prescribed exceptional circumstances exist.<sup>322</sup> For this purpose, domestic partners now have access to the Supreme and District Courts, which access was previously reserved for married couples.<sup>323</sup>

4.5.36 The amendments to the PRA are considered to be a milestone in that they oblige the decision-maker in a dispute to make just and equitable orders. All property and financial resources of the domestic relationship, whether in individual or joint names and regardless of how or when they were obtained (including gifts and inheritance) will be considered by the Court.<sup>324</sup> The application must be brought within two years after the relationship was terminated.<sup>325</sup>

---

<sup>320</sup> Part 4 of the PRA.

<sup>321</sup> Section 20 of the PRA.

<sup>322</sup> Section 17. These circumstances under s 17(2) are:

- (a) that there is a child of the parties to the application, or
- (b) that the applicant:
  - (i) has made substantial contributions of the kind referred to in s 20 (1)(a) or (b) for which the applicant would otherwise not be adequately compensated if the order were not made, or
  - (ii) has the care and control of a child of the respondent,

and that the failure to make the order would result in serious injustice to the applicant.

<sup>323</sup> Graycar & Millbank **Canadian Journal of Family Law** 2000 at 279 state that the District Court Act of 1973 was amended to enable people in domestic relationships who have lived together for two years to access the District Court or Supreme Court property division regime on relationship breakdown.

<sup>324</sup> Section 20 read with the definitions of "property" and "contribution" in the PRA.

<sup>325</sup> Section 18 of the PRA. Provision is made for condonation under specific circumstances.

4.5.37 Part 4 of the PRA recognises the right of unmarried couples who may automatically fall within the scope of the PRA, but who would wish to avoid inclusion, to enter into a legally binding domestic relationship agreement at the beginning of the relationship, or any time during its existence. They may also, in anticipation of the termination of the relationship or after separation, conclude a termination agreement.<sup>326</sup>

4.5.38 These agreements are regulated by contract law and may cover a wide range of financial or economic arrangements between the parties, such as maintenance, division of property or financial resources and payment of outstanding debts upon relationship breakdown. This contracting option is only available with reference to the property aspects of the PRA. It would not be possible to contract out of other consequences of the relationship.<sup>327</sup>

4.5.39 Courts hearing matters under the PRA are not bound by the agreements, but can take them into account when making decisions in property and maintenance disputes.<sup>328</sup> These agreements can provide for the financial needs of children but cannot provide for their care and protection, which, under federal legislative powers, are provided for in the Family Law Act of 1975.<sup>329</sup>

4.5.40 The Duties Act of 1997 was amended<sup>330</sup> to include in its application domestic partners who have cohabited for at least 2 years and who own property together. These partners are exempted from paying stamp duty on transfer of property at the end of a relationship (in accordance with a Court order or a separation agreement), or on transfer of property to joint ownership.

---

<sup>326</sup> Section 45 of the PRA. These are often called cohabitation or separation agreements.

<sup>327</sup> Section 46 and s 44 of the PRA providing for the definitions of "domestic relationship agreement" and "financial matters". See also Graycar & Millbank **Canadian Journal of Family Law** 2000 at 233 fn 12.

<sup>328</sup> Section 49 of the PRA.

<sup>329</sup> Section 45(2) of the PRA.

<sup>330</sup> Schedules to the Property (Relationship) Amendment Act of 1999.



## *Maintenance*

4.5.41 Domestic partners are not liable to maintain the other party to the relationship, and neither party is entitled to claim maintenance from the other, except as provided in Division 3 of the PRA.<sup>331</sup> Division 3 provides that parties to a domestic relationship that has lasted for more than two years are eligible to make a claim for maintenance. Such an application must be made within two years of the termination of the domestic relationship.

4.5.42 Maintenance may only be awarded in two circumstances.<sup>332</sup> The applicant must be able to demonstrate to the Court that:

- \* he or she is unable to support him or herself adequately because of having to assume the care and control of a child of the relationship who is still under the age of twelve (custodial maintenance)<sup>333</sup> or
- \* his or her earning capacity has been adversely affected by the circumstances of the relationship (rehabilitative maintenance).<sup>334</sup>

## *Succession*

4.5.43 The Wills, Probate and Administration Act of 1898 was amended<sup>335</sup> to extend automatic rights of inheritance under the laws of intestacy to de facto partners.<sup>336</sup> This amendment did not include close personal relationships.<sup>337</sup>

---

<sup>331</sup> Section 26 of the PRA.

<sup>332</sup> Section 27 of the PRA.

<sup>333</sup> This includes a child born as a result of sexual relations between the parties, adopted by both parties or for whose long-term welfare both parties have parental responsibility. The latter scenario will be of particular importance to same-sex couples. See s 27(1)(a) of the PRA.

<sup>334</sup> In the latter case, the Court must consider if maintenance would assist the applicant's earning capacity in that it will allow him or her to undertake training or study and the reasonableness of such an order. See s 27(1)(b) of the PRA.

<sup>335</sup> Schedules to the Property (Relationship) Amendment Act of 1999.

<sup>336</sup> Under this Act there is a hierarchy of relatives who are entitled to inherit with priority being given to surviving partners and children; often the surviving partner inherits the entire estate. Before the PRA, surviving partners in same-sex de facto partnerships had no automatic right to inherit and had to make a claim to the estate in the Supreme Court under the Family Provision Act of 1982. This process was costly, time consuming and stressful.

4.5.44 The Family Provision Act of 1982 was amended<sup>338</sup> specifically to include surviving partners and children of domestic relationships as eligible applicants for family provision. An applicant who believes that he or she did not receive an adequate share under a will may take a claim to that estate to the District or Supreme Court. There is no requirement regarding the duration of the cohabitation.<sup>339</sup>

4.5.45 Amendments to the Judge's Pension Act of 1953<sup>340</sup> provide that the Minister responsible for judges' pensions may, if it appears that the estate of a deceased judge or former judge may be the subject of litigation under the Family Provision Act of 1982, pay a pension that would otherwise be payable to another person, to the legal personal representative, including the same-sex de facto partner, of the deceased. Close personal relationships are not included in these amendments.

### *Children*

4.5.46 The PRA introduced changes for parenting relationships by defining children of a domestic relationship as *ia* "a child for whose long-term welfare both parties have parental responsibility".<sup>341</sup>

4.5.47 The Family Court can grant parental responsibility to anyone who is considered important to the care, welfare or development of the child (the so-called "best interest of the child" requirement). This means that lesbian and gay co-parents of children who wish to share the responsibility of raising a child, can apply for joint

<sup>337</sup> Section 61B of the Wills, Probate and Administration Act of 1898. Same-sex and opposite-sex relationships are now on a par following this amendment.

<sup>338</sup> Schedules to the Property (Relationship) Amendment Act of 1999.

<sup>339</sup> Millbank & Sant **Sydney Law Review** 2000 at 189.

<sup>340</sup> Schedules to the Property (Relationship) Amendment Act of 1999.

<sup>341</sup> Section 5(3) of the PRA. This primarily has implications for child maintenance. Prior to the PRA, a mother seeking maintenance from a female co-parent would not have access to statutory child support regimes. In 1996 in **W v G** (1996) 20 Fam LR 49, child maintenance was successfully claimed by a parent against a co-parent under the common law using the doctrine of promissory estoppel. Since such actions have to be brought in the Supreme Court on equitable principles, this is not an accessible avenue for many claimants. See Millbank & Sant **Sydney Law Review** 2000 at 209 fn 133. This amended definition is also important in that it will also apply for the Bail Act of 1987, Family Provision Act of 1982, Coroner's Act of 1980 and Trustee Act of 1925 which therefore recognise the relationship between children and co-parents for specific purposes.

parenting orders with their partners. Under the PRA it may now be possible for such non-biological lesbian and gay co-parents who have the care and responsibility of children after termination of the relationship, to apply for child maintenance from the biological parent if the child is under 12 years old or, if the child is disabled, until the child is 16 years old.<sup>342</sup>

4.5.48 The Adoption Act of 2000 (NSW) provides for a functional parent to adopt the legal child of his or her partner. This option is only available to opposite-sex partners and same-sex de facto couples are only eligible to apply to adopt as single persons.<sup>343</sup>

### *Guardianship and incapacity*

4.5.49 Section 4 of the Guardianship Act of 1987 was amended<sup>344</sup> to acknowledge the redefined de facto partners as persons who can make medical decisions in case of incapacity or for medical and dental treatment of their partners. There is no qualifying period of cohabitation. This amendment did not include close personal relationships.

4.5.50 Consequential amendments to sections 4 of the Anatomy Act of 1977, Human Tissues Act of 1983 and Coroners Act of 1980<sup>345</sup> defined same-sex partners as next of kin who may lodge objections to anatomical examinations or donations of bodies of deceased persons, request an inquest and make representations at an inquest. Similarly, the definition of "nearest relative" in Schedule 1 to the Mental Health Act of 1990<sup>346</sup> has been amended to include same-sex de facto partners who must now be notified of a proposed inquiry into their partner's mental capacity or contacted or consulted regarding certain treatments of their partner. These amendments did not include close personal relationships.

---

<sup>342</sup> Section 5(3) and s 27(1)(a) of the PRA. See also Legal Information Access Centre "Relationships" 1999 and Sant "Overview of Property (Relationships) Legislation Amendment Act, 1999" 1999.

<sup>343</sup> NSW Law Reform Commission **Review of the Property (Relationships) Act 1984** 2002 para 3.40 at 70.

<sup>344</sup> Schedules to the Property (Relationship) Amendment Act of 1999.

<sup>345</sup> *Ibid.*

<sup>346</sup> *Ibid.*

4.5.51 The Protected Estates Act of 1983 deals with the management of the affairs and property of persons incapable of managing their own affairs. Consequential amendments<sup>347</sup> to section 4 ensured that a same-sex de facto partner who has lived with the protected person as his or her partner for two years could be provided for from that person's estate. This amendment did not apply to close personal relationships.

4.5.52 Under sections 2 and 3 of the Inebriates Act of 1912, as amended,<sup>348</sup> de facto partners, but not close personal partners, may apply to the Court to declare a person a drunkard.

#### *Compensation orders and damages*

4.5.53 Several sections of the Compensation to Relatives Act of 1897, the Law Reform (Miscellaneous Provisions) Act of 1994 and the Motor Accidents Act of 1988 were amended<sup>349</sup> by the PRA to extend the right to sue in negligence for death, or to claim for nervous shock and psychological injury to same-sex de facto partners on the same basis as opposite-sex de facto partners.<sup>350</sup> There is no qualifying period of cohabitation. Close personal relationships were not included in these amendments.

4.5.54 Amendments to sections 3, 8 and 10 of the Insurance Act of 1902,<sup>351</sup> extended an exemption of insurance proceeds from forming part of the estate on death of a partner, to the surviving same-sex de facto partner where the parties have lived together for at least two years. This amendment did not include close personal relationships.

---

<sup>347</sup> *Ibid.*

<sup>348</sup> *Ibid.*

<sup>349</sup> *Ibid.*

<sup>350</sup> Children of co-parents do not appear to have any rights under the Motor Accidents Act of 1988. Sant "Overview of Property (Relationships) Legislation Amendment Act, 1999" 1999.

<sup>351</sup> Schedules to the Property (Relationship) Amendment Act of 1999.

### *Miscellaneous*

4.5.55 The Bail Act of 1978 is an example of an amendment that included close personal relationships. Section 4 of this Act was amended<sup>352</sup> to the effect that the interest and protection of partners in domestic relationships must be considered when a person in custody applies for bail. There is no qualifying period of cohabitation.<sup>353</sup>

#### **(ii) Marriage**

4.5.56 Marriage is only available to opposite-sex couples.

---

<sup>352</sup> Schedules to the Property (Relationship) Amendment Act of 1999.

<sup>353</sup> Other NSW statutes that have also been amended by Schedules to the Property (Relationship) Amendment Act of 1999 are:

- Amendments made to the Trustee Act of 1925, by the Property (Relationship) Amendment Act of 1999 ensure that protective trusts can be made for the benefit of de facto partners who have lived together for two years and children of parties to a domestic relationship.

- The Property (Relationship) Amendment Act of 1999 amended the Criminal Assets Recovery Act of 1990, to provide that a Court may consider hardship to a de facto partner when deciding on the issuing of a forfeiture order. There is no qualifying period of cohabitation.

- The Legal Aid Commission Act of 1979 was amended by the Property (Relationship) Amendment Act of 1999 to provide that the Commission can consider the ability of an applicant's de facto partner to pay the cost of the legal services sought by the applicant when assessing his or her means.

- In addition to the amendments by the Property (Relationship) Amendment Act of 1999, the 1996 amendments to the definition of "family victim" in the Criminal Procedure Act of 1986 and the Victims Compensation Act of 1996 are still current. Similarly, the 1998 amendments (also referred to in fn 305 above) introducing an ungendered definition of de facto partners to the Workplace Injury Management and Worker's Compensation Act of 1998 are still valid.

## 4.6 United States of America ("USA")<sup>354</sup>

### a) Background

4.6.1 The USA is a federal republic with a strong democratic tradition. There are fifty State jurisdictions in the USA. To this should be added the District of Columbia (the quasi-self-governing capital city) and other legal entities with bodies of local law, such as Puerto Rico and the USA Virgin Islands.

4.6.2 The Federal government has the limited legislative powers awarded to it in the USA Constitution<sup>355</sup> while, under the tenth amendment to the Constitution the State governments have general powers to enact laws for the protection of public safety, health, morals and to regulate the ongoing relationships between the people residing within their boundaries.<sup>356</sup> Therefore, each State has the authority to develop its own family law principles, more or less free from federal intervention. However, the Constitution's supremacy clause<sup>357</sup> ensures that the USA Supreme Court can review the constitutionality of laws relating to marriage.

4.6.3 The legal system is based on English common law and judicial review of legislation is permitted. The USA has a federal court system based on English common law; each State has its own unique legal system, of which all but one (Louisiana's) is based on English common law. The court system comprises of a Supreme Court, United States Courts of Appeal; United States District Courts; State and County Courts.<sup>358</sup>

---

<sup>354</sup> Britain's American colonies broke with the mother country in 1776 and were recognized as the new nation of the United States of America following the Treaty of Paris in 1783. During the 19th and 20th centuries, 37 new States were added to the original 13 as the nation expanded across the North American continent and acquired a number of overseas possessions. The USA is the world's third-largest country by size (after Russia and Canada) and by population (after China and India). The USA has a population of 295,734,134 of which the ethnic breakdown is white 81.7%, black 12.9%, Asian 4.2%, Amerindian and Alaska native 1%, native Hawaiian and other Pacific islander 0.2%. They adhere to the following religions: Protestant 52%, Roman Catholic 24%, Mormon 2%, Jewish 1%, Muslim 1%, other 10%, none 10%. See "Geography" and "Ethnic Groups and Religion" USA in **World Factbook**.

<sup>355</sup> US Constitution, dated 17 September 1787, effective 4 March 1789, hereafter referred to as "the Constitution". See "Legal System" USA in **World Factbook**.

<sup>356</sup> Leonard in Wintermute & Andenæs **Same-Sex Partnerships** 2001 chap 7 at 133.

<sup>357</sup> Article VI of the Constitution.

<sup>358</sup> See "Legal System" USA in **World Factbook**.

4.6.4 The prevalence of unmarried couples living together in the USA increased from just over 500 000 in 1970 to more than 2.8 million in 1990. With same-sex couples making up over 11% of all unmarried partner households in the USA, an increasing proportion of children, one third of babies in the USA, are born to parents who live together but are not married.<sup>359</sup>

4.6.5 It is clear from polls held at different times and places that public opinion in the USA is divided over homosexuality.<sup>360</sup> In 1996 a poll showed that 50% of the USA citizens agreed that homosexuality should be considered an acceptable alternative lifestyle.<sup>361</sup> A Massachusetts poll conducted in October 2003 estimated that 59% of registered voters believed that homosexual couples should have the right to enter into civil marriage. Previous polls in Hawaii and New Jersey have also shown majorities supporting same-sex marriage.<sup>362</sup>

4.6.6 However, in a recent national poll in 2004 by CBS it was found that only 22% favoured same-sex marriage, while 73% were opposed to these marriages. Many people distinguish between same-sex marriage and civil unions and there is larger support for permitting civil unions. More than 50% of Americans support some type of legal recognition for same-sex couples who wish to make a long term commitment.<sup>363</sup>

4.6.7 In July 2005, the General Synod of the United Church of Christ endorsed a same-sex marriage resolution making that Church the first major United States denomination to approve same-sex marriage.<sup>364</sup>

---

<sup>359</sup> Alternatives to Marriage Project **Annual Report** 2001. See also Sinclair **Marriage Law** 1996 at 270 fn 13.

<sup>360</sup> Since many USA States, eg Arkansas, Kansas, Maryland, Montana, Oklahoma, Rhode Island and Texas have yet to take the first steps of decriminalising consensual same-sex sexual activity between adults, it opened the door for opponents of same-sex marriage to argue that homosexuals are criminals and as such not deserving of any legal protection. See Maxwell **Electronic Journal of Comparative Law** 2000 at 33 and fn 222.

<sup>361</sup> R Padawer "30 Years After Stonewall, Gays Still Seeking Key Rights" *The Record Bergen County New Jersey* June 27 1999 at 1 referred to by Maxwell **Electronic Journal of Comparative Law** 2000 fn 221.

<sup>362</sup> See <http://www.ftm-mass.org/PollMemoOct2911.pdf> as referred to in "Same-Sex Marriage in the United States" in United States **Wikipedia**.

<sup>363</sup> See <http://www.cbsnews.com/stories/2004/03/15/opinion/polls/main606453.shtml> as referred to in "Same-Sex Marriage in the United States" in United States **Wikipedia**.

<sup>364</sup> See "Same-Sex Marriage in the United States" in United States **Wikipedia**.

## b) Development of relational status

### (i) Cohabitation

4.6.8 Legal recognition and regulation of opposite-sex domestic relationships are, at best, fragmented and exist mostly at local levels. Many municipalities, counties and other governmental entities have recently adopted so called "domestic partnership" measures and more than 3000 employers recognise domestic relationships, conferring benefits on parties that are similar to those provided to married spouses.<sup>365</sup>

4.6.9 In California some basic humanitarian rights, such as visitation rights during medical emergencies, were initially given to those who register their relationship in accordance with local law.<sup>366</sup> In September 2003, the California legislature passed an expanded domestic partnership Bill, extending nearly all the legal rights of married couples to opposite-sex unmarried couples in which one person is above the age of 62. This statute came into operation on 1 January 2005. Similarly, domestic partnerships exist in New Jersey for opposite-sex unmarried couples in which one partner is above the age of 62.<sup>367</sup>

4.6.10 Far from it being a legal substitute for marriage, these measures provide incentives for those who have registered as partners (both same-and opposite-sex) such as group health insurance, family sick leave and hospital visitation rights. Under these measures unmarried couples and their children acquire recognition as a family

---

<sup>365</sup> A study of 2001 found that 34% of the largest USA employers offer domestic partner health benefits, most making them available to both same- and opposite-sex couples. Alternatives to Marriage Project **Annual Report** 2001.

<sup>366</sup> NSW Law Reform Commission **Review of the Property (Relationships) Act 1984** 2002 at 38 and fn 59.

<sup>367</sup> These rights are also available to same-sex couples in these States. In Maine domestic partnerships exist for all couples, regardless of gender. See <http://www.planetout.com/news/article.html?2003/09/21/1> referred to by "Same-Sex Marriage in the United States" In United States **Wikipedia**.



for certain limited purposes and some workplace benefits are allocated on the basis of an existing family relationship rather than by marital status alone.<sup>368</sup>

4.6.11 On the other hand recognition of cohabiting relationships, in some of the instances where it exists, may in fact hold negative implications for the cohabitant. For example, in some States the termination, variation, or suspension of orders for post-divorce support is compulsory if the recipient starts cohabiting with a new partner.<sup>369</sup>

4.6.12 In addition, it is argued that "marriage-only" policies discriminate against those who cannot marry and those who prefer not to. While opposite-sex unmarried relationships are socially acceptable in the USA, current federal initiatives seek to tie welfare eligibility to marital status and to divert substantial monies away from safety-net programs for the poor into pro-marriage initiatives. As a result federal benefits for the families of those killed in the September 11<sup>th</sup> attacks, such as social security survivor's benefits, family-based assistance and victim's assistance programs administered by the FBI and the Federal Department of Justice, are mostly unavailable to domestic partners.<sup>370</sup>

4.6.13 See the discussion below in footnote 381 regarding reciprocal beneficiaries, *ie* partners who are legally prohibited from marriage such as same-sex couples.

## (ii) Marriage

4.6.14 The movement to obtain the legal protections of civil marriage, such as health insurance, hospital visitation and social security survivor benefits for same-sex families, started in the early 1970s and is supported by groups such as the Human Rights Campaign, National Association for the Advancement of Coloured People, National Organization for Women, United Farm Workers Union (Hispanic labour

---

<sup>368</sup> Canada Law Commission **Marriage and Marriage-Like Relationships** 2000.

<sup>369</sup> In other States the Court is given a discretion to amend the support order under circumstances where the recipient's need for maintenance has changed as a result of such cohabitation. Sinclair **Marriage Law** 1996 at 272 fn 22.

<sup>370</sup> Alternatives to Marriage Project **Annual Report** 2001.

union), American Civil Liberties Union, American Psychiatric Association and Reform Judaism.<sup>371</sup>

4.6.15 After a series of Court rulings, legislative votes and political actions during the 1990s this effort acquired widespread national attention. For example, in **Baehr v Lewin**<sup>372</sup> the Hawaii Circuit Court accepted the applicants' argument that it is discriminatory to limit marriage to opposite-sex couples. In Alaska in **Brause v Bureau of Vital Statistics**<sup>373</sup> a trial Court furthermore determined that limiting marriage to opposite-sex couples may violate a person's fundamental right to marry.<sup>374</sup>

4.6.16 These cases were initiated on the basis that the State Constitutions of Hawaii and Alaska specifically protect the right to privacy and specifically prohibit unequal treatment based on gender classifications. In both cases the applicants claimed that these constitutional rights had been violated. The State legislation preventing same-sex couples from obtaining marriage licenses was therefore declared unconstitutional by the two Courts.

4.6.17 In response to the Court's ruling in **Baehr v Lewin** and pending the defendant's appeal, the Hawaii State legislature, in what was to become an example followed by many other States, passed a constitutional amendment. The amendment stated that the legislature had the power to reserve marriage for opposite-sex couples. The effect was that the government could prevent this Court decision from taking effect.<sup>375</sup>

4.6.18 Following this amendment, the Hawaii Supreme Court reversed the trial court's ruling on appeal and found for the defendant (appellant) that it was not

---

<sup>371</sup> See "Same-Sex Marriage in the United States" in United States **Wikipedia**.

<sup>372</sup> 852 P.2d 44 (Haw. 1993) later known as **Baehr v Miike** 1996 WL 694235 (Haw. Cir. Ct.) available at <http://www.state.hi.us/jud/20371.htm>.

<sup>373</sup> 1998 WL 88743 (Alaska Super. Ct.).

<sup>374</sup> The petitioners in two other jurisdictions, New York and the District of Columbia were, however, not successful in asserting their rights to marry their same-sex partners. Maxwell **Electronic Journal of Comparative Law** 2000 at 14.

<sup>375</sup> This was done after an election on the matter was held in 1998 in which the citizens of Hawaii approved the amendment by a margin of 69%. Hawaii Constitution Art 1 s 23 referred to by Maxwell **Electronic Journal of Comparative Law** 2000 at 24.

discriminatory to limit marriage to opposite-sex couples. The Court held that the constitutional amendment took the Hawaii marriage legislation out of the ambit of the equal protection clause of the Hawaii Constitution.<sup>376</sup>

4.6.19 The voters in Alaska followed a similar route to prevent **Brause v Bureau of Vital Statistics**, which challenged the constitutionality of the Alaska marriage statute, from going on appeal. The amendment to the Alaska Constitution provided that to be recognised in that State, a marriage may exist only between one man and one woman.<sup>377</sup>

4.6.20 In a development regarding adoption by a partner in a same-sex relationship, in **B.L.V.B and E.L.V.B.**<sup>378</sup> the Vermont Supreme Court became the first appellate Court in the USA to interpret its State's adoption code to allow a same-sex co-parent to adopt her lesbian partner's biological children without affecting the parental rights of the biological mother. This meant that the Court interpreted the Vermont adoption code to allow a same-sex co-parent adoption, resulting in the child having two

---

<sup>376</sup> Maxwell **Electronic Journal of Comparative Law** 2000 *ibid.* Subsequently, the only legal protection available for same-sex couples and some unmarried opposite-sex couples in Hawaii is the Reciprocal Beneficiaries Act of 1997. The purpose of the Reciprocal Beneficiaries Act of 1997 is thus to provide certain governmental benefits to those who comply with the status of so-called reciprocal beneficiaries. The target group of this Act are those who are legally prohibited from marrying.

The Reciprocal Beneficiaries Act of 1997 allows two persons who comply with the prescribed requirements to register their relationship by filing a notarised declaration with the State Director of Health. Both parties shall be at least 18 years old and neither party may be married to another person or be a party to another reciprocal beneficiaries relationship. It is a requirement that the parties wanting to avail themselves of this option be legally prohibited from getting married. The Act therefore does not propose a solution to an ordinary opposite-sex couple who merely elects not to marry.

The Reciprocal Beneficiaries Act of 1997 affords the following rights for the partner of the beneficiary standing to sue for wrongful death and other delictual claims; authority to make health care decisions; right to worker's compensation benefits; right to receive payment of wages on the death of an employee and right to family leave under State law; survivorship rights including the tenancy rights to jointly hold property, equal to that of a widow; inheritance rights to an elective share (a death benefit determined by the length of the relationship) of the deceased partner's estate; state employees' retirement beneficiary benefits; and health care related benefits including private and public employee prepaid medical insurance benefits, auto insurance coverage, mental health commitment approvals and notifications, family and funeral leave.

A reciprocal beneficiaries relationship is terminated by the presentation of a signed notarised declaration of termination to the Director of Health by either of the beneficiaries. See LaViolette "Registered Partnership Model" 2001.

<sup>377</sup> Alaska Constitution Art 1 S 25 referred to by Maxwell **Electronic Journal of Comparative Law** 2000 at 24.

<sup>378</sup> 160 Vt. 368, 628 A.2d 1271, 27 A.L.R. 5<sup>th</sup> 819 (1993) referred to by Maxwell **Electronic Journal of Comparative Law** 2000 at 24 fn 164.

mothers and no father. Since then at least five other State appellate Courts have allowed same-sex co-parent adoptions.<sup>379</sup>

4.6.21 Six years later in **Baker v State of Vermont**<sup>380</sup> the Court accepted the applicants' argument that the limiting of the benefits of marriage to opposite-sex couples violated the "common benefits clause" of the Vermont Constitution, which was enacted to prevent favouritism and the conferring of advantages to privileged groups.

4.6.22 The Vermont Supreme Court thus issued a ruling that the applicants were entitled to claim the same benefits and protections afforded to opposite-sex couples. The Court furthermore instructed the legislature to enact legislation that would award such benefits and protections to same-sex couples, but did not express itself as to the manner in which these benefits and protections had to be awarded. The legislature was left to decide whether to open up civil marriage to same-sex couples or to create a parallel or equal institution like registered partnerships that would provide the same benefits and protections as marriage.<sup>381</sup>

4.6.23 Following the direction of the Vermont Supreme Court in **Baker v State of Vermont** the legislature created the parallel institution of "civil unions" which afforded same-sex couples equal benefits to married couples namely the Civil Unions Act of 2000.<sup>382</sup> This system is comparable to that of registered partnership in the Netherlands with the important difference that the Netherlands also permits same-sex marriage.

4.6.24 The Civil Unions Act of 2000 created a "separate but equal" system which some have argued produces unfair results. For example, many rights and benefits are linked to the terms "marriage" and "spouse", making it impossible to create a truly parallel institution to marriage when the relationship is defined as a "civil union". However, some gay rights advocates are hopeful that the law will act as a "stepping

---

<sup>379</sup> District of Columbia, Illinois, Massachusetts, New Jersey and New York. See Maxwell **Electronic Journal of Comparative Law** 2000 fn 164 for the references to the cases.

<sup>380</sup> 744 A.2d 864, 1999 WL 1211709 (Vt. 1999) available at <http://www.state.vt.us/courts/98-032.txt>.

<sup>381</sup> Maxwell **Electronic Journal of Comparative Law** 2000 at 27.

<sup>382</sup> An Act Relating to Civil Unions, 2000 (Act No. 91 of 2000).

stone" towards obtaining greater recognition for same-sex couples in the USA and internationally, and ultimately lead to full marriage equality.<sup>383</sup>

4.6.25 Other gay rights advocates are more critical of civil unions, drawing comparisons to the "separate but equal" justification for school segregation between white and black.<sup>384</sup> As Wolfson bluntly put it:

'gay marriage' is not good enough (we want 'marriage', full equality, not two lines at the clerk's office segregating couples by sexual orientation).<sup>385</sup>

4.6.26 In the meantime important developments took place regarding same-sex marriage. In **Goodridge et al. v. Department of Public Health**<sup>386</sup> the Supreme Court of Massachusetts ruled in November 2003 that the State's ban on same-sex marriage was unconstitutional and gave the State legislature 180 days to change the law. The Court found that Massachusetts may not "deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry" because of a clause in the State's constitution that forbids "the creation of second-class citizens". On 17 May 2004 the Supreme Court's ruling came into effect, and the city of Cambridge began processing applications for same-sex marriages at one minute past midnight.

4.6.27 Following this event, the State legislature convened a constitutional convention in an attempt to overturn the Supreme Court's decision. The constitutional amendment bans same-sex marriage but allows civil unions and was narrowly approved by the legislature. However, for such a constitutional amendment to take effect, it had to be approved again by the legislature in 2005 and pass a popular vote in a referendum in 2006. In 2005 the second convention to amend the Commonwealth's Constitution to disallow same-sex marriage (but permit civil unions) was held. This time, the amendment was defeated soundly, 157-39, and thus will not be put before the voters in 2006. Supporters of the defeated amendment plan to

<sup>383</sup> See "Controversy" in Civil Unions in Vermont – **Wikipedia**.

<sup>384</sup> *Ibid*.

<sup>385</sup> Wolfson in Wintermute & Andenæs **Same-Sex Partnerships** 2001 chap 9 at 174. Nevertheless, he goes on to say the progress and possibilities remain astonishing. Maxwell points out that in **Brown v Board of Education** 349 U.S. 294, 75 S.Ct. 753, 99 L. Ed. 108 (1955) the "separate but equal" position was found unconstitutional when applied to racial classifications. At fn 182.

<sup>386</sup> 798 N.E.2d 941 (Mass. 2003). See "Same-Sex Marriage in the United States" in United States-**Wikipedia**

introduce a new amendment that would ban same-sex marriage while *not* providing for civil unions. This amendment will need 50 votes in two successive constitutional conventions to make it on the ballot for 2008.<sup>387</sup>

4.6.28 The State of California, where the political battle for same-sex marriage has been intense for the last decade, is known for its gay communities and generally liberal political climate. Under the direction of the Mayor of San Francisco and in an attempt to undercut a legal challenge planned by a conservative group, Campaign for California Families, officials of San Francisco started issuing marriage licences in February 2004. City officials argued that although the marriages are prohibited by State law, they were legal under the Equal protection clause of the Constitution, which invalidates the State law.<sup>388</sup>

4.6.29 However, on 11 March 2004 the Supreme Court of California issued an interim order stopping the performance of same-sex marriages pending a Court review of the legality of the matter. In May 2004 the Supreme Court of California heard evidence on the legality of same-sex marriages and in August 2004 ruled unanimously that the City and County exceeded its authority and violated State law by issuing the marriage licenses. All the same-sex marriages performed in San Francisco were declared to be void.<sup>389</sup>

4.6.30 However, in a new case by the City of San Francisco before the California Superior Court, on 14 March 2005, the Court ruled that homosexual couples in California have a constitutional right to marry after declaring the State law that defines marriage as an opposite-sex union, unconstitutional. This case is being appealed and will be heard before the State Supreme Court in 2006.<sup>390</sup>

4.6.31 Subsequent to the ruling of the Superior Court, a Bill to legalise same-sex marriage was put on the agenda with the opening of the California legislature in August 2005. On 2 September 2005 the California Senate approved the Bill with a vote of 21-15 and on 6 September 2005 the California State Assembly followed suit

---

<sup>387</sup> See "Same-Sex Marriage in the United States" in the United States - **Wikipedia**.

<sup>388</sup> See "Same-Sex Marriage in California" in the United States– **Wikipedia**.

<sup>389</sup> See "Same-Sex Marriage in California" in the United States – **Wikipedia**.

<sup>390</sup> *Ibid*.

with a vote of 41-35, making California's legislature the first in the USA to approve a same-sex marriage Bill without court pressure. On 29 September 2005, however, the Governor of California vetoed the Bill, stating that he believed that same-sex marriage should be settled by the Courts or another vote by the people in a State referendum.<sup>391</sup>

4.6.32 The same political and legal events that started the movement to obtain legal protections for same-sex couples also gave rise to a counter movement to protect the status quo by legally defining traditional marriage as the marriage of one woman to one man. This would have the effect of excluding same-sex families from the legal protections of marriage. It is significant that this movement is supported by President George W. Bush, most Republicans in Congress and groups such as the Christian Coalition, Focus on the Family, Church of Jesus Christ of Latter-day Saints and the Roman Catholic Church. In addition to being the drive behind the forementioned amendments to State Constitutions this counter movement also created the platform for federal legislation to protect opposite-sex marriage.

4.6.33 When, subsequent to the judgments of the Hawaii court, the USA Congress became concerned that it might find itself in a situation where it would be forced by a Court ruling to recognise same-sex "marriages", Congress passed the Defence of Marriage Act<sup>392</sup> in September 1996. This Act has two sections, one relating to federal issues and the other clarifying the intent of Federal law on the meaning of marriage.<sup>393</sup>

4.6.34 The first section of the Defence of Marriage Act reaffirmed the power of the State to make their own decisions about marriage:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe, respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such

---

<sup>391</sup> *Ibid.*

<sup>392</sup> 28 U.S.C.1738 (C).

<sup>393</sup> See **Federal Information** available at [http://www.marriagelaw.cua.edu/Federal\\_.htm](http://www.marriagelaw.cua.edu/Federal_.htm) (accessed on 23 November 2002) The definition of marriage in a particular State's law is very relevant when a citizen of that State's rights and benefits under federal law must be determined with reference to his or her marital status.

other State, territory, possession or tribe, or a right or claim arising from such relationship<sup>394</sup>

4.6.35 The second section stated what Congress had always assumed and never regarded necessary to clarify:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.<sup>395</sup>

4.6.36 This legislative move<sup>396</sup> restricted the federal definition of marriage to members of the opposite sex and precluded same-sex married couples from federal economic funds (despite the fact that same-sex marriage was not at that stage recognised in any of the States). Congressional proponents thereby asserted authority to enact the law under the Full Faith and Credit clause of the United States Constitution with the purpose to normalise heterosexual marriage on a federal level and permit each state to decide for itself whether or not to recognise "same-sex unions" if other states did recognise same-sex unions. Thirty-eight states have enacted laws denying the recognition of same-sex unions, which is the same number of states needed to amend the United States Constitution.<sup>397</sup> The Defence of Marriage Act of 1996 was expressly designed to protect States from being forced through an interpretation of the American Constitution to recognise same-sex marriages.<sup>398</sup>

4.6.37 Maxwell points out that the focus of the legislative activities regarding same-sex couples has been to override the Court decisions that have declared marriage statutes unconstitutional. When the legislature did grant benefits to these couples it was either in reaction to a Court decision<sup>399</sup> or the result of long-fought battles for

---

<sup>394</sup> Pub.L.104-199, s 2, 100 Stat. 2419 (Sep.21, 1996) codified at 28 U.S.C. §1738C (1997), **Federal Information** *ibid.*

<sup>395</sup> Pub.L.104-199, s 1, 100 Stat. 2419 (Sep.21, 1996) codified at 1 U.S.C. §7 (1997), **Federal Information** *ibid.*

<sup>396</sup> For comment see Leonard in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 151.

<sup>397</sup> See "Same-Sex Marriage in the United States" in United States - **Wikipedia**.

<sup>398</sup> Canada Law Commission **Marriage and Marriage-Like Relationships** 2000 chap V.B.

<sup>399</sup> Further examples of such cases are: In January 2004 the Governor of New Jersey's signed this State's domestic partnership law to go into effect 180 days after it was signed. The legislature passed the law in part to curtail a lawsuit seeking full marriage rights for gay people. Between 12



domestic partnerships benefits to be recognised.<sup>400</sup> This counter movement was widely credited (or blamed) in some quarters for motivating voter turnout in the 2004 elections to support the Republican Party.<sup>401</sup>

4.6.38 On 2 November 2004 (Election Day), State constitutional amendments prohibiting same-sex marriage were passed in eleven States: Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Oregon, and Utah. The measures in Oregon, Mississippi, and Montana bar same-sex marriage only; those in the other States bar civil unions and domestic partnerships as well; and Ohio bars granting any benefits whatsoever to same-sex couples. Every State that had the "definition of marriage" amendment on the ballot passed the constitutional amendment.<sup>402</sup>

### c) Current legal position

4.6.39 The position as of April 2005 is that the Commonwealth of Massachusetts recognises same-sex marriage. Seventeen States have constitutional provisions that define marriage as a union of one man and one woman, while 24 other States have legislative statutes containing similar definitions.<sup>403</sup> The States of Vermont, Connecticut, California, Maine, Hawaii, the District of Columbia and New Jersey offer all (or similar) of the State-level rights and benefits of the legal protections of opposite-sex marriage to same-sex unions. They do not use the word "marriage" but call such partnerships civil unions, reciprocal benefits and domestic partnerships. These arrangements do not, however, provide the federal-level rights, benefits and

---

February and 11 March 2004 the newly elected mayor of San Francisco, California, ordered the county to begin issuing marriage licenses to same-sex couples. These licenses were later ruled void, but the events in California set the stage for national politics through the following year. In early 2004, the mayors of several villages and cities in the State of New York announced that they would recognise same-sex civil weddings. In February 2005, based on the equal protection clause of the State's constitution, the State Supreme Court ruled that New York City could not deny marriage licenses to same-sex couples. The order was stayed pending an appeal. In June 2005 the California Supreme Court ruled that the State's domestic partnership law did not conflict with a voter-approved resolution banning gay marriage. See "Same-Sex Marriage in the United States" in United States - **Wikipedia**.

<sup>400</sup> Maxwell **Electronic Journal of Comparative Law** 2000 at 31.

<sup>401</sup> See "Same-Sex Marriage in the United States" in United States - **Wikipedia**.

<sup>402</sup> See "Same-Sex Marriage in the United States" in United States - **Wikipedia**.

<sup>403</sup> See "Same-Sex Marriage in the United States" in United States - **Wikipedia**.

protections that come with a civil marriage license, nor will the partnerships necessarily be recognised in States that have no such laws.

4.6.40 For example, the Civil Unions Act of 2000 of Vermont provides for a same-sex couple to enter into a civil union, a system which is parallel to marriage.<sup>404</sup> Section 1 explicitly declares that the State has a strong interest in promoting stable and lasting families, including families of same-sex couples. It also acknowledges that without legal protections associated with civil marriage these couples suffer numerous obstacles and hardships.<sup>405</sup>

4.6.41 Same-sex partners who are not close family members and not a party to another civil union or a marriage may apply for a civil union licence from the town clerk, whereafter the union is certified either by a justice of the peace, judge or member of the clergy.

4.6.42 Parties to a civil union will be treated as spouses under the law and the relationship must be ended in the family Courts under the laws governing divorce proceedings. A residency of one year is required before a dissolution will be granted. Should a couple decide to terminate the relationship, one of them would need to live in Vermont for six months before applying for such a dissolution. Thereafter it takes another six months before the dissolution is finalised.<sup>406</sup>

4.6.43 Among the many rights and responsibilities conferred under the Act are the following:

- \* a support obligation between the partners similar to that of married spouses;
- \* the right to be treated as legal next-of-kin including preferences for guardianship of and medical decision making for an incapacitated partner, automatic inheritance rights, the right to leave work to care for

<sup>404</sup> Civil Unions Act of 2000 available at <http://www/leg.state.vt.us/docs/2000/bills/passed/h-847.htm> (accessed on 15 June 2000). See also LaViolette "Registered Partnership Model" 2001 Annexure 1.

<sup>405</sup> Referred to by Bonauto in Wintermute & Andenæs **Same-Sex Partnerships** 2001 chap at 201 fn 119.

<sup>406</sup> Demian "Marriage Traditions" 2002.

an ill partner, hospital visitation and the control of a partner's body upon death;

- \* the right to be treated as an economic unit for State (not federal) taxes including the ability to transfer property to each other without tax consequences, to have greater access to family health insurance policies and to obtain joint insurance policies and joint credit;
- \* equalisation in the worker's compensation and public benefits laws;
- \* parental rights with respect to a child of whom either party to the civil union becomes the natural parent during the term of the civil union similar to those of a married couple;
- \* entitlement to all the available benefits of adoption;
- \* legal standing to sue for the wrongful death of a partner, emotional distress caused by a partner's death or injury, and loss of consortium or death or injury of a partner; and
- \* partners are not compellable to testify against each other.

4.6.44 Civil unions differ from marriage in that civil union partners are not entitled to the rights created in more than 1042 federal laws which are triggered by legal marriage.

4.6.45 This Act also acknowledges another constituency among Vermont's families, namely the reciprocal beneficiaries who, under the Act, become eligible for certain benefits available to spouses. These rights include hospital visitation rights and decision making about medical treatment, anatomical gifts and disposition of remains.<sup>407</sup>

4.6.46 Reciprocal beneficiaries need only present a notarised declaration to the Commissioner of Health to either declare or terminate their relationship. These beneficiaries must be at least eighteen, related by blood or adoption (and therefore

---

<sup>407</sup> Bonauto in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 202.

barred by consanguinity from entering into a civil union or marriage) and not presently married or a party to another civil union.<sup>408</sup>

4.6.47 Since the nineteenth century, the states of the USA have moved away from informal marriages towards statutory marriages and Courts have explicitly rejected common-law marriage claims. Only a few States still authorise common-law marriage and even they discourage it.<sup>409</sup>

4.6.48 From the above it is clear that marriage between opposite-sex couples is firmly protected in the USA. Although same-sex marriage is not widely recognised, such couples who formally commit to their relationship are generally protected. However, informal same-sex relationships and cohabiting opposite-sex relationships only receive limited and ad hoc protection.

## 4.7 African Countries

### a) Background

4.7.1 One of the many challenges for legislatures in African countries is the integration and harmonisation of the various systems of personal law that exist concurrently in most of the States.

4.7.2 Historically, a plurality of legal systems is a result of the colonial occupation of these States by European countries. A reception of Western law took place while, at the same time, the colonial conquerors granted limited recognition to the States' existing indigenous systems of law and religious law. After obtaining political independence from their colonial rulers, the African States enacted legal reforms with the aim of integrating all these different systems of personal law, while simultaneously seeking to raise the status of woman and to protect the interests of their children.<sup>410</sup>

---

<sup>408</sup> Bonauto in Wintermute & Andenæs **Same-Sex Partnerships** 2001 *ibid.*

<sup>409</sup> Bonauto in Wintermute & Andenæs **Same-Sex Partnerships** 2001 at 181.

<sup>410</sup> Rwezaura **Journal of African Law** 1998 at 189.

## b) Opposite-sex relationships

4.7.3 Tanzanian marriage law poses an example of this attempted integration and protection. With the enactment of section 160 of the Law of Marriage Act of 1971, legal effect was given to the widely recognised de facto unions. The Act also dealt with the extension to these unions of the same legal consequences that follow a formal dissolution of legal marriage.

4.7.4 Section 160(1) of the Law of Marriage Act of 1971 creates a statutory presumption of marriage in favour of de facto unions that have existed for a minimum of two years. Section 160(2) States that should the presumption, however, be rebutted, the woman cohabitant and the children born of that union become legally entitled to apply to the Court for economic support from the male partner.<sup>411</sup>

4.7.5 Different categories of de facto unions<sup>412</sup> exist, but the version that is relevant to this discussion is the one that is also called "modern de facto unions". These unions are consciously established, even though the partners may have differing views as to the nature of the relationship. Modern de facto unions are not an attempt to contract a customary marriage but exist as a result of an unwritten mutual agreement between the parties. These types of unions are also found in the urban areas of other parts of Africa.<sup>413</sup>

4.7.6 The incidence of de facto unions in Tanzania is a result of the interaction between different models of marriage in a single jurisdiction.<sup>414</sup> Under the Law of Marriage Act of 1971, English colonial marriage laws and the customs regarding the

---

<sup>411</sup> In its proposals for this section, the government recognised the practice that have developed where couples live together for years and have children without ever getting formally married to each other. Statistics showed that the woman cohabitant was the loser once the man got tired of living with her. Such a woman could not sue for maintenance and her children were illegitimate. Rwezaura **Journal of African Law** 1998 at 187.

<sup>412</sup> See Rwezaura **Journal of African Law** 1998 at 194.

<sup>413</sup> A study that was done in 1994 in a sample of 126 men and 294 women, over a period from 1971 to 1992, found that 37% of the respondents were living in de facto unions or had separated from such unions. For a breakdown of these statistics, see Rwezaura **Journal of African Law** 1998 at 192 and fn 21.

<sup>414</sup> Rwezaura **Journal of African Law** 1998 at 212.

African traditional model of polygynous marriage, as a union of two families, were integrated and came under the jurisdiction of the national legal system administered by judges trained in the common law. The doctrine of presumption of marriage from the English common law became codified in section 160 of the Law of Marriage Act of 1971 and in a sense ensured a smooth transition between the old and the new system.<sup>415</sup>

4.7.7 Since African women are traditionally responsible for the care of young children they are economically disadvantaged compared to their male counterparts. It is thus not surprising that section 160 of the Law of Marriage Act of 1971 has been more readily used by women to protect their economic interest and those of their children, than by men.

4.7.8 In April 1994, the Law Reform Commission of Tanzania recommended that section 160 of the Law of Marriage Act of 1971 be repealed because it constitutes an unnecessary encroachment on the sanctity of marriage.<sup>416</sup> No amendment to the section has been done up to date.

4.7.9 Rwezaura submits that the proposed repeal of section 160 contradicts the spirit of article 13 of the Tanzania Constitution (1977) which provides for equal protection by the law.<sup>417</sup> He recommends that, rather than repealing section 160, it should instead be retained and refined.<sup>418</sup>

4.7.10 Another example of an African country's approach to domestic partnerships can be found in the laws of Kenya.<sup>419</sup>

---

<sup>415</sup> Rwezaura **Journal of African Law** 1998 at 213 and fn 114.

<sup>416</sup> The Commission recommended that the presumption of marriage under section 160 of the Law of Marriage Act is an unnecessary encroachment of the sanctity of marriage and contrary to spirit of the Act. Cohabitation should never be mixed up with issues of marriages. De facto arrangements may be considered elsewhere such as in Affiliation law and not in the Law of Marriage Act of 1971. The Commission strongly feels that those who chose to live in a de facto arrangement should not be supported by law. See Kenya Law Reform Commission **Law of Marriage Act** 1971.

<sup>417</sup> At 193.

<sup>418</sup> Two of the problems that exist with s 160(1) are the absence of the regulation of the rights and obligations of these couples during the existence of the relationship and the distribution of property where one of the cohabitants dies intestate.

<sup>419</sup> Kenya gained independence from the British Colonial Government when it became a Republic with a Constitution dated 12 December 1963. International Environmental Law Research Centre "Women in East Africa" 1995 at par I.

4.7.11 The legal system of Kenya is based on the English common law, customary law<sup>420</sup> and Islamic law.<sup>421</sup> In the absence of national legislation, Kenyan Courts resort to English law. English rules of equity and common law are, however, only applicable in Kenya in so far as the circumstances of Kenya and its inhabitants permit and subject to qualifications as those circumstances may render necessary.<sup>422</sup>

4.7.12 Statutory laws are supposedly superior to customary law and any law that contradicts the Constitution of Kenya, 1963, is null and void to the extent of contradiction. There have, however, been instances where customary law has overridden the statute law.<sup>423</sup>

4.7.13 There are several forms of marriage in Kenya. Statutory marriages<sup>424</sup> are recognised under the Marriage Act of 1902,<sup>425</sup> the African Christian Marriage and Divorce Act of 1931,<sup>426</sup> the Hindu Marriage and Divorce Act of 1960<sup>427</sup> and the Mohammedan Marriage and Divorce Act.<sup>428</sup> Customary marriages as governed by the laws and customs of a particular ethnic group are also recognised.<sup>429</sup> Customary

---

<sup>420</sup> Customary law is the law of small communities of people living together in ethnic context (tribes). In such communities a particular version of customary law is taken for granted as part of their everyday experience but it excludes outsiders. There are as many customary laws as there are tribal communities. In Kenya there are more than 42 different ethnic communities. Despite the general consensus on certain fundamental principles, there are nuances in each of them that only someone well versed with the community's way of life can identify. A characteristic of African customary law is the dominance of older male members over property and lives of women and their juniors. Other features of customary law are the centrality of the family as opposed to the individual and the definition of the family in expansive terms to include ascendants and descendants and more than one wife in polygynous unions. Kenya Constitution Review Commission 2001.

<sup>421</sup> **World Factbook.**

<sup>422</sup> Kenya Constitution Review Commission 2001.

<sup>423</sup> *Ibid.*

<sup>424</sup> These marriages are evidenced by registration and the issuing of a marriage certificate if they satisfy the requirements of the mentioned legislation as to formality and procedure. A spouse who contracts another marriage while the first statutory marriage still exists commits an offence of bigamy under the Penal Code. *Ibid.*

<sup>425</sup> Revised in 1962 (Chap 150 of the Laws of Kenya).

<sup>426</sup> Revised in 1962 (Chap 151 of the Laws of Kenya).

<sup>427</sup> (Chap 157 of the Laws of Kenya).

<sup>428</sup> (Chap 155 of the Laws of Kenya). Benschop "Women's Rights in East Africa" 2002 at chap 5.4.

<sup>429</sup> The late Chief Justice Madan is quoted to have said "With changing time we must change what constitutes a customary marriage". See **East African Standard (Nairobi)** "This Obsession with

law allows a man to marry as many wives as he wishes and the offence of bigamy does not apply to polygamous unions under this system. About eighty percent of Kenyans are married in the customary (or informal) way. Other customary practices are the levirate union,<sup>430</sup> woman-to woman marriage<sup>431</sup> and sororate unions.<sup>432</sup>

4.7.14 Recently Kenyan Courts have also started to recognise the "come we stay marriages", where a couple live as man and wife without undergoing any type of marriage ceremony.<sup>433</sup> Despite the recognition of these marriages there is no legislation regulating the legal position and resultant confusion is inevitable.<sup>434</sup>

4.7.15 The many laws designed to govern and protect property ownership do not apply to these unmarried couples. Furthermore, those living together expose themselves to litigation over issues of income and palimony when they split up or one partner dies. Verbal and or implied agreements they may have made regarding financial matters are susceptible to different interpretations.

4.7.16 When children are born from the living-in relationship, they are not automatically recognised as legal children of the parents that gave birth to them. They also cannot make medical decisions regarding one another unless they

---

Marriage Papers is Rubbish, Says Lawyer" 29 July 2002, available at <http://209.225.9.134/stories/200208020459.html>.

<sup>430</sup> Levirate union, a customary practice, is a form of widow inheritance in terms of which a widow goes into cohabitation with the brother or a male relative, even a son, of the deceased husband. While such a woman remains a wife to the deceased, she has a conjugal relationship with a living person. Since the underlying idea behind this practice is to ensure that the widow and her children are looked after within the family of the deceased husband and father, emphasis is placed on the protective and supportive roles of the deceased rather than on the sexual relationship. Kenya Constitution Review Commission 2001.

<sup>431</sup> A widow who has no children or has reached menopause makes a dowry payment to the parents of a young woman who comes to her home to bear children sired by a selected male relative of the deceased husband of the widow. The children thus born are regarded as the children of the deceased. Kenya Constitution Review Commission 2001.

<sup>432</sup> Sororate unions are a customary practice that entails the replacement of a deceased wife by her sister as wife to the widower where the deceased died without descendants or without male descendants. The underlying consideration for this practice is that the dowry has been paid by one family to the other and, rather than to refund such dowry, the deceased's family replaces the wife.

<sup>433</sup> Parties may also be in the process of marrying the customary way, not having completed the process.

<sup>434</sup> See **East African Standard Online** Edition 29 "The Legal Implications of Live-in Relationships" July/August 2002 available at <http://www.eastandard.net/Issue/issue290720020018.htm> (accessed on 9 September 2005) where the author spells out the risks of living together without any formal arrangements or contracts.



possess a "durable power of attorney for healthcare". A surviving partner cannot even make funeral arrangements if the other living-in partner dies.<sup>435</sup>

4.7.17 Courts in Kenya must determine disputes emanating from these associations that do not neatly fit into any of the systems of marriage or practice. When such cohabitants acquire property together or bring their individually owned property to the union, questions as to property rights are bound to occur in the event of death or relationship break-up. A Court then needs to determine whether or not the cohabitation actually constituted a marriage for purposes of allocating property rights.

4.7.18 In **Mary Njoki v John Kinyanjui and Others**<sup>436</sup> the appellant's claim to the deceased's property was rejected despite her cohabitation with him. The Court was of the view that cohabitation and repute alone were not enough to constitute a marriage. In the court's view such cohabitation had to be accompanied by an attempt to carry out some ceremony or ritual required for any marriage or under customary law.

4.7.19 Kameri-Mbote points out that legislation is especially necessary to address the rights of women who have been involved in situations of cohabitation for a number of years without going through a ceremony of marriage.<sup>437</sup>

### c) Same-sex relationships

4.7.20 Many African leaders seem to hold the view that homosexuality is "un-African" and "the spin-off of the capitalist system". Several announcements to this effect have been made by prominent leaders.<sup>438</sup>

---

<sup>435</sup> A 1987 case known as **Virginia Edith Wambui Otieno v Joasch Oschieng, Ougo and Omolo Siranga** illustrates this point. In this burial dispute the Court of Appeal decided that a widow does not have rights over the body of her husband because under customary law, the wishes of the widow and children are irrelevant. Referred to by Kenya Constitution Review Commission 2001.

<sup>436</sup> Unreported Civil Appeal Case No. 71 of 1984.

<sup>437</sup> *Ibid.*

<sup>438</sup> Steyn **TSAR** 1998 at 103 -105. She refers to the secretary-general of the Pan-Africanist Congress, an ANC National Executive member, a Zimbabwean parliamentarian and the Kenyan President.

4.7.21 In this regard the following four main contentions underlying African homophobia have been identified:<sup>439</sup>

- \* Homosexuality can easily be conflated with offences such as bestiality, paedophilia and the marketing of pornography;
- \* Homosexuality is a sickness;
- \* Homosexuality is an unnatural perversion that goes against God; and
- \* Homosexuality is a Euro-American perversion that is foreign to Africa.

4.7.22 Mr Robert Mugabe, the president of Zimbabwe, is one of the most outspoken opponents of homosexuality and persistently makes homophobic statements.<sup>440</sup> President Nujoma is also reported to have referred to gays and lesbians as "idiots" who should be condemned and who "are destroying the nation".<sup>441</sup>

4.7.23 Kenyan law defines any sexual relations between men as a criminal act.<sup>442</sup> There are, however, few prosecutions. The Attorney General, Amos Wako, has stated that homosexual practices are widely regarded as unAfrican and only occur on the continent as a result of pernicious Western influence.<sup>443</sup> Wanjira Kiama reports, however, that officials do not know the extent of homosexual practices.<sup>444</sup>

---

<sup>439</sup> Steyn **TSAR** 1998 *ibid*.

<sup>440</sup> Reuters **The Herald** (Harare) 12 Aug 1995 referred to by Steyn **TSAR** 1998 *ibid*. He stated that homosexuality is unnatural and there is no question of ever allowing these people to behave worse than dogs and pigs.

<sup>441</sup> Cameron **SALJ** 2002 at 642.

<sup>442</sup> In Africa homosexuality is illegal for gay men in 29 countries and for lesbian women in 20 countries. See "Legal Status of Homosexuality in Africa" available at [http://www.afrol/Categories/Gay/backgr\\_legalstatus.htm](http://www.afrol/Categories/Gay/backgr_legalstatus.htm) (accessed on 8 September 2005).

<sup>443</sup> See W Kiama "Homosexuality and Aids: A Double-Edged Sword" **Daily Nation on the Web Weekender: Special Report** 26 June 1998 available at [http://www.ilga.info/Information/Legal\\_survey/africa/supporting%20files/homosexuality\\_in\\_kenya\\_n\\_society.htm](http://www.ilga.info/Information/Legal_survey/africa/supporting%20files/homosexuality_in_kenya_n_society.htm) (accessed on 12 September 2005). Studies from all over the continent show that the practice of men having sex with men is not at all uncommon. Although documentation and statistics are not available, it does not mean that it does not exist. Accounts of homosexuality in traditional African cultures often find such practices accepted among adolescents but discouraged among adults. "Homosexuality Debate Distracts Aids Conference" 27 June 2001 AfricaOnline available at <http://www.africaonline.com> (accessed on 8 September 2005).

<sup>444</sup> See "Homosexuality Takes Root in Kenya" June 1998 **The Nation** (Nairobi) available at [http://www.mask.org.za/sections/AfricaPerCountry/abcnew/kenya\\_04.htm](http://www.mask.org.za/sections/AfricaPerCountry/abcnew/kenya_04.htm) (accessed on 18 July 2005).

4.7.24 Strong hostility exists towards homosexual men, reflecting generally conservative attitudes in the Kenyan society. According to President Moi, "Kenya has no room or time for homosexuals and lesbians. Homosexuality is against African norms and traditions, and even in religion it is considered a great sin."<sup>445</sup>

4.7.25 Dr Frank Njenga, a psychiatrist and chairman of the social responsibility committee for the Kenyan Medical association and an HIV/AIDS prevention activist, says that the extent of homosexuality, bisexuality and lesbianism in discussions is either exaggerated or underrated. He argues that Kenyan society has not "developed" to the level where people with a different sexual orientation are allowed to be themselves or develop within laws and rights set out for them, with the result that a good number of men "are constitutionally homosexual and socially heterosexual, so as to fit in the society."<sup>446</sup>

4.7.26 A proposed same-sex wedding ceremony set for the town of Lamu, a popular tourist destination, has sparked an angry debate in Kenya about homosexuality. A 24 year-old Kenyan man had to be taken into protective custody at the instigation of the District Administrator because of the danger of being lynched after it became known that he planned to "marry" another man.<sup>447</sup>

4.7.27 In Mombasa and other Kenyan cities homosexuality has, however, long been acknowledged and, unofficially, male marriages occur, complete with rings and dowry, within gay circles. In response to claims by non-governmental organisations that attempts to stop the wedding were an infringement of human rights, President Daniel arap Moi accused them of "advocating indecency" and "misleading the youth".<sup>448</sup>

---

2003) and W Kiama "AIDS-KENYA: Where Are Kenya's Homosexuals?" **World News** 14 August 1998 available at [http://www.mask.org.za/sections/AfricaPerCountry/kenya/aids\\_kenya.htm](http://www.mask.org.za/sections/AfricaPerCountry/kenya/aids_kenya.htm) (accessed on 12 September 2005).

<sup>445</sup> See "Kenyan President Denounces Homosexuals" Pink Ink – **International News** September 1998 available at <http://www.khsnet.net/pinkink/9809/news.htm> (accessed on 31 January 2006).

<sup>446</sup> W Kiama "Homosexuality and Aids: A Double-edged Sword" **Daily Nation on the Web Weekender: Special Report** 26 June 1998 available at [http://www.ilga.info/Information/Legal\\_survey/africa/supporting%20files/homosexuality\\_in\\_kenya\\_n\\_society.htm](http://www.ilga.info/Information/Legal_survey/africa/supporting%20files/homosexuality_in_kenya_n_society.htm) (accessed on 12 September 2005).

<sup>447</sup> ILGA "World Legal Survey – Kenya" 2000.

<sup>448</sup> See J Kamau "Wedding Row Sets Alight Gay Issue in Kenya" **Dispatch Online** 28 October 1999 available at <http://www.dispatch.co.za/1999/10/28/features/> (accessed on 12 September 2005).

4.7.28 Although discrimination between the sexes is prohibited, sexual orientation is not one of the prohibited grounds listed in the discrimination clause of the Kenya Constitution.<sup>449</sup> Despite amendments in 1997 to broaden the list of grounds in the Constitution, section 82 (4)(b) and (c) of the Constitution effectively still permit discrimination with respect to adoption, marriage, divorce, burial and devolution of property on death and other matters of personal law.<sup>450</sup>

4.7.29 In Nigeria the government is planning a specific ban on same-sex marriages, with five years in jail for anyone who has a gay wedding or officiates at one, as a "pre-emptive step" because of developments elsewhere in the world. In most cultures in Nigeria, same-sex relationships, sodomy and the likes of that, is regarded as abominable. The Justice also said that the law would ban "any form of protest to press for rights or recognition" by homosexuals, the AFP news agency reports.

4.7.30 The Archbishop who heads Nigeria's Anglican Church, has been a vocal opponent of same-sex marriage and allowing openly gay men to be priests and is publicly supported by President Olusegun Obasanjo on this stance. Archbishop Akinola told a conference of Nigerian bishops in October 2004 that "such a tendency is clearly un-Biblical, unnatural and definitely un-African".<sup>451</sup>

4.7.31 In South Africa there are religious leaders who do not condemn homosexuality. In this regard Archbishop Tutu of the Anglican Church and Reverend Moqoba of the Methodist Church have made submissions to the Constitutional Assembly of South Africa in support the acceptance of homosexual behaviour.<sup>452</sup>

4.7.32 Cameron points out that the judgments of the appellate Courts in this region have also taken differing approaches to the question of legal protection on the ground of sexual orientation. In South Africa the Constitutional Court has, in

---

<sup>449</sup> Section 82(3).

<sup>450</sup> International Environmental Law Research Centre "Women in East Africa" 1995.

<sup>451</sup> Nigeria - the most populous country in Africa - is divided between the predominantly Muslim north and the largely Christian south. Five northern States are governed by Islamic Sharia law and mandate death by stoning for adultery, including gay sex. **BBC NEWS** "Nigeria to outlaw same-sex unions" available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4626994.stm> (accessed on 23 January 2006).

<sup>452</sup> Steyn **TSAR** 1998 at 104 fn 49.

unequivocal terms, affirmed that gays and lesbians have a right to equality under the Constitution.<sup>453</sup>

4.7.33 In contrast, the Zimbabwean Supreme Court held by a majority of three to two that the criminal penalties against consensual private sodomy do not constitute discrimination under the Zimbabwean Constitution.<sup>454</sup> Under Zimbabwean common law "unnatural sexual acts" are illegal, with penalties ranging up to ten years' imprisonment. Botswana's penal code also proscribes homosexuality.<sup>455</sup>

4.7.34 In similar vein, the Supreme Court of Namibia held by a majority of two to one that a long-term lesbian relationship between a Namibian and a non-Namibian is not a factor in favour of the latter when she applies for permanent residence, since it was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual marital relationship.<sup>456</sup>

4.7.35 In making their rulings, the majority of judges in both the Zimbabwean and Namibian cases referred to the difference that exists between the South African Constitution and the Constitutions of their countries. The South African Constitution expressly lists sexual orientation as a prohibited ground of unfair discrimination, which is not the case in the other two Constitutions.<sup>457</sup>

4.7.36 Cameron emphasises that the real question should not be one of constitutional wording, but one of principle. He argues that the basis for the equal protection of gays and lesbians lies in the achievement of equality as one of the founding values of the South African constitutional order. The central importance attached to the value of equality stems from South African history.<sup>458</sup>

---

<sup>453</sup> **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1999 (1) SA 6 (CC) and **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000 (2) SA 1 (CC).

<sup>454</sup> **S v Banana** 2000 (3) SA 885 (ZS) referred to by Cameron **SALJ** 2002 *ibid.*

<sup>455</sup> Steyn **TSAR** 1998 at 105 and fn 60.

<sup>456</sup> **Chairperson of the Immigration Selection Board v Frank & Khaxas** (NmS 5 March 2001, case SA 8/99, unreported) referred to by Cameron **SALJ** 2002 *ibid.*

<sup>457</sup> See discussion in chap 3 above.

<sup>458</sup> A history which many Namibians share. Cameron **SALJ** 2002 at 644.

4.7.37 It is a history of inequality and oppressive injustice that taught our constitution-makers that irrelevant and stigmatising criteria should not be used as a basis for judging people and their legitimate place in society. Discrimination on the basis of sexual orientation will stand in the way of a proper appreciation of the human capacities of the person in question, and damages his or her dignity.

4.7.38 It is therefore these important values of equality and dignity that are at stake and not merely the fact that sexual orientation has been mentioned specifically as a prohibited ground.

4.7.39 It is also these same values that form the basis of the concept of African humanity, also called ubuntu. Ubuntu is said to embrace all forms of expressive human flourishing that contribute to society and that do not harm other humans.<sup>459</sup>

4.7.40 Quoting from the discussion of the ubuntu concept by the Constitutional Court in the case of **S v Makwanyane**,<sup>460</sup> Cameron submits that ubuntu finds practical application by providing protection not only for the strong and the powerful, the influential and the popular, but also for the weak, the unprotected and the socially vulnerable.

4.7.41 In this regard he recognises that gays and lesbians in South Africa are fortunate that the inclusive approach that the liberation movements took towards equality and dignity affirmed these fundamental African values. This paved the way for the recognition of equality of gays and lesbians under South African law. Cameron suggests that other African countries should use the ubuntu concept in similar ways to achieve real equality for minority groups.

---

<sup>459</sup> Cameron **SALJ** 2002 at 645. Ubuntu was given judicial articulation and endorsement in **S v Makwanyane** 1995 (3) SA 391 (CC), Cameron **SALJ** 2002 at 646 and fn 19.

<sup>460</sup> *Ibid.*

## CHAPTER 5: MARITAL RIGHTS FOR SAME-SEX COUPLES

### 5.1 Introduction

5.1.1 In South Africa marriage is currently defined in the common law (and confirmed in case law) as "the legally recognised voluntary union of one man and one woman, to the exclusion of all others while it lasts".<sup>1</sup>

5.1.2 The Marriage Act<sup>2</sup> itself does not contain a definition of marriage and deals only with procedural matters, prescribing the formalities with which a marriage must comply in order to be valid.<sup>3</sup> The legal consequences (substantive contents) of valid marriages are further prescribed in marriage-specific legislation and the common law.

5.1.3 It should, however, be noted that not all valid marriages in South Africa are concluded in terms of the Marriage Act of 1961. Customary marriages are recognised as valid marriages under the Recognition of Customary Marriages Act of 1998<sup>4</sup> with the result that their validity is not dependent on any of the provisions of the Marriage Act of 1961.

5.1.4 The Commission has, in addition, recently finished its investigation on Islamic marriages. In this investigation proposals have been considered which will allow

---

<sup>1</sup> Sinclair **Marriage Law** 1996 at 305 with reference to **Seedat's Executors v The Master (Natal)** 1917 AD 302 at 309; **Hyde v Hyde & Woodmansee** (1866) LR 1 P&D 130 at 133.

<sup>2</sup> Act 25 of 1961.

<sup>3</sup> Section 11(1) of the Marriage Act of 1961 provides that a marriage must be solemnised by a competent marriage officer. In terms of section 2(1) magistrates, special justices of the peace and certain commissioners are *ex officio* marriage officers. These marriage officers are civil servants and a marriage performed by them would constitute a civil marriage ceremony. See Heaton "Family Law and the Bill of Rights" 1996 at para 3C11. In terms of section 3(1) the Minister of Home Affairs may also designate any minister of religion or any person holding a responsible position in a religious denomination or organisation as a marriage officer. Where the religious leader is not properly designated as a marriage officer, members of that religious community will be obliged to undergo both a religious and a civil ceremony if they want the relationship to have any legal implications. Lind **SALJ** 1995 at 482.

<sup>4</sup> Act 120 of 1998.

Islamic marriages to be recognised as valid marriages for all purposes. Thus, if the legislative recommendations in the proposals of the Commission in this regard are accepted, Islamic marriages will not be dependent on any provisions in the Marriage Act of 1961.

5.1.5 Recommendations to amend the Marriage Act will thus not affect customary marriages or Islamic marriages.

5.1.6 As was seen above, marriage is defined in the common law as an opposite-sex institution and same-sex couples are excluded from its ambit. In a constitutional dispensation where discrimination on the basis of sexual orientation is explicitly prohibited in an equality clause, as has been the case under the Bill of Rights in the South African Constitution since 1993,<sup>5</sup> this definition of marriage together with the legislation supporting it<sup>6</sup> is vulnerable to constitutional challenge.<sup>7</sup>

5.1.7 Constitutional challenges have in fact been brought on a number of occasions.<sup>8</sup> The Courts have therefore carried much of the responsibility for crafting family law and policy with regard to same-sex partnerships by providing benefits and other entitlements.

5.1.8 The most recent case in this regard is that of **Minister of Home Affairs v Fourie**<sup>9</sup> in which the common-law definition of marriage was challenged, first before the High Court (Transvaal Provincial Division),<sup>10</sup> subsequently in an appeal to the

---

<sup>5</sup> Section 9 of the Constitution. See discussion in chap 3 above.

<sup>6</sup> Such as s 30(1) of the Marriage Act of 1961.

<sup>7</sup> See eg the discussion by De Vos **SAPL** 1996 *op cit* at 375. See also Pantazis **SALJ** 1997 at 574; Canada Department of Justice **Marriage and Same-Sex Unions** 2002 at 31 and the discussion on the Canadian legal position in chap 4.4 above.

<sup>8</sup> See the discussion of **Langemaat v Minister of Safety and Security** 1998 (3) SA 312 T, **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1999 (1) SA 6 (CC); **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000 (2) SA 1 (CC); **Satchwell v President of the Republic of South Africa** 2002 (6) SA 1 (CC); **Du Toit v Minister of Welfare and Population Development** 2003(2) SA 198 (CC); **J v Director General, Department of Home Affairs** 2003 (50 SA 621 (CC) in chap 3 above.

<sup>9</sup> **Minister of Home Affairs v Fourie** 2006 (1) SA 524 (CC).

<sup>10</sup> **Fourie v Minister of Home Affairs** Case No 17280/02, handed down on 18 October 2002 unreported.



Supreme Court of Appeal<sup>11</sup> and eventually in the Constitutional Court.<sup>12</sup> See the discussion below.

5.1.9 All of these decisions have influenced the work of the Commission in its investigation with regard to the possible recognition of marital rights for same-sex couples. The investigation is aimed at harmonising the applicable family law principles with the provisions of the Bill of Rights in the Constitution, and specifically with the constitutional value of equality.<sup>13</sup>

## 5.2 Options for reform set out in the Discussion Paper

5.2.1 During August 2003 the Commission published a Discussion Paper<sup>14</sup> for information and comment, which included the following three models for the recognition of the marital status of same-sex relationships:

- \* The first option was to **extend the common-law definition of marriage** to same-sex couples by inserting a definition to that effect in the Marriage Act of 1961. In terms of this option, marriage as it is currently known would be available to both same- and opposite-sex couples.
- \* The second option entailed the **separation of the civil and religious aspects of marriage** by separating the ceremonies and regulating only the civil aspects of marriage in the Marriage Act. This Act would then apply to both same- and opposite-sex couples. In practice it would mean that both same- and opposite-sex couples would have to solemnise their marriages before a civil marriage officer, whereafter couples who value the religious aspects of marriage would be free to have their marriage blessed before a religious officer in a religious ceremony. Religious institutions would be able to decide for themselves in terms of their own dogmas whether the blessing of their church would be available to same-

<sup>11</sup> **Fourie v Minister of Home Affairs** 2005 (3) BCLR 241 (SCA).

<sup>12</sup> **Minister of Home Affairs v Fourie** 2006 (1) SA 524 (CC).

<sup>13</sup> This investigation deals with both same- and opposite-sex relationships. See chap 6 and 7 below.

<sup>14</sup> Discussion Paper no 104 (Project 118) available at <http://www.doj.gov.za/salrc/index.htm>.

sex couples. Ministers of religion would, however, lose their status as marriage officers in terms of the legislation. State and church would therefore be separated and the church would lose some of its authority.

- \* The third option was to accord legal protection to same-sex couples in a separate institution, equal to marriage in all respects but called a **civil union**. Since it is a model that runs parallel to marriage, the legal consequences following the conclusion of a civil union would be the same as that of marriage. A civil union would be established by a civil registration procedure and terminated by agreement or a court procedure. A civil union is in effect a registered partnership with all the legal consequences of marriage. For constitutional reasons this option was proposed for opposite-sex couples as well.

5.2.2 These proposals were explained as follows in the Discussion Paper:

**a) Extension of the common-law definition of marriage**

5.2.3 The first option proposed in the Discussion Paper entailed the extension of the common-law definition of marriage to include same-sex couples by inserting a section to that effect in the Marriage Act of 1961. This section would have the effect of allowing a marriage to be concluded between two persons of either the opposite sex or of the same sex.

5.2.4 In addition to the insertion of a neutral definition of marriage, the Commission proposed an amendment to section 30 of the Marriage Act. This section currently contains the marriage formula and makes specific reference to the words "wife (or husband)". It was proposed that those words be replaced by the word "spouse".<sup>15</sup>

---

<sup>15</sup> Legislative amendments to the Marriage Act of 1961 to give effect to this proposal would read as follows:

***Amendment of section 1 of Act 25 of 1961***

**1.** *Section 1 of the Marriage Act, 1961 (in this Act referred to as the principal Act), is hereby amended by the insertion after the definition of "magistrate" of the following definition:*

**"marriage" means the voluntary union of two persons concluded in terms of this Act to the exclusion of any other marriage, union or partnership."**

**"spouse" means a partner of a person in a valid marriage;"**

5.2.5 In terms of these changes a same-sex marriage would for all purposes be a valid marriage, provided, of course, that all the other legal prescriptions to constitute a valid marriage have been complied with.

5.2.6 The advantage of this model is that it is the simplest way of affording marriage rights to same-sex couples. If the Marriage Act is amended accordingly, all references to married couples or spouses in the law will automatically include couples of the same and of the opposite sex.

5.2.7 Throughout history marriage has been restructured many times by various societies.<sup>16</sup> This restructuring has been brought about by changes in our needs as families, changes in our views of equality and expectations of our partners, and changes in technological and societal forces. It is not unknown for the evolution of marriage to have caused heated debate and public discord. Some of those changes were as startling in their time as the idea of marriage for same-sex couples is today.<sup>17</sup>

5.2.8 The fact that a same-sex couple cannot procreate is often used as an argument against permitting them to marry. However, nothing in the formalities and

---

***Amendment of section 30 of Act 25 of 1961***

**2.** *Section 30 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:*

*"(1) In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:*

*'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful [wife (or husband)] spouse ?',*

*and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:*

*'I declare that A.B. and C.D. here present have been lawfully married'."*

<sup>16</sup> See the discussion of the history of marriage in chap 3 above.

<sup>17</sup> A noteworthy change in South Africa is the abolition of the prohibition on interracial marriages. Also, for many years women had few or no legal rights once they were married. Over time, marriage laws have changed to reflect the equality of spouses. The development of "no fault" divorce is another example of some of the contentious changes to marriage law. As opinions and values continue to change, so too have the state objectives underlying marital regulation. Gay and Lesbian Advocates and Defenders "Civil Marriage for Same-Sex Couples" at 7-9.

conditions for marriage prohibits opposite-sex couples from getting married if they are unable to or do not intend to have children. This is because the state has no interest in whether the appropriation of gender roles in a marriage takes place in a particular fashion or in determining whether the couple can actually procreate and has the capacity to raise children.<sup>18</sup>

5.2.9 The view (based on the procreation argument) that marriage should be reserved for opposite-sex couples therefore poses no objective justification for maintaining the current distinctions between same-sex and opposite-sex conjugal relationships in law.

5.2.10 On the contrary, the plea for the legal recognition of same-sex marriages is objectively justifiable in constitutional terms.<sup>19</sup>

5.2.11 A government may seek to prove its commitment to the value of equality by allowing same-sex marriage. A constitutional challenge based on discrimination may thereby be averted. See the examples of the Netherlands, Belgium and now also of Canada.<sup>20</sup>

5.2.12 An amended definition of marriage to include same-sex couples would also further the value of autonomy by giving the couple in a same-sex relationship the freedom to choose their relational status.

5.2.13 It is argued that same-sex couples work, live and contribute in their communities and that they and their families deserve protection just like other families.<sup>21</sup> The formal recognition of same-sex marriage would therefore strengthen these family values in same-sex relationships.<sup>22</sup> Examples of such attributes are permanence and formality, sharing of residence and economic co-operation,

---

<sup>18</sup> Pantazis **SALJ** 1997 at 562.

<sup>19</sup> The unofficial submission of the Christian Lawyers Association of South Africa in response to Issue Paper no 17 (Project 118) available at <http://wwwserver.law.wits.ac.za/salc/issue/issue.html> noted that the door has already been opened to the recognition of same-sex relationships by the Constitution which prohibits discrimination.

<sup>20</sup> See chap 4 above.

<sup>21</sup> Gay and Lesbian Advocates and Defenders "Civil Marriage for Same-Sex Couples".

<sup>22</sup> See Pantazis **SALJ** 1997 at 571-2.

psychological support and emotional involvement in long-standing, intimate family relationships.<sup>23</sup>

5.2.14 The opponents of same-sex marriage want to preserve marriage as a time-tested and sacred institution. They feel that the legislature should not redefine a concept that they consider inseparable from its societal and religious meanings and origins.<sup>24</sup>

5.2.15 Another argument proffered against same-sex marriage is that it may be interpreted as societal approval of homosexuality.<sup>25</sup> It has also been suggested that same-sex marriage will have a variety of inappropriate collateral effects since many of the entitlements of marriage were not designed with same-sex couples in mind.<sup>26</sup>

5.2.16 The recognition of same-sex marriage is indeed a very controversial concept and is sometimes regarded with apprehension. Many governments, although committed to the constitutionally recognised values of autonomy and equality, remain reluctant to open up marriage to same-sex couples.<sup>27</sup> Marriage is seen as the last bastion of the "traditional family".<sup>28</sup>

---

<sup>23</sup> See Pantazis **SALJ** 1997 *ibid.* It is often taken for granted that marriage relationships do have these attributes. However, it is interesting to note that legally married couples are not required to live together and can sign ante-nuptial contracts to separate their financial matters. Nevertheless, "alternative relationships" are often criticised for not being as stable or interdependent as marriage and are denied legal recognition on that basis. Demian "Marriage Traditions" 2002.

<sup>24</sup> Canada Law Commission **Beyond Conjugality** 2001.

<sup>25</sup> See also the discussion of the role of public opinion under chap 3 above.

<sup>26</sup> De Vos **SAPL** 1996 with reference to Posner **Sex and Reason** 1992 at 365 fn 45.

<sup>27</sup> Eg the Vermont Civil Unions Act of 2000 contains a statement that "the state has a strong interest in promoting stable and lasting families. The state's interest in civil marriage is to encourage close and caring families, and to protect all family members from economic and social consequences of abandonment and divorce, focusing on those who have been especially at risk: women, children and the elderly". See in this regard Canada Law Commission **Legal Regulation of Adult Personal Relationships** 2000 at 120 where they ask the question whether these objectives can rationally be connected to an opposite-sex definition of marriage.

<sup>28</sup> On this topic see Canada Law Commission **Legal Regulation of Adult Personal Relationships** 2000 at 125-128.

## b) Separation of civil and religious marriage

5.2.17 The second option proposed was to separate the civil and religious aspects of marriage by separating the civil and religious ceremonies and then to regulate only the civil aspects of marriage in the Marriage Act.<sup>29</sup> The Marriage Act of 1961 would

<sup>29</sup> The legislative amendments to the Marriage Act of 1961 to give effect to this proposal would read as follows:

### **Amendment of section 1 of Act 25 of 1961**

1. Section 1 of the Marriage Act, 1961, (hereinafter referred to as the principal Act) is hereby amended by the insertion of the following definitions:

"marriage' means the voluntary union of two persons concluded in terms of this Act to the exclusion of any other marriage, union or partnership;

'marriage officer' means a marriage officer as described in section 2 of this Act;

'spouse' means a partner of a person in a valid marriage."

### **Repeal of section 3 of Act 25 of 1961**

2. Section 3 of the principal Act is hereby repealed.

### **Repeal of section 7 of Act 25 of 1961**

3. Section 7 of the principal Act is hereby repealed.

### **Repeal of section 8 of Act 25 of 1961**

4. Section 8 of the principal Act is hereby repealed.

### **Amendment of section 29 of Act 25 of 1961**

5. Section 29 of the principal Act is hereby amended –

(a) by the substitution for subsection (2) of the following subsection:

**"(2) A marriage officer [shall] may solemnize a marriage [in a church or other building used for religious service, or in a public office or private dwelling-house, with open doors] in any place and shall solemnize such marriage in the presence of the parties themselves and at least two competent witnesses [, but the foregoing provisions of this subsection shall not be construed as prohibiting a marriage officer from solemnizing a marriage in any place other than a place mentioned therein if the marriage must be solemnized in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties]"; and**

(b) by the substitution for subsection (3) of the following subsection:

**"(3) Every marriage [-**

**(a)] which was solemnized in the Orange Free state or the Transvaal before the commencement of this Act in any place other than a place appointed by a prior law as a place where for the purposes of such law a marriage shall be solemnized [; or**

**(b) which by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties was solemnized before**

***the commencement of the Marriage Amendment Act, 1968, in a place other than a place appointed by subsection (2) of this section as a place where for the purposes of this Act a marriage shall be solemnized,]***

*shall, provided such marriage has not been dissolved or declared invalid by a competent court and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if it had been solemnized in a place appointed therefore by the applicable provisions of the prior law [or, as the case may be, of this Act.]"*

**Substitution of section 30 of Act 25 of 1961**

5. The following section is hereby substituted for section 30 of the principal Act:

**"30 Marriage formula**

*(1) In solemnising a marriage any marriage officer shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:*

*'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful spouse?'*

*and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:*

*'I declare that A.B. and C.D. here present have been lawfully married.'*

*(2) If the provisions of this section or any former law relating to the questions to be put to each of the parties separately or to the declaration whereby the marriage shall be declared to be solemnized or to the requirement that the parties shall give each other the right hand, have not been strictly complied with owing to-*

*(a) an error, omission or oversight committed in good faith by the marriage officer; or*

*(b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,*

*but such marriage has in every other respect been solemnized in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided further that such marriage, if it was solemnized before the commencement of the Marriage Amendment Act, 1970 (Act 51 of 1970), has not been dissolved or declared invalid by a competent court and neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with."*

**Repeal of section 31 of Act 25 of 1961**

7. Section 31 of the principal Act is hereby repealed.

**Amendment of section 32 of Act 25 of 1961**

8. Section 32 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

***"(1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him as marriage officer in terms of this Act [; Provided that a minister of religion or a person holding a responsible position in a religious denomination or organization may, for or by reason of any such thing done by him, receive-***

accordingly make provision for the civil marriage of both opposite-sex and same-sex couples, but would have no relevance for religious institutions.

5.2.18 The distinction between civil marriage and religious marriage is relevant in that the purpose in each case differs. The purpose of a civil marriage is to provide an orderly framework in which people receive public recognition and support. By publicly expressing their commitment to each other they voluntarily assume a range of legal rights and obligations that are from time to time assigned to marriage by the law of matrimony.<sup>30</sup> A civil marriage is a contractual relationship<sup>31</sup> between two persons who meet certain statutorily prescribed requirements and who have performed a prescribed ceremony.<sup>32</sup>

5.2.19 Marriage from the vantage point of most religions, on the other hand, is a spiritual union of couples who meet the requirements for the union that are based upon their faith's tenets.<sup>33</sup> A religious marriage ceremony usually represents a blessing of the relationship by the religious institution.

5.2.20 In some countries<sup>34</sup> a civil ceremony is mandatory and is the only type of marriage recognised by law. A religious marriage may be held following the civil

---

(a) *such fees or payments as were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his religious denomination or organization, for or by reason of any such thing done by him in terms of a prior law; or*

(b) *such fee as may be prescribed]."*

<sup>30</sup> Canada Law Commission **Briefing to the Standing Committee** 2003.

<sup>31</sup> The law also provides for an orderly and equitable resolution of their affairs when the marriage breaks down. Canada Law Commission **Beyond Conjugality** 2001.

<sup>32</sup> In the Netherlands a civil marriage is a completely separate event from a church wedding. A church wedding cannot take place until the civil marriage has been concluded. The civil ceremony is the statutory prescribed requirement for the legal consequences of marriage to follow. The religious ceremony is optional and is relevant to those with religious sentiments only. The couple with religious sentiments is free to celebrate their marriage at a religious institution of their choice after the civil ceremony.

<sup>33</sup> Since religions have autonomy in deciding which marriages they will consecrate, the requirements set by religious institutions are often more stringent than the requirements set by the law for civil marriage.

<sup>34</sup> Including Belgium, Germany, the Netherlands and Switzerland.



ceremony, but no legal consequences follow religious marriages. The roles of the church and state are clearly separated.<sup>35</sup>

5.2.21 In other countries<sup>36</sup> both church and state have the authority to solemnise a marriage which is then legally recognised. South Africa has inherited this approach from England. Since 1961, with the passing of the Marriage Act of 1961, the state has taken control over the formalities of marriage but has allowed the church to perform both the civil and religious elements of marriage in one ceremony.

5.2.22 A marriage ceremony solemnised by a marriage officer and blessed by a minister of religion (who often is, but need not be a marriage officer) in accordance with the prescripts of the Marriage Act of 1961 will result in what can be referred to as a religious marriage.

5.2.23 A religious marriage is in effect a civil marriage plus a blessing by the religious official. However, a religious marriage has legal consequences as a result of compliance with the civil element<sup>37</sup> during the blessing ceremony.<sup>38</sup>

<sup>35</sup> For the historical background to this development of civil and religious marriages, see Farlam JA at [72] – [82] in **Fourie v Minister of Home Affairs** 2005(3) SA 429 (SCA).

<sup>36</sup> Including Denmark, the United Kingdom, Greece, Ireland, Italy, Norway, Portugal, Spain, Sweden Canada and the United States.

<sup>37</sup> Compliance with the relevant requirements plus solemnisation as prescribed in the Marriage Act of 1961 will establish a valid marriage. Solemnisation of a marriage takes place as prescribed in various sections of the Marriage Act of 1961. When a couple is married by a minister of religion designated as a marriage officer in terms of the Act, the civil ceremony and the religious blessing, although separate actions, usually take place at a combined ceremony with most couples not even aware of the distinction. (For ease of reference the term "blessing" as used in the Marriage Act of 1961 will be used to refer to the religious ceremony whereas the term "solemnisation" as used in the Marriage Act of 1961 will refer to the civil ceremony.)

It is the solemnisation in compliance with the requirements as prescribed in the Marriage Act of 1961 which results in the legal consequences of a valid marriage under the Act and not the blessing. In other words, the conduct of a minister of religion who is a designated marriage officer but who merely blesses a couple in accordance with the religious institution's rites and rituals, does not comply with the solemnisation requirements as prescribed in the Marriage Act of 1961. No legal consequences will flow from the blessing of the couple although they may be married in the eyes of that religious institution.

Other requirements originate in the common law: Ascendants and descendants in the direct line ad infinitum may not marry each other. Collaterals, whether of the whole or half blood, are prohibited from intermarrying if either of them is related to their common ancestor in the first degree of descent. A married person is incapable of contracting another marriage until the subsisting marriage has been dissolved. See Sinclair **Marriage Law** 1996 at 345.

<sup>38</sup> A particular religion may set requirements for a valid religious marriage that are stricter than the requirements for a valid civil marriage. Some religions, for example, will not marry someone who has been divorced, although the person may legally marry in a civil ceremony. The opposite is also true where some faith communities do allow religious unions or marriage between same-sex couples although those unions are not legally recognised. Individual congregations of Reform

5.2.24 The effect of the proposed separation of the civil and religious aspects of marriage would be to change the South African marriage dispensation to one where a civil ceremony is mandatory and the only type of marriage recognised by law.<sup>39</sup> Same-sex couples would then be able to contract a civil marriage and receive the legal consequences currently afforded to opposite-sex couples only.

5.2.25 One of the positive aspects of this model is that it gives effect to the secular purpose of marriage without derogating from the religious marriage concept.

### **c) Civil unions**

5.2.26 The third option for affording marital rights to couples in same-sex relationships is through a civil union. This option aims at providing same-sex couples with a status parallel to marriage, but within a separate institution, and is regarded as a suitable model in many countries.<sup>40</sup>

5.2.27 Civil unions are concluded and terminated in a civil procedure. As a duplicate of marriage, civil unions award couples all the rights and obligations of a marriage relationship without actually providing for them to get married.<sup>41</sup>

5.2.28 Civil unions can be dealt with either in the Marriage Act or on their own in a separate Act. Including it in the Marriage Act, however, could create the false

---

Jews, American Baptists, Buddhists, Episcopalians, Presbyterians, Unitarians Universalists, the Society of Friends and members of the United Church of Christ, among others, have performed marriages for same-sex couples. Gay and Lesbian Advocates and Defenders "Civil Marriage for Same-Sex Couples" at 4.

<sup>39</sup> Any legislative amendment to achieve such a separation between civil and religious marriage would only affect future marriages. Since all marriages would then have to be solemnised by an ex officio marriage officer, steps would have to be taken to ensure that the civil system will be able to cope with the new burden.

<sup>40</sup> See for example the models of Vermont, Quebec and the UK discussed in chap 4 above. See also the Danish Registered Partnership Act, 1989 (Act No. 373 of 1989), the Iceland Act on Recognised Partnership of 1996, the Norwegian Registered Partnership Act, 1993 (Act No. 40 of 1993), the Swedish Registered Partnership Act of 1994, the New Zealand Property (Relationships) Act 1976 No 166 and the UK Civil Partnership Act of 2004 Chapter 33. In all of these instances the legislation provides for the registration of a same-sex partnership and that the partnership will have the same legal effects as a marriage, except as provided for in exception clauses.

<sup>41</sup> As such it would be available to conjugal couples only.

impression that civil unions are actually marriages.<sup>42</sup> A schedule containing consequential amendments would be needed.

5.2.29 The premise of this proposal is that civil unions for same-sex couples would replace the need for same-sex marriage and that the status quo regarding opposite-sex marriage would therefore be maintained.

---

<sup>42</sup> The legislation providing for civil unions for same-sex couples would read as follows:

**Definitions**

1. *In this Act, unless the context otherwise indicates-*

*"civil union" means the voluntary union of two persons of the same sex concluded in terms of this Act to the exclusion of any other union or registered partnership;*

*"civil union partner" means a partner in a civil union concluded in terms of this Act;*

*"Registered Partnerships Act" means the Registered Partnerships Act, 20.. (Act No. ... of 20..).*

**Registration of civil unions**

2. (1) *A civil union is established through the registration process for registered partnerships provided for in sections 4 to 7 of the Registered Partnerships Act, 20.. (Act No. ... of 20..).*

(2) *A person may only be a partner in one civil union at any given time.*

(3) *A married person may not register a civil union until his or her subsisting marriage has been dissolved.*

(4) *A prospective civil union partner who has previously been married or registered as a partner in a registered partnership, must present a certified copy of the divorce order, termination certificate, termination order or death certificate of the former spouse or registered partner, as the case may be, to the registration officer contemplated in the Registered Partnerships Act, 20.. (Act No. ... of 20..) as proof that the previous registered partnership or marriage has been terminated.*

(5) *The registration officer may not proceed with the registration of the civil union unless in possession of the relevant documentation referred to in subsection (4).*

(6) *A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage.*

**Legal consequences of civil unions**

3. *Except as provided for in section 4, the legal consequences of a marriage shall apply, with such changes as may be required by the context, to a civil union.*

**Termination of civil unions**

4. *The process for the termination of registered partnerships prescribed in the Registered Partnerships Act, 20.. (Act No. ... of 20..) shall apply, with such changes as may be required by the context, to civil unions.*

5.2.30 Since it was anticipated that there might be opposite-sex couples who would also like to make use of the civil union option, a second version of civil unions was included in the proposal to make them available to both same- and opposite-sex couples.<sup>43</sup> The Commission proposed that the legislation providing for civil unions for same-sex couples should read exactly the same as for opposite-sex couples, with the only difference in the definition of "civil unions".<sup>44</sup>

5.2.31 The creation of a status parallel to marriage satisfies the need for legal protection of same-sex couples while the effect for the opponents of same-sex marriage is mitigated by calling it a "civil union".<sup>45</sup>

5.2.32 However, proponents of same-sex marriage do not perceive the civil union model positively. They see civil unions as a second-class category of relationship in lieu of allowing same-sex marriage.<sup>46</sup> As such civil unions distract from the goal of making same-sex marriage available to gay and lesbian couples and, in effect, constitute discrimination.<sup>47</sup>

5.2.33 Since civil unions are designed to treat one group of citizens in a separate and inferior manner despite identical circumstances, they have been described as a "separate but equal system" reminiscent of Apartheid policies.<sup>48</sup>

5.2.34 Thus, although civil unions for same-sex couples are seen as a step forward,<sup>49</sup> they seem to be constitutionally suspect. It has been said that politicians

---

<sup>43</sup> *"civil union" means the voluntary union of two persons concluded in terms of this Act to the exclusion of any other union or registered partnership;*

<sup>44</sup> It was argued that the exclusion of opposite-sex couples from the application of civil union legislation could be subject to constitutional challenge on the basis of discrimination. To avoid that the following definition for "civil union" was used in the second version of the civil union proposal.

*"civil union" means the voluntary union of two persons of the same sex concluded in terms of this Act to the exclusion of any other union or registered partnership;*

<sup>45</sup> Canada Law Commission **Legal Regulation of Adult Personal Relationships** 2000 at 127.

<sup>46</sup> LaViolette "Registered Partnerships Model" 2001 at 21 and see also Millbank & Sant 2000 **Sydney Law Review** 2000 at 197.

<sup>47</sup> For a discussion of this point and the various angles to it, see LaViolette "Registered Partnerships Model" 2001 at 13 and further.

<sup>48</sup> Canada Law Commission **Legal Regulation of Adult Personal Relationships** 2000; Canada Law Commission **Briefing to the Standing Committee** 2003; Bala **Canadian Journal of Family Law** 2000 at 185.

who support domestic partner benefits as a compromise "have in mind only modest handouts – not the whole package".<sup>50</sup>

### 5.3 Submissions received on the proposals in the Discussion Paper

#### a) Extension of the common-law definition of marriage

5.3.1 Opponents of same-sex marriage want to preserve marriage as a time-tested and sacred institution. They feel that the legislature is not entitled to redefine a concept that they consider inseparable from its societal and religious meanings and origins.<sup>51</sup> Another argument proffered against same-sex marriage is that it may be interpreted as societal approval of homosexuality.<sup>52</sup>

5.3.2 While the Commission contended in the Discussion Paper that the right to equality is infringed by the current common-law definition of marriage, religious objectors to the proposed extension of the definition stated that the infringement is justified in view of the special status of marriage in religion. It was submitted that undermining the marriage institution would override the constitutional rights of the vast majority of Christians, Muslims, Jews and others.<sup>53</sup> It was furthermore submitted that same-sex marriage is a theological impossibility and is forbidden in the scriptures as contrary to God's will and to nature.<sup>54</sup>

<sup>49</sup> See Equal Marriage for Same-Sex Couples "Quebec Civil Union Bill" 2002.

<sup>50</sup> See Demian "Marriage Traditions" 2002. See also the critique by Gay and Lesbian Advocates and Defenders "Civil Marriage for Same-Sex Couples" at 15.

<sup>51</sup> Canada Law Commission **Beyond Conjugality** 2001.

<sup>52</sup> To which the homosexual community respond that there is nothing about homosexuality to disapprove of. There are undoubtedly many people who strongly dislike gay and lesbian people. Courts should, however, not interpret principles of fairness and equality on popular preferences. Gay and Lesbian Advocates and Defenders "Civil Marriage for Same-Sex Couples" at 23. See also the discussion of the role of public opinion under chap 2 above.

<sup>53</sup> Department of Home Affairs, H Wetmore (Pietermaritzburg North Baptist Church), C Rogers (Lifeline Vaal Triangle), N E Fick (Department Health and Welfare, Mokopane), R Maile (Sukumani Makhosikati), J Tau (Methodist Church of SA), J J Smyth QC, Prof L N van Schalkwyk (UP), Rev P Holness (Baptist Union of Southern Africa, Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa (minority submission), the Baptist Union of Southern Africa.

<sup>54</sup> The Baptist Union of Southern Africa.

5.3.3 There were also objectors who contended that the right to religious freedom would be infringed by opening up marriage to same-sex couples. Many respondents objected to this proposal on the basis of the theological, universal, common-law and statutory understanding of marriage, despite the fact that some of them recognised the need for some legal recognition of same-sex partnerships. Concern was particularly expressed that this option would be problematic if religious groups refused to conduct same-sex marriages.<sup>55</sup>

5.3.4 Respondents to the Discussion Paper who were in favour of the extension of the common-law definition of marriage were generally pleased that the Constitution is alive to the fact that the definition of marriage has changed in practice. They pointed out that the exclusions brought about by the opposite-sex definition of marriage are unjustifiable under the Constitution and unacceptable in a heterogeneous society.<sup>56</sup>

5.3.5 It was submitted that this proposal eradicates all discrimination between same- and opposite-sex couples and that it is the most practical<sup>57</sup> and the simplest solution in legal terms.<sup>58</sup>

<sup>55</sup> Adv O Rogers SC, Chairperson of the Cape Bar Council, Prof L N van Schalkwyk (Department Privaatreg UP), S F Boshelo (Department of Justice), Adv G J van Zyl (Family Advocate), Adv P Matshelo (Justice College), S Marupi (Limpopo Advice Office), M T Rangata (Department of Health and Welfare, Limpopo Province), C M Makgoba (Commission on Gender Equality), M M Vincent (University of Venda), N E Fick (Department Health and Welfare, Mokopane), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, A McGill, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), T Jordaan & W Gerber (Legal Aid Board), S Moller (FAMSA, Welkom), S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA), J J Smyth. One respondent submitted that the state may be regarded as complicit in the religion's discrimination on the basis of sexual orientation if the state designates officials of such religions as marriage officers and they refuse to conduct the ceremony. Prof E Bonthuys (WITS) proposed that the state should not designate such office bearers as marriage officers.

<sup>56</sup> Women's Legal Centre, E Naidu (Durban Lesbian and Gay Community and Health Centre), R Krüger (Rhodes University), T Jordaan & W Gerber (Legal Aid Board), M S Nkuna (Magistrate Mhala), S Masila (Magistrate Nelspruit), S Moller (FAMSA, Welkom), Adv G J van Zyl (Family Advocate), F Muller (Lifeline/Rape Crisis), Adv P Matshelo (Justice College), M M Vincent (University of Venda), M T Rangata (Department of Health and Welfare, Limpopo Province), S Marupi (Limpopo Advice Office), C Cetchen (Society for the Physically Disabled), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office).

<sup>57</sup> Eg D Milton (Member Family Law Committee Law Society of South Africa), Cape Law Society Family Law and Gender Committee.

<sup>58</sup> Prof E Bonthuys (WITS). Many respondents thought that the redefinition of marriage need not affect the institution of marriage negatively. Cape Bar Council, E Naidu (Durban Lesbian and Gay Community and Health Centre), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), M S Nkuna (Magistrate Mhala), M S Masila (Magistrate Nelspruit), S Moller (FAMSA, Welkom), F Muller (Lifeline/Rape Crisis), C Cetchen (Society for the Physically Disabled), Adv G J van Zyl (Family Advocate), Adv P Matshelo (Justice College), S Marupi (Limpopo Advice Office), C M Makgoba (Commission on Gender Equality), M Modieleng (Department of Social

5.3.6 Some respondents who were in favour of the extension of the definition to include same-sex couples were nevertheless sensitive to the sentiments of religious objectors. They contended that religious groups should be allowed to refuse to marry same-sex couples just as they are allowed to refuse to marry people who do not comply with other aspects of their religion.<sup>59</sup>

#### **b) Separation of civil and religious marriage**

5.3.7 Respondents who objected to the proposal argued that the civil and religious components of marriage are inseparable. The religious act creates the sacred institution (which is regarded as the important part) while the civil aspect of marriage provides the legal and social framework of rights and duties. It was submitted that a separation is likely to have a negative effect on the stability of marriage with a subsequent detrimental effect on society.<sup>60</sup>

5.3.8 One respondent contended that this proposal might cause discrimination against religious Christian marriages.<sup>61</sup> She referred to the Bill proposed in the Commission's Report on Islamic Marriages and Related Marriages<sup>62</sup> which provides

---

Welfare), Women's Legal Centre, E Naidu (Durban Lesbian and Gay Community and Health Centre), T Jordaan & W Gerber (Legal Aid Board), S F Boshielo (Department of Justice), S A Strauss (University of the Free State), S P Bopape (Limpopo Advice Office), R Krüger (Rhodes University), M T Rangata (Department of Health and Welfare, Limpopo Province), M M Vincent (University of Venda), M Modieleng (Department of Social Welfare), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, Cape Law Society Family Law and Gender Committee. The SACC submitted that either of the first two options would be more appropriate ways of extending civil and legal recognition to same-sex relationships than civil unions, though both have potential drawbacks.

<sup>59</sup> CALS, Cape Law Society Family Law and Gender Committee. It was submitted that a provision to confirm that no religious marriage officer would be compelled to perform a same-sex marriage ceremony would be sufficient to address the objections of the religious community. Adv G J van Zyl (Family Advocate).

<sup>60</sup> E Poulter, D Scarborough (Evangelical Fellowship of Congregational Churches), Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa. Prof L N van Schalkwyk (UP), T Jordaan & W Gerber (Legal Aid Board), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, Adv G Wright (Society of Advocates, Free State) N E Fick (Department Health and Welfare, Mokopane), J Tau (Methodist Church of SA), Department of Home Affairs, Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa (minority submission), C Cetchen (Society for the Physically Disabled), Adv G Wright (Society of Advocates, Free State), Dr W J Botha (Director: Information Dutch Reformed Church).

<sup>61</sup> Prof E Bonthuys (WITS).

<sup>62</sup> Clause 6(5) of the Bill. Project 106 of 2003.

for the legal recognition of Islamic marriages under a new Act. Customary marriages are recognised under the Recognition of Customary Marriages Act of 1998. Thus Islamic and customary marriages would be recognised as valid but other religious marriages would have no legal effect.

5.3.9 From a practical viewpoint it was submitted that in South Africa most weddings take place in churches and it would place an extra burden on the state if all marriages were to be contracted civilly.<sup>63</sup> Concern was expressed that people who are used to one ceremony would tend to enter religious marriages without completing the necessary procedures for a civil marriage. Such people would be without legal protection and it would be particularly disadvantageous to the vulnerable party in a marriage, usually the woman.<sup>64</sup>

5.3.10 Another objection was that the separation of civil and religious aspects of marriage infringes the right to religious freedom since it deprives those who are currently known as religious marriage officers of the authority that they have to solemnise legal marriage.<sup>65</sup>

5.3.11 Although many respondents were not necessarily in favour of this option, they did not think that the proposed separation of the religious and civil aspects of marriage would deduct from the sanctity of marriage.<sup>66</sup>

---

<sup>63</sup> D Milton (Member Family Law Committee Law Society of South Africa), Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa.

<sup>64</sup> CALS.

<sup>65</sup> Eg D Scarborough (Evangelical Fellowship of Congregational Churches).

<sup>66</sup> R Krüger (Rhodes University), E Naidu (Durban Lesbian and Gay Community and Health Centre), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), H Wetmore (Pietermaritzburg North Baptist Church), M S Masila (Magistrate Nelspruit), S F Boshelo (Department of Justice), S Moller (FAMSA, Welkom), Adv P Matshelo (Justice College), S A Strauss (University of the Free State), M M Vincent (University of Venda), Adv G J van Zyl (Family Advocate), F Muller (Lifeline/ Rape Crisis), C Cetchen (Society for the Physically Disabled), R Maile (Sukumani Makhosikati), SAVF/NCVV Pietermaritzburg, Rev P Holness (Baptist Union of Southern Africa), Z M Moletsane (Acting President: Central Divorce Court), Women's Legal Centre, Directorate: Gender Issues Department of Justice and Constitutional Development, CALS, R Krüger (Rhodes University), C Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), M S Nkuna (Magistrate Mhala), M S Masila (Magistrate Nelspruit), S Marupi (Limpopo Advice Office), C M Makgoba (Commission on Gender Equality), M T Rangata (Department of Health and Welfare, Limpopo Province), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), M E Keepilwe (Department of Social Development), N Maanda (Lawyers for Human Rights, Johannesburg), N E Fick (Department Health and Welfare, Mokopane), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA).

The SACC submitted that the civil component of marriage is effectively little more than a contract that mainly regulates the material aspects of households. A secular state has no authority to



5.3.12 It was further contended that this option is particularly suitable for our Constitutional dispensation and shows a commitment to the value of equality. The proposed separation would balance the view that marriage is a sacred institution with the right to equality.<sup>67</sup>

5.3.13 It was even submitted that the religious community might welcome the separation proposal because religious institutions would then decide for themselves if they wanted to bless the civil marriage of same-sex couples.<sup>68</sup>

5.3.14 Same-sex couples, on the other hand, could argue that the civil marriage model infringes their right to have a religious marriage ceremony.

### **c) Civil union**

5.3.15 Many respondents to this proposal did not regard "this separate but parallel institution" for same-sex couples as justifiable and stated that all couples need equal treatment under the law.<sup>69</sup> The option would not withstand constitutional scrutiny, and

---

recognise or regulate a covenantal relationship with God. It can only enforce the contractual aspects of the marriage and confer civil benefits on the couple. This respondent acknowledged that the Commission (on behalf of the state) is competent only to address the question of civil marriage – or, more accurately, the manner and extent to which the state gives sanction and protection to the legal and contractual aspects of domestic relationships.

<sup>67</sup> Directorate: Gender Issues Department of Justice and Constitutional Development. It was submitted that a benefit of this proposal is that it would absolve the state from allegations of complicity in discrimination on the basis of sexual discrimination. Prof E Bonthuys (WITS).

<sup>68</sup> M E Keepilwe (Department of Social Development), Pietermaritzburg Gay and Lesbian Network, Women's Legal Centre. Rev A D Vorster (Uniting Presbyterian Church in Southern Africa) proposed that the proposal actually lifts a burden off many ministers of religion who are pressurised to marry young couples who, whilst having no religious commitment themselves, nevertheless want all the trappings of a church marriage. Baptist Union of Southern Africa, H Wetmore (Pietermaritzburg North Baptist Church) emphasised that it has no objections at all to the separation of the two aspects, but that it was opposed to the legal recognition of same-sex marriage under the civil marriage element.

<sup>69</sup> Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), S F Boshielo (Department of Justice), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office), Cape Law Society Family Law and Gender Committee, Cape Bar Council, Women's Legal Centre, E Naidu (Durban Lesbian and Gay Community and Health Centre), H G J Beukes, M M Vincent (University of Venda), M T Rangata (Department of Health and Welfare, Limpopo Province), S Marupi (Limpopo Advice Office), F Muller (Lifeline/ Rape Crisis), Adv P Matshelo, C M Makgoba (Commission on Gender Equality), S Moller (FAMSA, Welkom), Prof E Bonthuys (WITS), R Krüger (Rhodes University), SACC.

it would be just a matter of time before same-sex couples objected to civil unions not having the exact same status as marriages.<sup>70</sup>

5.3.16 It was argued that unless same-sex couples are also allowed to marry, the proposal of civil unions for both same- and opposite-sex couples would not address the constitutionality problem. Inherent in this argument is the fact that if marriage is opened to same-sex couples, no overriding reason exists for civil unions to remain an option since they replicate the features of marriage under a different name.<sup>71</sup> In fact civil unions, if open to everyone, would unnecessarily compete with marriage as a valid model for unmarried partnerships.<sup>72</sup>

5.3.17 There were, however, some respondents who strongly contended that civil unions would pass constitutional muster. They said that if same-sex couples were given both the option of civil unions and registered partnerships, it would be difficult to prove unfair discrimination.<sup>73</sup>

#### **5.4 Evaluation of the proposed models: An additional option proposed**

##### First option

5.4.1 From the inputs received it was clear that in relation to the first option<sup>74</sup> the challenge facing the Commission would be to reconcile the constitutional right to equality of same-sex couples with religious and moral objections to the recognition of these relationships.

---

<sup>70</sup> Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa (minority submission).

<sup>71</sup> CALS, SACC.

<sup>72</sup> SACC.

<sup>73</sup> Department of Home Affairs, H Wetmore (Pietermaritzburg North Baptist Church), Prof L N van Schalkwyk (UP), C Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), M S Nkuna (Magistrate Mhala), M S Masila (Magistrate Nelspruit), S A Strauss (University of the Free State), C Cetchen (Society for the Physically Disabled), Adv G J van Zyl (Family Advocate), Adv G Wright (Society of Advocates, Free State), Rev P Holness (Baptist Union of Southern Africa), J J Smyth.

<sup>74</sup> The extension of the common-law definition of marriage to include same-sex couples. See para 5.2.3 and further.

5.4.2 Although no ostensibly valid legal objection was proffered against the merits of legal recognition of same-sex marriage rights, the Project Committee nevertheless considered it advisable from a policy point of view not to disregard the strong religious and moral objections against such recognition voiced in submissions and worksheets as well as at meetings. It was also clear from the Commission's comparative study that religious and moral objection to same-sex marriage is a world-wide phenomenon.<sup>75</sup>

5.4.3 The concern for the objections set out in the submissions and evaluated in terms of the international context was an important consideration in the effort to accommodate religious sentiments to the extent possible in the development of a further proposal.<sup>76</sup> This proposal could be seen as an extension of option one.

5.4.4 In terms of this proposal (the so-called Dual Act proposal) a new generic marriage Act (to be called the Reformed Marriage Act) would be enacted to give legal recognition to all marriages, including those of same and opposite-sex couples and irrespective of the religion, race or culture of a couple.<sup>77</sup> However, the current Marriage Act would not be repealed, but renamed only (to be called the Conventional Marriage Act). For purposes of this Act, the status quo would be retained in all respects and legal recognition in terms of this particular Act would only be available to opposite-sex couples. (After further consideration of this option the Commission

<sup>75</sup> In this regard it was noted that no provision has been made for the recognition of same-sex relationships anywhere in Africa (see chap 4.7 above) and that homosexuality is still a criminal offence in many states. In Australia (the Marriage Legislation Protection Act, 2004) and the USA (the Defence of Marriage Act, 1997) these objections have led to the amendment of State Constitutions and other federal legislation to protect opposite-sex marriage. As of April 2005, 17 States in the USA have constitutional provisions that define marriage as a union of one man and one woman, while 24 other States have statutes containing similar definitions. See paras 4.5.21 *et seq* and 4.6.32 *et seq* above. In the UK (the Civil Partnership Act, 2004) and New Zealand (the Civil Unions Act, 2005) provision has been made for the protection of same-sex couples by providing for a new legal status of civil partnership, whilst maintaining the institution of marriage as an opposite-sex institution only. See para 4.2.40 *et seq* above and [www.civilunions.org.nz](http://www.civilunions.org.nz) (accessed on 9 March 2006). Countries such as Denmark, Norway and Sweden furthermore make provision for registered partnerships in order to protect same-sex couples. Same-sex marriage is, however, allowed in the Netherlands, Belgium, Spain, the State of Massachusetts and Canada (for civil purposes).

<sup>76</sup> The fact that none of the models researched emanated in a constitutional dispensation such as the South African one with explicit protection of sexual orientation in an equality clause, indicated the need for a uniquely South African solution.

<sup>77</sup> The principle of reasonable accommodation could be applied by the State to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience. S 31 of the Marriage Act of 1961 and later confirmed by Sachs J in **Minister of Home Affairs v Fourie** *op cit* at [159]

finally decided, for technical reasons, to amend the current Marriage Act to become a generic Act that is available to all couples and to enact a new Act (the "Orthodox Marriage Act") for opposite-sex couples only. See the discussion in para 5.6 below.)

5.4.5 The family law dispensation in South Africa would therefore make provision for a Marriage Act of general application together with a number of additional, specific marriage Acts for special interest groups such as couples in customary marriages, Islamic marriages, Hindu marriages and now also opposite-sex-specific marriages. Choosing a Marriage Act would be regarded as a couple's personal choice, taking account of the couple's religion, culture and sexual preference.

### Second option

5.4.6 The second option,<sup>78</sup> the model of separating the religious and civil aspects of marriage, was thought to be particularly suitable to make the legal consequences of marriage available to same-sex couples in a constitutional manner.

5.4.7 However, the historical fact that in South Africa both the church and State had the authority to solemnise marriage affected the suitability of this model to afford legal recognition to same-sex couples. Since the church in South Africa was previously allowed to perform both the civil and religious aspects of marriage, a separation at this stage would have the effect that the church's existing mandate would be curtailed. The idea did not seem to be widely acceptable.<sup>79</sup>

5.4.8 In addition to the impact that this model might have on the church, it would also affect people who wanted to get married. People in South Africa who desire a religious blessing of the marriage are not accustomed to following a dual procedure. They might regard this as inconvenient and an unnecessary duplication of what

---

<sup>78</sup> See para 5.2.17 above.

<sup>79</sup> E Poulter, D Scarborough (Evangelical Fellowship of Congregational Churches), Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa. Prof L N van Schalkwyk (UP), T Jordaan & W Gerber (Legal Aid Board), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, Adv G Wright (Society of Advocates, Free State) N E Fick (Department Health and Welfare, Mokopane), J Tau (Methodist Church of SA), Department of Home Affairs, Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa (minority submission), C Cetchen (Society for the Physically Disabled), Adv G Wright (Society of Advocates, Free State), Dr W J Botha (Director: Information Dutch Reformed Church).

would normally be a single procedure. This might influence their disposition towards the legislative reform in a negative way.

5.4.9 In an even worse scenario, they might be ignorant of the changes and be left with the incorrect impression that their religious marriage was a valid marriage with legal consequences. This would leave them without refuge upon termination of the religious marriage.<sup>80</sup>

5.4.10 This option could also be at risk of being challenged on the basis of discriminating against certain religious marriages, since Islamic and customary marriages would be recognised as valid but other religious marriages would have no legal effect.

### Third option

5.4.11 As far as option 3<sup>81</sup> was concerned, the Commission was of the opinion that the constitutionality of civil unions could be successfully challenged. Since the tenet of equal treatment was an important part of the motivation for permitting same-sex marriage, the creation of a separate but equal status would be discriminatory.

## **5.5 Minister of Home Affairs v Fourie; Gay and Lesbian Equality Project v Minister of Home Affairs**

5.5.1 In December 2005 the Constitutional Court handed down judgment in the case of **Minister of Home Affairs and Another v Fourie and Another**.<sup>82</sup> In this case the Court had to consider the constitutionality of the common-law definition of marriage and of section 30(1) of the Marriage Act of 1961.

5.5.2 The applicants before the Court complained that the law excluded them from publicly celebrating their love and commitment to each other in marriage. They

---

<sup>80</sup> Cf the failure to register a customary marriage does not affect the validity of that marriage. Section 4(7) of the recognition of Customary Marriages Act of 1998.

<sup>81</sup> See para 5.3.15 *et seq* above.

<sup>82</sup> 2006 (1) SA 524 (CC).

contended that the exclusion was due to the common-law definition which states that marriage in South Africa is a union of one man with one woman, to the exclusion of all others, while it lasts.<sup>83</sup>

5.5.3 The Gay and Lesbian Equality Project was allowed direct access by the Constitutional Court to be heard in the case of **Fourie**. The applicants in this case challenged section 30(1) of the Marriage Act of 1961.<sup>84</sup>

5.5.4 Both cases raised the question whether the absence of provision for same-sex couples to marry amounts to a denial of equal protection of the law and unfair discrimination by the state against them on the basis of their sexual orientation, contrary to the provision of the Constitution guaranteeing the right to equality and dignity. Should this be the case, the second question was what the appropriate remedy should be.<sup>85</sup>

5.5.5 Sachs J wrote the judgment of the Constitutional Court, which was unanimous on all matters except in relation to the remedy. The Court came to the conclusion that:

[114] .... the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law under

---

<sup>83</sup> At [2].

<sup>84</sup> Section 30(1) of the Marriage Act of 1961 provides as follows:

**Marriage formula**

**30** (1) In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:

'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?',

and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:

'I declare that A.B. and C.D. here present have been lawfully married.'.

<sup>85</sup> Media Summary available at <http://www.constitutionalcourt.org.za/site/gaylesb.htm> (accessed on 22 January 2006)

section 9(1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution. Furthermore, and for the reasons given in *Home Affairs*, such failure represents an unjustifiable violation of their right to dignity in terms of section 10 of the Constitution.

5.5.6 With regard to the source of the unconstitutionality, Sachs J said:

[117] The problem is not what is included in the common law definition and the Act, but what is left out. The silent obliterations of same-sex couples from the reach of the law, together with the utilisation of gender-specific language in the marriage vow, presupposes that only heterosexuals are contemplated.

[120] It is clear that just as the Marriage Act denies equal protection and subjects same-sex couples to unfair discrimination by excluding them from its ambit, so and to the same extent does the common law definition of marriage fall short of constitutional requirements.

5.5.7 The Court subsequently ordered that:

- \* the common-law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and benefits it accords to opposite-sex couples.
- \* the omission from section 30(1) of the Marriage Act of 1961 after the words "or husband" of the words "or spouse" is declared to be inconsistent with the Constitution, and the Marriage Act is invalid to the extent of this inconsistency.

5.5.8 In considering the question whether the Court was obliged to provide immediate relief or whether it should suspend the order of invalidity to give Parliament a chance to remedy the defect, Sachs J came to the conclusion that the correction by the Court itself should be delayed for an appropriate period so as to give Parliament itself the opportunity to correct the defect. He said that the circumstances of the present case called for an enduring and stable legislative appreciation and that a temporary measure was unlikely to achieve the enjoyment of equality.<sup>86</sup>

5.5.9 Of particular significance for this investigation and the evaluation of the

---

<sup>86</sup> At [135] and [136].

options that were proposed in the Discussion Paper were the arguments raised by the State and the amici (Doctors for Life International and the Marriage Alliance of South Africa) in this case.

5.5.10 They contended that, given that there is discrimination against same-sex couples, the remedy does not lie in radically altering the law of marriage. They objected to any remedial measures being assimilated into the traditional institution of marriage or permitting unions of same-sex couples to be referred to as marriages. The answer, they said, was to provide appropriate alternative forms of recognition to same-sex family relationships.<sup>87</sup>

5.5.11 Four main arguments were advanced in support of the proposition that whatever remedy is adopted, it must acknowledge the need to leave traditional marriage intact. These arguments were the following.<sup>88</sup>

- \* Same-sex relationships lack procreative potential, therefore they could never be regarded as marriages, whatever form of legal recognition is given to them.
- \* To disrupt and radically alter an institution of centuries-old significance to many religions would infringe the Constitution by violating religious freedom in a most substantial way.
- \* International law recognises and protects opposite-sex marriage.
- \* Section 15(3) of the Constitution presupposes special legislation governing separate systems of family law to deal with different family situations. This means that the Constitution envisaged that same-sex couples should be protected through special laws which would not interfere with the hallowed institution of marriage.

5.5.12 After discussing all of these arguments and turning each of them down in turn, Sachs J stated that the need to accord an appropriate degree of respect to

---

<sup>87</sup> **Minister of Home Affairs v Fourie** *op cit* at [83]. This argument corresponds with the civil union and registered partnership options of the Commission.

<sup>88</sup> See para 3.2.58 *et seq* above for a discussion of these arguments by the Court.



traditional concepts of marriage did not as a matter of law constitute a bar to vindicating the constitutional rights of same-sex couples to take part in the institution of marriage. He continued as follows:

a further question arises: has justification in terms of section 36 of the Constitution been shown to exist for the violation of the equality and dignity rights of these couples?

5.5.13 The Court then went on to consider the question whether there might be justification, in terms of section 36 of the Constitution, for the violation of the equality and dignity of same-sex couples wanting to get married. Two arguments were advanced by the amici as justification. The first was that the inclusion of same-sex couples in marriage would undermine the institution of marriage. The second was that the inclusion would intrude upon and offend against strong religious susceptibilities of certain sections of the public.<sup>89</sup>

5.5.14 Sachs J dealt with both these arguments<sup>90</sup> and concluded that they could not be upheld. He said that, objectively speaking, these arguments were profoundly demeaning to same-sex couples and inconsistent with the constitutional requirement that everyone be treated with equal concern and respect. He said that the factors that were advanced might have some relevance in the search for effective ways to provide an appropriate remedy that enjoys the widest public support. The arguments could not, however, justify the continuing discrimination of excluding same-sex couples from the institution of marriage.

5.5.15 In his conclusion Sachs J then clearly stated that the solution lay in the correction of the Marriage Act and the common-law definition of marriage, hence the order for the amendment of the Marriage Act if Parliament fails to correct the defects in the legislation by 1 December 2006.

5.5.16 Sachs J noted that since this matter touches deep public and private sensibilities and has great public significance, Parliament is well-suited to finding the best ways of correcting the defects.<sup>91</sup> He also made it clear that an interim arrangement that would be replaced by subsequent legislative determinations by

---

<sup>89</sup> See para 3.2.58 *et seq* above for a discussion of these arguments by the Court.

<sup>90</sup> See the discussion in para 3.2.64 *et seq* above.

<sup>91</sup> At [138] and [147].

Parliament would not be in keeping with the stability normally associated with marriage.<sup>92</sup>

5.5.17 With reference to the number of legislative initiatives already undertaken by Parliament and which demonstrates its concern to end discrimination on the ground of sexual orientation, Sachs J said that Parliament should be able to shoulder its responsibilities in this respect within the framework established by the judgment. Referring to the extensive research done by the Commission, he concluded that enacting the necessary legislation would be the culmination of a process that has been under way for many years.<sup>93</sup>

5.5.18 The Court subsequently suspended these declarations of invalidity for 12 months to allow Parliament to correct the defects. The Court further ordered that should Parliament fail to correct the defects within this period:

Section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words "or spouse" after the words "or husband" as they appear in the marriage formula.

5.5.19 Without pronouncing on the constitutionality of any particular legislative route, the Court noted that there are different ways in which the legislature could legitimately deal with the gap that exists in the law.<sup>94</sup> After discussing the various options proposed during the case, the Court referred to two options, namely the simple reading in of the words "or spouse" in section 30 of the Marriage Act and the final option canvassed in the Commission's memorandum (as discussed in para 5.4 above)<sup>95</sup> as firm proposals for legislative action that would appear to be ripe for consideration by Parliament.<sup>96</sup>

5.5.20 The Court indicated that although the constitutional terminus in both these two options would be the same, the legislative formats adopted for reaching the end-

---

<sup>92</sup> At [154].

<sup>93</sup> At [155].

<sup>94</sup> At [139].

<sup>95</sup> At [140] and [141]. Before hearing the case in May 2005, the Chairperson of the Commission, Mokgoro J, requested a progress report and summary of the options considered by the Commission. This was made available to the Court via a memorandum.

<sup>96</sup> At [147].

point would be vastly different. It said that this is an area where symbolism and intangible factors play a particularly important role. What might appear to be options of a purely technical character could have quite different resonances for life in public and in private. The greater the degree of public acceptance for same-sex unions, the more will the achievement of equality be promoted.<sup>97</sup>

5.5.21 With regard to the first option Sachs J said the following:<sup>98</sup>

[159] Reading-in of the words “or spouse” has the advantage of being simple and direct. It involves minimal textual alteration. The values of the Constitution would be upheld. The existing institutional mechanisms for the celebration of marriage would remain the same. Budgetary implications would be minimal. The long-standing policy of the law to protect and enhance family life would be sustained and extended. Negative stereotypes would be undermined. Religious institutions would remain undisturbed in their ability to perform marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only. The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience. If Parliament wished to refine or replace the remedy with another legal arrangement that met constitutional standards, it could still have the last word.

5.5.22 With regard to the Dual Act proposal, the Court stated that this proposal is comprehensive in character and is based upon Parliament adopting a legislative scheme for marriage and family law based on acknowledgement of the diverse ways in which conjugal unions have come to be established in South Africa. The Court said that one of the features of such a scheme would be that it provides for equal status to be accorded to all marriages.<sup>99</sup>

5.5.23 With regard to the ostensible special treatment of religious marriages in the Dual Act proposal, it is significant that the Court said the following:

[152] It is precisely sensitivity to context and impact that suggest that equal treatment does not invariably require identical treatment. Thus corrective measures to overcome past and continuing discrimination may justify and may even require differential treatment. Similarly, measures based on objective

---

<sup>97</sup> At [139].

<sup>98</sup> The Court pointed out that amending the marriage formula to include "spouse" would effectively amend the common law definition of marriage to include same-sex couples. This option corresponds with option 1 of the Commission in that the common law-definition of marriage would be extended to include same-sex couples. This is also what would become the legal position if Parliament fails to correct the defect in the Marriage Act by 1 December 2006.

<sup>99</sup> At [141].

biological or other constitutionally neutral factors, such as those concerning toilet facilities or gender-specific search procedures, might be both acceptable and desirable. The crucial determinant will always be whether human dignity is enhanced or diminished and the achievement of equality is promoted or undermined by the measure concerned. Differential treatment in itself does not necessarily violate the dignity of those affected. It is when separation implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status that it becomes constitutionally invidious.

5.5.24 The Court added, however, that these two options would not necessarily exhaust the legislative paths which could be followed to correct the defect. The following guiding principles were set out to assist the legislature:

- \* The objective of the new measure must be to promote human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>100</sup>
- \* Parliament should avoid a remedy that on the face of it would provide equal protection, but do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation. The Court warned that the historical concept of "separate but equal" should not be used to serve as a cloak for covering distaste for or repudiation by those in power of the group subjected to segregation. The Court also said that it frequently happens that when proposals are made for recognising same-sex unions in desiccated and marginalised forms, proponents of such segregation deny any intention to cause insult. On the contrary, they would justify the apartness as being a reflection of a natural or divinely ordained state of affairs. Alternatively they would assert that the separation was neutral if the facilities provided by the law were substantially the same for both groups.<sup>101</sup>
- \* However, equal treatment does not invariably require identical treatment.<sup>102</sup> The crucial determinant will always be whether human dignity is enhanced or diminished and the achievement of equality is promoted or undermined by the measure concerned. It is when separation

---

<sup>100</sup> At [149].

<sup>101</sup> At [150].

<sup>102</sup> At [152].

implies repudiation, or connotes distaste or inferiority, that it becomes constitutionally invidious.

- \* Whatever legislative remedy is chosen, it must be as generous and accepting towards same-sex couples as it is to heterosexual couples. It must be truly and manifestly respectful of the dignity of same-sex couples.<sup>103</sup>

5.5.25 Responses to the judgment of the Constitutional Court in **Minister of Home Affairs v Fourie** were diverse. In its reaction to the judgment, the African National Congress expressed its support for a change to the law. Most church societies, headed by the influential Anglican Church, said that they would accept the judgment, but in particular appreciated the Court's note that no one is obliged to perform a same-sex marriage ceremony. The South African Council of Churches noted that, for many lesbian and gay people, the Court's decision came as a joyful affirmation of their humanity and dignity.<sup>104</sup>

5.5.26 The Marriage Alliance of South Africa, one of the amici before the Court, said "we endorse and support the court's referral of the matter to Parliament and thereby placing the final responsibility for the outcome on civil society and the people of South Africa."<sup>105</sup>

5.5.27 While the Dutch Reformed Church, in line with other major protestant churches, was relatively neutral, a spokesperson for the Catholic Church said that it would never recognise gay or lesbian marriages.<sup>106</sup>

5.5.28 The Council of Muslim Theologians said that the judgment is a step backward that will have serious repercussions on the moral and social fabric of society.<sup>107</sup> The

---

<sup>103</sup> At [153].

<sup>104</sup> **afrol News** "Church, ANC Welcome Same-Sex Marriage Ruling" available at <http://www.afrol.com/articles/17515> (accessed on 19 January 2006).

<sup>105</sup> Mail & Guardian online "Muslim Council Condemns Gay-Marriage Judgment" available at [http://www.mg.co.za/articlePage.aspx?articleId=258422&area=/breaking\\_news/breaking\\_news\\_national/](http://www.mg.co.za/articlePage.aspx?articleId=258422&area=/breaking_news/breaking_news_national/) (accessed on 19 January 2006).

<sup>106</sup> **afrol News** "Church, ANC Welcome Same-Sex Marriage Ruling" available at <http://www.afrol.com/articles/17515> (accessed on 19 January 2006).

<sup>107</sup> Mail & Guardian online "Muslim Council Condemns Gay-marriage Judgment" available at [http://www.mg.co.za/articlePage.aspx?articleId=258422&area=/breaking\\_news/breaking\\_news\\_national/](http://www.mg.co.za/articlePage.aspx?articleId=258422&area=/breaking_news/breaking_news_national/)

Baptist Union of Southern Africa stated that it does not believe that the changes caused by the judgment are in the interest of the Country, its families, its children or any of its people. It further said that such a change is not believed to be democratic as it would not reflect the convictions of the majority of South Africans.<sup>108</sup> In similar vein, the National House of Traditional Leaders said in a statement that they respected the judgment but that they are "generally disappointed that this immoral practice has been given a lifeline by our courts."<sup>109</sup>

## 5.6 Recommendation of the Commission

5.6.1 In the final analysis it is clear that the Commission has four options for legislative reform to choose from:

- \* to extend the common-law definition of marriage in the current Marriage Act to apply to same- and opposite-sex couples;
- \* to extend the common-law definition of marriage in the current Marriage Act to apply to same- and opposite-sex couples, and enact another Marriage Act to apply to opposite-sex marriages only;
- \* to separate the civil and religious aspects of marriage; and
- \* to create civil unions for all couples.

5.6.2 As seen above,<sup>110</sup> the constitutionality of the proposal to separate the civil and religious aspects of marriage is doubtful and the option is perceived to be impractical.

5.6.3 Similarly, the Constitutional Court has indicated that civil unions for same-sex couples will be unconstitutional.<sup>111</sup>

---

[national/](#) (accessed on 19 January 2006).

<sup>108</sup> **Pretoria News** "Same-Sex Marriages Dismay" 29 December 2005.

<sup>109</sup> **IOL** "Traditional Leaders against Law on Gay Unions".

<sup>110</sup> Para 5.4.12 *et seq* above.

<sup>111</sup> See the discussion of the judgment in **Minister of Home Affairs v Fourie** above and in particular para 5.5.24.

5.6.4 As far as the first two options are concerned, it is clear from the judgment in **Minister of Home Affairs v Fourie** that the first option (to extend the common-law definition of Marriage and amend the Marriage Act accordingly) must be the Commission's first choice. The Commission agrees with the Court that the constitutional defect in the Marriage Act must be addressed and therefore recommends that the Marriage Act be amended by the insertion of a definition of marriage to the effect that it is available to same- and opposite-sex couples. In addition, section 30(1) of the Act should also be amended by the insertion of the words "or spouse" in the marriage formula after the words "wife (or husband)". For this purpose a definition of "spouse" should also be inserted to define it as a partner in a valid marriage.

5.6.5 This amendment will satisfy the equality provision of the Constitution as set out in section 9. The following statement made by the Canadian Government to explain its own legislative developments in this regard, aptly expresses the Commission's sentiment in this regard:<sup>112</sup>

The Government cannot, and should not, pick and choose whose rights they will defend and whose rights they will ignore. If the fundamental rights of one minority can be denied, so potentially can those of others. This bill will respect and defend the Charter rights of all Canadians.

**5.6.6 The Commission thus recommends:**

- a) **the amendment of the Marriage Act of 1961 by the insertion of a definition of marriage that extends marriage in terms of that Act to same- and opposite-sex couples;**
- b) **the amendment of the Marriage Act of 1961 by inserting a definition of the word "spouse"; and**
- c) **the amendment of the marriage formula in the Marriage Act of 1961 to include the words "or spouse".**<sup>113</sup>

<sup>112</sup> Canada Department of Justice Newsroom "Civil Marriage Act" 2005 available at [http://www.canad.justice.gc.ca/en/news/nr/2005/doc\\_31376.html](http://www.canad.justice.gc.ca/en/news/nr/2005/doc_31376.html) (accessed on 14 February 2006).

<sup>113</sup> A further recommendation is the extension of the definition of "spouse" to other legislation. This provision aims to obviate the need for further consequential amendments at this stage. It is

### 5.6.7 The enactment of this recommendation should read as follows:

#### **Amendment of section 1 of Act 25 of 1961**

1. Section 1 of the Marriage Act, 1961 (in this Act referred to as the principal Act), is hereby amended-

(a) by the insertion after the definition of "magistrate" of the following definition:

"marriage' means the voluntary union of two persons concluded in terms of this Act to the exclusion of all others;"; and

(b) by the insertion after the definition of "prior law" of the following definition:

"spouse' means a lawful partner of a person in a valid marriage concluded in terms of this Act;".

#### **Amendment of section 30 of Act 25 of 1961**

2. Section 30 of the principal Act is hereby amended by the inclusion in subsection (1) of the words "or spouse" after the words ("or husband").

5.6.8 However, as was submitted earlier, the matter does not end there. The Commission regards it as important from a policy point of view to accommodate the religious and moral objections that were raised against the recognition of same-sex marriage. The same sentiment was displayed by the Constitutional Court where it referred to the fact that religious objections have relevance in the search for effective ways to provide an appropriate remedy, although they cannot serve to justify continued discrimination.<sup>114</sup>

---

envisaged that a schedule of specific amendments will be included in the Bill before submission to Parliament after the policy decisions have been made. It is recommended that this clause reads as follows.

#### **Insertion of section 39B**

3. The following section is hereby inserted in the principal Act, after section 39A:

##### **"Miscellaneous**

**39B.** Any reference to spouse in any other law includes a spouse as defined in this Act."

<sup>114</sup> Sachs J in **Minister of Home Affairs v Fourie** *op cit* at [113]. One of the Project Committee members, Ms Beth Goldblatt, argued that the landscape (the context within which decisions have to be made) has changed as a result of the judgment in **Minister of Home Affairs v Fourie**. She could therefore not endorse the decision of the Committee to go ahead with its recommendation with respect to the issue of the creation of a new piece of legislation entitled the "Orthodox Marriage Act" in addition to a generic Act. She is of the opinion that the Marriage Act (if amended as recommended in this Report to include same sex couples) provides adequate protection for religious couples and religious marriage officers who wish to be married and conduct marriages in accordance with their specific religious convictions. She believes that the creation of a separate Act to appease those couples who do not wish to be married under the same piece of legislation as same sex couples is offensive towards gay and lesbian people in our society and contradicts the spirit of tolerance, equality and dignity that we are trying to foster in terms of



5.6.9 It is already accepted practice in our law that marriage officers are not compelled to solemnise marriages which do not conform to the rites, formularies, tenets, doctrines or discipline of their specific religious denominations.<sup>115</sup> The Constitutional Court has furthermore confirmed this principle.<sup>116</sup> Supporters of option 1 contend that this protection should be enough to satisfy the guarantee of freedom of conscience and religion set out in section 15 of the Constitution.

5.6.10 However, Sachs J pointed out in **Minister of Home Affairs v Fourie** that the legislative solution to the invalidity of the common law and the Marriage Act is an area where symbolism and intangible factors play a particularly important role. He went on to say that what might appear to be options of a purely technical character could have quite different resonances for life in public and in private.<sup>117</sup>

5.6.11 The insistence by some religious observers on marriage as an exclusively opposite-sex institution is a matter that emanates from religious dogma in the sense that the religious sacrament of marriage is believed to be available to opposite-sex couples only. Marriage therefore has a specific meaning within the church, and when marriage officers solemnise marriages in their churches they want to do so according to that meaning and not any other secular interpretation. Religious objectors therefore desire marriage (with its intrinsic symbolic value) at which they officiate to be distinguishable from the legal recognition given to same-sex couples.

5.6.12 It has already been established that it is not possible to attain this goal through a separate institution such as civil unions, as has been done in some countries. The State has to accord equal protection to all people. However, the Constitution does allow for specific protection of religious practices under section 15(3).

---

South Africa's new constitutional order.

<sup>115</sup> See s 31 of the Marriage Act of 1961.

<sup>116</sup> **Minister of Home Affairs v Fourie** *op cit* at [97].

<sup>117</sup> At [139].

5.6.13 Section 15(3) of the Constitution allows legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law, subject to consistency with the other provisions of the Constitution.

5.6.14 The Constitutional Court pointed out in **Minister of Home Affairs v Fourie** that section 15(3) is indicative of constitutional sensitivity in favour of acknowledging diversity in matters of marriage.<sup>118</sup> A separate Act would therefore provide State sanction for the solemnisation (not only the blessing) of a marriage according to the specific dogma of a religious group in its own sphere of operation. The Commission does not believe that such a sanction will impact on the dignity and respect of same-sex couples who do not subscribe to such a church's dogma.

5.6.15 It is important to realise that although most religions are not ready yet to re-evaluate the sacrament of marriage, recognition of the need to protect the dignity and other rights of same-sex couples is nevertheless acknowledged. Evidence of internal debates<sup>119</sup> in churches regarding this matter has furthermore been noted and although it is the Commission's opinion that the climate of opinion has not advanced sufficiently for all churches to accept same-sex marriage, provision is made in the legislation to accommodate developments of this nature should they occur.<sup>120</sup> This is, however, a matter best left to individual faiths to decide.

5.6.16 It is also interesting to note that in those countries that have recently acknowledged the rights of same-sex couples, great care has been taken to ensure that a distinction can be drawn between the responsibilities of State and church.<sup>121</sup>

---

<sup>118</sup> At [109]

<sup>119</sup> **Pretoria News** "Gay Rights Threaten to Split Anglicans" 21 September 2005; **Pretoria News** "Anglican Leaders Meet to Ponder Divisive Issue of Gay Bishops" 22 February 2005; **Die Burger** "Kerkleiers Verdeeld oor Gay-Troues" 2 December 2005; **Die Burger** "Kerke Vra Referendum in SA oor Gay-Troues" 17 December 2004; **Volksblad** "Skerp Reaksie oor Gay Huwelike" 1 Desember 2004; **Sunday Independent** "Churches Call for Referendum on Gay Marriage" 12 December 2004. **Rapport** "Anglikane Wroeg Ook oor Gays en Lesbiërs" 12 March 2006; "Churches Initiate a Broad discussion of Same-Sex Marriage" 7 February 2006 available at <http://www.sacc.org.za/news06/ssmsem.html> (accessed on 1 March 2006); **Beeld** "Gays en Naasteliefde: Kerk moet hom afvra of dië Veroordeling nog Geldig is" 23 Maart 2006.

<sup>120</sup> The legislation makes provision for the possibility of religious marriage officers to solemnise same-sex marriage, at any time, if they so choose.

<sup>121</sup> In keeping with the secular nature of the UK Civil Partnership Act, the legislation specifically provides that registration may not take place on religious premises and there is to be no religious ceremony during the registration.

In Canada access to marriage was extended to same-sex couples for civil purposes. It was clearly stated that the title speaks of civil marriage only in order to make it clear that religions will

5.6.17 The Commission therefore recommends<sup>122</sup> as its second choice, that in addition to the amended Marriage Act, a new Marriage Act be enacted that will apply to opposite-sex couples only (the so-called Dual Act option). This new Marriage Act will principally be the same in content as the current Marriage Act, except for the definition of marriage which would refer to opposite-sex couples only. This Act will be named the "Orthodox Marriage Act"<sup>123</sup> and the amended Marriage Act will be called the "Reformed Marriage Act". The Constitutional Court has referred to this combination of the two pieces of legislation as a firm proposal.<sup>124</sup> (The names of the recommended Acts are for convenience only and can of course be changed.)

5.6.18 In view of the Court's remarks regarding substantive equality, it is submitted that the differential treatment of opposite-sex couples who would choose to be treated differently would not violate their dignity. Nor would the dignity of same-sex couples be infringed if specific provision were made in legislation for a particular religious group.<sup>125</sup>

5.6.19 Amending the Marriage Act to be a generic Act and enacting the Orthodox Act<sup>126</sup> for opposite-sex couples only, will give effect to the second proposal as set out in the judgment of the Constitutional Court at para 141. The Constitutional Court said

---

continue to make their own decisions about the question of same-sex marriage. In addition to section 3 of the Act, which deals with the freedom of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs, s 3(1) has been added and reads as follows:

3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

<sup>122</sup> See para 5.4 above.

<sup>123</sup> "Orthodox" refers to the confirmation of closely followed traditional beliefs and practices of a religion. Oxford **Advanced Learner's Dictionary of Current English** 6<sup>th</sup> edition Oxford University Press 2000

<sup>124</sup> At [147].

<sup>125</sup> At [152].

<sup>126</sup> If this recommendation is followed it might be necessary to give the amended Marriage Act a specific name, such as "Reformed Marriage" Act in order to differentiate between "orthodox marriages" and "reformed marriages".

that one of the features of this option is that it would provide for equal status for all marriages, whatever the system under which they were celebrated.<sup>127</sup>

5.6.20 Only religious marriage officers would be appointed in terms of the Orthodox Marriage Act and therefore only religious marriages will be solemnised in terms of this Act. It is foreseen that the Orthodox Marriage Act will ultimately resort with the Islamic Marriages Act, the Recognition of Customary Marriages Act, 1998, and perhaps a Hindu Marriage Act in a “religious marriages” category of legislation. The proposed Reformed Marriage Act will be the generic Act which will be open to everybody and any religions that choose not to make use of their own Acts. The State will appoint its marriage officers in terms of the Reformed Marriage Act.

5.6.21 The Commission submits that this proposal addresses the religious concerns expressed by some respondents to the Discussion Paper to the extent that it is possible to do so in the current constitutional framework. It will furthermore give effect to the right to religious freedom as protected in section 15 of the Constitution.

5.6.22 The Commission accepts that many religious objectors may still object to the recommended reform. However, the Commission believes that the recommended legislation will be able to withstand constitutional scrutiny, which has always been the determinative consideration.

**5.6.23 The Commission makes the following recommendation:**

- a) the enactment of an Orthodox Marriage Act (in addition to the enactment of a generic Marriage Act) in the same format as the current Marriage Act, with a limited definition of "orthodox marriage";<sup>128</sup>**

---

<sup>127</sup> At [141]. See fn 90 above.

<sup>128</sup> The new specific Marriage Act will be based on the text and format of the Marriage Act of 1961, with the following deviations:

- insertion of a definition of orthodox marriage in s 1;
- omission of s 2;
- insertion of a new s 2(2);
- omission of former s 7;

- b) the provision for the appointment of religious marriage officers in terms of this Act;
- c) the insertion of section 27 with the aim of ensuring that orthodox marriages are recognised as valid marriages for all purposes.

**5.6.24 The enactment of this recommendation should read as follows:<sup>129</sup>**

*“orthodox marriage” means the voluntary union of a man and a woman concluded in terms of this Act to the exclusion of all others;*

***Designation of ministers of religion and other persons attached to churches as marriage officers***

*2. (1) The Minister and any officer in the public service authorised thereto by him or her may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organisation to be, so long as he or she is such a minister or occupies such position, a marriage officer for the purpose of solemnising orthodox marriages according to the tenets of the religious denomination or organisation concerned.*

*(2) Any person who, at the commencement of this Act, is a marriage officer under the provision of section 3 of the Marriage Act, 1961 (Act No. 25 of 1961), will continue to have authority to solemnise marriages, but will exercise such authority in accordance with the provisions of this Act.*

*(3) A designation under subsection (1) may further limit the authority of any such minister of religion or person to the solemnisation of orthodox marriages-*

*(a) within a specified area; or*

- 
- omission of former s 30;
  - omission of former s 39;
  - insertion of "orthodox" in former s 40;
  - insertion of s 27; and
  - the use of the term "orthodox marriage" throughout.

The reason for the omission of s 2 is that the State will appoint its civil marriage officers under the Reformed Marriage Act only. Consequently, several other minor amendments where reference was made to civil marriage officers will have to be effected throughout. Section 2(2) will have to be inserted to ensure that all religious marriage officers retain their appointment under the Marriage Act of 1961. Former s 7 will be omitted in view of the new s 2(2). Former s 30 will be omitted in view of the fact that only religious marriage officers will be marriage officers under this Act. Former s 39 will be omitted as it is redundant. The wording of former s 40 will have to be amended to fit the new Act.

<sup>129</sup>

See Annexure D for the complete text of the recommended Act.

*(b) for a specified period.*

**Miscellaneous**

*27. Where applicable, any reference to marriage in any other law includes an orthodox marriage as contemplated in this Act.*

5.6.25 The Bill has been shaped by consultation with stakeholders and the public at large. The Commission wishes to echo the words of Baroness Scotland of Ashtal,<sup>130</sup> which read as follows:

There is division - but the Government have sought to walk a path between the areas of disagreement, one of proportionality, fairness and balance. We hope that we have created sufficient comfort for those who disagree on some of these issues to make it possible, as the debate has demonstrated, for us to walk together, even though our steps may be at a slightly different pace. We believe that is certainly worth doing.

5.6.26 Should the legislature, however, decide to dismiss the strong religious objections against same-sex marriage as prejudice and prefer to adopt the simplest option by merely amending the Marriage Act of 1961, the recommendation for the enactment of the second Act will simply fall away.

---

<sup>130</sup> House of Lords Second reading of the Civil Partnership Bill: 22 April 2004 Column 432 available at <http://www.civilpartnerships.org.uk/staticpages/index.php?page=2004042703232181> (accessed on 8 March 2006).

## CHAPTER 6: REGISTERED PARTNERSHIPS

### 6.1 Introduction

6.1.1 Even if marriage is made available to both same- and opposite-sex couples, this will not address the need for protection of people in functional family relationships who do not wish to or who are unable to get married for different reasons.

6.1.2 Firstly, not all same-sex couples favour marriage, and many see it as an oppressive institution that is wrongly presented by a heterosexual society as the norm against which all other relationships should be measured.

6.1.3 Secondly, many opposite-sex couples deliberately choose not to get married because they do not desire the consequences that attach to marriage. The legislature must respect the autonomy of partners in both these categories.<sup>1</sup>

6.1.4 Thirdly, a further category of relationships exists where the partners are not married because one of the partners does not want to get married. The other partner, who is often not in a position to insist on marriage, is generally referred to as the vulnerable partner in such a relationship and may be in dire need of legal protection.

6.1.5 Fourthly, adult individuals in non-conjugal but close personal relationships based on emotional or economic interdependency may also be in need of formalising their interdependent relationship in order to provide for one another upon the death of one of them. These couples are often referred to as care-partners.<sup>2</sup>

---

<sup>1</sup> Same- and opposite-sex couples with moral objections against the gender and patriarchal connotations of marriage as an institution prefer the registered partnership model. Bala **Canadian Journal of Family Law** 2000 at 185.

<sup>2</sup> Some regard registered partnerships as pre-eminently a model by which non-conjugal partners can formalise a relationship of mutual rights and obligations, particularly in relation to third party entitlements. The question has been posed why two individuals who wish to undertake mutual obligations should be required to have a particular kind of emotional commitment or sexual relationship? Bala **Canadian Journal of Family Law** 2000 at 39 fn 149.

6.1.6 The Commission considered various models to accommodate such couples. One possibility is that of registered partnership.

## 6.2 Registered partnership model

6.2.1 A registered partnership model enables unmarried partners to register their mutually dependent domestic relationship in order to gain official state and societal recognition.

6.2.2 The term "partnership" therefore refers to an interdependent and established personal relationship outside of marriage and "registered" refers to a system that requires partners to identify themselves to the relevant authorities through a prescribed process.<sup>3</sup>

6.2.3 The partners are required to take the prescribed steps to commit themselves publicly to their relationship before the relationship will have any legal consequences. The legal consequences of registration as well as a process for termination of the relationship are determined in legislation.<sup>4</sup>

6.2.4 The registered partnership model's qualities of stability, certainty and publicity make registered partnerships comparable to marriage, and the rights and obligations that the couple acquire upon registration are often similar to marriage.<sup>5</sup>

6.2.5 Furthermore, the requirement of voluntariness of this model affirms the values of equality, autonomy and freedom of choice.<sup>6</sup>

---

<sup>3</sup> LaViolette "Registered Partnerships Model" 2001 at 2.

<sup>4</sup> LaViolette "Registered Partnerships Model" 2001 *ibid*.

<sup>5</sup> Canada Law Commission **Beyond Conjuality** 2001. Many gay and lesbian activists regard registered partnerships to be an acceptable compromise when viewed as a political strategy. They see marriage as an alternative or stepping-stone to marriage. In Australia and New Zealand surveys showed that gay and lesbian couples preferred registered partnerships to same-sex marriage. LaViolette "Registered Partnerships Model" 2001 at 15 refers to a survey by Sarantakos which showed that 80% of lesbian and gay couples indicated that marriage was not their preferred option with the majority choosing registered partnerships as the best form of partnership recognition. In this survey, many of the Australians and New Zealanders characterised marriage as antiquated and not a step to liberation but to subjugation. Sarantakos **Alternative Law Journal** 1999 at 79. See also Millbank & Sant **Sydney Law Review** 2000 at 185 and fn 28. Also LaViolette "Registered Partnerships Model" 2001 at 16.



6.2.6 The fact that the existence of the relationship is officially recorded through the registration process is an important characteristic of this model. Because of the public record element, registered partnerships can regulate rights between partners, entitlements and obligations involving third parties and, in some cases, parenting rights.<sup>7</sup>

6.2.7 The formal termination process of the registered partnership ensures a public, orderly and equitable resolution of the parties' affairs.

6.2.8 Under a model where relational status is ascribed to certain relationships over a period of time, it is often necessary to examine individual relationships closely to decide whether they fit the definition of a committed relationship.<sup>8</sup> However, since a registered partnership model provides certainty about the legal status of the close personal relationship from the date of registration, there is generally no reason to subject the relationship to scrutiny.

6.2.9 Nevertheless, the registered partnership model does not pose a real solution to the vulnerable partner in an intimidating relationship. Such an individual will not be able to convince the stronger partner to register the relationship any more than he or she would be able to convince the stronger partner to get married or to enter into a cohabitation agreement.

6.2.10 There are various versions of registered partnership models. The differences between these versions mainly relate to eligibility requirements and the levels of benefits and obligations incurred by a couple through the registration process. See also the discussion of civil unions in chapter 5 above.

6.2.11 In order to categorise the various versions of registered partnership models, marriage can be used as the measure.<sup>9</sup> This means that marriage is taken as the

---

<sup>6</sup> Law Commission Canada **Beyond Conjuality** 2001.

<sup>7</sup> In contrast, domestic partnership agreements between the partners cannot obligate the state or other third parties.

<sup>8</sup> See discussion of the unregistered model in chap 7 below.

<sup>9</sup> Objections can be proffered against this modus operandi as it sets opposite-sex marriage as the norm.

model offering the most extensive rights and obligations to couples, while at the opposite end, non-married partners have no rights or obligations at all. With these two extremes as reference points, registered partnerships can be divided into two main categories, namely the **marriage-minus** scheme and the **blank-slate-plus** scheme.

6.2.12 The marriage-minus scheme offers quasi-marital effects, but falls short of marriage in that it excludes a small number of rights and responsibilities conferred on married couples. These registered partnerships reproduce marriage both functionally and socially. This version of registered partnerships is mostly used as a parallel to marriage where it applies to same-sex couples only.<sup>10</sup>

6.2.13 The blank-slate-plus scheme consists of initiatives designed to grant specific enumerated rights and obligations to two individuals in a relationship, without attempting to parallel marriage laws. These registered partnerships add rights and obligations to what was previously a blank slate. In some cases the rights and obligations may be very modest.

6.2.14 Since the main aim of the blank-slate-model is not to provide same-sex couples with marriage-like recognition, the focus shifts to matters that may be of general and practical importance to people. Consequently, a status that is an intermediary between marriage and ad hoc recognition is established. As such it “provide[s] an entry point for official state and societal recognition” to interdependent adult relationships.<sup>11</sup>

6.2.15 The Registered Partnership Bill proposed in the Discussion Paper was designed on the premise that both same- and opposite-sex couples would also be permitted to marry or, alternatively, that same-sex couples would be awarded

---

<sup>10</sup> Brumby **Georgia Journal International and Comparative Law** 1999 at 168, referred to by LaViolette "Registered Partnerships Model" 2001 at 5. The Nordic states of Denmark, Sweden, Norway and Iceland, and also the Netherlands and Vermont make use of this scheme. These registered partnerships come close to mirroring the marriage institution by offering marriage-like formalities and consequences. With the exception of the Netherlands, all marriage-minus models exclude opposite-sex couples. These schemes are mostly aimed at regulating same-sex relationships. Since these schemes are intended for individuals in conjugal relationships, they also exclude relatives from registering their interdependent close relationships.

<sup>11</sup> This format is used in France, Belgium, Germany, Hawaii, two provinces of Spain and Nova Scotia. Although the detail of the schemes is quite diverse in these countries, the similarities in the basics are significant. Juel **Boston College Third World Law Journal** 1993 as referred to by LaViolette "Registered Partnerships Model" 2001 at 9 fn 22. In many cases, the motivation to extend entitlements stems from anti-discrimination policies.

marriage-like protection under a civil union.<sup>12</sup> The Bill proposed a formal registration process and a formal termination process through the Courts, and it described extensive legal consequences of registration and termination. Other matters such as the interests of third parties and children of registered partners were also addressed.<sup>13</sup> The model was thus a hybrid between the blank-slate-model and the marriage minus model in order to give quite extensive protection to partners in committed relationships who do not wish to get married.

6.2.16 The registered partnerships model received support from respondents to the Discussion Paper to whom it is important that the existence, content and termination of relationships be formally regulated. It was submitted that some formalisation is necessary to protect the interests of employers and service providers, since the rights of such partners will be enforceable against third parties.<sup>14</sup>

6.2.17 It was also submitted that the registration model makes it easier for individuals to regulate the consequences of their relationship whereas currently they have to regulate every aspect of their partnership through contracts. In this way, registered partnerships will lower the costs of access to legal recognition and protection of the relationship.<sup>15</sup>

---

<sup>12</sup> The category of people who are eligible for the rights and obligations also impacts on the levels of rights and obligations. If same-sex couples are permitted to marry or conclude a civil union, the rights and obligations created by a registered partnership model need not be particularly marriage like. The model would be designed on the blank-slate-model. If, however, same-sex couples are not allowed to marry or conclude a civil union, the registered partnership model will need to be marriage like and would have to be designed on the marriage-minus model.

<sup>13</sup> The availability or not, of same-sex marriage (or civil unions) is determinative of the contents of a registered partnership model - if same-sex couples are permitted to marry or conclude a civil union, the rights and obligations created by a registered partnership model need not be particularly marriage like in order to make up for this lacunae in the law.

<sup>14</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, J McGill (Africa Christian Action), Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), H G J Beukes, Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Nkuna (Magistrate Mhala), S F Boshielo (Department of Justice), C M Makgoba (Commission on Gender Equality), S Marupi (Community Advice Bureau), M P Sebati (Polokwane Municipality), T M Rangata (Department of Health and Welfare, Limpopo Province), M M Vincent (University of Venda), Adv P Matshelo (Justice College), J la Rochelle (SANDF), Adv G J van Zyl (Family Advocate), S A Strauss (University of the Free State), F Muller (Lifeline/Rape Crisis), S W T Machumele (Magistrate Ritavi), M E Keepilwe (Department of Social Development), N Maanda (Lawyers for Human Rights, Johannesburg), N E Fick (Department Health and Welfare, Mokopane), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA), R M Chirwa (Magistrate Eerstehoek), S Moller (FAMSA, Welkom).

<sup>15</sup> Department of Public Service and Administration, Department of Home Affairs indicated its support for registered partnerships since it will facilitate the regulation of service and employee benefits and will prevent abuse of employee benefits. The Minister of Public Service and Administration already approved a definition of "spouse" that gives formal recognition to both the

6.2.18 The main objection against the registered partnership model was that the option as proposed was unlikely to offer better protection and be significantly more accessible to vulnerable partners than marriage would be.<sup>16</sup> It was predicted that such partners would remain in unregistered relationships despite the availability of a registered partnership<sup>17</sup> and that it should not be regarded as a definitive solution to their situation.<sup>18</sup>

6.2.19 Some respondents also regarded the registered partnership model as proposed as too cumbersome.<sup>19</sup> While it was admitted that it should not be made too

---

registered life partners (same- or opposite-sex) and spouses of employees for purposes of service benefits, employee compensation and work facilities of public service employees. In the absence of legislation providing for the registration of partnerships a unique form of registration is used to regulate this matter within the Department. J Duvenhage, Association of Afrikaans Christian Women Executive Committee, Rev W J Parsons Directorate: Gender Issues Department of Justice and Constitutional Development, Z M Moletsane (Acting President: Central Divorce Court), E Naidu (Durban Lesbian and Gay Community and Health Centre), R Krüger (Rhodes University), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), M S Masila (Magistrate Nelspruit), Adv P Matshelo (Justice College), F Muller (Lifeline/Rape Crisis), S W T Machumele (Magistrate Ritavi), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), M E Keepilwe (Department of Social Development), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, N Kweleta (Masimanyane Women's Support Centre, East London), N Majola (Masimanyane Women's Support Centre, East London), R Maile (Sukumani Makhosikati) H Wetmore (Pietermaritzburg North Baptist Church).

<sup>16</sup> In responding to the Discussion Paper, the Directorate: Gender Issues of the Department of Justice and Constitutional Development referred to their experience with the monitoring of the effective implementation of the Customary Marriages Act of 1998. The Directorate submitted that the majority of African rural, semi-urban people are not able to access the rights afforded in legislation due to the inaccessibility of the Courts and the legislation. The Directorate submitted that the High Courts and Family Courts are not an option for many of these people because litigation in the former is costly and only a limited number of the latter exists. In addition to making litigation unaffordable these problems will result in the finalisation of many cases being delayed.

The Directorate further submitted that enforcement of legal rights through a Court process renders legislation meaningless for the majority of South Africans. Poor people cannot afford an attorney and rural people cannot get to the legal aid boards which are mainly located in urban areas. If no provision is made to simplify the application procedure for the ordinary person, the illiterate, semi-illiterate and even a majority of the literate will not be able to bring an application to Court to declare the status of a relationship or for property division. This is unfortunate since the legislation purports to give rights to the poor, rural and illiterate. In practice, those members of the public who can actually reach the venue of the Court go to the Court officials for assistance. If the Court officials are not equipped to deal with such matters they send the people back home to consult an attorney on how to make the application.

<sup>17</sup> The SACC indicated that affluent couples in urban areas who enjoy better access to information and are under less pressure to conform to family expectations or cultural norms are most likely to consider this option.

<sup>18</sup> Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), H Wetmore (Pietermaritzburg North Baptist Church), N E Fick (Department Health and Welfare, Mokopane), S F Boshieo (Department of Justice) F Muller (Lifeline/ Rape Crisis), Family & Gender Service Delivery Task Team of the Lower Court Judiciary.

<sup>19</sup> Eg. Baptist Union of Southern Africa.

easy,<sup>20</sup> an informal form of registration to accommodate poor and less sophisticated people<sup>21</sup> was favoured. Some respondents at the workshops indicated that they preferred a simpler registration procedure with limited rights.

6.2.20 After consideration of the abovementioned comments, an important decision for the Commission was whether a need remained for the institution of registered partnerships for both same- and opposite-sex couples who elect not to get married.

6.2.21 It was clear that, in light of the decision taken regarding same-sex marriage, no need exists for the registered partnership model as an option to *replace* marriage for same-sex couples. However, since submissions to the Commission made it clear that many same- and opposite-sex couples are not in favour of marriage as an institution, it seems that a need still exists for the protection of relationships of unmarried couples. If the registered partnership model were withdrawn, it would mean that same- and opposite-sex parties who do not want to get married would be left with a contract as the only means to formalise their relationship. This would imply that they would not be able to obtain enforceable rights against third parties.

6.2.22 The Commission therefore considered the simplification of the proposed registered partnership model. Instead of largely duplicating marriage, a simplified version of registered partnerships would serve as a proper *alternative* to marriage, making it more accessible for vulnerable partners and affordable to indigent people, and thereby addressing some of the objections.

**6.2.23 The Commission recommends the implementation of a Registered Partnership Act for couples who elect not to get married but desire some legal protection for their relationship and who are willing to make a public commitment to obtain such protection. This proposal should be read in conjunction with the proposal regarding unregistered partnerships set out in chapter 7.**

---

<sup>20</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre), R Krüger (Rhodes University), Adv G Wright (Society of Advocates, Free State).

<sup>21</sup> Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), H Wetmore (Pietermaritzburg North Baptist Church).

6.2.24 Various elements of this proposal will be discussed next under the following main headings:

- \* the scope of the Act,
- \* establishing partnerships: the registration process,
- \* the legal consequences of registration,
- \* termination of partnerships: the termination process and
- \* the legal consequences of termination.

### 6.3 Scope of the Act

#### a) Proposals in the Discussion Paper

6.3.1 According to the proposal set out in the Discussion Paper, a couple wanting to register a partnership has to comply with the requirements set out in clause 4 of the proposed legislation.<sup>22</sup> The Commission proposed that the requirements of marriage apply to prospective registered partners.

---

<sup>22</sup> **Partners in a registered partnership**

*4. (1) A person may only be a partner in one registered partnership at any given time.*

*(2) A married person or a person in a civil union may not register a registered partnership until his subsisting marriage has been dissolved.*

*(3) A prospective registered partner who has previously been married or registered as a partner in a registered partnership or civil union, must present a certified copy of the divorce order, termination certificate, termination order or death certificate of the former spouse or registered partner to the registration officer as proof that the previous registered partnership or marriage has been terminated.*

*(4) The registration officer may not proceed with the registration process unless presented with a certified copy of the document as contemplated in subsection (3).*

*(5) Partners in a registered partnership may at any time marry each other or enter into a civil union with each other.*

*(6) A partnership may only be registered-*

*(a) if at least one of the partners to the prospective registered partnership is a South*

6.3.2 In order to prevent “abuse” of registered partnership legislation by foreigners, the Commission proposed that at least one of the prospective partners should be a South African citizen.<sup>23</sup>

6.3.3 Since the registered partnership would be available to couples in conjugal relationships, the Commission further proposed a prohibition on the registration of relationships between siblings and people who are relatives in the descending or ascending line.

6.3.4 It was submitted that the remedies available under contract law and other legislation,<sup>24</sup> together with the fact that they were included in the unregistered relationships proposal, provided adequate protection for partners in such relationships.

6.3.5 Some of the questions that were raised with regard to the scope of the legislation were whether it should be permissible to have more than one domestic partner at a time, either as a result of a communal living arrangement, a multiple partner relationship or some other form of a serial relationship.<sup>25</sup>

6.3.6 The Commission was of the opinion that the registered partnership option should be available to people who are not involved in a formal status-creating relationship such as marriage or another registered partnership only.<sup>26</sup>

---

*African citizen or has a certificate of naturalisation in respect of South Africa; and*

*(b) by prospective registered partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage.*

<sup>23</sup> Although the registration may have no legal consequences to them in their country of origin and would not entitle them to eg South African citizenship, it may have symbolic importance to the couple as an opportunity to commit publicly to the relationship.

<sup>24</sup> For example, a member of the pension fund can nominate anybody as beneficiary. See the definition of beneficiary in Annexure 1 to the Government Employees Pension Law, 1996 (Proclamation 21 of 1996): “beneficiary” means “the dependant or nominee of a member or pensioner”.

<sup>25</sup> Bala **Canadian Journal of Family Law** 2000 at 189-190. Practical and social considerations suggest that a person should only be able to have one “legal partner” or “spouse” at a time.

<sup>26</sup> See also the discussion of polygamous-like unregistered partnerships in chap 7 below.

6.3.7 Another scenario is that a couple can live in the same household in a conjugal relationship without necessarily residing together permanently. One partner may, for example, work in another town and reside there in a semi-permanent residence while regarding the residence where the other partner resides as their communal home for all practical purposes. This should not be a reason to exclude such a couple from registering their relationship. Therefore, it was submitted that the couple need not necessarily cohabit or intend to cohabit before being permitted to register their relationship.

6.3.8 A further contentious question was whether a valid marriage may be transformed into a registered partnership. In the Netherlands this is permissible. Since termination of a registered partnership is less cumbersome than getting a divorce, this element of the Dutch model may be criticised for the fact that it is susceptible to abuse. It was feared that couples might use the option of transforming their marriage into a registered partnership in order to escape the divorce process. The Commission therefore proposed that, in order to avoid such abuse, that option not be included in the South African version.

## **b) Evaluation**

6.3.9 The majority of respondents who commented on the Commission's proposal regarding the requirements for prospective registered partners agreed with the approach that the requirements for a couple to be able to register their relationship should be comparable to that of marriage.<sup>27</sup>

<sup>27</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, E Naidu (Durban Lesbian and Gay Community and Health Centre), R Krüger (Rhodes University), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Nkuna (Magistrate Mhala), M S Masila (Magistrate Nelspruit), S F Boshielo (Department of Justice), Adv P Matshelo (Justice College), C M Makgoba (Commission on Gender Equality), J la Rochelle (SANDF), Adv G J van Zyl (Family Advocate), S Marupi (Community Advice Bureau), M P Sebati (Polokwane Municipality), T M Rangata (Department of Health and Welfare), M M Vincent (University of Venda) S A Strauss (University of the Free State), F Muller (Lifeline/Rape Crisis), S W T Machumele (Magistrate Ritavi), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), M E Keepilwe (Department of Social Development), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, N Kweleta (Masimanyane Women's Support Centre, East London), N Majola (Masimanyane Women's Support Centre, East London), R Maile (Sukumani Makhosikati), S P Bopape (Limpopo Advice Office), R M Chirwa (Magistrate Eerstehoek). As an alternative to the citizenship requirement Adv G Wright (Society of Advocates, Free State) proposed that both parties should at least have the right to permanent residence in South Africa.



**c) Recommendation**

**6.3.10 The Commission recommends that the requirements for prospective domestic partners to register their relationship be comparable to that of marriage. The relevant provisions should read as follows:**

***Partners in a registered partnership***

**4. (1)** *A person may only be a partner in one registered partnership at any given time.*

*(2) A married person may not register a partnership.*

*(3) A registration officer may not proceed with the registration process of a prospective partner who has previously been married or registered as a partner in a registered partnership unless presented with a certified copy of the -*

*(a) divorce order;*

*(b) termination certificate; or*

*(c) death certificate*

*of the former spouse or registered partner, as proof that the previous marriage or registered partnership has been terminated.*

*(4) Persons who would be prohibited by law from concluding a marriage on the basis of consanguinity may not register a partnership.*

*(5) A relationship may only be registered as a partnership if at least one of the prospective partners is a South African citizen or has a certificate of naturalisation in respect of South Africa.*

**6.4 Establishing partnerships**

**a) Registration procedure**

**(i) Proposals in the Discussion Paper**

6.4.1 In the Discussion Paper, the provisions of the Marriage Act of 1961 dealing with religious marriage officers and the solemnisation of marriage were adapted for purposes of the registered partnership proposal in that paper.

6.4.2 According to the proposal, the Minister of Home Affairs may designate any officer in the public service as a registration officer (clause 6). A very formal registration procedure before the registration officer and two witnesses would ensure the voluntary nature of the registration. Furthermore, the registration officer would be obliged to keep record of all registrations and transmit the recorded information to whoever is responsible for the population register in accordance with the Identification Act of 1997 (clause 7).<sup>28</sup>

---

<sup>28</sup> The Commission proposed that the legislation providing for registration officers and the registration procedure read as follows:

**Registration officers**

*5. (1) The Minister, and any officer in the public service authorized thereto by him or her, may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his or her office and so long as he or she holds such office, a registration officer, either generally or for any specified class of persons or country or area.*

*(2) Every designation of a person as a registration officer shall be by written instrument and the date as from which it shall have effect and any limitation to which it is subject shall be specified in such instrument.*

**Registration of the partnership**

*6. (1) The registration officer shall put the following questions to each of the prospective registered partners separately, to which each shall reply in the affirmative before the registration may proceed:*

*"Do you A., B. declare that you voluntarily want to register your relationship as a registered partnership in terms of the Registered Partnerships Act, 20.. (Act No. ... of 20..)?*

*Do you A. B. declare that you are aware of the legal rights and obligations that follow this registration?*

*Do you A. B. declare that you are aware of the process that must be followed to effect the termination of a registered partnership?"*

*(2) The prospective registered partners must individually and in writing declare their willingness to enter into the registered partnership with one another by signing the prescribed document in the presence of two witnesses.*

*(3) The registration officer and the two witnesses must sign the prescribed document to certify that the declaration referred to in subsection (2) was made in their presence.*

*(4) The registration officer must issue the partners to the registered partnership with a registration certificate stating that they have entered into a registered partnership.*

*(5) This certificate is prima facie proof that a valid registered partnership exists between the parties referred to in the certificate.*

*(6) Each registration officer shall keep a record of all registered partnerships conducted by him.*

*(7) The registration officer shall forthwith transmit the registered partnership register and records concerned to the officer in the public service with the delegated responsibility for the population register in his district of responsibility.*

## (ii) Evaluation

6.4.3 Respondents found the proposed registration procedure generally acceptable,<sup>29</sup> and some submitted that it should not be made too easy.<sup>30</sup>

6.4.4 However, as was seen in paragraphs 6.2.18 and 6.2.19 above, many respondents favoured a more informal form of a declaration<sup>31</sup> that would accommodate poor and less sophisticated people.<sup>32</sup> It was also proposed that if a vulnerable partner is unable to convince the other partner to register a partnership, the former should be able to make an affidavit with the legal effect of protecting such a partner after the relationship has ended.<sup>33</sup>

## (iii) Recommendation by the Commission

6.4.5 The Commission feels that an accessible registration procedure requires the designated “registration officer” to be readily available and the procedure to be uncomplicated, inexpensive and quick.

---

*(8) Upon receipt of the said register the delegatee shall cause the particulars of the registered partnership concerned to be included in the population register in accordance with the provisions of section 8(e) of the Identification Act, 1997 (Act No. 68 of 1997).*

<sup>29</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, J McGill (Africa Christian Action), Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), H G J Beukes, Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Nkuna (Magistrate Mhala), S F Boshielo (Department of Justice), C M Makgoba (Commission on Gender Equality), S Marupi (Community Advice Bureau), M P Sebati (Polokwane Municipality), T M Rangata (Department of Health and Welfare, Limpopo Province), M M Vincent (University of Venda), Adv P Matshelo (Justice College), J la Rochelle (SANDF), Adv G J van Zyl (Family Advocate), S A Strauss (University of the Free State), F Muller (Lifeline/Rape Crisis), S W T Machumele (Magistrate Ritavi), M E Keepilwe (Department of Social Development), N Maanda (Lawyers for Human Rights, Johannesburg), N E Fick (Department Health and Welfare, Mokopane), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA), R M Chirwa (Magistrate Eerstehoek), S Moller (FAMSA, Welkom).

<sup>30</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre), R Krüger (Rhodes University), Adv G Wright (Society of Advocates, Free State).

<sup>31</sup> Dr A E Naude & Adv G Sonnekus (FAMSA Knysna).

<sup>32</sup> H Wetmore (Pietermaritzburg North Baptist Church).

<sup>33</sup> H Wetmore (Pietermaritzburg North Baptist Church).

6.4.6 Although it is foreseen that the registration officer will be an official from the Department of Home Affairs, the Minister will be able to appoint an appropriate person from any State Department as a registration officer in areas where there are no Home Affairs officials.<sup>34</sup>

6.4.7 The registration procedure should entail the completion of a prescribed document in the presence of the registration officer and a certification by the latter that the registration is done voluntarily. No formula is prescribed and the registration officer is merely a facilitator.

6.4.8 Registration must be recorded in a public register in combination with the furnishing of a registration certificate to facilitate and expedite the promulgation of the existence of the partnership to third parties. The register of registered partnerships is transmitted to the population register in order to ensure that the information is available to third parties who may incur a liability towards such partners. Publication of the existence of the partnership is one of the main reasons for the existence of a registered partnership option, and is crucial to its effectiveness.

**6.4.9 The Commission recommends that the provisions regarding registration officers and the registration procedure should read as follows:**

***Registration officers***

*5. (1) The Minister, and any officer in the public service authorised thereto by him or her, may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his or her office and so long as he or she holds such office, a registration officer, either generally or for any specified area.*

*(2) Every designation of a person as a registration officer must be in writing and the date as from which it will have effect and any limitation to which it is subject must be specified in such a written document.*

***Registration of partnerships***

*6. (1) Subject to the limitations of section 4, any two persons may register their relationship as a partnership as provided for in this section.*

---

<sup>34</sup> The recommended clause refers to “any officer or employee in the public service” which will enable the Minister to appoint an appropriate person from any State Department as a registration officer in areas where there are no Home Affairs officials.

*(2) A registration officer must conduct the registration procedure on the official premises designated for that purpose and in the manner provided for in this section.*

*(3) The prospective partners must individually and in writing declare their willingness to register their partnership by signing the prescribed document in the presence of the registration officer.*

*(4) The registration officer must sign the prescribed document to certify that the declaration referred to in subsection (3) was made voluntarily and in his presence.*

*(5) The registration officer must make notification of the existence of a registered partnership agreement, where applicable, on the registration certificate.*

*(6) The registration officer must issue the partners with a registration certificate stating that they have registered their partnership and, where applicable, attach a certified copy of the registered partnership agreement to the registration certificate.*

*(7) The registration certificate issued by the registration officer is prima facie proof of the existence of a registered partnership between the partners.*

*(8) Each registration officer must keep a register of all registrations of partnerships conducted by him and make a notification of the existence of a registered partnership agreement, where applicable, in the register.*

*(9) The registration officer must forthwith transmit the said register to the officer in the public service with the delegated responsibility for the population register in his district of responsibility.*

*(10) Upon receipt of the said register the delegate must cause the particulars of the registered partnership concerned to be included in the population register in accordance with the provisions of section 8(e) of the Identification Act.*

## **b) Property regime**

6.4.10 In case of marriage the default property regime is community of property. However, by concluding an ante-nuptial contract a married couple may deviate from this default property regime. The contract would then determine how their property will be divided upon divorce.

6.4.11 Since the aim of the registered partnership proposal was to create an *alternative* to marriage, the default property regime proposed in the Discussion Paper differed from that of marriage.

### (i) Proposals in the Discussion Paper

6.4.12 The Commission proposed that a registered partnership should by default be out of community of property and subject to the accrual system, unless the partners concluded a pre-registration agreement (clause 9). A pre-registration agreement could include community of property or exclude the accrual system. The legislation prescribed formal requirements for a pre-registration agreement such as attestation before a notary and attachment to the registration certificate (clause 10).<sup>35</sup>

### (ii) Evaluation

6.4.13 The proposed default property regime for registered partnerships was supported by many of the respondents.<sup>36</sup> One respondent opined that the proposal is

<sup>35</sup> The Commission proposed that the legislation providing for the default property regime should read as follows:

***Accrual system***

*9. Except as provided for in section 10(1)(b) and (c), a registered partnership under this Act will be subject to the accrual system.*

***Pre-registration agreements***

*10.(1) Prospective registered partners may conclude a pre-registration agreement whereby-*

- (a) community of property or community of profit and loss is made applicable to the registered partnership;*
- (b) the accrual system is excluded from the registered partnership; or*
- (c) certain property is excluded from the accrual system.*

*(2) A pre-registration agreement must be-*

- (a) signed by both prospective registered partners;*
- (b) attested to by a notary;*
- (c) handed in to the registration officer before or on the date of registration of the registered partnership; and*
- (d) attached to the registration certificate of the registered partnership to serve as prima facie evidence of the proprietary status of the registered partnership.*

<sup>36</sup> Colleen Rogers (Lifeline Vaal Triangle), Rev W J Parsons, M S Nkuna (Magistrate Mhala), M S Masila (Magistrate Nelspruit), S F Boshielo (Department of Justice), C M Makgoba (Commission on Gender Equality), S Marupi (Community Advice Bureau), M P Sebati (Polokwane Municipality), T M Rangata (Department of Health and Welfare, Limpopo Province), Adv P Matshelo (Justice College), J la Rochelle (SANDF), Adv G J van Zyl (Family Advocate), S A

more practical than community of property as it offers the better of two worlds; independence with no obligations regarding mutual support.<sup>37</sup>

6.4.14 However, some respondents regarded the proposed default position as too closely linked to that of marriage and too complicated,<sup>38</sup> while others preferred a contractual arrangement between the prospective partners.<sup>39</sup> Some respondents submitted that a default property regime similar to that of for marriage<sup>40</sup> is the most advantageous for partners and does not cause additional financial expenses.<sup>41</sup>

6.4.15 The proposed default regime was also rejected as impractical, unnecessarily complicated<sup>42</sup> and inappropriate for the poor and illiterate, who would not be in a financial position to enter into an ante-nuptial contract in order to change the default property regime.<sup>43</sup> It was also said that some parties tend to hide their assets or fail to disclose their assets, which makes it difficult to determine the accrual to the joint estate. A partner would require the assistance of an attorney to obtain his or her share of the accrued assets.<sup>44</sup>

6.4.16 Instead, it was suggested that a list of options should be available on registration with the selected option indicated on the certificate of registration; a

---

Strauss (University of the Free State), F Muller ( Lifeline/ Rape Crisis), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office), R M Chirwa (Magistrate Eerstehoek), S Moller (FAMSA, Welkom), Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), M M Vincent (University of Venda), N Maanda (Lawyers for Human Rights, Johannesburg), J Tau (Methodist Church of SA).

<sup>37</sup> R Krüger (Rhodes University). The Cape Law Society Family Law and Gender Committee felt that the proposed default property regime is desirable and practical for the envisioned end users.

<sup>38</sup> N E Fick (Department Health and Welfare, Mokopane).

<sup>39</sup> T Jordaan & W Gerber (Legal Aid Board).

<sup>40</sup> Eg H G J Beukes.

<sup>41</sup> Prof L N van Schalkwyk (UP).

<sup>42</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre).

<sup>43</sup> Directorate: Gender Issues Department of Justice and Constitutional Development criticised this proposal and referred to research conducted by CALS that shows that it is unlikely that the majority of persons in South Africa, especially Blacks, will favour the process of registered partnership.

<sup>44</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre), Directorate: Gender Issues Department of Justice and Constitutional Development.

choice between accrual or community of profit and loss but with a prescribed duty of support, contribution to household needs and intestate succession.<sup>45</sup>

### (iii) Recommendation by the Commission

6.4.17 The Commission took cognisance of the critique on the complexity of the proposed accrual property regime and revisited the matter in view of the decision to recommend a simple registration process.

6.4.18 Subsequently, to prevent a situation where an unsophisticated couple register a partnership and find themselves in a property regime that they did not expect and do not understand, the Commission recommends that the registration of a partnership should not result in a prescribed property regime. The registered domestic partnership would thus by default be out of community of property, *ie* each partner to the relationship remains the owner of his or her property before and after the establishment of a domestic partnership. In the event of any dispute as to the division of property, the partners will have to approach the Court. Some property will be acquired and subsequently used for joint purposes. It may also happen that a registered partner contributes directly or indirectly to the acquisition, maintenance or improvement of the separate property of the other registered partner. In the absence of agreement between the registered partners, such joint property and separate property should be divided by a Court with the discretion to order a fair and equitable division.<sup>46</sup>

6.4.19 For this purpose the definition of “partnership property” was also revised and reference is now made to “joint property”. The Commission recommends that “joint property” be limited to household goods and property jointly owned by the partners in equal or unequal shares. Other related terms such as “property” and “separate property” are also defined.

---

<sup>45</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre).

<sup>46</sup> In the absence of agreement as to the division of joint and separate property, the position of registered partners is on a par with the position of unregistered partners. See para 7.5.51 *et seq* below.



**6.4.20 The Commission recommends that the relevant definitions should read as follows:**

**"household goods"** means corporeal property, owned separately or jointly by the domestic partners, intended and used for the joint household and includes-

- (a) *movable goods of the following kind;*
  - (i) *household furniture;*
  - (ii) *household appliances, effects, or equipment;*
  - (iii) *household articles for family use or amenity or household ornaments, including tools, garden effects and equipment;*
  - (iv) *motor vehicles, caravans, trailers or boats, used wholly or principally, in each case, for family purposes;*
  - (v) *accessories of goods to which subparagraph (iv) applies;*
  - (vi) *household pets; and*
- (b) *any of the goods mentioned in paragraph (a) that are in the possession of either or both domestic partners under a credit agreement or conditional sale agreement or an agreement for lease or hire; but*
- (c) *does not include-*
  - (i) *movable goods used wholly or principally for business purposes;*
  - (ii) *money or securities for money; and*
  - (iii) *heirlooms;*

**"joint property"** means household goods and property owned jointly in equal or unequal shares by the domestic partners;

**"property"** includes any present, future or contingent right or interest in or to movable or immovable, corporeal or incorporeal property, money, a debt and a cause of action;

**"separate property"** means property of domestic partners that is not joint property;

6.4.21 The Commission furthermore recommends that it should nevertheless be open to the parties who register their partnership to conclude a registered partnership agreement which regulates the consequences of their relationship, including their proprietary rights.

6.4.22 Therefore, the Commission recommends that partners who so wish may conclude a registered partnership agreement. Notification of its existence must be made on the registration certificate as well as in the registration officer's register.

6.4.23 For the sake of legal certainty, the Commission further recommends that

- \* only a registered partnership agreement referred to on the registration certificate and register be admissible in legal proceedings and
- \* besides the exceptions provided for in the legislation, the normal principles of contract law regulate the validity and other aspects of the registered partnership agreement.

**6.4.24 The Commission recommends that the legislation providing for the property regime and the interpretation of a registered partnership agreement should read as follows:**

*"registered partnership agreement" means a written agreement concluded between and undersigned by prospective registered partners to regulate the financial matters pertaining to their partnership;*

**Registration of partnerships**

**6. (1) ... (4)**

*(5) The registration officer must make notification of the existence of a registered partnership agreement, where applicable, on the registration certificate.*

*(6) The registration officer must issue the partners with a registration certificate stating that they have registered their partnership and, where applicable, attach a certified copy of the registered partnership agreement to the registration certificate.*

**(7) ... (10)**

**Property regime**

**7. (1) Except as provided in this section, there is no general community of property between registered partners.**

*(2) In the event of a dispute regarding the division of property after a registered partnership has ended, section 22 of this Act applies.*

**(3) Registered partners may conclude a registered partnership agreement.**

*(4) Where no notification of the existence of a registered partnership agreement has been effected on or no copy of such registered partnership agreement has been attached to a registration certificate as required in section 6(5) and 6(6), and where no notification of the existence of such a registered partnership agreement has been made as required in section 6(8), such agreement binds only the parties to the agreement.*

### **Registered partnership agreement**

**8.** (1) *In proceedings regarding the division of property between registered partners under this Act, a court may consider the fact that the parties have concluded a registered partnership agreement and the terms thereof, provided that the registered partnership agreement has been noted on and attached to the registration certificate.*

(2) *If the court, having regard to all the circumstances, is satisfied that giving effect to a registered partnership agreement would cause serious injustice, it may set aside the registered partnership agreement, or parts thereof.*

(3) *In deciding, under subsection (2) whether giving effect to a registered partnership agreement would cause serious injustice, the court may have regard to—*

- (a) *the terms of the registered partnership agreement;*
- (b) *the time that has elapsed since the registered partnership agreement was concluded;*
- (c) *whether the registered partnership agreement was unfair or unreasonable in the light of all the circumstances at the time it was made;*
- (d) *whether the registered partnership agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made, whether those changes were foreseen by the parties, or not;*
- (e) *the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the registered partnership agreement;*
- (f) *the contributions of the parties to the registered partnership; and*
- (g) *any other matter that the court considers relevant.*

(4) *A court may make an order under this section notwithstanding that the registered partnership agreement purports to exclude the jurisdiction of the court to make that order.*

(5) *A court must decide any other matter regarding a registered partnership agreement on the applicable principles of the law of contract.*

## **6.5 Legal consequences of a registered partnership during its existence**

6.5.1 The legal consequences that are relevant during the existence of a registered partnership are a **duty of support, limitations on the disposal of joint property and the right to occupy the family home.**

### a) Duty of support

6.5.2 A duty of support during the existence of a partnership forms the basis of claims for accommodation, food, clothing, medical and dental attention, employee benefits and delictual claims.

#### (i) Proposals in the Discussion Paper

6.5.3 Under the common law no duty of support exists between unmarried partners.<sup>47</sup> Notwithstanding this, the Commission proposed in the Discussion Paper that, concomitant with the formal commitment of registered partners, they should have a reciprocal statutory duty of support (clause 8). The duty must be complied with in accordance with each partner's financial means and includes joint liability for household expenses. Clause 1, as originally proposed, defined "duty of support" to mean each partner's responsibility to provide for the other partner's basic living expenses.<sup>48</sup>

---

<sup>47</sup> See discussion chap 3 above.

<sup>48</sup> The Commission also proposed the following substantial provision regarding this duty between registered partners:

#### ***Duty of support***

**8. (1)** *Registered partners shall have a reciprocal duty of support in accordance with each partner's financial means.*

*(2) The registered partners are jointly liable for debts incurred for household expenses.*

*(3) Each registered partner may enforce the joint responsibility established in this section against the other registered partner through legal proceedings in a Court of law.*

*(4) A third party to whom debts are owed by either or both registered partners relating to household expenses incurred may enforce the joint liability against either or both partners through legal proceedings in a Court of law.*

## (ii) Evaluation

6.5.4 Respondents submitted that the duty of support embraces essential needs and the potential availability of medical, pension and insurance benefits is often the motivation for forming relationships.<sup>49</sup>

6.5.5 Many respondents agreed with the view of the Commission that in the absence of a formal public commitment by the parties to the relationship, there should not be a general duty to support.<sup>50</sup> It was agreed that such a duty should only be extended to couples who are willing to register their relationship under the proposed legislation.<sup>51</sup>

6.5.6 Some respondents proposed that the availability of benefits could be conditional, for example varying with the level of dependency between the partners,<sup>52</sup> or limited to couples with children<sup>53</sup>. Alternatively a limit could be placed on the number of partners one may have on one's medical aid.<sup>54</sup>

<sup>49</sup> Rev W J Parsons, F Muller (Lifeline/ Rape Crisis), Adv G Wright (Society of Advocates, Free State), S Moller (FAMSA, Welkom), Rev B D Dlamini & Dr C S Rankhota (University of Natal), M S Masila (Magistrate Nelspruit), Adv p Matshelo (Justice College), S W T Machumele (Magistrate Ritavi), N Maanda (Lawyers for Human Rights, Johannesburg), S P Bopape (Limpopo Advice Office), E Naidu (Durban Lesbian and Gay Community and Health Centre), Prof L N van Schalkwyk (UP), Colleen Rogers (Lifeline Vaal Triangle), S F Boshielo (Department of Justice), Adv G J van Zyl (Family Advocate), Adv P Matshelo (Justice College), S W T Machumele (Magistrate Ritavi).

<sup>50</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, J McGill (Africa Christian Action), E Naidu (Durban Lesbian and Gay Community and Health Centre), Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), R Krüger (Rhodes University), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), H Wetmore (Pietermaritzburg North Baptist Church), Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Nkuna (Magistrate Mhala), M S Masila (Magistrate Nelspruit), S F Boshielo (Department of Justice), C M Makgoba (Commission on Gender Equality), S Marupi (Community Advice Bureau), M P Sebati (Polokwane Municipality), T M Rangata (Department of Health and Welfare, Limpopo Province), M M Vincent (University of Venda), J la Rochelle (SANDF), Adv G J van Zyl (Family Advocate), S A Strauss (University of the Free State), S W T Machumele (Magistrate Ritavi), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), N Maanda (Lawyers for Human Rights, Johannesburg), N E Fick (Department Health and Welfare, Mokopane), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, J Tau (Methodist Church of SA), R M Chirwa (Magistrate Eerstehoek), S Moller (FAMSA, Welkom).

<sup>51</sup> See discussion on the position of unregistered partners in chap 7 below.

<sup>52</sup> H G J Beukes.

<sup>53</sup> T Jordaan & W Gerber (Legal Aid Board).

<sup>54</sup> Fritse Muller (Lifeline/Rape Crisis).

6.5.7 The Commission also took cognisance of the interests of third parties and the fact that the recognition of a duty of support between domestic partners will oblige third parties to make their benefits available to domestic partners as well as married couples.

6.5.8 The interests of these third parties had to be reconciled with the aim of protecting unmarried partners. The autonomy of those couples who deliberately chose not to incur the reciprocal duty of support of marriage should furthermore not be infringed.

6.5.9 The Commission submits that the recommended simplification of the registration procedure is the compromise that is needed to address the concerns of all interested parties. Combined with a statutory duty of support between partners in registered partnerships, the simpler and more accessible procedure still enables third parties readily to verify the existence of such partnerships. It will further assist them to administer and manage their concern emanating from the duty of support between unmarried partners and should not prejudice their business interests.

### **(iii) Recommendation by the Commission**

6.5.10 The Commission recommends that couples who comply with the very simple registration procedure acquire a statutory duty of support.

**6.5.11 The Commission recommends that the relevant provisions should read as follows:**

*"duty of support" means the responsibility of each registered partner to provide for the other partner's basic living expenses while the registered partnership exists;*

#### ***Duty of support***

**9. Registered partners owe each other a duty of support in accordance with each partner's financial means and needs.**

**b) Limitation on the disposal of joint property**

**(i) Proposals in the Discussion Paper**

6.5.12 Since it was proposed in the Discussion Paper that registered partners should be able to determine their own property arrangements in a pre-registration agreement, no additional limitation on the disposal of communal property was proposed.

**(ii) Evaluation**

6.5.13 In view of the fact that the Commission now recommends a simple registration procedure with no default property regime, this matter has to be revisited. It is common for partners in a cohabitation relationship to join their property and acquire additional property together. To protect the interests of both partners in the absence of a default regime, some limitation on the unilateral disposal of the joined and newly acquired property is required.

6.5.14 Respondents generally agreed that once a partnership had been established, the disposal of certain property should be limited during the existence of the relationship to secure the position of vulnerable partners.<sup>55</sup>

6.5.15 The Commission submits that a definition of joint property is needed to ensure that the partner's property rights are not unduly limited. For this purpose, only the property that can be linked to the existence of the partnership should be included. This definition would also be relevant for purposes of determining which property should be redistributed upon termination of the partnership.<sup>56</sup>

---

<sup>55</sup> Eg E Naidu (Durban Lesbian and Gay Community and Health Centre), Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), Rev B D Dlamini & Dr C S Rankhota (University of Natal), H G J Beukes, Colleen Rogers (Lifeline Vaal Triangle), Rev W J Parsons, S F Boshielo (Department of Justice), S W T Machumele (Magistrate Ritavi), M E Keepilwe (Department of Social Development), N Maanda (Lawyers for Human Rights, Johannesburg), N E Fick (Department Health and Welfare, Mokopane), N Kweleta (Masimanyane Women's Support Centre, East London), S P Bopape (Limpopo Advice Office), S Moller (FAMSA, Welkom).

<sup>56</sup> See para 6.6.28 below.

(iii) **Recommendations by the Commission**

**6.5.16 The Commission recommends that the legislation defining, and limiting the disposal of, joint property should read as follows:**

*"joint property" means household goods and property owned jointly in equal or unequal shares by the domestic partners;*

***Limitation on the disposal of joint property***

*10. A registered partner may not without the consent of the other registered partner sell, donate, mortgage, let, lease or otherwise dispose of joint property.*

**c) Right to occupy the family home**

(i) **Proposals in the Discussion Paper**

6.5.17 The Commission proposed in the Discussion Paper that the right of registered partners to occupy the family home be protected. To this end it was proposed that both registered partners would be entitled to occupy the family home during the existence of the partnership, irrespective of which of them owns or leases the family home. The owner or lessee may not evict the other partner without providing him or her with alternative accommodation (clause 18).<sup>57</sup>

---

<sup>57</sup> The Commission proposed that the legislation providing for the right to occupy the family home read as follows:

***Family home***

*18.(1) Both registered partners are entitled to occupy the family home during the existence of the registered partnership, irrespective of which of the registered partners owns or rents the property.*

*(2) The registered partner who owns or rents the family home has no right to eject the other registered partner from the family home during the existence of the registered partnership without providing him or her with suitable alternative accommodation.*

*(3) Unless a registered partner who does not own or rent the family home obtains another legal right to occupy the family home, the right of occupation provided for in section 18 ends upon termination of the registered partnership.*

*(4) If, on termination of the registered partnership it is necessary to transfer ownership of the family home from one registered partner to the other registered partner following a mutual agreement, Court order, will or right to intestate succession to that effect, that registered partner will be deemed to be a "spouse" as meant in the Transfer Duty Act, 1949 (Act No. 40 of 1949).*



## (ii) Evaluation

6.5.18 The proposal to protect the right of occupation of a registered partner for the duration of the relationship was welcomed.<sup>58</sup> One respondent argued that the rights of registered partners to occupy the family home should be similar to those of married partners.<sup>59</sup>

## (iii) Recommendation by the Commission

6.5.19 The Commission recommends that in order to protect vulnerable partners who may have no other refuge, both registered partners should have the explicit right to occupy the family home during the existence of the registered partnership, irrespective of which partner owns the dwelling.

**6.5.20 The Commission recommends that the legislation providing for the right to occupy the family home should read as follows:**

*"family home" means the dwelling used by either or both domestic partners as the only or principal family residence, together with any land, buildings, or improvements attached to that dwelling and used wholly or principally for the purposes of the domestic partnership household;*

### ***Right of occupation of the family home***

**11. (1)** *Both registered partners are entitled to occupy the family home during the existence of the registered partnership, irrespective of which of the registered partners owns or rents the property.*

**(2)** *The registered partner who owns or rents the family home has no right to evict the other registered partner from the family home during the existence of the registered partnership without providing him or her with suitable alternative accommodation.*

---

<sup>58</sup> CALS, A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), M E Keepilwe (Department of Social Development), Women's Legal Centre.

<sup>59</sup> Alternatively, it was proposed that this aspect be dealt with under the reciprocal duty of support. Cape Law Society Family Law Committee.

## 6.6 Termination of partnership

6.6.1 Just as the registration of a partnership has legal consequences, the termination of a domestic partnership also has legal consequences for former partners. It is important to determine with certainty when and under which circumstances the partners can expect those consequences to become effective.

### a) Proposals in the Discussion Paper

6.6.2 It was proposed that the registered partnership would terminate upon death of one of the partners, with the conclusion of a termination agreement or when a Court order to that effect is rendered (clause 29).

6.6.3 In view of the fact that a formal registration procedure was prescribed in the Discussion Paper, the Commission proposed an extensive and equally formal termination process. Depending on the circumstances, termination could take place by agreement or Court procedure.

6.6.4 In order to protect vulnerable partners, a termination agreement had to comply with prescribed formalities (clause 30). Registered partners had to apply for a Court order to terminate the partnership where they had children or where they could not come to an agreement to terminate the partnership or as to the division of the joint property (clause 31).

6.6.5 The Court would make a termination order if it was satisfied that the registered partnership had reached a state of disintegration and there was no reasonable prospect of the restoration of the relationship (clause 33).<sup>60</sup>

<sup>60</sup> The Commission proposed that the legislation providing for the termination of registered partnerships read as follows:

#### ***Termination of registered partnerships***

**29.(1)** *A registered partnership exists until—*

- (a) *it is terminated by death;*
- (b) *the date on which a mutual termination agreement contemplated in section 30, is filed with a registration officer;*
- (c) *a Court order to terminate the registered partnership, as provided for in this Act, is issued.*

- 
- (2) A death certificate, termination certificate issued by the relevant registration officer or a termination order will be prima facie proof that a registered partnership has been terminated.

### **Termination agreement**

30.(1) Except as provided for in section 31, registered partners may terminate the registered partnership by mutual agreement executed before a notary.

(2) The mutual agreement must-

- (a) state that it is entered into voluntarily by both registered partners;
- (b) declare that the registered partners have come to a mutual agreement to terminate the partnership;
- (c) set out the following information:
  - (i) any conditions of the termination;
  - (ii) the division of accrued or joint property;
  - (iii) arrangements regarding the family home;
  - (iv) settlement of pension and other similar claims; and
- (d) be filed with the registration officer in the area where the registered partners at the time of the mutual agreement usually reside.

(3) If the registered partners have concluded a pre-registration agreement, division of property will take place in accordance with that agreement.

(4) The mutual agreement to terminate the registered partnership will be effective from the date that it was filed with the said registration officer.

(5) The registration officer must issue a termination certificate upon the filing of a mutual agreement by the registered partners.

### **Termination by Court order**

31.(1) The registered partners or a registered partner must apply to the Court for an order to terminate the registered partnership if—

- (a) the registered partners have minor children; or
- (b) the registered partners cannot come to an agreement regarding the-
  - (i) termination of the registered partnership; or
  - (ii) division of accrued or joint property upon termination of the registered partnership.

(2) An application to terminate a registered partnership is made to the Court in accordance with the provisions of the Supreme Court Act, 1959 (Act No. 59 of 1959).

### **When Court may grant termination order**

33.(1) A Court may grant an order to terminate a registered partnership if it is satisfied that the registered partnership has reached a state of disintegration and there is no reasonable prospect of the restoration of the relationship between the partners.

(2) A Court granting an order to terminate a registered partnership may make an order with

## b) Evaluation

6.6.6 Many respondents agreed with the formal termination procedure proposed in the Discussion Paper.<sup>61</sup>

6.6.7 With reference to the termination of the partnership in case of a simple registration option, respondents suggested that

- \* termination should be based on mutual agreement with the assistance of an arbitrator or attorney,<sup>62</sup> only entering the Court system if there is a disagreement,<sup>63</sup>
- \* a deregistration procedure with the registration officer would suffice,<sup>64</sup> or
- \* a lower Court could deal with these cases.<sup>65</sup>

---

*regard to the division of the accrued or joint property of the registered partners in accordance with a written agreement between such partners if it deems it just and equitable.*

*(3) Where there is no written agreement about the division of the accrued or joint property or, if the Court is not satisfied that the division of property agreed to by the registered partners is just and equitable, the Court may make an order to divide the property in a manner which it deems just and equitable.*

*(4) A Court granting an order to terminate a registered partnership may make an order with regard to the division of the joint property of the registered partners in accordance with a pre-registration agreement between the partners if it is satisfied that such agreement is valid.*

<sup>61</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, J McGill (Africa Christian Action), E Naidu (Durban Lesbian and Gay Community and Health Centre), R Krüger (Rhodes University), H G J Beukes, E N Maanda (Department of Social Development), Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), Colleen Rogers (Lifeline Vaal Triangle) T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Nkuna (Magistrate Mhala), S F Boshielo (Department of Justice), F Muller (Lifeline/Rape Crisis), Adv P Matshelo (Justice College), S W T Machumele (Magistrate Ritavi), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), M E Keepilwe (Department of Social Development), N Maanda (Lawyers for Human Rights, Johannesburg), M Modieleng (Department of Social Welfare), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, N Kweleta (Masimanyane Women's Support Centre, East London), N Majola (Masimanyane Women's Support Centre, East London), J Tau (Methodist Church of SA), R M Chirwa (Magistrate Eerstehoek), S Moller (FAMSA, Welkom).

<sup>62</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre).

<sup>63</sup> J Duvenhage.

<sup>64</sup> H Wetmore (Pietermaritzburg North Baptist Church), Family & Gender Service Delivery Task Team of the Lower Court Judiciary.

- \* due notice to all parties with an interest in being aware in the termination of the relationship should be required.<sup>66</sup>

6.6.8 Many respondents commented that, irrespective of what the prescribed termination procedure entails, provision should be made that the best interests of children should at all times be borne in mind.<sup>67</sup>

### **c) Recommendation by the Commission**

6.6.9 In view of the recommended simple registration process set out above, the Commission revisited the formal termination process proposed in the Discussion Paper and adapted it accordingly. The most important aspects of the new simplified prescribed termination process are that the termination of the partnership by agreement must be done voluntarily and in writing before a registration officer. Furthermore, the registration officer responsible for executing the termination procedure must issue a termination certificate and ensure publication of the termination.

6.6.10 The Commission further regarded it to be in the best interest of children to retain the Court procedure for termination of a registered partnership where the partners have minor children who were born from the relationship.

**6.6.11 The Commission recommends the following general provision to indicate with certainty when a registered partnership is terminated:**

#### ***Termination of registered partnerships***

**12. (1) A registered partnership terminates upon–**

***(a) the death of one or both registered partners;***

---

<sup>65</sup> N E Fick (Department Health and Welfare, Mokopane).

<sup>66</sup> T Jordaan & W Gerber (Legal Aid Board), a group at the Cape Town workshop. See in this regard para 6.8 below.

<sup>67</sup> Eg Cape Bar Council, N E Fick (Department Health and Welfare, Mokopane), T Jordaan & W Gerber (Legal Aid Board), Family & Gender Service Delivery Task Team of the Lower Court Judiciary.

(b) agreement by the partners; or

(c) a court order to terminate the registered partnership, as provided for in this Act.

(2) A death certificate, termination certificate issued under this Act or a termination order made by the court under this Act is prima facie proof that such a registered partnership has ended.

**6.6.12 The Commission furthermore recommends that for the purpose of legal certainty and in line with the aim of keeping the processes simple, affordable and accessible, registered partnerships should be terminable in the following manner:**

***Termination procedure***

**13.** (1) A registration officer must conduct the termination procedure on the official premises used for that purpose and in the manner provided for in this section.

(2) Registered partners who intend to terminate their partnership must present the registration officer with a certified copy of the registration certificate as proof that a registered partnership exists between them.

(3) Registered partners must individually and in writing declare their desire to terminate the registered partnership by signing the prescribed document in the presence of a registration officer.

(4) The registration officer must sign the prescribed document to certify that the declaration referred to in subsection (3) was made voluntarily and in his or her presence.

(5) The registration officer must issue the registered partners with a certificate stating that their partnership has been terminated and make a notification of the existence of a termination agreement, where applicable, on the certificate.

(6) Each registration officer must keep a register of all registered partnerships terminated by him and make a notification of the existence of a termination agreement, where applicable, in the register.

(7) The registration officer must forthwith transmit the said register and documents concerned to the officer in the public service with the delegated responsibility for the population register in his district of responsibility.

(8) Upon receipt of the said register the delegate must cause the particulars of the terminated partnership to be included in the population register in accordance with the provisions of section 8(e) of the Identification Act.

6.6.13 To accommodate couples who have not concluded a domestic partnership agreement but still want to make their own arrangements to regulate the legal

consequences of the termination of their relationship, provision is made for them to conclude a termination agreement before formal termination at the registration officer under clause 9.

**6.6.14 The Commission recommends that the provision providing for a termination agreement should read as follows:**

***Termination agreement***

**14.** (1) *Registered partners who want to terminate their registered partnership as provided for in section 13 of the Act, may conclude a termination agreement to regulate the financial consequences of the termination of their registered partnership.*

(2) *A termination agreement must be in writing, signed by both registered partners and must declare that it is entered into voluntarily by both partners.*

(3) *A termination agreement may provide for-*

(a) *the division of joint and separate property;*

(b) *one registered partner to pay maintenance to the other registered partner;*

(c) *arrangements regarding the family home; and*

(d) *any other matter relevant to the financial consequences of the termination of the registered partnership.*

6.6.15 To protect the position of minor children of registered partners, a procedure similar to that of divorce proceedings is prescribed when the partners want to terminate their partnership.

**6.6.16 The Commission recommends that the provisions providing for a Court procedure to protect the position of children upon termination of a registered partnership should read as follows:**

***Termination by court order***

**15.** (1) *Registered partners who have minor children from the registered partnership and who intend to terminate the registered partnership must apply to the court for a termination order.*

(2) *An application for the termination of a registered partnership is made to the court in accordance with the provisions of the Supreme Court Act.*

### **Welfare of minor children**

**16.** (1) *A court may not order the termination of a registered partnership unless the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the registered partnership are in the best interests of such child.*

(2) *In order to determine that the circumstances set out in subsection (1) exist, the court may order that an investigation be instituted and for that purposes the provisions of section 4 of the Mediation in Certain Divorce Matters Act apply, with the changes required by the context.*

(3) *Before making the termination order, the court must consider the report and recommendations referred to in the said section 4(1) of the Mediation in Certain Divorce Matters Act.*

(4) *In order to determine that the circumstances set out in subsection (1) exist, the court may order any person to appear before it and may order either or both the registered partners to pay the costs of an investigation and appearance.*

(5) *A court granting an order to terminate a registered partnership may, in regard to the maintenance and education of a dependent child of the registered partnership or the custody or guardianship of, or access to, a minor child of the registered partnership, make any order which it deems fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent must be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.*

(6) *Unless where otherwise ordered by a court, the rights of and obligations towards children of a registered partner under any other law are not affected by the termination of the registered partnership.*

(7) *For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order either or both the registered partners to pay the costs of the representation.*

6.6.17 See the discussion in paragraph 6.6.8 below regarding the presumption of paternity of a male partner in a registered partnership.

## **6.7 Legal consequences of the termination of registered partnerships**

6.7.1 The legal consequences that are relevant to former partners are **maintenance after termination or death, intestate succession, delictual claims and property division.**



**a) Maintenance after termination or death**

6.7.2 The reciprocal duty of support of the partners in a registered partnership is the basis for maintenance during the existence of the partnership as well as for maintenance of a surviving partner after the registered partnership has ended through termination or death.<sup>68</sup> The premise for this extension is the continuation of the statutory duty of support between registered partners.<sup>69</sup>

6.7.3 Despite the fact that the Divorce Act of 1979 extended the common-law duty of support to continue after the divorce of married spouses, our Courts prefer to facilitate a "clean break" between the parties by ordering the redistribution of assets rather than ordering the payment of periodical maintenance. The calculation of the redistribution of assets is based on past contributions to a former spouse's estate and aims to provide for the future maintenance requirements of the spouse. This is done with a view to enabling the parties to become economically independent of each other as soon as possible.<sup>70</sup>

---

<sup>68</sup> At common law, the duty of support between husband and wife terminated when the marriage ended. The Divorce Act of 1979 extended the duty of support between spouses to continue as a maintenance liability after termination of the marriage under prescribed circumstances. See Sinclair **Marriage Law** 1996 at 148. Similarly the Maintenance of Surviving Spouses Act of 1990 and the Intestate Succession Act of 1987 were designed to provide economically for surviving spouses who constitute a socially vulnerable group. These Acts derogate from the common law rules of intestate succession that denied a surviving spouse of any claims for support or inheritance against the estate of her or his deceased spouse. Moseneke J in **Daniels v Campbell N.O.** 2004 (5) SA 331 (CC) at [99] and Skweyiya J in **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) at [37].

The Intestate Succession Act of 1987 does not define "spouse". The relevant principles of intestate succession provide that if the deceased is survived by a spouse but no descendants, the surviving spouse inherits the whole intestate estate. If the deceased is survived by a spouse as well as descendants, the spouse inherits a child's portion of the estate or the amount that the Minister of Justice determines from time to time by way of Notice in the Government Gazette. These two amounts are compared and the spouse gets the greater amount. Although the spouses' matrimonial property regime does not influence the calculation of the surviving spouse's inheritance, it must naturally be taken into account in order to determine the size of the intestate estate. See De Waal & Schoeman **Succession** 2003 at 18 and 19.

<sup>69</sup> See in this regard Skweyiya J in **Volks N.O. v Robinson and Others** 2005 (5) BCLR 446 (CC) at [56] regarding the fact that the estate of a deceased person would remain legally liable for maintenance where such a duty existed by operation of law during his or her lifetime.

<sup>70</sup> **Pillay v Pillay** 2004 (4) SA 81 (SE) at 86. "The purpose of doing the former is to achieve the clean break to which our Courts have repeatedly referred." **Esterhuizen v Esterhuizen** 1999 (1) SA 492 (C) at 501.

**(i) Proposals in the Discussion Paper**

6.7.4 With the “clean break” principle in mind, the Commission proposed that, despite the proposed duty of support between registered partners, no general maintenance obligation should be created for former registered partners. The Commission instead proposed that a Court should have a discretion to award maintenance under specified circumstances.

6.7.5 The principles set out in the Discussion Paper were based on section 7 of the Divorce Act of 1979<sup>71</sup> but expressly stated that no general right to maintenance exists between registered and unregistered partners upon termination of the partnership (clause 35).

6.7.6 The proposed legislation provided for a Court considering a maintenance award, to have regard to

- \* the existing or prospective means of each of the partners,
- \* their respective earning capacities,
- \* their future financial needs and obligations,
- \* the age of each of the partners,
- \* the duration of the partnership,

---

<sup>71</sup> The relevant part of s 7 of the Divorce Act of 1979 reads as follows:

**7 Division of assets and maintenance of parties**

(1) A Court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the Court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the Court should be taken into account, make an order which the Court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

- \* the standard of living of the partners prior to the termination, and
- \* any other factor which in the opinion of the Court should be taken into account.

6.7.7 Provision was also made for the registered partners to conclude an agreement as to the payment of maintenance and for the Court to make the agreement an order of Court.<sup>72</sup>

## (ii) Evaluation

6.7.8 Respondents generally agreed that former partners should at least have a limited liability for maintenance under prescribed circumstances.<sup>73</sup> Some respondents suggested alternative conditions for consideration by the Court before awarding maintenance,<sup>74</sup> while one emphasised that any maintenance obligation should cease in the event of a former partner's commencing another domestic partnership.<sup>75</sup>

---

<sup>72</sup> The Commission proposed that the legislation providing for the maintenance payable between former registered partners read as follows:

### **Maintenance**

**35.(1)** *There is no general right to maintenance between registered partners upon termination of the partnership.*

*(2) A Court granting a termination of the registered partnership may in accordance with a written agreement between the registered partners make an order with regard to the payment of maintenance by the one partner to the other.*

*(3) In the absence of an agreement referred to in subsection (2), the Court may, having regard to the existing or prospective means of each of the registered partners, their respective earning capacities, future financial needs and obligations, the age of each of the partners, the duration of the registered partnership, the standard of living of the parties prior to the termination of the registered partnership, and any other factor which in the opinion of the Court should be taken into account, make an order which is just and equitable in respect of the payment of maintenance by the one partner to the other for any specified period or until the death or remarriage of the partner in whose favour the order is given, whichever event may first occur.*

<sup>73</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Nkuna (Magistrate Mhala), M M Vincent (University of Venda), S Marupi (Community Advice Bureau), M P Sebati (Polokwane Municipality), T M Rangata (Department of Health and Welfare, Limpopo Province), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA), S Moller (FAMSA, Welkom), Directorate: Gender Issues Department of Justice and Constitutional Development, J McGill (Africa Christian Action), R Krüger (Rhodes University). Some respondents pointed out the need to provide for a maintenance claim against the estate of a deceased partner when the registered partnership is terminated by death. Eg CALS, Prof L N van Schalkwyk (UP).

<sup>74</sup> Eg the existence of children (C M Makgoba (Commission on Gender Equality), N E Fick

6.7.9 A further proposal was that the payment of maintenance after termination of the partnership should be determined by affordability and the history of the relationship.<sup>76</sup> One respondent suggested that maintenance should only be payable where the parties agree on it,<sup>77</sup> while another recommended that the original wording of the Divorce Act of 1979 should be adapted to redress injustices.<sup>78</sup>

6.7.10 One respondent recommended that the definition of "contribution" of the New South Wales Property (Relationships) Act of 1984<sup>79</sup> be used instead of the definition in the New Zealand Property (Relationships) Act of 1976<sup>80</sup> that was proposed in the

---

(Department Health and Welfare, Mokopane)), where the women has given up her career or has been disadvantaged by the relationship as relevant considerations to determine the obligation to pay maintenance (S W T Machumele (Magistrate Ritavi)), a relationship of long duration (5 years) (M Modieleng (Department of Social Welfare)), or where one of the partners is unemployed or does not have any source of income (M E Keepilwe (Department of Social Development), M Modieleng (Department of Social Welfare), S F Boshielo (Department of Justice), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein)), only if there is a partnership agreement to that effect (N Maanda (Lawyers for Human Rights, Johannesburg).

<sup>75</sup> R Krüger (Rhodes University).

<sup>76</sup> Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), J Tau (Methodist Church of SA).

<sup>77</sup> Adv G J van Zyl (Family Advocate).

<sup>78</sup> Eg Cape Bar Council.

<sup>79</sup> **"contribution"** means

(a) the financial and non-financial contributions made directly or indirectly by or on behalf of partners to the acquisition, conservation or improvement of any partnership property or separate property of either of the partners or to the financial resources of either or both of them, or

(b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the partners to the welfare of the partner or to the welfare of the family constituted by them and a child of the intimate partnership;

There is no presumption that a contribution referred to in (a) is of greater value than a contribution referred to in (b)

<sup>80</sup> **"contribution"** means-

(a) the care of—

- (i) any child of an intimate partnership;
- (ii) any aged or infirm relative or dependant of a partner;

(b) the management of the household and the performance of household duties;

(c) the provision of money, including the earning of income, for the purposes of an unregistered partnership;

(d) the acquisition or creation of partnership property including the payment of money for those

Discussion Paper. The former definition is shorter and makes it clear that both financial and non-financial contributions as well as contributions made in the capacity of homemaker or parent must be considered on an equal basis.<sup>81</sup>

## (ii) Recommendation by the Commission

6.7.11 In reaching its final recommendation the Commission considered the judgment in **Volks N.O. v Robinson**,<sup>82</sup> where the Constitutional Court emphasised that it is imperative that a duty of support existed by operation of law during the existence of the relationship in order for it to have the potential to be extended after its termination.<sup>83</sup>

---

purposes;

- (e) the payment of money to maintain or increase the value of—
  - (i) the partnership property or any part of that property; or
  - (ii) the separate property of the other partner or any part of that property;
- (f) the performance of work or services in respect of—
  - (i) partnership property or any part of that property; or
  - (ii) separate property of the other partner or any part of that property; or
- (g) the forgoing of a higher standard of living by either partner than would otherwise have been available;
- (h) the giving of assistance or support to the other partner (whether or not of a material kind), including the giving of assistance or support that—
  - (i) enables the other partner to acquire qualifications; or
  - (ii) aids the other partner in the carrying on of his or her occupation or business.

provided that there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature.

<sup>81</sup> The Cape Law Society Family Law Committee.

<sup>82</sup> 2005 (5) BCLR 446 (CC). This case dealt with the issue of maintenance of a surviving partner.

<sup>83</sup> See in this regard Skweyiya J about the position of people in unmarried relationships *op cit* at [62]:

People in the class of relationships to which she belongs are not in that position. In the circumstances, it is not appropriate that an obligation that did not exist before death be posthumously imposed.

6.7.12 The Commission recommends that on the premise that partners in registered partnerships do acquire a statutory duty of support, they also acquire the right to enforce it after the relationship has ended whether by death or termination.

6.7.13 Where no agreement has been entered into,<sup>84</sup> a Court should reach a fair decision by considering both past contributions and future financial needs of the respective partners. For this purpose the Commission recommends the amendment of the definition of "contribution" and that a former domestic partner may, after the partnership terminated, be awarded maintenance at the discretion of a Court after the prescribed factors have been considered. The legal position of maintenance between former registered partners is thus similar to that of divorced spouses.

**6.7.14 The Commission recommends that the legislation providing for the definition of "contribution" should read as follows:**

***"contribution" means-***

- (a) *the financial and non-financial contributions made directly or indirectly by the domestic partners-*
  - (i) *to the acquisition, maintenance or improvement of any joint property, or separate property of either of the domestic partners or to the financial resources of either or both of them, or*
  - (ii) *in terms of a registered partnership agreement, and*
- (b) *the contributions, including any contributions made in the capacity of homemaker or parent, made by either domestic partner to the welfare of the other domestic partner or to the welfare of the family constituted by them and a child of the domestic partners;*

*provided that there is no presumption that a contribution referred to in (a) is of greater value than a contribution referred to in (b);*

**6.7.15 The Commission recommends that the legislation providing for the discretionary maintenance liability should read as follows:**

***Maintenance after termination***

**18. (1)** *In the absence of an agreement, a court may, after termination of a registered partnership as provided in section 12(1)(b) and 12(1)(c) of the Act, upon application, make an order which is just and equitable in respect of the payment of maintenance by one registered partner to the other for any specified period or until the death or remarriage of the registered partner in whose favour the order is given, or the establishment of a registered partnership by the*

<sup>84</sup> Provision is made that partners can agree on maintenance in their termination agreement. See para 6.6.14 above.

*registered partner in whose favour the order is given with a new partner, whichever event occurs first.*

*(2) When deciding whether to order the payment of maintenance and the amount and nature of such maintenance, the court must have regard to the-*

- (a) respective contributions of each partner to the registered partnership,*
- (b) existing and prospective means of each of the registered partners,*
- (c) respective earning capacities, future financial needs and obligations of each of the registered partners;*
- (d) age of the registered partners;*
- (e) duration of the registered partnership;*
- (f) standard of living of the registered partners prior to the termination of the registered partnership;*

*and any other factor which in the opinion of the court should be taken into account.*

6.7.16 In case of maintenance for a surviving partner after the death of the other partner it was necessary to consider the wording of the Maintenance of Surviving Spouses Act of 1990. This Act defines “survivor” as “surviving spouse in a marriage dissolved by death”. The Act currently reflects the narrow common-law notions of marriage and family as it was enacted well ahead of the advent of the present constitutional era<sup>85</sup> and does not include a woman who is the survivor of a cohabitation relationship.<sup>86</sup>

6.7.17 On the basis that a duty of support and the concomitant right to maintenance after termination are recognised for former registered partners, the Commission recommends that rights similar to those under the Maintenance of Surviving Spouses Act of 1990 should be equally available to surviving registered partners.

---

<sup>85</sup> **Daniels v Campbell N.O.** 2004 (5) SA 331 (CC) Moseneke J at [99].

<sup>86</sup> **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC).

**6.7.18 The Commission recommends that the legislation providing for maintenance of surviving partners should read as follows:**

***Maintenance after death***

*19. For purposes of this Act, a reference to "spouse" in the Maintenance of Surviving Spouses Act must be construed to include a registered partner.*

**b) Intestate succession**

**(i) Proposals in the Discussion Paper**

6.7.19 Since the duty of support also forms the basis for the right to intestate succession, the Commission proposed in the Discussion Paper that, in the absence of a will, a surviving registered partner be allowed to inherit in the same manner as a surviving spouse (clause 19). For that purpose the Intestate Succession Act of 1987 would apply to registered partnerships and a registered partner would be deemed to be a "spouse" under that Act.<sup>87</sup>

**(ii) Evaluation**

6.7.20 Some respondents proposed that a surviving partner should always have the same status as a spouse in intestate succession and should inherit the entire estate if there are no dependants.<sup>88</sup>

6.7.21 Alternative suggestions were that that the Court should have a discretion to consider the facts of each particular case<sup>89</sup> and award the surviving partner a

---

<sup>87</sup> The Commission proposed that the legislation regarding intestate succession in the registered partnership option read as follows:

***Right to succession***

*19. The Intestate Succession Act, 1987 (Act No. 81 of 1987) applies, with the changes required by the context, to registered partnerships and for purposes of the Intestate Succession Act, 1987 (Act No. 81 of 1987) a partner in a registered partnership is deemed to be a "spouse" as meant in that Act.*

<sup>88</sup> CALS, H G J Beukes. Prof L N van Schalkwyk (UP) enquired how the calculation will be done when there are no children or when there is more than one unregistered partner.



reasonable share<sup>90</sup> or only redeem the contributions made by him or her to the partnership.<sup>91</sup>

### (iii) Recommendation by the Commission

6.7.22 Despite the fact that the Intestate Succession Act of 1987 does not define "spouse", the Commission recommends that the rights awarded to a "spouse" in the Intestate Succession Act should be equally available to surviving registered partners. This is also in line with the earlier recommendation that a duty of support and the concomitant right to maintenance be recognised for former registered partners.

**6.7.23 The Commission recommends that the legislation providing for intestate succession for surviving registered partners should read as follows:**

#### *Intestate succession*

*20. For purposes of this Act, a reference to "spouse" in the Intestate Succession Act must be construed to include a registered partner.*

### c) Delictual claims

#### (i) Proposals in the Discussion Paper

6.7.24 The duty of support also forms the basis of a delictual claim for damages by dependants upon the death of their breadwinner. The Commission subsequently also proposed in the Discussion Paper that such a delictual claim be made available to a registered partner upon the unlawful death of his or her partner.<sup>92</sup>

<sup>89</sup> S F Boshelo (Department of Justice).

<sup>90</sup> S Moller (FAMSA, Welkom).

<sup>91</sup> T Adloff (Lawyers for Human Rights), Family & Gender Service Delivery Task Team of the Lower Court Judiciary. Some respondents proposed that mediation be prescribed as a manner of dispute resolution in these cases. R Krüger (Rhodes University). Also recommended by a group at the Cape Town workshop, especially where there are children born into the relationship.

<sup>92</sup> The Commission proposed that the legislation regarding delictual claims read as follows:

#### *Delictual claims*

## (ii) Evaluation

6.7.25 The Commission was referred to case law where the Court has extended the duty of support to relationships of dependency and mutual obligation other than civil marriage, for example in case of Muslim marriages and same-sex relationships. It was argued that to extend a general duty of support to unregistered partners would clarify and simplify matters such as a dependant's actions for damages.<sup>93</sup>

## (iii) Recommendation by the Commission

6.7.26 On the basis that a duty of support is recognised for registered partnerships, the Commission recommends that a delictual claim for damages be extended to a partner in a registered partnership.

**6.7.27 The Commission recommends that the legislation providing for the extension of a delictual claim for damages should read as follows:**

### ***Delictual claims***

**21. (1) *For the purpose of claiming damages in a delictual claim, registered partners are deemed to be "spouses" in a legally valid marriage.***

**(2) *A registered partner is not excluded from instituting a delictual claim for damages based on the wrongful death of the other partner merely on the ground that the partners have not been legally married.***

**(3) *A registered partner is a dependant for purposes of the Compensation for Occupational Injuries and Diseases Act.***

---

**21.(1) *For the purpose of claiming damages in a delictual claim, registered partners are deemed to be "spouses" in a legally valid marriage.***

**(2) *A registered partner is not excluded from instituting a delictual claim for damages based on the wrongful death of the other partner merely on the ground that the partners have not been legally married.***

**(3) *A registered partner is a dependant for purposes of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993).***

## d) Property division

6.7.28 People in relationships collect property during the existence of the partnership for their joint and separate use, and when the relationship ends this property needs to be distributed equitably. The contributions of each partner are seldom easily calculated, nor the ownership determined when this property must be divided.<sup>94</sup> Where partners have paid together for property or where one partner has paid for property with money that he or she earned while the other partner took care of the household, it may be difficult to determine ownership or calculate each partner's share in property. The solution to this problem is to regulate the position through legislation.

6.7.29 When a Court is called upon to settle a dispute regarding the division of property of a married couple, the Court will first determine what the couple's property regime is.

### (i) Proposals in the Discussion Paper

6.7.30 As was seen in paragraph 6.4.12 above, the Commission proposed in the Discussion Paper that a registered partnership had, by default, to be out of community of property and subject to the accrual system, unless the partners had concluded a pre-registration agreement.

6.7.31 This meant that when the registered partnership ended, the accrual had to be divided as prescribed in the legislation. The legislation proposed that the difference in accrual of the two estates be divided equally (clause 14).<sup>95</sup>

---

<sup>94</sup> For instance, there may be property that they have paid for together or that one has paid for with money that he or she earned while the other partner took care of the household.

<sup>95</sup> The Commission proposed that the legislation regarding the division of accrual read as follows:

#### ***Division of accrual***

***14.(1) Under the accrual system, at the termination of a registered partnership, the registered partner whose estate shows no accrual or a smaller accrual than the estate of the other registered partner, or his or her estate if he or she is deceased, acquires a claim against the other registered partner, or his or her estate if he or she is deceased, for an amount equal to half of the difference between the accrual of the respective estates of the registered partners.***

***(2) Subject to the provisions of section 16, a claim in terms of subsection (1) arises at the termination of the registered partnership.***

## (ii) Evaluation

6.7.32 The proposed property division legislation was rejected as impractical, unnecessarily complicated and inappropriate for the poor and illiterate. It was also said that some parties tend to hide their assets or fail to disclose their assets, which make it difficult to determine the accrual to the joint estate. A partner would require the assistance of an attorney to obtain his or her share of the accrued assets.<sup>96</sup>

6.7.33 Instead, it was suggested that a list of options should be available on registration and that the selected option would have to be indicated on the certificate of registration; a choice between accrual or community of profit and loss but with a prescribed duty of support, contribution to household needs and intestate succession.<sup>97</sup>

6.7.34 See in this regard also the comments on the default property regime in para 6.4.13 *et seq.*

## (iii) Recommendation by the Commission

6.7.35 In relation to the actual division of the joint property after the termination of the registered partnership, there are two ways to approach the division. The first is to order a division strictly according to each partner's past contribution to the domestic partnership, *ie* to look back on the relationship. The second is to evaluate each partner's means and future needs, taking into consideration the presence of dependant children of the partnership, *ie* to anticipate future necessities. The ideal seems to lie in a combination of the two with the aim of reaching a fair and just distribution of assets.

---

*(3) The right of a registered partner to share in the accrual of the estate of the other registered partner in terms of this Act is not transferable or liable to attachment during the subsistence of the registered partnership, and does not form part of the insolvent estate of a registered partner.*

<sup>96</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre), Directorate: Gender Issues Department of Justice and Constitutional Development.

<sup>97</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre).

6.7.36 The Commission recommends that the enabling legislation require of the Court to make an equitable as opposed to a mathematical division. To reach a decision as to what would be an equitable division, the Court must consider both the past contributions and the future needs of the partners.

6.7.37 The Commission recommends that an adapted version of section 7 of the Divorce Act of 1979 be imported into the registered partnership legislation to create the necessary discretion for the Court.

**6.7.38 The Commission recommends that the provision providing for property division should read as follows:**

***Property division***

*22. (1) In the event of a dispute regarding the division of property after a registered partnership has ended, one or both registered partners may apply to a court for an order to divide their joint property or the separate property, or part of the separate property of the other registered partner.*

*(2) Upon an application for the division of joint property, a court must order the division of that property which it regards just and equitable with due regard to all relevant factors.*

*(3) Upon an application for the division of separate property or part of the separate property, a court may order that the separate property or part of the separate property of the other registered partner as the court regard just and equitable, be transferred to the applicant.*

*(4) A court considering an order as contemplated in subsections (2) and (3) must take into account-*

- (a) the existing means and obligations of the registered partners;*
- (b) any donation made by one partner to the other during the subsistence of the registered partnership;*
- (c) the circumstances of the registered partnership;*
- (d) the vested rights of interested parties in joint and separate property;*
- (e) the existence and terms of a registered partnerships agreement, if any; and*
- (f) any other relevant factors.*

*(5) A court granting an order as contemplated under subsection (3) must be satisfied that it is just and equitable to do so by reason of the fact that the registered partner in whose favour the order is granted, made direct or indirect contributions to the maintenance or increase of the separate property or part of*

*the separate property of the other registered partner during the subsistence of the registered partnership.*

*(6) A court granting an order as contemplated under subsection (3) may, on application by the registered partner against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court regard just and equitable.*

**Application only within two years after end of registered partnership**

**23. (1)** *Except as otherwise provided by this section, an application to a court for an order under this Chapter may only be made within a period of two years after the termination of the registered partnership.*

*(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to an applicant to apply to the court for an order under this Chapter, where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave were not granted than would be caused to the respondent if the leave were granted.*

**6.8 Other matters**

**a) Interests of third parties**

**(i) Proposals in the Discussion Paper**

6.8.1 Since a duty of support creates entitlements involving third parties, it is necessary to protect the interests of those parties.

6.8.2 In the Discussion Paper the Commission proposed that a party to whom debts are owed by either partner relating to household expenses may enforce that liability through legal proceedings in a Court (clause 8(4)). In addition a Court must have regard to the interests of an interested party when exercising its powers under this Act (clause 42).<sup>98</sup>

<sup>98</sup> The Commission proposed in the Discussion Paper that the legislation protect the interests of third parties in their dealings with partners in the registered partnership as follows:

***Duty of support***

**8. (1)..... (3)**

## (ii) Evaluation

6.8.3 Many respondents confirmed the need to protect the interests of third parties and found the proposals in the Discussion Paper to be adequate in this regard.<sup>99</sup>

6.8.4 One respondent submitted that partners in registered partnerships should be under a legal obligation to inform insurers of the registration of a partnership as this would expedite certainty, facilitate the administrative process and avoid potential disputes and conflicts upon termination of the partnership.<sup>100</sup>

6.8.5 A general suggestion was that it is necessary to provide for a sanction of the omission to inform interested third parties of the termination of the registered partnership. It was also suggested that a definition of interested third party be added to the legislation.

---

*(4) A party to whom debts are owed by either or both registered partners relating to household expenses incurred may enforce the joint liability against either or both partners through legal proceedings in a Court of law.*

### **Interests of other parties**

*42.(1) In the exercise of its powers under this Act, a Court must have regard to the interests of, and must make any order proper for the protection of, a bona fide purchaser or other person with an interest in property concerned.*

*(2) The rights of creditors of the partners are not affected by this Act.*

<sup>99</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, E Naidu (Durban Lesbian and Gay Community and Health Centre), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Masila (Magistrate Nelspruit), C M Makgoba (Commission on Gender Equality), M M Vincent (University of Venda), S Marupi (Community Advice Bureau), M P Sebati (Polokwane Municipality), T M Rangata (Department of Health and Welfare, Limpopo Province), Adv P Matshelo, S W T Machumele (Magistrate Ritavi), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA), R M Chirwa (Magistrate Eerstehoek), J McGill (Africa Christian Action), E Naidu (Durban Lesbian and Gay Community and Health Centre), Rev B D Dlamini & Dr C S Rankhota (University of Natal), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), M E Keepilwe (Department of Social Development), S Moller (FAMSA, Welkom). It was nevertheless proposed that a provision be included which directs partners to also give notice to any third parties which may have an interest in the matter if an application is made to Court to have the relationship declared an unregistered partnership under the ex post facto proposal.

<sup>100</sup> Life Office's Association.

### (iii) Recommendation by the Commission

6.8.6 Publication of the registration and termination of existing domestic partnerships is of particular importance to enable third parties to confirm the status of the relationships concerned. This will assist benefit and service providers to control the supply of such benefits and services. The publication aspect is facilitated by the recording of the registration and termination of partnerships in a public register and furnishing of a certificate to that effect. In addition the Commission recommends a notification duty on the former registered partners when the partnership is terminated.

**6.8.7 The Commission recommends that the legislation providing for the protection of the interests of third parties should read as follows:**

*"interested party" means any party with an interest, or who could reasonably be expected to have an interest, in the joint property of the domestic partners or the separate property of either of the domestic partners or in a partnership debt;*

#### **Notification of termination of a registered partnership**

**24.** (1) *When a registered partnership is terminated, both registered partners are liable to give written notice of the termination to interested parties.*

(2) *When one or both registered partners die, the surviving registered partner or the executor of the estate of either registered partner is liable to give written notice of the termination of the registered partnership to interested parties.*

#### **Interests of other parties**

**25.** (1) *A court considering an application under this Chapter must have regard to the interests of a bona fide purchaser of, or other person with an interest or vested right in, property concerned.*

(2) *A court may make any order proper for the protection of the rights of interested parties.*

### **b) The children of registered partners**

#### **(i) Proposals in the Discussion Paper**

6.8.8 The Commission submitted that the rights and obligations of parties to a partnership with respect to their biological child need not be addressed in this



legislation, since it is covered by the common law and legislation such as the Natural Fathers of Children Born out of Wedlock Act of 1997 and the new Children's Act.<sup>101</sup>

6.8.9 However, concomitant with the formal commitment of registered partners, the Commission regarded it appropriate to create a presumption that the male partner in an opposite-sex registered partnership is deemed to be the biological father of a child born in that partnership. Once this biological link between the male partner and the child has been established, the common law and legislation regulating their rights and obligations mentioned above become applicable.

### **(ii) Evaluation**

6.8.10 The Commission received no pertinent comments on the proposals regarding the children of domestic partners except to point out that the best interests of children should at all times be borne in mind. A Court called upon to adjudicate any matter involving a partnership in which or from which minor children are born, should have the jurisdiction to adjudicate all matters pertaining to the minor children simultaneously with any matter regarding the financial aspects of the partnerships.<sup>102</sup>

### **(iii) Recommendation by the Commission**

6.8.11 Despite the simplification of the registered partnership model, the Commission decided to recommend that a male registered partner be presumed to be the biological father of a child born to the female registered partner. The Commission submits that this presumption will serve to support the legal position of a biological father and his children.

6.8.12 For this purpose it is necessary to create a presumption in the legislation. Once the biological link between the male partner and the child has been established, the legal provisions regulating his rights and obligations become applicable.

---

<sup>101</sup> Currently the Children's Bill 70D of 2003.

<sup>102</sup> Cape Bar Council.

**6.8.13 The Commission recommends that the legislation providing for the presumption of paternity should read as follows:**

***Children of registered partners of the opposite sex***

*17. Where a child is born into a registered partnership between persons of the opposite sex, the male partner in the registered partnership is deemed to be the biological father of that child and has the legal rights and responsibilities towards that child that would have been conferred upon him if he had been married to the biological mother of the child*

6.8.14 The Commission furthermore adheres to the view held in the Discussion Paper that the common law and the new Children's Act<sup>103</sup> sufficiently address all the aspects in regard to the protection of children and the rights and obligations of their biological parents. It is therefore unnecessary to provide for these aspects in the domestic partnerships legislation.

6.8.15 See also the provisions to protect the interests of minor children in case of the termination of a registered partnership of a couple with minor children, as discussed in para 6.6.16 above.

---

<sup>103</sup> Currently the Children's Bill 70D of 2003.

## CHAPTER 7: UNREGISTERED PARTNERSHIPS

### 7.1 Introduction

7.1.1 Having provided for same-sex marriage and for registered partnerships for both same- and opposite-sex couples, one last category of relationship remains to be dealt with. These are unregistered partnerships, where the domestic partners are not married and where they have not registered their relationship for whatever reason.<sup>1</sup>

7.1.2 Recognition of an unregistered partnership would imply that the law would award a status to unmarried, unregistered domestic partners notwithstanding the fact that they have not committed themselves formally to the relationship through marriage or registration.

### 7.2 Unregistered partnership models

7.2.1 Two versions of the unregistered partnership model will be discussed. Under the first version the status is automatically ascribed to the relationship in terms of a relevant statute after a certain period or under certain circumstances (eg after two years of cohabiting or where children are born to the cohabiting partners) without the couple taking any steps to effect such recognition. For purposes of this discussion, this version will be referred to as the ascription model.<sup>2</sup> For an example of the ascription model see the discussion of the position in British Columbia<sup>3</sup> in chapter 4 above.

---

<sup>1</sup> See chap 2.2 above for the reasons why people cohabit.

<sup>2</sup> To be distinguished from the term "judicial discretion" (see discussion below). In the Discussion Paper the Commission used the term "ascription" for both categories. Discussion Paper no 104 (Project 118) available at <http://www.doj.gov.za/salrc/index.htm>.

<sup>3</sup> A province of Canada.

7.2.2 The second version of the unregistered partnership model is where statutory provision is made for one or both partners to turn to the Court to make a just and fair order to conclude the financial consequences of the termination of their unregistered family relationship. This can only be done once the Court has determined that the relationship complied with certain requirements during its existence. For purposes of this discussion this version will be referred to as the judicial discretion model. See the discussion of the position in New South Wales<sup>4</sup> in chapter 4 above for an example of the judicial discretion model.

7.2.3 Under the British Columbia ascription model the relevant rights are awarded to couples in unregistered relationships by the insertion of the term "marriage-like relationships" in 35 different statutes such as the Adult Guardianship Act, Criminal Injury Compensation Act, Estate Administration Act, Family Maintenance Enforcement Act, Health Care (Consent) and Care Facility Act and Home Owner Grant Act.<sup>5</sup>

7.2.4 No further description is given to the term "marriage-like relationship", and the relevant Acts require minimum periods of duration for the legislation to apply. Rights in terms of one Act may be ascribed to a marriage-like relationship after two years and in terms of another Act only after a minimum duration of three years. Where the status of a relationship is disputed by either of the partners or a third party, such a dispute must be settled by a Court.<sup>6</sup>

7.2.5 Under the New South Wales model the parties to an unregistered relationship acquire their civil status once a Court establishes that they have been in a "de facto relationship". The New South Wales Property (Relationships) Act of 1984 provides that a "de facto relationship" is a relationship where two adult persons, who are not married or related, "lived together as a couple" under certain circumstances. These circumstances are listed in the Act and are to be taken into consideration by a Court

---

<sup>4</sup> A state of Australia.

<sup>5</sup> See the Definition of Spouse Amendment Act of 2000, S.B.C. 2000, chap 24 and also Canada Law Commission **Beyond Conjuality** 2001.

<sup>6</sup> Another example of the ascription model is found in the Cohabitees (Joint Homes) Act of 1987 read with the Homosexual Cohabitees Act of 1988 of Sweden which automatically apply to unmarried relationships where the couple "live together in circumstances resembling marriage". See Schweltnus **Obiter** 1995 at 235.

through its judicial discretion in determining whether the couple lived as a couple.<sup>7</sup> If the Court's answer is positive, the relationship is declared to be a de facto relationship.

7.2.6 Once it has been established that the couple are in fact in a "de facto relationship", the Act allows either partner to apply for a property adjustment order and limited maintenance orders after the relationship has ended.<sup>8</sup>

7.2.7 An important difference between the ascription and judicial discretion model is the stage at which the status of the marriage-like relationship or the de facto relationship is determined.

7.2.8 Ostensibly marriage-like status under the ascription model aims to protect the partners during the existence of the relationship and thereafter. This means that any two parties living in a "marriage-like relationship" may enforce their rights in terms of eg the Home Owner Grant Act. If their status is accepted as such by the institution administering that Act, they will be able to claim the entitlements available under that Act. When a "marriage-like relationship" comes to an end, various Acts, such as the Family Maintenance Enforcement Act, determine the outcome.<sup>9</sup>

7.2.9 A couple's status under the judicial discretion model, on the other hand, becomes relevant only after the relationship has ended. The model aims to regulate the financial consequences of the termination of the relationship. It extends coverage to people who find themselves in an unfavourable economic position upon termination of the relationship as a result of circumstances related to the relationship. The legislative relief can be invoked where the parties are unable to manage their situation privately and one or both of the parties approach a Court to exercise its judicial discretion.

---

<sup>7</sup> Section 4 of the New South Wales Property (Relationships) Act of 1984.

<sup>8</sup> In addition the New South Wales Property (Relationships) Act of 1984 confers some rights on these relationships by way of consequential amendments to a number of statutes in which the mentioned definitions will be incorporated. An amendment to the Act in 1999 amended a number of New South Wales Acts to include same-sex couples within the meaning of de facto relationships. See NSW Law Reform Commission **Review of the Property (Relationships) Act 1984** 2002 at 6.

<sup>9</sup> These Acts were made applicable to such relationships by the insertion of such relationships in the scope of those Acts.

7.2.10 In terms of the New South Wales Property (Relationships) Act of 1984 a minimum duration of two years for the existence of the relationship is required before the Court can be approached for an order for property division or maintenance.<sup>10</sup> In determining whether two persons were in a de facto relationship, the Court will evaluate the circumstances of the relationship retrospectively.<sup>11</sup> If satisfied that the circumstances reflect that the former couple lived as a couple, the Court will determine a fair and just distribution of communal property and possibly maintenance in accordance with the guidelines set by the legislation.<sup>12</sup>

7.2.11 Couples need not be aware of the existence of the relevant legislation for it to apply to them. This makes the unregistered partnership model particularly valuable for vulnerable partners who cannot convince their partner to get married or register the relationship. This model is heralded as a way to compensate the weaker partner in a relationship who may have been exploited by the emotionally or financially stronger partner who is reluctant to formalise the partnership.<sup>13</sup>

#### a) Proposals in the Discussion Paper

7.2.12 In the Discussion Paper the Commission proposed two alternative options to regulate unmarried and unregistered family relationships. The first alternative, referred to in the Discussion Paper as the de facto option is here referred to as the ascription model and should not be confused with the term "de facto relationships" under New South Wales legislation. This option created rights and obligations for a couple in a conjugal (intimate) relationship **during the existence of the**

<sup>10</sup> Section 17 of the New South Wales Property (Relationships) Act of 1984 makes provision for exceptions where the partners have a child or the applicant made substantial contributions to the partnership for which he or she would not be adequately compensated and the failure to make an order would result in serious injustice.

<sup>11</sup> Sinclair **Marriage Law** 1996 at 297.

<sup>12</sup> Sinclair **Marriage Law** 1996 *ibid*. If the Court must only test the relationship for compliance with a list of objective criteria, the intention of the partners does not carry much weight. Under a subjective approach, the intention of the partners may be decisive. A combined approach would allow for an equitable outcome.

<sup>13</sup> The Courts have rejected the argument that since a couple made a "choice" not to get married, there should be no rights or obligations on the basis that there is too much potential for the stronger party to take advantage of the weaker party by denying responsibility for dependencies once the relationship is over. Bala **Canadian Journal of Family Law** 2000 at 193. See also Forder **Canadian Journal of Family Law** 2000 at par 11. Such exploitation is an inherent risk of registration models and even of contract models.

**unregistered relationship.** The second alternative, referred to as in the Discussion Paper as the ex post facto option is here referred to as the judicial discretion model. This option allowed partners in former relationships to apply to the Court for a property division or maintenance order in the event that they cannot come to an agreement **after the relationship has ended.** Under both options the legislation would apply automatically to the relationship.

7.2.13 The Commission's premise in the Discussion Paper was that the legal consequences in both cases should be limited in view of the absence of any formal commitment to the relationship.

## **b) Evaluation**

7.2.14 The main objection of respondents to the Discussion Paper against the registered partnership model<sup>14</sup> was that the option, as it was proposed, was unlikely to offer better protection and be significantly more accessible to vulnerable partners than marriage.<sup>15</sup> It was predicted that such partners would remain in unregistered relationships despite the availability of a registered partnership and that it should not be regarded as a solution to their situation.<sup>16</sup> It was submitted that the law should automatically protect vulnerable persons in cohabitation relationships.<sup>17</sup>

7.2.15 However, many respondents also objected to the invasion of couples' autonomy and privacy by awarding them automatic legal status without their

---

<sup>14</sup> See chap 6 above.

<sup>15</sup> In responding to the Discussion Paper, the Directorate: Gender Issues of the Department of Justice and Constitutional Development referred to their experience with the monitoring of the effective implementation of the Recognition of Customary Marriages Act of 1997. The Directorate submitted that the majority of people, especially African rural, semi-urban, are not able to access the rights afforded in legislation due to the inaccessibility of the Courts and the legislation. The Directorate submitted that the High Courts and Family Courts are not an option for many of these people because litigation in the former is costly and only a limited number of the latter exists. In addition to making litigation unaffordable these problems will result in the finalisation of many cases being delayed.

<sup>16</sup> Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), H Wetmore (Pietermaritzburg North Baptist Church), N E Fick (Department Health and Welfare, Mokopane), S F Boshielo (Department of Justice) F Muller (Lifeline/ Rape Crisis), Family & Gender Service Delivery Task Team of the Lower Court Judiciary.

<sup>17</sup> CALS.

necessarily being aware of the existence and applicability of the legislation.<sup>18</sup> It was contended that the proposal directly infringes on individuals' rights to choose not to enter into any contracts and it would thus be unconstitutional.<sup>19</sup>

7.2.16 Objections also included the fact that, in the event of a dispute, a Court would first have to determine and declare the status of the relationship. It is said that this procedure hinders the enforcement of rights, creates legal uncertainty and may be abused by an intimidating partner.<sup>20</sup>

7.2.17 Furthermore, a Court that is required to settle such a dispute regarding the status of the relationship might have to engage in extensive and intrusive inquiries into the intimate details of the relationship in order to test the relationship's compliance with the relevant statutory requirements.<sup>21</sup> As a result, it might be costly and difficult to prove that a relationship did, or did not, exist.

7.2.18 Arguments in support of automatic legal status for unregistered relationships include the fact that the vast majority of cohabitants do not exercise a conscious choice to avoid marriage.<sup>22</sup> Since the legislation is beneficial, it should apply by default to all relationships that potentially qualify as unregistered partnerships.<sup>23</sup> It is

<sup>18</sup> To address this objection legislation creating an automatic legal status often contains an opt-out clause which enables a couple to contract out of the default protection automatically created by the legislation. This presupposes that the partners are aware of the application of the Act as well as the opt-out option. In Sweden, under s 5 of the Cohabitees (Joint Homes) Act of 1987, cohabitants who do not want the law of cohabitation to apply to their relationship can draw up an agreement signed by both cohabitants stating same. Part 4 of the New South Wales Property (Relationships) Act of 1984 makes extensive provision for two persons who are not married to each other to enter into a domestic relationship agreement to provide for their financial matters.

<sup>19</sup> H Wetmore (Pietermaritzburg North Baptist Church), N Majola (Masimanyane Women's Support Centre, East London), S Moller (FAMSA, Welkom). It was suggested that the partners should first be informed and consulted. Colleen Rogers (Lifeline Vaal Triangle), R Krüger (Rhodes University), Adv G J van Zyl (Family Advocate), C Cetchen (Society for the Physically Disabled), S A Strauss (University of the Free State), S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA), Adv G Wright (Society of Advocates, Free State). Cape Bar Council, R Krüger (Rhodes University). D Milton (Member Family Law Committee Law Society of South Africa). Women's Legal Centre.

<sup>20</sup> Canada Law Commission **Beyond Conjugality** 2001.

<sup>21</sup> In **M. v. H.** the Canadian Supreme Court held that the approach to determining whether a relationship is of a conjugal nature, must be flexible since the relationships of all couples will vary widely. As discussed and referred to in Canada Law Commission **Legal Regulation of Adult Personal Relationships** 2000 at 147 fn 427.

<sup>22</sup> Prof E Bonthuys (WITS), Women's Legal Centre.

<sup>23</sup> A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), Khaya (Masimanyane Women's Support Centre, East London), Thandiwe (Masimanyane Women's Support Centre,



also submitted that the unregistered partnership model protects partners who neglect to take steps to formalise the relationship.<sup>24</sup>

7.2.19 Protection of unregistered family relationships furthermore assists the children of the partnership indirectly owing to the fact that the Court will consider the presence and needs of any children of the partnership when determining property division and maintenance for the custodial partner.<sup>25</sup>

7.2.20 Protection of unregistered family relationships is also a way to deal with the changing needs of the new family types in society. The New South Wales Property (Relationships) Act of 1984 showed that the model can be used for non-conjugal relationships.<sup>26</sup>

7.2.21 Support for the first (de facto) and second (ex post facto) options among respondents to the Discussion Paper was fairly evenly spread.

7.2.22 Some respondents preferred the de facto unregistered partnership for its wider scope of protection<sup>27</sup> as it was submitted that vulnerable partners should be afforded protection as early as possible in the relationship.<sup>28</sup> The de facto option

---

East London), J McGill (Africa Christian Action), Prof L N van Schalkwyk (UP), H G J Beukes, M S Masila (Magistrate Nelspruit), R Maile (Sukumani Makhosikati).

<sup>24</sup> Forder **Canadian Journal of Family Law** 2000 at 11 points out that even where parties may have the freedom to regulate their property and other relationships by eg registering, in practice they don't exercise this freedom. In this regard the Swedish system with its opt out clause is respectful of the couple's individual autonomy. Australian case law on inheritance shows few people order their affairs in advance through formal documents like wills. See also Millbank & Morgan in Wintermute & Andenæs at 309.

<sup>25</sup> Forder **Canadian Journal of Family Law** 2000 at 13.

<sup>26</sup> Unregistered partnership models can also serve to protect same-sex couples in societies where rates of discrimination and violence against lesbians and gays remain high and cause reluctance to commit to such relationships publicly through marriage or by registering it. Graycar & Millbank **Canadian Journal of Family Law** 2000 at 262 and the references in fn 76, submit that in Australia preference was given to ascription or presumption based models. This would be relevant where same-sex couples are not allowed to marry.

<sup>27</sup> CALS, Prof J Heaton & Dr R Songca (UNISA), Pietermaritzburg Gay and Lesbian Network, E Naidu (Durban Lesbian and Gay Community and Health Centre), Rev B D Dlamini & Dr C S Rankhota (University of Natal), Prof L N van Schalkwyk (UP), Rev W J Parsons, M S Masila (Magistrate Nelspruit), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office), S Moller (FAMSA, Welkom).

<sup>28</sup> SACC, Women's Legal Centre, C Cetchen (Society for the Physically Disabled), S A Strauss (University of the Free State), Adv G J van Zyl (Family Advocate), Adv P Matshelo (Justice College), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), M E Keepilwe (Department of Social Development), C Nkwenyane (Magistrate Mankweng), Colleen

would also protect those who "drift" into relationships and who avoid or postpone decisions about marriage.<sup>29</sup>

7.2.23 It was contended that the ex post facto recognition of unregistered partnerships could largely benefit economically resourced partners, *ie* partners who could afford the Court process that initiates this option.<sup>30</sup>

7.2.24 Respondents in favour of ex post facto recognition based their preference on objections against the de facto recognition of unregistered partnerships.<sup>31</sup> Two main objections were raised.

- \* Firstly, it was submitted that the de facto proposal is impractical. Owing to the informal nature of the relationship the de facto proposal would be difficult to implement in practice. It was submitted that de facto recognition would be complex to regulate and was expected to result in an unmanageable and unenforceable situation. It was contended that the real need for protection of domestic partnerships arises once the partnership comes to an end and the one partner, usually the women, is left destitute with no automatic remedy available. The ex post facto option facilitates a "clean break" with the Court stepping in at the end to come to the rescue of a weaker party.<sup>32</sup>
- \* The second major objection was that the de facto proposal infringes on the autonomy of partners who have deliberately chosen not to formalise their relationship. It was submitted that the partners should only be

---

Rogers (Lifeline Vaal Triangle), Adv G Wright (Society of Advocates, Free State), Dr W J Botha (Director: Information Dutch Reformed Church).

<sup>29</sup> SACC.

<sup>30</sup> Report by Women's Legal Centre.

<sup>31</sup> Z M Moletsane (Acting President: Central Divorce Court), Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), R Krüger (Rhodes University), Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), T Jordaan & W Gerber (Legal Aid Board), S F Boshieo (Department of Justice), T Adolff (Lawyers for Human Rights), N Majola (Masimanyane Women's Support Centre, East London), Directorate: Gender Issues Department of Justice and Constitutional Development. This does not necessarily mean that the latter is of the opinion that domestic partnerships do not require protection and regulation during its existence but they were often concerned about the practical feasibility of the de facto option.

<sup>32</sup> Eg Department of Public Service and Administration, Directorate: Gender Issues Department of Justice and Constitutional Development.

assisted by the legislation when at least one of the partners brings such a Court application, in other words ex post facto recognition.<sup>33</sup>

7.2.25 A general objection was also raised against the creation of a hierarchy of relationships by using marriage as the norm for the design of other forms of partnership regulation, as if marriage is the ideal to which other family forms should aspire. The effect is that less formal relationships get fewer rights and thus unregistered partnerships receive the most restricted rights.<sup>34</sup>

7.2.26 In determining the suitability of the format and content of the aforementioned models for the legal protection of unregistered partnerships to be recommended to the legislature, the Commission considered the following matters.

7.2.27 At the stage when the relevant legislative protection for unregistered family relationships was instituted in their jurisdictions, neither British Columbia nor New South Wales had general legislation that protected couples in cohabiting relationships or law that provided for same-sex marriage. These facts must have played an important role when their legislatures designed the format and content of the legislation. It meant that the legislation had to provide adequate protection to couples who might have wanted to get married but were not allowed to, while at the same time provide protection to couples who were able to marry but, for a variety of reasons, did not.

7.2.28 The category of unregistered family partnerships in South Africa differs from partnerships in British Columbia and New South Wales. The Commission's

<sup>33</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, A McGill, E Naidu (Durban Lesbian and Gay Community and Health Centre), Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), Rev B D Dlamini & Dr C S Rankhota (University of Natal), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, S F Boshieo (Department of Justice), Adv P Matshelo (Justice College), Adv G J van Zyl (Family Advocate), S W T Machumele (Magistrate Ritavi), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), N Maanda (Lawyers for Human Rights, Johannesburg), N E Fick (Department Health and Welfare, Mokopane), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, Family & Gender Service Delivery Task Team of the Lower Court Judiciary, N Kweleta (Masimanyane Women's Support Centre, East London), Khaya (Masimanyane Women's Support Centre, East London), N Majola (Masimanyane Women's Support Centre, East London), R Maile (Sukumani Makhosikati), S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA), Adv G Wright (Society of Advocates, Free State), S Moller (FAMSA, Welkom).

<sup>34</sup> Prof E Bonthuys (WITS) referred to Forder **Canadian Journal of Family Law** 2000 at 622 who pointed out that the legal regulation of marriage is by no means perfect and that "the recognition of domestic partnerships presents an opportunity to write better laws".

recommendations regarding same-sex marriage and registered partnerships cover two categories of relationships that were not included by British Columbia and New South Wales when their legislation was designed. Thus, while the need to protect unregistered family relationships may be just as strong in South Africa as in other jurisdictions, the format and content must be adapted to suit the unique South African circumstances.

7.2.29 According to the earlier recommendations of the Commission, same-sex couples will be able to marry if they so wish. In addition the registered partnership option creates an alternative to marriage for couples who do not want to get married but desire some form of legal protection and who are willing to undertake some form of public commitment. Therefore it seems fair to conclude that in the South African context partners in family relationships who do not get married and do not register their partnership are either vulnerable to intimidation in the sense that one of them cannot convince the other partner to commit formally to the relationship, or both are unwilling to obtain any legal consequences under the available legislation. It might also be that one of the partners is married to a third party already. The Commission must protect the interests of all three groups on the premise that two people who set up a home together and live a stable, permanent and affectionate relationship intend to deal fairly with one another.<sup>35</sup>

### **c) Recommendation**

7.2.30 The Commission submits that the South African solution lies in making unregistered partnership legislation principally applicable to all unmarried couples who have not registered their relationships. Under the judicial discretion model the legislation applies automatically. However, in order for one or both partners to enforce their rights, they have to approach the Court for relief where any prejudice is imminent as a result of the fact that the relationship has ended. In practice it means that one or both partners can effectively "opt in" to the already available protection of the Act after the relationship has come to an end.

7.2.31 The Commission gave serious consideration to the fact that the enforcement of rights according to the de facto option (now referred to as the ascription model)

---

<sup>35</sup> Sinclair **Marriage Law** 1996 at 297.

would provide vulnerable partners with relief at an earlier stage. However, the Commission could not ignore the inherent uncertainties of this option and the difficulties that are foreseen with implementing this proposal in practice,<sup>36</sup> nor the need to protect the interests of third parties.

7.2.32 In addition, respondents to the Discussion Paper as well as the Commission's own research showed that the real need for protection of vulnerable partners arises once the partnership comes to an end. It is then when the one partner, usually the women, is left destitute and needs a remedy that is automatically available.<sup>37</sup>

7.2.33 To accommodate all these factors, a model is needed in terms of which rights are not enforceable against the intention of one or both partners at a stage when the existence of the relationship is still uncertain or difficult to establish and in a way that will prejudice the interests of third parties.

7.2.34 The Commission submits that a model will run contrary to the above interests where it provides for one of the partners to obtain a declaratory Court order, during the existence of the relationship, to the effect that an unregistered partnership exists. The Commission is of the opinion that if a partner needs to go to Court to enforce his or her rights against the other partner, the Court would be inclined to find that the partnership, if any, is over. In that event the Court should be merely empowered with the discretion to order a fair and equitable outcome.<sup>38</sup>

---

<sup>36</sup> In **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) Ngcobo J emphasised this fact:

[95] Another consideration that is relevant is the difficulty of establishing the existence of a permanent relationship. The point at which such partnerships come into existence is not determinable in advance.

<sup>37</sup> See para 7.2.25 above. See also Goldblatt **SALJ** 2003 at 621 where she discusses the regulation of domestic partnerships, and pronounces as follows:

The issue is how the law should deal with the property of domestic partners on dissolution of the partnership following the breakdown of the relationship or the death of a partner. Maintenance of the partners is also in issue.

Goldblatt **SALJ** 2003 at 620 refers with approval to Bailey–Harris, who proposes an "adjustive statutory regime" so as to do justice to a range of relationships after relationship breakdown and to Sinclair, who calls for legislation that provides judicial discretion to redistribute property on the basis of equity. Goldblatt further states that such a discretionary approach seems to be appropriate.

<sup>38</sup> This does not mean that partners in an unregistered partnership may not approach, eg a Medical Fund who may be willing to accept them as a member and dependant on the basis of their informal relationship. However, the Fund will be not be obliged to do so and may require a marriage or registration certificate.

7.2.35 A decisive development in this regard that guided the Commission's final recommendation was the ruling of Ngcobo J in **Volks v Robinson**, where he stated:<sup>39</sup>

[94] People involved in a relationship may choose not to marry for a whole variety of reasons, including the fact that they do not wish the legal consequences of a marriage to follow from their relationship. It is also true that they may not marry because one of the parties does not want to get married. Should the law then step in and impose the legal consequences of marriage in these circumstances? To do so in my view would undermine the right freely to marry and the nature of the agreement inherent in a marriage. Indeed it would amount to the imposition of the will of one party upon the other. This is equally unacceptable.

7.2.36 In this regard, Skweyiya J said in the same case:

[62] ...people in marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position. In the circumstances, it is not appropriate that an obligation that did not exist before death be posthumously imposed.

7.2.37 The Commission submits that legislation that can be initiated by one or both partners addresses the concerns of respondents in this regard and is in line with the comments of Skweyiya J and Ngcobo J in **Volks N.O. v Robinson**.

7.2.38 In order to determine which relationships should qualify, some jurisdictions define unregistered partnerships in terms of duration or the existence of children of the relationship. Goldblatt shows that this is problematic since childless relationships of short duration may also create dependencies and property issues that require some legal intervention. Goldblatt refers to Bailey-Harris, who prefers a broad definition on the premise that there can be many indicators of mutual commitment in a relationship. Goldblatt concludes that a broad definition should look at the function of the relationship together with a set of indicators which act as a guide for the Courts.<sup>40</sup>

7.2.39 The Commission agrees that the decisive consideration ought to be whether a mutual dependency can be inferred from the partners' conduct during the existence

---

<sup>39</sup> 2005 (5) BCLR 446 (CC).

<sup>40</sup> Goldblatt **SALJ** 2003 at 619.

of the relationship. This is also in line with the guidance of Ngcobo J's in **Volks v Robinson**.<sup>41</sup>

[95] ...In addition, the consequences of such partnerships are determined by agreement between the parties. Unless these have been expressly agreed upon, they have to be inferred from the conduct of the parties.

7.2.40 The best way to protect vulnerable partners in such unregistered partnerships is by giving a Court the discretion to determine from the circumstances of cohabitation whether there are indicators of mutual commitment. This would include consideration of the intentions, whether stated or implied, of the partners.<sup>42</sup> The Commission submits that a Court process will ensure real equity and legal certainty for partners in these types of relationships.

7.2.41 The Commission further submits that the fact that one partner can approach the Court alone is significant. Vulnerable partners who could not convince their partner to commit to the relationship will be able to find relief from an objective source at the end of the relationship when they are at their most vulnerable. Thus, although one partner cannot bind the other partner unilaterally during the existence of the relationship, he or she can afterwards bring the other to account for his or her conduct.

7.2.42 The Commission took note of the objections that a Court procedure is costly and may be unaffordable, but trusts that the availability of legal aid will enhance the accessibility of this option. It is also true that the mere existence of the Court procedure will encourage parties to find their own private solution. A Court will be guided by legislative guidelines and has to follow the prescribed process and precedents in similar cases. In addition, a Court process will allow the partner who did not intend the relationship to be one of interdependency an opportunity to present his or her case before a competent forum. By this procedure both the vulnerability of certain partners as well as the autonomy of other partners are protected.

7.2.43 The proposals for unregistered partnerships made by the Commission in the Discussion Paper, the comments received by respondents as well as the

---

<sup>41</sup> 2005 (5) BCLR 446 (CC).

<sup>42</sup> See Goldblatt **SALJ** 2003 at 621.

Commission's recommendations for a model of judicial discretion for unregistered partnerships will next be discussed under the following main headings:

- \* scope of the Act,
- \* establishing the existence of an unregistered partnership,
- \* legal consequences of having lived as a couple, and
- \* other matters.

### **7.3 Scope of the Act**

7.3.1 Whereas polygamous and care-partnerships were never an option under the registered partnership model, the Commission had to consider these types of relationships seriously for inclusion in the unregistered partnership option. The reason is that the less formal characteristics of an unregistered partnership model make it particularly suitable as a way to deal with the changing needs of the new family types in society.<sup>43</sup>

#### **a) Polygamous-like relationships**

7.3.2 Although the term "polygamy" refers to more than one wife or husband in a married relationship, it is used here to denote the phenomenon of a partner in an unregistered partnership who is also married to a third party. It is foreseeable that a person who is already married to a third party under the Marriage Act of 1961 or the Recognition of Customary Marriages Act of 1998 may become involved in a conjugal relationship with a third party which might qualify as an unregistered partnership. In practice, if such a person benefits from both the marriage and the unregistered partnership it results in the legal recognition of polygamous-like relationships.

---

<sup>43</sup> The New South Wales Property (Relationships) Act of 1984 showed that the model can be used for non-conjugal relationships. See also in this regard Canada Law Commission **Beyond Conjuality** 2001 in general.



### (i) Proposals in the Discussion Paper

7.3.3 Since both civil marriage and registered partnerships have already been declared to be monogamous, the Commission proposed that no such limitation would be necessary for either de facto or ex post facto unregistered partnerships.

7.3.4 The Commission noted that an unregistered partnership that obtains legal status during the existence of the relationship under the de facto option has the potential to result in "actual" multiple relationships. Under the ex post facto option, on the contrary, the unregistered partnership acquires legal status after the relationship has been terminated and only for purposes of division of property and maintenance, addressing the results of what were in practice multiple partnerships. In view of this fact, the Commission suggested that multiple relationships under the ex post facto option would be less objectionable than under the de facto option.

### (ii) Evaluation

7.3.5 The need to protect polygamous relationships was pointed out in literature<sup>44</sup> as well as by some respondents to the Discussion Paper.

7.3.6 Respondents had various and often strong views on polygamy. Many respondents were opposed to the legal recognition of unregistered multiple

---

<sup>44</sup> CALS Report 2001, Women's Legal Centre, the Directorate: Gender Issues (Department: Justice and Constitutional Development).

Goldblatt "Law Recognise 'New' Families" 2002 at 3. Goldblatt **SALJ** 2003 at 622: "First, such a framework needs to be more flexible as it may have to accommodate de facto polygamy ...". Goldblatt **SALJ** 2003 refers to research findings that indicate that many domestic partners are also married, either under customary law or in terms of general law. This corresponds with comments that were received on the Discussion Paper.

partnerships,<sup>45</sup> while others favoured only the conditional recognition of multiple partnerships.<sup>46</sup>

7.3.7 Respondents opposed to multiple unregistered partnerships stated that polygamy gives legal recognition to an immoral situation, and Christian institutions generally submitted that it constitutes adultery in the eyes of the Lord.<sup>47</sup>

7.3.8 Objections of a more mundane nature included concern for the wife and children who may find after the husband's death that there are other claimants with legitimate claims to their inheritance.<sup>48</sup>

7.3.9 The Department of Public Service and Administration submitted that in terms of the current definition of "spouse" adopted by it as employer for purposes of employee benefits, employees may register a life partner. This is allowed provided that an employee who has registered a spouse in terms of the Recognition of Customary Marriages Act of 1998 or the Marriage Act of 1961 may not register a life partner as well. The Department submitted that one of the underlying principles of this policy is the protection of vulnerable spouses and that if the de facto option is accepted it will be unable to enforce this policy.

---

<sup>45</sup> Fr H Ennis (St Francis House), N E Fick (Department Health and Welfare, Mokopane), T Adloff (Lawyers for Human Rights), N Kweleta (Masimanyane Women's Support Centre, East London), Khaya (Masimanyane Women's Support Centre, East London), Thandiwe (Masimanyane Women's Support Centre, East London), N Majola (Masimanyane Women's Support Centre, East London), Adv G Wright (Society of Advocates, Free State) A McGill, Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), T Jordaan & W Gerber (Legal Aid Board), N E Fick (Department Health and Welfare, Mokopane), N Kweleta (Masimanyane Women's Support Centre, East London), Thandiwe (Masimanyane Women's Support Centre, East London), N Majola (Masimanyane Women's Support Centre, East London).

<sup>46</sup> Eg where the third person is a dependant (H G J Beukes) or receiving care (C Cetchen (Society for the Physically Disabled), S A Strauss (University of the Free State)) was unaware of the existence of the marriage of his or her partner, (H G J Beukes, Adv P Matshelo (Justice College)) where a child was born into the relationship (E Naidu (Durban Lesbian and Gay Community and Health Centre)) or where all three parties agreed to it (H Wetmore (Pietermaritzburg North Baptist Church), S P Bopape (Limpopo Advice Office), C Nkwenyane (Magistrate Mankweng)).

<sup>47</sup> Concern was expressed that profligacy, or adultery will be encouraged and it was contended that marriage should be strengthened to prevent abuse of vulnerable parties eg by criminalising adultery. A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), C Nkwenyane (Magistrate Mankweng), S Moller (FAMSA, Welkom), Khaya (Masimanyane Women's Support Centre, East London), Africa Christian Action. In exceptional cases of deceit the deceiving party must "be severely punished by law". H Wetmore (Pietermaritzburg North Baptist Church), D Scarborough (Evangelical Fellowship of Congregational Churches), Adv G Wright (Society of Advocates, Free State), Calvin Protestant Church of South Africa, Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa (minority submission).

<sup>48</sup> M E Keepilwe (Department of Social Development), F Muller (Lifeline/Rape Crisis).

7.3.10 However, many other respondents accepted the need for legal recognition of polygamous relationships in so far as the intention is to provide legal protection to vulnerable partners.<sup>49</sup> Reference was made to the prevalence of polygamous relationships amongst Africans and it was submitted that not to afford them recognition will result in untold hardship for many ignorant women.<sup>50</sup> In this regard it was submitted that the Recognition of Customary Marriages Act of 1998 has removed the *contra bonos mores* stigma that was previously associated with polygamy.<sup>51</sup>

7.3.11 One respondent referred to the phenomenon of "discarded wives" and submitted that these women may find themselves with no other refuge than to apply to be declared unregistered partners and subsequent to such a declaration, lay claim to whatever benefits are available to them under such a dispensation.<sup>52</sup>

<sup>49</sup> The CALS Report 2001 op cit. The full Report is available from the Centre for Applied Legal Studies Documentation Centre. For more information see <http://wwwserver.law.wits.ac.za/ca>. See also the discussion and references to this Report in chap 3 above. Women's Legal Centre, Rev B D Dlamini & Dr C S Rankhota (University of Natal), H G J Beukes, T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Masila (Magistrate Nelspruit), S W T Machumele (Magistrate Ritavi), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, R Maile (Sukumani Makhosikati). Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), Colleen Rogers (Lifeline Vaal Triangle), Rev W J Parsons, S F Boshieho (Department of Justice), T M Rangata (Department of Health and Welfare, Limpopo Province), M P Sebati (olokwane Municipality), C M Makgoba (Commission on Gender Equality), S Marupi (Community Advice Bureau), M M Vincent (University of Venda), S W T Machumele (Magistrate Ritavi), T Adolff (Lawyers for Human Rights), R Maile (Sukumani Makhosikati), S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA), Jared. Some respondents acknowledged the existence of polygamous relationships but suggested that society may not be ready to accept their legal recognition. Eg G J van Zyl (Family Advocate), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein).

<sup>50</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, M E Keepilwe (Department of Social Development), E Naidu (Durban Lesbian and Gay Community and Health Centre), Colleen Rogers (Lifeline Vaal Triangle), S F Boshieho (Department of Justice).

<sup>51</sup> Women's Legal Centre. The recommended Bill in the Report on Islamic Marriages and Related Matters has also recognised the institution of polygamy. The monogamous ideal is not held throughout South African society. Prof E Bonthuys (WITS).

<sup>52</sup> The Directorate: Gender Issues Department of Justice and Constitutional Development raised questions pertaining to the matter of "discarded wives". The example used by the respondent is that of a man who, prior to 1988 marries wife X customarily and thereafter, but still prior to 1988, marries wife Y civilly. In accordance with **Nkambula v Linda** 1951 (1) SA 377 (A), a subsequent civil marriage nullified the customary marriage. Hence the term "discarded wives", used for women who had been abandoned by their customary husbands following a subsequent civil marriage. Due to her ignorance on the consequences of a subsequent civil marriage, wife A continues to stay in her marital home as a wife and sees her "husband" every year during the December holidays when he is back from the city. Thus wife A continues to regard herself (and be regarded) as the customary wife. The respondent argued that at customary law that first marriage remains a valid marriage. However, if these marriages were to remain valid, it would amount to recognising polygamous civil marriages.

7.3.12 Another respondent made the point that although the legal recognition of a polygamous relationship would be contra the nature of a civil marriage it is not contra a customary marriage.<sup>53</sup> In accordance with the Commission's suggestion in the Discussion Paper,<sup>54</sup> one respondent contended that the morality problem can be addressed by regulating only the consequences of multiple partnerships, *ie* ex post facto.<sup>55</sup>

7.3.13 The comments by respondents on this topic confirmed the Commission's view that polygamy is culture-related. It further confirmed that in practice the real problems with multiple relationships arise after one of the relationships has ended, and mainly where there is a maintenance, succession or property dispute.

7.3.14 This observation means that only parties who would in the ordinary course of events as part of their culture become a partner in multiple relationship need protection, in particular ex post facto protection (*ie* after termination of one or both of the multiple relationships).

7.3.15 The Commission submits that partners who are in unregistered partnerships and simultaneously in civil marriages or registered partnerships do not fall into the category that needs protection.

### (iii) Recommendation

**7.3.16 The Commission thus recommends that the remedies in the legislation only be available to partners who have not also been in a civil marriage or registered partnership with a third party at the time of unregistered partnership.**<sup>56</sup>

---

<sup>53</sup> Prof L N van Schalkwyk (UP). Similarly, it was suggested that only those polygamous relationships that can be connected to migrant labour resulting from the previous government's policy of apartheid, should be recognised. Rev A D Vorster (Uniting Presbyterian Church in Southern Africa).

<sup>54</sup> See para 7.3.4 above.

<sup>55</sup> R Krüger (Rhodes University).

<sup>56</sup> With reference to the two issues pointed out by the Directorate: Gender Issues (Department: Justice and Constitutional Development) namely discarded wives (see fn 53 above) and putative wives: Where the customary marriage process has not been completed (or is disputed) whilst the couple lived together as man and wife and the woman finds herself with no legal rights after

7.3.17 The Commission submits that the wording of clause 25(4) of the recommended legislation facilitates this recommendation:

***Court application***

**26. (1) ... (3)**

*(4) A court may not make an order under this Chapter regarding a relationship of a person who, at the time of that relationship, was also in a civil marriage or registered partnership with a third party.*

*(5) ... .*

**b) Non-conjugal relationships**

**(i) Proposals in the Discussion Paper**

7.3.18 The Commission accepts that the ascription model can be useful to protect people in care relationships (non-conjugal). Nevertheless, the Commission submitted in the Discussion Paper that care-partners should not be included in the scope of the de facto option owing to the more intimate nature of the legal consequences that were proposed to attach to de facto partnerships. The Commission therefore proposed that the de facto option apply to intimate (conjugal) partnerships only and submitted that the qualification of "two adult persons who live as couple" in the definition of "intimate partnerships" facilitates that proposal.<sup>57</sup>

7.3.19 However, the Commission proposed that both intimate and care relationships be included in the ex post facto option. The Commission proposed that care partnership be defined as "a non-conjugal relationship provided for in section 5 of this Act and includes a former care partnership between the partners".

---

separation. The Commission submits that these "wives" could qualify for ex post facto protection if the Court is satisfied that the circumstances of their cohabitation justify it.

<sup>57</sup> The Commission proposed that this definition read as follows:

***"intimate partnership"*** means a relationship, other than a marriage, civil union or registered partnership, between two adult persons who live as a couple and includes a former intimate partnership.

7.3.20 Clause 5 of the proposed ex post facto unregistered partnership legislation describes a care partnership as a relationship other than between registered or married partners of a non-intimate nature who provide each other with support and personal care. Under the proposal, they need not live together or be related. Where such support and personal care are rendered for a fee or reward, or on behalf of an organisation or someone else, the relationship would not qualify as a care partnership.<sup>58</sup>

## (ii) Evaluation

7.3.21 Many respondents submitted that care-partners should be included in the protection afforded to domestic partners,<sup>59</sup> since taking care of a person may be prejudicial to the caretaker's earning power.<sup>60</sup>

<sup>58</sup> The Commission proposed that this clause read as follows:

### **Care partnership**

*5.(1) A care partnership is a close personal relationship, other than a marriage or a registered partnership or an intimate partnership, between two adult persons, irrespective of whether or not such persons are living together or related by family, in circumstances where either of them provides the other with domestic support and personal care.*

*(2) For the purposes of subsection (1), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:*

- (a) for fee or reward; or*
- (b) on behalf of another person or an organization, including a government or government agency, a body corporate or a charitable or benevolent organisation.*

<sup>59</sup> Adv G J van Zyl (Family Advocate), E Naidu (Durban Lesbian and Gay Community and Health Centre), Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, S W T Machumele (Magistrate Ritavi), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), M E Keepilwe (Department of Social Development), T Adolff (Lawyers for Human Rights), N Majola (Masimanyane Women's Support Centre, East London), S P Bopape (Limpopo Advice Office), Z M Moletsane (Acting President: Central Divorce Court), G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), Colleen Rogers (Lifeline Vaal Triangle), M S Masila (Magistrate Nelspruit), M M Vincent (University of Venda), S Marupi (Community Advice Bureau), C M Makgoba (Commission on Gender Equality), J La Rochelle (SANDF), C Cetchen (Society for the Physically Disabled), T M Rangata (Department of Health and Welfare, Limpopo Province), N Kweleta (Masimanyane Women's Support Centre, East London), S Moller (FAMSA, Welkom).

<sup>60</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre), Prof L N van Schalkwyk (UP), H G J Beukes, Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, R Maile (Sukumani Makhosikati), S Moller (FAMSA, Welkom), Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), F Muller (Lifeline/ Rape Crisis), S W T Machumele (Magistrate Ritavi). It was submitted that in reality it is often women who undertake care giving, give up their careers and an income and then find themselves destitute and abandoned after the termination of the care relationship. F Muller (Lifeline/ Rape Crisis).

7.3.22 Other respondents disagreed, saying that care is a family duty and should be an act of love, not a legal relationship with the hope to be rewarded.<sup>61</sup> It was also submitted that the needs of non-conjugal partners are different to those of conjugal partners and would not be properly covered by domestic partnership legislation.<sup>62</sup>

7.3.23 Concern was furthermore expressed that legal recognition of care partnerships may be susceptible to abuse<sup>63</sup> and could lead to exploitation of people in need of care.<sup>64</sup>

### (iii) Recommendation

7.3.24 The Commission decided that a proper study is needed to consider the specific needs of care-partners and therefore recommends that these couples not be included in the scope of this legislation.

7.3.25 The Commission recommends the following wording for the definition of unregistered partnership to indicate that only conjugal relationships are meant to be included in the scope of the recommended legislation.

<sup>61</sup> R Krüger (Rhodes University), Rev B D Dlamini & Dr C S Rankhota (University of Natal), Adv G J van Zyl (Family Advocate), Adv P Matshelo (Justice College), C Cetchen (Society for the Physically Disabled), S A Strauss (University of the Free State), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, T Adolff (Lawyers for Human Rights), N Kweleta (Masimanyane Women's Support Centre, East London), Khaya (Masimanyane Women's Support Centre, East London), Thandiwe (Masimanyane Women's Support Centre, East London), S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA), C Nkwenyane (Magistrate Mankweng), Adv G Wright (Society of Advocates, Free State), D Scarborough (Evangelical Fellowship of Congregational Churches), N E Fick (Department Health and Welfare, Mokopane), C Nkwenyane (Magistrate Mankweng), D Scarborough (Evangelical Fellowship of Congregational Churches), J Tau (Methodist Church of SA) Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa.

<sup>62</sup> Presbytery of the Western Cape Uniting Presbyterian Church in Southern Africa, Directorate: Gender Issues Department of Justice and Constitutional Development, Rev B D Dlamini & Dr C S Rankhota (University of Natal), A R Manning, ChristianViewNetwork, S F Boshelo (Department of Justice), S A Strauss (University of the Free State), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, R Maile (Sukumani Makhosikati).

<sup>63</sup> A McGill, Adv P Matshelo (Justice College), Khaya (Masimanyane Women's Support Centre, East London), Adv G Wright (Society of Advocates, Free State).

<sup>64</sup> A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein).

*"unregistered partnership" means a relationship between two adult persons who live as a couple and who are not related by family;*

#### **7.4 Establishing the existence of an unregistered partnership: judicial discretion**

7.4.1 In accordance with the Commission's recommendation to provide for the fair and equitable conclusion to the financial consequences of the termination of an unregistered partnership through a Court procedure, provision must be made to establish which relationships deserve such protection.

7.4.2 For this purpose the Commission proposes a procedure whereby a Court determines after the end of the relationship whether the conduct of the parties during the relationship points to an implied agreement to incur rights and obligations. Where partners have neither married nor registered their partnership in order to create and obtain legal rights and obligations, the intention of mutual commitment must be inferred from the circumstances of their cohabitation.<sup>65</sup>

##### **a) Proposals in the Discussion Paper**

7.4.3 The de facto and ex post facto Bills in the Discussion Paper proposed a list of factors for consideration to determine the status of the relationship.

7.4.4 The proposed de facto unregistered partnership legislation applies to all unregistered relationships which qualify as intimate partnerships, irrespective of whether one or both partners are aware of the legislation.

7.4.5 Clause 4(1) of the Bill prescribes a list of factors for consideration by any person or Court who is required to determine the status of the relationship, for example to evaluate a partner's entitlement to service benefits. These factors are:

- \* the duration of the relationship;

---

<sup>65</sup> **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) at [95].



- \* the nature and extent of common residence;
- \* whether or not a sexual relationship exists;
- \* the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;
- \* the ownership, use and acquisition of property;
- \* the degree of mutual commitment to a shared life;
- \* the care and support of children;
- \* the performance of household duties;
- \* the reputation and public aspects of the relationship

7.4.6 In the event of a formal dispute regarding the status of the relationship, a Court will be required to determine the status of the relationship with reference to the definition and the list of factors (clause 5). However, a finding in respect of any of the matters in clause 4(1) is not essential for the existence of an intimate partnership and regard may also be had to any other matter as seem appropriate under the circumstances.<sup>66</sup>

---

<sup>66</sup> In the de facto option the Commission proposed the following provisions regarding the determination of the status of an intimate partnership during its existence by an individual or institution (clause 4) or, in the event of a dispute, by a Court (clause 5):

***Existence of an intimate partnership***

***4. (1) When determining whether two persons are in an intimate partnership, regard must be had to all the circumstances of the relationship, including such of the following matters as may be relevant in a particular case:***

- (a) the duration of the relationship;*
- (b) the nature and extent of common residence;*
- (c) whether or not a sexual relationship exists;*
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;*
- (e) the ownership, use and acquisition of property;*
- (f) the degree of mutual commitment to a shared life;*

7.4.7 Under the ex post facto option the Commission proposed that a declaration of status of an intimate partnership (conjugal) or care partnership (non-conjugal) by a Court is needed after the dissolution of the relationship, in order to determine if a relationship falls within the scope of the legislation. The factors that a Court may consider in determining the status of the former intimate partnership concurs with the list referred to in para 7.4.5 above.

7.4.8 The list of factors for consideration of care partnerships, which has been duly adapted to suit non-conjugal relationships,<sup>67</sup> is:

- \* the duration of the relationship;
- \* the nature and extent of common residence;
- \* the degree of financial dependence or interdependence, and any
  - (g) the care and support of children;
  - (h) the performance of household duties;
  - (i) the reputation and public aspects of the relationship.

*(2) A finding in respect of any of the matters mentioned in subsection (1), or in respect of any combination of them, shall not be regarded as essential for the existence of an intimate partnership, and in determining whether such a partnership exists, regard may be had to further matters and the weight be attached to such matters as may seem appropriate in the circumstances of the case.*

**Declaration of unregistered partnerships status**

*5.(1) When the status of an intimate partnership provided for in this Act is disputed, any interested party may at any time apply to Court for an order declaring the status of the relationship.*

*(2) The Court, upon determining whether two persons are in an intimate partnership, must take all the circumstances of the relationship into account, including such of the matters set out in section 4(1) as may be relevant in a particular case.*

*(3) A finding in respect of any of the matters mentioned in subsection (2), or in respect of any combination of them, shall not be regarded as essential for the existence of an intimate partnership, and a Court, in determining whether such a partnership exists, is entitled to have regard to further matters, and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case.*

<sup>67</sup> Several writers suggest that marriage marginalises people who are outside that unit and that the opening up of registered partnerships to more than just gays and lesbians moves society further along the road of recognising a broader definition of family. "Part of our struggle is to fight for a broader definition of the family. Domestic partners should not have to be gay or lesbian. They should not have to be having sex. They can be two adults sharing a home and sharing commitment, responsible to each other". See Findlen 1995 **Ms. Magazine** at 87 fn 49 referred to by LaViolette "Registered Partnerships Model" 2001 at 25 fn 101.

arrangements for financial support, between the partners;

- \* the ownership, use and acquisition of property;
- \* the reputation and public aspects of the relationship.

7.4.9 None of the listed factors is essential for the existence of the intimate or care partnership and a Court may also have regard to other matters.<sup>68</sup>

---

<sup>68</sup> The Commission proposed that the legislation read as follows:

***Declaration of partnerships***

**6.(1)** *A person in an unregistered relationship may after the relationship ends apply to the Court for an order declaring the relationship an intimate partnership or a care partnership under this Act.*

*(2) The Court, upon determining whether two persons are in an intimate partnership, must take all the circumstances of the relationship into account, including such of the following matters as may be relevant in a particular case:*

- (a) the duration of the relationship;*
- (b) the nature and extent of common residence;*
- (c) whether or not a sexual relationship exists;*
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;*
- (e) the ownership, use and acquisition of property;*
- (f) the degree of mutual commitment to a shared life;*
- (g) the care and support of children;*
- (h) the performance of household duties;*
- (i) the reputation and public aspects of the relationship;*

*(3) The Court, upon determining whether two persons are in a care partnership, must take all the circumstances of the relationship into account, including such of the following matters as may be relevant in a particular case:*

- (a) the duration of the relationship;*
- (b) the nature and extent of common residence;*
- (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;*
- (d) the degree of emotional dependence or interdependence between the partners;*
- (e) the ownership, use and acquisition of property;*
- (f) the reputation and public aspects of the relationship.*

7.4.10 The proposed content of the list for intimate partnerships concurs in both Bills. However, in accordance with international examples of similar legislative measures, an additional requirement that the relationship must have existed for at least two years was proposed under the ex post facto option. Exceptions, on the basis of the presence of children of the partnership and serious injustice resulting, had to be allowed.<sup>69</sup>

## **b) Evaluation**

7.4.11 Respondents were generally in favour of the factors listed to determine the status of a relationship, whether de facto or ex post facto.<sup>70</sup> Respondents had varying opinions on the relevance of some of the factors,<sup>71</sup> mostly confirming that no factor should be more important than others or be decisive.<sup>72</sup>

---

*(4) A finding in respect of any of the matters mentioned in subsections (2) and (3), or in respect of any combination of them, shall not be regarded as essential for the existence of an intimate partnership or a care partnership, and a Court, in determining whether such a partnership exists, is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case.*

<sup>69</sup> This proposal read as follows:

### ***Prerequisites for making of order under this Part***

**15.(1)** *Except as provided by subsection (2), a Court may not make an order under this Act unless it is satisfied that the partnership has existed for a period of not less than two years.*

**(2)** *Notwithstanding the fact that the partnership has not existed for a period of not less than two years, a Court may make an order under this Act if it is satisfied that-*

- (a) the partnership is an intimate partnership and the partners have a child, or*
- (b) the applicant-*
  - (i) has made substantial contributions for which the applicant would otherwise not be adequately compensated if the order were not made, or*
  - (ii) has custody of a child of the respondent,*

*and that the failure to make the order would result in serious injustice to the applicant.*

<sup>70</sup> Eg E Naidu (Durban Lesbian and Gay Community and Health Centre), H G J Beukes, Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Masila (Magistrate Nelspruit), S W T Machumele (Magistrate Ritavi), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, Adv G Wright (Society of Advocates, Free State), S Moller (FAMSA, Welkom).

<sup>71</sup> S P Bopape (Limpopo Advice Office), M E Keepilwe (Department of Social Development), N E Fick (Department Health and Welfare, Mokopane), Khaya (Masimanyane Women's Support

7.4.12 Different opinions were expressed about the minimum requirement of two years proposed in the ex post facto option.<sup>73</sup> Some respondents regarded two years as reasonable.<sup>74</sup> Some suggested longer<sup>75</sup> and others shorter minimum periods.<sup>76</sup>

7.4.13 The idea of a minimum period of time was rejected by some respondents. They expressed the view that the duration of the relationship is not decisive, but that maturity and commitment to the growth of the relationship should be evaluated, and that the Court should have the final say in this regard.<sup>77</sup>

---

Centre, East London), C Nkwenyane (Magistrate Mankweng), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), T Adolff (Lawyers for Human Rights), Khaya (Masimanyane Women's Support Centre, East London), E Naidu (Durban Lesbian and Gay Community and Health Centre), Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), S F Boshielo (Department of Justice), J Tau (Methodist Church of SA), R Krüger (Rhodes University), R Maile (Sukumani Makhosikati), N Maanda (Lawyers for Human Rights, Johannesburg), Rev B D Dlamini & Dr C S Rankhota (University of Natal), M E Keepilwe (Department of Social Development).

<sup>72</sup> Prof L N van Schalkwyk (UP), M S Masila (Magistrate Nelspruit), S W T Machumele (Magistrate Ritavi), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office), S Moller (FAMSA, Welkom).

<sup>73</sup> T Jordaan & W Gerber (Legal Aid Board) expressed a concern that disputes about the actual starting date of the relationship and in cases of temporary break-ups and subsequent reconciliation may render this requirement impractical.

<sup>74</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), Rev B D Dlamini & Dr C S Rankhota (University of Natal), Colleen Rogers (Lifeline Vaal Triangle), M S Masila (Magistrate Nelspruit), S F Boshielo (Department of Justice), Adv P Matshele (Justice College), C Cetchen (Society for the Physically Disabled), S A Strauss (University of the Free State), F Muller (Lifeline/Rape Crisis), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), N E Fick (Department Health and Welfare, Mokopane), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, T Adolff (Lawyers for Human Rights), Khaya (Masimanyane Women's Support Centre, East London), R Maile (Sukumani Makhosikati), S Moller (FAMSA, Welkom), E Naidu (Durban Lesbian and Gay Community and Health Centre).

<sup>75</sup> Eg five years (C Nkwenyane (Magistrate Mankweng)).

<sup>76</sup> Eg one year, 8 months and 6 months. Thandiwe (Masimanyane Women's Support Centre, East London), N Majola (Masimanyane Women's Support Centre, East London) M E Keepilwe (Department of Social Development) N Maanda (Lawyers for Human Rights, Johannesburg).

<sup>77</sup> Adv G J van Zyl (Family Advocate), J Tau (Methodist Church of SA), Rev W J Parsons, Prof L N van Schalkwyk (UP), H G J Beukes, J La Rochelle (SANDF), N Kweleta (Masimanyane Women's Support Centre, East London), Adv G Wright (Society of Advocates, Free State) and one group at the workshop in Bloemfontein suggested that it is unnecessarily cautious to require two years and that there should not be a difference between marriage and these partnerships since the aim is to remove discrimination between married and unmarried relationships. T Jordaan & W Gerber (Legal Aid Board). In the event of the death of one of the partners shortly after the partnership began, an investigation as to the origin of the relationship and the original intentions of the partners should be decisive. Rev W J Parsons.

### c) Recommendation

7.4.14 In this recommendation the Commission also strives to give effect to the guidance of Skweyiya J and Ngcobo J in **Volks v Robinson** regarding the need to regulate permanent life partnerships through legislation.<sup>78</sup>

7.4.15 The Commission recommends that the legislation provides for a Court, upon application from one or both former partners, to consider the circumstances of the relationship. The Commission therefore recommends that the threshold question is whether they have lived as a couple. This must be determined from the circumstances of their cohabitation, and for this purpose the Commission recommends a non-conclusive list of factors<sup>79</sup> but also allows the Court to consider other factors that it may regard to be relevant.

7.4.16 Once the Court is satisfied that the circumstances show that the parties have lived as a couple, it can be accepted that there was a mutual commitment. Then the Court may allow them to apply for the protective measures provided for in the Act in order to give effect to that mutual commitment after the end of the relationship.

7.4.17 As far as a minimum duration for the relationship is concerned, the Commission agreed with the objection that it might be difficult to determine the actual starting and end dates of the relationship. The question what to do in cases where one partner passes away shortly before the minimum time period ran out, for instance, further convinced the Commission that it would not be fair to set a minimum period and this requirement was subsequently rejected.

7.4.18 The Commission also recommends that it should not be a requirement that the couple actually live together, in view of the fact that it is not a requirement for married couples. The relevance of the fact that a couple did not actually live together will, however, be a factor for the Court to consider.

#### **7.4.19 The Commission recommends that the legislation providing for the Court's discretion should read as follows:**

<sup>78</sup> 2005 (5) BCLR 446 (CC) at [65], [68] and [95].

<sup>79</sup> This list was gleaned from s 4 of the New South Wales Property (Relationships) Act of 1984 and the **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000 (2) SA 1 (CC) at [88].

### **Court application**

**26.** (1) *One or both unregistered partners, may, after the unregistered partnership has ended through death or separation, apply to a court for a maintenance order, an intestate succession order or a property division order under this Chapter.*

(2) *When deciding an application for an order under this Chapter a court must have regard to all the circumstances of the relationship, including such of the following matters as may be relevant in a particular case:*

- (a) *the duration and nature of the relationship;*
- (b) *the nature and extent of common residence;*
- (c) *the degree of financial dependence or interdependence, and any arrangements for financial support, between the unregistered partners;*
- (d) *the ownership, use and acquisition of property;*
- (e) *the degree of mutual commitment to a shared life;*
- (f) *the care and support of children of the domestic partnership;*
- (g) *the performance of household duties;*
- (h) *the reputation and public aspects of the relationship; and*
- (i) *the relationship status of the unregistered partners with third parties.*

(3) *A finding in respect of any of the matters mentioned in subsection (2), or in respect of any combination of them, is not essential before a court may make an order under this Chapter, and regard may be had to further matters and the weight be attached to such matters as may seem appropriate in the circumstances of the case.*

(4) *A court may not make an order under this Chapter regarding a relationship of a person who, at the time of that relationship, was also in a civil marriage or registered partnership with a third party.*

(5) *A court may only make an order under this Chapter regarding a relationship where at least one of the parties to the relationship is a South African citizen or has a certificate of naturalisation in respect of South Africa.*

7.4.20 As far as the termination of an unregistered partnership is concerned, before the Act will apply one or both partners must bring an application to Court after the relationship has ended. This means that there is no need to provide for the circumstances under which the relationship ends, as the Court application would effectively indicate this.

## 7.5 Legal consequences of having lived as a couple

7.5.1 The consequences of the break-up of the partnership remain the same as was proposed in the Discussion Paper, namely a limited right to **maintenance after separation or death, intestate succession and property division**.

### a) Duty of support

7.5.2 At common law there is no automatic duty of support between domestic partners. According to the ex post facto model the duty of support is not extended to partners in domestic partnerships. However, under the legislation, specific rights that form part of the duty of support may be applied for in Court, thereby creating in effect a statutory duty of support.

#### (i) Proposals in the Discussion Paper

7.5.3 On the basis that there is not a formal commitment between the partners, the Commission submitted in the Discussion Paper that there is no general duty between the partners to support each other. In order to protect third parties, the Commission proposed that de facto partners who have established the existence of their relationship acquire a limited duty of support and partners are jointly liable for debts incurred for household expenses (clause 6). Household expenses are defined as those expenses incurred to maintain the common household and household goods are defined to mean corporeal goods intended for use of the joint household (clause 1).<sup>80</sup>

---

<sup>80</sup> The proposal read as follows:

#### ***Duty of support***

**6. (1)** *Except as provided for in this section, there is no general duty of support between partners in an unregistered partnership.*

**(2)** *Partners are jointly liable for debts incurred for household expenses.*

**(3)** *A third party to whom debts referred to in subsection (1) are owed by either or both of the partners may enforce the joint liability against either or both of the partners through legal proceedings in a Court of law.*



7.5.4 No provision was made for a duty of support in the ex post facto option.

## (ii) Evaluation

7.5.5 As was indicated before, the relevance of a duty of support is that it embraces essential needs and the potential availability of medical, pension and insurance benefits.

7.5.6 Many respondents emphasised the importance of a duty of support and it was said that this duty is often the motivation for forming relationships.<sup>81</sup> However, many respondents also agreed with the Commission's submission in the Discussion Paper that in the absence of a formal public commitment by the parties to the relationship there should not be a general duty of support.<sup>82</sup>

7.5.7 Some respondents to the Discussion Paper contended that informal commitment,<sup>83</sup> an explicit agreement (other than marriage) to undertake such a duty,

<sup>81</sup> Rev W J Parsons, F Muller (Lifeline/ Rape Crisis), Adv G Wright (Society of Advocates, Free State), S Moller (FAMSA, Welkom), Rev B D Dlamini & Dr C S Rankhota (University of Natal), M S Masila (Magistrate Nelspruit), Adv P Matshelo (Justice College), S W T Machumele (Magistrate Ritavi), N Maanda (Lawyers for Human Rights, Johannesburg), S P Bopape (Limpopo Advice Office), E Naidu (Durban Lesbian and Gay Community and Health Centre), Prof L N van Schalkwyk (UP), Colleen Rogers (Lifeline Vaal Triangle), S F Boshelo (Department of Justice), Adv G J van Zyl (Family Advocate), Adv P Matshelo (Justice College), S W T Machumele (Magistrate Ritavi). It was proposed that the availability of benefits could be conditional eg depending on the level of dependency between the partners (H G J Beukes), or only to a couple with children (T Jordaan & W Gerber (Legal Aid Board). Alternatively a limit could be placed on the number of partners one may have on your medical aid. Fritse Muller (Lifeline/Rape Crisis).

<sup>82</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, J McGill (Africa Christian Action), E Naidu (Durban Lesbian and Gay Community and Health Centre), Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), R Krüger (Rhodes University), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), H Wetmore (Pietermaritzburg North Baptist Church), Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Nkuna (Magistrate Mhala), M S Masila (Magistrate Nelspruit), S F Boshelo (Department of Justice), C M Makgoba (Commission on Gender Equality), S Marupi (Community Advice Bureau), M P Sebati (Polokwane Municipality), T M Rangata (Department of Health and Welfare, Limpopo Province), M M Vincent (University of Venda), J la Rochelle (SANDF), Adv G J van Zyl (Family Advocate), S A Strauss (University of the Free State), S W T Machumele (Magistrate Ritavi), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), N Maanda (Lawyers for Human Rights, Johannesburg), N E Fick (Department Health and Welfare, Mokopane), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, J Tau (Methodist Church of SA), R M Chirwa (Magistrate Eerstehoek), S Moller (FAMSA, Welkom).

<sup>83</sup> Juan La Rochelle (SANDF), Adv P Matshelo (Justice College). It was contended that the premise of the Commission follows the trend to ascribe a duty to maintain to some form of agreement between the parties or to a public religious ceremony as referred to in **Satchwell v President of the Republic of South Africa** 2002 (6) SA 1 (CC) para 24. See also **Amod v Multilateral**

a certain level of interdependency, the intention and desire to live together and share a household and life, financial dependency or the mere decision to form the relationship could form the basis for the duty of support between unregistered partners.<sup>84</sup>

7.5.8 These respondents emphasised the fact that, while the relationship may otherwise function as a permanent life partnership, many vulnerable parties in unmarried relationships with intimidating partners are unable to convince them to make a formal public commitment. These vulnerable partners are thus in dire need of default protection and in particular an enforceable duty of support.<sup>85</sup>

7.5.9 With the dismissal of de facto option the possibility of extending the common-law duty of support to unregistered partners also had to be dismissed. See in this regard the ratio for the judgment in **Volks v Robinson** that no duty of support arises by operation of law in the case of unmarried cohabitants, and thus no duty to maintain the surviving partner could be passed on to the estate of the deceased.<sup>86</sup>

7.5.10 The Commission submits that the solution to this problem lies in the creation of a statutory claim for maintenance under prescribed circumstances and intestate succession. This would comply with the requirement that the duty must exist "by operation of law". This will not only enhance legal certainty as to the content of the rights and obligations as well as the circumstances under which they will be available, but make specific elements of the common-law duty of support which are relevant to partners in informal relationships available to them.

---

**Vehicle Accidents Fund (Commission for Gender Equality Intervening)** 1999 (4) SA 1319 (SCA) paras 20, 23, 25. Prof E Bonthuys (WITS) submitted that not all duties of support require a public ceremony or an agreement and that a duty of support should be based on factors of dependence, need or contribution. Eg parents and children are liable to support one another despite being unwilling and failing to recognise the relationship publicly. The respondent referred to Sinclair **Marriage Law** 1996 at 299 and Goldblatt **SALJ** 2003 at 625.

<sup>84</sup> S F Boshielo (Department of Justice), Colleen Rogers (Lifeline Vaal Triangle), N Maanda (Lawyers for Human Rights, Johannesburg), N Majola (Masimanyane Women's Support Centre, East London), J Tau (Methodist Church of SA), R Krüger (Rhodes University), H G J Beukes, E Naidu (Durban Lesbian and Gay Community and Health Centre), Women's Legal Centre, Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), Rev B D Dlamini & Dr C S Rankhota (University of Natal), Adv G J van Zyl (Family Advocate), S W T Machumele (Magistrate Ritavi), S P Bopape (Limpopo Advice Office).

<sup>85</sup> CALS, Women's Legal Centre. The Commission was referred to case law where the Court has extended the duty of support to relationships of dependency and mutual obligation other than civil marriage eg in case of Muslim marriages and same-sex relationships.

<sup>86</sup> **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC) at [56] and [60], in the context of the provision of maintenance of the survivor of a marriage.

**7.5.11 The Commission recommends that a limited right to maintenance and intestate succession be provided for in the Act.**

**b) Maintenance**

**(i) Proposals in the Discussion Paper**

7.5.12 In accordance with the Commission's proposal that only a limited statutory duty of support exists between de facto unregistered partners during the relationship, the Commission did not propose a general maintenance obligation between former unregistered partners, whether de facto or ex post facto.<sup>87</sup> Provision was made for exceptions and the Court would have a general discretion regarding the making of maintenance orders under prescribed circumstances (clause 24).<sup>88</sup>

---

<sup>87</sup> This is also in line with international trends to limit maintenance obligations even between divorced spouses. Schweltnus *Obiter* 1995 at 240. See also the reference to the "clean break principle" in chap 6.7.3 above.

<sup>88</sup> The Commission proposed that these maintenance provisions for former unregistered partners should read as follows:

***Maintenance***

**23.** *A partner is not liable to maintain the other partner when the partnership ends and neither partner is entitled to claim maintenance from the other, except as provided for in this Act.*

***Maintenance order***

**24.(1)** *Upon an application by a partner for an order to pay maintenance, a Court may make such an order where the Court is satisfied that-*

- (a) *the applicant partner is unable to support himself or herself adequately by reason of having the custody of a child of an intimate partnership with the respondent partner, being a child who is, on the day on which the application is made, a minor child or a physically or mentally disabled child; or*
- (b) *the applicant partner is unable to support himself or herself adequately because that partner's earning capacity has been adversely affected by the circumstances of the partnership and, in the opinion of the Court-*
  - (i) *an order for maintenance would increase that partner's earning capacity by enabling the applicant partner to undertake a course or program of training or education, and*
  - (ii) *it is, having regard to all the circumstances of the case, reasonable to make the order.*

7.5.13 No proposals were made for maintenance of surviving partners after the death of the other partner.

## (ii) Evaluation

7.5.14 Respondents generally agreed that former partners should at least have a limited liability for maintenance under prescribed circumstances.<sup>89</sup> Some respondents suggested alternative conditions for consideration by the Court before awarding

---

*(2) In determining whether to make a maintenance order under this Act and in fixing any amount to be paid pursuant to such an order, a Court shall have regard to-*

- (a) the income, property and financial resources of each partner and the physical and mental capacity of each partner to appropriate gainful employment;*
- (b) the financial needs and obligations of each partner;*
- (c) the responsibilities of either partner to support any other person;*
- (d) the terms of any order made or proposed to be made under this Act for the division of property; and*
- (e) any payments made, pursuant to an order of a Court or otherwise, in respect of the maintenance of a child or children in the custody of the applicant;*
- (f) the availability of employment to the applicant.*

*(3) In making an order for maintenance, a Court must ensure that the terms of the order will, so far as is practicable, preserve any entitlement of the applicant partner to a pension, allowance or benefit.*

<sup>89</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Nkuna (Magistrate Mhala), M M Vincent (University of Venda), S Marupi (Community Advice Bureau), M P Sebati (Polokwane Municipality), T M Rangata (Department of Health and Welfare, Limpopo Province), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA), S Moller (FAMSA, Welkom), Directorate: Gender Issues Department of Justice and Constitutional Development, J McGill (Africa Christian Action), R Krüger (Rhodes University).

maintenance,<sup>90</sup> while one emphasised that any maintenance obligation should cease in the event of a former partner commencing another domestic partnership.<sup>91</sup>

7.5.15 A further proposal by some respondents was that the payment of maintenance after the end of the partnership should be determined by affordability and the history of the relationship.<sup>92</sup> One respondent suggested that maintenance should only be payable where the parties agree on it,<sup>93</sup> while another recommended that the original wording of the Divorce Act of 1979 should be adapted to redress injustices.<sup>94</sup>

7.5.16 The lack of provision for maintenance of surviving partners was pointed out as a serious defect of the proposals in the Discussion Paper since this is one of the main issues for vulnerable partners in informal relationships.<sup>95</sup>

7.5.17 Both the judgments of Skweyiya J and Ngcobo J in **Volks v Robinson** also point to the need to provide for the vulnerable partners in these circumstances.<sup>96</sup>

---

<sup>90</sup> Eg the existence of children (C M Makgoba (Commission on Gender Equality), N E Fick (Department Health and Welfare, Mokopane)), where the women has given up her career or has been disadvantaged by the relationship as relevant considerations to determine the obligation to pay maintenance (S W T Machumele (Magistrate Ritavi)), a relationship of long duration (5 years) (M Modieleng (Department of Social Welfare)), or where one of the partners is unemployed or does not have any source of income (M E Keepilwe (Department of Social Development), M Modieleng (Department of Social Welfare), S F Boshielo (Department of Justice), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein)), only if there is a partnership agreement to that effect (N Maanda (Lawyers for Human Rights, Johannesburg),

<sup>91</sup> R Krüger (Rhodes University).

<sup>92</sup> Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), J Tau (Methodist Church of SA).

<sup>93</sup> Adv G J van Zyl (Family Advocate).

<sup>94</sup> Eg Cape Bar Council.

<sup>95</sup> CALS, Prof L N van Schalkwyk (UP). Alternative suggestions were that that the Court should have a discretion to consider the facts of each particular case (S Moller (FAMSA, Welkom)), that the surviving partner be awarded a reasonable share or be redeemed for the contributions made by him or her to the partnership S F Boshielo (Department of Justice) S F Boshielo (Department of Justice).

<sup>96</sup> **Volks N.O. v Robinson** 2005 (5) BCLR 446 (CC).

**(iii) Recommendations for maintenance after separation or death**

7.5.18 The Commission recommends that a limited statutory right to maintenance be available to former partners in unregistered partnerships after separation or death. A Court can consider the merits of an application for such an order after it has concluded that the couple has indeed lived as a couple under clause 25.

**7.5.19 The Commission recommends that the legislation providing for the limited maintenance right should read as follows:**

***Maintenance***

*27. Unregistered partners are not liable to maintain one another and neither partner is entitled to claim maintenance from the other, except as provided in this Chapter.*

**7.5.20 The Commission recommends that the legislation providing for the circumstances under which a Court may order maintenance after separation should read as follows:**

***Application for a maintenance order after separation***

*28. (1) A court may, after the separation of unregistered partners upon application of one or both of them, make an order which is just and equitable in respect of the payment of maintenance by one unregistered partner to the other for a specified period.*

*(2) When deciding whether to order the payment of maintenance and the amount and nature of such maintenance, the court must have regard to the age of the unregistered partners, duration of the unregistered partnership, standard of living of the unregistered partners prior to separation as well as the following matters-*

- (a) ability of the applicant to support himself or herself adequately in view of him or her having custody of a minor child of the domestic partnership;*
- (b) respective contributions of each unregistered partner to the partnership;*
- (c) existing and prospective means of each unregistered partner;*
- (d) respective earning capacities, future financial needs and obligations of each unregistered partner;*
- (e) the relevant circumstances of another unregistered partnership or customary marriage of one or both unregistered partners, where applicable;*

*in so far as they are connected to the existence and circumstances of the unregistered partnership and any other factor which in the opinion of the court should be taken into account.*

**7.5.21 The Commission recommends that the legislation providing for the circumstances under which a Court may order maintenance of a surviving partner should read as follows:**

***Application for a maintenance order after death of unregistered partner***

**29. (1)** *A surviving unregistered partner may after the death of the other unregistered partner, bring an application to a court for an order for the provision of his or her reasonable maintenance needs from the estate of the deceased until his or her death, remarriage or registration of another registered partnership, in so far as he or she is not able to provide therefore from his or her own means and earnings.*

*(2) The surviving unregistered partner will not, in respect of a claim for maintenance, have a right of recourse against any person to whom money or property has been paid, delivered or transferred in terms of section 34 (11) or 35 (12) of the **Administration of Estates Act**, or pursuant to an instruction of the Master in terms of section 18(3) or 25(1)(a)(ii) of that Act.*

*(3) The provisions of the **Administration of Estates Act** apply mutatis mutandis to a claim for maintenance of a surviving unregistered partner, subject to the following-*

- (a) the claim for maintenance of the surviving unregistered partner must have the same order of preference in respect of other claims against the estate of the deceased as a claim for maintenance of a dependent child of the deceased has or would have against the estate if there were such a claim;*
- (b) in the event of competing claims of the surviving unregistered partner and that of a dependent child of the deceased the court must make an order that it regards just and equitable with reference to all the relevant circumstances of the unregistered partnership;*
- (c) in the event of competing claims of an unregistered partner and that of a surviving customary spouse, the court must make an order that it regards just and equitable with reference to the existence and circumstances of multiple relationships between the deceased and an unregistered partner, and between the deceased and a customary spouse;*
- (d) in the event of a conflict between the interests of the surviving unregistered partner in his or her capacity as claimant against the estate of the deceased and the interests in his capacity as guardian of a minor dependent child of the domestic partnership, the court must make an order that it regards just*

*and equitable with reference to all the relevant circumstances of the unregistered partnership; and*

- (e) *the executor of the estate of a deceased spouse must have the power to enter into an agreement with the surviving unregistered partner and the heirs and legatees having an interest in the agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate, or a right in the assets, to the surviving unregistered partnership, or to impose an obligation on an heir or legatee, in settlement of the claim of the surviving unregistered partner or part thereof.*

***Determination of reasonable maintenance needs of the surviving unregistered partner***

***30. When determining the reasonable maintenance needs of the surviving unregistered partner, the court must consider the-***

- (a) *amount in the estate of the deceased available for distribution to heirs and legatees;*
- (b) *existing and expected means, earning capacity, financial needs and obligations of the surviving unregistered partner;*
- (c) *standard of living of the surviving unregistered partner during the subsistence of the unregistered partnership and his or her age at the death of the deceased;*
- (d) *existence and circumstances of multiple relationships between the deceased and an unregistered partner, and between the deceased and a customary spouse; and*

*any other factor that it regards relevant.*

7.5.22 In view of the Commission's recommendation to regulate the consequences of multiple relationships, the Commission submits that clauses 28(e) and 29(3)(c) address the situation of competing claims by a partner and customary spouse.

**c) Intestate succession**

7.5.23 As was indicated before the right to intestate succession of a surviving spouse is also a continuation of the duty of support between married spouses. The same impediments that applied to the maintenance obligation between former unregistered partners will therefore apply to the matter of intestate succession.<sup>97</sup>

---

<sup>97</sup> See para 7.5.10 above.



### (i) Proposals in the Discussion Paper

7.5.24 The Commission proposed in the Discussion Paper that the surviving partner to an intimate de facto partnership would be entitled to inherit a child's share from his or her deceased partner's intestate estate (clause 10).<sup>98</sup>

7.5.25 The Commission furthermore proposed that the surviving partner in an ex post facto partnership would first have to obtain a Court order declaring the status of the former relationship to be that of an unregistered partnership in terms of the legislation before he or she can claim a child's share from his or her deceased partner's intestate estate (clause 22).<sup>99</sup>

### (ii) Evaluation

7.5.26 Some respondents proposed that a surviving partner should always have the same status as a spouse in intestate succession and should inherit the entire estate if there are no dependants.<sup>100</sup>

---

<sup>98</sup> The Commission proposed that the legislation regarding intestate succession in the ex post facto option read as follows:

***Intestate succession***

***10.*** A surviving partner in an unregistered partnership shall inherit a child share or an amount that does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette under the Intestate Succession Act, 1987 (Act No. 81 of 1987), whichever is the greater, from his or her deceased unregistered partner who died intestate.

<sup>99</sup> The Commission proposed that the legislation regarding intestate succession in the ex post facto option read as follows:

***Intestate succession***

***22.*** A surviving party to an unregistered relationship who have acquired a declaration in terms of section 6 of this Act that the relationship was an intimate partnership, shall inherit a child share or an amount that does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette under the Intestate Succession Act, 1987 (Act No. 81 of 1987), whichever is the greater, from his or her deceased intimate partner who died intestate.

<sup>100</sup> CALS, H G J Beukes. Prof L N van Schalkwyk (UP) enquired how the calculation will be done when there are no children or when there is more than one unregistered partner.

7.5.27 Alternative suggestions were that that the Court should have a discretion to consider the facts of each particular case<sup>101</sup> and award the surviving partner a reasonable share<sup>102</sup> or only redeem the contributions made by him or her to the unregistered partnership.<sup>103</sup>

7.5.28 One respondent pointed to the complication in the event of a polygamous marriage and domestic partnership. It was proposed that the spouse and the partner could share the estate and if there are descendants the spouse, partner and descendants could each receive a child's share.<sup>104</sup>

### (iii) Recommendation of the Commission

7.5.29 The Commission recommends the creation of a statutory right to intestate succession for surviving partners of unregistered partnerships at the discretion of the Court. A Court can consider an application for intestate succession after it has decided that the couple has indeed lived as a couple under clause 26.

**7.5.30 The Commission recommends that the legislation providing for a right of intestate succession to a surviving partner of an unregistered partnership should read as follows:**

#### *Intestate succession*

*31. (1) Where an unregistered partner dies intestate his or her surviving unregistered partner may bring an application to a court, subject to subsections (2) and (3), for an order that he or she may inherit the intestate estate.*

*(2) Where the deceased is survived by an unregistered partner as well as a descendant such unregistered partner inherits a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in*

---

<sup>101</sup> S F Boshielo (Department of Justice).

<sup>102</sup> S Moller (FAMSA, Welkom).

<sup>103</sup> T Adloff (Lawyers for Human Rights), Family & Gender Service Delivery Task Team of the Lower Court Judiciary. Some respondents proposed that mediation be prescribed as a manner of dispute resolution in these cases. R Krüger (Rhodes University). Also recommended by a group at the Cape Town workshop, especially where there are children born into the relationship.

<sup>104</sup> CALS.

*the Gazette, whichever is the greater, as provided for in the **Intestate Succession Act**.*

*(3) In the event of a dispute between a surviving unregistered partner and the customary spouse of a deceased partner regarding the benefits to be awarded, a court may, upon an application by either the unregistered partner or the customary spouse, make an order that it regards just and equitable with reference to all the relevant circumstances of both relationships.*

7.5.31 In view of the Commission's recommendation to regulate the consequences of multiple relationships, the Commission submits that clause 31(3) addresses the situation of competing claims by a partner and customary spouse of the deceased for intestate succession.

#### **d) Property division**

7.5.32 Since there is no formal commitment by the partners in an unregistered partnership, there is no stage at which they are required to consider and indicate the property dispensation of their choice. The result is that there is no community of property and theoretically each partner retains whatever he or she owns and may dispose thereof at will.

7.5.33 In reality, however, cohabiting partners join their property and acquire additional property together. This joint property must be divided fairly after the relationship has ended.

#### **(i) Proposal in the Discussion Paper**

7.5.34 To facilitate a property division proposal, the Commission proposed that "partnership property" be defined to include<sup>105</sup>

<sup>105</sup> The Commission proposed that the definition reads as follows:

**"partnership property" means-**

- (a) *the family home of the partnership whenever acquired;*
- (b) *household goods of the partnership whenever acquired;*
- (c) *property owned jointly or in common in equal shares by the partners;*
- (d) *property owned by either partner immediately before the partnership began if-*

- \* the family home and household goods;
- \* property owned jointly or in common in equal shares by the partners;
- \* property owned by either partner immediately before the partnership began, provided the property was acquired in contemplation of the partnership and was intended for the common use or common benefit of both partners;
- \* all property acquired after the partnership began for the common use or benefit of both partners if the property was acquired out of property owned by either of or both partners before the partnership began; or the property was acquired out of the proceeds of any disposal of any property owned by either of or both partners before the partnership began;
- \* any income and gains derived from the proceeds of and any increase in the value of any property described above.

7.5.35 The Commission further proposed that former partners in an unregistered partnership who cannot come to an agreement about the ownership and subsequent division of property may apply to Court for an order for the division of partnership property. The proposed legislation provided for the Court to order an equal division of the partnership property between the former partners (clause 19).<sup>106</sup>

- 
- (i) *the property was acquired in contemplation of the partnership; and*
  - (ii) *the property was intended for the common use or common benefit of both partners;*
  - (e) *all property acquired after the partnership began for the common use or benefit of both partners if –*
    - (i) *the property was acquired out of property owned by either of or both partners before the partnership began; or*
    - (ii) *the property was acquired out of the proceeds of any disposal of any property owned by either of or both partners before the partnership began;*
  - (f) *any income and gains derived from the proceeds of and any increase in the value of any property described in paragraphs (a) to (e).*

<sup>106</sup> The Commission proposed that the relevant legislation read as follows:

**Equal division**

7.5.36 In addition, to ensure an equitable settlement of disputes, provision was made for deviation from equal division. Thus a Court may, after having had regard to the various contributions made by the partners, order a just and equitable adjustment of the sharing of the partners in the relevant property (clause 20).<sup>107</sup> In this regard the proposed definition of "contribution" also aimed to equalise monetary and non-monetary contributions towards the acquisition of partnership property or the welfare of the other partner or family.<sup>108</sup>

---

**19.(1)** *In making a decision as to the division of partnership property, the Court must take into account that each of the partners is entitled to share equally in partnership property.*

(2) ...

<sup>107</sup> The Commission proposed that the legislation providing for an adjustment under the de facto option read as follows:

**Adjustment order**

**20.(1)** *Notwithstanding the provisions of section 19, upon an application by the partners for an adjustment order under this Act, a Court may make such order adjusting the interests of the parties in partnership property as seems just and equitable having regard to-*

- (a) *the contributions made by or on behalf of the partners towards the acquisition, conservation or improvement of partnership property, or to the financial resources of the partners, or of either of them, and*
- (b) *the contributions, including any contributions made, in the capacity of homemaker or parent, by either of the partners to the welfare of the other partner or to the welfare of the family constituted by the partners and any child or children of the intimate partners.*

<sup>108</sup> The Commission proposed the following definition:

**"contribution" means-**

- (a) *the care of—*
  - (i) *any child of an intimate partnership;*
  - (ii) *any aged or infirm relative or dependant of a partner;*
- (b) *the management of the household and the performance of household duties;*
- (c) *the provision of money, including the earning of income, for the purposes of an unregistered partnership;*
- (d) *the acquisition or creation of partnership property including the payment of money for those purposes;*
- (e) *the payment of money to maintain or increase the value of—*
  - (i) *the partnership property or any part of that property; or*
  - (ii) *the separate property of the other partner or any part of that property;*
- (f) *the performance of work or services in respect of—*

7.5.37 Furthermore, the Commission proposed that the Court has the discretion to order a further adjustment in the division of property if the Court is satisfied that the future income and living standards of the partners are likely to be significantly different as a result of the division of functions within the former partnership (clause 21).<sup>109</sup>

- 
- (i) *partnership property or any part of that property; or*
  - (ii) *separate property of the other partner or any part of that property; or*
  - (g) *the forgoing of a higher standard of living by either partner than would otherwise have been available;*
  - (h) *the giving of assistance or support to the other partner (whether or not of a material kind), including the giving of assistance or support that—*
    - (i) *enables the other partner to acquire qualifications; or*
    - (ii) *aids the other partner in the carrying on of his or her occupation or business.*

*provided that there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature.*

<sup>109</sup> The Commission proposed that the legislation providing for a further adjustment under the de facto option should read as follows:

**Further Adjustment Order**

**21.(1)** *Notwithstanding the provisions in sections 19 and 20, if upon the division of partnership property under this Act the Court is satisfied that, after the partnership ends, the income and living standards of a partner are likely to be, or have in fact been, significantly higher than the other partner because of the effects of the division of functions within the partnership while the partners were living together, the Court may award lump sum payments or order the transfer of property in accordance with this section.*

- (2) *In determining whether or not to make an order under this section, the Court may have regard to—*
  - (a) *the likely earning capacity of each partner;*
  - (b) *the responsibilities of each partner for the ongoing daily care of any minor or dependent children of the intimate partnership;*
  - (c) *any other relevant circumstances.*
- (3) *If this section applies the Court, if it considers it just, may, for the purpose of compensating a partner—*
  - (a) *order the other partner to pay a sum of money out of his or her share of the partnership property to such partner; and*
  - (b) *order the other partner to transfer any other property out of his or her share of the partnership property to such partner.*

7.5.38 The wording proposed for these provisions in the ex post facto option was exactly the same except that a Court first had to declare the status of the relationship.

## (ii) Evaluation

7.5.39 Some respondents to the Discussion Paper regarded "partnership property" to be adequately defined,<sup>110</sup> while others were concerned that the concept as proposed might create huge legal and factual disputes.<sup>111</sup>

7.5.40 Alternative definitions suggested by the respondents included the definition of partnership property on the same basis as in a marriage out of community of property,<sup>112</sup> or as "the collective goods each partner brought into the relationship and that which accrued in the course of the relationship".<sup>113</sup>

7.5.41 The proposals for the division of partnership property after termination of an unregistered partnership were criticised as being rather cumbersome without their being likely to achieve substantive gender equality in the South African context.<sup>114</sup>

7.5.42 The concern of respondents generally focused on two areas. The first was that the ownership of the relevant property is often uncertain. The second was that a

---

<sup>110</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, H G J Beukes, S W T Machumele (Magistrate Ritavi), S P Bopape (Limpopo Advice Office).

<sup>111</sup> R Krüger (Rhodes University), Adv G J van Zyl (Family Advocate). The Cape Law Society Family Law Committee commented that the definition is problematic in that difficulties will arise in determining whether properties were intended for common use of the partnership. It also criticised the inclusion of a family home which was acquired before commencement of the partnership. Some respondents emphasised the relevance of ensuring who paid for what (A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), M E Keepilwe (Department of Social Development), Adv P Matshelo (Justice College)), that property should be registered as partnership property (Rev A D Vorster (Uniting Presbyterian Church in Southern Africa)) and that the intention of the parties when property is bought partnership should be decisive (S F Boshielo (Department of Justice)).

<sup>112</sup> T Jordaan & W Gerber (Legal Aid Board).

<sup>113</sup> Rev B D Dlamini & Dr C S Rankhota (University of Natal), Cape Law Society Family Law Committee.

<sup>114</sup> Where women give up or curtail their careers to care for children from the relationship or where one partner contributed to the other partner's earning power and increased that partner's separate property, the increase in the separate property cannot be redistributed. Prof E Bonthuys (WITS), Anonymous.

partner's contribution to the partnership is often of a non-financial nature. This means that even where the ownership of the property was certain it would not presuppose a fair outcome since the financially stronger partner would retain all the material goods that he or she had paid for and leave the other partner with nothing.<sup>115</sup>

7.5.43 Therefore respondents generally proposed that a wide discretion be given to the Court to consider these matters with the aim to address possible inequities.<sup>116</sup> On the other hand, a concern was expressed that this discretion might result in the Court's ordering something that the parties never intended.<sup>117</sup> Sufficient guidelines for using the discretion should therefore be provided to the Court.<sup>118</sup>

7.5.44 Furthermore, it was suggested that a "fair distribution" rather than an "equal distribution" of partnership property should be the starting point for a Court.<sup>119</sup> Another respondent was concerned that the presupposition of equal sharing in partnership property reverts back to the proof of a universal partnership, which is notoriously difficult to prove. In addition the proposals for adjustment and further adjustment orders were criticised as they allow perpetual litigation, unlike divorce provisions, where a final distribution of assets is effected.<sup>120</sup>

---

<sup>115</sup> Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), Rev B D Dlamini & Dr C S Rankhota (University of Natal), H G J Beukes, Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Masila (Magistrate Nelspruit), F Muller (Lifeline/ Rape Crisis), Adv P Matshelo (Justice College), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, Family & Gender Service Delivery Task Team of the Lower Court Judiciary, N Majola (Masimanyane Women's Support Centre, East London), S P Bopape (Limpopo Advice Office), S Moller (FAMSA, Welkom), Directorate: Gender Issues Department of Justice and Constitutional Development.

<sup>116</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre), Rev A D Vorster (Uniting Presbyterian Church in Southern Africa), Rev B D Dlamini & Dr C S Rankhota (University of Natal), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), T Jordaan & W Gerber (Legal Aid Board), S F Boshieo (Department of Justice), M M Vincent (University of Venda), S Marupi (Community Advice Bureau), S A Strauss (Univeristy of the Free State), S W T Machumele (Magistrate Ritavi), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, Khaya (Masimanyane Women's Support Centre, East London), N Majola (Masimanyane Women's Support Centre, East London), S P Bopape (Limpopo Advice Office), S Moller (FAMSA, Welkom), F Muller (Lifeline/ Rape Crisis), M E Keepilwe (Department of Social Development).

<sup>117</sup> Adv G J van Zyl (Family Advocate).

<sup>118</sup> J McGill (Africa Christian Action).

<sup>119</sup> Eg Bonthuys, Cape Bar Council.

<sup>120</sup> The Cape Law Society Family Law and Gender Committee.



7.5.45 One respondent indicated that the proposed approach differed from the provisions in the Divorce Act of 1979 and as such might be discriminatory. He proposed that a general judicial discretion should be applicable under all circumstances.<sup>121</sup> A further suggestion entailed that provisions similar to those currently in section 7 of the Divorce Act of 1979 be imported into this aspect of the law. This would entitle the Court to have regard to a wide variety of factors with which the judiciary are already well acquainted.<sup>122</sup>

7.5.46 One respondent recommended that the definition of "contribution" of the New South Wales Property (Relationships) Act of 1984<sup>123</sup> be used instead of the definition

---

<sup>121</sup> Prof L N van Schalkwyk (UP).

<sup>122</sup> Cape Bar Council. See in particular section 7(2) and (3) of the Divorce Act of 1979 which provides as follows:

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the Court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the Court should be taken into account, make an order which the Court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

(3) A Court granting a decree of divorce in respect of a marriage out of community of property-

- (a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or
- (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the Court may deem just be transferred to the first-mentioned party.

<sup>123</sup> "**contribution**" means

- (a) the financial and non-financial contributions made directly or indirectly by or on behalf of partners to the acquisition, conservation or improvement of any partnership property or separate property of either of the partners or to the financial resources of either or both of them, or
- (b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the partners to the welfare of the partner or to the welfare of the family constituted by them and a child of the intimate partnership;

There is no presumption that a contribution referred to in (a) is of greater value than a contribution referred to in (b).

in the New Zealand Property (Relationships) Act of 1976<sup>124</sup> that was proposed in the Discussion Paper. The former definition is shorter and makes it clear that both financial and non-financial contributions as well as contributions made in the capacity of homemaker or parent must be considered on an equal basis.<sup>125</sup> It was also suggested that the partner's contributions should be only one of the factors considered by the Court.<sup>126</sup>

7.5.47 In relation to the possible use of agreements to divide property, respondents submitted that where domestic partnership or termination agreements have been

---

<sup>124</sup> "contribution" means-

- (a) the care of—
  - (i) any child of an intimate partnership;
  - (ii) any aged or infirm relative or dependant of a partner;
- (b) the management of the household and the performance of household duties;
- (c) the provision of money, including the earning of income, for the purposes of an unregistered partnership;
- (d) the acquisition or creation of partnership property including the payment of money for those purposes;
- (e) the payment of money to maintain or increase the value of—
  - (i) the partnership property or any part of that property; or
  - (ii) the separate property of the other partner or any part of that property;
- (f) the performance of work or services in respect of—
  - (i) partnership property or any part of that property; or
  - (ii) separate property of the other partner or any part of that property; or
- (g) the forgoing of a higher standard of living by either partner than would otherwise have been available;
- (h) the giving of assistance or support to the other partner (whether or not of a material kind), including the giving of assistance or support that—
  - (i) enables the other partner to acquire qualifications; or
  - (ii) aids the other partner in the carrying on of his or her occupation or business.

provided that there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature.

<sup>125</sup> The Cape Law Society Family Law Committee.

<sup>126</sup> N Kweleta (Masimanyane Women's Support Centre, East London).

concluded, the division of property should be done in accordance with the terms of such an agreement.

7.5.48 Some respondents suggested, however, that despite the existence of an agreement there had to be a thorough investigation first<sup>127</sup> to ensure that all prevailing circumstances were considered.<sup>128</sup> A Court should furthermore be allowed to set a valid agreement aside where an injustice would otherwise result.<sup>129</sup>

7.5.49 Another respondent submitted that a Court should not interfere if it is clear that the partners were fully aware of the effect of the domestic partnership agreement.<sup>130</sup> These respondents also confirmed that disputes regarding the validity and terms of agreements had to be determined by a Court in terms of the legislation and contract law.<sup>131</sup>

7.5.50 On a practical level, concern was expressed about the Court's capacity to deal with these cases.<sup>132</sup> The Department: Justice and Constitutional Development made valuable comments regarding which Courts should have jurisdiction in these matters.<sup>133</sup>

---

<sup>127</sup> C Cetchen (Society for the Physically Disabled), Directorate: Gender Issues Department of Justice and Constitutional Development.

<sup>128</sup> S W T Machumele (Magistrate Ritavi).

<sup>129</sup> Women's Legal Centre, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna).

<sup>130</sup> E Naidu (Durban Lesbian and Gay Community and Health Centre).

<sup>131</sup> Adv G J van Zyl (Family Advocate), R Krüger (Rhodes University), Khaya (Masimanyane Women's Support Centre, East London), Thandiwe (Masimanyane Women's Support Centre, East London), J Tau (Methodist Church of SA).

<sup>132</sup> Rev W J Parsons.

<sup>133</sup> Directorate: Gender Issues Department of Justice and Constitutional Development.

•The Courts with jurisdiction are the High Court and the Family Courts. The judges in the High Court who preside over divorce cases have been exercising similar discretion in those divorce cases for centuries and it is believed that they have the necessary expertise to make such equitable division. Similarly the judges in the High Court have had the opportunity to also preside over cases where the one party in a domestic partnership is seeking to access proprietary rights at the end of a domestic partnership through use of contract such as universal partnership, unjustified enrichment etc. It is desirable to give such discretion to the High Court. Many of the officers presiding in the Family Court do not have similar experience to the High Court judges, and the few who are presiding over divorce cases have never presided over domestic partnership cases.

•Accordingly it is strongly recommended that prior to the coming into operation of the Act, Family Court presiding officers undergo intensive and ongoing training on how such discretion should be exercised, what factors should and should not be taken into consideration during exercising the

(iii) **Recommendation of the Commission**

7.5.51 After due consideration of all the comments, the Commission decided to amend the definition of "partnership property" and rename it "joint property".

**7.5.52 The Commission subsequently recommends that the definition of "joint property" should read as follows:**

*"household goods" means corporeal property, owned separately or jointly by the domestic partners, intended and used for the joint household and includes-*

- (a) *movable goods of the following kind;*
  - (i) *household furniture;*
  - (ii) *household appliances, effects, or equipment;*
  - (iii) *household articles for family use or amenity or household ornaments, including tools, garden effects and equipment;*
  - (iv) *motor vehicles, caravans, trailers or boats, used wholly or principally, in each case, for family purposes;*
  - (v) *accessories of goods to which subparagraph (iv) applies;*
  - (vi) *household pets; and*
- (b) *any of the goods mentioned in paragraph (a) that are in the possession of either or both domestic partners under a credit agreement or conditional sale agreement or an agreement for lease or hire; but*
- (c) *does not include-*
  - (i) *movable goods used wholly or principally for business purposes;*
  - (ii) *money or securities for money; and*
  - (iii) *heirlooms;*

*"joint property" means household goods and property owned jointly in equal or unequal shares by the domestic partners;*

7.5.53 The Commission further decided to adopt the principles of the Divorce Act dealing with property division as guidelines that the Courts are familiar with.

**7.5.54 The Commission recommends that the legislation providing for the property division of former unregistered partners should read as follows:**

***Property division***

**32.** (1) *In the absence of agreement, one or both unregistered partners may apply to court for an order to divide their joint property or the separate property, or part of the separate property of the other unregistered partner.*

(2) *Upon an application for the division of joint property, a court must order the division of that property which it deems just and equitable with due regard to all relevant factors.*

(3) *Upon an application for the division of separate property or part of the separate property, a court may order that the separate property or such part of the separate property of the other unregistered partner as the court regard just and equitable, be transferred to the applicant.*

(4) *A court considering an order as contemplated in subsections (2) and (3) must take into account-*

- (a) *the existing means and obligations of the partners;*
- (b) *any donation made by one partner to the other during the subsistence of the unregistered partnership;*
- (c) *the circumstances of the unregistered partnership;*
- (d) *the vested rights of interested parties in joint and separate property; and*
- (e) *any other relevant factors.*

(5) *A court granting an order as contemplated under subsection (3) must be satisfied that it is just and equitable to do so by reason of the fact that the unregistered partner in whose favour the order is granted, made direct or indirect contributions to the maintenance or increase of the separate property or part of the separate property of the other party during the existence of the unregistered partnership.*

(6) *A court granting an order as contemplated under subsection (3) may, on application by the unregistered partner against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court regards just and equitable.*

**7.5.55 The Commission also heeded the proposals to use the New South Wales Property (Relationships) Act's definition of "contribution".**

**7.5.56 The Commission subsequently recommends that the definition of "contribution" should read as follows:**

**"contribution" means-**

- (a) *the financial and non-financial contributions made directly or indirectly by the domestic partners-*
  - (i) *to the acquisition, maintenance or improvement of any joint property, or separate property of either of the domestic partners or to the financial resources of either or both of them, or*
  - (ii) *in terms of a registered partnership agreement, and*
- (b) *the contributions, including any contributions made in the capacity of homemaker or parent, made by either domestic partner to the welfare of the other domestic partner or to the welfare of the family constituted by them and a child of the domestic partners;*

*provided that there is no presumption that a contribution referred to in (a) is of greater value than a contribution referred to in (b);*

**Application only within two years after end of relationship**

**33. (1)** *Except as otherwise provided by this section, an application to a court for an order under this Chapter may only be made within a period of two years after the date on which an unregistered partnership has ended through separation or death.*

*(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to an applicant to apply to the court for an order under this Act, where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave was not granted than would be caused to the respondent if the leave were granted.*

**e) Property division between multiple partners**

7.5.57 In accordance with the Commission's recommendation that the consequences of multiple unregistered partnerships and customary marriages should be regulated after the partnership has ended, the property division between such former partners must be considered next.

7.5.58 Where an unregistered partner was also a spouse in a customary marriage with a third party and has used communal property for the benefit of the domestic partnership, the division of property must be approached with circumspection. While it is conceded that a multiple unregistered partner should not be able to benefit from

his or her unauthorised use of communal property for the maintenance of a separate family, his or her unregistered partner may well be deserving of protection.<sup>134</sup>

**(i) Proposals in the Discussion Paper**

7.5.59 No specific proposals were made for the division of property between multiple partners except to provide for the Court, when exercising its powers, to have regard to the interests that other persons may have in the property concerned.

**(ii) Evaluation**

7.5.60 One respondent pointed to complications in the event of a simultaneous customary marriage and unregistered partnership. It was proposed that the spouse and the partner could share the estate and if there are descendants the spouse, partner and descendants could each receive a child's share.<sup>135</sup>

7.5.61 Another respondent proposed that the portion of the communal property of the customary spouse/partner be adjusted upon divorce of the married parties,<sup>136</sup> which means that joint property can only be divided once the communal property has been divided.<sup>137</sup> Alternatively, it was suggested that the three parties involved could come to an agreement beforehand regarding the division of property.<sup>138</sup>

7.5.62 Another respondent suggested that the Court should have a similar discretion to that under sections 7 and 8 of the Recognition of Customary Marriages Act of 1998 to ensure an equitable distribution of the relevant property after taking into account all the relevant circumstances of the family groups to be affected.<sup>139</sup>

---

<sup>134</sup> CALS, Directorate: Gender Issues Department of Justice and Constitutional Development.

<sup>135</sup> CALS.

<sup>136</sup> Directorate: Gender Issues Department of Justice and Constitutional Development.

<sup>137</sup> Adv P Matshelo (Justice College), T Adloff (Lawyers for Human Rights), S P Bopape (Limpopo Advice Office).

<sup>138</sup> M E Keepilwe (Department of Social Development), S P Bopape (Limpopo Advice Office), Thandiwe (Masimanyane Women's Support Centre, East London).

<sup>139</sup> Prof L N van Schalkwyk (UP).

**(iii) Recommendation by the Commission**

7.5.63 The Commission's dilemma in this instance is that it is impossible to legislate for all foreseeable and unforeseeable circumstances. After consideration of the proposals by respondents as to which relationship should receive preferential treatment, the Commission decided that it should be left to a Court to order an equitable division of property which falls in both estates after proper consideration of all relevant circumstances.

7.5.64 The Commission recommends that the relevant provision provides that, when considering an application for the division of property, the Court should have regard to the vested proprietary rights and interests of third parties in such property.

**7.5.65 The Commission recommends that the legislation accommodating the interest that a spouse of an unregistered partner may have in joint or separate property should read as follows:**

***Property division***

**32. (1) – (3)**

*(4) A court considering an order as contemplated in subsections (2) and (3) must take into account-*

- (a) the existing means and obligations of the partners;*
- (b) any donation made by one partner to the other during the subsistence of the unregistered partnership;*
- (c) the circumstances of the unregistered partnership;*
- (d) the vested rights of interested parties in joint and separate property; and*
- (e) any other relevant factors.*

**(5) – (7)**



## 7.6 Other matters

### a) Interests of third parties

7.6.1 Third parties may become involved as a result of the limited duty of support of de facto unregistered partners, and may also have an interest in property that is subject to property division of both de facto and ex post facto unregistered partners. It is necessary to protect the interests of these parties.

#### (i) Proposals in the Discussion Paper

7.6.2 The Commission proposed that both de facto partners are liable to give written notification to third parties when they cease to live as a couple. Similarly, when one of the partners dies, the surviving partner is under a duty to do this.<sup>140</sup>

7.6.3 In addition, third parties may have a specific interest in property owned by one or both partners in a de facto or ex post facto unregistered partnership. The Commission proposed that a Court exercising its powers under the Act must have regard to the interests of a bona fide purchaser of, or other person with an interest in, property concerned. In addition, it was proposed that the rights of creditors of the partners are not affected by the provisions of the Act.<sup>141</sup>

---

<sup>140</sup> The Commission proposed that the legislation providing for such notification read as follows:

***Notification of end of partnership***

**13.** (1) *When the partners in an unregistered partnership cease to live as a couple, both partners are liable to give written notice of the dissolution of the relationship to all interested parties.*

(2) *When one of the partners in an unregistered partnership dies, the surviving partner must give written notice of the dissolution of the relationship to all interested parties.*

<sup>141</sup> The Commission proposed that the legislation regarding the consideration of the interests of third parties should read as follows:

***Interests of other parties***

**42.** (1) *In the exercise of its powers under this Act, a Court must have regard to the interests of, and must make any order proper for the protection of, a bona fide purchaser or other person with an interest in property concerned.*

(2) *The rights of creditors of the partners are not affected by this Act.*

## (ii) Evaluation

7.6.4 Many respondents confirmed the necessity of protecting the interests of third parties and found the proposals in the Discussion Paper to be adequate in this regard. It was proposed that a provision be included which directs partners to give notice to any third parties who may have an interest in the matter if an application is made to Court to have the relationship declared an unregistered partnership under the ex post facto proposal. A further suggestion was to define "interested party".<sup>142</sup>

## (iii) Recommendation by the Commission

7.6.5 The Commission gave due consideration of the comments received, keeping in mind the deviations from the proposals in the Discussion Paper.

7.6.6 The interest of third parties is protected in clause 32(4) where provision is made for a court to take the vested rights of interested parties in joint and separate property into account when considering an application for the division of property.

**7.6.7 The Commission recommends the definition of "interested party" read as follows:**

*"interested party" means any party with an interest, or who could reasonably be expected to have an interest, in the joint property of the domestic partners or the separate property of either of the domestic partners or in a partnership debt;*

---

<sup>142</sup> Directorate: Gender Issues Department of Justice and Constitutional Development, E Naidu (Durban Lesbian and Gay Community and Health Centre), H G J Beukes, Dr A E Naude & Adv G Sonnekus (FAMSA Knysna), Colleen Rogers (Lifeline Vaal Triangle), T Jordaan & W Gerber (Legal Aid Board), Rev W J Parsons, M S Masila (Magistrate Nelspruit), C M Makgoba (Commission on Gender Equality), M M Vincent (University of Venda), S Marupi (Community Advice Bureau), M P Sebati (Polokwane Municipality), T M Rangata (Department of Health and Welfare, Limpopo Province), Adv P Matshelo, S W T Machumele (Magistrate Ritavi), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), N Maanda (Lawyers for Human Rights, Johannesburg), Family & Gender Service Delivery Task Team of the Lower Court Judiciary, S P Bopape (Limpopo Advice Office), J Tau (Methodist Church of SA), R M Chirwa (Magistrate Eerstehoek), J McGill (Africa Christian Action), E Naidu (Durban Lesbian and Gay Community and Health Centre), Rev B D Dlamini & Dr C S Rankhota (University of Natal), A Dreyer and Colleagues (Kinder en Gesinsorg Vereniging, Bloemfontein), M E Keepilwe (Department of Social Development), S Moller (FAMSA, Welkom).

## b) The children of unregistered partners

### (i) Proposals in the Discussion Paper

7.6.8 The Commission submitted that the rights and obligations of parties to a partnership with respect to their biological child need not be addressed in this legislation as it is covered by the common law and legislation such as the Natural Fathers of Children Born out of Wedlock Act of 1997 and what was then a proposed Children's Bill.<sup>143</sup>

7.6.9 Besides the extensive definition of a child of the intimate partners in such an unregistered partnership for purposes of determining the need for maintenance of a former partner, no provision was made for regulating the relationship of unregistered partners and their partners' biological children.<sup>144</sup>

### (ii) Evaluation

7.6.10 The Commission received no pertinent comments on the proposals regarding the children of domestic partners except to point out that the best interests of children should at all times be borne in mind. A Court called upon to adjudicate any matter involving a partnership in which or from which minor children are born, should have the jurisdiction to adjudicate all matters pertaining to the minor children simultaneously with any matter regarding the financial aspects of the partnerships.<sup>145</sup>

---

<sup>143</sup> Clause 35 of the Children's Bill.

<sup>144</sup> The position regarding adoption will also be regulated by clause 258 of the Children's Bill. In any event, the position of same-sex partners in these kinds of unregistered, but permanent conjugal relationships has already been settled in principle by the Constitutional Court of South Africa in its ruling in the case of **Du Toit v Minister for Welfare and Population Development** 2002 (10) BCLR 1006 (CC) by allowing for same-sex couples to apply for the adoption of children.

<sup>145</sup> Cape Bar Council.

**(iii) Recommendation by the Commission**

7.6.11 The Commission therefore adheres to the view held in the Discussion Paper that the common law and the new Children's Act<sup>146</sup> sufficiently address the issue of children of unmarried parents and that it is therefore unnecessary to provide for this in the unregistered partnerships legislation.

---

<sup>146</sup> Currently the Children's Bill 70D of 2003.

**ANNEXURE A****LIST OF RESPONDENTS TO ISSUE PAPER NO 17****SUBMISSIONS RECEIVED ON ISSUE PAPER NO 17 FROM PERSONS ATTACHED TO INSTITUTIONS**

1. AFRICAN CHRISTIAN DEMOCRATIC PARTY
2. BLACK SASH
3. CHARMANE PILLAY & COMPANY ATTORNEYS
4. CHURCH OF ENGLAND IN SOUTH AFRICA
5. COMMISSION ON GENDER EQUALITY
6. DEPARTMENT OF EDUCATION
7. DEPARTMENT: PUBLIC SERVICE AND ADMINISTRATION
8. DITZ INCORPORATED ATTORNEYS
9. DURBAN LESBIAN & GAY COMMUNITY & HEALTH CENTRE
10. DUTCH REFORMED CHURCH
11. FAMSA
12. FATHER HYACINTH ENNIS
13. FISH HOEK FULL GOSPEL CHURCH
14. GENDER RESEARCH PROJECT OF THE CENTRE FOR APPLIED LEGAL STUDIES, UNIVERSITY OF THE WITWATERSRAND
15. HIS PEOPLE CHRISTIAN CHURCH
16. HUGO, MR JUSTICE JH
17. HUMAN LIFE INTERNATIONAL
18. NATIONAL COUNCIL OF WOMEN OF SOUTH AFRICA
19. NORTHERN PROVINCE, OFFICE OF THE PREMIER
20. NTANJANA, PATRICK VUYANI
21. PIETERMARITZBURG OFFICE CHILD RIGHTS PROJECT, LAWYERS FOR HUMAN RIGHTS
22. RHEMA MINISTRIES
23. SOUTH AFRICAN NATIONAL COUNCIL FOR CHILD WELFARE
24. STRUBENS VALLEY FAMILY CHURCH
25. THE CHRISTIAN LAWYERS ASSOCIATION OF SOUTH AFRICA
26. THE LAW SOCIETY OF THE CAPE OF GOOD HOPE
27. TSHABALALA, MR JUSTICE VEM

28. UNITED CHRISTIAN ACTION
29. WOMEN'S LEGAL CENTRE
30. WYBROW, DEBBIE

**SUBMISSIONS RECEIVED ON ISSUE PAPER NO 17 FROM INDIVIDUALS**

1. ACKERMAN, C & PADFIELD, L
2. ACTION BOLT
3. ADAIR, KEVIN
4. ALEXANDER, N
5. ANDREW
6. ANONYMOUS
7. ATKINS, M
8. BARBARA
9. BARNARD, M
10. BONTHUYS, E
11. BOOYSE, P
12. BORDEAUX
13. BOS, R
14. BOWMAN, P
15. BRALUCKY
16. BRAND, S
17. BROUGH, A
18. CAGE, K
19. CARRADICE, C
20. CERFF, M
21. COETZEE, A
22. COETZEE, T
23. DE VILLIERS, D
24. DREYER, I
25. DUVENHAGE, J
26. ELDON, P
27. FIELD FUSION
28. FOURIE, C
29. FOWLES, H
30. FRANCOIS

31. GARTH, M
32. GOODE, H
33. GRIFF
34. GROBLER, J
35. GROUT TIM G
36. HAYES, B
37. HOGBU, P
38. HOLM, H
39. HOPE – RYAN, M & C
40. HORN, H
41. HUGO
42. IVE, J & T
43. IWORTH, F
44. JANSSENS, S
45. JELBERT, T
46. JEWKES, R
47. JOUBERT, M
48. KAROLIE
49. KARTHRYN
50. KLINCK, E
51. KNOX, P
52. KUKKUK, C
53. LAWSON, VS
54. LE ROUX, N
55. LESLIE, K
56. LIEBENBERG, N
57. LINNEGAR, J
58. LOCK, B
59. MAGGOTT, TC
60. MALHERBE, E
61. MARITZ, A
62. MARTIN, P
63. McCARTHY, L
64. McMAHON, I
65. MEINTJIES, A
66. MEYEROWITZ, D
67. MORRISON, B

68. MOUTON, D
69. MRKDEPT
70. MSB
71. NAIR, Y
72. NEL, M
73. NEL, T & L
74. NICO
75. OLIVIER, REV R
76. OSMAN, P
77. PETER
78. PILLAY, I
79. POULTER, E
80. POWELL, C
81. RETORIUS, A
82. REFRESHING
83. RETIEF, G
84. RICHARDSON, R
85. ROBINSON, L
86. RYNO
87. SAMPSON, D
88. SCHOEMAN, H
89. SEWPERSAD, R
90. SHACKLEFORD, C
91. SHAW, D
92. SHEARAR, C
93. SMIT, D
94. SMITH, G
95. SOKOLIC, F
96. SOLOMONS, K
97. STACY & DEBBIE
98. STEYN, M
99. STRONG, D
100. STRONG,N
101. SWART, S
102. SYMEONE, L
103. THERON, PROF ES
104. TONY



105. TRIREME
106. ULYARE, C
107. VAN DER MERWE, A
108. VAN DER MERWE, L
109. VAN ZYL, M
110. WEBSTER, N
111. WETMORE, H
112. WRIGHT, P & I
113. WYBENGA, F
114. XX
115. ZAK

**ANNEXURE B****LIST OF RESPONDENTS TO DISCUSSION PAPER 104****SUBMISSIONS RECEIVED ON DISCUSSION PAPER 104 FROM INSTITUTIONS**

1. ACDP – BLOEMFONTEIN
2. ACTING PRESIDENT: CENTRAL DIVORCE COURT
3. AFRICA CHRISTIAN ACTION
4. APOSTOLIC FAITH MISSION OF SOUTH AFRICA
5. ASSOCIATION OF AFRIKAANS CHRISTIAN WOMEN
6. BAPTIST UNION OF SOUTHERN AFRICA
7. CALVYN PROTESTANT CHURCH
8. CAPE BAR COUNCIL
9. CAPE LAW SOCIETY FAMILY LAW AND GENDER COMMITTEE
10. CENTRE FOR APPLIED LEGAL STUDIES: GENDER RESEARCH PROJECT (UNIVERSITY OF THE WITWATERSRAND)
11. CHRISTELIKE GEREFORMEERDE KERK
12. CHRISTIAN DEMOCRATIC PARTY
13. CHRISTIAN LIBERTY BOOKS
14. CHRISTIAN MOVEMENT FROM THE ROMAN CATHOLIC CHURCH
15. CHRISTIANS FOR TRUTH
16. CHRISTIANVIEW NETWORK
17. CIVIL CHILDREN'S MOVEMENT FOR THE REMOVAL OF HOMOSEXUALS
18. DEPARTMENT OF HOME AFFAIRS
19. DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION
20. DIRECTORATE: GENDER ISSUES (DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)
21. DOCTORS FOR LIFE INTERNATIONAL
22. DUTCH REFORMED CHURCH
23. EBENEZER CHURCH
24. EL SHADDAI CHRISTIAN CHURCH
25. EVANGELICAL ALLIANCE OF SOUTH AFRICA
26. EVANGELICAL FELLOWSHIP OF CONGREGATIONAL CHURCHES OF SOUTH AFRICA
27. FAMILY & GENDER SERVICE DELIVERY TASK TEAM

28. FAMILY AND MARRIAGE SOCIETY OF SOUTH AFRICA (KNYSNA OFFICE)
29. FAMILY LAW COMMITTEE, LAW SOCIETY OF SOUTH AFRICA
30. FOCUS ON THE FAMILY
31. FRIENDS OF THE FAMILY
32. FULL GOSPEL CHURCH OF GOD IN SOUTH AFRICA
33. GEREFORMEERDE KERKE IN SUID AFRIKA
34. HARRISMITH CHRISTIAN CENTRE
35. HIS PEOPLE CHRISTIAN CHURCH, GRAHAMSTOWN
36. HUMAN LIFE INTERNATIONAL
37. INTERNATIONAL FEDERATION OF CHRISTIAN CHURCHES
38. ISLAMIC FORUM AZAADVILLE
39. LEWENDE WATERS BEDIENING
40. LIFE OFFICES' ASSOCIATION
41. LOURENS PROKUREURS
42. MATJHABENG CHRISTIAN LEADERS FORUM
43. MUSLIM ASSEMBLY (CAPE)
44. MUSLIM COUNCIL
45. NEDERDUITSCH HERVORMDE KERK IN AFRIKA
46. NETWORK OF COMMUNITY CHURCHES
47. PIETERMARITZBURG GAY AND LESBIAN NETWORK
48. PIETERMARITZBURG NORTH BAPTIST UNION
49. PIETERMARITZBURG CHRISTIAN FELLOWSHIP
50. PORT ALFRED CHRISTIAN CENTRE
51. PRESBYTERY OF THE WESTERN CAPE – UNITING PRESBYTERIAN CHURCH IN SOUTHERN AFRICA (MAJORITY AND MINORITY SUBMISSIONS)
52. SAREPTA CHURCH
53. SOUTH AFRICAN COUNCIL OF CHURCHES PARLIAMENTARY OFFICE
54. SOUTH AFRICAN COUNCIL OF CHURCHES
55. STRUBENS VALLEY FAMILY CHURCH
56. SUID-AFRIKAANSE VROUW FEDERASIE PIETERMARITZBURG
57. UNION OF ORTHODOX SYNAGOGUES OF SOUTH AFRICA (OFFICE OF THE CHIEF RABBI)
58. UNITED CHRISTIAN ACTION
59. VALLEY CHRISTIAN CHURCH

**SUBMISSIONS RECEIVED FROM INDIVIDUAL RESPONDENTS ON DISCUSSION  
PAPER NO 104**

1. ANDERSON E S
2. ANDERSON P D
3. APPLEBY E W
4. BARRY R L & F H
5. BENSON D G
6. BEST C
7. BESTER N
8. BLOND K
9. BONTHUYS E PROF
10. BOSSE B & D
11. BOTES J
12. BRIEN M A E DR
13. BURGER T & W
14. BURGOYNE C & B
15. BURGOYNE N
16. CALDER R REV
17. CHAMBERS K
18. COLLET R
19. CONCERNED NEW SOUTH AFRICAN
20. CORRIGAN A
21. CURRIE A, BIBB L, BECK A
22. DAAN
23. DAVIES D
24. DAVIES D A
25. DAVIES S
26. DE BEER C F
27. DE KOCK D
28. DE VILLIERS V G
29. DE WET S W
30. DEDEKIND H
31. DELPORT A
32. DENNIS D & C
33. DENNIS L

34. DENNIS R V
35. DOLL J
36. DUVENHAGE J
37. EDUTEL
38. EDY A
39. ELS A E
40. ENGELBRECHT E C
41. ENNIS H FR
42. ERASMUS D
43. ERNST W
44. FIELD-BUSS G
45. FOURIE I & J
46. GARDNER D
47. GAVEN FAMILY
48. GEORGE R
49. GERBER J
50. GOEMANS B & A
51. GREEN L
52. GREYLING H
53. GROUT T DR
54. GUNNING P & M
55. HAMBLIN A
56. HARMER E A
57. HAWTHORN M
58. HEATON J PROF & SONGCA R DR
59. HULTZER F
60. HUSON M E
61. HOLNESS R REV
62. INTERESTED PARTY
63. JAMES FAMILY
64. JARED
65. JEFFERIES T T
66. JOLLEY A
67. KIESWETTER J
68. KLEINHANS A
69. KNEISEL M
70. KRIEL M

71. KUKKUK C
72. LANCELAS M
73. LAUGHTON P J
74. LE FLEUR S
75. LE ROUX D
76. LE ROUX M S
77. LINDEQUE W
78. LOUPERE C A
79. LUPPNOW S
80. MAAMAN L P
81. MACMILLAN FAMILY
82. MANNING A R
83. MARAIS J
84. MARSHALL A
85. MARUMO T
86. MCCLELLAND
87. MCGILL A
88. MCGILL J
89. MCGOUGH P & J
90. MCKIRDY G
91. MILNES V H
92. MOCKE M
93. MOKGESI J M
94. MOSTERT J R
95. MUNDELL L
96. NEAME N
97. NEL E S
98. PAPENFUS R J K
99. PARNELL C W
100. PARSONS J
101. PEATTIE C ARCHDEACON
102. PERRY M
103. PETITION 151 SIGNATURES IN FAVOUR OF CIVIL UNIONS
104. PICKHARD I
105. PJM
106. PORTELAS C
107. POULTER E

108. POULTER T Y
109. QWE QAZ
110. RADEMAN H
111. REHDERS H
112. REYNOLDS A M
113. REYNOLDS M L
114. RHODES S
115. ROBINSON J & S
116. ROBINSON L W
117. ROGERS A
118. ROGERS G
119. ROSS A & N
120. SAMUEL A
121. SATCHWELL K MADAM JUSTICE
122. SCHEEPERS I
123. SCHEEPERS J
124. SCHULTZ A
125. SHARP G
126. SMITH J C
127. SMYTH J J QC
128. SOODYALL
129. SPEAR A V
130. SPEAR H
131. SPENGLER A
132. STAVER M D
133. STENGER K
134. STEWART M
135. STRYDOM D
136. TER MORSHUIZEN A
137. THORPE D & J
138. TILTON D
139. TONKIN J
140. TURNBILL K
141. UCT STUDENT
142. V D WALT FAMILY
143. VAN DER HOORN P
144. VAN DER MERWE D

145. VAN EYSSSEN E
146. VENTER J
147. VERMEULEN A
148. VERREYNNE T REV
149. VILJOEN H
150. VIV & NORMA
151. VIVIER E
152. VLOK H E
153. WAGENER M
154. WAIT I P
155. WARD S R
156. WARDLE N M DR
157. WEBBER C
158. WEBSTER A
159. WHITBREAD R & M
160. WILSON T



**RECOMMENDED AMENDMENTS TO MARRIAGE ACT 25 OF 1961****GENERAL EXPLANATORY NOTE:**

[     ]       Words in bold type in square brackets indicate omissions from existing enactments

\_\_\_\_\_       Words underlined with a solid line indicate insertions in existing enactments

---

**BILL**

**To amend the Marriage Act 25 of 1961 so as to provide for a definition of marriage to be included in the Act; to provide for a definition of spouse to be included in the Act and to amend the marriage formula.**

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:-

**Amendment of section 1 of Act 25 of 1961**

1. Section 1 of the Marriage Act, 1961 (in this Act referred to as the principal Act), is hereby amended-

(a) by the insertion after the definition of "magistrate" of the following definition:

"marriage' means the voluntary union of two persons concluded in terms of this Act to the exclusion of all others;"; and

(b) by the insertion after the definition of "prior law" of the following definition:

"spouse' means a lawful partner of a person in a valid marriage concluded in terms of this Act;".

**Amendment of section 30 of Act 25 of 1961**

2. Section 30 of the principal Act is hereby amended by the inclusion in subsection (1) of the words "or spouse" after the words ("or husband").

**Insertion of section 39B**

3. The following section is hereby inserted in the principal Act, after section 39A:

**"Miscellaneous**

**39B.** Any reference to spouse in any other law includes a spouse as defined in this Act."

**Short title and commencement**

5. This Act is called the Marriage Amendment Act, 20.. (Act No. ... of 20..) and will come into operation on a date fixed by the President by proclamation in the Gazette.

**ANNEXURE D****RECOMMENDED ORTHODOX MARRIAGE ACT****BILL**

**To provide for the conclusion of orthodox marriage between two persons of the opposite sex and to provide for matters related thereto.**

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:-

**Definitions**

1. In this Act, unless the context otherwise indicates-

**"Commissioner"** includes an Additional Commissioner and an Assistant Commissioner;

**"orthodox marriage"** means the voluntary union of a man and a woman concluded in terms of this Act to the exclusion of all others;

**"marriage officer"** means any person who is a marriage officer by virtue of the provisions of this Act and who officiates at an orthodox marriage;

**"Minister"** means the Minister of Home Affairs;

**"prescribed"** means prescribed by this Act or by regulation made under this Act;

**Designation of ministers of religion and other persons attached to churches as marriage officers**

2. (1) The Minister and any officer in the public service authorised thereto by him or her may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organisation to be, so long as he or she is such a minister or occupies such position, a marriage officer for the purpose of

solemnising orthodox marriages according to the tenets of the religious denomination or organization concerned.

(2) Any person who, at the commencement of this Act, is a marriage officer under the provision of section 3 of the Marriage Act, 1961 (Act No. 25 of 1961), will continue to have authority to solemnise marriages, but will exercise such authority in accordance with the provisions of this Act.

(3) A designation under subsection (1) may further limit the authority of any such minister of religion or person to the solemnisation of orthodox marriages-

- (a) within a specified area; or
- (b) for a specified period.

#### **How designation as marriage officer to be made**

3. Every designation of a person as a marriage officer must be by written instrument and the date as from which it will have effect and any limitation to which it is subject will be specified in such instrument.

#### **Certain persons may in certain circumstances be deemed to have been marriage officers**

4. (1) Whenever any person has acted as a marriage officer during any period or within any area in respect of which he or she was not a marriage officer under this Act, and the Minister or any officer in the public service authorised thereto by the Minister is satisfied that such person did so under the bona fide belief that he or she was a marriage officer during that period or within that area, he or she may direct in writing that such person must for all purposes be deemed to have been a marriage officer during such period or within such area, duly designated as such under this Act, as the case may be.

(2) Whenever any person acted as a marriage officer in respect of any orthodox marriage while he or she was not a marriage officer and both parties to that orthodox marriage bona fide believed that such person was in fact a marriage officer, the Minister or any officer in the public service authorised thereto by him or her may, after having conducted such inquiry as he or she may deem fit, in writing direct that

such person must for all purposes be deemed to have been duly designated as a marriage officer in respect of that orthodox marriage.

(3) Any orthodox marriage solemnised by any person who is in terms of this section deemed to have been duly designated as a marriage officer will, provided that such orthodox marriage was in every other respect solemnised in accordance with the provisions of this Act, as the case may be, and there was no lawful impediment thereto, be as valid and binding as it would have been if such person had been duly designated as a marriage officer.

(4) Nothing in this section contained may be construed as relieving any person in respect of whom a direction has been issued thereunder, from the liability to prosecution for any offence committed by him or her.

(5) Any person who acts as a marriage officer in respect of any orthodox marriage, must complete a certificate on the prescribed form in which he or she must state that at the time of the solemnisation of the orthodox marriage he or she was in terms of this Act entitled to solemnise that orthodox marriage.

#### **Change of name of religious denomination or organisation and amalgamation of religious denominations or organisations**

5. (1) If a religious denomination or organisation changes the name whereby it was known or amalgamates with any other religious denomination or organisation, such change in name or amalgamation will have no effect on the designation of any person as a marriage officer by virtue of his or her occupying any post or holding any position in any such religious denomination or organisation.

(2) If a religious denomination or organisation in such circumstances as are contemplated in subsection (1) changes the name whereby it was known or amalgamates with any other religious denomination or organisation, it must immediately advise the Minister thereof.

**Revocation of designation as, or authority of, marriage officer and limitation of authority of marriage officer**

6. The Minister or any officer in the public service authorised thereto by him or her may, on the ground of misconduct or for any other good cause, revoke in writing the designation of any person as a marriage officer or the authority of any other person to solemnise orthodox marriages under this Act, or in writing limit in such respect as he or she may deem fit the authority of any marriage officer or class of marriage officers to solemnise orthodox marriages under this Act.

**Solemnisation of orthodox marriages in country outside the Republic of South Africa**

7. (1) Any person who is under the provisions of this Act authorised to solemnise any orthodox marriages in any country outside the Republic of South Africa-

- (a) may so solemnise any such orthodox marriage only if the parties thereto are both South African citizens domiciled in the Republic of South Africa; and
- (b) will solemnise any such orthodox marriage in accordance with the provisions of this Act.

(2) Any orthodox marriage so solemnised will for all purposes be deemed to have been solemnised in the province of the Republic of South Africa in which the male party thereto is domiciled.

**Unauthorised solemnisation of orthodox marriage ceremonies forbidden**

8. (1) An orthodox marriage may be solemnised by a marriage officer only.

(2) Any marriage officer who purports to solemnise an orthodox marriage which he or she is not authorised under this Act to solemnise or which to his or her knowledge is legally prohibited, and any person not being a marriage officer who purports to solemnise an orthodox marriage, is guilty of an offence and liable on conviction to a fine not exceeding four hundred rand or, in default of payment, to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment.

(3) Nothing in subsection (2) contained will apply to any orthodox marriage ceremony solemnised in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid orthodox marriage.

### **Prohibition of solemnisation of orthodox marriage without production of identity document or prescribed declaration**

9. No marriage officer may solemnise any orthodox marriage unless-
- (a) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act, 1997 (Act No. 68 of 1997); or
  - (b) each of such parties furnishes to the marriage officer the prescribed affidavit; or
  - (c) one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b).

### **Irregularities in publication of banns or notice of intention to marry or in the issue of special orthodox marriage licences**

10. If the provisions of any law relating to the issue of special orthodox marriage licences, or the applicable provisions of any law of a country outside the Republic of South Africa relating to the publication of banns or the publication of notice of intention to marry were not strictly complied with but such orthodox marriage was in every other respect solemnised in accordance with the provisions of this Act, that orthodox marriage will, provided there was no other lawful impediment thereto and provided such orthodox marriage has not been dissolved or declared invalid by a competent court, and provided further that neither of the parties to such orthodox marriage has after such orthodox marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

### **Objections to orthodox marriage**

11. (1) Any person desiring to raise any objection to any proposed orthodox marriage must lodge such objection in writing with the marriage officer who is to solemnise such orthodox marriage.

(2) Upon receipt of any such objection the marriage officer concerned must inquire into the grounds of the objection and if he or she is satisfied that there is no lawful impediment to the proposed orthodox marriage, he or she may solemnise the orthodox marriage in accordance with the provisions of this Act.

(3) If he or she is not so satisfied he or she must refuse to solemnise the orthodox marriage.

### **Orthodox marriage of minors**

**12.** (1) No marriage officer may solemnise an orthodox marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the orthodox marriage has been granted and furnished to him or her in writing.

(2) For the purposes of subsection (1) a minor does not include a person who is under the age of twenty-one years and previously contracted a valid orthodox marriage which has been dissolved by death or divorce.

### **Consequences and dissolution of orthodox marriage for want of consent of parents or guardian**

**13.** (1) Notwithstanding anything to the contrary contained in any law or the common law an orthodox marriage between persons of whom one or both are minors will not be void merely because the parents or guardian of the minor, or a commissioner of child welfare whose consent is by law required for the entering into of an orthodox marriage, did not consent to the orthodox marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the orthodox marriage is made-

- (a) by a parent or guardian of the minor before he or she attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the orthodox marriage; or
- (b) by the minor before he or she attains majority or within three months thereafter.



(2) A court may not grant an application in terms of subsection (1) unless it is satisfied that the dissolution of the orthodox marriage is in the interest of the minor or minors.

#### **When consent of parents or guardian of minor cannot be obtained**

**14.** (1) If a commissioner of child welfare defined in section 1 of the Child Care Act, 1983, is after proper inquiry satisfied that a minor who is resident in the district or area in respect of which he or she holds office has no parent or guardian or is for any good reason unable to obtain the consent of his or her parents or guardian to enter into an orthodox marriage, such commissioner of child welfare may in his or her discretion grant written consent to such minor to marry a specified person, but such commissioner of child welfare may not grant his or her consent if one or other parent of the minor whose consent is required by law or his or her guardian refuses to grant consent to the orthodox marriage.

(2) A commissioner of child welfare must, before granting his or her consent to an orthodox marriage under subsection (1), enquire whether it is in the interests of the minor in question that the parties to the proposed orthodox marriage should enter into an antenuptial contract, and if he or she is satisfied that such is the case he or she may not grant his or her consent to the proposed orthodox marriage before such contract has been entered into, and must assist the said minor in the execution of the said contract.

(3) A contract so entered into is deemed to have been entered into with the assistance of the parent or guardian of the said minor.

(4) If the parent, guardian or commissioner of child welfare in question refuses to consent to an orthodox marriage of a minor, such consent may on application be granted by a judge of the High Court of South Africa: Provided that such a judge may not grant such consent unless he or she is of the opinion that such refusal of consent by the parent, guardian or commissioner of child welfare is without adequate reason and contrary to the interests of such minor.

**Prohibition of orthodox marriage of persons under certain ages**

**15.** (1) No boy under the age of 18 years and no girl under the age of 15 years is capable of contracting a valid orthodox marriage except with the written permission of the Minister or any officer in the public service authorised thereto by him or her, which he or she may grant in any particular case in which he or she considers such orthodox marriage desirable: Provided that such permission will not relieve the parties to the proposed orthodox marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission will not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.

(2) If any person referred to in subsection (1) who was not capable of contracting a valid orthodox marriage without the written permission of the Minister or any officer in the public service authorised thereto by him or her, in terms of this Act, contracted an orthodox marriage without such permission and the Minister or such officer, as the case may be, considers such orthodox marriage to be desirable and in the interests of the parties in question, he or she may, provided such orthodox marriage was in every other respect solemnised in accordance with the provisions of this Act, and there was no other lawful impediment thereto, direct in writing that it is for all purposes a valid orthodox marriage.

(3) If the Minister or any officer in the public service authorised thereto by him or her so directs it will be deemed that he or she granted written permission to such orthodox marriage prior to the solemnisation thereof.

**Proof of age of parties to proposed orthodox marriage**

**16.** If parties appear before a marriage officer for the purpose of contracting an orthodox marriage with each other and such marriage officer reasonably suspects that either of them is of an age which debars him or her from contracting a valid orthodox marriage without the consent or permission of some other person, he or she may refuse to solemnise an orthodox marriage between them unless he or she is furnished with such consent or permission in writing or with satisfactory proof showing that the party in question is entitled to contract an orthodox marriage without such consent or permission.

**Orthodox marriage between person and relatives of his or her deceased or divorced spouse**

17. Any legal provision to the contrary notwithstanding it will be lawful for-

- (a) any widow or widower to marry the sister of his or her deceased spouse or any female related to him or her through his or her deceased spouse in any more remote degree of affinity than the sister of his or her deceased spouse, other than an ancestor or descendant of such deceased spouse;
- (b) any widow or widower to marry the brother of his or her deceased spouse or any male related to him or her through his or her deceased spouse in any more remote degree of affinity than the brother of his or her deceased spouse, other than an ancestor or descendant of such deceased spouse;
- (c) any man or woman to marry the sister of a person from whom he or she has been divorced or any male or female related to him or her through the said person in any more remote degree of affinity than the sister or brother of such person, other than an ancestor or descendant of such person; and
- (d) any man or woman to marry the brother of a person from whom he or she has been divorced or any male or female related to him or her through the said person in any more remote degree of affinity than the sister or brother of such person, other than an ancestor or descendant of such person.

**Time and place for and presence of parties and witnesses at solemnisation of orthodox marriage and validation of certain orthodox marriages**

18. (1) A marriage officer may solemnise an orthodox marriage at any time on any day of the week but will not be obliged to solemnise an orthodox marriage at any other time than between the hours of eight in the morning and four in the afternoon.

(2) A marriage officer must solemnise any orthodox marriage in a church or other building used for religious service, or in a private dwelling-house, with open doors and in the presence of the parties themselves and at least two competent witnesses, but the foregoing provisions of this subsection must not be construed as prohibiting a marriage officer from solemnising an orthodox marriage in any place other than a

place mentioned therein if the orthodox marriage must be solemnised in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties.

(3) No person may under the provisions of this Act contract a valid orthodox marriage through any other person acting as his or her representative.

### **Registration of orthodox marriages**

**19.** (1) The marriage officer solemnising any orthodox marriage, the parties thereto and two competent witnesses must sign the orthodox marriage register concerned immediately after such orthodox marriage has been solemnised.

(2) The marriage officer must forthwith transmit the orthodox marriage register and records concerned, as the case may be, to a regional or district representative designated as such under section 21 (1) of the Identification Act, 1997 (Act No. 68 of 1997).

### **Orthodox marriage formula**

**20.** (1) In solemnising any orthodox marriage any marriage officer designated under section 2 may follow the marriage formula usually observed by his or her religious denomination or organisation if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, the marriage officer concerned must put the following questions to each of the parties separately, each of whom must reply thereto in the affirmative:

'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed orthodox marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?',

and thereupon the parties must give each other the right hand and the marriage officer concerned must declare the orthodox marriage solemnised in the following words:

'I declare that A.B. and C.D. here present have been lawfully married.'.

(2) Subject to the provisions of subsection (1), a marriage officer, may in solemnising an orthodox marriage follow the rites usually observed by his or her religious denomination or organisation.

(3) If the provisions of this section have not been strictly complied with owing to-

- (a) an error, omission or oversight committed in good faith by the marriage officer; or
- (b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,

but such orthodox marriage has in every other respect been solemnised in accordance with the provisions of this Act, that orthodox marriage will, provided there was no other lawful impediment thereto, be as valid and binding as it would have been if the said provisions had been strictly complied with.

### **Certain marriage officers may refuse to solemnise certain orthodox marriages**

**21.** Nothing in this Act contained must be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation to solemnise an orthodox marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his or her religious denomination or organisation.

### **Fees payable to marriage officers**

**22.** (1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him or her as marriage officer in terms of this Act: Provided that a minister of religion or a person holding a responsible position in a religious denomination or organisation may, for or by reason of any such thing done by him or her, receive-

- (a) such fees or payments as were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his or her religious denomination or organisation, for any such thing done by him or her; or
- (b) such fee as may be prescribed.

(2) Any marriage officer who contravenes the provisions of subsection (1) is guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or, in default of payment, to imprisonment for a period not exceeding six months.

### **Religious rules and regulations**

**23.** Nothing in this Act contained will prevent-

- (a) the making by any religious denomination or organisation of such rules or regulations in connection with the religious blessing of orthodox marriages as may be in conformity with the religious views of such denomination or organisation or the exercise of church discipline in any such case; or
- (b) the acceptance by any person of any fee charged by such religious denomination or organisation for the blessing of any orthodox marriage,

provided the exercise of such authority is not in conflict with the civil rights and duties of any person.

### **Penalties for solemnising orthodox marriage contrary to the provisions of this Act**

**24.** Any marriage officer who knowingly solemnises an orthodox marriage in contravention of the provisions of this Act is guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or, in default of payment, to imprisonment for a period not exceeding six months.

### **Penalties for false representations or statements**

**25.** Any person who makes for any of the purposes of this Act, any false representation or false statement knowing it to be false, is guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

### **Offences committed outside the Republic of South Africa**

**26.** If any person contravenes any provision of this Act in any country outside the Republic of South Africa the Minister of Justice must determine which court in the Republic of South Africa must try such person for the offence committed thereby, and

such court will thereupon be competent so to try such person, and for all purposes incidental to or consequential on the trial of such person, the offence will be deemed to have been committed within the area of jurisdiction of such court.

### **Miscellaneous**

**27.** Where applicable, any reference to marriage in any other law includes an orthodox marriage as contemplated in this Act.

### **Regulations**

**28.** (1) The Minister may make regulations as to-

- (a) the form and content of certificates, notices, affidavits and declarations for the purposes of this Act;
- (b) the fees payable for any certificate issued or any other act performed in terms of this Act,

and, generally, as to any matter which by this Act is required or permitted to be prescribed or which he or she considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that the provisions of this Act may be effectively administered.

(2) Such regulations may prescribe penalties for a contravention thereof, not exceeding, in the case of a fine, fifty rand or, in the case of imprisonment, a period of three months.

(3) Different and separate regulations may be made under subsection (1) in respect of different areas and regulations made under subsection (1) (b) must be made in consultation with the Minister of Finance.

### **Short title and commencement**

**29.** This Act is called the Orthodox Marriage Act, 20.. (Act No. ... of 20..) and will come into operation on a date to be fixed by the President by proclamation in the Gazette.

**RECOMMENDED DOMESTIC PARTNERSHIPS ACT****BILL**

To provide for the legal recognition of domestic partnerships; to provide for the enforcement of the legal consequences of domestic partnerships; and to provide for matters related thereto.

**CONTENTS<sup>1</sup>***Sections***CHAPTER 1  
INTERPRETATION OF THE ACT**

1. **Definitions**
2. **Objectives of the Act**
3. **Relationships to which the Act applies**

**CHAPTER 2  
REGISTERED PARTNERSHIPS****PART 1  
REGISTRATION PROCEDURE**

4. **Partners in a registered partnership**
5. **Registration officers**
6. **Registration of partnerships**
7. **Property regime**

---

<sup>1</sup> This list of contents is provided for easy reference.



- 8. **Registered partnership agreement**

**PART II**

**LEGAL CONSEQUENCES OF REGISTERED PARTNERSHIPS**

- 9. **Duty of support**
- 10. **Limitation on the disposal of joint property**
- 11. **Right of occupation of the family home**

**PART III**

**TERMINATION OF REGISTERED PARTNERSHIP**

- 12. **Termination of registered partnerships**
- 13. **Termination by agreement**
- 14. **Termination agreement**
- 15. **Termination by court order**
- 16. **Welfare of minor children**
- 17. **Children of registered partners of the opposite sex**

**PART IV**

**MAINTENANCE AFTER TERMINATION OF A REGISTERED PARTNERSHIP**

- 18. **Maintenance after termination**
- 19. **Maintenance after death**
- 20. **Intestate succession**
- 21. **Delictual claims**

**PART V**

**PROPERTY DIVISION AFTER TERMINATION OF A REGISTERED PARTNERSHIP**

- 22. **Property division**
- 23. **Application only within two years after end of registered partnership**
- 24. **Notification of termination of a registered partnership**
- 25. **Interests of other parties**

**CHAPTER 3**  
**UNREGISTERED PARTNERSHIPS**

- 26. **Court application**
- 27. **Maintenance**
- 28. **Application for a maintenance order after separation**
- 29. **Application for a maintenance order after death of unregistered partner**
- 30. **Determination of reasonable maintenance needs of the surviving unregistered partner**
- 31. **Intestate succession**
- 32. **Property division**
- 33. **Application only within two years after end of relationship**

**CHAPTER 4**  
**MISCELLANEOUS**

- 34. **Regulations**
- 35. **Repeal and savings**
- 36. **Short title and commencement**

**BE IT THEREFORE ENACTED** by the Parliament of the Republic of South Africa, as follows:-

**CHAPTER 1**

**INTERPRETATION OF THIS ACT**

**Definitions**

1. In this Act, unless the context otherwise indicates—

**"Administration of Estates Act"** means the Administration of Estates Act 66 of 1965;

**"child of a domestic partnership"** includes-

- (a) any child born as a result of sexual relations between the domestic partners; or
- (b) any child of either domestic partner; or
- (c) any child adopted by the domestic partners jointly; or
- (d) any other child who was a dependant of the domestic partners-
  - (i) at the time when the domestic partners ceased to live together; or
  - (ii) if at that time the domestic partners had not ceased to live together, at the time immediately before an application under this Act; or
  - (iii) at the date of the death of one of the domestic partners;

**"Compensation for Occupational Injuries and Diseases Act"** means the **Compensation for Occupational Injuries and Diseases Act 130 of 1993**;

**"contribution"** means-

- (a) the financial and non-financial contributions made directly or indirectly by the domestic partners-
  - (i) to the acquisition, maintenance or improvement of any joint property, or separate property of either of the domestic partners or to the financial resources of either or both of them, or
  - (ii) in terms of a registered partnership agreement, and
- (b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either domestic partner to the welfare of the other domestic partner or to the welfare of the family constituted by them and a child of the domestic partners;

provided that there is no presumption that a contribution referred to in (a) is of greater value than a contribution referred to in (b);

**"court"** means a provincial or local division of the High Court of South Africa or a family court established under section 2(k) of the **Lower Courts Act 32 of 1944**;

**"domestic partner"** means a partner in a domestic partnership and includes a former domestic partner;

**"domestic partnership"** means a registered partnership or unregistered partnership and includes a former domestic partnership;

**"duty of support"** means the responsibility of each registered partner to provide for the other partner's basic living expenses while the registered partnership exists;

**"family"** includes partners in a domestic partnership and their dependants;

**"family home"** means the dwelling used by either or both domestic partners as the only or principal family residence, together with any land, buildings, or improvements attached to that dwelling and used wholly or principally for the purposes of the domestic partnership household;

**"financial matters"** in relation to parties to a registered partnership agreement, means matters with respect to:

- (a) the property of either or both of the parties, or
- (b) the financial resources of either or both of the parties;

**"financial resources"** in relation to either or both of the domestic partners includes:

- (a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which pension, retirement or similar benefits are provided;
- (b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the partners or either of them;
- (c) property, the alienation or disposal of which is wholly or partly under the control of the partners or of either of them and which is lawfully capable of being used or applied by or on behalf of the partners or by either of them in or towards their or his or her own purposes, and
- (d) any other benefit with a value;

**"household goods"** means corporeal property, owned separately or jointly by the domestic partners, intended and used for the joint household and includes-

- (a) movable goods of the following kind;
  - (i) household furniture;
  - (ii) household appliances, effects, or equipment;

- (iii) household articles for family use or amenity or household ornaments, including tools, garden effects and equipment;
  - (iv) motor vehicles, caravans, trailers or boats, used wholly or principally, in each case, for family purposes;
  - (v) accessories of goods to which subparagraph (iv) applies;
  - (vi) household pets; and
- (b) any of the goods mentioned in paragraph (a) that are in the possession of either or both domestic partners under a credit agreement or conditional sale agreement or an agreement for lease or hire; but
- (c) does not include-
- (i) movable goods used wholly or principally for business purposes;
  - (ii) money or securities for money; and
  - (iii) heirlooms;

**"interested party"** means any party with an interest, or who could reasonably be expected to have an interest, in the joint property of the domestic partners or the separate property of either of the domestic partners or in a partnership debt;

**"Identification Act"** means the **Identification Act 68** of 1997;

**"Intestate Succession Act"** means the **Intestate Succession Act 81** of 1987;

**"joint property"** means household goods and property owned jointly in equal or unequal shares by the domestic partners;

**"Lower Courts Act"** means the **Lower Courts Act 32** of 1944;

**"Maintenance of Surviving Spouses Act"** means the **Maintenance of Surviving Spouses Act 27** of 1990;

**"maintenance order"** means an order for the payment, including the periodical payment, by a domestic partner of sums of money towards the maintenance of the other domestic partner;

**"Mediation in Certain Divorce Matters Act"** means the Mediation in Certain Divorce Matters Act 24 of 1987;

**"Minister"** means the Cabinet member responsible for the administration of Home Affairs;

**"partnership debt"** means a debt that has been incurred, or to the extent that it has been incurred-

- (a) by the domestic partners jointly; or
- (b) in the course of a common enterprise of the domestic partnership carried on by the partners, whether individually, together or with another person; or
- (c) for the purpose of acquiring, improving, or maintaining joint property, or
- (d) for the benefit of both domestic partners in the course of managing the affairs of the common household; or
- (e) for the purpose of bringing up any child of a domestic partnership;

**"periodic maintenance order"** means an order for the payment of periodic sums of money by a domestic partner towards the maintenance of the other domestic partner;

**"prescribed"** means prescribed by regulations made under section 34 of this Act;

**"property"** includes any present, future or contingent right or interest in or to movable or immovable, corporeal or incorporeal property, money, a debt and a cause of action;

**"registered partnership"** means a relationship that has been registered as a partnership under section 6 of the Act;

**"registered partnership agreement"** means a written agreement concluded between and undersigned by prospective registered partners to regulate the financial matters pertaining to their partnership;

**"registration officer"** means any person who has been designated to be a registration officer under section 5 of this Act;

**"regulation"** means a regulation made under section 34 of this Act;

**"separate property"** means property of domestic partners that is not joint property;

**"Supreme Court Act"** means the Supreme Court Act 59 of 1959;

**"termination certificate"** means a certificate issued by a registration officer to the effect that a registered partnership has been terminated in the manner provided for in section 13 of this Act;

**"unregistered partnership"** means a relationship between two adult persons who live as a couple and who are not related by family.

### **Objectives of the Act**

2. The objectives of this Act are to ensure the rights of equality and dignity of the partners in domestic partnerships and to reform family law to comply with the applicable provisions of the Bill of Rights, through the-

- (a) recognition of the legal status of domestic partners;
- (b) regulation of the rights and obligations of domestic partners;
- (c) protection of the interests of both domestic partners and interested parties when domestic partnerships terminate; and
- (d) final determination of the financial relationships between domestic partners and between domestic partners and interested parties when domestic partnerships terminate.

### **Relationships to which the Act applies**

3. This Act applies to relationships between domestic partners and between either one or both domestic partners and another party or other parties.

**CHAPTER 2****REGISTERED PARTNERSHIPS****PART I****REGISTRATION PROCEDURE****Partners in a registered partnership**

4. (1) A person may only be a partner in one registered partnership at any given time.

(2) A married person may not register a partnership.

(3) A registration officer may not proceed with the registration process of a prospective partner who has previously been married or registered as a partner in a registered partnership unless presented with a certified copy of the -

- (a) divorce order;
- (b) termination certificate; or
- (c) death certificate

of the former spouse or registered partner, as proof that the previous marriage or registered partnership has been terminated.

(4) Persons who would be prohibited by law from concluding a marriage on the basis of consanguinity may not register a partnership.

(5) A relationship may only be registered as a partnership if at least one of the prospective partners is a South African citizen or has a certificate of naturalisation in respect of South Africa.

**Registration officers**

5. (1) The Minister, and any officer in the public service authorised thereto by him or her, may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his or her office and so long as he



or she holds such office, a registration officer, either generally or for any specified area.

(2) Every designation of a person as a registration officer must be in writing and the date as from which it will have effect and any limitation to which it is subject must be specified in such a written document.

### **Registration of partnerships**

6. (1) Subject to the limitations of section 4, any two persons may register their relationship as a partnership as provided for in this section.

(2) A registration officer must conduct the registration procedure on the official premises designated for that purpose and in the manner provided for in this section.

(3) The prospective partners must individually and in writing declare their willingness to register their partnership by signing the prescribed document in the presence of the registration officer.

(4) The registration officer must sign the prescribed document to certify that the declaration referred to in subsection (3) was made voluntarily and in his presence.

(5) The registration officer must make notification of the existence of a registered partnership agreement, where applicable, on the registration certificate.

(6) The registration officer must issue the partners with a registration certificate stating that they have registered their partnership and, where applicable, attach a certified copy of the registered partnership agreement to the registration certificate.

(7) The registration certificate issued by the registration officer is prima facie proof of the existence of a registered partnership between the partners.

(8) Each registration officer must keep a register of all registrations of partnerships conducted by him and make a notification of the existence of a registered partnership agreement, where applicable, in the register.

(9) The registration officer must forthwith transmit the said register to the officer in the public service with the delegated responsibility for the population register in his district of responsibility.

(10) Upon receipt of the said register the delegate must cause the particulars of the registered partnership concerned to be included in the population register in accordance with the provisions of section 8(e) of the **Identification Act**.

### **Property regime**

7. (1) Except as provided in this section, there is no general community of property between registered partners.

(2) In the event of a dispute regarding the division of property after a registered partnership has ended, section 22 of this Act applies.

(3) Registered partners may conclude a registered partnership agreement.

(4) Where no notification of the existence of a registered partnership agreement has been effected on or no copy of such registered partnership agreement has been attached to a registration certificate as required in section 6(5) and 6(6), and where no notification of the existence of such a registered partnership agreement has been made as required in section 6(8), such agreement binds only the parties to the agreement.

### **Registered partnership agreement**

8. (1) In proceedings regarding the division of property between registered partners under this Act, a court may consider the fact that the parties have concluded a registered partnership agreement and the terms thereof, provided that the registered partnership agreement has been noted on and attached to the registration certificate.

(2) If the court, having regard to all the circumstances, is satisfied that giving effect to a registered partnership agreement would cause serious injustice, it may set aside the registered partnership agreement, or parts thereof.

(3) In deciding, under subsection (2) whether giving effect to a registered partnership agreement would cause serious injustice, the court may have regard to—

- (a) the terms of the registered partnership agreement;
- (b) the time that has elapsed since the registered partnership agreement was concluded;
- (c) whether the registered partnership agreement was unfair or unreasonable in the light of all the circumstances at the time it was made;
- (d) whether the registered partnership agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made, whether those changes were foreseen by the parties, or not;
- (e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the registered partnership agreement;
- (f) the contributions of the parties to the registered partnership; and
- (g) any other matter that the court considers relevant.

(4) A court may make an order under this section notwithstanding that the registered partnership agreement purports to exclude the jurisdiction of the court to make that order.

(5) A court must decide any other matter regarding a registered partnership agreement on the applicable principles of the law of contract.

## **PART II**

### **LEGAL CONSEQUENCES OF REGISTERED PARTNERSHIPS**

#### **Duty of support**

**9.** Registered partners owe each other a duty of support in accordance with each partner's financial means and needs.

**Limitation on the disposal of joint property**

**10.** A registered partner may not without the consent of the other registered partner sell, donate, mortgage, let, lease or otherwise dispose of joint property.

**Right of occupation of the family home**

**11.** (1) Both registered partners are entitled to occupy the family home during the existence of the registered partnership, irrespective of which of the registered partners owns or rents the property.

(2) The registered partner who owns or rents the family home has no right to evict the other registered partner from the family home during the existence of the registered partnership without providing him or her with suitable alternative accommodation.

**PART III****TERMINATION OF REGISTERED PARTNERSHIPS****Termination of registered partnerships**

**12.** (1) A registered partnership terminates upon–

- (a) the death of one or both registered partners;
- (b) agreement by the partners; or
- (c) a court order to terminate the registered partnership, as provided for in this Act.

(2) A death certificate, termination certificate issued under this Act or a termination order made by the court under this Act is prima facie proof that such a registered partnership has ended.

**Termination by agreement**

**13.** (1) A registration officer must conduct the termination procedure on the official premises used for that purpose and in the manner provided for in this section.

(2) Registered partners who intend to terminate their partnership must present the registration officer with a certified copy of the registration certificate as proof that a registered partnership exists between them.

(3) Registered partners must individually and in writing declare their desire to terminate the registered partnership by signing the prescribed document in the presence of a registration officer.

(4) The registration officer must sign the prescribed document to certify that the declaration referred to in subsection (3) was made voluntarily and in his or her presence.

(5) The registration officer must issue the registered partners with a certificate stating that their partnership has been terminated and make a notification of the existence of a termination agreement, where applicable, on the certificate.

(6) Each registration officer must keep a register of all registered partnerships terminated by him and make a notification of the existence of a termination agreement, where applicable, in the register.

(7) The registration officer must forthwith transmit the said register and documents concerned to the officer in the public service with the delegated responsibility for the population register in his district of responsibility.

(8) Upon receipt of the said register the delegate must cause the particulars of the terminated partnership to be included in the population register in accordance with the provisions of section 8(e) of the **Identification Act**.

### **Termination agreement**

**14.** (1) Registered partners who want to terminate their registered partnership as provided for in section 13 of the Act, may conclude a termination agreement to regulate the financial consequences of the termination of their registered partnership.

(2) A termination agreement must be in writing, signed by both registered partners and must declare that it is entered into voluntarily by both partners.

- (3) A termination agreement may provide for-
- (a) the division of joint and separate property;
  - (b) one registered partner to pay maintenance to the other registered partner;
  - (c) arrangements regarding the family home; and
  - (d) any other matter relevant to the financial consequences of the termination of the registered partnership.

### **Termination by court order**

**15.** (1) Registered partners who have minor children from the registered partnership and who intend to terminate the registered partnership must apply to the court for a termination order.

(2) An application for the termination of a registered partnership is made to the court in accordance with the provisions of the Supreme Court Act.

### **Welfare of minor children**

**16.** (1) A court may not order the termination of a registered partnership unless the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor child or dependent child of the registered partnership are in the best interests of such child.

(2) In order to determine that the circumstances set out in subsection (1) exist, the court may order that an investigation be instituted and for that purposes the provisions of section 4 of the **Mediation in Certain Divorce Matters Act** apply, with the changes required by the context.

(3) Before making the termination order, the court must consider the report and recommendations referred to in the said section 4(1) of the **Mediation in Certain Divorce Matters Act**.

(4) In order to determine that the circumstances set out in subsection (1) exist, the court may order any person to appear before it and may order either or both the registered partners to pay the costs of an investigation and appearance.

(5) A court granting an order to terminate a registered partnership may, in regard to the maintenance and education of a dependent child of the registered partnership or the custody or guardianship of, or access to, a minor child of the registered partnership, make any order which it deems fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent must be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.

(6) Unless where otherwise ordered by a court, the rights of and obligations towards children of a registered partner under any other law are not affected by the termination of the registered partnership.

(7) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order either or both the registered partners to pay the costs of the representation.

#### **Children of registered partners of the opposite sex**

17. Where a child is born into a registered partnership between persons of the opposite sex, the male partner in the registered partnership is deemed to be the biological father of that child and has the legal rights and responsibilities towards that child that would have been conferred upon him if he had been married to the biological mother of the child

### **PART IV**

#### **MAINTENANCE AFTER TERMINATION OF A REGISTERED PARTNERSHIP**

##### **Maintenance after termination**

18. (1) In the absence of an agreement, a court may, after termination of a registered partnership as provided in section 12(1)(b) and 12(1)(c) of the Act, upon application, make an order which is just and equitable in respect of the payment of maintenance by one registered partner to the other for any specified period or until the death or remarriage of the registered partner in whose favour the order is given, or the

establishment of a registered partnership by the registered partner in whose favour the order is given with a new partner, whichever event occurs first.

(2) When deciding whether to order the payment of maintenance and the amount and nature of such maintenance, the court must have regard to the-

- (a) respective contributions of each partner to the registered partnership,
- (b) existing and prospective means of each of the registered partners,
- (c) respective earning capacities, future financial needs and obligations of each of the registered partners;
- (d) age of the registered partners;
- (e) duration of the registered partnership;
- (f) standard of living of the registered partners prior to the termination of the registered partnership;

and any other factor which in the opinion of the court should be taken into account.

#### **Maintenance after death**

**19.** For purposes of this Act, a reference to "spouse" in the **Maintenance of Surviving Spouses Act** must be construed to include a registered partner.

#### **Intestate succession**

**20.** For purposes of this Act, a reference to "spouse" in the **Intestate Succession Act** must be construed to include a registered partner.

#### **Delictual claims**

**21.** (1) For the purpose of claiming damages in a delictual claim, registered partners are deemed to be "spouses" in a legally valid marriage.

(2) A registered partner is not excluded from instituting a delictual claim for damages based on the wrongful death of the other partner merely on the ground that the partners have not been legally married.

(3) A registered partner is a dependant for purposes of the **Compensation for Occupational Injuries and Diseases Act**.



## PART V

### PROPERTY DIVISION AFTER TERMINATION OF A REGISTERED PARTNERSHIP

#### Property division

**22.** (1) In the event of a dispute regarding the division of property after a registered partnership has ended, one or both registered partners may apply to a court for an order to divide their joint property or the separate property, or part of the separate property of the other registered partner.

(2) Upon an application for the division of joint property, a court must order the division of that property which it regards just and equitable with due regard to all relevant factors.

(3) Upon an application for the division of separate property or part of the separate property, a court may order that the separate property or part of the separate property of the other registered partner as the court regard just and equitable, be transferred to the applicant.

(4) A court considering an order as contemplated in subsections (2) and (3) must take into account-

- (a) the existing means and obligations of the registered partners;
- (b) any donation made by one partner to the other during the subsistence of the registered partnership;
- (c) the circumstances of the registered partnership;
- (d) the vested rights of interested parties in joint and separate property;
- (e) the existence and terms of a registered partnerships agreement, if any; and
- (f) any other relevant factors.

(5) A court granting an order as contemplated under subsection (3) must be satisfied that it is just and equitable to do so by reason of the fact that the registered partner in whose favour the order is granted, made direct or indirect contributions to the

maintenance or increase of the separate property or part of the separate property of the other registered partner during the subsistence of the registered partnership.

(6) A court granting an order as contemplated under subsection (3) may, on application by the registered partner against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court regard just and equitable.

### **Application only within two years after end of registered partnership**

**23.** (1) Except as otherwise provided by this section, an application to a court for an order under this Chapter may only be made within a period of two years after the termination of the registered partnership.

(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to an applicant to apply to the court for an order under this Chapter, where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave were not granted than would be caused to the respondent if the leave were granted.

### **Notification of termination of a registered partnership**

**24.** (1) When a registered partnership is terminated, both registered partners are liable to give written notice of the termination to interested parties.

(2) When one or both registered partners die, the surviving registered partner or the executor of the estate of either registered partner is liable to give written notice of the termination of the registered partnership to interested parties.

### **Interests of other parties**

**25.** (1) A court considering an application under this Chapter must have regard to the interests of a bona fide purchaser of, or other person with an interest or vested right in, property concerned.

(2) A court may make any order proper for the protection of the rights of interested parties.

## CHAPTER 3

### UNREGISTERED PARTNERSHIPS

#### Court application

**26.** (1) One or both unregistered partners may, after the unregistered partnership has ended through death or separation, apply to a court for a maintenance order, an intestate succession order or a property division order under this Chapter.

(2) When deciding an application for an order under this Chapter a court must have regard to all the circumstances of the relationship, including such of the following matters as may be relevant in a particular case:

- (a) the duration and nature of the relationship;
- (b) the nature and extent of common residence;
- (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the unregistered partners;
- (d) the ownership, use and acquisition of property;
- (e) the degree of mutual commitment to a shared life;
- (f) the care and support of children of the domestic partnership;
- (g) the performance of household duties;
- (h) the reputation and public aspects of the relationship; and
- (i) the relationship status of the unregistered partners with third parties.

(3) A finding in respect of any of the matters mentioned in subsection (2), or in respect of any combination of them, is not essential before a court may make an order under this Chapter, and regard may be had to further matters and weight be attached to such matters as may seem appropriate in the circumstances of the case.

(4) A court may not make an order under this Chapter regarding a relationship of a person who, at the time of that relationship, was also in a civil marriage or registered partnership with a third party.

(5) A court may only make an order under this Chapter regarding a relationship where at least one of the parties to the relationship is a South African citizen or has a certificate of naturalisation in respect of South Africa.

### **Maintenance**

**27.** Unregistered partners are not liable to maintain one another and neither partner is entitled to claim maintenance from the other, except as provided in this Chapter.

### **Application for a maintenance order after separation**

**28.** (1) A court may, after the separation of unregistered partners upon application of one or both of them, make an order which is just and equitable in respect of the payment of maintenance by one unregistered partner to the other for a specified period.

(2) When deciding whether to order the payment of maintenance and the amount and nature of such maintenance, the court must have regard to the age of the unregistered partners, the duration of the unregistered partnership and the standard of living of the unregistered partners prior to separation, as well as the following matters-

- (a) the ability of the applicant to support himself or herself adequately in view of him or her having custody of a minor child of the domestic partnership;
- (b) the respective contributions of each unregistered partner to the partnership;
- (c) the existing and prospective means of each unregistered partner;
- (d) the respective earning capacities, future financial needs and obligations of each unregistered partner;
- (e) the relevant circumstances of another unregistered partnership or customary marriage of one or both unregistered partners, where applicable;

in so far as they are connected to the existence and circumstances of the unregistered partnership, and any other factor which in the opinion of the court should be taken into account.

### **Application for a maintenance order after death of unregistered partner**

**29.** (1) A surviving unregistered partner may after the death of the other unregistered partner, bring an application to a court for an order for the provision of his or her reasonable maintenance needs from the estate of the deceased until his or her death, remarriage or registration of another registered partnership, in so far as he or she is not able to provide therefore from his or her own means and earnings.

(2) The surviving unregistered partner will not, in respect of a claim for maintenance, have a right of recourse against any person to whom money or property has been paid, delivered or transferred in terms of section 34(11) or 35(12) of the **Administration of Estates Act**, or pursuant to an instruction of the Master in terms of section 18(3) or 25(1)(a)(ii) of that Act.

(3) The provisions of the **Administration of Estates Act** apply *mutatis mutandis* to a claim for maintenance of a surviving unregistered partner, subject to the following-

- (a) the claim for maintenance of the surviving unregistered partner must have the same order of preference in respect of other claims against the estate of the deceased as a claim for maintenance of a dependent child of the deceased has or would have against the estate if there were such a claim;
- (b) in the event of competing claims of the surviving unregistered partner and that of a dependent child of the deceased the court must make an order that it regards just and equitable with reference to all the relevant circumstances of the unregistered partnership;
- (c) in the event of competing claims of an unregistered partner and that of a surviving customary spouse, the court must make an order that it regards just and equitable with reference to the existence and circumstances of multiple relationships between the deceased and an unregistered partner, and between the deceased and a customary spouse;
- (d) in the event of a conflict between the interests of the surviving unregistered partner in his or her capacity as claimant against the estate of the deceased and the interests in his capacity as guardian of a minor dependent child of the domestic partnership, the court must make an order that it regards just and equitable with reference to all the relevant circumstances of the unregistered partnership; and

- (e) the executor of the estate of a deceased spouse must have the power to enter into an agreement with the surviving unregistered partner and the heirs and legatees having an interest in the agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate, or a right in the assets, to the surviving unregistered partnership, or to impose an obligation on an heir or legatee, in settlement of the claim of the surviving unregistered partner or part thereof.

### **Determination of reasonable maintenance needs of the surviving unregistered partner**

**30.** When determining the reasonable maintenance needs of the surviving unregistered partner, the court must consider the-

- (a) amount in the estate of the deceased available for distribution to heirs and legatees;
- (b) existing and expected means, earning capacity, financial needs and obligations of the surviving unregistered partner;
- (c) standard of living of the surviving unregistered partner during the subsistence of the unregistered partnership and his or her age at the death of the deceased;
- (d) existence and circumstances of multiple relationships between the deceased and an unregistered partner, and between the deceased and a customary spouse; and

any other factor that it regards relevant.

### **Intestate succession**

**31.** (1) Where an unregistered partner dies intestate his or her surviving unregistered partner may bring an application to a court, subject to subsections (2) and (3), for an order that he or she may inherit the intestate estate.

(2) Where the deceased is survived by an unregistered partner as well as a descendant, such unregistered partner inherits a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater, as provided for in the **Intestate Succession Act**.

(3) In the event of a dispute between a surviving unregistered partner and the customary spouse of a deceased partner regarding the benefits to be awarded, a court may, upon an application by either the unregistered partner or the customary spouse, make an order that it regards just and equitable with reference to all the relevant circumstances of both relationships.

### **Property division**

**32.** (1) In the absence of agreement, one or both unregistered partners may apply to court for an order to divide their joint property or the separate property, or part of the separate property of the other unregistered partner.

(2) Upon an application for the division of joint property, a court must order the division of that property which it deems just and equitable with due regard to all relevant factors.

(3) Upon an application for the division of separate property or part of the separate property, a court may order that the separate property or such part of the separate property of the other unregistered partner as the court regard just and equitable, be transferred to the applicant.

(4) A court considering an order as contemplated in subsections (2) and (3) must take into account-

- (a) the existing means and obligations of the partners;
- (b) any donation made by one partner to the other during the subsistence of the unregistered partnership;
- (c) the circumstances of the unregistered partnership;
- (d) the vested rights of interested parties in joint and separate property;
- and
- (e) any other relevant factors.

(5) A court granting an order as contemplated under subsection (3) must be satisfied that it is just and equitable to do so by reason of the fact that the unregistered partner in whose favour the order is granted, made direct or indirect contributions to the maintenance or increase of the separate property or part of the separate property of the other party during the existence of the unregistered partnership.

(6) A court granting an order as contemplated under subsection (3) may, on application by the unregistered partner against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court regards just and equitable.

(7) A court may make any order proper for the protection of the rights of interested parties.

### **Application only within two years after end of relationship**

**33.** (1) Except as otherwise provided by this section, an application to a court for an order under this Chapter may only be made within a period of two years after the date on which an unregistered partnership has ended through separation or death.

(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to an applicant to apply to the court for an order under this Act, where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave was not granted than would be caused to the respondent if the leave were granted.

## **CHAPTER 4**

### **MISCELLANEOUS**

#### **Regulations**

**34.** The Minister may make regulations regarding any matter which is required or permitted to be prescribed or which he considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that the provisions of this Act may be effectively administered.

#### **Repeal and savings**

**35.** The laws specified in the Schedule are hereby repealed to the extent set out in the third column thereof.



**Short title and commencement**

**36.** This Act is called the Domestic Partnerships Act, ... of 2006 and will come into operation on a date fixed by the President by proclamation in the Gazette.