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The EQUALITY Project

SUBMISSION ON THE CIVIL UNION BILL, 2006[1]

1. The Lesbian and Gay Equality Project ("the Equality Project") is a non-profit organisation that is committed to the defence and advancement of the rights of lesbian, gay, bisexual, transgender and intersex people.[2] In the furtherance of its aims and objectives, the Equality Project and its predecessor – the National Coalition for Gay and Lesbian Equality – have been involved in several landmark cases, as applicant, *amicus curiae* or representative.[3]

2. In particular, the Equality Project has played an active role in the cases dealing with marriages between two persons of the same sex ("same-sex marriages"):

   - *Fourie v Minister of Home Affairs (The Lesbian and Gay Equality Project intervening as amicus curiae)*, unreported decision of the Transvaal High Court in case no. 17280/02 (18 October 2002) – as *amicus curiae*;

   - *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) – as *amicus curiae*; and

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[1] For more information on this submission, contact Jonathan Berger at bergerj@alp.org.za or 083 419 5779 or Makibuko Jara at mazibukokjara@ananzi.co.za or 073 240 5722.

[2] Its objectives include:
- the promotion of equality before the law for all persons, irrespective of their sexual orientation;
- the amendment and/or repeal of laws that unfairly discriminate on the basis of sexual orientation;
- participating in the legislative process in order to develop statutory law that gives full recognition to the right to equality for all people irrespective of their sexual orientation;
- challenging all forms of unfair discrimination on the basis of sexual orientation, by means of litigation, lobbying, advocacy, public education and political mobilisation; and
- promoting a South Africa based on social justice for all.

[3] These cases include the following:
- *Du Toit v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)* 2003 (2) SA 198 (CC) – the rights of same-sex couples to adopt children;
- *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) – the legal recognition of same-sex relationships (for the purpose of immigration);
- *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) – the decriminalisation of sodomy and certain other criminal laws that unfairly discriminated against people on the basis of their sexual orientation; and
- *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T), as representative – the legal recognition of same-sex relationships (for the purpose of medical scheme membership).

- *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006(1) SA 524 (CC) ("the *Fourie* and *Equality Project* cases") – as applicant.

3. In its order in the *Fourie* case, the Constitutional Court declared the common law definition of marriage to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status, benefits and responsibilities that it accords to heterosexual couples. The declaration of invalidity was suspended for 12 months to allow Parliament to correct the defect.

4. In its order in the *Equality Project* case, the Court also declared "the omission from section 30(1) of the Marriage Act 25 of 1961 after the words 'or husband' of the words 'or spouse'" to be inconsistent with the Constitution. The Marriage Act was therefore "declared to be invalid to the extent of this inconsistency", with Parliament once again being given 12 months to correct the defect.

5. Importantly, the Constitutional Court also held that if Parliament does "not correct the defects within this period, Section 30(1) of the Marriage Act will forthwith be read as including the words 'or spouse' after the words 'or husband' as they appear in the marriage formula." In other words, should Parliament not legislate to correct the defects identified,[4] the law will automatically change on 1 December 2006 to allow for same-sex couples to get married in terms of the Marriage Act.

UNCONSTITUTIONALITY OF THE BILL

6. Instead of allowing the law to automatically change, the Minister of Home Affairs has tabled the Civil Union Bill, B26—2006 ("the Bill"), which – if enacted – will recognise same-sex unions as civil partnerships. We oppose this law because it is unconstitutional, failing to give effect to the Constitutional Court's decision in the *Fourie* and *Equality Project* cases:

   - It creates a separate marriage-like institution – a civil partnership – for same-sex couples alone, without any reasonable basis for the distinction.

   - It groups civil partnerships and (registered and unregistered) domestic partnerships into a new separate institution known as a civil union,

[4] This includes the enactment, promulgation and coming into effect of a new law.

existing apart from – and having a lower status than that of – the Marriage Act.

- It permits all marriage officers – religious or not – to refuse to "marry" same sex couples on the basis of conscience alone. According to the Marriage Act, only a religious marriage officer may refuse to marry a couple if the marriage "would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization."[5]

7. Our conclusion in this regard is supported by the South African Law Reform Commission (SALRC) report entitled "Project 118: Report on Domestic Partnerships" ("the SALRC report"), which appears to have been published only this week.[6] The SALRC report clearly states that "the Constitutional Court has indicated that civil unions for same-sex couples will be unconstitutional."[7]

8. In its summary of recommendations, the SALRC report makes the following legislative reform recommendations regarding "couples (same- and opposite-sex) who want to get married":

> "a) **Generic Marriage Act**
>
> The Commission recommends as it first choice the amendment of the Marriage Act of 1961 by the insertion of a definition of marriage that makes the Act applicable to all couples wanting to get married, irrespective of their religion, race, culture or sexual orientation. (See Annexure C for the recommended text of this Act.)
>
> This amendment will give effect to the equality provision set out in section 9 of the Constitution.
>
> b) **Orthodox Marriage Act**
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> The Commission furthermore considers it advisable from a policy viewpoint not to disregard the strong objections against such recognition. The concern for these objections is an important consideration in the strive

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[5] In addition, it is doubtful if civil partnerships would be recognized on a par with marriage in any other country, even if accorded all the benefits and responsibilities of marriage in South Africa. The Constitution places certain obligations on the state regarding the protection of the rights of South Africans, both within and beyond the borders of this country. By enacting legislation that is likely to result in lesbian and gay South Africans being subjected to unfair discrimination abroad, Parliament would be acting outside of its constitutional mandate.

[6] The report is available online at http://www.doj.gov.za/salrc/reports/r_prj118_2006march.pdf. Although the cover page indicates a March 2006 date, the electronic file name appears to indicate a 4 October 2006 date, whereas the document appears to have been created on 15 September 2006.

[7] Paragraph 5.6.3 at page 305

> to accommodate religious sentiments, to the extent that it is constitutionally possible.
>
> The Commission therefore recommends, as its second choice, the enactment of an Orthodox Marriage Act (in addition to the amended Marriage Act). This Act will be applicable to opposite-sex couples only. The Commission is of the opinion that section 15(3)(a)(i) of the Constitution, which allows legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law, supports this approach.
>
> The Orthodox Marriage Act will be enacted in the same format as the current Marriage Act of 1961 with a definition of marriage that limits the application of the Act to opposite-sex couples only. The wording of the Orthodox Marriage Act would otherwise remain the same as the Marriage Act of 1961 and the status quo for opposite-sex couples in terms of this Act would be retained in all respects. (See Annexure D for the recommended text of this Act.)
>
> Ministers of religion (or religious institutions) will have the choice to decide in terms of which Act they wish to be designated as marriage officers. The State will designate its civil marriage officers in terms of the generic Marriage Act. Should the legislature decide to dismiss the strong religious objections against same-sex marriage as prejudice and prefer to adopt the simplest option by merely amending the Marriage Act of 1961, the recommendation for the enactment of the Orthodox Marriage simply falls away."[8]

9. In summary, the SALRC report proposes the following:

- An amended Marriage Act for all, in terms of which the state's civil marriage officers must operate and religious marriage officers may operate; and
- A new Orthodox Marriage Act for opposite-sex couples only, in terms of which only religious marriage officers may operate.

The Bill does not even attempt to give effect to these recommendations.

SUMMARY OF OUR CONCERNS AND RECOMMENDATIONS

10. This submission considers the majority decision of the Constitutional Court to explain why the Bill does not give full and proper effect to the judgment. Both the majority decision of Justice Sachs and the minority decision of

[8] Ibid at page xiv (emphasis added)

Justice O'Regan make it plain that Parliament's options are limited. In our view, the Constitutional Court's decision obliges Parliament to:

- Afford same-sex couples the right to get married (not "civilly partnered");[9]
- In terms of a law which does not apply only to same-sex couples; and
- Without imposing any conditions or limitations on same-sex couples that are not imposed on heterosexual couples who choose to get married in terms of the same law.

11. We do not believe that the Bill is capable of being amended to address these concerns. Given the fast-approaching deadline of 1 December 2006, we submit that there are only three realistic options open to Parliament at this late stage:[10]

- Enacting legislation along the lines of the Department of Home Affairs' Draft Marriage Amendment Bill of April 2006, which inserts a gender neutral definition of marriage into the Marriage Act, amends the marriage formula to include the word "spouse" and largely resembles the first choice identified in the SALRC report;
- Adopting the SALRC report recommendations regarding an amended Marriage Act and a new Orthodox Marriage Act; or
- Not legislating at all, thereby allowing the law to change automatically on 1 December 2006.

In our view, the third option appears to be the most pragmatic solution to adopt at this late stage in the process.

12. While we support the principle of statutory recognition of registered and unregistered domestic partnerships, we are of the view that there are some key problems with the domestic partnership aspects of the Bill. Given the complexity of these issues, as well as the Constitutional Court deadline applying only to same-sex marriages, we submit that these issues should be addressed separately (from marriage) and within a longer timeframe.

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[9] This applied only to civil marriage.

[10] None of these options will preclude Parliament from considering other constitutionally permissible models at a later stage.

13. In our view, there is an urgent need for informed public debate on the issue and sufficient time for further consultation and consensus building on the complex issues related to the statutory recognition of domestic partnerships. The SALRC report, which appears to be the basis for this part of the Bill, has only just been published. Its reasoning and recommendations cannot be addressed within the proposed rushed timeframe.

14. Before considering the Constitutional Court judgment in some detail, it is important to set out what is not up for debate in this legislative process:

- Whether denying same-sex partners the full and equal right to marry can be considered as fair discrimination and whether such discrimination can be considered as reasonable and justifiable – the judgment makes it plain that there is no constitutional basis for limiting the right to marry for same-sex partners;

- The invariable consequences of marriage – these have to apply to same-sex marriages, so that the benefits and responsibilities of marriage also apply to same-sex couples who choose to get married;

- The parental rights of same-sex couples (including joint and second-parent adoptions) – these have been addressed in a range of cases including *V v V* 1998 (4) SA 169 (C) and *Du Toit*;[11] and

- All other rights of lesbian and gay people recognized in legislation and a series of court decisions[12] since 1994.

15. It is with this in mind that we raise our concerns regarding the recent public hearings on the bills, that have lead one commentator to warn that –

> "we would do well to be suspicious of the farce of consultation on the same-sex marriage Bill that suggests that a vulnerable 'minority' is safe to victimize, and that government consultation processes are appropriate stages for hate speech."[13]

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[11] See above note 3

[12] In addition to the cases already mentioned in this submission, these include the following:
- *S v Kampher* 1997 (4) SA 460 (C);
- *Farr v Mutual and Federal Insurance Co Ltd* 2000 (3) SA 684 (C);
- *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC);
- *J v Director-General, Department of Home Affairs* 2003 (5) SA 621 (CC); and
- *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

[13] Pumla Dineo Gqola, "Welcome to the slippery slope", *Mail & Guardian* (September 29 to October 5 2006) at 24

16. Our concern should not be misunderstood. We understand the need for and indeed support informed public participation in any legislative drafting process. We therefore associate ourselves with the majority decision of the Constitutional Court in *Doctors for Life International*, in which Justice Ngcobo held as follows:

> "Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."[14]

17. Justice Ngcobo's comments must, however, be understood in the context of a constitutional framework that is underpinned by the founding values of "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms". According to the Constitution, the exercise of public power is – at minimum – subject to the principles of rationality and legality.

18. Applied to the public hearings in respect of the Bill, these principles demand a consultation process aimed at finding an appropriate legislative mechanism for implementing the orders in the *Fourie* and *Equality Project* cases. In our view, however, the hearings have largely failed to address the fundamental issue at stake – how to give full and meaningful effect to the Constitutional Court decision – but have instead provided a space for the propagation of hate speech.

19. We are concerned that the Portfolio Committee on Home Affairs not only facilitated but indeed permitted presenter after presenter to infringe the prohibition of hate speech, as contemplated by section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ("the Equality Act").[15] Instead of promoting human rights, the Committee has

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[14] Paragraph 205, footnote omitted

[15] Section 10(1) provides as follows:

> "Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—
>
> *(a)* be hurtful;
>
> *(b)* be harmful or to incite harm; or

ensured that the rights of lesbian and gay people have been violated. In this regard, we have lodged a formal complaint with Parliament.

ANALYSIS OF THE *FOURIE* AND *EQUALITY PROJECT* CASES

In our analysis of the judgment in the two cases, this submission considers the following seven issues:

- The issues that were before the Constitutional Court;
- Context within which to decide the issues;
- The problem with the common law definition and the Marriage Act;
- Why status is important;
- Dispensing with arguments and justifications for leaving "traditional marriage" intact;
- The options open to Parliament; and
- The options not open to Parliament.

In respect of each issue, we quote and thereafter consider the implications of selected sections of the judgment that are of direct relevance.

The issues that were before the Constitutional Court

> "[5] The matter before us accordingly raises the question: does the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amount to denial of equal protection of the law and unfair discrimination by the state against them because of their sexual orientation? And if it does, what is the appropriate remedy that this Court should order?"

> "[45] At the hearing two broad and interrelated questions were raised: The first was whether or not the failure by the common law and the Marriage Act to provide the means whereby same-sex couples can marry, constitutes unfair discrimination against them. If the answer was that it does, the second question arose, namely, what the appropriate remedy for the unconstitutionality should be."

(*c*) promote or propagate hatred."

The prohibited grounds, as set out in section 1(1)(xxii), include sexual orientation.

The first question before the Court, therefore, was largely about whether the law unfairly discriminates against same-sex couples by excluding them from the institution of marriage. The question was not whether it is lawful to withhold the status, benefits and responsibilities of marriage from same-sex couples, but rather whether it is lawful to exclude them from marriage and thereby deny them equal protection of the law by denying them equal status, benefits and responsibilities. The distinction is important, as it draws the express link between the chosen institution and the issue of status.

Context within which to decide the issues

> "[4] In the pre-democratic era same-sex unions were not only denied any form of legal protection, they were regarded as immoral and their consummation by men could attract imprisonment."
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> "[61] The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect. In the words of the Preamble, South Africa belongs to all who live in it, united in diversity. What is at stake in this case, then, is how to respond to legal arrangements of great social significance under which same-sex couples are made to feel like outsiders who do not fully belong in the universe of equals."
>
> "[74] … the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact. It is precisely those groups that cannot count on popular support and strong representation in the legislature that have a claim to vindicate their fundamental rights through application of the Bill of Rights."

The full legal recognition of same-sex unions is not something that happens in a vacuum, devoid of history. Instead, legal recognition takes place within a context where the law has played a significant role in the marginalization of lesbian and gay people – a minority in society who are almost exclusively reliant on the Bill of Rights for protection – but has now been transformed into something that celebrates diversity and inclusivity by treating everyone with equal dignity and respect. It is with this in mind that the Bill must be considered, with its message of continued exclusion from the institution of marriage without good cause.

This legislative process is distinct from most others in that it is not about the ordinary passage of legislation in accordance with the provisions of the Constitution in general and the Bill of Rights in particular. Instead, it is about giving effect to a Constitutional Court decision that has already held an Act of Parliament to be unconstitutional. As such, it provides Parliament with an historic opportunity to perform its constitutionally recognized role. But in so doing, it should be wary of the potential dangers of majoritarianism.

The problem with the common law definition and the Marriage Act

> "[77] … The problem is that the Marriage Act simply makes no provision for … [same-sex couples] to have their unions recognised and protected in the same way as it does for those of heterosexual couples. It is as if they did not exist as far as the law is concerned."
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> "[78] … taking account of the decisions of this Court, and bearing in mind the symbolic and practical impact that exclusion from marriage has on same-sex couples, there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree. The effect has been wounding and the scars are evident in our society to this day. By both drawing on and reinforcing discriminatory social practices, the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples."
>
> "[114] … 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, constitutes an unjustifiable violation of their right to equal protection of the law under section 9(1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution. Furthermore, and for the reasons given in *Home Affairs*, such failure represents an unjustifiable violation of their right to dignity in terms of section 10 of the Constitution. As this Court said in that matter, the rights of dignity and equality are closely related. The exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society." (Footnotes omitted)

The unconstitutionality lies in denying same-sex couples the right to "enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage". Three separate constitutional provisions are implicated:

- Dignity (section 10);
- Equal protection and benefit of the law (section 9(1)); and
- Unfair discrimination on the basis of sexual orientation (section 9(3)).

The Constitutional Court was at pains to stress that the unconstitutionality extends beyond the practical and the pragmatic to the symbolic, "drawing on and reinforcing discriminatory social practices". The question that has to be asked of the Bill is how it deals with the symbolic aspect – does it grant to same-sex couples the equal status of marriage, or does it continue to exclude? In our view, it grudgingly gives almost all of the material benefits of marriage whilst at the same time according a somewhat lesser status to civil partnerships. The clear

message – that traditional marriage must be protected from "contamination" – is insulting, demeaning and constitutionally impermissible.

Why status is important

> "[72] It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. … If heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, 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." (Footnotes omitted)

Given the importance we – as a society – attach to marriage, much significance flows from according people the option to choose whether or not to get married. In denying lesbian and gay people the right to achieve such a societally recognised status, the law undermines their autonomy and sense of self worth. It says that their relationships are not worthy of full recognition – that they are of a somewhat lower status. In our view, the Bill reinforces and gives legal sanction to the insulting, demeaning and constitutionally impermissible notions of lesser status, "contamination" and discriminatory social practices.

Dispensing with arguments and justifications for leaving "traditional marriage" intact

> "[84] Four main propositions were advanced in support of the proposition that whatever remedy is adopted, it must acknowledge the need to leave traditional marriage intact. There was some overlap between the arguments but for convenience they may be identified as: the procreation rationale; the need to respect religion contention; the recognition given by international law to heterosexual marriage argument; and the necessity to have recourse to diverse family law systems contained in section 15 of the Constitution submission."

> "[110] … There are accordingly two interrelated propositions advanced as justification that need to be considered. The first is that the inclusion of same-sex couples would undermine the institution of marriage. The second is that this inclusion would intrude upon and offend against strong religious susceptibilities of certain sections of the public."

Not one of the arguments or justifications advanced in favour of leaving "traditional marriage" intact was found to be persuasive. In short, the Constitutional Court found no constitutionally permissible basis for excluding same-sex unions from the institution of civil marriage. It is therefore unsurprising that the Bill and its memorandum are unable to provide any reasonable basis for

the distinction drawn between civil partnerships and marriage. As such, it appears merely to be pandering to considerations that the Constitution does not permit.

By failing to comply with the orders of the Constitutional Court, the Bill unreasonably and unjustifiably limits constitutional rights to dignity and equality, the latter of which includes a prohibition against unfair discrimination. It also calls into question the state's commitment to upholding the separation of powers doctrine that lies at the heart of our constitutional democracy.

The options open to Parliament

> "[139] … it is necessary to bear in mind that there are different ways in which the legislature could legitimately deal with the gap that exists in the law. On the papers, at least two different legislative pathways have been proposed. Although the constitutional terminus would be the same, the legislative formats adopted for reaching the end-point would be vastly different. This is an area where symbolism and intangible factors play a particularly important role."
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> "[146] The SALRC memorandum adds that the family law dispensation in South Africa would therefore make provision for a marriage act of general application together with a number of additional, specific marriage acts for special interest groups such as couples in customary marriages, Islamic marriages, Hindu marriages and now also opposite-sex specific marriages. Choosing a marriage act, the memorandum concludes, will be regarded as the couple's personal choice, taking account of the couple's religion, culture and sexual preference."
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> "[148] It would not be appropriate for this Court to attempt at this stage to pronounce on the constitutionality of any particular legislative route that Parliament might choose to follow. At the same time I believe it would be helpful to Parliament to point to certain guiding principles of special constitutional relevance so as to reduce the risk of endless adjudication ensuing on a matter which both evokes strong and divided opinions on the one hand, and calls for firm and clear resolution on the other."

In dealing with remedy, the Constitutional Court considered two options – that proposed by the applicants in the *Equality Project* case and an SALRC proposal (which is an earlier version of that contained in its recently published report). Importantly, neither of two options expressly mentioned provide for a separate institution for same-sex couples. Both allow for same-sex unions to be solemnized and recognized in law as ordinary marriages.

The *Equality Project* proposal involved the redefinition of marriage (to make it gender neutral) and the inclusion of the word "spouse" in the marriage formula. In terms of the SALRC option, there was to be a "marriage act of general application" for everyone, gay and straight alike. People could choose to separate themselves and get married in terms of a separate law. Crucially, no-one would be

forced to be separate, as would be the case for same-sex couples alone who wish to marry if the Bill were to become law.

The options <u>not</u> open to Parliament

> "[149] … in overcoming the under-inclusiveness of the common law and the Marriage Act, it would be inappropriate to employ a remedy that created equal disadvantage for all. Thus the achievement of equality would not be accomplished by ensuring that if same-sex couples cannot enjoy the status and entitlements coupled with the responsibilities of marriage, the same should apply to heterosexual couples. Levelling down so as to deny access to civil marriage to all would not promote the achievement of the enjoyment of equality. Such parity of exclusion rather than of inclusion would distribute resentment evenly, instead of dissipating it equally for all."
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> "[150] The second guiding consideration is that Parliament 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 offensive in concept and wounding in practice. Yet, just as is frequently the case when proposals are made for recognising same-sex unions in desiccated and marginalised 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 or divinely ordained state of affairs. Alternatively they would assert that the separation was neutral if the facilities provided by the law were substantially the same for both groups."[16]
>
> "[151] The above approach is unthinkable in our constitutional democracy today not simply because the law has changed dramatically, but because our society is completely different. What established the visible or invisible norm then is no longer the point of reference for legal evaluation today. Ignoring the context, once convenient, is no longer permissible in our current constitutional democracy which deals with the real lives as lived by real people today. Our equality jurisprudence accordingly emphasises the importance of the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected."

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[16] The quote continues:

> "In *S v Pitje*, where the appellant, an African candidate attorney employed by the firm Mandela and Tambo, occupied a place at a table in court that was reserved for "European practitioners" and refused to take his place at a table reserved for "non-European practitioners", Steyn CJ upheld the appellant's conviction for contempt of court as it was ". . . clear [from the record] that a practitioner would in every way be as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table." (Footnotes omitted)

Parliament may not do two things. First, it may not get rid of civil marriage, relegating all non-religious and non-customary unions to the status of a civil or domestic union or partnership. Second, it may not do what is proposed in the Bill – setting up a 'separate but equal' marriage-like institution for same-sex couples. While people may be given the choice to opt-out from a generic marriage law that applies to all couples, whether heterosexual or same-sex, that choice cannot be made for them. On its face, the Bill appears to provide equal protection. But its content, context and application effectively reproduce new forms of marginalization, in direct conflict with the judgment of the Constitutional Court.

While we welcome this opportunity to make submissions to the Portfolio

> "In the landmark case of *Brown v Board of Education* 347 US 483 (1954), the United States Supreme Court overturned the notorious separate but equal doctrine as affirmed in *Plessy v Ferguson* that had authorised segregated facilities for persons classified as Negroes. Chief Justice Warren stated:
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> > 'We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though that physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe it does.'"

couples. In so doing, Parliament should not impose any conditions or limitations on same-sex couples that are not imposed on heterosexual couples who choose to get married in terms of the same law. Anything short of this will fall short of what the Constitution requires and simply invite judicial review.

In our view, the most appropriate course of action at this late stage is to expunge chapter two of the Bill dealing with civil partnership, as well as any provisions elsewhere in the Bill that refer to civil partnerships. The remainder of the Bill should be renamed the Domestic Partnership Bill, which should be republished for public comment and processed within a more reasonable timeframe. In respect of the *Fourie* and *Equality Project* cases, the law should simply be allowed to take its course on 1 December 2006 – with proper consideration of the SALRC's proposal on same-sex marriage being put onto a future legislative agenda.

The Lesbian and Gay Equality Project
6 October 2006, Johannesburg