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Parliamentary Submission: Civil Union Bill

29 September 2006

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EXECUTIVE SUMMARY OF SUBMISSION

The question as to whether Parliament will broaden the institution of marriage to include lesbian and gay people fundamentally tests its commitment to the transformation of South Africa. South African history clearly attests to two critical points:

- Separate is never equal and has served as a means to ensure the continual subjugation of black people and other oppressed peoples;
- Separateness for its own sake is itself morally repugnant where there is no reason for the separateness. Keeping black and white separate and declaring marriages between black and white illegal are measures that are themselves serious violations of the political values which link us together in our common humanity and solidarity.

The new South Africa was founded upon a total rejection of apartheid philosophy. Our Constitution makes it clear that South Africa is founded upon three foundational values: "human dignity, the achievement of equality and the advancement of human rights and freedoms".[2] Those values appear throughout the Constitution and it is through giving effect to them in our concrete laws that the desired transformation of South Africa is to take place.

In its judgment on same-sex marriage, the Constitutional Court made it clear that the status quo in terms of which lesbian and gay people are excluded from having the same status, rights and responsibilities as heterosexuals do in marriage is simply unacceptable. Parliament was given a year to remedy this constitutional defect and ensure that the law in both its tangible and intangible respects accords lesbian and gay people **the same status, rights and responsibilities** as heterosexuals.[3]

In September 2006, Parliament released the Civil Union bill which purports to offer lesbian and gay people the opportunity to form a "civil partnership". A civil partnership is effectively a *separate* institution from marriage. This is clearly evidenced by the fact that lesbian and gay people are required to register a civil partnership on a separate register to heterosexuals. Lesbian and gay people seem also to be excluded from marrying under the Marriage Act. Marriage officers may object on grounds of conscience to the solemnizing of civil partnerships whereas only religious marriage officers are allowed to object to performing marriages for heterosexuals on religious grounds.

In our view, the Civil Union Bill is objectionable both in what it does and what it fails to do: first, it entrenches inequality between lesbian/gay and straight people in our law which is indefensible; secondly, it fails to accord lesbian/gay people the full recognition demanded by the Constitution for their relationships.

We provide ten arguments as to why the Bill fails to meet the requirements of the Constitution:

1. Civil partnerships are inconsistent with the fundamental guarantee in the Constitution that prohibits discrimination on grounds of sexual orientation.
2. Creating two parallel institutions does not constitute equal treatment under our Constitution and amounts to a form of institutional segregation.

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[2] S1 of the Constitution of the Republic of South Africa, 1996.
[3] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at [149].

3. Civil partnerships exclusively applicable to same-sex couples are only legally acceptable in jurisdictions which have a lesser equality guarantee than SA.
4. Civil partnerships mark and stigmatize lesbian and gay people as 'other', second-class citizens and thus violate both the right and value of dignity in our Constitution.
5. Civil partnerships fail to respect the value of Ubuntu which requires that gay and lesbian people be affirmed as full members of the South African community.
6. Civil partnerships violate the fundamental freedom that should be afforded to same-sex couples to be able to choose to get married.
7. Civil partnerships do not respect the religious freedom of those lesbian or gay people who wish to be married; allowing same-sex couples to be married would not violate any religious group's freedom.
8. Civil partnerships conflict with the Constitutional Court's judgment in the *Fourie* case and would thus spark further litigation, and accordingly fail to resolve the status of same-sex relationships in South African law.
9. Civil partnerships would add to the administrative burden already borne by the Department of Home Affairs.
10. Civil partnerships are not in the best interests of the children of same-sex couples, nor do they adequately protect same-sex families.

The essence of our complaint is that enacting a regime of civil partnerships for same-sex couples would result in **legal exclusion and marginalisation** and would be inconsistent with our Constitution's unequivocal guarantee of substantive equality and dignity for gay and lesbian people. This will inevitably lead to a situation where the Bill, should it become an Act, is challenged, and in all probability is found to be unconstitutional.[4]

This submission is put forward by fifteen member organisations of the Joint Working Group (JWG). See Annexures 3 and 4 for details of the JWG, and the member that made this submission, respectively. As organisations working within a human rights framework, we are acutely aware of the impact of discrimination and homophobic attitudes upon the well-being of our constituencies. Deliberations upon same-sex marriage must be sensitive to the history of stigma and marginalisation that has faced lesbian and gay people in South African:

- Prior to 1994, lesbian and gay people lived in a shadowy world on the fringes of society.
- Lives were lived in a matrix of societal scorn and criminal sanction which invaded the most intimate aspects of such lives.
- Sodomy was a crime in terms of the South African common law. Being openly homosexual exposed one to the risk of criminal prosecution. In turn, this led to the notion that gay men were criminals.[5]
- Adding to this discrimination was the fact that men convicted of sodomy were excluded from certain careers.[6]
- This regime of institutional discrimination obviously could not survive in a society based on equality, freedom and human dignity.[7] In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[8] the Constitutional Court agreed and declared the common-law crime of sodomy inconsistent with the

[4] See for example *Fourie* at [149] – [151] for the Constitutional Court's mandate to Parliament and its discussion of "separate but equal" legislation.
[5] See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at [28].
[6] For example, the schedule to the Security Officers Act, 1957.
[7] See S1 of the Constitution.
[8] 1999 (1) SA 6.

Constitution. The case reaffirmed the recognition of the humanity of all South Africans and was a forerunner to several judgments that sought to afford gay and lesbian people their Constitutional rights.[9]

Original research conducted by OUT in conjunction with its partners in the JWG showed that LGBT people in both Gauteng and KwaZulu-Natal *suffer discrimination* in every arena of social life. The research revealed significant rates of victimisation among lesbian, gay and bisexual men and women in both provinces.[10] Because they are stigmatised for their perceived sexual and/or gender "deviance", lesbian and gay people are frequently targeted for sexual violence precisely because of their sexual and/or gender identity. The research found that 87% of respondents in KwaZulu-Natal believed that homophobia was the reason for the victimisation they had experienced in various forms.[11] In Gauteng, both women and men all reported homophobia as the main reason for their experiences of victimisation.[12] Violence against lesbian and gay people is thus not an individual injury, but a "hate crime" that is part of a larger system of discrimination against LGBT people.[13] Hate crimes also send this message to the identity community of which the survivor is a part, creating a climate of fear and repression.[14]

As such, despite post-apartheid legal reforms to the contrary, lesbian and gay people are likely still to be victimised,[15] to be discriminated against at the hands of the police service and health care facilities[16], and, in many cases, are at risk of attempting suicide[17]. In every case, homophobia plays a crucial role in sustaining this disadvantage. There is a great discrepancy between the Constitutional rights accorded lesbian and gay people, including the right to non-discrimination, and their lived reality. High levels of homophobia in South African society, and negative social attitudes towards sexual diversity make it difficult for same-sex couples to realize fully their constitutional rights to equality, dignity and privacy. It is within this historical context of discrimination and negative social attitudes toward sexual minorities that the legal remedy for same sex couples should be sought. This submission concerns the interests of a disadvantaged and marginalised group made up of real people with real lives.

In light of the history and continued marginalisation of lesbian and gay people in South Africa, it is all the more important that the law in no way entrench attitudes towards gay and lesbian people that perpetuate marginalisation and discrimination. Unfortunately, the Civil Union Bill, as it currently stands, continues the tradition of stigmatizing same sex

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[9] See for example *Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) where the same-sex life partners of South African citizens could qualify for citizenship as if married to a South African citizen; *Du Toit v Minister of Population Development* 2003 (3) SA 198 (CC) where it was held that same-sex couples could jointly adopt children; *Minister of Home Affairs v Fourie, Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) where it was held that the prohibition on same-sex marriage was unconstitutional.

[10] Wells and Polders (2004) *Levels of Empowerment among Lesbian, Gay, Bisexual and Transgender People in Gauteng, South Africa* OUT LGBT Well-being: Pretoria at 4. In Gauteng, 14.9% of black women and 11.2% of white women reported that they had survived sexual abuse and rape in school, while 15.3% of black men and 11.3% of white men reported similar abuse.

[11] Wells and Polders at 8.

[12] Wells and Polders at 6.

[13] For more on "hate crimes" see Harris (2004) *Arranging Prejudice: Exploring Hate Crime in post-apartheid South Africa* Centre for the Study of Violence and Reconciliation: Johannesburg.

[14] *Ibid.*

[15] Wells (2006) *Levels of Empowerment among Lesbian, Gay, Bisexual and Transgender People in Kwa-Zulu Natal, South Africa* Out LGBT Well-Being: Pretoria at 6; Wells and Polders at 4.

[16] Wells at 9; Wells and Polders at 6,

[17] Wells at 16; Wells and Polders at 13.

relationships as second-class rather than treading a bold course towards a future where all relationships – whether homosexual or heterosexual – are treated with dignity and equal respect. The only viable method of achieving these noble aims is, in our view, to allow gay people to marry under the same legal regime as heterosexuals do.

Our submission consists of three main parts:

- The first part of this submission presents our understanding of the Civil Union Bill and its key deficiencies;
- The second part of the submission presents in more detail ten arguments concerning why civil partnerships fail to meet the requirements laid out by the Constitutional Court in the *Fourie* decision; this part of the submission also provides reasons why only the inclusion of lesbian and gay people within civil marriage will succeed in fully achieving equality, dignity and freedom for all in South Africa.
- The third and concluding section offers our recommendation that the existing Marriage Act should be amended so as to enable lesbian and gay people to have their relationships recognized as civil marriages.
- Annexure one illustrates how the rationale for marriage has changed over time, and why the inclusion of same-sex couples within this institution is both a necessary and evolutionary development.
- Annexure two debunks the myth that same-sex relationships are 'un-African' and provides evidence of the existence of same-sex relationships and marriages in a range of African societies.
- Annexure three and four provide, respectively, some background information concerning OUT and the organisations that have endorsed this submission.

This submission thus seeks to demonstrate that Parliament is now faced with a fundamental choice: *does it move South Africa forward into an era which respects human dignity, equality and freedom and categorically rejects apartheid philosophy, or does it continue to perpetuate values that seek to discriminate, stigmatize and dehumanize?*

We hope it will choose the former course and usher in a new era in South Africa. We hope that Parliament will, in its deliberations, bear in mind the eloquent words of Justice Sachs' judgment in *Fourie* that succinctly capture the essence of our position on this Bill:

> Parliament (must) be sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation. **Historically the concept of "separate but equal" served as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation.** The very notion that integration would lead to miscegenation, mongrelisation or contamination, was offence in concept and wounding in practice. Yet, just as is frequently the case when proposals are made for recognizing same-sex unions in desiccated and marginalized forms, proponents of segregation would vehemently deny any intention to cause insult. On the contrary, they would justify the apartness as being a reflection of a natural and divinely ordained state of affairs … **The above approach is unthinkable in our constitutional democracy today** … because our society is completely different.[18]

[18] *Fourie* at [150] – [151]. Footnotes omitted and emphasis added.

PART 1: THE CIVIL UNION BILL: ANALYSIS AND CRITIQUE OF ITS PROVISIONS

In *Fourie v Minister of Home Affairs*,[19] the Constitutional Court found that the common law definition of marriage and the Marriage Act 25 of 1961 were unconstitutional to the extent that they failed to accord same-sex couples the same status, rights and responsibilities that heterosexual couples have in marriage. In its interpretation of the doctrine of the separation of powers, the majority of the Constitutional Court provided no immediate solution to the problem. Instead the Court gave the legislature the opportunity to remedy this invalidity. Attached to this mandate were two important caveats: Parliament had to cure the Constitutional invalidity by affording same-sex couples **the same status**, **benefits and responsibilities** as heterosexual couples enjoy in marriage and that Parliament had 12 months to achieve this.[20]

It is in execution of this mandate that the Civil Union Bill has been introduced as an attempt to cure the Constitutional defect in our marriage laws. This part of the submission first considers the main provisions of the new Bill, particularly in relation to civil partnerships. It then engages in a critique of the Bill that is designed to show that the Bill treats lesbian and gay relationships as second class and thus contravenes both the foundational values of the Constitution as well as the Constitutional Court's express requirement that lesbian and gay relationships be accorded equal status to heterosexual relationships.

The Civil Union Bill

The Bill provides, in Chapter 2, for a new status to be created in our law, namely, the civil partnership. A civil partnership means a "voluntary union between two adult persons of the same sex that is solemnized and registered in accordance with the procedures prescribed in this Act to the exclusion, while it lasts, of all others".[21] Only same-sex couples may register a civil partnership. Such partnerships are solemnised by a marriage officer.[22] Religious denominations may be designated by the Minister to perform civil partnerships. [23] Marriage officers may, on grounds of conscience, however, indicate to the Minister that they object to solemnizing civil partnerships and may be exempted from doing so.[24] A married partner may not register a civil partnership and a person may only register one civil partnership at a time. [25]

The Bill then describes the process of solemnising and registering a civil partnership. It provides for a civil partnership formula whereby the parties to a civil partnership can decide whether to solemnize their partnership with the use of the term "marriage" or the use of the term "civil partnership".[26] Importantly, whether or not they use the locution "marriage" or "civil partnership", the union becomes registered as a civil partnership on a separate register to those who are married.[27] The Bill states that all the legal consequences of marriage apply to a civil partnership. Reference to marriage in any other law, including the common law, includes civil partnerships but marriage in terms of the Marriage Act is exclusively heterosexual.[28]

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[19] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).
[20] *Fourie* at [162]. Emphasis added.
[21] S1 of the Bill.
[22] S4 (1) of the Bill.
[23] S5(1) of the Bill.
[24] S6(1) of the Bill.
[25] S8(1) and (2) of the Bill.
[26] S11(1) and (2) of the Bill.
[27] S12 of the Bill.
[28] See S13(2) of the Bill.

In Chapter 3, the Bill goes on to create a new legal status known as domestic partnerships. Such partnerships can be registered by both homosexual and heterosexual people. Much of the Bill is designed to outline the consequences of entering into a domestic partnership. This submission does not engage in depth with the domestic partnership provisions. We commend the Bill for attempting to offer alternative possibilities to marriage. Our problem with the Bill is that whilst it offers gay and lesbian people the alternatives of a civil partnership or a domestic partnership, it does not offer same-sex couples marriage.

Key Deficiencies of the Bill

The constitutional deficiencies of the civil partnership regime are evident in the following sections of the Bill:

- As the definition of 'civil partnership' makes plain, civil partnerships may only be entered into by persons of the same sex. The regime of civil partnerships is therefore intended to be separate from the institution of marriage which the Bill seeks to reserve for opposite-sex couples alone. This is purportedly achieved through section 13(2) by stipulating that all references to 'marriage' in the law must be read to include civil partnerships '*with the exception* of the Marriage Act'.[29] It is unclear why there needs to be an Act reserved for heterosexuals and a separate Act for lesbian and gay people. If the definition of marriage at common law includes gay and lesbian persons, why the need for a separate Act? This can only be an indication that the law continues to treat same-sex relationships as inferior, and ensures that gay and lesbian people are in reality unable to enter into a relationship that has the full status of a marriage in our law. As such, this provision is inconsistent with the demands of our Constitution's equality guarantee which requires that the same *status*, benefits and responsibilities of marriage be accorded to same-sex couples.

- The separation between the institutions of marriage and civil partnerships is further entrenched in section 8(2) which stipulates that a married person may not register a civil partnership.

- As section 12 of the Bill makes clear, it is envisaged that there will be a separate register[30] for civil partnerships and separate documentation which will record the registration of civil partnerships.[31] This provides a crucial indication of the difference in status accorded to marriage and civil partnerships. In the past, the State sought, in a variety of ways, to separate different population groups on grounds of race in our country. Such separation was rejected at the time for what it was: an insult to the dignity and common humanity of individuals. It may thus be asked why the government is now instituting separate registers for homosexual and heterosexual people. Why should the law suggest that same-sex relationships are not worthy of being placed on the same register as those of straight people?

- The definition of 'civil union' seeks to class together, in the eyes of the law, civil partnerships and domestic partnerships as distinct from marriages. It is clear that domestic partnerships do not have the status of marriages. By placing

[29] Emphasis added.
[30] See S12(6).
[31] See S12(1).

civil partnerships in the same Bill as domestic partnerships, the Bill is clearly demonstrating that the status of civil partnerships is inferior to that of marriage. This is the case despite the fact that the Constitutional Court demanded that same-sex partnerships have equal status to marriage in the *Fourie* judgment.

- In terms of section 5 of the Bill, any minister of religion or person holding a responsible position in any religious institution wishing to be registered as a marriage officer for the purposes of solemnising civil partnerships after the commencement of the Bill (should it become law) would be required to await the designation of his or her religious institution as an institution that may solemnise civil partnerships[32] before submitting a letter of request to the Minister of Home Affairs to be so registered as a marriage officer him- or herself. This provision will make it impossible for any minister or responsible person in a religious institution to solemnise civil partnerships where his or her religious institution has not made an application[33] to be designated or has not been so designated despite having made such application.[34] This will negatively impact upon many ministers of religion who wish to be marriage officers and who may decide to act against the dictates of the majority of the denomination of which the minister forms part. The freedom of religion of those ministers who wish to object to discriminatory policies of the denominations of which they are part will be curtailed and the tyranny of authority structures within denominations will be supported by the State. The interests of religious authoritarian structures will thus be prioritized over those of the individual and this would violate the individual's freedom of religion.

- Section 6 of the Bill is crafted in far wider terms than its counterpart in section 31 of the Marriage Act 25 of 1961. In terms of section 6 of the Bill, any marriage officer may object on grounds of conscience to solemnising civil partnerships. By contrast, in terms of section 31 of the Marriage Act, only a minister of religion or a person holding a responsible position in a religious denomination or organisation may refuse to solemnize a marriage. Such a person may only refuse to perform a marriage on the basis that 'it would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organisation'. The space provided in the Marriage Act for respecting the religious beliefs of religious marriage officers has been vastly, and illegitimately, extended in the case of all marriage officers under the Bill to object to solemnising civil partnerships on the basis of conscience. The differences between these two exclusions suggests that there is greater reason to object to civil partnerships than there is to marriage: but why should this be unless the Bill were entrenching a view that same-sex relationships are in some sense inferior to heterosexual relationships? Again, the message is reinforced that same-sex relationships merit different and unequal treatment to heterosexual relationships. Public officials should be required to uphold the law and not cast judgment on people who approach them expecting them to fulfill an impartial official function. To be turned away by a civil marriage officer would be deeply insulting and hurtful. Public officials, particularly magistrates, are required to honour and operationalise the Constitution.

- Although section 11 of the Bill allows the marriage officer to refer to a civil partnership as a marriage during the ceremony, the fact still remains that same-

[32] In terms of s5(2) read with s5(4).
[33] In terms of s5(1).
[34] In terms of s5(2).

sex partners are entitled to conclude *only* civil partnerships. Thus, despite the fact that the couples may wish their relationship to be referred to as a marriage during the ceremony, in the eyes of the law it is a civil partnership: a separate institution created by the State, discreet from marriage and without its history, tradition or status.

In the above analysis, we have sought to identify the key problems with the Civil Union Bill which demonstrate that the Bill fails to accord same-sex couples the same status, rights and responsibilities which marriage accords to opposite-sex couples. Essentially, a separate institution is created for lesbian and gay people, which is objectionable both in what it does and what it fails to do: first, it entrenches inequality between lesbian/gay and straight people in our law which is indefensible; secondly, it fails to accord lesbian/gay people the full recognition demanded by the Constitution for their relationships.

We now elaborate on ten arguments that show why the proposed civil partnership regime conflicts with the fundamental values that underlie the new South Africa and are enshrined in our Constitution. **It is our submission that only by including gay and lesbian people within marriage, will Parliament succeed in realising these ideals**.

PART 2: TEN ARGUMENTS AGAINST CIVIL PARTNERSHIPS AND IN FAVOUR OF MARRIAGE FOR SAME-SEX COUPLES

The question as to whether Parliament will broaden the institution of marriage to include lesbian and gay people fundamentally tests its commitment to the transformation of South Africa. Historically, central to the ethos that dominated the South African State was the segregation of peoples: South African history is notorious for its apartheid laws, and the "segregationist" philosophy. However, that same history clearly attests to two critical points:

- Separate is never equal and has served as a means to ensure the continual subjugation of black people;
- Separateness for its own sake is itself morally repugnant where there is no reason for the separateness. Keeping black and white separate and declaring marriages between black and white illegal are measures that are themselves serious violations of the political values which link us together in our common humanity and solidarity.

The new South Africa grew out of a total rejection of apartheid philosophy. Our Constitution makes it clear that South Africa is founded upon three foundational values: "human dignity, the achievement of equality and the advancement of human rights and freedoms".[35] Those values appear throughout the Constitution and it is through giving effect to them in our concrete laws that the desired transformation of South Africa is to take place.

Despite the radically changed commitments envisaged in our Constitution, it remains entirely possible to fall back into past modes of thinking and to try and separate issues where they are in fact the same. The Constitutional Court has made it clear in the *Fourie* judgment that Parliament is required to find a solution which accords lesbian and gay people **the same status, rights and responsibilities** as heterosexuals.[36]

Parliament is now faced with a fundamental choice: *does it move South Africa forward into an era which respects human dignity, equality and freedom and categorically rejects apartheid philosophy, or does it continue to perpetuate values that seek to discriminate, stigmatize and dehumanize?*

Arguments against civil partnerships

1.1 Civil partnerships are inconsistent with the fundamental guarantee in the Constitution prohibiting discrimination on grounds of sexual orientation.

The South African Constitution prohibits the State or any person from unfairly discriminating against another person or group on a range of grounds. These grounds are based upon a range of features that are relatively fixed and central to individuals, including, race, sex, gender and sexual orientation.[37] The Equality clause is the first right in the Bill of Rights. It is one of the most important clauses in the Constitution in that it signals decisively the break South Africa has made from a past in which

[35] S1 of the Constitution of the Republic of South Africa, 1996.
[36] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at [149].
[37] S9(3) of the Constitution.

differences between people were used arbitrarily and irrationally to allow the State to treat people unequally.

Equality before the law entails that laws must apply to people equally unless there is a justification for differential treatment.[38] It has at times been argued that gay and lesbian people *are* in fact different and that there is no need to offer gay and lesbian individuals identical treatment to heterosexuals as a result. This raises the questions: **When does difference translate into differential treatment?**

It is important to acknowledge that in one respect, homosexual and heterosexuals are different: one group is orientated towards having intimate relationships with members of their own sex and one group is orientated towards having intimate relationships with the opposite sex. However, it is equally true that black people differ from white people in terms of their skin colour; and women differ from men, at least, in certain physiological ways.

However, **difference does not automatically translate into a justification for differential treatment.**[39] In the words of Justice Sachs who delivered the majority judgment in the *Fourie* case, "[e]quality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference."[40] South Africa has adopted a model of society where we celebrate our differences, yet the law should not treat us differently unless there is a good reason to do so. The fact that black and white people differ in relation to skin colour is irrelevant to how the law should treat them. Consider a scenario where there were laws regulating marriages for white people and law regulating marriages for black people. We would want to know in such a situation why it were necessary to create two separate laws, where there is no material respect in which white people and black people differ necessitating the creation of such separate legal structures.

It is our submission that the same holds true for the distinction between lesbian/gay and heterosexual people and relationships. Whilst there is an obvious difference between the two, that difference provides no good reason to create different laws for the two groups. Gay and lesbian people love like heterosexuals; gay and lesbian people need legal protections like heterosexual people; gay and lesbian people often have children like heterosexual people; and so on. **There is in our view no relevant distinction between gay and lesbian people that would justify creating separate legal structures for the two groups**. Any such differentiation in structure would thus be inherently discriminatory and perpetuate, rather than eliminate, a form of apartheid in our society.[41]

1.2 Creating two parallel institutions does not constitute equal treatment under our Constitution and constitutes a form of institutional segregation.

Civil partnerships are a 'pale shadow of marriage';[42] they come with none of the reputation, experience, position, influence, standing in the community, traditions and

[38] *Harksen v Lane* NO 1998 (1) SA 300 (CC) at [42].
[39] See Williams '"I Do" or "We Won't": Legalising Same-sex Marriage in South Africa' (2004) 20 SAJHR 32 at 41-44.
[40] *Fourie* at [60].
[41] See Pantazis "An Argument for the Legal Recognition of Gay and Lesbian Marriage" (1997) 114 *SALJ* 556.
[42] Cox "But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage,

prestige of marriage.[43] Marriage has a long history, a particular status in our society and a range of associated rituals. Marriage, for many, also has a religious and spiritual meaning. No other institution has these attributes and, particularly not one that is a recent creation of statute.

The famous philosopher Ronald Dworkin has recently provided an eloquent understanding as to why civil partnerships cannot be truly comparable to marriage:

"The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social and personal meaning. It means something slightly different to each couple, no doubt. For some it is primarily a union that sanctifies sex, for others a social status, for still others a confirmation of the most profound possible commitment. But each of these meanings depends on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered: it enables two people together to create value in their lives that they could not create if that institution had never existed…If we allow a heterosexual couple access to that wonderful resource but deny it to a homosexual couple, we make it possible for one pair but not the other to realize what they both believe to be an important value in their lives".[44]

Marriage also brings a range of tangible benefits to the couple concerned. Research consistently shows that the act of marrying improves people's physical, psychological, and financial well-being.[45] In part, it does so because it entails entering an institution whose meaning is widely understood and respected by all in society. At present, civil partnerships lack the same understanding and respect.

Thus, **no remedy other than allowing same-sex couples to be included within the institution of marriage will ensure that the equality of gay and lesbian relationships is fully respected.**

The adoption of a separate 'civil partnership' institution for lesbian and gay people amounts to a form of institutional segregation. This is highlighted by the fact that section 12 of the Bill requires that civil partnerships be placed on a separate register to marriages for heterosexuals in terms of the Marriage Act. If marriages and civil partnerships were equivalent, why would they not be placed on the same register?

The history of our nation (and others) has demonstrated that separate is seldom, if ever, equal. Experiences with 'separate but equal' have repeatedly shown 'that separation can never result in equality because the separation is based on a belief of distance necessary to be maintained between those in the privileged position and those placed in the inferior position.'[46]

According to the Constitutional Court, "historically the concept of 'separate but equal' served as a threadbare cloak for covering distaste for or repudiation by those in power

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and Separate But (Un)Equal" (2000) 25 *Vermont Law Review* 113 at 130.

[43] *Ibid.*

[44] Dworkin "Three Questions for America" (2006) New York Review of Books.

[45] Waite and Gallagher (2000) *The Case for Marriage: Why married people are happier, healthier and better off financially* Doubleday: New York.

[46] Cox at 134.

of the group subjected to segregation".[47] **Such segregation harms not only the members of minority communities who are its direct victims but also the members of the majority, because both groups are taught that they require separation from one another where in fact no such separation is required.** In the race and sex context, this type of separation was based on beliefs of the one group's inferiority and the other group's superiority. Even if such a belief does not motivate the civil partnerships' proposal, equality for lesbian and gay people will not occur as long as their relationships remain segregated from those in the majority community, particularly given the history of discrimination and marginalisation faced by lesbian an gay people.[48] Equality requires giving same-sex couples the same opportunities to marry as opposite-sex couples and would not sanction the channeling of same-sex couples into a less-regarded institutional status.[49]

It may be contended that this is simply a matter of semantics, that if same-sex couples are being afforded all the same rights and privileges of marriage as heterosexual couples and the only thing which distinguishes their unions from those of their heterosexual counterparts is a name, then all that is at stake is a label, and labels cannot be constitutionally important. However, as the Massachusetts Supreme Court pointed out in its *Goodridge* Advisory Opinion, which declared unconstitutional a legislative enactment of a civil union option for the recognition of same-sex partnerships, it is not the word 'union' or 'partnership' that incorporates a pejorative value judgment itself but it is the fact that the institution of marriage excludes same-sex couples from its ambit that is objectionable.[50] The term 'marriage' is important as it brings with it all the historical, social and personal meanings that civil partnerships lack.

1.3 Civil partnerships for same sex couples as an alternative to marriage are only legally acceptable in jurisdictions which have a lesser equality guarantee than SA.

In the *Fourie* judgment itself, the Constitutional Court stressed that the determination of the issue of same-sex couples' entitlement to marry must be decided against the backdrop of our Constitution's emphasis on the values of human dignity, equality and freedom. The Court held that it should be these values, and the case law which has elucidated their meaning, which serve as the compass that guides the analysis, 'rather than references made … to North American polemical literature or to religious texts'.[51]

The emphasis which the Court placed on our domestic equality jurisprudence is important because it explains why reference to other jurisdictions which have adopted a civil partnership option for same-sex partners is irrelevant to the constitutionality of this option in the South African context. The equality guarantee in South Africa is broader than many equivalent provisions in other jurisdictions in two respects: first, it lists 'sexual orientation' as a prohibited ground of discrimination; and secondly, it considers the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected by that differentiation when testing its

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[47] *Fourie* at [150].
[48] Cox at 124. For some details concerning the history and continued marginalisation of lesbian and gay people, see the executive summary of this submission.
[49] Samar "Privacy and The Debate Over Same-Sex Marriage Versus Unions" (2005) 54 *DePaul Law Review* 783 at 785.
[50] *Goodridge Advisory Opinion* 440 Mass. 1201; 802 N.E.2d 565 at [14].
[51] *Fourie* at [48].

constitutionality. For this reason, the constitutionality of such options in other jurisdictions does not provide any support for their constitutionality in our country.

None of the jurisdictions in which a civil partnership option has been adopted by Parliament has as expansive an equality guarantee as that found in our Constitution. The impact of the extent of this guarantee is usefully highlighted if one considers the opinion of the Massachusetts Supreme Court when the Massachusetts legislature passed a Civil Union Bill similar to that proposed by Cabinet here. In a dissenting judgment in the case, Sosman J indicated that if the Massachusetts Constitution contained an equal rights amendment making sexual orientation the equivalent of the prohibited categories of 'sex, race, color, creed, or national origin' she would have joined the majority in holding that the legislation was in conflict with the Constitution.[52] Our Constitution *does* provide this guarantee. The inclusion of sexual orientation as a listed ground of unfair discrimination has two important implications: it renders any discrimination on the basis of sexual orientation presumptively unfair and subjects any such measures to a heightened level of scrutiny to which equivalent measures in other jurisdictions are simply not subject. Thus whereas the civil partnership option may pass constitutional scrutiny in other jurisdictions with lesser equality guarantees, it could not pass muster under our Constitution's requirements.

Moreover, in many countries, **civil partnerships have been recognized as failing fully to comply with constitutional guarantees of equality in those jurisdictions but have been recognized as expedient compromises for political purposes.**[53]Since South Africa has a government that is committed to the realization of equality for all its citizens, no such political compromises need be forged; moreover, our constitutional commitment to full equality for lesbian and gay people entails that no such political compromise will be legitimate under the Constitution.

1.4 Civil partnerships mark and stigmatize lesbian and gay people as 'other', second-class citizens and thus violate both the right and value of dignity in our Constitution

The value of dignity is a cornerstone of both our democracy and the Bill of Rights.[54] It is the second substantive right in our Bill of Rights.[55] The Constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of society.[56]

Dignity does not merely require that we reverse past indignities; it demands that we transform our society into one that will ultimately recognize the intrinsic worth of each individual.[57] To do so, we have to ensure that our laws contain within them the possibilities for each individual to realize their preferred way of life. It also requires that the law in no way impugns an individual's sense of self-respect. The treatment of gay and lesbian relationships has in many ways been "deeply demeaning and has had

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[52] *Goodridge Advisory Opinion* at [38].
[53] Cox at 117. See also Eskridge "Equality practice – Liberal reflections on the jurisprudence of civil unions" (2001) 64 *Albany Law Review* 853 at 855.
[54] See S7 (1) of the Constitution.
[55] S10 of the Constitution.
[56] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at [28].
[57] Woolman *Dignity* in Woolman *et al* (eds*)* (2006) *Constitutional Law of South Africa* 2nd Edition Cape Town: Juta.

the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays".[58]

What is recognised crucially by the value of dignity is the impact of *intangible* damage as well as *material* deprivation. During the apartheid era, the pass laws, apart from providing severe physical hardship to black people, were designed to demean: they thus impacted severely upon the dignity of citizens. Similarly, the marking and branding of persons as other, placing a yellow star or a pink triangle on a person may not physically harm them but it stigmatizes, dehumanizes and represents a grave violation of their dignity.

Thus, in *Fourie,* the Constitutional Court recognized that "[i]ntangible damage to same-sex couples is as severe as the material deprivation".[59] This, for instance, involves being obliged to "live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture".[60]

Particularly important is the impact that an apparently neutral distinction can have on dignity and sense of self-worth of persons affected.[61] Thus, the idea of recognizing civil partnerships (as is covered more fully below) for lesbian and gay people and marriage for straight people may to some seem an innocent, neutral distinction. However, it is when "separation implies repudiation; connotes distaste or inferiority, and perpetuates caste-like status that it becomes constitutionally invidious".[62] **There is no rational reason to exclude lesbian and gay people from marriage**; rather, the reason for doing so can only lie in an attempt to ensure that gay and lesbian people are not fully included within existing legal structures; to represent that gay and lesbian people are "other" and that their relationships are second-class. This is precisely what is prohibited by our Constitution's protection of dignity. Consequently, nothing more nor less than the inclusion of same-sex couples within marriage will be adequate to ensure that the dignity of gay and lesbian people is fully respected.

1.5 Civil partnerships fail to respect the value of Ubuntu which requires that gay and lesbian people be affirmed as full members of the South African community

The fundamental African value of Ubuntu is closely linked to the protection of human dignity. Ubuntu is a relational value: it involves the crucial recognition that a person can only achieve respect and recognition through relationships with others. In the words of our Chief Justice, Ubuntu "recognizes 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…[a]n outstanding feature of Ubuntu in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept".[63]

The relational nature of Ubuntu highlights the importance of ensuring that the relations between individuals in society fully reflect the humanity that is to be

[58] *Fourie* at [50].
[59] *Fourie* at [72]
[60] Ibid.
[61] *Fourie* at [151]
[62] *Fourie* at [152].
[63] *S v Makwanyane* 1995 (3) SA 391 (CC) at [224]-[225].

accorded to each person. Marriage is a well-understood and significant way of structuring the relations between individuals and has a significant social status for those who enter this institution. Only by allowing gay and lesbian people access to this institution, will it be possible to ensure that gay and lesbian relationships can garner the same status and recognition as that which attaches to heterosexual relationships.

Ubuntu finds particular application in protecting those who are weak, unprotected and socially vulnerable.[64] Gays and lesbians have historically been marginalized and not treated as fully part of the community. **To affirm the value of Ubuntu, it is critical for Parliament to affirm that gays and lesbians are full members of the South African community**. To do so will require that gays and lesbians are treated with dignity and equality under the law: the only way comprehensively to achieve this aim will be through full recognition of marriage that includes gay and lesbian people.

1.6 Civil partnerships violate the fundamental freedom that should be afforded to lesbian and gay people to be able to choose to get married

In a society with a wide range of views about what living well entails, lawmakers are faced with the task of ensuring that the framework of laws in the society treats such differing views with respect and enables each citizen to realize their own mode of living well.[65] This is a fundamental principle of any societal order that respects the freedom and autonomy of the individual.

The decision to "enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfillment in an aspect of life that is of central significance". [66] The decision to marry or not is a fundamental decision that has a significant impact upon the self-identity of a person. [67] Such a decision is a fundamental freedom owing to our respect for each individual's autonomy.[68] "Given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way".[69]Thus, lesbian and gay people are entitled to exercise their autonomy to decide whether they wish to marry as much as heterosexual people. *As such, a lesbian or gay person's right to marry should be respected as much as any straight person's right to marry.* [70]

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[64] Cameron "Constitutional Protection of Sexual Orientation and African conceptions of Humanity' (2001) 118 *SALJ* 642.

[65] This is a central pillar of any liberal political order: see Rawls (1993) *Political Liberalism* New York: Columbia University Press at 5. Naturally, there is a proviso that each citizen may only realize their conception of the good to the extent that they do not infringe on the ability of other citizens to realize their own conceptions of the good.

[66] *Dawood and another v Minister of Home Affairs and others* 2000 (3) SA 936 (CC) at [37].

[67] *Goodridge v Department of Public Health* 440 Mass. 309 at 322 : "Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity and family…because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition".

[68] *Dawood* at [37].

[69] *Fourie* at [72]. See also *Goodridge* quoted above.

[70] *Fourie* at [72].

The freedom value also suggests that it is important to take into account, in the process of legislative reform, the many persons – both lesbian/gay and straight - who do not wish to form part of the institution of marriage. Many of these people do, however, wish to have some legal consequences flowing from their relationships. The freedom value supports law reform whereby the legislature offers people a range of legal choices relating to their relationships thus enabling them to decide which legal structure they wish to belong to. This value thus supports the recognition of domestic partnerships, for instance, of those who do not wish to be married. **Critically, however, civil marriage must be one structure open to all people in society, irrespective of sexual orientation.**

1.7 Civil partnerships do not respect the religious freedom of those gay or lesbian people who wish to be married; allowing same-sex couples to be married would not violate any religious group's freedom.

Many lesbian and gay people, as part of their religious commitments, wish to be married and to accept all the consequences of the marriage institution. Many religious denominations would conduct such marriages and bless them as any other marriage. There is no institution known as a civil partnership in most religions. Thus, lesbian and gay people would be required to split their civil ceremony from their religious ceremony. The civil partnership law also requires that lesbian and gay people split their civil and religious status: they may be married religiously but are only joined in a civil partnership civilly: this creates a disjuncture that no heterosexual is subject to. The civil partnership law prevents religious people from exercising their religious freedom to recognize gay and lesbian relationships as full marriages, if they so choose.

The only basis upon which to restrict such freedom would be upon showing that allowing such a freedom would harm others or in some sense limit the rights of others.[71] It has been suggested that allowing lesbian and gay people to marry will in some way infringe the rights of conservative religious heterosexuals who do not believe same-sex couples should be allowed to marry. This argument exhibits a fundamental confusion concerning when restrictions of freedom are permissible. Consider, for example, a Christian person arguing that a Muslim marriage is potentially polygamous and thus offends her values; or two white people objecting to the marriage between a black and white person. In these cases, the Christians or whites may well be offended; yet, offence does not give them any right to prevent the Muslim or mixed race marriage. They may proclaim their views in public; they may hold to their own beliefs and establish communities in which such beliefs hold sway: **what they cannot do legitimately is demand that the civil law prevent others who differ from them from gaining its full protection**.

Moreover, persons belonging to cultural, religious and linguistic communities do have the right to enjoy their culture and practice their religion in association with others.[72] However, they may not exercise these rights in a manner inconsistent with any other provision of the Bill of Rights.[73] This means that persons may decide in their own communities not to recognise same-sex marriages: they may not, however, impose this view on other cultural and religious communities that wish to recognize such marriages. They may also **not** impose this view upon individuals who disagree with it. The Constitutional Court has, for instance, made it clear that the right to belong to a religious community of one's choosing does not allow a community to practice corporal

[71] See S36 of the Constitution. For a classic historical defense of this view, see Mill (1991) *On Liberty and other essays* New York: Oxford University Press.
[72] Section 31 (1) of the Constitution.
[73] Section 31 (2) of the Constitution.

punishment in its schools since this would violate the rights of children to dignity.[74] The right contained in section 31 thus provides no basis upon which to deny same-sex couples equal treatment and dignity as is guaranteed to them in all the other provisions of the Constitution.

In *Fourie,* Justice Sachs clearly articulated this perspective in his following remarks: "what matters from a constitutional point of view is that a Court ensure that a person is protected in his right to regard his marriage as sacramental, to belong to a religious community that celebrates its marriages according to its own doctrinal tenets and to be free to express his views in an appropriate manner in public and in Court…further than that, the Court could not be expected to go".[75] Provided religious organisations retain the right not to celebrate the marriages of same-sex couples, there will have been no infringement of religious freedom.[76] **If the current Marriage Act were to be extended to incorporate the right of same-sex couples to marry, marriage officers would still be entitled to refuse to solemnise certain marriages in terms of section 31 of the Act.**[77]

Thus, as the Court concluded in *Fourie*, it is clear from the above that the acknowledgement by the State of the right of same-sex couples to marry in terms of the Marriage Act would in no way be inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages.[78] It would also crucially allow those religious organisations who wish to celebrate marriages between persons of the same sex to do so.

Those who argue otherwise fail to understand the **fundamental importance of separating religion from State.** Most of the opponents to the inclusion of lesbian and gay people within marriage, such as the ACDP, fail to exhibit any understanding of the separation of religion from State. Religions should have their own ability to decide whether to include same-sex couples within their own marriage practices: what they cannot do is claim that their religious convictions should be entrenched in the civil law.

1.8 Civil partnerships conflict with the Constitutional Court's judgment in the Fourie case and would thus spark further litigation, and thus fail to resolve the status of gay and lesbian relationships in South African law

In the *Fourie* judgment, the Constitutional Court held that the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage was unconstitutional.[79] As Sachs J himself pointed out: what was in issue in the case was 'a question of status'.[80] By including 'status' within the characterisation of the constitutional deficiency, the Court indicated that its concern was not merely with

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[74] See *Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC).*
[75] *Fourie* at [93].
[76] *Fourie* at [98].
[77] S31 of the Marriage Act reads: 'Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organisation.'
[78] *Fourie* at [98].
[79] *Fourie* at [114]. At times, the Court adds that the constitutional infirmity includes the exclusion of same-sex couples from the 'dignity' available to heterosexual couples through marriage. See also [78].
[80] *Fourie* at [154] (emphasis added).

the exclusion of same-sex couples from the legal rights and privileges which attach to marriage but with the intangible attributes of the institution of marriage which are withheld from same-sex couples.

Sachs J makes this explicit when he holds that: 'Same-sex unions continue in fact to be treated with the same degree of repudiation that the State until two decades ago reserved for interracial unions; the statutory format might be different, but the effect is the same. The negative impact is not only symbolic but also practical, and each aspect has to be responded to. Thus, it would not be sufficient merely to deal with all the practical consequences of exclusion from marriage. It would also have to accord to same-sex couples a public and private status equal to that which heterosexual couples achieve from being married.'[81]

The judgment deals in detail with four grounds advanced for the proposition that it would be appropriate to provide an alternative form of recognition to same-sex couples; that is, a form of recognition which does not include them within the institution of marriage but affords to such couples the same rights and privileges of that institution.[82] Each of these four grounds was evaluated by the Court and systematically rejected.[83]

Although the judgment leaves it to Parliament, within the stipulated time-frame, to remedy the Constitutional inconsistency, it is not silent on the constitutionality of the various options which Parliament might pursue in order to remedy this defect in the law. The Court deals specifically with two options which it identifies as available to Parliament:

- The first is the proposal, advanced by the applicants in the case, simply to read the words 'or spouse' into the Marriage Act.[84]
- The second proposal is to adopt the South African Law Reform Commission's proposal of two Marriage Acts: one to be called the Reformed Marriage Act and one to be called the Conventional Marriage Act.[85]

It is important to note that at no point in the judgment is the proposal of a civil partnership alternative canvassed as an option which is viably open to Parliament. Sachs J does acknowledge that there may be other statutory means which could be found to remedy the unconstitutionality[86] but, again, the judgment is not silent on the formulation of these additional alternatives. The Court stipulates that there is one 'unshakable criterion'[87] which should guide this process: 'the defect must be remedied so as to ensure that same-sex couples are not subjected to marginalisation or exclusion by the law, either directly or indirectly.'[88] Enacting a regime of civil partnerships for same-sex couples would result in just such exclusion and marginalisation and would be inconsistent with our Constitution's unequivocal guarantee of substantive equality and dignity for gay and lesbian people.

Given that the civil partnerships option is inconsistent with the *Fourie* judgment, if Parliament were to adopt this option, such legislation would be liable to challenge as itself unconstitutional. It is significant that the State Law Advisor has refused to

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[81] *Fourie* at [81].
[82] *Fourie* at [83].
[83] See *Fourie* at [87], [98], [105] and [109].
[84] *Fourie* at [140].
[85] *Fourie* at [144].
[86] *Fourie* at [147].
[87] *Ibid.*
[88] *Ibid.*

certify the Bill, acknowledging that the State's legal advisors are aware that the Bill as it currently stands will fail to pass constitutional muster. The Constitutional Court seems to have been mindful of the potential for such litigation were the option adopted by Parliament not to remedy the constitutional inconsistency in the case. To guard against 'the risk of endless adjudication on the matter',[89] the Court provides 'certain guiding principles of special constitutional relevance'[90] to Parliament.

The Court highlighted that Parliament should be sensitive to the need to avoid a remedy that on its face would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation. Of crucial relevance to the potential for litigation on this matter is the fact that the Court concluded this section of the judgment by warning that whatever legislative remedy is chosen by Parliament, to survive constitutional scrutiny, it 'must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved'.[91]

A civil partnership option is neither generous nor accepting towards same-sex couples. Instead, it brands same-sex couples with a second-class status and accordingly would not survive scrutiny under our Constitution's equality injunction. This would once again be challenged in the courts and further fail to resolve the status of gay and lesbian relationships in the law. It would represent **a missed opportunity for Parliament to show itself to be fully committed to the equality of all in South Africa and to take a decisive step towards the full recognition of gay and lesbian people in our society.**

1.9 Civil partnerships would add to the administrative burden already borne by the Department of Home Affairs

By creating a new institution for same-sex couples as opposed to accommodating them in terms of the Marriage Act, the administrative burden that the Department of Home Affairs currently bears will be increased by the passing of the Bill as it currently stands.

New administrative forms will have to be designed and created.[92] This will add dramatically to existing costs, as these forms will need to be made available and distributed nationally. Likewise, the requirement of separate registers for marriages and for civil partnerships[93] requires more storage space, additional printing and other ancillary costs.

Furthermore, clause 5 of the Bill demands that religious organisations that wish to conduct civil partnerships must apply for to the Department of Home Affairs for designation to conduct such "marriages". Again, this process is time consuming, requires resources such as further documents, creates more data that will need future verification and will otherwise add to what the Department has to do. Magnifying this is the additional need for religious marriage officers to themselves apply to conduct civil partnerships once their religious denomination or organisation has done so. **This cumbersome procedure simply places unnecessary burdens on an already overstretched department.**

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[89] *Fourie* at [148].
[90] *Fourie* at [148].
[91] *Fourie* at [153].
[92] See for example S12(1) of the Bill.
[93] S12 of the Bill.

The above are simple, practical concerns that reflect our view that the State should not be unnecessarily overburdened. However, there is another more important cause for concern that will also place a further burden on the Department of Home Affairs. In terms of the Marriage Act as it currently stands, only religious marriage officers may object to performing a marriage[94]. By contrast, the Civil Union Bill allows **all** marriage officers to refuse to perform civil partnerships on grounds of conscience[95]. Whilst this raises equality problems, it also creates a problem for the Department of Home Affairs. Not only does this create the administrative problem of having to register such objections, but the Department will also have to ensure that there is a sufficient number of marriage officers willing to register civil partnerships in any given area. This is a result of the State's obligation to "respect, protect, promote and fulfill" the rights in the Bill of Rights[96], and in particular the right to equality.

In light of these problems, there is a serious concern that Parliament may, if the Bill is adopted, create a law that is not implemented on the ground. Lesbian and gay people may thus be promised civil partnerships but, in practice, be unable to register such partnerships given the administrative burden such a regime places upon the Department of Home Affairs. **By extending marriage to same-sex couples under the Marriage Act, all these administrative problems will be obviated. The latter solution consequently makes sense not only from a principled point of view but from a pragmatic point of view as well.**

1.10 Civil partnerships are not in the best interests of the children of same-sex couples nor do they adequately protect same-sex families.

In the *Dawood* case, the Constitutional Court recognised that families come in many shapes and sizes and that the Court (and legislature) should be careful not to entrench particular forms of family.[97] The definition of family changes as social patterns and traditions change. The landmark Constitutional Court decision in *Du Toit v Minister of Welfare and Population Development*[98] saw same-sex couples being afforded the right to adopt children jointly. The effect of this decision is that, for all intents and purposes, same-sex couples now enjoy the same competence as married, heterosexual couples to adopt children.

Therefore, what *Du Toit* saw was the emergence of a new type of family that, whilst different from the typical Western nuclear family, is as real and genuine for its members as any other form of family. In support of this, a recent study confirmed that, **children brought up with gay or lesbian parents show no significant difference to their counterparts brought up in heterosexual homes with regard to areas such as gender identity, emotional development or behavioural adjustment.**[99] Indeed, some studies even indicate that children growing up with homosexual parents have certain advantages, especially with tolerating diversity.[100]

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[94] S23 of Act 25 of 1961.
[95] S6 of the Bill.
[96] S7(2) of the Constitution.
[97] *Dawood* at 31.
[98] 2003 (2) SA 198 (CC).
[99] Andersen *et al* "Outcomes for children with lesbian or gay parents – A review of the studies from 1978 to 2000" (2002) 43 *Scandinavian Journal of Psychology* 335.
[100] Pawelski *et al* "The effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children" (2006) 118 *Pediatric* 349 at 359.

Section 28(2) of the Constitution of the Republic of South Africa, 1996 lays out that the child's best interests are of paramount importance in every matter concerning the child.[101] **Studies prove that children raised by parents who are married civilly benefit from the legal status granted to their parents.**[102] Is it then not of paramount importance to the interests of the children of same-sex couples that their parents can enjoy the same status as heterosexual parents?

The institution and meaning of marriage is so socially and historically important that excluding lesbian and gay South Africans from it represents a deeply scarring form of discrimination not only for the couple itself but for their children too.

IN SUMMARY

What is at stake in the issue before Parliament currently is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect.[103] This section has argued that Parliament should affirm that civil marriage is an institution that is inclusive and recognizes gay and lesbian people as full equals before the law. We should reject any attempt to set up a structure regulating our personal law that in any way mirrors the "separate but equal" structures of our past, that stigmatizes gay and lesbian persons and casts them as others.

Parliament is urged to take note of the transformative vision of our Constitution as expressed by the late Justice Mahomed:

> "In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic".[104]

[101] Emphasis added.
[102] Pawelski at 361.
[103] *Fourie* at [60].
[104] *Makwanyane* at [262].

PART 3: CONCLUSION AND RECOMMENDATIONS

One of the central themes in the struggle against apartheid was the acknowledgement of the humanity of all South Africans, irrespective of distinguishing features such as race, gender or class. It is this realisation that is embodied on our Constitution, which represents a 'radical rupture' from a brutalizing past, toward a common humanity.

Part of this journey has been the growing societal awareness of the humanity of lesbian and gay people.[105] How far our society has come in rejecting its discriminatory past can be measured against the attitude it takes to the inclusion of lesbian and gay people within civil marriage.

We welcome the fact that a large amount of thought has been dedicated to the Bill and to its provisions. It must be stressed that we are not opposed to the Bill in its entirety. To the contrary, we welcome the introduction of domestic partnerships as a progressive step toward the regulation of relationships that previously fell outside the legal sphere. Like their heterosexual counterparts, same sex couples may choose not to marry, and instead, enter into a registered partnership. In addition, given high levels of social prejudice, gay and lesbian couples may remain unwilling to marry due to social stigma. Such couples may, with the introduction of domestic partnerships, still benefit from some level of legal protection. The key issue is that the law should offer recognition and protection to a wide range of families in our society because families take many shapes and sizes in our plural, and increasingly tolerant, context.

However, we cannot accept that the institution of civil partnerships adequately gives effect to the ruling of the Constitutional Court in *Fourie*. **Moreover, we cannot accept the entrenchment of a second-class status in our law for lesbian and gay relationships.** Religious groups will likely challenge whatever decision Parliament takes. Their objection misses the point though. We live in a secular State where religion has to coexist alongside a society whose legal framework is located in the Constitution. What is a stake is not a limitation of religion or a dilution of the exclusive right of heterosexuals to marry. What is at stake is far more important: ***it is about the inclusion of all people under a single legislative framework, the design of which was laid out by our Constitution***.

Parliament has a responsibility to ensure that all laws accord with the Bill of Rights regardless of the religious or moral opinions of individual members and regardless of public pressure to ignore the constitutional text. To do otherwise is to jeopardize the entire foundation of our constitutional State. Many opponents of including lesbian and gay people within marriage are aware that their opposition runs contrary to the Constitution. They are thus calling for a constitutional amendment. Such calls should be seen for what they are: a threat to the very founding and structuring values of the Constitution, namely, equality, dignity and freedom. Rather, Parliament should follow a course that honours our Constitution and thus embraces the full equality of lesbian and gay people by allowing them to marry. Parliament has been brave in choosing principle over populism on a number of key issues in our young democracy: it must be brave again on this issue.

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[105] See for example the decisions of the Constitutional Court in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC)*; National Coalition for Gay and Lesbian Equality and Another v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC *; Du Toit and Another v Minister of Welfare and Population Development and Other* 2003 (2) SA 198 (CC).

In light of our submission that the only way in which truly to recognize lesbian and gay equality is to extend the laws relating to marriage to lesbian and gay people, we make the following recommendations:

- The current text of Chapter 2 of the Civil Union Bill be deleted;
- The Civil Union Bill should be renamed the "Domestic Partnership Bill" and should provide for domestic partnerships for both lesbian/gay and straight people.
- A Marriage Act Amendment Draft Bill should be introduced to parliament as a separate Bill which provides for the inclusion of same-sex couples within marriage in both the common law and the Marriage Act. Such a Bill has already been drafted by the Department of Home Affairs and presented to the Home Affairs Portfolio Committee on 1 August 2006. This Bill also has the added advantage of curing certain pre-existing defects within the existing Marriage Act.

Finally, as part of the public participation process in the formulation of legislation for same-sex marriage, **we would request that OUT LGBT Well-being be given the opportunity to make an oral submission on this matter**. It is only fitting that Parliament engage the LGBT sector on an issue of such significance and the outcome of which directly impacts our constituencies. As an organisation with a track record of servicing LGBT communities, and given our role in the LGBT community relating to same-sex marriage, in collaboration with the Joint Working Group[106] we would welcome the opportunity to provide well-researched, reality-based input into the parliamentary deliberations.

[106] The JWG is a national network of organisations, and partners, that work collaboratively toward the strengthening of programmes and capacity within the LGBTI sector.

ANNEXURE 1: HISTORICAL TRENDS SUPPORTING SAME-SEX MARRIAGE

The primary function of marriage has changed dramatically over time. For much of its history across the vast majority of the world's cultures, including indigenous African cultures, the primary function of marriage has been to form alliances between extended families. These alliances helped manage the distribution of property and other resources. While spouses during this period may have loved each other, love and intimacy were only secondary considerations in the choice of a spouse. They certainly were not considered necessary for a successful marriage.

The emphasis on property distribution usually demanded clarity about which children of a marriage were legitimate heirs to family property. For this reason, marriage was also an institution for the strict control of women's' sexual behaviour. If a women were to bear a child conceived in an extra-marital affair, this child may go on to inherit property even if his or her biological father was not the mother's husband. Such a possibility would violate the norms of the time period, and therefore women who had sex outside marriage suffered extreme penalties. Because husbands were not at risk from becoming pregnant through their own extra-marital sexual dalliances, they were punished less frequently and less severely for such behaviour.

This imbalance was further reflected in every aspect of the marital relationship. Through marriage, women in effect became wards of their husbands. They were powerless to buy property or enter contracts in their own names, or to refuse sex with their husbands. The era of marriage as alliance was thus also one of marriage as inequality.

Happily, marriage has taken on a very different character in recent decades. Marriage remains an occasion for the coming together of extended families, and an important mechanism for the protection of property rights. But these functions now support the development of loving intimacy among the spouses. At its core, marriage has the potential to be about the mutual love between two individuals. This transformation of marriage has been accompanied by the emergence of a more equal relationship between opposite-sex spouses. While significant inequalities often remain in many marriages, the law now recognises a wife's capacity to buy property, to contract, and to decide for herself whether or not to have sex. It also recognises a binding, reciprocal duty of support between the two spouses. This duty helps foster what is now marriage's primary function: the day-to-day care of spouses for each other along economic, emotional, and physical dimensions.

In other words, as marriage has focused more and more on love the law has changed to support this function. Because we now recognise that same-sex couples are as capable as opposite-sex couples of loving one another, it is appropriate that the law should further change to offer support for such love to those same-sex couples who seek it. In contemporary society, marriage is the paramount legal and social vocabulary through which such intimate love is spoken and understood. To deny lesbian and gay people marriage, and no less to deny them the honorific word itself, is to send a message that the government believes lesbian and gay people are incapable of forming truly loving and permanent relationships. It is to allow the State to make fundamental decisions concerning the intimate lives of individuals that should be left up to those individuals.

ANNEXURE 2: HOMOSEXUALITY IS AFRICAN, HOMOPHOBIA IS UNAFRICAN: AN OVERVIEW OF SAME-SEX RELATIONSHIPS IN AFRICA

Research internationally has shown that around 10% of people in any community are lesbian or gay. Yet there is still a widely held misconception that lesbian and gay people only live in Europe or America. The existence of same-sex practices and marriages in Africa has generated a fierce debate in the fields of religion, culture and politics. Amongst these debates is the claim that homosexuality is unAfrican. However, there is ample research illustrating that there have been African people who loved and had sexual relationships with people of the same-sex for hundreds of years. For example in Namibia, Kenya, Nigeria and South Africa, bond friendships, ancestral wives, female husbands and male wives have existed for centuries as forms of same-sex relationships. All these relationships were accepted and respected in Africa, long before Africa was colonized. In addition, these forms of partnerships and marriages were protected by common law. We contend that same-sex practices have always been a part of African sexual desires, intimacy and practice. To motivate this position we offer a brief summary below of different experiences of same-sex practices in various parts of Africa.

Same-sex practices in South Africa

There are different forms of same-sex practices that exist in Africa. Amongst the Lovedu tribe it is acceptable for a queen of the tribe to marry other women, as a means of building a family. The rain queen, for example, had ten wives and her daughter too has more that one wife. The queen pays "lobola", a bride price to the family of the woman that she wishes to marry, exactly as a man would. She becomes the social husband for the women and she fathers the children of the women she marries. These children take on her surname as required by custom. This custom is permissible in terms of the Recognition of Customary Marriages Act.[107] It is noteworthy that this remains an acceptable practice in the Lovedu tribe.

Other forms of same-sex relations in South Africa were recorded from the practice of "mummy-baby" relationships among the Zulu and Sotho tribes.[108] This is where younger women fall in love with older women for purposes of nurturing, intimacy and sexual expression. Some of these relationships were noted to have had a long lasting effect for the people involved. This practice is also common among sangomas[109] (traditional healers in South Africa). Some do it for spiritual purposes while others do it as a form of erotic and sexual expression. In the Zulu culture, the people involved in same-sex practices are called "izinkonkoni".

Same-sex practices have also been documented amongst the Venda[110]. These are mainly associated with female and male initiation. During this ritual, young girls are encouraged to play with each other's genitals in order to promote elongation of these parts to promote sexual pleasure. For most this becomes a long lasting practice that involves feelings, emotions and attraction.

Research also found that there were intimate bonds and associations between men and between women among the Naman. These were called 'soregus'[111] meaning

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[107] Act 120 of 1998.

[108] Morgan and Wieringa (2005) *Tommy boys, lesbian men and ancestral wives: Female same-sex practices in Africa* Jacana: Johannesburg.

[109] Morgan and Wieringa at 231.

[110] Murray (2004) *Africa Sub-Saharan; pre-Independence* in Summers (ed) *GLBTQ: An encyclopedia of Gay, Lesbian, Bisexual, Transgender and Queer Culture* West Adams: Chicago

[111] Murray at [6].

homosexual. These kinds of relationships still exist in contemporary South Africa. It is noteworthy too, that interviews conducted by Vivianne Ndatshe and British Sibuyi on same-sex pairings amongst migrant labors at the Witwatersrand mines in 1998[112] revealed that there was an institution of the "tinkonkana" - a Swazi name meaning the wives of the mine. These were younger men who entered into sexual relationships with older male miners for the duration of their contracts. This experience was found to date back to the 1930's and 1940's. In other mines in South Africa, same-sex practices are named "bukhontxana" - an indigenous name for homosexuality in that context.

What is clear in the above illustrations is that, whilst same-sex practices are termed different things in different cultures and may take different forms amongst the various peoples of South Africa, they have a long history and are an important facet of daily life for many Africans.

Same-sex practices in other parts of Africa

There are accounts of same-sex practices in other parts of Africa which confirm the existence of such relationships in pre-colonial Africa. In Nigeria there are cross dressers (yan ndandu) amongst the Handu tribe, the seemingly bisexual 'gordjiguene' well known among the Wolof tribe in Senegal, the 'kunyenga' term for gay men in Tanzania[113], the 'gaglgo' men who take other men as wives in Dahomey[114]. Most times an affair of this sort persists during the entire life of a pair, contrary to suggestions by same-sex opponents that homosexuality is a phase for most young people. Female husbands have also been reported in the Igbo and Yuruba tribes in Nigeria.[115]

In the Nuerland region of Sudan, a woman marries another woman and counts as a peter (father) of the children born of the wife. Such marriages are by no means uncommon in Nuerland and are regarded as some form of simple legal marriage, for the woman-husband marries her wife in exactly the same way as a man marries a woman. The term 'female husband' refers to a woman who takes on legal and social roles of husband and father by marrying another woman according to the approved rules and ceremonies of society.[116]

Another Sudanese experience is that of a warrior tradition documented as an institution of boy-wives for military men among the Azande[117]. The Azande considered the relationship a marriage both legally and culturally. The warrior paid bride-price to the parents of his boy and performed services for them as he would have done had he married their daughter. If another man was involved with the boy, the warrior could sue him for adultery. The warrior addressed the boy as diare (wife), and the boy addressed the warrior as kumbami (husband). The relationship was both sexual and functional.[118]

Similar accounts have been documented among the Kikuyu, Meru ('mogawe' – homosexuals) and the Nandi tribe in Kenya, the North Eastern Congo, The Central African Republic, the Siberian 'Chuckchees' (homosexuals) and the indigenous North American tribe of Mohave's. They trace their roots from Africa and same-sex practices

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[112] Ridinger (2002) *African Literatures: the need for research into African homosexuality* in Summers (ed) *GLBTQ: An encyclopedia of Gay, Lesbian, Bisexual, Transgender and Queer Culture* West Adams: Chicago

[113] Madlala "Field of Sexuality Studies: What is it?" (2004) *Sexuality in Africa Magazine*

[114] Murray *op cit.*

[115] Murray *op cit.*

[116] Eskridge (1996) *The case for same sex marriage: from sexual liberty to civilized commitment* Free Press: New York

[117] Eskridge at 9.

[118] Eskridge at 5.

have been documented amongst them of 'alyha' – feminine men in love with other men and the 'hwames' women in love with other women. In Ethiopia, the 'ashtime' men who cross over to feminine genders and roles and had sexual relations with other men were also documented.[119]

Interestingly some African countries have what are called third, fourth, fifth and sixth genders. These are genders that refer to people who do not identify as male and female.[120] Countries like Ethiopia and the Mohave tribes of Indigenous Afro-Americans observe these genders as part of their gender structures. In Ethiopia, the name of the third gender is called 'wobo' [121] which is what is commonly referred as transgender in many societies.

In summary these are but a few documented examples of the prevalence of same-sex practices in Africa. Most findings confirm a wide diversity of same-sex pleasures, behaviors, courtships and marriages. Some same-sex practices have been influenced by gender and age-structured forms, and by patriarchy and hetero-normativity. Others have evolved to more egalitarian relationships where gender and age differences are more neutralized. The latter is the most common practice in contemporary Africa, although there are still significant traces of gender structured same-sex relationships.

In addition, there is no record of traditional African societies legislating against homosexuality. Such laws are a Western import, manifested through colonial penal codes and the criminalization of sodomy across the continent. As such, we would assert that it is homophobia, not homosexuality, which is unAfrican. However, it is important to note that categories such as 'heterosexual', 'homosexual' and 'bisexual', as defined in western societies, do not necessarily carry the same meaning elsewhere, particularly in Africa. Homosexual behaviour for example, while occurring to some extent in every society, is as variegated in its form, content, and meaning as heterosexual behaviour. How we interpret sexual desire in its multiplicity of contexts and expression is one of the most important issues in the quest to understand and embrace sexual diversity. [122]

To be African is not to conform to a single identity. As such, the expression of African identities is as diverse as variations in race, culture, language, ethnicity, sexuality and gender. Despite the fact that our Constitution prohibits discrimination on the basis of sexual orientation, cultural and religious intolerance still forces gay and lesbian people to hide their sexual identities. As a result, some lesbian and gay people, including those living in African communities, do not disclose or openly show who they are in public. This does not suggest, however, that homosexuality is unAfrican. By acknowledging the existence of same-sex practices and relationships in African history, it becomes increasingly clear that homophobia is an unAfrican notion, because it denies people the opportunity to express their full humanity.

Whilst it is important to engage with the past, and the diverse expressions of sexuality that have occurred, it is important also to recognise that many features of past social orders – including those relating to race, sex and sexual orientation - have in fact been oppressive and based upon values inimical to the present day constitutional order. The Constitution is a blueprint for the future and envisages the creation of a very different society to that of apartheid South Africa. The core argument in this submission is that the response of Parliament to same-sex marriage should be guided by the fundamental values and rights embodied in our Constitution within a post-apartheid and post-colonial

[119] Murray *op cit.*
[120] Murray at 4.
[121] Murray at 7.
[122] Madlala *op cit.*

South Africa. The South African Constitution both allows and embraces the diversity of relationships, and it does so, based on the foundational values of dignity and equality for all South Africans. It is these ideals which are to serve as the compass for how we, as a society, are required to engage with 'difference', and, in this way, realise the constitutional vision of seeking to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".[123]

[123] Preamble of the South African Constitution.

ANNEXURE 3: ABOUT THE JOINT WORKING GROUP

This submission is made on behalf of the Joint Working Group (JWG).

The Joint Working Group (JWG) started in 2002. It combines the efforts of community organisations working primarily with gay and lesbian people or issues. Many of these organisations are registered with the Department of Social Development as Non-Profit Organisations. The JWG often speaks on gay and lesbian issues and in the past has commented on matters such as the ban by the South African Blood Transfusion Services on the donation of blood by gay men.

Since its inception, the JWG has produced a booklet titled "The ABC of LGBTIs in South Africa" focusing on the critical issues facing LGBTI people and offering information on the services and programmes of member organisations. In addition, the JWG called for the first representative, quantitative study on the levels of empowerment of gay and lesbian people in Gauteng, KwaZulu Natal and the Western Cape. It has also recently hosted the first national lesbian conference in South Africa.

Since the beginning of 2006, the JWG has focused its work on the following areas:

- Development of black leadership within the LGBTI sector
- Resource mobilization for future sustainability of the sector
- Support for emerging community-based organisations
- Combined advocacy programmes towards the realisation of LGBTI rights

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ANNEXURE 4: JWG MEMBERS SUPPORTING THIS SUBMISSION

Activate WITS
Activate is an LGBTI student organisation at the University of Witwatersrand, that engages with this specific community's issues and needs. It plays a supportive and representative role to its student membership.

Contact person:
Zak Mabele
Tel: 0836955065
Email: activatewits@hotmail.com
Website: www.gala.wits.ac.za/activate.

Behind the Mask
Behind The Mask is a media organisation publishing a news website intended for gay and lesbian affairs in Africa, and was launched on 8 May 2000. The organisation considers information and communication technology (ICT), as well as independent journalistic activism, as its main tools. By way of publishing a website magazine the organisation gives voice to African LGBTI communities and provides a platform for exchange and debate for LGBTI groups, activists, individuals and allies.

Contact person:
Thuli Madi
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Email: thuli@mask.org.za
Website: www.mask.org.za

Durban Lesbian and Gay Community and Health Centre
The Durban Lesbian and Gay Community and Health Centre is a drop-in centre providing legal, personal and health counseling, primarily for gay, lesbian, bisexual and transgender communities.

Contact person:
Nonhlanhla Mkize
Tel: 031-3012145
Email: info@gaycentre.org.za
Website: www.gaycentre.org.za

Forum for the Empowerment of Women
Forum for the Empowerment of Women (FEW) is a development, support, advocacy and networking organisation. It is registered as a non-profit organisation, and was established in 2002 as a black lesbian organisation in South Africa.

Contact person:
Donna Smith
Tel: 011-339-1882
Email: ceo_few@absa.co.za
Website: www.few.org.za.

Gay and Lesbian Archives
The Gay and Lesbian Archives (GALA) are a unique source of information for the public, and document otherwise silenced community histories and personal narratives. These records highlight the broader processes of oppression and social transformation in South Africa. The archive boasts an extensive collection of individual and organisational records - it is the foundation of a comprehensive lesbian and gay social history in South Africa and the African continent. All our projects are designed to generate new archival material and make it available to the LGBT community and the general public, for educational purposes and to raise awareness of LGBT issues and rights.

Contact person:
Ruth Morgan
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Gender DynamiX
Gender DynamiX is a South African-based organisation, the first organisation in Africa to focus on transgender issues. Gender DynamiX is committed to provide resources, information and support to the transgender community.

Contact person:
Liesl Theron
Tel: 021-4476519 or 0833207691
Email: liesl@genderdynamix
Website: www.genderdynamix.org.za

Good Hope Metropolitan Community Church
Good Hope Metropolitan Community Church (GHMCC) in Cape Town is a congregation of Metropolitan Community Churches, a worldwide movement in more than 22 countries with an inclusive, affirming ministry to the heterosexual, lesbian, gay, bisexual, transgender and intersex community. MCC churches have a long history of being at the vanguard of civil and human rights movements and addresses the important issues of racism, sexism, homophobia, ageism, and other forms of oppression. MCC is the largest international vehicle for public education about homosexuality and Christianity.

Contact person:
Sharon Cox
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Email: welcome@goodhopemcc.org
Website: www.goodhopemcc.org.

Hope and Unity Metropolitan Community Church
Hope and Unity MCC is affiliated with the Universal Fellowship of Metropolitan Council of Churches and has a special outreach to the LGBTI community. Most of the members are young and Black. We have a created a safe space for our community.

Contact person:
Rev. Paul Mokgethi
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Jewish OutLook
Jewish OutLook is a South African Jewish Organisation that caters to the Lesbian, Gay, Bisexual, Transgendered and Intersex (LGBTI) Community. The organization has three aims: to provide support to Jewish LGBTI persons, to arrange social events, and to provide political representation for Jewish and LGBTI persons. Jewish OutLook aims to combat homophobia and heterosexism wherever it exists and to create communities in which the dignity and equality of LGBTI persons are fully respected.

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Lesbian/Gay/Bisexual/Organisation (LEGBO)
LEGBO Northern Cape operates from Kimberley and has been in existence for 5 years. It carries the interest and aspirations of homosexual people as well as people infected and affected by HIV/AIDS.

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OUT LGBT Well-being
OUT Lesbian, Gay, Bisexual and Transgender (LGBT) Well-being is 11 years old and is registered as a non-profit organisation with the Department of Social Development. OUT's vision is dedicated to building healthy, empowered lesbian, gay, bisexual, transgender communities in South Africa. OUT aims to reduce heterosexism and homophobia in society at large and our mission is to work toward LGBT physical and mental health, within a human rights framework. OUT is a member of the Sexual Offences Bill Working Group, the Department of Social Development's Gauteng Victim Empowerment Forum, the 1 in 9 Campaign, and is an affiliate to Themba Lesizwe. OUT has four focus areas of work: Direct sexual and mental health services; research; mainstreaming of LGBT issues within service provision; and advocacy.

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Out In Africa South African Gay & Lesbian Film Festival (OIA)
Out In Africa (OIA) is the organiser, since 1994, of the annual South African Gay & Lesbian Film Festival that plays to audiences of 20,000 in 6 cities across the country. This Human Rights themed Festival works to counteract all sexual orientation, gender and racial discriminations. The Festival started in 1994 and the impetus was to celebrate the Clause in the Constitution that prohibits discrimination on the basis of sexual orientation. OIA runs filmmaking workshops and has produced 16 short films which have screened at over 20 international Film Festivals.

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Rainbow UCT
Rainbow UCT is a student run society aiming to provide a comfortable environment for the lesbian, gay, bisexual, and transsexual, intersexed and questioning (LGBTI) students and staff members at the University of Cape Town. While our main focus is LGBTI community, we welcome anyone who would like to join us. We seek to promote campus profile of LGBTI issues and to create a space in which freedom to express your love is accepted.

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Triangle Project
Triangle Project is the oldest LGBT service organisation is South Africa, and celebrated 25 years of history in 2006. Triangle Project operates out of Cape Town and provides services primarily in the Western Cape. Its services include a health clinic, various support groups, outreach programmes as well as public education and training.

Contact person:
Dawn Betteridge
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Website: www.triangleproject.org.

XX/Y FLAME
The XX/Y Flame is a student gay and lesbian organisation based at Free State University in Bloemfontein. Its role is to give support and counselling to gay and lesbian people on campus and in the community at large.

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