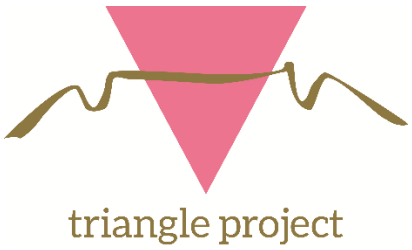



# SUBMISSIONS TO THE SOUTH AFRICAN LAW REFORM COMMISSION ON THEIR DISCUSSION PAPER 152 OF PROJECT 144 SINGLE MARRIAGE STATUTE

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

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# Contents

## I. INTRODUCTION

1. Triangle Project and the Women's Legal Centre (hereinafter the contributing organisations) refer to the call for comment[1] in respect of the South African Law Reform Commission's Discussion Paper on a Single Marriage Statute (the Discussion Paper) and its draft Bills.[2] The contributing organisations welcome an opportunity to engage with the South African Law Reform Commission (SALRC) on the Discussion Paper and draft Bills. The WLC has made specific submissions on the Discussion Paper, but has been requested by Triangle Project to collaborate on these submissions which will focus on the need for the inclusion of LGBTQI+ communities and SOGIESC human rights in the discussion and investigation being undertaken by the SALRC and in subsequent draft Bills.

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 which we believe to be pertinent to the development of the legislation geared towards marriage and relationship recognition; and
    2.3 **Part IV** provides the submission to the Discussion Paper and its accompanying draft Bills.

## 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

[1] https://pmg.org.za/call-for-comment/1030/

[2] https://static.pmg.org.za/210223SingleMarriageStatute-Jan2021.pdf

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 HUMAN RIGHTS, LEGISLATIVE AND POLICY DEVELOPMENTS PERTINENT TO THE DEVELOPMENT OF A MARRIAGE POLICY AND MARRIAGE STATUTE

8. The contributing organisations welcome the acknowledgment in the Discussion 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. 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. We submit that this broader understanding is critical for the development of laws and policies that seek to address the legacy of oppression, injustice and discrimination from our past.

## a) Inclusion of Diverse SOGIESC in Legislation in Policy

10. 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[3] and cisnormative[4] 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.

11. 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

[3] "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.

[4] "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.[5]

12. It is therefore strongly recommended that the SALRC refer to all four the key categories and human rights of Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (SOGIESC) in its discussion papers and legislative and policy proposals, 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.

### b) Recognition of Diversity in LGBTQIA+ Communities when developing Law and Policy

13. 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 often surrounded processes of policy development and law reform in this regard. 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 therefore 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”.

14. LGBTQIA+ people also represent diverse groups in terms of race, culture, religion, language, geography, health status, socio-economic circumstances,

[5] 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

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 to have an awareness of the great diversity and different positionalities within LGBTQI+ communities. When we develop laws and policies such as proposed by the Discussion Paper and the draft Bills, we need to be alive to the lived realities of those most often persecuted and excluded for being different.

15. The marriage law and policy reform process speaks to the very lived realities of people and therefore must not be considered in isolation from other aspects of people's lives. We have noted particular discourses of neutrality, that risk the very non-recognition that the process seeks to address if it is not done with the necessary awareness of the lived realities of LGBTQIA+ individuals.

### c) Law and Policy Developments Relevant to Marriage Law and Policy Reform

16. There are currently several other law and policy reform developments and 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. It is important that the SALRC interrogate these processes so as to ensure that the process is as inclusive of other developments.

*Civil Union Act 17 of 2006 and Civil Union Amendment Act 8 of 2020*

17. 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.[6] 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,[7] which removed the discriminatory Section 6 that had

[6] http://www.saflii.org/za/legis/num_act/cua2006139.pdf

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

allowed marriage officers to refuse to solemnise same-sex marriages. As a result, Home Affairs officials may no longer discriminate against same-sex or same-gender 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.

18. It should be noted that the removal of the unconstitutional Section 6 of the Civil Union Act also removed one of the main justifications (unjust as it was) 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.

*Draft Official Identity Management Policy, 2020*

19. The Department of Home Affairs is currently 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.

20. Several trans, intersex and LGBTQI+ organisations made submissions, including our organisations,[8] and an important position paper has been published.[9] We

[8] 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.

[9] Matthyse, L., Payne, A-L, Mudarikwa, M., Smit, E., Camminga, B. & Rossouw, R. (2020). *Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa*. Gender DynamiX & Legal Resources Centre. https://drive.google.com/file/d/1Wx7d9o06qec0ka2aJ32G47JsT1BR2DI0/view

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 the SALRC to interrogate and familiarise itself with the above-mentioned submissions, position paper and the OIMP so that there is a clear understanding of how this policy will engage with and speak to what is envisaged by the Discussion Paper and the draft Bills.

21. 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.

22. 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 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 Discussion Paper and draft Bills in respect of the registration of protected relationships or marriages and life partnerships, and the capturing of data and information, particularly with regard to whether, how and where gender may be captured as part of the recording of the identities of the parties.

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

23. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)[10] defines 'sex' as including 'intersex', but fails to make explicit provisions addressing the protection of intersex rights, such as the prohibition of intersex genital mutilation. However, this does entail a broadening of the understanding of sex beyond binary female and male categories.

*Children's Amendment Bill, 2020*

24. The Department of Social Development's Children's Amendment Bill of 2020 includes the prohibition of genital mutilation, among other matters. This is good, but not enough. Intersex organisations and activists are calling for an explicit prohibition of both Intersex Genital Mutilation (IGM) and Female Genital Mutilation (FGM), and that these matters be dealt with comprehensively in separate sections, since these are different types of human rights violations that should not be conflated as each has a distinct set of issues to be addressed. Such inclusion would be an important advance for the legal protection of the rights of intersex persons or persons with variations in sex characteristics. This is urgently needed to start addressing the gross human rights violations that intersex persons face in South Africa, and to increase visibility, affirmation and recognition of bodily diversity beyond narrow binary understandings of biological sex as simply female or male. In this regard, we advise that the SALRC consult the submissions by Intersex South Africa (ISSA) and the contributing organisations.[11]

[10] http://www.saflii.org/za/legis/consol_act/poeapouda2000637.pdf

[11] Intersex South Africa, Women's Legal Centre, Triangle Project & Joshua Sehoole. (2020, 27 November). Submission to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020]. http://triangle.org.za/wp-content/uploads/2020/11/ISSA-WLC-TP-Sehoole-2020-Nov-Intersex-South-Africa-Submission-on-Childrens-Amendment-Bill-regarding-Intersex-Genital-Mutilation.pdf

Intersex South Africa (ISSA). (2021, 13 May). Oral Submission to the Portfolio Committee on Social Development at the Virtual Public Hearings on the Children's Amendment Bill [B18 – 2020]. See 2:40:05 - 2:44:07 at https://www.youtube.com/watch?v=om7lAdF22RY Also see coverage of the presentation in social media: https://twitter.com/TriangleOrg/status/1393260755089305608

*Prevention and Combatting of Hate Crimes and Hate Speech Bill*

25. The Department of Justice's Prevention and Combatting of Hate Crimes and Hate Speech Bill[12] is long overdue, but also includes sexual orientation, gender identity and intersex among the recognised grounds for hate crime and hate speech offences.

## d) Regional and International Legal Obligations

26. South Africa also has regional and international legal obligations towards LGBTQI+ people and the recognition and protection of individuals sexual orientation, gender identity, gender expression and sex characteristics within different contexts, including marriage.

27. 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.[13]

28. The Yogyakarta Principles (2007)[14] and Yogyakarta Principles Plus 10 (2017)[15] are important to consult 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. The Yogyakarta Principles covers a broad range of rights as they apply to LGBTQIA+ people, including the right to legal gender recognition and

[12] https://pmg.org.za/bill/779/

[13] 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

[14] *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. 2007. http://www.yogyakartaprinciples.org/

[15] *Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*. 2017. http://www.yogyakartaprinciples.org/

the right to found a family, which among others addresses marriage and other partnerships.

29. The Yogyakarta Principles has been applied in South African courts in 2019 in an important judgment, *September v Subramoney NO and Others*,[16] which protects the right of a transgender woman in a male prison to express her gender identity. This judgment has implications for the broader protection of gender identity in other contexts as well, which would include legislative and policy frameworks for the recognition and legal consequences of marriage.

### e) Attentiveness to SOGIESC human rights language and frameworks

30. These and other human rights, legal and policy frameworks and processes are reconceptualising and broadening how we look at sex, gender and sexual orientation. The Bill of Rights in our Constitution provided a solid basis for such developments through protecting us against discrimination on the basis of sexual orientation, sex and gender. However, the meaning and implications of these categories often need to be articulated in more specific terms to understand what they mean in relation to LGBTQIA+ people and diverse SOGIESC.

31. As the Discussion Paper and the draft Bills are important policy documents for the protection and realisation of the human rights of LGBTQI+ people, the SALRC is encouraged to eliminate misconceptions, inaccurate assumptions and offensive language. We further urge the SALRC to become familiar with the SOGIESC human rights language and frameworks as articulated in these submissions (including the resources they reference) made by our organisations and other LGBTQI+, transgender and intersex organisations.

## IV. COMMENTS ON THE DISCUSSION PAPER AND DRAFT BILLS

### a) Inclusiveness of the Statute

32. The Discussion Paper and the draft Bills have as a key outcome the creation of inclusivity for all the people of our country who enter or seek to enter into marriage

[16] September v Subramoney NO and Others (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019), http://www.saflii.org/za/cases/ZAEQC/2019/4.html

or to make commitments similar to marriage. Importantly, it recognises that not all marriages/relationships that are currently being concluded in South Africa 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.

33. It is clear from the Discussion Paper that 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.[17] Our Courts have compelled the recognition of same-sex marriage[18] 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.

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

### b) LGBTQI+ Inclusion in all Civil, Customary and Religious Marriages

35. We therefore submit 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 and similar relationship commitments, have

[17] 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).

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

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+.

36. 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 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.

### c) Title of the Statute

37. The contributing organisations note that the two drafts Bills differ only in their proposed titles, namely "Protected Relationships Bill" and "Recognition and Registration of Marriages and Life Partnerships Bill", and in how relationships are accordingly referred to throughout the respective Bills. We are of the view that “Protected Relationships” is the broader and more inclusive term.

38. People conceptualise partnerships in different ways, and we need to recognise that LGBTQIA+ people represent diverse communities, with different religions and cultures. The term ‘marriage’ may be experienced as legitimising and enabling for some LGBTQIA+ people within their families and communities and they may feel strongly about identifying their partnership as a marriage. However, other LGBTQIA+ people may not identify with either the term ‘marriage’ or ‘life partnership’, but may still have relationships to which they attach great significance and for which they want legal protection.

39. The term “Protected Relationships” would be able to include marriage, life partnerships and other partnerships that require protection, without privileging the notion of marriage or life partnership over other relationships. It should be understood that “protected relationships” would be the overarching concept for all these types of relationships, but that people would still be able to name their particular relationships in accordance with their beliefs and practices.

### d) Polygamy

40. We have noted the attention in the media and in public discourse that the inclusion and recognition of polyandry as part of the Department of Home Affairs’ Green Paper on Marriages in South Africa[19] has had. 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 when and where such discussions are had that it is underpinned by the principles of substantive equality and dignity.

41. The Discussion Paper currently deals with polygamy within a patriarchal, heteronormative gender binary, but polygamy can and does take different forms in people’s everyday lives. The issue 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 to be 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.

42. We submit that if inclusion is a key outcome of this process, then Section 9 of the Constitution is to be given effect to. There is therefore an obligation to have more than just formal equality in the language and provisions that are made in the draft

[19] https://static.pmg.org.za/210511greenpaperonmarriages.pdf

Bills. 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.

### e) Need for SOGIESC-Inclusive Language

43. As pointed out in Part III above, the language of the Discussion Paper and draft Bills needs to be inclusive of diverse SOGIESC.

44. It is encouraging to see that gender-inclusive language was introduced in many places. However, in the draft Bills there are repeated references to “he or she”, “his or her”, “polygynous”, “male party” and female parties”. We recommend using the gender-neutral pronouns “they” and “them” throughout, and referring to polygamy in a gender-neutral manner so that all forms of polygamy would be included regardless of the SOGIESC of the persons involved.

45. The draft Bills’ currently refer to “polygynous or potentially polygynous protected relationship” and “polygynous or potentially polygynous marriage or life partnership”, defining it as “a relationship in which a male party may, during the subsistence of the relationship, be in a relationship with a female person or female persons”. This could be replaced by “polygamous or potentially polygamous protected relationship” and the definitions amended to a gender-neutral formulation, namely, “a relationship in which a party may, during the subsistence of the relationship, be in a relationship with a person or persons”. Such a definition would then be inclusive of, for instance, a nonbinary person in a relationship with multiple other persons who may identify as nonbinary, female, male or another gender.

46. The two proposed Bills’ definitions of ‘monogamous protected relationship’ and ‘monogamous marriage or life partnership’ currently refer to “the relationship of two people regardless of their sex, sexual orientation, or gender identity”. These definitions could be extended to include all the SOGIESC concepts by referring to “the relationship of two people regardless of their sex, sex characteristics, sexual orientation, gender, gender identity or gender expression”.

47. The terminology in the Discussion Paper needs to be corrected in places, for example “inter-sexed” should be “intersex” and “transgendered” should be “transgender”. The use of terms like “same-sex” and “opposite sex” are also not useful, as they reinforce a binary concept of biological sex. Such terms are not inclusive of people whose sex characteristics are more diverse than conventional notions of “female” and “male”, including many intersex persons or persons born with variations in sex characteristics, as well as transgender persons with gender-affirming body modifications.

48. It should also be understood that it is frequently gender identity rather than sex characteristics that is a defining factor in relationships. There are many gender identities, so relationship options are not limited to the two options of “same” and “opposite”.

### f) Design of the Statute

49. The Discussion Paper proposes to move forward with the suggestion of a Single or Unified Marriage Statute.

    30.1 Firstly, it proposes a Single Statute, which seeks to bring all protected relationships or marriages and life partnerships under one piece of legislation and that would apply a single set of requirements for registration and recognition to them all, but largely leaving their legal consequences to be dealt with in other legislation.[20] Two different, but almost identical, draft Bills are proposed as alternatives embodying such as Single Statute. This approach is somewhat similar to what has been put forward by the Department of Home Affairs (DHA) as one of the proposals in their Green Paper on Marriages in South Africa, but with the important difference that the Green Paper proposal would include applying not only a single set of requirements, but also a single set of legal consequences to all marriages – an approach that the Department does not believe will pass constitutional muster.

[20] Cf. Section 12 of the Draft Bills.

30.2 Secondly, the Discussion Paper does mention an Omnibus Statute option, but without exploring in any detail what such an approach might look like. The DHA Green Paper on Marriages in South Africa also provides as option an Omnibus or Umbrella Statute, which would contain different chapters for civil marriages, civil unions, customary marriages and other marriages not currently accommodated, and seems to consider this in a favourable light.

50. The Department of Home Affairs' 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".[21] 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 of barriers and violations of the rights of married transgender, nonbinary and intersex persons who change their legal gender markers.

51. For the contributing organisations, the issue of the equal recognition and protection of the marriages, life partnerships and relationships of LGBTQI+ persons, inclusive of their SOGIESC rights, does not necessarily reside in whether the new marriage statute is a Single Statute or whether it is an Omnibus Statute. Our concern is that individuals need to be recognised fully within their culture, tradition and religion when they choose to enter a marriage, life partnership 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.

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

52. Should a single statute for the registration and recognition of protected relationships/marriages and life partnerships – as proposed by the draft Bills in the Discussion Paper – be opted for, the SOGIESC rights of LGBTQI+ people must be recognised throughout this statute and other legislation regulating the legal consequences of protected relationships/marriages and life partnerships. The SALRC must ensure that we do not have a repeat of the present circumstances where there is an us and them approach, and a stripping away of the identities and diverse SOGIESC of individuals in order to placate those holding homophobic, transphobic and intersexphobic prejudices.

53. The Constitutional 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*,[22] 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 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*".

54. We would therefore suggest that some efforts are made to explore an omnibus statute that may have 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,

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

in direct opposition to the spirit, values and principles of our Constitution, would callously deny them their humanity, equality and dignity.

### g) Solemnising Marriages

55. 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 in the public discourse since the release of the Discussion Paper and the Department of Home Affairs Green Paper that there are a number of lobby groups attempting to reintroduce this discriminatory provision through the law reform processes underway.

56. 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 and same-gender couples are treated by the State using the same standards as for different-sex and different-gender couples. The effect of allowing marriage officers who are public servants (and even those who are not) to have discretion regarding which persons they are willing to solemnise marriages for, discriminates against same-sex and 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 represents) does not have discretion to unfairly discriminate due to public servants' personal beliefs against any individual requiring state services.

57. 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."*

58. 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[23] (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.

59. In respect of broadening the scope for the designation of marriage officers we note that the Discussion Paper refers to processes underway by the Department of Home Affairs. The Green Paper sets out in option 3 of Section 4.4,[24] the broadening of the scope of designated marriage officers. We would in principle 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.

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

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

### h) Validity Requirements and Minimum Age Requirement

60. 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.

61. This recommendation is in line with the proposal made by the Department of Social Development in their Children's Amendment Bill currently before parliament as well as the position being put forward by the Department of Home Affairs in the Green Paper.

62. We support a requirement for free, full and informed consent and recommend that this be defined clearly in the definitions section of the Bill.

### i) Implications for Legal Gender Recognition and Forced Divorces

63. We note that trans, gender diverse and intersex issues were to some extent recognised in the Discussion Paper, particularly in Section M dealing with forced divorces in cases where an individual married under the heterosexual Marriage Act 25 of 1961, change or seek to change their legal gender marker, and their marriage thereby becoming a same-gender marriage. In Section 2.147, the Discussion Paper states that "there is no need for a legislative provision to clarify the relationship status of a person who was granted an order for the alteration of his or sex description as referred to in the Alteration of Sex Description and Sex Status Act 49 of 2003. The relationship status of the parties prior to such alteration order being granted, must be recognised as a protected relationship in terms of the proposed legislation".

64. However, it is not clear how existing forced divorces, as well as challenges with inaccurate marriage certificates and duplicate identity profiles at Home Affairs, which are experienced by married transgender and intersex persons who had already changed or attempted to change their gender markers, will be resolved in the absence of a legislative provision. These problems have still not been

adequately addressed by Home Affairs despite the judgment in *KOS v The Minister of Home Affairs* [25] in 2017.

65. This section of the Discussion Paper also requires a better understanding of legal gender recognition and of South Africa's gender recognition law, the Alteration of Sex Description and Sex Status Act 49 of 2003 ("Act 49").[26] At issue is the legal recognition of an individual's gender identity.

66. 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. 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.

67. 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 administrative and data capturing systems used by the Department to record marriages and the gender of persons in their records and on the national population register.

68. Because of these administrative and data capturing systems issue, people who want to access legal gender recognition are being subjected to delays that often

[25] KOS and Others v Minister of Home Affairs and Others (2298/2017) [2017] ZAWCHC 90; [2017] 4 All SA 468 (WCC); 2017 (6) SA 588 (WCC) (6 September 2017), http://www.saflii.org/za/cases/ZAWCHC/2017/90.html

[26] https://www.gov.za/sites/default/files/gcis_document/201409/a49-03.pdf

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.

69. The Western Cape High Court in the *KOS v The Minister of Home Affairs,* which is cited in the Discussion Paper, 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 of the Constitutional importance of the legislation link back to religious and cultural prejudice within the Department itself.

70. 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 120 of 1998,[27] 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.

71. This is not merely an issue of systems but also an issue of policy and implementation. The forward-looking nature of the Discussion Paper and the draft Bills do not address how existing marriages in terms of the Marriages Act and Recognition of Customary Marriages Act will be dealt with where Act 49 is invoked under the new framework. It merely states that the marriage will continue to be a lawful marriage without dealing with the implementation context. The capturing of that relationship on the internal information technology and administrative systems of the Department however will be a discretionary issue in terms of the Department's policies and protocols, which really is the current status.

[27] http://www.saflii.org/za/legis/consol_act/rocma1998366.pdf

72. The question therefore is how will existing marriages be dealt with practically from the perspective of the Department of Home Affairs' internal registration systems and the capturing of information on the national population register?

73. In order to avoid uncertainty, it would be more prudent to include a section in the draft Bill(s) under registration that echoes the protection in Act 49, stating that:

> *A protected relationship / marriage or life partnership registered with the Department of Home Affairs and captured on the national population register shall remain valid and legal regardless of an alteration of the gender marker(s) of any of the parties.*
>
> *A party's gender marker shall not be captured as part of their identity in a protected relationship / marriage or life partnership, except if they indicate that they wish for it to be captured".*

74. 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*[28] 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."*

## V. CONCLUSION

75. In conclusion, we would 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

[28] 2001 (10) BCLR 995 (CC) para. 44.

of a separate Civil Union Act for same-sex and same-gender marriages and unions, which moreover fails to be inclusive of SOGIESC diversity.

76. 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.

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****ENDS****