INTRODUCTION

The South African Law Reform Commission was established by the South African Law Commission Act, 1973 (Act No. 19 of 1973)

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The Honourable Madam Justice L Mailula (Vice-Chairperson)
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PREFACE

This discussion paper has been prepared to elicit responses from interested parties and to serve as a basis for the Commission’s deliberations. Following an evaluation of the responses and any final deliberations on the matter, the Commission may issue a report on this subject which will be submitted to the Minister of Justice for tabling in Parliament.

The views, conclusions and recommendations in this paper are not to be regarded as the Commission’s final views. The paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents unless representations are marked confidential. Respondents should be aware that under section 32 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) the Commission may have to release information contained in representations.

Respondents are requested to submit written comments, representations or requests to the Commission by 1 December 2003 at the address appearing on the previous page. Any requests for information and administrative enquiries should be addressed to the Secretary of the Commission or the researchers allocated to this project, Ms AM Louw or Ms CJ Pienaar.
SUMMARY OF LEGISLATIVE PROPOSALS

Marriage is currently the only legally recognised intimate partnership. Domestic partnerships between people of the same or opposite sex are virtually unrecognised. Partners in such established relationships are excluded from the rights and obligations which attach automatically to marriage despite the fact that they often function in a manner similar to traditional married families. They have to make use of the ordinary rules and remedies of the law, such as those relating to property, contract, unjustified enrichment and estoppel. The number of people living in such domestic partnership relationships has increased worldwide and also in South Africa.

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

The Commission foresees that this will require a balancing act. The proposals set out below are, therefore, aimed at harmonising family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity.

The legislative proposals can be summarised as follows:

A) SAME-SEX RELATIONSHIPS

The Commission considers as unconstitutional the fact that there is currently no legal recognition of same-sex relationships. It is therefore proposed that same-sex relationships should be acknowledged by the law. Recognition could be effected in a number of ways. The following alternatives have been identified:
a) Same-sex marriage

Option 1 – Common-law marriage

The first option entails the opening up of the common-law definition of marriage to same-sex couples by inserting a definition to that effect in the Marriage Act of 1961. In terms of this option marriage as it is currently known will be available to both same- and opposite-sex couples.

Option 2 – Civil marriage

The second option entails the separation of the civil and religious elements of marriage. The Marriage Act of 1961 will be amended to the extent that it will only regulate the civil aspect of marriage, namely the requirements and consequences prescribed by law. It will also make provision for the civil marriage of both same- and opposite-sex couples.

In practice it will mean that both same- and opposite-sex couples will have to solemnise their marriages before a civil marriage officer, whereafter couples who value the religious aspects of marriage will be free to have their marriage blessed before a religious officer in a religious ceremony. Religious institutions may decide for themselves in terms of their own dogmas whether the blessing of their church will be available to same-sex couples or not.

b) Civil unions

Option 3 – Marriage-like alternative

According to this option couples are accorded a legal status parallel to that of marriage under a separate institution called civil unions.
Option 3.1 – Civil unions for same-sex couples only

Under this option, civil unions are implemented as an alternative to same-sex marriage and thus will be available to same-sex couples only. Since it is a model that runs parallel to marriage, the legal consequences following the conclusion of a civil union will be the same as that of marriage. However, in view of the fact that it is not a marriage, a civil union will be regulated in terms of the proposed Registered Partnerships legislation. It will be established by a civil registration procedure and terminated by agreement or a court procedure.

Option 3.2 – Civil unions for same- and opposite-sex couples

It is anticipated that there may be opposite-sex couples who object to the moral and religious connotations attached to traditional marriage but who do want the legal consequences of marriage. Such opposite-sex couples may also prefer to make use of the option of civil unions. For this reason, under option 3.2, civil unions are made available to both same- and opposite sex couples. Except for the extended scope of the proposal, the content of this option is exactly the same as option 3.1.

B) REGISTERED PARTNERSHIPS (same-sex + opposite-sex relationships)

Option 1

A Registered Partnerships Act is proposed for partners of the same or opposite sex who do not wish to get married or to obtain all the legal consequences of marriage, but still desire some protection. This proposal entails a formal commitment by the parties with concomitant certainty as to their rights and obligations. Registration of a partnership will afford parties some of the basic rights associated with civil marriage. The proposed legislation prescribes a formal registration procedure, with termination taking place by agreement or court procedure, depending on the circumstances.

A default property regime that differs from that of marriage is prescribed. In addition to the property dispensation, registered partners have other rights and duties such as a mutual duty to support each other, the right to intestate succession and delictual claims. Where a child is born into a registered partnership between persons of the opposite sex, the male
partner is deemed to be the biological father of that child. There is only a limited right to maintenance between former registered partners after termination of the registered partnership.

C) UNREGISTERED PARTNERSHIPS (same-sex + opposite-sex relationships)

Under the ascription or status model, unmarried and unregistered partners of the same or opposite sex are awarded a civil status as if they have formally committed to the relationship, without their having taken any steps to effect such recognition. The civil status automatically attaches to relationships under certain circumstances. The proposed options distinguish between de facto relationships and ex post facto relationships.

Option 1 - De facto unregistered partnerships

Option 1 creates rights and obligations for a couple in a conjugal relationship during the existence of the unregistered relationship. The proposed Unregistered Partnerships legislation prescribes a definition of an unregistered partnership together with a list of factors to be considered by any person who must evaluate the status of the relationship or by a court in the event of a formal dispute of the status of the relationship during its existence.

The Commission proposes that the availability of benefits during the existence of such a partnership (ie without the commitment of marriage or registration of the partnership) be limited.

The focus of the proposed legislation is on property. The disposal of partnership property is restricted and there is joint liability for household expenses during the relationship. In addition, provision is made for an equitable division of partnership property at the end of the relationship and a right to inherit a child's share from a partner who dies intestate. A former partner may claim maintenance from the other partner only under prescribed circumstances.

Since this legislation applies to an unregistered partnership by default, there is an option to exclude the application of the Act by concluding an opt-out or a domestic partnership agreement. Where the application of the Act has been excluded, the parties can of course still rely on the remedies of estoppel, undue enrichment and contract law to the extent that they may be applicable.
Option 2 - Ex post facto unregistered partnerships

Option 2 allows former partners in an unregistered partnership to apply to court for a property division or maintenance order in the event that they cannot come to agreement after the unregistered relationship has ceased to exist. As in option 1, the proposed Unregistered Partnerships legislation will automatically apply to the relationship. The difference between option 1 and 2 is that in the latter case the legislation only becomes relevant if, at the end of the relationship, one or both of the former partners apply to court for the relief provided for in the Act and only if the court determines that the relationship does indeed qualify as an unregistered partnership as defined.

Following an application to court by one or both of the former partners, the focus of the judicial intervention is on the equitable settlement of any disputes relating to the property of the former partnership and maintenance between former partners. For this purpose the court is awarded a judicial discretion to ensure an equitable outcome. In option 2 the former partners effectively opt for the application of the legislation by applying to court for relief because they cannot settle the matter themselves. The possible existence and content of a domestic partnership agreement is one of various factors that the court may consider in coming to an equitable solution.

Option 2 will apply to intimate partnerships (conjugal relationships) as well as care partnerships (non-conjugal relationships). Care partners are persons who are in financially or emotionally interdependent relationships that are of a non-conjugal nature.

D) CONCLUSION

As is evident from the various options set out above, it would be impossible to adopt only a single generally valid statutory measure regarding the regulation of domestic partnerships. A differentiated approach seems to be necessary, depending on the nature of the relationship to be protected. It is foreseeable that elements of the various proposals may be interchanged when the Commission is formulating its final recommendation.

It is the aim of the Commission to consult a wide range of interest groups about the content of the proposed options at workshops to be held following the publication of this discussion paper.
Discussions at the workshops will centre on the viability of the different combinations set out below. Alternative options may be adopted in any of the following combinations in order to give optimum protection to the parties to these relationships without over-regulating the position and imposing on their autonomy.

Combination 1

All options available to both same- and opposite-sex couples

Marriage [option 1 (common-law marriage) or option 2 (civil marriage)]
  +
Registered Partnership
  +
Unregistered Partnership [option 2: ex post facto partnerships]

In this combination same- and opposite-sex couples will have a choice between three levels of commitment and concomitant degrees of rights and obligations. Marriage will afford them the full complement of rights and obligations as it currently exists. The second level will be to register the relationship in order to ensure the availability of certain proprietary and other rights and obligations. The third level will establish no legally enforceable rights and obligations during the existence of the relationship, but will create the possibility of judicial intervention to ensure an equitable division of partnership property and an amendment order at the end of the relationship.

Combination 2

Marriage [common-law marriage: opposite-sex couples only]
  +
Civil Union [option 1: same-sex couples only]
  +
Registered Partnership [both same- and opposite-sex couples]
  +
Unregistered Partnership [option 2: ex post facto partnerships for same- and opposite-sex couples]
In this combination civil unions allow for the legal recognition of same-sex relationships. Marriage will be available to opposite-sex couples and civil unions to same-sex couples. Consequently, the necessity to amend the marriage law becomes redundant. Registered and unregistered partnerships for both same- and opposite-sex couples are nevertheless included for those who prefer lesser degrees of commitment and obligations (see combination 1).

**Combination 3**

All options available to both same- and opposite-sex couples

- **Marriage** [option 1 (common-law marriage)]
  
  - **Civil Union** [option 2]
  
  - **Registered Partnership**
  
  - **Unregistered Partnership** [option 2: ex post facto partnerships]

This combination differs from combination 1 in that civil unions (parallel to marriage) are added as an alternative to marriage for those couples who object to the moral and religious connotations of marriage.

**Combination 4**

Both options available to same- and opposite-sex couples

- **Marriage** [option 1 (common-law marriage) or option 2 (civil marriage)]
  
  - **Unregistered Partnership** [option 1: de facto partnerships]

This combination offers the choice between a full complement of rights and obligations to those who get married, and a limited combination of rights and obligations during the existence of the relationship to those who do not get married. Civil unions and registered partnerships are not available and no provision is made for care relationships.
Combination 5

All options available to both same- and opposite-sex couples

Marriage [option 1 (common-law marriage)]
  +
Civil Union [option 2]
  +
Unregistered Partnership (option 1: de facto partnerships)

This combination is similar to combination 4 but adds the option of civil unions to those couples who object to the moral and religious connotations of marriage. It differs from combination 3 in that registered partnerships are not available.

Combination 6

Marriage [common-law marriage for opposite-sex couples only]
  +
Civil Union [option 1: only same-sex couples]
  +
Unregistered Partnership [option 1: de facto partnerships both same- and opposite-sex couples]

Based on the reasoning used in combination 2, in this combination common-law marriage for opposite-sex couples and civil unions exist as two parallel institutions. The option to acquire a limited status automatically during the existence of the relationship is available to those in unregistered relationships who do not opt out of or contract out of the application of the unregistered partnerships legislation.

Combination 7

Combination 6
  +
Unregistered Partnership (option 2: in so far as ex post facto partnerships for care
partnerships only are concerned)

This combination adds to combination 6 the limited protection of people in care partnerships. No legally enforceable rights and obligations exist during the existence of the care relationship. However, upon application to court by one or both former partners, judicial intervention will ensure an equitable division of partnership property at the end of the relationship.
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VERMONT

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CHAPTER 1: INTRODUCTION

1.1 History of investigation

1.1.1 The Department of Home Affairs approached the Commission during 1996 with a request to investigate and recommend legislation relating to a new marriage dispensation for South Africa. The Minister of Justice approved the inclusion of the investigation in the Commission’s programme on 27 January 1997. The investigation focused mainly on whether the provisions contained in the Marriage Act, 1961\(^1\) were adequate or whether they had to be amended.

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

1.1.3 At the same time media reports suggested that "urgent" consideration be given by Parliament to the adoption of legislation relating to the recognition in South Africa of same-sex partnerships. The matter was rendered even more important by the media after the judgment of Langemaat v Minister of Safety and Security\(^2\) in which Roux J held *ultra vires* certain provisions of Polmed (the medical aid scheme of the South African Police Service), evidently on grounds related to perceived discrimination in its provisions on the basis of sexual orientation.\(^3\) Section 9 of the Constitution of the Republic of South Africa, 1996\(^4\) (the so-called equality clause) prohibits discrimination on the basis of sexual orientation.\(^5\)

1.1.4 In its original memorandum the Department of Home Affairs had furthermore drawn the Commission’s attention to the fact that it was experiencing ever increasing demands

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2. 1998 (3) SA 312 (T).
3. See also the *National Coalition for Gay and Lesbian Equality and Others v The Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 CC.
5. See chap 4 below for a discussion of the Constitutional imperatives.
from the gay community for the recognition of gay marriages as valid marriages.

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

1.1.6 The investigation into the Review of the Marriage Act was divided into two separate projects: the original project (Project 109) which was dealt with first and which was concerned entirely with technical issues such as for example the designation of marriage officers and a new project (Project 118) which is concerned with domestic partnerships.

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

1.1.8 In October 2001 the Commission published an Issue Paper in the form of a questionnaire. The Commission distributed approximately five hundred issue papers (questionnaires) to identified interested bodies and persons. A copy of the Issue Paper was also made available on the Commission's Internet site. An interactive web site was furthermore set up to enable respondents to answer the questions on-line and to submit their inputs directly to the Commission.

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

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6  63rd Meeting of the Working Committee held in Pretoria on 17 April 1998.
7  Commission Paper 487.
8  Ms Malepe subsequently resigned as a member of the Project Committee in June 2002.
1.1.10 Submissions ranged from passionate calls for legal recognition of same-sex marriage and cohabitation arrangements to outright condemnation of any act associated therewith. The comments received and points raised in response to the Issue Paper have all been taken into account in the drafting of the enclosed Bill. The Commission takes this opportunity to thank all who responded to the Issue Paper.

1.2 Exposition of the problem

1.2.1 For many years opposite-sex marriage was the only legally recognised family form, and it carried with it a plethora of legal rights and obligations.\textsuperscript{10} It was regarded as the cornerstone of society - a fixed traditional structure essential for the raising of children and a healthy family.\textsuperscript{11}

1.2.2 However, to say that marriage is a constant would be untrue. Over the past thirty years the institution of marriage has gone through significant changes - a general movement away from reliance on fault, for example in the recognition of "no fault" divorce, and revolutionary changes in matrimonial property laws. Many of the features of marriage which are assumed to have been present from time immemorial are actually of more recent origin. What is clear though is that marriage in its many forms has enjoyed a uniquely privileged status.\textsuperscript{12}

1.2.3 Domestic partnerships, on the other hand, were virtually unrecognised. Opposite-sex partners were a largely invisible group as far as the legal system was concerned: any acknowledgment of their existence tended to be characterised by scathing references to their attempts to "masquerade as husband and wife". They were excluded from the rights and obligations which attached automatically to marriage and it was not even clear whether any agreements which they entered into in order to create parallel rights and obligations, were legally enforceable.\textsuperscript{13}

1.2.4 In so far as same-sex partners were concerned the position was even more

\textsuperscript{10} Holland 2000 \textit{CJFL}, at 6.
\textsuperscript{11} Hutchings & Delport 1992 \textit{De Rebus}, at 121.
\textsuperscript{12} Holland 2000 \textit{CJFL}, \textit{ibid}.
\textsuperscript{13} Holland 2000 \textit{CJFL}, \textit{ibid}. Labuschagne E 1985 \textit{TSAR}, at 222. In 1995 it was stated that the general position in South Africa is that the law does not acknowledge or protect contracts which will encourage immoral relationships – C Nathan "Samehousing of samehousing" in Bosman & Eckard \textit{Welsynsreg}, at 245 and Devlin \textit{Enforcement Morals}: "The modern state concerns itself with promoting institutions which are beneficial to society, the legislator has to consider how the law can best be used to help marriage and discourage alternatives".
problematic. South African society was characterised by a strong degree of hostility towards homosexuals and homosexual conduct.\textsuperscript{14} Since homosexual conduct was to a large extent criminalised,\textsuperscript{15} the recognition of a same-sex marriage or partnership of any kind would be completely out of the question.

1.2.5 The tumultuous years after the World War II, however, heralded a dissipation of social disapproval towards cohabitation.\textsuperscript{16} It was perhaps the decade of the swinging sixties that established the domestic partnership as a socially acceptable institution.\textsuperscript{17} This was the position specifically in so far as opposite-sex couples were concerned, although the incidence of same-sex couples living together discreetly was not unknown.

1.2.6 Over the years, there has been an increasing focus on the rights of opposite- and same-sex partners as domestic partnerships have come to be perceived as functionally similar to marriage.\textsuperscript{18} The increased recognition of intimate relationships outside of marriage started with the imposition of support obligations created in domestic partnership agreements and continued with the use of principles of unjust enrichment to provide property rights and to extend statutorily defined benefits for similar partnerships. Initially the extension was rather grudging and seemed primarily designed to "pass the buck" from welfare authorities to the family.\textsuperscript{19}

1.2.7 The number of people living in non-marriage relationships has, however, increased worldwide and also in South Africa.\textsuperscript{20} The dissatisfaction with the current laws can be seen in the activities of law makers and law reform bodies across the globe. In both Britain and France there is evidence of restructuring away from marriage on a large scale, a process termed "de mariage".\textsuperscript{21} Denmark recognises same-sex partnerships while the Netherlands and Belgium recognise same-sex marriage.\textsuperscript{22} South Africa is, however, far behind other

\textsuperscript{14} Steyn 1998 TSAR, at 97.
\textsuperscript{15} Lesbianism was never criminalised. See discussion below.
\textsuperscript{16} Bosman & Eckard Welsynsreg, at 252.
\textsuperscript{17} Hutchings & Delport 1992 De Rebus, \textit{ibid}.
\textsuperscript{18} See further Labuschagne 1989 TSAR, at 371, where he refers to Scholnik who stated that marriage and the family has not disappeared but it has been deregulated.
\textsuperscript{19} Holland 2000 CJFL, \textit{ibid}.
\textsuperscript{20} In research on marriage conducted by Statistics South Africa, approximately 40 percent of African and Coloured women indicated that they were in marriages of one kind or another (religious, customary or civil). This suggests that large numbers of South Africans live with their intimate partners without marrying.
\textsuperscript{22} See comparative study in chap 6 below.
countries in its development of appropriate laws.

1.2.8 Given South Africa's conservative and Calvinistic background, it is not surprising that acceptance of domestic partnerships occurred at a slower and more reluctant rate than in countries like Canada, Sweden, England and the United States of America. There is, however, mounting dissatisfaction with the failure of the law to adapt to changing patterns of domestic partnership. More and more legal problems associated with domestic partners and their families are coming to the attention of the courts and of lawyers generally. Partners are increasingly likely to bring disputes over such matters as property and custody before the courts. Lately there have been a number of Constitutional and High Court cases dealing with challenges in terms of section 9 of the Constitution of 1996 (the so-called equality clause).

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

1.2.10 One argument is that lawmakers should abandon archaic, moralistic rules and confer legal status upon such relationships, for if anything is sure, it is that these living arrangements will not disappear simply because we refuse to acknowledge them. In a country espousing democracy, equality and change, the question must be asked - is it not time to stop marginalising this relationship simply because it does not conform to the majoritarian morality of the past?

1.2.11 The increasing social acceptability of non-marriage relationships and the absence of structure and formality appear to make it increasingly popular, yet it is precisely these perceived advantages which create the greatest potential for problems. The dissolution of a valid marriage carries significant legal effect which does not extend to the domestic

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23 Hutchings & Delport 1992 De Rebus, ibid.
24 See discussion in chap 4 below.
25 Singh 1996 CILSA, at 317. See also P J Bailey "Legal recognition of de facto relationships" 1987 Australian Law Journal 174 at 185, as referred to by Labuschagne 1989 TSAR, at 370, where she says: "Faced with the existence of stable de facto relationships, the law can no longer afford to turn its back but must decide whether or not they are to be given recognition comparable to marriage."
26 Singh 1996 CILSA, at 318.
partnership irrespective of its permanence. The major disadvantage of the domestic partnership is the absence of structured protection for the parties when the relationship ends.28

1.2.12 Three factors should be noted in regard to domestic partners.29 First, partners who discuss their respective rights tend to be in a better position than those who simply trust the other person. Secondly, evidence that contributions were made out of love and affection tends to be fatal to a claim, as it is assumed that this implies a willingness to make the contributions regardless of any expectation of an interest in the property. Thirdly, little weight is given to domestic contributions, as opposed to financial contributions or work to which a commercial value can readily be ascribed. Thus, partners who exchange or reduce their labour market role for an unpaid domestic role receive no financial compensation from their partner on relationship breakdown.

1.2.13 It is our submission that some degree of legal guidance is essential to clarify the position with regard to domestic partnerships.30

1.3  **Scope of investigation**

1.3.1. Increasingly diverse kinds of living arrangements occur in society and different needs arise out of such relationships. The investigation deals with the question of the legal recognition and regulation of all domestic partnerships - that is, established marriage-like relationships between people of the same or opposite sex.

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

1.3.3  There are furthermore reported incidents of domestic partnerships where one of the

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28  Singh 1996 *CILSA*, at 318.
29  Barlow & Probert *WJCL Studies*, at 2.
30  Hutchings & Delport 1992 *De Rebus*, at 124; De Bruyn & Snyman 1998 *SA Merc LJ*, at 10; Labuschagne 1989 *TSAR*, in his conclusion at 389, that marriage should be deregulated and that legal recognition be extended to factual marriages. Singh 1996 *CILSA*, at 321 states: "In addition to steps taken by the parties inter se, there is a crying need for legislative reform to bolster the rights of cohabiting partners".
partners is already married to someone else. Although this phenomenon is not unique to South Africa, it is especially relevant here since it is in many cases the product of the history and character of our society: many men live in a domestic partnership in an urban area while having a wife in the rural areas.

1.3.4 The investigation does not deal, however, with marriages that are not recognised by law by reason of the fact that they are potentially polygynous, or with marriages that do not comply with the requirements of the Marriage Act of 1961. Persons in this category are couples married by African customary law and couples married by Muslim or Hindu rights. The consequences of customary marriages are governed by the indigenous law formalised by statute in the new Recognition of Customary Marriages Act, 1998.

1.3.5 The Commission is consequently considering proposals for possible law reform with regard to the following issues:

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

1.4 Definitions and terminology

1.4.1 It is important, right at the outset of the discussion paper, to explain important and interesting terms and concepts that will be used throughout the investigation. Respondents are encouraged to comment on the correctness and clarity of interpretation in each

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

32 Act No. 120 of 1998.
Domestic partnership

1.4.2 Domestic partnership may assume many forms. Traditionally "domestic partnership" or "cohabitation", as it is sometimes called, refers to the relationship of a man and a woman who live together, ostensibly as man and wife, without having gone through a legal ceremony of marriage.33

1.4.3 In terms of a more modern definition it refers to the stable, monogamous living together as husband and wife of persons who do not wish to, or are not allowed to marry.34 However, domestic partnership is not the sole prerogative of unmarried, opposite-sex persons; it may also encompass relationships between two men or between two women as well as non-conjugal relationships.

1.4.4 It should be clear that the relationships under discussion in this issue paper are those with a considerable degree of permanence and stability, not those of casual or intermittent character. These unions are not valid marriages, nor do they become so by the lapse of time.35

1.4.5 Other terms used to denote the domestic partnership includes shacking-up, living together, concubinage, association libre, Verhältnis, common-law marriage, de facto marriage, quasi-marriage, and putative marriage.36 Also registered partnership, universal partnership and private marriage. For the purposes of this investigation the term "domestic partnership" will, however, be used throughout.

1.4.6 Defining domestic partnership or cohabitation has been attempted often. The definitions inevitably resort to arbitrary characteristics that are restrictive and often harsh. In the English case of Helby v Rafferty37 the judge required such a degree of apparent permanence and stability that the ordinary man would say

35 Sinclair & Heaton Marriage Law, at 268.
36 Sinclair & Heaton Marriage Law, ibid.
that the parties live together as man and wife.

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

1.4.8 Domestic partnership or cohabitation has been the basis for support and other obligations and there is no need to depart from this model when contemplating changes to domestic partnership: it is understood and accepted. In McEachern v Fry Estate\(^\text{38}\) Sheppard J wrote:

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

1.4.9 The domestic partnership relationship must furthermore be distinguished from the 'mistress-patron' relationship. In Davis v Johnson\(^\text{39}\) Lord Kilbrandon described a mistress as

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

1.4.10 The Concise Oxford Dictionary defines a mistress as

> a man's female lover with whom he has a continuing illicit sexual relationship.

1.4.11 The mistress relationship carries clear connotations of a deliberate variation of the monogamous ideal because a mistress appears to co-exist with her lover's spouse in a form of quasi-polygamy, which actively undermines the conventional marriage.\(^\text{40}\)

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


\(^{39}\) [1979] AC 264 at 338.

\(^{40}\) M Welstead "Mistresses in law: Deserving of protection" (1990) Family Law 20 at 72, referred to by Singh 1996 CILSA, at 324.
resulted in an excessively rigid conceptualisation of all extra-marital relationships. \(^{41}\)

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

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

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

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

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

1.4.18 The registered domestic partnership can furthermore be divided into the marriage-minus model and the blank-slate model. The marriage-minus model offers quasi-marital effects, but falls short of marriage. It is mostly exclusive to same-sex couples and will, in this investigation, form the basis of the so-called "civil union". The blank-slate-plus model grants specific enumerated rights and obligations to individuals in a relationship without attempting to parallel marriage laws, and this concept will be used when discussing "registered partnerships". \(^{42}\)

\(^{41}\) Singh 1996 CILSA, at 325. See also Sinclair & Heaton Marriage Law, at 268 fn 7. Equally unsatisfactory are the labels “concubinage” and “paramour”.

\(^{42}\) See full discussion in chapters 8, 9 and 10 below.
1.4.19 Couples in the second category sometimes conclude a contract to regulate some of the consequences of their shared lives. Non-conjugal domestic partnerships are also found in the second category.

1.4.20 Although couples in domestic partnerships as a rule cohabit, it is not a distinctive feature of these relationships.

**Domestic partnership agreement**

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

**Registration**

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

**Dependence/Dependant**

1.4.23 Dependence does not arise only upon need and the applicant should not have to prove that without the support of his or her partner during the period of cohabitation he or she would have been seriously deprived or even destitute. The language should be interpreted so as to give effect to the realities of our current society. These include the desirability of not only the male but also the female partner in a common-law relationship, as indeed in a marriage, being financially and economically independent and having the ability to enjoy a fulfilling life in the market place as well as to rear children, if so desired. It should be interpreted in the context of equality between the spouses.

1.4.24 It is therefore enough if the couple co-operate in assisting each other so that they are

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43 See discussion in chap 7 below regarding the difference between the rights and obligations created by marriage in comparison with domestic partnerships.
dependent one upon the other in the improvement of their life. The economic support may go to a better lifestyle because each is co-operating in the meeting of expenses.

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

Permanent

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

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

1.4.27 None of these considerations is indispensable for establishing a permanent partnership.

Spouse

1.4.28 The definition of "spouse" in South African legislation does not, as a general rule, at present include same-sex life partner. Its ordinary meaning connotes "a married person, a wife, a husband". See, however, the ad hoc amendments made in legislation regarding the

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44 National Coalition for Gay and Lesbian Equality and Others v The Minister of Home Affairs and Others, at para 86.
45 At para 88.
46 At para 25-26.
definition of spouse. It is of course also true that marriage represents but one form of life partnership.

Unjustified enrichment

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

Common-law marriage

1.4.30 A common-law marriage arises when a couple agree between themselves to be married, hold themselves out to be married, and live together for a substantial period of time. The common-law marriage was, and still is, recognised in some states of America. 48

1.4.31 One should, however, distinguish the common-law marriage in a handful of American jurisdictions where the informal consent marriage is still recognised as a legal marriage and the popular use of the word. 49

1.5 Methodology

1.5.1 In this paper the present position regarding domestic partnerships in South Africa will be discussed and the way in which partnerships are regulated in a wide variety of countries will be noted. The Commission will furthermore set out provisional proposals (which in some instances include more than one option) for information, discussion and comment with the ultimate object of developing a new family law dispensation within which domestic partnerships will find their proper place.

1.5.2 The views, conclusions and proposals which follow should not at this stage be regarded as the Commission’s final views, however.

1.5.3 The issues raised and the proposed legislation need to be debated thoroughly. The comments of all parties who are interested in these issues are of vital importance to the Commission. The manner in which the investigation will progress will primarily depend on

48  Sinclair & Heaton Marriage Law, at 282.
49  Hahlo Fiat Iustitia, at 245. See para 1.4.13 above.
the response received from interested parties. Respondents may also raise new issues that fall outside this discussion paper.

1.5.4 The discussion paper will be followed by a report with the Commission’s final recommendations and legislative proposals. The Commission will also be organising regional workshops at which members of the Project Committee will be present to explain and discuss proposed solutions and to note comments.
CHAPTER 2: SOCIAL AND POLITICAL CONTEXT

2.1 Incidence of domestic partnership

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

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

2.1.3 The Christian emperors did not look upon concubinage in a favourable light but did accept its existence without recognising its legality. Justinian regarded concubinage as an inaequale coniugium or second-rate marriage with legal consequences, if certain requirements were met.

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

It shall not be lawful to keep Concubines. The law which authorised men who did not blush at such a connection to keep concubines was conducive to neither modesty nor virtue. Hence we do not permit the error of former legislators to disgrace our government, and we hereby repeal this law forever. For, in accordance with the precepts which we have received from God, and which are becoming to Christians, we prohibit such a practice as being injurious not only to religion but also to nature. And, indeed, if you have a spring and the Divine Law invites you to drink from it, do you prefer to resort to a muddy pool, when you can obtain pure water? And even though you have no such a spring, you still should not make use of what is forbidden.

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1 Hahlo Fiat iustitia, at 245.
2 Labuschagne E 1989 TSAR, at 662.
3 Hahlo Fiat iustitia, at 260 fn 66.
4 Labuschagne E 1989 TSAR, ibid.
It is not difficult to find a consort for life. (See Scott XVII The Civil Law 276).

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

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

2.1.7 In recent times, the patterns of marriage, divorce, and living together without marriage have been changing. That the incidence of domestic partnership is growing throughout the world is not a disputed proposition. Family lawyers across the globe will tell of the increase in the number of palimony suits. In America forty-five per cent of all couples living together are unmarried. In Sweden, nine out of ten couples marrying for the first time already live together, while in Denmark, more than one-third of women in their early twenties are living with a partner without the ties of marriage. The Scandinavian pattern appears to be emerging in Austria, Belgium, France and across the channel, in Scotland and Wales as well. As a rough estimate, around one million heterosexual couples are living together without being married in Britain, while in France the number has reached two and a half

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5 Labuschagne E 1989 TSAR, at 661-662.
6 Cameron 2002 SALJ, at 649.
7 Pantazis 1997 SALJ, at 559.
9 See for example Sinclair & Heaton Marriage Law, at 269; Rodriguez Cohabitation, Labuschagne 1989 TSAR, at 371 and Labuschagne E 1989 TSAR, at 649.
10 J Haskey and K Kieman "Cohabitation in Great Britain - characteristics and estimated numbers of cohabiting partners" 1989 Population Trends 58, referred to by Singh 1996 CILSA, at 317; See Sinclair & Heaton Marriage Law, at 270 fn 13 and the references therein: In the United States of America the number of people cohabiting increased from just over 500 000 in 1970 to more that 1,1 million in 1978, 1,9 million in 1983 and more that 2,8 million in 1990.
12 See Sinclair & Heaton Marriage Law, at 270 fn 12 and the references therein: In 1986/7 in the age group 16-59, 12% of men and 14% of women were cohabiting, making up about 900 000 cohabiting couples.
2.1.8 South African statistics also demonstrates the rising trend in domestic partnerships. Even conservative statistics indicate that a very large number of people live in domestic partnerships in South Africa. Statistical data show that only about 40% of Africans and Coloured women are married.

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

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

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

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13 Barlow & Probert WJCL Studies.
14 The census of 1996 found 1,268,964 people to describe themselves as living together with a partner. This is approximately 5% of the total population over the age of 14 (25,691,803). This is probably a significant undercount for the following reasons: Firstly, many people both cohabit and are married. When asked, they are likely to describe themselves as married rather than as cohabiting because marriage is regarded as more socially acceptable. Secondly, people may not be willing to admit that they are cohabiting because of the (perceived) social stigma attached to cohabitation. It is also important to note that the percentage of cohabitation is based on total population over the age of 14. If only the adult population were included, the percentage should increase significantly.
15 It is assumed that while many of the remaining 60% of these women live without men, a significant number cohabitate with men but do not marry. The figures for Indian and White women show that more than 60% of them are married.
17 Sinclair & Heaton Marriage Law, at 271.
18 Hutchings & Delport 1992 De Rebus, at 122.
19 Singh 1996 CILSA, ibid.
2.1.12 Domestic partnerships are found under:

(a) young, never-married (sometimes tertiary educated) persons, who seek freedom from the legal, financial and social constraints of marriage;
(b) the poorer sections of the population (this is a trend especially noticeable in South Africa); and
(c) older people choosing the life-style in response to legal, financial, emotional and religious problems.

2.1.13 The increase in cohabitation is indicative of the changing mores. Domestic partnership has come to be accepted by many people and although the moral and social stigma attached to domestic partnership has not disappeared completely it has diminished substantially. The traditional nuclear family is no longer the universal norm.  

2.2 Reasons why domestic partnerships exist

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

a) Parties have chosen not to marry

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

(i) Migrant labour and apartheid

2.2.3 In South Africa a battery of apartheid legislation in many instances shattered families and family life. Influx control, group areas and forced removals, coupled with overcrowding

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21 Sinclair & Heaton *Marriage Law*, at 271.
22 Goldblatt *Living Together*, at 3.
caused by rapid urbanisation and inadequate housing, have all had an enormous impact on the intimate relationships of black people, often resulting in cohabitation for socio-political and economic reasons.\(^\text{23}\)

2.2.4 Migrant labour and apartheid have led to the breakdown of many traditional family arrangements and many couples live together for most of the year in the urban area without marrying (the man often has a rural wife). These women have little legal protection of their property interests in families.\(^\text{24}\)

2.2.5 Research indicates that in some urban areas domestic partnerships have "grown up specifically to meet the needs of the isolated migrant men and women". For them domestic living together is cheaper than maintaining separate households. It protects the partners against destitution in times of illness, unemployment\(^\text{25}\) or pregnancy. Furthermore, it is considered unnatural, particularly for male migrant workers, to "be alone".

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

2.2.7 More recently it has also become necessary for some women to leave their families behind to search for work. This has resulted in her living in two separate places as well. The fact that children have been forced to live separately from their fathers (and often their mothers as well) causes them to suffer greatly and has significant consequences for stable family life.\(^\text{26}\)

(ii) Poverty and unemployment

2.2.8 Women need men to support them and their children since men usually have better access to jobs, income and accommodation. Women rely on them for their basic needs. Women accept the man's refusal to marry them as well as economic and physical abuse

\(^{23}\) Sinclair & Heaton *Marriage Law*, at 273.

\(^{24}\) Goldblatt Living Together, at 3.

\(^{25}\) Motshogolane for HSRC, at 197-8, referred to by Sinclair & Heaton *Marriage Law*, at 273.

\(^{26}\) See CALS Report. The full Report is available from the Centre for Applied Legal Studies Documentation Centre. For more information see http://wwwserver.law.wits.ac.za/cals/gender/genderindex.htm.
because their material needs are so great. Women remain in these relationships despite the insecurity they feel.\textsuperscript{27}

2.2.9 In research conducted it was found that, generally speaking, domestic partnerships were less common in settled townships and in the formal housing areas and more common in the back rooms and shacks. The prevalence of domestic partnerships seems to be partly related to poverty.\textsuperscript{28}

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

2.2.11 Lack of money for lobola was sometimes cited as a reason for the domestic partnership. A man in Vryberg said: "If I want to marry her it means I have to pay lobola. Marriage is a commitment. You cannot marry if you won't be able to provide for wife and children."\textsuperscript{29}

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

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

\textsuperscript{27} CALS Report, at 40.
\textsuperscript{28} CALS Report, at 36: A woman in Pimville said: "Some girls cohabit because of poverty. The girl will go to cohabit with a man so that she gets something to eat and clothes to wear. These girls find it difficult leave because they are already used to wearing expensive clothes and a meal everyday." Another woman said: "People cohabit because if they do not share a place with fathers of their children, then the man would not pay maintenance. So people cohabit so that the fathers can maintain their children."
\textsuperscript{29} CALS Report, at 37.
(iii) Economic conditions

2.2.13 In the past, in South Africa, couples may have elected to live together in a domestic partnership (rather than marry) because of the obvious tax benefits at a time when married women were the most heavily burdened citizens, or because married women were immediately excluded from the many state or other work-related subsidies. This has changed, yet getting married still has an effect on the woman's chances of a permanent position or promotion\(^{30}\) and evidence indicates that domestic partnership remains a popular life-style despite the lack of legal rules regulating the rights of partners.\(^{31}\)

2.2.14 Further, a divorced person or surviving spouse\(^{32}\) who receives maintenance, pension or income from an annuity may choose a domestic partnership rather than lose the financial benefits of maintenance, pension or annuity on remarriage.\(^{33}\)

(iv) The avoidance of the traditional obligations of marriage\(^{34}\)

2.2.15 An increase in domestic partnerships can be seen in young, tertiary educated, never-married couples. These groups are likely to see domestic partnerships as being free from the legal and social constraints and financial obligations imposed by formal marriage.\(^{35}\)

2.2.16 People seek companionship and intimacy, and wish to share their domestic lives with each other even where they do not wish to marry.\(^{36}\) Men benefit from the lack of legal protection of domestic partnerships as they are able to enter and leave relationships very freely and have no obligations to support women or share their property with them.\(^{37}\)

\(^{30}\) Hutchings & Delport 1992 *De Rebus*, at 122.

\(^{31}\) Singh 1996 *CILSA*, at 318.

\(^{32}\) Respondents in the CALS Report said that widows formed relationships with men in their village. A man would then contribute in some way to a woman’s household by bringing food that she would cook and then they would eat together. From his side he would help her with agricultural work or chop wood for her. Although they do not actually live together they may even have children together. The widow would benefit from his assistance and enjoy a relationship. She would, however, not remarry or live with him because according to custom she will lose her use of the house in which she lived, which had been the property of her husband. Also, anecdotally, it is well known that woman with husbands in the cities have "boyfriends" who help out around the house.

\(^{33}\) Sinclair & Heaton *Marriage Law*, at 272.

\(^{34}\) Holland 2000 *CJFL*, at 22.

\(^{35}\) Hutchings & Delport 1992 *De Rebus*, *ibid*; Sinclair & Heaton *Marriage Law*, *ibid*.

\(^{36}\) CALS Report, at 39.

\(^{37}\) CALS Report, at 40.
2.2.17 It is furthermore easier to end a cohabiting relationship than to end a marriage. Domestic partners expect fewer "exit costs" to ending the relationship. However, most couples do not engage in crystal-ball gazing at the inception of the relationship and do not have a clear idea which obligations they are consciously choosing to avoid. If they did, one would expect such couples to have entered into a domestic contract rather than risking subsequent claims based on support or unjustified enrichment.

(v) Avoidance of traditional roles

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

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

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

2.2.21 On the other hand it was found that some men also want to avoid their traditional role as husbands. Women who want to get married often depend on men to ask them to marry

38 Rodriguez Cohabitation.
39 Holland 2000 CJFL, ibid. The fact that partners by and large do not use contracts suggests that the fear of liability does not play a major role in their decision to cohabit.
40 Hutchings & Delport 1992 De Rebus, ibid.
41 Holland 2000 CJFL, ibid.
42 Sinclair & Heaton Marriage Law, at 272; Labuschagne 1989 TSAR, at 371 fn 8.
43 Labuschagne 1989 TSAR, at 374 and fn 33: "The family in historical times, and at present, is in transition from an institution to a companionship. In the past, the important factors unifying the family have been external, formal and authoritarian, as the law, the mores, public opinion, tradition, the authority of the family head, rigid discipline, and elaborate ritual. At present, in the new emerging form of the companionship family, its unity inheres less and less community pressures, and more in such interpersonal relationships as the mutual affection, the sympathetic understanding, and the comradeship of its members."
and consider it inappropriate to make such a suggestion. Generally, women want the security and status of marriage while men prefer the freedom of domestic partnership. A woman from Pimville expressed the insecurity of living in a domestic partnership as follows:

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

2.2.22 Respondents to the Issue Paper\(^{44}\) reflected contradicting views; many wanted to be married because of the status, security and property but also saw marriage as entailing lack of freedom, slavery and a restriction on their ability to leave.

b) Parties are unable to marry

(i) Same sex unions

2.2.23 Our common law defines marriage as a union between a man and a woman. This leaves parties of same-sex unions without legal resource.

(ii) Prohibited degree of blood-relationship

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

(iii) Married already

2.2.25 Prior to the Divorce Act, 1979\(^{45}\) it was difficult to obtain a divorce if one of the parties refused to cooperate. Today the spouse wishing to obtain a divorce may take the initiative without the other spouse’s cooperation.\(^{46}\) Factors such as the division of matrimonial

\(^{44}\) Issue paper no 17 (Project 118) available at [http://wwwserver.law.wits.ac.za/salc/issue/issue.html](http://wwwserver.law.wits.ac.za/salc/issue/issue.html).

\(^{45}\) Act No. 70 of 1979.

\(^{46}\) Hutchings & Delport 1992 *De Rebus*, at 122.
property, however, may still prevent spouses from seeking a divorce. See also above for the example of the city woman living with the man with a rural wife.

c) Customary marriage

2.2.26 A customary marriage may be incomplete or defective in some way. The new Recognition of Customary Marriages Act, 1998\(^47\) has not provided complete assistance to people who believe they are married but do not have a marriage certificate. For example, a woman may try to make use of the protections that the Act offers and her partner may deny that there is a marriage. It remains to be seen how the courts will deal with a situation where the parties differ on whether they are married. Many men are likely to deny the existence of a marriage because they realise that the law provides women with greater rights that they were afforded under the previous customary law.\(^{48}\)

d) Trial marriage

2.2.27 Another reason for the existence of the domestic partnership is that parties may use the domestic partnership as a precursor to marriage, the so-called "trial marriage".\(^{49}\) Whereas just 11% of marriages in the USA between 1965 -1974 were preceded by domestic partnerships, between 1980-84, 44% of all marriages involved at least one spouse who had cohabited. It is estimated that half of all couples who married after 1985 began their relationships as domestic partners.\(^{50}\)

e) Ignorance of the law

2.2.28 Even today many people believe that simply living with another person for a continuous period of time establishes legal rights and duties between them.\(^{51}\) Jackson notes that the regular reference to "common-law husband or wife" appears to lend credibility to this

\(^{47}\) Act No. 120 of 1998.

\(^{48}\) Goldblatt New Families, at 3.

\(^{49}\) Holland 2000 CJFL, ibid.

\(^{50}\) Rodriguez Cohabitation.

\(^{51}\) Research showed that a woman from Eldorado Park believed that the period was three months while others in Vryberg thought it was six months or two years. CALS Report, at 35.
Many different perceptions exist about the law. Some believe that the duration of the relationship creates legal protection while others think that having children together entitles the domestic partners to legal protection. Some parties do not know that there is no legal recognition of domestic partnerships.

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

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

Some people furthermore believe that marriage is unnecessary or irrelevant if no children are involved.

**f) HIV/Aids**

Besides the historic reasons for the massive breakdown in families and social dislocation, current problems relating to HIV/Aids have a profound impact on social relations and family forms. The fact that the Aids epidemic has left thousands of children orphaned has resulted in young children having to act as heads of families of even younger children.

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52 J Jackson "People who live together should put their affairs in order" (1990) 20 *Family Law* 439, referred to by Singh 1996 *CILSA*, at 318.
54 Sinclair & Heaton *Marriage Law*, at 274 and references made therein.
and has increased the numbers of grand parents taking care of their orphaned grandchildren, and other children living in adoptive families. Millions of people find themselves in these types of family relationships which directly affect their proprietary (and other) interests.

2.2.34 Seen against this background, the law and social policy reforms should aim to provide for both cohabiting couples in general as well as these new family types. 56 This must be done whilst acknowledging gender inequality and serious levels of violence against women.

2.3 Forms of domestic partnership

2.3.1 Account was taken of the family and family arrangements of the couple in order to categorise the main types of domestic partnership. The following forms of domestic partnerships have been identified: 57

a) Casual relationships of convenience

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

2.3.3 In the poorer sections of the community the women often squirrel away money and then hide their purchases such as cutlery and crockery. A number of domestic workers said that they no longer cohabit as men use them to get free accommodation, food and money. 58

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

57 Labuschagne 1989 TSAR, at 372 and the references therein.

58 CALS Report, at 30: A female respondent who is also a domestic worker described her arrangement as follows: "We are only keeping each other company. There is not much in the relationship".
b) Extension of affectionate dating and courtship or trial marriage

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

c) Permanent alternative to marriage

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

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

2.3.7 Most of the respondents in the Coloured township of Joe Slovo Park confirmed that domestic partnership rather than marriage was the norm in the area, even where people had been together for many years. A number of respondents said that while most Coloured people cohabit, their Xhosa neighbours were more likely to marry because "they have a tradition that they follow".59

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

2.3.9 From a law reform point of view, these categories suggest the need for a solution to the problem of de facto "polygamy"60 and a workable definition or test of domestic

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

60 See discussion in chap 7 below.
partnership that captures the essential elements of those relationships that are deserving of legal protection.
CHAPTER 3: THE LEGAL POSITION REGARDING DOMESTIC PARTNERSHIPS IN SOUTH AFRICA PRIOR TO THE INCEPTION OF THE INTERIM CONSTITUTION IN 1994

3.1 General: no specific family law protection for domestic partners

3.1.1. Marriage laws in South Africa have traditionally provided the parties to a marriage with a variety of legal protections.\(^1\) These laws govern what happens to the property of the parties during the marriage and on its dissolution, either by divorce or death. Being married also means that many State and other benefits are automatically acquired, such as membership of medical aid funds, pensions etc.

3.1.2. A legal marriage, furthermore, has to be entered into in accordance with the Marriage Act, 1961.\(^2\) Marriages under this Act, known as civil marriages, do not include Muslim and African customary marriages (partly because these marriages are potentially polygamous). No provision is made for partners in other kinds of intimate relationships.

3.1.3. Over the last few decades significant reforms of South Africa’s marriage laws have taken account of the context of gender inequality and the need for a fair system for the control of marital property. However, the protections they offer are only benefitting some of the couples who need assistance.\(^3\)

3.1.4. Domestic partnerships have never been prohibited by South African law, but equally they do not enjoy any noteworthy recognition or protection by the law.\(^4\) Simply stated, a man and a woman living together do not have the rights and duties of a married couple.\(^5\) The relationship is not recognised by law as a marriage with the concomitant and participatory rights and duties that marriage confers.\(^6\) That is the case irrespective of the duration of the relationship.\(^7\)

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\(^1\) Barnard, Cronje and Olivier *Persons and Family Law*, at 164 *et seq*.
\(^2\) Act No. 25 of 1961.
\(^3\) Goldblatt *Living Together*, at 2.
\(^4\) Report by Women’s Legal Centre.
\(^5\) Hutings & Delport 1992 *De Rebus*, at 121.
\(^6\) Singh 1996 *CILSA*, at 325.
\(^7\) Sinclair & Heaton *Marriage Law*, at 274. See also Hahlo *Fiat Iustitia*, at 246.
3.1.5 However, if one were to compare the situation with other countries, it would be
evident that there is scarcely a country left in the world that does not afford some measure of
recognition to a domestic partnership, always provided that the relationship is not of a casual
or intermittent character.\textsuperscript{8}

3.1.6 In so far as same-sex partnerships are concerned, South African society was, prior to
1994, characterised by a strong degree of hostility towards homosexuals and homosexual
conduct.\textsuperscript{9} The South African legislature and judiciary entrenched a system of "sexual
policing" in terms of which homosexual conduct was prosecuted.\textsuperscript{10} The treatment was
historically founded\textsuperscript{11} and did not generally include any explicit punishment for lesbian
behaviour.\textsuperscript{12}

3.1.7 In so far as the judiciary's attitude is concerned it should be noted that in 1956, 30
men were arrested on charges of indecent assault in Durban. In handing down sentences
from six to fifteen months, the magistrate declared:\textsuperscript{13}

\begin{quote}
your type is a menace to society and likely to corrupt and bring about degradation to
innocent and unsuspecting, decent-living young men and so spell ruin to their future.
\end{quote}

3.1.8 Even in 1990, in the case of \textit{S v M},\textsuperscript{14} one still found reference to the term "normal
heterosexual relationships".

3.1.9 The case of \textit{Van Rooyen v Van Rooyen}\textsuperscript{15} concerned the access rights of a lesbian
mother to her two minor children. The court explicitly rejected the idea that "the relationship
created on the basis of two females" could be called a family\textsuperscript{16} and attacked a statement by

\textsuperscript{8} Hahlo \textit{Fiat Iustitia, ibid.}
\textsuperscript{9} Steyn 1998 \textit{TSAR}, at 97; Wildenboer 2000 \textit{Codicillus}, at 58.
\textsuperscript{10} In terms of the common law sodomy and other "unnatural offences" between men were punished. See
also the 1969 amendment (Immorality Amendment Act, 1969 (Act No. 57 of 1969) to the Sexual
Offences Act, 1957 (Act No. 23 of 1957) which criminalised behaviour between male persons at a party
which is calculated to stimulate sexual passion to give sexual gratification. A "party" was defined as any
occasion where more than two persons were present.
\textsuperscript{11} See discussion above.
\textsuperscript{12} The Immorality Amendment Act, 1988 (Act No. 2 of 1988) did, however, prohibit "immoral and indecent
acts" between women and girls under 19. See also the discussion of \textit{Van Rooyen v Van Rooyen} 1994
(2) SA 325 (W) below.
\textsuperscript{13} Gevisser & Cameron, at 18 fn 6, referred to by Steyn 1998 \textit{TSAR}, at 98.
\textsuperscript{14} 1990 2 SACR 509 (E).
\textsuperscript{15} 1994 (2) SA 325 (W).
\textsuperscript{16} At 326J.
the family counsellor that homosexuality is no longer regarded as a mental illness or a sin; listing the "wrong signals" to which the children would be exposed in a lesbian household.\textsuperscript{17} The outcome was an extremely intrusive order, effectively forcing the mother to choose between her lesbian lifestyle and unencumbered access to her children.\textsuperscript{18}

3.1.10 It is therefore clear that since homosexuality was criminalised and lesbian behaviour was frowned upon, the recognition of a same-sex marriage or partnership of any kind would have been out of the question.

3.1.11 Gay rights formed part of the broader spectrum of human rights that were negated by the apartheid system. The government’s divisive strategy that was so integral to the concept of apartheid would, however, prove to be a crucial link in the subsequent development of human rights and gay consciousness.\textsuperscript{19}

3.2. Ordinary rules and remedies of the law

3.2.1 No family-law consequences flowed automatically from domestic partnerships. Partners could not invoke any of the protective, adjustive and supportive measures available to spouses. In order to find protection, partners (mainly opposite-sex, but, to the extent that it was possible, same-sex partners as well) had to make use of the ordinary rules and remedies of the law, such as those relating to property and contract, unjustified enrichment and estoppel.\textsuperscript{20} It is important to note that these remedies are still available to partners today, although they are not the sole remedies anymore. See the discussion on the post-constitutional developments in chapter 4 below.

\textbf{a) Contract}

3.2.2 Even though domestic partners do not have the rights and duties of a married couple, the South African courts have on occasion come to the assistance of such couples by deciding that an express or implied universal partnership proper (\textit{societas universorum}

\begin{flushright}
\textsuperscript{17} At 329B-330B.
\textsuperscript{18} At 329F-G; Steyn 2001 TSAR, at 346.
\textsuperscript{19} Gevisser and Cameron \textit{Gay & Lesbian Lives}, at 4-5 fn 4, referred to by Steyn 1998 TSAR, at 99 fn 17.
\textsuperscript{20} Sinclair & Heaton \textit{Marriage Law}, at 274 with references made therein.
\end{flushright}
3.2.3 The concept of universal partnership is found in the law of contract. A universal partnership can be defined as an agreement where the contracting parties agree to bring all their present and future goods, in whatever way they were accumulated, into the community of property.

3.2.4 It was originally used in divorce cases, prior to the introduction of the judicial discretion to redistribute property in certain instances, to assist women married out of community of property to achieve a sharing of the assets accumulated by joint effort.

3.2.5 The universal partnership can arise from an express or tacit agreement. Although evidence may present a problem, the court may find that a partnership exists between persons who cohabit and that each is entitled to share equally in the profits.

3.2.6 The leading precedent in South African Law on the proprietary consequences of domestic partnership is *Ally v Dinath*. The parties in this case lived together as man and wife in an Islamic relationship for fifteen years before the relationship broke down.

3.2.7 The plaintiff, a female, alleged that they had shared a joint household, pooled their assets, income and labour for their joint benefit and, therefore, had tacitly, or alternatively by implication, entered into a universal partnership (a partnership *universorum bonorum*) in equal shares and accumulated a joint estate for the benefit of both parties. She also sought a half share in the immovable property which had been their common home but which was registered only in the name of the defendant.

3.2.8 The plaintiff alleged that they had a joint household and that each was entitled to share equally in the profits. The court found that a partnership existed between the parties, and awarded the plaintiff a half share in the immovable property.

References:
- Schwellnus, at 6; See also De Bruyn & Snyman 1998 *SA Merc LJ* at 279 and the references therein.
- Bamford *Partnership*, at 122.
- Sinclair & Heaton *Marriage Law*, at 279 and the references therein.
- Hutchings & Delport 1992 *De Rebus*, at 122.
- Labuschagne E 1985 *TSAR*, at 219; Other important case law in this regard:
  - Mograbi v Mograbi 1921 AD 274; *Fink v Fink* 1945 WLD 226; *Isaacs v Isaacs* 1949 (1) SA 952 (C); *V (also known as L) v De Wet NO* 1953 (1) SA 412 (O) Pom v Mazista Ltd 1981 3 SA 152 A.
3.2.8 Relying on the decision in *Annabhay v Ramlall and Others* the defendant raised two points in his defence. He stated that there were no allegations of an express agreement to enter into a universal partnership, and neither were there any allegations that the object of the partnership was to make a profit.

3.2.9 Eloff J dismissed the exceptions. He disagreed with the interpretation of Voet in *Annabhay's* case where it was stated "that a universal partnership of all present and future goods cannot be entered into by implied consent and circumstances." He also disagreed with the Tudor translation of Pothier on Partnership which stated that "partners are not considered, in the absence of express contract, to have entered into this kind of partnership".

3.2.10 He preferred to rely on Kotze's translation of Van Leeuwen's treatise on Roman Dutch Law where it states

> ....sometimes it happens that this (contracting of community of property) is also understood to have taken place tacitly, and the community is created by conduct. For it is considered that the existence of something may be established not only by express words but also by conduct.

3.2.11 He held that it would be contrary to well settled principles if it were to be said that a particular contract could not be created tacitly. The principle is firmly established that any contract can be brought about by conduct.

3.2.12 In so far as the second point raised is concerned, namely that the object of the partnership was not to make a profit, Eloff J held that a purely pecuniary profit motive is not required. He stated that the achievement of other material gain, such as a joint exercise for the purpose of saving costs, will suffice. In the present case the objective of this accumulation of an appreciating joint estate is sufficient.

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26 1960 (3) SA 802 N.

27 He stated that Voet was not laying down a principle of general application; he merely intended to convey that one does not readily infer from a tacit partnership that the partners intended to include all the assets in the community, but only such assets as they in fact dealt with. It has of course to be borne in mind that one cannot infer from the conduct of parties a contract with a greater scope than is intended by conduct.

28 He held that this passage should not be interpreted to mean other than that a clear contract is required, not that a tacit agreement may not establish a universal partnership.

29 At 454 F.
3.2.13 In Muhlman v Muhlman the requirements for a partnership which had been set out in previous case law, were reiterated and confirmed on appeal. They are that:

(i) each party should bring something into the partnership, or bind himself or herself to bring something into it;
(ii) the venture should be carried on for the joint benefit of the parties;
(iii) the object should be to make a profit;
(iv) the partnership contract should be valid.

3.2.14 Hoexter JA furthermore agreed that an express agreement was not a prerequisite and ruled that the proper enquiry was simply whether it was more probable or not that a tacit agreement had been reached.

3.2.15 However, the court made it clear that it would be difficult to prove a tacit agreement. Where the claimant (wife) had been working in the husband’s business without remuneration, unless she had rendered services manifestly exceeding those ordinarily expected of a wife in her situation, a court would not easily be persuaded to infer a tacit agreement of partnership.

3.2.16 Similarly, where a wife enters an established and flourishing business, it will be more difficult for her to establish that a partnership must be inferred. A mere agreement to pool assets does not satisfy the requirements for the creation of a partnership; nor does contribution by both parties to the purchase price of an asset owned by one of them satisfy the requirements.

3.2.17 Ironically, in a case of domestic partnership, it may be easier to show a contribution to a universal partnership as there may not be the same societal assumptions about the role of a woman as a dutiful wife.

3.2.18 In Fink v Fink and Another the parties were married out of community of property and had built up a dairy business together. On divorce, the defendant claimed that a partnership had existed between the parties in respect of the business and claimed a share
in the enterprise. The court indicated that in cases where an implied agreement is alleged, the intention of the parties must be ascertained by their words and conduct.

3.2.19 Although it is therefore possible to rely on an implied contract, there are problems\textsuperscript{35} that can limit its effectiveness. As seen above, these kinds of contract are notoriously difficult to invoke and prove and the person relying upon the agreement bears the onus of proof, not only of the existence of the agreement itself, but also as to the terms of the agreement showing a universal partnership.\textsuperscript{36}

3.2.20 The non-designee faces the difficult task of satisfying the court that, in equity, he or she contributed to the property. The notion of ‘equity’ in our law remains undefined save to say that it will be based upon the intentions of the parties which must be proved directly or inferred from their conduct.

3.2.21 Without any witnesses, oral agreements are difficult to prove - it is one person's word against another's; it is very difficult to prove the existence of a tacit universal partnership. It is therefore very risky to rely on a tacit universal partnership. The partner who feels that he or she has not been given a fair share will very often not be the better-off one in the couple, and may not be able to afford expensive lawyers to fight his or her case. It can also be very expensive to lose a court case.\newline

(ii) Express Contract

3.2.22 Domestic partners may also choose to regulate various aspects of their relationship by means of a contract.\textsuperscript{37} The contract clarifies the expectations of the partners and it could also serve as an early warning of future possible problems.\textsuperscript{38}

\textsuperscript{35} Sinclair & Heaton \textit{Marriage Law}, at 278.

\textsuperscript{36} Report by Women’s Legal Centre, at 12; See also Singh 1996 \textit{CILSA}, at 325: However, working together to accumulate assets will not automatically or easily imply the creation of a universal partnership. The test of a tacit universal partnership as set out in the cases is onerous and in absence of any other remedy, provides no definite protection for the cohabiting parties. As it is, the principle would work better where there has been a long-standing relationship, but it clearly falls short when one considers shorter (one/two year) relationships. In the latter cases, the claimant faces an uphill battle to prove the tacit agreement. In the absence of express agreement and because of the paucity of statutory protection, parties in a cohabitation relationship may find themselves in an extremely difficult position.

\textsuperscript{37} Hutchings & Delport 1992 \textit{De Rebus}, at 122.

\textsuperscript{38} See Hutchings & Delport 1992 \textit{De Rebus}, \textit{ibid} for a discussion of clauses in the contract.
3.2.23 A contract (domestic partnership agreement) will determine what would happen to property and assets of the couple if they should separate. The agreement is, however, not enforceable in so far as third parties are concerned.

3.2.24 The contracts will often contain terms and provisions similar in intent to a nuptial agreement. To rely on the contract and ensure that it fulfils its purpose, the contract should ideally be reduced to writing, witnessed and signed, either by the parties acting on their own, or preferably with the assistance of a competent legal advisor.

3.2.25 The contract should cover liability and ultimate responsibility for the parties' reasonable and anticipated expenses and include consensus regarding, inter alia, payment of all daily household expenses together with allocating responsibility for other household costs, maintenance and repairs.

3.2.26 Parties to the relationship would be advised to stipulate their joint assets as separate and specific from their individual assets, in the absence of any further agreement, since the latter will remain the property of the initial owner.39

3.2.27 However, it is important to note that, especially in the past, unlike marriage, extra-marital relationships were not recognised as "social institutions". Therefore a major concern with advising reliance on a pre-cohabitation contract was that the courts would refuse to uphold it for being contra bonos mores.40

3.2.28 A conservative court might find the partnership contract to be tainted with immorality - the underlying idea being that a contract by which one person is compensated for sexual favours is null and void because it promotes immorality and is thus against public policy.

3.2.29 The basic rules are as follows:

(a) in accordance with the ex turpi causa non oritur actio doctrine, an immoral contract will not be enforced; and
(b) a "money for sex" contract falls within this category. The change in judicial attitudes that has occurred relates to the approach which the courts will adopt

40 Labuschagne E 1985 TSAR, at 222.
in determining whether that contract is a "money for sex" contract.\textsuperscript{41}

3.2.30 It has been argued\textsuperscript{42} that such contracts are so closely linked to the supposed 'immoral' character of the relationship between the cohabiting parties that the enforcement of the contract would violate public policy.

3.2.31 However, the counter-argument is simple: the fact that a man and a woman live together without marriage and engage in a sexual relationship, cannot and should not, in itself, invalidate agreements between them relating to their earnings, property or expenses.\textsuperscript{43} Neither should such an agreement be invalid merely because the parties may have contemplated the creation or continuation of a non-marital relationship when they entered into it.\textsuperscript{44}

3.2.32 It has therefore been suggested that by virtue of changed societal mores, and in line with the softening of the approach to this question in other jurisdictions, our courts should accept the view that express and implied contracts between partners should be enforced.\textsuperscript{45}

3.2.33 The courts recognised that just as there is more to a legal marriage than sex - love, companionship, mutual support in sickness and health - so sex is only one element, and not necessarily the most important one, in a common-law union.\textsuperscript{46}

3.2.34 Adults who live together in a consensual relationship and engage in sexual relations are as competent as any other persons to order their economic affairs by contract and no policy should preclude a court from enforcing such an agreement. An agreement between non-marital partners is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services.\textsuperscript{47}

\textsuperscript{41} Hahlo \textit{Fiat Iustitia}, at 256 with references made therein.
\textsuperscript{42} \textit{Fender v St John-Mildmay} [1938] AC 1 (HL) at 42: "The law will not enforce an immoral promise, such as a promise between a man and a woman to live together without being married or to pay a sum of money or to give some other consideration in return for immoral association." Referred to by Hahlo \textit{Fiat Iustitia}, \textit{ibid}.
\textsuperscript{43} Hahlo \textit{Fiat Iustitia}, at 247.
\textsuperscript{44} Singh 1996 \textit{CILSA}, at 324.
\textsuperscript{45} Sinclair & Heaton \textit{Marriage Law}, at 281.
\textsuperscript{46} Hahlo \textit{Fiat Iustitia}, at 256 with references made therein.
\textsuperscript{47} \textit{Marvin v Marvin} 1976 18 Cal 3d 660, referred to by Singh 1996 \textit{CILSA}, at 323.
3.2.35 Thomas states that a contract of this nature is not contra bonos mores in the light of the decision in Ally v Dinath and that it could thus be enforced between the cohabitants (in the above case no reference was made to the question of boni mores).

3.2.36 In Hewitt v Hewitt, on facts very similar to the British case of Windeler v Whitehall, the Appeal Court held that based on the fact that the parties had outwardly lived a conventional married life the plaintiff’s conduct had not "so affronted public policy that she should be denied any and all relief".

3.2.37 In the case of Ismail v Ismail the court was precluded from enforcing the terms of the contractual agreement between the parties as it was void because of public policy (in this case because it could lead to polygamy).

3.2.38 Real problems do arise with the enforcement of a domestic partnership agreement - express or implied- where the partner being sued is still legally married to a third party. It has been argued that in such cases domestic partnership agreements violate public policy to the extent that they impair the community of property rights (where applicable) of the lawful married spouse.

3.2.39 This defence was raised in the Marvin case where the defendant claimed that any alleged arrangement between himself and his cohabitating partner purporting to transfer to her a half interest in their community of property, could not be upheld on the ground that the arrangement was contra bonos mores since it infringed the property rights of his lawful wife.

3.2.40 The court decided that whether or not the defendant's contract with the plaintiff exceeded his rights in the community of property between himself and his wife, defendant's argument could not be upheld for the reason that an improper transfer of community of property is not void ab initio but merely voidable.

3.2.41 This argument would be equally acceptable in South African law as the provisions of

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1979 77 Ill 2d 49, referred to by Singh 1996 CILSA, ibid.


1983 (1) SA 1006(A).

Marvin v Marvin, ibid.
section 15 of the Matrimonial Property Act, 1984\(^\text{53}\) are similar in effect.

3.2.42 Consequently, it is possible for a domestic partner to create a community of property with his or her partner to whom he or she is not married which has no effect on the community of property established with his spouse.\(^\text{54}\)

3.2.43 It should not be forgotten that drawing up a contract is not the panacea for the problem of regulating domestic partnership. Contractual regulation is reserved largely for the sophisticated, literate, middle class. It rarely caters effectively for the most vulnerable members of society. And even if partners do enter into a contract, it may turn out to be unsatisfactory.

3.2.44 Firstly, many couples who enter into domestic partnership agreements at an early stage of their relationship are unlikely or unwilling to think of the consequences of possible breakdown and choose to concentrate on governing an ongoing relationship.

3.2.45 Secondly, a contract concluded at the outset of a relationship may not make provision for changed circumstances, or may be framed in a way which makes it difficult to adapt it to the changing circumstances of the union, such as the birth of children.

3.2.46 Furthermore, it is an unfortunate but persisting reality that partners in intimate relationships seldom bargain on an equal footing. Agreements between them are commonly used to insulate the position of the economically stronger partner (usually the man); woman are often more risk-averse than men and often do not have the same access to legal representation and expertise.\(^\text{55}\)

3.2.47 Owing to ignorance of the law, lack of access to lawyers, poverty and unequal power relations between the partners, contract law is not a practical solution to the existing problem.\(^\text{56}\)

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\(^{53}\) Act No. 88 of 1984.
\(^{54}\) Singh 1996 CILSA, at 324.
\(^{55}\) Sinclair & Heaton Marriage Law, at 283.
\(^{56}\) CALS Report, at 11.
b) Proprietary estoppel

3.2.48 Alternatively, a disadvantaged partner may rely on the doctrine of proprietary estoppel. Here again, he or she faces the onus of proving that the legal titleholder created a situation from which it could be reasonably inferred that some right or legal interest in or over the property had been accorded to the non-owner. Further, the party raising the defence bears the onus of proving precisely how he or she acted to his or her prejudice by relying on the alleged promise.57

3.2.49 If the opposite-sex couple held themselves out as husband and wife, they will be bound by each other's contracts for household necessities to the same extent as if they were legally married because they will be estopped from denying a contract of agency.58 There exists an evidentiary presumption that parties who live openly together as man and wife are legally married.59

c) Unjustified enrichment

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

3.2.51 If the relationship of an unmarried couple breaks up during the parties' joint lives, an individual who has rendered him/herself financially dependent on her partner will only be entitled to a contribution for services rendered on the grounds of unjustified enrichment in order to achieve justice between the two of them. The latter remedy is available to a person unjustly impoverished at the expense of another person.

3.2.52 The same principle would apply if the partner had made a genuine financial contribution, for example, in the case where the owner of a house and his/her partner contributed jointly to the purchase of a house which is registered only in the owner's name.60

57 Singh 1996 CILSA, at 319.
58 Sinclair & Heaton Marriage Law, at 284.; Thompson v Model Steam Laundry Ltd 1926 (TPD) 674.
59 Labuschagne 1989 TSAR, at 375 fn 38 and the references to Ex parte Azar 1932 OPD 107 at 109; Ex parte L 1947 (3) SA 50 (K) 55; Ex parte Soobiah 1948 (1) SA 873 (N) 881.
60 Hutchings & Delport 1992 De Rebus, at 121.
3.2.53 For many years it was thought that the law on unjustified enrichment only applied to certain recognised categories and that the domestic partnership was not one of these. Our law had no general enrichment claim. 61

3.2.54 This view was based on the judgment in Nortje and Another v Pool NO62 in which the Appellate Division denied the existence of such a claim and held that a plaintiff had to bring his or her cause of action within the recognised condictiones.

3.2.55 In the decision of Kommissaris van Binnelandse Inkomste v Willers,63 however, the Appellate Division decided that Nortje's case does not exclude extension of liability on the ground of unjustified enrichment cases where such liability has not existed in the past. Botha JA held that the decision in the Nortje case does not preclude the court from finding that there is enrichment in a particular case merely because liability has not previously been recognised in the same, or similar, circumstances. In each case the court will have to consider whether extension of liability on the grounds of enrichment is necessary or desirable.64

3.2.56 This decision augered well for domestic partners: although the Appellate Division did not overturn the decision in Nortje, it has clearly acknowledged the need for a general unjustified enrichment claim in our law and might well on particular facts recognise one.

3.2.57 The law is, however, still not clear - relying on these laws is risky and unpredictable. Courts are very concerned about certainty and if there is any doubt and a judge is unclear, he or she might be unwilling to make any decision.

d) Constructive trust

3.2.58 Significant is the readiness of English, American, Canadian and Australian courts to find a resultant or constructive trust in favour of a common-law wife who has contributed

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61 Sinclair & Heaton Marriage Law, at 277.
62 1966 (3) SA 96 (A).
63 1994 (3) SA 283 (A).
64 At 333 C-E.
money, money's worth or labour to the acquisition of property by her paramour.65

3.2.59 The South African law of trusts, for technical and historical reasons, is unlikely to be the vehicle for the results that have been achieved in other jurisdictions. In our law a trust66 exists when the creator of the trust [the founder], ... has handed over or is bound to hand over to another the control of property which, or the proceeds of which, is to be administered or disposed of by the other (the trustee or administrator) for the benefit of some person other than the trustee as beneficiary, or for some impersonal object.

3.2.60 An intention on the part of the founder to create a trust is a central requirement. Normally the intention has to be express. The court will infer an intention to create a trust only if it is clear from all circumstances that this was the common intention of the founder and the trustee.

3.2.61 Thus, unlike in Anglo-American law, a trust cannot be created if the persons who are bound by it have no clear intention to create it. For these reasons there is little scope for the development in South African law of the resulting, implied or constructive trust of Anglo-American law.67

65  Hahlo *Fiat Iustitia*, at 259 and the references made therein.
66  Sinclair & Heaton *Marriage Law*, at 277.
67  Sinclair & Heaton *Marriage Law*, *ibid* and the references made therein.
CHAPTER 4: LEGAL DEVELOPMENTS REGARDING DOMESTIC PARTNERSHIPS IN SOUTH AFRICA AFTER 1994

4.1 Constitutional and human rights imperatives

4.1.1 In December 1993 South Africa adopted an interim Constitution which included "sexual orientation" and "marital status" as expressly prohibited grounds of discrimination. These clauses were retained as enumerated grounds of discrimination in the Bill of Rights enshrined in the Constitution of the Republic of South Africa, 1996.3

4.1.2 Section 9 of the Constitution of 1996 (the so-called equality clause) states that everyone is equal before the law and has the right to equal protection and benefit of the law.4 Neither the state nor any other person may unfairly discriminate directly or indirectly against anyone on the grounds stated.

4.1.3 All these grounds have bearing on the development of family law towards a more

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2 Steyn 1998 TSAR, at 100 (with references made therein) explains that the inclusion of "sexual orientation" in this fashion was largely due to the lobbying work of the Organisation of Lesbian and Gay Activists (OLGA) that led to the inclusion in the ANC's draft Bill of Rights of a clause outlawing discrimination on the basis of sexual orientation. This clause also found its way into proposals of the Inkatha Freedom Party and the Democratic Party. The National Party furthermore went accord with the proposal of the Commission that lesbians and gays should be seen as a "natural group" and that discrimination on the basis of a "natural characteristic" should be prohibited. A "natural group" is one with characteristics that the members did not choose themselves; See also Cameron 2002 SALJ, at 644 et seq.
4 S 9 of the Constitution of 1996 states:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal treatment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.
inclusive and pluralistic system.\textsuperscript{5}

4.1.4 The conditions enumerated in the equality provisions of the Bill of Rights have two factors in common. They are grounds on which people in fact discriminate against others and yet, as a basis of decision-making, they stand in the way of a proper appreciation of the human capacities of the person in question. Such discrimination damages the dignity of the person in question and violates the public good in that it impedes the proper distribution of social goods and services. Irrelevant and stigmatising criteria should not be used as a basis for judging people and their legitimate place in society.\textsuperscript{6}

4.1.5 Even though there is a presumption in section 9 that discrimination on the enumerated grounds is unfair, this is not an absolute provision and it may therefore be limited where the limitation in terms of section 36 would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

4.1.6 Section 36(1) further details relevant factors in deciding the issue of circumscribing a right which include an examination of the nature of the right, the importance of the purpose of the limitation, the relation between the limitation and its purpose and whether there exist less restrictive means of achieving the purpose.

4.1.7 There has been a number of important legal developments in the field of family law since the enactment of the Constitution. These developments point to a recognition by the lawmakers and the courts that the notion of family is influenced by culture and changes over time. There is also a recognition that the nucleus model of a single-generation, heterosexual, civilly married couple with children born within wedlock is neither the norm nor the only form of family that deserves legal recognition.\textsuperscript{7}

4.1.8 The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000\textsuperscript{8} is one Act that gives greater effect to the constitutional guarantee. The Act prohibits discrimination against any person in terms of section 6. In terms of the Act the prohibited grounds for discrimination again include marital status and sexual orientation.

\textsuperscript{5} See CALS Report, at 12.
\textsuperscript{6} Cameron 2002 \textit{SALJ}, at 645.
\textsuperscript{7} CALS Report, at 11.
\textsuperscript{8} Act No. 4 of 2000. This legislation was enacted in terms of s 9(4) of the Constitution of 1996 which stated that "national legislation must be enacted to prevent or prohibit unfair legislation".
4.1.9 In section 25(4) of this Act it is stated that all Ministers must implement measures within the available resources which are aimed at the achievement of equality in their areas of responsibility by \textit{ia} eliminating any form of unfair discrimination or the perpetuation of inequality in any law, policy or practice for which those Ministers are responsible.

4.1.10 The Act in section 34 furthermore refers to the possible inclusion of the grounds of “family responsibility” and “family status” within the listed grounds of discrimination.

4.1.11 The Employment Equity Act, 1998\footnote{Act No. 55 of 1998} is also important since it contains the ground of discrimination on the basis of family responsibility.\footnote{CALS Report, at 12.}

4.1.12 The position of the family in the new dispensation has been the subject of a number of court cases. In \textit{Dawood and Others v Minister of Home Affairs}\footnote{Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs, 2000 (8) BCLR 837 (CC) at para 31.} O Regan J said the following:

\begin{quote}
... families come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.
\end{quote}

4.1.13 Ackermann J\footnote{National Coalition for Gay and Lesbian Equality and Others v The Minister of Home Affairs and Others 2000 (2) SA 1 CC at para 47.} made similar statements in a leading case dealing with the rights of same-sex life partners:

\begin{quote}
It is important to emphasise that over the past decade an accelerating process of transformation has taken place in family relationships as well as in societal and legal concepts regarding the family and what it comprises.
\end{quote}

4.1.14 South Africa, furthermore became the first country in the world formally to protect freedom of sexual orientation as a basic human right in its Constitution.\footnote{Steyn 1998 \textit{TSAR}, at 100; Wildenboer 2000 \textit{Codicillus}, at 59.} The fact that sexual orientation is entrenched in the Constitution of 1996 as an enumerated ground of non-discrimination constitutes a major policy change based on an altered perception of social reality. It is significant enough in the Western context, but for an African state this type
of libertarian jurisprudence is unheard of.\textsuperscript{14}

4.1.15 The change in societal perceptions of homosexuality was already apparent from the approach in \textit{S v H},\textsuperscript{15} where the Court stated:\textsuperscript{16}

There is a growing body of opinion, in South Africa as well, which questions fundamentally the sociological, biological, religious and other premises on which the proscription of homosexual acts between consenting adult men which takes place in private, have traditionally been based.

4.1.16 The Court furthermore criticised the phrase "normal heterosexual relationships" as employed in \textit{S v M}\textsuperscript{17} on the basis that it "implies that homosexual relationships are abnormal in a sense other than the mere fact that they are statistically in the minority."\textsuperscript{18} The Court concluded:

In my respectful view the use of the word "normal" in this context is unfortunate, as it might suggest a prejudgement of much current psychological and sociological opinion which is critical of various conventions and assumptions regarding human society. It may also suggest a wrong line of enquiry when coming to re-evaluate the status of homosexual relationships. I would suggest that a more fruitful legal enquiry might be directed at concepts of privacy and autonomy and the issue whether private sexual intimacy per se between consenting male adults can ever cause harm to society any more than private heterosexual intimacy between consenting adults.

4.1.17 In \textit{National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others}\textsuperscript{19} the court found that the common-law offence of sodomy\textsuperscript{20} was unconstitutional as violating the rights of equality, dignity and privacy. Ackermann J stated as follows:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy.

\textsuperscript{14} Steyn 1998 \textit{TSAR}, at 97. See comparative study in chap 7 for a discussion on Africa's legal position.
\textsuperscript{15} 1995 (1) SA 120 (C).
\textsuperscript{16} At 122.
\textsuperscript{17} 1990 (2) SACR 509 (E).
\textsuperscript{18} Steyn 1998 \textit{TSAR}, at 99.
\textsuperscript{19} 1998 (2) SACR 102 (W) upheld by the Constitutional Court in 1998 (12) BCLR 1517 (CC), 1999 (1) SA 6 (CC).
4.1.18 It was stressed that the determining factor regarding the unfairness of discrimination is, in final analysis, the impact of the discrimination on the complainant or the members of the affected group.21

4.1.19 This was a groundbreaking judgment regarding the nature of gay identity in South Africa. It laid a solid foundation, relying principally on the right to equality, but also on dignity and privacy, on which further developments in gay and lesbian rights have been and can be based.22

4.1.20 The case points to a profound shift in our law towards gay men and lesbians. It suggests that legislation based on a heterosexual norm which assumes that only heterosexuality is normal or natural, will inevitably be problematic from a constitutional perspective. It also implies that traditional legal principles and constructs - including the notion of the exclusive heterosexual marriage and family - are in need of revision.23

4.1.21 Constitutional protection was arguably the most significant reason behind changed public attitudes toward gays and lesbians.24

4.1.22 There are a number of constitutional arguments to be made for the recognition and regulation of domestic partnerships in South Africa. It seems that there is a strong argument for viewing domestic partnerships as a form of family that deserves protection since singling out marriage as the only protected institution would constitute unfair discrimination. The

21 The approach to this determination is a nuanced and comprehensive one in which various factors come into play which, when assessed cumulatively and objectively, will assist in elaborating and giving precision to the constitutional test of unfairness. Important factors to be assessed in this regard (which do not constitute a closed list) are:

(a) the position of complainants in society and whether they have suffered in the past from patterns of disadvantage;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in their fundamental human dignity or in a comparably serious respect, but is aimed at achieving a worthy and important societal goal as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

22 Louw 2000 SAJHR, at 319.

23 De Vos Sexual Orientation.

24 Louw 2000 SAJHR, ibid.
courts have been quite ready to accept this argument where it has been made by partners in gay and lesbian relationships.

4.1.23 In *Langemaat v Minister of Safety and Security*25 the applicant, a lesbian, had lived with her partner for almost twelve years. They owned a house, operated joint finances and had named each other beneficiaries in their respective insurance policies. The applicant requested that her partner be registered as her dependant with Polmed.

4.1.24 The court declared regulation 30(2)(b) of the South African Police Services Regulations and Polmed's Rule 4.2 to be in conflict with the Constitution and thus invalid. The reason was that the Polmed's regulations defined "dependant" as the legal spouse or widower or the dependant child of the member.

4.1.25 The court also provided an extension of the common-law duty of support. It found that a same-sex couple who had lived together in an intimate and stable relationship for many years owed a duty of support to each other. Unfortunately the argument and reasoning for the extension in the judgment is not very comprehensive.26

4.1.26 In the *Langemaat* case the court found that the principles in our law are not clear as to who is under such a duty. Although the court held that a same-sex union created a duty to support, it seems that this is a prima facie right only.27

4.1.27 The court stated with regard to same-sex couples:

> The stability and permanence of their relationships is no different from the many married couples I know. Both types of unions are deserving of respect and protection. If our law does not accord protection to the type of union I am dealing with, then I suggest it is time it does so.

4.1.28 However, the court indicated that the relationship between couples to a same-sex union will be recognised only if it has existed for some time. Couples will have to prove that their relationships are stable and permanent. It should be noted that couples in a marriage relationship still do not have to prove anything but the marriage to enjoy benefits. The same-

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25 1998 (3) SA 312 T.
26 Report by Women's Legal Centre, at 17.
27 At 316 D, referred to by Wildenboer 2000 *Codicillus*, at 59.
sex couple will therefore still have to make a special application to enjoy the same benefits that a married couple can automatically enjoy.\(^{28}\) The court, therefore, did not afford same-sex couples the same protection as the institution of marriage.\(^{29}\)

4.1.29 With regard to custody of children by lesbian mothers, there have been significant shifts away from the Van Rooyen\(^{30}\) case in the past couple of years. In V v V\(^ {31}\) the court found that the homosexuality of the mother was not necessarily a bar to joint custody. In addition there have been at least two unreported judgments where the court has found in favour of a lesbian mother in a custody matter.\(^ {32}\)

4.1.30 In the case of National Coalition for Gay and Lesbian Equality v Minister of Home Affairs\(^ {33}\) the court found section 25 of the Aliens Control Act of 1991\(^ {34}\) to be inconsistent with the provisions of section 9 of the Constitution of 1996 and therefore invalid. The provision facilitated the granting of immigration permits to spouses of South African citizens or permanent residents.

4.1.31 The court found that section 25 conferred benefits exclusively on spouses, thereby discriminating against same-sex life partners. It found that the provision in the Act constituted unfair discrimination and an unjustifiable limitation of the right to equality and to dignity of gay and lesbian persons who are in permanent same-sex life partnerships with foreign nationals.

4.1.32 The court unanimously found that gay and lesbian relationships can constitute a family, whether nuclear or extended. The court stated that these relationships establish, enjoy and benefit from family life in similar ways as heterosexual spouses. The court emphasised that lesbians and gays are capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running a common

\(^{28}\) Wildenboer 2000 *Codicillus*, at 61.

\(^{29}\) Wildenboer 2000 *Codicillus*, at 59.

\(^{30}\) *Op cit.*

\(^{31}\) 1998 (4) SA 169 C.

\(^{32}\) Mohapi v Mohapi (WLD 1998, unreported) and Greyling v Minister of Welfare and Population Development (WLD case no 98/8297, unreported), referred to by Louw 2000 *SAJHR*, at 315.

\(^{33}\) 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC).

\(^{34}\) Act No. 96 of 1991.
4.1.33 The judgment entrenched the principle that discrimination on the basis of marital status and sexual orientation in this context is unfair and cannot be justified by the state’s desire to promote marriage and family life.  

4.1.34 It has been argued that if, as the court stated, gays and lesbians are just as capable of forming families and raising children as heterosexual families and if one has a right to form such a family, the state has a positive duty to ensure that it becomes possible for gay men and lesbians to exercise these rights. It also places a duty on the state to put in place the legal framework that would provide the same rights and duties associated with traditional marriage and family life.  

4.1.35 In Satchwell v President of the Republic of South Africa and Others a High Court judge took the Minister of Justice to court for failing, despite undertakings to do so, to have effected changes to the law that determines the remuneration and conditions of service of judges. The Judges Remuneration and Conditions of Employment Act, 1989 provides for certain benefits for the spouses of judges. The judge, a partner in a long standing same-sex relationship, claimed that her partner was unfairly discriminated against because she was not eligible for these benefits.  

4.1.36 The court declared unconstitutional - and hence extended - certain provisions of the abovementioned Act and corresponding regulations so as to confer "spousal" benefits - pension rights, travelling and subsistence allowances- upon the same-sex life partners of judges. Kgomo J relied heavily on the constitutional right to dignity in coming to his finding.  

4.1.37 The respondent submitted before the Constitutional Court that the orders made by the High Court were invalid in that they failed to make provision for unmarried heterosexuals in permanent relationships. Madala J, on behalf of a unanimous Court, declined to consider

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35 At para 53.  
36 Report by Women’s Legal Centre, at 11.  
37 De Vos Sexual Orientation, at 4.  
38 2001 (12) BCLR 1284 (T).  
the latter argument, pointing out that it raised questions of fact and law not raised by the applicant and not considered by the High Court. The orders made by Kgomo J were in the main confirmed by the Constitutional Court.\footnote{Satchwell v President of the Republic of South Africa and Another op cit.}

4.1.38 Madala J, however, added the following interesting qualification to the orders made by the High Court:

I should emphasise however that section 9 generally does not require benefits provided to spouses to be extended to all same-sex partners where no reciprocal duties of support have been undertaken. The Constitution cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations ... In my view the order by the High Court reading in the words "or partner in a permanent same-sex life partnership" to remedy the constitutional wrong that is the impugned provisions, omits an important requirement. It fails to have regard to the requirement of a reciprocal duty of support. That is addressed in the order I make. Such partners must have undertaken and committed themselves to reciprocal duties of support.\footnote{Para [24], [25] and [34].}

4.1.39 In the case of \textit{Du Toit and Another v Minister for Welfare and Population Development and Others}\footnote{2002 (10) BCLR 1006 (CC).} the Constitutional Court struck down provisions of the Child Care Act, 1983\footnote{Act No. 74 of 1983.} prohibiting the joint adoption of children by same-sex couples. Of interest in this case was that the arguments adduced concerned not only the rights of the adult same-sex applicants, but also the best interests of the children involved. The court was of the view that the situation that was created by only one partner to the same-sex union having a legal relationship with the adopted children was manifestly not in the best interests of those children whose rights their care-givers sought to enforce and protect.

4.1.40 In the matter of \textit{J and B v Minister of Home Affairs and Another}\footnote{CCT 46/02.} the applicants were two women in a permanent same-sex relationship. In 2001 the one applicant gave birth to twins as a result of in vitro fertilisation, using the oocytes of the other applicant and the sperm of an anonymous donor.
4.1.41 Section 5 of the Children's Status Act, 1987\(^{46}\) provides for the legal status of children born in consequence of artificial insemination but does not provide for these rights in case of permanent same-sex relationships.

4.1.42 The High Court ordered that the section was unconstitutional for this reason as it violated the applicants’ rights to human dignity as well as the children's rights to family and parental care. On 28 March 2003, the Constitutional Court confirmed that section 5 of the Children's Status Act of 1987 was inconsistent with the Constitution and ordered that it should be read to provide the same status to children born from artificial insemination to same-sex permanent life partners, as it provided to such children born to heterosexual married couples.

4.1.43 The Constitutional Court remedied the unconstitutionality by striking out the word "married" wherever it appeared and reading in the words "or permanent same-sex life partner" after the word "husband" wherever it appeared.\(^{47}\)

4.1.44 Of interest is the fact that there is no formal recognition of permanent life partnerships of heterosexual couples in South Africa.\(^{48}\) It is, however, also true that the recognition of heterosexual domestic partnerships has not been properly canvassed in courts in South Africa yet.\(^{49}\)

4.1.45 In other comparable jurisdictions, greater accommodation of the fact that some persons elect not to marry, but live in marriage-like relationships, has been afforded to what are commonly known as partners. Some of the adjustive, supportive and protective measures of family law have been extended to partners because they live in permanent life partnerships that in all respects mimic the relationships of married persons.\(^{50}\)

\(^{46}\) Act No. 82 of 1987.

\(^{47}\) See in this regard the SALRC Child Care Act. Since clause 52 of the Children's Bill, is intended to replace sec 5 of the Children's Status Act of 1987, it is proposed that the status quo of that Bill be determined when the final report on Domestic partnerships is compiled in order to do the necessary consequential amendments to bring this provision in line with the Constitutional Court's judgment in J and B v Minister of Home Affairs and Another, \textit{op cit}.

\(^{48}\) In \textit{National Coalition for Gay and Lesbian Equality v Minister of Home Affairs, op cit}, the court pointed out that no view was expressed on the issue and that it was left completely open.

\(^{49}\) CALS Report, at 47.

\(^{50}\) Sinclair & Heaton \textit{Marriage Law}, at 23.
4.1.46 One of the arguments made to and by the courts regarding same-sex cohabitation is that such couples have no choice as to their form of union because they are not allowed to marry under our law. Courts may say, in response to heterosexual partners, that they chose not to marry and cannot ask for assistance from the courts when they failed to exercise this choice.\(^{51}\)

4.1.47 This may explain why there have been no challenges to legislation on the ground of exclusion of heterosexual unmarried couples who have chosen not to bring themselves within the class "spouses" identified in a particular statute or legal rule.\(^{52}\)

4.1.48 One response to this is that "choice" must be understood contextually. In South Africa gender inequality, disempowerment of women, poverty and ignorance of the law all contribute towards removing real choice from many people, especially poor women. The Constitutional Court, in its equality jurisprudence, has shown a willingness to consider the actual impact of laws on people's lives and to view law in its social context (often by having to resort to sociological evidence).

4.2 Limited statutory intervention

4.2.1 Legislation which has been passed following the introduction of the interim and final Constitutions has shown a growing acknowledgement and recognition of domestic partnerships.\(^{53}\)

4.2.2 The following examples show the wide range of circumstances in which the law expressly recognises domestic partnerships, including other unions in the ambit of marriage. These instruments of recognition are limited to the specific purposes of each statute.\(^{54}\) Examples of some of these legislative provisions are as follows (the list does not profess to be exhaustive):\(^{55}\)

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51 CALS Report, at 47.
52 Sinclair & Heaton *Marriage Law*, at 23.
54 Report by Women's Legal Centre, at 10.
55 *The National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, *op cit.*
(a) the use of the expressions "spouse, partner or associate" in section 6(1) (f) of the Independent Media Commission Act, 1993\(^{56}\) and sections 5(1) (e) and (f) of the Independent Broadcasting Authority Act, 1993\(^{57}\) and the fact that, for purposes of these provisions, "spouse" includes a "de facto spouse";

(b) "life-partner" in sections 3(7)(a)(ii), 3(8) and 7(5) of the Lotteries Act, 1997;\(^ {58}\)

(c) section 27 (2)(c)(i) of the Basic Conditions of Employment Act, 1997\(^ {59}\) provides for family responsibility leave in the event of the death of a "spouse or partner";

(d) the definition of "spouse" in section 31 of the Special Pensions Act, 1996\(^ {60}\) to mean "the partner ... in a marriage relationship" which latter relationship is defined to include "a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years";

(e) the definition of "family responsibility" in section 1 of the Employment Equity Act, 1998\(^ {61}\) which includes "responsibility of employees in relation to their spouses or partner, their dependent children or other members of their immediate family who need their care and support";

(f) the definition of "dependant" in the Medical Schemes Act, 1998\(^ {62}\) which includes the "the spouse or partner, dependant children or other members of the member's immediate family in respect of whom the member is liable for family care and support" (see further the discussion in chapter 5 regarding benefits afforded to domestic partners);

(g) the definition of "spouse" in section 8(6)(e)(iii)(aa) of the Housing Act, 1997\(^ {63}\) which includes "a person with whom the member lives as if they were married or with whom the member habitually cohabits";

(h) sections 9(4) and 11(5)(b) of the South African Civil Aviation Authority Act, 1998;\(^ {64}\)

(i) "life partners" in sections 10(2) and 15(9) of the Road Traffic Management Corporation Act, 1999;\(^ {65}\)

(j) section 35 of the Constitution of 1996, dealing with the rights of arrested, detained and accused persons, provides that such people have the right to

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58 Act No. 57 of 1997.
59 Act No. 75 of 1997.
60 Act No. 69 of 1996.
63 Act No. 131 of 1998.
64 Act No. 107 of 1997.
65 Act No. 40 of 1998.
communicate with and to be visited by his or her spouse or partner;

(k) clarity for unmarried fathers on their rights of access and custody. Natural Fathers of Children Born out of Wedlock Act, 1997.66

(l) section 1(vi) of the Domestic Violence Act, 199867 defines a domestic relationship in numerous ways, including:

(i) they live or lived together in a relationship in the nature of a marriage, although they are not, or were not, married to each other, or are not able to be married to each other;

(ii) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

(iii) they are or were in an engagement, dating or customary relationship which includes but is not limited to an actual or perceived romantic, intimate or sexual relationship of any duration;

(iv) they share or shared the same household or residence;

(m) the Compensation for Occupational Injuries and Diseases Act, 1993.68 in describing dependant, includes a "widow/widower married to employee by civil law, indigenous law or customary law as well as any person with whom the employee was, in the opinion of the Commissioner, at the time of the accident, living as husband and wife" (section 1(c)). Section 22 provides that if the employee meets with an accident resulting in his disablement or death, such employee or the dependants of such employee shall be entitled to benefits provided for and prescribed in the Act;

(n) section 21(13) of the Insolvency Act, 193669 states that for purposes of that section the word "spouse" means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another;

(o) legislation recently passed extending the definition of "spouse" for the purpose of estate duty provisions to domestic partners (Amendment of the definition of spouse in section 1 of the Estate Duty Act, 195570 in terms of section 3 of the Taxation Laws Amendment Act, 200171).

68 Act No. 130 of 1993.
69 Act No. 24 of 1936.
70 Act No. 45 of 1955.
71 Act No. 5 of 2001
4.3  **Conclusion**

4.3.1 The extension of recognition of the intimate relationships in the above legislation is an important development in terms of reflecting the current mores of our society. With the extension of statutorily defined benefits (sometimes including domestic partnerships in the definition of "spouse" for various purposes), there has been increasing recognition of domestic partnerships outside marriage.

4.3.2 However, partners are faced with a plethora of statutory provisions, many with different requirements. Consistency is important: it is therefore important that domestic partnerships be recognised uniformly.

4.3.3 In so far as case law is concerned, the Constitutional Court and the High Courts have already had the opportunity of applying section 9 on a number of occasions. However, issues are picked off one at a time and not necessarily in any logical order. The courts are careful to point out that they are addressing only the issue before them and nothing that has been said is to be taken to affect broader issues.

4.3.4 Incremental change is, therefore, slow, time-consuming and costly. The result is a patchwork of legal rights and obligations. It seems appropriate for legislators to start to consider possible options now. It is preferable to look over the whole field and decide where lines are to be drawn. Decisions about where the line is drawn should be based on rationally defensible grounds rather than on arbitrary considerations.

4.3.5 While all the developments referred to in this chapter provide important relief to many members of domestic partnerships, there is still no general legal recognition of their relationships. The only solution is that there should be a comprehensive reform of the law so as to recognise and regulate domestic partnerships.

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72 Report by Women's Legal Centre, at 12.
73 Holland 2000 *CJFL*, at 17.
74 Holland 2000 *CJFL*, *ibid*.
75 CALS Report, at 11.
CHAPTER 5: CONSEQUENCES OF DOMESTIC PARTNERSHIPS: CURRENT LEGAL POSITION

5.1 The common home and other property

5.1.1 The common law provides little protection for the property rights of domestic partners. The law of unjustified enrichment or the concept of universal partnership within the contract law might be used to assist partners in a property dispute.

5.1.2 Generally the result of establishing a permanent relationship is the sharing of a joint home. If both parties are separate homeowners, the (not unusual) result is for one of them to give up and sell his or her home and move in with the other. Over the years the proceeds of the sale may be used up, applied for the benefit of the new family, or be invested in the new joint household.

5.1.3 This is particularly important where women and men live together: often men earn more and women may look after the children. If they split up and the man has paid towards the house, he will be entitled to keep it and the woman may be left with the children and no home. Where the one partner dies the surviving partner may well find him- or herself evicted from the family home.

5.1.4 When the owner partner dies or the partners separate, the following questions need to be answered:

a) is the non-owning partner entitled to any part of the joint home; and
b) if so, to how much of the house is such a partner entitled?

The answers are: no and nothing, respectively.

5.1.5 A domestic partner who is not the owner or lessee of the property has no special

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1 "Untying the legal love knots" Weekly Mail and Guardian April 24, 1998 (hereafter referred to as "Weekly M & G").
2 Singh 1996 CILSA, at 318.
right to occupy the common home.\(^3\) Division of property, as is found in the case of divorce, does not take place where domestic partners split up.\(^4\) In so far as the family home is concerned, the title deed of the property has to be specifically amended in the Deeds Register to reflect ownership in the names of both parties for the non-owner to be entitled to any rights.

5.1.6 The only recognised recourse for the non-owner is for him or her either to claim the existence of a universal partnership between the parties, or compensation on the ground of unjustified enrichment. Cohabitation per se gives rise to no automatic property rights, but the ordinary rules of the law of contract, property and unjustified enrichment might be invoked by co-habitants to enforce rights acquired in or to each others property.\(^5\) See above for a discussion of these concepts.\(^6\)

5.1.7 A very important recent development came about with the enactment of the Prevention of Domestic Violence Act, 1998.\(^7\) This Act appears to confer a right of occupation upon a partner/cohabitant. It speaks of “parties to a marriage” but deems this expression to include men and women living together as husband and wife. It also provides remedies for violence, including orders preventing the owner of the common home from entering or living in it, and from ejecting the non-owning partner.\(^8\)

5.1.8 It is very important\(^8\) in any domestic partnership to be specific about the respective parties' beneficial interest where immovable property is involved. Where such property is paid for by both parties, it is best that the property be registered in the names of both individuals.

5.1.9 However, where property is already registered in the name of one of the partners as sole titleholder, the entitled holder could consent to the necessary amendment to the deed of property to facilitate the transfer of the property into their joint names. Alternatively, the parties could enter into a partnership agreement or for a trust with both parties as trustees. A

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5. Sinclair & Heaton *Marriage Law*, at 274.
6. Chap 3 above.
further option would be for them to create a company with the two parties as shareholders. Should the parties intend the property to be divided in shares other than equally, this must be specifically recorded, for, as the court held in Walker v Hall, the law does not allow property to be affected by telepathy.10

5.1.10 It should be noted that these alternatives are often financially prohibitive, and this raises the question who will be liable to pay for the necessary procedures?

5.1.11 In Britain the following decisions should be noted:

a) In Windeler v Whitehall11 Millet J was adamant that courts possessed neither a statutory nor an inherent jurisdiction to disturb existing rights of property on the termination of an extra-marital relationship - however long-established or deserving the claimant. In casu the respondent was a successful businessman while the applicant was a home-maker who kept house and entertained for him. When the relationship ended, the plaintiff claimed a proprietary interest in the house which they had shared and in the business. Her stated interest in the former was based upon the work that she had allegedly done on the house. In denying the application the court held that with regard to her claims to the house, in order to give rise to an inference of the kind needed, the conduct of the claimant should be ascribable to the acquisition of the property. It was the view of the judge that the mere act of cohabitation, and the concomitant performance of ordinary domestic tasks by two people, could not be construed as being substantial or significant, let alone linked to the purchase of the house. From the circumstances there was evidently no indication that the parties intended to alter any of their existing property rights in any way. While the de facto position was that the property had been shared and the plaintiff had spent money on and worked on it, the court was satisfied with its decision that such evidence did not, on its own, suffice to affect entitlement.12

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10 Walker v Hall 1984 FLR 126, referred to by Singh 1996 CILSA, ibid.
12 Singh 1996 CILSA, at 320.
b) An arguably more enlightened and equitable judgment on the proprietary effects of cohabitation was that of Maharaj v Chand. The court found that a legal owner who led another (being his or her partner in the instance of cohabitation) to believe that he would not assert his right to terminate the other's occupation of the joint home, could be estopped from subsequently acting inconsistently with that representation if the representee had performed to his or her detriment in reliance on the implied promise.

c) Similarly in Ungarian v Lesnoff and Others, in order to set up home with the plaintiff, the defendant gave up a promising academic career in Poland and a flat over which she enjoyed a lifetime usufruct, and emigrated with her children to England. When the relationship ended, the plaintiff was the absolute owner of the house they had been sharing. He sought an order evicting the defendant from the property. The court found that the correct and proper inference to be drawn from the circumstances in which the house had been purchased and the ensuing conduct of the parties - in other words, the intention attributed to them - was that the defendant was, at least, to have the right to occupy the house during her lifetime.

5.1.12 Ancillary to the "house owner" dilemma are the problems which arise with regard to accumulated household goods and furniture. Neither party, unless appointed as agent by the other, can bind the other by contract with a third person. However if the couple ostensibly live together as husband and wife, either of them can bind the other by contracts for household necessities to the same extent as if they were legally married.

5.1.13 Couples leasing a home also find themselves in a predicament. In terms of the South African Rental Housing Act, 1999 a "tenant" means the lessee of a dwelling which is leased by a landlord. No reference is made to a spouse or dependant of such a lessee, thus a former domestic partner has no legal basis for redress as he or she was not a party to the lease contract. Although such a partner would also not be liable to pay rent during the relationship, it may happen in practice that he or she has indeed paid the rent or contributed in some other way to the household expenses. However, upon termination of the

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15 Hahlo Fiat Iustitia, at 246 and the references therein.
16 Act No. 50 of 1999.
relationship, no certain ground exists to consider such contribution and he or she is not protected by the law.\textsuperscript{17}

5.1.14 Even if the couple stay in a rented home leased in the name of both domestic partners, problems may occur when a decision must be made about who is to stay on in the home after termination of the relationship. Tenants face difficult decisions about which partner should retain the home and what accommodation alternatives are available for the outgoing partner. For most the circumstances in which these decisions are made are not amicable.\textsuperscript{18}

5.1.15 As can be seen from the above, couples who live together have to plan their financial portfolios separately, especially if one partner works and the other does not. If the relationship dissolves the person who doesn't work is left with no income, no assets, and no promise of maintenance from the other partner.

5.2 Maintenance

5.2.1 If a couple is married they have a legal duty to support each other during the subsistence of their marriage. Generally this obligation terminates upon either the death of one of the parties, or on their divorce unless, in the case of divorce, the court granting the decree makes an order for the continuation of maintenance.\textsuperscript{19}

5.2.2 It should, however, be noted that since fault is no longer the basis of divorce, maintenance is no longer seen as a meal-ticket for life.\textsuperscript{20} If a former spouse is able to

\textsuperscript{17} The uncertainty and high costs of the alternative recourses disqualify them as real remedies.

\textsuperscript{18} These facts were acknowledged in the UK where the Government in 1987 set up the Relationships Breakdown Working Party with the brief to "consider the implications for security of tenure, under the Housing Act 1985, of breakdown of marital or other similar relationships .......". In its recommendations the Working party supported a procedure whereby the court could order the transfer of tenancy between the former partners. "Relationships Breakdown, A Guide for Social Landlords" UK Office of the Deputy Prime Minister available at http://www.housing.odpm.gov.uk/information/breakdown/.htm. This project mainly referred to rental housing by local housing authorities.

\textsuperscript{19} Hutchings & Delport 1992 \textit{De Rebus}, at 122; Sinclair & Heaton \textit{Marriage Law}, at 298 and 284.

\textsuperscript{20} However Sinclair & Heaton \textit{Marriage Law}, at 299 state as follows: For deep-rooted social, religious and economic reasons and because women are unequally burdened with child-care responsibilities, they do not enjoy a capacity to earn that is equal to that of men. There are still many woman who have interrupted their careers or sacrificed them altogether to raise a family and who need post-divorce maintenance - temporary, rehabilitative maintenance if they are still young, permanent maintenance if they are not. If need for maintenance is regarded as a determinative criterion, and the need is created by the dependence-producing relationship in which the woman found herself, there is no justification for denying support to a cohabitant. On this argument the duty of support should, it is submitted, be
support himself or herself, or is able to earn an income, he or she is required to do so, and the courts attempt to effect a 'clean break' between the parties (there are exceptions to this rule, especially in relation to the wife of a very wealthy man). 21

5.2.3 There is no reciprocal duty of support between the parties in a domestic partnership during their relationship or after its termination by death or otherwise, 22 nor is there an action for damages for the unlawful death of a person who was supporting his/her partner. 23 This would be so even if the couple has undertaken contractually to support each other. In Union Government v Warneke 24 it was held that a claim for damages resulting from loss of support lies only if the duty to support exists by operation of the law. 25 Neither party may bind the other in contract for household necessities, unless the one has appointed the other as his or her agent. 26

5.2.4 There appears to be some possibility of success in challenging the common law in these areas given recent cases that have pushed the boundaries of the notion of "duty of support". 27 See discussion of the Langemaat case in chapter 4 above.

5.2.5 However, even the periodic payments made after divorce terminate upon remarriage of the recipient spouse. This raises the question whether maintenance would also terminate if the recipient spouse entered into a relationship of cohabitation with a third party and if so, whether it would revive were the partners subsequently to end the relationship. 28 This is

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21 Sinclair & Heaton Marriage Law, at 298.
22 Hutchings & Delport 1992 De Rebus, ibid; Hahlo Fiat Iustitia, at 246; Collins Electronic M & G; CALS Report, at 10.
23 CALS Report, ibid.
24 1911 AD 657.
25 Sinclair & Heaton Marriage Law, at 285.
26 Sinclair & Heaton Marriage Law, at 284 and references made therein.
27 CALS Report, ibid referring to Langemaat v Minister of Safety and Security and Others 1998 (3) SA 312 (T); Santam Bpk v Henery 1999 (3) 421 (SCA); Amod v Multilateral Motor Vehicle Accident Fund 1999 (4) SA 1319 (SCA). See also the discussion of and critique on the Amod case by Goldblatt 2000 SAJHR.
28 In Britain the following cases: In Stead v Stead 1968 1 All ER 989, referred to by Singh 1996 CILSA, at 325, the court held that cohabitation had no effect on any agreements between the ex spouses - it would be unfair to put financial pressure on a woman to marry a man whom she did not wish to marry. However, in MH v MH 1982 3 FLR 429, referred to in Singh 1996 CILSA, at 325 Wood J ruled that it could be neither fair, just or reasonable to allow a woman to be placed in a more favourable position because she chose to cohabit rather than remarry. The leading case on cohabitation is probably Atkinson v Atkinson 1988 2 FLR 353, referred to in Singh 1996 CILSA, ibid in which the Court of Appeal recognised that it was not for the courts to equate the effect of cohabitation with remarriage, nor
important in light of the argument that the domestic partnership is never fully equated with marriage (or remarriage as the case may be).²⁹

5.2.6 Failing provision to the contrary, a person entitled to maintenance or income from an annuity 'until death or remarriage' does not automatically lose his or her claim if he or she enters a domestic partnership.³⁰ If the person with whom the ex-spouse is cohabiting provides him or her with adequate support, the recipient's altered financial position may, according to Hahlo, constitute a ground for variation or at least suspension of the maintenance order.

5.2.7 The law does not distinguish between married and unmarried parents in regard to the obligation to support children. See discussion below on the position of children.

5.3 Business

5.3.1 In Britain in Windeler v Whitehall the applicant ia claimed a proprietary interest in the business. In respect of the latter, she supported her claim with reference to the social activities and entertaining in which she had engaged, all of which had assisted to promote the respondent's business. In denying the claim the court held that in the absence of proof showing that the plaintiff had actively helped the defendant build up his business, the notion that her conduct (as described above) entitled her to a proprietary interest in the business was ridiculous.³¹ See also the discussion on implied agreements (universal partnerships) in chapter 4 above.

5.4 Children

5.4.1 Historically a child born of a domestic partnership would have been regarded as

²⁹ Singh 1996 CILSA, at 321.
³⁰ Sinclair & Heaton Marriage Law, at 272.
illegitimate. However, it is important to note that the distinction between "legitimate" and "illegitimate" children has been abolished in South Africa.

5.4.2 The law does not distinguish between married and unmarried parents in regard to the obligation to support children. Decisions regarding custody and access are based on what is in the best interests of the child. Children are protected if the couple is not married since both biological parents are responsible for their children. The father and mother are both still liable for maintenance if the couple splits up.32

5.4.3 However, a father of a child born out of wedlock does not automatically have any rights over such a child. Rights to custody and access will only be accorded to a father of a child on application by a court of law and if it is in the best interests of the child. This means that for financial responsibilities there is automatic recognition of fatherhood, but for the more general parenthood responsibilities an unmarried father must take positive steps to obtain a court order to that effect. The Constitutional Court has found that there was discrimination against fathers of illegitimate children in legislation that failed to obtain their consent to the adoption of the child.34

5.4.4 However, the law only recognises the relationship between parent and child based on biology or marriage.35 If a child is adopted by one partner and the child is raised by both partners as its parents, the partner who has custodianship of the child can refuse access to the other partner in the event of the relationship breaking up.36 If the custodial parent dies, the other partner would not automatically assume custody of the child.37

31 Singh 1996 CILSA, at 320.
32 Collins Electronic M & G, ibid.
34 Fraser v The Children's Court, Pretoria North an Others 1997 (2) BCLR 153 (CC); 1997 (2) SA 261 (CC).
35 If a gay relationship breaks up after the couple have raised a child together, the non-custodial parent may have no rights of access. A gay person may adopt as a single person, but not as a partner in a relationship. He suggests that the couple should draw up a contract to outline their intent and provide a court challenge if necessary. He points out that if the custodial parent dies "the other partner is a stranger in terms of the law and would automatically be a person who could adopt the child."
36 Weekly M & G, ibid.
37 Some Australian state legislation permits de facto couples to adopt, subject to their having been in a relationship for a certain period. See s 11 Adoption Act of 1984 (Victoria); s 19(1A) Adoption of Children Act of 1965 (New South Wales); s 12 Adoption Act of 1988 (South Australia); s 18 Adoption Act of 1993 (Australian Capital Territory).

In New Zealand the law currently permits the making of adoption applications by single persons and two spouses together (s 3(2) Adoption Act of1955). The law does not permit applications by de facto couples, same-sex couples or a male in respect of a female child. The use of the term "spouse" has posed problems for couples in de facto and same-sex relationships who want to adopt a child. In 1955 it
5.4.5 The Child Care Act, 1983 provides for the adoption of children by a wide variety of individuals, including unmarried and divorced persons. In principle it is therefore possible for domestic partners to adopt children, but only as individuals.

5.4.6 Until very recently same-sex couples could, however, not adopt children as couples - only married couples were allowed to adopt jointly since the Act only provided for the legally married spouse of a parent to adopt that parent's child by another person. This effectively excluded homosexuals from adopting the children of their domestic partners, even where they shared a family life. However, in the recent decision of Du Toit v Minister of Welfare and Population Development the Constitutional Court found these provisions to be unconstitutional. See discussion in chapter 4 above.

5.5 Succession/Inheritance

5.5.1 Married couples automatically inherit from each other where no will has been made. There is, however, no right of intestate succession between domestic partners, no matter how long they have lived together. A partner is not automatically regarded as an heir or dependant.

was unlikely that the legislature would have contemplated permitting adoption by unmarried couples. (There was an unspoken presumption that adoptive parents would be a married couple). However over the last 45 years social mores have changed quite dramatically. A significant number of New Zealand children are raised in de facto relationships. The 1996 Census data reveals that 8.17 percent of New Zealand families with children are headed by a de facto (opposite sex) couple. The rate of marriage dissolution is also rising. Some judges have adopted a more flexible approach to the issue of whether de facto couples are able to adopt. In Re Adoption by Paul and Hauraki [1993] NZFLR 266 (FC) a couple living in Maori customary marriage successfully applied to adopt their niece. In the case Boshier J stated that:

A "spouse" outside marriage is not specifically excluded in terms of sec 3 of the Adoption Act of 1955. Depending on context, it is appropriate to include partners to a de facto relationship as "spouses". In pieces of social legislation that may be all the more important.... For the purpose of the Adoption Act of 1955, I am of the view that marriage is not a prerequisite to definition of "spouse" and that the Court is entitled to look at the actual relationship in question to see whether it is of such an enduring and stable nature to enable the word "spouse" to be applied to the partners to that relationship.

The issue is still not resolved. In the case In the matter of R (Adoption) [1998] NZFLR 145, 159 (FC) Inglis J held that the point decided in the Paul & Hauraki case was restricted to Maori customary marriage. He concluded that it was not possible to change the meaning of terms in statutes simply because society's values had changed. He stated that "the Court is forbidden by Parliament to entertain a joint application for adoption by two people who are not married." The Law Commission recommended that the legality of these adoptions in New Zealand should be clarified. New Zealand Law Commission Adoption.

38 Act 74 of 1983.
39 2002 (10) BCLR 1006 (CC).
40 Sinclair & Heaton Marriage Law, at 289; Weekly M & G, and Hahlo Fiat Iustitia, at 246.
5.5.2 The rules of intestate succession as set out in the Intestate Succession Act, 1987\textsuperscript{42} are very clear. In the event of there being no valid testamentary document, the beneficiaries are, in the first instance, a spouse or descendants or both. In the event of there being neither spouse nor descendants, the estate devolves upon other more distant members of the bloodline.\textsuperscript{43}

5.5.3 Should the deceased partner have failed to make a will favouring the other, the survivor could be faced with the monstrous task of having to prove his or her specific contribution to the joint estate before entitlement will be forthcoming. Proving actual contribution is often extremely difficult, especially after one partner has died. Litigation is usually lengthy and costly and obviously unwelcome, particularly at a time already fraught with emotional trauma. This problem is exacerbated if the deceased had not divorced a previous spouse. In law, the first spouse clearly has the leverage to proceed and claim the entire estate.\textsuperscript{44}

5.5.4 If a couple is married the estate duty after the death of the first party is furthermore deferred on property willed to the surviving spouse.\textsuperscript{45} It is, of course paid at the time of the surviving spouse’s death. This does not, however, happen when the domestic partnership is one of permanence but not marriage. Full estate duty has to be paid immediately.

5.5.5 The Maintenance of Surviving Spouses Act, 1990\textsuperscript{46} furthermore once again places a spouse in a better position than a partner by providing for the reasonable maintenance needs of a surviving spouse to be met by the estate of the deceased spouse.\textsuperscript{47}

5.5.6 There is, however, no obstacle to making specific provision for a domestic partner by will.\textsuperscript{48} Nothing precludes a partner from leaving his or her estate to the other partner in the relationship. He or she may do so even to the exclusion of his or her spouse.\textsuperscript{49} The testator will, however, have to make it plain that he or she wants to benefit the domestic partner.\textsuperscript{50}

\textsuperscript{42} Act No. 81 of 1987.
\textsuperscript{43} Singh 1996 \textit{CILSA}, at 314.
\textsuperscript{44} Singh 1996 \textit{CILSA}, at 318.
\textsuperscript{45} Submission from Ms G I Neke received regarding the Review of the Marriage Act Discussion Paper.
\textsuperscript{46} Act No. 27 of 1990.
\textsuperscript{47} Hutchings & Delport 1992 \textit{De Rebus}, at 121.
\textsuperscript{48} Hutchings & Delport 1992 \textit{De Rebus}, at 122.
\textsuperscript{49} Hahlo \textit{Fiat Iustitia}, at 246.
\textsuperscript{50} Sinclair & Heaton \textit{Marriage Law}, at 289 and references therein.
5.5.7 In England reasonable financial provision can be made for a surviving partner out of a deceased's estate under section 1 of the Inheritance (Provision for Family and Dependents) Act of 1975. In 1992 the Scottish Law Commission recommended and enactment of legislation introducing a similar right for Scottish partners.51

5.5.8 Under section 64(d)(i) of the Ontario Succession Law Reform Act, 199052 relief out of a deceased's estate may be awarded to a common-law spouse who has cohabited with the deceased continuously for a period of not less than five years or in a relationship of some permanence where a child has been born of the union. The requirement that under section 14 of the Family Law Reform Act of 1978 the parties must have so cohabited within the year preceding the application does not apply in this case.53

5.6 Insurance

5.6.1 Either partner in a partnership may name the other as beneficiary under a life insurance policy. The nomination will however, have to be clear, for a clause in an insurance policy which confers benefits on members of the insured's "family" may cause problems. And if a policy, for instance a motor-car insurance policy, covers (or excludes) passengers who are members of the insured's family, this provision does not operate to the benefit (or detriment) of the insured's partner.54

5.6.2 However, in Farr v Mutual & Federal Insurance Co Ltd55 the court held that two gay men living together in a domestic relationship constituted a family. In this case the applicant was involved in a motor vehicle accident. His passenger was his partner with a limited claim on the Multilateral Motor Vehicle Fund. This made the applicant liable for the remainder of his partner's claim and accordingly the applicant relied on his own insurer, the respondent. The respondent repudiated the claim. The court upheld the repudiation in finding that the applicant's partner was a member of his family.56

51 Sinclair & Heaton Marriage Law, at 284.
53 Hahlo Fiat iustitia, at 254 with references made therein.
54 Sinclair & Heaton Marriage Law, at 290.
55 2000 (3) SA 684 (C).
56 See discussion by Louw 2000 SAJHR, at 316.
5.7 **Insolvency**

5.7.1 The Insolvency Act, 1936\(^{57}\) is one of the statutory provisions in our law which makes specific provision for the position of partners. Section 21 of this Act provides that if the separate estate of one of two spouses who are not living apart is sequestrated, the estate of the solvent as well as that of the insolvent spouse vests, first in the Master, and then in the trustee.

5.7.2 It further provides that the estate of the solvent spouse has to be released if he or she proves that it was acquired by him or her by a title which cannot be assailed by the creditors of the insolvent spouse.

5.7.3 Section 21(13) provides that a woman who is living with a man as his wife, and a man who is living with a woman as her husband are included in the definition of spouse. In *Chaplin v Gregory*,\(^ {58}\) however, the insolvent lived with another woman, apart from his wife, and the court held that the estate of his wife and not of his cohabiting partner vested in the trustee. The decision seems not to be in accord with the statutory provisions.\(^ {59}\)

5.8 **Employment benefits (health care, housing, pension)**

*Medical aid benefits*

5.8.1 In a conventional marriage it is comparatively easy to have a spouse recognised as a dependant in terms of medical aid or pension rules. The same can not be said in regard to same-sex couples. In the *Langemaat* case,\(^ {60}\) the High Court found that the police medical aid society was discriminating when it would not allow the partner of a lesbian police officer onto her medical aid. See the discussion of the case in chapter 4 above.

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\(^{57}\) Act No. 24 of 1936.

\(^{58}\) 1950 (3) SA 555.

\(^{59}\) Sinclair & Heaton *Marriage Law*, *ibid*.

\(^{60}\) *Langemaat v Minister of Safety and Security and Others* 1998 3 SA 312 T.
5.8.2 The Medical Schemes Act, 1998\(^{61}\) was amended in accordance with the new constitutional dispensation.\(^{62}\) The Act regulates the management of medical schemes in order to protect the public from exploitation and abuse. Institutions that carry on the business of a medical aid scheme are required by the Act to lodge an application to register the medical scheme with the Registrar of Medical Aid Schemes.

5.8.3 The new Act prohibits the registration of any medical scheme unless the Council is satisfied that the medical scheme does not or will not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds including, inter alia, sexual orientation. This implies that a medical aid scheme is now required by law to provide individuals in same-sex relationships with the same opportunities it affords opposite-sex married and unmarried couples to register their dependants including their partners on the medical aid scheme.

*Pension Fund*

5.8.4 The rules of pensions and provident funds often provide benefits to the "spouse" or "widow/er" of a member, where these terms are explicitly or implicitly defined with specific reference to marriage. At present the Pension Funds Act, 1956\(^ {63}\) does not prescribe rules as to when the partner in a same-sex relationship should be accommodated by pension fund rules and when not. However, the Pension Funds Adjudicator has confirmed that such accommodation was required.

5.8.5 The Adjudicator was called upon to consider the validity of a decision by a pension fund to refuse to pay spousal benefits to the same-sex life partner of one of its members.\(^ {64}\) He found that the definition of marriage in the respondents’ rules differentiated between man/woman domestic partnerships and same-sex domestic partnerships and thus discriminated against the latter. He furthermore found that the discrimination was unfair. In light of his finding the adjudicator declared that the definition of marriage had to be reworked to make provision for all couples irrespective of their sexual orientation.

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\(^{61}\) Act 131 of 1998.

\(^{62}\) See discussion of De Vos Sexual Orientation, at 5.

\(^{63}\) Act 24 of 1956.

\(^{64}\) See discussion of De Vos Sexual Orientation, at 6.
5.8.6 A domestic partner may therefore receive pension fund benefits as a nominee. A
domestic partner may also receive pension benefits as a factual dependant if he or she
qualifies as such under the definition of "dependant" in the regulations or conditions of that
particular fund.65

5.8.7 In the event of a dispute it would be essential to prove that the relationship is a
"committed cohabitation relationship" or "universal partnership". Proving this is not always
easy. Courts examine whether partners have made "a public commitment to each other", for
example if they share finances. Goldblatt has been quoted as saying that "the courts want
the relationship to look like traditional concepts of marriage, but not even marriage is
traditional any more".66

5.8.8 The Divorce Amendment Act, 198967 now provides that on divorce the accumulated
pension interests of a party will be regarded as an asset in that party's estate. Thus pension
interests will now form an asset to be taken into account upon the distribution of the
matrimonial property.68

Compensation claims

5.8.9 Under the South African Compensation for Occupational Diseases Act, 199769 a
surviving domestic partner does have a claim for compensation if a partner died as a result
of injuries received during the course of work, if he or she was a person with whom the
employee was at the time of the employee's death living as "husband and wife". However, by

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65 Schellinus Obiter 1996, at 49. The Government Employees Pension Law, 1996 (Proclamation 21 of
1996) in sec 1 defines dependant to also mean any person in respect of whom the member or
pensioner, although not legally liable for maintenance, was, in the opinion of the Board at the time of
death in fact dependent upon such member or pensioner for maintenance. Another example is where
spouse in sec 31 of the Special Pensions Act, 1996 (Act No.69 of 1996) is defined to mean 'the partner ...
in a marriage relationship', which latter relationship is defined to include 'a continuous cohabitation in
a homosexual or heterosexual partnership for a period of at least five years'. Cohabitation has in general
no effect on the receipt of social pensions. An exception is the definition of wife in the Military Pensions
Act, 1976 (Act No. 84 of 1976) to include a woman who is the natural mother of a child under the age of
eighteen years who is regularly maintained by the member, and a woman with whom the member lived
together as man and wife for a period of at least five years immediately prior to the commencement of
his military service within the meaning of sec 2(3).

66  Weekly M & G, ibid.
67  Act No. 7 of 1989.
68  Hutchings & Delport 1992 De Rebus, ibid.
69 Subsection (c) of the definition of dependent in the Compensation for Occupational Diseases Act, 1997
(Act No. 61 of 1997).
referring to husband and wife, this definition ostensibly excludes same-sex relationships.

5.9 Immigration

5.9.1 The attack in the *The National Coalition for Gay and Lesbian Equality and Others v The Minister of Home Affairs and Others*\(^{70}\) on the constitutional validity of section 25(5) of the Aliens Control Act, 1991\(^{71}\) concentrated on the fact that it enabled preferential treatment to be given to a foreign national applying for an immigration permit who is "the spouse ... of a person permanently and lawfully resident in the Republic", but not to a foreign national who, though similarly placed in all other respects, is in a same-sex life partnership with a person permanently and lawfully resident in the Republic. See discussion in chapter 4.
CHAPTER 6: COMPARATIVE SURVEY

6.1 The Netherlands

a) Background

6.1.1 The Netherlands has a constitutional monarchy, with a Constitution adopted in 1814, and a civil law legal system. The basic rules on family law in the Netherlands can be found in Book 1 of the DCC. This code, enacted in 1838, is based on a mixture of Roman, French and old National Dutch law. Although this code has been modernised several times owing to the growing influence of human rights on the Dutch legal system in the last few decades, the Dutch legislator is constantly confronted with challenges to adjust the code to the jurisprudence, especially in the field of family law. The Constitution does not permit judicial

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1 The Netherlands is a small but densely populated country: more than 15 million people live on 41.548 km². The population does not constitute a homogeneous cultural whole. The ethnic groups found in the Netherlands are Dutch: 91%; Moroccans, Turks and other: 9%. Diversity in terms of religious values (Roman Catholic 31%, Protestant 21%, Muslim 4.4%, other 3.6% and unaffiliated 40%) and professional activity is an outstanding characteristic of the inhabitants. World Factbook – The Netherlands, op cit. Very conservative (eg orthodox religious) and modern groups can be found living next to each other peacefully. See in this regard Vlaardingerbroek Influence of Human Rights Conventions.

2 Hereafter referred to as the “DCC”. Title 5 of Book 1 deals with marriages. S 1 of Title 5 prescribes the conditions for conclusion of a marriage, s 2 the formalities, s 3 the grounds on which a marriage may be barred, s 4 the consummation of marriages and s 5 the annulment of marriages. Besides this part of the Civil Code, family law can also be found in other codes.

3 At a supra-national level the activities of the Council of Europe and the United Nations are important because Dutch law can be superseded by international law. The impact of international conventions, like the European Convention on Human Rights and Fundamental Freedoms, on Dutch Law has been enormous. As an example, Articles 8 and 14 of that Convention have had a particularly great influence on Dutch family law. Article 8 provides for respect for private and family life and Article 14 guarantees the enjoyment of rights without discrimination on sex. See also Marckx v Belgium 68833/74 of 13/06/1979 a decision by the European Court of Human Rights, available at http://hudoc.echr.coe.int/hudoc/viewHtml (accessed 8 April 2002).

4 Court challenges to the marriage laws in the Netherlands have generally been unsuccessful. Dutch judges have been unwilling to find that same-sex couples had the right to marry, saying it was not up to the judiciary to remedy claims of inequality between same- and opposite sex-couples, deferring the problem, instead, to Parliament. Although Dutch law is based on statute, it is interesting to note that judge-made law is becoming ever more important. For an overview of the jurisprudence on this topic see Maxwell 2000 EJCL.
review of acts of the Staten Generaal.\textsuperscript{5} This fact causes the courts to be reluctant to amend pieces of legislation which were argued to be unconstitutional on the basis of discrimination.\textsuperscript{6}

6.1.2 Prior to 1998 there was no general recognition\textsuperscript{7} of the rights of unmarried couples.\textsuperscript{8} Marriage law provided that a man and a woman were allowed to get married when they were 18 years or older, and a marriage had to be monogamous and between opposite-sex partners.\textsuperscript{9}

6.1.3 Only a civil marriage was regarded as being legally valid, a church ceremony alone was insufficient.\textsuperscript{10} This is still the case, even today.

6.1.4 Some couples were, however, for various reasons not inclined to marry and others, such as same-sex couples, were not allowed to marry. Apart from the piecemeal provision in public law legislation regarding taxes and social security,\textsuperscript{11} these couples were left to create their own rules by entering into a cohabitation contract. The terms of the contract were in most cases drafted by a civil notary\textsuperscript{12} and to a large extent copied the statutory provisions of

\textsuperscript{5} The legislative branch.

\textsuperscript{6} Compare the role that the courts play in South Africa and Canada (and even the UK with an unwritten Constitution) in developing the legal recognition of domestic partnerships where constitutions allow judicial scrutiny of legislation for constitutionality.

\textsuperscript{7} See however the liberal views held by the population referred to in fn 15 below.

\textsuperscript{8} In the early eighties tax legislation provided that couples living together in a common household for more than 5 years after attaining the age of 22 years were considered married partners and treated as such. Later in the eighties, many legislative enactments and social security legislations were adjusted to consider the factual situation parties lived in rather than their formal legal position. Van Der Burght 2000 De Jure, at 80. In 1992 the report of the Dutch government’s Advisory Commission for Legislation proposed development of the private law. See the discussion in para 6.1.6 below.

\textsuperscript{9} Art 1:33 DCC. Spouses owed each other fidelity, help and support and they were obliged to supply each other with the necessities of life. They had the duty to bring up and educate their children and to cohabit after deciding together on a place to live. Both spouses had to bear the household expenses and liabilities. Both parties had to provide each other with housekeeping money. The law did not differentiate between husband and wife in so far as mutual marital obligations were concerned. Art 1:81-85 DCC.

\textsuperscript{10} Art 1:30 DCC. The wedding normally consists of a ceremony in both the town hall and in the church. A wedding in the church may not take place before the civil wedding before the Registrar. Because of the secularisation of society church ceremonies are becoming less common.

\textsuperscript{11} Referred to in fn 8 above.

\textsuperscript{12} Notaries are generally experts in matrimonial property and inheritance law.
the matrimonial property law. This notarial agreement was, and still is, commonly accepted in business spheres as proof of the existence of a "real" partnership.13

6.1.5 Besides the formal notary cohabitation contract, the facts could also indicate the existence of at least a tacit contractual relationship. For these couples the courts and legal scholars developed valuable theories to protect them from unfair results.14

b) Development of relational status15

Registered partnerships

6.1.6 In 1992, the Dutch government’s Advisory Commission for Legislation issued a report recommending the adoption of registered partnership legislation similar to that in Danish Law.16 In 1994 a partnership Bill for same-sex couples was submitted to Parliament.17 In September 1995, before this Bill became law, a controversial amending memorandum proposing that partnership registration be opened to opposite-sex couples18 was published.

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13 Employees with notarial cohabitation contracts are sometimes treated as married couples for purposes of pensions, public transportation, discount schemes etc. Van Der Burght 2000 De Jure, at 80.

14 Van Der Burght 2000 De Jure, at 78. In the absence of a contract, the facts of what the legal content of the relationship is must be assessed and then one must borrow from the rules of matrimonial property law with reference to the parties’ general behaviour and reasonable expectations.

15 The legislative development in the Netherlands regarding same-sex relationships should be seen in the context of the social status of same-sex in that country. The Netherlands has been liberal in recognizing and protecting the rights of lesbians and gay men. Public opinion polls about homosexuality show that the majority of Dutch citizens believe in recognizing and protecting the rights of sexual minorities. On the issue of opening civil marriage to same-sex couples, a poll conducted in 1996 found that fifty-two percent of those polled agreed that same-sex couples should be allowed to marry and have the same rights and obligations as married opposite sex couples. In the same poll thirty-five percent of persons over fifty-five - the most conservative individuals interviewed - agreed that same-sex couples should be allowed to marry. As early as 1990, opinion polls of the Social and Cultural Planning Office suggested that 95 percent of the Dutch population believed that one should let homosexuals be as free as possible to live the way they choose. The same poll suggested that 89 percent believed that homosexuals should have the same housing rights as married couples, 93 percent believed that they should have the same inheritance rights, and 47 percent that they should have the same adoption rights. See Sociaal en Cultureel Rapport 1992 (Rijswijk: Sociaal en Cultureel Planbureau, 1992) at 465.

16 The Scandinavian legislation then provided for registered partnerships for same-sex couples only.

17 Bill nr 23761.

18 It was controversial because the Scandinavian legislation on registered partnership limited registration to same-sex couples whereas this proposal intended a dual system for Dutch opposite sex couples enabling them to choose between traditional marriage and registered partnership.
6.1.7 In 1997, the Dutch Parliament approved two separate Acts amending the DCC and more than 100 other statutes. These Acts came into operation on 1 January 1998 and established a system of registered partnerships for both same- and opposite-sex couples by making the provisions relating to marriage applicable to registered partnerships.19

**Same-sex marriage**

6.1.8 In the meantime, in April 1996 a resolution of the Lower Chamber of Parliament was passed demanding the preparation of a Bill to allow same-sex couples to marry.20 In a separate resolution the same forum demanded a Bill to allow same-sex couples to adopt children as a couple.21

6.1.9 In October 1997 a Dutch Parliamentary Committee, gave its support, in principle, to same-sex marriages and child adoption by gay couples.22 In February 1998 the House of Representatives passed yet another resolution, demanding that the Dutch government prepare such legislation by January 1999.

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19 Act of 16 July 1997, Staatsblad 1997, 324 and Act of 17 December 1997, Staatsblad 1998, 600. Wijzigings-wet Boek 1 Burgerlijk Wetboek en Wetboek van Burgerlijk Rechtsvordering (opneming van bepalingen voor het geregistreerd partnerschap). The Advisory Commission for Legislation (Leefvormen) recommended in 1991 that registration should be the deciding factor for conferring rights and obligations on cohabitants. This Commission recommended that cohabitants should have two types of registration to choose from: "lichte registratie" and "zware registratie". The former would confer social security, tax, subsidy and accommodation rights and duties on the couple and create a maintenance duty between them. De-registration would take place at the mere request of either or both parties. The latter would more or less have the same legal consequences of marriage and de-registration would have to be done by notarial deed. Sinclair & Heaton *Marriage Law*, at 295 fn 100. None of these concepts featured in the subsequent legislation.

20 *Parliamentary Papers* 1995/96, 22700/18 (replacing 22700/9); proposed by Ms Van der Burg (labour) and Mr Dittrich (democrats); adopted on April, 16, 1996 (81 votes in favour, 60 against; see Handelingen II 1995/96, pp. 4883-4884).

21 *Parliamentary Papers* 1995/96 22700/14 proposed by Mr Dittrich (democrats) and Ms Van der Burg (labour) (83 votes in favour, 58 against).

22 Kortmann Committee.
6.1.10 The Dutch Cabinet subsequently approved a Bill in December 1998 which led to the amendment of Article 30 of Book 1 of the DCC to change the definition of marriage to include same-sex couples.23

6.1.11 This Act came into operation on 1 April 2001, making the Netherlands the first country in the world to allow same-sex couples to marry. Adoption by same-sex partners as a couple also became possible on 1 April 2001.24 The first such adoptions were expected to be decided by Dutch courts around January 2002.

6.1.12 Being the only country that recognises same-sex marriage, same-sex married couples must, however, be aware of the fact that their marriage and its legal consequences will not always be accepted in other countries.

c) Current legal position

6.1.13 Same- and opposite-sex unmarried couples wanting to formalise a relationship now have three options, namely registered partnership, civil marriage or cohabitation contract.25

6.1.14 There is no separate regime for registered partners – by virtue of Article 1:80a of the DCC all provisions relating to marriage are automatically applicable to registered

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24 Act of 21 December 2000. Under the new adoption rules children who are raised by same-sex couples are given judicial protection ie becoming lawful heirs of their adoptive parents. A new condition also became applicable to all adoptions namely that adoption may only be granted if the judge decides that the child has nothing more to expect from its original parent(s). Euro-letter No. 93 November 2001, available at http://www.steff.suite.dk/eurolet/eur_93.pdf (accessed on 24 April 2002). See also Waaldijk Nine Months, op cit. A separate Adjustment Act of 8 March 2001 (Staatsblad 2001, nr. 128) provided for various consequential amendments to other legislation that have become necessary as a result of the opening up of marriage and adoption. This Act also came into effect on 1 April 2001. It introduced gender-neutral formulations into those laws that still use gender-specific words for parents and spouses (e.g. in definitions of polygamy, half-orphans, etc.). It specified that an inter-country adoption would only be possible by a different-sex married couple or by one individual (opening up inter-country adoption to same-sex couples would not be useful, because the authorities in the original country of the child would not allow it to be adopted by Dutch same-sex partners). It also replaced the old rule, that child benefits would be paid to the mother in case of disagreement between father and mother, by a gender-neutral rule: in future the benefit office will decide to whom to pay the benefit in such circumstances. Finally, it prescribed the costs for converting an existing registered partnership into a marriage (or vice versa). Waaldijk Latest News.

25 The discussion to follow does not relate to cohabitation contracts since contract law and jurisprudence determine the effects of the particular contract on its own merits.
partnerships. This principle applies to all fields of law: social security law, taxation law, administrative law, penal law etc.26

6.1.15 There is furthermore no provision for same-sex marriage parallel to that of opposite-sex marriage. The definition of marriage in Article 30(1) of Book 1 of the DCC was merely changed to include same-sex couples.

6.1.16 The differences between registered partnership and marriage, and between same- and opposite-sex marriage, are therefore negligible.

6.1.17 A marriage can only be terminated through divorce proceedings by the court. Registered partnerships can be terminated either through a court procedure or, as an alternative, the partners can have their relationship terminated out of court by mutual consent. Termination of a registered partnership through the courts follows the same procedure as divorce proceedings in the case of marriage.27

6.1.18 A registered partnership can be converted into marriage and a marriage can be converted into a registered partnership. The latter conversion would for example be used when the married couple is keen on the idea of terminating their relationship by mutual consent out of court.28

6.1.19 The opposite would also be possible where partners in a registered partnership desire the security of a marriage, or a same-sex couple in a registered partnership would like to be married. A registered couple wanting to get married to each other would either have to convert their partnership into marriage or terminate it before getting married.29 A registered

26 Van Der Burght 2000 De Jure, at 84, criticises this transplant of all provisions developed for marriage to registered partnerships. He states that the majority of couples who choose a registered partnership above a marriage do so because they do not want to be married. In addition he argues that terms used in the (former marriage) legislation, such as "loyalty, help and assistance" being primarily a moral stipulation, have a specific meaning in the context of a marriage. He asks if "reasonableness and fairness" in a marriage have the same contents when transplanted to registered partnerships?

27 The court's decision is entered in the Register of Births, Marriages and Deaths.

28 The civil registrar draws up a record of conversion. In principle, conversion has no effect on the consequences of what was formerly the marriage or the registered partnership. Conversion does have the effect of terminating the converted partnership and commencing the marriage.

29 For comments on this procedure, see Van Der Burght 2000 De Jure, at 90.
partner would not be allowed to marry someone else without terminating the existing partnership.

6.1.20 There are a few minor differences between the marriage ceremony and the ceremony for registering partnerships.

d) Conditions for recognition

6.1.21 The general conditions of marriage referred to in paragraphs 6.1.2 above are still applicable, except that marriage is open to both same- and opposite-sex couples.

6.1.22 Both marriage covenants and partnership covenants must be entered into by a notarial deed. Registered partnership covenants may, in general, be formulated according to the partners’ own wishes; they may deviate from the full community of property and also, to some extent, from the stipulations of the DCC.30

6.1.23 If foreigners want to marry or register their partnership in the Netherlands, at least one of the partners must either have Dutch citizenship or have his or her domicile and habitual residence there.31

e) Legal consequences of recognition

6.1.24 The consequences of (same-sex) marriage and registered partnerships are similar. Both married and registered partners have a maintenance obligation towards each other, sharing the costs of the household. In principle, all possessions and debts are joined. As with marriage, registered partners can make different arrangements before or during the marriage, executed in a notarial deed before a notary public. The rights to old-age pension acquired during a registered partnership, as with a marriage, must be divided upon

30 Those prescribed in chap 6 of Book 1.

31 The Act of 21 December 2000 made this rule also applicable to partnership registrations and replaced the requirement that both partners should either have Dutch citizenship or lawful residency. This Act entered into force on 1 April 2001 (Staatsblad 2001, nr 11). See also Waaldijk in Wintemute & Andenaes, at 437.
separation unless different arrangements have been made. Equally, a survivor's pension goes to the longest surviving partner.

6.1.25 Registered partners and married couples require each other’s permission to enter into certain commitments, for example selling of a home they jointly own and occupy. Upon the death of one of the partners, if a will to that effect has been made, the entire estate can accrue to the other partner. This is the same with married couples.

6.1.26 Registration of a partnership creates an official family relationship and the family members become "related by marriage" to the other partner or spouse in a similar way as with married couples. These "in-laws" have specific rights and are, for example, not obliged to act as witnesses against their relative’s partner or spouse in certain court cases.

6.1.27 Differences exist, however, between married and registered partners' legal position towards children born to or adopted by the couple. In this regard the distinction drawn in Dutch law between a legal parent and a person with parental authority is important.

6.1.28 A legal parent automatically has full legal and financial rights and responsibilities towards the child. Parental authority is a lesser status and applicable legislation refers to such a person as "the other person" or "the non-parent".32

6.1.29 Parental authority comes into existence ex lege under the circumstances discussed above in paragraphs 6.1.21-23. Parents with parental authority may be financially responsible for the child until he or she is 21 years of age, but only have authority over the child until he or she is 18 years of age. A child cannot automatically inherit from a person with parental authority (unless mentioned in that person’s will) or from such a person’s relatives.33

6.1.30 When a child is born in an opposite-sex marriage, the mother and her husband are ex lege the legal parents of that child. This does not happen ex lege where two women or

32 For example, the title of para 3A of the DCC.

33 The Kortmann Committee, at para 2.7 recognized the legal inequities experienced by lesbian couples who were not allowed to become legal parents through adoption as a couple. The Committee recommended that such a couple should automatically have joint parental authority concerning the child. The Committee also recommended that joint parental authority should have wider consequences under tax laws, social security and inheritance laws.
two men are married, or where the couple (whether same-or opposite-sex) has entered into a registered partnership:

(i) When a child is born into a lesbia marriage, or a registered partnership of two women, or a registered partnership of a man and a woman,\textsuperscript{34} the biological mother of the child is \textit{ex lege} the \textbf{legal parent} of the child and her partner has \textit{ex lege} \textbf{parental authority} over the child.\textsuperscript{35} That spouse or partner will \textbf{not be deemed} to be the father, parent or second mother of the child.\textsuperscript{36}

(ii) Where a biological father, who has custody of a child, enters a same-sex marriage or partnership and his partner or spouse wants to share the legal and financial responsibilities of the child, he will have to go to court to \textbf{apply} that joint \textbf{parental authority} be awarded to him. The spouse or partner will not obtain \textit{ex lege} parental authority when he concludes the registered partnership or marriage ceremony with the biological father of the child.\textsuperscript{37}

\textbf{6.1.31} When a child is born into a same-sex marriage or registered partnership, be that gay or lesbian, the partner who wants to have the complete status of a legal parent will have to \textbf{adopt} the child.\textsuperscript{38}

\textbf{6.1.32} Both same-and opposite-sex married couples and registered partners can also jointly adopt a child as a couple.

\textsuperscript{34} It should be noted that in these relationships there would always be at least one woman.

\textsuperscript{35} This became possible when the Act of 4 October 2001, amending various articles of Book 1 of the Civil Code), came into operation. This Act was published in Staatsblad 2001, nr. 468 and came into operation on 1 January 2002 by virtue of a Royal Decree of 7 November 2001 (Staatsblad 2001, nr. 544) giving effect to the recommendations by the Kortmann Committee. Waaldijk Latest News.

\textsuperscript{36} Waaldijk in Wintermute & Andenæs.

\textsuperscript{37} \textit{Ibid}.

\textsuperscript{38} \textit{Ibid}.
6.2 United Kingdom of Great Britain and Northern Ireland

a) Background

6.2.1 The United Kingdom has a constitutional monarchy with an unwritten constitution found in statutes, the common law and practice. The common law tends to favour incremental reform, dealing with particular problems on a piecemeal basis.

6.2.2 Cohabitation, the term used for unmarried couples in domestic partnerships, has always existed in the UK, and recent studies indicate that its incidence is continuously increasing.

6.2.3 Historically the following factors determined the incidence of cohabitation in the UK:

(i) Up until the mid 18th century various informal ways of marriage were legally recognised which gave rise to the term "common-law wife/husband". Cohabitation during the period after betrothal but before the wedding ceremony used to be common. During the Middle Ages and up to the 18th century it was the Christian view that marriage began with betrothal and that

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39 The United Kingdom has a population of almost 60 million living on 245,820 km². The ethnic groups found in the United Kingdom are English 81.5%, Scottish 9.6%, Irish 2.4% and Welsh 1.9%. The other 4% consist mostly of West Indians, Indians and Pakistanis. Almost 50% of the population is Anglican and the remainder is Roman Catholics (9 million), Muslims, Presbyterians, Methodist, Sikh, Hindu, Jewish and others. World Factbook - UK.

40 Hereafter referred to as the "UK".

41 The country has a common-law tradition with early Roman as well modern continental influences. No judicial review of Acts of Parliament exists. The judicial branch consists of the House of Lords and the Supreme Courts of England, Wales and Northern Ireland. Scotland has a Court of Session and Court of the Judiciary. The British courts are increasingly subject to review by European Union courts. World Factbook.

42 Barlow & Probert WJCL Studies, at 2.


44 See the figures and studies referred to by Shaw Research Paper, at 9. See also the Law Society Report on Cohabitation, at para 4.
sexual cohabitation was permitted after such betrothal. Betrothal was then later followed by the marriage ceremony once fertility had been established.45

(ii) However, the Hardwicke Marriage Act of 175346 changed the definition of marriage and required a marriage to be conducted in a church or public chapel. This change brought about by the Act meant that marriage now only began with a wedding in the church or chapel,47 which caused a decrease in cohabitation.48

(iii) With changing social circumstances in the 19th century and the recognition of non-Christian religions, the concept of marriage expanded and registry office weddings became recognised. This development also reflected growing secularisation49 and together with that cohabitation increased.

(iv) During the 19th century the Industrial Revolution increased the economic independence of women and the mobility of the population which furthermore led to an increase in cohabitation.50

6.2.4 Since the sixties the number of cohabiting women in the UK has risen from 6 percent to 70 percent.51 It is suggested that the reasons couples cohabit in modern times are either because they do not wish to marry or want to test the long-term viability of their relationship.

45 Once a pregnancy was confirmed, the couple would formally get married. Thatcher Religion and Sexuality and Law Society Report on Cohabitation, at para 6.

46 Shaw Research Paper, at 11 and the Law Society Report on Cohabitation, at paras 5-10. This Act further required registration of all marriages in England and Wales. Verbal contracts were no longer regarded as binding.

47 This was not so much a religious or theological, but a class matter. One of the main aims of the 1753-Act was to regulate the increase in marriages between families that had derived their wealth from agriculture and commerce. Parker Informal Marriage and Cohabitation. The upper and middle classes used their political clout to enforce the social respectability of the new marriage laws. Thatcher Religion and Sexuality.

48 While the working classes continued to practice alternatives to legal marriage, the stigma of illegitimacy now attached to children whose parents had not been through a wedding ceremony. Thatcher Religion and Sexuality.

49 Shaw Research Paper, at 11.

50 Shaw Research Paper, ibid.

51 “The myth of the common-law wife” and “Cohabitants beware: who will get the house if we split up?” available at http://www.divorce.co.uk/hottopics/articles/cohabitants.htm (accessed on 2 July 2002)
6.2.5 The following factors influence present-day cohabitation in the UK:\(^{52}\)

(i) The increase in divorce and separations cause people to change their views on the permanent nature of marriage and the marriage commitment.

(ii) The perceived lack of any great financial or fiscal advantage in marriage as opposed to cohabitation.

(iii) Cohabitants often wrongly believe that they will acquire rights after living with each other for a certain time.

(iv) Women gradually became active in the labour market, thereby increasing their economic independence and contributing to their being less dependent on the security a marriage was perceived to provide.

(v) Same-sex partners cohabit because marriage is impossible under statute law.

b) Current legal position

6.2.6 No special legal status exists for a cohabiting couple. Couples living together in stable relationships are often in lay terms referred to as "common-law spouses". These couples are often unaware of the fact that this concept has not been recognised in England and Wales since Hardwicke’s Marriage Act abolished informal marriages in 1753. Consequently they are unaware that they have no vested rights.\(^{53}\) The position regarding common-law marriages is the same in Northern Ireland.

6.2.7 The Scottish Courts have limited power to recognise an informal common-law marriage arising from "habit and repute". This form of a common-law marriage gives the

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\(^{52}\) Northern Ireland Law Reform Advisory Committee Report on Matrimonial Property, at para 4.5. Cohabiting relationships are not yet as common in Northern Ireland as in England and Wales.

\(^{53}\) Myth of the common-law wife, op cit. According to the latest report from the National Centre for Social Research, more than half of the population falsely believe there is something called "common-law marriage" giving cohabiting couples the same rights as married couples. Shaw Research Paper, at 12.
same rights as regular marriage but is extremely rare, partly owing to difficulties experienced by the partners in proving its existence.\textsuperscript{54}

6.2.8 The dearth of remedies available to former cohabiting partners upon termination of the relationship has compelled them to seek relief in general legal principles.\textsuperscript{55} Since mere cohabitation does not give rise to automatic property rights, the ordinary rules of contract, property and unjustified enrichment have on occasion been invoked by cohabitants to enforce rights acquired in or to each other’s property.\textsuperscript{56} In England, in particular, resulting, implied or constructive trusts have also been used to achieve a fair division of property between cohabitants.\textsuperscript{57} The English courts have also used proprietary estoppel to give cohabitants a share in the other’s property upon termination of the relationship.\textsuperscript{58}

c) Consequences of cohabitation

6.2.9 Case law and piecemeal legislative developments have established the following consequences of cohabitation:\textsuperscript{59}

\textsuperscript{54} To be so married the couple must have behaved in a way compatible with marriage and must prove that their nearest friends and relatives believed that they were indeed married. Only about 50 applications per year are made to the Court of Session to have such marriages recognized, Shaw Research Paper, at 49.

\textsuperscript{55} The results were often inappropriate since these general legal principles have no regard for the emotional relationship between the parties.

\textsuperscript{56} Sinclair & Heaton Marriage Law, at 274. This approach has led to judge made law playing an active and important role in the development of rights for unmarried cohabitants. Compare this with the role Dutch courts could play in a system that does not allow judicial scrutiny of parliamentary legislation.

\textsuperscript{57} Cook v Head [1972] ALL ER 38 (CA), [1972] 1 WLR 518; Eves v Eves [1975] 3 ALL ER 768 (CA), [1975] 1 WLR 1338 and Grant v Edwards [1986] 2 ALL ER 426, [1986] 3 WLR 114, [1986], referred to and discussed by Sinclair & Heaton Marriage Law, at 275. This has not succeeded in Scotland and the failure to recognize this remedy has been ascribed to the common misunderstanding that a constructive trust cannot arise unless the conditions in the Blank Bonds and Trusts Act of 1696 are satisfied. McK Norrie 1995 JR, at 225. See Sinclair & Heaton Marriage Law, at 274 fn 26. See also discussion by Schwellnus Obiter 1996, at 52.

\textsuperscript{58} For such a claim to succeed, the plaintiff must prove he or she incurred expenditure or committed some detrimental act and that he or she did so in the belief, encouraged by the defendant, that the plaintiff already owned or would be given some proprietary interest in a specific asset. Sinclair & Heaton Marriage Law, at 275 fn 26. See also Schwellnus Obiter 1996, at 57.

\textsuperscript{59} Shaw Research Paper, at 12-51.
Property Rights.  

6.2.10 Upon separation of the couple, the basis for division is strictly according to ownership of the property and the courts have no overriding power to divide it equitably as they may do on divorce.

6.2.11 Property bought jointly by the two partners may, upon breakdown of the relationship, be divided in appropriate shares, provided that the basis and share percentages of joint ownership are clear.

6.2.12 When property is in the sole name of one of the partners, the court may, in very special circumstances where the technical rules of the law of trusts or proprietary estoppel can be made applicable, determine that the other cohabitant has a share in that property.  

6.2.13 Cohabiting couples may enter into a contract to regulate their relationship and in particular their property rights. The validity of general cohabitation contracts has not yet been established. In practice, a series of legally enforceable agreements on specific matters is made.  

6.2.14 When the cohabiting couple has children, the court has the power under Schedule 1 of the Children Act of 1989 to make transfers of capital for the children’s benefit with incidental benefit to the other former cohabitant. Same-sex cohabitants sharing a home are treated as unconnected individuals as regards home ownership.  

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60 See also Schwellnus Obiter 1996, at 43 et seq.

61 The party who has no legal interest in the home may be found to have a beneficial or equitable interest in the property. The apparent intentions of the parties are relevant to decide the portion of each party. For a detailed summary of the current law position see the Law Society Report on Cohabitation, para 17 et seq. See also the cases referred to in fn 57 above.

62 Barlow & Probert WJCL Studies, at 3.

63 To be valid such contract must comply with the general formalities of contract law.


65 -whether in the form of property or a lump sum-

66 The same would apply for example to an elderly parent sharing a home with a child ie non-conjugal relationships. A current review by the Law Commission for England and Wales covers a broad range of people including friends and relatives who share a home.
Transfer of Tenancies

6.2.15 Under Schedule 7 of the Family Law Act of 1996 the court may, in the case of an opposite-sex couple living together as husband and wife, order that a tenancy in the name of one of the cohabitants be transferred into the name of the other after breakdown of the relationship.

6.2.16 The right to succeed to a tenancy upon the death of a cohabiting partner varies depending on the nature of the tenancy, namely private or council tenancy:

(i) Statutory provision is made for couples living together as married couples and who have exclusive occupation of private rented accommodation, to be treated in the same way as married couples for succession purposes, i.e., cohabitants would succeed to a statutory tenancy.

(ii) In the case of a council tenancy the tenant’s family may succeed to the tenancy if they resided with the deceased tenant for at least 12 months before the death. For the purposes of succession that includes “persons living together as husband and wife”.

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68 For a detailed discussion see Parker Cohabitees, at 101 et seq.


70 In the appeal of Fitzpatrick v Sterling [2000] 1 FLR 271 the House of Lords upheld such a claim for succession by a surviving partner in a same-sex cohabitation relationship. Referred to by Shaw Research Paper, at 15.

71 S 113 of the Housing Act of 1985. The majority of local authorities are reported to allow same-sex partners to succeed to tenancies as a matter of policy. "We are family" Inside Housing 5 November 1999, referred to by Shaw Research Paper, ibid.
Domestic Violence

6.2.17 The Family Law Act of 1996 allows cohabitants as home-sharers and former home sharers to apply for non-molestation and other court orders regulating the occupation of the family home. Same-sex cohabitants are included but have fewer rights as "associated persons" than opposite-sex couples, being defined as "cohabitants under the Act".

Death and Inheritance

6.2.18 No automatic inheritance right exists for unmarried partners. Under the Inheritance (Provision for Family and Dependents) Act of 1975, opposite-sex cohabitants may claim against the estate of the deceased partner if inadequate provision has been made for the surviving partner, either by will or as a result of the operation of the rules of intestate succession. Such a cohabitant may make a claim only if he or she was living as the husband or wife of the deceased in the same household for the two years immediately before the death.
6.2.19 A same-sex cohabitant who wishes to make such a claim would have to establish, in addition to the above, that he or she was a dependant of the deceased and was being maintained by the deceased immediately before death.  

6.2.20 Same-sex cohabitants are not allowed to claim bereavement damages for the wrongful death of a partner owing to the reference to living as "husband and wife" in the definition of "dependant" in the Fatal Accidents Act of 1976.

Maintenance

6.2.21 Although unmarried parents both have a duty to support their children financially, no such obligation exists between the partners themselves.

Social Security

6.2.22 There is no entitlement to contributory benefits based on the status of cohabitation outside marriage. Moreover, under social security law, the unit of claim for means-tested-benefits is a "family". "Family" is then defined to include an unmarried couple, meaning that their resources will be aggregated when the benefit is calculated. An "unmarried couple" is interpreted as referring only to opposite-sex couples living together as husband and wife. No reference is made to same-sex couples.

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79 As such, same-sex cohabitants have fewer inheritance rights than opposite-sex cohabitants. Shaw Research Paper, at 17. See also Barlow & Probert WJCL Studies, at 4.

80 Parker Cohabitees, at 189.


82 Parker Cohabitees, at 5.


84 Shaw Research Paper, ibid.


86 Shaw Research Paper, at 17 and Barlow & Probert WJCL Studies, at 4. The latter says that this results in a double penalty for opposite sex couples. See also Parker Cohabitees, at 21.
Pensions

6.2.23 Contrary to the position of a widow, widower or divorcee, a cohabitant cannot rely on the former partner’s contributions for the purposes of state retirement pension. Entitlement to other pension benefits will depend on the rules of the scheme concerned.

Taxation

6.2.24 Cohabiting couples are treated as unconnected individuals for tax purposes. Transfer of property between cohabiting partners is thus not exempted from inheritance tax and capital gains tax.

Immigration and Nationality

6.2.25 Immigration law currently provides that a cohabiting partner cannot immigrate to the UK despite the fact that his or her partner is a British citizen. The government has introduced a concession to allow unmarried, long-term cohabiting partners to apply for leave to enter/remain in the United Kingdom. One of the criteria for permitting these cohabitants to enter is that there must be a legal prohibition on marriage. This means that in practice it is not possible for opposite-sex cohabitants to take advantage of this concession.

6.2.26 The basic rule in the British Nationality Act of 1981, when trying to ascertain whether or not a child is British, is that the child cannot acquire British nationality by virtue of his or her father’s British nationality or settled immigration status, unless the child’s parents were married to each other at the time of the child's birth (or, if the family is resident in Britain, became married after the child’s birth).

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87 Shaw Research Paper, ibid.


89 Law Society Report on Cohabitation, at paras 90 and 91.
Adoption

6.2.27 Under the Adoption Act of 1976, only married couples or single people are allowed to adopt. Same-sex partners may therefore not adopt as a couple but may do so in their individual capacities. Partners of unmarried persons who have successfully adopted do not have full parental rights, leaving the child potentially vulnerable in the event of its adoptive parent’s death or the couple splitting up.

6.2.28 From the above it is clear that the current legal position relating to cohabitation in the UK is complex, arbitrary and uncertain. Marriage is generally regarded as playing an important role in English society. Nevertheless, it is widely acknowledged that the law needs to recognise and respond to the increasing diversity of living arrangements in the UK.

6.2.29 The Law Commission (of England and Wales) has, since 1993, been examining the property rights of all persons who share a home. The Commission is of the view that the adoption of legislation providing for the registration of certain "civil partnerships" and the

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90 As amended. See discussion by Parker Cohabitees, at 216.

91 M Woolf “Unmarried couple win right to adopt” Independent.co.uk News available at http://news.independent.co.uk/uk/legal/story.jsp/story=115921 (hereafter referred to as "Woolf").


93 The fact that a consultation document of 1998 "Supporting Families" by the Home Office, available at http://homeoffice.gov.uk/vcu/suppfam.htm, makes little reference to the particular needs of cohabiting couples, and none to the work of the Law Commission in this area, would seem to suggest that reform of "cohabitation law" is not a priority for the Government. Although the paper espouses neutrality, it does state that marriage "remains the choice of the majority of people in Britain" and for that reason it makes sense for the Government to do all it can to strengthen marriage. This approach ignores the fact that the increase in cohabiting outside marriage leaves an increasing percentage of the population without legal remedy. Barlow & Probert WJCL Studies, at 5. The Law Commission in its Discussion Paper (fn 95 below) pertinently pointed out that marriage is a status deserving of special treatment and that an attempt to define another status that would lead to the vesting of rights and obligations would amount to interference in questions of social policy which are essentially matters for Government.

94 Including married couples, cohabitants, relations and friends.
imposition of legal rights and obligations on persons in relationships outside marriage should be considered.95

6.2.30 **The Law Society** (of England and Wales) proposed wider reform than the Law Commission.96 In its report, the Law Society made substantial recommendations with regard to the definition of cohabitation, financial provision on separation, pensions and succession with the aim to protect the vulnerable on relationship breakdown.

6.2.31 The Law Society, however, emphasised that some cohabitants do not marry because they wish to avoid the legal consequences of marriage. To recreate marriage would thus be inappropriate and would concomitantly undermine marriage.

6.2.32 According to the Law Society’s report, the approach to any reforms should be to provide those who need it with greater protection within a more rational system than the current one without derogating from the pertinence of marriage in society. This would also leave scope for increasing the protection offered to same-sex cohabitants so that it equates with what is available to opposite-sex cohabitants.97

6.2.33 **The Solicitors’ Family Law Association**98 also advocates a new cohabitation law, but proposed that cohabitants should have the right to "opt out" of the legal rights and duties in this law through a cohabitation contract.99

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96 In its report, the Law Society states that the policy underlying the *ad hoc* developments that have taken place has been neutral and attempted to protect cohabitants from the worst excesses of the law which would otherwise apply to them, without equating cohabitation with marriage. The Law Society Report on Cohabitation, at paras 13 and 14. In a statement on its website dated 19 July 2002 the Law Society said that a major campaign is being launched to urge Parliament to reform the law to offer legal protections to millions of people following relationship breakdown, Law Society on Cohabitation. This statement coincided with the publication of the Law Commission's Discussion Paper on Sharing Homes, fn 95 above.

97 See the follow-up report by the Law Society dated July 2002, where the registration of partners in same-sex relationships are recommended in order to give partners rights and responsibilities analogous to those for married couples. Law Society Proposals on Cohabitation.

98 Hereafter referred to as “SFLA”.

99 Solicitor's Family Law Association Fact Sheets. The proposed new law should *ia* allow the courts to do what is fair and reasonable between the couple under the circumstances.
6.2.34 The Northern Ireland Law Reform Advisory Committee on Matrimonial Property\textsuperscript{100} similarly proposed law reform of the law relating to cohabiting couples. The Committee came to the conclusion that before parties to a cohabitation relationship should be allowed to rely on the recommended benefits in Chapter 6 of its report, they must either have lived together in the same household for a continuous period of two years within the last three years or have lived together in the same household and have had a child together irrespective of the duration of the relationship. In addition they must have been cohabitating on the date of the relevant transaction \textit{ie} transfer of the property concerned.\textsuperscript{101}

6.2.35 The Scottish Executive published a white paper proposing legislative reform of the law relating to cohabitants in September 2000.\textsuperscript{102}

6.2.36 Two \textit{Private Members' Bills}\textsuperscript{103} on this issue were introduced in Parliament in October 2001 and January 2002 in response to the inadequacy of the law and the lack of legal recognition for unmarried cohabiting couples. These Bills are broadly similar in that they seek to introduce a system of partnership registration for same- and opposite-sex partners with ensuing legal responsibilities and benefits. At the first reading of the Bill the House of Commons was divided and voted ayes 179 and noes 59.\textsuperscript{104} Time ran out on its second reading debate and on 19 July 2002, when it was scheduled to resume, it was not moved for further debate.

6.2.37 The Government indicated that it would conduct a cross-departmental review of the matter to consider the significant financial and administrative implications of the Bills.\textsuperscript{105} The

\textsuperscript{100} Para 6.2.5 fn 52 above, Northern Ireland Law Reform Advisory Committee Report on Matrimonial Property, \textit{ibid}. Reference is also made to the importance of Articles 8 and 14 of the \textit{European Convention on Human Rights} when assessing the validity of the present law and considering proposals for reform. See also in this regard fn 3 of the discussion of the Netherlands.

\textsuperscript{101} Northern Ireland Law Reform Advisory Committee Report on Matrimonial Property, at para 4.15, with reference to Australian legislation on this topic. The SFLA had a similar recommendation.

\textsuperscript{102} Scotland Whitepaper, referred to by Shaw \textit{Research Paper}, at 49.

\textsuperscript{103} The Relationships (Civil Registration) Bill introduced by Jane Griffiths (the member for Reading, East) on 24 October 2001, Bill 36 of 2001-02 available at \url{www.publications.parliament.uk/pa/cm200102/cmbills/036/2002036.pdf} and The Civil Partnerships Bill introduced in the House of Lords on 11 February 2002 by Lord Lester of Herne Hill, HL Bill 41 of 2001-02 available at \url{www.publications.parliament.uk/pa/1d200102/1dbills/041/2002041.pdf}.

\textsuperscript{104} Shaw \textit{Research Paper}, at 26.

\textsuperscript{105} House of Commons Debate and House of Lords Debate.
Opposition’s position on the Civil Partners Bill is that it cannot support the Bill.\textsuperscript{106} After its second reading, Lord Lester stated on 11 February 2002 that he would not be proceeding with the Bill during that session in order to allow for the cross-departmental review of the impact of the proposed reforms.\textsuperscript{107}

6.2.38 An Adoption and Children Bill is currently being debated before the House of Lords.\textsuperscript{108} During debate of the Bill a proposal to specifically allow unmarried same- and opposite-sex couples to adopt, was approved in the House of Commons with a majority of 155 votes.\textsuperscript{109} An opposing proposal to specifically exclude same-sex couples from adopting children was dismissed in the House of Commons with a majority of 128 votes.\textsuperscript{110}

6.2.39 In terms of the proposed Bill people aged 21 years or older who can demonstrate that they have a long-term commitment to the relationship and are living in a stable relationship, will be permitted to adopt.\textsuperscript{111} Under Part 1 Chapter 1 section 1(2) of the Bill the

\textsuperscript{106} House of Lords Debate, Col 1737. Baroness Buscombe spoke for the Official Opposition at the second reading debate and said that there is no need to create a separate category of registered civil partnerships for opposite sex couples as it would serve to undermine the institution of marriage. The Bill is seen, however, as an opportunity to consider the rights of those who are not able to marry ie same-sex couples in a long-term stable relationship. She concluded that a detailed review of the operation of civil relationships in Europe is needed before further in-depth discussions of all the issues should take place.

\textsuperscript{107} Shaw Research Paper, at 26. The latest development in this regard was the publication of a consultative document by the British Government which proposes the creation of homosexual "civil partnerships". People in these partnerships would have access to the pension of a dead partner, exemption from inheritance tax and the power to make decisions in the event of medical incapacity. Couples in these relationships would have to enter their names on a register and there would also be a form of 'divorce" involving the striking of names from the register and a financial settlement. Although these proposals represent an enormous advance for homosexual rights, they are being criticised for excluding cohabiting opposite-sex couples. The Government argues that cohabiting couples do not need additional legal rights because they can attain them by getting married. Opponents of this view argue that it forces people to marry in order to qualify for legal protection. N Tweedie "Legal rights for homosexual couples attacked --by gays" News.telegraph.co.uk 30 June 2003 available at http://news.telegraph.co.uk. See also L Letourneau "Gay partnership Rights --It's a Couple Thing" available at http://www.gayfinance.info/news/partnership-rights.htm (accessed on 30 June 2003).

\textsuperscript{108} The 2nd reading debate took place on 10 June 2002. Hansard House of Lords.


\textsuperscript{111} Woolf, ibid.
paramount consideration for the court or adoption agency when considering an adoption application would be the child’s welfare.\textsuperscript{112}

6.3 Sweden\textsuperscript{113}

a) Background

6.3.1 The legal system of Sweden is a civil law system which is influenced by customary law.\textsuperscript{114} The government is a constitutional monarchy with a Constitution dating back to January 1975.

6.3.2 The Scandinavian countries have a reputation for having a liberal approach to the regulation of domestic relationships\textsuperscript{115} or cohabitation, the term used for couples in unmarried domestic partnerships. Within the Nordic region, it is said that cohabitation was hardly ever condemned in Sweden and Denmark.\textsuperscript{116}

6.3.3 In Sweden the recognition of unmarried relationships was influenced by conventions relating to which elements constituted marriage. These conventions differed over time and

\textsuperscript{112} Research reveals that among those most likely to adopt, single and cohabiting couples are more likely to consider it in future than married couples. A recent poll by the British Agency for Adoption and Fostering found than in a sample of 2000 adults 68% "supported" and 36% "strongly supported" joint adoption by unmarried couples. "Adoption Bill Could Benefit Gays" RainbowNetwork.com news available at http://rainbownetwork.com/content/News.asp?newsid=2293 (accessed on 8 April 2003).

\textsuperscript{113} Sweden has a population of almost 9 million living on 450,000 km\textsuperscript{2}. The indigenous ethnic compilation is Swedes, Finns and Sami minorities. Almost 80% of the population is followers of the Lutheran religion. World Factbook - Sweden.

\textsuperscript{114} The Swedish legal system has a continental legal tradition with its dependence on statutory law. The close communication between scholars of Sweden and the European continent in the eighteenth century led to a strong influence from the German Roman tradition. Kabir Swedish Legal System.

\textsuperscript{115} As far back as 1920 the Swedish Marriage Code has attracted attention as being liberal. M A Glendon The Transformation of Family Law Chicago: University of Chicago Press 1989 at 184, describes the provisions for divorce as the legal embodiment of blissfulness – quoted by Bradley Modern Legal Studies, at 1 fn 1.

between particular regions, classes and social groups.\textsuperscript{117} Sexual relations and betrothal were often regarded as the start of marriage, and a subsequent religious ceremony merely as the confirmation thereof.\textsuperscript{118} The relatively weak influence exerted by the Church in Sweden enhanced secular sentiments towards religious marriage.\textsuperscript{119}

6.3.4 Industrialisation and urbanisation appeared to have provided an additional stimulus for the so-called "Stockholm-marriage", \textit{i.e.} pre-marital cohabitation amongst unskilled workers and poor women in nineteenth-century Stockholm. For many of these people civil marriage was unavailable owing to the accompanying expenses and intricate and costly procedures if a previous marriage had to be dissolved.\textsuperscript{120}

6.3.5 Despite the influence of secular liberalism on early twentieth-century laws, religious elements in the Swedish Marriage Code of 1920 were not eliminated completely and some remained until the late 'sixties. For example, restrictions on marital capacity, which includes degrees of affinity, and provisions for annulment reflect religious values.\textsuperscript{121} A religious ceremony is an alternative to civil marriage even today.\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{117} On one assessment, pre-marital sexual relations have been the norm for couples in Scandinavia during the entire Protestant era. Formerly, prior to and after, the Reformation and under the Ecclesiastical Law of 1686, betrothal or promise of marriage and subsequent cohabitation had been sufficient to constitute a relationship which qualified for legal recognition. Only in 1734, under the General Code, did a religious marriage ceremony become a pre-requisite for acquisition of marital status. At that stage the church, however, seemed to have been faced with institutionalised opposition, resulting in the condonation of non-compliance with the requirement for a religious ceremony in sections of Swedish society. Bradley \textit{Modern Legal Studies}, at 3.
\item \textsuperscript{118} J Frykman "Sexual Intercourse and Social Norms" 1975 \textit{Ethnologia Scandinavia} 110 at 146, referred to by Bradley \textit{Modern Legal Studies}, at 4.
\item \textsuperscript{119} Christianity was established late in Sweden and considerable remnants of paganism existed until the late sixteenth century. Bradley \textit{Modern Legal Studies}, at 5. J W F Sunberg "Recent changes in Swedish Family Law: Experiment Repeated" 1975 \textit{The American Journal of Comparative Law} 38, ascribes the popularity of cohabitation in Sweden to the negative view held by socialist ideologists with respect to the bourgeois church marriage, thereby favouring as a matter of principle free partnerships based on conscience, referred to by Schwellnus \textit{Obiter} 1995, at 229 fn 1.
\item \textsuperscript{120} Bradley \textit{Modern Legal Studies}, at 6.
\item \textsuperscript{121} Bradley \textit{Modern Legal Studies}, at 65.
\item \textsuperscript{122} See Dialogue with Swedish Citizens.
\end{itemize}
6.3.6 During the late 'sixties cohabitation outside marriage increased markedly and the marriage rate declined significantly.\textsuperscript{123} Cohabitation became the norm to such an extent that it can be seen as a social institution.\textsuperscript{124} But, although this appears to be a liberal development, it may simply be adherence to the pre-Christian betrothal and marriage forms under Ecclesiastical Law.\textsuperscript{125}

b) Development of relational status

6.3.7 In 1969 Sweden began developing "an irreligious, ahistorical, anti-national concept of society" (the Neutrality Principle),\textsuperscript{126} resulting in directives for family law reform attacking \textit{ia} religious values expressed in laws relating to the family.\textsuperscript{127} The Social Democratic government in 1969 approved these directives for family law reform. Although religious values were renounced, the central position of marriage was still recognised in principle.\textsuperscript{128}

6.3.8 Over the same period, separate from the above reform initiative, a comprehensive and comparatively liberal statute on transsexualism, enacted in 1972,\textsuperscript{129} led to the liberation of the institution of marriage from requirements for actual or potential capacity to have children. This major development debilitated the traditional religious marriage institution as the exclusive domain of opposite-sex couples and would eventually ease the facilitation of

\begin{thebibliography}{99}
\bibitem{123} Bradley \textit{Modern Legal Studies}, at 96. In 1979 more than 99\% of the couples who got married in Sweden had cohabitated in marriage-like conditions prior to the marriage. Schwellnus \textit{Obiter} 1995, at 230.
\bibitem{124} Schwellnus \textit{Obiter} 1995, \textit{ibid}.
\bibitem{125} Bradley \textit{Modern Legal Studies}, at 96 and further where he qualifies this view by stating that it is not argued that there are complete parallels between the pre-Christian betrothal and the current situation.
\bibitem{126} Ministry of Justice \textit{Protocol on Justice Department Matters} (1969) at 4: "New legislation ought (so far as possible) to be neutral in relation to the different forms of living together and different moral views. Marriage has and ought to have a central position in the family law, but one should try to see that the family law legislation does not create any provisions which create unnecessary hardships or inconveniences for those who have children and build families without marrying". Referred to by Bradley \textit{Modern Legal Studies}, at 97 fn 11.
\bibitem{127} This clearly indicated more than a reluctant endorsement of extra-marital relationships or concern to minimise tax advantages and limit social security benefits. The notion of neutrality is an explicit rejection of a moral code and laws which restrictively defined the legitimacy of sexual relations by confining it to marriage. Schwellnus \textit{Obiter} 1995, at 231.
\bibitem{128} Bradley \textit{Modern Legal Studies}, at 64.
\bibitem{129} Lag om Wasteland agv Königshörigkeit i Vissa Fall (English title not available) SFS 1972:119.
\end{thebibliography}
same-sex cohabitation. From then on marriage in Sweden was no longer based on procreation.

6.3.9 By 1973 the Swedish parliament accepted the proposition that cohabitation by two persons of the same-sex was considered by society to be a perfectly acceptable form of cohabitation although same-sex marriage as such was still not acceptable.

6.3.10 The reform which followed, mainly resulting from the work of three government commissions, gradually altered what remained of the concept of marriage known to Swedish family law up to that time. The trend was to create equality regarding public law rights of spouses and cohabitants (initially for opposite- but soon also for same-sex couples) but to retain the distinction in their status in private law.

6.3.11 In 1981 proposals for extensive rights for opposite-sex cohabitants were included in a review of matrimonial property and succession law, *The Commission Report on Matrimonial Property, Inheritance Law and Cohabitation without Marriage*. This report reflected the trend of avoiding full equation of cohabitation and marriage (private law status) but of proposing legislation that would protect the weaker party in the cohabitation relationship (equality in public law).

6.3.12 Subsequent to this review of matrimonial property and succession law, *The Commission Report on Homosexuality and Society* was published in 1984 and provided a thorough review of the conditions governing homosexuality in the Swedish society. This state-sponsored study, initiated in 1978, was the starting-point for the

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130 Bradley *Modern Legal Studies*, at 67.

131 Infertile opposite-sex couples were still regarded as complying with the *essentialia* of the ideal marriage since they at least had the potential to procreate.

132 This approach was based on contemporary public opinion, rather than any commitment to religious values. Bradley *Modern Legal Studies*, at 68.

133 SOU 1981:85.


135 SOU 1984:63.

136 The work of this Commission revealed two facts which emerged from surveys of the general public and of homosexuals. First, homosexuality was not a recognised social or cultural institution. Second, disapproval centred on public perceptions of homosexuality as being only about sex, rather than
movement to create concrete legal protection for gays and lesbians in particular. An important recommendation was that the Instrument of Government, which protects fundamental rights and freedoms, should be amended to protect homosexuals.

6.3.13 **The Commission Report on Partnerships**\(^{137}\) which followed in 1993, also took up this theme of commitment to a better dispensation for same-sex couples. The Commission rejected arguments that registered partnerships would cause decadence and crime or threaten civilisation, society, marriage, heterosexuality or young people and reported that predictions of harm were unfounded on the basis that no justification for such allegations could be found.

6.3.14 The recommendations in the reports of the commissions referred to in paragraphs 6.3.11, 12 and 13 above eventually led to the following legislation addressing the discrimination in domestic partnerships: the Cohabitees (Joint Homes) Act in 1987,\(^{138}\) the Homosexual Cohabitees Act in 1988\(^{139}\) and the Registered Partnership (Family Law) Act in 1994.\(^{140}\)

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\(^{137}\) SOU 1993:98.


c) Current legal position

6.3.15 Under current Swedish legislation the following relationships are recognised. In so far as opposite-sex couples are concerned: cohabitation or marriage. For same-sex couples: cohabitation or the option of registered partnership, but they may not get married.

6.3.16 Cohabitation may be a staging post on the way to marriage for opposite-sex partners or to a registered partnership for same–sex partners. It may also be a permanent lifestyle. These options became available through the following legislation.

6.3.17 The Cohabitees (Joint Homes) Act of 1987 initially applied to "relationships in which an unmarried woman and an unmarried man live together in circumstances resembling marriage". Same-sex cohabiting partners were brought within the scope of this legislation for opposite-sex partners by the Homosexual Cohabitees Act of 1988.\footnote{The Homosexual Cohabitees Act of 1988 contained a provision whereby what applies in relation to cohabitants in accordance with specified enactments and provisions shall also apply to two persons who live together in a homosexual relationship. The Cohabitees (Joint Homes) of 1987 is one of those Acts. Brochure Ministry of Justice: Sweden, chap 4 on Registered Partnership.}

6.3.18 There are, however, a number of provisions applicable to cohabitants that do not apply to opposite-sex cohabitants.\footnote{Brochure Ministry of Justice: Sweden, chap 4 on Registered Partnership.} The social significance of these Acts lies in the confirmation that an adverse approach to unmarried relationships has been abandoned.

6.3.19 The Registered Partnership (Family Law) Act of 1994\footnote{SFS 1994:1117.} came into force on 1 January 1995.\footnote{A survey done in 1998, indicated 1015 men and 481 women to be registered under this new partnership status (only residents of Sweden were included in this statistic, thus the uneven numbers. Rydström Rydström Current Sweden, at 3.} Official documentation of the Ministry of Justice indicates that this system was primarily intended for same-sex couples, although the law does not explicitly require or limit its availability to such a sexual disposition.\footnote{Brochure Ministry of Justice: Sweden, at 25.}

6.3.20 The rest of this discussion will refer to registered partnerships as same-sex relationships only, since this was ostensibly the intention of the legislature.
6.3.21 In contrast with the legislation regulating cohabitating relationships, this Act does not apply automatically and the partners must actively take steps in order to bring the relationship within the scope of the Act.

d) Conditions for recognition

Cohabitation

6.3.22 The relationship of two unmarried and unregistered people of any sex, living together on a consensual basis (indicating that it has a permanent nature) is automatically regulated by the Cohabitees (Joint Homes) Act of 1987. Rights do not depend on arbitrary time requirements for the duration of cohabitation 146 and no special ceremony or registration is required to make cohabitation official or to bring it within the scope of the Act.

6.3.23 Application of the Cohabitees (Joint Homes) of 1987 is thus determined by the fact that two persons cohabit and that they act like a couple in the traditional sense. The household should be of a nature where sexual intercourse is generally expected, sexual intercourse between them must be legal 147 and each partner must have legal capacity in his or her own right. 148

6.3.24 The couple must have a joint domicile home and a joint household whereto they both contribute. At the very least, there must be some kind of financial and practical co-operation and interdependency in the household. 149

6.3.25 According to Fawcett, 150 although seemingly uncertain and too flexible, these rules are not so troublesome in Swedish society, it being a very homogenous society.

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146 Parliamentary debates leading to this Act indicate that only relationships that lasted longer than 6 months were intended to be included. Schwellnus Obiter 1995, at 235.

147 The Act does not apply for example if one of the partners is less than 15 years old, as sexual intercourse with him or her would be illegal.

148 Both partners must be over 18 years.

Registered partnerships

6.3.26 As was indicated in paragraph 6.3.19 above, the Registered Partnership (Family Law) Act of 1994 does not explicitly limit the scope of the Act to same-sex couples, but it is generally accepted that it was intended to apply to same-sex couples. It is also interesting that the legislation does not specifically require that the partners cohabit (i.e. that they are registered at the same address) or have a sexual relationship. Only those who are 18 years or older may register their partnership.

6.3.27 A person who is already registered as a partner or married may not register a new partnership before the previous partnership or marriage has been terminated.

6.3.28 In July 2000 the Registered Partnership (Family Law) Act of 1994 was amended to allow foreigners who have lived in Sweden for at least two years to register their relationship. The Registered Partnership (Family Law) Act of 1994 also applies to Swedish citizens living abroad. The second partner need not have any connection to Sweden in order to be eligible to register a partnership with a Swedish citizen.

6.3.29 People who are related to each other as direct ascendants or descendants may not register a partnership.

6.3.30 Partnerships are registered by a judge at a district court or by a person appointed by the county administrative board to do so. The ceremony resembles the civil marriage ceremony.

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151 Unless otherwise indicated the source for the information in this section is the report by Skolander ILGA Report, fn 28.

152 Before this amendment it was a condition that at least one of the partners be a Swedish citizen domiciled in Sweden. This condition was exclusive to registered partnerships and was for that reason obviously discriminatory. Jensen Europe.

153 Skolander ILGA Report.
c]eremony.\textsuperscript{154} Both partners have to be present at the ceremony, which has to take place in the presence of two witnesses.

e) Legal consequences of recognition\textsuperscript{155}

Cohabitation

6.3.31 Although comparable to the rights of a surviving spouse, the rights of cohabitants under the Cohabitees (Joint Homes) Act of 1987 regarding property and succession are limited.\textsuperscript{156}

6.3.32 Cohabitants are restricted in the free use of joint resources during the period of cohabitation, i.e. joint consent or judicial authorisation for certain dispositions relating to the joint home and household items is required if the property in question falls in a category which would be subject to division or transfer upon termination of cohabitation as provided for under the Act.

6.3.33 Upon termination of the cohabitation, parties have the right to ask for the division of joint property which was intended and acquired for joint use.\textsuperscript{157} The basic principle is equal division after deduction of debts. However, the cohabitant most in need may be permitted by the court to take over the dwelling and/or household item where the court regards it to be "unreasonable … for one cohabitant to surrender property to the other …" in view of the

\textsuperscript{154} The Swedish Church has not yet allowed for this civil status to be reflected in a religious church rite. It does permit ministers to administer an informal, non-church blessing of the civil ceremony. After the ceremony, the registrar gives the couple a registration certificate and enters the partnership in the official register of marriages and registered partnerships. Rydström Current Sweden.

\textsuperscript{155} Compare the legal position with the position under the Property (Relationships) Act of 1984 of New South Wales as discussed under para 6.5 et seq, below.

\textsuperscript{156} The substance of the legislation is to establish a property regime for unmarried cohabitants. Schwellnus \textit{Obiter} 1995, at 236. Community of property in a marriage establishes an economic partnership for spouses whereas the scheme for cohabitants merely provides a safety net limiting basic unfairness.

\textsuperscript{157} Objects acquired prior to cohabitation are presumed not acquired for joint use and all objects acquired after the relationship began are presumed acquired for mutual use. Household goods exclusively for the use of one cohabitant and property used mainly for recreational purposes are excluded. Schwellnus \textit{Obiter} 1995, at 236. This system is comparable to a regime in the Swedish Marriage Code 1987 known as deferred property regime and applies to specified property intended to be the joint home and chattels for that home. Bradley \textit{Modern Legal Studies}, at 98.
duration of the relationship, the financial situation of the parties and the overall circumstances. The value will be deducted from the transferee's share of property or compensation will be payable to the transferor, upon division.\textsuperscript{158} These rights can be excluded by agreement.

6.3.34 Upon termination of the cohabitation a party may also approach the court to transfer to him or her accommodation held under certain forms of tenure.\textsuperscript{159} This power of the court relates to property which falls outside the ambit of the provisions discussed in paragraphs 7.3.27 and 28, for example where property was not actually acquired as a joint home.

6.3.35 In these cases the court may order that the cohabitant most in need of a dwelling may have it. Compensation will be payable to the transferor. This provision has limited application. It applies only to tenant or tenant-owner rights and not to full ownership. If the cohabitants do not have children of whom both of them are the parents, the court will require of the applicant to prove the existence of "extraordinary circumstances" to justify such a transfer.

6.3.36 Cohabitants have no legal obligation to pay maintenance to each other during or after the termination of the relationship.\textsuperscript{160}

6.3.37 Cohabitation does not include automatic joint taxation or the right to take each other's name.\textsuperscript{161}

6.3.38 Cohabitation is dissolved by separation or death. In the event of a dispute regarding the division of property it will be necessary for a court to determine the division in accordance with the principles set out above.\textsuperscript{162}

\textsuperscript{158} Skolander ILGA Report.

\textsuperscript{159} This is based on a 1973 statute.

\textsuperscript{160} Schwellinus \textit{Obiter} 1995, at 240. The cohabitants are free to contractually agree to the payment of either or both types of maintenance.

\textsuperscript{161} Skolander ILGA Report.

\textsuperscript{162} Skolander ILGA Report. The right to request division of property or taking over of a dwelling or household items only applies in favour of the surviving cohabitants and cannot be exercised by the estate of the deceased. Bradley \textit{Modern Legal Studies}, at 99.
6.3.39 Although a cohabitant is not given full intestate succession rights like a spouse, the Cohabitees (Joint Homes) Act of 1987 provides for a modest form of succession right - on division of the dwelling and household items.\(^{163}\) The survivor in an unmarried cohabitation relationship is always entitled to receive an amount equivalent to two times the "base amount".\(^{164}\) This provision is unassailable and can override testamentary dispositions.\(^{165}\)

6.3.40 In the event of testamentary succession in favour of the cohabitant, the rule on legitimate portions giving descendants the right to half of the share they would have taken on intestacy, weakens the position of such cohabitant.\(^{166}\)

6.3.41 Cohabitants are principally taxed separately. However, cohabitants who have children together or who have been married to each other before are treated like spouses in that they are taxed jointly with regard to income from capital.\(^{167}\)

6.3.42 Occupational injuries insurance payable to a cohabitant is equal to that of a surviving spouse if they lived together for a considerable period under circumstances resembling a marriage.\(^{168}\) Case law would determine which cohabitation relationships would satisfy these criteria.

6.3.43 Damages payable to a cohabitant after the loss of a breadwinner as a result of a delict are also equal to that of a married widow.\(^{169}\)

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\(^{163}\) All children of unmarried parents acquired automatic succession rights on the father’s side in 1969 and their rights would therefore be in competition with the cohabiting partner’s claims to intestate succession. Bradley Modern Legal Studies, at 105.

\(^{164}\) The National Insurance Act of 1961 provides for an amount which is indexed and forms the "base amount" for calculation of various social insurance benefits, referred to by Schwellnus Obiter 1995, at 242 fn 93.

\(^{165}\) This provision applies only to the residence and household items and all debts relating to these items must be paid first. Schwellnus Obiter 1995, at 242.

\(^{166}\) Schwellnus Obiter 1995, at 243.

\(^{167}\) Schwellnus Obiter 1995, ibid.


\(^{169}\) Schwellnus Obiter 1995, at 244.
6.3.44 On the basis of their relationship cohabitants may not bear witness in court cases against each other.170

6.3.45 If a cohabiting opposite-sex couple has a child, the mother automatically gets sole custody of the child. Parents are, however, responsible for the maintenance of their children, irrespective of their marital status. The male cohabitant of an unmarried mother is not deemed to be the father and his paternity is established by his acknowledgement or by a judgment following an investigation by social welfare.

6.3.46 A male cohabitant, who is not the biological parent of his opposite-sex cohabitant’s child, will qualify as a stepparent of such a child and could be liable to maintain the child to the extent that the child cannot be maintained by his or her biological parents.171

6.3.47 Same-sex cohabiting partners do not have any rights or obligations towards their partner’s biological children.

6.3.48 Contracting out of the Cohabitees (Joint Homes) of 1987 takes place as follows:

- Cohabitants who do not want the law of cohabitation to apply to their relationship have to draw up an agreement signed by both cohabitants stating same.172

- There are limitations on the rights to be waived in such an agreement and it is also not possible to conclude an agreement making all patrimonial consequences of marriage applicable to a cohabitation relationship.173

- Although the right to contract out of the legislation allows those who are sufficiently well informed a measure of self determination it does not give the same rights as a registered partnership.174 If they prefer not to contract out, the assumption is that they

170 Qualifications like these exist in the instance of marriage, family relationship or "if such person is in a similar way closely connected with a party". Procedural Code, 1973 chap 4 s 13, referred to by Schwellnus Obiter 1995, at 245.

171 Brochure Ministry of Justice: Sweden, at 38.

172 The Cohabitees (Joint Homes) Act of 1987 s 5.

173 See Schwellnus Obiter 1995 for a discussion of these limitations, at 246.

174 This agreement does not give the same rights as a registered partnership. Skolander ILGA Report.
intend to share the home and household items which they acquire as prescribed by law. 175

Registered partnerships

6.3.49 Under the Registered Partnership (Family Law) Act of 1994, the majority of the provisions of the Swedish Marriage Code 176 also apply to registered partnerships. 177 The provision concerning the surname of the parties, maintenance obligations between the partners, the assets and debts of the parties and also the dissolution of a registered partnership are the same as those that apply to marriage. The parties also inherit from each other in the same manner as spouses do. 178 The following aspects are also regulated by the Registered Partnership (Family Law) Act of 1994.

6.3.50 The property of registered partners is divided into partnership property and separate property. Property becomes separate by agreement, conditions in a will or conditions attached to a gift. The rest is principally partnership property.

6.3.51 During the registered partnership, each registered partner has a responsibility for his or her own and the other’s maintenance - if one partner cannot maintain him or herself completely, the other is liable to contribute. Both registered partners assume responsibility for finances and chores at home. Registered partners are in principle entitled to half the partnership property held by the other partner.

6.3.52 Each registered partner is personally responsible for his or her debts. A partner’s creditors are thus not entitled to obtain payment out of property of the other partner, irrespective of whether the property comprises marital property or separate property.

175 Bradley Modern Legal Studies, at 100.
177 Brochure Ministry of Justice: Sweden, at 25.
178 The rules offer freedom and increased security to live in a relationship whilst imposing responsibilities and obligations, Brochure Ministry of Justice: Sweden, at 25.
6.3.53 For the duration of the registered partnership each partner controls his or her own separate property. There are certain limitations on a partner’s ability to control the joint dwelling and household goods, even if that partner is the sole owner of the property. Consent of the other partner is, for example, needed to alienate the joint home and other immovable property.

6.3.54 If one of the registered partners dies, the surviving partner has the right to a pension for a limited period of time, generally 12 months after death. If a registered partner dies as the consequence of an accident at his or her job, the surviving partner is entitled to a life annuity.

6.3.55 Registered partnerships terminate automatically when one of the partners dies. A division of property takes place with the deceased’s heirs conducting the division with the surviving partner.

6.3.56 Registered partnerships can also be dissolved by a court order. Applications for dissolution must be handled by a lawyer. An application may be filed by one or both partners and must be submitted to the local district court.179

6.3.57 In case of a dispute regarding the division of the property upon dissolution of the registered partnership (or after death of one of the partners), the courts apply rules that are similar to those governing marriages to resolve these disputes.180

6.3.58 The parties must, not later than registration, choose between having one of their surnames as joint surname or retaining the surname they had immediately before registration.181

6.3.59 Registered partners cannot get joint custody of children, and cannot jointly be appointed as guardians of children.182 However, the biological children of one of the partners

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179 This court will then decide whether to grant the dissolution immediately or after a six-month trial period. In most cases where both partners agree and no children below the age of 16 are involved, the partners are granted immediate dissolution of the partnership.

180 For a detailed discussion see Brochure Ministry of Justice: Sweden, ibid.

181 A partner who has taken the surname of the other spouse can retain his or her former surname as middle name. Notice of this choice must be given to the relevant authorities.
would be considered stepchildren of the other partner. A stepparent refers to a person who permanently lives with someone who is the parent with custody of a child and as such has some responsibility for the support of that stepchild. The stepparent may claim certain entitlements related to child benefits instead of the biological parent. These entitlements include parent subsidies, parental leave and the right to work three-quarter time for a limited period.183

6.3.60 In a recent development, on 6 June 2002 the socialist-led Swedish parliament approved legislation to allow registered partners to adopt children jointly. Previously, homosexuals could only adopt a child as an individual and only with the permission of the court. This law should take effect in 2003.184

6.3.61 Registered partners are explicitly excluded from the right to artificial insemination since the law regulating insemination states that it is available to women who are married or live together with a man in circumstances resembling marriage, ie opposite-sex relationships only.185

6.3.62 Registered partnerships are not recognised by foreign countries, but partnerships registered in Denmark and Norway are valid in Sweden.186

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182 Custody involves the caring for a child’s physical and mental needs, whereas guardianship mainly refers to the child’s financial needs.

183 Skolander ILGA Report.


185 Artificial insemination is governed by the law only if it is done by a hospital. Since the law does not regulate private insemination, it may still be an option available to gay men and lesbians wanting to become parents other than by adopting a child. See Jensen Europe, op cit. On 6 June 2002, the Swedish parliament has postponed proposals in this regard for further investigation. S Andersson “Swedish Parliament Says Yes to Same-Sex-Couples Possibility to Apply for Adoptions” Press release from the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights 6 June 2002, available at http://outrage.nabumedia.com/pressrelease.asp?id=154 (accessed on 5 July 2002).

186 Brochure Ministry of Justice: Sweden, at 27.
6.4 Canada

a) Background

6.4.1 Canada's legal system is based on the English common law, except in Quebec, where the civil law system, based on French law, prevails. The Canadian Charter of Human Rights and Freedoms is found in Schedule B of the Constitution Act of 1982.

6.4.2 The form of government is a confederation with a parliamentary democracy. The 1867 Constitution provides that legislative jurisdiction is shared between the federal and provincial governments. Regarding marriage, the federal Parliament has exclusive legislative jurisdiction concerning "marriage and divorce" (capacity to marry) and the provincial legislatures have exclusive jurisdiction concerning "solemnisation of marriage in the province" and "property and civil rights in the province".

6.4.3 The provinces may therefore not legislate to make marriage available to same-sex couples. The provinces would, however, be in a position to regulate the property and civil rights of same-sex couples.

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187 Canada is the second-largest country in the world (after Russia) with a population of 31,592,805. The population originates from the British Isles 28%, France 23%, other European countries 15%, Amerindian 2%, African, Asian and Arab 6% and from a mixed background 26%. The religions adhered to are Catholic 42%, Protestants 40% and others 18%. Canada has 10 provinces and three territories. World Factbook - Canada.

188 The judicial branch consists of the Supreme Court of Canada, the Federal Court of Canada; the Federal Court of Appeal and the Provincial Courts. The latter are called Court of Appeal, Court of Queens Bench, Superior Court, Supreme Court and Court of Justice respectively. World Factbook – Canada.

189 Hereafter referred to as "the Charter". Under the constitutional model of Canada more than one Constitution exist and are read together in determining constitutional issues. See footnotes 190 and 191 below.

190 Under the original British North America Act of 1867 (also cited as the Constitution Act, 1867) the federal Parliament has exclusive legislative jurisdiction with respect to some matters and the provincial legislatures have exclusive jurisdiction with respect to other matters. With respect to a third category of matters, the federal Parliament and the provincial legislature share jurisdiction and would have to cooperate in enacting constitutionally valid legislation. Casswell in Wintermute & Andenæs, chap 11 at 216.

191 British North America Act of 1867 s 91(26), 92(12) and 92(13). Although complex, the case law interpreting these provisions of the British North America Act of 1867 generally accepts two points namely that the Act provides for overlapping legislative authority and that the federal Parliament has legislative authority with respect to the capacity to marry. See In Re Marriage Legislation in Canada [1912] A.C. 880 (Privy Council), referred to by Caswell on British Columbia, at 217 fn 10.
rights of couples in relationships other than marriage. 192

b) Development of relational status

6.4.4 Over the past decade or so the federal and provincial courts have gradually begun to recognize the rights of same-sex partners as well as unmarried opposite-sex partners. This was possible by implementing section 15 of the Charter. 193

6.4.5 Section 15(1) of the Charter provides that every individual is equal before and under the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical ability.

6.4.6 Section 1 of the Charter provides that the rights (such as the right to equality in section 15(1)) and freedoms set out therein are subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

6.4.7 In the Andrews case194 the Supreme Court of Canada relied on the words "in particular" which precede the enumerated prohibited grounds of discrimination, to hold unanimously that protection is also afforded against discrimination on the basis of grounds analogous to those enumerated. 195 Therefore, although "sexual orientation" and "marital status" are not included in the prohibited grounds of discrimination enumerated in section 15, it could be argued that they too are analogous grounds. 196

192 See para 6.4.28 and fn 224 below for examples of how this was done by some of the provinces.

193 The equality guarantees in this section came into force on 17 April 1985. The Charter was to a large extent used as a source of reference by the drafters of the South African Constitution which means that this modus operandi of the courts is of particular relevance to the development of the South African legal position.


195 This case did not involve a claim based on sexual discrimination or marital status but a claim based on discrimination against non-citizens, referred to by Casswell in Wintermute & Andenæs, at 219 fn 18.

196 See in this regard paras 6.4.10 and 6.4.13 below.
Opposite-sex couples

6.4.8 Section 15 of the Charter played an important role in the development of the rights of opposite-sex unmarried couples.\textsuperscript{197} In the sixties marriage was the only officially recognised family form and opposite-sex cohabitants, the term used for unmarried couples in domestic partnerships, were excluded from the rights and obligations which attached automatically to marriage. At that time it was also uncertain whether agreements between partners attempting to create marriage-like rights and obligations for partners would be legally enforceable.\textsuperscript{198}

6.4.9 *Ad hoc* legislative and judicial recognition of the rights of opposite-sex couples began with the imposition of support obligations and provisions,\textsuperscript{199} the use of principles of undue enrichment to provide rights in property\textsuperscript{200} and the extension of statutorily defined benefits\textsuperscript{201} for such cohabitants.

6.4.10 In 1995 the Supreme Court of Canada came close to equating marriage and cohabitation in *Miron v Trudel*.\textsuperscript{202} On appeal, the Supreme Court of Canada held, by a five to four majority, that marital status was an analogous ground of discrimination within section 15(1) of the Charter. The Court further held that the exclusion of unmarried opposite-sex cohabitants from the accident benefits available to married spouses violated section 15(1)

\textsuperscript{197} Marital status was included in the Ontario Human Rights Code as a ground of discrimination on the assumption that marital status would be found to be an analogous ground of discrimination within s 15(1) of the Charter. An omnibus Bill covering over thirty statutes, the Equality Rights Statute Law Amendment Act of 1986, S.O. 1986 chap 64, was furthermore passed by the Ontario government, again on the assumption that marital status was covered under s 15(1) of the Charter. See in this regard Holland 2000 CJFL.

\textsuperscript{198} Holland 2000 CJFL, para 3(c).

\textsuperscript{199} See the Family Reform Act of 1987 S.O. 1978 chap 2. The then Attorney General for Ontario made it clear during the second reading of the Bill that those in "no strings attached" relationships would not be covered. See Holland 2000 CJFL, fn 15.

\textsuperscript{200} *Sorochan v Sorochan* [1986] 2 S.C.R. 834, referred to by Holland 2000 CJFL, fn 16.


and was not saved under section 1 of the Charter.\textsuperscript{203}

6.4.11 Generally provincial and federal legislatures, although not opposed to extending rights and obligations to unmarried cohabitants, nevertheless seemed anxious that this extension should not undermine marriage and seemed to believe that it was necessary to maintain a definite distinction between the two types of relationships.\textsuperscript{204}

6.4.12 An indication of this sentiment is the resolution adopted by the House of Commons in June 1999. Emanating from the foregoing case law the resolution stated:

\begin{quote}
In the opinion of this House, it is necessary, in light of public debate around recent court decisions, to state that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps within the jurisdiction of the Parliament of Canada to preserve this definition of marriage in Canada.\textsuperscript{205}
\end{quote}

**Same-sex couples**

6.4.13 In 1995, following the Andrews decision,\textsuperscript{206} the Supreme Court of Canada\textsuperscript{207} unanimously held that sexual orientation was an analogous ground of discrimination under section 15 and, therefore, that discrimination on the basis of sexual orientation was prohibited under the Charter.

\textsuperscript{203} Although the decision related to uninsured motorist coverage and loss of income accident benefits, there was no indication that the judgment was intended to be narrow in scope. Holland 2000 CJFL, at para 3(c)(ii).

\textsuperscript{204} Holland 2000 CJFL, at para 3(c)(i). As an example, cohabitants were still excluded from provisions dealing with matrimonial property. While the support provisions of the Ontario Family Law Reform Act of 1990 R.S.O. 1990, chap. F.3, s 29 (later it became the Family Law Act) were extended to opposite sex partners, other provisions of the Act dealing with division of assets and the matrimonial home were confined to those who are married. Holland 2000 CJFL, ibid. This is still the case under the British Columbia Family Relations Act of 1996. See discussion in para 6.4.44 below.

\textsuperscript{205} Parliament of Canada *House of Commons Debates* 8 June 1999, Hansard, 36\textsuperscript{th} Parl., 1\textsuperscript{st} Sess., Number 240 available at www.parl.gc.ca/36/1/parlbus/chambus/house/debates/240-1999-06-08/han240-e.htm. This resolution had no legal effect \textit{per se} but confirmed the common-law limitation on marriage based on cases like *Hyde v Hyde* (1866) L.R.1 P. &D. 130, referred to by Casswell 2001 CBR, at 812.

\textsuperscript{206} See para 6.4.7 and fn 194 above.

6.4.14 As a result of this decision, applicants in a case dealing with discrimination based on sexual orientation now only have to show that the impugned legislation or government action actually discriminates on the basis of sexual orientation and that the discrimination is not justified under section 1 of the Charter.

6.4.15 In 1999 the Supreme Court of Canada held in M v H (by an eight-Justice majority) that the definition of "spouse" in the part of Ontario’s Family Law Act of 1990, which deals with partner support, was unconstitutional since it included unmarried opposite- but not same-sex partners.

6.4.16 The federal government responded to this judgment by enacting the Modernization of Benefits and Obligations Act of 2000. This Act inserted a definition of "common-law partner" in 68 federal statutes, thereby extending benefits and obligations to same-sex partners to put them on par with unmarried opposite-sex partners. A "common-law partner" was defined as a person who is cohabitating with [another] individual in a conjugal relationship, having so cohabited for a period of at least one year.

6.4.17 The result of this Act was that the 68 federal statutes that were amended now respectively refer to "spouses" (who at common law are limited to married spouses) and to "common-law partners" who may be either same-sex or unmarried opposite-sex partners.

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208 S 32 of the Charter provides that the Charter applies "to the Parliament and government of Canada ... and ... to the legislature and government of each province ...." There is thus no horizontal application of the Charter.

209 In the case of Egan v Canada the applicants' claim was turned down on the facts by a five to four majority decision of the Supreme Court.


211 While the Court's decision strictly applies only to this particular definition of "spouse", it has precedential significance with regard to all definitions of "spouse" and all other family relationship signifiers in all Canadian legislation. Casswell in Winternute & Andenaes, at 216. In response to the Court's ruling, the federal and several provincial governments undertook to examine their legislation to determine whether amendments to recognise same-sex partnerships were required. CBC News 21 May 1999 "Most Premiers ready to make Changes after Same-Sex Ruling" available at http://cbc.ca/news, referred to by Casswell in Winternute & Andenaes, ibid fn 3.

212 Statutes of Canada, 2000 chap 12.

213 In doing so the Act effectively "demoted" unmarried opposite sex partners who previously had been "spouses" under many federal statutes to the status of "common-law partners".
6.4.18 By doing so, the Act actually went further than required by M v H and extended to both same- and opposite-sex partners benefits that had previously been available only to married spouses.\(^{214}\) In this regard Parliament responded to Miron v Trudel,\(^{215}\) which required the Court to compare unmarried opposite-sex partners with married spouses.

6.4.19 Following the resolution of the House of Commons to retain a definite distinction between marriage and partnerships,\(^{216}\) Parliament included in section 1.1 of the Modernization of Benefits and Obligations Act of 2000, under the title "interpretation", the following words:

For greater certainty, the amendments made by this Act do not affect the meaning of the word "marriage", that is, the lawful union of one man and one woman to the exclusion of all others.

6.4.20 This provision reaffirmed the common-law definition of "marriage" with respect to the Modernization of Benefits and Obligations Act of 2000 and the 68 statutes amended by it.

6.4.21 Against the background of the case law and in view of section 52 of the Constitution Act of 1982,\(^{217}\) which provide that any law that is inconsistent with the Charter is of no force or effect, it could be argued that this restrictive common-law definition of marriage is susceptible to constitutional challenge.

6.4.22 In this regard reference must also be made to section 33 of the Charter, which permits the federal Parliament or a provincial legislature to enact legislation which expressly declares that it will operate "notwithstanding" that it may, or even patently does, violate certain provisions of the Charter.\(^{218}\)

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\(^{214}\) Casswell 2001 CBR, at 818.


\(^{216}\) See para 6.4.12 above.

\(^{217}\) The Supreme Court of Canada has interpreted this provision as enabling the courts to strike down unconstitutional legislation or effectively amend it by "reading in" or "reading down" the legislation as enacted. Schachter v Canada [1982] 1 S.C.R. 679, referred to by Casswell in Wintemute & Andenaes, at 218 fn 13.

\(^{218}\) The equality rights guaranteed by s 15 are among those provisions that may be overridden using the s 33 "notwithstanding clause". Such a declaration only has effect for five years, but may be re-enacted. Casswell 2001 CBR, at 812. This section has only very rarely been invoked and only once in the context of lesbian and gay rights. This was the instance where the Alberta legislature in reaction to M v H amended the Alberta Marriage Act to define "marriage" as "a marriage between a man and a woman" declaring that the Act operates notwithstanding the Charter. See Marriage Act of 1980, R.S.A. 1980,
6.4.23 It is significant that Parliament did not, however, invoke the "notwithstanding clause" to insulate this affirmation of the restrictive common-law definition of "marriage" from Charter-based judicial scrutiny.

6.4.24 The restrictive common-law definition of marriage could, therefore, be constitutionally challenged by arguing that it constitutes discrimination on the basis of sexual orientation, thereby violating the right to equality guaranteed by section 15 of the Charter, and that it cannot be saved by either section 1 or 33 of the Charter. 219

6.4.25 On 23 July 2001 the British Columbian government brought such a constitutional challenge to court. It challenged the exclusion of same-sex partners from the right to marry legally. 220 On October 3 2001 Pitfield J dismissed the petition. He stated that, although the legal character of "marriage" as defined infringes on the petitioners equality rights, such infringement is reasonable and demonstrably justifiable in a free and democratic society and therefore saved by section 1 of the Charter. 221

6.4.26 A recent newspaper article 222 has, however, indicated that the British Columbia Court of Appeal has endorsed the right of gay and lesbian couples to marry. The appeal court gave the provincial and federal governments until July 12, 2004 to change existing marriage laws. The judge indicated that procreation can no longer be regarded as a sufficiently pressing and substantive objection to justify discrimination against same-sex couples. Civil marriage

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220 Casswell 2001 CBR, at 813.


should adapt to contemporary notions of marriage as an institution in a society which
recognise the right of homosexual persons to non-discriminating treatment. The Court of
Appeal therefore found that refusing to allow gay and lesbian couples to marry violates the
antidiscrimination measures in the Charter.

c) The current legal position

(i) Introduction

6.4.27 As stated above the federal position regarding the regulation of relationships in terms
of the Modernisation of Benefits and Obligations Act of 2000 is that a distinction is made
between spouses, who are limited to married spouses, on the one hand and common-law
partners, who may be either same-sex or unmarried opposite sex partners, on the other.
Same-sex and opposite sex partners are, however, on a par with married couples in so far
as benefits and obligations are concerned.

6.4.28. In response to the ruling in M v H, the provincial governments of Ontario, Manitoba,
Quebec, Nova Scotia and Saskatchewan also enacted omnibus legislation to address
discrimination against partners in provincial Acts.223 This legislation does not involve capacity
to marry and as such does not exceed the provinces’ legislative power as provided for in the
British North America Act of 1867.224

6.4.29 An example of the type of legislation enacted can be found in British Columbia,

223 For example the Definition of Spouse Amendment Act of 2000, S.B.C. 2000, chap 24 and the
Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act of 1999, S.O. 1999,
chap 6. By enacting omnibus legislation recognizing same-sex partnerships, legislatures responded to
the Supreme Court’s indication in M v H that it might be preferable to address the issues in a more
comprehensive fashion, rather than leaving them to be resolved “on a case-by-case basis at great cost
to private litigants and the public purse”, M v H at para 147. New Brunswick and Newfoundland
responded by amending only their family relations law concerning partner support to include same-sex
partners thereby dealing only with the specific issue considered in the case. An Act to Amend the
relevant legislation, leaving Prince Edward Island and the three territories as having not responded to M
v H Casswell 2001 CBR, at 815.

224 See para 6.4.2 and fn 190 above.
where the Definition of Spouse Amendment Act of 2000\textsuperscript{225} defined "spouse" in 35 British Columbia statutes as a person who is, or was, "married to another person" or living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same-sex.\textsuperscript{226}

6.4.30 Although there is no reference to the possibility of same-sex marriage,\textsuperscript{227} this definition principally equalised marriage and marriage-like relationships and negated the distinction between same- and opposite-sex couples by including them in the definition of spouse in the enumerated Acts.

6.4.31 This discrepancy between the federal legislation and provincial legislation has the result that unmarried partners in British Columbia will qualify as spouses under British Columbia legislation but not under federal legislation. Under federal legislation they are "common-law partners" and would thus only benefit from legislation awarding them rights and obligations in that capacity. According to a booklet by the Legal Services Society for British Columbia this distinction does not matter in practice.\textsuperscript{228} An important difference, though, is that under federal law an unmarried cohabiting couple qualifies for benefits after one year while under British Columbia law, they would qualify after two years.

6.4.32 This province's legal position will be discussed below to serve as an example of the legislative response to judicial findings of discrimination based on marital status and sexual orientation within the legislative jurisdiction of a province.\textsuperscript{229}

\textsuperscript{225} Definition of Spouse Amendment Act of 2000, S.B.C. 2000, chap 24, referred to by Casswell in Wintemute & Andenaes, at 222 fn 27.

\textsuperscript{226} This method of recognition of same-sex partnerships differs from the methods used in Quebec and Ontario. In a similar manner as the federal Modernisation of Benefits Act of 2000, Quebec grouped same-sex partners and unmarried opposite sex partners together as "\textit{de facto} spouses" or "common-law partners". Ontario's legislation created a separate category altogether for same-sex partners as "same-sex partners" whilst leaving unmarried opposite-sex partners in various extended definitions of "spouse". As a result the plaintiff in \textit{M v H} applied to the Supreme Court of Canada for a rehearing concerning remedy, arguing that the Ontario legislation did not satisfy the Court's 1999 order. The Court dismissed the application without reasons. See \url{http://www.lexum.umontreal.ca/csc-scc/en/bul/2000/html/00-05-26.bul.html} (rehearing) (No. 25838), referred to by Casswell in Wintemute & Andenaes, at 223 fn 31.

\textsuperscript{227} It would have been \textit{ultra vires} the province's legislative jurisdiction.

\textsuperscript{228} Legal Services Society Booklet, at 5.

\textsuperscript{229} A decade ago none of the approximately 500 statutes in British Columbia recognised same-sex partnerships. The subsequent change in the law is the result of the Charter, the decisions of the Supreme Court of Canada and the pro lesbian and gay provincial government who was in office over
(ii) Conditions for recognition

6.4.33 The Definition of Spouse Amendment Act of 2000 does not prescribe any conditions for recognition of a partnership other than living together in a marriage-like relationship. Most British Columbia statutes require in addition that a partner must have been living with the same partner (whether same- or opposite-sex) for two or more years to be recognised as such. If they have lived together in a marriage-like relationship for two or more years they automatically become entitled to the rights and obligations of spouses provided for in an Act, if that Act is one of the 35 Acts that has been amended by the Definition of Spouse Amendment Act of 2000.231

6.4.34 There is no condition prohibiting a person who is still married from living in a marriage-like relationship with another person.232

(iii) Legal consequences of recognition of partnerships

6.4.35 British Columbia was the first province of Canada to provide that same-sex partners were eligible to receive spousal pension benefits after living together for at least two years.234 This was previously only available to opposite-sex unmarried partners. Similar

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230 Note that cohabitation is the term used for couples living together in an unmarried domestic partnership.

231 Eg Pension Benefits Standards Act of 1996, R.S.B.C. 1996, chap 352, s 1(1)(b). Compare this with the legal position under the Swedish Cohabittees (Joint Homes) Act, 1987, para 6.3 above and the New South Wales Property (Relationships) Act of 1984, para 6.5 below. As was indicated above some Acts have been amended to include these marriage-like relationships before the promulgation of the Definition of Spouse Amendment Act of 2000. Those Acts merely included these relationships in the scope of the particular Act.

232 Legal Services Society Booklet, at 5

233 Unless otherwise indicated the source for this information is Legal Services Society Booklet. This booklet reflects the changes in federal and provincial laws that give unmarried cohabiting couples the same rights and obligations as married couples.

234 With the enactment of the Pension Statutes Amendment Act of 1998 (No.2), 1998, S.B.C. 1998, chap 40. Referred to by Casswell in Wintemute & Andenæs, at 224 fn 33. This legislation regulated pensions of members of the Legislative Assembly, college instructors, municipal workers, members of the provincial public service and teachers.
legislation followed relating to all private pension plans\textsuperscript{235} in which an employer contributes to employee pension funds.\textsuperscript{236}

6.4.36 The legal responsibility financially to support (maintain) a partner in a marriage-like relationship starts only after the partners have been living together for two years or more. This responsibility continues after the relationship ends. In the event of a dispute regarding the payment of support between the partners or former partners, the court can make a support order upon application.\textsuperscript{237}

6.4.37 The Insurance Corporation of British Columbia will pay the "no-fault" death benefits to a partner (same- or opposite-sex) who has been in a marriage-like relationship for two years and whose partner is killed in a car crash, regardless of who was at fault in the accident.

6.4.38 A surviving partner may be eligible to Workers' Compensation death benefits when his or her partner is killed on the job and they have been living together in a marriage-like relationship for at least three years before the death and the former partner was dependent on the latter. If they had a child together, the minimum required time for living together before death is one year.

6.4.39 The various British Columbia statutes that deal with social assistance provide that a person's eligibility for such assistance be determined by the financial situation of an applicant's household. The definitions of spouse for these Acts on social assistance have not been amended by the Definition of Spouse Amendment Act of 2000 and thus do not recognise same-sex partners as "spouses". However, pursuant to administrative policy, persons who live together in a "marriage-like relationship" are treated as "spouses" and,

\textsuperscript{235} Pension Benefits Standard Amendment Act of 1999, S.B.C. 1999, chap 41. Referred to by Casswell in Wintermute & Andenæs, at 224 fn 36. These amendments were done even before the Definition of Spouse Amendment Act of 2000.

\textsuperscript{236} The Canada pension plan allows common-law couples to share a retirement pension after living together for at least one year. This arrangement is called an "assignment" and could reduce the amount of income tax payable on the pension received. After the Definition of Spouse Amendment Act of 2000, unmarried same-and opposite-sex couples receive the same benefits as couples in marriage-like relationships.

\textsuperscript{237} Family Maintenance Enforcement Act of 1996, R.S.B.C. 1996, chap 127, as amended by the Definition of Spouse Amendment Act of 2000, S.B.C. 2000, chap 24. This application must be made within a year after separation.
therefore, as members of the same "household". 238

6.4.40 Amendments to the relevant legislation provide for the British Columbia Medical Services Plan to cover partners without any minimum limits on living together. 239

6.4.41 Pursuant to legislation that has been in force since February 2000, 240 a person may make treatment decisions on behalf of his or her same-sex partner. A same-sex partner may also be appointed as a partner’s proxy to make decisions concerning personal or health care in the event of incapacitation.

6.4.42 Many private and public sector employees, in particular the British Columbia government, provide the same benefits to their employees’ same-sex partners and their families as they do to their employees in opposite-sex relationships and their families. 241

Partnership breakdown 242

6.4.43 With respect to custody of and access to children and child- and partner support, same-sex partners have access to the same judicial remedies as married and unmarried opposite-sex partners.

6.4.44 Part 5 of the British Columbia Family Relations Act of 1996 243 determines property

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238 This is an example of a situation where recognition of same-sex partnerships may work against the financial interest of such partners. Caswell in Wintemute & Andenaes, at 225.

239 In 1991, following the decision by the British Columbia Supreme Court in *Knodel v British Columbia*, (1991), 58 (B.C.L.R.) (2d) 356 the British Columbia government amended the Medical and Health Services Act of 1992, S.B.C. 1992, chap 76, s 1. (This Act was later amended accordingly by the Definition of Spouse Amendment Act of 2000.) The Court found in the Knodel case that the omission of same-sex partners in the definition of spouse in medical services legislation violated the Charter and ordered that same-sex partners be included in the definition.

240 Health Care (Consent) and Care Facility (Admission) Amendment Act of 1996.

241 Human Resources Development Canada administers the Employment Insurance program and considers partners to be in a marriage-like relationship if they have been living together as a couple for one year. The same principles that apply to married couples are also applicable to them. Caswell, at 223.

and pension division when a marriage ends. This part has not been amended by the Definition of Spouse Amendment Act of 2000 and does not apply to unmarried cohabiting relationships.\textsuperscript{244} Thus, neither same-sex partners (who cannot marry) nor unmarried opposite-sex partners have automatic access to the remedies provided for in the Family Relations Act of 1996 concerning property and pension division.

6.4.45 It is, however, possible under the Family Relations Act of 1996, for unmarried couples who have lived together in a "marriage-like" relationship for two years or more to enter into an agreement that the provisions of that Act governing property and pension division apply to them and this agreement will be judicially enforceable.\textsuperscript{245}

6.4.46 In the absence of a property and pension division agreement, a former same-sex partner who is left in a financially disadvantaged position may, after separation, claim division of property based on the common-law judicial remedy of constructive trust.\textsuperscript{246}

6.4.47 The British Columbia Adoption Act of 1996\textsuperscript{247} provides that a child may be adopted by "one adult alone or two adults jointly". Same-sex partners may therefore jointly adopt a child unrelated to either partner. The Act also provides that an adult "may apply … to jointly become a parent of a child with a birth parent of the child".\textsuperscript{248}

6.4.48 All biological (natural) parents have a legal obligation to support their children


\textsuperscript{244} See Casswell in Wintermute & Andenaes, at 227.

\textsuperscript{245} Family Relations Act of 1996, R.S.B.C. 1996, s.120.1. Before the legislation was amended to provide for these agreements to be enforceable, the British Columbia Supreme Court held that, at common law such a contract was judicially enforceable. However, enforcing it in practice was difficult and sometimes impossible. \textit{Sleeth v Wasserlein} (1991) 36 R.F.L. (3d) 278 (B.C.S.C.), referred to by Casswell in Wintermute & Andenaes, \textit{ibid} fn 49.

\textsuperscript{246} \textit{Anderson v Luoma} (1986), 50 R.F.L. (2d) 127 (B.C.S.C), referred to by Casswell in Wintermute & Andenaes, at 227 fn 48.

\textsuperscript{247} R.S.B.C. 1996, chap 5, s 5, 29, referred to by Casswell in Wintermute & Andenaes, at 228. British Columbia is the second province after Quebec to amend its adoption legislation to permit such adoptions. This was done following the decision of the Ontario Provincial Court in \textit{Re K. & B.} (1995), 125 D.L.R. (4th) 653, which held that the provisions of Ontario’s adoption legislation restricting stepparent adoption to opposite sex partners were unconstitutional. Casswell in Wintermute & Andenaes, at 229.

\textsuperscript{248} "Birth parent" is defined as "birth mother" or "birth father", which in turn are defined as "biological mother" or "biological father". The latter are not defined.
financially until the age of 19 or after that if the child remains dependent. A legal parent is someone who has lived with a partner for at least two years and has contributed regularly to the support of that partner’s child for at least one year. Such a legal parent has a legal obligation to help support the child, just like a natural parent.

6.4.49 Parents who live together share custody. Upon break-up of the relationship, anybody who has a connection with the child may apply to the court for custody, for example, natural or legal parents but also grandparents. The court makes a decision on the basis of the best interests of the child.

6.4.50 Refusal to render alternative insemination treatment to a lesbian couple has been ruled to be discrimination on the basis of sexual orientation and a violation of the British Columbia Human Rights Act of 1995. This decision by the British Columbia Human Rights Council was affirmed by the British Columbia Supreme Court in Potter v Korn.

Wills and estates

6.4.51 A person may designate any person as beneficiary under a will and thus also a same-sex partner.

6.4.52 A same-sex partner is, since the amendment of the estates administration legislation in 1999, included in the definition of "spouse" and may inherit a spouse’s portion as statutorily specified of the deceased partner’s estate on intestacy.

6.4.53 Similarly, after amendment of British Columbia’s Wills Variation Act 1996 a same-sex partner who was financially dependant on the deceased, and who was inadequately

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provided for in the deceased’s will, may apply for judicial variation of the will to make adequate provision.

6.5 Australia

a. Background

6.5.1 Australia became a Commonwealth of the British Empire on 1 January 1901 when the Act to Constitute the Commonwealth of Australia of 1900 (hereafter referred to as the Constitution) came into effect. Australia has since been governed by a democratic federal system recognizing the British Monarchy as sovereign.

6.5.2 The Constitution divides the lawmaking power in Australia between the Commonwealth and the States on the principle that powers not expressly granted to the federal Parliament remain with the States.

6.5.3 In this regard the Constitution provides that the federal Parliament has the power to legislate with respect to “marriage” and “divorce and matrimonial cause”. Other areas of family law such as the rights and duties of unmarried couples remain within the powers of the States.

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253 Australia is a country slightly smaller than the USA with a population of almost 19.5 million people living on 7.5 million km². The ethnic groups living in Australia are 92 percent Caucasian, 7 percent Asian and 1 percent aboriginal and others. Twenty six percent of the population subscribe to the Anglican religion, 26 percent to Roman Catholic and 24 percent to other Christian religions. The rest are non-Christians. World Factbook - Australia.


255 Australia is divided into 6 States (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) and 2 territories (Australian Capital Territory and Northern Territory). World Factbook.

256 S 51 (xxi) and (xxii) of the Constitution. For a discussion of the role of the Constitution in this type of legislation, see Harrison 1991 Family Matters.

257 Graycar & Millbank 2000 CJFL, at 234.
6.5.4 Since the English common law applies in Australia, the concept of marriage as defined in the English case *Hyde v Hyde and Woodmansee* as "the union of one man and one woman" has become part of the adopted common law of Australia.

6.5.5 The common law was partially substituted in 1961 when the federal Parliament followed the Constitutional direction and enacted the Marriage Act of 1961 (Cth) (providing who may marry and prescribing the requirements for a legal ceremony) and the Family Law Act of 1975 (Cth) (governing divorce and other consequences of marriage breakdown).

6.5.6 Although the Marriage Act of 1961 (Cth) does not prescribe the sex of the parties to a marriage, the marriage formula as set out in section 46(1) provides that the marriage officer must state the following when performing the ceremony:

> Marriage, according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

6.5.7 This section has been interpreted to limit marriage to heterosexual couples.

6.5.8 The Family Law Act of 1975 (Cth) does not define marriage either, but section 43 of that Act states as a principle to be applied by the courts, that the Family Court shall have regard to the

> need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others …

258 Catholic Encyclopaedia.

259 [1861-1873] All ER Rep 175.

260 Which repealed the Matrimonial Causes Act of 1959 (Cth).


263 In *Hosking v Hosking* [1995] FLC 92, referred to by Parker, Parkinson & Behrens *Australian Family Law*. This provision was held to be merely directory. However, present attitudes towards homosexuals make it unlikely that the ambit of marriage will be extended beyond the traditional notion as found in s 43 of the Family Law Act of 1975 (Cth). See eg "Howard Rejects Gay Marriage" *Herald Sun* 24 August 2001, where Prime Minister John Howard was reported to have said that he did not believe that "homosexual relationships should be given the same place in our society as concepts such as marriage.", referred to by Zemljak & Stone *Same-Sex Relationships*. 
6.5.9 Since same-sex couples are excluded from the definition of marriage and thus from the federal legislative jurisdiction, it has been argued that state Parliaments are at liberty to enact legislation to recognize their relationships\textsuperscript{264} as long as it is not to provide for them to get married.\textsuperscript{265}

\begin{itemize}
  \item[(b)] Legislative development of relational status
\end{itemize}

6.5.10 Although the phenomenon of unmarried cohabitation has always existed, the incidence thereof became more frequent from the late sixties with a marked increase after 1976. Some of the reasons suggested for the increase are:

\begin{itemize}
  \item[(i)] A revival in the popularity of informal marriage historically associated with poorer people in insecure employment;
  \item[(ii)] The difficulty and expense of divorce;
  \item[(iii)] Recent changes in attitudes to marriage; and
  \item[(iv)] Deterioration in economic conditions.\textsuperscript{266}
\end{itemize}

6.5.11 In response to the circumstances in society, gradually introduced legislation ensured that certain legal protections were extended to those in de facto relationships.\textsuperscript{267} These protections were, however, mostly limited to rights concerning property with the effect that

\textsuperscript{264} Graycar & Millbank 2000 CJFL, \textit{ibid}. See also Sandor Australia. So called de facto relationships fall under the jurisdiction of the Commonwealth Family Law Act of 1975 only when there are disputes concerning children involved. This is the result of the referral by the states of legislative power in respect of illegitimate children to the Commonwealth, leading to the application of the Family Law Act of 1975 to all private law disputes concerning children.

\textsuperscript{265} Studies that have been conducted in Australia to sample the opinion of same-sex partners indicate that the majority surveyed (80 percent) do not consider that marriage or marriage equivalence is desirable in their cases. They do want legal protection against discrimination and the removal of discriminatory provisions. See also the Kirby Australian Developments and Millbank & Sant 2000 SLR, at 185 fn 28.

\textsuperscript{266} For figures and detailed discussions, see Glezer 1999 \textbf{Family Matters}. New South Wales Law Reform Commission Report 36, chap 3. See also Social Issues Report, par 2.3 "Growth of De Facto Relationships: Statistical and Other Evidence".

\textsuperscript{267} Eg the Widows’ Pension Act of 1942 (Cth) which included within the terms of eligibility for pension, certain classes of de facto wives whose husbands had died. The Social Issues Report NSW proposed that this legislative recognition of de facto wives for the purposes of Commonwealth pension programs more than 60 years ago, suggests that recent increases in de facto relationships may be merely an extension of a well-established pattern in Australia. See also the legislation referred to by Mr Justice Hutley in Seidler v Schallhofer [1982] 2 NSWLR 80 at 101 as quoted in the New South Wales Law Reform Commission Report 36, para 4.8 and chap 4 of that Report in general.
unmarried couples were treated differently from married couples in many remaining respects.

6.5.12 The absence of a Bill of Rights and other constitutional or statute-based guarantees of equality and fundamental rights in Australia have contributed to the recognition of unmarried relationships in a manner that differs from that in other countries. The approach entails presumption-based recognition of unmarried relationships through the enactment of state legislation that amends the interpretation of terms like spouse, dependant, etc in other Acts.

6.5.13 New South Wales became the first Australian State to enact legislation dealing with the rights and duties of couples in unmarried relationships by passing the De Facto Relationships Act of 1984. Several of the other States have since enacted similar legislation. The rest of this discussion will focus on unmarried relationships in New South Wales as an example of the position in Australia.

6.5.14 The De Facto Relationships Act of 1984 ("DFRA") closely followed the recommendations made by the New South Wales Law Reform Commission ("NSW LRC") in its Report on De Facto Relationships. The DFRA created the designation of a de facto partner and defined it in relation to a man as:

a woman who is living or has lived with the man as his wife on a bona fide domestic basis although not married to him

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268 The International Treaties to which Australia has subscribed became a means of supporting the constitutional validity of federal legislation outside traditional federal fields. Eg Australia's obligations under the International Covenant on Civil and Political Rights enabled the federal Parliament to enact the Human Rights (Sexual Conduct) Act of 1994 (Cth). See Kirby Australian Developments. For a detailed discussion see Nicholson Australian Judicial Approaches.

269 Presumption based recognition means that the relevant legislation applies to all those relationships who meet the criteria for recognition under the statute, rather than only to those couples who opt in by registering their relationship.

270 As opposed to providing that those who complied with a prescribed definition may register their relationship with the view to acquire certain rights and obligations. Graycar & Millbank 2000 CJFL, at 229 et seq.

271 In 1981 the NSW LRC received a reference to review the law relating to family and domestic relationships. The approach of the NSW LRC was to avoid the equation of unmarried relationships with marriage in order to prevent both the undermining of the marriage institution and the imposing of legal consequences on unmarried couples who may have deliberately chosen to avoid the legal consequences of marriage. New South Wales Law Reform Commission Report 36.
and in relation to a woman as:

a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.

6.5.15 The DFRA was designed to meet some of the needs of opposite-sex couples who were not legally married and whose relationships were marriage-like, but it did not create a definition of de facto relationships with general application which would effectively equate married and unmarried couples. On the contrary, the DFRA dealt primarily with the division of property on termination of an opposite-sex unmarried relationship and had no effect on legislation not specifically referred to in the DFRA. The definition of de facto relationship also did not include same-sex couples.

6.5.16 The effect of the DFRA was that a statutory differentiation was created between unmarried and married opposite-sex couples with the former often being worse off when compared with their married counterparts.

272 The premise of the New South Wales Law Reform Commission Report 36 and the subsequent DFRA was that marriage was a fixed benchmark against which other relationships had to be compared and effectively ranked. The Commission noted in its Report that the de facto relationships resemble marriage to a certain extent, although not in all respects and that other domestic relationships bear less resemblance to marriage. Graycar 2001 LSJ, at 64.

273 The following differences remained between married and de facto couples (de facto refers to unmarried opposite sex couples):

1. A number of statutory provisions relating to the breakdown of marriage were not found in the Acts specifically governing de facto relationships with the effect that de facto partners seeking similar redress had to commence proceedings at common law and equity, which was more expensive, complex and unpredictable.

2. Under the FLA, the Family Court had jurisdiction to settle property and maintenance matters between parties to a marriage or former marriage. This court only acquired jurisdiction to determine property matters between former parties to de facto relationships as a side-effect of the actual dispute being about the care of children of such parties.

3. When making a property adjustment order under the DFRA, a Court was confined to compensation for past contributions to the property and welfare of the family. Under the FLA the Court, when making such an order, could consider the future circumstances of the parties and the differences in the parties’ financial positions on the breakdown of their relationship.

4. Maintenance under the DFRA was ordered in much more limited circumstances than under the FLA.

5. Enforceable financial agreements between de facto couples were permissible under the DFRA but similar agreements between married partners were not recognised under the FLA. Social Issues Report, par 2.3. See also Graycar & Millbank 2000 CJFL, at 235.
6.5.17 In 1992 the Gay and Lesbian Rights Lobby of New South Wales began lobbying the recognition of relationships of same-sex couples. In 1993 the Gay and Lesbian Rights Lobby published a discussion paper, "The Bride Wore Pink", which explored different methods of relationship recognition. This discussion paper strongly recommended that the recognition of both live-in sexual relationships and other forms of important interdependent relationships should take place simultaneously, but distinctly. This document resulted in ad hoc amendments to separate statutes relating to same-sex couples.

6.5.18 In 1998 the Australian Democrats (NSW) introduced a Bill into the NSW Legislative Council (Upper House). The Bill proposed amendments to 53 Acts, intending to enact the recommendations of the revised version of The Bride Wore Pink. The Bill was referred to a parliamentary committee. Shortly after the NSW government was re-elected in 1999, it introduced its own Bill under the title the Property (Relationships) Legislation Amendment Bill. This Bill was limited and foresaw amendments to only 20 Acts.

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274 This was followed by a revised version in 1994, available at [http://www.rainbow.net.au/~gdl](http://www.rainbow.net.au/~gdl) under discussion papers (for a summary of the recommendations see Millbank & Sant 2000 SLR, at 197). This revised version recommended broad based presumptive recognition of relationships of same-sex couples who lived together and a more limited recognition of other relationships, which need not be couple based and the partners need not cohabit. Presumptive recognition does not require any steps to be taken or formal acknowledgement of relational status, and operates to recognize the relationship automatically when the parties have satisfied certain criteria such as living together as a couple for a certain period. The opposite of presumptive recognition would be the opt-in registration system which requires a formal declaration of some kind from the couple such as lodging a document, before a relationship will be formally recognised. For a discussion of these models see Millbank 1999 AGLLJ.

275 Millbank & Sant 2000 SLR, at 196.

276 1. In 1996, amendments to the criminal procedural legislation and new victims' compensation legislation both defined family victim as "the victim’s de facto spouse, or partner of the same-sex, who has cohabitated with the victim for the last two years". Criminal Procedure Act of 1986 (NSW) s 23A and Victims Compensation Act of 1996 (NSW) s 9, referred to by Millbank & Sant 2000 SLR, at 187. Millbank & Sant suggest that these amendments indicates a trend to move away from defining de facto relationships as "marriage-like" to focus more on purposive and less overtly gendered and heterosexually based criteria.

277 Thereby government complied with an election promise of the Labour Party made before the 1995 election. Millbank & Sant 2000 SLR, at 200 footnotes 77 and 78. This was a watered down version of the legislation foreseen by "The Bride Wore Pink" with more traditional relationship definition and a limited scope. For an interesting discussion of the parliamentary debate before approval of this Act and the orchestrated underplaying of it as dealing primarily with property rights and not equality or lesbian and gay rights, see Millbank & Sant 2000 SLR, at 201 et seq and Graycar & Millbank 2000 CJFL, at 250 et seq.
6.5.19 When this Bill became the Property (Relationships) Legislation Amendment Act of 1999, ("PRLA") it had the following effect:\footnote{278}

- The PRLA amended the DFRA and renamed it the Property (Relationships) Act of 1984.\footnote{279}

- The PRLA also created an umbrella term, namely "domestic relationship", to cover two kinds of relationships. The first is a "de facto relationship" which has been redefined to include also same-sex couples. The second is a "close personal relationship" in which the parties live together and the one provides the other with domestic support and personal care.

- The PRLA also made consequential amendments to a number of Acts containing provisions which confer rights or privileges, afford concessions to or impose obligations on partners in the newly defined de facto and close personal relationships which are normally associated with marriage.

6.5.20 Since the substantive provisions of the DFRA have been retained, the discrepancies referred to in footnote 273 above remain.\footnote{280}

\footnote{278}{Social Issues Report, at 35.}

\footnote{279}{While the Property (Relationships) Legislation Amendment Act of 1999, amended some 20 pieces of legislation, the legislation proposed by the Gay and Lesbian Rights Lobby would have amended 53 separate Acts. Notable omissions were in areas of employment law, provision of death or injury benefits to the partner of an employee or insured person and access to unpaid parental leave. See the legislation referred to by Millbank & Sant 2000 SLR, at 206 fn 110-112. The result is that there are over twenty statutes in which specifically gendered definitions are still being used, about twenty statutes where the 1999 (ungendered) definition is used, three more where same-sex partners are included but the language used is different from that in the PRA, while several others statutes use the category of de facto relationship with no definition. Millbank & Sant 2000 SLR, at 207 footnotes 117 and 118.}

\footnote{280}{In that sense the PRA is seen as not going far enough and leaving certain issues unaddressed. See in this regard the Social Issues Report, para 5.3 "Response to the Passage of the Property (Relationships) Legislation Amendment Act 1999".}
c) Current legal position under the Property (Relationships) Act of 1984

(i) Introduction

6.5.21 The Property (Relationships) Act of 1984 (PRA) defines a domestic relationship as:

- a de facto relationship: or

- a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of them of whom provides the other with domestic support and personal care.281

6.5.22 A de facto relationship is in turn defined in a non-gendered fashion as a relationship between two adults who live together as a couple282 and are not married or related by family.

6.5.23 Domestic relationships therefore include both de facto (conjugal relationships) and close personal relationships (non-conjugal relationships). 283

6.5.24 For purposes of determining the legal status of each category, the following should be noted. The PRA, after being amended by the PRLA, provides ia for proceedings for financial adjustment on relationship breakdown. In this regard a distinction is made between property division and maintenance between the former partners. These provisions apply to domestic partnerships, ie both de facto and close personal relationships.

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281 This concept was introduced by the PRA for the first time into NSW laws and was intended to cover other forms of close relationships in a smaller number of NSW laws, ie those concerning statutory property division, family provision, bail and stamp duty. These Acts are generally amended in the Schedule to the PRLA with reference to the new definition. For a table of the amended Acts see Millbank & Sant 2000 SLR, at 189 et seq.

282 This is the heart of the new definition with no reference to "marriage-like" or "as his wife/her husband". During the Second Reading Debate of the PRA, the Attorney-General made it clear in his speech that the non-gendered definition of de facto spouse was intended to include lesbian and gay couples. The Honourable J W Shaw, Legislative Council of NSW, Parliamentary Debates (Hansard) 13 May 1999 (hereafter referred to as "Attorney–General") at 22, referred to by Millbank & Sant 2000 SLR, at 190.

283 Graycar 2001 LSJ, at 64 et seq and Millbank & Sant 2000 SLR, at 188 fn 45. The fact that the definition of domestic partnership in the PRA deliberately excludes non-cohabitants has been referred to as the greatest flaw of that Act, since, in many cases it could mean that nothing is gained for people in non-traditional relationships who often do not cohabitate. Millbank & Sant 2000 SLR, at 208.
6.5.25 The consequential amendments with reference to the newly defined categories of relationships that were brought about by the PRLA, involved numerous areas of NSW law. The laws concerning family provision, intestacy, accident compensation, stamp duty and decision-making in illness and upon death of one partner are the ones that were most affected. Following these amendments, either only de facto relationships or both de facto and close personal relationships under the designation of domestic partnerships, were included in the scope of the enumerated Acts. Close personal relationships were covered in a smaller number of NSW laws, notably those concerning statutory property division, family provision, bail and stamp duty.\textsuperscript{284}

6.5.26 As was pointed out earlier,\textsuperscript{285} the Australian approach is presumptive, meaning that the relevant legislation automatically applies to the relationships which comply with the definitions and other requirements of de facto or close personal relationship, as the case may be.

(ii) Conditions for recognition

De facto relationships

6.5.27 The key requirement in the PRA for a de facto relationship is cohabitation as a couple. For purposes of determining if a particular relationship qualifies, a court must, however, consider all the circumstances. Regard may be had to the following factors:\textsuperscript{286}

\begin{itemize}
  \item Duration of the relationship
  \item Nature and extent of common residence
  \item Whether a sexual relationship exists
\end{itemize}

\textsuperscript{284} Millbank & Sant 2000 \textit{SLR}, at 189

\textsuperscript{285} See fn 260 above, as well as the discussions of the Swedish Cohabitees (Joint Homes) Act of 1987 and the British Columbia Definition of Spouse Amendment Act of 2000.

\textsuperscript{286} NSW Courts have formulated and used similar indications since the passing of the DFRA in 1984. See for example \textit{D v McA} (1986) 11 Fam LR 214 at 227. The Attorney-General, \textit{ibid} said that the use of "as a couple" was not intended to alter the nature of the inquiry undertaken by a court to determine the existence of a relationship, nor to alter the application of prior case law on property division under the PRA.
- Degree of financial dependence or interdependence and arrangements for financial support
- Ownership, use and acquisition of property
- Degree of mutual commitment to a shared life
- Care and support of children
- Performance of household duties
- Reputation and public aspects of the relationship.
- None of these factors is essential or decisive.

6.5.28 The PRA makes it clear that these factors are indications of, and not requirements for, the existence of a de facto relationship.²⁸⁷

Close personal relationship

6.5.29 A close personal relationship would require two adult persons who are not married or in a de facto relationship, to live together so that one can provide the other with domestic support and personal care.²⁸⁸

(iii) Consequences of recognition of domestic partnerships²⁸⁹

6.5.30 The PRA provisions regarding property division and maintenance in the event of relationship breakdown now apply to all domestic relationships, both the redefined de facto relationships and close personal relationships. The PRA also makes provision for couples who do not wish the PRA to apply to their relationships to "contract out" of the PRA, in accordance with the prescripts.

²⁸⁷ S 4(3): "[n]o finding in respect of any of the matters mentioned in subsection (2)(a)(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case."

²⁸⁸ Such a relationship does not exists where the domestic support and personal care is rendered for a fee or reward or on behalf of another. S 5(2) of the PRA.

²⁸⁹ Unless otherwise indicated the sources for this section are Legal Information Access Centre, New South Wales Community Legal Centres on Same-Sex Relationships and Sant 1999 GLR.
Property division on relationship breakdown

6.5.31 Domestic partners may apply to a court for an order for the adjustment of interests with respect to the property of the parties to the relationship. The PRA restricts the court's jurisdiction to make such an order to relationships of duration of two years or longer, unless the court is satisfied that the prescribed exceptional circumstances exist. For this purpose, domestic partners now have access to the Supreme and District Courts, which access was previously reserved for married couples.

6.5.32 The amendments to the PRA are considered to be a milestone in that they oblige the decision-maker in a dispute to make just and equitable orders. All property and financial resources of the domestic relationship, whether in individual or joint names and regardless of how or when they were obtained (including gifts and inheritance) will be considered by the Court. The application must be brought within two years after the relationship was terminated.

6.5.33 Part 4 of the PRA recognises the right of unmarried couples who may automatically fall within the scope of the PRA and wish to avoid this, to "contract out". Such a couple may at the beginning of the relationship, or any time during its currency, enter into a legally binding domestic relationship agreement. They may also, in anticipation of the termination of

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290 S 17. These circumstances under s 17(2) are:

(a) that there is a child of the parties to the application, or

(b) that the applicant:

(i) has made substantial contributions of the kind referred to in s 20 (1)(a) or (b) for which the applicant would otherwise not be adequately compensated if the order were not made, or

(ii) has the care and control of a child of the respondent, and that the failure to make the order would result in serious injustice to the applicant.

291 The District Court Act of 1973 was amended to enable people in domestic relationships who have lived together for two years to access the District Court or Supreme Court property division regime on relationship breakdown. Graycar & Millbank 2000 CJFL, at 279.

292 The definition of property provided for under the Family Law Act of 1975 in so far as it applies to married couples is used.

293 Specific domicile requirements are prescribed for the parties to be allowed to apply for this court order.
the relationship or after separation, conclude a termination agreement. These agreements are regulated by contract law and may cover a wide range of financial or economic arrangements between the parties, such as maintenance, division of property or financial resources and payment of outstanding debts upon relationship breakdown. This opt-out option is only available with reference to the property aspects of the PRA. It would not be possible to opt out of other presumptive based consequences of the relationship.

6.5.34 Courts are not bound by the agreements, but can take them into account when making decisions in property and maintenance disputes. These agreements can provide for the financial needs of children but cannot provide for their care and protection, which, under federal legislative powers, are provided for in the Family Law Act of 1975.

6.5.35 The Duties Act of 1997 was amended to include domestic partners who have cohabited for at least 2 years and who own property together in its application. These partners are exempted from paying stamp duty on transfer of property at the end of a relationship (in accordance with a court order or a separation agreement), or on transfer of property to joint ownership.

**Maintenance**

6.5.36 Domestic partners are not liable to maintain the other party to the relationship, and neither party is entitled to claim maintenance from the other, except as provided in Division 3 of the PRA. Division 3 provides that parties to a domestic relationship that has lasted for more than two years are eligible to make a claim for maintenance. Such an application must be made within two years of the termination of the domestic relationship.

6.5.37 Maintenance would only be awarded in two circumstances. The applicant must be able to demonstrate that:

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294 These are often called cohabitation or separation agreements.


- he or she is unable to support him or herself adequately because of having to assume the care and control of a child of the relationship who is still under the age of twelve (custodial maintenance)\textsuperscript{297} or

-his or her earning capacity has been adversely affected by the circumstances of the relationship (rehabilitative maintenance).\textsuperscript{298}

**Succession**

6.5.38 The Wills, Probate and Administration Act of 1898\textsuperscript{299} was amended to extend automatic rights of inheritance under the laws of intestacy to de facto partners. This amendment did not include close personal relationships.\textsuperscript{300}

6.5.39 The Family Provision Act of 1982 was amended specifically to include surviving partners and children of domestic relationships as eligible applicants for family provision.\textsuperscript{301} An applicant who believes that he or she did not receive an adequate share under a will may take a claim to that estate to the District or Supreme Court. There is no requirement regarding the duration of the cohabitation.

6.5.40 Amendments to the Judge’s Pension Act of 1953 provide that the Minister responsible for judges’ pensions may, if it appears that the estate of a deceased judge or former judge may be the subject of litigation under the Family Provision Act of 1982, pay a pension that would otherwise be payable to another person, to the legal personal

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\textsuperscript{297} This includes a child born as a result of sexual relations between the parties, adopted by both parties or for whose long-term welfare both parties have parental responsibility. The latter scenario will be of particular importance to same-sex couples.

\textsuperscript{298} In the latter case, the court must consider if maintenance would assist the applicant’s earning capacity in that it will allow him or her to undertake training or study and the reasonableness of such an order.

\textsuperscript{299} Under this Act there is a hierarchy of relatives who are entitled to inherit with priority being given to surviving partners and children; often the surviving partner inherits the entire estate. Before the PRA, surviving partners in same-sex de facto partnerships had no automatic right to inherit and had to make a claim to the estate in the Supreme Court under the Family Provision Act of 1982. This process was costly, time consuming and stressful.

\textsuperscript{300} S 61B of the Wills, Probate and Administration Act of 1898. Same-sex and opposite-sex relationship are now on a par following this amendment.

\textsuperscript{301} Millbank & Sant 2000 *SLR*, at 189.
representative, including the same-sex de facto partner, of the deceased. Close personal relationships are not included in these amendments.

**Children**

6.5.41 The PRA introduced limited changes for parenting relationships by defining children of a domestic relationship as including "a child for whose long-term welfare both parties have parental responsibility".302

6.5.42 The Family Court can grant parental responsibility to anyone who is considered important to the care, welfare or development of the child (the so-called "best interest of the child" requirement). This means that lesbian and gay co-parents of children who wish to share the responsibility of raising a child, can apply for joint parenting orders with their partners. Under the PRA it may now be possible for such non-biological lesbian and gay co-parents who have the care and responsibility of children after termination of the relationship, to apply for child maintenance from the biological parent if the child is under 12 years old or, if the child is disabled, until the child is 16 years old.

6.5.43 Under section 19 of the Adoption Act of 1965 (NSW), adoption orders may only be made "in favour of a husband and wife jointly", except in extraordinary circumstances where an order may be made in favour of a man and woman who have lived together for not less than three years, or in favour of one person. Opposite-sex couples will thus only be allowed to adopt under special circumstances and same-sex de facto couples are eligible to apply to adopt as single persons but not as a couple.303

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302 This primarily has implications for child maintenance. Prior to the PRA, a mother seeking maintenance from a female co-parent would not have access to statutory child support regimes. In 1996 child maintenance was successfully claimed by a parent against a co-parent under the common law using the doctrine of promissory estoppel in *W v G* (1996) 20 Fam LR 49. Since such actions must be brought in the Supreme Court on equitable principles, this was not an accessible avenue for many claimants. See Millbank & Sant 2000 SLR, at 209 fn 133. This amended definition is also important in that it will also apply for the Bail Act of 1987, Family Provision Act of 1982, Coroner’s Act of 1980 and Trustee Act of 1925 which therefore recognise the relationship between children and co-parents for specific purposes.

303 It has been argued that an outright prohibition on same-sex couples to adopt should be replaced with a method by which individual applications can be judged on their merits, with the focus on the best interest of the child. The Standing Committee on Social Issues recommended a full examination of the issue with a view to amending appropriate legislation if necessary. Social Issues Report, para 9.3.
Guardianship and incapacity

6.5.44 The Guardianship Act of 1987 was amended to acknowledge the redefined de facto partners as persons who can make medical decisions in case of incapacity or for medical and dental treatment of their partners. There is no qualifying period of cohabitation. This amendment did not include close personal relationships.

6.5.45 Consequential amendments to the Anatomy Act of 1977, Human Tissues Act of 1983 and Coroners Act of 1980 defined same-sex partners as next of kin who may lodge objections to anatomical examinations or donations of bodies of deceased persons, request an inquest and make representations at an inquest. Similarly, the definition of "nearest relative" in the Mental Health Act of 1990 has been amended to include same-sex de facto partners who must now be notified of a proposed inquiry into their partner's mental capacity or contacted or consulted regarding certain treatments of their partner. These amendments did not include close personal relationships.

6.5.46 The Protected Estates Act of 1983 deals with the management of the affairs and property of persons incapable of managing their own affairs. Consequential amendments ensured that a same-sex de facto partner who has lived with the protected person as his or her partner for two years could be provided for from that person's estate. This amendment did not apply to close personal relationships.

6.5.47 Under the Inebriates Act of 1912, as amended by the PRA, de facto partners, but not close personal partners, may apply to the court to declare a person an inebriate.

Compensation orders and damages

6.5.48 The Compensation to Relatives Act of 1897, the Law Reform (Miscellaneous Provisions) Act of 1994 and the Motor Accidents Act of 1988 were amended by the PRA to extend the right to sue in negligence for death, or to claim for nervous shock and psychological injury to same-sex de facto partners on the same basis as opposite-sex de facto partners. There is no qualifying period of cohabitation. Close personal relationships were not included in these amendments.

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304 Children of co-parents do not appear to have any rights under the Motor Accidents Act of 1988. Sant 1999 GLR.
6.5.49 Amendments made by the PRA to the Insurance Act of 1902, extended an exemption of insurance proceeds from forming part of the estate on death of a partner, to the surviving same-sex de facto partner where the parties have lived together for at least two years. This amendment did not include close personal relationships.

Miscellaneous

6.5.50 The Bail Act of 1978 is an example of an amendment that included close personal relationships. This Act was amended by the PRA to the effect that the interest and protection of partners in domestic relationships must be considered when a person in custody applies for bail. There is no qualifying period of cohabitation.305

6.6 United States of America (“USA”)

6.6.1 The USA is a federal republic with a strong democratic tradition. There are fifty state jurisdictions in the USA. To this should be added the District of Columbia (the quasi-self-governing capital city) and other legal entities with bodies of local law, such as Puerto Rico and the USA Virgin Islands. The legal system is based on English common law and judicial review of legislation is permitted.306

305 See also the following: 1. Amendments made to the Trustee Act of 1925, by the PRA ensure that protective trusts can be made for the benefit of de facto partners who have lived together for two years and children of parties to a domestic relationship.

2. The PRA amended the Criminal Assets Recovery Act of 1990, to provide that a court may consider hardship to a de facto partner when deciding on the issuing of a forfeiture order. There is no qualifying period of cohabitation.

3. The Legal Aid Commission Act of 1979, was amended by the PRA to provide that the Commission can consider the ability of an applicant’s de facto partner to pay the cost of the legal services sought by the applicant when assessing his or her means.

4. In addition to the amendments by the PRA, the 1996 amendments to the definition of “family victim” in the Criminal Procedure Act of 1986 and the Victims Compensation Act of 1996 referred to in fn 276 above are still current. Similarly, the 1998 amendments (also referred to in fn 276 above) introducing an ungendered definition of de facto partners to the Workplace Injury Management and Worker’s Compensation Act of 1998 are still valid.

306 World Factbook - USA.
6.6.2 The Federal government has the limited legislative powers awarded to it in the USA Constitution while, under the tenth amendment to the Constitution the state governments have general powers to enact laws for the protection of public safety, health, morals and to regulate the ongoing relationships between the people residing within their boundaries.\textsuperscript{307} Therefore, each state has the authority to develop its own family law principles, more or less free from federal intervention.

\textbf{Opposite-sex couples}

6.6.3 The prevalence of unmarried couples living together in the USA increased by 72\% in the last decade.\textsuperscript{308} An increasing proportion of children, one third of babies in the USA, are born to parents who live together but are not married.\textsuperscript{309} While opposite-sex unmarried relationships are socially acceptable in the USA, current federal initiatives seek to tie welfare eligibility to marital status and to divert substantial monies away from safety-net programs for the poor into pro-marriage initiatives.

6.6.4 Federal benefits for the families of those killed in the September 11\textsuperscript{th} attacks, such as social security survivor’s benefits, family-based assistance and victim’s assistance programs administered by the FBI and the Federal Department of Justice, are mostly unavailable to domestic partners.

6.6.5 Marriage-only policies discriminate against those who cannot marry (people in same-sex relationships) and those who prefer not to. See also the discussion of the Federal Defence of Marriage Act of 1996 in paragraph 6.6.40 below.

6.6.6 Legal recognition and regulation of these domestic relationships are, at best, fragmented and exist mostly on local levels. Thirty-five municipalities provide limited benefits and obligations for both same- and opposite-sex couples while more than 3000 employers recognise domestic relationships, conferring benefits on parties that are similar to those

\textsuperscript{307} Leonard in Wintermute & Andenæs, chap 7 at 133.

\textsuperscript{308} Alternatives Marriage Project. The number of cohabiting couples increased from just over 500 000 in 1970 to more than 2.8 million in 1990. See also Sinclair & Heaton \textit{Marriage Law}, at 270 fn 13.

\textsuperscript{309} Alternatives Marriage Project.
provided to married spouses. In California some basic humanitarian rights, such as visitation rights during medical emergencies, are given to those who register their relationship in accordance with local law.

6.6.7 Recognition of cohabiting relationships, in the few instances where it exists, may in fact hold negative implications for the cohabitant. For example, in some states the termination, variation, or suspension of orders for post-divorce support is compulsory if the recipient starts cohabiting with a new partner.

**Same-sex couples**

6.6.8 Same-sex couples make up over 600,000 homes, 11% of all unmarried partner households, in the USA. Public opinion in the USA is divided over homosexuality. A poll in 1996 showed that 50% of the USA citizens agreed that homosexuality should be considered an acceptable alternative lifestyle.

6.6.9 However, many USA states have yet to take the first steps of decriminalising consensual same-sex sexual activity between adults. This opens the door for opponents of same-sex marriage to argue that homosexuals are criminals and as such are not deserving of any legal protection.

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310 A study of 2001 found that 34% of the largest USA employers offer domestic partner health benefits, most making them available to both same- and opposite-sex couples. Alternatives Marriage Project.


312 In other states the court is given a discretion to amend the support order under circumstances where the recipient's need for maintenance has changed as a result of such cohabitation. Sinclair & Heaton *Marriage Law*, at 272 fn 22.

313 Alternatives Marriage Project.

314 R Padawer “30 Years After Stonewall, Gays Still Seeking Key Rights” *The Record* Bergen County New Jersey June 27 1999 at 1, referred to by Maxwell 2000 *EJCL*, fn 221.

315 For example Arkansas, Kansas, Maryland, Montana, Oklahoma, Rhode Island and Texas. See Maxwell 2000 *EJCL*, at 33 and fn 222.

316 Maxwell 2000 EJCL, at 33.
6.6.10 Although same-sex marriage remains impossible, many municipalities, counties and other governmental entities have recently adopted so called "domestic partnership" measures. Far from it being a legal substitute for marriage, these measures provide for those who have registered as partners (both same-and opposite-sex) such incentives as group health insurance, family sick leave and hospital visitation rights. Under these measures unmarried couples and their children acquire recognition as a family for certain limited purposes and some workplace benefits are allocated on the basis of an existing family relationship rather than by marital status alone.317

6.6.11 The State Constitutions of Hawaii and Alaska specifically protect the right to privacy and specifically prohibit unequal treatment based on gender classifications. In Hawaii in Baehr v Lewin318 the courts accepted the applicants' argument that it is discriminatory to limit marriage to opposite-sex couples. In Alaska in Brause v Bureau of Vital Statistics319 a trial court furthermore determined that limiting marriage to opposite-sex couples may violate a person's fundamental right to marry.320

6.6.12 In both of the cases referred to above, the applicants claimed that these constitutional rights have been violated. The state legislation preventing same-sex couples from obtaining marriage licenses was therefore declared unconstitutional.

6.6.13 In response to the court's ruling in Baehr v Lewin321 and pending the defendant's appeal, the Hawaii state legislature passed a constitutional amendment with the effect that marriage be limited to opposite-sex couples in order to prevent this court decision to take effect.322 The amendment passed by the Hawaii legislature stated that the legislature shall have the power to reserve marriage to opposite-sex couples.323

317 Bailey for Law Commission Canada.


319 1998 WL 88743 (Alaska Super. Ct.).

320 The petitioners in two other jurisdictions, New York and the District of Columbia were not successful in asserting their rights to marry their same-sex partners. Maxwell 2000 EJCL, at 16.

321 See fn 318 above.

322 This was done after an election on the matter was held in 1998 in which the citizens of Hawaii approved the amendment by a margin of 69%.

6.6.14 Following this amendment, the Hawaii Supreme Court reversed the trial court's ruling and found for the defendant (appellant). The Court held that the constitutional amendment took the Hawaii marriage legislation out of the ambit of the equal protection clause of the Hawaii Constitution.\(^{324}\)

6.6.15 The voters in Alaska followed a similar route to prevent the Brause case\(^{325}\) referred to above, which challenged the constitutionality of the Alaska marriage statute, from going on appeal.\(^{326}\)

6.6.16 The only legal protection available for same-sex couples and some unmarried opposite-sex couples in Hawaii is the Reciprocal Beneficiaries Act of 1997.\(^{327}\)

6.6.17 The committee report on this Bill made it clear that the committee agreed that the traditional concept of marriage should be reserved as it is under the current law. Nevertheless it was felt, as a matter of fundamental fairness, that couples in permanent commitments which bear the same burdens and share the same aspirations as legally married couples should be afforded the economic benefits provided by the state of Hawaii to married couples. The purpose of this Act is thus to provide certain governmental benefits to those who comply with the status of so-called reciprocal beneficiaries. The target group of this Act are those who are legally prohibited from marrying.

6.6.18 This Act allows two persons who comply with the prescribed requirements to register their relationship by filing a notarised declaration with the state Director of Health. In this declaration the couple declares their voluntary intent to enter into a relationship and that they meet the requirements for a valid reciprocal beneficiary relationship. The Director maintains a record of each declaration filed with his office.

\(^{324}\) Maxwell 2000 \textit{EJCL}, \textit{ibid}.

\(^{325}\) See fn 319 above.

\(^{326}\) The amendment to the Alaska Constitution provided that to be recognised in that State, a marriage may exist only between one man and one woman. Alaska Constitution Art 1 S 25 referred to by Maxwell 2000 \textit{EJCL}, at 24.

\(^{327}\) Unless otherwise indicated the sources for the information on the Reciprocal Beneficiaries Act of 1997 are the Hawaii Report and LaViolette for Law Commission Canada.
6.6.19 This registration option is open to all without regard to relationships, sex and family ties. Each of the parties shall be at least 18 years old and neither party may be married to another person or be a party to another reciprocal beneficiaries relationship. It is a requirement that the parties wanting to avail themselves of this option be legally prohibited from getting married. This Act therefore does not propose a solution to an ordinary opposite-sex couple who merely elects not to marry.

6.6.20 This Act affords between fifty and sixty rights that were previously reserved for married spouses. These include the following rights for the partner of the beneficiary:

- standing to sue for wrongful death and other delictual claims;
- authority to make health care decisions;
- right to worker's compensation benefits;
- right to receive payment of wages on the death of an employee and right to family leave under state law;
- survivorship rights including the tenancy rights to jointly hold property, equal to that of a widow;
- inheritance rights to an elective share (a death benefit determined by the length of the relationship) of the deceased partner's estate;
- state employees' retirement beneficiary benefits; and
- health care related benefits including private and public employee prepaid medical insurance benefits, auto insurance coverage, mental health commitment approvals and notifications, family and funeral leave.

6.6.21 A reciprocal beneficiaries relationship is terminated by the presentation of a signed notarised declaration of termination to the Director of Health by either of the beneficiaries.

6.6.22 This relationship differs from marriage in the following ways:

- It does not grant tax advantages or many of the other benefits provided by the federal government.
- There is no division of property upon termination of the relationship comparable to that of divorce.
- The couples do not have access to adoption.
- There is no medical insurance for these partners and also no requirement for the Public Employees Health Fund to provide coverage for unmarried partners of state workers or retirees.

6.6.23 The significance of legislation like the Reciprocal Beneficiaries Act of 1997 has been called into question and has even been criticised as ineffective and futile.\(^{328}\) Although it is a positive factor that non-conjugal couples are permitted to register their relationships, the fact

\(^{328}\) Maxwell 2000 *EJCL*, at 30 fn 207.
that opposite-sex unmarried couples do not fall within the scope of the Act significantly contributes to the negative disposition towards the Act. Out of the Hawaii state population of over 1.1 million, only 435 reciprocal beneficiary relationships were registered by October 1999.329

6.6.24 In Adoption case of B.L.V.B and E.L.V.B.330 the Vermont Supreme Court became the first appellate court in the USA to interpret its state’s adoption code to allow a same-sex co-parent to adopt her lesbian partner’s biological children without affecting the parental rights of the biological mother. This meant that the court interpreted the Vermont adoption code to allow a same-sex co-parent adoption, resulting in the child having two mothers and no father. Since then at least five other state appellate courts have allowed same-sex co-parent adoptions.331

6.6.25 Six years later in the Baker v State of Vermont332 the court accepted the applicants’ argument that the limiting of the benefits of marriage to opposite-sex couples violated the ”common benefits clause” of the Vermont Constitution, which was enacted to prevent favouritism and the conferring of advantages to privileged groups.

6.6.26 The Vermont Supreme Court thus issued a ruling that the applicants were entitled to claim the same benefits and protections afforded to opposite-sex couples. The Court furthermore instructed the legislature to enact legislation that would award such benefits and protections to same-sex couples, but did not express itself on the manner in which these benefits and protections should be awarded. The legislature was left to decide whether to open up civil marriage to same-sex couples or to create a parallel or equal institution like registered partnerships that would provide the same benefits and protections as marriage.333


331 District of Columbia, Illinois, Massachusetts, New Jersey and New York. See Maxwell 2000 *EJCL*, fn 164 for the references to the cases.


333 Maxwell 2000 *EJCL*, at 27.
6.6.27 Following the direction of the Vermont Supreme Court in the Baker case\textsuperscript{334} the legislature created the parallel institution of "civil unions" which afforded same-sex couples equal benefits to married couples namely the Civil Unions Act of 2000\textsuperscript{335}. This system is comparable to that of registered partnership in the Netherlands with the important difference that the Netherlands also permits same-sex marriage.

6.7.28 In Vermont the Civil Unions Act of 2000 provides for same-sex couples to enter into civil unions, a system which is parallel to marriage.\textsuperscript{336}

6.7.29 Section 1 explicitly declares that the state has a strong interest in promoting stable and lasting families, including families of same-sex couples. It also acknowledges that without legal protections associated with civil marriage these couples suffer numerous obstacles and hardships.\textsuperscript{337}

6.7.30 Same-sex partners who are not close family members and not a party to another civil union or a marriage may apply for a civil union licence from the town clerk, whereafter the union is certified either by a justice of the peace, judge or member of the clergy.

6.7.31 Parties to a civil union will be treated as spouses under the law and the relationship must be ended in the family courts under the laws governing divorce proceedings. A residency of one year is required before a dissolution will be granted. Should a couple decide to terminate the relationship, one of them would need to live in Vermont for six months before applying for such a dissolution. Thereafter it takes another six months before the dissolution is finalised.\textsuperscript{338}

6.7.32 Among the many rights and responsibilities conferred as a result of the Act are the following:

\begin{itemize}
  \item See fn 332 above.
  \item An Act Relating to Civil Unions, 2000 (Act No. 91 of 2000).
  \item Unless otherwise indicated, the sources for the information on the Civil Unions Act of 2000 are the Act itself, available at \url{http://www/leg.state.vt.us/docs/2000/bills/passed/h-847.htm} (accessed on 15 June 2000) and LaViolette for Law Commission Canada, Annexure 1.
  \item Referred to by Bonauto in Wintemute & Andenæs, chap at 201 fn 119.
  \item Demain \textit{Partners Task Force}.
\end{itemize}
- a support obligation between the partners similar to that of married spouses;
- the right to be treated as legal next-of-kin including preferences for guardianship of and medical decision making for an incapacitated partner, automatic inheritance rights, the right to leave work to care for an ill partner, hospital visitation and the control of a partner's body upon death;
- the right to be treated as an economic unit for state (not federal) taxes including the ability to transfer property to each other without tax consequences, to have greater access to family health insurance policies and to obtain joint insurance policies and joint credit;
- equalisation in the worker's compensation and public benefits laws;
- parental rights with respect to a child of whom either party to the civil union becomes the natural parent during the term of the civil union similar to those of a married couple;
- entitlement to all the available benefits of adoption;
- legal standing to sue for the wrongful death of a partner, emotional distress caused by a partner's death or injury, and loss of consortium or death or injury of a partner; and
- partners are not compellable to testify against each other.

6.6.33 Civil unions differ from marriage in that civil union partners are not entitled to the rights created in more than 1042 federal laws which are triggered by legal marriage.

6.6.34 This Act also acknowledges another constituency among Vermont's families, namely the reciprocal beneficiaries who, under the Act, become eligible to certain benefits available to spouses. These rights include hospital visitation rights and decision making about medical treatment, anatomical gifts and disposition of remains.339

- Reciprocal beneficiaries need only present a notarised declaration to the Commissioner of Health to either declare or terminate their relationship.
- These beneficiaries must be at least eighteen, related by blood or adoption (and therefore barred by consanguinity from entering into a civil union or marriage) and not presently married or a party to another civil union.340

6.6.35 The Civil Unions Act of 2000 created a "separate but equal" system which may be at risk of being challenged on constitutional grounds since the question remains whether any legislation can create a truly equivalent institution to opposite-sex marriage. For example, many rights and benefits are linked to the terms "marriage" and "spouse", making it impossible to create a truly parallel institution to marriage when it is named "civil union".

340  Bonauto in Wintermute & Andenaas, ibid.
6.6.36 As Wolfson bluntly put it:

'gay marriage' is not good enough (we want 'marriage', full equality, not two lines at the clerk’s office segregating couples by sexual orientation).  

6.6.37 Maxwell points out that in Brown v Board of Education the "separate but equal" position was found unconstitutional when applied to racial classifications.

6.6.38 Although, as was indicated above, marriage laws in the USA are almost exclusively governed by state law, the USA Constitution's supremacy clause ensures that the USA Supreme Court can review the constitutionality of laws relating to marriage. In addition, the definition of marriage in a particular state's law becomes very relevant when a citizen of that state's rights and benefits under federal law must be determined with reference to his or her marital status.

6.6.39 Subsequent to the judgments of the Hawaii court, the USA Congress became concerned that it might find itself in a situation where it would be forced by a court ruling to recognise same-sex "marriages".

6.6.40 As a result of this concern Congress passed the Defense of Marriage Act in 1996. This Act has two sections, one relating to federal issues and the other clarifying the intent of Federal law on the meaning of marriage.

6.6.41 The first section reaffirmed the power of the State to make their own decisions about marriage:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe, respecting a relationship between persons of the

341 Wolfson in Wintermute & Andenæs, chap 9 at 174. Nevertheless, he goes on to say the progress and possibilities remain astonishing.


343 At fn 182.

344 28 U.S.C.1738(c).

345 Federal Information.
same sex that is treated as a marriage under the laws of such other state, territory, possession or tribe, or a right or claim arising from such relationship.346

6.6.42 The second section stated what Congress had always assumed and never regarded necessary to clarify:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.347

6.6.43 This legislative move348 restricted the federal definition of marriage to members of the opposite sex and precluded same-sex married couples from federal economic funds (despite the fact that same-sex marriage is not recognised in any of the states). The Defense of Marriage Act of 1996 was expressly designed to protect states from being forced by the American Constitution to recognise same-sex marriages.349

6.6.44 Maxwell points out that the focus of the legislative activities regarding same-sex couples has been to override court decisions that have declared marriage statutes unconstitutional. When the legislature did grant benefits to these couples it was either in reaction to a court decision or the result of long-fought battles for domestic partnerships benefits to be recognised.350

6.6.45 It has to be noted that the attempts to reform the law relating to same-sex couples have been very controversial and the debates highly polarized. The progress that has been made is regarded as insignificant.351


348 Leonard in Wintermute & Andenæs, at 151, described this Act as one of the grossest examples of legislation specifically enacted to pander to voters during a heated national election.

349 Bailey for Law Commission Canada, chap V.B.


351 Bailey for Law Commission Canada, ibid.
Common-law marriage

6.6.46 Since the nineteenth century, the USA states have moved away from informal marriages towards statutory marriages and courts have explicitly rejected common-law marriage claims. Only a few states still authorise common-law marriage and even they discourage it.352

6.7 African Countries

6.7.1 One of the many challenges for legislatures in African countries is the integration and harmonisation of the various systems of personal law that exist concurrently in most of the states.

6.7.2 Historically, a plurality of legal systems is a result of the colonial occupation of these states by European countries. A reception of Western law took place while, at the same time, the colonial conquerors granted limited recognition to the states' existing indigenous systems of law and religious law. After obtaining political independence from their colonial rulers, the African states enacted legal reforms with the aim of integrating all these different systems of personal law, while simultaneously seeking to raise the status of woman and to protect the interests of their children.353

Opposite-sex relationships

6.7.3 Tanzania marriage law poses an example of this attempted integration and protection. With the enactment of section 160 of the Law of Marriage Act of 1971, legal effect was given to the widely recognised de facto unions. The Act also dealt with the extension to these unions of the same legal consequences that follow a formal dissolution of legal marriage.

352 Bonauto in Wintemute & Andenaes, at 181.
6.7.4 Section 160(1) of the Law of Marriage Act of 1971 creates a statutory presumption of marriage in favour of de facto unions that have existed for a minimum of two years. Section 160(2) states that should the presumption, however, be rebutted, the woman cohabitant and the children born of that union become legally entitled to apply to the court for economic support from the male partner.\textsuperscript{354}

6.7.5 Different categories of de facto unions\textsuperscript{355} exist, but the version that is relevant to this discussion is the one that is also called "modern de facto unions". These unions are consciously established, even though the partners may have differing conceptions as to the nature of the relationship. Modern de facto unions are not an attempt to contract a customary marriage but exist as a result of an unwritten mutual agreement between the parties. These types of unions are also found in the urban areas of other parts of Africa.\textsuperscript{356}

6.7.6 The incidence of de facto unions in Tanzania is a result of the interaction between different models of marriage in a single jurisdiction.\textsuperscript{357} Under the Law of Marriage Act of 1971, English colonial marriage laws and the customs regarding the African traditional model of polygynous marriage, as a union of two families, were integrated and came under the jurisdiction of the national legal system administered by judges trained in the common law. The doctrine of presumption of marriage from the English common law became codified in section 160 of the Law of Marriage Act of 1971 and in a sense ensured a smooth transition between the old and the new system.\textsuperscript{358}

6.7.7 Since African women are traditionally responsible for the care of young children they are economically disadvantaged compared to their male counterparts. It is thus not

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\textsuperscript{354} In its proposals for this section, the government recognised the practice that have developed where couples live together for years and have children without ever getting formally married to each other. Statistics showed that the woman cohabitant was the loser once the man got tired of living with her. Such a woman could not sue for maintenance and her children were illegitimate. Rwezaura 1998 \textit{JAL}, at 187.

\textsuperscript{355} See Rwezaura 1998 \textit{JAL}, at 194.

\textsuperscript{356} A study that was done in 1994 in a sample of 126 men and 294 women, over a period from 1971 to 1992, found that 37% of the respondents were living in de facto unions or had separated from such unions. For a breakdown of these statistics see Rwezaura 1998 \textit{JAL}, at 192 and fn 21.

\textsuperscript{357} Rwezaura 1998 \textit{JAL}, at 212.

\textsuperscript{358} Rwezaura 1998 \textit{JAL}, at 213 and fn 116.
surprising that section 160 of the Law of Marriage Act of 1971 has been more readily used by women to protect their economic interest and those of their children, than by men.

6.7.8 It should, however, be noted that in April 1994, the Law Reform Commission of Tanzania (LRC) recommended that section 160 of the Law of Marriage Act of 1971 be repealed because it constitutes an unnecessary encroachment on the sanctity of marriage.359

6.7.9 Rwezaura submits that the proposed repeal of section 160 contradicts the spirit of article 13 of the Tanzania Constitution (1977) which provides for equal protection by the law.360 He recommends that, rather than repealing section 160, it should instead be retained and refined.361

6.7.10 Another example of an African country’s approach to domestic partnerships can be found in the laws of Kenya.362

6.7.11 The legal system of Kenya is based on the English common law, customary law363 and Islamic law.364 In the absence of national legislation, Kenyan courts resort to English law. English rules of equity and common law are, however, only applicable in Kenya in so far

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360 At 193.

361 Two of the problems that exist with s 160(1) are the absence of the regulation of the rights and obligations of these couples during the existence of the relationship and the distribution of property where one of the cohabitants dies intestate.

362 Kenya gained independence from the British Colonial Government when it became a Republic with a Constitution dated 12 December 1963. IELRC East Africa, at par I.

363 Customary law is the law of small communities of people living together in ethnic context (tribes). In such communities a particular version of customary law is taken for granted as part of their everyday experience but it excludes outsiders. There are as many customary laws as there are tribal communities. In Kenya there are more than 42 different ethnic communities. Despite the general consensus on certain fundamental principles, there are nuances in each of them that only someone well versed with the community’s way of life can identify. A characteristic of African customary law is the dominance of older male members over property and lives of women and their juniors. Other features of customary law are the centrality of the family as opposed to the individual and the definition of the family in expansive terms to include ascendants and descendants and more than one wife in polygynous unions. Kameri Mbote for Constitution of Kenya Review Commission.

364 World Factbook.
as the circumstances of Kenya and its inhabitants permit and subject to qualifications as those circumstances may render necessary.\footnote{Kameri Mbote for Constitution of Kenya Review Commission.}

6.7.12 Statutory laws are supposedly superior to customary law and any law that contradicts the Constitution of Kenya, 1963, is null and void to the extent of contradiction. There have, however, been instances where customary law has overridden the statute law.\footnote{Thongori for Constitution of Kenya Review Commission.}

6.7.13 There are several forms of marriage in Kenya. Statutory marriages\footnote{These marriages are evidenced by registration and the issuing of a marriage certificate if they satisfy the requirements of the mentioned legislation as to formality and procedure. A spouse who contracts another marriage while the first statutory marriage still exists commits an offence of bigamy under the Penal Code. Thongori for Constitution of Kenya Review Commission.} are recognised under the Marriage Act of 1902,\footnote{Revised in 1962 (Chap 150 of the Laws of Kenya).} the African Christian Marriage and Divorce Act of 1931,\footnote{Revised in 1962 (Chap 151 of the Laws of Kenya).} the Hindu Marriage and Divorce Act of 1960\footnote{(Chapter 157 of the Laws of Kenya).} and the Mohammedan Marriage and Divorce Act.\footnote{(Chap 155 of the Laws of Kenya). Benschop Women's Rights in East Africa, at chap 5.6.} Customary marriages as governed by the laws and customs of a particular ethnic group are also recognised.\footnote{The late Chief Justice Madan is quoted to have said "With changing time we must change what constitutes a customary marriage". "This Obsession With Marriage Papers is Rubbish, Says Lawyer" The East African Standard (Nairobi) 29 July 2002, available at \url{http://209.225.9.134/stories/200208020459.html} (hereafter referred to as “EAS Nairobi”).} Customary law allows a man to marry as many wives as he wishes and the offence of bigamy does not apply to polygamous unions under this system. About eighty percent of Kenyans are married in the customary (or informal) way. Other customary practices are the levirate union,\footnote{Levirite union, a customary practice, is a form of widow inheritance in terms of which a widow goes into cohabitation with the brother or a male relative, even a son, of the deceased husband. While such a woman remains a wife to the deceased, she has a conjugal relationship with a living person. Since the underlying idea behind this practice is to ensure that the widow and her children are looked after within the family of the deceased husband and father, emphasis is placed on the protective and supportive roles of the deceased rather than on the sexual relationship. Kameri Mbote for Constitution of Kenya Review Commission.} woman-to woman marriage\footnote{Kameri Mbote for Constitution of Kenya Review Commission.} and sororate unions.\footnote{Kameri Mbote for Constitution of Kenya Review Commission.}
6.7.14 Recently Kenyan courts have also started to recognise the "come we stay marriages", where a couple live as man and wife without undergoing any type of marriage ceremony. Despite the recognition of these marriages there is no legislation regulating the legal position and resultant confusion is inevitable.

6.7.15 The many laws designed to govern and protect property ownership do not apply to these unmarried couples. Furthermore, those living together expose themselves to litigation over issues of income and palimony when they split up or one partner dies. Verbal and or implied agreements they may have made regarding financial matters are susceptible to different interpretations.

6.7.16 When children are born from the living-in relationship, they are not automatically recognized as legal children of the parents that gave birth to them. They also cannot make medical decisions regarding one another unless they possess a "durable power of attorney for healthcare". A surviving partner cannot even make funeral arrangements if the other living-in partner dies.

6.7.17 Courts in Kenya must determine disputes emanating from these associations that do not neatly fit into any of the systems of marriage or practice. When such cohabitants acquire property together or bring their individually owned property to the union, questions as to property rights are bound to occur in the event of death or relationship break-up. A court

374 A widow who has no children or has reached menopause makes a dowry payment to the parents of a young woman who comes to her home to bear children sired by a selected male relative of the deceased husband of the widow. The children thus born are regarded as the children of the deceased. Kameri Mbote for Constitution of Kenya Review Commission.

375 Sororate unions are a customary practice that entails the replacement of a deceased wife by her sister as wife to the widower where the deceased died without descendants or without male descendants. The underlying consideration for this practice is that the dowry has been paid by one family to the other and, rather than to refund such dowry, the deceased’s family replaces the wife.

376 Parties may also be in the process of marrying the customary way, not having completed the process.


378 A 1987 case known as Virginia Edith Wambui Otieno v Joash Oschieng, Ougo and Omolo Siranga illustrates this point. In this burial dispute the court of Appeal decided that a widow does not have rights over the body of her husband because under customary law, the wishes of the widow and children are irrelevant. Referred to by Thongori for Constitution of Kenya Review Commission.
then needs to determine whether or not the cohabitation actually constituted a marriage for purposes of allocating property rights.

6.7.18 In *Mary Njoki v John Kinyanjui and Others* the appellant's claim to the deceased's property was rejected despite her cohabitation with him. The court was of the view that cohabitation and repute alone were not enough to constitute a marriage. In the court's view such cohabitation had to be accompanied by an attempt to carry out some ceremony or ritual required for any marriage or under customary law.

6.7.19 Kameri-Mbote points out that legislation is especially necessary to address the rights of women who have been involved in situations of cohabitation for a number of years without going through a ceremony of marriage.380

Same-sex relationships

6.7.20 Many African leaders seem to hold the view that homosexuality is "un-African" and "the spin-off of the capitalist system". Several announcements to this effect have been made by prominent leaders.381

6.7.21 In this regard the following four main contentions underlying African homophobia have been identified:382

- Homosexuality can easily be conflated with offences such as bestiality, paedophilia and the marketing of pornography;
- Homosexuality is a sickness;
- Homosexuality is an unnatural perversion that goes against God; and
- Homosexuality is a Euro-American perversion that is foreign to Africa.

6.7.22 Robert Mugabe, the president of Zimbabwe, is one of the most outspoken opponents of homosexuality and persistently makes homophobic statements.383 President Nujoma is

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379 Unreported Civil Appeal Case No. 71 of 1984.
380 Op cit.
381 Steyn 1998 *TSAR*, at 103 -105. She refers to the secretary-general of the Pan-Africanist Congress, an ANC National Executive member, a Zimbabwean parliamentarian and the Kenyan President.
382 Steyn 1998 *TSAR*, *ibid*. 
also reported to have referred to gays and lesbians as "idiots" who should be condemned and who "are destroying the nation".  

6.7.23 Kenyan law defines any sexual relations between men as a criminal act. There are, however, few prosecutions. The Attorney General, Amos Wako, has stated that homosexual practices are widely regarded as uncivilized and only occur on the continent as a result of pernicious Western influence. Wanjira Kiama reports, however, that officials do not know the extent of homosexual practices.

6.7.24 Strong hostility exists towards homosexual men, reflecting generally conservative attitudes in the Kenyan society. According to President Moi, "Kenya has no room or time for homosexuals and lesbians. Homosexuality is against African norms and traditions, and even in religion it is considered a great sin."  

6.7.25 Dr Frank Njenga, a psychiatrist and chairman of the social responsibility committee for the Kenyan Medical association and an HIV/AIDS prevention activist, says that the extent of homosexuality, bisexuality and lesbianism in discussions is either exaggerated or underrated. He argues that Kenyan society has not "developed" to the level where people with a different sexual orientation are allowed to be themselves or develop within laws and institutions.

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383 Reuters The Herald (Harare) 12 Aug 1995, referred to by Steyn 1998 TSAR, ibid. He stated that homosexuality is unnatural and there is no question ever of allowing these people to behave worse than dogs and pigs.

384 Cameron 2002 SALJ, at 642.


rights set out for them, with the result that a good number of men "are constitutionally homosexual and socially heterosexual, so as to fit in the society."\textsuperscript{389}

6.7.26 A proposed same-sex wedding ceremony set for the town of Lamu, a popular tourist destination, has sparked an angry debate in Kenya about homosexuality. A 24 year-old Kenyan man had to be taken into protective custody at the instigation of the District Administrator because of the danger of being lynched after it became known that he planned to "marry" another man.\textsuperscript{390}

6.7.27 In Mombasa and other Kenyan cities homosexuality has, however, long been acknowledged and, unofficially, male marriages occur, complete with rings and dowry, within gay circles. In response to claims by non-governmental organisations that attempts to stop the wedding were an infringement of human rights, President Daniel arap Moi accused them of "advocating indecency" and "misleading the youth".\textsuperscript{391}

6.7.28 Although discrimination between the sexes is prohibited, sexual orientation is not one of the prohibited grounds listed in the discrimination clause of the Kenya Constitution.\textsuperscript{392} Despite amendments in 1997 to broaden the list of grounds in the Constitution, section 82 (4)(b) and (c) of the Constitution effectively still permit discrimination with respect to adoption, marriage, divorce, burial and devolution of property on death and other matters of personal law.\textsuperscript{393}

6.7.29 In South Africa there are religious leaders who do not condemn homosexuality. In this regard Archbishop Tutu of the Anglican Church and Reverend Moqoba of the Methodist Church have made submissions to the Constitutional Assembly of South Africa in support the acceptance of homosexual behaviour.\textsuperscript{394}

\textsuperscript{389} Kiama, \textit{op cit}.

\textsuperscript{390} The International Lesbian and Gay Association \textbf{World Legal Survey-Kenya} available at \url{http://www.ilga.org/Information/legal_survey/africa/kenya.htm}.

\textsuperscript{391} J Kamau "Wedding Row Sets Alight Gay Issue In Kenya" \textbf{Dispatch Online} 28 October 1999 available at \url{http://dispatch.co.za/1999/10/28/features/LP1.HTM}.

\textsuperscript{392} S 82(3).

\textsuperscript{393} \textbf{The Status of Women In Kenya} available at \url{http://www.eastafricanlaw.com?LawArticle}.

\textsuperscript{394} Steyn 1998 \textbf{TSAR}, at 104 fn 49.
6.7.30 Cameron points out that the judgments of the appellate courts in this region have also taken differing approaches to the question of legal protection on the ground of sexual orientation. In South Africa the Constitutional Court has, in unequivocal terms, affirmed that gays and lesbians have a right to equality under the Constitution.\textsuperscript{395}

6.7.31 In contrast, the Zimbabwean Supreme Court held by a majority of three to two that the criminal penalties against consensual private sodomy do not constitute discrimination under the Zimbabwean Constitution.\textsuperscript{396} Under Zimbabwean common law "unnatural sexual acts" are illegal, with penalties ranging up to ten years' imprisonment. Botswana's penal code also proscribes homosexuality.\textsuperscript{397}

6.7.32 In similar vein, the Supreme Court of Namibia held by a majority of two to one that a long-term lesbian relationship between a Namibian and a non-Namibian is not a factor in favour of the latter when she applies for permanent residence, since it was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual marital relationship.\textsuperscript{398}

6.7.33 In making their rulings, the majority of judges in both the Zimbabwean and Namibian cases referred to the difference that exists between the South African Constitution and the Constitutions of their countries. The South African Constitution expressly lists sexual orientation as a prohibited ground of unfair discrimination, which is not the case in the other two Constitutions.\textsuperscript{399}

6.7.34 Cameron emphasises that the real question should not be one of constitutional wording, but one of principle. He argues that the basis for the equal protection of gays and lesbians lies in the achievement of equality as one of the founding values of the South

\textsuperscript{395} National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC), 1999 (1) SA 6 (CC) and National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC).

\textsuperscript{396} S v Banana 2000 (3) SA 885 (ZS), referred to by Cameron 2002 \textit{SALJ}, \textit{ibid}.

\textsuperscript{397} Steyn 1998 \textit{TSAR}, at 105 and fn 60.

\textsuperscript{398} Chairperson of the Immigration Selection Board v Frank & Khaxas (NmS 5 March 2001, case SA 8/99, unreported), referred to by Cameron 2002 \textit{SALJ}, \textit{ibid}.

\textsuperscript{399} See discussion in chap 4 above.
African constitutional order. The central importance attached to the value of equality stems from South African history.400

6.7.35 It is a history of inequality and oppressive injustice that taught our constitution-makers that irrelevant and stigmatising criteria should not be used as a basis for judging people and their legitimate place in society. Discrimination on the basis of sexual orientation will stand in the way of a proper appreciation of the human capacities of the person in question, and damages his or her dignity.

6.7.36 It is therefore these important values of equality and dignity that are at stake and not merely the fact that sexual orientation has been mentioned specifically as a prohibited ground.

6.7.37 It is also these same values that form the basis of the concept of African humanity, also called ubuntu. Ubuntu is said to embrace all forms of expressive human flourishing that contribute to society and that do not harm other humans.401

6.7.38 Quoting from the discussion of the ubuntu concept by the Constitutional Court in the case of Makwanyane,402 Cameron submits that ubuntu finds practical application by providing protection not only for the strong and the powerful, the influential and the popular, but also for the weak, the unprotected and the socially vulnerable.

6.7.39 In this regard he recognises that gays and lesbians in South Africa are fortunate that the inclusive approach that the liberation movements took towards equality and dignity affirmed these fundamental African values. This paved the way for the recognition of equality of gays and lesbians under South African law. Cameron suggests that other African countries should use the ubuntu concept in similar ways to achieve real equality for minority groups.

400  A history which many Namibians share. Cameron 2002 SALJ, at 644.
401  Cameron 2002 SALJ, at 645. Ubuntu was given judicial articulation and endorsement in S v Makwanyane 1995 (3) SA 391 (CC), Cameron, at 646 and fn 19.
402  Op cit.
CHAPTER 7: UNDERLYING POLICY ARGUMENTS

7.1 The legal recognition and regulation of domestic partnerships will threaten marriage as a sacred and stable institution

a) Marriage as a sacred and stable institution

7.1.1 The definition of marriage in South African law is the western Judeo-Christian concept of marriage as referred to in Hyde v Hyde & Woodmansee.\(^1\) It reads as follows:

Marriage is the legally recognised voluntary union of a man and a woman for life to the exclusion of all others.\(^2\)

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

7.1.2 Marriage is, furthermore, an institution which, for many people, carries with it strong religious connotations.\(^3\) Religious interest groups contend that the marital relationship is the foundation of the family.\(^4\) According to these interest groups, marriage was established for

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\(^1\) The concept of marriage has not been statutorily defined in South Africa, but judicially. Hyde v Hyde & Woodmansee (1866) LR 1 P & D 130 at 133, referred to by Sinclair & Heaton Marriage Law, at 305 fn 1. See also W v W 1976 2 SA 308 (W) where the court held that the marriage of a post-operative transsexual was invalid on the basis that the operation did not change the plaintiff’s sex and that a valid marriage could only be contracted by parties of the opposite-sex. A further element, “while it lasts”, has been added by writers as a result of the changes brought about by divorce laws. See eg Sinclair & Heaton Marriage Law, at 307: “The assertion that marriage is ‘for life’ is thus simply not true” the references in fn 10 and 11. See also in general Sinclair 1993 AJ, op cit.

\(^2\) Apart from the judicial definition of what constitutes a marriage under South African law, preconstitutional legislation provides for the formalities that need to be complied with. Under the Marriage Act, 1961 (Act No 25 of 1961) only those marriages that are celebrated before a state marriage officer, or religious officer recognised under that Act, are valid. The legal consequences arising from such a marriage are determined by the common law and statute.

\(^3\) Holland 2000 CJFL, at 7.

\(^4\) See Genesis 2: 18 -

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

and Matthew 19: 5 –
the purpose of companionship and partnership with a view to procreation and for fulfilling a stewardly responsibility for the earth.⁵

7.1.3 Those who believe marriage to be a sacred, biblical institution also regard it as the only way to create a stable environment for the raising of children. In this regard it has often been said that the basic building block of society is the family.⁶ On the premise that marriage equals healthy family structures, marriage plays an important role in promoting social stability and good order which makes it the cornerstone of society.

7.1.4 In this context it is said that the most significant relationships to which the law attaches enforceable consequences are those established by marriage (wife and husband) and procreation (blood relations); both relationships recognised in society at large as family relationships.⁷ Marco states that marriage “undergirds all of American society”.⁸ The institution of marriage is sometimes regarded as a religious ceremony to legalise the union of the spouses in the eyes of God.⁹

7.1.5 Closely linked to the religious views on marriage is the South African common law, which determines that a marriage “creates a physical, moral and spiritual community of life, a consortium omnis vitæ”.¹⁰ This has been described as:

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


 Lind 1995 SALJ, at 482.


 Ian McMahon, a respondent to the Issue Paper.

 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) para 64 referring to Sinclair & Heaton Marriage Law, at 422 and the authorities cited there.
…an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage … These embrace intangibles, such as loyalty and sympathetic care and affection, concern … as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in supporting-generating business.  

7.1.6 Sinclair points out that the duties of cohabitation and fidelity flow from this relationship. In Grobbelaar v Havenga it was held that

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

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

7.1.8 The Constitutional Court in its judgment in the Satchwell case also acknowledged the role of marriage in society:

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

7.1.9 The rights and obligations associated with marriage are vast and all-encompassing. Besides the religious and social importance of marriage, marriage as an institution is at

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11 Sinclair & Heaton Marriage Law, ibid referring to ia Erasmus J in Peter v Minister of Law and Order 1990 (4) SA 6 (E) at 9, in fn 21.  
12 1964 (3) SA 522 (N) referred to in The National Coalition for Gay and Lesbian Equality and other v The Minister of Home Affairs and others, at 525E.  
13 Mosikatsana 1996 SAJHR, at 557 with reference to K L Karst "The Freedom of Intimate Association" (1979-80) 89 Yale Law Journal 624 (hereafter referred to as "Karst") at 651, 684.; See also the reference in CALS Report, op cit at 27 where a man explained that cohabitation is common in townships but not in rural areas. "People in rural areas like tradition. If you want to live with a woman that you love you have to get married. People living in the township know their tradition but it is not important to them".  
14 Satchwell v President of the Republic of South Africa and Another 2002 (9) BCLR 986 (CC).  
15 However, as will be seen under the discussion of the constitutional approach, these remarks must be read in context.
present the only source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.\textsuperscript{16} Marriage is also important in regulating the legitimacy of children and the financial relationship between the parties on breakdown of the relationship.\textsuperscript{17}

b) The perceived threat

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

7.1.11 It is argued that to grant domestic partnerships the same rights and duties as married spouses would undermine the institution of marriage and lead to a decline in the frequency of opposite-sex marriages.\textsuperscript{18}

7.1.12 The fear furthermore exists that the rights of the legal spouse may be adversely affected by the improved legal position of domestic partners. If the consequences of marriage are not distinguished from those of domestic relationships, the theme runs, marriage will die out.\textsuperscript{19} Whether based on particular religious grounds or not,\textsuperscript{20} proponents of the preferential status of marriage are concerned that the demise of marriage will inevitably have the downfall of our stable society as a consequence.

\textsuperscript{16} Mosikatsana 1996 \textit{SAJHR}, at 556. See also Steyn 1998 \textit{TSAR}, at 107 for a more extensive list of relevant family benefits.

\textsuperscript{17} Holland 2000 \textit{CJFL}, at 25 fn 9.

\textsuperscript{18} Hahlo \textit{Husband and Wife}, at 262 and Hutchings & Delport 1992 \textit{De Rebus}, at 121.

\textsuperscript{19} Sinclair & Heaton \textit{Marriage Law}, at 291.

\textsuperscript{20} In an article that does not have a particularly religious approach, Nock states that marriage as a social institution provides a template for a family relationships. This template reflects the boundaries that are commonly understood to be allowable limits of behaviour in a marriage. According to him, a married couple must adhere to this template and this fact distinguishes marriage from other kinds of relationships. He argues that although there may be justifiable legal and moral reasons for treating married and unmarried adults alike, there are enormous social costs associated with doing so and that these costs are sufficiently great to justify granting married couples significant legal, economical and social benefits. As such marriage is a relationship defined by legal, moral and conventional assumptions that, rather than originate in marriage, precede and influence it. S L Nock “The Social Costs of De-institutionalizing Marriage” available at \url{http://familycenter.byu.edu/marriageconf/media/nock.pdf} (hereafter referred to as “Nock”) at 1.
7.1.13 Submissions received by the South African Law Reform Commission from interest groups in the community on the Issue Paper\textsuperscript{21} also reflected these concerns.

7.1.14 Some respondents reflected on the influence that the recognition of domestic partnerships may have on the state. It was submitted that acknowledging domestic partnerships will “lead to instability of the State since the weakening of the institution of marriage weakens the State”.\textsuperscript{22} Likewise, it was said that “[l]egally married heterosexual couples may feel threatened by the favours granted to ‘domestic partners’ and thus they may feel that their vital and primary importance to the State and its future well-being might be down-played or discriminated against.”\textsuperscript{23}

7.1.15 Concern was also expressed for children of the non-committed relationships.\textsuperscript{24} Promoting domestic partnership by awarding it legal recognition would make children the innocent victims of unstable and whimsical relationships.\textsuperscript{25} Therefore governments must afford marriage differential treatment which it should deny other forms of relationships.\textsuperscript{26}

7.1.16 Proponents of marriage as a sacred institution hope to preserve marriage as an institution by giving it a distinctive status that affords parties thereto unique responsibilities, privileges and benefits which are only available to persons who are prepared, or able, to make the commitment demanded by marriage. They propose that domestic partners look for alternative remedies to prevent injustice in the law of property, contract, delict, unjustified enrichment and trusts.

\textsuperscript{21} Issue Paper no 17 (Project 118) available at \url{http://wwwserver.law.wits.ac.za/salc/issue/issue.html}.

\textsuperscript{22} Human Life International.

\textsuperscript{23} Father Hyacinth Ennis from St Francis House.

\textsuperscript{24} Claire Carradice held the belief that “marriage indicates some type of permanence and stability which is what children thrive on” and was concerned that domestic partners can “just up and away at their whim”.

\textsuperscript{25} T Marco “Gay Protected Class Status Would Undermine Traditional Family Values and Structures” 13 July 2002 available at \url{http://www.leaderu.com/marco/special/spc23.html}. Although his statement was made only in relation to same-sex marriages, the underlying sentiment is equally applicable to the view opposing legitimizing opposite-sex cohabitants.

\textsuperscript{26} As Posner \textit{Sex and Reason} has put it “marriage is a status rich in entitlements”, many of which were not designed with same-sex couples in mind. Supporters of this view may want to add: nor with uncommitted cohabitants in mind. Eskridge 1993 \textit{VLR}, 1431.
The view is therefore held that only those who comply with the current definition of marriage are entitled to the rights and obligations attached to marriage and that only a legally valid marriage can create a family worthy of legal protection. This is referred to as the definitional argument.

c) Response

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

i) The first category of respondents is of the opinion that an analysis of history refutes the arguments used to back up the limited common-law definition of marriage with its religious origin. They argue that marriage is a social construction and as such is continuously being constructed by society, as opposed to being a fixed and sacred institution set in stone. “Religious marriage” is but one version of marriage as it has presented itself over time. This argument is referred to as the historical response.

27 The misconception that there is consensus about family life and the role of family in society is discussed by Mosikatsana 1996 SAJHR. At 550 he quotes K Franklin “A Family Like Any Other Family: Alternative Methods of Defining Family in Law” (1990-91) 18 New York University Review of Law and Social Change at 1027 where he stated “Families have long been viewed as among the most essential and universal units of society. This sense of the shared experience of family has led to an often unexamined consensus regarding what exactly constitutes a family.” In this regard it is important to note the way the Constitutional court expressed itself about the omission of marriage and family rights as basic human rights from the 1996 Constitution in Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA, 1996-1996 (10) BCLR 1253 (CC); (1996 (4) SA 744 (CC). “Families are constituted, function and are dissolved in such a variety of ways and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutional terms. They thereby avoid disagreements over whether the family to be protected is a nuclear family or an extended family, or over which ceremonies, rites or practices would constitute a marriage deserving of constitutional protection….. . These are seen as questions which relate to the history, culture and special circumstances of each society permitting of no universal solutions.” At para [99].

28 The American federal court made such a definitional argument where it said “there has been for centuries a combination of scriptural and canonical teaching under which ‘marriage’ between persons of the same-sex was unthinkable and, by definition, impossible”. Adams v Howerton 486 F.Supp.1119 (C.D. Cal 1980), referred to by Eskridge 1993 VLR, at 1429 fn 25. It went on to say that limiting the definition in such a way is morally justified to preserve family values and traditional ethical notions. In this regard reference is often made to the anti-homosexual teachings of the Old Testament. Eskridge 1993 VLR, at 1430.
ii) The second category of respondents is an extension of the first category and emanates from the argument that marriage changes over time. Supporters of this view say the time has come to redefine marriage. They propose a functional definition for marriage which highlights the attributes of marriage that the proponents of the first view are advocating to protect. This will be referred to as the functional response.

iii) The third category of respondents argues that, regardless of one’s views on the history of marriage and the common-law definition, the exclusions brought about by that definition are no longer acceptable in a heterogeneous society and nor are they justifiable under our Constitution. This will be referred to as the constitutional response.

7.1.19 These three responses will be discussed in what follows.

(i) The historical response

7.1.20 When the dominant class in society promotes its interests in, and maintains control of the marriage issue, the impression is created that “the traditional family notion” (and the concepts such as heterosexuality, sacredness and covenental nature of marriage implicated in it) is the dominant concept of reality. This leads to the perception that the values and interests of the white, middle-class middle-aged heterosexual male are the norm and anything else would amount to a morally unacceptable deviation.29

7.1.21 However, historical research proves that there is no coherent tradition of long-term monogamous, procreation-oriented marriage among heterosexuals. Rather, an ideal of long-term, monogamous, procreation-orientated marriage is created against which many other variations of relationships are measured. Ironically same-sex couples (and for that matter, opposite-sex cohabiting couples) are measured against this fake ideal, found wanting and on that basis denied entry into marriage and the legal consequences of it.30

29  Mosikatsana 1996 *SAJHR*, at 554.

30  Pantazis 1997 *SALJ*, at 562 and the sources referred to in his fn 45.
7.1.22 Proponents of the historical approach state that the common perception that historically marriage was, and has always been the legally recognised voluntary union of a man and a woman for life to the exclusion of all others, is proved wrong by history itself.

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

History of heterosexual marriage

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

7.1.25 In the Frankish period important changes took place in the law of marriage, mainly under the influence of the Church. In addition to her father’s consent, the bride’s consent was now required for the first time. This was declared in the presence of their relations. Only

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31 Two prominent historians Boswell and Eskridge in particular researched this topic and followers of this viewpoint continuously refer to their work.

32 A few interesting examples will show that the form marriage takes varies widely in both law and custom. Sumerian Marital law of ancient Mesopotamia about 4 600 years ago, permitted the king to have sex with a bride before their husbands were allowed. For centuries in Ancient Europe, marriage began and was consummated with a sometimes secret betrothal and the public wedding only following a confirmed pregnancy, or after the birth of a child. In Marche, a district of Medieval France, the bride-to-be had sex with every man she encountered on the way to the church. In Hutu and Tutsi Tribes of East Africa premarital sex is forbidden, but, once married, a woman could have sex with whomever she wished. Demain Partners Task Force.

33 From the dawn of history to the end of the fifth century A.D., ie it includes the pre-Roman period as well as the period of Roman occupation of Gaul. Hahlo & Kahn SA Legal System, at 330.

34 Frankish Empire 5 A.D. - 9 A.D. Hahlo & Kahn SA Legal System, at 330.

35 After the disintegration of the Western Roman Empire during the fifth century, the conversion of the Franks to Christianity took place. There was no separation between State and Church and the latter participated in secular government.
towards the end of the Frankish period did it become the practice to have the marriage blessed by the parish priest, usually the morning after the wedding.36

7.1.26 During the Middle Ages37 the law relating to matrimony passed under the jurisdiction of the Church. The regulation of marriage was for many years left to the church and under canon law the status of marriage could be created with almost complete absence of formality. The doctrine of the early Church was that consummation was the essential factor in the creation of marriage,38 but by the twelfth century it became accepted that a valid marriage could be formed by an exchange of consents with no need for any other ceremony.39

7.1.27 Initially a declaration of consent by the parties to marry each other was made outside the church and was followed by benediction in the church. In the thirteenth century the Roman Catholic Church made marriage sacramental, celebrating Holy Communion and performing the ceremony at the Church altar.40 By the sixteenth century it had become customary to hold the whole ceremony in the church.

7.1.28 In 1753 Lord Hardwicke’s Act did away with formless common-law marriages in England. The Act stipulated a public church ceremony after the calling of banns on three successive Sundays.41 Parents’ consent was required for minors and entries were made in an official register. The Act applied to all except the Royal Family, Quakers and Jews. This meant that Protestant dissenters and Roman Catholics had to get married according to the Anglican rite or not at all.

36  Hahlo & Kahn SA Legal System, at 384.
37  9 AD – 16 AD. Hahlo & Kahn SA Legal System, at 330.
38  Cretney & Masson Family Law, at 5. The text relied on was Genesis 2:24 “Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they will be one flesh.” This doctrine, however, gave rise to problems with regard to the marriage of Joseph and Mary.
39  If the consent was expressed in the future tense and sexual intercourse subsequently took place, the parties immediately became husband and wife. Thereby the church reconciled its own primitive doctrine that consummation was necessary to form marriage with the doctrine of Roman law that consent was the vital factor. Cretney & Masson Family Law. Also Hahlo & Kahn SA Legal System, at 448.
40  Eskridge 1993 VLR and his reference to Boswell, at 1452 et seq.
41  It was possible to dispense with banns under specified circumstances.
7.1.29 In 1836 the law changed again and it became possible to marry either in the Church of England (with the requirements similar to the Hardwicke Act) or under the 1836 Act. The latter could either be purely secular (a registry office ceremony) or with certain formalities in a non-Anglican place of worship. Subsequent marriage legislation still followed this pattern established in 1836.42

7.1.30 Besides the above historical changes, polygamy, which was common for many men featured in the Bible, and still is in some modern societies, eliminates the “to the exclusion of all others” part of the common-law definition.43 Another change belying the common-law definition of marriage is altered divorce laws which make marriage no longer necessarily “for life”.

7.1.31 Factors indicated to have played a role in bringing these changes about over time are the process of industrialisation and, in its wake, the ideology of individualism and the emancipation of women. These changes occur over different time spans in different places and have not been completed.44

7.1.32 In 1988 the English Law Commission expressed itself as follows on these factors and its influence on the marriage concept:45 “Socio-economic developments seem to have led to a change in the nature of marriage in Western Society. What has been called ‘institutional’ marriage which largely entails economic functions and the provision of domestic services has been replaced by what may be called ‘companionate’ marriage, which requires a continuing successful emotional relationship.”

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42 Cretney & Masson Family Law.

43 Western culture did not view monogamy as essential to marriage until Modestinus, a fourth century non-Christian Roman lawyer, defined the institution as such.

44 Sinclair & Heaton Marriage Law, at 12 -14.

History of same-sex unions in western culture

7.1.33 Generally it is said that at least until the thirteenth century homosexual practice and interest were regarded as an ordinary part of the range of human eroticism.\(^{46}\)

7.1.34 Evidence\(^{47}\) has been found that pre-modern cultures, considered to be important antecedents for Western culture like early Egyptian and Mesopotamian societies, recognised same-sex relationships in their culture, literature and mythology.\(^{48}\) Eskridge shows that proof exists that classical Greek culture developed cultural norms to govern same-sex relationships\(^{49}\) and of documented cases of same–sex marriage ceremonies dating back to 2,400BC in Egypt.\(^{50}\)

7.1.35 Stronger and more direct evidence exist of same-sex marriages in early Roman culture, in imperial Rome and in Western Europe for much of the Christian Middle Ages.\(^{51}\)

7.1.36 Modern historians are in agreement that republican Rome was tolerant of same-sex relationships and accorded some same-sex unions the legal and cultural status of marriage but that the late Roman Empire grew less tolerant of it. According to Foucault, imperial Rome’s opposition of same-sex relations related to the institution of companionate marriage during which procreation became a focal point of opposite-sex relationships.\(^{52}\)

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\(^{46}\) J Boswell *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe From the Beginning of the Christian Era to the Fourteenth Century* Chicago: University of Chicago Press 1980 (hereafter referred to as ”Boswell”) at 333, referred to by Pantazis 1997 *SALJ*, at 560.

\(^{47}\) Eskridge emphasises that this early evidence of marriage between same-sex partners is at best indirect. Eskridge 1993 *VLR*, at 1422.

\(^{48}\) See the complete discussion with examples in Eskridge 1993 *VLR*, at 1437-1453.

\(^{49}\) Greek men celebrated homosexuality, ideally as elder–to-younger lovers. Opposite-sex marriage, however, was a business deal; men married women for their household services. Demain *Partners Task Force*, op cit. Examples of both companionate and transgenerational same-sex relationships are found in Plato’s *Symposium* which was written in the 4\textsuperscript{th} Century B.C., Eskridge 1993 *VLR*, at 1441.

\(^{50}\) New Zealand Civil Union Bill Cabinet Memorandum available at [http://www.timbarnett.org.nz/civilunions/marriage.htm](http://www.timbarnett.org.nz/civilunions/marriage.htm) with reference to Eskridge and Boswell.

\(^{51}\) Eskridge 1993 *VLR*, ibid.

\(^{52}\) M Foucault *The History of Sexuality* Harmondsworth: Penguin 1984 (Pantheon Books 1986), referred to by Eskridge 1993 *VLR*, at 1419 fn 98. By the end of the second century the propriety of such relationships gradually became a matter of controversy, the collapsing Roman Empire grew increasingly inhospitable towards same-sex unions.
7.1.37 A connection is suggested between the increasing influence of Christianity after Constantine’s conversion to that religion in 312 A.D., and the anti-homosexual disposition. The Justinian Code of 533 A.D. eventually outlawed same-sex intimacy and placed it in the same category as divorce and adultery, all of which violated the Christian ideal of companionate opposite-sex marriage.

7.1.38 During the early and high Middle Ages the criticism of the Church towards same-sex intimacy focussed strongly on the fact that it could not result in procreation and constituted sex outside the then established ideal of companionate marriage. Paradoxically, in practice the Church remained tolerant of same-sex unions, especially within its own clergy. Ceremonies creating so-called brotherhood liturgies were sometimes performed for male missionaries before they embarked on missions or for other males who wished to formalise their friendship. The main difference between the brotherhood liturgy and the one originally used to wed opposite-sex couples was that the former emphasised the companionate, rather than the procreative nature of the relationship. Thus the blanket assertion that same-sex marriage offends religious values is not sustained.

7.1.39 In what is regarded as a turning-point in the West’s attitudes towards same-sex unions, many secular governments enacted their first laws prohibiting sodomy in the thirteenth century. Coinciding with an increased intolerance of other minority groups and other non-conformists (such as non-Christians, especially Jews), intolerance towards gays

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53 The ninth to sixteenth century – Hahlo & Kahn SA Legal System, at 330.

54 Throughout its history, the Catholic Church developed over 100 liturgies for same-sex marriage and approved of same-sex marriage for over 1500 years, only ceasing to perform them in the nineteenth century. J L Dorrell “Gay Marriage: It’s Not Such a New Idea After All” Aug 13-19, 1993 This Week In Texas, referred to by Lauw 1994 MUEJL, at fn 15.

55 See the discussion by Eskridge 1993 VLR, ibid regarding the question whether or not these ceremonies indeed contemplated sexual unions.
and lesbians became noticeable. Following this trend the Church also began to take a stronger stand against same-sex intimacy.

7.1.40 During the nineteenth century the West went even further, with sexologists categorising homosexuality as a sexual deviation from “normal” sexual orientation.

7.1.41 An interesting point made by Pantazis with reference to Boswell’s research is that heterosexual matrimony (until the fourteenth century) tended to be viewed as dynastic or business arrangements with love arising only after the coupling, if at all. Same-sex unions, on the contrary, were from the beginning primarily emotional commitments which, because of this difference were not then perceived as a threat to opposite-sex unions. In modern times opposite-sex marriage generally also involves a similar emotional commitment, hence the sentiment that same-sex marriage holds a corresponding threat.

7.1.42 Despite the threat to same-sex relationships and marriages, Western condemnation did not succeed in eradicating them, either in Europe or in the rest of the world. Eskridge

56 Pantazis 1997 SALJ, ibid. Before 1200 no systematic theory explained why certain acts like sodomy were occasionally regarded as unacceptable and proscribed randomly. Such conduct was penalised mildly and only episodically. However, after 1200, medieval thinkers purposefully started developing such theories with the result that societies began regarding nonconforming behaviour to be alarming and threatening, gradually insisting on penalising this conduct in a systematic and harsh way. Thus, whereas during the Middle Ages same-sex unions at some point were regarded as problematic to a minor extent, in the early modern period the belief that constitute a severe threat to the social order and the state took root.

57 Leading scholastic thinkers like Albertus Magnus and Thomas Aquinas began to formulate systematised theological arguments against such behaviour. This shift in attitude is tentatively ascribed to urbanisation which, on the one hand allowed many men to enter into and enjoy same-sex relationships but, on the other, rendered these activities more prominent and potentially destabilising. Eskridge points out that same-sex relationships formerly practiced primarily in the discreet closets of nunneries, monasteries and royal courts were less likely to remain unobserved in this bustling urban environment, becoming more open or apparent and thereby more troubling, at 1470. An interesting point made by Eskridge is that urbanization forced society to also face other “aberrations” like spinsters and religious non-conformists and he shows that Jews, heretics, witches and homosexuals encountered similar historical patterns of identification, segregation and harassment.

58 Declaring it a disease caused a new wave of hysteria and persecution during the middle part of the twentieth century, with a particularly strong reaction in the United States of America. This hostile reaction and state sanctioned suppression of same-sex unions affected the attitudes of other cultures towards such unions. For a discussion see Eskridge 1993 VLR, at 1473 et seq.

59 Boswell, op cit, referred to by Pantazis 1997 SALJ, at 560. This fact is also confirmed by Nock in his arguments in support of view 1. See Nock, op cit at 7, were he states that historically family alliances were the main purpose of marriage, being the central economic institution and love was not seen as a stable basis for such important considerations.

60 Pantazis 1997 SALJ, at 561 fn 31.
demonstrates how same-sex unions not only survived but flourished throughout the modern period, albeit in different ways at different times.\textsuperscript{61}

**History of same-sex unions in other cultures**

7.1.43 Eskridge's research reveals strong evidence of the existence of same-sex unions, including legally recognised marriages, in Native American,\textsuperscript{62} African and Asian cultures in the period prior to the domination of those cultures by Western Europe.\textsuperscript{63}

7.1.44 In the history of African cultures specific reference is made to transgenerational same-sex unions (typical man-boy and the analogous mother-baby relationships), transgenderal unions (marriage between individuals of the same sex) and the uniquely African variant of female-husbands, (woman to woman marriage).\textsuperscript{64} Banks has proposed that the first homosexual humans were African.\textsuperscript{65}

7.1.45 Institutionalised same-sex unions historically existed also throughout Asian cultures in one or more of the forms already described.\textsuperscript{66} In some cultures, including Chinese society, all three of these types of same-sex relationships have flourished.\textsuperscript{67}

7.1.46 In summary, history shows that marriage has been available in many versions over the ages. It has not always been only an opposite-sex union that was only valid once certain

\textsuperscript{61} For a discussion of “Boston marriages” and “passing women” see Eskridge 1993 *VLR*, at 1474. The most interesting ways in which same-sex unions have persisted have been those institutions that undermined lines of gender identification in the modern era.

\textsuperscript{62} In addition to Eskridge see also Demain *Partners Task Force*, op cit with reference to *America’s Fascinating Indian Heritage* from the Reader’s Digest Association Inc. Pleasantville NY 1978.

\textsuperscript{63} Eskridge 1993 *VLR*, at 1453. See his discussion of the recognition of the berdaches in Native American cultures who were regarded by many to be a third sex and who married individuals of the same-sex.

\textsuperscript{64} For a detailed discussion see Eskridge 1993 *VLR*, at 1458.

\textsuperscript{65} A Banks “Homosexuality in Ancient Africa” available at \url{http://www.geocities.com/ambwww/GAYS-IN-AFRICA.htm}. She submits that there are at least 33 different cultures in Africa where marriages between women are recognised and that academics who deny that lesbianism has a role in those arrangements do so despite considerable evidence to the contrary.

\textsuperscript{66} *Berdache* tradition existing in Native American culture, companionate same-sex marriage from Classical Greece and pre-Christian Rome or transgenerational tradition of boy-wives.

\textsuperscript{67} Eskridge 1993 *VLR*, at 1462 and the sources referred to in his fn 156.
legal prescriptions had been complied with. As such it is not a natural given, but is constructed by society, making it a dynamic institution that is amenable to change.\textsuperscript{68} As Hahlo remarked in 1985 that changes in societal values could not but affect the law.\textsuperscript{69}

(ii) The functional response

7.1.47 Those who cherish the traditional marriage concept argue that one of the most certain ways to improve the health and wellbeing of the world’s population is to encourage and support the idea of marriage.\textsuperscript{70} In this regard reference is made to social science research which continually reveals that married people are generally physically healthier, happier, live longer, enjoy better mental health, are more fulfilled and less likely to suffer physical abuse.

7.1.48 The question asked by proponents of the functional definition of marriage is: What logic says that these benefits only accrue to those who comply with the current narrow legal definition of marriage? They advocate the definition of marriage according to the functions it serves and argue that other relationships can also fulfil the functions that are traditionally conceived to be only attributes of marriage.\textsuperscript{71}

7.1.49 Such an approach looks beyond biology and the legal requirements of marriage by considering the way in which a group of people function. Minow states that certain groups of people may not fit the definition of a family because they did not formally get married but

\textsuperscript{68} Pantazis illustrates that the value of the historical research lies in the fact that it shows that marriage is not state conferred, but rather that it is “a fundamental relationship that precedes the state” merely given recognition by the state. Pantazis 1997 \textit{SALJ}, at 561, with reference to S K Homer “Against Marriage” 1994 29 \textit{Harvard Civil Rights-Civil Liberties Law Review} 505 at 514.

\textsuperscript{69} At 36, with reference to a statement by L J Bridge in Dyson Holdings Ltd v Fox [1976] QB 503 at 512-13 that between 1950 and 1975 there has been a complete revolution in society’s attitude to unmarried partnerships as the social stigma that attached to them has mostly disappeared.


\textsuperscript{71} Families are social groupings of which we all have a very personal, often idiosyncratic, perception. Our perception often involve a significant emotional and material relationship (whether adults or children) born of a genetic or sexual relationship. Lind 1995 \textit{SALJ}, at 482.
may share affection and resources and regard themselves as a family, and may be regarded by broader society as family members.\textsuperscript{72}

7.1.50 The Constitutional Court expressed itself as follows on this topic: \textsuperscript{73}

\begin{quote}
[O]ver the past decades an accelerating process of transformation has taken place in family relationships as well as in societal and legal concepts regarding the family and what it comprises.
\end{quote}

7.1.51 When supporters of the definitional argument assume that couples who have made a public commitment by way of marriage are the only ones who have a legal responsibility to each other, and would be more likely to provide a child with stability and security, they are under a wrong impression.

7.1.52 On the one hand, even married relationships are not guaranteed for life and do end with inevitable accompanying negative consequences. On the other, it is an unjustified generalisation to contend that unmarried couples of the same or opposite sex are not committed to their relationships.

7.1.53 Therefore, to regard marriage as a guarantee that the family created thereby would have certain characteristics is a misrepresentation. These characteristics could also be present in other relationships.

7.1.54 With regard to the argument that the main purpose of traditional marriage is to procreate, which same-sex couples are not biologically able to do, and that this inability threatens the survival of the human race, Pantazis\textsuperscript{74} notes two points. Firstly, same-sex desire is a minority preference and could thus not factually threaten the survival of humankind. Secondly, many same-sex couples do have children through marriages that previously ended in divorce, donor insemination, adoption or as de facto step-parents. In


\textsuperscript{73} National Coalition for Gay and Lesbian Equality \textit{v} Minister of Home Affairs 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC).

\textsuperscript{74} Pantazis 1997 \textit{SALJ}, \textit{ibid}.
addition, it is not a condition for opposite-sex couples that they must bear children. In fact, they often are incapable of bearing children and sometimes just do not care to.\textsuperscript{75}

7.1.55 Another objection against same-sex marriages is that if homosexuals are allowed to marry and raise children, such children will be more inclined to be homosexual and that society has the right to protect the welfare of children against same-sex partners.\textsuperscript{76}

7.1.56 In response to this, Pantazis refers to social science research on the effect of same-sex parenthood on children. Regarding the effect on the sexual identity of children, he states that empirical evidence shows that the children of same-sex parents are not more likely than the children of opposite-sex parents to grow up to be homosexual.\textsuperscript{77}

7.1.57 Concerning the emotional wellbeing of children of same-sex parents, studies have shown that the quality of parenting is the main influence and have rejected the notion that homosexuals are mentally or emotionally unbalanced.\textsuperscript{78}

7.1.58 A third consideration favoured by the proponents of the traditional definition is called the "pragmatic argument" and raises the practical difficulties faced by employers if same-sex

\textsuperscript{75} Lauw says that the fact that there has never been an attempt to prohibit unions between a sterile woman and a fertile man or vice versa and that legislation does not oblige a married couple to have children suggests that procreation is not the primary concern it is made out to be. Lauw 1994 \textit{MUEJL}, at 4.

\textsuperscript{76} North American courts have denied custody of children to same-sex couples on the ground that the children will develop homosexual preferences when exposed to the homosexual parents and their partners. Clark 1998 \textit{CILSA}, at 301 fn 71. Some even argue that allegations of gender discrimination under the Bill of Rights can be fended in that recognition of same-sex marriage gives legal sanction to and will encourage abnormal behaviour. See the references by Heaton \textit{Bill of Rights}, at 3C par 8. For a strong worded argument about the abnormality of homosexuality, see Visser 1995 \textit{THRHR}, at 705. See also Steyn 1998 \textit{TSAR}, at 114, where she refers to a case where a North Carolina court considered exposure to improper influences that could damage two boys emotionally and socially as grounds to remove them from the custody of their father who had been living with his male lover. An argument with the same purview is that recognising same-sex relationships as marriage would be widely interpreted as placing a stamp of approval on homosexuality. With that the social value of being married would be reduced as the term then refers to a wider category of relationship types. Posner \textit{Sex and Reason}, at 311-13, referred to by Eskridge 1993 \textit{VLR}, at 1431.

\textsuperscript{77} Pantazis 1997 \textit{SALJ}, at 569 fn 90. Pantazis makes the point that, in any case, unless one concedes that homosexual children suffer from societal prejudice from which one would want to protect them, there can not be an objection them growing up to be gay or lesbian. Lauw also states that a more serious concern is the possibility that children raised by a same-sex couple will be subjected to discrimination and prejudice from members in society who are quick to ridicule and ostracize any one perceived to be "different" in any way. See in this regard also the discussion by Lind 1995 \textit{SALJ}, at 497-499.

\textsuperscript{78} Pantazis 1997 \textit{SALJ}, at 568 fn 88 and 89. See also the research referred to by Lauw 1994 \textit{MUEJL}, at fn 24 and 25.
marriages are to be legalised. The point is made that such legalisation will necessitate substantial reforms in employment, health and other areas. It is contended that both private and public employers would be forced to reassess benefits currently available to married couples in order to determine a scheme which will be economically efficient and that on a cost-benefit analysis, society cannot afford the extra cost. Pantazis’ response to this is that discrimination can never be permitted only because the alternative is too costly.

7.1.59 In his search for a functional definition, Pantazis has identified four attributes of marriage considered to be deserving of protection:

i) Marriage has the potential for creating a parent-child relationship and is a primary site for the socialisation of children.

ii) Spouses usually cohabit; there is a sharing of residence, economic co-operation and sexual relations between the partners, all of which heighten the significance of the relationship for the individual.

iii) The marital commitment has elements of permanence and formality, leading to stability for the individuals concerned and subsequently for society which is based on these family units.

iv) The psychological support and emotional involvement in longstanding, intimate family relationships make them more important for the individual than any other attribute.

7.1.60 Pantazis then goes on to argue that same-sex relationships, too, have the potential to function in this manner and that the formal recognition of those relationships would actually strengthen these attributes to the same extent that formal recognition does for opposite-sex marriage. He refers to research that refutes the myths regarding same-sex relationships that:

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79 Lauw 1994 MUEJL, at 5 with reference to Posner Sex and Reason, at 313.

80 Lauw 1994 MUEJL, at 5 shares this opinion and says that this is just a convenient excuse used not to permit legal recognition of same-sex relationships.

81 Pantazis 1997 SALJ, at 571.

82 At 572 fn 110.
i) Gays and lesbians are unhappy individuals who cannot develop enduring same-sex relationships and do not want to;

ii) Same-sex relationships are unhappy, dysfunctional and deviant;

iii) Husband and wife roles are universal in intimate relationships, and

iv) Gays and lesbians have impoverished social support networks.

7.1.61 Pantazis disposes of the arguments against same-sex marriage in order to protect the family by showing that same-sex relationships are just as capable of creating an intimate union for emotional and financial support, child-bearing and rearing, and participation in social and kinship relations, otherwise known as family. In other words, same-sex families can function in exactly the same way as opposite-sex married families and the legal recognition of this fact can only contribute to the well-being of these families and enhance their contribution to society.

7.1.62 Lauw submits that a comparison of the features of successful same- and opposite-sex relationships will not reveal any differences which justify the restriction of the marital status to heterosexual couples. The factors contributing to successful heterosexual relationships apply equally to homosexual relationships.\(^83\) The same could be said of opposite-sex cohabitants. The way these couples and their families function should entitle them to rights and obligations and not the label the (outdated) law is giving them.

7.1.63 Mosikatsana’s formulation of this view affords an appropriate summary of the functional approach:\(^84\)

\[B\]ecause the exclusive nature of the common-law definition of marriage does not reflect social reality, it has become necessary under certain legislation to adopt a functional approach to defining family status, with the result that couples who do not fit the traditional family model may be deemed spouse of one another…..

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83 Lauw 1994 *MUEJL*, at 3.

84 *Op cit.*
7.1.64 South African courts (and the legislator) should determine whether or not to extend common law and other legal protections to family members on this basis. Such an approach will lead to greater fairness, will bring the law in line with reality and is more likely to harmonise the law with the values underlying the Constitution.85

(iii) The constitutional response

7.1.65 Proponents of the constitutional approach submit that changes to the South African marriage laws are imminent in light of the new constitutional dispensation, notwithstanding the merits that the above arguments may have.

7.1.66 The ethic of tolerance of the new Constitution supports a diverse family law which treats individuals equally in permitting them to choose their family relationships and to bestow state sanction on their preference. The exclusive nature of the common-law definition of marriage does not reflect the social reality where various other social groupings86 function in the same way as same-sex couples, African customary marriages, Hindu, Jewish and Muslim marriages87 although they do not comply with the traditional family model. South African family policy will no longer be able to ignore the existing cultural diversity and the emerging values of pluralism of the constitutional era.

7.1.67 Freedom of marriage as a basic civil right is recognised under natural law88 and marriage and family rights are protected in international human rights documents.89 Although

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85 Goldblatt 2000 SAJHR, ibid.
86 The common denominator of the traditional family and these other groupings is a significant emotional and material relationship between the members. It may be born of a genetic connection or a sexual relationship. Lind 1995 SALJ, at 492.
87 Mosikatsana 1996 SAJHR, at 554. “Where a national society demonstrates the kind of social and cultural diversity that is evidenced in South Africa, the imposition of a limited but universally applicable family definition on a diffuse population cannot continue to satisfy the expectations and aspirations of all the citizens of society.” Lind 1995 SALJ, at 483.
88 Sinclair & Heaton Marriage Law, at 312.
89 See for example art 16 of the Universal Declaration of Human Rights, art 23 of the International Covenant on Civil and Political Rights, art 10 of the International Covenant on Economic, Social and Cultural Rights, art 18 of the African Charter on Human and People’s Rights, art 12 of the European Human Rights Convention and art 16 of the European Social Charter, referred to by Lind 1995 SALJ, at 500 fn 110. The Constitution requires that regard be had to international law, in particular international treaties which South Africa has ratified when interpreting the Constitution, other legislation and developing the common law.
there is no express right to marry in the Constitution, this does not mean that the conclusion can be drawn that such a right is not worthy of entrenchment. The Constitutional Court expressed itself as follows on omission of the legislator to include provisions expressly protecting the rights to marry and family life:90

[T]he absence of marriage and family rights in the constitutions of many African and Asian countries reflects the multi-cultural and multi-faith character of such societies. Families are constituted, function and are dissolved in such a variety of ways and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms. They thereby avoid disagreements over whether the family to be protected is a nuclear family or an extended family, or over which ceremonies, rites or practices would constitute a marriage deserving of constitutional protection... These are seen as questions which relate to history, culture and special circumstances of each society permitting of no universal solutions.

7.1.68 Ostensibly the Constitutional Court preferred to leave the definition of marriage open rather than to define it in a way that may be too limiting in view of the equality clause, which expressly prohibits discrimination on the basis of sexual orientation and married status.

7.1.69 It should not be interpreted to mean that the Constitutional Court did not regard marriage as important enough to define it or the right to a family as not important enough to entrench it. It would ultimately defy the object of demonstrating the equal worth of all individuals if the legal consequences of marriage were not available to a minority group (same-sex couples), while others were persuaded to do so against their will by denying them the social and economical benefits (cohabiting couples).

7.1.70 The question arises whether the limitations resulting from the current definitional approach are not perhaps justifiable under the limitation clause of the Constitution. The answer to that will depend on whether opposite-sex cohabitation rights or same-sex marriage are propagated.

7.1.71 The argument that opposite-sex couples do have the right to marry but choose not to, may go some way to justify their exclusion from the benefits of marriage. However the answer to that may be to argue that "forcing" opposite-sex couples to marry in order to get benefits that are exclusively available to married couples amounts to a violation of their right

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not to be discriminated against on the basis of their marital status. This means that forcing couples to marry by denying them benefits cannot be justifiable.91

7.1.72 Same-sex couples, on the other hand, do not have the option to marry in order to appropriate the consequences of marriage, and justification will be harder to demonstrate in that instance.92

7.1.73 An argument proffered in this context is that homosexuals are free to marry a person of the opposite sex. If they choose not to, it is their own preference. This correlates with the view that homosexuality is a matter of choice.93 In this regard Lauw refers to the substantial agreement among international scientific researchers that sexual orientation is largely a result of genetic factors and is determined at a very young age.94

7.1.74 In heterogeneous South Africa, the traditional legal definition of marriage is therefore not acceptable for the majority of the population. Marriage that excludes those who do not comply with the traditional Christian definition of marriage is regarded as outdated, sexist and blatantly discriminatory.95

7.1.75 Cameron J (as he then was), with reference to section 35(3) of the 1993 Constitution, made it clear that "[t]he directive in s 35(3) in my view requires the fundamental reconsideration of any common-law rule that trenches on a fundamental rights guarantee".96

7.1.76 To the extent that marital status affects important interests, the loss of material benefits can be directly ascribed to the exclusive definitional approach to marriage. The argument proposed by advocates of the common-law definition, namely that other remedies in the law are available to those who do not want to or are not able to marry, does not find

91  Heaton Bill of Rights, at 3C2.
92  Heaton Bill of Rights, ibid.
93  Steyn 1998 TSAR, ibid.
94  Lauw 1994 MUEJL, at fn 29 and 20.
96  Holomisa v Argus Newspapers Ltd 1996 (2) SA 588 (W), referred to by Mosikatsana 1996 SAJHR, at 566.
favour with couples in alternative relationships. These remedies are at best uncertain since it is not guaranteed that such a contract, for example, will survive legal challenges. Furthermore, while some of these consequences of marriage may be appropriated independently by means of a contract between the parties, others are beyond the reach of these couples when third parties, such as the state, insurance companies, employers and debt collectors are involved. In any event, in addition to the economic factors, some same-sex couples desire the public recognition associated with the public commitment of marriage.97

7.2 The legal recognition and regulation of domestic partnerships will threaten the autonomy of partners

a) Marital consequences for persons who have chosen not to marry

7.2.1 A popular argument against reforming the law to give domestic partners the same rights as married couples is that regulation of these relationships would be oppressive to those cohabitants who may be deliberately trying to avoid marriage-like regulation.98 This is called the private autonomy approach.99 This approach postulates the view that those partners who cohabit have chosen not to marry and the law should respect that freedom of choice by preserving their autonomy, and not attempt to treat them as if they were married.

7.2.2 Marriage does not, however, belong only to the realm of individual needs and desires and the sphere of private agreement. By creating a status to which the law assigns a number of legal consequences, marriage is transferred into the realm of the public domain.

7.2.3 The intervention by the state by imposing preconditions on those citizens who wish to marry has made marriage an institution with public relevance.100 Legal recognition of

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97 For a discussion of these alternative remedies see Lind 1995 SALJ, at 486.

98 Barlow et al Social Attitudes Survey, at 21.

99 Freeman & Lyon Cohabitation, at 189.

100 It is within this perspective that same-sex marriages as well as, in western society, under-age, polygamous and incestuous marriages have been outlawed. Also, marriage does not only affect the two spouses and their relationship, but also includes the joint upbringing of children. Steiner 2000 CFLQ, at 11.
domestic relationships will have a similar effect, ie transfer the relationships from the private sphere into the public domain.

7.2.4 Hahlo, placing a high premium on individual autonomy, is of the view that no reason exists to create a special legal status for couples in domestic partnerships. His proposal entails that a couple who elected not to marry but to cohabit, made that choice deliberately and should not complain if the consequences of marriage do not attach to their union.101

7.2.5 Sinclair submits that respect for the autonomy of individuals who choose not to marry is, compared to the view that domestic partnerships would damage marriage as an institution, a more powerful argument against the intervention to regulate.102 The freedom of choice and of intimate association of cohabiting couples should be protected and the law should not foist on the couple a status of marriage as a punishment for their lifestyle.103

7.2.6 Deech, writing on statutory intervention in English law and a strong advocate for individualism, feels that the dignity, autonomy, privacy and self-development of an individual should be recognised and protected. She submits that the fact that a couple chose not to marry should be recognised as significant as they had specific expectations when doing so. Both Deech and Samuels see the solution of problems faced by cohabiting couples in the law of contract.104

101 Hahlo is prepared to accept two exceptions to this pronouncement namely for a delictual claim where a breadwinner was killed by the unlawful act of a third party and for purpose of intestate succession, but only in cases of longstanding relationships. Although acknowledging that protection may arguably be needed in these instances, Hahlo feels that it should not be through statutory intervention. The fact that the couple was not married may be considered when quantification of the claim is done. H R Hahlo “The Law of Concubinage” 1972 SALJ 321 at 331 – 332, referred to by Schwellnus Obiter 1996, at 46.

102 As Sinclair puts it “[I]f marriage were going to be eclipsed by other lifestyles it would have happened somewhere in the two thousand years since concubinage was practised by the Romans. It has not. Furthermore, if the popularity of marriage is declining, ways should be sought to make it more attractive, not cohabitation punitively unattractive.” Sinclair & Heaton Marriage Law, at 291.


7.2.7 Similarly, Freeman and Lyon strongly argue that marriage is a voluntary institution; whether the parties are completely cognisant of all the legal effects of such a commitment is immaterial. Since domestic partners do not make that same commitment, the same rights and duties should not follow. Imposing marital rights and obligations will be a denial of their freedom of choice.\textsuperscript{105}

7.2.8 From a constitutional perspective, Heaton submits that saying to couples (be they of the same or opposite sex) that they must get married to get the same benefits as spouses, amounts to an unacceptable violation of their right to equality and freedom from unfair discrimination on the ground of marital status.\textsuperscript{106}

7.2.9 The private autonomy approach is also reflected in the responses received to the Issue Paper\textsuperscript{107}. Some of the respondents opposing the legal regulation of domestic partnerships motivated their response with reference to the parties' explicit election not to get married. Some respondents were of the opinion that if those couples want the same legal protection of a married couple, they should simply get married\textsuperscript{108} since it is a fairly simple procedure.\textsuperscript{109}

7.2.10 Other respondents, although not opposed to recognising domestic partnerships, said the legislator should not create a default system which will result in legal obligations for a partner who is actively seeking to avoid them. It was also pointed out that domestic partners may not be in agreement about committing to the relationship.\textsuperscript{110} Similarly, it was submitted that it may be assumed that people in domestic partnership do not get married because they do not wish the rights and the obligations that arise out of a marriage to apply to their arrangement.\textsuperscript{111} To regulate such a domestic partnership would be to superimpose rights and obligations that the parties do not want to apply to their situation. It was further

\textsuperscript{105} At 191.

\textsuperscript{106} Heaton \textit{Bill of Rights}, at 3C2 fn 7.

\textsuperscript{107} Issue Paper no 17 (Project 118) available at \url{http://wwwserver.law.wits.ac.za/salc/issue/issue.html}.

\textsuperscript{108} Legal Services, Office of the Premier, Northern Province.

\textsuperscript{109} Unofficial submission of the Christian Lawyers Association of South Africa.

\textsuperscript{110} The Christian Lawyers Association of South Africa.

\textsuperscript{111} Ditz Incorporated Attorneys.
suggested that there may be people who are unaware of the potential problems following termination of the relationship, and proposed that this be solved by an educational programme rather than by amended legislation.

7.2.11 Another respondent referred to the option to arrange their affairs by contract and suggested that consideration should be given to regulate the contents of such contracts so as to avoid the victimisation of the vulnerable partner.112

7.2.12 The relevance of acknowledging the autonomy of partners in such a relationship was also reflected in the reasons afforded by respondents for couples living together without marrying: that today’s younger couples do not want to live with the same “labels” as all the generations before them and that marriage is nothing more than a tradition being forced on people in order to obtain certain rights.113 It was submitted, in particular, that couples cohabit because people have come to find pride in self- and individual identity.114

7.2.13 It is clear that the proposal made in support of individual autonomy namely “they would get married if they want the legal consequences of marriage” does not solve the problem of same-sex couples because they do not have the option to marry.

7.2.14 Individualistic concepts of self-determination and autonomy have also been used in favour of same-sex marriage. In this regard, the advocates of same-sex marriage argue that preventing same-sex partners from marrying interferes with the fundamental freedoms of personal choice and intimate association underlying marriage. According to this view the legal recognition of same-sex relationships is justified on the grounds that sexual orientation is a fundamental aspect of one’s own personality and individuality.115

112 The Honorable Mr Justice J H Hugo in his personal capacity.

113 J Grobler.

114 R Sewpersad.

115 In response to this contention, Steiner points out that the recognition of same-sex relationships has the effect of projecting sexual orientation into the public sphere, thereby interfering with the social dimension of marriage and family law. Subsequently, the French scholar Gaudu questions the appropriateness of a situation whereby, through the formality of legal registration, society is invited to witness and condone the sexual behaviour of same-sex minority groups. F Gaudu A Propos Du Contract d’Union Civile: Critique d’un Profane 1998 Recueil Dalloz 2nd Cahier, at 20, referred to by Steiner 2000 CFLQ, at 12. Steiner further submits that autonomy arguments applied in this context to justify the legal recognition of same-sex partnerships are neither helpful nor conclusive because they leave unresolved the particular difficulty of where to draw the line between what is acceptable in terms of sexual conduct and what not. If its is argued that the state should support this particular conduct, on the basis that people are free to chose relationships they want for themselves, then on the same basis, should recognition not be
b) The role of the state

7.2.15 Throughout history human sexuality has manifested itself in the formation of publicly avowed and socially recognised relationships intended to be enduring.116 One of the roles of the state is to provide legal mechanisms for people to be able to achieve stability and security in these personal relationships – to provide a framework in which people can express their commitment to each other and voluntarily assume a range of legal rights and obligations in an orderly fashion.117 Legal paternalism118 in this context sees the proper role of the law as ensuring fairness and justice between family members.119

7.2.16 For a long time the state has focussed on marriage as the vehicle of choice for adults to express their commitment. Marriage provides parties with the ability to state their intentions toward one another publicly and officially. Ex lege, marriage is entered into voluntarily and, since it cannot be terminated without legal procedure, it provides for certainty and stability.120

7.2.17 However, marriage no longer suffices as the only model for the variety of relationships of our time. Many modern relationships outside of marriage are characterised by emotional and economic interdependence, mutual care and concern and the expectation of some duration.121 The law cannot turn its back on the social reality and should

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117 These legal mechanisms must simultaneously respect the values of equality, autonomy and choice. Report of the Law Commission Canada Beyond Conjugality, at chap 4.
118 Legal paternalism suggests that the government knows what is better for the individual and on that basis has the right to restrict the liberty of individuals for their own sake.
119 It is proper for the law to redress any power imbalance or inequality between the partners, whether the inequality is physical, emotional or financial.
120 Law Commission Canada Beyond Conjugality.
121 Statistics show that incidence of cohabitation outside marriage has risen dramatically in recent years while marriage rates are at their lowest since 1889. Bailey-Harris 1996 CFLQ, at 138.
acknowledge the fact that these relationships can also benefit from legal frameworks to support partners’ needs for certainty and stability.

7.2.18 The right to choose whether and with whom to form an intimate relationship is a fundamental right in democratic societies. This right to associate freely entails that the state does not, directly or indirectly, interfere with adults’ freedom to choose their intimate relationships. It would amount to indirect interference if financial pressure were put on partners to abandon their personal relationships of caring and commitment or if privileged status were to be accorded to certain kinds of relationships without reference to their qualitative attributes.

7.2.19 The right to associate freely does not mean that the state should have no role to play. The respect accorded to individual self-determination requires that the choice to be different should also be given legal meaning. Accordingly the state has an obligation to ensure that autonomy can be exercised in a manner not compromising the equal right to autonomy of others.

7.2.20 This sentiment was also reflected in the response to the Issue Paper by the Women’s Legal Centre. It was submitted that respect for the autonomy of individuals should not come at the expense of women who will continue to suffer at the end of the domestic relationship owing to a lack of legal protection. In similar manner, it was said that women are often unable to assert their interests and may sign away their rights out of powerlessness and ignorance. The Gender Research Project of the Centre for Applied Legal Studies was

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122 Karst puts it as follows: “it is the choice to form an intimate association that permits full realisation of the associational values we cherish most” namely companionship, caring, commitment, intimacy and self-realisation. Karst, referred to by Cossman & Ryder for Law Commission Canada, at par C.1.(b) and fn 95.

123 Cossman & Ryder for Law Commission Canada, ibid.


125 For example, the state must take steps to protect adults who are vulnerable to economic or physical/emotional abuse in these relationships. Cossman & Ryder for Law Commission Canada, ibid. According to Parker, an English writer, it is the duty of the law to protect the vulnerable and that the law should play a paternalistic role in awarding relief against exploitation particularly to those who have been willingly exploited by electing to cohabit. Parker 1984 Family Law, at 43, referred to by Schwellnus Thesis, at 214.

126 Ibid fn 114.

127 Rachel Jewkes.
of the same opinion and said that the law's protective role should be given priority over autonomy concerns in this instance.

7.2.21 As soon as diverse family forms are recognised in principle, the next question is how to strike the balance between individuals’ rights to self-determination and legal paternalism. On the one hand, it is argued that diversity demands that individuals be free to agree amongst themselves which consequences they want to attach to the relationships of their choice. On the other hand, there are at least two roles ascribed to family regulation that justify limiting this freedom of individual determination.128 These roles are the following:

i) In its protective role, the law prevents exploitation of one family member by the other where there is a power imbalance in the relationship. The law must particularly protect children, but an adult partner may be just as vulnerable to exploitation, whether emotional, physical or financial.

ii) In its remedial role, once a relationship has broken down, the law aims to resolve the parties’ rights and obligations with fairness and in a manner that minimises hostility. The law in its remedial form should be sufficiently flexible to permit the outcome to be tailor-made to meet the justice of a particular case and to take account of the myriad ways in which a couple can arrange their lives.129

7.2.22 In addition, the facilitative function of the law entails that it must “help people to organise their lives and affairs in the ways they prefer”,130 not only amongst themselves, but also between them and the state or other third parties. Indeed, many of the laws concerning


129 Bailey-Harris submits that once the remedial function of the law has been acknowledged, a distinction between different types of relationships according to their legal status or even the sexual orientation of the parties concerned can not be justified. Put differently, if the purpose of the law is to respond to what actually happened in the relationship and to correct imbalances the classification of the relationship is irrelevant. What is relevant is how the role-division assumed within a relationship has determined the different contributions made by each party and has affected their respective financial futures. Bailey-Harris 1996 CFLQ, at 141. See also in this regard Bailey-Harris 1995 IJLF, at 234 et seq.

marriage perform a facilitative function. For example, taxation law allows spouses to transfer property between them without subjecting it to gift tax.

7.2.23 Domestic partners are currently left out of these facilitative provisions. Such couples can attempt to order their material arrangements through individual devices such as wills or written contracts. However, these devices may not be enforceable in the specific circumstances and often are not affordable to many. In addition it must be remembered that the entirety of legal responsibilities and benefits cannot be constructed from individuals’ contracts. For example, an individual may try and negotiate with his employer for health insurance of his or her life partner, but is not guaranteed to be successful.131

7.2.24 If the argument is correct that giving cohabitants the same rights as married couples would be oppressive, it is logical to conclude that cohabitants would be opposed to such regulation. This is, however, not necessarily the case. Barlow et al, with specific reference to the views of Bailey-Harris, Freeman and Deech, have done research on this aspect.

7.2.25 The research showed that in relation to financial support on marital breakdown and property inheritance, domestic partners were actually keener than others that domestic partners should have the same rights as married couples.

7.2.26 It was also found that 70 percent of current cohabitants thought that a cohabiting woman should have the same rights to financial support on relationship breakdown as a married woman. A near 97 percent of cohabitants thought that a woman should have the same rights as a married woman to remain in a house bought in the man’s name after his death without a will. The various responses of men and women did not differ significantly.

7.2.27 The conclusion of the survey on this point is that the majority of subjects believe the law should treat long-standing cohabitants in the same way as married couples and that this is particularly true among people who are themselves cohabiting.132


132 At 22.
7.2.28 Concern for the victims of the breakdown of these relationships suggests that non-interference is unjust. In most countries it is accepted that the protection of domestic partners cannot be left entirely to the initiatives of parties.

c) Freedom of choice and informed choice

7.2.29 Bailey-Harris directs attention to the fact that arguments about individualism and party autonomy assume freedom of choice and, indeed, of informed choice. This assumption is not universally justified when these relationships are formed. Bailey-Harris submits that people drift into these relationships, often with misconceptions of the legal consequences.133

7.2.30 Kingdom points out that one of the main attractions of cohabitation is thought to be its potential as a means of establishing genuinely egalitarian relationships between the partners, free from the jurisdiction and unwanted intrusion of marriage law. However, in practice they are likely to find themselves in a position of uncertainty about their legal position in that they may be treated as married and their respective legal positions are constructed by analogy with those of married persons, irrespective of their choice not to marry.134

7.2.31 The decision not to marry may not be joint, but may be imposed by one cohabitant on the other. One partner may be deceiving the other or stringing him or her along with promises of future marriage. Furthermore, although the parties may have the freedom to regulate their property and other relationships to some extent, in practice they do not exercise that freedom.135

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135 See eg Barlow et al Social Attitudes Survey, at 18.
d) Balancing of autonomy on the one hand and legal paternalism on the other

7.2.32 Statutory regulation of domestic partnerships does not mean total denial of autonomy. Nor is the opposite true. The aim of regulation should be to maximise the scope for individual autonomy across all spheres of life while preventing individual exercises of autonomy from unacceptably disempowering others.\textsuperscript{136} This is particularly relevant in view of the developing sensitivity for the potential for power imbalance in personal relationships.

7.2.33 The conclusion by the Australian Law Reform Commission in its \textit{Discussion Paper on Multiculturalism and the Law} is informative in this regard. It states that

\begin{quote}
\textit{…generally speaking, the law should not inhibit the formation of family relationships and should recognise as valid the relationships people choose for themselves. Further, the law should support and protect those relationships. However, the law should restrict a person’s choice to the extent that it is necessary to protect the fundamental rights of others and should not support relationships in which the fundamental rights and freedoms of others are violated. Instead it should intervene to protect them.}\textsuperscript{137}
\end{quote}

7.2.34 Once the expediency of regulation is accepted, the question must be considered to what extent the legal consequences of domestic partnerships should mirror those attached to marriage.

7.2.35 On one hand it is frequently argued that the freedom of individuals to choose a domestic partnership as alternative to marriage would be undermined if the legal consequences of the two were assimilated.

7.2.36 The opposite argument is that to blur the legal distinction between marriage and unmarried cohabitation undermines the sanctity of the former as an institution.


7.2.37 Although for different reasons, both these arguments would prefer distinctly different dispensations for marriage and domestic partnerships.\textsuperscript{138} In this regard Raz submits that pluralism presupposes that individuals are not only given an adequate range of options but also that the options available must differ in respects which may rationally affect choice.\textsuperscript{139}

7.2.38 On the premise that there must be distinctive dispensations, the practical question of how they should come into being arises. Two basic models mirror the “competing” interests of autonomy and legal paternalism. On the one hand there is a regime that applies ex lege to relationships as defined,\textsuperscript{140} also referred to as ascribed status. On the other hand, an opt-in system would require specific actions to be taken to bring the relationship within the operation of the law,\textsuperscript{141} also referred to as registered partnerships.

7.2.39 The objection against the form of domestic partnership protection where the legal implications emanate automatically when two people are living together in circumstances resembling marriage (as in Sweden and New South Wales), is that it is not right to impose a legal regime upon a couple who has deliberately chosen to avoid marriage as it denies individual autonomy.\textsuperscript{142} This objection is, however, refuted by the provision of an opt-out clause.\textsuperscript{143}

\textsuperscript{138} Steiner 2000 CFLQ discusses the French PACS as an example of an unsuccessful attempt to create such a diverse dispensation. PACS is the Du Pacte Civil de Solidarité et du Concubinage which was created by Law no 99-944 of 15 November 1999 and which added a new part to the chapter of the French Civil Code devoted to marriage. Despite its original intention, the legislation has effectively fashioned PACS in the image of legal marriage. Thus, far from promoting legal pluralism, resembling marriage as it does, PACS effectively shut the door on alternative ways for couples to organize their personal domestic lives. See Steiner’s comparison in particular, op cit at 7.


\textsuperscript{140} The definition may, for example, refer to duration or children.

\textsuperscript{141} Bailey–Harris favours the first model, as the alternative model makes legal protection dependent on the consent of both parties to registration. Her objection is that such a model provides no safeguard to the position of the more vulnerable and less empowered party. Bailey–Harris Dividing Assets, at 83.

\textsuperscript{142} This argument is the main reason given in, for example, Finland and Denmark for the choice not to enact cohabitation legislation. In Catalonia, a progressive province of Spain the consequences of the Stable Couples Act 10 of 1998 apply automatically to a couple of the opposite sex once they have lived together for two years or more or have a child together. The fact that these couples are subject to this act regardless of any initiative taken by them is very controversial. Forder 2000 CJFL, at par 11.

\textsuperscript{143} The Swedish Cohabitates (Joint Homes) Act of 1987 and the Property (Relationships) Act of 1984 of New South Wales. See also Forder’s view: “Individual autonomy is better safeguarded by a clear legislative system than with a case-law system, the outcome of a case may be difficult to predict. Individual autonomy is even better safeguarded if the cohabitation scheme provides an opt out clause ….”, at par 91.
7.2.40 This means that cohabiting parties not wanting the legal implications in the Swedish Cohabitees (Joint Homes) Act of 1987 may follow the prescribed instructions to escape its application.

7.2.41 Ideally, contracting out of a general regime must not impose unrealistically onerous formalities on parties, nor must the court’s powers of ultimate variation be so wide as to remove the attraction of agreements.

7.2.42 The form of domestic partnership where specific actions must be taken to bring the couple within applicable regulation, leaves one with the same objections mentioned throughout namely protection of weaker parties and the fact that in practice couples do not take those steps to bring the relationship within the scope of the applicable act.

7.2.43 In the absence of legislative protection, case law is invariably relied on to give a greater or lesser degree of proprietary protection in the event of the breakdown of the relationship. This result is inevitable since disputes are bound to end before the courts with unpredictable and inconsistent outcomes. In that sense, the Swedish system which lays down the rules in a statute, whilst offering the opportunity to opt out of the provisions to a great degree, is more respectful of the couple’s individual autonomy than the legal systems in which the rights of the parties are determined retrospectively by the courts.144

7.2.44 An interesting point advanced by Bailey-Harris is that the degree of free choice exercised at the time of entering a relationship is in many cases exaggerated. This, she says, is so because the intentions of the partners at the commencement of the partnership are hardly relevant. When the law is fulfilling its remedial function upon termination of the relationship, the purpose of property adjustment is to respond to what actually happened in the relationship, rather than what was hoped for or promised initially.145

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144 The legal regulation of partner rights by judicial decision can run counter to individual autonomy of the parties but has the benefit of providing protection for the vulnerable partner.

145 See Bailey-Harris 1995 IJLF and the authorities referred to by her in support of this view, at 236 fn 13 and 14.
Pluralism

7.2.45 In order for people to be free to enter into the relationship of their choice, a pluralistic legal context is required. Such a pluralistic legal context will be able to facilitate more than one model of legally regulated relationship. A pluralist society expects of the law to recognise and support a diversity of family formations.

7.2.46 As South Africa is a legally pluralistic society, South African law must find the best way to accomplish the support of relationships of caring and commitment while at the same time respecting basic individual rights to autonomy, privacy, equality and security associated with the legal prohibitions on discrimination on the basis of sex, marital status and sexual orientation.

The legal recognition and regulation of domestic partnerships will protect the victims of domestic partnership breakdown

a) Background

7.3.1. Historically women have often found themselves in a weaker bargaining position than men when negotiating the terms of a relationship. This is the case in both marriage and domestic partnerships. However, owing to the lack of legal protection for domestic partnerships, the risks are noticeably higher for people involved in these relationships.

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146 Steiner 2000 CFLQ, at 4.


148 Cossman and Ryder for Law Commission Canada. In principle, state policy should not interfere with choices of intimate companions and decisions regarding conclusion and termination of personal relationships in the absence of violence or exploitation.
7.3.2 There is an absence of structured protection for the domestic partners when the relationship ends.\textsuperscript{149} Domestic partners, unlike their married counterparts, do not enjoy a standard set of legal duties and obligations to one another. The legal protection enjoyed by married couples acknowledges that the social function and economic consequences of the relationship justify state intervention to protect the economically weaker party. Yet even though couples in a domestic partnership may function in exactly the same way and for the same reasons, they do not have that legal protection.\textsuperscript{150}

7.3.3 In the context of relationship break-up these weaker parties are particularly at risk when the division of assets and debts of a former relationship must be arranged and enforced.

7.3.4 For a discussion of the current position regarding the consequences of domestic partnerships in South Africa and the problems faced by all domestic partners on the breakdown of the relationship, see Chapter 5 above.

7.3.5 In South Africa, in particular, as was seen in the discussion of the Report by the Gender Research Project of the Centre for Applied Legal Studies,\textsuperscript{151} many women find themselves in a situation where the law affords them no protection at all.

7.3.6 Women, particularly Black women, are uniquely vulnerable. They and their children are the victims of a system that deliberately destroyed African family life. Statistics show that most domestic partners are Black (and poor).\textsuperscript{152}

7.3.7 Any legal framework being designed for family relationships needs to take into account the highly disorganised and uncontrolled structure of society in rural areas and to protect the rights of people who find themselves in all these arbitrary situations. There are

\textsuperscript{149} Singh 1996 CILSA.

\textsuperscript{150} Barlow et al Social Attitudes Survey, at 17. See also the discussion on the functional approach in par 7.1.47 above.

\textsuperscript{151} CALS Report.

\textsuperscript{152} Sinclair & Heaton Marriage Law, at 301 and the references made therein.
many people who fall outside the structure of the present legal framework and cannot seek help of the law because their “marriage” does not fit the defined legal pattern.\textsuperscript{153}

7.3.8 Living in a domestic partnership has particularly detrimental consequences for women in such relationships. The reason for this is that women are generally more economically vulnerable as they are responsible for housework and child care while men are earning an income and accumulate property. Upon termination of the relationship, women are often left without property that they indirectly helped to accumulate through supporting the man, his home and their children.

7.3.9 Unequal gender relations in society and the family further compound women’s poverty. In these households men maintain their control in the domestic sphere by violence or the threat of violence. Despite the desire to address inequalities, government policies have sometimes reinforced these patriarchal relations.\textsuperscript{154}

7.3.10 The research for the Report by the Gender Research Project of the Centre for Applied Legal Studies found a woman in her late forties who had been living with a man in a house in his sister’s yard for 10 years. She moved in with this man for the sake of her children but said that despite their wish to marry, his family would not allow it. The general perception was that her partner was justified in treating her badly since she had forced herself on him and was seen as a “girlfriend” despite her age.\textsuperscript{155}

7.3.11 The study found an enormous lack of trust between men and women. Men generally needed women to cook, clean, provide sex and child care while women often needed food and shelter from men.\textsuperscript{156}

7.3.12 Women were often financially dependent on men with little bargaining power to access a greater share during or after the dissolution of the relationship. The lack of legal

\textsuperscript{153} Dr R M Garratt, FRCS Trainer in Rural Surgery and Anaesthesia in Nongoma in his submission re South African Law Reform Commission Review Marriage Act.

\textsuperscript{154} An example of this is found in the area of land reform. A study showed that attempts to provide land equitably by using the household as the unit of planning has reinforced rather than alleviate inequalities and women’s lack of access to land since the men were regarded as head of the household.

\textsuperscript{155} CALS Report, \textit{ibid.}

\textsuperscript{156} A woman respondent said: “the man is the one who must buy food. He is the one who proposed so he must provide. You clean, cook, do the laundry and have sex with him.”
protection of cohabitation and men’s ability to use violence contributed to women’s financial insecurity in these relationships.

7.3.13 Children from previous opposite-sex relationships are often brought up and cared for in same-sex relationships. Both the weaker party in the relationship and these children are left financially at risk when the relationship fails.

7.3.14 In this regard a respondent to the Issue Paper\textsuperscript{157} submitted that to overcome the argument of social and economic disadvantage for women, a program of education in regard to their choices and rights flowing from these choices ought to be developed.\textsuperscript{158}

7.3.15 It is conceded that affluent and educated couples are indeed in a position to construct some legal protection for themselves during the relationship and after its termination. However, the problem that needs to be addressed is the dearth of remedies that exists for those who cannot afford these measures, who are unaware of the situation being a problem and the fact that there are a host of situations that cannot be regulated through contracts between the domestic partners. An example of this is health care benefits where a third party is involved. In addition, a contract is of no use to someone who wants to dispute its terms but cannot afford to take the matter to court. It is furthermore unrealistic to expect from a population denied basic education the sophistication to negotiate a domestic partnership agreement.\textsuperscript{159}

7.3.16 In South Africa welfare services are insufficient. The State is unable to protect the victims of intimate relationships. It is therefore becoming increasingly difficult to justify that in the case of marriage breakdown the victims of the termination of the relationship enjoy protection of the law while in the case of partnership breakdown they do not.\textsuperscript{160}

\textsuperscript{157} Issue Paper no 17 (Project 118) available at \url{http://wwwserver.law.wits.ac.za/salc/issue/issue.html}.

\textsuperscript{158} Ditz Incorporated Attorneys.

\textsuperscript{159} Sinclair & Heaton \textit{Marriage Law}, at 301.

\textsuperscript{160} Driven by his desire to protect these victims, Lord Denning manipulated the English law of trusts to produce a judicial power to redistribute property in a similar way as would have possible under the judicial discretion of a court in case of a divorce. Sinclair & Heaton \textit{Marriage Law}, at 293 - 294 and fn 95.
b) Examples of the vulnerable position of domestic partners

7.3.17 There are many concrete examples of the vulnerable position of parties, and especially female partners, in domestic partnerships. There is for instance no reciprocal duty of support between the parties during a domestic partnership or after its termination.\textsuperscript{161}

7.3.18 In the Issue Paper the question was asked if legislation should enable domestic partners to bring maintenance claims against their partners, and upon breakdown of the relationship, against their former partners.\textsuperscript{162}

7.3.19 The respondents who opposed the recognition of some form of domestic partnership in principle were simply of the view that if one chooses not to marry, one must accept the negative consequences like the absence of a maintenance duty, along with the benefits of not being formally attached.

7.3.20 The respondents who supported the recognition of domestic partnerships had views that related to the type of recognition that they advocated. Some said that the law on marriage should simply be made applicable to domestic relationships older than six months and that a maintenance duty similar to that of married couples (ie no maintenance except where one former partner is not able to ensure some sort of income) should follow.\textsuperscript{163} Others suggested that liability for maintenance should depend on the provisions of the domestic partnership agreement.\textsuperscript{164} Another view was that maintenance should be considered with the following factors in mind: the duration of the relationship; the ability or not of the former partner to be self supporting and secure employment considering his or her age, health, education and previous employment history; and the contributions made by each party to the couple’s estate.\textsuperscript{165}

7.3.21 The only recourse that partners have at the moment is to claim either the existence of a universal partnership or compensation based on unjustified enrichment, with the

\textsuperscript{161} Sinclair & Heaton, at 284

\textsuperscript{162} Question 6.1.

\textsuperscript{163} Martin Nel.

\textsuperscript{164} Director, Legislation and Legal Services, Department of Education.

\textsuperscript{165} Charmane Pillay & Co Attorneys.
claimant facing the task of convincing the court that he or she has contributed to the property and is thus entitled to be compensated. The alternative is to rely on the doctrine of estoppel with an equally heavy burden of proof and an unpredictable outcome. Singh submits that in our law “equity” remains undefined and will be based on the intentions of the parties which must be proved directly or be inferred from their conduct.

7.3.22 In the Issue Paper the question was asked if the courts should be given the power to alter the rights of domestic partners to the communal home and other property according to what is “just and equitable”. The positive respondents proposed that the court should be allowed to make just and equitable determinations. Some respondents were only in favour of such a determination by the court if there is no other agreement.

7.3.23 The Issue Paper enquired from respondents if cohabiting partners should have an automatic right of inheritance where the one partner dies without a will. Some of the positive respondents qualified their answer, namely that the surviving partner should only be entitled to a percentage of the estate, only if the partnership have been registered or only after proving the existence of the partnership. The negative respondents either suggested that

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166 For a discussion of these alternative remedies in this context see Sinclair & Heaton at 274 and fn 26.

167 At 319.

168 Question 7.

169 In the UK the court has no discretionary jurisdiction to order financial relief on the breakdown of a relationship outside marriage. This position can be mitigated to some extent where the parties had children as the parent with care will be able to claim child support from the absent parent. Under Schedule 1 to the Children Act of 1989, an application can be made for capital provision. This may only be done for the benefit of the child and does not per se compensate for the economic disadvantage of the parent. Law Commission Sharing Homes, op cit at 5.16.

170 Legal Services, Office of the Premier, Northern Province and The Honourable Mr Justice J H Hugo in his personal capacity.

171 Specialist Committee on Family Law of the Society of the Cape of Good Hope.

172 Question 8.

173 Ms Padayachee (assisted by Mr H Sarawan) for Pietermaritzburg Office Child Rights Project (Lawyers for Human Rights).

174 The Honourable Mr Justice J H Hugo in his personal capacity.

175 Women’s Legal Centre.
a will\textsuperscript{176} or contract\textsuperscript{177} be used to solve the problem or emphasised that this result may be exactly what the parties had in mind and that the law should not refute their decision not to get married by regulating effects that they wanted to avoid.\textsuperscript{178} Some respondents were unsure but nevertheless suggested that hardship and poverty ought to be avoided. Each case must, therefore, be examined on its own merits.\textsuperscript{179}

7.3.24 As to how this “inheritance” should be regulated, diverse proposals were received. Some suggested maintenance claims against the estate,\textsuperscript{180} others that an annexure to the domestic partnership agreement be added,\textsuperscript{181} by means of an amendment of the Maintenance of Surviving Spouses Act of 1990\textsuperscript{182} and others, presumably on application to the court, on a just and equitable basis.\textsuperscript{183}

c) Comments

7.3.25 The foregoing shows that, in the absence of special arrangements, domestic partners are in a particularly vulnerable legal position. Statistics in Britain indicate, nevertheless, that in the overwhelming majority of cases, domestic partners do not make special arrangements to protect their position with regard to inheritance, property rights or rights to and responsibility for their children. The misconception that common-law marriage still exists leads more than half of them to believe that unmarried couples have the same rights as married people.\textsuperscript{184}

\begin{footnotesize}
\begin{footnotes}
\item[176] Amiene van der Merwe.
\item[177] Legal Services, Office of the Premier, Northern Province.
\item[178] Ditz Incorporated Attorneys.
\item[179] Father Hyacinth Ennis.
\item[180] Women’s Legal Centre.
\item[181] Debbie Wybrow in her personal capacity.
\item[182] Act No. 27 of 1990, The Honourable Mr Justice J H Hugo in his personal capacity.
\item[183] Ms Padayachee (assisted by Mr H Sarawan) for Pietermaritzburg Office Child Rights Project (Lawyers for Human Rights) and Charmane Pillay & Co Attorneys.
\item[184] Singh 1996 \textit{CILSA}, at 318. See also Barlow et al \textit{Social Attitudes Survey}, at 18 and \textit{Socio Legal Newsletter} No 37 Summer 2002 on these studies.
\end{footnotes}
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7.3.26 The findings of the study showed that even those partners who knew the truth about common-law marriage, still did not take appropriate provision for themselves to the extent possible in general law.

7.3.27 Ostensibly people are quite willing to make decisions about their relationships in both moral and social terms but regard the legal position as part of the external environment to be regulated by the state - the general expectation is for the law to provide fair and appropriate remedies for all family situations. Singh submits that this proves the need for legislative reform to bolster the rights of domestic partners.

7.3.28 In *Satchwell v President of the Republic of South Africa and Another* the Constitutional Court noted that there is a growing number of statutes which now account for “partners” and not only for a married couple as intended in the common-law definition. The statutory provisions referred to by the Constitutional Court create exceptions to the standard definition of spouse which is based on the common-law definition of marriage as being a heterosexual union after compliance with legal prescripts. The Court referred to that fact as an indication that the legislature acknowledges the social realities of our changing times.

7.3.29 Bailey-Harris regards the following weaknesses of the law as it is currently made applicable to domestic partnerships as responsible for the predicament of the victims of domestic partnership breakdown.


186 Singh 1996 *CILSA*, at 321.

187 2002 (9) BCLR 986 (CC) par [32].

188 See discussion in chap 4 above.

189 In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 (CC) par [39] the Constitutional Court said that a notable and significant development in our statute law in recent years has been the extent of express and implied recognition accorded by the legislator to same-sex partnerships. The Court went on to say that “while this legislative trend is significant in evincing Parliament’s commitment to equality on the ground of sexual orientation, there is still no appropriate recognition in our law of the same-sex life partnership, as a relationship, to meet the legal and other needs of its partners.”
i) The complexity and the uncertainty of the alternative remedies result in a lack of clarity and contribute to the remedies being inaccessible.  

ii) Trust law gives inadequate recognition of non-financial contributions to the relationship and continues to favour the wage-earning, property acquiring partner in a family relationship.  

iii) Despite its formal neutrality, in practice the law operates with gender bias. Firstly it undervalues non-financial contributions in the determination of beneficial interests. Secondly it makes stereotyped assumptions about the roles assumed by women and men respectively.  

iv) Equity’s primary focus is retrospective, asking what happened in the past and if intentions can be inferred from actual agreements or contributions. The aim of the law should be to equalize the economic effects which the relationship (through the roles assumed by the parties) had, and this must involve consideration of their future economic prospects.  

7.3.30 Considering all of the above it seems that the real question is not so much if domestic partnerships per se should be protected, but rather how the victims of relationship breakdown should be protected.
7.4 The legal recognition and regulation of domestic partnerships will reinforce the stereotyped notions of female dependence

7.4.1 The definition of marriage as the union of a man and a woman is based on sex. Sex in this context refers to a biological category. In reality, it is argued, the definition is based on gender, a social category. In this regard the social meanings ascribed to gender see men as strong, women as subservient; men as not responsible for family care, women as nurturing; men as sexually aggressive, and women as the passive victims. In terms of this view, one’s status as either husband or wife determines all duties and obligations in the marriage relationship.

7.4.2 Under this traditional view of marriage, marriage tends to be an oppressive institution.

7.4.3 A historical analysis shows that all cultures throughout the ages have been male-dominated because of women’s economic dependence on men. The degree and expression of female subordination, however, has varied greatly. Mead stresses that although the conventions by which the sexes are differentiated vary from society to society, in every society the differentiation is accompanied by a value hierarchy. According to this hierarchy the activities and characteristics defined as “male” are regarded as superior to or more important than the activities and characteristics defined as “female”. Only the man who was by law and custom the head of the family was validated as an individual.

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195 Hunter *Radical Philosophy*, at 224. Hunter illustrates this point with the example of race as a biological category that is also susceptible to a social definition. With reference to *Loving et ux. v. Virginia* 388 US 1, 18 L ed 2d 1010, 87 S Ct 1817, 1967 Hunter submits "What changed between the time of the slave codes and the decision in *Loving* was not the biological but the social aspects of race." In this case the U.S. Supreme Court decided that the Fourteenth Amendment of the Constitution requires that the freedom of choice to marry may not be restricted by invidious racial discriminations; the freedom to marry, or not marry, a person of another race resides with the individual.

196 Law 1988 *WLR*, at 209.

197 Janz Canadian Families, at par IV.C.1.

198 Law 1988 *WLR*, at 197.

199 M Mead *Male and Female* 1968 349, referred to by Law 1988 *WLR*, at 197 fn 46. According to Mead "every known society creates and maintains artificial occupational divisions and personality expectations for each sex that limit the humanity of the other sex."
7.4.4 This social reality is also reflected in customary marriages:

The cultural allocation of functions in most black South African rural communities consigns women to menial domestic chores with little or no economic value. Thus, in most rural households the wife or wives are expected to tend to the raising of children, tilling of the soil and the gathering of wood and fetching of water for fuel and domestic use, respectively. Men on the other hand have allocated themselves the pleasurable roles of supervision, acquiring an education and working for real incomes in the western establishments.\textsuperscript{201}

7.4.5 Besides the role that women's economic dependence on men played in the development of marriage as a hierarchical institution, Nkosi refers to the way in which religion and biological differences between men and women have been exploited to justify gender discrimination. She submits that traditional as well as universal religions have been invoked whenever roles were assigned.\textsuperscript{202}

Patently gender neutral verses from the Bible and Koran are time and again manipulated through biased interpretation by patriarchal figures to preserve for themselves and those who can challenge them favourable placements in the socio-economic scheme of things.

7.4.6 In the nineteenth century, industrialisation and urbanisation altered family circumstances and values and feminist movements began objecting to gender stereotyping.

7.4.7 Despite different approaches, an underlying similarity of feminist perspectives is that they all assume that sexism privileges men and leads to discrimination against woman.\textsuperscript{203}

7.4.8 When these feminist theories are contextualised in family and relationships research, it is generally concluded that marriage is more beneficial for men.\textsuperscript{204} It is said that marriage provides men with emotional support that is typically not available to them elsewhere and

\textsuperscript{201} Nkosi 2000 \textbf{Codicillus}, at 49.

\textsuperscript{202} Nkosi 2000 \textbf{Codicillus}, \textit{ibid}.

\textsuperscript{203} Janz Canadian Families, at par II.B.

\textsuperscript{204} However, see the result of an analysis of 93 separate studies by Dr W Wood of Texas A&M University, where it was found that the benefits of marriage "proved stronger for women than men". Dr Wood and her colleagues explain this contradicts the "picture of the 'grim mental health' of wives popularised by feminists. G T Stanton "What’s Marriage Got to Do With It?" 1 October 1998 \textbf{Citizen Link} available at http://www.family.org/cforum/research/papers/a0002965.html.
that men’s occupational progress is enhanced through the direct and indirect support of the wives.205

7.4.9 Women, on the contrary, are generally oppressed and disadvantaged by traditional marriage and family relationships. Women receive fewer emotional benefits from marriage than men and their occupational achievement is slowed. One of the reasons given for this is that women are responsible for the majority of work in the family such as caring for the family members and doing routine housework; tasks that are generally devalued and unpaid.206

7.4.10 Thus feminist and gay/lesbian scholars conclude that traditional nuclear family associated with traditional marriage is not functional to society because it discriminates against women and privileges men.207 Enouncements like the following are made: “marriage is a rotten institution”;208 marriage as constructed by the West involves hierarchies that have systematically subordinated women’s personal, economic and social interests to those of men;209 and marriage as it is structured at the moment is a problematic institution since it facilitates the oppression of women and subordinates men and women who choose not to marry.210 Proposed changes envisage women leading safe and satisfying lives.211

205 Janz Canadian Families, at para II.E.
206 Radical feminist theorists go as far as to say that families and intimate relationships are unsafe for women and children with reference to the high occurrence of men’s violence and sexual assault. Janz Canadian Families.
207 Even today most heterosexual relationships are not egalitarian and men tend to benefit more from marriage relative to women. Social norms and the disparity of resources between women and men influence the distribution of power in heterosexual relationships. Men tend to be more powerful in relationships because they generally have access to more sources of power. They tend to earn more money, have higher status or prestigious jobs, and higher levels of education relative to women. Studies indicate that those with greater personal resources such as higher income, more education and higher social status are more likely to make important decisions. Relative income remains an important factor because many women still depend on their husbands for financial support and wives who have no paid employment tend to have the least power of all women in heterosexual relationships. Power imbalances also result from disparities in unpaid work. Housework and caring for the family is generally perceived as a woman’s responsibility. Janz Canadian Families.
208 See reference by Eskridge 1993 VLR, at 1486 fn 244.
209 Eskridge 1993 VLR, at 1486.
210 De Vos 1996 SAPL, at 359.
211 The social exchange theory suggests that those with the most resources in a relationship will have the most influence. Thus, this theory predicts that when individuals in a relationship have equal resources, the distribution of power in the relationship will be equal. Contrary to this prediction, research showed that even when women earn more than men, relationships remain unequal, with women continuing to have more responsibility for nurturing the family and doing the housework. Such findings are explained by the fact that traditional beliefs and social norms favour men, and the influences of these beliefs are strong. Janz Canadian Families, at par IV.C.1.
7.4.11 The focus of women’s movements since the early nineteenth century has been the achievement of equality for woman in the workplace and in the family.

7.4.12 The objection against legal regulation of domestic partners based on the marriage model is that it will reinforce the stereotyped notion of female dependence associated with marriage. Legal regulation of the consequences of domestic partnerships will mean a relapse to the myth of the weak woman in need of protection by the laws of the state, whereas it is said that most women have made a lot of progress towards establishing social and economic independence.

7.4.13 In reply to this objection, it is said that this oppressive potential is principally a feature of all opposite-sex relationships, and is not restricted to the formal marriage relationship. In addition, marriage laws have been amended to address these oppressive issues with the result that these laws do not rely on these stereotyped notions any more. Major successes have been achieved regarding formal equality by querying the legitimacy of patriarchal hierarchies and oppressive prerogatives of husbands in respect of their wives. This has led to reforms in the law of persons to recognise the separate legal personality of married woman with the result that they are able to own property and conduct business. In addition, parental relationships have been formally equalized so that both parents have similar parental authority over their children. Developments in divorce laws have made it more gender-neutral. These reforms were principally aimed at increasing gender equality in the family domain.212

7.4.14 Therefore, instead of excluding women in domestic relationships from these benefits, they should rather be allowed to avail themselves of the same protective measures available to married women.

7.4.15 While acknowledging that some women have made a lot of progress towards establishing social and economic independence, it is unfortunately true that in the South African heterogenic society the majority of women are still socially and economically disadvantaged and in need of legal protection. This need is particularly visible at the time of breakdown of the relationship, and these women should be allowed to benefit from legislative intervention.

212 Boshoff 2001 SALJ, at 316.
7.4.16 Formal gender equality may therefore not be enough. The existence of individual rights for women is worthless if the systematic subordination of women makes the enforcement of these rights untenable. The formal protection of legal rights becomes meaningless in an environment where women as a group, are socially and financially disempowered. The example used is that of the battered wife who may have the legal right to send her abusive husband to jail, but lacks the economic and social power to do so. Changing the law alone would not necessarily result in change of social practice.  

7.4.17 In order to prevent the reinforcement of female stereotyping, the supplementing of formal equality with substantive equality is necessary. For example, if one wants to protect the rights of a party to a marriage contract or divorce settlement who is not on an equal footing with the other party, it is not enough that the law put them on a theoretical equal footing. The real remedy lies in empowering the weaker party to negotiate equally.

7.4.18 While more couples recognise the value of endorsing equality, two social forces in the familial context make it difficult to develop egalitarian relationships: the gender gap in wages and in the responsibility for household chores and childrearing. Until these social inequalities are addressed, change is unlikely.  

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213 Bonthuys Equal Choices, submits the following reasons for this discouraging conclusion. The function of the law is to adjudicate between competing legal rights. In order to do that certain facts and issues must be excluded from influencing decisions about these competing rights. These factors which are generally excluded from influencing the decision may be exactly those that are definitive of the benefit or detriment of the legal measures to oppressed groups. Formal equality will not address the problem satisfactorily unless the law also takes account of these social and cultural forces. Where oppressed groups (as woman are alleged to be) are presented with a choice, for example, to adopt their husbands’ surnames, the implicit inference is that this choice reflects a voluntary decision. This inference is strengthened by the fact that some women in fact do choose not to adopt their husbands’ surnames. Such an inference negates the context of women’s decisions and assumes that all women are in the position of those who are most advantaged. Further to the example: women who choose not to assume their husbands’ surnames are typically highly educated, aware of political issues around gender stereotypes and often have established themselves in professions or in business prior to their marriages. This, however, does not accurately reflect the positions of most women and in particular not of most disadvantaged women. In other words, what is structured as a choice for women is more often than not no choice at all due to oppressive social systems which sometimes cause women choose the least beneficial alternative. Where the legal rule was intended to be beneficial, it now has a negative effect and in this sense such legal rules add to the disadvantage already experienced. In addition to the fact that no social value emanates from the legal intervention an additional burden may be incurred and the social value of the “choice” fade away. The foregoing emphasizes that the removal of directly discriminatory measures does not necessarily lead to substantial equality since social contexts often prevent members of oppressed groups from sharing in the opportunities which have formally been provided for them.  

214 Boshoff 2001 SALJ, at 317.  

should actively aim not to reinforce traditional patriarchal values that oppress women and to take positive measures to correct this distorted disposition.

7.4.19 While relationships based on dominance and subordination can be destructive and abusive, people in egalitarian relationships tend to use effective conflict resolution skills and, as a result, such relationships are less violent. Egalitarian relationships are also based on sharing, caring trust, friendship, appreciation and mutual respect. Such relationships are also more common when individuals are equally involved in the relationship and have less traditional attitudes toward the assignment of gender roles. Individuals in an egalitarian relationship are more likely than other couples to be similarly situated with respect to financial, educational and occupational status.\textsuperscript{216}

7.4.20 A submission received by the South African Law Reform Commission on the Issue Paper\textsuperscript{217} mirrors these different views.\textsuperscript{218} The Gender Research Project of the Centre for Applied Legal Studies at the University of the Witwatersrand has undertaken primary research into the reasons people cohabit without marrying and the following was submitted regarding women’s position in relationships:

Women, who may wish to marry, often feel unable to insist on this because they are dependent on men. Many of the men are reluctant to marry because of the freedom this affords them to come and go as they please and to remain outside of legal regulation of their relationship while benefiting from the domestic labour of women. Women depend on men because of their unequal position in society, their relative lack of access to income, their responsibilities to children and their inability to resist physical abuse by men.

7.4.21 It was also stated that the idea of strong, economically independent women may apply to middle-class women, but for the majority of South African women who are poor, financial dependence on men is a reality. Domestic partnership laws should therefore be sufficiently flexible in order to protect those in need of protection whilst not affecting those in more equal relationships negatively.

\textsuperscript{216} Janz Canadian Families, at par IV.C.2.


\textsuperscript{218} An opponent of extending the law of marriage to include same-sex couples referred to marriage as “an institution that failed miserably in the heterosexual world”.

7.5 Should the institution of marriage be opened up to same-sex couples in view of the perceived oppressive nature of traditional marriage?

7.5.1 The arguments regarding the oppressive nature of traditional marriage have also been raised in the gay and lesbian community in so far as the desirability of same-sex marriage is concerned. Some homosexuals regard marriage as a patriarchal institution not worth aspiring to, while others predict that same-sex marriage has the potential to change the stereotyped nature of the institution.

7.5.2 Mosikatsana is of the opinion that by applying the feminist critiques of marriage as a patriarchal institution to same-sex marriages, it may be argued that asserting the right to marry has the potential for reinforcement of marriage as an oppressive institution.219

7.5.3 In Harksen v Lane220 Sachs J remarked with reference to section 21 of the Insolvency Act, 1936221 that the section's underlying premise is that one business mind is at work within the marriage, not two, and that this stems from and reinforces a stereotypical view of the marriage relationship which, in the light of the new constitutional values, is demeaning to both spouses.

7.5.4 Polikoff is of the opinion that most examples of same-sex relationships in other times and places in fact replicate gender hierarchies.222 Based on Eskridge's research she observes that most of the same-sex relationships reported were in fact gendered. Notwithstanding the fact that the partners in a same-sex relationships are biologically of the same sex, one partner tended to assume the characteristics and responsibilities of the opposite gender with the result that both partners then acted out traditional gender roles.223 She predicts that same-sex marriages would be assimilated in the marriage institution by accepting, rather than challenging it.

220 1998 (1) SA 300 (CC).
221 Act 24 of 1936.
222 Polikoff 1993 VLR, at 1535.
223 Polikoff 1993 VLR, at 1539.
7.5.5 Eskridge agrees with Polikoff. He states that gender roles and attitudes towards women are deeply embedded in our society and that merely introducing a new institution like same-sex marriage will not necessarily change those roles and attitudes but rather that in the long term the old attitudes might absorb the new institution.224

7.5.6 In their response to the Issue Paper225 the Christian Lawyers Association of South Africa submitted that the characteristics identified for marriage can nearly all be attained and attributed to same-sex relationships as well.

7.5.7 In this regard it is argued that same-sex relationships, especially those formed by two women, tend to be more egalitarian than heterosexual relationships because most gay and lesbian couples do not adhere to traditional heterosexual scripts or masculine-feminine role-playing. They cannot "assign the breadwinner role on the basis of gender". Instead they tend to negotiate issues regarding the division of labour, communication and power, which leads to more equitable decisions that are not restricted to a normative or traditional script.226

7.5.8 In response to the marriage-is-rotten argument it is proposed that same-sex marriage would itself change the institution. Hunter is a proponent of this view who has analysed both marriage and domestic partnership against the feminist inquiry of how law reinforces power imbalances within the family. Hunter has argued that same-sex marriages cannot recreate the hierarchy (man as breadwinner, woman as housekeeper) and thereby the gender-based power differentials to which the feminists object in traditional marriages.227 She refers to evidence that same-sex couples in America are less likely to follow the traditional breadwinner-housekeeper division.228

7.5.9 Even if one partner does the breadwinning and the other partner does the housekeeping, the essence of same-sex marriage refutes the inevitable stereotyping of men

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224 Eskridge 1993 VLR, at 1488.


226 Janz Canadian Families, at par IV.C.2.

227 Hunter Radical Philosophy, at 1425.

228 The Mendola Report, referred to by Eskridge 1993 VLR, fn 237, Pantazis 1997 SALJ, at 566 also refers to research by L A Peplau “Lesbian and Gay Relationships” Homosexuality: Research Implications for Public Policy edited by J Gonsiorek and J D Weinrich Sage 1991 177 indicating that American gays and lesbians actively reject traditional husband-wife or masculine-feminine roles.
7.5.10 Tripp also claims that same-sex marriage would change marriage as an institution that subordinates women, and states:

In interacting with each other, men and women are guided by traditional social mores as to what to expect of each other in terms of division of labour and leadership. In gay relationships these arrangements have to be individually worked out.\(^\text{230}\)

7.5.11 Pantazis argues that most gays and lesbians are said to be in "dual-worker" relationships, with each partner having some economic independence and neither partner being the exclusive breadwinner. Household tasks are not divided and sexual behaviour and decision-making do not occur along husband-wife clear cut lines. Pantazis submits that although some measure of specialisation of activities exists it would rarely happen that one partner perform most of the traditionally female activities and the other the traditionally male activities. In this regard specialisation seems to be based on more individualistic factors such as skills and interests.\(^\text{231}\)

7.6 Public opinion will not allow the legal recognition of domestic partnerships

7.6.1 It is expected that proposals for the legal recognition of domestic partnerships will elicit strong public reaction. More specifically, public opinion is likely to be strongly opposed to legislation granting unmarried couples the legal consequences previously only available to married couples, and even more so, to legislation granting same-sex couples the right to marry.

7.6.2 Since the Constitutional Court is the institution which will ultimately be called upon to adjudicate the constitutionality of legislation regulating such recognition, it is necessary to consider the Court's handling of matters that involved public opinion in the past. It is generally accepted that the Constitutional Court has an important role to play as a guardian

\(^{229}\) Hunter *Radical Philosophy*, at 225.


\(^{231}\) *Ibid.*
of minority rights. A more sensitive issue is, however, how the Court should deal with the question of protecting minority rights against the will of the public.\textsuperscript{232} Public opinion in this sense can be defined as shared and accepted morality of a given social group.\textsuperscript{233}

7.6.3 In an article about the jurisprudence of the Constitutional Court after its first year of existence, Cockrell drew the conclusion that public opinion is of little relevance in a constitutional argument about the interpretation of the Bill of Rights.\textsuperscript{234} In the \textit{Makwanyane} case\textsuperscript{235} the Constitutional Court made it clear that if public opinion were to be decisive, there would not be a need for constitutional adjudication. This statement is of particular importance especially since this case, in which the constitutionality of the death penalty was decided, attracted much interest amongst the general public. This was a topic on which the general public held very strong opinions, a large majority of which were opposed to the abolition of the death penalty, despite the fact that the right to life is expressly entrenched in the Bill of Rights.

7.6.4 Whereas public opinion is precarious and susceptible to change over time, it is the Court's place to uphold individual rights against the sway of public opinion in controversial issues where individual rights are threatened by laws or policies which have large public support.\textsuperscript{236}

\textsuperscript{232} Also known as the counter-majoritarian dilemma.

\textsuperscript{233} H L A Hart \textit{Law, Liberty and Morality} Oxford University Press 1963 at 17 – 24, referred to by Du Plessis 2002 \textit{SAJHR}, at 2.

\textsuperscript{234} Cockrell 1996 \textit{SAJHR}, at 1, referred to by Du Plessis 2002 \textit{SAJHR}, at 1. Cockrell noted that the Court had moved from a formal to a substantive vision of law. This was a result of the fact that the foundational values incorporated in the Bill of rights demanded a substantive as opposed to a formal approach of the Court. An aspect of the Court's adoption of a substantive reasoning involves the matter of public opinion. Cockrell 1996 \textit{SAJHR}, at 19 as referred to by Du Plessis 2002 \textit{SAJHR}, at 2.

\textsuperscript{235} \textit{S v Makwanyane} 1995 (3) SA 391 (CC) para [88] per Chaskalson P, referred to by Du Plessis 2002 \textit{SAJHR}, \textit{ibid}.

The protection of rights could then be left to Parliament........ The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in our courts, was to protect the rights of minorities and others who cannot protect their rights through the democratic process.

\textsuperscript{236} Du Plessis 2002 \textit{SAJHR}, at 2.
7.6.5 An overview of the Constitutional Court judgments\textsuperscript{237} shows, however, that the Court would not just negate public opinion. If it is to retain its legitimacy as an institution, the Court must provide persuasive reasons why it has chosen to reject public opinion. Thus the Court rejected public opinion through the use of critical morality.\textsuperscript{238}

7.6.6 Critical morality seeks to exhibit and lay bare the value assumptions implicit in public opinion, to reassess these and render them coherent and thus to develop critical principles by reference to which we can reappraise and re-orient our ordinary day-to-day judgments and standards of judgment. Critical morality therefore reflects on the way we pass judgment on behaviour and the standards we use in doing so.\textsuperscript{239}

7.6.7 This modus operandi is particularly visible in the way the Court handled the Makwanyane case. In this case it was argued on behalf of the Attorney-General that the death sentence has the greatest deterrent effect and meets the need for retribution that is demanded by the majority of society in response to South Africa's exorbitant crime figures. These arguments of the Attorney-General also reflected the public's opinion about the role of the death sentence.

7.6.8 The Court, however, ruled that the death sentence is unconstitutional, despite the fact that it was made clear to the Court that public opinion favoured the death sentence. However, the Court did so only after bringing critical morality to bear on the deterrence argument and concluding that the deterrence argument no longer deserves "further homage" since the "premise underlying and accounting for it is fallacious or unfounded".\textsuperscript{240}

7.6.9 The Court's approach entailed an investigation into the validity of the premise for the public's opinion on this issue. After finding that this premise is "fallacious and, at the least,

\textsuperscript{237} Unless otherwise indicated the discussion of these cases was gleaned from Du Plessis 2002 \textit{SAJHR}, \textit{ibid.}

\textsuperscript{238} As Du Plessis 2002 \textit{SAJHR}, \textit{ibid}, suggests, the identification of the problem in the public opinion is only the beginning of the Court's task in this respect. The Court runs the risk of losing legitimacy if it stops at merely criticizing the public opinion and finds against it.

\textsuperscript{239} If we do not reorient them, that will show what we have merely entertained and understood, but not accepted, the critical principle in question. Definition for critical morality by N MacCormick at http://www.ethics.bun.kyoto-u.ac.jp/~kodama/ethics/wordbook/positive_morality.html3/17/2003.

\textsuperscript{240} Per Didcott J, para 188.
highly speculative and rationally unconvincing”, the Court was in a position where it could give good reasons for refusing to rely on the public opinion.241

7.6.10 The Court, therefore, did not merely stop at the statement that the right to life is entrenched in the Bill of Rights and since the Constitution is the superior law of the country, the state may not execute dangerous criminals. On the contrary, through critical morality, the Court questioned the basis for the public opinion, found the underlying arguments to be incorrect and, in giving its ruling explained why it could not make a ruling in accordance with the public opinion.

7.6.11 Another example in the context of the minority rights of homosexuals and where the public's opinion clearly differed from the Court's view on a moral issue, is found in National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others242 which dealt with the decriminalization of sodomy. The Court's official position as a guarantor of minority rights made it an obvious place for gays and lesbians to turn to for support.243 In this case the court was very alert to the fact that there is considerable public opposition to the expression of homosexuality. Ackermann J, writing the Court's judgment referred to the private morals of a section of the community which are based "on nothing more than prejudice" and "religious views".244

7.6.12 Sachs J, in his separate but concurring judgment, concluded that the public’s prejudice is not so much against the act of sodomy (the act can also be performed in a heterosexual relationship) but more against the homosexual person who performs it, and that this fact brings the right to equal treatment into play. Ackermann J pointed out that it

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241 Per Mohamed DP, para 287-294; With reference to the high crime rate at the time the case was heard, Chaskalson P pointed out that it could not exclusively be attributed to the moratorium that was placed on executions at the time, but that other factors also played a role. He referred to the conflict associated with the political change during 1990-1994, homelessness, unemployment, poverty and the police’s inability to cope with the surge in crime. Consequently, the Court argued that the greatest deterrent to crime was the likelihood of being caught, convicted and sentenced and that the missing ingredient in the fight against crime is effective policing and an effective court system, not the death sentence. Regarding the public’s call for retribution, the Court said that this could be translated into a demand for vengeance. On this point Chaskalson P said that there are other ways than capital punishment that moral outrage could be shown, like incarcerating someone for a very long time. He said that the state need not engage in the calculated killing of murderers in order to express moral outrage at their conduct.

242 1998 (12) BCLR 1517 (CC), 1999 (1) SA 6 (CC).


244 At paras 37 and 38.
also influences their rights to dignity and privacy. By using critical morality the Court showed that the public’s opinion on this issue is an emotional and biased reaction against homosexuals simply because they are different, and as such is nothing more than prejudice.245

7.6.13 Regarding the public’s religious views and influences on the matter of homosexuality, Sachs J approached the matter from a different angle by suggesting that those who disagree with homosexuality or condemn it for religious or other reasons are free to hold those beliefs and even to express them. But he appealed to all people in South Africa to recognise the vitality of difference and encouraged them to strive for an ethical identity which accepts difference. In this context he relied on the constitutional values and said:

The invalidation of anti-sodomy laws will mark an important moment in the maturing of an open democracy based on dignity, freedom and equality...The Constitution acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.246

7.6.14 Of particular relevance to the topic of this discussion paper is the conclusion to Sachs’ J judgment:

In my view, the decision of this Court should be seen as part of a growing acceptance of difference in an increasingly open and pluralistic South Africa. It leads me to hope that the emancipatory effects of the elimination of institutionalized prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the human kind.247

7.6.15 The third example of how the Constitutional Court deals with matters where public opinion differs from the Court's view is found in the Hoffmann v South African Airways case248. This case dealt with HIV/AIDS.

246  Sachs J, para 132. See more about this approach in the discussion of the ubuntu principle in para 8.8.19 below and in the comparative study on African Countries chap 6.7 above.
247  Sachs J, para 138.
248  2001 (1) SA 1 (CC). In this case the South African Airways had the opinion that all people with HIV/AIDS are unsuitable to work as a flight attendant, base on the common perception that such people are debilitated, sickly and liable to contract opportunistic diseases. In this case the Court used medical evidence to show that the public opinion is unsubstantiated prejudice and pointed out that it was necessary to distinguish between the various stages of HIV. Hoffmann was in the asymptomatic stages of infection and could perform his task normally. By using critical morality Ngcobo J stated that
7.6.16 As was seen above, critical morality as applied by the Constitutional Court has involved the scrutiny of the public’s morality on a given issue. Such scrutiny has often revealed that the public’s opinion is informed by false information, fraught with prejudice or mired in sentiment. To reject the public’s opinion in each of these three cases it was necessary for the Court to give reasons that exposed the errors in those opinions.

7.6.17 In addition to that, the process of reasoning that the Court has adopted also involves referring to the public morality that is found in the Constitution itself. The Court refers to the Constitution as a reflection of the nation’s soul, demonstrating that the reason for rejecting the opinion of citizens is found in the constitutional morality of those same citizens and that the court’s role is only to show it to them.

7.6.18 In this context and with reference to the Constitutional Court’s regard to public opinion, Cameron discusses constitutional protection of sexual orientation in particular within the context of the African conceptions of humanity.249

7.6.19 The Constitutional Court has, in unequivocal terms, affirmed that gays and lesbians have a right to equality under the Constitution.250 To the question what basis exists for this entitlement to legal equality and to constitutional protection for this equal status, the Constitutional Court has also found a very clear answer. The answer lies in the founding premises of the South African constitutional order, namely the achievement of equality.

7.6.20 South Africa’s history of inequality and oppressive injustice motivated the constitution-makers to prevent irrelevant and stigmatizing criteria from being used as a basis

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249 Cameron 2002 SALJ at 643. He points out that the controversy about the place of homosexuality in our society raise real and important questions for us as Southern Africans. Who we are as people, and what sort of society do new wish to live in? To whom, and to which groups, does our concept of African humanity extend? Is Africa big enough, and is African society, as it should be, large and generous enough to include variant minority groups like gays and lesbians within it?

250 National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC), 1999 (1) SA 6 (CC) and National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC).
for judging people and their legitimate place in society, hence the emphatic list of prohibited
grounds of discrimination, including sexual orientation.\textsuperscript{251} The Constitution substitutes a
different and expansive norm, one that includes people of all colours, races and
backgrounds. It is a brave and important experiment in committing South Africans to an
inclusive conception of our own variety and richness as a nation.\textsuperscript{252}

7.6.21 The conception of African humanity that embraces all forms of expressive human
flourishing that contribute to society and that does not harm other humans, is also called
ubuntu. In the \textit{Makwanyane} case, Langa J articulated the value of ubuntu as follows:

\begin{quote}
It recognises a person’s status as a human being, entitled to unconditional respect,
dignity, value and acceptance from the members of the community such person
happens to be part of.
\end{quote}

7.6.22 The entitlement to respect has a corresponding duty, namely to give the same
respect, dignity, value and acceptance to each member of that community. In regulating the
exercise of rights, emphasis is also put on the sharing and co-responsibility and the mutual
enjoyment of rights by all.\textsuperscript{253}

7.6.23 In the constitutional context ubuntu entails constitutional protection for the strong and
the powerful, for the influential and the popular, for the weak and the unprotected and the
socially vulnerable alike. The view of the majority as reflected in public opinion is no
substitute for the duty vested in the Courts to interpret the Constitution and to uphold its
provision without fear or favour.\textsuperscript{254}

7.6.24 Cameron puts it as follows:

\begin{quote}
[T]he very basis of all constitutionalism, and the foundation of the constitutional state
itself, is the protection of unpopular minorities who are unable to assert their
entitlement to dignity and equality through the electoral process. To rely on popular
\end{quote}

\textsuperscript{251} The equality clause, and the express enumeration of the conditions protected in it, constitutes a
resounding statement that the basis upon which the South African legal system judged people under
apartheid reflected an unjust power relation, that between oppressor and oppressed, which could not be
countenanced in the new dispensation.

\textsuperscript{252} Cameron 2002 \textit{SALJ}, at 4.

\textsuperscript{253} Referred to by Cameron 2002 \textit{SALJ}, at 646.

\textsuperscript{254} Chaskalson P in Makwanyane, \textit{ibid} para 88, referred to by Cameron 2002 \textit{SALJ}, \textit{ibid}. 
expressions of distaste, dislike or hatred for unpopular minorities as a justification for withholding constitutional protection from them is, therefore, to misunderstand the very essence of constitutionalism.\textsuperscript{255}

7.6.25 The jurisprudence of Chaskalson P and Langa J demonstrates that the constitutional protection of minorities in South Africa is based on a commitment to a more mature society, which relies on moral persuasion rather than force. The test for the integrity of a legal system is not the popular cases, but the unpopular and politically inexpedient cases where protection of disfavoured minorities puts principle to its most vigorous test.\textsuperscript{256}

7.6.26 In the event of a challenge before the Constitutional Court of the opposite-sex common-law definition of marriage and of the institution as the only form of relationship deserving of legal protection, the following factors may be of importance:

a) whether the statement that marriage is a sacred and stable institution that can only be defined as the voluntary union for life between one man and one woman after compliance with the legal prescripts in the Marriage Act of 1961 is correct.

b) will this institution be undermined if other forms of stable relationships also receive similar legal recognition and preferential treatment.

7.6.27 Although the opposite-sex common-law definition of marriage has not been challenged before the Court as such,\textsuperscript{257} the Court has in many instances indicated that it is in principle in favour of the recognition of same-sex relationships. How far the Court would

\textsuperscript{255} Cameron 2002 \textit{SALJ}, ibid.

\textsuperscript{256} Referred to by Cameron 2002 \textit{SALJ}, at 648.

\textsuperscript{257} In the case of \textit{Fourie and Bonthuys v The Minister of Home Affairs and the Director of Home Affairs} CCT 25/03 (decided on 31 July 2003) the applicants sought leave to appeal directly to the Constitutional Court against a judgment and order of the Pretoria High Court. The applicants are both females who have lived together as partners in a permanent same-sex relationship since 1994. In their application before the High Court, they sought a declaratory order that the "marriage" between them was legally binding in terms of the Marriage Act of 1961 and that the respondents be directed to register their relationship as a marriage in terms of that Act. The High Court dismissed the application on the grounds that the "marriage" in respect of which they sought a declaratory order, is invalid under common law and is not covered by the Marriage Act which contemplates a marriage between a male and female. The application for direct access was also dismissed by the Constitutional Court. Moseneke J held that the appeal raises complex and important questions relating to the common law and that these questions should first be considered and determined by the Supreme Court of Appeal.
be prepared to go regarding the form such recognition should take is uncertain. The Court has, until now, mostly extended definitions of spouse and statutory provisions regarding benefits on an ad hoc basis. It is emphasised that the Court has not, as yet, ruled that same-sex couples must be permitted to get legally married. It is possible that the Court might rule that the availability of marital rights and obligations to same-sex couples under a separate system is adequate to comply with the constitutional imperatives of equality.

7.7 The legal recognition and regulation of domestic partnerships will legitimise bigamy.

7.7.1 It is objectively foreseeable that a person may become involved in a relationship after being alienated and separated from his or her married spouse without ever getting a divorce. If domestic partnership status is presumed to develop when such a couple lives together for a specified period, it is possible that a person may find that he or she is a party to two legally recognised relationships simultaneously.

7.7.2 The social reality of migrant workers has furthermore had the result that married men often see their wives (who stay behind in the rural area) once a year and live with their urban partners for the rest of the year. These urban relationships may be stable and of long duration and often there are children born to them. At the same time, though, the marriage with the wife in the rural areas is still valid and may not even be compromised. What should be the respective legal positions of these two “wives”?

7.7.3 In these circumstances it is correct to say that the legal recognition of domestic partnerships has the potential to lead to the recognition of bigamous relationships.

7.7.4 To illustrate how this potential can either be curtailed or left to transpire, certain aspects of the current legal positions of domestic partnerships in the Netherlands and British Columbia will briefly be compared. The comparison shows that the various models of regulation tend to favour either strict monogamy or a relaxed approach towards polygamy. Of relevance is the manner in which the particular relationship came into being and the limitations, if any, on multiplicity that were put in these two countries.

7.7.5 It is interesting to note that the Dutch courts were unwilling to grant judicial recognition to unmarried relationships, saying that it is the task of the legislature to remedy
any lacunae that may exist in the existing legislation. Contrary to this, the British Columbian courts played a much more active role in bringing about the changes in the law by giving judicial recognition to these relationships.258

7.7.6 The relevant legislation in the Netherlands established a system of registered partnerships for both same- and opposite-sex couples by making the provisions relating to marriage applicable to registered partnerships.259 Similarly, the definition of marriage in the Dutch Civil Code was amended to include same-sex couples.

7.7.7 As a result of this manner of legislative amendment, the general conditions of marriage are made applicable to both registered partnerships (be they of the same or opposite sex) and same-sex marriage. Since the Dutch Civil Code provides that a marriage had to be monogamous, both same-sex marriage and registered partnerships must, therefore, also be monogamous.260

7.7.8 Partners who want the registered partnership dispensation to apply to their relationship must register their partnership as prescribed in the relevant legislation.261 When a couple must take specific steps to bring their relationship within the scope of the legislation, it is called an opt-in model.262

7.7.9 The British Columbian legislature has specifically re-defined "spouse" in applicable legislation as a person who is, or was, married to another person or living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship

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258 See Maxwell 2000 EJCL.

259 For more information on the legislation see chap 6.1 above.

260 In the parliamentary debate on the opening up of marriage to same-sex couples it has been argued by the gay rights movement that the Dutch government should also consider introducing legislation to recognise relationships of three or more persons. The government replied by showing that there is no need to legislation for this since multiple partnerships can be concluded by means of a notarial cohabitation contract. It was submitted by the government that enquiries showed that this does not often happen in practice, indicating that no real need for it existed. In view of the fact that it can not be argued that the equality principle in sec 1 of the Constitution extends to bigamous marriages, the government also pointed out that marriage between more than two people is unlikely to be acceptable in the Dutch culture. See Second Chamber Debates 1999-2000, 26 672, nr 5 available at http://www.emancipatie.nl/_documenten/emb/tk/26/26672/nr05.pdf at 28-29.

261 Article 80a(5) of the Dutch Civil Code.

262 See also the discussion on the various models in chap 8, 9 and 10 below.
between persons of the same gender, in order to give effect to several court decisions. In addition to the prescribed definition, to qualify as a spouse in a marriage–like relationship, most British Columbian laws require that the couple must have been living together for two or more years. This has the effect that employment benefits, pension benefits, social assistance, medical services coverage, etc attach to a marriage-like relationship automatically after the prescribed period. This is also referred to as a presumption based model. This means that the regime applies automatically to all relationships falling within the scope of the applicable legislation.

7.7.10 It must be noted that these rights only attach automatically to the relationship as long as neither of the partners nor a third party, for example a medical service provider, disputes the status of the relationship. In the event of such a dispute, be that during or upon termination of the relationship, the matter must be decided by a court which will evaluate the circumstances of the relationship to make a determination. As such, in the event of a dispute about the presumed status of the relationship, the rights and obligations of the parties are determined ex post facto and may have retrospective effect.

7.7.11 One of the requirements of a valid marriage in British Columbian law is that both spouses must be unmarried at the time of their marriage and polygamy in marriage is a Criminal Code offence. However, British Columbian authorities have ostensibly decided not to enforce the prohibition on polygamy on the basis that the legislation prohibiting it is regarded as unconstitutional. Noticeably, the legislation that included domestic partnerships under spouses did not limit the status of "marriage-like" partners to those in monogamous relationships. Subsequently, British Columbia has gained a reputation as being a haven for polygamists. It is thus not surprising to learn that it is not illegal in British

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263 Definition of Spouse Amendment Act, 2000 (S B C) 2000, chap 24. For a discussion of the British Columbia legal position see chap 6.4 above.

264 See also the discussion of the various models in chap 8, 9 and 10 below.


266 In a jurisdiction where the courts are at liberty to question the constitutionality of legislation, the public would be aware of this decision not to enforce.

Columbia to be living in a common-law relationship while being legally married to another person.\textsuperscript{268}

7.7.12 When people drift into a relationship without contemplating the legal consequences and do not formalise the relationship, it could easily happen that a partner who is still married but separated, eventually moves in with the new partner and they start amassing goods together.\textsuperscript{269}

7.7.13 In a system where the parties must take specific steps to formalise their relationship, they will be confronted with the question of an existing marriage or registered partnership at some point before registration. They will thus be forced to consider the termination of previous legally recognised relationships, and the legal consequences of their neglect to, before being allowed to formally initiating a new relationship.

7.7.14 Under a presumption-based model, the relationship develops over time and may only be tested for compliance with the relevant legislation in the event of a dispute when the status of the relationship needs to be formally determined. Therefore, a couple in a presumed domestic partnership may only be forced to consider the question whether either of them is still married to a third party at the point when the subsequent domestic partnership breaks up. Both parties in such a relationship are vulnerable to the unfavourable legal outcome. For example, since the previous marriage was not terminated in law, the former spouse still has all the legal rights of marriage and may lay claim to goods that the domestic partners may have expected to have sole title in.

7.7.15 Under a presumption-based model a court would be called upon to settle the dispute. If the enabling legislation prescribes that the outcome of the case must be decided on an equitable basis, the court may rule in favour of the second relationship if the marriage has, for all practical purposes, ceased to exist and the second relationship has all the qualities of a marriage. Such an outcome would however result in the judicial recognition of bigamy.

7.7.16 Against this background, it is submitted that there is potential for recognition of multiple relationships under a presumption-based system, more so than under a registration

\textsuperscript{268} Legal Services Society Booklet, at 5.

\textsuperscript{269} Bailey-Harris 1996 CFLQ, at 138.
system. It is not submitted that any formal or definite correlation exists between the model of recognition of unmarried relationships and non-monogamous relationships. It is further not submitted that a presumption-based system indicates social goodwill towards bigamous relationships. It is, however, possible that it may work out that way in practice, as has been the case in British Columbia.

7.7.17 Proponents of legal recognition of domestic partnerships often refer to the vulnerability of the partners as motivation for their cause. As was seen in the reference to the South African scenario, partners who cannot convince the other partner formally to commit to the relationship often stay in the relationship despite their vulnerable and uncertain position. Following this view, domestic relationships in presumed-based systems will be regarded as deserving of protection despite the fact that one or both of the partners may still be married to other people.\footnote{Problems may also arise with the enforcement of a cohabitation agreement – express or implied – where the partner being sued is still legally married to a third party. It has been argued that in such cases pre-cohabitation contracts are contra bonos mores (violate public policy) to the extent that they impair the community of property rights of the lawful married spouse. This defence was raised in Marvin v Marvin 1976 18 Cal 3d 660, where the defendant claimed that any alleged arrangement between himself and his cohabiting partner purporting to transfer to her a half interest in their community property, could not be upheld on the ground that the arrangement was contra bonos mores since it infringed on the property rights of his lawful wife. In casu the defendant’s argument was not upheld for the reason that even if the agreement with the partner was improper, an improper transfer of community property was merely voidable and not void ab initio. See Singh 1996 CILSA, at 322. There may thus be room to uphold a claim by a former domestic partner against the communal estate of a marriage that was not officially terminated. It must, however, be kept in mind that the claim in the Marvin case was contractual.}

7.7.18 Consider, for example, also the French Pacte Civil de Solidarité (PACS). Here the parties are subject to formal registration at the local court, which has the same legal significance as a marriage celebration. The relevant legislation specifically provides, as with marriage, that no one may enter a PACS prior to the dissolution of a previous marriage or when already bound by another PACS. This means that a civil marriage and PACS can not legally co-exist.

7.7.19 However, another type of personal relationship, namely concubinage, exists in the French legal system. Concubinage refers to the legal recognition of the fact that two persons are living together as spouses. It comes into existence without the expression of the will of the parties at a special ceremony. Nevertheless, both French legislation and case law are tolerant with regard to polygamy in this context. For example, both a female spouse and a female concubine can simultaneously be beneficiaries of the social security of the same
 Concurrent concubinage relationships and marriage are thus given legal recognition by both the French courts and legislation.

7.7.20 In view of this, it is submitted that the degree of tolerance by both society and the legal system for non-monogamous relationships will play a role in determining the model of, as well as requirements for, recognition of unregistered domestic partnerships.

7.7.21 Another situation that is peculiar to South Africa is the legal recognition of polygamous customary marriages for some members of the population while for the rest a bigamous marriage is null and void.272

7.7.22 The Gender Research Project of the Centre for Applied Legal Studies of the University of the Witwatersrand273 has made some interesting findings regarding the polygamous relationships. Its Report points out that three types of multiple relationships exist, namely multiple domestic partnerships; customary marriage and domestic partnership; and civil marriage and domestic partnership. It is further clearly indicated that many of these partners are in dire need of protection as a result, amongst other reasons, of the unequal power relations in these relationships and the concerned parties’ ignorance of the law.

7.7.23 These practical realities will influence the proposed model of recognition as well as the policy decision whether or not explicitly to proscribe bigamous relationships.

7.7.24 The responses to the Issue Paper274 regarding the recognition of multiple relationships were divided. The Gender Research Group of the Centre for Applied Legal Studies suggested that it would be unrealistic and unfair to the parties involved to ignore these relationships totally. It was also submitted that ignorance of the law by the partners, disability, age and whether or not the relationship are effectively consensual in nature, are factors that should play a role when the outcome of disputes between various claimants are decided.

272 S 2 and 3 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998).
273 CALS Report, ibid. See chap 5 above.
7.7.25 In the motivation for its view that the law of marriage should not be extended to include same-sex couples, the United Christian Action expressed concern for the fact that it will become all the more difficult to draw the line on which relationships to recognise.275

7.7.26 On the specific question whether the law should protect the interests of both families where a married person is also involved in a domestic partnership,276 there were both responses in favour of277 and against278 such protection.

7.7.27 On the positive side it was submitted that the male spouse who elects to have two families should take care of both.279

7.7.28 With reference to African traditions 280 it was submitted that multiple relationships were traditionally accepted when men could afford to keep two families but that this type of bigamy should not be encouraged.281

7.7.29 The negative respondents generally referred to the sanctity of marriage which would be violated if bigamous domestic partnerships were legitimised. The concern was expressed that such protection will open the door for further exploitation of women and that it would in

275 “If we allow two men to marry, what will prevent three men marrying, or a bisexual marrying both his sexual partners in future?”
276 Question 4.4.
277 Positive responses were received inter alia from the Women’s Legal Centre; Commission on Gender Equality; Ms Pritima Osman; Chairmaine Pillay & Co Attorneys: Informal contribution from ad hoc group brought together through the initiative of the Black Sash; Department: Public Service and Administration, Lynette Schreuder (Director National Programmes of South African National Council for Child Welfare in her personal capacity); contribution ad hoc group brought together through the initiative of the Office of the General Synod, Dutch Reformed Church; Elsa Bondhuys; Gender Research Group of the Centre for Applied Legal Studies, University of the Witwatersrand; Specialist Committee on Family Law of the Law Society of the Cape of Good Hope and various private individuals.
278 Negative responses were received inter alia from the Honourable Mr Justice J H Hugo in his personal capacity; Ditz Incorporated Attorneys; Rhema Ministries, United Christian Action; His People Christian Church; Patrick Eldon; Stefan Janssens, Johan Grobler and Ian McMahon.
279 Ms S Padayachee assisted by Mr H Sarawan for Pietermaritzburg Office Child Rights Project (Lawyers for Human Rights).
280 M Garth.
281 Peter Knox.
fact be protecting adultery.\textsuperscript{282} Another submission stated that bigamous relationships would harm both families and that marriage should be given preference.\textsuperscript{283}

7.7.30 On the question regarding the rights of intestate successors in the event of bigamous relationships,\textsuperscript{284} the Gender Research Group of the Centre for Applied Legal Studies, submitted that the estate needs to be divided between the spouse and the domestic partner and other intestate heirs in accordance with the equities of justice, as determined by a court. The Women’s Legal Centre suggested that the court be given a discretion to decide what is an equitable portion for the domestic partner under the circumstances.

\textsuperscript{282} Rhema Ministries and His People Church.

\textsuperscript{283} Pretorius_ark. The United Christian Church found the concept disgusting.

\textsuperscript{284} Question 8.1 and 8.2.
CHAPTER 8: MODELS FOR REFORM¹: SAME-SEX RELATIONSHIPS

8.1 Introduction

8.1.1 Marriage is currently the only intimate partnership recognised for legal purposes. Domestic partnerships are virtually unrecognised and domestic partners are excluded from the rights and obligations which attach ex lege to marriage.

8.1.2 However, section 9(1) in the Bill of Rights of the Constitution of the Republic of South Africa of 1996² provides for the right to equal treatment. Section 9(3) prohibits discrimination on the grounds of marital status and sexual orientation in particular.

8.1.3 This means that law and conduct that has the effect of discriminating against anyone on the grounds of sexual orientation are at risk of being challenged on the ground of unconstitutionality.

8.1.4 The Constitutional Court is the official guarantor of minority rights against major preferences. Gays and lesbians are almost exclusively reliant on the Bill of Rights for their protection, which makes the Constitutional Court the obvious place for them to turn to for the protection of their rights.

8.1.5 In this context, the Constitutional Court has repeatedly stated that under the Constitution of 1996, same-sex couples in permanent relationships ought to be protected by the law and has on various occasions declared statutory provisions unconstitutional on the basis that they discriminate on the grounds mentioned in section 9(3) of the Constitution of 1996.³

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¹ Assuming that some regulation of domestic partnerships is desirable, the question arises as to the form it should take. A number of approaches can be identified. The purpose of the following three chapters would therefore be to indicate the range of policy alternatives that need to be considered in the case of both same-sex and opposite-sex partners.

² Act No. 108 of 1996, hereafter referred to as "the Constitution of 1996".

³ The position of same-sex couples has, up to now, been unregulated except for ad hoc case and statutory recognition of permanent same-sex relationships. See in this regard the discussion in chap 4 above.
8.1.6 The Commission has considered various options for law reform in order to regulate this situation. One option is to open up the institution of marriage to same-sex couples. Option two deals with the separation of civil and religious marriage and option three provides for a unique new institution called a civil union.

8.1.7 The Commission is aware of the fact that the position of same-sex couples is a very sensitive issue to many who cherish the institution of marriage as a sacred religious entity. The Commission has therefore attempted to acknowledge these sentiments but also to balance them with the constitutional values of human dignity and the achievement of equality as set out in the Constitution of 1996. In the following paragraphs the Commission will be setting out the above-mentioned options for law reform in more detail.

8.2 Option 1: Marriage for same-sex couples

a) Introduction

8.2.1 The first option is to open up the common-law definition of marriage to same-sex couples by inserting a section to that effect in the Marriage Act of 1961. This section will have the effect that a marriage can be concluded between two persons of either the opposite sex or of the same sex.

8.2.2 The effect of this enactment will be that a same-sex marriage will for all purposes be a valid marriage if the legal prescriptions to constitute a valid marriage have been adhered to.

8.2.3 Throughout history marriage has been restructured many times by various societies. This restructuring has been brought about by changes in our needs as families, changes of our views of equality and expectations of our partners and changes in technological and societal forces. It is not unknown for the evolution of marriage to have caused heated debate

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4 Act No. 25 of 1961. Marriage is currently defined in the common law (and confirmed in case law) as “the legally recognised voluntary union of one man and one woman, to the exclusion of all others while it lasts”. Sinclair & Heaton Marriage Law, at 305 with reference to Seedat's Executors v The Master (Natal) 1917 AD 302 at 309; Hyde v Hyde & Woodmansee (1866) LR 1 P&D 130 at 133.

5 See the discussion of the history of marriage in chap 7 above.
and public discord. Some of those changes were as startling in their time as the idea of marriage for same-sex couples is today.\(^6\)

8.2.4 The fact that a same-sex couple cannot procreate is often used in arguments against permitting them to marry. However, nothing in the formalities and conditions for marriage prohibits opposite-sex couples from getting married if they are unable to or do not intend to have children.

8.2.5 The state has no interest in whether the appropriation of gender roles in a marriage takes place in a particular fashion or in determining whether or not the couple can actually procreate and has the capacity to raise children.

8.2.6 The view that marriage should be reserved to opposite-sex couples, based on the procreation argument, therefore, poses no objective justification for maintaining the current distinctions between same-sex and opposite-sex conjugal relationships in law.\(^7\)

8.2.7 The plea for the legal recognition of same-sex marriages, on the contrary, is objectively justifiable in constitutional terms.\(^8\)

8.2.8 In the Netherlands\(^9\) married men and married women in same-sex relationships have the same rights and obligations as do an opposite-sex couple within the institution of marriage.

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\(^6\) A most noteworthy change that marriage has undergone was to get rid of the prohibition on interracial marriages. Also, for many years women had few or no legal rights once they were married. Over time, marriage laws have changed to reflect the equality of spouses. The development of "no fault" divorce is another example of some of the contentious changes to marriage law. As opinions and values continue to change, so too have the state objectives underlying marital regulation. GLAD Civil Marriage, at 7-9.

\(^7\) The Vermont Civil Unions Act of 2000 contains a statement that "the state has a strong interest in promoting stable and lasting families. The state's interest in civil marriage is to encourage close and caring families, and to protect all family members from economic and social consequences of abandonment and divorce, focusing on those who have been especially at risk: women, children and the elderly". See in this regard Cossman & Ryder for Law Commission Canada, at 120, where they ask the question whether these objectives can rationally be connected to an opposite-sex definition of marriage.

\(^8\) In the unofficial submission of the Christian Lawyers Association of South Africa in response to the Issue Paper no 17 (Project 118) (hereafter referred to as "the Issue Paper") available at [http://wwwserver.law.wits.ac.za/salc/issue/issue.html](http://wwwserver.law.wits.ac.za/salc/issue/issue.html). It was suggested that the door has already been opened to the recognition of same-sex relationships by the Constitution which prohibits discrimination.

\(^9\) In the Netherlands a civil marriage is a completely separate event from a church wedding. A church wedding cannot take place until the civil marriage has been concluded. Religious bodies and institutions may decide for themselves whether they wish to solemnise or celebrate a marriage between two men or two women. Belgium has made a similar provision by an amendment in the Belgium Civil Code that was approved on 30 January 2003. Indications are that it should come into operation in June 2003. Waaldijk Belgium.
marriage. Examples of these are the obligation to support one another and the matrimonial property regime of community of property or antenuptial agreement.

8.2.9 The marriage of a same-sex couple is also subject to the same conditions as the marriage of opposite-sex couples. These conditions refer, for example, to monogamy, consanguinity and citizenship.

8.2.10 For a marriage to be dissolved, the court must pronounce the couple divorced. This applies equally to same- and opposite-sex couples.

b) Arguments in favour of marriage for same-sex couples

8.2.11 In constitutional jurisdictions where discrimination on the basis of sexual orientation is explicitly prohibited in an equality clause, the ban on same-sex marriage is increasingly seen as discrimination. This means that the common-law definition of marriage in Hyde v Hyde & Woodmansee is vulnerable to constitutional challenge.

8.2.12 A government which proactively realises its constitutional obligations can prove its commitment to the value of equality by allowing same-sex marriage. The most successful way to avert a constitutional challenge based on discrimination is to follow the example of the Netherlands, and now also of Belgium.

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10 On this topic see Cossman and Ryder for Law Commission Canada, at 125-128.

11 In this case marriage was defined as the legally recognised voluntary union of a man and a woman for life to the exclusion of all others. Hyde v Hyde & Woodmansee, op cit at 133 as referred to by Sinclair & Heaton Marriage Law, at 305.

12 See eg the discussion by De Vos P, op cit at 375. On the constitutionality issue, the Supreme Court of Canada held that even though sexual orientation per se is not one of the prohibited discrimination grounds in the Canadian Charter, by analogy sexual orientation is indeed a ground of discrimination prohibited by sec 15 of the Canadian Charter on Human Rights. The Court said that the exclusion of same-sex couples from the right to marry would not pass the test of whether same-sex couples are subject to differential treatment on the basis of a prohibited ground of discrimination. Such discrimination is also not justifiable under the limitation clause. For a detailed discussion of the relevant case law see Cossman and Ryder for Law Commission Canada, at 113 et seq. See also Pantazis 1997 SALJ, at 574 and Department of Justice of Canada Discussion Paper, at 31 and the discussion on the Canadian legal position in chap 6 above.

13 Fn 9 above.
8.2.13 An amended definition of marriage to include same-sex couples would also further the value of autonomy by giving the couple in a same-sex relationship the freedom to choose their relational status.

8.2.14 An amended definition of marriage would further be consistent with the value of privacy, since no intrusive tests would be required to determine a couple's entitlement to benefits. Instead, the couple can publicly declare their commitment and be recognised as spouses for the purposes of a range of legal rights and responsibilities.

8.2.15 Same-sex couples work and live and contribute in their communities. They and their families deserve protection just like other families. The formal recognition of same-sex marriage would strengthen those attributes in same-sex relationships that resemble opposite-sex marriage the most. Examples of such attributes are permanence and formality, sharing of residence and economic co-operation, psychological support and emotional involvement in long-standing, intimate family relationships.

8.2.16 Although many couples do take measures to protect themselves and their children legally, they cannot replicate the extensive web of benefits and responsibilities that automatically emanates from marriage through contracts and the general principles of the law.

**c) Arguments against marriage for same-sex couples**

8.2.17 The recognition of same-sex marriage is a very controversial concept and as such is sometimes regarded with apprehension. Many governments, although committed to the constitutionally recognised values of autonomy and equality, remain reluctant to open up marriage to same-sex couples. Marriage is seen as the last bastion of the "traditional family".

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14 GLAD Civil Marriage.

15 See Pantazis 1997 *SALJ*, at 571-2. It is often taken for granted that marriage relationships do have these attributes. However, it is interesting to note that legally married couples are not required to live together and can sign ante-nuptial contracts to separate their financial matters. Nevertheless, "alternative of relationships" are often criticized for not being as stable or interdependent as marriage and are denied legal recognition on that basis. Demain *Partners Task Force*.

16 GLAD Civil Marriage, at 20.
8.2.18 The opponents of same-sex marriage want to preserve marriage as a time-tested and sacred institution. They feel that the legislature should not redefine a concept that they consider inseparable from its societal and religious meanings and origins.\(^{17}\)

8.2.19 Another argument proffered against same-sex marriage is that it may be interpreted as societal approval of homosexuality.\(^{18}\)

8.2.20 It has also been suggested that same-sex marriage will have a variety of inappropriate collateral effects since many of the entitlements of marriage were not designed with same-sex couples in mind.\(^{19}\)

8.2.21 It is important to realise that the removal of restrictions on same-sex marriage will not eliminate the need for other schemes of relationship recognition. Not all same-sex couples are in favour of same-sex marriage and many see it as an oppressive institution which is wrongly presented by a heterosexual society as the norm against which all other relationships should be measured.

d) Respondents to Issue Paper\(^{20}\)

8.2.22 Respondents to the Issue Paper had differing opinions on the question whether the law of marriage should be extended to include same-sex couples.\(^{21}\)

8.2.23 On the one hand there were those in favour of the extension of the law of marriage to same-sex couples\(^{22}\) and who recommended an amendment to the Marriage Act.

\(^{17}\) Law Commission Canada Beyond Conjugality.

\(^{18}\) To which the homosexual community respond that there is nothing about homosexuality to disapprove of. There are undoubtedly many people who strongly dislike gay and lesbian people. Courts should, however, not interpret principles of fairness and equality on popular preferences. GLAD Civil Marriage, at 23. See also the discussion of the role of public opinion under chap 7 above.

\(^{19}\) De Vos 1996 SAPL with reference to Posner Sex and Reason, at 365 fn 45.

\(^{20}\) Question 1.2 of the Issue Paper.

\(^{21}\) The Church of England in South Africa expressed their concern in general about proposals made in the Issue Paper to "the trends to dismantle traditional marriage as we know it" and indicated that they would like to comment further when the investigation reaches the next stage.

\(^{22}\) The submissions by the Black Sash (not an official response), South African National Council for Child Welfare, The Specialist Family Law Committee of the Law Society of the Cape of Good Hope, The
8.2.24 Some respondents indicated such an extension as their preferred option with specific reference to the constitutional prohibition on discrimination based on sexual orientation. They also recognised the fact that the Constitution of 1996 has, in effect, already provided for same-sex marriage and that the prospective legislation should merely regulate the situation.

8.2.25 On the other hand, there were those respondents who were opposed to the extension of the law of marriage to same-sex couples and submitted that this idea is unthinkable.

8.2.26 Some respondents were not opposed to the extension of rights and obligations to same-sex couples but felt that they should be accommodated in the proposed law on domestic partnerships and not in the existing marriage law.

8.2.27 Serious reservations were expressed by some respondents about the long-term effect of same-sex marriages on the family unit.

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23 The Gender Research Project of the Centre for Applied Legal Studies at the University of the Witwatersrand.

24 In an unofficial submission, the Christian Lawyers Association of South Africa stated that "... our preferred option is that if same sex-couples want to marry, they should be afforded the full protection of the law BUT only as long as they comply with everything that is required of traditionally married couples. The door has been opened to these relationships when the Constitution allowed for non-discrimination even on sexual orientation. ... The time has come to regulate the situation" and "a simple clause in the Marriage Act can include spouse of the same gender." Similarly, in a comment compiled by Charmane Pillay & Company Attorneys that was submitted by the KwaZulu-Natal Law Society, reference was made to the Constitutional imperative of non-discrimination and it was suggested that the law of marriage be extended to same-sex marriage.

25 Father Hyacinth Ennis (of the Catholic Church), Human Life International and The National Council of Women.


27 Prof W J Botha, Director: Doctrine and Current affairs of the Dutch Reformed Church (not the official viewpoint of the church).

28 Rhema Ministries.
8.2.28 In this context, a concern was expressed that inclusion of same-sex marriages would infringe on the rights of magistrates and ministers of religion who would be forced by law to marry such couples.29

8.2.29 In this regard it should, however, be noted, that in terms of section 31 of the Marriage Act of 1961 religious institutions who object to same-sex marriage are permitted to refuse to marry such couples on the grounds that same-sex marriage does not conform to the rites, formularies, tenets, doctrines or discipline of the particular denomination or organisation.

8.2.30 Such a refusal could, perhaps, be regarded as discriminatory. On the other hand, since there are religious institutions who would not object to same-sex marriages and who would accommodate such marriages, the fact that these couples would turn to these institutions could arguably save from unconstitutionality a decision by a specific institution not to marry same-sex couples.

8.2.31 See also in this regard section 15 of the Constitution of 1996 which provides that the right to religious freedom does not prevent legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law.30

e) Legislation

8.2.32 The effect of option 1 will be that all legal principles and legislation that are currently applicable to what is known as the opposite-sex marriage, will mutatis mutandis become applicable to same-sex marriages. It is clear that if this route is followed, a number of consequential amendments will be necessary.

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29 Reverend K O’Donoghue from the Fish Hoek Full Gospel Church.
30 S 15(3)(a) provides the following:

This section does not prevent legislation recognising—

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
8.2.33 A factor that may complicate the opening up of the institution of marriage to same-sex couples is the fact that it would only be recognised internationally by those countries where same-sex marriages are also permitted. This should, however, not inhibit the proposed legislation since the international trend is clearly to allow some form of recognition of these relationships.

8.2.34 Should option 1 be chosen, the amendments to the Marriage Act of 1961 will read as follows:31

**Amendment of section 1 of Act 25 of 1961**

1. Section 1 of the Marriage Act, 1961 (in this Act referred to as the principal Act), is hereby amended by the insertion after the definition of “magistrate” of the following definition:

   "marriage" means the voluntary union of two persons concluded in terms of this Act to the exclusion of any other marriage, union or partnership;"

   "spouse" means a partner of a person in a valid marriage;"

**Amendment of section 30 of Act 25 of 1961**

2. Section 30 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

   "(1) In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:

   'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful [wife (or husband)] spouse ?';

   and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:

   'I declare that A.B. and C.D. here present have been lawfully married'."

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31 See Annexure B. The consequential amendments are not shown here, but will be included in an amendment.
8.2.35 The Commission is interested in hearing the views of advocates for the opening up of marriage to couples of the same sex as well as opponents of this option.

8.3 Option 2: Separation of civil and religious marriage

a) Introduction

8.3.1 A civil marriage is the legal relationship of two persons who meet certain statutorily prescribed requirements following a civil ceremony. The secular purpose of marriage is to provide an orderly framework in which people can express their commitment to each other, receive public recognition and support and voluntarily assume a range of legal rights and obligations that are from time to time assigned to it by the law of matrimony.\(^{32}\) In this sense, marriage has a purely contractual nature.\(^ {33}\)

8.3.2 Marriage from the vantage-point of most religions, on the other hand, is a spiritual union of couples who meet the requirements for the union that are based upon that faith’s tenets. Since religions have autonomy in deciding which marriages they will consecrate, the requirements set by religious institutions are often more stringent than the requirements set by the law for civil marriage.

8.3.3 A religious marriage ceremony usually represents a blessing of the relationship by the religious institution. However, to receive the legal protections of marriage, a couple must have a civil marriage,\(^ {34}\) or the civil element prescribed by law must be included in the religious ceremony.

8.3.4 In the Netherlands and France, these ceremonies take place on separate occasions, before a state official and a religious marriage officer respectively. The civil ceremony is the

\(^{32}\) Standing Committee Briefing Law Commission Canada.

\(^{33}\) The law also provide for an orderly and equitable resolution of their affairs when the marriage breaks down. Law Commission Canada Beyond Conjugality.

\(^{34}\) GLAD Civil Marriage, \textit{ibid.}
statutory prescribed requirement for the legal consequences of marriage to follow. The religious ceremony is optional and is relevant to those with religious sentiments only. The couple with religious sentiments is free to celebrate their marriage at a religious institution of their choice after the civil ceremony.

8.3.5 The second option proposed by the Commission is to separate the civil and religious aspects of marriage by separating the ceremonies.

8.3.6 The effect of the separation of the civil and religious aspects of marriage in South Africa will be that only the civil aspect of marriage will be regulated by law. The Marriage Act of 1961 will accordingly make provision for the civil marriage of both opposite-sex and same-sex couples, but will have no relevance for religious institutions.

b) The origin of the distinction between civil and religious marriage

8.3.7 Historically the marriage laws in Europe have been characterised by a struggle between religious organisations and the state to control the institution of marriage.

8.3.8 In Roman law marriage was not a legal institution but a social institution and was considered a private matter of which the formation and dissolution was regulated primarily by custom, with neither the state nor the church showing much interest. After the fall of the Roman Empire and with the rise of the Christian Church, the claim of exclusive jurisdiction over marriage by the Church brought about a fundamental transformation in the regulation of marriage.36

8.3.9 The authority of the ecclesiastical courts and the basics of canon law were settled in France and the Germanies by the end of the tenth century and in England by the twelfth century. Canon law established the indissolubility of marriage and, along with it, a complex set of regulations for more precisely defining marriage. Up to the middle of the sixteenth

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35 Unless otherwise indicated the information in this historical account was gleaned from Law Commission Canada Beyond Conjugality.

36 This claim to exclusive jurisdiction and the novel idea that marriage was indissoluble were closely connected to the idea that marriage was a sacrament. Glendon, at 309, as referred to in Law Commission Canada Beyond Conjugality.
century the church still recognised local, informal marriage customs but since 1563, no marriage would be valid unless it had been publicly celebrated in the presence of a priest.\footnote{The Decree of Tametsi, referred to in Report on Close Personal Relationships Law Commission of Canada, at 125 fn 38.}

8.3.10 From the sixteenth century onwards the state began to take an interest in the regulation of marriage and the Catholic Church began to lose its exclusive jurisdiction over marriage.\footnote{In parts of Europe the Catholic Church lost its jurisdiction due to the Protestant Reformation.} Initially there was little change in the rules governing marriage as the jurisdiction slowly transferred to the secular authorities.

8.3.11 However, during the eighteenth century private law gradually became codified and with it came the extensive regulation of the formation, dissolution and content of marriage, as well as the emergence of the compulsory civil marriage ceremony, according to which only a civil marriage would be recognised as a valid marriage. While the royal courts had already assumed control over marriage from the church, the introduction of the civil marriage completed the state’s exclusive jurisdiction over marriage and, with it, the separation of church and state.

8.3.12 In France, the compulsory civil marriage was the product of the French Revolution. For the state, maintaining the supremacy of marriage had a political dimension: The advent of the Republic in 1792 coincided with the introduction of the civil marriage in France and was, therefore, closely associated with the republican ideology of secularism and universality. The purpose of secularising marriage was two-fold – first, for the state to gain monopoly over marriage by eliminating the competing jurisdiction in this field of the Catholic Church\footnote{This monopoly is still reinforced today in the Criminal Code in that it is forbidden in France to celebrate a religious marriage prior to a civil marriage. Steiner 2000 \textit{CFLQ}, at 9.} and second, to create a marriage available for all.\footnote{Before the revolution in 1789, Protestant marriages were not recognised and their children were therefore considered to be illegitimate. Steiner 2000 \textit{CFLQ}, at 9 fn 51.}

8.3.13 In England, the Church of England held on to its jurisdiction over marriages well into the nineteenth century. Informal marriages were still regarded as valid until the passage of Lord Hardwicke’s Act in 1753,\footnote{(U.K.), 26 Geo. II, c. 33 as referred to in Report on Close Personal Relationships Law Commission of Canada, at fn 11.} which banned all clandestine marriages and set out the
basic requirements for the validity of marriage such as age, witnesses and formalities. When civil marriage was eventually introduced in 1836 with the Marriage Act of 1836, it did not displace religious marriages.

8.3.14 These two approaches to the role of church and state in relation to marriage continue in contemporary Western Europe today. In some countries a civil ceremony is mandatory and is the only type of marriage recognised by law. A religious marriage may be held following the civil ceremony, but no legal consequences follow religious marriages. The roles of the church and state are clearly separated.

8.3.15 In other countries both church and state have the authority to solemnise a marriage which will be legally recognised. South Africa has inherited this approach from England.

8.3.16 In 1961, with the passing of the Marriage Act of 1961, the state took exclusive control over the formalities of marriage.

8.3.17 In so far as substantive law is concerned it has been argued that state regulation of marriage reached its high-water mark in 1949 with the Prohibition of Mixed Marriages Act, 1949. In terms of this Act marriage between whites and non-whites were void. This Act was promulgated in the belief that it had a theological basis, a fact that legitimised the state’s systematic approach towards Apartheid.

8.3.18 However, since 1949 various amendments to the marriage laws have resulted in more freedom for the parties from both state and religious interference. Marriage has to a

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43 Law Commission Canada Beyond Conjugality. Although this brief historical overview is limited to the evolution of marriage in the Western world it is submitted that it explains the distinction between the two forms of marriage, thereby facilitating an adjudication of its relevance in modern times.

44 Including Belgium, Germany, the Netherlands and Switzerland.

45 Including Denmark, the United Kingdom, Greece, Ireland, Italy, Norway, Portugal, Spain, Sweden Canada and the United States.


47 In the 1930’s the laws granting divorce were relaxed. Divorce laws were further amended significantly in 1979 with the passing of the Divorce Act, 1979 (Act No. 70 of 1979) which abolished the fault principle. In 1984 the marital power was abolished in the Matrimonial Property Act, 1984 (Act No. 88 of 1984).
large extent become a private affair once parties have complied with the formalities prescribed by the state.

8.3.19 Through deregulation the formalities of marriage have therefore lost their substantive function and have obtained an evidentiary function only.48

c) Current position in South Africa

8.3.20 In South African law the Marriage Act of 1961 prescribes the formalities with which a marriage must comply in order to be valid. Section 11(1) of the Marriage Act of 1961 provides that the marriage must be solemnised by a competent marriage officer.

8.3.21 In terms of section 2(1) of the Marriage Act of 1961, magistrates, special justices of the peace and certain commissioners are _ex officio_ marriage officers. The latter category of marriage officers are civil servants and a marriage performed by them would constitute a civil marriage ceremony.49

8.3.22 In terms of section 3(1) of the Marriage Act of 1961, the Minister of Home Affairs may also designate any minister of religion or any person holding a responsible position in a religious denomination or organisation as a marriage officer.50

8.3.23 A marriage ceremony solemnised by such a marriage officer and blessed by a minister of religion (who often is, but need not be a marriage officer) in accordance with the prescripts of the Marriage Act of 1961 will result in what can be referred to as a religious marriage. A religious marriage is in effect a civil marriage plus a blessing by the religious official. This religious marriage has legal consequences as a result of compliance with the

49 Heaton _Bill of Rights_, at para 3C11.
50 By implication some religious ceremonies will have no legal status. Where the religious leader is not properly designated as a marriage officer, members of that religious community will be obliged to undergo both a religious and a civil ceremony if they want the relationship to have any legal implications. Lind 1995 _SALJ_, at 482.
civil element during the blessing ceremony. A particular religion may set requirements for a valid religious marriage that are stricter than the requirements for a valid civil marriage.\footnote{Some religions, for example, will not marry someone who has been divorced, although the person may legally marry in a civil ceremony. The opposite is also true where some faith communities do allow religious unions or marriage between same-sex couples although those unions are not legally recognised. Individual congregations of Reform Jews, American Baptists, Buddhists, Episcopalians, Presbyterians, Unitarians Universalists, the Society of Friends and members of the United Church of Christ, among others, have performed marriages for same-sex couples. GLAD Civil Marriage, at 4.}

8.3.24 Solemnisation of a marriage takes place as prescribed in various sections of the Marriage Act of 1961.\footnote{Compliance with the relevant requirements plus solemnisation as prescribed will establish a valid marriage: Marriage must be solemnised by a competent marriage officer. There must be consent of the parties to marry each other. Consent may be vitiated by the following factors: insanity and intoxication, duress, mistake or fraud. The Marriage Act provides as follows:}

- S 12 Prohibition of solemnization of marriage without production of identity document or prescribed declaration
  
  No marriage officer shall solemnise any marriage unless-

  (a) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act, 1986 (Act 72 of 1986); or ……

- S 24 Marriage of minors
  
  (1) No marriage officer shall solemnise a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing. ……

- S 26 Prohibition of marriage of persons under certain ages
  
  (1) No boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage except with the written permission of the Minister or any officer in the public service authorized thereto by him, which he may grant in any particular case in which he considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law. Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted. ……

Other requirements originate in the common law:

- Ascendants and descendants in the direct line ad infinitum may not marry each other.

- Collaterals, whether of the whole or half blood are prohibited from intermarrying if either of them is related to their common ancestor in the first degree of descent.

- A married person is incapable of contracting another marriage until the subsisting marriage has been dissolved. See Sinclair & Heaton Marriage Law, at 345.
separate actions, usually take place at a combined ceremony with most couples not even aware of the distinction.

8.3.25 For ease of reference the term "blessing" as used in the Marriage Act of 1961 will be used to refer to the religious ceremony whereas the term "solemnisation" as used in the Marriage Act of 1961 will refer to the civil ceremony.

8.3.26 It is the solemnisation in compliance with the requirements as prescribed in the Marriage Act of 1961 that results in the legal consequences of a valid marriage under the Act and not the blessing. In other words, the conduct of a minister of religion who is a designated marriage officer but who merely blesses a couple in accordance with the religious institution's rites and rituals, does not comply with the solemnisation requirements as prescribed in the Marriage Act of 1961. No legal consequences will flow from the blessing of the couple although they may be married in the eyes of that religious institution.

53  S 29A  Registration of marriages

(1) The marriage officer solemnizing any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnised.

(2) The marriage officer shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative designated as such under section 21 (1) of the Identification Act, 1986 (Act 72 of 1986).

S 30  Marriage formula

(1) In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:

'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?'

and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnised in the following words:

'I declare that A.B. and C.D. here present have been lawfully married.'

(2) Subject to the provisions of subsection (1), a marriage officer, if he is a minister of religion or a person holding a responsible position in a religious denomination or organization, may in solemnizing a marriage follow the rites usually observed by his religious denomination or organization.
8.3.27 As far as the term "solemnisation" in the Marriage Act of 1961 is concerned, note is taken of the proposals made by the South African Law Reform Commission in its project on the review of the Marriage Act that the verb "solemnise" be replaced with the term "conduct".\footnote{The South African Law Reform Commission considered that the terms "conduct a marriage" or "join parties in marriage" are better substitutes and that words to that effect should be used in place of the terms "solemnise" or "solemnisation" where appropriate in s 3(1) and (2), 5, 6(3) and (5), 9, 10(1) and (2), 11(1) and (2), 12, 22, 23, 24(1), 26(2), 27, 29(1), (2) and (3), 29, 29A(1), 30(1), (2) and (3), 31 and 35. See para 2.7.3—7 of the SALRC Report Review Marriage Act.} It is submitted that the term "conduct" will also suit the concept of civil marriage better as it will refer to a formality as opposed to a ritual of religious significance.\footnote{In that Report reference was made to a suggestion by one Prof J C Bekker that the term "solemnise" seems to be obsolete because it is derived from a performance in the context of religious rites and ceremonies, and as marriages are no longer necessarily religious, one may simply refer to the occasion as a registration. He considered that the acceptance of the marriage event as a registration should not unduly disturb religious denominations, since they would continue to practice their rituals. Professor Bekker therefore questioned the fact that the Marriage Act appears to equate the registration of a marriage with a solemn occasion.}

\[d\] The distinction between civil and religious marriage is conducive to the legal recognition of same-sex marriage

8.3.28 Lind points out that it is unfortunate that the term "marriage" is used to describe both the most prominent institution of family law (civil marriage) and the relationship which dominates various moral and social contexts (religious marriage).\footnote{Lind 1995 \textit{SALJ}, at 484.} On the one hand it is a term for the union described by the law with certain legal consequences but with no religious relevance.\footnote{The problem with using one term for both the legal and the social union becomes particularly evident when the ceremony for celebrating a marriage is culture-specific, for example the Hindu marriage. Such religious ceremonies may not have any legal status, although the parties and their social group will not regard the relationship as any less a marriage than one that complies with legal prescriptions. See Lind's view on the probable validity of Hindu marriages, \textit{op cit} at 482, as opposed to Heaton's presumption, \textit{op cit} at 3C11. However, the legal consequences do not follow the religious ritual. The same will apply to polygamous customary marriages and even a "gay marriage" where it has been celebrated in accordance with a specific social setting that finds it acceptable. Lind 1995 \textit{SALJ}, at 482.} On the other hand it is a term for the union supported by a variety of religious groups to validate a relationship for religious or moral purposes.

8.3.29 Lind proposes that it might solve the problem to give the two aspects of the institution different names. Lind's proposal acknowledges the fact that marriage in law is more than a moral institution and serves a more diverse community with different and sometimes secular...
needs. The opposite can also be said, namely that marriage for a religious institution is more than just the legal consequences that the state are concerned with.

8.3.30 If the religious aspects of marriage could be separated and preserved for the religious, many of the moral and religious objections against the legal recognition of same-sex relationships and opposite-sex domestic relationships would be eliminated.

8.3.31 For many, even the civil institution of marriage has special meaning and portrays a certain symbolism. Although many gays and lesbians are opposed to marriage as an opposite-sex institution, many others wish to confirm their relationship in precisely that manner.

58 In this way individuals will be treated equal to the extent that they will be free to choose their family relationship with the knowledge that it will receive legal sanction. Lind submits that same-sex relationships and domestic relationships between siblings or friends who may not have a sexual relationship, but who desire the legal consequences of marriage for pragmatic material reasons are the types of relationships who will benefit by this distinction, op cit 484-485. The so-called PACS (Du Pacte Civil de Solidarité et du Concubinage) of France, the PACS format serve as good example of how the legal and moral versions of the marriage institution can be separated. With regards to the legal aspects, PACS to a large extent constitute a replica of marriage. In fact, PACS so strongly resembles marriage that it has been criticized as not providing a real alternative to couples who want to organize their domestic life in a different manner, which was its original aim. Like marriage PACS originate from an agreement between two persons wishing to regulate their relationship. Couples who register will obtain most of the rights and obligations of marriage in the field of social welfare, housing, tax law and property rights. A set of conditions similar to that of marriage automatically apply to the parties. Firstly, a PACS must be formally registered. Although registration takes place at the local court it has the same legal significance as a marriage celebration which entails a special ceremony at the local town hall. It provides a public record and evidence of an event with important legal consequence for both the parties themselves, for third parties and for the state. Secondly, the new legislation lays down the same prohibitions, based on affinity and consanguinity, as those laid down in the Civil Code under the law of marriage. Thirdly, it provides, as with marriage, that no one may enter a PACS prior to the dissolution of a previous marriage or when bound by another PACS. Furthermore, similar to the duties imposed on spouses, PACS provides for emotional and material assistance between the partners as well as joint liability to third parties for household debts. Finally, similarities occur in the management and distribution of assets, as is illustrated by the fact that, within a new scheme, partners are subject to a regime similar to the matrimonial regime of the separation of assets. The main differences between PACS and marriage relates to what can be regarded as moral aspects: there is no duty of fidelity and the relationship can end unilaterally. Steiner 2000 CFLQ, at 1 and 7.

59 The Baptist Union of South Africa, for example, adopted a resolution with regard to the issue of homosexual marriages wherein the conviction that God ordained marriage as a unique and complementary partnership between a man and a woman was confirmed. They further expressed the concern that the undermining of the institution of marriage will have seriously detrimental consequences for society.

60 In this regard E Knoesen, the then acting director of the Lesbian and Gay Equality Project, commented that “Society has elevated marriage to a place that is greater than any form of relationship. If I was in a relationship for ten years, I wouldn’t get nearly as much respect as a couple who met two weeks ago and then got married” and “The Lesbian and Gay Equality Project doesn’t promote marriage. We are just saying that it is not the role of the state to tell people who can and can not get married.” S Adams “Court Will Decide if Gay Couples May Marry” Daily News October 14 2002.

61 After a discussion of the importance of marriage, Cossman & Ryder for Law Commission Canada come to the conclusion that it is largely symbolic, a symbol of commitment and public recognition of the
8.3.32 In terms of this option the civil and religious aspects of marriage will be separated in a manner similar to the Netherlands. The effect of this proposal will be that religious marriage will remain preserved as the sacred institution within the realm of the church, subject to the values held in specific church denominations. Civil marriage, on the other hand, will be regulated by the state. Both opposite and same-sex couples will have to solemnise their marriages.

8.3.33 Couples who value religious marriage could, after signing a marriage contract before the secular marriage officer, have their marriage blessed before a religious officer in a religious ceremony in the same manner currently available to them in terms of section 33 of the Marriage Act of 1961.

8.3.34 Religious institutions would, however, have to decide for themselves in terms of their own dogmas whether the blessing of their church would be available to same-sex couples or not. This will create exactly the same rights and obligations for same- and opposite–sex couples without forcing churches to conform to values which they do not support.

8.3.35 It is argued that this proposal will comply with both the constitutional prescripts regarding the right to religious freedom and the right not to be discriminated against on the basis of one’s sexual orientation. In this process grounds for constitutional challenge will be eliminated.

e) Respondents to the Issue Paper

8.3.36 The question whether respondents thought it possible to separate the civil and religious aspects of marriage was posed in the Issue Paper. It elicited different responses.

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63 Fn 20 above.
64 Question 2.6 of the Issue Paper.
8.3.37 Some respondents were in favour of the separation of the civil and religious aspects of marriage in view of the fact that civil marriages need not be solemnised according to a religion.65 This means that civil marriage can be made available to people who do not belong to a religion or people whose views may not be acceptable to the religious institution.

8.3.38 One respondent referred to the complete separation that exists between state and church regarding marriage in some other countries, and recommended that the state should take care of all the regulation and contracts.66

8.3.39 Another respondent pointed out that it must be acknowledged that not all people who want to get married are religious and that particularly the proprietary rights should be separated from the religious aspects of marriage.67

8.3.40 It was also suggested by one respondent that the distinction should be that civil law recognises only one "marriage" for purposes of civil law or rights or obligations while the religious regime concerned may recognise multiple marriages for religious purposes or for social purposes and in respect of the rights of children. Under this respondent's proposal, same-sex partnerships should then be recognised civilly (upon marriage or registration or registered contract) with all the consequences of a marriage.68

8.3.41 The point was further made that there are so many religious groupings, that it is not possible to provide for all religious requirements and that for purposes of clarity and certainty marriage law ought to be separated from religious influence.69

8.3.42 According to another respondent marriage has effectively become a secular institution in that many people enter into religious rituals when marrying, but these are practised within families and communities as an adjunct to the civil process of marriage. Thus, couples recognise that the civil system of marriage is the secular side of marriage that

65 The Women’s Legal Centre.
66 Dr W J Botha, Director: Doctrine and Current affairs of the Dutch Reformed Church (not the official viewpoint of the Dutch Reformed Church). See also the discussion in chap 9 above.
67 The Specialist Family Law Committee of the Law Society of the Cape of Good Hope.
68 The Honourable Mr Justice J H Hugo in his personal capacity.
69 Ditz Incorporated Attorneys.
is regulated by the state and concerns the property, children and other legal consequences of marriage. The point that many people choose to marry in a magistrates’ court rather than a place of religion was also made.\textsuperscript{70}

8.3.43 Other respondents were opposed to the separation of the civil and religious aspects of marriage\textsuperscript{71} although some admitted that it is possible in practice. It was pointed out that marriage has always been protected in law and that the state has an interest in preserving and protecting the special status of marriage, regardless of religious beliefs.\textsuperscript{72}

8.3.44 One respondent commented that marriage is made up of the public witness and legal signing (the legal/non-religious aspects) as well as the religious aspect (vows made before God, before one's family and community and the consummation thereof). She stated that for practical reasons, for example, passport applications, some people do the legal part and then later celebrate the religious aspect. Only once both aspects have been concluded, is the marriage complete.\textsuperscript{73}

8.3.45 Another respondent felt strongly about the fact that, although it may be possible to separate the two aspects, it is not possible to ignore the fact that God ordained marriage and a distortion of marriage is no longer marriage.\textsuperscript{74}

8.3.46 A general concern expressed in response to this question referred to the role of natural law and "the time-honoured respect for and promotion of heterosexual marriage and their families for the well-being and future of the nation."\textsuperscript{75}

\textsuperscript{70} The Gender Research Project of the Centre for Applied Legal Studies at the University of the Witwatersrand.
\textsuperscript{71} The Black Sash (not the official position) stated that religion and culture are too integrated to separate the religious and non-religious aspects.
\textsuperscript{72} The United Christian Action.
\textsuperscript{73} Debbie Wybrow of the KwaZulu-Natal Law Society Family Law Committee.
\textsuperscript{74} The African Christian Democratic Party.
\textsuperscript{75} Father Hyacinth Ennis of the Catholic Church.
8.3.47 An interesting view was that all marriages have a religious aspect, being a sacred union ordained by God. Although individuals may have the right to ignore this fact, they should not be legally empowered to force their views on others.\textsuperscript{76}

\textbf{f) Legislation}

8.3.48 It should be noted that not all valid marriages in South Africa are concluded in terms of the Marriage Act of 1961. Customary marriages are recognised as valid marriages under the Recognition of Customary Marriages Act, 1998\textsuperscript{77} with the result that their validity is not dependent on any of the provisions of the Marriage Act of 1961. The Marriage Act of 1961 prescribes the legal requirements (formalities) for a legally valid marriage in general. The legal consequences (substantive contents) of valid marriages are prescribed in marriage-specific legislation and the common law. This proposal should, therefore, not affect the validity or legal consequences of customary marriages.

8.3.49 The Commission is currently also investigating the matter of Islamic marriages.\textsuperscript{78} Proposals are being investigated which would have the effect that Islamic marriages will be recognised as valid marriages for all purposes. The proposed Bill prescribes certain requirements for and legal consequences of Islamic marriage. The proposals in this investigation will once again have no effect on the validity of Islamic marriages which, if the proposals of the South African Law Reform Commission in that regard are accepted, will not be dependent on any provisions in the Marriage Act of 1961. The fact that an Islamic marriage is described as a civil contract and not in the nature of a sacrament\textsuperscript{79} further confirms this submission.

8.3.50 Both customary marriages and Islamic marriages (according to the proposed Bill) are required to be registered with a registering officer (marriage officer under the Bill) designated

\textsuperscript{76} His People Christian Church. It was also submitted that ministers of religion and conscientious objectors such as magistrates should be precluded from performing marriages that conflict with their religious beliefs. Furthermore, businesses should not be forced by law to recognise and provide benefits to partnerships that exist outside the boundaries of normal heterosexual marital relationships.

\textsuperscript{77} Act No. 120 of 1998.

\textsuperscript{78} South African Law Reform Commission Islamic Marriages.

\textsuperscript{79} Cachalia 1993 \textit{THRHR}, at 401.
in terms of the distinctive legislation. Although not a requirement for its validity, as would be the case in the event of the proposed civil marriage, this puts the processes of civil marriage, customary marriage and Islamic marriages on a par. In all instances a formality before a civil servant, ie the marriage officer under the Marriage Act of 1961, the registering officer under the Recognition of Customary Marriages Act of 1998 and the marriage officer as proposed in the Islamic Marriages Bill, is prescribed.

8.3.51 Any legislative amendment to achieve this separation between civil and religious marriage would only affect future marriages. Since all marriages would then have to be solemnised by an ex officio marriage officer, steps would have to be taken to ensure that the civil system could cope with the new burden.

8.3.52 In order to determine the consequential amendments to other legislation, scrutiny of all legislation where the terms marriage, spouse and even parent are used needs to be undertaken.

8.3.53 The legislative enactment of this proposal will read as follows:

**Amendment of section 1 of Act 25 of 1961**

1. Section 1 of the Marriage Act, 1961, (hereinafter referred to as the principal Act) is hereby amended by the insertion of the following definitions:

- "mariage’ means the voluntary union of two persons concluded in terms of this Act to the exclusion of any other marriage, union or partnership;
- ‘marriage officer’ means a marriage officer as described in section 2 of this Act;
- ‘spouse’ means a partner of a person in a valid marriage;”

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80 S 4(9) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) and clause 6(11) of the proposed Islamic Marriage Bill.

81 It is further noted that in the Children's Bill marriage is defined as "a marriage "concluded in accordance with a system of religious law subject to specified procedures ....". If this definition is accepted by Parliament, it will have to be revisited in order to determine whether the separation of the civil and religious aspects of marriage proposed here, defies the purpose of this definition as used in the Children's Bill. It may be possible to obviate this problem and achieve the same result by limiting this wider definition of marriage only for purposes of the Children's Act. See the Children's Bill in the South African Law Reform Commission Child Care Act.

82 See Annexure B.
Repeal of section 3 of Act 25 of 1961
2. Section 3 of the principal Act is hereby repealed.

Repeal of section 7 of Act 25 of 1961
3. Section 7 of the principal Act is hereby repealed.

Repeal of section 8 of Act 25 of 1961
4. Section 8 of the principal Act is hereby repealed.

Amendment of section 29 of Act 25 of 1961
5. Section 29 of the principal Act is hereby amended –
(a) by the substitution for subsection (2) of the following subsection:

"(2) A marriage officer [shall] may solemnize a marriage [in a church or other building used for religious service, or in a public office or private dwelling-house, with open doors] in any place and shall solemnize such marriage in the presence of the parties themselves and at least two competent witnesses [, but the foregoing provisions of this subsection shall not be construed as prohibiting a marriage officer from solemnizing a marriage in any place other than a place mentioned therein if the marriage must be solemnized in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties]"; and

(b) by the substitution for subsection (3) of the following subsection:

"(3) Every marriage [-

(a)] which was solemnized in the Orange Free State or the Transvaal before the commencement of this Act in any place other than a place appointed by a prior law as a place where for the purposes of such law a marriage shall be solemnized [, or

(b) which by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties was solemnized before the commencement of the Marriage Amendment Act, 1968, in a place other than a place appointed by subsection (2) of this section as a place where for the purposes of this Act a marriage shall be solemnized,]

shall, provided such marriage has not been dissolved or declared invalid by a competent court and provided further that neither of the parties to such
marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if it had been solemnized in a place appointed therefor by the applicable provisions of the prior law [or, as the case may be, of this Act]."

Substitution of section 30 of Act 25 of 1961

6. The following section is hereby substituted for section 30 of the principal Act:

"30  Marriage formula

(1) In solemnising a marriage any marriage officer shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:

'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful spouse?'

and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:

'I declare that A.B. and C.D. here present have been lawfully married'.

(2) If the provisions of this section or any former law relating to the questions to be put to each of the parties separately or to the declaration whereby the marriage shall be declared to be solemnized or to the requirement that the parties shall give each other the right hand, have not been strictly complied with owing to:

(a) an error, omission or oversight committed in good faith by the marriage officer; or

(b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,

but such marriage has in every other respect been solemnized in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided further that such marriage, if it was solemnized before the commencement of the Marriage Amendment Act, 1970 (Act 51 of 1970), has not been dissolved or declared invalid by a competent court and neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with."
Repeal of section 31 of Act 25 of 1961

7. Section 31 of the principal Act is hereby repealed.

Amendment of section 32 of Act 25 of 1961

8. Section 32 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him as marriage officer in terms of this Act [: Provided that a minister of religion or a person holding a responsible position in a religious denomination or organization may, for or by reason of any such thing done by him, receive-

(a) such fees or payments as were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his religious denomination or organization, for or by reason of any such thing done by him in terms of a prior law; or

(b) such fee as may be prescribed].”

8.3.54 The Commission would like to hear the views of interested parties on the concept of the separation of the civil and religious aspects of marriage as a way to afford same-sex relationships legal recognition.

8.4 Option 3: Civil union

a) Introduction

8.4.1 The third option whereby legal protection can be accorded to couples in unmarried relationships is the civil union model. Owing to the fact that this model aims at providing for a status parallel to marriage, but within a separate institution, it is suited for same-sex couples. See for example the models of Vermont (discussed in chap 6.6 above) and in Quebec (referred to in para 8.4.15 below). See also the Danish Registered Partnership Act, 1989 (Act No. 373 of 1989), the Island Act on Recognised Partnership of 1996, the Norwegian Registered Partnership Act, 1993 (Act No. 40 of 1993), and the Swedish Registered Partnership Act of 1994. In all of these instances the legislation provides for the registration of a same-sex partnership and that the partnership will have the same legal effects a marriage, except as provided for in exception clauses.
same-sex couples only. Two options are set out below: option 1, making provision for same-sex couples only, and option 2 for both same- and opposite-sex couples.

8.4.2 A civil union is concluded and terminated in the same manner as a registered partnership, but partners are awarded all the rights and obligations normally awarded to married couples.

8.4.3 The term "civil union" is used to distinguish this model from the registered partnership discussed in chapter 9 below, which provides couples with limited marriage-like rights and obligations only.

8.4.4 Being a duplicate of marriage, civil unions award couples all the rights and obligations of a marriage relationship without actually providing for them to get married and as such would be available to conjugal couples only.

**Option 3.1**

8.4.5 The option of civil unions for same-sex relationships as an alternative to same-sex marriage is proposed in view of the fact that the Constitutional Court has not as yet intimated that same-sex marriage is necessarily the manner in which the equal protection of these relationships should be achieved.

8.4.6 As a hybrid model with aspects of both marriage and registered partnerships integrated into one proposal, it can be dealt with either in the Marriage Act, on its own in a separate Act or in the Registered Partnership Act. Including it in the Marriage Act, however, may create the false impression that civil unions are actually marriages.

8.4.7 A separate Act for civil unions is the preferred option since it will ensure that civil unions are classified as a unique option for same-sex couples. A schedule with the consequential amendments will still be needed.

8.4.8 Legislatures seem to prefer to create such a parallel civil status, calling it a "civil union", rather than to open up the marriage institution itself to same-sex couples. It is

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84 See chap 9 and 10 below.
suggested that to create this kind of parallel structure to marriage, but to call it something else, such as "civil union", would satisfy the need for legal protection of same-sex couples while simultaneously ameliorate its effect on the opponents of same-sex marriage.\textsuperscript{85}

8.4.9 However, registration schemes in lieu of allowing same-sex marriage are seen, by those in favour of same-sex marriage as creating a second-class category of relationships.\textsuperscript{86} As such, this concept has not been equally well received by the proponents of same-sex marriage.\textsuperscript{87} It has been described as a system that represents Apartheid as it was designed to treat one group of citizens in a separate and inferior manner despite identical circumstances.\textsuperscript{88}

8.4.10 Thus, although civil unions for same-sex couples are seen as a step forward,\textsuperscript{89} statements like the following are also made:

Politicians supporting ‘domestic partner benefits as a compromise have in mind only modest handouts – not the whole package’.\textsuperscript{90}

8.4.11 It should, furthermore, be noted that the constitutionality of this option is not guaranteed. Since the tenet of equal treatment is the motivation for permitting same-sex marriage, the creation of a separate but equal status could be regarded as discriminatory. The question may well be asked why a separate institution is necessary if the legal protection provided is the same as that which is available through marriage.\textsuperscript{91}

\textsuperscript{85} Cossman and Ryder for Law Commission Canada, at 127.

\textsuperscript{86} Standing Committee Briefing Law Commission Canada.

\textsuperscript{87} Cossman and Ryder for Law Commission Canada.

\textsuperscript{88} See Bala 2000 CJFL, at 185.

\textsuperscript{89} Equal Marriage for Same-Sex Couples "Quebec Unanimously Passes Civil Union Bill" June 7 2002 available at \url{http://www.samesexmarriage.ca/legal/qc.html} (hereafter referred to as "Quebec Equal Marriage").

\textsuperscript{90} See Demain Partners Task Force. See also the critique by GLAD Civil Marriage, at 15.

\textsuperscript{91} Even if civil unions will be available to both same- and opposite-sex couples, marriage will still only be available to opposite-sex couples, which makes this option susceptible to constitutional challenge.
Option 3.2

8.4.12 Since it is anticipated that there may be opposite-sex couples who would also like to make use of the option of civil unions, a second option that would make the civil union available to opposite- and same-sex couples is included in the proposal as a further alternative - option 3.2.

8.4.13 Whereas option 3.1 (civil unions for same-sex couples only) is meant to replace the need for same-sex marriage,\textsuperscript{92} it is foreseeable that option 3.2 may become available in combination with same-sex marriage. The reason is that there may be same-and opposite-sex couples who would prefer registered civil unions to getting married.

8.4.14 The Nordic states of Denmark,\textsuperscript{93} Sweden, Norway and Iceland and the Netherlands are examples of countries that make use of a registered partnership scheme where

\textsuperscript{92} As such the status quo regarding opposite-sex marriage will be maintained.

\textsuperscript{93} See as an example of the marriage-minus scheme the Danish Registered Partnership Act of 1989. This Act provides the following:

1. Two persons of the same sex may have their partnership registered.

Registration

2.(1) Part 1, sections 12 and 13(l) and clause 1 of section 13(2) of the Danish Marriage (Formation and Dissolution) Act shall apply similarly to the registration of partnerships.

(2) A partnership may only be registered provided both or one of the parties has his permanent residence in Denmark and is of Danish nationality.

(3) The rules governing the procedure of registration of a partnership, including the examination of the conditions for registration, shall be laid down by the Minister of Justice.

Legal Effects

3.(1) Subject to the exceptions of section 4, the registration of a partnership shall have the same legal effects as the contracting of marriage.

(2) The provisions of Danish law pertaining to marriage and spouses shall apply similarly to registered partnership and registered partners.

4.(1) The provisions of the Danish Adoption Act regarding spouses shall not apply to registered partners.

(2) Clause 3 of section 13 and section 15(3) of the Danish Legal Incapacity and Guardianship Act regarding spouses shall not apply to registered partners.

(3) Provisions of Danish law containing special rules pertaining to one of the parties to a marriage determined by the sex of that person shall not apply to registered partners.
registration of the partnership has the same effect as the contracting of marriage. The Netherlands’ registered partnership is available to both same-and opposite-sex couples.

8.4.15 In Quebec the National assembly passed the Act Instituting Civil Unions and Establishing New Rules of Filiation of 2002. This Act amended the Civil Code and a number of other provincial laws to create the new status of civil union partners which is open to same- and opposite-sex couples. The Quebec example, however, differs from that of the Nordic states since the civil union is concluded in terms of the marriage legislation and is regulated thereby.

8.4.16 As such, civil union partners in Quebec have almost all of the same benefits and obligations under provincial laws as married couples do, including the legal relationship between a partner and children of the other partner. The legislation makes it clear, however, that civil unions are not marriages, and retains some legal distinctions between the two institutions.

(4) Provisions of international treaties shall not apply to registered partnership unless the other contracting parties agree to such application.

Dissolution

5.(1) Parts 3, 4 and 5 of the Danish Marriage (Formation and Dissolution) Act and Part 42 of the Danish Administration of Justice Act shall apply similarly to the dissolution of a registered partnership.

(2) Section 46 of the Danish Marriage (Formation and Dissolution) Act shall not apply to the dissolution of a registered partnership.

(3) Irrespective of section 448 c of the Danish Administration of Justice Act a registered partnership may always be dissolved in this country.

The Quebec National Assembly passed the Act in June 2002. See also the discussion of civil unions in Vermont in chap 7.6 above. It is said that these civil unions are really marriage under a different name. See LaViolette for Law Commission Canada, at 3 et seq.

The sources of the information regarding civil unions are Department of Justice of Canada Discussion Paper and Quebec Equal Marriage, op cit.

The legislation insures property rights for both partners in a civil union relationship, as well as life insurance, health, succession, and pensions. It also guarantees the right of a partner to oversee medical care for a spouse when that person is unable to make their own decisions. A civil union can be dissolved by a court judgment, a notarised joint declaration under specified circumstances or upon death of one of the partners. A partner to a civil union cannot get married without terminating the civil union. In the event of a termination of the civil union, the partners will share in the communal assets, including property.

For example, some provisions of the Civil Code relating to separation apply only to married couples.
b) Enabling legislation: option 3.1

8.4.17 The legislation providing for this option will read as follows.98

Definitions

1. In this Act, unless the context otherwise indicates-

"civil union" means the voluntary union of two persons of the same sex concluded in terms of this Act to the exclusion of any other union or registered partnership;

"civil union partner" means a partner in a civil union concluded in terms of this Act;

"Registered Partnerships Act" means the Registered Partnerships Act, 20.. (Act No. … of 20..).

Registration of civil unions

2. (1) A civil union is established through the registration process for registered partnerships provided for in sections 4 to 7 of the Registered Partnerships Act, 20.. (Act No. … of 20..).

(2) A person may only be a partner in one civil union at any given time.

(3) A married person may not register a civil union until his or her subsisting marriage has been dissolved.

(4) A prospective civil union partner who has previously been married or registered as a partner in a registered partnership, must present a certified copy of the divorce order, termination certificate, termination order or death certificate of the former spouse or registered partner, as the case may be, to the registration officer contemplated in the Registered Partnerships Act, 20.. (Act No. … of 20..) as proof that the previous registered partnership or marriage has been terminated.

(5) The registration officer may not proceed with the registration of the civil union unless in possession of the relevant documentation referred to in subsection (4).

(6) A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage.

98 See Annexure C.
Legal consequences of civil unions

3. Except as provided for in section 4, the legal consequences of a marriage shall apply, with such changes as may be required by the context, to a civil union.

Termination of civil unions

4. The process for the termination of registered partnerships prescribed in the Registered Partnerships Act, 20.. (Act No. … of 20..) shall apply, with such changes as may be required by the context, to civil unions.

8.4.18 The Commission would like to hear the views of couples who would be interested in making use of this option. Is a parallel system under a different name acceptable? Views on alternatives are welcomed.

c) Enabling legislation: option 3.2

8.4.19 The legislation providing for this option will read as follows:99

Definitions

1. In this Act, unless the context otherwise indicates-

“civil union” means the voluntary union of two persons concluded in terms of this Act to the exclusion of any other union or registered partnership;

“civil union partner” means a partner in a civil union concluded in terms of this Act;

“Registered Partnerships Act” means the Registered Partnerships Act, 20.. (Act No. … of 20..);

Registration of civil unions

2. (1) A civil union is established through the registration process for registered partnerships provided for in sections 4 to 7 of the Registered Partnerships Act, 20.. (Act No. … of 20..).

(2) A person may only be a partner in one civil union at any given time.

99 See Annexure C.
A married person may not register a civil union until his or her subsisting marriage has been dissolved.

A prospective civil union partner who has previously been married or registered as a partner in a registered partnership, must present a certified copy of the divorce order, termination certificate, termination order or death certificate of the former spouse or registered partner, as the case may be, to the registration officer contemplated in the Registered Partnerships Act, 20.. (Act No. … of 20..) as proof that the previous registered partnership or marriage has been terminated.

The registration officer may not proceed with the registration of the civil union unless in possession of the relevant documentation referred to in subsection (4).

A civil union may only be registered by prospective civil union partners who would, apart from the fact that they may be of the same sex, not be prohibited by law from concluding a marriage.

Legal consequences of civil unions

Except as provided for in section 4, the legal consequences of a marriage shall apply, with such changes as may be required by the context, to a civil union.

Termination of civil unions

The process for the termination of registered partnerships prescribed in the Registered Partnerships Act, 20.. (Act No. … of 20..) shall apply, with such changes as may be required by the context, to civil unions.

The Commission would like to hear the views of couples who would be interested in making use of this option. Should civil unions be available to both same- and opposite-sex couples? Views on alternatives are welcomed. Should partners in unregistered partnerships (see chapter 10 and Annexure E) be prohibited from concluding a civil union with a third party?
CHAPTER 9: MODELS FOR REFORM: REGISTERED DOMESTIC PARTNERSHIPS

9.1 Introduction

9.1.1 The term registered partnership describes the model which allows unmarried partners to register their mutually dependent domestic relationship in order to gain official state and societal recognition.

9.1.2 In this regard "partnership" refers to the unmarried, interdependent and established personal relationship that is the subject of registration models. The term "registration" refers to the fact that it is an "opt-in" scheme requiring partners to identify themselves to the relevant authorities through the prescribed process.¹

9.1.3 The partners are therefore required to take the prescribed steps to commit themselves publicly to their relationship before the relationship will have any legal consequences. The legal consequences of registration as well as a process for termination of the relationship are determined in legislation.

9.1.4 In some instances support for registered partnerships was motivated by the inability of same-sex couples to gain legal recognition of their relationships.² Another interest group is opposite–sex couples who choose not to get married but who do live together in a household that functions in many ways comparable to marriage.

9.1.5 Individuals in non-conjugal but close adult personal relationships make up the third category of partisans of this model of relationship recognition. Parties to these types of relationships feel that their relationship is deserving of legal protection on the basis of their emotional or economic interdependency.³

¹ LaViolette for Law Commission Canada, at 2.
² LaViolette for Law Commission Canada, at 3. See also discussion of civil unions in chap 8 above.
³ A non-conjugal relationship may be between unrelated friends or relatives other than spouses or minor children. There must be a degree of economic interdependence based on shared living expenses and a high level of social and emotional commitment. As such registered partnerships, if not limited to sexual or romantic relationships, is seen as an important opportunity for many to claim certain minimal protections. Ettelbrick 1998 Out/Look, at 12, as referred to by LaViolette for Law Commission Canada, at 17 fn 99. Some regard registered partnerships as pre-eminently a model by which non-conjugal
9.1.6 An increasing number of jurisdictions have enacted (or are considering enacting) registered partnership schemes in order to establish a civil status for close personal relationships whereby the state can recognise and support these relationships as an alternative to marriage.4

9.2 Positive aspects of the registered partnership model

9.2.1 A registered partnership model has the potential to recognise, validate and support same-sex relationships where marriage is not allowed, opposite-sex partners who prefer not to marry and also non-conjugal but close adult personal relationships. Upon registration of the relationship, couples acquire a range of rights and responsibilities which are often similar to marriage.5

9.2.2 The registered partnership model affirms the basic principles and values that ought to guide the regulation of close personal adult relationships. These are equality and respect for diversity on one hand and autonomy and freedom of choice on the other. By their nature, registered partnerships have the qualities of voluntariness, stability, certainty and publicity, which make them comparable to marriage.6

9.2.3 The fact that the existence of the relationship is officially recorded through the registration process is an important characteristic of this model.7 Because of the public

partners or non-cohabiting couples can formalise a relationship of mutual rights and obligations, particularly in relation to third party entitlements. Why should two individuals who wish to undertake mutual obligations be required to have a particular kind of emotional commitment or sexual relationship? Bala 2000 CJFL, at 39 fn 149.

See also the discussion in chap 6 above. Denmark, Norway, Sweden, Iceland passed legislation giving almost all of legal consequences of opposite-sex marriage to same-sex couples who register their relationship. Germany, Belgium, France, Hungary and Portugal and regions of Catalonia, Navarre and Aragon in Spain passed laws extending some of the rights and obligations of marriage. The Swiss government and Czechoslovakia are currently considering introduction of a similar scheme. In the first registration scheme in Canada, the province of Nova Scotia introduced a scheme that is open to both same-sex and opposite-sex couples. There is a growing movement to extend all rights including adoption rights and access to assisted reproductive technology to these relationships. For detailed discussions see the Cossman & Ryder for Law Commission Canada, at B.1.9(a) and Demczuk Lesbian Couples, at chap 5.

For the first two categories, the entitlements are not as important as the concomitant symbolism of societal recognition that comes with registered partnerships. The fact that the state provides a forum whereby people could make a public commitment to their relationship is of fundamental value in itself.

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This feature is absent in the ascription model. See chap 10 below.
record element, registered partnerships can regulate rights between partners, entitlements and obligations involving third parties and, in some cases, parenting rights.\textsuperscript{8}

9.2.4 The termination process provided for in the registered partnership model ensures an orderly and equitable resolution of the parties' affairs.

9.2.5 Couples, whether same- or opposite-sex, with moral objections against marriage as an institution with gender and patriarchal connotations, prefer the registered partnership model, if available.\textsuperscript{9}

9.2.6 Since a registered partnership model provides certainty about the legal status of the close personal relationship from the date of registration, there is generally no reason to subject the relationship to scrutiny. Under a model where relational status is ascribed to certain relationships over a period of time, it is often necessary to examine individual relationships closely to decide whether they fit the definition of a committed relationship.\textsuperscript{10}

9.2.7 Registered partnerships are seen by many as an acceptable alternative to marriage.\textsuperscript{11} Many gay and lesbian activists are happy to regard registered partnerships as a stepping-stone to marriage, seeing it as an acceptable compromise when viewed as a political strategy.\textsuperscript{12}

9.3 Negative aspects of the registered partnership model

9.3.1 A registered partnership model does not pose a solution to the vulnerable partner in an intimidating relationship. Such an individual will no more be able to convince the stronger

\textsuperscript{8} Domestic partnership agreements between the partners cannot obligate the state or other third parties.

\textsuperscript{9} Bala 2000 \textit{CJFL}, at 185.

\textsuperscript{10} See discussion of the unregistered model in chap 10 below.

\textsuperscript{11} In Australia and New Zealand surveys showed that gay and lesbian couples preferred registered partnerships to same-sex marriage. LaViolette for Law Commission Canada, at 15 refers to a survey by Sarantakos which showed that 80% of lesbian and gay couples indicated that marriage was not their preferred option with the majority choosing registered partnerships as the best form of partnership recognition. In this survey, many of the Australians and New Zealanders characterised marriage as antiquated and not a step to liberation but to subjugation. Sarantakos 1999 \textit{ALJ}, at 79. See also Millbank & Sant 2000 \textit{SLR}, at 185 and fn 28.

\textsuperscript{12} LaViolette for Law Commission Canada, at 17.
partner to register the relationship than he or she would be able to convince him or her to get married or to enter into a cohabitation agreement.\textsuperscript{13}

9.3.2 In a homophobic society, gays and lesbians are often reluctant to commit publicly to their relationship and would therefore prefer a model where the legal consequences are ascribed to their relationship.\textsuperscript{14}

9.3.3 Gays and lesbians who are keen on extending marriage to same-sex couples object to the registered partnership model as creating yet another (inferior) category of relationships.\textsuperscript{15} Registered partnerships may be seen as distracting from the goal of making same-sex marriage available to gay and lesbian couples. According to this view, anything short of marriage is discrimination.\textsuperscript{16}

9.4 Different versions of the registered partnership model\textsuperscript{17}

9.4.1 There are various versions of registered partnership models. The differences between these versions mainly relate to eligibility requirements and the levels of benefits and obligations incurred by a couple through the registration process. See also the discussion of civil unions in chapter 8 above.

9.4.2 In order to categorise the various versions of registered partnership models, marriage can be used as the measure.\textsuperscript{18} This means that marriage is taken as the model offering the most extensive rights and obligations to couples while at the opposite end, non-married partners have no rights or obligations at all. With these two extremes as reference points, registered partnerships can be divided into two main categories, namely the \textit{marriage-minus} scheme and the \textit{blank-slate-plus} scheme.

\textsuperscript{13} See in general the discussion on the autonomy of the parties in chap 7 above.

\textsuperscript{14} Millbank & Sant 2000 \textit{SLR}, at 199.

\textsuperscript{15} LaViolette for Law Commission Canada, at 21 and see also Millbank & Sant 2000 \textit{SLR}, at 197.

\textsuperscript{16} For a discussion of this point and the various angles to it, see LaViolette for Law Commission Canada, at 13 \textit{et seq}.

\textsuperscript{17} Unless otherwise indicated the source for this discussion is LaViolette for Law Commission Canada, \textit{ibid}.

\textsuperscript{18} Objections can be proffered against this modus operandi as it sets opposite-sex marriage as the norm.
a) **Marriage-minus-scheme**

9.4.3 The marriage-minus scheme offers quasi-marital effects, but falls short of marriage in that it excludes a small number of rights and responsibilities conferred on married couples. These registered partnerships reproduce marriage both functionally and socially.\(^{19}\)

9.4.4 The Nordic states of Denmark,\(^{20}\) Sweden, Norway and Iceland, and also the Netherlands and Vermont make use of this scheme. These registered partnerships come

\(^{19}\) Brumby *Geo J Int & Comp L*, at 168, referred to by LaViolette for Law Commission Canada, at 5.

\(^{20}\) See as an example of the marriage-minus scheme the Danish Registered Partnership Act, 1989 (Act No. 373 of 1989). This act provides the following:

1. Two persons of the same sex may have their partnership registered.

Registration

2.(1) Part 1, sections 12 and 13(i) and clause 1 of section 13(2) of the Danish Marriage (Formation and Dissolution) Act shall apply similarly to the registration of partnerships.

(2) A partnership may only be registered provided both or one of the parties has his permanent residence in Denmark and is of Danish nationality.

(3) The rules governing the procedure of registration of a partnership, including the examination of the conditions for registration, shall be laid down by the Minister of Justice.

Legal Effects

3.(1) Subject to the exceptions of section 4, the registration of a partnership shall have the same legal effects as the contracting of marriage.

(2) The provisions of Danish law pertaining to marriage and spouses shall apply similarly to registered partnership and registered partners.

4.(1) The provisions of the Danish Adoption Act regarding spouses shall not apply to registered partners.

(2) Clause 3 of section 13 and section 15(3) of the Danish Legal Incapacity and Guardianship Act regarding spouses shall not apply to registered partners.

(3) Provisions of Danish law containing special rules pertaining to one of the parties to a marriage determined by the sex of that person shall not apply to registered partners.

(4) Provisions of international treaties shall not apply to registered partnership unless the other contracting parties agree to such application.

Dissolution
close to mirroring the marriage institution by offering marriage-like formalities and consequences. In its most comprehensive form, this version of registered partnerships is used as parallel to marriage for same-sex couples.21

9.4.5 In some of these jurisdictions the differences between marriage and registered partnerships are relatively minor, or may relate to matters outside the jurisdiction’s legislative powers.22 In other cases the differences are, although not considerable, of specific social significance in that they relate to rights regarding children such as custody, adoption and medically assisted procreation.

9.4.6 With the exception of the Netherlands, all marriage-minus models exclude opposite-sex couples. These schemes are mostly aimed at regulating same-sex relationships.

9.4.7 Since these schemes are intended for individuals in conjugal relationships, they also exclude relatives from registering their interdependent close relationships.23

9.4.8 Some registered partnerships are easier to dissolve than are others, for example in the Netherlands a registered partnership can be dissolved by mutual agreement and registration of a declaration stating that the partners wish to end the relationship. Others may prescribe a court procedure or period of separation similar to marriage.24

5.(1) Parts 3, 4 and 5 of the Danish Marriage (Formation and Dissolution) Act and Part 42 of the Danish Administration of Justice Act shall apply similarly to the dissolution of a registered partnership.

5.(2) Section 46 of the Danish Marriage (Formation and Dissolution) Act shall not apply to the dissolution of a registered partnership.

5.(3) Irrespective of section 448 c of the Danish Administration of Justice Act a registered partnership may always be dissolved in this country.

21 See also the discussion of civil unions in chap 8 above.

22 All these marriage-like registered partnerships have been enacted by jurisdictions with constitutional power to regulate marriage.

23 Close relatives in the ascending or descending line, or siblings.

24 See in this regard the discussion of civil unions in Vermont in chap 7 above.
b) **Blank-slate-plus scheme**

9.4.9 The blank-slate-plus scheme consists of initiatives designed to grant specific enumerated rights and obligations to two individuals in a relationship, without attempting to parallel marriage laws. These registered partnerships add rights and obligations onto what was previously a blank slate. In some cases the rights and obligations may be very modest.

9.4.10 This method is used in France, Belgium, Germany, Hawaii, two provinces of Spain and Nova Scotia.\(^{25}\) Although the detail of the schemes is quite diverse in these countries, the similarities in the basics are significant.

9.4.11 Since the main aim of the blank-slate-model is not to provide same-sex couples with marriage-like recognition, the focus shifts to matters that may be of general and practical importance to people in a variety of relationships. Consequently a status that is intermediary between marriage and ad hoc recognition is established. As such it "provide[s] an entry point for official state and societal recognition"\(^{26}\) to interdependent adult relationships.

9.4.12 In many cases, the motivation to extend entitlements stems from anti-discrimination policies. For instance, many private employers concluded that to deny family benefits to gay and lesbian employees who were similarly situated to married heterosexual employees was in fact a violation of their own anti-discrimination employment policy relating to sexual orientation.

9.4.13 The focus is on the creation of entitlements for non-married couples to rights and benefits offered by third parties such as employment and health benefits, hospital and prison visitation privileges and tenancy rights, but only after public commitment.\(^{27}\)

9.4.14 The format of the blank-slate-plus version of the registration model tends to be longer and more detailed as it is not desirable merely to cross-refer to stipulations in other legislation concerning marriage.

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\(^{25}\) These models have also been established on municipal levels and by private employees where registration may be required together with some evidentiary support of eligibility requirements.

\(^{26}\) Juel *BCTWL Journal*, at 319, as referred to by LaViolette for Law Commission Canada, at 9 fn 22.

\(^{27}\) Registered partnerships have been regulated by legislative bodies at the local, regional or national level while others are the product of the private sector.
9.4.15 The marriage-minus model and the blank-slate-plus model of registered partnerships are quite diverse. The former is mostly exclusive to same-sex couples whereas the latter is often open to all without regard to conjugality, sex, or family ties.\textsuperscript{28} Aiming at different objectives, the levels of benefits provided and obligations incurred differ significantly between the schemes.

9.5 Enabling legislation

9.5.1 For purposes of our discussion the term "registered partnership" will refer to the blank-slate-plus model of registered partnerships.

9.5.2 The Commission proposes the enactment of a Registered Partnerships Act. The complete Bill proposed by the Commission in this regard can be found in Annexure D. The relevant clauses are quoted below.\textsuperscript{29}

9.5.3 The purpose of this registration model proposal is to recognise, validate and support committed, mutually supportive conjugal relationships between unmarried individuals. By registering their relationship, individuals make an official record of their partnerships and in return they receive a number of entitlements and obligations. The legislation regulates rights between partners, as well as entitlements and obligations involving third parties.

9.5.4 The design of the proposed registered partnership is based on the premise that both same- and opposite-sex couples are also permitted to marry or, alternatively, that same-sex couples are awarded marriage-like protection under a civil union.\textsuperscript{30}

\textsuperscript{28} In Belgium, Hawaii and New York registration is open to all. In France the PACS excludes people who are siblings or lineal descendants, but no restriction is placed on the sex of the couple. In Nova Scotia, Catalonia and Aragon any two persons who live in a conjugal relationship can register, regardless of their sex. In Germany, Hamburg and for a substantial number of private employers in the USA, registration programs are limited to same-sex couples living in conjugal relationships.

\textsuperscript{29} Where the provisions originated in other legislation, the references will be indicated in footnotes. The definitions relevant to the quoted clauses are not quoted here, but can be seen in Annexure D. Consequential amendments are not shown but will be considered after approval of the various models for reform.

\textsuperscript{30} See the discussion of marriage-minus and blank-slate-plus models in par 9.4 above. The availability, or not, of same-sex marriage (or civil unions) is determinative of the contents of a registered partnership model - if same-sex couples are permitted to marry or conclude a civil union, the rights and obligations created by a registered partnership model need not be particularly marriage like in order to make up for this lacunae in the law. The model would be designed on the blank-slate-model, \textit{ie} from the starting
9.5.5 The enabling legislation stipulates the registration process, the availability of registered partnerships, the legal consequences and a process for termination of the registered partnership.

a) Registration

9.5.6 Since a registered partnership is an "opt-in" model, those couples who desire the legal consequences to apply to them would be required to register their status. The registration process will take place before a registration officer designated by the Minister.

9.5.7 Both parties should consent to the registering of the partnership and consent obtained by force, duress or fraud will be invalid and result in rendering the registration void ab initio. Both parties should therefore be present at the actual registration and there should be a witness present besides the official performing the registration.

9.5.8 The legislation providing for registration officers, place of registration and the registration procedure would read as follows:

Registration officers

5. (1) The Minister, and any officer in the public service authorized thereto by him or her, may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his or her office and so long as he or she holds such office, a registration officer, either generally or for any specified class of persons or country or area.

(2) Every designation of a person as a registration officer shall be by written instrument and the date as from which it shall have effect and any limitation to which it is subject shall be specified in such instrument.

point of protection that partners in committed relationships, who do not wish to get married, would desire from such a system. The category of people who are eligible for the rights and obligations also impacts on the levels of rights and obligations. If, however, same-sex couples may not marry or conclude a civil union, the registered partnership model need to be marriage like and would have to be designed on the marriage-minus model, namely with the view to allow registered partners the maximum rights and obligations of opposite-sex married couples, short of allowing them to actually get married.

Place of registration

6. The registration process must be conducted on the premises used for such purposes by the registration officer.

Registration of the partnership

7. (1) The registration officer shall put the following questions to each of the prospective registered partners separately, to which each shall reply in the affirmative before the registration may proceed:

"Do you A., B. declare that you voluntary want to register your relationship as a registered partnership in terms of the Registered Partnerships Act, 20.. (Act No. ... of 20..)?

Do you A. B. declare that you are aware of the legal rights and obligations that follow this registration?

Do you A. B. declare that you are aware of the process that must be followed to effect the termination of a registered partnership?"

(2) The prospective registered partners must individually and in writing declare their willingness to enter into the registered partnership with one another by signing the prescribed document in the presence of two witnesses.

(3) The registration officer and the two witnesses must sign the prescribed document to certify that the declaration referred to in subsection (2) was made in their presence.

(4) The registration officer must issue the partners to the registered partnership with a registration certificate stating that they have entered into a registered partnership.

(5) This certificate is prima facie proof that a valid registered partnership exists between the parties referred to in the certificate.

(6) Each registration officer shall keep a record of all registered partnerships conducted by him.

(7) The registration officer shall forthwith transmit the registered partnership register and records concerned to the officer in the public service with the delegated responsibility for the population register in his district of responsibility.

(8) Upon receipt of the said register the delegatee shall cause the particulars of the registered partnership concerned to be included in the population register in accordance with the provisions of section 8(e) of the Identification Act, 1997 (Act No. 68 of 1997)33.

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33 S 8(e) of the Identification Act, 1997 (Act No. 68 of 1997) to be amended to include also registered partnership statistics.
b) Availability

9.5.9 In principle there is no reason to restrict a registration scheme to conjugal couples or same-sex couples.\(^{34}\)

9.5.10 However, a registered partnership, as proposed, is not available to non-conjugal partners. It is submitted that the remedies available under contract law and other legislation,\(^{35}\) together with the fact that they are included in the unregistered relationships proposal,\(^{36}\) provide adequate protection for partners in such relationships. The Commission would, however, consider any inputs in this regard.

9.5.11 A contentious question is whether a valid marriage may be transformed into a registered partnership. In the Netherlands this is permitted. Since termination of a registered partnership is less cumbersome than getting a divorce, this element of the Dutch model may be criticised for the fact that it is susceptible to abuse. It is thus feared that couples may use the option to transform their marriage into a registered partnership in order to escape the divorce process. It is proposed that in order to avoid such abuse, that option not be included in the South African version.

9.5.12 The registered partnership is available to both same- and opposite sex couples.\(^{37}\) It is possible that there are many same- and opposite-sex couples who do not wish to get married, either for religious, political or philosophical reasons. Thus, for constitutional

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\(^{34}\) Several writers suggest that marriage marginalises people who are outside that unit and that the opening up of registered partnerships to more than just gays and lesbians moves society further along the road of recognising a broader definition of family. “Part of our struggle is to fight for a broader definition of the family. Domestic partners should not have to be gay or lesbian. They should not have to be having sex. They can be two adults sharing a home and sharing commitment, responsible to each other”. Findlen 1995 Ms. Magazine, at 87 fn 49, as referred to by LaViolette for Law Commission Canada, at 25 fn 101.

\(^{35}\) For example, a member of the pension fund can nominate anybody as beneficiary. See the definition of beneficiary in Annexure 1 to the Government Employees Pension Law, 1996 (Proclamation 21 of 1996): “beneficiary” means "the dependant or nominee of a member or pensioner”.

\(^{36}\) See option 2 in chap 10 below.

\(^{37}\) In the Netherlands both same- and opposite-sex couples are permitted to marry or to register their relationships. Provision was made for a re-evaluation of this dual option after five years. In view of the high premium placed on providing the public with various options to choose a dispensation that suits their needs, indications are that both these options will remain in place.
equality purposes, both same- and opposite-sex couples should be permitted to elect not to marry but to register their relationship as an alternative to marriage in order to receive some legal recognition.

9.5.13 Since the registered partnership will be used by couples in a conjugal relationship, there is a prohibition on the registration of relationships between siblings and people who are relatives in the descending or ascending line. For the same reason it is submitted that the requirements of marriage relating to age\(^{38}\) be applied to the registered partnership model.

9.5.14 The question may be posed whether it should be permissible to have more than one domestic partner at a time, either as a result of a communal living arrangement, a

\(^{38}\) The amendments proposed in clause 17 of the proposed Bill in the South African Law Reform Commission Review Marriage Act are aimed at bringing this aspect in line with the Constitution of 1996 and these amendments are thus supported:

**Amendment of section 26 of Act 25 of 1961**

17. Section 26 is amended by-

(a) the substitution of the following subsection for subsection (1):

(1) No boy or girl under the age of 18 years [and no girl under the age of 15 years] shall be capable of contracting a valid marriage except with the written permission of the Minister [or any officer in the public service authorized thereto by him,] which he or she may grant in any particular case in which he or she considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.

(b) by the substitution of the following subsection for subsection (2):

(2) If any person referred to in subsection (1) who was not capable of contracting a valid marriage without the written permission of the Minister [or any officer in the public service authorized thereto by him or her,] in terms of this Act or a prior law, contracted a marriage without such permission and the Minister [or such officer,] as the case may be, considers such marriage to be desirable and in the interests of the parties in question, he or she may, provided such marriage was in every other respect [solemnized] conducted in accordance with the provisions of this Act, or, as the case may be, any prior law, and there was no other lawful impediment thereto, direct in writing that it shall for all purposes be a valid marriage.

(c) by the substitution of the following subsection for subsection (3):

(3) If the Minister [or any officer in the public service authorized thereto by him] so directs it shall be deemed that he or she granted written permission to such marriage prior to the [solemnization] conducting thereof.
polygamous relationship or some other form of a serial relationship? In the event of a “polygamous registered partnership”, should all the partners be equally entitled to the rights and subjected to the obligations?

9.5.15 The Commission's opinion is that this option should only be available to people who are not involved in a formal status-creating relationship like marriage or another registered partnership. Due to the informal nature of a de facto partnership (see chapter 10 and Annexure E) it is not clear if and how partners to such a partnership should be prohibited from registering a partnership with a third party. See also the discussion of polygamous relationships in chapter 10 below.

9.5.16 Keeping in mind that there is no similar requirement for marriage, the prospective registered couple should not be required actually to live together (cohabit) after registration.

9.5.17 It is possible that a couple can live together in the same household in a conjugal relationship without necessarily residing together permanently. One partner may, for example, work in another town and reside there in a semi-permanent residence while regarding the residence where the other partner resides as their communal home for all practical purposes. This should not be a reason to exclude such a couple from registering their relationship. Therefore, it is submitted that the couple need not necessarily cohabit or intend to cohabit before being permitted to register their relationship.

9.5.18 In National Coalition for Gay and Lesbian Equality and Others v The Minister of Home Affairs and Others section 25(5) of the Aliens Control Act, 1991 was ruled unconstitutional. Following this judgment of the Constitutional Court foreign same-sex

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39 Bala 2000 CJFL, at 189-190. Practical and social considerations suggest that a person should only be able to have one “legal partner” or “spouse” at a time. See also the discussion on bigamy in chap 7 above.

40 See, however, the discussion of polygamous unregistered partnerships in chap 10 below.

41 According to the Netherlands registered partnership model, couples are obliged to cohabit, but not in Denmark and Sweden.

42 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 CC.

43 Act No. 96 of 1991. The relevant section provided for the authorisation of the issue of an immigration permit to the spouse or dependant child of a person who is permanently and lawfully resident in the RSA but did not include the foreign same-sex partner of a permanent and lawful resident of the Republic.
partners and dependants of lawful residents or citizens of South Africa who are in relationships other than marriage now have the right to be issued an immigration permit. The relationships referred to by the court would include registered partnerships as proposed here. Therefore, a foreign registered same-sex partner of a lawful resident or citizen of South Africa would have the right to be issued an immigration permit under the Aliens Control Act, 1991. The legal position regarding the granting of immigration permits to foreign partners of unmarried opposite-sex couples is uncertain as the judgment did not include opposite-sex couples.

9.5.19 A related matter is the possibility that, without any requirement of citizenship or naturalisation of at least one of the partners, a situation may develop whereby foreigners from countries where no legal recognition other than marriage is available, may "abuse" the availability of registered partnerships in South Africa. This will have the result that couples come to South Africa for purposes of registering their relationship without the intention of acquiring citizenship. Although the registration may be of no legal consequence to them in their country of origin, it may have symbolic importance to the couple as an opportunity to commit publicly to the relationship.44 The question whether this possibility of "abuse" justifies the requirement of citizenship for registered partnerships will be discussed at the workshops following the publication of the discussion paper.

9.5.20 Since marriage creates a more comprehensive status than registered partnership, partners who are registered in a partnership should at any time be free to marry each other.45

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44  This may have the result that South Africa becomes known as the second Lotusland (British Columbia) or haven (Vermont) for same-sex couples to have their relationships formalised. See with regard to the international validity and legal consequences of civil unions under Vermont law: "US gays tie knot in midnight 'marriage" Reuters July 2 2000:

But those out-of-state couples who obtain civil Union licenses will face legal struggles in their home-states before their status is recognised, legal experts said. 'It is a principle of international law that as a general rule if a marriage is valid where it is celebrated, it is valid everywhere else,' explained Barbara Cox, a professor at the California Western School of Law and author of a number of articles on same-sex marriage. The challenge will come, she said, when the couple from California or New York or Oklahoma gets a Vermont civil Union license, returns home and demands the same rights, such as survivorship, or hospital visits, that are automatically granted to married couples.

45  The system in the Netherlands whereby couple in a registered partnership must first terminate their relationship before they will be allowed to marry has been criticised. Van Der Burght 2000 De Jure, at 76.
9.5.21 The legislation providing for the availability of registered partnerships would read as follows:

**Partners in a registered partnership**

4. (1) A person may only be a partner in one registered partnership at any given time.

(2) A married person or a person in a civil union may not register a registered partnership until his subsisting marriage or civil union has been dissolved.

(3) A prospective registered partner who has previously been married or registered as a partner in a registered partnership or civil union, must present a certified copy of the divorce order, termination certificate, termination order or death certificate of the former spouse or registered partner to the registration officer as proof that the previous registered partnership or marriage has been terminated.

(4) The registration officer may not proceed with the registration process unless presented with a certified copy of the document in contemplated in subsection (3).

(5) Partners in a registered partnership may at any time marry each other or enter into a civil union with each other.

(6) A partnership may only be registered-

(a) if at least one of the prospective registered partnership is a South African citizen or has a certificate of naturalisation in respect of South Africa; and

(b) by prospective registered partners who would, apart from the fact that they are of the same sex,\(^{46}\) not be prohibited by law from concluding a marriage.

**c) Legal consequences\(^{47}\)**

9.5.22 If same-sex relationships are recognised either under the same-sex marriage model or a civil union model, the ideal is to provide in the registered partnership model for legal consequences that differ from the marriage regime. For this reason the property dispensation proposed in this registered partnership model is the opposite of that which

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\(^{46}\) This wording is only relevant if the marriage option for same-sex couples is rejected.

\(^{47}\) Some examples of legal consequences found in international versions of registered partnerships are the following: The obligation for reciprocal maintenance during the existence of the relationship in the Netherlands but the opposite is true in Sweden. Partners retain the power to administer the property that he or she brought into the partnership in Sweden. Household expenses have to be shared in the Netherlands. Succession rights under the Norwegian Registered Partnerships Act, 1993 (Act No. 40 1993). Partners can refuse to testify against each other in a criminal trial in the Netherlands. See also in general chap 6 above.
applies to a married couple. Provision is furthermore made for the couple to make additional arrangements.

9.5.23 The matter of international recognition of these registered partnerships is a factor that must be kept in mind by the legislature as well as those couples intending to make use of this model. Registered partners may find that they have no reciprocal rights and obligations when they travel overseas or emigrate.\textsuperscript{48}

9.5.24 When designing a registered partnership scheme, it must not in itself be seen as the only solution of the legal recognition of unmarried relationships. Even if the number of people making use of it is not significant, the model may contribute to the solution of the problem of relationship recognition in combination with other models of relationship recognition.\textsuperscript{49}

9.5.25 Despite the fact that the proposal is not aimed at recreating marriage, there are definite similarities between the legal consequences of marriage and registered partnerships.

9.5.26 The legislation providing for the legal consequences of registered partnerships would read as follows:

\textbf{Duty of support}

8. (1) Registered partners shall have a reciprocal duty of support in accordance with each partner's financial means.

(2) The registered partners are jointly liable for debts incurred for household expenses.

(3) Each registered partner may enforce the joint responsibility established in this section against the other registered partner through legal proceedings in a court of law.

(4) A third party to whom debts are owed by either or both registered partners relating to household expenses incurred may enforce the joint liability against either or both partners through legal proceedings in a court of law.

\textsuperscript{48} It is predicted that international recognition of registration schemes may come about sooner than international recognition of same-sex marriage. Particularly in view of the fact that the recognition of foreign marriages are in itself controversial and complicated. LaViolette for Law Commission Canada, at 36.

\textsuperscript{49} LaViolette for Law Commission Canada, \textit{ibid}. 
Accrual system

9. Except as provided for in section 10(1)(b) and (c), a registered partnership under this Act will be subject to the accrual system.

Pre-registration agreements

10. (1) Prospective registered partners may conclude a pre-registration agreement whereby-
(a) community of property or community of profit and loss is made applicable to the registered partnership;
(b) the accrual system is excluded from the registered partnership; or
(c) certain property is excluded from the accrual system.

(2) A pre-registration agreement must be-
(a) signed by both prospective registered partners;
(b) attested to by a notary;
(c) handed in to the registration officer before or on the date of registration of the registered partnership; and
(d) attached to the registration certificate of the registered partnership to serve as prima facie evidence of the proprietary status of the registered partnership.

Determination of accrual

11. (1) In the determination of the accrual of the estate of a registered partner-
(a) any amount which accrued to that estate by way of damages, other than damages for patrimonial loss, is not taken into account;
(b) an asset which has been excluded from the accrual system in terms of a pre-registration agreement contract by the registered partners, as well as any other asset acquired by virtue of the possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;
(c) the net value of that estate at the commencement of the registered partnership is calculated with due allowance for any difference which may exist in the value of money at the commencement and termination of his registered partnership, and for that purpose the weighted average of the consumer price index as published from time to time in the Gazette serves as prima facie proof of any change in the value of money.

(2) The accrual of the estate of a deceased registered partner is determined before effect is given to any testamentary disposition, donation mortis causa or bequest out of that estate in terms of the law of intestate succession.

Exclusions from accrual

12. (1) An inheritance, a legacy or a donation which accrues to a registered partner during the subsistence of the registered partnership, as well as any other asset acquired by virtue of the possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of such registered partner's estate, except in so far as –
   (a) the registered partners has otherwise agreed in a pre-registration agreement; or
   (b) the testator or donor has otherwise stipulated.

(2) In the determination of the accrual of the estate of a registered partner a donation between registered partners, other than a donation mortis causa, is not taken into account either as part of the estate of the donor or as part of the estate of the donee.

Declaration of accrual

13. (1) Where the registered partnership will be subject to the accrual system, the prospective partners to the registered partnership must declare the net values of their respective estates by making a statement to that effect on the prescribed form at the registration officer before or on the date of registration of the partnership.

(2) The registration officer shall attach this statement to the registration certificate to be part thereof and this statement serves as prima facie proof of the net value of the estate of the registered partner concerned at the commencement of the registered partnership.

(3) The net value of the estate of a registered partner at the commencement of the registered partnership is deemed to be nil if-
   (a) the liabilities of that partner exceed his assets at such commencement;
   (b) that value was not declared in a statement contemplated in subsection (1) and the contrary is not proved.

Division of accrual

14. (1) Under the accrual system, at the termination of a registered partnership, the registered partner whose estate shows no accrual or a smaller accrual than the estate of the other registered partner, or his or her estate if he or she is deceased, acquires a claim against the other registered partner, or his or her estate if he or she is deceased, for an amount equal to half of the difference between the accrual of the respective estates of the registered partners.

(2) Subject to the provisions of section 16, a claim in terms of subsection (1) arises at the termination of the registered partnership.

(3) The right of a registered partner to share in the accrual of the estate of the other registered partner in terms of this Act is not transferable or liable to attachment during the subsistence of the registered partnership, and does not form part of the insolvent estate of a registered partner.
Furnishing of particulars of accrual

15. When it is necessary to determine the accrual of the estate of a registered partner or a deceased registered partner, that registered partner or the executor of the estate of the deceased registered partner, as the case may be, shall at the request of the other registered partner or the executor of the estate of the other registered partner, as the case may be, within a reasonable time, furnish full particulars of the value of that estate.

Court orders regarding division of accrual

16. A court may, on the application of a registered partner whose registered partnership is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of that other partner at the termination of the registered partnership is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other registered partner, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Part or on such other basis as the court may deem just and equitable.

Accrual claims

17. A court may, on the application of a registered partner against whom an accrual claim lies, order that satisfaction of the claim be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.

Family home

18. (1) Both registered partners are entitled to occupy the family home during the existence of the registered partnership, irrespective of which of the registered partners owns or rents the property.

(2) The registered partner who owns or rents the family home has no right to eject the other registered partner from the family home during the existence of the registered partnership without providing him or her with suitable alternative accommodation.

(3) Unless a registered partner who does not own or rent the family home obtains another legal right to occupy the family home, the right of occupation provided for in section 18 ends upon termination of the registered partnership.

(4) If, on termination of the registered partnership it is necessary to transfer ownership of the family home from one registered partner to the other registered partner following a mutual agreement, court order, will or right to intestate succession to that effect, that registered partner will be deemed to be a "spouse" as meant in the Transfer Duty Act, 1949 (Act No. 40 of 1949).

9.5.27 Besides the property dispensation, provision is made for intestate succession rights, medical decisions, delictual claims and the right to artificial insemination as additional
legal consequences of a registered partnership.\textsuperscript{51} Although the legal consequences in the proposed model are quite comprehensive and may seem marriage-like, these additional benefits should be kept to a minimum, to prevent the model from becoming a duplicate of marriage. The benefits and rights are principally included in the proposal to show what these other benefits would look like if included in the registered partnership model. The final design will be decided upon after consideration of the inputs of people who intend to make use of this model.

9.5.28 If the registered partnership proposal is accepted, the final wording of the clause regarding intestate succession will be formulated in accordance with the amendments to the Intestate Succession Act, 1987\textsuperscript{52}, Maintenance of Surviving Spouses Act, 1990\textsuperscript{53} and the Estate Duty Act, 1955\textsuperscript{54} following the judgment in the (at this stage) unreported case of Daniels v Campbell NO and Others.\textsuperscript{55}

9.5.29 In view of the fact that the definition of "dependant" in the Medical Schemes Act, 1998\textsuperscript{56} is wide enough to include partners in registered partnerships, it is submitted that it is not necessary to provide for medical benefits for registered partners in the proposed Registered Partnerships Act. When the final Bill is prepared the status quo will be evaluated.

9.5.30 The legislation providing for these additional legal consequences of registered partnerships would read as follows:

\[\text{\textsuperscript{51}}\text{ These provisions are in line with ad hoc legislative amendments or court decisions regarding the rights and obligations of unmarried relationships. See in this regard chap 4 above.}\]

\[\text{\textsuperscript{52}}\text{ Act No. 81 of 1987.}\]

\[\text{\textsuperscript{53}}\text{ Act No. 27 of 1990.}\]

\[\text{\textsuperscript{54}}\text{ Act No. 45 of 1955.}\]

\[\text{\textsuperscript{55}}\text{ Case NO 1646/01 in the High Court of South Africa, Cape of Good Hope Provincial Division.}\]

\[\text{\textsuperscript{56}}\text{ Act No. 131 of 1998. The current definition in the Medical Schemes Act of 1988 provides as follows:}\]

"dependant" means-

(a) the spouse or partner, dependent children or other members of the member's immediate family in respect of whom the member is liable for family care and support; or

(b) any other person who, under the rules of a medical scheme, is recognised as a dependant of a member;
Right to succession

19. The Intestate Succession Act, 1987 (Act No. 81 of 1987) applies with the changes required by the context to registered partnerships and for purposes of the Intestate Succession Act, 1987 (Act No. 81 of 1987) a partner in a registered partnership is deemed to be a "spouse" as meant in that Act.

Medical decisions

20. For the purposes of medical matters, registered partners are deemed to be "spouses" in a legally valid marriage and are also entitled to access to each other's medical records as if they were legally married.

Delictual claims

21. (1) For the purpose of claiming damages in a delictual claim, registered partners are deemed to be "spouses" in a legally valid marriage.

(2) A registered partner is not excluded from instituting a delictual claim for damages based on the wrongful death of the other partner merely on the ground that the partners have not been legally married.

(3) A registered partner is a dependant for purposes of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993).

Artificial insemination

22. Registered partners are not prohibited from procreating through artificial insemination merely on the ground that they are not legally married.

Registered partners not compellable to disclose communications between them

23. (1) A registered partner may not in civil or criminal proceedings be compelled to disclose any communication made to him by the other registered partner during the registered partnership.

(2) Subsection (1) applies to a communication made during the subsistence of a registered partnership or a putative registered partnership which has been terminated or annulled by a competent court.

Evidence of accused and registered partner on behalf of accused\textsuperscript{58}

24. The registered partner of an accused person is not a compellable witness where a co-accused calls that registered partner as a witness for the defence.

9.5.31 It is submitted that the rights and obligations of parties to a partnership with respect to their biological child need not be addressed in this legislation as it is covered by the common law and legislation like the Natural Fathers of Children Born out of Wedlock Act, 1997.\textsuperscript{59} However, it is necessary to create a presumption that the male partner in an opposite-sex registered partnership is deemed to be the biological father of a child born in that partnership. Once the biological link between the male partner and the child is established, the legal provisions regulating his rights and obligations become applicable.

9.5.32 In addition, the position of a partner regarding a biological child of the other partner needs to be addressed. In this regard, the proposed legislation refers to the Children's Bill proposed in the South African Law Reform Commission's Report on the Review of the Child Care Act.\textsuperscript{60} If the Commission’s proposals on registered partnerships are accepted, the status quo of the Children’s Bill will have to be determined when the final legislation is drafted. If that Bill has not been accepted by Parliament by the time the final Registered Partnerships Act is drafted, substantive provisions with a similar content will be incorporated in the legislation on registered partnerships.

\textsuperscript{58} Criminal Procedure Act, 1977 (Act No. 51 of 1977).

\textsuperscript{59} Act No. 86 of 1997.

\textsuperscript{60} SALRC Review Child Care Act. The relevant parts of clause 35 of the Children’s Bill reads as follows:

Assignment of parental responsibilities and rights by orders of court

35. (1) Any person having an interest in the care, well-being or development of a child may apply to a court for an order assigning to the applicant full or any specific parental responsibilities and rights in respect of the child.

(2) When considering an application the court must take into account –

(a) the relationship between the applicant and the child, and any other relevant person and the child;

(b) the degree of commitment that the applicant has shown towards the child; and

(c) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and

(d) any other fact that should, in the opinion of the court, be taken into account.
9.5.33 The proposal provides for the adoption of children of one of the registered partners by his or her same-sex registered partner. This proposal is in line with the amendment of section 17 of the Child Care Act, 1983\(^{61}\) ordered by the Constitutional Court in its judgment in the case of *Du Toit and Another v Minister for Welfare and Population Development and Others.*\(^ {62}\)

9.5.34 The legislation providing for matters regarding children of either or both partners in registered partnerships would read as follows:

**Children of registered partners of the opposite sex**

25. (1) Where a child is born into a registered partnership between persons of the opposite sex, the male partner in the registered partnership is deemed to be the biological father of that child and has the legal rights and responsibilities towards that child that would have been conferred upon him if he had been married to the biological mother of the child.

(2) Where a child is born into a registered partnership between persons of the opposite sex and the male partner in the partnership is not the biological father of the child, that male partner may apply to the court to be assigned parental rights and responsibilities with regard to that child in terms of the Children’s Act, 20.. (Act No. ... of 20..).

(3) Where a child is born in a registered partnership between persons of the opposite sex and the male partner in the partnership is not the father of the child and that male partner does not wish to apply to court for parental rights in terms of subsection (2) but wishes to adopt the child, he may apply to do so in terms of the Children’s Act, 20.. (Act No. ... of 20..).

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\(^{61}\) Act No. 74 of 1983.

\(^{62}\) 2002 (10) BCLR 1006 (CC). The position regarding adoption will be regulated by clause 258 of the Children’s Bill. The relevant parts of clause 258 reads as follows:

**Persons who may adopt a child**

258. (1) A child may be adopted –

(a) jointly by –

(i) ...

(ii) partners in a permanent domestic conjugal life-partnership; ...

(c) by a married person whose spouse is the parent of the child or by a person whose permanent conjugal life-partner is the parent of the child
Adoption of children by same-sex registered partners.

26. (1) The registered partner in a registered partnership between persons of the same sex who is not the biological parent of the child may apply to the court to be assigned parental rights and responsibilities with regard to that child in terms of the Children’s Act, 20.. (Act No. … of 20..).

(2) The registered partner in a registered partnership between persons of the same sex who is not the biological parent of the child may adopt the biological child of the other partner as provided for in the Children’s Act, 20.. (Act No. … of 20..).

(3) Same-sex couples may apply to adopt a child of which none of them are the biological parents jointly, as provided for in the Children’s Act, 20.. (Act No. … of 20..).

Maintenance duty of biological father

27. Nothing provided for in section 25 and 26 affects the duty of a biological father of a child to contribute towards the maintenance of that child.

Amendment of custody or guardianship orders63

28. (1) An order regarding the custody or guardianship of, or access to, a child, made in terms of this Act, may, upon application by any of the registered partners, at any time be rescinded or varied or, in the case of an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) or (2)(b) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4(1) have been considered by the court.

(2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the registered partners are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.

9.5.35 The ultimate content of the legal consequences of the registered partnership system will be determined by the inputs received by the Commission from the relevant interest groups. This may have the effect that the proposed model becomes either more marriage-like or less.

63 Divorce Act, 1979 (Act No. 70 of 1979).
d) Termination of the registered partnership

9.5.36 How should the legislation provide for the termination of the relationship? Some of the options are: by mutual agreement, subsequent declaration or a deregistration process. The regulation of the dissolution of the registration must ensure that the legal obligations between the former partners and third parties upon relationship breakdown are respected and that the division of property is done on an equitable basis.

9.5.37 In view of the fact that a formal registration procedure is prescribed, the proposed model prescribes a formal process by which the partners may terminate their relationship. Since the aim is to provide a dispensation that differs from the marriage model, termination of the registered partnership can be done by mutual agreement after compliance with some formalities. However, where the couple has children or when they cannot come to an agreement regarding the fact or the terms of the termination, termination must be done through a court process in order to protect vulnerable parties. Limited provision is made for maintenance upon termination.

9.5.38 The proposed model of termination of registered partnerships is similar to the Dutch model. A registered partnership would terminate:

   i) upon death of one of the partners;
   ii) by mutual agreement and subsequent deregistration; or
   iii) upon a declaration to that effect by a court.

9.5.39 The mutual agreement to terminate the partnership has to be in a written format and will deal with the division of assets and debts, maintenance if any, calculation of pension claims and other property arrangements.

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In 1999 the Pension Funds Adjudicator in the matter of **Muir v Mutual and Federal and 4 Others** ordered Mutual and Federal to pay out the surviving partner of a lesbian relationship in full in 1999. In view of this ruling and the definition for "dependant" in the Pension Fund Act, 1956 (Act No. 24 of 1956), it is proposed that both same- and opposite-sex partners in registered partnerships would in any event qualify as dependants under the Pension Funds Act of 1956. This should be even more true under a formal registered partnership system. The definition of dependant in the Pension Funds Act of 1956 reads as follows:

‘dependant’, in relation to a member, means-

(a) a person in respect of whom the member is legally liable for maintenance;
9.5.40 If the partners cannot agree, one party may apply through a court procedure to the court to declare the dissolution of the partnership. Where the registered partners have minor children, termination of the partnership must also be done through the court process.\(^65\)

9.5.41 The legislation providing for the termination of registered partnerships and the maintenance payable between former registered partners would read as follows:

**Termination of registered partnerships**\(^66\)

29. (1) A registered partnership exists until –

(a) it is terminated by death;

(b) the date on which a mutual termination agreement contemplated in section 30, is filed with a registration officer;

(c) a court order to terminate the registered partnership, as provided for in this Act, is issued.

(2) A death certificate, termination certificate issued by the relevant registration officer or a termination order will be prima facie proof that a registered partnership has been terminated.

**Termination agreement**

30. (1) Except as provided for in section 31, registered partners may terminate the registered partnership by mutual agreement executed before a notary.

(2) The mutual agreement must-

(a) state that it is entered into voluntarily by both registered partners;

(b) declare that the registered partners have come to a mutual agreement to terminate the partnership;

(c) set out the following information:

(i) any conditions of the termination;
(ii) the division of accrued or joint property;
(iii) arrangements regarding the family home;
(iv) settlement of pension and other similar claims; and

(d) be filed with the registration officer in the area where the registered partners at the time of the mutual agreement usually reside.

(b) a person in respect of whom the member is not legally liable for maintenance, if such person-

(i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance; ..... 

\(^65\) In the Netherlands this court procedure is very similar to a divorce process.

\(^66\) The Netherlands Registered Partnership legislation.
(3) If the registered partners have concluded a pre-registration agreement, division of property will take place in accordance with that agreement.

(4) The mutual agreement to terminate the registered partnership will be effective from the date that it was filed with the said registration officer.

(5) The registration officer must issue a termination certificate upon the filing of a mutual agreement by the registered partners.

Termination by court order

31. (1) The registered partners or a registered partner must apply to the court for an order to terminate the registered partnership if—
(a) the registered partners have minor children; or
(b) the registered partners cannot come to an agreement regarding the-
   (i) termination of the registered partnership; or
   (ii) division of accrued or joint property upon termination of the registered partnership.

(2) An application to terminate a registered partnership is made to the court in accordance with the provisions of the Supreme Court Act, 1959 (Act No. 59 of 1959).

Welfare of minor children

32. (1) A court shall not order the termination of a registered partnership unless the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor child of the registered partnership are in the best interests of such child.

(2) In order to determine that the circumstances set out in subsection (1) exist, the court may order that an investigation be instituted and for that purposes the provisions of section 4(1)(a) or (2)(a) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) apply, with the changes required by the context, to the registered partnership.

(3) Before making the termination order, the court must consider the report and recommendations referred to in the said section 4(1) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987).

(4) In order to determine that the circumstances set out in subsection (1) exist, the court may order any person to appear before it and may order either or both the registered partners to pay the costs of an investigation and appearance.

(5) A court granting an order to terminate a registered partnership may, in regard to the maintenance and education of a dependent child of the registered partnership or the custody or guardianship of, or access to, a minor child of the registered partnership, make any order which it deems fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship or the sole

custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.

(6) Unless where otherwise ordered by a court, the rights of and obligations towards children of a registered partnership under any other law are not affected by the termination of the registered partnership.

(7) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order either or both the registered partners to pay the costs of the representation.

**When court may grant termination order**

33. (1) A court may grant an order to terminate a registered partnership if it is satisfied that the registered partnership has reached a state of disintegration and there is no reasonable prospect of the restoration of the relationship between the partners.

(2) A court granting an order to terminate a registered partnership may make an order with regard to the division of the accrued or joint property of the registered partners in accordance with a written agreement between such partners if it deems it just and equitable.

(3) Where there is no written agreement about the division of the accrued or joint property or, if the court is not satisfied that the division of property agreed to by the registered partners is just and equitable, the court may make an order to divide the property in a manner which it deems just and equitable.

(4) A court granting an order to terminate a registered partnership may make an order with regard to the division of the joint property of the registered partners in accordance with a pre-registration agreement between the partners if it is satisfied that such agreement is valid.

**Transfer of accrued property**

34. (1) Upon granting an application to terminate a registered partnership, a court may, subject to the provisions of subsections (2), (3) and (4), order that accrued or joint property or such part thereof as the court may deem just and equitable, be transferred to one of the registered partners.

(2) An order under subsection (1) shall not be granted unless the court is satisfied that it is equitable and just with reference to the contributions made by the registered partner in whose favour the order is granted.

(3) When considering the transfer of accrued or joint property or part thereof as contemplated in subsection (1), the court must, apart from the contributions made by the registered partners, also take into account—

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(a) the existing means and obligations of both registered partners,
(b) any donation made by one registered partner to the other registered partner during the subsistence of the registered partnership; and
(c) any other relevant factor.

(4) A court granting a transfer order under subsection (1) may, on application by the registered partner against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments and the delivery or transfer of specified assets, as the court deems just.

(5) In the determination of the division of accrued or joint property, the pension interest of a registered partner is deemed to be part of that registered partner's property.

(6) Notwithstanding the provisions of any other law or of the rules of any pension fund-
(a) the court granting a termination order in respect of a member of such a fund, may make an order that-
(i) any part of the pension interest of that registered partner which, by virtue of subsection (5), is due or assigned to the other registered partner, must be paid by that fund to that other registered partner when any pension benefits accrue in respect of that member;
(ii) an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other registered partner;
(b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, also applies, with the changes required by the context, mutatis mutandis with regard to the right of that other registered partner in respect of that part of the pension interest concerned.

(7) For purposes of this section, a registered partner will be a dependant as defined in the Pension Funds Act, 1956 (Act No. 24 of 1956).

Maintenance

35. (1) There is no general right to maintenance between registered partners upon termination of the partnership.

(2) A court granting a termination of the registered partnership may in accordance with a written agreement between the registered partners make an order with regard to the payment of maintenance by the one partner to the other.

(3) In the absence of an agreement referred to in subsection (2), the court may, having regard to the existing or prospective means of each of the registered partners, their respective earning capacities, future financial needs and obligations, the age of each of the partners, the duration of the registered partnership, the standard of living of the parties prior to the termination of the registered partnership, and any other factor which in the opinion of the court should be taken into account, make an order which is just and equitable in respect of the payment of maintenance by the one partner to the other for any specified

70 Divorce Act of 1979.
period or until the death or remarriage of the partner in whose favour the order is given, whichever event may first occur.

9.5.42 Whether or not same-sex marriage or civil unions for same-sex couples are recognised has an impact on the acceptability of a registered partnership model. Much of the controversy regarding registered partnerships centres on the continued ban on same-sex marriage. Social conservatives are opposed to registered partnerships because of their connotation of same-sex relationships and their claims to marriage-like rights and obligations. If same-sex marriage is no longer banned, public policy discussions in relation to registered partnerships are predicted to be substantially different and the debate about their acceptability weakened.71

9.5.43 Recognising unmarried domestic partnerships under a registered partnership model makes it possible to address the problems of couples who are not interested in marriage but want to protect their relationships in other ways. In this regard the Canadian Law Commission pointed out that the removal of restrictions on same-sex marriage would not eliminate the need for the enactment of registered partnership models. It is foreseeable that marriage (both for same- and opposite-sex) and a registered partnership model should even function in conjunction with other models of relationship recognition like unregistered partnership models and domestic partnership agreements,72 each filling the gaps in the others. This would provide individuals with real choices as to how they prefer to regulate their personal relationships and what level of commitment and attendant obligation they want the relationship to have. In addition, it will create alternatives for those partners opposing marriage on political and philosophical grounds.73

9.5.44 In some countries the utilisation rate of registered partnership programs is low. This may lead to concern about the credibility of this new civil status as well as how attractive it is

71 LaViolette for Law Commission Canada, at 36.
72 See the discussion of these models under chap 10 below.
73 The availability of options is an important feature of living in a democracy. Law Commission Canada Beyond Conjugality, chap 4 at 131. Besides that, it is also suggested that the plurality of views among cohabiting gays and lesbians about the appropriate form of legal recognition makes it advisable that governments adopt a number of options. Sarantakos 1999 ALJ, at 225, as referred to by LaViolette for Law Commission Canada, at 37 fn 145.
to partners. Several authors suggest the following factors as explanation for low registration rates: reluctance to disclose a same-sex relationship, benefits already available from another source, unwillingness to take on financial responsibility for a partner, or discouraging formalities. However, if used in conjunction with other schemes, low utilisation rates would merely indicate that other schemes may be more attractive to some for a variety of reasons. As long as couples are making use of a system, it could be seen as an indication that there is a need for it.

9.5.45 The Commission is interested in hearing the views of people in domestic partnerships who would consider registering their relationship. Would they prefer a formal process similar to the one described above? What should the legal consequences of such registration be? How should the relationship be terminated? Should registered partnerships be freely available to foreigners? Should partners in de facto unregistered partnerships be prohibited from registering a partnership with a third party?

74 In France, after the PACS has been available for just more than a year, 29,855 partnerships were registered. Marriage, on the other hand, is two times more popular. However, a recent poll taken in France reveals that 70 percent of individuals questioned were very supportive (“très favorables”) of the new PACS. In Hawaii, as of October 1999, records of the Hawaii Health Department reflected only 435 reciprocal beneficiary relationships registered. In Denmark, only around 1,793 partnerships were registered in the 9 years from 1990 to 1998. This amounts to only 0.8 percent of the number of marriages. In Belgium, the “cohabitation légale” scheme is reportedly unpopular. As of June 2000, few couples had registered in the whole of the country, with only eight couples having done so in Brussels. It is difficult to draw accurate conclusions from the statistics as to the popularity of registered partnerships given that statistics are often non-existent or incomplete. LaViolette for Law Commission Canada, at 29-30.

75 LaViolette for Law Commission Canada, at 30.
CHAPTER 10: MODELS FOR REFORM: UNREGISTERED DOMESTIC PARTNERSHIPS

10.1 Introduction

10.1.1 The benefit of a registered partnership model is the certainty and peace of mind it provides from the moment of registration. Its main drawback, however, lies in the fact that the most likely victims of injustice, those who need the protection, namely the vulnerable, disorganised, pressurised, naïve, unsophisticated and ill-informed, are those who will most likely not register their partnership. They are also the ones who may be persuaded by a strong-willed partner not to register the relationship. Those whom the law aims to protect may thus not benefit from such a system.

10.1.2 Hence, a third category of domestic partners to be discussed refers to those who do not wish to, who are not able to, or who are not eligible to get married or to formally register their relationship.

10.1.3 The first question is if any rights should indeed be extended to couples who either do not wish formally to commit to the relationship in a public manner as required by marriage or registration, or who are ex lege excluded from getting married or registering their relationship. If so, which rights should be bestowed on these couples and what is the best way to do it?

10.2 Ascription or status model

a) Introduction

10.2.1 Ascription refers to the model of unmarried relationship recognition whereby unmarried domestic partners are awarded a civil status by legislation as if they have formally committed to the relationship, without their having taken any steps to effect such recognition.

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1 The exclusion of these couples from the marriage or registered partnership institutions may have to do with consanguinity or the existence of a marriage or registered partnership.
In other words, a particular status automatically attaches to the relationship after a certain period or under certain circumstances. Couples need not be aware of the existence of the legislation for it to apply to them.

10.2.2 By imposing this status and concomitant rights and responsibilities in the absence of a publicly and voluntarily assumed commitment, ascription supplies a default arrangement for couples who would otherwise have to resort to cumbersome traditional contract law prescriptions. As such, ascription has a particular value for vulnerable partners who cannot convince their partner to get married or alternatively, register the relationship under a registered partnership model.

10.2.3 Legislation regulating the default arrangement normally contains a definition of the relationship to be recognised. The definition is often used in combination with other prescribed requirements related to the period and circumstances of cohabitation. As such the definition in itself is inconclusive.

10.2.4 This inconclusiveness has the result that couples under this model lack the certainty about their legal position that registered partners have from the outset.

b) Different forms of the ascription model

10.2.5 Two forms of the ascription model can be identified. In the first version parties will receive their ascribed status automatically as soon as they have complied with the prescribed requirements (usually set out in a definition). They will, therefore, acquire certain rights and obligations which are enforceable during the existence of the relationship against each other and third parties. For purposes of this discussion these relationships will be termed "de facto relationships".

10.2.6 In the second version of the ascription model, status only becomes relevant once the relationship ends. This model creates a judicial discretion whereby a court may declare that a relationship complied with the prescribed definition and award limited rights and obligations for parties ex post facto and with retrospective effect. It will only be invoked where the

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2 This model is also referred to as a presumption based model.

3 Law Commission Canada Beyond Conjugality.
parties are unable to manage their situation privately. This type of unregistered partnership may be termed "ex post facto relationships".

(i) De facto relationships

10.2.7 A de facto relationship comes into existence because the partners in the relationship live like a couple. Under the ascription model a certain legal status is automatically ascribed to the relationship after a certain period or because of the existence of certain circumstances.

10.2.8 A couple complying with the prescribed definition and conditions set out in the relevant legislation is entitled to claim the rights and obligations provided for in the legislation. Partners in a de facto unregistered partnership may, however, find that the de facto status of their relationship is disputed by either of the partners or a third party, such as a medical services provider. Such a dispute will then have to be settled by a court.

10.2.9 Besides the establishment of a regime for the distribution of property upon dissolution of the relationship, the rights that are relevant in this context are mostly rights created by consequential amendments to other legislation. Examples of these are rights under legislation regarding mental health, legal aid, bail, guardianship, etc. Because the existence of the relationship may at any time be disputed, the enforcement of these additional rights may be hindered and are often uncertain.

10.2.10 Since imposing the default position on couples in de facto relationships can be seen as an infringement of their autonomy, legislation providing for ascribed relationship status often contains an opt-out clause. An opt-out clause enables a couple to contract out of the default protection created by the ascription legislation.

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4 Sinclair & Heaton *Marriage Law*, at 298.

5 See the legislation amended by the New South Wales Property (Relationships) Act of 1984.

6 Under the Stable Couples Act of 1998 in Catalonia, a province of Spain, opposite sex couples, who have lived together for two years or more, are automatically subject to the private law aspects regulated by that Act with no provision for them to opt out of its operation. The fact that they are subject to this Act regardless of any initiative taken by them, is very controversial. Forder 2000 *CJFL*, at par 12.
10.2.11 As part of the opt-out option, ascription legislation in other countries sometimes makes detailed provision for cohabitation agreements and termination agreements. This legislation regulates the topics that may be dealt with in those agreements and provides requirements for valid agreements.7

10.2.12 An example of this ascription-based model is found in the Cohabitees (Joint Homes) Act of 1987 read with the Homosexual Cohabitees Act of 1988 of Sweden which automatically apply to unmarried relationships where the couple "live together in circumstances resembling marriage".8 No other requirements are prescribed for the relationship but the term "resembling marriage" has been interpreted to mean that they must live like a couple in the traditional sense. At the very least there must be some kind of financial and practical co-operation in a household, and where there are children, such relationships always qualify.9

10.2.13 A feature of the Swedish Cohabitees (Joint Homes) Act of 1987 is that provision is made for the parties to avoid the application of the legislation by concluding a written agreement whereby they exclude — opt out of — the prescribed property dispensation.10

10.2.14 Under the opt-out option couples indicate that they do not desire the protection created in the legislation, in which case they will be unprotected to the extent that the traditional private-law models do not apply to their partnership.

10.2.15 The New South Wales ("NSW") Property (Relationships) Act of 198411 provides another example of ascribed relationship status.12 This Act defines de facto

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7 See for example the New South Wales Property (Relationships) Act of 1984.

8 See chap 6.3 above.

9 Schwellnus Obiter 1995, at 235. See also the discussion in Demczuk Lesbian Couples, at chap 5.1.1.

10 Certain rules, like the right of a cohabitant to take over the other party’s tenancy rights in the event of termination of cohabitation, can never be excluded. To do this the claimant must demonstrate a "greater need" for the house and it must be "reasonable in the light of all circumstances". This provision is intended to protect a cohabitant with children.


12 See chap 6 above.
(conjugal) and close personal (non-conjugal) relationships\(^\text{13}\) as domestic partnerships. The NSW Property Relationships Act of 1984 makes provision for a property division dispensation and limited maintenance obligations between the partners upon termination of the domestic partnership. In addition the statute confers a wide range of rights on these relationships by way of consequential amendments to a number of statutes in which the mentioned definitions will be incorporated. These incorporations have the effect that unregistered partners complying with the prescribed definitions have certain rights under those Acts during the existence of the relationship.\(^\text{14}\)

10.2.16 The NSW Property Relationships Act of 1984 also provides for the making of domestic relationship agreements and termination agreements which in effect allow couples to opt out of the property division dispensation by making their own arrangements. However, while it is possible to opt out of the property aspects in these contracts, it is not possible to opt out of the other legal consequences that flow from domestic partnership status.\(^\text{15}\)

(ii) Ex post facto relationships/judicial discretion

10.2.17 This model provides rights and obligations to the parties with retrospective effect. It is invoked where the parties are unable to resolve the financial aspects of their break-up privately. Under those circumstances one or both of the parties may approach a court to declare the status of the relationship and to exercise its judicial discretion to achieve an equitable result.

10.2.18 Relying on the premise that two people who set up a home together and live a stable, permanent, affective relationship intend to deal fairly with one another, the court would aim to impose redistribution that would achieve equity between the parties.\(^\text{16}\)

\(^\text{13}\) Fewer rights and obligations are awarded to the non-conjugal relationships than to the conjugal relationships.

\(^\text{14}\) See the discussion of de facto partnerships in para 10.3 below.

\(^\text{15}\) The NSW Property Relationships Act of 1984 is an example of how ascription legislation can regulate the opt-out option in detail.

\(^\text{16}\) Sinclair & Heaton *Marriage Law*, at 298.
10.2.19 The legislation determines how the court should exercise this judicial discretion. Guidelines for the exercise of the discretion, as in the case of divorce, are set.\textsuperscript{17} If the court must only test the relationship for compliance with a list of objective criteria, the intention of the partners does not carry much weight. Under a subjective approach, the intention of the partners may be decisive. A combined approach would allow for an equitable outcome.

10.2.20 When a court is called upon to settle a dispute regarding the division of property or maintenance, there are two ways of dealing with it. The first is to order a division strictly according to each partner’s contribution to the domestic partnership. The second is to evaluate each partner’s needs and means at the end of the relationship, taking into consideration the presence of dependant children of the partnership. Another factor to be considered is the degree of dependency that developed between the partners as a result of the domestic partnership.

10.2.21 If the enabling legislation awards the court the discretion to make an equitable decision, both the contributions of the partners and their various needs and means are considered, ensuring an equitable as opposed to a clinical, mathematical calculation of maintenance and division of property.

10.2.22 Partners in this category may still make use of a domestic partnership agreement to regulate their relationship privately. However, since it is difficult to make provision for family matters through the contract law, the legislation usually provides for judicial scrutiny of the outcome of the domestic partnership agreements to ensure that an equitable result is achieved.

c) Positive aspects of ascription

10.2.23 Ascription models are generally heralded as a way to compensate for the fact that the weaker partner in a relationship may have been exploited by his or her emotionally

\textsuperscript{17} Sinclair & Heaton \textit{Marriage Law, ibid.}
or financially stronger partner who is reluctant to formalise the partnership. Such exploitation is an inherent risk of registration models and even of contract models.\footnote{18}

10.2.24 Ascription models furthermore protect partners in domestic partnerships who are negligent in taking steps to formalise the relationship.\footnote{19}

10.2.25 In both instances of reluctance to register and negligence in doing so, ascribed relationship status indirectly protects the children of the partnership owing to the fact that the court will consider the presence and needs of any children of the partnership when determining property division and maintenance for the custodial partner.

10.2.26 Ascription is a way for government to respond to the changing needs with regard to changes in family types in society. The NSW Property (Relationships) Act of 1984 showed that the model is also useful in the non-conjugal relationships context.

10.2.27 Since no form of registration is required, people do not have to be aware of the legislation to benefit from it. A couple will be covered by the relevant legislation even if they do not make their own financial arrangement by means of a private agreement.

10.2.28 This model provides protection to the parties who find themselves in a society where rates of discrimination and violence against lesbians and gays remain high and may lead to reluctance to commit to their relationship publicly through marriage or by registering it.\footnote{20}

\footnote{18}{The courts have rejected the argument that since a couple made a “choice” not to get married, there should be no rights or obligations on the basis that there is too much potential for the stronger party to take advantage of the weaker party by denying responsibility for dependencies once the relationship is over. Bala 2000 \textit{CJFL}, at 193. See also Forder 2000 \textit{CJFL}, at par 11.}

\footnote{19}{Forder points out that even where parties may have the freedom to regulate their property and other relationships by eg registering, in practice they don’t exercise this freedom. Accordingly, where there is no legislative protection, there is invariably case law to determine proprietary protection in the event of breakdown. Forder contends that the Swedish system with it’s opt out clause is respectful of the couple’s individual autonomy. Forder 2000 \textit{CJFL}, at 11. Australian case law on inheritance shows few people including lesbians and gay men order their affairs in advance through formal documents like wills. Millbank & Morgan in Wintermute & Andenaes, at 309.}

\footnote{20}{In Australia preference was given to ascription or presumption based models. Three factors are indicated for this preference: past law reform assimilated the treatment of cohabiting opposite sex relationships with married couples, constitutional realities and the influence of gay and lesbian lobby groups. Graycar & Millbank 2000 \textit{CJFL}, at 262 and the references in fn 76.}
d) Negative aspects of ascription

10.2.29 Ascription infringes upon the autonomy of the partners by eliminating choice.\(^{21}\) In so far as de facto partnerships are concerned the opt-out clause aims to address this objection. Similarly, partners using the ex post facto variation of this model, who do not want any legal protection, will be able to arrange their matters in complete privacy if they make sure that they treat each other fairly throughout. Their relationship will only be scrutinised in court if one party is not satisfied with the private arrangements and equity becomes an issue.

10.2.30 The enforcement of rights and obligations of de facto partnerships during the existence of the relationship is only attainable as long as the presumed status is not disputed.\(^{22}\) In the event of a dispute of the status of de facto relationships, a court will have to determine and declare the status of the relationship. This attribute creates uncertainty and may be abused by an intimidating partner.

10.2.31 A court requested to settle a dispute regarding the status of the relationship may have to engage in detailed inquiries into the intimate details of the relationship, intruding on the privacy of the couple, in order to test the relationship’s compliance with the relevant statutory requirements.\(^{23}\) In this regard it may also be costly and difficult to prove that a relationship did, or did not, exist.

10.2.32 A standard argument against any initiative to provide for relationship recognition is that it may serve as a disincentive to marriage and contribute to its decline.

\(^{21}\) It should not be assumed that all cohabiting couples wish to be subject to a legal regime. This statement is made by those who wish to preserve the freedom and autonomy of people entering into unmarried relationships. This is particularly relevant in the cases of divorced people who live together in a cohabiting relationship and deliberately refrain from remarrying because they wish to avoid the obligations imposed by law.

\(^{22}\) It could be argued that a dispute indicates termination of the relationship in any event.

\(^{23}\) In M v H the Canadian Supreme Court held that the approach to determining whether a relationship is of a conjugal nature, must be flexible since the relationships of all couples will vary widely. As discussed and referred to in Cossman Ryder, at 147 fn 428.
e) **Matters to consider when contemplating an ascription model**

10.2.33 An important aspect to decide is what the threshold question for a relationship to qualify for this civil status should be? Should a minimum period of cohabitation be prescribed and should there be additional requirements like proof of dependency? If so, should the required dependency be emotional or economic, or both? Must dependency be defined? A list of factors to be considered like the one provided for in the Property (Relationships) Act of 1984 of New South Wales may be handy as a guideline.

10.2.34 Another way is to use the functional approach. This means that the basic dimensions and functions of a marital relationship will have to be identified and then it will have to be determined whether the relationship in question sufficiently approximates a marital relationship. Factors that may be considered are the economic relationship between

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24 Proof of dependency may be relevant since a person who is dependent on his or her partner is more likely to suffer hardship or injustice on the termination of their relationship.

25 See for example the discussion of British Columbia in chap 6 above.

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4 **De facto relationships**

(2) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:

(a) the duration of the relationship,

(b) the nature and extent of common residence,

(c) whether or not a sexual relationship exists,

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,

(e) the ownership, use and acquisition of property,

(f) the degree of mutual commitment to a shared life,

(g) the care and support of children,

(h) the performance of household duties,

(i) the reputation and public aspects of the relationship.

(3) No finding in respect of any of the matters mentioned in subsection (2) (a) (i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.
the partners, residence, sexual and personal relationships, domestic services, social
activities and children. The functional approach has been criticised primarily for the fact that
it measures all relationships against a norm of an idealised relationship, namely marriage.27

10.2.35 Should both conjugal and non-conjugal relationships be included in the
definition? If so, should the same legal consequences attach to both kinds of relationships?
New South Wales has proved that it is possible to bring both types of relationships within the
ambit of one Act, albeit with different legal consequences. Although the property division and
maintenance dispensations apply to close personal relationships (non-conjugal) and de facto
(conjugal) partnerships equally, fewer consequential amendments have been made
applicable to non-conjugal relationships.28

10.2.36 If non-conjugal relationships are included, must it be a requirement that the
partners live together?29 The requirement to cohabit may even impact adversely on couples
in a conjugal relationship who, for a variety of reasons, do not live together but who are
nevertheless in a primary relationship of mutual emotional interdependency. The fact that
married couples are entitled to their rights and obligations irrespective of whether they are
living together, must be considered when making a decision regarding this requirement.

10.2.37 The needs of partners in non-conjugal relationships differ from those of
couples in conjugal relationships. Unless the legislation specifically distinguishes between
conjugal and non-conjugal relationships, ascription may not properly respond to the needs of
both types of relationships.

10.2.38 It would be inappropriate to presume that, for example, a parent living with an
adult child has the same needs as partners in a marriage-like conjugal relationship.30 A non-
conjugal couple may pass the threshold definitional test for recognition of their relationship

27 Cossman & Ryder for Law Commission Canada, at 147.
28 See the discussion of the position in New South Wales in chap 6 above.
29 It has already been suggested that it may be necessary to consider creating yet another category on the
list of protected relationships in the Property (Relationships) Act of 1984 in order to provide for people in
a relationship of personal or financial commitment and support of a domestic nature for the material
benefit of the other, who do not live together. Puplick Sexual Apartheid Australia.
30 Law Commission Canada Beyond Conjugality. Ascription need not treat all conjugal relationships alike,
irrespective of the level of emotional or economic interdependency that they may present. The Property
(Relationships) Act of 1984 of New South Wales distinguishes between de facto and domestic
partnerships and awards different legal consequences.
by law, but find themselves with totally inappropriate rights and obligations for their kind of relationship.

10.2.39 With reference to the opt-out clause, the following matters must be considered. Firstly, should the legislation merely make that option available or should there be detailed legislative prescriptions as to the format and contents of such opting-out agreements? Secondly, should a domestic partnership agreement automatically be regarded as an opt-out agreement? Thirdly, should some minimal rights and obligations be excluded from the opt-out option?31

10.2.40 While the ideal is to respect the independence and freedom of choice of the parties, from an equity and social justice point of view, individual freedom should not be exercised selectively. Therefore, those who opt for a particular status should all have similar advantages and disadvantages and should not be permitted to pick and choose their consequences.32

10.2.41 A problem that may arise in practice is the case of a married, but separated spouse, who becomes a partner in a cohabiting relationship which, owing to ascription, acquires legal status as a de facto partnership, thereby effectively giving status to a polygamous relationship. Besides the moral implications of this result, it could lead to a conflict of interest between the rights of the lawful spouse and the cohabiting partner.

10.2.42 In the case of the ex post facto relationship, this conflict of interest will only be visible upon termination of the ascribed relationship, when the status of that relationship will be determined in order to divide the partnership property equitably. During the relationship only the marriage will enjoy legal recognition.33 These facts should be taken into account when the definition of unregistered partnership is considered. Should the unregistered

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31 See for example the position in Sweden in chap 6.3 above. Under the NSW legislation, only financial matters may be dealt with in the domestic partnership and termination agreements.

32 See in general the discussion of autonomy of the parties in chap 7 above.

33 New South Wales Law Reform Commission Report 36, chap 5. The Cohabitation (Joint Homes) Act of 1987 of Sweden requires the couple to be both unmarried and unregistered as partners. A similar requirement is applicable to de facto relationships in New South Wales, but not in British Columbia, where an ascription model is also in operation.
partnership exclude people who may be married from developing an ascribed status with a third person?34

10.2.43 Will it be necessary to prescribe a particular procedure to terminate this ascribed status? The relationship is most often dissolved by mere separation or death.

10.2.44 Should the enabling legislation give a court the discretion to make an equitable ruling, notwithstanding a domestic partnership agreement?

f) Concluding remarks

10.2.45 The legislature should look at a system that would affirm the capacity of people to establish for themselves the terms of their relationships whilst protecting the ignorant or vulnerable, and provide models for doing so. This presupposes more than one model.

10.2.46 Using one of the versions of the ascribed status model in combination with another model, such as registered partnerships, is seen as a viable option. This will also prevent couples from choosing not to register in an attempt to avoid legal responsibilities. This would effectively give couples a choice between marriage, registered partnerships and ascription as well as the original option to enter into a joint domestic partnership agreement.

10.2.47 One of the various types of relationships that exist in the South African community is the care relationship. Care relationships refer to non-conjugal relationships where one partner is dependant on the other, or both depend on each other. Examples of such relationships are a daughter taking care of an elderly father or two adult siblings living together for economic reasons. In these circumstances it is unavoidable that the “couple” collect goods together, in particular (but not only) when they also live together.

10.2.48 Another relationship that the Commission cannot ignore is the relationship where a person may still be married to one person, while living in a long-term conjugal relationship with another. As was argued before,35 such a person may find that he is a party

34 See also in this regard the discussion of bigamous relationships in chap 7 above.

35 See chap 7 above
to two relationships with legal status. This will be possible if a married person is not excluded from acquiring ascribed legal status under the unregistered relationships legislation.

10.2.49 It is notable that all three Australian proposals recommending a form of registered partnership regime, proposed that such a system should operate in tandem with the ascribed status model rather than on its own as the only method of relationship recognition.36

10.2.50 It seems that the solution lies in finding the particular combination of the three models – marriage, registered partnership and ascribed status – that can best achieve the balance between regulating relationship consequences and respect for the values of autonomy, privacy, equality and security.

10.3 Enabling legislation: Option 1 De facto relationships

10.3.1 Option 1 entails the use of the de facto relationship variation of the ascription model to create rights automatically for couples who comply with the definition of a de facto relationship. On the assumption that marriage or civil unions will be available to both same- and opposite sex-couples, it may be said that the registered partnership model proposed in chapter 9 above would be superfluous under this option.

10.3.2 However, this de facto unregistered partnership option includes some of the legal consequences of the proposed registered partnership model in order to provide for aspects of the relationship that should not be left unregulated.

10.3.3 The complete Bill proposed by the Commission in this regard can be seen in Annexure E option 1. The relevant clauses and definitions are quoted below. Where the provisions originated in other legislation, references are given in the footnotes.

10.3.4 Legislation will provide for the factors that a court should consider when determining the status of a relationship of the parties before the court. It will read as follows:

a) Description and declaration of de facto unregistered partnerships

10.3.5 As was seen in the discussion above, the ascription model can be useful to protect people in care relationships. However, owing to the nature of the legal consequences that automatically attach to de facto relationships during their existence, care-partners are excluded from the scope of the Bill proposed under option 1.37

10.3.6 It was pointed out in para 10.2.41 above that unless the definition of "unregistered partnership" is limited to unmarried persons, polygamous unregistered partnerships could obtain legal status under this model.38 In view of the CALS Report39 and given the existence of migrancy, dual households are a reality that requires recognition and protection by South African law. However, public opinion may regard the legal recognition of polygamous relationships as unacceptable.

10.3.7 A related problem is where a person in an existing unregistered partnership wants to marry or register a partnership with a third party. It could be said that if a partner in an unregistered partnership wants to marry a third party, the continued existence of the unregistered partnership is questionable. But what if the other partner in the unregistered partnership disputes the termination of the relationship? In view of the uncertainty of the status of unregistered partnerships, is it practicable to prohibit partners in unregistered partnerships from getting married, concluding a civil union or registering a partnership? Furthermore, is it justifiable to do so, if the opposite situation referred to in par 10.2.41 above is not also prohibited? The Commission would like to discuss this issue at the workshops following the publication of the discussion paper.

37 See also para 10.2.36 – 38 above.

38 Since the de facto unregistered partnership actually obtains legal status (with potential concomitant implications for third parties) during the existence of the relationship, it may result in actual polygamy. This differs from the position under the second option of an ex post facto unregistered partnership, where the relationship acquires its legally recognised status after termination and for purposes of division of property and maintenance only. It is submitted that the recognition of the status of the de facto partnership results in "de iure polygamy" as opposed to "de facto polygamy" in the case of ex post facto partnerships.

39 Op cit. The full Report is available from the Centre for Applied Legal Studies Documentation Centre. For more information see http://wwwserver.law.wits.ac.za/ca. See also the discussion and references to this Report in chap 4 above.
10.3.8 In addition to the moral objections to polygamous relationships, another objection against the legal recognition of such relationships is that it has the result that parties to such relationships are allowed to benefit from the legal consequences of both relationships simultaneously. It may be regarded as unfair that the legal recognition of the unregistered partnership creates a liability for a third party to provide medical benefits to both a member's spouse and his or her unregistered de facto partner. This issue may render this option susceptible to criticism.\(^40\)

10.3.9 On the other hand, third parties like the providers of medical benefits, have to provide benefits to multiple wives in customary marriages or to members of dual families in the case of serial monogamy after divorce.

10.3.10 The legislation prescribing the definition of an unregistered partnership and the declaration of the status of the relationship in the event of a dispute would read as follows:\(^41\)

"unregistered partnership" means an intimate partnership that is not registered under the Registered Partnership Act, 20.. (Act No. … of 20..) and includes a former unregistered partnership;

"intimate partnership" means a relationship, other than a marriage, civil union or registered partnership, between two adult persons who live as couple and includes a former intimate partnership;

**Existence of an intimate partnership**

4. (1) When determining whether two persons are in an intimate partnership, regard must be had to all the circumstances of the relationship, including such of the following matters as may be relevant in a particular case:
   a. the duration of the relationship;
   b. the nature and extent of common residence;
   c. whether or not a sexual relationship exists;
   d. the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;
   e. the ownership, use and acquisition of property;
   f. the degree of mutual commitment to a shared life;
   g. the care and support of children;
   h. the performance of household duties;
   i. the reputation and public aspects of the relationship.

\(^{40}\) See also the comments regarding maintenance obligations under para 10.3.25 below.

\(^{41}\) The definitions relevant to the quoted provisions are in the Bill in Annexure E.
(2) A finding in respect of any of the matters mentioned in subsection (1), or in respect of any combination of them, shall not be regarded as essential for the existence of an intimate partnership, and in determining whether such a partnership exists, regard may be had to further matters and the weight be attached to such matters as may seem appropriate in the circumstances of the case.

Declaration of unregistered partnerships status

5. (1) When the status of an intimate partnership provided for in this Act is disputed, any interested party may at any time apply to court for an order declaring the status of the relationship.

(2) The court, upon determining whether two persons are in an intimate partnership, must take all the circumstances of the relationship into account, including such of the matters set out in section 4(1) as may be relevant in a particular case.

(3) A finding in respect of any of the matters mentioned in subsection (2), or in respect of any combination of them, shall not be regarded as essential for the existence of an intimate partnership, and a court, in determining whether such a partnership exists, is entitled to have regard to further matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

b) Legal consequences of de facto unregistered partnerships

10.3.11 Certain legal consequences automatically attach to the de facto unregistered relationship during its existence. Besides the consequences provided for in the Bill, additional consequential amendments would have to be made so as to include the definitions of these relationships in other relevant legislation.42

10.3.12 In view of the fact that there is no formal public commitment by the parties to the relationship, it is submitted that there cannot be a general reciprocal duty to support each other. The duty to support or a relationship of dependency forms the basis for many entitlements traditionally associated with marriage, for example, medical benefits and delictual damages. The absence of such a duty to support raises the question on what basis these kinds of rights should be made available to partners in unregistered partnerships. As with the issue of polygamy, this issue may render this option susceptible to criticism. It could be argued that partners who wish to acquire, for example, medical benefits, should at least

register their relationship. The counter-argument, and the reason why this option is included in the proposal, is that many vulnerable partners in intimidating relationships are unable to convince their partner to make that kind of public commitment.

10.3.13 Except for the specific legal consequences provided for in consequential amendments, the legislation prescribing the general legal consequences of the de facto unregistered partnerships would read as follows:

**Duty of support**

6.  (1) Except as provided for in this section, there is no general duty of support between partners in an unregistered partnership.

(2) Partners are jointly liable for debts incurred for household expenses.

(3) A third party to whom debts referred to in subsection (1) are owed by either or both of the partners may enforce the joint liability against either or both of the partners through legal proceedings in a court of law.

**Medical decisions**

7. For the purposes of decisions on medical matters, partners in an unregistered partnership are deemed to be "spouses" in a legally valid marriage and are also entitled to access to each other's medical records as if they were legally married.

**Unregistered partners not compellable to disclose communications between them**

8. A partner in an unregistered partnership may not in civil or criminal proceedings be compelled to disclose any communication made to him by the other partner during the unregistered partnership.

**Evidence of accused and partner on behalf of accused**

9. The unregistered partner of an accused person is not a compellable witness where a co-accused calls that unregistered partner as a witness for the defence.

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44 Criminal Procedure Act of 1977
10. A surviving partner in an unregistered partnership shall inherit a child share or an amount that does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette under the Intestate Succession Act, 1987 (Act No. 81 of 1987), whichever is the greater, from his or her deceased unregistered partner who died intestate.

10.3.14 Since there is no formal commitment by the partners in an unregistered partnership, there is no stage at which they indicate the property dispensation that they would prefer. Although it is accepted that there are cases where one partner cannot convince the other partner to commit, it must be kept in mind that there are probably just as many, if not more, instances where the couple deliberately choose not to marry (or register their relationship) because they do not want the prescribed default position to apply to their property. It is impossible to predict what the various couples’ preferred dispensation would be.

10.3.15 Against this background, no property dispensation is prescribed under the proposed legislation with the result that there is no community of property and theoretically each partner retains whatever he or she owns.

10.3.16 Although the autonomy of the parties is acknowledged in such a proposal, the reality is that the partners tend to acquire property together and the contributions of each partner are not always easily calculated, nor the ownership determined. For instance, there may be property that they have paid for together or that one has paid for with money that he or she earned while the other partner took care of the household. It is, therefore, proposed that a limitation be placed on the partners’ ability to dispose of property defined as partnership property.

10.3.17 The legislation providing for this would read as follows:

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45 If this version of the unregistered partnership proposal is accepted, the final wording of the clause regarding intestate succession will be adapted in accordance with the amendments to the Intestate Succession Act, 1987 (Act No. 81 of 1987), Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990) and the Estate Duty Act, 1955 (Act No. 45 of 1955) following the judgment in the (at this stage) unreported case of Daniels v Campbell NO and Others case NO 1646/01 in the High Court of South Africa, Cape of Good Hope Provincial Division.


47 See also the Bill in Annexure E for related clauses.
"partnership property" means-
   (a) the family home of the partnership whenever acquired;
   (b) household goods of the partnership whenever acquired;
   (c) property owned jointly or in common in equal shares by the partners;
   (d) property owned by either partner immediately before the partnership began if-
      (i) the property was acquired in contemplation of the partnership; and
      (ii) the property was intended for the common use or common benefit of both partners;
   (e) all property acquired after the partnership began for the common use or benefit of both partners if —
      (i) the property was acquired out of property owned by either of or both partners before the partnership began; or
      (ii) the property was acquired out of the proceeds of any disposal of any property owned by either of or both partners before the partnership began;
   (f) any income and gains derived from the proceeds of and any increase in the value of any property described in paragraphs (a) to (e);

"separate property" means property which does not form part of partnership property;

**Disposal of partnership property**

11. A partner in an unregistered partnership may not without the consent of the other partner sell, donate, mortgage, let, lease or otherwise dispose of partnership property.

C) Legal consequences of the dissolution of de facto unregistered partnerships

10.3.18 Since there is no formal registration process for the partnership to come into being, it is proposed that no formal dissolution procedure be prescribed.50

10.3.19 The legislation regarding the end of the partnership will read as follows:

**End of partnership**

12. An unregistered partnership ends if –

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50 This is similar to the Swedish model in the Cohabitees (Joint Homes) Act of 1987.
(a) the partners in an intimate partnership cease to live as a couple;
(b) one of the partners dies.\textsuperscript{51}

10.3.20 By its nature, the legal status and consequences of de facto unregistered partnerships also involve third parties. These parties will have a definite interest in being informed when the de facto unregistered partnership ceases to exist. The legislation to ensure that notification of termination takes place would read as follows:

**Notification of end of partnership**

\textbf{13. (1)} When the partners in an unregistered partnership cease to live as a couple, both partners are liable to give written notice of the dissolution of the relationship to all interested parties.

\textbf{(2)} When one of the partners in an unregistered partnership dies, the surviving partner must give written notice of the dissolution of the relationship to all interested parties.\textsuperscript{52}

10.3.21 People in relationships collect property together and when the relationship ends this property needs to be distributed equitably. As was mentioned before, it may be difficult to determine ownership or calculate each partner's share in property where they have paid together for property or where one partner has paid for property with money that he or she earned while the other partner took care of the household.

10.3.22 Also, with reference to the possibility of polygamous partnerships, it is foreseeable that in the event of the dissolution of such a polygamous partnership, both the spouse and the unregistered partner may lay claim to the same property, albeit on different grounds. One of the consequential amendments to consider would be the interaction between the proposed Bill and the Matrimonial Property Act of 1984.

10.3.23 If after the dissolution of property, the former partners are able to come to an agreement about the division of property, the partners may apply to the court to make that agreement an order of the court.

\textsuperscript{51} It may be necessary to add to this clause that the partnership ends when one of the partners marry a third party or enter into a registered partnership or civil union with such a third party.

\textsuperscript{52} The term "interested parties" should be defined with reference to the third parties that may be involved in the rights and obligations of de facto partnerships. This will be done if this option is selected and the set of rights and obligations has been identified. The rights of these parties should also be saved in the event of failure to give notice.
Settlement to be made an order of court

14. Where, after the dissolution of an intimate partnership, the partners have come to an agreement as to the division of partnership property, they may apply to court to make that settlement an order of court.

10.3.24 In view of the above factors, the proposed legislation provides for the court to make an equitable division of property where the parties cannot agree as to the division of property and apply to the court for an order of division of the partnership property. The legislation providing for this procedure and the factors that a court must consider upon such an application would read as follows.⁵³

Status and division of property

15. (1) When an unregistered partnership ends, partners who cannot agree as to the status or division of partnership property may apply to the court for an order in that respect.

(2) A court may declare the status of property and the rights upon division of such property, if any, of either partner or other party in respect of partnership property.

Equal division

19. (1) In making a decision as to the division of partnership property, the court must take into account that each of the partners is entitled to share equally in partnership property.

(2) If the family home has been sold, each partner is entitled to share equally in the proceeds of the sale, provided that the court making the order is satisfied that-

(a) either partner has or both of them have sold the family home with the intention of applying all or part of the proceeds of the sale towards the acquisition of another home as a family home; and

(b) that family home has not been acquired, at the date of the application to the court; and

(c) no more than 2 years have elapsed since the date when those proceeds were received or became payable, whichever is later.

Adjustment order

20. (1) Notwithstanding the provisions of section 19, upon an application by the partners for an adjustment order under this Act, a court may make such order adjusting

⁵³ See the complete Bill in Annexure E for all the applicable definitions.
the interests of the parties in partnership property as seems just and equitable having regard to-
(a) the contributions made by or on behalf of the partners towards the acquisition, conservation or improvement of partnership property, or to the financial resources of the partners, or of either of them, and
(b) the contributions, including any contributions made, in the capacity of homemaker or parent, by either of the partners to the welfare of the other partner or to the welfare of the family constituted by the partners and any child or children of the intimate partners.

Further Adjustment Order

21. (1) Notwithstanding the provisions in sections 19 and 20, if upon the division of partnership property under this Act the court is satisfied that, after the partnership ends, the income and living standards of a partner are likely to be, or have in fact been, significantly higher than the other partner because of the effects of the division of functions within the partnership while the partners were living together, the court may award lump sum payments or order the transfer of property in accordance with this section.

(2) In determining whether or not to make an order under this section, the court may have regard to—
(a) the likely earning capacity of each partner;
(b) the responsibilities of each partner for the ongoing daily care of any minor or dependent children of the intimate partnership;
(c) any other relevant circumstances.

(3) If this section applies the court, if it considers it just, may, for the purpose of compensating a partner—
(a) order the other partner to pay a sum of money out of his or her share of the partnership property to such partner; and
(b) order the other partner to transfer any other property out of his or her share of the partnership property to such partner.

Classification date

22. (1) Subject to subsection (2), the classification date on which the value of the share of a partner in an unregistered partnership is to be determined is-
(a) the date of the application to the court if the partnership has not ended;
(b) the date on which the partnership ended if the partnership has ended other than by death of one of the partners; or
(c) the date of death of the deceased partner if the partnership does not end while both partners are alive.

(2) A court hearing the application may, in its discretion when it is just and equitable, decide that the classification date may be another date as determined by the court.
Application only within two years after end of unregistered relationship

23. (1) Except as otherwise provided by this section, an application to a court for the division of partnership property under this Act may only be made within a period of two years after the date on which the partnership ended.

(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to an applicant partner to apply to the court for an order under this Act, where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant partner if that leave were not granted than would be caused to the respondent partner if that leave were granted.

d) Maintenance

10.3.25 In view of the fact that no general duty to support exists between de facto unregistered partners during the relationship, the Commission proposes that no general obligation should be created to pay maintenance after the dissolution of the relationship. This is also in line with international trends to limit maintenance obligations even between divorced spouses.54

10.3.26 Nevertheless, it is foreseeable that there may be circumstances under which it would be unfair not to award maintenance and for this reason, the court may grant maintenance under certain prescribed circumstances.

10.3.27 The relevant maintenance provisions would read as follows:

Maintenance

28. A partner is not liable to maintain the other partner when the partnership ends and neither partner is entitled to claim maintenance from the other, except as provided for in this Act.

Maintenance order

29. (1) Upon an application by a partner for an order to pay maintenance, a court may make such an order where the court is satisfied that-
(a) the applicant partner is unable to support himself or herself adequately by reason of having the custody of a child of an intimate partnership with the respondent partner,

(b) the applicant partner is unable to support himself or herself adequately because that partner’s earning capacity has been adversely affected by the circumstances of the partnership and, in the opinion of the court-

(i) an order for maintenance would increase that partner’s earning capacity by enabling the applicant partner to undertake a course or program of training or education, and

(ii) it is, having regard to all the circumstances of the case, reasonable to make the order.

(2) In determining whether to make a maintenance order under this Act and in fixing any amount to be paid pursuant to such an order, a court shall have regard to-

(a) the income, property and financial resources of each partner and the physical and mental capacity of each partner to appropriate gainful employment;

(b) the financial needs and obligations of each partner;

(c) the responsibilities of either partner to support any other person;

(d) the terms of any order made or proposed to be made under this Act for the division of property; and

(e) any payments made, pursuant to an order of a court or otherwise, in respect of the maintenance of a child or children in the custody of the applicant;

(f) the availability of employment to the applicant.

(3) In making an order for maintenance, a court must ensure that the terms of the order will, so far as is practicable, preserve any entitlement of the applicant partner to a pension, allowance or benefit.

Periodic maintenance

30. Where, upon an application by a partner for a maintenance order, it appears to a court that such partner is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment by the partner who is the respondent, pending the disposal of the application, of such periodic sum or other sums of money as the court considers reasonable.

Duration of maintenance order

31. The duration of a periodic maintenance order must be determined by the court making that order.

Application by a partner in respect of whom an order has been made

32. (1) Upon an application by a partner in respect of whom an order has been made under this Act for periodic maintenance, a court may-

(a) subject to subsection (2), discharge the order;

(b) suspend the operation of the order wholly or in part and either until further order or until a fixed time or the happening of some future event;

(c) revive wholly or in part the operation of an order suspended under paragraph (b); or
(d) subject to subsection (2), vary the order so as to increase or decrease any amount directed to be paid by the order or in any other manner.

(2) A court shall not make an order discharging, increasing or decreasing an amount directed to be paid by an order unless it is satisfied that, since the order was made, or last varied-
(a) the circumstances of the partner in whose favour the order was made have so changed;
(b) the circumstances of the partner against whom the order was made have so changed; or
(c) the cost of living has changed to such an extent as to justify its so doing.

(3) In satisfying itself for the purposes of subsection (2)(c), a court shall have regard to any changes that have occurred during the relevant period.

(4) An order decreasing the amount of a periodic sum of money payable under an order may be expressed to be retrospective to such date as the court thinks fit.

**Extension of a periodic maintenance order**

33. (1) Where a court has made a periodic maintenance order under this Act the partner in whose favour the order is made may, at any time before the expiration of that period, apply to the court for an extension of the period for which the order applies.

(2) A court shall not make an order pursuant to an application under subsection (1) unless it is satisfied that there are circumstances which justify its so doing.

10.3.28 In accordance with the view that generally a person should not be allowed to benefit materially from more than one legally recognised relationship simultaneously,\(^55\) it is proposed that the limited right to maintenance terminates once the former unregistered partner becomes a partner in another relationship with legal status, be that marriage, civil union, registered partnership or unregistered partnership. However, this once again brings the issue of polygamous relationships to the fore. The question may be asked how in one instance an unregistered partner in an intimate partnership (that is effectively polygamous owing to one partner’s existing marriage) is allowed to receive medical benefits, but in the other instance is not allowed to keep on receiving maintenance from a former unregistered partner after becoming a partner in a new relationship with legal status.\(^56\)

\(^{55}\) See also in this regard the comments in para 10.3.7 above.

\(^{56}\) In principle it is easier to justify limiting such an uncommitted partner’s right to medical benefits than to justify his or her receipt of maintenance from more than one former partner.
10.3.29 The legislation limiting the right to maintenance under these circumstances would read as follows:

**Effect of subsequent marriage, unregistered partnership or registered partnership on maintenance order**

34. If the partners have ceased to live together, an application to court for a maintenance order may not be made by a partner who, at that time, has entered into an unregistered partnership or a registered partnership with another person or who, at that time, has married.

**Maintenance order ceases to have effect**

35. (1) A maintenance order under this Act shall cease to have effect-
   (a) on the death of the partner in whose favour the order was made;
   (b) on the death of the partner against whom the order was made; or
   (c) on the marriage or commencement of an unregistered partnership or registration of a registered partnership with a third person by the person in whose favour the order was made;

   (2) Where, in relation to a partner in whose favour a maintenance order under this Part is made, a marriage takes place or an unregistered partnership commences or a registered partnership is registered with a third person, that partner must, without delay, notify the partner against whom the order was made of the date of the marriage or commencement of an unregistered partnership or registration with another partner.

   (3) Any money paid pursuant to a maintenance order under this Act, being money paid in respect of a period occurring after a marriage or commencement of an unregistered partnership with a third person partner, may be recovered as a debt in a court by the partner who made the payment.

**e) Opt-out clause**

10.3.30 This option would have to include an opt-out clause for those couples who do not want the de facto unregistered relationships status to apply automatically to their relationship. An opt-out agreement could merely be a declaration that the partners do not want the Act to apply to their relationship. Nevertheless, in order to facilitate proof of this decision and to limit intimidation by one of the partners, it is proposed that these agreements be reduced to writing and witnessed by two witnesses.

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57 See the discussion of opt-out clauses in para 10.2 above.
10.3.31 Since a domestic partnership agreement is an indication that the partners intend to make their own arrangements concerning their relationship, such an agreement is also regarded as an opt-out agreement. Therefore, where the couple have opted out or concluded a domestic partnership agreement, the rights and obligations under the proposed legislation do not apply to them and they would not have access to the court procedures and the remedies provided for. They would have to rely on contract law and the remedies of trust and estoppel to the extent that they apply to the relationship.\(^{58}\)

10.3.32 The relevant legislation would provide as follows:

"domestic partnership agreement" means a written agreement regulating financial matters of parties during cohabitation or thereafter;  

"financial matters" in relation to parties to a domestic partnership agreement, means matters with respect to any one or more of the following: 
(a) the property of the parties or of either of them,  
(b) the financial resources of the parties or of either of them.  

"opt-out agreement" means an agreement provided for in section 37 of this Act or a domestic partnership agreement;  

**Opt-out option**  
37. (1) A couple in an unregistered partnership may voluntarily and in writing come to an agreement whereby they declare that the provisions of this Act do not apply to their relationship.  
(2) An opt-out agreement must be in writing and signed in the presence of two witnesses.

**f) Children of intimate partnerships**

10.3.33 In view of the fact that unregistered partnerships under this option are conjugal by nature, the position of children born of that relationship should be considered. As was mentioned in the discussion of the proposed registered partnership legislation,\(^{59}\) the common law and current legislation like the Natural Fathers of Children Born out of Wedlock

\(^{58}\) The question whether a court should be awarded the same safeguarding function regarding the content of the domestic partnership agreement as in option 2, will be discussed at the workshops.

\(^{59}\) See discussion chap 9 above.
Act, 1997\textsuperscript{60} cover the rights and obligations of biological parents. That aspect will, therefore, not be addressed in this legislation.

10.3.34 However, the legal position of a partner towards a biological child of the other partner, whether that partner is of the same or opposite sex, needs to be considered. In this regard, the position regarding the assignment of parental responsibilities and rights by orders of court is the same as under the proposed registered partnership legislation, namely that the proposed Children's Bill will regulate the legal position.\textsuperscript{61} The partner will thus not have any direct rights or obligations emanating from the unregistered partnership towards the biological child of his or her unregistered partner.

10.3.35 Therefore, besides the extensive definition of a child of the intimate partners in such an unregistered partnership for purposes of determining the necessity for maintenance of a former partner, no provision is made for regulating the relationship of unregistered partners and their biological children. The matter will be re-evaluated when the final Bill is drafted.\textsuperscript{62}

\textsuperscript{60} Act No. 86 of 1997.

\textsuperscript{61} See in this regard also the discussion in chap 9 above. The relevant parts of clause 35 of the Children's Bill reads as follows:

\textsuperscript{62} The position regarding adoption will also be regulated by clause 258 of the Children's Bill. In any event, the position of same-sex partners in these kinds of unregistered, but permanent conjugal relationships
10.3.36 The legislation providing for the definition of child of an intimate partnership will read as follows:

"child of an intimate partnership" means-
(a) any child born as a result of sexual relations between the intimate partners; or
(b) any child of either intimate partner; or
(c) any child adopted by one or both of the intimate partners jointly; or
(d) any other child who was a member of the family of the intimate partners-
   (i) at the time when the intimate partners ceased to live together; or
   (ii) if at that time the intimate partners had not ceased to live together, at
        the time immediately before an application under this Act; or
   (iii) at the date of the death of one of the intimate partners;

10.3.37 The Commission would like to receive comments from respondents who are in domestic partnerships and who do not wish to register the relationship in a manner similar to registered partnerships. Should the provisions of an Act be made applicable to a couple without their knowing about it? Is the opt-out option sufficient? Is the protection afforded under such legislation necessary? And if so, is it appropriate? Are there other legal consequences that you would like to see included in the Act, or should any of the proposed consequences be excluded? Should polygamous de facto unregistered partnerships be legally recognised?

10.4 Enabling legislation: Option 2 Ex post facto relationships

10.4.1 In option 2 the ex post facto relationship variation is used. No legal status is ascribed to the relationship before its termination and then only if one or both the former partners apply to the court for a declaration for purposes of partnership property division, intestate succession and maintenance.

has already been settled in principle by the Constitutional Court of South Africa in its ruling in the case of Du Toit and Another v Minister for Welfare and Population Development and Others 2002 (10) BCLR 1006 (CC) by allowing for same-sex couples to apply for the adoption of children.

63 NSW Property (Relationships) Act of 1984

64 Since option 2 does not create any rights for the unregistered couple during the relationship, it is proposed that option 2 will be used in combination with the registered partnerships model. "Governments should continue to use both ascription and other methods such as registration" Graycar & Millbank 2000 CJFL, at 264. See also Law Commission Canada Beyond Conjugality.
10.4.2 Although this option may also potentially give legal recognition to polygamous relationships, the effect is to a large extent moderated by the fact that there are not competing rights between the two relationships during their existence. With regard to the division of property upon dissolution of the unregistered partnership, the proposed role of the court is to consider the interests of all parties concerned, which would include both a spouse and a former partner in an unregistered partnership. Nonetheless, the interaction between the proposed unregistered partnership Bill and the Matrimonial Properties Act of 1984 will have to be considered in the consequential amendments.

10.4.3 As it is foreseen that option 2 would operate in combination with registered partnerships, couples will have a choice between marriage, registered partnerships and ascription as well as the original option of entering into a domestic partnership agreement. This combination will prevent couples from choosing not to register in an attempt to avoid legal responsibilities.

10.4.4 The complete Bill proposed by the Commission in this regard can be seen in Annexure E option 2. The relevant clauses and definitions are quoted below. Where the provisions originated in other legislation, the references are indicated in the footnotes.

a) Description of ex post facto unregistered partnerships

10.4.5 Owing to the fact that the legal consequences are mainly of a proprietary nature, it is proposed that both conjugal and non-conjugal relationships be included in this option. The legislation describing unregistered partnerships would read as follows:  

\[\text{Intimate partnership}\]

4. An intimate partnership is a relationship, other than a marriage or registered partnership, between two adult persons who live as couple.

\[\text{Care partnership}\]

5. (1) A care partnership is a close personal relationship, other than a marriage or a registered partnership or an intimate partnership, between two adult persons,

65 The definitions relevant to the quoted clauses are in the Bill in Annexure E.
irrespective of whether or not such persons are living together or related by family, in circumstances where either of them provides the other with domestic support and personal care.

(2) For the purposes of subsection (1), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:
(a) for fee or reward; or
(b) on behalf of another person or an organization, including a government or government agency, a body corporate or a charitable or benevolent organisation.

b) Declaration of partnership status when relationship ends

10.4.6 When a relationship ends and a couple wants the Act to apply to their partnership it would be necessary for a court to determine the status of the relationship. A negative feature of the ascription model is that it may be difficult to determine which relationships fall within the scope of the Act since so many variations of relationships are found. To obviate this problem to some extent, it is proposed that a description of the domestic partnership be used in combination with a checklist of factors for the court to consider.

10.4.7 Since the court will be asked to evaluate the relationship retrospectively on the date that an application to that effect is made, it is possible for a relationship to develop into the described partnership over time.

10.4.8 The legislation will read as follows in providing for the status declaration and the factors that a court should consider when determining the status of a relationship of the parties before the court:

**Declaration of partnerships**

6. (1) A person in an unregistered relationship may after the relationship ends\(^66\) apply to the court for an order declaring the relationship an intimate partnership or a care partnership under this Act.

(2) The court, upon determining whether two persons are in an intimate partnership, must take all the circumstances of the relationship into account, including such of the following matters as may be relevant in a particular case:
(a) the duration of the relationship;

\(^66\) The following variation on this option will be considered at the workshops: Should partners in an unregistered partnership be allowed, during the existence of the relationship, to apply to the court for an order to declare the relationship an unregistered partnership in order to obtain certain benefits? If so, which benefits should then be available?
(b) the nature and extent of common residence;
(c) whether or not a sexual relationship exists;
(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;
(e) the ownership, use and acquisition of property;
(f) the degree of mutual commitment to a shared life;
(g) the care and support of children;
(h) the performance of household duties;
(i) the reputation and public aspects of the relationship;

(3) The court, upon determining whether two persons are in a care partnership, must take all the circumstances of the relationship into account, including such of the following matters as may be relevant in a particular case:
(a) the duration of the relationship;
(b) the nature and extent of common residence;
(c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;
(d) the degree of emotional dependence or interdependence between the partners;
(e) the ownership, use and acquisition of property;
(f) the reputation and public aspects of the relationship.

(4) A finding in respect of any of the matters mentioned in subsections (2) and (3), or in respect of any combination of them, shall not be regarded as essential for the existence of an intimate partnership or a care partnership, and a court, in determining whether such a partnership exists, is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

c) Division of partnership property when partnership ends

10.4.9 It is proposed that the protection of parties in relationships with ascribed status should be limited in comparison to marriage and registered partnerships. This is in line with international views that, on the premise that all options are available to everybody, the protection offered to relationships should be on a par with the level of commitment by the parties. It is submitted that couples who desire certainty about their relationship status and their concomitant rights in advance, should make use of the other options proposed, namely marriage or registered partnership.

10.4.10 The proposed model extends coverage to people who find themselves in an unfavourable economic position upon termination of the relationship as a result of circumstances related to the relationship. There may, for example, be a dispute about the division of the property assembled during the relationship. In particular, it would protect those partners in unequal relationships in which they are unable to convince the other party
to register the relationship formally. They may be in need of protection in case of termination of the relationship.

10.4.11 The proposed legislation aims at providing a fair property division dispensation. For that purpose it is necessary to determine what property is susceptible to division.

10.4.12 The legislation dealing with defining partnership property will read as follows:

"partnership property" means-
(a) the family home of the partnership whenever acquired;
(b) household goods of the partnership whenever acquired;
(c) property owned jointly or in common in equal shares by the partners;
(d) property owned by either partner immediately before the partnership began if –
   (i) the property was acquired in contemplation of the partnership; and
   (ii) the property was intended for the common use or common benefit of both partners;
(e) all property acquired after the partnership began for the common use or benefit of both partners if –
   (i) the property was acquired out of property owned by either or both partners before the partnership began; or
   (ii) the property was acquired out of the proceeds of any disposal of any property owned by either or both partners before the partnership began;
(f) any income and gains derived from the proceeds of and any increase in the value of any property described in paragraphs (a) to (e);

"separate property" means property which does not form part of partnership property, as the case may be;

Status of property

8. A court may, in proceedings relating to the status of the partnership, declare the status of property and the rights, if any, of either partner or other party in respect of partnership property.

Separate property becomes partnership property

9. If any increase in the value of separate property, or any income or gain derived from separate property, was attributable to the utilisation of partnership property, such increase in value or income or gain, as the case may be, is partnership property.

Property not partnership property

10. Partnership property does not include-
(a) property that a partner acquires from a third person—
   (i) by succession;
   (ii) by gift; or
   (iii) because the partner is a beneficiary under a trust established by a third person;
(b) the proceeds of a disposal of property contemplated in paragraph (a); or
(c) property acquired out of property contemplated in paragraph (a) unless such property, or the proceeds of any disposal of it has, with the express or implied consent of the partner who received it, been so intermingled with other partnership property that it is unreasonable or impracticable to regard that property or those proceeds as separate property.

Gifts between partners

11. For purposes of this Act, property that one partner acquires by gift from the other partner is not partnership property unless the gift is used for the benefit of both partners.

10.4.13 Since there is no formal registration process required for the partnership to begin, no formal dissolution process is prescribed.

10.4.14 The proposed legislation will read as follows:

End of partnership

7. An unregistered partnership ends if –
(a) the partners in an intimate partnership cease to live as a couple;
(b) the care relationship between the care partners ceases to exist; or
(c) one of the partners dies.

10.4.15 Under the proposed legislation, the court will be permitted to make a just and equitable order regarding the division of property when the relationship ends. This judicial discretion only comes into play upon application of one or both partners, in other words when they cannot resolve their differences regarding the division of the partnership property between themselves. The legislation providing for the equitable division of partnership property will read as follows:
Equal division

12. (1) In making a decision as to the division of partnership property, the court must take into account that each of the partners is entitled to share equally in partnership property.

(2) If the family home has been sold, each partner is entitled to share equally in the proceeds of the sale, provided that the court making the order is satisfied that-
(a) either partner or both of them has sold the family home with the intention of applying all or part of the proceeds of the sale towards the acquisition of another home as a family home; and
(b) that family home has not been acquired, at the date of the application to the court; and
(c) no more than 2 years have elapsed since the date when those proceeds were received or became payable, whichever is later.

Adjustment order

13. (1) Notwithstanding the provisions of section 12, upon an application by the partners for an adjustment order under this Act, a court may make such order adjusting the interests of the parties in partnership property as it seems just and equitable having regard to-
(a) the contributions made by or on behalf of the partners towards the acquisition, conservation or improvement of partnership property, or to the financial resources of the partners, or of either of them, and
(b) the contributions, including any contributions made, in the capacity of homemaker or parent, by either of the partners to the welfare of the other partner or to the welfare of the family constituted by the partners and a child of the intimate partners.

Further Adjustment Order

14. (1) Notwithstanding the provisions in sections 13 and 14, if upon the division of partnership property under this Act, the court is satisfied that, after the partnership ends, the income and living standards of a partner are likely to be, or have in fact been, significantly higher than the other partner because of the effects of the division of functions within the partnership while the partners were living together, the court may award lump sum payments or order the transfer of property in accordance with this section.

(2) In determining whether or not to make an order under this section, the court may have regard to—
(a) the likely earning capacity of each partner;
(b) the responsibilities of each partner for the ongoing daily care of any minor or dependent children of the intimate partnership;
(c) any other relevant circumstances.

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating a partner—
(a) order the other partner to pay a sum of money out of his or her share of the partnership property to such partner; and
(b) order the other partner to transfer any other property out of his or her share of the partnership property to such partner.
Prerequisites for making of order under this Part

15. (1) Except as provided by subsection (2), a court may not make an order under this Act unless it is satisfied that the partnership has existed for a period of not less than two years.

(2) Notwithstanding the fact that the partnership has not existed for a period of not less than two years, a court may make an order under this Act if it is satisfied that-
(a) the partnership is an intimate partnership and the partners have a child, or
(b) the applicant-
   (i) has made substantial contributions for which the applicant would otherwise not be adequately compensated if the order were not made, or
   (ii) has custody of a child of the respondent,
and that the failure to make the order would result in serious injustice to the applicant.

Classification date

16. (1) Subject to subsection (2), the classification date on which the value of the share of a partner in an unregistered partnership is to be determined is-
(a) the date of the application to the court if the partnership has not ended;
(b) the date on which the partnership ended if the partnership has ended other than by death of one of the partners; or
(c) the date of death of the deceased partner if the partnership does not end while both partners are alive.

(2) A court hearing the application may, in its discretion when it is just and equitable, decide that the classification date may be another date as determined by the court.

Application only within two years after end of unregistered relationship

17. (1) Except as otherwise provided by this section, an application to a court for an order under this Act, can only be made within a period of two years after the date on which the partnership ended.

(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to a applicant partner to apply to the court for an order under this Act, where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant partner if that leave were not granted than would be caused to the respondent partner if that leave were granted.
d) Intestate succession

10.4.16 It is proposed that an unregistered partner in an intimate partnership be entitled to a child's share of the estate under the intestate succession law, but only once the status of an unregistered partnership has been declared by the court.

10.4.17 The legislation providing for this will read as follows: 68

Intestate succession 69

22. A surviving party to an unregistered relationship who have acquired a declaration in terms of section 6 of this Act that the relationship was an intimate partnership, shall inherit a child share or an amount that does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette under the Intestate Succession Act, 1987 (Act No. 81 of 1987), whichever is the greater, from his or her deceased intimate partner who died intestate.

e) Maintenance

10.4.18 In option 1, in view of the fact that no duty to support existed between the unregistered partners during the relationship, the Commission proposes that no general obligation should be created to pay maintenance after the dissolution of the relationship.

10.4.19 Nevertheless, there may be circumstances under which it would be unfair not to award maintenance. For this reason, the court may grant maintenance to former partners under certain prescribed circumstances after the status of their relationship has been declared by the court.

10.4.20 Since an ex post facto partnership only acquires legal status after its termination, maintenance orders would not cease to have effect when a former unregistered partner in whose favour such an order was made, initiates another unregistered

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69 If this version of the unregistered partnership proposal is accepted, the final wording of the clause regarding intestate succession will be adapted in accordance with the amendments to the Intestate Succession Act, 1987 (Act No. 81 of 1987), Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990) and the Estate Duty Act, 1955 (Act No. 45 of 1955) following the judgment in the (at this stage) unreported case of Daniels v Campbell NO and Others case NO 1646/01 in the High Court of South Africa, Cape of Good Hope Provincial Division.
partnership. In an attempt to mitigate this negative effect it is proposed that no right to apply for a maintenance order exists whilst a former partner is receiving maintenance from a previous partner.

10.4.21 The legislation regarding maintenance will read as follows:

**Maintenance**

23. A partner is not liable to maintain the other partner and neither partner is entitled to claim maintenance from the other, except as provided for in this Act.

**Maintenance order**

24. (1) Upon an application by a former partner for an order to pay maintenance, a court may make such an order where the court is satisfied that-
   (a) the applicant partner is unable to support himself or herself adequately by reason of having the custody of a child of an intimate partnership with the respondent partner, being, in either case, a child who is, on the day on which the application is made, a minor child or a physically or mentally disabled child; or
   (b) the applicant partner is unable to support himself or herself adequately because that partner's earning capacity has been adversely affected by the circumstances of the partnership and, in the opinion of the court-
      (i) an order for maintenance would increase that partner's earning capacity by enabling the applicant partner to undertake a course or program of training or education, and
      (ii) it is, having regard to all the circumstances of the case, reasonable to make the order.

   (2) In determining whether to make a maintenance order under this Act and in fixing any amount to be paid pursuant to such an order, a court shall have regard to-
   (a) the income, property and financial resources of each partner and the physical and mental capacity of each partner to appropriate gainful employment;
   (b) the financial needs and obligations of each partner;
   (c) the responsibilities of either partner to support any other person;
   (d) the terms of any order made or proposed to be made under this Act for the division of property; and
   (e) any payments made, pursuant to an order of a court or otherwise, in respect of the maintenance of a child or children in the custody of the applicant.

   (3) In making an order for maintenance, a court must ensure that the terms of the order will, so far as is practicable, preserve any entitlement of the applicant partner to a pension, allowance or benefit.

**Periodic maintenance**

25. Where, upon an application by a former partner for a maintenance order, it appears to a court that such partner is in immediate need of financial assistance, but it is not

70 Compare the position under option 1 discussed in para 10.3.28 above.
practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment by the partner who is the respondent, pending the disposal of the application, of such periodic sum or other sums of money as the court considers reasonable.

**Duration of maintenance order**

26. The duration of a periodic maintenance order must be determined by the court making that order.

**Application by a partner in respect of whom an order has been made**

27. (1) Upon an application by a partner in respect of whom an order has been made under this Act for periodic maintenance, a court may-
   (a) subject to subsection (2), discharge the order;
   (b) suspend the operation of the order wholly or in part and either until further order or until a fixed time or the happening of some future event;
   (c) revive wholly or in part the operation of an order suspended under paragraph (b); or
   (d) subject to subsection (2), vary the order so as to increase or decrease any amount directed to be paid by the order or in any other manner.

   (2) A court shall not make an order discharging, increasing or decreasing an amount directed to be paid by an order unless it is satisfied that, since the order was made, or last varied-
      (a) the circumstances of the partner in whose favour the order was made have so changed;
      (b) the circumstances of the partner against whom the order was made have so changed; or
      (c) the cost of living has changed to such an extent as to justify its so doing.

   (3) In satisfying itself for the purposes of subsection (2)(c), a court shall have regard to any changes that have occurred during the relevant period.

   (4) An order decreasing the amount of a periodic sum of money payable under an order may be expressed to be retrospective to such date as the court thinks fit.

**Extension of a periodic maintenance order**

28. (1) Where a court has made a periodic maintenance order under this Act the partner in whose favour the order is made may, at any time before the expiration of that period, apply to the court for an extension of the period for which the order applies.

   (2) A court shall not make an order pursuant to an application under subsection (1) unless it is satisfied that there are circumstances which justify its so doing.
Effect of subsequent marriage, registered partnership or partnership on maintenance order

29. (1) An application to court for a maintenance order may not be made by a partner who, at the time at which the application is made, has entered into a registered partnership with another person or who, at that time, has married.

(2) An application to court for a maintenance order may not be made by a partner who, at the time at which the application is made, is entitled to receive maintenance in terms of a maintenance order under this Act from a partner in a previous partnership.

Maintenance order ceases to have effect

30. (1) A maintenance order under this Act shall cease to have effect-
   (a) on the death of the partner in whose favour the order was made;
   (b) on the death of the partner against whom the order was made; or
   (c) on the marriage or registration of a registered partnership by the person in whose favour the order was made.

(2) Where, in relation to a partner in whose favour a maintenance order under this Part is made, a marriage or registration of a registered partnership with a third person takes place, that partner must, without delay, notify the partner against whom the order was made of the date of the marriage or registration of a partnership with another partner.

(3) Any money paid pursuant to a maintenance order under this Act, being money paid in respect of a period occurring after a marriage or registration of a partnership with another partner takes place, may be recovered as a debt in a court by the partner who made the payment.

g) Children of intimate partnerships

10.4.21 See the discussion under para 10.3.33 above.

10.5 Domestic partnership agreements

10.5.1 A domestic partnership agreement is a private agreement between domestic partners, which typically aims at establishing contractually for the parties inter partes some of the rights and obligations that married people obtain by operation of the law.  

71 Under option 1, a domestic partnership agreement may be regarded as an indication that the partners meant to opt-out of the scope of the legislation by making their own arrangements.
10.5.2 The option of domestic partnership agreements is available to partners in a domestic partnership on condition that the contract complies with the formal requirements of the law of contracts and does not contain stipulations that are contrary to public policy.72

10.5.3 A domestic partnership agreement may be made before the couple begin living together or during the course of the relationship. It is also possible to conclude a domestic partnership agreement upon termination of the relationship.

10.5.4 The option of a domestic partnership agreement is already in use in South African law. See in this regard the discussion of the current legal position in chapter 4 above.

10.5.5 The domestic partnership agreement model respects the autonomy of the partners but often falls short of supporting other values such as equality or efficiency. Nevertheless, domestic partnership agreements have the potential to play an important role for partners in a relationship who want to regulate their affairs. The utility of agreements in the domestic partnership context could be enhanced by statutory refinement of some of the applicable principles. Therefore, an important question to consider is to what extent it is necessary to regulate domestic partnership agreements in domestic partnership legislation.

10.5.6 One of these refinements could be to provide for a process whereby a former domestic partner may apply to the court to declare the agreement (or certain of the terms) void if, in the court’s discretion, giving effect to the contract will lead to an unfair and harsh result which could not have been foreseen by the partners when the contract was concluded.

10.5.7 An example of legislation designed to provide for domestic partnership agreements is found in the Ontario Family Law Reform Act of 1978.73 This example shows how the issue can be dealt with summarily, and not much detail is provided for.74

72 Thomas, at 156 states that a contract of this nature is not contra bonos mores in light of the decision in Ally v Dinath 1984 (2) SA 451 (T). It is important to note that the courts will not enforce an agreement providing for sexual services. A contract where one party undertakes to pay the other party for the commencement or continuation of a sexual relationship will fall under this category. See Hutchings & Delport 1992 De Rebus, at 123. For more on the arguments about public policy see New South Wales Law Reform Commission Report 36, chap 11.II. See also New South Wales Law Reform Commission Discussion Paper 44, chap 4.5-4.6. Also on the boni mores of cohabitation agreements see Schwellnus Thesis.

73 Referred to New South Wales Law Reform Commission Report 36, at chap 11.C.

74 The major provisions of this Act relating to cohabitation contracts are as follows:
10.5.8 Under the NSW Property (Relationships) Act of 1984\textsuperscript{75} domestic partnership agreements are regulated in combination with the ascription model. Under this Act the court is given a particular safeguarding role and in addition has the overriding power to set aside or vary agreements where the enforcement of the agreement would lead to serious injustice.\textsuperscript{76}

10.5.9 There is a risk that vulnerable partners in unregistered partnerships could be intimidated into contracting to their detriment or that the couple may find that at the time of termination of the relationship, the contract does not adequately provide for their circumstances.

10.5.10 In order to avoid this, it is proposed that the unregistered partnerships legislation provides that these domestic partnership agreements be subject to judicial scrutiny. In terms of the proposed legislation the court will, upon application by one of the parties for an order under the Act, be able to consider the existence of the agreement and the fairness of its terms.\textsuperscript{77}

\begin{quote}
52(1) A man and a woman who are cohabiting and not married to one another may enter into an agreement in which they agree to their respective rights and obligations during cohabitation or upon ceasing to cohabit, or death including,

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and

(d) any other matter in the settlement of their affairs...

54(1) A domestic contract and any agreement to amend or rescind a domestic contract are void unless made in writing and signed by the parties to be bound and witnessed.

55(1) In the determination of any matter respecting the support, education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the court, to do so is in the best interests of the child.
\end{quote}

\textsuperscript{75} In the context of opt out contracts.

\textsuperscript{76} As referred to in New South Wales Law Reform Commission Discussion Paper 44, at 108

\textsuperscript{77} As indicated in fn 58 above, it will be considered at the workshops whether this safeguarding role of the court should be provided for under option 1 as well.
10.5.11 The legislation providing for defining domestic partnership agreements will read as follows:

"domestic partnership agreement" means a written agreement regulating financial matters of parties during cohabitation or thereafter;

"financial matters" in relation to parties to a domestic partnership agreement, means matters with respect to any one or more of the following:
   (a) the property of the parties or of either of them,
   (b) the financial resources of the parties or of either of them.

10.5.14 The legislation providing for the judicial scrutiny and overriding power of the court under option 2 will read as follows:

**Court may consider domestic partnership agreement**

31. (1) In proceedings between parties to an unregistered partnership under this Act, a court may consider the fact that the parties have concluded a domestic partnership agreement and the terms thereof.

(2) If the court, having regard to all the circumstances, is satisfied that giving effect to a domestic partnership agreement would cause serious injustice, it may set the domestic partnership agreement aside, notwithstanding compliance with the prescribed requirements.

(3) In deciding, under subsection (2) whether giving effect to a domestic partnership agreement would cause serious injustice, the court may have regard to—
   (a) the terms of the domestic partnership agreement;
   (b) the length of time since the domestic partnership agreement was concluded;
   (c) whether the domestic partnership agreement was unfair or unreasonable in the light of all the circumstances at the time it was made;
   (d) whether the domestic partnership agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made, whether or not those changes were foreseen by the parties;
   (e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the domestic partnership agreement;  
   (f) any other matters that the court considers relevant, including the contributions of the parties to the partnership.

(4) A court is not required to give effect to the terms of any domestic partnership agreement where the court is of the opinion that-
   (a) the parties have, by their words or conduct, revoked or consented to the revocation of the domestic partnership agreement, or
   (b) the domestic partnership agreement has otherwise ceased to have effect.
(5) A court may make any order under this section notwithstanding that the domestic partnership agreement purports to exclude the jurisdiction of the court to make that order.

(6) If a domestic partnership agreement is void, voidable or is invalid or unenforceable, and the court makes no other order, the provisions of this Act have effect as if the agreement had never been made.

**Court may make an order regarding the children of the parties**

32. Nothing in a domestic partnership agreement affects the power of a court to make an order with respect to the right to custody of, or maintenance of or access to or otherwise in relation to the children of the parties to the domestic partnership agreement.

10.5.16 The Commission would like to receive comments from respondents who are in domestic partnerships and who do not wish to register the relationship in a manner similar to registered partnerships. Is it acceptable that the provisions of the Act only apply when one of the partners approaches the court for that purpose? Is the protection afforded under such legislation necessary? And if so, is it appropriate? Should the court be given judicial discretion to protect vulnerable parties in these kinds of relationships, even to set aside valid domestic partnership agreements? Should polygamous ex post facto unregistered partnerships be legally recognised?
CHAPTER 11: CONCLUSION

11.1 In the preceding chapters we have endeavoured to set out the various problem areas regarding domestic partnerships. The Commission has furthermore set out various alternative options for reform in Chapters 8, 9 and 10.

11.2 It should, however, once again be noted that the proposals set out in this discussion paper should not be regarded as the final recommendations of the Commission. They are being put forward for consideration and evaluation. This process will be facilitated by the series of workshops that is being planned and will be held during the second half of 2003. Respondents will be provided with ample opportunity to discuss the various sections of the proposed legislation in detail.

11.3 The object of this discussion paper has been, however, to provide background information and to develop the basic principles that will form the basis of the forthcoming legislation.

11.4 It appears that it would be impossible to adopt only a single generally valid statutory measure regarding the regulation of domestic partnerships. A differentiated approach seems to be necessary, depending on the nature of the relationship to be protected.

11.5 The preliminary conclusions of the Commission can be summarised as follows:

a) Same-sex relationships are to be acknowledged by the law.

b) Partnerships (both same-sex and opposite-sex) will come into being by way of consensus/private contract but with the option of registration.

c) The availability of benefits during the existence of the partnership without registration of the partnership must be limited.

1 Should any interested persons wish to attend these workshops, they should contact the South African Law Reform Commission for further information. Contact details are set out in the Introduction page in the front of this document.
d) At the end of the unregistered partnership any party may approach the court for an equitable distribution of property on the basis of status subject to specific criteria.

11.6 The alternatives proposed foresee amendments to the Marriage Act of 1961 or the promulgation of a Civil Unions Act, a Registered Partnerships Act and an Unregistered Partnerships Act. See Annexures B, C, D and E in this regard.

The Commission is seeking feedback regarding all these proposals. Comments will be appreciated and taken into account in drafting the final report.
## Annexure A

### Submissions Received from Persons Attached to Institutions

1. **African Christian Democratic Party**
2. **Black Sash**
3. **Charmane Pillay & Company Attorneys**
4. **Church of England in South Africa**
5. **Commission on Gender Equality**
6. **Department of Education**
7. **Department: Public Service and Administration**
8. **Ditz Incorporated Attorneys**
9. **Durban Lesbian & Gay Community & Health Centre**
10. **Dutch Reformed Church**
11. **Famsa**
12. **Father Hyacinth Ennis**
13. **Fish Hoek Full Gospel Church**
14. **Gender Research Project of the Centre for Applied Legal Studies, University of the Witwatersrand**
15. **His People Christian Church**
16. **Hugo, MR Justice JH**
17. **Human Life International**
18. **National Council of Women of South Africa**
19. **Northern Province, Office of the Premier**
20. **Ntanjana, Patrick Vuyani**
21. **Pietermaritzburg Office Child Rights Project, Lawyers for Human Rights**
22. **RHEMA Ministries**
24. **Strubens Valley Family Church**
25. **The Christian Lawyers Association of South Africa**
26. **The Law Society of the Cape of Good Hope**
27. **Tshabalala, MR Justice Vem**
28. **United Christian Action**
29. **Women’s Legal Centre**
SUBMISSIONS RECEIVED FROM INDIVIDUALS

1. ACKERMAN, C & PADFIELD, L
2. ACTION BOLT
3. ADAIR, KEVIN
4. ALEXANDER, N
5. ANDREW
6. ANONYMOUS
7. ATKINS, M
8. BARBARA
9. BARNARD, M
10. BONTHUYS, E
11. BOOYSE, P
12. BORDEAUX
13. BOS, R
14. BOWMAN, P
15. BRALUCKY
16. BRAND, S
17. BROUGH, A
18. CAGE, K
19. CARRADICE, C
20. CERFF, M
21. COETZEE, A
22. COETZEE, T
23. DE VILLIERS, D
24. DREYER, I
25. DUVENHAGE, J
26. ELDON, P
27. FIELD FUSION
28. FOURIE, C
29. FOWLES, H
30. FRANCOIS
31. GARTH, M
32. GOODE, H
33. GRIFF
34. GROBLER, J
35. GROUT TIM G
36. HAYES, B
37. HOGBU, P
38. HOLM, H
39. HOPE – RYAN, M & C
40. HORN, H
41. HUGO
42. IVE, J & T
43. IWORTH, F
44. JANSSENS, S
45. JELBERT, T
46. JEWKES, R
47. JOUBERT, M
48. KAROLIE
49. KARTHRYN
50. KLINCK, E
51. KNOX, P
52. KUKKUK, C
53. LAWSON, VS
54. LE ROUX, N
55. LESLIE, K
56. LIEBENBERG, N
57. LINNEGAR, J
58. LOCK, B
59. MAGGOTT, TC
60. MALHERBE, E
61. MARITZ, A
62. MARTIN, P
63. McCARThY, L
64. McMAHON, I
65. MEINTJIES, A
101. SWART, S
102. SYMEONE, L
103. THERON, PROF ES
104. TONY
105. TRIREME
106. ULYARE, C
107. VAN DER MERWE, A
108. VAN DER MERWE, L
109. VAN ZYL, M
110. WEBSTER, N
111. WETMORE, H
112. WRIGHT, P & I
113. WYBENGA, F
114. XX
115. ZAK
GENERAL EXPLANATORY NOTE:

[          ] Words in bold type in square brackets indicate omissions from existing enactments

_____ Words underlined with a solid line indicate insertions in existing enactments

Option 1:

BILL

To amend the Marriage Act, 1961 so as to provide for the conclusion of a marriage between persons of the same sex; and to amend the marriage formula to acknowledge marriages between persons of the same sex.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 1 of Act 25 of 1961

1. Section 1 of the Marriage Act, 1961 (in this Act referred to as the principal Act), is hereby amended by the insertion after the definition of "magistrate" of the following definition:

"marriage" means the voluntary union of two persons concluded in terms of this Act to the exclusion of any other marriage, union or partnership;

"spouse" means a partner of a person in a valid marriage;"

Amendment of section 30 of Act 25 of 1961

2. Section 30 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or
organization if such marriage formula has been approved by the Minister, but if such
marriage formula has not been approved by the Minister, or in the case of any other
marriage officer, the marriage officer concerned shall put the following questions to
each of the parties separately, each of whom shall reply thereto in the affirmative:

'Do you, A.B., declare that as far as you know there is no lawful impediment
to your proposed marriage with C.D. here present, and that you call all here
present to witness that you take C.D. as your lawful [wife (or husband)]
spouse ?',

and thereupon the parties shall give each other the right hand and the marriage
officer concerned shall declare the marriage solemnized in the following words:

'I declare that A.B. and C.D. here present have been lawfully married.".

Short title and commencement

3. This Act is called the Marriage Amendment Act, 20.. (Act No. … of 20..) and
will come into operation on a date fixed by the President by proclamation in the Gazette.
Option 2:

BILL

To amend the Marriage Act, 1961 so as to provide for the conclusion of a marriage between persons of the same sex; to amend the marriage formula to acknowledge marriages between persons of the same sex; to provide for marriage officers to solemnize marriages between persons of the same or opposite sex; and to provide for matters related thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 1 of Act 25 of 1961

1. Section 1 of the Marriage Act, 1961, (hereinafter referred to as the principal Act) is hereby amended by the insertion of the following definitions:

"'marriage' means the voluntary union of two persons concluded in terms of this Act to the exclusion of any other marriage, union or partnership;

'marriage officer' means a marriage officer as described in section 2 of this Act;

'spouse' means a partner of a person in a valid marriage;"

Repeal of section 3 of Act 25 of 1961

2. Section 3 of the principal Act is hereby repealed.

Repeal of section 7 of Act 25 of 1961

3. Section 7 of the principal Act is hereby repealed.

Repeal of section 8 of Act 25 of 1961

4. Section 8 of the principal Act is hereby repealed.
Amendment of section 29 of Act 25 of 1961

5. Section 29 of the principal Act is hereby amended –

(a) by the substitution for subsection (2) of the following subsection:

"(2) A marriage officer [shall] may solemnize a marriage [in a church or other building used for religious service, or in a public office or private dwelling-house, with open doors] in any place and shall solemnise such marriage in the presence of the parties themselves and at least two competent witnesses [, but the foregoing provisions of this subsection shall not be construed as prohibiting a marriage officer from solemnizing a marriage in any place other than a place mentioned therein if the marriage must be solemnized in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties]”; and

(b) by the substitution for subsection (3) of the following subsection:

"(3) Every marriage [-

(a)] which was solemnized in the Orange Free State or the Transvaal before the commencement of this Act in any place other than a place appointed by a prior law as a place where for the purposes of such law a marriage shall be solemnized [, or

(b)] which by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties was solemnized before the commencement of the Marriage Amendment Act, 1968, in a place other than a place appointed by subsection (2) of this section as a place where for the purposes of this Act a marriage shall be solemnized,
shall, provided such marriage has not been dissolved or declared invalid by a
competent court and provided further that neither of the parties to such
marriage has after such marriage and during the life of the other, already
lawfully married another, be as valid and binding as it would have been if it
had been solemnized in a place appointed therefor by the applicable
provisions of the prior law [or, as the case may be, of this Act.]

Substitution of section 30 of Act 25 of 1961

6. The following section is hereby substituted for section 30 of the principal Act:

"30 Marriage formula

(1) In solemnising a marriage any marriage officer shall put the following
questions to each of the parties separately, each of whom shall reply thereto
in the affirmative:

'Do you, A.B., declare that as far as you know there is no lawful
impediment to your proposed marriage with C.D. here present, and
that you call all here present to witness that you take C.D. as your
lawful spouse?'

and thereupon the parties shall give each other the right hand and the
marriage officer concerned shall declare the marriage solemnized in the
following words:

'I declare that A.B. and C.D. here present have been lawfully married'.

(2) If the provisions of this section or any former law relating to the questions
to be put to each of the parties separately or to the declaration whereby the
marriage shall be declared to be solemnized or to the requirement that the
parties shall give each other the right hand, have not been strictly complied
with owing to-
(a) an error, omission or oversight committed in good faith by the marriage officer; or

(b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,

but such marriage has in every other respect been solemnized in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided further that such marriage, if it was solemnized before the commencement of the Marriage Amendment Act, 1970 (Act 51 of 1970), has not been dissolved or declared invalid by a competent court and neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with."

Repeal of section 31 of Act 25 of 1961

7. Section 31 of the principal Act is hereby repealed.

Amendment of section 32 of Act 25 of 1961

8. Section 32 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him as marriage officer in terms of this Act [:

Provided that a minister of religion or a person holding a responsible position in a religious denomination or organization may, for or by reason of any such thing done by him, receive-

(a) such fees or payments as were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his
religious denomination or organization, for or by reason of any such thing done by him in terms of a prior law; or

(b) such fee as may be prescribed]."

Short title and commencement

5. This Act is called the Marriage Amendment Act, 20.. (Act No. … of 20..) and will come into operation on a date fixed by the President by proclamation in the Gazette.
Option 3.1:

BILL

To provide for persons of the same sex to conclude a civil union, to provide for a registration process for civil unions, to provide for the legal consequences of civil unions, and to provide for the termination of civil unions.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates-

“civil union” means the voluntary union of two persons of the same sex concluded in terms of this Act to the exclusion of any other union or registered partnership;

“civil union partner” means a partner in a civil union concluded in terms of this Act;

“Registered Partnerships Act” means the Registered Partnerships Act, 20. (Act No. … of 20..).

Registration of civil unions

2. (1) A civil union is established through the registration process for registered partnerships provided for in sections 4 to 7 of the Registered Partnerships Act, 20. (Act No. … of 20..).

(2) A person may only be a partner in one civil union at any given time.

(3) A married person may not register a civil union until his or her subsisting marriage has been dissolved.
A prospective civil union partner who has previously been married or registered as a partner in a registered partnership, must present a certified copy of the divorce order, termination certificate, termination order or death certificate of the former spouse or registered partner, as the case may be, to the registration officer contemplated in the Registered Partnerships Act, 20.. (Act No. … of 20..) as proof that the previous registered partnership or marriage has been terminated.

The registration officer may not proceed with the registration of the civil union unless in possession of the relevant documentation referred to in subsection (4).

A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage.

Legal consequences of civil unions

Except as provided for in section 4, the legal consequences of a marriage shall apply, with such changes as may be required by the context, to a civil union.

Termination of civil unions

The process for the termination of registered partnerships prescribed in the Registered Partnerships Act, 20.. (Act No. … of 20..) shall apply, with such changes as may be required by the context, to civil unions.

Short title and commencement

This Act is called the Civil Unions Act, 20.. (Act No. … of 20..) and will come into operation on a date fixed by the President by proclamation in the Gazette.
Option 3.2:

BILL

To provide for persons to conclude a civil union, to provide for a registration process for civil unions, to provide for the legal consequences of civil unions, and to provide for the termination of civil unions.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates-

“civil union” means the voluntary union of two persons concluded in terms of this Act to the exclusion of any other union or registered partnership;

“civil union partner” means a partner in a civil union concluded in terms of this Act;

“Registered Partnerships Act” means the Registered Partnerships Act, 20.. (Act No. … of 20..).

Registration of civil unions

2. (1) A civil union is established through the registration process for registered partnerships provided for in sections 4 to 7 of the Registered Partnerships Act, 20.. (Act No. … of 20..).

(2) A person may only be a partner in one civil union at any given time.

(3) A married person may not register a civil union until his or her subsisting marriage has been dissolved.
A prospective civil union partner who has previously been married or registered as a partner in a registered partnership, must present a certified copy of the divorce order, termination certificate, termination order or death certificate of the former spouse or registered partner, as the case may be, to the registration officer contemplated in the Registered Partnerships Act, 20.. (Act No. … of 20..) as proof that the previous registered partnership or marriage has been terminated.

The registration officer may not proceed with the registration of the civil union unless in possession of the relevant documentation referred to in subsection (4).

A civil union may only be registered by prospective civil union partners who would, apart from the fact that they may be of the same sex, not be prohibited by law from concluding a marriage.

Legal consequences of civil unions

Except as provided for in section 4, the legal consequences of a marriage shall apply, with such changes as may be required by the context, to a civil union.

Termination of civil unions

The process for the termination of registered partnerships prescribed in the Registered Partnerships Act, 20.. (Act No. … of 20..) shall apply, with such changes as may be required by the context, to civil unions.

Short title and commencement

This Act is called the Civil Unions Act, 20.. (Act No. … of 20..) and will come into operation on a date fixed by the President by proclamation in the Gazette.
To recognise the legal status of the relationships provided for in this Act; to provide a system for two persons in a relationship to commit to that relationship by registering that relationship as a partnership; to provide for the registration process; to provide for the legal consequences of such registration; to provide for a procedure to terminate a registered partnership; to provide for the legal consequences of the termination of a registered partnership; to provide for legal procedures to enforce these rights and obligations and to provide for matters related thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates—

“accrual of the estate of a registered partnership” means the amount by which the net value of that estate at the dissolution of the registered partnership exceeds the net value of the estate at the commencement of that registered partnership;

“contribution” means-

(a) the care of—

(i) any child of a registered partnership;

(ii) any aged or infirm relative or dependant of a registered partner;

(b) the management of the household and the performance of household duties;

(c) the provision of money, including the earning of income, for the purposes of a registered partnership;

(d) the acquisition or creation of joint or accrued property, including the payment of money for those purposes;

1 Where the provisions in this Bill originate from other legislation, it is indicated in the footnotes.


(e) the payment of money to maintain or increase the value of—
   (i) the joint or accrued property or any part of that property; or
   (ii) the separate property of the other partner or any part of that property;

(f) the performance of work or services in respect of—
   (i) joint or accrued property or any part of that property; or
   (ii) separate property of the other partner or any part of that property;

(g) the forgoing of a higher standard of living by either registered partner than
   would otherwise have been available;

(h) the giving of assistance or support to the other registered partner (whether or
   not of a material kind), including the giving of assistance or support that—
   (i) enables the other registered partner to acquire qualifications; or
   (ii) aids the other registered partner in the carrying on of his or her
   occupation or business.

provided that there is no presumption that a contribution of a monetary nature is of greater
value than a contribution of a non-monetary nature;4

"court" means a provincial or local division of the High Court of South Africa or a family court
established under section 2 (k) of the Lower Courts Act, 1944 (Act 32 of 1944)5;

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4 Alternative definition for contribution from New South Wales ("NSW") Property (Relationship) Act of 1984:

"contribution" means

   (a) the financial and non-financial contributions made directly or indirectly by or on behalf of

   (i) the registered partners to the acquisition, conservation or improvement of
   any joint or accrued property, or separate property of either of the
   registered partners or to the financial resources of either or both of them, or

   (ii) the parties in terms of a cohabitation agreement, and

   (b) the contributions, including any contributions made in the capacity of homemaker or
   parent, made by either of the

   (i) registered partners to the welfare of the other registered partner or to the
   welfare of the family constituted by them and a child of the registered
   partners;

   (ii) cohabiting parties.

There is no presumption that a contribution referred to in (a) is of greater value than a contribution
referred to in (b).

5 Section 2 of the Magistrates' Courts Act, 1944 (Act 32 of 1944) has been substituted by section 2 of the
Magistrates' Courts Amendment Act, 1993 (Act No. 120 of 1993) to be cited as the Lower Courts Act,
"duty of support" means the responsibility of each registered partner to provide for the other partner's basic living expenses while the registered partnership exists;

"family" includes partners in a registered partnership and their dependants;

"family home" means the dwelling that either or both of the registered partners habitually or from time to time use as the only or principal family residence, together with any land, buildings, or improvements attached to that dwelling and used wholly or principally for the purposes of the household;

"financial resources" in relation to either or both of the registered partners includes:

(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which pension, retirement or similar benefits are provided;
(b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the registered partners or either of them;
(c) property, the alienation or disposal of which is wholly or partly under the control of the registered partners or of either of them and which is lawfully capable of being used or applied by or on behalf of the registered partners or by either of them in or towards their or his or her own purposes, and
(d) any other benefit with a value;

"household goods" means corporeal goods intended for use of the joint household that either or both of the registered partners own and includes—

(a) movable goods of the following kind;
   (i) household furniture;
   (ii) household appliances, effects, or equipment;
   (iii) household articles for family use or amenity or household ornaments, including tools, garden effects and equipment;

1944 – Section 2(k) provides for family courts to be instituted by the Minister of Justice. This section will be put into operation by proclamation.

8 New Zealand Property (Relationships) Act of 1976.
(iv) motor vehicles, caravans, trailers, or boats, used wholly or principally, in each case, for family purposes;
(v) accessories of goods to which subparagraph (iv) applies;
(vi) household pets; and

(b) any of the goods mentioned in paragraph (a) that are in the possession of either or both under a credit agreement or conditional sale agreement or an agreement for lease or hire; but

(c) does not include—
(i) movable goods used wholly or principally for business purposes;
(ii) money or securities for money:
(iii) heirlooms;

"household expenses" means expenses incurred that are reasonably necessary to maintain the common household;

"joint property" means the property in the joint estate of registered partners who agreed to community of property in accordance with section 10(1)(a) of this Act;

"maintenance" means maintenance (whether periodic or otherwise) including the provision of accommodation, food, clothing, medical and dental care and other reasonable requirements, to be paid by a registered partner in terms of a maintenance order or in terms of an agreement under this Act;

"maintenance order" means an order by a court to pay maintenance (whether for periodic maintenance or otherwise) in terms of this Act or any other law;

"Minister" means the Cabinet member responsible for the administration of Home Affairs;

"pension fund" means a pension fund as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), irrespective of whether the provisions of that Act apply to the pension fund or not;

"pension interest" in relation to a partner in a registered partnership and who is a member of a-

pension fund, excluding a retirement annuity fund, means the benefits to which that partner as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of termination on account of his resignation from his office; and

retirement annuity fund which was bona fide established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to the date of termination, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act 55 No. of 1975), for the purposes of that Act;

"periodic maintenance" means maintenance paid or payable or to be paid, as the case may require, by means of periodic sum in terms of a court order or in terms of an agreement under this Act;

"personal debt" means a debt that is not a partnership debt;

"prescribed" means prescribed by regulations made under section 44 of this Act;

"property" without limiting the generality thereof, includes any right or interest (whether present, future or contingent) in or to movable or immovable, corporeal or incorporeal property, money, any debt and any cause of action;

"registered partner" means a person in a registered partnership and includes a former registered partner;

"registered partnership" means a relationship between two persons registered in accordance with the procedures prescribed in this Act;

"registration officer" means any person who is a registration officer by virtue of section 5 of this Act;

"regulation" means a regulation made under section 44 of this Act;

"separate property" means property which does not form part of a joint property;

"termination certificate" means a certificate of proof that a registered partnership has been terminated in a manner provided for in this Act, issued by the registrar or a court as the case may be;

"termination order" means an order by a court to terminate a registered partnership;

Objectives of the Act

2. The objectives of this Act are to provide for the -
   (a) recognition and regulation of the rights and obligations of registered partners;
   (b) protection of the interests of persons upon the termination or end of registered partnerships; and
   (c) final determination of the financial relationships between persons upon the termination of registered partnerships.

Transactions to which this Act apply

3. This Act applies to transactions between-
   (a) registered partners;
   (b) registered partners in respect of property;
   (c) either or both registered partners and other parties;
   (d) either or both registered partner and other parties in respect of property as provided for in this Act.

Partners in a registered partnership

4. (1) A person may only be a partner in one registered partnership at any given time.

   (2) A married person or a person in a civil union may not register a registered partnership until his subsisting marriage has been dissolved.
(3) A prospective registered partner who has previously been married or registered as a partner in a registered partnership or civil union, must present a certified copy of the divorce order, termination certificate, termination order or death certificate of the former spouse or registered partner to the registration officer as proof that the previous registered partnership or marriage has been terminated.

(4) The registration officer may not proceed with the registration process unless presented with a certified copy of the document in contemplated in subsection (3).

(5) Partners in a registered partnership may at any time marry each other or enter into a civil union with each other.

(6) A partnership may only be registered-
(a) if at least one of the prospective registered partnership is a South African citizen or has a certificate of naturalisation in respect of South Africa; and
(b) by prospective registered partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage.

Registration officers

5. (1) The Minister, and any officer in the public service authorized thereto by him or her, may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his or her office and so long as he or she holds such office, a registration officer, either generally or for any specified class of persons or country or area.

(2) Every designation of a person as a registration officer shall be by written instrument and the date as from which it shall have effect and any limitation to which it is subject shall be specified in such instrument.

Place of registration

6. The registration process must be conducted on the premises used for such purposes by the registration officer.

Registration of the partnership

7.  (1) The registration officer shall put the following questions to each of the prospective registered partners separately, to which each shall reply in the affirmative before the registration may proceed:

"Do you A., B. declare that you voluntarily want to register your relationship as a registered partnership in terms of the Registered Partnerships Act, 20.. (Act No. … of 20..)?

Do you A. B. declare that you are aware of the legal rights and obligations that follow this registration?

Do you A. B. declare that you are aware of the process that must be followed to effect the termination of a registered partnership?"

(2) The prospective registered partners must individually and in writing declare their willingness to enter into the registered partnership with one another by signing the prescribed document in the presence of two witnesses.

(3) The registration officer and the two witnesses must sign the prescribed document to certify that the declaration referred to in subsection (2) was made in their presence.

(4) The registration officer must issue the partners to the registered partnership with a registration certificate stating that they have entered into a registered partnership.

(5) This certificate is prima facie proof that a valid registered partnership exists between the parties referred to in the certificate.

(6) Each registration officer shall keep a record of all registered partnerships conducted by him.

(7) The registration officer shall forthwith transmit the registered partnership register and records concerned to the officer in the public service with the delegated responsibility for the population register in his district of responsibility.

(8) Upon receipt of the said register the delegatee shall cause the particulars of the registered partnership concerned to be included in the population register in accordance with the provisions of section 8(e) of the Identification Act, 1997 (Act No. 68 of 1997).¹³

**Duty of support**

8. (1) Registered partners shall have a reciprocal duty of support in accordance with each partner's financial means.

(2) The registered partners are jointly liable for debts incurred for household expenses.

(3) Each registered partner may enforce the joint responsibility established in this section against the other registered partner through legal proceedings in a court of law.

(4) A party to whom debts are owed by either or both registered partners relating to household expenses incurred may enforce the joint liability against either or both partners through legal proceedings in a court of law.

**Accrual system**¹⁴

9. Except as provided for in section 10(1)(b) and (c), a registered partnership under this Act will be subject to the accrual system.

¹³ S 8(e) of the Identification Act of 1997 to be amended to include also registered partnership statistics.

Pre-registration agreements

10. (1) Prospective registered partners may conclude a pre-registration agreement whereby-

(a) community of property or community of profit and loss is made applicable to the registered partnership;
(b) the accrual system is excluded from the registered partnership; or
(c) certain property is excluded from the accrual system.

(2) A pre-registration agreement must be-

(a) signed by both prospective registered partners;
(b) attested to by a notary;
(c) handed in to the registration officer before or on the date of registration of the registered partnership; and
(d) attached to the registration certificate of the registered partnership to serve as prima facie evidence of the proprietary status of the registered partnership.

Determination of accrual

11. (1) In the determination of the accrual of the estate of a registered partner-

(a) any amount which accrued to that estate by way of damages, other than damages for patrimonial loss, is not taken into account;
(b) an asset which has been excluded from the accrual system in terms of a pre-registration agreement contract by the registered partners, as well as any other asset acquired by virtue of the possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;
(c) the net value of that estate at the commencement of the registered partnership is calculated with due allowance for any difference which may exist in the value of money at the commencement and termination of his registered partnership, and for that purpose the weighted average of the consumer price index as published from time to time in the Gazette serves as prima facie proof of any change in the value of money.
(2) The accrual of the estate of a deceased registered partner is
determined before effect is given to any testamentary disposition, donation mortis causa or
bequest out of that estate in terms of the law of intestate succession.

Exclusions from accrual

12. (1) An inheritance, a legacy or a donation which accrues to a registered
partner during the subsistence of the registered partnership, as well as any other asset
acquired by virtue of the possession or former possession of such inheritance, legacy or
donation, does not form part of the accrual of such registered partner's estate, except in so
far as –
   (a) the registered partners has otherwise agreed in a pre-registration agreement; or
   (b) the testator or donor has otherwise stipulated.

(2) In the determination of the accrual of the estate of a registered partner
a donation between registered partners, other than a donation mortis causa, is not taken into
account either as part of the estate of the donor or as part of the estate of the donee.

Declaration of accrual

13. (1) Where the registered partnership will be subject to the accrual system,
the prospective partners to the registered partnership must declare the net values of their
respective estates by making a statement to that effect on the prescribed form at the
registration officer before or on the date of registration of the partnership.

(2) The registration officer shall attach this statement to the registration
certificate to be part thereof and this statement serves as prima facie proof of the net value
of the estate of the registered partner concerned at the commencement of the registered
partnership.

(3) The net value of the estate of a registered partner at the
commencement of the registered partnership is deemed to be nil if-
   (a) the liabilities of that partner exceed his assets at such commencement;
   (b) that value was not declared in a statement contemplated in subsection (1) and the
       contrary is not proved.
Division of accrual

14. (1) Under the accrual system, at the termination of a registered partnership, the registered partner whose estate shows no accrual or a smaller accrual than the estate of the other registered partner, or his or her estate if he or she is deceased, acquires a claim against the other registered partner, or his or her estate if he or she is deceased, for an amount equal to half of the difference between the accrual of the respective estates of the registered partners.

(2) Subject to the provisions of section 16, a claim in terms of subsection (1) arises at the termination of the registered partnership.

(3) The right of a registered partner to share in the accrual of the estate of the other registered partner in terms of this Act is not transferable or liable to attachment during the subsistence of the registered partnership, and does not form part of the insolvent estate of a registered partner.

Furnishing of particulars of accrual

15. When it is necessary to determine the accrual of the estate of a registered partner or a deceased registered partner, that registered partner or the executor of the estate of the deceased registered partner, as the case may be, shall at the request of the other registered partner or the executor of the estate of the other registered partner, as the case may be, within a reasonable time, furnish full particulars of the value of that estate.

Court orders regarding division of accrual

16. A court may, on the application of a registered partner whose registered partnership is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of that other partner at the termination of the registered partnership is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other registered partner, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Part or on such other basis as the court may deem just and equitable.
Accrual claims

17. A court may, on the application of a registered partner against whom an accrual claim lies, order that satisfaction of the claim be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of installments, and the delivery or transfer of specified assets, as the court may deem just.

Family home

18. (1) Both registered partners are entitled to occupy the family home during the existence of the registered partnership, irrespective of which of the registered partners owns or rents the property.

(2) The registered partner who owns or rents the family home has no right to eject the other registered partner from the family home during the existence of the registered partnership without providing him or her with suitable alternative accommodation.

(3) Unless a registered partner who does not own or rent the family home obtains another legal right to occupy the family home, the right of occupation provided for in section 18 ends upon termination of the registered partnership.

(4) If, on termination of the registered partnership it is necessary to transfer ownership of the family home from one registered partner to the other registered partner following a mutual agreement, court order, will or right to intestate succession to that effect, that registered partner will be deemed to be a "spouse" as meant in the Transfer Duty Act, 1949 (Act No. 40 of 1949).

Right to succession

19. The Intestate Succession Act, 1987 (Act No. 81 of 1987) applies, with the changes required by the context, to registered partnerships and for purposes of the Intestate Succession Act, 1987 (Act No. 81 of 1987) a partner in a registered partnership is deemed to be a "spouse" as meant in that Act.\textsuperscript{15}

\textsuperscript{15} If this proposal is accepted, the final wording of this clause will be formulated in view of the judgment in the unreported case of Daniels v Campbell NO and Others, Case NO 1646/01 in the High Court of South Africa, Cape of Good Hope Provincial Division.
Medical decisions

20. For the purposes of medical matters, registered partners are deemed to be "spouses" in a legally valid marriage and are also entitled to access to each other's medical records as if they were legally married.

Delictual claims

21. (1) For the purpose of claiming damages in a delictual claim, registered partners are deemed to be "spouses" in a legally valid marriage.

(2) A registered partner is not excluded from instituting a delictual claim for damages based on the wrongful death of the other partner merely on the ground that the partners have not been legally married.

(3) A registered partner is a dependant for purposes of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993).

Artificial insemination

22. Registered partners are not prohibited from procreating through artificial insemination merely on the ground that they are not legally married.

Registered partners not compellable to disclose communications between them

23. (1) A registered partner may not in civil or criminal proceedings be compelled to disclose any communication made to him by the other registered partner during the registered partnership.

(2) Subsection (1) applies to a communication made during the subsistence of a registered partnership or a putative registered partnership which has been terminated or annulled by a competent court.

Evidence of accused and registered partner on behalf of accused

24. The registered partner of an accused person is not a compellable witness where a co-accused calls that registered partner as a witness for the defence.

Children of registered partners of the opposite sex

25. (1) Where a child is born into a registered partnership between persons of the opposite sex, the male partner in the registered partnership is deemed to be the biological father of that child and has the legal rights and responsibilities towards that child that would have been conferred upon him if he had been married to the biological mother of the child.\(^\text{18}\)

(2) Where a child is born into a registered partnership between persons of the opposite sex and the male partner in the partnership is not the biological father of the child, that male partner may apply to the court to be assigned parental rights and responsibilities with regard to that child in terms of the Children's Act, 20.. (Act No. ... of 20..).\(^\text{19}\)

(3) Where a child is born in a registered partnership between persons of the opposite sex and the male partner in the partnership is not the father of the child and that male partner does not wish to apply to court for parental rights in terms of subsection (2) but wishes to adopt the child, he may apply to do so in terms of the Children's Act, 20.. (Act No. ... of 20..).\(^\text{20}\)

Adoption of children by same-sex registered partners.

26. (1) The registered partner in a registered partnership between persons of the same sex who is not the biological parent of the child may apply to the court to be

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17 Criminal Procedure Act of 1977.
18 See chap 9.5.31 above.
19 See chap 9.5.32 above.
20 See chap 9.5.33 above.
21 See chap 9.5.31-33 above.
assigned parental rights and responsibilities with regard to that child in terms of the Children's Act, 20.. (Act No. … of 20..).

(2) The registered partner in a registered partnership between persons of the same sex who is not the biological parent of the child may adopt the biological child of the other partner as provided for in the Children's Act, 20.. (Act No. … of 20..).

(3) Same-sex couples may apply to adopt a child of which none of them are the biological parents jointly, as provided for in the Children's Act, 20.. (Act No. … of 20..).

Maintenance duty of biological father

27. Nothing provided for in section 25 and 26 affects the duty of a biological father of a child to contribute towards the maintenance of that child.

Amendment of custody or guardianship orders

28. (1) An order regarding the custody or guardianship of, or access to, a child, made in terms of this Act, may, upon application by any of the registered partners, at any time be rescinded or varied or, in the case of an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) or (2)(b) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4(1) have been considered by the court.

(2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the registered partners are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.

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Termination of registered partnerships

29. (1) A registered partnership exists until –
(a) it is terminated by death;
(b) the date on which a mutual termination agreement contemplated in section 30, is filed with a registration officer;
(c) a court order to terminate the registered partnership, as provided for in this Act, is issued.

(2) A death certificate, termination certificate issued by the relevant registration officer or a termination order will be prima facie proof that a registered partnership has been terminated.

Termination agreement

30. (1) Except as provided for in section 31, registered partners may terminate the registered partnership by mutual agreement executed before a notary.

(2) The mutual agreement must-
(a) state that it is entered into voluntarily by both registered partners;
(b) declare that the registered partners have come to a mutual agreement to terminate the partnership;
(c) set out the following information:
   (i) any conditions of the termination;
   (ii) the division of accrued or joint property;
   (iii) arrangements regarding the family home;
   (iv) settlement of pension and other similar claims; and
(d) be filed with the registration officer in the area where the registered partners at the time of the mutual agreement usually reside.

(3) If the registered partners have concluded a pre-registration agreement, division of property will take place in accordance with that agreement.

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23 The registered partnership legislation of the Netherlands.
(4) The mutual agreement to terminate the registered partnership will be effective from the date that it was filed with the said registration officer.

(5) The registration officer must issue a termination certificate upon the filing of a mutual agreement by the registered partners.

**Termination by court order**

31. (1) The registered partners or a registered partner must apply to the court for an order to terminate the registered partnership if—
   
   (a) the registered partners have minor children; or
   
   (b) the registered partners cannot come to an agreement regarding the-
       
       (i) termination of the registered partnership; or
       
       (ii) division of accrued or joint property upon termination of the registered partnership.

   (2) An application to terminate a registered partnership is made to the court in accordance with the provisions of the Supreme Court Act, 1959 (Act No. 59 of 1959).

**Welfare of minor children**

32. (1) A court shall not order the termination of a registered partnership unless the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor child of the registered partnership are in the best interests of such child.

   (2) In order to determine that the circumstances set out in subsection (1) exist, the court may order that an investigation be instituted and for that purposes the provisions of section 4(1)(a) or (2)(a) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) apply, with the changes required by the context, to the registered partnership.

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(3) Before making the termination order, the court must consider the report and recommendations referred to in the said section 4(1) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987).

(4) In order to determine that the circumstances set out in subsection (1) exist, the court may order any person to appear before it and may order either or both the registered partners to pay the costs of an investigation and appearance.

(5) A court granting an order to terminate a registered partnership may, in regard to the maintenance and education of a dependent child of the registered partnership or the custody or guardianship of, or access to, a minor child of the registered partnership, make any order which it deems fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.

(6) Unless where otherwise ordered by a court, the rights of and obligations towards children of a registered partnership under any other law are not affected by the termination of the registered partnership.

(7) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order either or both the registered partners to pay the costs of the representation.

**When court may grant termination order**

33. (1) A court may grant an order to terminate a registered partnership if it is satisfied that the registered partnership has reached a state of disintegration and there is no reasonable prospect of the restoration of the relationship between the partners.

(2) A court granting an order to terminate a registered partnership may make an order with regard to the division of the accrued or joint property of the registered

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partners in accordance with a written agreement between such partners if it deems it just and equitable.

(3) Where there is no written agreement about the division of the accrued or joint property or, if the court is not satisfied that the division of property agreed to by the registered partners is just and equitable, the court may make an order to divide the property in a manner which it deems just and equitable.

(4) A court granting an order to terminate a registered partnership may make an order with regard to the division of the joint property of the registered partners in accordance with a pre-registration agreement between the partners if it is satisfied that such agreement is valid.

Transfer of accrued property

Upon granting an application to terminate a registered partnership, a court may, subject to the provisions of subsections (2), (3) and (4), order that accrued or joint property or such part thereof as the court may deem just and equitable, be transferred to one of the registered partners.

(2) An order under subsection (1) shall not be granted unless the court is satisfied that it is equitable and just with reference to the contributions made by the registered partner in whose favour the order is granted.

(3) When considering the transfer of accrued or joint property or part thereof as contemplated in subsection (1), the court must, apart from the contributions made by the registered partners, also take into account—

(a) the existing means and obligations of both registered partners,
(b) any donation made by one registered partner to the other registered partner during the subsistence of the registered partnership; and
(c) any other relevant factor.

(4) A court granting a transfer order under subsection (1) may, on application by the registered partner against whom the order is granted, order that

26 Divorce Act of 1979.
satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments and the delivery or transfer of specified assets, as the court deems just.

(5) In the determination of the division of accrued or joint property, the pension interest of a registered partner is deemed to be part of that registered partner's property.

(6) Notwithstanding the provisions of any other law or of the rules of any pension fund-

(a) the court granting a termination order in respect of a member of such a fund, may make an order that-

(i) any part of the pension interest of that registered partner which, by virtue of subsection (5), is due or assigned to the other registered partner, must be paid by that fund to that other registered partner when any pension benefits accrue in respect of that member;

(ii) an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other registered partner;

(b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, also applies, with the changes required by the context, mutatis mutandis with regard to the right of that other registered partner in respect of that part of the pension interest concerned.

(7) For purposes of this section, a registered partner will be a dependant as defined in the Pension Funds Act, 1956 (Act No. 24 of 1956).

Maintenance

35. (1) There is no general right to maintenance between registered partners upon termination of the partnership.

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(2) A court granting a termination of the registered partnership may in accordance with a written agreement between the registered partners make an order with regard to the payment of maintenance by the one partner to the other.

(3) In the absence of an agreement referred to in subsection (2), the court may, having regard to the existing or prospective means of each of the registered partners, their respective earning capacities, future financial needs and obligations, the age of each of the partners, the duration of the registered partnership, the standard of living of the parties prior to the termination of the registered partnership, and any other factor which in the opinion of the court should be taken into account, make an order which is just and equitable in respect of the payment of maintenance by the one partner to the other for any specified period or until the death or remarriage of the partner in whose favour the order is given, whichever event may first occur.

Void registered partnerships

36. (1) A registered partnership which has not been registered in accordance with the provisions of this Act, may be declared void upon the application to the High Court by any interested person and the Court may make an order regarding the division of property in a manner that it deems just and equitable.

(2) A registered partnership that has been declared void has the same effect as a void marriage.

Effect of termination on will28

37. If any registered partner dies within three months after his registered partnership was terminated or annulled by a competent court and such partner executed a will before the date of such termination or annulment, that will must be implemented in the same manner as it would have been implemented if the other registered partner had died before the date of the termination or annulment concerned, unless it clearly appears from the will that the testator intended to benefit the other registered partner notwithstanding the termination or annulment.

28 Wills Act of 1953.
General Powers of the court

38. (1) Without derogating from any other power of a court under this Act or any other law, a court, in exercising its powers under this Act, may do any one or more of the following:

(a) order the transfer of property;
(b) order the sale of property and the distribution of the proceeds of sale in such proportions as the court deems fit;
(c) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
(d) order payment of a lump sum, whether in one amount or by instalments;
(e) order payment of a weekly, fortnightly, monthly, yearly or other periodic sum;
(f) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;
(g) appoint or remove trustees;
(h) make an order or grant an injunction-
   (i) for the protection of or otherwise relating to the property or financial resources of the partners or of either of them;
   (ii) to aid enforcement of any other order made in respect of an application, or both; and
   (iii) impose terms and conditions;
(i) make an order by consent;
(j) make an order in the absence of a registered partner or other party;
(k) make any other order or grant any other injunction (whether or not of the same nature as those mentioned in the preceding paragraphs) which it regards necessary to do justice.

(2) A court may, in relation to an application under this Act-

(a) make any order or grant any remedy or relief which it is empowered to make or grant under this Act or any other law, and
(b) make any order or grant any remedy or relief under this Act in addition to or in conjunction with making any other order or granting any other remedy or relief which it is empowered to make or grant under this Act or any other law.
Execution of instruments by order of a court

39. (1) Where-
(a) an order under this Act has directed a person to execute a deed or instrument, and
(b) the person has refused or neglected to comply with the direction or, for any other reason, a court deems it necessary to exercise the powers conferred on it under this subsection,
the court may appoint an officer of the court or other person to execute the deed or instrument in the name of the person to whom the direction was given and to do all acts and things necessary to give validity and operation to the deed or instrument.

(2) The execution of the deed or instrument by the person so appointed has the same force and validity as if it had been executed by the person directed by the order to execute it.

(3) A court may make such order as it deems just as to the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.

Variation and setting aside of orders

40. Where, on the application of a registered partner or other party in respect of whom an order has been made, a court is satisfied that-
(a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;
(b) in the circumstances that have arisen since the order was made, it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or
(c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order,
the court may, in its discretion, vary the order or set the order aside and, if it deems fit, make another order in accordance with this Act in substitution for the order so set aside.
Transactions to defeat claims

41. (1) In this Act, disposal includes a sale and a gift.

(2) On an application for an order under this Act, a court may set aside or restrain the making of an instrument or disposal by or on behalf of, or by direction or in the interest of, a person, which is made or proposed to be made to defeat an existing or anticipated order relating to the application, or which, irrespective of intention, is likely to defeat any such order.

(3) The court may order that any property dealt with by any such instrument or disposal may be taken in execution or used or applied in, or charged with, the payment of such sums payable pursuant to an order adjusting interests with respect to the property of the registered partner or other parties or either of them or for maintenance or costs as the court directs, or that the proceeds of a sale must be paid into court to abide its order.

(4) A registered partner or other party or a person acting in collusion with him or her may be ordered to pay the costs of the other registered partner or other party or of a bona fide purchaser or other person with an interest in and incidental to any such instrument or disposal and the setting aside or restraining of the instrument or disposal.

Interests of other parties

42. (1) In the exercise of its powers under this Act, a court must have regard to the interests of, and must make any order proper for the protection of, a bona fide purchaser or other person with an interest in property concerned.

(2) The rights of creditors of the partners are not affected by this Act.

Remedies under any other Act or law

43. Nothing in this Act derogates or affects any right of a registered partner or other party to apply for any remedy or relief under any other law.
Regulations

44. The Minister may make regulations as to any matter which by this Act is required or permitted to be prescribed or which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that the provisions of this Act may be effectively administered.

Short title and commencement

45. This Act is called the Registered Partnerships Act, 20.. (Act No. … of 20..) and will come into operation on a date fixed by the President by proclamation in the Gazette.
Option 1:

BILL

To provide for the ascribed legal status of intimate partnerships in unregistered relationships; to provide for certain rights and obligations during the existence of the unregistered relationship; to provide for the division of partnership property when the relationship ends; to provide for the factors to be considered by a court when ordering the division of property; to provide for legal procedures to enforce these rights and obligations and to provide for matters related thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates—

"adjustment order" means an order made by a court under section 20 of this Act to adjust the equal shares of partners in partnership property upon division;

"biological father" does not include a male person whose relationship with the child exists merely because he was a gamete donor in artificial insemination of a person as defined in section 1 of the Human Tissue Act, 1983 (Act 65 of 1983), whereby that child was fathered, in the absence of any prior love relationship between the natural parents and who has waived all rights he may have had towards the said child;

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1 This Bill is mainly a combination of the provisions of the Swedish Cohabitees (Joint Homes) Act of 1987, the New South Wales Property (Relationships) Act of 1984 and the New Zealand Property (Relationships) Act of 1976.

2 Natural Fathers of Children Born Out of Wedlock Act 86 of 1997
"child of an intimate partnership"\(^3\) means-

(a) any child born as a result of sexual relations between the intimate partners; or

(b) any child of either intimate partner; or

(c) any child adopted by one or both of the intimate partners jointly; or

(d) any other child who was a member of the family of the intimate partners-
   (i) at the time when the intimate partners ceased to live together; or
   (ii) if at that time the intimate partners had not ceased to live together, at
        the time immediately before an application under this Act; or
   (iii) at the date of the death of one of the intimate partners;

"classification date" means the date on which any property is classified as partnership property or as any other type of property in terms of this Act;

"contribution"\(^4\) means-

(a) the care of—
   (i) any child of an intimate partnership;
   (ii) any aged or infirm relative or dependant of a partner;

(b) the management of the household and the performance of household duties;

(c) the provision of money, including the earning of income, for the purposes of an unregistered partnership;

(d) the acquisition or creation of partnership property including the payment of money for those purposes;

(e) the payment of money to maintain or increase the value of—
   (i) the partnership property or any part of that property; or
   (ii) the separate property of the other partner or any part of that property;

(f) the performance of work or services in respect of—
   (i) partnership property or any part of that property; or
   (ii) separate property of the other partner or any part of that property; or

(g) the forgoing of a higher standard of living by either partner than would otherwise have been available;

(h) the giving of assistance or support to the other partner (whether or not of a material kind), including the giving of assistance or support that—
   (i) enables the other partner to acquire qualifications; or

\(^3\) NSW Property (Relationships) Act of 1984

\(^4\) New Zealand Property (Relationships) Act of 1976
(ii) aids the other partner in the carrying on of his or her occupation or business.

provided that there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature;³

“court” means a provincial or local division of the High Court of South Africa or a family court established under section 2 (k) of the Lower Courts Act, 1944 (Act 32 of 1944)⁶;

“division” means the division of the partnership property at any time in accordance with the provisions of this Act;

“division order” means an order made by a court under section 19 of this Act for partners to share equally in partnership property upon division;

“domestic partnership agreement” means a written agreement regulating financial matters of parties during cohabitation or thereafter;

“family” includes partners in an unregistered partnership and their dependants;

“family home”⁷ means the dwelling that either or both of the partners habitually or from time to time use as the only or principal family residence, together with any land, buildings, or

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³ Alternative definition for contribution based on the New South Wales (“NSW”) Property (Relationship) Act of 1984:

"contribution" means

(a) the financial and non-financial contributions made directly or indirectly by or on behalf of partners to the acquisition, conservation or improvement of any partnership property or separate property of either of the partners or to the financial resources of either or both of them, or

(b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the partners to the welfare of the partner or to the welfare of the family constituted by them and a child of the intimate partnership;

There is no presumption that a contribution referred to in (a) is of greater value than a contribution referred to in (b)

⁶ Section 2 of the Magistrates’ Courts Act, 1944 (Act 32 of 1944) has been substituted by section 2 of the Magistrates’ Courts Amendment Act, 1993 (Act No. 120 of 1993) to be cited as the Lower Courts Act, 1944 – Section 2(k) provides for family courts to be instituted by the Minister of Justice. This section will be put into operation by proclamation.

improvements attached to that dwelling and used wholly or principally for the purposes of the common household;

"financial matters" in relation to parties to a domestic partnership agreement, means matters with respect to any one or more of the following:

(a) the property of the parties or of either of them,

(b) the financial resources of the parties or of either of them.

"financial resources" in relation to either or both of the partners includes:

(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which pension, retirement or similar benefits are provided;

(b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the partners or either of them;

(c) property, the alienation or disposal of which is wholly or partly under the control of the partners or of either of them and which is lawfully capable of being used or applied by or on behalf of the partners or by either of them in or towards their or his or her own purposes, and

(d) any other benefit with a value;

"further adjustment order" means an order made by a court under section 21 of this Act for the further adjustment of the shares of partners in partnership property upon division;

"household goods" means corporeal goods intended for use of the joint household that either or both of the partners own and includes—

(a) movable goods of the following kind;

(i) household furniture;

(ii) household appliances, effects, or equipment;

(iii) household articles for family use or amenity or household ornaments, including tools, garden effects and equipment;

(iv) motor vehicles, caravans, trailers, or boats, used wholly or principally, in each case, for family purposes;

(v) accessories of goods to which subparagraph (iv) applies;

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9 New Zealand Property (Relationships) Act of 1976.
(vi) household pets; and

(b) any of the goods mentioned in paragraph (a) that are in the possession of either or both under a credit agreement or conditional sale agreement or an agreement for lease or hire; but

(c) does not include—

(i) movable goods used wholly or principally for business purposes;
(ii) money or securities for money:
(iii) heirlooms;

"household expenses" means expenses incurred that are reasonably necessary to maintain the common household;

"maintenance" includes the provision of accommodation, food, clothing, medical and dental care and other reasonable requirements, to be paid by a partner in terms of a maintenance order or in terms of an agreement under this Act, whether periodic or otherwise;

"maintenance order" means an order by a court to pay maintenance in terms of this Act or any other law;

"intimate partner" means a partner in an intimate partnership and includes a former intimate partner;

"intimate partnership" means a relationship, other than a marriage, civil union or registered partnership, between two adult persons who live as a couple and includes a former intimate partnership;

"Minister" means the Cabinet member responsible for the administration of Home Affairs;

"opt-out agreement" means an agreement provided for in section 37 of the Act or a domestic partnership agreement;

"partner" means a partner in an unregistered partnership and includes a former partner;

"partnership" means an unregistered partnership;
"partnership debt" means a debt that has been incurred, or to the extent that it has been incurred,—

(a) by the partners jointly; or

(b) in the course of a common enterprise of the partnership carried on by the partners, whether alone or together with another person; or

(c) for the purpose of acquiring, improving, or maintaining partnership property, whether or not at the time the debt was incurred, the property for which it was incurred was partnership property, as long as that property later becomes partnership property; or

(d) for the benefit of both partners in the course of managing the affairs of the common household; or

(e) for the purpose of bringing up any child of the intimate partnership.

"partnership property" means—

(a) the family home of the partnership whenever acquired;

(b) household goods of the partnership whenever acquired;

(c) property owned jointly or in common in equal shares by the partners;

(d) property owned by either partner immediately before the partnership began if—

(i) the property was acquired in contemplation of the partnership; and

(ii) the property was intended for the common use or common benefit of both partners;

(e) all property acquired after the partnership began for the common use or benefit of both partners if—

(i) the property was acquired out of property owned by either of or both partners before the partnership began; or

(ii) the property was acquired out of the proceeds of any disposal of any property owned by either of or both partners before the partnership began;

(f) any income and gains derived from the proceeds of and any increase in the value of any property described in paragraphs (a) to (e);

"pension fund" means a pension fund as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), irrespective of whether the provisions of that Act apply to the pension fund or not;

"periodic maintenance" means maintenance paid or payable or to be paid, as the case may require, by means of periodic sum in terms of a court order or in terms of an agreement under this Act;

"personal debt" means a debt that is not a partnership debt;

"prescribed" means prescribed by regulations made under section 44 of this Act;

"property" without limiting the generality thereof, includes any right or interest (whether present, future or contingent) in or to movable or immovable, corporeal or incorporeal property, money, any debt and any cause of action;

"registered partnership" means a partnership registered in terms of the Registered Partnership Act, 20.. (Act No. … of 20..);

"regulation" means a regulation made under section 44 of this Act;

"share" means the share of a partner in partnership property determined by a division, adjustment or further adjustment order, made under this Act;

"separate property" means property which does not form part of partnership property;

"unregistered partner" means a partner in an intimate partnership that is not registered under the Registered Partnership Act, 20.. (Act No. … of 20..) and includes a former unregistered partner;

"unregistered partnership" means an intimate partnership that is not registered under the Registered Partnership Act, 20.. (Act No. … of 20..) and includes a former unregistered partnership;

"voluntary agreement" means a written agreement made between partners who are parties to proceedings under this Act, providing for--

(a) the division of partnership property;

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(b) one partner to pay money to the other partner for the maintenance of—
   (i) the other partner;
   (ii) a child of the intimate partnership

in settlement of the application before the court.

Objectives of the Act

2. The objectives of this Act are to provide for the -
   (a) recognition and regulation of the rights and obligations of persons in unregistered partnerships;
   (b) protection of the interests of persons when an unregistered partnership ends; and
   (c) final determination of the financial relationships between persons when an unregistered partnership ends.

Transactions to which this Act apply

3. This Act applies to transactions between-
   (a) either or both partners;
   (b) either or both partners in respect of property;
   (c) either or both partners and other parties;
   (d) either or both partners and other parties in respect of property as provided for in this Act.

Existence of an intimate partnership

4. (1) When determining whether two persons are in an intimate partnership, regard must be had to all the circumstances of the relationship, including such of the following matters as may be relevant in a particular case:
   (a) the duration of the relationship;
   (b) the nature and extent of common residence;
   (c) whether or not a sexual relationship exists;
   (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;
   (e) the ownership, use and acquisition of property;
   (f) the degree of mutual commitment to a shared life;
   (g) the care and support of children;
(h) the performance of household duties;

(i) the reputation and public aspects of the relationship.

(2) A finding in respect of any of the matters mentioned in subsection (1), or in respect of any combination of them, shall not be regarded as essential for the existence of an intimate partnership, and in determining whether such a partnership exists, regard may be had to further matters and the weight be attached to such matters as may seem appropriate in the circumstances of the case.

Declaration of unregistered partnerships status

5. (1) When the status of an intimate partnership provided for in this Act is disputed, any interested party may at any time apply to court for an order declaring the status of the relationship.

(2) The court, upon determining whether two persons are in an intimate partnership, must take all the circumstances of the relationship into account, including such of the matters set out in section 4(1) as may be relevant in a particular case.

(3) A finding in respect of any of the matters mentioned in subsection (2), or in respect of any combination of them, shall not be regarded as essential for the existence of an intimate partnership, and a court, in determining whether such a partnership exists, is entitled to have regard to further matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

Duty of support

6. (1) Except as provided for in this section, there is no general duty of support between partners in an unregistered partnership.

(2) Partners are jointly liable for debts incurred for household expenses.

(3) A third party to whom debts referred to in subsection (1) are owed by either or both of the partners may enforce the joint liability against either or both of the partners through legal proceedings in a court of law.
Medical decisions

7. For the purposes of decisions on medical matters, partners in an unregistered partnership are deemed to be "spouses" in a legally valid marriage and are also entitled to access to each other's medical records as if they were legally married.

Unregistered partners not compellable to disclose communications between them\(^\text{12}\)

8. A partner in an unregistered partnership may not in civil or criminal proceedings be compelled to disclose any communication made to him by the other partner during the unregistered partnership.

Evidence of accused and partner on behalf of accused\(^\text{13}\)

9. The unregistered partner of an accused person is not a compellable witness where a co-accused calls that unregistered partner as a witness for the defence.

Intestate succession\(^\text{14}\)

10. A surviving partner in an unregistered partnership shall inherit a child share or an amount that does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette under the Intestate Succession Act, 1987 (Act No. 81 of 1987), whichever is the greater, from his or her deceased unregistered partner who died intestate.


\(^{13}\) Criminal Procedure Act of 1977

\(^{14}\) If this version of the unregistered partnership proposal is accepted, the final wording of the clause regarding intestate succession will be adapted in accordance with the amendments to the Intestate Succession Act, 1987 (Act No. 81 of 1987), Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990) and the Estate Duty Act, 1955 (Act No. 45 of 1955) following the judgment in the (at this stage) unreported case of Daniels v Campbell NO and Others case NO 1646/01 in the High Court of South Africa, Cape of Good Hope Provincial Division.
Disposal of partnership property

11. A partner in an unregistered partner may not, without the consent of the other partner, sell, donate, mortgage, let, lease or otherwise dispose of partnership property.

End of partnership

12. An unregistered partnership ends if –

(a) the partners in an intimate partnership cease to live as a couple;

(b) one of the partners dies.

Notification of end of partnership

13. (1) When the partners in an unregistered partnership cease to live as a couple, both partners are liable to give written notice of the dissolution of the relationship to all interested parties.

(2) When one of the partners in an unregistered partnership dies, the surviving partner must give written notice of the dissolution of the relationship to all interested parties.\(^{16}\)

Settlement to be made an order of court

14. Where, after the dissolution of an intimate partnership, the partners have come to an agreement as to the division of partnership property, they may apply to court to make that agreement an order of court.

\(^{15}\) Swedish Cohabitees (Joint Homes) Act of 1987.

\(^{16}\) The term "interested parties" should be defined with reference to the third parties that may be involved in the rights and obligations of de facto partnerships. This will be done if this option is selected and the set of rights and obligations has been identified.
Status and division of property

15. (1) When an unregistered partnership ends, partners who cannot agree as to the status or division of partnership property may apply to the court for an order in that respect.

(2) A court may declare the status of property and the rights upon division of such property, if any, of either partner or other party in respect of partnership property.

Separate property becomes partnership property

16. If any increase in the value of separate property, or any income or gain derived from separate property, was attributable to the utilisation of partnership property, such increase in value or income or gain, as the case may be, is partnership property.

Property not partnership property

17. Partnership property does not include-

(a) property that a partner acquires from a third person—

(i) by succession;

(ii) by gift; or

(iii) because the partner is a beneficiary under a trust established by a third person;

(b) the proceeds of a disposal of property contemplated in paragraph (a); or

(c) property acquired out of property contemplated in paragraph (a)

unless such property, or the proceeds of any disposal of it has, with the express or implied consent of the partner who received it, been so intermingled with other partnership property that it is unreasonable or impracticable to regard that property or those proceeds as separate property.

Gifts between partners

18. For purposes of this Act, property that one partner acquires by gift from the other partner is not partnership property unless the gift is used for the benefit of both partners.
Equal division

19. (1) In making a decision as to the division of partnership property, the court must take into account that each of the partners is entitled to share equally in partnership property.

(2) If the family home has been sold, each partner is entitled to share equally in the proceeds of the sale, provided that the court making the order is satisfied that-

(a) either partner or both of them has sold the family home with the intention of applying all or part of the proceeds of the sale towards the acquisition of another home as a family home; and

(b) that family home has not been acquired, at the date of the application to the court; and

(c) no more than 2 years have elapsed since the date when those proceeds were received or became payable, whichever is later.

Adjustment order

20. (1) Notwithstanding the provisions of section 19, upon an application by the partners for an adjustment order under this Act, a court may make such order adjusting the interests of the parties in partnership property as it seems just and equitable having regard to-

(a) the contributions made by or on behalf of the partners towards the acquisition, conservation or improvement of partnership property, or to the financial resources of the partners, or of either of them, and

(b) the contributions, including any contributions made, in the capacity of homemaker or parent, by either of the partners to the welfare of the other partner or to the welfare of the family constituted by the partners and a child or children of the intimate partners.

Further Adjustment Order

21. (1) Notwithstanding the provisions in sections 20 and 21, if upon the division of partnership property under this Act, the court is satisfied that, after the partnership ends, the income and living standards of a partner are likely to be, or have in fact been, significantly higher than the other partner because of the effects of the division of functions
within the partnership while the partners were living together, the court may award lump sum payments or order the transfer of property in accordance with this section.

(2) In determining whether or not to make an order under this section, the court may have regard to—
(a) the likely earning capacity of each partner;
(b) the responsibilities of each partner for the ongoing daily care of any minor or dependent children of the intimate partnership;
(c) any other relevant circumstances.

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating a partner—
(a) order the other partner to pay a sum of money out of his or her share of the partnership property to such partner; and
(b) order the other partner to transfer any other property out of his or her share of the partnership property to such partner.

Classification date

22. (1) Subject to subsection (2), the classification date on which the value of the share of a partner in an unregistered partnership is to be determined is-
(a) the date of the application to the court if the partnership has not ended;
(b) the date on which the partnership ended if the partnership has ended other than by death of one of the partners; or
(c) the date of death of the deceased partner if the partnership does not end while both partners are alive.

(2) A court hearing the application may, in its discretion when it is just and equitable, decide that the classification date may be another date as determined by the court.

Application only within two years after end of unregistered relationship

23. (1) Except as otherwise provided by this section, an application to a court for the division of partnership property under this Act, can only be made within a period of two years after the date on which the partnership ended.
(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to a applicant partner to apply to the court for an order under this Act, where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant partner if that leave were not granted than would be caused to the respondent partner if that leave were granted.

Adjournment of application

24. (1) Where, upon an application for an order by a partner in terms of this Act, the court is of the opinion-
(a) that there is likely to be a significant change in the financial circumstances of the partners or of either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and
(b) that an order that the court could make with respect to property of the partners, or of either of them, if the significant change in financial circumstances contemplated in par (a) occurs, is more likely to do justice between the partners than an order that the court could make immediately with respect to property of the partners or of either of them,

the court may, if so requested by either partner, adjourn the application until a time determined by the court.

(2) Where a court adjourns an application as provided by subsection (1), the court may make such temporary order as it considers appropriate with respect to the property of the partners or of either of them.

(3) A court may, when deciding whether there is likely to be a significant change in the financial circumstances of the partners, have regard to any change in the financial circumstances of a partner that may occur by reason of the vesting in the partners, or the use of, a financial resource of the partners.

Deferred of order

25. Where a court is of the opinion that a partner in respect of whose property an order is made pursuant to an application under this Act is likely to become entitled, within a short period, to property which may be applied in satisfaction of the order, the court may
defer the operation of the order until such date or the occurrence of such event as is specified in the order.

**Effect of death of a partner or partners**

**26.** (1) Where, before an application under this Act is determined, either partner dies, the application may be continued by or against, the estate of the deceased partner, as the case may be.

(2) Where a court is of the opinion that-

(a) it would have made an adjustment order in respect of partnership property if the deceased partner had not died, and

(b) notwithstanding the death of the deceased partner, it is still appropriate to adjust the interests of the deceased partner,

the court may make an adjustment order under this Act in respect of such property as it deems just and equitable.

(3) An order referred to in subsection (2) may be enforced on behalf of, or against, the estate of the deceased partner, as the case may be.

**Order may be enforced against estate of deceased partner**

**27.** Where a partner dies after an order has been made against such partner under this Act, the order may be enforced against the estate of the deceased partner.

**Maintenance**

**28.** A partner is not liable to maintain the other partner when the partnership ends and neither partner is entitled to claim maintenance from the other, except as provided for in this Act.

**Maintenance order**

**29.** (1) Upon an application by a partner for an order to pay maintenance, a court may make such an order where the court is satisfied that-
(a) the applicant partner is unable to support himself or herself adequately by reason of having the custody of a child of an intimate partnership with the respondent partner, being a child who is, on the day on which the application is made, a minor child or a physically or mentally disabled child; or 
(b) the applicant partner is unable to support himself or herself adequately because that partner’s earning capacity has been adversely affected by the circumstances of the partnership and, in the opinion of the court-

(i) an order for maintenance would increase that partner’s earning capacity by enabling the applicant partner to undertake a course or program of training or education, and 
(ii) it is, having regard to all the circumstances of the case, reasonable to make the order.

(2) In determining whether to make a maintenance order under this Act and in fixing any amount to be paid pursuant to such an order, a court shall have regard to-

(a) the income, property and financial resources of each partner and the physical and mental capacity of each partner to appropriate gainful employment; 
(b) the financial needs and obligations of each partner; 
(c) the responsibilities of either partner to support any other person; 
(d) the terms of any order made or proposed to be made under this Act for the division of property; and 
(e) any payments made, pursuant to an order of a court or otherwise, in respect of the maintenance of a child or children in the custody of the applicant; 
(f) the availability of employment to the applicant.

(3) In making an order for maintenance, a court must ensure that the terms of the order will, so far as is practicable, preserve any entitlement of the applicant partner to a pension, allowance or benefit.

Periodic maintenance

30. Where, upon an application by a partner for a maintenance order, it appears to a court that such partner is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment by the partner who is the respondent, pending the
disposal of the application, of such periodic sum or other sums of money as the court considers reasonable.

**Duration of maintenance order**

31. The duration of a periodic maintenance order must be determined by the court making that order.

**Application by a partner in respect of whom an order has been made**

32. (1) Upon an application by a partner in respect of whom an order has been made under this Act for periodic maintenance, a court may-

(a) subject to subsection (2), discharge the order;

(b) suspend the operation of the order wholly or in part and either until further order or until a fixed time or the happening of some future event;

(c) revive wholly or in part the operation of an order suspended under paragraph (b); or

(d) subject to subsection (2), vary the order so as to increase or decrease any amount directed to be paid by the order or in any other manner.

(2) A court shall not make an order discharging, increasing or decreasing an amount directed to be paid by an order unless it is satisfied that, since the order was made, or last varied-

(a) the circumstances of the partner in whose favour the order was made have so changed;

(b) the circumstances of the partner against whom the order was made have so changed; or

(c) the cost of living has changed to such an extent as to justify its so doing.

(3) In satisfying itself for the purposes of subsection (2)(c), a court shall have regard to any changes that have occurred during the relevant period.

(4) An order decreasing the amount of a periodic sum of money payable under an order may be expressed to be retrospective to such date as the court thinks fit.
Extension of a periodic maintenance order

33. (1) Where a court has made a periodic maintenance order under this Act the partner in whose favour the order is made may, at any time before the expiration of that period, apply to the court for an extension of the period for which the order applies.

(2) A court shall not make an order pursuant to an application under subsection (1) unless it is satisfied that there are circumstances which justify its so doing.

Effect of subsequent marriage, unregistered partnership or registered partnership on maintenance order

34. If the partners have ceased to live together, an application to court for a maintenance order may not be made by a partner who, at the time at which the application is made, has entered into an unregistered partnership or a registered partnership with another person or who, at that time, has married.

Maintenance order ceases to have effect

35. (1) A maintenance order under this Act shall cease to have effect-
(a) on the death of the partner in whose favour the order was made;
(b) on the death of the partner against whom the order was made; or
(c) on the marriage or commencement of an unregistered partnership or registration of a registered partnership with a third person by the person in whose favour the order was made.

(2) Where, in relation to a partner in whose favour a maintenance order under this Part is made, a marriage takes place or an unregistered partnership commences or a registered partnership is registered with a third person, that partner must, without delay, notify the partner against whom the order was made of the date of the marriage or commencement of an unregistered partnership or registration with another partner.

(3) Any money paid pursuant to a maintenance order under this Act, being money paid in respect of a period occurring after a marriage or commencement of an unregistered partnership with a third person partner, may be recovered as a debt in a court by the partner who made the payment.
Court may make an order regarding the children of the partners

36. Nothing in a domestic partnership agreement affects the power of a court to make an order with respect to the right to custody of, or maintenance of or access to or otherwise in relation to the children of the parties to the domestic partnership agreement.

Opt-out option

37. (1) A couple in an unregistered partnership may voluntarily and in writing come to an agreement whereby they declare that the provisions of this Act do not apply to their relationship

(2) An opt-out agreement must be in writing and signed in the presence of two witnesses.

General Powers of the court

38. (1) Without derogating from any other power of a court under this Act or any other law, a court, in exercising its powers under this Act, may do any one or more of the following:

(a) order the transfer of property;

(b) order the sale of property and the distribution of the proceeds of sale in such proportions as the court deems fit;

(c) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

(d) order payment of a lump sum, whether in one amount or by instalments;

(e) order payment of a weekly, fortnightly, monthly, yearly or other periodic sum;

(f) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;

(g) appoint or remove trustees;

(h) make an order or grant an injunction-
   (i) for the protection of or otherwise relating to the property or financial resources of the partners or of either of them;
(ii) to aid enforcement of any other order made in respect of an application, or both; and
(iii) impose terms and conditions;

(i) make an order by consent;
(j) make an order in the absence of a partner or other party;
(k) make any other order or grant any other injunction (whether or not of the same
    nature as those mentioned in the preceding paragraphs) which it regards necessary
    to do justice.

(2) A court may, in relation to an application under this Act-

(a) make any order or grant any remedy or relief which it is empowered to make or grant
    under this Act or any other law, and
(b) make any order or grant any remedy or relief under this Act in addition to or in
    conjunction with making any other order or granting any other remedy or relief which
    it is empowered to make or grant under this Act or any other law.

Execution of instruments by order of a court

39. (1) Where-

(a) an order under this Act has directed a person to execute a deed or instrument, and
(b) the person has refused or neglected to comply with the direction or, for any other
    reason, a court deems it necessary to exercise the powers conferred on it under this
    subsection,

the court may appoint an officer of the court or other person to execute the deed or
instrument in the name of the person to whom the direction was given and to do all acts and
things necessary to give validity and operation to the deed or instrument.

(2) The execution of the deed or instrument by the person so appointed

has the same force and validity as if it had been executed by the person directed by the
order to execute it.

(3) A court may make such order as it deems just as to the payment of

the costs and expenses of and incidental to the preparation of the deed or instrument and its
execution.
Variation and setting aside of orders

40. Where, on the application of a partner or other party in respect of whom an order has been made, a court is satisfied that-

(a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;

(b) in the circumstances that have arisen since the order was made, it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or

(c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order,

the court may, in its discretion, vary the order or set the order aside and, if it deems fit, make another order in accordance with this Act in substitution for the order so set aside.

Transactions to defeat claims

41 (1) In this Act, disposal includes a sale and a gift.

(2) On an application for an order under this Act, a court may set aside or restrain the making of an instrument or disposal by or on behalf of, or by direction or in the interest of, a person, which is made or proposed to be made to defeat an existing or anticipated order relating to the application, or which, irrespective of intention, is likely to defeat any such order.

(3) The court may order that any property dealt with by any such instrument or disposal may be taken in execution or used or applied in, or charged with, the payment of such sums payable pursuant to an order adjusting interests with respect to the property of a partner or other party or of either of them or for maintenance or costs as the court directs, or that the proceeds of a sale must be paid into court to abide its order.

(4) A registered partner or other party or a person acting in collusion with him or her may be ordered to pay the costs of the other registered partner or other party or of a bona fide purchaser or other person with an interest in and incidental to any such instrument or disposal and the setting aside or restraining of the instrument or disposal.
Interests of other parties

42. (1) In the exercise of its powers under this Act, a court must have regard to the interests of, and must make any order proper for the protection of, a bona fide purchaser or other person with an interest in property concerned.

(2) The rights of creditors of the partners are not affected by this Act.

Remedies under any other Act or law

43. Nothing in this Act derogates or affects any right of a registered partner or other party to apply for any remedy or relief under any other law.

Regulations

44. The Minister may make regulations as to any matter which by this Act is required or permitted to be prescribed or which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that the provisions of this Act may be effectively administered.

Short title and commencement

45. This Act is called the Unregistered Partnerships Act, 20.. (Act No. … of 20..) and will come into operation on a date fixed by the President by proclamation in the Gazette.
Option 2:

BILL

To recognise the legal status of the relationships provided for in this Act; to provide for the ascribed status of intimate partnerships and care partnerships in unregistered relationships; to provide for the equal division of partnership property when the relationship ends by means of a court order; to provide for a court to adjust each partner's share to the relationship where an order for equal division of partnership property would be repugnant to justice; to provide for a court to further adjust the division of partnership property to redress any economic disparities between the partners; to provide for the factors that a court should consider when making adjustment orders under the Act; to provide for certain safeguards to ensure that any domestic partnership agreement reached between unregistered partners is voluntary made and fair; to provide for circumstances where a court may overrule a domestic partnership agreement; to provide for legal procedures to enforce these rights and obligations and to provide for matters related thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates—

"adjustment order" means an order made by a court under section 13 of this Act to adjust the equal shares of partners in partnership property upon division;

"biological father" does not include a male person whose relationship with the child exists merely because he was a gamete donor in artificial insemination of a person as defined in section 1 of the Human Tissue Act, 1983 (Act 65 of 1983), whereby that child was fathered, in the absence of any prior love relationship between the natural parents and who has waived all rights he may have had towards the said child;

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1  Where the provisions in this Bill originate from other legislation, it is indicated in the footnotes

2  Natural Fathers of Children Born Out of Wedlock Act 86 of 1997
"care partner" means a partner in a care partnership and includes a former care partner;

"care partnership" means a non-conjugal relationship provided for in section 5 of this Act and includes a former care partnership between the partners;

"child of an intimate partnership" means-
(a) any child born as a result of sexual relations between the intimate partners; or
(b) any child of either intimate partner; or
(c) any child adopted by one or both of the intimate partners jointly; or
(d) any other child who was a member of the family of the intimate partners-
   (i) at the time when the intimate partners ceased to live together; or
   (ii) if at that time the intimate partners had not ceased to live together, at the time immediately before an application under this Act; or
   (iii) at the date of the death of one of the intimate partners;

"classification date" means the date on which any property is classified as partnership property or as any other type of property in terms of this Act;

"contribution" means-
(a) the care of—
   (i) any child of a intimate partnership;
   (ii) any aged or infirm relative or dependant of a partner;
(b) the management of the household and the performance of household duties;
(c) the provision of money, including the earning of income, for the purposes of an unregistered partnership or in accordance with a domestic partnership agreement;
(d) the acquisition or creation of partnership property or in accordance with a domestic partnership agreement, including the payment of money for those purposes;
(e) the payment of money to maintain or increase the value of—
   (i) the partnership property or any part of that property; or
   (ii) the separate property of the other partner or any part of that property;

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3 NSW Property (Relationships) Act of 1984
4 New Zealand Property (Relationships) Act of 1976
(iii) property of either or of both the parties in terms of a domestic partnership agreement;

(f) the performance of work or services in respect of—
   (i) partnership property or any part of that property; or
   (ii) separate property of the other partner or any part of that property; or
   (iii) property of either or of both the parties in terms of a domestic partnership agreement;

(g) the forgoing of a higher standard of living by either partner than would otherwise have been available;

(h) the giving of assistance or support to the other partner (whether or not of a material kind), including the giving of assistance or support that—
   (i) enables the other partner to acquire qualifications; or
   (ii) aids the other partner in the carrying on of his or her occupation or business.

provided that there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature;\(^5\)

"court" means a provincial or local division of the High Court of South Africa or a family court established under section 2 (k) of the Lower Courts Act, 1944 (Act 32 of 1944)\(^6\);

\(^5\) Alternative definition for contribution based on the New South Wales ("NSW") Property (Relationship) Act of 1984:

"contribution" means

(a) the financial and non-financial contributions made directly or indirectly by or on behalf of
   (i) partners to the acquisition, conservation or improvement of any partnership property or separate property of either of the partners or to the financial resources of either or both of them, or
   (ii) the parties in terms of a cohabitation agreement, and

(b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the partners to the welfare of the partner or to the welfare of the family constituted by them and a child of the intimate partnership;

There is no presumption that a contribution referred to in (a) is of greater value than a contribution referred to in (b)

\(^6\) Section 2 of the Magistrates' Courts Act, 1944 (Act 32 of 1944) has been substituted by section 2 of the Magistrates' Courts Amendment Act, 1993 (Act No. 120 of 1993) to be cited as the Lower Courts Act, 1944 – Section 2(k) provides for family courts to be instituted by the Minister of Justice. This section will be put into operation by proclamation.
"division" means the division of the partnership property at any time in accordance with the provisions of this Act;

"division order" means an order made by a court under section 12 of this Act for partners to share equally in partnership property upon division;

"domestic partnership agreement" means a written agreement regulating financial matters of parties during cohabitation or thereafter;

"duty of support" means the responsibility of each registered partner to provide for the other partner's basic living expenses while the registered partnership exists;

"family" includes partners in an unregistered partnership and their dependants;

“family home” means the dwelling that either or both of the partners habitually or from time to time use as the only or principal family residence, together with any land, buildings, or improvements attached to that dwelling and used wholly or principally for the purposes of the common household;

“financial matters” in relation to parties to a domestic partnership agreement, means matters with respect to any one or more of the following:

(a) the property of the parties or of either of them,
(b) the financial resources of the parties or of either of them.

“financial resources” in relation to either or both of the partners includes:

(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which pension, retirement or similar benefits are provided;
(b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the partners or either of them;
(c) property, the alienation or disposal of which is wholly or partly under the control of the partners or of either of them and which is lawfully capable of


being used or applied by or on behalf of the partners or by either of them in or towards their or his or her own purposes, and

(d) any other benefit with a value;

"further adjustment order" means an order made by a court under section 14 of this Act for the further adjustment of the shares of partners in partnership property upon division;

"household goods" means corporeal goods intended for use of the joint household that either or both of the partners own and includes—

(a) movable goods of the following kind;

(i) household furniture;

(ii) household appliances, effects, or equipment;

(iii) household articles for family use or amenity or household ornaments, including tools, garden effects and equipment;

(iv) motor vehicles, caravans, trailers, or boats, used wholly or principally, in each case, for family purposes;

(v) accessories of goods to which subparagraph (iv) applies;

(vi) household pets; and

(b) any of the goods mentioned in paragraph (a) that are in the possession of either or both under a credit agreement or conditional sale agreement or an agreement for lease or hire; but

(c) does not include—

(i) movable goods used wholly or principally for business purposes;

(ii) money or securities for money;

(iii) heirlooms;

"household expenses" means expenses incurred that are reasonably necessary to maintain the common household;

"intimate partner" means a partner in an intimate partnership and includes a former intimate partner;

"intimate partnership" means a relationship provided for in section 4 of this Act and includes a former intimate partnership;

9 New Zealand Property (Relationships) Act of 1976.
“maintenance” means maintenance (whether periodic or otherwise) including the provision of accommodation, food, clothing, medical and dental care and other reasonable requirements, to be paid by a partner in terms of a maintenance order or in terms of an agreement under this Act;

“maintenance order” means an order by a court to pay maintenance (whether for periodic maintenance or otherwise) in terms of this Act or any other law;

“Minister” means the Cabinet member responsible for the administration of Home Affairs;

“partner” means a partner in an unregistered partnership;

“partnership” means an intimate partnership and a care partnership;

“partnership debt” means a debt that has been incurred, or to the extent that it has been incurred,—

(a) by the partners jointly; or

(b) in the course of a common enterprise of the partnership carried on by the partners, whether alone or together with another person; or

(c) for the purpose of acquiring, improving, or maintaining partnership property, whether or not at the time the debt was incurred, the property for which it was incurred was partnership property, as long as that property later becomes partnership property; or

(d) for the benefit of both partners in the course of managing the affairs of the common household; or

(e) for the purpose of bringing up any child of the intimate partnership.

“partnership property” means—

(a) the family home of the partnership whenever acquired;

(b) household goods of the partnership whenever acquired;

(c) property owned jointly or in common in equal shares by the partners;

(d) property owned by either partner immediately before the partnership began if—

(i) the property was acquired in contemplation of the partnership; and
(ii) the property was intended for the common use or common benefit of both partners;
(e) all property acquired after the partnership began for the common use or benefit of both partners if—
(i) the property was acquired out of property owned by either of or both partners before the partnership began; or
(ii) the property was acquired out of the proceeds of any disposal of any property owned by either of or both partners before the partnership began;
(f) any income and gains derived from the proceeds of and any increase in the value of any property described in paragraphs (a) to (e);

"pension fund" means a pension fund as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), irrespective of whether the provisions of that Act apply to the pension fund or not;

"periodic maintenance" means maintenance paid or payable or to be paid, as the case may require, by means of periodic sum in terms of a court order or in terms of an agreement under this Act;

"personal debt" means a debt that is not a partnership debt;

"prescribed" means prescribed by regulations made under section 39 of this Act;

"property" without limiting the generality thereof, includes any right or interest (whether present, future or contingent) in or to movable or immovable, corporeal or incorporeal property, money, any debt and any cause of action;

"regulation" means a regulation made under section 39 of this Act;

"share" means the share of a partner in partnership property determined by a division, adjustment or further adjustment order, made under this Act;

"separate property" means property which does not form part of partnership property, as the case may be;

"unregistered partnership" includes an intimate and a care partnership and a former unregistered partnership;

"voluntary agreement" means a written agreement made between partners who are parties to proceedings under this Act, providing for—

(a) the division of partnership property;

(b) one partner to pay money to the other partner for the maintenance of—
   (i) the other partner;
   (ii) a child of the intimate partnership

in settlement of the application before the court.

Objectives of the Act

2. The objectives of this Act are to provide for the -

(a) recognition and regulation of the rights and obligations of persons in unregistered partnerships;

(b) protection of the interests of persons when an unregistered partnership ends; and

(c) final determination of the financial relationships between persons when an unregistered partnership ends.

Transactions to which this Act apply

3. This Act applies to transactions between-

(a) both or either partners;

(b) both or either partners in respect of property;

(c) both or either partners and other parties;

(d) both or either partners and other parties in respect of property as provided for in this Act.

Intimate partnership

4. An intimate partnership is a relationship, other than a marriage or registered partnership, between two adult persons who live as couple.
Care partnership

5. (1) A care partnership is a close personal relationship, other than a marriage or a registered partnership or an intimate partnership, between two adult persons, irrespective of whether or not such persons are living together or related by family, in circumstances where either of them provides the other with domestic support and personal care.

(2) For the purposes of subsection (1), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:
(a) for fee or reward; or
(b) on behalf of another person or an organization, including a government or government agency, a body corporate or a charitable or benevolent organisation.

Declaration of partnerships

6. (1) A person in an unregistered relationship may after the relationship ends apply to the court for an order declaring the relationship an intimate partnership or a care partnership under this Act.

(2) The court, upon determining whether two persons are in an intimate partnership, must take all the circumstances of the relationship into account, including such of the following matters as may be relevant in a particular case:
(a) the duration of the relationship;
(b) the nature and extent of common residence;
(c) whether or not a sexual relationship exists;
(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;
(e) the ownership, use and acquisition of property;
(f) the degree of mutual commitment to a shared life;
(g) the care and support of children;
(h) the performance of household duties;
(i) the reputation and public aspects of the relationship;
(3) The court, upon determining whether two persons are in a care partnership, must take all the circumstances of the relationship into account, including such of the following matters as may be relevant in a particular case:

(a) the duration of the relationship;
(b) the nature and extent of common residence;
(c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;
(d) the degree of emotional dependence or interdependence between the partners;
(e) the ownership, use and acquisition of property;
(f) the reputation and public aspects of the relationship.

(4) A finding in respect of any of the matters mentioned in subsections (2) and (3), or in respect of any combination of them, shall not be regarded as essential for the existence of an intimate partnership or a care partnership, and a court, in determining whether such a partnership exists, is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

End of partnership

7. An unregistered partnership ends if –

(a) the partners in an intimate partnership cease to live as a couple;
(b) the care relationship between the care partners ceases to exist; or
(c) one of the partners dies.

Status of property

8. A court may, in proceedings relating to the status of the partnership, declare the status of property and the rights, if any, of either partner or other party in respect of partnership property.

Separate property becomes partnership property

9. If any increase in the value of separate property, or any income or gain derived from separate property, was attributable to the utilisation of partnership property, such increase in value or income or gain, as the case may be, is partnership property.
Property not partnership property

10. Partnership property does not include-

(a) property that a partner acquires from a third person—
   (i) by succession;
   (ii) by gift; or
   (iii) because the partner is a beneficiary under a trust established by a third person;

(b) the proceeds of a disposal of property contemplated in paragraph (a); or

(c) property acquired out of property contemplated in paragraph (a)

unless such property, or the proceeds of any disposal of it has, with the express or implied consent of the partner who received it, been so intermingled with other partnership property that it is unreasonable or impracticable to regard that property or those proceeds as separate property.

Gifts between partners

11. For purposes of this Act, property that one partner acquires by gift from the other partner is not partnership property unless the gift is used for the benefit of both partners.

Equal division

12. (1) In making a decision as to the division of partnership property, the court must take into account that each of the partners is entitled to share equally in partnership property.

(2) If the family home has been sold, each partner is entitled to share equally in the proceeds of the sale, provided that the court making the order is satisfied that—

(a) either partner or both of them has sold the family home with the intention of applying all or part of the proceeds of the sale towards the acquisition of another home as a family home; and

(b) that family home has not been acquired, at the date of the application to the court; and
(c) no more than 2 years have elapsed since the date when those proceeds were received or became payable, whichever is later.

Adjustment order

13. (1) Notwithstanding the provisions of section 12, upon an application by the partners for an adjustment order under this Act, a court may make such order adjusting the interests of the parties in partnership property as it seems just and equitable having regard to—

(a) the contributions made by or on behalf of the partners towards the acquisition, conservation or improvement of partnership property, or to the financial resources of the partners, or of either of them, and

(b) the contributions, including any contributions made, in the capacity of homemaker or parent, by either of the partners to the welfare of the other partner or to the welfare of the family constituted by the partners and a child of the intimate partners.

Further Adjustment Order

14. (1) Notwithstanding the provisions in sections 12 and 13, if upon the division of partnership property under this Act, the court is satisfied that, after the partnership ends, the income and living standards of a partner are likely to be, or have in fact been, significantly higher than the other partner because of the effects of the division of functions within the partnership while the partners were living together, the court may award lump sum payments or order the transfer of property in accordance with this section.

(2) In determining whether or not to make an order under this section, the court may have regard to—

(a) the likely earning capacity of each partner;

(b) the responsibilities of each partner for the ongoing daily care of any minor or dependent children of the intimate partnership;

(c) any other relevant circumstances.

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating a partner—

(a) order the other partner to pay a sum of money out of his or her share of the partnership property to such partner; and
(b) order the other partner to transfer any other property out of his or her share of the partnership property to such partner.

Prerequisites for making of order under this Part

15. (1) Except as provided by subsection (2), a court may not make an order under this Act unless it is satisfied that the partnership has existed for a period of not less than two years.

(2) Notwithstanding the fact that the partnership has not existed for a period of not less than two years, a court may make an order under this Act if it is satisfied that-

(a) the partnership is an intimate partnership and the partners have a child, or
(b) the applicant-
   (i) has made substantial contributions for which the applicant would otherwise not be adequately compensated if the order were not made, or
   (ii) has custody of a child of the respondent,
and that the failure to make the order would result in serious injustice to the applicant.

Classification date

16. (1) Subject to subsection (2), the classification date on which the value of the share of a partner in an unregistered partnership is to be determined is-

(a) the date of the application to the court if the partnership has not ended;
(b) the date on which the partnership ended if the partnership has ended other than by death of one of the partners; or
(c) the date of death of the deceased partner if the partnership does not end while both partners are alive.

(2) A court hearing the application may, in its discretion when it is just and equitable, decide that the classification date may be another date as determined by the court.
Application only within two years after end of unregistered relationship

17. (1) Except as otherwise provided by this section, an application to a court for an order under this Act, can only be made within a period of two years after the date on which the partnership ended.

(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to an applicant partner to apply to the court for an order under this Act, where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant partner if that leave were not granted than would be caused to the respondent partner if that leave were granted.

Adjournment of application

18. (1) Where, upon an application for an order by a partner in terms of this Act, the court is of the opinion-

(a) that there is likely to be a significant change in the financial circumstances of the partners or of either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and

(b) that an order that the court could make with respect to property of the partners, or of either of them, if the significant change in financial circumstances contemplated in par (a) occurs, is more likely to do justice between the partners than an order that the court could make immediately with respect to property of the partners or of either of them,

the court may, if so requested by either partner, adjourn the application until a time determined by the court.

(2) Where a court adjourns an application as provided by subsection (1), the court may make such temporary order as it considers appropriate with respect to the property of the partners or of either of them.

(3) A court may, when deciding whether there is likely to be a significant change in the financial circumstances of the partners, have regard to any change in the financial circumstances of a partner that may occur by reason of the vesting in the partners, or the use of, a financial resource of the partners.
Deferment of order

19. Where a court is of the opinion that a partner in respect of whose property an order is made pursuant to an application under this Act is likely to become entitled, within a short period, to property which may be applied in satisfaction of the order, the court may defer the operation of the order until such date or the occurrence of such event as is specified in the order.

Effect of death of a partner or partners

20. (1) Where, before an application under this Act is determined, either partner dies, the application may be continued by or against, the estate of the deceased partner, as the case may be.

(2) Where a court is of the opinion that-

(a) it would have made an adjustment order in respect of partnership property if the deceased partner had not died, and

(b) notwithstanding the death of the deceased partner, it is still appropriate to adjust the interests of the deceased partner,

the court may make an adjustment order under this Act in respect of such property as it deems just and equitable.

(3) An order referred to in subsection (2) may be enforced on behalf of, or against, the estate of the deceased partner, as the case may be.

Order may be enforced against estate of deceased partner

21. Where a partner dies after an order has been made against such partner under this Act, the order may be enforced against the estate of the deceased partner.
Intestate succession

22. A surviving party to an unregistered relationship who have acquired a declaration in terms of section 6 of this Act that the relationship was an intimate partnership, shall inherit a child share or an amount that does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette under the Intestate Succession Act, 1987 (Act No. 81 of 1987), whichever is the greater, from his or her deceased intimate partner who died intestate.

Maintenance

23. A partner is not liable to maintain the other partner when the partnership ends and neither partner is entitled to claim maintenance from the other, except as provided for in this Act.

Maintenance order

24. (1) Upon an application by a former partner for an order to pay maintenance, a court may make such an order where the court is satisfied that-

(a) the applicant partner is unable to support himself or herself adequately by reason of having the custody of a child of an intimate partnership with the respondent partner, being, in either case, a child who is, on the day on which the application is made, a minor child or a physically or mentally disabled child; or

(b) the applicant partner is unable to support himself or herself adequately because that partner’s earning capacity has been adversely affected by the circumstances of the partnership and, in the opinion of the court-

(i) an order for maintenance would increase that partner’s earning capacity by enabling the applicant partner to undertake a course or program of training or education, and

(ii) it is, having regard to all the circumstances of the case, reasonable to make the order.

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12 If this version of the unregistered partnership proposal is accepted, the final wording of the clause regarding intestate succession will be adapted in accordance with the amendments to the Intestate Succession Act, 1987 (Act No. 81 of 1987), Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990) and the Estate Duty Act, 1955 (Act No. 45 of 1955) following the judgment in the (at this stage) unreported case of Daniels v Campbell NO and Others case NO 1646/01 in the High Court of South Africa, Cape of Good Hope Provincial Division.
(2) In determining whether to make a maintenance order under this Act and in fixing any amount to be paid pursuant to such an order, a court shall have regard to-

(a) the income, property and financial resources of each partner and the physical and mental capacity of each partner to appropriate gainful employment;

(b) the financial needs and obligations of each partner;

(c) the responsibilities of either partner to support any other person;

(d) the terms of any order made or proposed to be made under this Act for the division of property; and

(e) any payments made, pursuant to an order of a court or otherwise, in respect of the maintenance of a child or children in the custody of the applicant.

(3) In making an order for maintenance, a court must ensure that the terms of the order will, so far as is practicable, preserve any entitlement of the applicant partner to a pension, allowance or benefit.

Periodic maintenance

25. Where, upon an application by a former partner for a maintenance order, it appears to a court that such partner is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment by the partner who is the respondent, pending the disposal of the application, of such periodic sum or other sums of money as the court considers reasonable.

Duration of maintenance order

26. The duration of a periodic maintenance order must be determined by the court making that order.

Application by a partner in respect of whom an order has been made

27. (1) Upon an application by a partner in respect of whom an order has been made under this Act for periodic maintenance, a court may-

(a) subject to subsection (2), discharge the order;
(b) suspend the operation of the order wholly or in part and either until further order or until a fixed time or the happening of some future event;
(c) revive wholly or in part the operation of an order suspended under paragraph (b); or
(d) subject to subsection (2), vary the order so as to increase or decrease any amount directed to be paid by the order or in any other manner.

(2) A court shall not make an order discharging, increasing or decreasing an amount directed to be paid by an order unless it is satisfied that, since the order was made, or last varied-
(a) the circumstances of the partner in whose favour the order was made have so changed;
(b) the circumstances of the partner against whom the order was made have so changed; or
(c) the cost of living has changed to such an extent as to justify its so doing.

(3) In satisfying itself for the purposes of subsection (2)(c), a court shall have regard to any changes that have occurred during the relevant period.

(4) An order decreasing the amount of a periodic sum of money payable under an order may be expressed to be retrospective to such date as the court thinks fit.

Extension of a periodic maintenance order

28. (1) Where a court has made a periodic maintenance order under this Act the partner in whose favour the order is made may, at any time before the expiration of that period, apply to the court for an extension of the period for which the order applies.

(2) A court shall not make an order pursuant to an application under subsection (1) unless it is satisfied that there are circumstances which justify its so doing.

Effect of subsequent marriage, registered partnership or partnership on maintenance order

29. (1) An application to court for a maintenance order may not be made by a partner who, at the time at which the application is made, has entered into a registered partnership with another person or who, at that time, has married.
(2) An application to court for a maintenance order may not be made by a partner who, at the time at which the application is made, is entitled to receive maintenance in terms of a maintenance order under this Act from a partner in a previous partnership.

**Maintenance order ceases to have effect**

30. (1) A maintenance order under this Act shall cease to have effect-

(a) on the death of the partner in whose favour the order was made;
(b) on the death of the partner against whom the order was made; or
(c) on the marriage or registration of a registered partnership by the person in whose favour the order was made.

(2) Where, in relation to a partner in whose favour a maintenance order under this Part is made, a marriage or registration of a registered partnership with a third person takes place, that partner must, without delay, notify the partner against whom the order was made of the date of the marriage or registration of a partnership with another partner.

(3) Any money paid pursuant to a maintenance order under this Act, being money paid in respect of a period occurring after a marriage or registration with another with another partner takes place, may be recovered as a debt in a court by the partner who made the payment.

**Court may consider domestic partnership agreement**

31. (1) In proceedings between parties to an unregistered partnership under this Act, a court may consider the fact that the parties have concluded a domestic partnership agreement and the terms thereof.

(2) If the court, having regard to all the circumstances, is satisfied that giving effect to a domestic partnership agreement would cause serious injustice, it may set the domestic partnership agreement aside, notwithstanding compliance with the prescribed requirements.
(3) In deciding, under subsection (2) whether giving effect to a domestic partnership agreement would cause serious injustice, the court may have regard to—

(a) the terms of the domestic partnership agreement;
(b) the length of time since the domestic partnership agreement was concluded;
(c) whether the domestic partnership agreement was unfair or unreasonable in the light of all the circumstances at the time it was made;
(d) whether the domestic partnership agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made, whether or not those changes were foreseen by the parties;
(e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the domestic partnership agreement;
(f) any other matters that the court considers relevant, including the contributions of the parties to the partnership.

(4) A court is not required to give effect to the terms of any domestic partnership agreement where the court is of the opinion that—

(a) the parties have, by their words or conduct, revoked or consented to the revocation of the domestic partnership agreement, or
(b) the domestic partnership agreement has otherwise ceased to have effect.

(5) A court may make any order under this section notwithstanding that the domestic partnership agreement purports to exclude the jurisdiction of the court to make that order.

(6) If a domestic partnership agreement is void, voidable or is invalid or unenforceable, and the court makes no other order, the provisions of this Act have effect as if the agreement had never been made.

Court may make an order regarding the children of the partners

32. Nothing in a domestic partnership agreement affects the power of a court to make an order with respect to the right to custody of, or maintenance of or access to or otherwise in relation to the children of the parties to the domestic partnership agreement.
General Powers of the court

33. (1) Without derogating from any other power of a court under this Act or any other law, a court, in exercising its powers under this Act, may do any one or more of the following:

(a) order the transfer of property;

(b) order the sale of property and the distribution of the proceeds of sale in such proportions as the court deems fit;

(c) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

(d) order payment of a lump sum, whether in one amount or by instalments;

(e) order payment of a weekly, fortnightly, monthly, yearly or other periodic sum;

(f) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;

(g) appoint or remove trustees;

(h) make an order or grant an injunction-

   (i) for the protection of or otherwise relating to the property or financial resources of the partners or of either of them;

   (ii) to aid enforcement of any other order made in respect of an application, or both; and

   (iii) impose terms and conditions;

(i) make an order by consent;

(j) make an order in the absence of a partner or other party;

(k) make any other order or grant any other injunction (whether or not of the same nature as those mentioned in the preceding paragraphs) which it regards necessary to do justice.

(2) A court may, in relation to an application under this Act-

(a) make any order or grant any remedy or relief which it is empowered to make or grant under this Act or any other law, and

(b) make any order or grant any remedy or relief under this Act in addition to or in conjunction with making any other order or granting any other remedy or relief which it is empowered to make or grant under this Act or any other law.
Execution of instruments by order of a court

34. (1) Where-
   (a) an order under this Act has directed a person to execute a deed or instrument, and
   (b) the person has refused or neglected to comply with the direction or, for any other reason, a court deems it necessary to exercise the powers conferred on it under this subsection,

   the court may appoint an officer of the court or other person to execute the deed or instrument in the name of the person to whom the direction was given and to do all acts and things necessary to give validity and operation to the deed or instrument.

   (2) The execution of the deed or instrument by the person so appointed has the same force and validity as if it had been executed by the person directed by the order to execute it.

   (3) A court may make such order as it deems just as to the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.

Variation and setting aside of orders

35. Where, on the application of a partner or other party in respect of whom an order has been made, a court is satisfied that-
   (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;
   (b) in the circumstances that have arisen since the order was made, it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or
   (c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order,

   the court may, in its discretion, vary the order or set the order aside and, if it deems fit, make another order in accordance with this Act in substitution for the order so set aside.
Transactions to defeat claims

36. (1) In this Act, disposal includes a sale and a gift.

(2) On an application for an order under this Act, a court may set aside or restrain the making of an instrument or disposal by or on behalf of, or by direction or in the interest of, a person, which is made or proposed to be made to defeat an existing or anticipated order relating to the application, or which, irrespective of intention, is likely to defeat any such order.

(3) The court may order that any property dealt with by any such instrument or disposal may be taken in execution or used or applied in, or charged with, the payment of such sums payable pursuant to an order adjusting interests with respect to the property of a partner or other party or of either of them or for maintenance or costs as the court directs, or that the proceeds of a sale must be paid into court to abide its order.

(4) A registered partner or other party or a person acting in collusion with him or her may be ordered to pay the costs of the other registered partner or other party or of a bona fide purchaser or other person with an interest in and incidental to any such instrument or disposal and the setting aside or restraining of the instrument or disposal.

Interests of other parties

37. (1) In the exercise of its powers under this Act, a court must have regard to the interests of, and must make any order proper for the protection of, a bona fide purchaser or other person with an interest in property concerned.

(2) The rights of creditors of the partners are not affected by this Act.

Remedies under any other Act or law

38. Nothing in this Act derogates or affects any right of a registered partner or other party to apply for any remedy or relief under any other law.
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Regulations

39. The Minister may make regulations as to any matter which by this Act is required or permitted to be prescribed or which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that the provisions of this Act may be effectively administered.

Short title and commencement

40. This Act is called the Unregistered Partnerships Act, 20.. (Act No. … of 20..) and will come into operation on a date fixed by the President by proclamation in the Gazette.