JOINT SUBMISSION TO THE

PORTFOLIO COMMITTEE ON HOME AFFAIRS

ON THE MARRIAGE BILL, [B43-2023]

Joint submission by 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 the contributing organisations) refer to the call for comment[1] in respect of the Marriage Bill, [B43-2023][2] by the Portfolio Committee on Home Affairs (hereinafter the Committee). The contributing organisations welcome an opportunity to engage with the Committee on the Marriage Bill (hereinafter the Bill). The WLC has made specific submissions on the Marriage Bill, but has also 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 Marriage Bill.

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 in South Africa; and
    2.3 **Part IV** provides specific comments on the Bill.

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 rights and intersectional justice for lesbian, gay, bisexual, transgender, queer, intersex, plus (LGBTQI+) persons, their partners, families and communities.

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,

[1] Call for Comment on Marriage Bill, [B43-2023], https://pmg.org.za/call-for-comment/1464/

[2] Marriage Bill, [B43-2023], https://static.pmg.org.za/B43-2023_Marriage_Bill.pdf

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. One of the core objectives of the Centre is to advance and protect the human rights of women and girls in South Africa. In so doing, the Centre seeks to contribute to redressing the systemic inequality faced by women in South Africa. These interventions are particularly necessary in respect of women who suffer multiple and intersecting forms of disadvantage.

8. The Centre provides legal assistance and advice to women who face systemic discrimination free of charge. It litigates on behalf of clients and in the name of the WLC Trust with the broader aim of developing feminist jurisprudence that recognises and advances women's rights in South Africa. The Centre also participates in litigation in the role of amicus curiae to assist Courts in constitutional and public interest matters that concern women's rights and promotes gender equality.

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

9. The contributing organisations welcome the acknowledgment in the Policy process that was conducted in the run-up to the Bill that colonialism and apartheid have left a legacy on the interpersonal relationships between people living in South Africa and on our family law framework. Secondly, we acknowledge the commitment expressed during the roundtable dialogues and the previous draft of the Marriage Bill by the Department of Home Affairs 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.

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. 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

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[3] and cisnormative[4] assumptions, norms and prejudices. As a result, the human rights and needs related to the diverse

[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.

sexual orientations, gender identities, gender expressions and/or sex characteristics (SOGIESC) of LGBTQI+ people have been invisibilised and violated through criminalisation, discrimination, pathologisation and systemic violence. 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 protected, widespread discrimination, hate crimes, lack of access to services and other human rights violations continue for LGBTQI+ communities.[5]

13. We submit that in order for the Portfolio Committee to meet its constitutional obligation in respect of law reform, it must consider the impact of the legislation on all four of the key categories of Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (SOGIESC) and the applicable human rights standards. It is also important that those drafting the legislation ensure that they have an accurate understanding and articulation of how these categories apply to the different groups within the LGBTQI+ acronym, in particular avoiding conflating issues of sexual orientation with issues of gender identity and sex characteristics.

[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. https://health.uct.ac.za/sites/default/files/content_migration/health_uct_ac_za/806/files/SOGIE%2520and%2520wellbeing_07_South%2520Africa.pdf

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

14. It is important to note that LGBTQI+ 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. LGBTQI+ 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”. We want to recognise the efforts that have been made in this respect in the current draft of the Bill before the Portfolio Committee, and want to draw attention to why this approach is necessary.

15. LGBTQI+ 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 her 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 South African 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 the Bill before you for consideration. This Portfolio Committee needs to be alive to the lived realities of those most often persecuted and excluded for being different within a particular family and community.

16. The Bill speaks to the very lived realities of people and their most intimate relationships and therefore must not be considered in isolation from other aspects of people’s lives such as their religious and cultural beliefs and expression. We have noted especially in the online consultations that discriminatory suggestions

were made that because of individuals' diverse sexual orientation or gender identity they should be denied access to their right to express their faith, culture and/or traditions. Such suggestions go against the very spirit and heart of the Constitution, and the process underway in addressing the legacy of entrenched apartheid discrimination.

17. Parliament has a duty in terms of S7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. We have to ensure that in this process of rectifying the wrongs of the past, we do not reintroduce discriminatory thinking, language and practices, which have become ingrained in our society as harmful stereotypes. Parliament needs to be alive to the obligation that rights cannot simply be limited or restricted without a lawful and justifiable purpose.

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

18. There have been several other law and policy reform developments and processes by the Department of Home Affairs that speak to the recognition of SOGIESC human rights and that have a significant impact on LGBTQI+ people and the understanding of sexual, gender and bodily diversity in legislation and policy.

19. In addition, the South African Law Reform Commission is in the process of reviewing issues related to matrimonial property as part of its Project 100E. It had released Discussion Paper 160 in 2023, and the aspects of matrimonial property reform that they are investigating speaks directly to aspects in the Bill before the Portfolio Committee.

20. It is important that the Portfolio Committee is mindful of the implications and impact which policy and law reform developments that the Department of Home Affairs has engaged on over the last few years on identity and identity management, might have on the Bill under consideration, and that these different processes must align to ensure developments and language in an inclusive manner.

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

21. 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 repealed 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 or same-gender couples based on their sexual orientation.

22. However, as illustrated by the Department's Green Paper on Marriage, the Civil Union Act continues to create a separate dispensation for same-sex/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.

23. It should be noted that the repeal by this Parliament through a Private Members Bill 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. 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.

Official Identity Management Policy (OIMP)

24. The Department of Home Affairs' Official Identity Management Policy (OIMP), which Cabinet approved in March 2022, 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

[6] Civil Union Act 17 of 2006, 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.

transgender, nonbinary, gender diverse and intersex persons, and more generally for the understanding of sex and gender in law and policy.

25. Several trans, intersex and LGBTQI+ organisations made submissions, including our organisations,[8] and an important position paper has been published.[9] We have asked that the OIMP 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 Department 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 Marriage Bill.

26. A clear implication flowing from the OIMP process, for instance, was the recommendation 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.

27. 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

[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

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.

28. 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 Marriage Bill and its implementation in the form of regulations. Here we are concerned with how and where gender markers will be required and captured as part of the identities of the spouses in the registration process related to marriage.

National Identification Registration Bill, 2022

29. In 2023, the Department called for public comments on the National Identification Registration (NIR) Bill, 2022.[10] The main objective of this NIR Bill is to establish a single, inclusive and integrated national identification system and it is undeniable that should the NIR Bill be passed into law in its current form, it will have 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.

30. The NIR Bill currently only uses binary he/she pronouns, thereby excluding nonbinary persons. In order to be inclusive, the Bill should instead use the gender-neutral pronoun “they” throughout, or at least use all the pronouns “she, he or they”.

31. The NIR Bill seems to imply there will be three gender marker options in an identity number, namely F, M and a gender-neutral option, with the gender-neutral option then apparently reserved for nonbinary people as well as people whose gender status have not been determined. A gender-neutral identity

[10] National Identification Registration (NIR) Bill, 2022, https://www.gov.za/sites/default/files/gcis_document/202304/48435gon3311.pdf

number would then have a numerical figure that bears no relation to the gender of the person.

32. Making provision for a gender-neutral option is commendable. However, by making a gender-neutral option available only to persons who are nonbinary or whose gender status has not been determined, the NIR Bill causes risk of discrimination and violence to nonbinary persons and persons whose gender status has not been determined. Instead, the gender-neutral gender marker should be all-inclusive and available to anyone (female, male, nonbinary) who requests it, regardless of how they identify. Such an all-inclusive gender marker would assist in preventing minorities from being targeted based on their gender marker, and would be an important step towards a gender-inclusive society.

33. Some children, including some intersex children, may be assigned a gender-neutral gender marker at birth, but later on identify as female or male. Making the gender-neutral option an open-ended and all-inclusive gender marker, would ensure that they would not face the administrative burden of having to change their ID numbers to female or male later in life.

34. If legal gender change still requires the cumbersome process of changing ID numbers, it perpetuates the current situation of administrative injustice, discrimination and exclusion faced by transgender and intersex persons when they need to amend their details across so many systems and services.

35. We reiterate that it would be best not to capture any gender in ID numbers or identity documents at all, as we pleaded in our submissions, in order to better ensure personal safety and prevent administrative injustice.

36. Regarding correction or cancellation of identity cards and certificates, the NIR Bill says if an identity card/certificate does not correctly reflect the particulars of a person, the person or their guardian must, within the prescribed period hand over by registered post, the identity card/certificate to the Director-General. Then, if the Director-General has obtained possession of an identity card, “he or she” must, without delay, cancel it in the prescribed manner and replace it with a corrected identity card.

37. The NIR Bill does not say if there would be any other requirements to change your particulars (including gender), apart from handing over the ID and declaring that certain particulars need to be corrected. It fails to say whether people may freely change their gender markers in their IDs on the basis of a simple self-declaration. (The NIR Bill also fails to say what happens in the interim – is the person left with no identification while waiting for the Director-General to issue a new ID?).

38. With the Alteration of Sex Description and Sex Status Act No. 49 of 2003[11] left in place/unamended by the NIR Bill, it seems to imply that healthcare letters will continue to be required, which means exclusion of the majority of transgender and intersex people from legal gender recognition. This means that the NIR Bill is not about gender self-determination and does not solve the main problems we repeatedly requested DHA to address.

39. The NIR Bill falls far short of the commitments made by DHA and DOJ at the *SA-EU Dialogue on Policy Improvements for Trans and Intersex Persons* in November 2021,[12] [13] to address, as a matter of urgency, the need for legal gender recognition (LGR) based on gender self-determination.[14]

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

40. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)[15] defines 'sex' as including 'intersex', but fails to make explicit

[11] Alteration of Sex Description and Sex Status Act No. 49 of 2003, https://www.gov.za/sites/default/files/gcis_document/201409/a49-03.pdf

[12] SA-EU Dialogue on Policy Improvements for Trans and Intersex Persons, Pretoria, 4-5 November 2021, https://www.iranti.org.za/wp-content/uploads/2021/11/SA-EU_Transgender-Intersex-4-5-Nov-Conference-Digital-pack.pdf

[13] Deputy Justice Minister John Jeffery opens SA-EU Dialogue on Transgender & Intersex Persons, 4 November 2021, https://www.youtube.com/watch?v=yhsQMzHSDkc&list=PLEA3vMnyFu6gSHmnflnp_cFOaWfAaEGow

[14] Gender Dynamix ED Liberty Matthyse speaks at SA-EU Dialogue Transgender and Intersex Persons, 4 November 2021, https://www.youtube.com/watch?v=ueNgRy_vR5E&list=PLEA3vMnyFu6gSHmnflnp_cFOaWfAaEGow&index=2

[15] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), http://www.saflii.org/za/legis/consol_act/poeapouda2000637.pdf

provisions addressing the protection of intersex rights, such as the prohibition of intersex genital mutilation (IGM). However, this does entail a broadening of the understanding of sex beyond binary female and male categories.

41. 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 DHA consult the submissions by Intersex South Africa (ISSA) and the contributing organisations.[16]

Prevention and Combating of Hate Crimes and Hate Speech Act, No. 16 of 2023

42. The Department of Justice's Prevention and Combating of Hate Crimes and Hate Speech Act has finally been signed into law,[17] and it also includes sexual orientation, gender identity, gender expression and sex characteristics among the recognised characteristics for hate crime offences and recognised grounds for hate speech offences.

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[16] 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

[17] Prevention and Combating of Hate Crimes and Hate Speech Act, No. 16 of 2023, https://static.pmg.org.za/50652_14-5_PreventionandCombatingofHateCrimesandHateSpeecht16_2023.pdf

d) Regional and International Legal Obligations

43. 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.

44. 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.[18]

45. The Yogyakarta Principles (2007)[19] and Yogyakarta Principles Plus 10 (2017)[20] 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 LGBTQI+ people, including the right to legal gender recognition and the right to found a family, which among others addresses marriage and other partnerships.

46. The Yogyakarta Principles has been applied in South African courts in 2019 in an important judgment, *September v Subramoney NO and Others*,[21] which protects the right of a transgender woman in a male prison to express her gender

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[18] African Commission on Human and Peoples' Rights. Resolution 275. 55th Ordinary session held in Luanda, Angola, from 28 April to 12 May 2014, https://achpr.au.int/en/adopted-resolutions/275-resolution-protection-against-violence-and-other-human-rights-violations.

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

[20] *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://yogyakartaprinciples.org/principles-en/yp10/

[21] 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

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

47. The above regional and international SOGIESC 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 LGBTQI+ people and diverse SOGIESC.

48. As the Marriage Bill is important for the protection and realisation of the human rights of LGBTQI+ people, the Portfolio Committee is encouraged to eliminate misconceptions, inaccurate assumptions and offensive language. We therefore urge the Portfolio Committee 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 MARRIAGE BILL

a) Inclusiveness of the Bill

49. The Bill has as a key outcome the creation of inclusivity for all the people of our country who enter or seek to enter into marriage. Importantly, it recognises that not all marriages 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 that do not amount to legal marriage, are not regulated and vulnerable parties in such relationships are unable to access and vindicate their rights.

50. 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.[22] Our Courts have compelled the recognition of same-sex marriage,[23] 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.

51. In the Fourie[24] 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 same-gender couples who have their marriages solemnised in terms of the Civil Union Act.

52. The consequences of this policy approach and how the legacy of apartheid continued to influence policy and legislative decision making, was clear from some of the comments made during the online consultations facilitated by the Department of Home Affairs in 2023 on the internal draft of the Marriage Bill. It is clear that for many anti-rights, anti-LGBTQI+ and conservative groups, it has strengthened their conviction that they enjoy more rights and protection than LGBTQI+ people, and so can demand a continuation of a separated system.

[22] 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).

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

[24] Minister of Home Affairs and Another v Fourie and Another 2006 (1) SA 524 (CC).

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

53. We submit that inclusivity can be created by bringing all marriages into and under one umbrella that recognizes that people who enter or seek to enter into marriages and similar relationship commitments, have diverse identities, backgrounds and forms of social, religious and cultural belonging that include and 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.

54. 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+.

55. We therefore welcome the inclusion of the language in S5(2) of the Bill which recognises that a valid marriage can be entered into in many different ways as long as it is celebrated in accordance with the respective custom, tradition or religion of the parties entering the marriage. Where the Bill then becomes contradictory is in S11 where marriage officers are free to discriminate against parties wanting to enter into marriage, allowing them to refuse to solemnise a marriage if they believe that such a marriage is contrary to their conscience, religion or belief.

56. The Marriage Bill needs to be unapologetic about its purpose, which seeks to regulate all marriages under a Constitutional dispensation where the state recognises that it has a legal duty to protect couples who seek to enter into marriage relationships. The solemnization and registration of that marriage is a state function, and the state cannot allow a marriage officer who acts as a state functionary to discriminate against the very people it is enacting legislation for. This would apply to all marriage officers, both ex officio marriage officers (S7) and other persons designated as marriage officers (S8).

57. 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 themselves. 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.

58. 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*,[25] 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".

59. We therefore cannot support 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 the spirit, values and principles of our Constitution, would callously deny them their humanity, equality and dignity.

60. The SOGIESC rights of LGBTQI+ people must be recognised throughout all forms of customary and religious marriage. DHA must ensure that we do not have a repeat of the present circumstances where there is an us and them approach,

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

and a stripping away of the identities and diverse SOGIESC of individuals in order to placate those holding homophobic, transphobic and intersexphobic prejudices.

c) Polygamous Marriage

61. 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[26] 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.

62. The Bill currently deals with polygamy within a patriarchal, heteronormative gender binary (referring to husband and wives), 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 (one man and two or more women) is to be recognised, then not only should polyandry (one woman and two or more men) be recognised, but polygamy or multiple marriage relationships in all its forms, which would include instances where the persons in the relationship may identify as either nonbinary, woman, man or another gender. For instance, a nonbinary person may be in a polygamous or multiple marriage relationship with three other persons, which could consist of a woman, a man and another nonbinary person.

63. 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 Bills. The obligation extends to ensuring that the lived realities of people are not

[26] Green Paper on Marriages in South Africa, https://static.pmg.org.za/210511greenpaperonmarriages.pdf

only considered, 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.

d) Need for SOGIESC-Inclusive Language

64. As pointed out in Part III above, the language of the Marriage Bill needs to be inclusive of diverse SOGIESC.

65. It is encouraging to see that gender-inclusive language was introduced in many places. However, in the Bill there are repeated references to “he or she”, “his or her”, “him or her”, “husband” and “wife” or “wives”. We recommend using the gender-neutral pronouns “they” and “them” and gender-neutral terms “spouse” and “spouses” throughout, and referring to polygamy in a gender-neutral manner as “multiple marriage relationships” so that all forms of marriage would be included regardless of the SOGIESC of the persons involved.

e) Solemnising Marriages

66. 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, and now also the Marriage Bill, that there are a number of lobby groups attempting to reintroduce this discriminatory provision through the law reform processes underway.

67. 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 both international and constitutional obligations to ensure LGBTQI+ marriages are treated by the State using the same standards as for heterosexual, cisgender, endosex marriages. The effect of allowing any marriage officers, even if they are not ex officio marriage officers or public servants, to have discretion regarding which persons they are willing to solemnise marriages for, discriminates against LGBTQI+ people.

68. 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 marriage officer represents) does not have discretion to unfairly discriminate because of their own belief system against any individual requiring state services. S11(4) was not present in the previous draft of the Marriages Bill that was circulated by the Department for public comment, and we can see no legal and justifiable reason for its inclusion into the current Bill.

69. 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."*

70. 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*[27] (commonly known as the Fourie case) on 1 December

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

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.

f) Validity Requirements and Minimum Age Requirement

71. The contributing organisations fully support the prohibition on child marriage.

72. 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.

73. We support a requirement for free, full and informed consent and recommend that this be defined clearly in the definitions section of the Marriage Bill. The consent aspect is especially important for marriages that are concluded in terms of custom, tradition or religion where the voices of women are often silenced or not made provision for because of the processes involved.

g) Implications for Legal Gender Recognition and Forced Divorces

74. The Alteration of Sex Description and Sex Status Act 49 of 2003[28] (Act 49) has no regulations which has made it challenging to implement and address Act 49 issues insofar as they relate to alterations needed on spouses' marriage certificates. DHA will continue to be challenged with inaccurate marriage certificates and duplicate identity profiles on its system because these issues have still not been adequately addressed by the Marriage Bill despite the KOS v

[28] Alteration of Sex Description and Sex Status Act 49 of 2003, https://www.gov.za/sites/default/files/gcis_document/201409/a49-03.pdf.

Minister of Home Affairs[29] (KOS) judgment. The *KOS* judgment notes 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.

75. 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 25 of 1961, nor the Recognition of Customary Marriages Act 120 of 1998,[30] 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. KOS has proven that the issues raised above are not merely an issue of systems, but also an issue of policy and implementation.

76. 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 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 transgender and intersex people experience.

77. Through this misapplication, married couples in which one of the partners changed or applied to change their legal gender, have been forced to institute

[29] 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

[30] Recognition of Customary Marriages Act 120 of 1998, http://www.saflii.org/za/legis/consol_act/rocma1998366.pdf

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.

78. Because of these administrative and data capturing systems issue, people who want to access legal gender recognition have been subjected to 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.

79. The Marriage Bill does not address how existing marriages in terms of the Marriages Act, Civil Union 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.

80. 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? The Bill does not speak to the continued challenges that transgender and intersex persons are experiencing with the Home Affairs system of recording information.

81. In order to avoid uncertainty, it would be more prudent to include a section in the Marriage Bill under registration that echoes the protection in Act 49, stating that:

"A marriage 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 marriage, except if they indicate that they wish for it to be captured".

82. 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*[31] 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

83. In this submission, we drew attention to aspects of the current Marriage Bill that remain discriminatory and exclusionary, which we ask the Portfolio Committee to address. These include, among others, that the Bill in its current form allows some marriage officers to object to solemnising LGBTQI+ marriages; makes provision only for polygyny while not recognising the full diversity of polygamous marriages; fails to make clear provision for transgender and intersex persons whose gender markers have changed and who require continued recognition of their marriages under their new personal details; fails to provide for the option not to capture gender should spouses wish not to have gender captured; and uses language that is not gender-neutral and excludes nonbinary persons, and is therefore not inclusive of gender diversity.

[31] 2001 (10) BCLR 995 (CC) para. 44.

84. In conclusion, we would welcome a progressive and inclusive marriage law that ensure that LGBTQI+ people finally achieve marriage equality, rather than the current unequal and othering dispensation of a separate Civil Union Act for same-sex and same-gender marriages and unions, which moreover fails to be inclusive of SOGIESC diversity.

85. We also wish to emphasise again that the sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) rights of LGBTQI+ people must be protected throughout all forms of marriage, including all cultural, customary and religious marriages.

86. We would formally request and would welcome the opportunity to give an oral submission to the Portfolio Committee.

****ENDS****