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Submission

to the

South African Law Reform Commission

on

ISSUE PAPER 35 ON A SINGLE MARRIAGE STATUTE (PROJECT 144)

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1. Introduction

1.1. The Centre for Applied Legal Studies (CALS) is a civil society organisation based in the School of Law at the University of the Witwatersrand. CALS is also a law clinic, registered with the Legal Practice Council. As such, CALS connects the worlds of academia and social justice and brings together legal theory and practice. CALS operates across a range of programme areas, namely: rule of law, basic services, business and human rights, environmental justice, and gender.

1.2. We wish to make submissions in response to Issue Paper 35 on a Single Marriage Statute ('the issue paper') as we believe it raises important questions regarding the legal recognition of different family forms in South Africa and the impacts thereof.

1.3. CALS has a rich history of work in the gender rights arena and has been active in this field since the early 1990s. We have been involved in research, advocacy and litigation on issues ranging from gender-based violence to termination of pregnancy, sex work, LGBT+ rights and, perhaps most relevant to this submission, domestic partnerships and civil unions.

1.4. In the early 2000s, CALS conducted extensive research on domestic partnerships and the associated vulnerability of women. This resulted in the publication of a report[1] by one of our researchers who was later appointed as a member of the South African Law Reform Commission's Project Committee on Domestic Partnerships (and same-sex marriage). This research later informed our intervention as *amicus curiae* in a leading case on domestic partnerships, *Volks v Robinson*;[2] as well as our parliamentary submissions on the Civil Unions Bill and Domestic Partnerships Bill which followed.

1.5. More recently, CALS has continued research and advocacy efforts in this area through conference papers and academic publications on marriage and domestic partnerships,[3] as well as submissions to Parliament. Our latest comments to the Minister of Justice and Correctional Services on the Recognition of Customary Marriages Draft Amendment Bill focused on the need for clear definitions of terms such as 'marital property' to avoid disputes

[1] See B Goldblatt et al 'Cohabitation and Gender in the South African Context – implications for law reform' (2001) A research report prepared by the Gender Research Project of the Centre for Applied Legal Studies, University of the Witwatersrand.
[2] (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC).
[3] See B Meyersfeld 'If You Can See, Look: Domestic Partnerships, Marriage and the South African Constitutional Court' *Constitutional Court Review* Vol 3; and *Domestic Partnerships and the Law: A Review of the Constitutional Court's Jurisprudence* (2011) delivered at the South African Institute for Advanced Legal Studies.

around inheritance.[4] We are also currently developing an advocacy project aimed at addressing the inaccessibility of antenuptial contracts, and calling for financial institutions to seek consent from spouses married in community of property before extending credit to their partners.

1.6. In light of this, we assert that CALS has sufficient expertise and institutional knowledge to comment on the issue paper at hand. Our submissions seek to draw attention to the importance of having laws that are inclusive and are not harmful or discriminatory to women, children, people living in poverty and/or members of the LGBT+ community. In instances where we have not commented directly on a portion of the issue paper, this should not be taken to signify implicit agreement with the contents of that section.

2. **Reflections on the issue paper**

2.1. Definitions of marriage

The Marriage Act[5] does not explicitly set out a definition for 'marriage', however, from references to the types of officials (other than appointed officials) that can conduct marriages (such as 'any minister of religion' or 'any person holding a responsible position, in any religious denomination') it can be seen that the notion of marriage in terms of the act is primarily a religious one. In comparison, the Civil Union Act[6] is primarily focused on permitting same-sex individuals to 'marry' (although it also permits opposite-sex individuals to marry under the Act). This can be seen from the Act's preamble which states that it notes that 'the [previous] family law dispensation situation did not provide for same-sex couples to enjoy the status and the benefits coupled with the responsibilities that marriage accords to opposite-sex couples' and thus the Act endeavors to provide such benefits and responsibilities.

As explained by de Vos and Barnard, the separate Marriage and Civil Union Acts are instances of the 'separate but equal' regime.[7] They explain that the inequality experienced by same-sex couples was not eradicated by the introduction of Civil Union Act, but rather it has perpetuated inequality and discrimination.[8] The issues with the separate Acts, includes that the Civil Union Act problematically suggests that civil partnerships can only be concluded by same-sex couples or at least was created for same-sex couples.

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[4] Available at https://bit.ly/2tR4U7W.
[5] Marriage Act 25 of 1961 ('Marriage Act').
[6] Civil Union Act 17 of 2006 ('Civil Union Act').
[7] P De Vos and J Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' *SALJ* (2007) 795 – 826, 821 – 822.
[8] As above.

Furthermore, the marriage regime or series of acts governing marriages in South Africa consists of three hierarchies.[9] The first, and most fiercely protected, hierarchy is marriage (under the Marriage Act) which is reserved for heterosexual religious individuals and is the most superior form of 'marriage'. This is seen as the purest form of marriage and has historically been protected by not being amended to include same-sex marriages. The next hierarchy is the civil marriage, also reserved for heterosexual couples (who may or may not be religious) and finally, the inferior civil union, which is reserved solely for same-sex couples.[10] A compounded issue with the acts is the fact that heterosexual couples can choose various forms of 'marriage', yet same-sex couples are relegated to one form of marriage.

Therefore, the problem with the Acts is ultimately their very existence. To have separate acts dealing with the same legal practice (marriage) only reinforces that some individuals and some relationships are seen as *different* in South Africa. There are no legal consequences that differ in the instance of same-sex 'unions' to that of married heterosexual individuals. The existence of the Civil Unions Act is an example of the state's pandering to conservative religious groups, who assert that 'marriage' is a wholly religious act (which same-sex individuals cannot qualify for). This is, of course, incorrect as marriage is a legal act with legal consequences.

In light of this, we argue that only one term be used to describe all forms of marriages or unions, as separate terms only re-entrench discriminatory perceptions around forms of relationships that are not seen as 'traditional' and make those perceptions legally permissible.

2.2. Consent to marry

In this section we focus primarily on consent and the marriage of minors. It must, however, be noted that the Commission should consider how consent (and its requirements) may affect the regulation of relationships between different persons in society, for example persons with psycho-social disabilities.

In summary, the current (and very problematic) position with regard to the marriage of minors in South Africa is as follows:

- No marriage officer is permitted to solemise a marriage between a couple where one individual is a minor or both individuals are minors unless she/he has been provided with the requisite written consent.[11]

[9] As above.
[10] As above.
[11] Section 24 Marriage Act.

- ‘Minors’ is defined as being an individual under the age of 21 in the Marriage Act. Yet, in terms of the Children’s Act a minor is an individual under 18 years of age. Both the Civil Union Act and Recognition of Customary Marriages Act describe minors as being under the age of 18.[12]

- In terms of the Marriage Act, female children can get married at 16 (with the requisite consent) and male individuals can get married at 18 (with the requisite consent).[13]

- The Civil Union Act states the minimum age for both sexes to marry is 18,[14] whereas the Recognition of Customary Marriages Act[15] simply specifies that a ‘minor’ requires parental consent to marry.

According to the Pew Research Centre in a 2016 study which was based on data from the US States Department and the United Nations, 117 countries permit some form of marriage of a minor(s).[16] In a similar study conducted by the World Policy Analysis Centre it was found that approximately 93 countries worldwide allow female children under the age of 18 to be married by mere parental consent.[17]

Focusing specifically on the issue of child marriages in South Africa, a report by UNICEF in 2017 found that the rate of female child marriages in South Africa was 6% and in cases of female children younger than 15, the rate was 1%.[18]

The reasons child marriage is problematic are not merely based on the infringement of the child’s rights to dignity and autonomy but an intersection of rights. This includes the following rights in our Constitution: the rights to equality (section 9), freedom and security of the individual (section 12), healthcare (section 27), the rights of children (section 28) and education (section 29).

With regard to the intersection of rights that are affected, as set out above, a brief exploration of the nature of some of these limitations is needed to demonstrate why child marriage is harmful, unconstitutional and should be eradicated.

Permitting the marriage of female children is a health issue. In *Health Consequences of Child Marriages in Africa,* Nour states that ‘[a] common belief is that child marriage

[12] Section 17 Children’s Act 38 of 2005 (‘Children’s Act’).
[13] Section 26 Marriage Act.
[14] Section 1 Civil Union Act, 2006 (Act No. 17 of 2006) (‘Civil Union Act’)
[15] Section 3 Recognition of Customary Marriages Act 120 of 1998 (‘RCMA’).
[16] A Sandstrom and A Theodorou ‘Many Countries Allow Child Marriages’ Pew Research Centre (2016). Available at https://www.pewresearch.org/fact-tank/2016/09/12/many-countries-allow-child-marriage/.
[17] Girls Not Brides ‘Child Marriages and the Law’. Available at https://www.girlsnotbrides.org/child-marriage-law/.
[18] UNICEF ‘Percentage of women aged 20 to 24 who were first married or in union before ages 15 and 18’. Available at https://data.unicef.org/resources/dataset/child-marriage/.

protects girls from promiscuity and, therefore disease; the reality is quite different'.[19] In a study in Kenya it was found that married female children had a 50% higher chance of HIV infection than unmarried female children.[20] Another study in Uganda found that the HIV prevalence rate from married female children between 15 – 19 years of age was 89% whereas for non-married female children the rate was 66%.[21] These studies showed that the married female children have a higher risk of HIV infection than non-married female children and that their husbands were primarily responsible for their infection.

On potential reasons for the high rate of transmission of HIV to female children, Nour suggests that, in relationships where the one party is a female child, a financial dependence on the husband is created.[22] Yet, other than mere financial dependence there are three compounded levels of power disparity between the female child and her husband. The first is the disparity based on her being female and experiencing dominating masculinity. The other, which intersects with her sex/gender, is the fact that she is a child and thus due to age experiences various forms of powerlessness. Poverty cannot be ignored as contributing to powerlessness (this will be discussed further below).

The problem of a differential in power is that the female child may be unable to request certain actions from her husband. This includes asking him to take a HIV test or having little to no ability to abstain from intercourse or request he use a condom.[23] Furthermore, female children in these types of marriages may not be able to divorce their husbands as this may be viewed as unacceptable and may have serious implications for familial ties.[24]

There is also a potential for debilitating illness or mortality in instances of female children giving birth to children. In comparison with women aged 20 and above, children aged between 10 – 14 years have 5 – 7 times more chance of dying during childbirth, children aged between 15 – 19 are twice as likely to die.[25]

Permitting the marriage of female minors is an education issue. A study by Nguyen and Wodon found that there were large statistical differences in education attainment based on whether a female children were married or not. [26] The literacy rate of women who had not married as children was 53.7% whereas that of women who married as

[19] N M Nawal 'Health consequences of child marriage in Africa' *Emerging infectious diseases* 12.11 (2006): 1644.
[20] As above.
[21] As above.
[22] As above.
[23] Nour.
[24] Nour.
[25] Nour.
[26] M, Nguyen and Q, Wodon 'Impact of child marriage on literacy and education attainment in Africa' (2014) *Washington, DC: UNICEF and UNESCO Statistics*.

children was only 29%.[27] When looking at secondary education, 13.4% of women (aged between 25 to 34) who did not marry as children had completed secondary education whereas only 2% of women who married as children had completed such.[28]

There is also link between child marriage and poverty. Robinson explains that the marriage of many female children may be seen as a way to alleviate poverty by their families.[29] This may not solely be in instances of dowry but also by the mere fact that the family will have one less individual to feed. Another reason for marriage is an attempt to escape violence in the familial home, which may unfortunately lead to an equally violent relationship with the husband.[30]

The Convention on the Rights of the Child (CRC), a convention that South Africa ratified in 1995, recommends that the minimum and unilateral age for marriage be 18. Similarly, the Maputo Protocol sets out that states should ensure that the minimum age for marriage of women is 18. South Africa ratified the Protocol in 2005.

In light of both CRC and the Maputo Protocol and the acknowledgment that numerous rights, as set out in the Constitution, of the female children are violated through permitting child marriage we argue that no child marriages should be lawful in South Africa whatsoever as this an affront to the rights of the individual child. Legislation must change to protect the rights of the female children and ensure the flourishing of each individual by guarding against limitations of dignity, autonomy, education and health care.

2.3. Marriage officers

One of the questions we feel it is important to raise, and which the issue paper does not itself ask, is whether marriage officers should be restricted to appointed officials or anyone who identifies as a 'minister of religion or any person holding a responsible position in any religious denomination or organisation'.[31] This seems to be symptomatic of a conflation of the legal recognition of marriage with a religious practice (which was briefly addressed above at 2.1).

Conceiving of marriage as inherently linked to religion is perhaps the origin of the development of a separate Civil Union Act in addition to, as opposed to replacing or amending, the existing Marriages Act[32] to serve all persons regardless of their gender

[27] As above.
[28] As above.
[29] L Robinson 'Early Marriage and Poverty: Why we must break the cycle' Available at https://www.one.org/us/blog/early-marriage-and-poverty-why-we-must-break-the-cycle/
[30] Human Rights Watch 'This old man can feed us, you will marry him'. Available at https://www.hrw.org/report/2013/03/07/old-man-can-feed-us-you-will-marry-him/child-and-forced-marriage-south-sudan.
[31] Civil Union Act, 2006.
[32] Marriage Act.

or sexual identity. Curiously, though, this restriction is true even for civil unions, which by design should have no traditional ties to religion to circumvent any religious requirements for marriage to be between 'a man and a woman'.

Including only religious leaders (in addition to appointed officials) in the definition of marriage officers may discriminate against a significant proportion of the population who do not identify as religious,[33] or cannot or do not wish to take up a position in a religious organisation, but nonetheless would like to perform or participate in a marriage ceremony reflecting their beliefs. This also has an impact on members of the LGBT+ community who are persecuted under the guise of 'religious freedom' the world over. In fact, some religious organisations may specifically decide to exclude from their community any leaders who identify as LGBT+ or solemnise unions between people of the 'same sex' or advocate for any issue that runs counter to their doctrine.

A system which conflates marriage and the role of marriage officers with religious practices has real world implications for many women and members of the LGBT+ community in South Africa. Perhaps this is best embodied in section 6 of the Civil Union Act, the provision which allows marriage officers to choose not to solemnise civil unions between 'persons of the same sex' if they object on the grounds of religion or belief.[34] Clauses like this undermine the fundamental rights to equality and dignity and have no place in our law.

As the issue paper indicates, this is currently being addressed by the legislature. However, as the law stands, there is nothing preventing this kind of discrimination against people who identify as LGBT+ and it will take at best a few years before this situation is corrected. The legislature has further proposed a 24 month 'grace' period, during which these discriminatory practices may continue, to allow for training and sensitising of officials about the constitutional rights upon which they are infringing. It is inconceivable that this would be provided if the discrimination were on the basis of another category, such as race. As de Vos has argued, this situation particularly affects LGBT+ individuals experiencing poverty or living in rural areas.[35]

CALS is also aware of a number of complaints against marriage officers and officials at the Department of Home Affairs by women who have had their last names changed on the population registry to those of their husbands without their knowledge and against their instructions. In 2017, our colleagues at the Legal Resources Centre engaged with Department representatives who undertook to review the systems in place and conduct internal training to address any biases and prejudice in their data capturing.[36] Despite this intervention, the practice appears to continue, with officials in

[33] Statistics South Africa, Community Survey 2016, available at: https://bit.ly/2Hj7Rp3
[34] Civil Union Act.
[35] See P de Vos 'The "inevitability" of same-sex marriage' *SAJHR* (2007) 23:432 at 463.
[36] See 'Minister responds to unauthorised change of women's surnames after marriage'. Available at: https://bit.ly/2No4vom

some cases reportedly requesting written permission from women's husbands and/or fathers for them to be legally allowed to keep their own names.[37] This kind of discriminatory practice once again infringes on the rights to equality and dignity and does not seem to be improving with promises of training.

We would therefore suggest that the Commission consider whether, if there are to be functionaries involved in the solemnisation of marriages, the definition of 'marriage officers' should be opened to include those who do not identify as religious. Further, we would question whether there is a need to mention religion at all in the legislation governing marriage, except where it is relevant to recognising a particular cultural practice and protecting the rights of women, such as in Muslim marriages.

2.4. Registration of customary marriages

A proper inquiry has to done when customary marriages are registered after the death of one spouse. It is trite that most customary marriages are registered after the death of one of the parties of the marriages, usually the man in the marriage.[38] This opens up women, particularly those in the rural areas to harm. As stated by Manyath,

> '[*f]requently people only try and register their marriages after their spouse has died. Evidence of a customary marriage has to be produced in order for it to be registered. However, registration so many years after the marriage is difficult to prove and the Department of Home Affairs is not equipped to make a proper inquiry. A common problem that affects rural women is found when their urban spouse remarries in an urban area. On the death of the man, the urban wife reports the death and inserts herself as executor and her family as the heirs. Sometimes this takes place without the rural woman even knowing her husband has died*.[39]

We would submit that this risk of harm extends beyond the dynamics of 'rural vs town' wife. Where there are family divisions, unscrupulous family members of the deceased might deny the existence of a customary marriage in order to inherit from the estate or they might present a wife of their own choosing in other to benefit from the estate. Thus, is it fundamental that a proper investigation be done in marriages registered after the death of a spouse.

2.5. Spousal Support

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[37] See, for example, S Wild 'Home Affairs requires husbands to give women consent to change their names and it's an affront' *News24* (24 July 2019). Available at https://www.news24.com/Columnists/GuestColumn/home-affairs-requires-husbands-to-give-women-consent-to-change-their-names-and-its-an-affront-20190724.

[38] N Manyath 'Women urged to register customary marriages as soon as possible' *De Rebus* (October 2011). Available at http://www.justice.gov.za/docs/articles/201110-register-customary-marriages-derebus.pdf.

[39] As above.

Domestic partnerships need to be recognised by our law. The 2011 census records over three million people in South Africa over the age of 15 living in domestic partnerships. This is a significant proportion of the population who currently fall outside of the protections of family law. A lack of recognition for domestic partnerships disadvantages women, members of the LGBT+ community, people living in poverty – and most particularly people occupying the intersections of these categories, such as Black working-class women.

The Constitutional Court has already recognised that women are left particularly vulnerable by the lack of legal recognition for domestic partnerships in *Volks v Robinson*.[40] The Court acknowledged that women in these relationships are often economically dependent on men, that their contributions to the shared household often go unrecognised and uncompensated, and that the power structures in these relationships mean that they do not always have a choice in whether they get married. To address the hardships faced by these women, especially those most vulnerable women living in poverty and with a limited education, the Court found that legislative intervention was appropriate and necessary.

Domestic partnerships are often described as 'new' forms of family, which deserve the same recognition as 'traditional' relationships. In reality, many of these unions result from the legacy of the apartheid-era migrant labour system which forced men from rural areas to travel to urban centres for work. In fact, the largest proportion of cohabiting persons in the country according to the most recent census identify as Black African and Coloured, with 10,4% and 9,7% of adults in these groups respectively recorded as living in domestic partnerships.[41] Migrant workers often have more than one home and more than one partner supporting them and who they should have a duty to support.

It is also important to highlight how the legal status of domestic partnerships might affect members of the LGBT+ community. Interestingly, 'same sex' domestic partners may actually be said to benefit from greater legal protection than cisgender heterosexual partners in South Africa – particularly upon the death of their partners. Our courts have ensured surviving same sex partners are able to inherit from their deceased partners' estates,[42] qualify for spousal medical aid and immigration benefits,[43] are entitled to pension benefits,[44] and have the right to institute action for loss of support.[45] These important rights were first extended because same sex couples were discriminated against and not given the right to marry. Though this

[40] (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC).
[41] StatsSA. 2018. An exploration of nuptiality statistics and implied measures in South Africa (2018) Available at http://www.statssa.gov.za/publications/03-01-25/03-01-252016.pdf
[42] (CCT28/06) [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC).
[43] 1998 (3) SA 312.
[44] ZACC 18, 2002 (9) BCLR 986 (CC), 2002 (6) SA 1 (CC).
[45] (443/2002) [2003] ZASCA 86.

situation has been remedied, these rights remain. It is unclear, at this point, why these same protections should not be extended to all people in domestic partnerships.

Members of the LGBT+ community do, however, continue to face an enormous amount of stigma. Cohabiting men, for example, may be unwilling or unable to register their relationships out of fear or because they are already in a recognised marriage to a woman. This should not disadvantage their domestic partner.

It is important to bear in mind, therefore, that entering into a domestic partnership, as opposed to a legally recognised marriage or civil partnership, is not always a choice for one of the partners concerned. The lack of recognition for these relationships continues to disadvantage, in particular, Black working-class women. The number of domestic partnerships in our country is significant and is continuing to grow every year. Our laws need to be brought in line with this reality.

2.6. Antenuptial agreements

The requirement that antenuptial agreements must be notarised is anti-poor. The requirement that antenuptial agreements for marriages out of community of property should be notarially executed is discriminatory against poor working class persons who cannot afford the services of a notary public.[46] The default position in South Africa is that marriages are in community of property unless the parties to the marriage enter into an antenuptial contract that specifically excludes community of property.

In a marriage in community of property, the spouses' estates are joined together. Each party to the marriage has an undivided or indivisible half share of the joint estate. Their estate will include all their assets and any liabilities; they are equal concurrent managers of the joint estate and each has the right of disposal over the assets.[47]

Marriages in community of property are the cheapest to enter into as they do not require the service of a notary public. It is free to get married at a Home Affairs office and one need only pay R75,00 for an unabridged marriage certificate.[48] If parties want to enter into an antenuptial agreement, then they have to pay for amongst other things: a consultation with an notary public as well as the drafting of the standard antenuptial agreement, signage of same with parties and attendance at the Deeds Office in order to register same, Deeds Office Disbursement and Postages and Petties Disbursements.

The consequences of this is that poor people can only afford to get married in community of property. It is true that parties can enter into an informal antenuptial

[46] Section 86 of the Deeds Registries Act 47 of 1937.
[47] Section 14 of the Matrimonial Property Act of 88 of 1984.
[48] Department of Home Affrairs 'Marriage Certificates'. Available at http://www.dha.gov.za/index.php/marriage-certificates.

agreement; however, this is only valid between the parties not against third parties. It is important to be protected against third parties because the liabilities incurred by the spouses prior to marriage or during the subsistence of the marriage are liabilities of the joint estate. The spouses are therefore jointly liable for the debt. This debt can include anything from 'contractual debt, maintenance payment for ex-spouses or children, car loans, personal loans, credit card payments, bonds, rental and any other form of accumulated debt'.[49]

3. **Further Recommendations**

3.1 The problem of *lex domicilii matrimonii* and foreign marriages

The *lex domicilii matrimonii* rule stipulates that the patrimonial consequences of a foreign marriage/civil union will be determined by the husband's domicile at the time of the marriage. It is a problematic principle due to its inherent sexism in forcing the domicile to follow the male in the relationship, its lack of awareness of gender neutral identifying individuals who may not identify as a man/women therefore not a husband/wife and it is further discriminatory as it does not have scope for the recognition of same-sex relationships.

We therefore compel the Law Reform Commission to consider this principle and its discriminatory nature and suggest adequate legal reformations in relation thereto.

[49] SchoemanLaw Inc 'Getting married in community of property – your rights and liabilities' *Polity* (September 2018). Available at https://www.polity.org.za/article/getting-married-in-community-of-property-your-rights-and-liabilities-2018-09-07.