

SOUTH AFRICAN LAW COMMISSION

**ISSUE PAPER 17
(QUESTIONNAIRE)**

PROJECT 118

DOMESTIC PARTNERSHIPS

Closing date for comments:

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

Madam Justice Y Mokgoro (Chairperson)
Advocate J J Gauntlett SC
Prof C E Hoexter (additional member)
The Honourable Mr Justice C T Howie
Madam Justice L Mailula
Professor I P Maithufi (full-time member)
Mr P Mojapelo
Ms Z Seedat

The Secretary is Mr W Henegan. The Commission's offices are on the 12th floor, Sanlam Centre, Corner of Andries and Schoeman Streets, Pretoria.

The members of the Project Committee for this investigation are -

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The project leader responsible for the investigation is The Honourable Mr Justice C T Howie. The researcher is Ms A M Louw.

PREFACE

This issue paper was prepared in the form of a questionnaire to elicit responses from interested persons and to serve as a basis for the Commission's deliberations. The issue paper is published so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with the opportunity to place full submissions before the Commission. Following an evaluation of the responses the Commission will issue a discussion paper on this subject setting out recommendations and if necessary draft legislation. The discussion paper will once again be distributed for comment before a final report is written.

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 the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act, Act 2 of 2000.

Respondents are requested to submit written comments, representations or requests to the Commission by **30 November 2001** at the address appearing on the previous page. Any request for information and administrative enquiries should be addressed to the Secretary of the Commission or the researcher allocated to this project, Ms AM Louw.

QUESTIONNAIRE: DOMESTIC PARTNERSHIPS: PROJECT 118

The South African Law Commission is currently involved in an investigation dealing with the question of the legal recognition and regulation of domestic partnerships - that is, established relationships between people of the same or opposite sex. The investigation is aimed at harmonising family law with the provisions of the Bill of Rights and specifically, with the constitutional values of equality and dignity.

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;
- * whether marital rights and obligations should be further extended to people living in interdependent relationships having no sexual element.

The issues raised need to be debated thoroughly. The comments of all parties who are interested in these issues are therefore of vital importance to the Commission. It would be appreciated if you could read through the following paragraphs and answer the questions posed in each case as fully as possible. Respondents may also raise new issues that fall outside of the questions.

1. NEED FOR REFORM: WHY A DEBATE NOW ?

Marriage is currently the only legally recognised intimate partnership. Domestic partnerships, on the other hand, are virtually unrecognised and partners are excluded from the rights and obligations which attach automatically to marriage.

The number of people living in non-marriage relationships has, however, increased worldwide and also in South Africa. 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.

Social customs have changed radically, outdating early notions of marriage as the only form of acceptable relationship. Domestic partnerships have come to be perceived in many cases as functionally similar to marriage. More and more legal problems associated with domestic partners and their families are coming to the attention of the courts and of lawyers generally. South Africa is, however, far behind many countries in its development of appropriate laws. Tanzanian law, for example, protects the rights of couples in opposite-sex partnerships. Denmark recognises same-sex partnerships while the Netherlands and Germany recognise same-sex marriage.

QUESTION 1:

1.1 *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?*

1.2 *Should the law of marriage be extended to include same-sex couples?*

2. SOCIAL AND POLITICAL CONTEXT

For various reasons many individuals seek living arrangements other than marriage.

QUESTION 2:

2.1 *In your experience, what are the reasons for couples living together without marrying?*

2.2 *Should the Commission carry out any empirical inquiries (such as surveys) before reaching a conclusion on the policy issues? If so, what inquiries should be made? Why are they needed?*

2.3 *Could you refer the Commission to any surveys that have been done or other inquiries that have been made regarding domestic partnerships in South Africa?*

2.4 *Are there any special arrangements that need to be made for different ethnic or religious communities?. If so, what are they?*

Some argue that to grant couples in domestic partnerships the same rights and duties as married couples will undermine the institution of marriage.

2.5 Do you have any fears/concerns about the impact of domestic partnership laws on the institution of marriage?

2.6 Is it possible to separate the non-religious aspect of marriage from the religious aspect?

The following arguments have been put forward:

* In so far as opposite-sex partners are concerned:

a) Further legal protection to domestic partners will reinforce the stereotyped notion of female dependence. At a time when most women are establishing social and economic independence, the myth of the weak woman should not be resorted to. Others argue that women are still socially and economically disadvantaged and need legal protection.

b) Domestic partners should look for a remedy in the law of property, contract, delict, unjust enrichment and trusts. The principles of family law should be reserved for persons who are prepared to make the commitment that marriage demands.

* Legal regulation is a good idea because without it the burden of support may fall on the social security system rather than on the family members. For example, a domestic partner who is permitted to claim a share of the estate of a deceased partner may thereby avoid the need to claim a government pension.

2.7 How would you respond to the abovementioned arguments?

2.8 Would protecting domestic partnerships harm or improve the position of women in society?

2.9 Please raise any other pertinent arguments that you may have.

3. CONSTITUTIONAL AND HUMAN RIGHTS IMPERATIVES

Sec 9 of the Constitution, 1996 (the "equality clause") states that everyone is equal before the law

and has the right to equal protection and benefit of the law. Neither the state nor any other person may unfairly discriminate directly or indirectly against anyone on the grounds stated, which include sexual orientation and marital status. However, this is not an absolute provision and may be limited in terms of sec 36 if the limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Constitutional Court and the High Court have given judgment in successful challenges under sec 9 of the Constitution on the ground of sexual orientation.

QUESTION 3:

Do you regard the exclusion of domestic partners from the benefits of schemes such as medical aid, or from other consequences that normally attach to marriage, as undesirable?

4. DESIRED SCOPE OF REFORM

Increasingly diverse kinds of living arrangements occur in society and different needs arise out of such relationships. It could therefore be argued that any legislation which is introduced should extend to domestic relationships where people live under one roof without necessarily having an intimate or 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, Aids orphans living together, etc.

QUESTION 4:

4.1 Should all domestic partnerships be protected? For example, should rights and obligations be extended to people living in interdependent relationships that are not intimate or marriage-like?

4.2 What should be the criteria for the recognition of such relationships? Please motivate for each suggested criterion.

4.3 Should there be any age requirement, and if so, why?

There are reported incidents of domestic partnerships where one of the 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 the urban area, while having a rural wife as well.

4.4 Should the law protect the interests of both families where a married person is also involved in a domestic partnership?

Some argue that people freely choose not to marry and if we attach marriage-like consequences to their relationships, we remove their freedom of choice. Respect for the autonomy of individuals who

choose not to marry is a powerful argument against intervention by regulation. However, many people, especially women, are not able to exercise real choice in this matter. In such cases the real issue is whether the victims of the breakdown of intimate relationships deserve protection. In addition, in some relationships there is not consensus between the parties about the nature of the relationship.

4.5 How should the law accommodate people who do not want to be part of a system of domestic relationships while protecting the needs and interests of vulnerable groups?

4.6 Should the law regulate domestic partnerships where there is no agreement between partners as to the exact nature of the relationship? Should one party be allowed to contract out of a regulated system even if such a step would be detrimental to the other party in or children from the relationship?

5. POSSIBLE OPTIONS FOR REFORM: A NEW FAMILY LAW DISPENSATION?

In the recent past the courts have carried much of the responsibility for crafting family law and policy with regard to domestic partners by creatively applying non-family laws, including the law of unjust enrichment, estoppel and contract, to domestic partners who were excluded from family law regimes. The Constitutional Court has furthermore upheld a constitutional challenge under sec 9 (equality) on the ground of sexual orientation. With the extension of statutorily defined benefits (sometimes including domestic partnerships into the definition of "spouse" for various purposes), there has also been increasing recognition of these relationships outside marriage. The law of marriage itself has undergone major changes, for example with the recognition of the "no-fault" divorce, the recognition of customary marriages and changes in matrimonial property rules. These developments have led to a patchwork of laws that do not express coherent family policy. Possible options for reform in this regard are therefore being investigated.

QUESTION 5:

How should a domestic partnership be defined and protected?

5.1 *Do you think that the existing legal remedies referred to above are adequate to prevent injustice and protect domestic partners?*

5.2 *Should special provision be made to make the principles of family law applicable to domestic partners?*

5.3 *Should a domestic partnership come about through:*

a) a written domestic partnership contract between the parties themselves; or

b) official registration of the domestic partnership contract;

c) status - that is, rights and obligations imposed on all who meet certain criteria set out for the legal recognition of domestic partnerships such as cohabitation, demonstrated commitment to a permanent union, joint property ownership, etc.

5.4 *What would be the advantages and disadvantages of the system of your choice?*

5.5 *Where contract or registration is the criterion for the imposition of rights and obligations, should the same consequences as marriage accrue to such a partnership or not?*

- 5.6 *Where status is the criterion for the imposition of rights and obligations:*
- a) *What would parties have to prove to show that a domestic partnership exists?*
- b) *What dispensation should be selected for domestic partners: community of property, the accrual system or something else?*
- c) *From what date should any of these systems apply? Must the law lay down specific periods, such as living together for one, two, or three years before the chosen system operates? Must a court be required to discover a date upon which the domestic partnership started?*
- d) *What happens if one party alleges that the partnership was subject to community of property and the other that the accrual system applied?*
- e) *Would it be possible to contract out of this "automatic" dispensation?*
- 5.7 a) *What should be the manner of ending a domestic partnership?*
- b) *If this should be by agreement, what form should the agreement take?*

6. CHILDREN AND MAINTENANCE

If a couple is married they have a legal duty to support each other during the subsistence of their marriage. There is no reciprocal duty of support between the parties during a domestic partnership or after its termination by death or otherwise. There is also no action for damages for loss of support against a third party who unlawfully causes the death of a domestic partner who has been supporting his or her partner.

The law does not distinguish between married and unmarried parents in regard to the obligation to support children. However, a father of a child born out of wedlock does not have any automatic 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 if it is in the best interests of the child. The law furthermore only recognises the relationship between parent and child based on biology or marriage. If a child is adopted by one partner and the child is raised by both partners as its parents, the partner who has custody of the child can refuse access to the other partner in the event of the relationship breaking up. If the custodial parent dies, the other partner would not automatically assume custody of the child.

QUESTION 6:

6.1 *Should legislation enable domestic partners to bring maintenance claims against their partners? If so, should the principles be the same as those applied to married persons?*

6.2 *Should the courts be able to deal with children born of domestic partnerships in the same way as cases involving children born in a marriage?*

6.3 *Should the rights of a natural father of a child born out of wedlock be extended where the natural parents of the child were living in a domestic partnership at the time of the child's conception or at any time thereafter?*

6.4 *Should the law permit domestic partners to adopt children jointly? If so, under what circumstances?*

7. THE COMMUNAL HOME AND OTHER PROPERTY

Division of property, as is found in the case of divorce, does not take place where domestic partners split up. 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.

QUESTION 7:

Should courts be given the power to alter the rights of domestic partners according to what is "just and equitable"?

8. SUCCESSION/ INHERITANCE

No automatic right of inheritance exists if a partner in a domestic partnership dies intestate. However, nothing precludes a domestic partner from making specific provision for a partner in a will.

QUESTION 8:

8.1 *Should cohabiting partners, like spouses, have an automatic right of inheritance where the one partner dies without leaving a will?*

8.2 *If so, how should this be regulated?*