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MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION CONCERNING ITS INVESTIGATION INTO DOMESTIC PARTNERSHIPS (PROJECT 118)

The South African Law Reform Commission hereby releases its discussion paper on domestic partnerships for general information and comment. The discussion paper deals 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 discussion paper does not come out in favour of any particular option and the idea is to canvass a number of options.

Marriage is currently the only legally recognised form of 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 these relationships has, however, increased worldwide and also in South Africa. 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.

In the recent past the courts have carried much of the responsibility for crafting family law and policy with regard to domestic partnerships 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, on more than one occasion, upheld constitutional challenges under the equality clause on the ground of sexual orientation. The Constitutional Court has made it clear that same-sex relationships must receive some form of recognition, but has not been prescriptive as to how it should be done. With the extension of statutorily defined benefits (sometimes including domestic partnerships into the definition of "spouse" for various purposes) there has been an increasing recognition of these relationships outside marriage. These developments have led to a patchwork of laws that do not express coherent family policy.

This discussion paper therefore includes proposals for possible law reform to recognise and regulate various forms of domestic partnerships. The proposals are aimed at harmonising family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity. Possible amendments to the Marriage Act of 1961 and the promulgation of legislation to deal specifically with registered and unregistered partnerships are proposed.

The legislative proposals can be summarised as follows:

A) MARRIAGE AND CIVIL UNIONS

The Commission considers as unconstitutional the fact that there is currently no formal legal recognition of same-sex relationships. Recognition could be effected in a number of ways. The following alternatives have been identified:

a) Same-sex marriage (same-sex relationships)

Option 1:

The first option is to make marriage as it is currently known available to both same- and opposite-sex couples by inserting a definition of marriage to that effect in the Marriage Act.

Option 2:

The second option entails the separation of the civil and religious elements of marriage. The Marriage Act of 1961 will therefore only regulate the civil aspect of marriage, namely the requirements and consequences prescribed by law. In practice it will mean that both same- and opposite-sex couples will have to solemnise their marriages before a civil marriage officer. After the civil ceremony couples who value the religious aspects of marriage will then be free to have their marriage blessed by a religious official in a religious ceremony. Religious institutions will have to decide whether their religious blessing is available to same-sex couples or not.

b) Civil unions (same- and opposite sex relationships)

Option 3:

According to this option same-sex couples will be afforded a legal status parallel to that of marriage under a separate institution called a civil union. A civil union will have the same legal consequences as marriage, but will be established through a civil registration procedure and, depending on the circumstances, terminated by mutual agreement or court procedure.

Option 4:

In terms of option 4 the institution of civil union will also be made available to opposite sex couples who object to the moral and religious connotations of traditional marriage.

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

Option 5:

A Registered Partnerships Act is proposed for partners of the same or opposite sex who do not wish to get married but still desire some legal protection. Upon registering their relationship as a partnership with a civil registration officer, parties will be afforded some of the basic rights associated with civil marriage. Depending on the circumstances, termination of a registered partnership will take place either by mutual agreement or court procedure.

The default property regime for registered partnerships will be the accrual system, but parties could agree to use another system. In addition, registered partners will have a mutual duty to support each other during the

existence of the relationship; the right to claim damages in the event of the death of a partner; and the right to intestate succession. Where a child is born into a registered partnership between persons of the opposite sex, the male partner will be deemed to be the biological father of that child. There will only be a limited right to maintenance between former registered partners after termination of the registered partnership.

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

An Unregistered Partnerships Act is proposed in terms of which same- or opposite-sex couples in unregistered partnerships will be afforded a civil status as if they have formally committed to the relationships, without their having taken any steps to effect such recognition. The Commission distinguishes between de facto and ex post facto relationships in this regard.

Option 6: De facto unregistered partnerships

Option 6 creates rights and obligations for a couple in a conjugal relationship during the existence of the unregistered partnership. Relationships will be assessed in terms of a definition and a list of factors (both set out in the Unregistered Partnership legislation) such as the duration of the relationship and the degree of mutual commitment to a shared life. When the status of the relationship is disputed during its existence, a court may be approached to declare the status of the relationship.

Compared to marriage and registered partnerships the rights and obligations afforded to unregistered partnerships will be limited. The focus will be on regulating the ownership of property accumulated by the partners during and after termination of the relationship. The disposal of such property by one partner will be restricted and there will be a joint liability for household expenses during the relationship. Provision will be made for the equitable division of accumulated property after termination of the relationship and the right to inherit a child's share from a partner who dies intestate. A former partner will be able to claim maintenance from the other partner only under prescribed circumstances.

In order to protect the autonomy of partners in unregistered partnerships, there will be a provision to exclude the legislation by mutual agreement. Where the application of the Act has been so excluded, the parties will still have recourse to the ordinary remedies of the law to the extent that they may be applicable.

Option 7: Ex post facto unregistered partnerships

This option allows former partners in an unregistered partnership who cannot agree about the division of property and maintenance after the partnership has ended, to apply to court for an equitable property division and maintenance order. Such an order may be made only after the court has determined that the relationship indeed qualifies as an unregistered partnership as defined. No rights and obligations are created automatically for the couple during the existence of the relationship. The legislation only becomes relevant to the partners on the breakup of the relationship or the death of one of the partners should they be unable to manage their situation privately.

When making a property division or maintenance order, the focus of the court will be to ensure an equitable settlement of the proprietary disputes between the former partners. The court will be allowed to consider the terms of a domestic partnership agreement between the former partners when deciding the case.

This version of the unregistered partnership proposal 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.

CONCLUSION

Owing to the diverse nature of the options mentioned before and the wide variety of relationships under discussion, it would be impossible to select only a single generally valid statutory measure to regulate all relationships. The aim would be to combine the proposals in such a way as to afford the desired protection to parties in domestic partnerships without imposing on their autonomy or over-regulating the position.

The Commission in its effort to consult all interested parties will host a series of workshops during October 2003. Members of the Project Committee will be present to explain and discuss the draft Bill and to note comments. The workshops are scheduled to be held as follows: 7 October (Gauteng), 9 October (Durban), 10 October (East London), 13 October (Bloemfontein), 14 October (Cape Town), 21 October (Pietermaritzburg), 27 October (Polokwane) and 28 October (Nelspruit). Persons interested in attending should contact the Commission at (012) 322 6440 (contact person Ms C Pienaar).

The discussion paper is obtainable free of charge from the Commission upon request. The discussion paper has already been posted to interested persons and bodies and it has furthermore been published on the Commission's website at <http://www.law.wits.ac.za/salc.html>. The Commission will however be ready to receive further requests for copies of the discussion paper as from 15 September 2003.

Written comments or suggestions should reach the Commission by **1 December 2003** at the following address:

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ISSUED BY THE SECRETARY: SA LAW REFORM COMMISSION, PRETORIA

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ENQUIRIES IN RESPECT OF MEDIA STATEMENT:

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