SUBMISSIONS TO THE DEPARTMENT OF HOME AFFAIRS

ON THE

THE GREEN PAPER ON MARRIAGES IN SOUTH AFRICA

Joint submission by the TRIANGLE PROJECT and WOMEN'S LEGAL CENTRE which was compiled with input from:

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I. INTRODUCTION

1. Triangle Project and the Women's Legal Centre (hereinafter contributing organisations) refer to the call for comment in respect of the Green Paper on Marriages in South Africa (the Green Paper). The contributing organisations welcome an opportunity to engage with the Department of Home Affairs (the Department) on the Green Paper on Marriages in South Africa through written submissions. The Department will note that we have engaged in the Roundtable discussions in 2019 and also in the online consultations that have taken place.

2. Our submission is divided into three parts:
    2.1 **Part II** introduces the contributing organisations;
    2.2 **Part III** provides general remarks on other legislative and policy developments pertinent to the development of the marriage policy; and
    2.3 **Part IV** provides the submission to the Green Paper on Marriages in South Africa.

II. INTRODUCTION TO THE CONTRIBUTING ORGANISATIONS

3. Triangle Project (https://triangle.org.za/) is a non-profit human rights organisation offering professional services to ensure the full realisation of constitutional and human rights for lesbian, gay, bisexual, transgender, queer, intersex, plus (LGBTQI+) persons, their partners and families.

4. Our three-core services centre around Health and Support, Community Engagement and Empowerment, and Research and Advocacy. We offer a wide range of services to LGBTQI+ communities. These include health services related to general and sexual health, counselling, support groups, a helpline, public education and training services, advocacy, community outreach, and court support to survivors of hate crimes.

5. These submissions fall within our Research, Advocacy and Policy Programme that works to advance the inclusion and protection of the human rights to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) within South African legislation, policy and practices.

6. The Women's Legal Centre (WLC, http://www.wlce.co.za/) is an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy, education and training. The Centre has a vision of women in their diversity in South Africa who enjoy equal and substantive access to their rights, being free from violence, empowered to ensure their own sexual health and reproductive rights, free to own their own share of property and resources, having a safe place to stay, access to work in a safe and equal work environment.

7. The WLC was founded in 1998 and remains uniquely placed as the only dedicated women's rights legal centre of its kind in South Africa. Our programmatic work and focus areas are shaped by the women who seek assistance from us. These submissions fall into our programmatic work on relationship rights.

III. GENERAL COMMENTS ON LEGISLATIVE AND POLICY DEVELOPMENTS PERTINENT TO THE DEVELOPMENT OF A MARRIAGE POLICY

8. The submitting organisations welcome the acknowledgment in the Green Paper that colonialism and apartheid have left a lasting legacy on the interpersonal relationships between people living in South Africa and on our family law framework as a whole. Secondly, the acknowledgement that the state has a constitutional obligation to address this legacy of discrimination and prejudice not only from a formal equality perspective, but also from the perspective of shifting the lived realities of those most vulnerable within our society.

9. We therefore welcome the opportunity that the Green Paper provides in respect of public consultation, but also for engagement as South Africans on how we live, love and enter relationships, and the role and obligation that the state has in the

protection of the human rights of persons within their personal and intimate relationships.

10. Before we engage in the substantive recommendations, we believe it important to raise several key issues as general comments for the process of policy and law reform that lies ahead.

11. Traditionally, within legislation and policy our understanding of sexuality, sex and gender has been informed and developed within a discriminatory belief system based on heteropatriarchal, endosex[1] and cisnormative[2] assumptions, norms and prejudices. As a result, the human rights and needs related to the diverse sexual orientations, gender identities, gender expressions and/or sex characteristics (SOGIESC) of LGBTQI+ people have been violated and invisibilised. This applies not only to marriage legislation, but also to other legislation, policy and practices which impact on the daily lives of LGBTQI+ persons.

12. The history of discrimination, violence, human rights violations and criminalisation targeting lesbian, gay, bisexual, transgender, queer, intersex, plus (LGBTQI+) people in South Africa continues to have a severe impact today. Although same-sex sexual relations have been decriminalised and the human rights to sexual orientation, gender (which includes gender identity and gender expression) and sex (which includes sex characteristics) are now constitutionally

[1] "Endosex" refers to persons born with sex characteristics that fall within dominant social norms for typically 'male' or 'female' bodies. It is the opposite of "intersex", which refers to persons born with sex characteristics that are more diverse than dominant social norms for typically 'male' or 'female' bodies.

[2] "Cisnormative" refers to the discriminatory belief that every person is or should be cisgender, in other words, that every person has or should have a gender identity that is the same as the gender assigned to them at birth. Cisnormativity invisibilises and excludes transgender persons, whose gender identities differ from the gender assigned to them at birth; nonbinary persons, whose gender identities transcend the gender binary of woman/girl/female and man/boy/male; and gender diverse persons, whose gender and gender expressions are more diverse than dominant gender norms of femininity and masculinity.

protected, widespread discrimination, hate crimes, lack of access to services and other human rights violations continue for LGBTQI+ communities.[3]

13. One of the steps that the state has taken in addressing the history of discrimination and exclusion is through the adoption of the Civil Union Act 17 of 2006. We acknowledge the role and significance of the Civil Union Act in this context, and particularly its recent amendment through the Civil Union Amendment Act 8 of 2020,[4] which removed the discriminatory Section 6 that had allowed marriage officers to refuse to solemnise same-sex marriages. As a result, Home Affairs officials may no longer discriminate against same-sex couples based on their sexual orientation. However, this Act continues to create a separate dispensation for same-sex and same-gender marriages and civil unions and does so within an exclusionary sex and gender binary, resulting in a lack of recognition of SOGIESC diversity and continued barriers, discrimination and lack of access to marriage and relationship equality for LGBTQI+ persons.

14. It should be noted that the removal of the unconstitutional Section 6 of the Civil Union Act also removed one of the main reasons why a separate same-sex marriage law was created in the first place, and this development affirms the imperative to develop an equal and non-discriminatory marriage and relationship legal and policy framework that applies to all people regardless of their SOGIESC.

15. LGBTQIA+ people, or people of diverse SOGIESC, are not a single homogenous community. Misconceptions, inadequate understandings, incomplete assessments of the issues, and inaccurate terms and statements have been relied on during the Department of Home Affairs' roundtable in 2019, the online consultation(s) in 2021 and again during the Colloquium as recently as Monday

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[3] Müller, A., Daskilewicz, K. & the Southern and East African Research Collective on Health (2019). *Are we doing alright? Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in South Africa: Research report based on a community-led study in nine countries*. Amsterdam: COC Netherlands. http://www.ghjru.uct.ac.za/sites/default/files/image_tool/images/242/PDFs/Dynamic_feature/SOGIE%20and%20wellbeing_07_South%20Africa.pdf

[4] Civil Union Amendment Act 8 of 2020, https://www.gov.za/sites/default/files/gcis_document/202010/43832gon1108.pdf.

28 June 2021, as well as in the Green Paper itself. Rather, LGBTQIA+ people comprise many different communities or groups based on diverse sexual orientations, gender identities, gender expressions and sex characteristics. This means that the language and provisions in policy and legislation need to be inclusive of sexual, gender and bodily diversity, and also accommodate diverse forms of relationships and gender-inclusive or gender-neutral formulations rather than for instance limiting itself to exclusionary binary notions of “woman” and “man” and “opposite sex” and “same sex”.

16. LGBTQIA+ people also represent diverse groups in terms of race, culture, religion, language, geography, health status, socio-economic circumstances, occupation, dis/ability, and other positionalities. For example, a black Muslim bisexual transgender woman living in a rural area seeking access to marriage services and protection of their relationship rights will face different challenges from a white Christian gay man living in an urban city because of structural racism, prejudice and patriarchy in our society. It is therefore important that when the Department and officials make use of the term LGBTQIA+ that there is an appreciation that there is great diversity within the acronym. When we develop laws and policies such proposed by the Green Paper, we need to be alive to the lived realities of those most often persecuted for being different.

17. It is therefore strongly recommended that the Department use key categories and human rights of Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (SOGIESC) in law and policy and ensure an accurate understanding and articulation of how these categories apply to the different groups within the LGBTQIA+ acronym, in particular avoiding conflating issues of sexual orientation with issues of gender identity and sex characteristics.

18. The marriage law and policy reform process speak to the very lived realities of people and therefore must not be considered in isolation from other aspects of people’s lives. There are currently also several other law and policy reform processes that speak to the recognition of SOGIESC human rights and that have a significant impact on LGBTQIA+ people and the understanding of sexual, gender and bodily diversity in legislation and policy.

19. The Department itself is in the process of working on the development of a Draft Official Identity Management Policy (OIMP) of 2020, which deals with gender markers on identity documents and the National Population Register (NPR), among other matters. The policy has important implications for the legal gender recognition rights of transgender, nonbinary, gender diverse and intersex persons, and more generally for the understanding of sex and gender in law and policy. Several trans, intersex and LGBTQI+ organisations made submissions, including our organisations,[5] and have asked that the policy use a gender self-determination model, where each person can freely state their self-identified gender marker in a quick, easy, non-discriminatory procedure without external requirements like medical reports. It is important for us to understand how this policy will engage with and speak to the Green Paper and what it envisages.

20. A clear implication flowing from the OIMP process for instance was recommendations that we do away with gender markers on identity documents and in ID numbers. Gender should only be confidentially captured on the NPR if needed for statistical and resource allocation purposes, not to police the personal identities of individuals. To be more inclusive of all gender identities, a third gender marker option (X) needs to be added, which should mean "unspecified/ unstated". The X must not be assumed to be reserved exclusively for transgender, nonbinary and intersex persons, as this would make them easily identifiable and put them at risk of discrimination and violence. Importantly, it will continue to 'other' them as classes of persons not integrated or welcomed in society.

21. The draft OIMP made a serious error in assuming all trans, nonbinary and intersex persons would want an X as gender marker. Many transgender and intersex persons identify as F or M and would choose these as their gender markers. The approach should be that any person must be able to freely choose F, M or X as their gender marker. This would help ensure that people of all gender

[5] Women's Legal Centre, Triangle Project & Intersex South Africa. (2021, 15 March). Submission to the Department of Home Affairs on the Draft Official Identity Management Policy, http://triangle.org.za/wp-content/uploads/2021/04/WLC-TP-ISSA-2021-March-Submission-to-Department-of-Home-Affairs-on-Draft-Official-Identity-Management-Policy-OIMP.pdf.

identities are accommodated, including nonbinary persons and persons who do not want a specific gender captured. This recommendation, together with the recommendation that gender markers be kept confidential, which was made by several activists and organisations to the Department of Home Affairs, will have implications for the recommendations being put forward by the Department of Home Affairs in respect of the registration of marriages and the capturing of data and information, particularly with regard to how and where gender may be captured.

22. As both the Draft OIMP and the Green Paper on Marriages in South Africa are important policy documents for the protection and realisation of the human rights of LGBTQI+ people, but unfortunately both contain misconceptions, inaccurate assumptions and offensive language, we urge the Department to become familiar with the SOGIESC human rights language and frameworks as articulated in the submissions (including the resources they reference) made by our organisations and other LGBTQI+, transgender and intersex organisations that have been engaging with the Department.

IV. COMMENTS ON THE GREEN PAPER POLICY OPTIONS

Inclusiveness of the Marriage Statute

23. The Green Paper has as a key outcome social cohesion and inclusivity of all the people of our country who seek to and enter into marriage. Importantly, it recognises that not all marriages that are currently being concluded in South Africa are legally recognised and that not all relationships that people are entering into are legally recognised. This lack of legal recognition means that the interests and consequences that flow from interpersonal relationships are not regulated and vulnerable parties in relationships are unable to access and vindicate their rights.

24. The legislative reform has lagged behind the advancement of the law through our courts and litigation. It is the Courts that found that the ongoing criminalisation of

sodomy was a gross violation of the Constitutional rights of individuals.[6] Our Courts have compelled the recognition of same-sex marriage[7] and the adoption of the Civil Union Act 17 of 2006 was a direct result of a Court case, although a separate marriage dispensation for same-sex or same-gender couples was not what the Courts ordered. In other words, ordinary South Africans demanding access to their rights have been at the forefront of not only precedent-setting jurisprudence in our country but have also compelled the recognition of their rights.

25. In the Fourie case, the Constitutional Court did not compel the enactment of separate legislation. This was the approach adopted by the state to comply with the judgment and court order. It has long been argued that the enactment of the Civil Union Act created a system of separate but equal. This approach has translated into ongoing and continued discrimination against couples who have their marriages solemnised in terms of the Civil Union Act.

26. We therefore submit that that inclusivity can be created by bringing all interpersonal relationships into and under one umbrella that recognises that people who enter or seek to enter into marriages have diverse identities, backgrounds and forms of social, religious and cultural belonging that include and also extend beyond their gender, sex and sexual orientation. LGBTQI+ persons have culture and custom, religious beliefs and traditions, and they have a desire to give expression to them. These should not be presented in false opposition to their needs and rights to have their sexual orientation, gender identity, gender expression and sex characteristics recognised, protected and validated within these social, cultural and religious contexts - something that is generally already enjoyed by many persons who happen not to be LGBTQI+. An LGBTQI+ person should be considered a whole person like anyone else, embedded in family, cultural and community relationships, and should not be framed as divorced from society and reduced only to specific aspects of their

[6] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)

[7] Minister of Home Affairs and another v Fourie and Bonthuys CCT60/04, 2005 (3) BCLR 355 (CC).

selves. For example, a customary or religious marriage should be able to take place between persons regardless of whether one or more of the spouses are men, women, nonbinary persons or identifying as another gender, whether there is two or multiple parties to the relationship.

27. We have noted the attention that the inclusion and recognition of polyandry has been given in the media and public discourse[8]. We believe that such discussions and engagements are critically important to ensure that as a country we become a more inclusive and tolerant society. It is however important that this discourse is underpinned by a Green Paper which seeks to recognise the rights of persons in our country as the foundation.

28. The rationale for the inclusion of different forms of polygamy should be recognised as an issue of equality as a value in our Constitution as well as a right in terms of Section 9. It should be viewed within the context of our colonial past and apartheid legacy of discrimination and criminalisation of people's interpersonal relationships. If polygyny is recognised, then not only should polyandry be recognised, but polygamy in all its forms, which would include instances where the persons in the relationship may identify as either nonbinary, female, male or another gender. For instance, a nonbinary person may be in a polygamous relationship with three other persons, which could consist of a woman, a man and another nonbinary person.

29. We submit that if Section 9 of the Constitution is to be given effect, there is an obligation to have more than just formal equality. The obligation extends to ensuring that the lived realities of people are not only taken into account, but that we address the discrimination and prejudice present in their everyday lives. This will ensure that we achieve substantive equality in terms of Section 9.

[8] We note with dismay that these objections have largely been focussed on the retention of patriarchal values in our society. There has been expressions that has highlighted the toxic masculinity that exists in our society, which justifies ownership of women and the violent abuse of women and others who do not conform to what a patriarchal society wants to cement.

Design of the Marriage Act

30. The Green Paper (Section 4.3) proposes three options in respect of the design of the new marriage law.

    30.1 Firstly, it proposes a single marriage statute, which seeks to bring all marriages under one piece of legislation and that would apply a single set of requirements and consequences to all marriages. This approach is in part what has been proposed by the South African Law Reform Commission in their Discussion Paper 152 of Project 144 on a Single Marriage Statute,[9] although primarily in respect of the requirements for the recognition and registration of marriages, rather than the consequences thereof, which are largely left to be dealt with in other legislation.

    30.2 Secondly, the Green Paper provides as option an Omnibus Act, which would contain different chapters for civil marriages, civil unions, customary marriages and other marriages not currently accommodated.

    30.3 Thirdly, it notes the option of parallel legislation, which would reflect our current legal framework where there are different marriage laws seeking to deal with different categories of marriage.

31. The Green Paper rightly points out that the status quo of parallel marriage acts is not "consistent with the transformative nature of the country's Constitution".[10] We strongly feel that continuing the current separate marriage dispensation would not achieve marriage and relationship equality for LGBTQI+ persons, but continue to reinforce the marginalisation and stigmatisation of their relationships and of themselves, as well as invisibilise the rights and needs of those persons whose sexualities, bodies and identities go beyond exclusionary binary sex and gender categories. Additionally, the status quo would continue to present a range

[9] South African Law Reform Commission. (2021, 31 March). Single Marriage Statute, Discussion Paper 152, Project 144, https://static.pmg.org.za/210223SingleMarriageStatute-Jan2021.pdf.

[10] The Green Paper on Marriages, pg 51.

of barriers and violations of the rights of married transgender, nonbinary and intersex persons who change their legal gender markers.

32. For the contributing organisations, the issue of the equal recognition and protection of the marriages and relationships of LGBTQI+ persons, inclusive of their SOGIESC rights, does not necessarily reside in whether the new marriage statute is a Single Marriage Act or whether it is an Omnibus Act. Our concern is that individuals need to be recognised fully within their culture, tradition and religion when they choose to enter a marriage or protected relationship. Our law therefore must recognise that all individuals, regardless of their sex, gender or sexual orientation, have the right to give expression to their culture, traditions and religion in the solemnisation of their marriages, and that the law must recognise, respect and protect their right to do so. This is the basis of substantive equality.

33. Should an omnibus statute be opted for, the SOGIESC rights of LGBTQI+ people must be recognised throughout all chapters and for all categories of marriage and protected relationship. It should not be relegated to a separate chapter in imitation of the current dispensation.

34. The Court found that discrimination against people because of their sexual orientation cannot be justified and that the State has a positive obligation to take steps to address the discrimination. In one of the earliest cases *of National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others*,[11] the Court stated:

> "*At the heart of equality jurisprudence is the recusing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself, as happens in the case of the disabled. In the case of gays, it comes from*

[11] National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others (CCT11/98).

compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality".

35. We agree that an omnibus statute has the potential of being reflective of South Africa's diversity, but we caution against an approach where once again LGBTQI+ persons will be stripped of their cultural, traditional and religious identities to placate those who, in direct opposition to spirit, values and principles of our Constitution, would callously deny them their humanity, equality and dignity.

Solemnising Marriages

36. The contributing organisations have been actively involved in advocating for and engaging on the recission of Section 6 of the Civil Union Act which allowed the State (through its employees) to object to performing marriages that are considered to be same-sex marriages under the Act. We have noted through the public engagement process with the Department of Home Affairs that there have been some calls to reintroduce this discriminatory provision. We strongly caution against any consideration of reintroducing this provision through introducing processes that are as "gender, cultural and religious neutral as possible",[12] as suggested in the Green Paper.

37. Our law has firmly entrenched the principle that individuals deserve dignity and equal treatment by the State irrespective of their sexual orientation. Consequently, the State has a constitutional obligation to ensure same-sex/same-gender couples are treated by the State using the same standards as for different-sex/different-gender couples. The effect of allowing marriage officers who are public servants (and even those who are not) to have discretion on who they will solemnise marriages for discriminates against same-sex/same-gender couples. We acknowledge the rights of individuals to their religious freedom, but our countries' value system does not allow for prejudice and bigotry to hide behind a mask of religious freedom. The State (as this is who the public servant

[12] Green Paper on Marriages in South Africa, pg. 52.

represents) does not have discretion to unfairly discriminate against any individual requiring state services because of their personal beliefs.

38. The Constitution of course guarantees the right to equality in that it is both a foundational value as well as a right contained in Section 9 of the Constitution, which clearly stipulates that:

(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 enjoyment 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."

39. It is within these values and recognition of these rights that the Constitutional Court handed down the judgment in Minister of Home Affairs and Another v Fourie and Another[13] (commonly known as the Fourie case) on 1 December 2005, which recognised the discrimination and rights violation faced by same-sex couples who wished to get married. The Court settled the debate on whether there was a right to enter into a marriage and whether the State had an obligation to fulfil this obligation. There is a right and the State and its organs of State have an obligation to ensure that the discrimination is eliminated, and the rights realised.

[13] Minister of Home Affairs and another v Fourie and Bonthuys CCT60/04, 2005 (3) BCLR 355 (CC).

40. In respect of broadening the scope for the designation of marriage officers as set out in option 3 of Section 4.4,[14] we would fully support that such designation can and should be extended because of principles of equality. This however cannot and should not create a regime of separate but equal where objection to solemnise certain marriages will be tolerated simply because there would now be a broader category of persons who can and may be marriage officers.

41. We also support the criteria that the Green Paper proposes in terms of the minimum requirements that marriage officers would have to meet in order to be so designated. We would emphasise that as part of the training that marriage officers undergo, they be educated on the constitutional rights of all to access services, including sensitisation on the SOGIESC rights of all persons.

42. There may be certain instances in especially the conclusion of customary marriages where a marriage officer is not present. It is important to recognise that such marriages are not invalidated because no marriage officer was present at the necessary customary practices and rituals. It is also important to emphasise that non-registration of that marriage does not invalidate the marriage. This is the current position as set out by the Recognition of Customary Marriages Act.

Marriages that Involve Minors

43. The Civil Union Act places the marriage age at 18 years and does not allow for minors to enter into a civil union even with the consent of their parents or the Minister of Home Affairs. The contributing organisations fully support the prohibition on child marriage.

44. This recommendation is in line with the proposal made by the South African Law Reform Commission. They too have found that girls are disproportionately affected by child marriage.

[14] Green Paper on Marriages in South Africa, pg. 53.

Transitional mechanisms for 'sex alteration'

45. The language in this section (as well as other sections) of the Green Paper is deeply problematic in that it lacks a clear understanding of legal gender recognition and of the purpose of South Africa's gender recognition law, the Alteration of Sex Description and Sex Status Act 49 of 2003 ("Act 49"). At issue is the legal recognition of an individual's gender identity, and what happens at Home Affairs if an individual married under the heterosexual Marriage Act changes or wants to change their legal gender in terms of Act 49.

46. Firstly, it is important to note here that Act 49 contains extremely discriminatory language and requirements that constitute gross human rights violations, and the Act is in urgent need of reform. However, Act 49 does not go as far as speaking to or requiring a 'sex change', which is a deeply offensive term.

47. Act 49 merely deals with the alteration (amendment) of an individual's gender marker on the birth register and allows for them to access an amended birth certificate which now records their correct gender marker (unfortunately currently still limited only to recognition of one of the two binary gender options, namely female or male). It has been the misapplication of the legislation and its intentions by the Department of Home Affairs that has contributed to the prejudice and discrimination that people experience.

48. Through this misapplication, married couples in which one of the partners changed or applied to change their legal gender, have been forced to institute divorce proceedings even though they wish to remain married, or their marriages have been deleted by Home Affairs without their consent. This has been happening because of the separate marriage regimes (different-gender couples vs same-gender couples) enforced by the system used by the Department to record marriages and the gender of persons on the national population register.

49. Because of this systems issue, people who want to access legal gender recognition are being frustrated with delays that often last many years before their gender marker applications are processed, letters of proof of amendment to

the national population register are issued and amended IDs and marriage certificates that indicate their current details are obtained.

50. The Western Cape High Court in the KOS v The Minister of Home Affairs[15] case specifically addressed the misapplication of the Act in its judgment against the Department. The judgment notes in particular that the "lack of uniform approach" to the implementation of the Act is striking. The Court also notes that the implementation of the Act is unsatisfactory. The Court goes on to note that the lack of clarity in the implementation and the lack of understanding the Constitutional importance of the legislation links back to religious and cultural prejudice within the Department itself.

51. The KOS judgment is clear in stating that there is nothing in the existing Marriage Act 25 of 1961 that prohibits the alteration and continued marriage of the couples (and others similarly situated) that appeared before that Court. Neither the Marriage Act, nor the Recognition of Customary Marriages Act, speaks to a prohibition against the alteration of an individual to their gender marker on the national population register. Such an alteration does not invalidate in law the marriage between the parties and does not give rise to any legal ground for divorce.

52. We therefore fail to understand why a "transitional mechanism" is necessary for persons who are married in terms of a particular statute. The introduction of such a mechanism will only exacerbate the existing discrimination that transgender and intersex persons experience when they seek to access the provisions of Act 49. It further serves as an indicator of the religious and cultural bias that exists within the formulation of the Green Paper.

53. What needs to happen instead is the recognition and protection of people's marriages and relationships regardless of their sexual orientation, gender or sex. In this regard, we also refer again to our comments above on the Official Identity Management Policy, and the need to treat gender markers as confidential and only relevant for statistical and resource allocation purposes where really

[15] http://www.saflii.org/za/cases/ZAWCHC/2017/90.html

needed; and not for the gendered identification of persons. This would also mean the removal of gender markers from marriage certificates, and an end to reserving certain forms of marriage only for different-gender partners.

54. There is a proactive burden that is placed on the State to address discrimination, as set out by the Constitutional Court in the case *of Carmichele v The Minister of Safety and Security*[16] where the Court said:

> "*There is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."*

55. South Africa also has regional and international legal obligations towards same-sex/same-gender couples and the recognition of individual's gender identity within different contexts, including marriage. The African Commission on Human and Peoples' Rights (ACHPR) addresses the right to non-discrimination based on sexual orientation and gender identity, and the right to have equal protection before the law in its Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity.[17]

56. The Yogyakarta Principles (2007) and Yogyakarta Principles Plus 10 (2017)[18] are important to consult in this regard as it outlines state obligations on the application of human rights in relation to sexual orientation, gender identity, gender expression and sex characteristics. South Africa's former Constitutional Court Judge Edwin Cameron was one of the international experts who developed the initial set of principles.

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[16] 2001 (10) BCLR 995 (CC) para. 44.

[17] African Commission on Human and Peoples' Rights. Resolution 275. 55th Ordinary session held in Luanda, Angola, from 28 April to 12 May 2014, https://www.achpr.org/sessions/resolutions?id=322.

[18] https://yogyakartaprinciples.org/

57. The Yogyakarta Principles has been applied in South African courts in 2019 in an important judgment protecting the right of a transgender woman in a male prison to express her gender identity (*September v Subramoney NO and Others*). The Yogyakarta Principles covers a broad range of rights as they apply to LGBTQIA+ people, including the right to legal gender recognition and the right to find a family, which among others addresses marriage and other partnerships.

Premarital Counselling

58. The contributing organisations recognise the benefits of counselling and therapy to assist in the strengthening of relationships and making informed choices if it is entered into freely by all parties. However, we note with alarm that the Green Paper is suggesting that premarital counselling should be made compulsory prior to couples being allowed to enter a valid marriage.

59. Our first concern with the proposal is that it does not set out who the Department of Home Affairs envisages should be service providers of the counselling. Without clear criteria or an indication of who the service provider needs to be there will be arbitrary implementation of the criteria by officials who need to verify that the counselling had been complied with. We are also concerned about the cost implication of making this mandatory given the high cost, inaccessibility and unaffordability of counselling services for the majority of the population in South Africa.

60. Secondly, we are concerned that without clear guidelines in respect of what the counselling must entail and who will provide said counselling there is a risk that unsuspecting parties may be subjected to some form of conversion therapy. The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has been recorded as saying that “mental health diagnosis has been misused to pathologize identities and other diversities” and that “the pathologization of lesbian, gay, bisexual,

transgender and intersex persons reduces their identities to diseases, which compounds stigma and discrimination".[19]

61. The United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI) says that so-called "conversion therapy", (also known as "reparative therapy") is an umbrella term for harmful interventions of a wide-ranging nature, which are founded on the belief that an individual's sexual orientation, gender identity or gender expression can and should be changed or suppressed if the individual does not comply with dominant norms.[20] He describes these practices as "degrading, inhuman and cruel". It is also described by LGBTQ+ activists as a process of cisgender, heteronormative indoctrination.

62. There is a very real risk that by introducing premarital counselling that is unregulated and of which the purpose is unclear, LGBTQI+ couples will find themselves being subjected to gross rights violations under the guise of premarital counselling.

63. Lastly, imposing counselling on people could be challenged as unethical and unacceptable interference by the State in people's personal lives and choices. Forced therapy is also unlikely to achieve the effect intended by the Green Paper. At the very most, couples could be made aware of premarital counselling as an option to consider should they feel the need for information or support.

Conclusion

64. In conclusion, we welcome a progressive and inclusive marriage policy and marriage law that ensure that LGBTQI+ people finally achieve marriage and relationship equality, rather than the current unequal and othering dispensation

[19] A/HRC/35/21, para.48.

[20] Practices of so called "conversion therapy". Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity to the United Nations Human Rights Council, General Assembly, 1 May 2020, https://undocs.org/A/HRC/44/53.

of a separate Civil Union Act for same-sex and same-gender marriages and unions.

65. We also wish to emphasise again that regardless of whether a single or omnibus statute is opted for, the sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) rights of LGBTQIA+ people must be protected throughout all forms of marriages and relationships, including all cultural, customary and religious marriages.

****ENDS****