Reform Commission (SALRC). Nevertheless, this reason is not valid because there is a substantial discontinuity between the two processes (see 'Consultation of the SALRC', below).

Thirdly, the process has been left to the last minute and then ridiculously rushed. On 1st August 2006, Parliament was presented with a completely different proposal by the Department of Home Affairs. Then this Civil Union Bill proposal was substituted and released for comment on 7 September 2006.

The Public Hearings process was advertised in the Sunday Times on 24 September 2006. Hearings began in Soweto on 20 September 2006, with approximately 24 hours notice to most participants. In Limpopo on 21 September 2006, the venue was not ready in time for the hearings. It was rescheduled to the afternoon, and on request from our representative rescheduled again to 6 October 06. In KwaZulu, hearings were scheduled first for Ulundi, then moved to Pietermaritzburg. The dates changed and many people who wanted to present concerns, did not know about the last minute changes. Some only found out after the hearings had already commenced. Admittedly, the parliamentary staff worked in difficult circumstances, this being the first time they had organised such hearings; the short time frame and reported problems with organisation with local municipalities. Nevertheless, the result has been that the consultation process required in terms of the Constitutional Court ruling of 17 august 2006 has not been complied with. The rights of many interested parties to present their views at provincial venues have been denied. Homosexual rights organisations agreed that the hearings were flawed (Hawker, 2006).

It is therefore recommended that Home Affairs apply to the Constitutional Court for an extension of time to deal with this Bill.

Concerns on the 'Memorandum on the objects of the Bill, 2006'

Consultation of the SALRC

The memorandum on the objects of the Bill states: "The South African Law Reform Commission consulted extensively before completing their report."

This is misleading. The SALRC conducted a process on 'domestic partnerships' over a period of several years, which included public participation, and which resulted in a final report submitted to the Minister of Justice in early 2006. The Minister of Justice did not accept all the recommendations of the SALRC and in fact it was not released to the public until September 2006. The current Civil Union Bill proposal used some of the proposals on 'domestic partnerships' from an early draft of the SALRC. It did not however use their proposals regarding 'Civil Unions' or 'Same-sex marriage' from either their early draft reports or their final report. Therefore there is a discontinuity between the SALRC process and the current 'Civil Union Bill' proposal. The two processes must be seen as separate and not continuous. The Departments of Justice and Home Affairs are not legally obliged to follow the recommendations of the SALRC report, but if they fail to do so, then it is not fair to credit the public participation work done by the SALRC to bolster the credibility of the current parliamentary consultation process.

It is common cause between pro-homosexual and pro-marriage groups that the parliamentary public consultation process on the Civil Union Bill has been seriously flawed (Hawker, 2006).

Albie Sachs in his judgement on the Fourie-case ruled that only a twelve-month period was needed for parliament to pass legislation to provide the right of 'same-sex marriage' because of the extensive work and consultation already done by the SALRC (Sachs, 2005). Since there is a discontinuity between the two processes, this argument is no longer applicable.
Normally, for passing such legislation, parliament would be granted a 24-month period. Parliament was in fact, on 17 August 2006, granted a longer eighteen-month period to re-pass two pieces of legislation invalidated on procedural grounds rather than substantive grounds. This would require considerably less work than the new Civil Union Bill. The Constitutional Court has already granted extension of time to parliament for other laws of much lesser significance.

It is therefore recommended that the Department of Home Affairs request the Constitutional Court for an extension of time to properly consider the available alternatives and consult with the public on this issue.

Referral to traditional leaders

'The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.'

We expressed disagreement with this statement in a letter to parliament dated 18 September 2006 owing to the references to customary law marriages and the integral part that marriage plays in the traditions of all communities. We are pleased to hear that the Bill has since been referred to the House of Traditional Leaders and hope that parliament will take due note of the concerns of this group.

Comments on specific sections of the Bill

Objection to the misleading name of the Bill

The Bill is named the 'Civil Union Bill'. 'Civil Union' is a term usually used elsewhere in the world and previously in South Africa to describe a limited set of rights granted to same-sex couples. This is the sense in which the term was used by the South African Law Reform Commission (SALRC) process on domestic partnerships and also in the news media.

Firstly in this Bill, parliament uses the same term 'Civil Union', but with a different meaning. The Bill uses the term 'Civil Union' interchangeably with the terms 'civil partnership' and 'marriage', (particularly in section 11) and provides in the Bill for all the legal consequences of marriage to be given to same-sex couples. The Bill even allows the term 'marriage' to be used during the 'civil union' exchange of vows. Therefore, the Bill uses the term 'Civil Union' to mean something almost equal to marriage.

This is misleading to both the public and to parliamentarians who will vote on the Bill – especially those who have strong conscience objections to the legalisation of 'same-sex marriage', but may have less serious objections to 'civil unions'.

Secondly, the Bill includes provisions for 'registered and unregistered domestic partnerships' between couples of the same or opposite sex (sections 21 to 48). Again, this is something entirely different from the normal meaning of the term 'civil union'. This is misleading to the public who may read about the Bill in the media and presume that it only impacts on same-sex relationships, while it actually impacts also on heterosexual relationships.

The Bill is thus much more far reaching in its implications than its name implies.

It is suggested that a more appropriate descriptive name for the bill would be the 'Recognition of sexually immoral relationships Bill'.

Preamble

The preamble follows the argument of the homosexual lobby and the Constitutional Court ruling of 1 December 2005 in implying that the right to recognition of same sex unions is found in the Bill of Rights. It is argued that the Constitutional Court erred in their decision. No such right was ever contemplated or intended by the framers of the Constitution. Rather a Constitutional Amendment is needed to correct this bad decision, rather than to enforce or perpetuate it.

The preamble refers to 'permanent domestic partnerships'. Now 'marriage' is meant to be a permanent relationship. Domestic partnerships are a looser more easily broken agreement than a marriage. If people want a permanent partnership, then why do they not get married?

Dignity

The question of dignity is referred to in the preamble, as an application of the Bill of Rights and again in section 14 with reference to domestic partnerships. These are seriously problematic issues because they indicate an attempt to use the law to change the social values of the population. This is an abuse of the concept of dignity as referred to in the Bill of Rights. While co-habitation outside of marriage is common in our society, it is still regarded with a certain degree of shame in many communities. That shame is because it is deemed immoral behaviour that should be discouraged. This type of shame is distinct from disrespect to people regarding aspects of their person such as their race, which they cannot change. Thus the concept of dignity is used to undermine sexual morality.

Further it is submitted that the proposed stripped down version of marriage called 'domestic partnerships' is itself degrading. In the case of unmarried couples living together, usually it is the woman in the relationship who is most vulnerable, when denied the security that comes from a stable and faithful marriage. This 'domestic partnership' arrangement will be used as an alternative to marriage, thus undermining the security of

the women who are locked into such degrading relationships and children born into such unstable families.

References to 'Marriage' in the Bill

The Bill is ambiguous with reference to the meaning of the term 'Marriage'. Civil Unions are in senses distinct from marriage, but in other senses referred to as being the same as marriage.

In Section 1 (Definitions), the definition of 'marriage officer' is the same as those defined under the Marriage Act. The same state officials are thus expected to undertake 'Civil Unions' as marriages. This implicitly undermines the Sanctity of Marriage. It is submitted that if, in the unfortunate event that this bill is to be passed, such people should be not be referred to as 'marriage officers', but rather 'Civil Union officers' or 'registration officers'. It is noted that section 17 under 'domestic partnerships' refers to 'registration officers' rather than 'marriage officers'. This is less insulting to the institution of marriage.

Section 5 (Designation of ministers of religion and other persons attached to churches as marriage officers), again refers to people solemnising such relationships as 'marriage officers', thus implying that Civil Unions are analogous to marriage. Again this undermines the sanctity of marriage.

Section 11 (Civil Partnership formula), allows the parties to chose whether to refer to their union as a 'civil union' or a 'marriage' in vow formulas used in the ceremony. It again refers to the solemnising official as a 'marriage officer'.

Section 11(3) goes further to refer on three occasions to a 'civil partnership/marriage', implying that the two are just different words meaning the same thing. It is submitted that there is a very big difference between the meaning of the words 'civil partnership' and the word 'marriage'.

Section 13(1) says that the 'Legal consequences of a marriage apply, with such changes as may be applied by the context, to a civil partnership'. It further redefines the words 'marriage, husband, wife and spouse' in any other law including the common law to include a civil partner in terms of the Act. It is unclear exactly what would be excluded in terms of the context that may apply.

This means that the term 'Civil Partnership' or 'Civil Union' as used in the Bill has a very different meaning to the way the same term is used overseas. It is almost, but not quite the legalisation of full same-sex marriage. The Bill, if it was accepted by the Constitutional Court, would be slightly less damaging than the alternative of redefining the term marriage in terms of the Marriage Act, firstly since for legal purposes, some distinction would be drawn between a same-sex and an opposite sex union. Nevertheless, the Bill is very damaging, and it is doubtful that the Constitutional Court will accept it.

Conscientious objection

Section 6 (Marriage officers may refuse to solemnise civil partnership) is a form of positive mitigation of the threat of harm by the proposed Bill. Nevertheless, the section does not

provide a guarantee that there will not be infringements of the right to freedom of conscience. This has been demonstrated with regard to the abortion issue where despite promises that conscientious objection would be allowed at the time of the passing of the law in 1996, there have been numerous infringements and threats of infringements on the right to conscientious objection of medical health workers.

Firstly, it is suggested that as with section 5 for religious marriage officers, the onus should be on the marriage officer to register as a civil union officer, rather than the other way around.

Secondly, section 6(2) excludes religious marriage officers who have themselves applied to be allowed to conduct same-sex civil unions from the conscientious objection provisions. Nevertheless, this does not take into account a problem that has arisen with the abortion issue in the health profession where certain persons initially agree to be trained to do abortions and to do such work, but then later have an attack of conscience and wish to stop. Therefore, it is argued that this provision should be omitted from Section 6 or that Section 5 should contain provision for people to immediately withdraw their consent to solemnise 'Civil Unions'.

Thirdly, the bill only protects the rights of marriage officers. There are other employees of state and private companies who may wish to conscientiously object to involvement with Civil Unions. For example the secretarial staff at Home Affairs may object to involvement with processing Civil Unions. They should also be allowed to conscientiously object. There may also be numerous people associated with the hospitality industry, rental accommodation, education, medical aid, adoption agencies who will have a conscience problem with endorsing or recognising Civil Unions. Magistrates may also possibly object to having to settle disputes between partners who have formed such Civil Unions. This area needs further investigation.

Therefore, the Bill, if passed, should be more explicit in protecting the rights to conscientious objection of all parties affected by Civil Unions.

Furthermore section 17 allows the minister to designate any officer in the public service as a 'registration officer'. Nevertheless, there is no provision here for the officer in the public service to conscientiously object to such designation.

The issue of conscientious objection is most likely to be a problem in remote locations where is may be difficult to find anyone willing to solemnise such a ceremony.

Concerns on aspects of the Bill relating to Customary Marriage and Unregistered Domestic Partnerships

In the section on 'Unregistered domestic partnerships', sections 40(2)(e); 41(3)(c); 42(d); and 43(3) refer to 'customary marriages' and spouses with regard to the issues of maintenance after separation or death and intestate succession. The Bill gives the court powers to grant maintenance and inheritance rights to an unregistered domestic partner.

In section 38(4), the court can't make an order if the person is in a civil marriage, civil union, or domestic partnership. What is conspicuous by omission is a customary marriage.

Section 41(3)(b) reads *"in the event of competing claims of the surviving unregistered partner and that of a dependent child of the deceased the court must make an order that it regards just and equitable with reference to all the relevant circumstances of the unregistered domestic partnership;"*

Section 43(3) reads *"In the event of a dispute between a surviving unregistered partner and the customary spouse of a deceased partner regarding the benefits to be awarded, a court may, upon an application by either the unregistered partner or the customary spouse, make an order that it regards just and equitable with reference to all the relevant circumstances of both relationships."*

What is concerning is that the rights may be granted in competition with those of the legitimate children and customary spouse. No mention is made of a spouse registered according to the Marriage Act, 1961. It therefore appears as if for the purposes of this Bill, an 'unregistered domestic partnership' is considered to have a similar status and benefits to a 'customary marriage'.

This is a very grave insult and injustice to the Sanctity of Marriage. A customary marriage, whether traditional African, Islamic or Hindu is a real marriage, whether the state recognises it or grants benefits for it or not. An unregistered domestic partnership is a sinful relationship, which the state has a compelling economic interest to discourage. Since there is no commitment by the father to remain with his partner, his children will be greatly disadvantaged by the instability of the relationship. Such children are more vulnerable to educational, health and social welfare problems if the breadwinner leaves the family. Granting equal status to unmarried sexual partners as to a customary marriage wife undermines the rights of the real wife.

False statements known to be false

Section 46(4) *"Any person who makes for any of the purposes of this Act, any false representation or false statement knowing it to be false, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury."*

It is submitted that the use of the word 'marriage' to refer to same sex coupes in section 11 of this Bill is a false statement, known by everyone to be false. Therefore, under this section everyone who does so will be committing perjury.

Conclusion

The proposed Civil Union Bill would have drastic negative impacts on South African society, by reducing respect for the Sanctity and Uniqueness of Marriage by creating a set of marriage-like alternatives. Such social impacts have already been demonstrated overseas. The Bill should be rejected in totality.

The Civil Union Bill is unlikely to be accepted by the Constitutional Court. It is highly unpopular with the South African public and it appears that Home Affairs itself is uncomfortable with the Bill. The Bill combines two issues, which should really be dealt with separately: Same-sex civil partnerships and domestic partnership legislation that can be for same or opposite sexes. There is no rush to deal the latter issue now and it should be separated from the same-sex debate.

The alternative of a Constitutional Amendment to define Marriage as being between a man and a woman should be supported. A number of parliamentarians have already expressed support for such an amendment. Parliamentarians should be allowed a free vote on both the Civil Union Bill and the Constitutional Amendment.

There have been serious procedural problems with the Bill. The Bill is a consequence of judicial activism and the constitutional court should never have considered the issue in the first place. The public consultation has not fulfilled the requirements of the Constitution. Therefore, Home Affairs is urged to ask the Constitutional Court for an extension of time to consider the issues more carefully.

The Memorandum on the objects of the Bill refers to consultation with the South African Law Reform Commission Report. The Bill is discontinuous with this process and therefore this is misleading. Contrary to the view expressed in the memorandum, the Bill is relevant to the House of Traditional Leaders and needs to be considered by this group.

The name of the Bill is misleading, since the meaning of Civil Partnership is different to the generally accepted meaning, and it also provides for Domestic Partnerships, which is an entirely different issue. This misleading name may cause some to support the Bill, not being aware of its true contents.

The preamble is based on the faulty logic of the 1 December 2005 Constitutional Court ruling. The Bill misleadingly refers to itself as enhancing 'dignity', while its provisions are for morally degrading relationships, which fall short of the pure dignity of true marriage. The Bill allows the use of the word 'marriage' for civil union in the exchange of vows; refers to solemnising officials as 'marriage officers' and uses the word 'marriage' interchangeably with 'civil partnership'. This appears to be an attempt to be ambiguous on the issue, in the hope of appeasing pro-marriage supporters and the Constitutional Court. It is morally not acceptable to misuse the word 'marriage' in this way.

The Bill does provide for Conscientious objection, but in a manner that it inadequate. If the Bill is not scrapped in its entirety, then the conscientious objection section needs to be strengthened to also protect all people who may have objection to the implementation of the bill and not just marriage officers.

The provisions for 'unregistered domestic partnerships' appear to create rights for people who live in sin at times, at the expense of the rights of customary spouses. This is problematic from both a substantive perspective and also in undermining the dignity of customary marriages.

The Act contains a provision against making false statements known to be false. It is argued that all 'same-sex civil unions' referred to in vows as marriages in terms of this Bill will be false statements known to be false.

We request permission to make an oral submission to the Home Affairs Portfolio Committee.

References

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Appendix A: Parliamentarians comments on the proposed Constitutional Amendment

- *"It is inconceivable that either the serving lawmakers or the sitting judges would contemplate a marriage between themselves and persons of the same sex, nor do I think that the constituent assembly intended to imply same-sex marriages."*
- *"If the majority of Christians in this country are sincerely Christian they will have to make a choice between God and man made law. They will have to take a stand to the glory of God. There is no middle way. Those who want to obey God and need God for protection, blessing and success should come together in solidarity against all evil and this bill."*
- *"I don't support same-sex marriage because it is against God's law. If you adopt a child in that situation, it will affect the child's mind. The child won't even distinguish between mother and father and the roles they have to play as parents."*
- *"It is a pity that leaders of some religious institutions are also confused and allowed themselves to be co-opted to drive the 'same-sex marriage' agenda."*
- *"I am totally against same-sex marriage."*
- *"As a Christian I believe that marriage was created by God when he gave Eve to Adam as a wife. He said to them: 'multiply and replenish the earth'."*
- *"Same-sex marriage is not recognised by the Holy Book, hence not negotiable"*
- *"I agree fully with reasons put forward in your circular letter. These reasons should form the basis for elaborate discussion on this matter. As a result the majority of parliamentarians and the general public should be convinced of the undesirability of the 'recognition'."*
- *"Leviticus 18:22, 20:13"*
- *'I consider myself a married man because my wife and I constitute a family."*
- *"You will be pleasantly surprised that the leader of our party, Kgosi L. M. Mangope put it categorically as a matter of policy that he and the party will not accept 'same-sex marriages'. My Church has come up with a policy position that same-sex marriages/unions should not be recognised and that should a pastor officiate over such marriage, such a pastor will be struck off the roll. I therefore fully subscribe to these two positions."*
- *"Thanks for your good work. May God bless your work and give us the victory in His time."*

Appendix B: Is judicial activism endangering democracy?

It was originally understood that the judiciary and specifically the Constitutional Court would interpret the detail those aspects of the constitution that are unclear. Nevertheless, we are seeing more and more speculative constitutional litigation aimed at making major changes on national social policy bypassing the legislature and the democratic process. This would not be a problem, if such speculative litigation was dismissed, but making things worse are certain judges who perceive their role as activists or social engineers, rather than strictly interpreters of the Constitution. When judges abuse their powers in this way, they effectively nullify the democratic process.

In terms of the constitution, senior Judges were given almost no accountability for their decisions, but are restricted to a narrow field of power. Now, however some are assuming a role with broad powers for social engineering, but still have no accountability. South Africa is in a much more dangerous position than many other countries for abuse of power by the judiciary, because:

1. Unlike the United States, there are no provisions to impeach judges who abuse their powers.
2. Unlike Canada, there is no way parliament can overrule the Constitutional Court.
3. Unlike our previous interim constitution, there is no presumption that laws predating the constitutional until proven otherwise.
4. Further, the Constitutional Court has not made sufficient guidelines as to how and why they make decisions.

Thus the Constitutional Court has power to make arbitrary decisions based on their personal values, which are not shared by 99% of the population. Is this not a return to the kind of arbitrary rule of Kings and Emperors who rule by divine right and are accountable to no one? Is not the whole purpose of the Constitution to avoid that type of tyranny? Effectively, when major social policies of state are made by a set of unaccountable unelected judges, then they become more powerful than the legislature or the executive - and no one can do much to reverse their decisions.

Who gives unelected unaccountable judges the right to overrule the views of 99% of the population if they wish to do so? Do they think they are gods? Do we think they are gods in allowing them to do so? Are their words some sort of scriptural religious creed, which we are supposed to accept and obey without question?

Surely, where the Constitution is not clear on issues of major social policy, the decision should be left to the legislature, rather than being decided by a group of unelected judges.

Currently, the 'Constitution' and interpreted decisions from the courts are being referred to like some sort of religious code, which is above question - as if anyone who questions or criticises it sins by doing so. But the constitution is silent on many major issues of social policy – do then unelected judges have a right to 'invent' new rights never intended by the framers of the Constitution. Did the original Constitutional Assembly sign a 'blank cheque' for these judges to decided social policy instead of parliament?

The Constitutional Court are supposed to protect us against abuse of power by the legislature, but who will protect us against abuse of power by the Constitutional Court? Surely this is a serious flaw in our Constitution that needs to be remedied?

Furthermore, South Africa's provision to follow international case law encourages the Constitutional Court to follow activist judges overseas, especially for example in Canada. Thus the South African population, which has much more conservative social values, is disenfranchised by decisions of foreign courts which in many cases were made without the consent of their own more liberal populations. Further, our Constitution was written in a rush, without the framers all being fully aware of how similar 'rights' had been interpreted overseas.

There is nothing wrong with a judge becoming an activist or politician, but if he does so, then he should stop being a judge. It is even more ridiculous when a judge who is also an activist - sits and decides on a case on one of the issues, which he is fighting most as an activist. Such judges should at least recuse themselves from cases where they are activists fighting for a particular cause - and thus have a demonstrated bias and closed mind. Better they should retire from the judiciary altogether and work as full time politicians or activists.

Now the common argument is that we need the independence of the judiciary to protect us from the legislature. This is agreed, when the judiciary restricts itself to its proper role of interpreting the detail of laws for specific cases. But when we have activist Supreme Court and Constitutional Court judges who interpret their role as that of Social Engineers - who make decisions to solve social problems rather than to technically interpret the detail of the constitution - then we have a seriously dangerous situation.

It is important to protect the independence of the judiciary, for example in specific cases, for example if a high profile government leader was on trial - then the government should not be able to protect him from justice.

But it is not helpful to protect judicial independence of a group of unelected people making major changes to social policy, which the majority of the population is seriously objecting to. That is a trashing of democracy in favour of a new elite.

We need some constitutional amendments to curb the abuse of power by the senior members of the judiciary. We need checks and balances that will prevent abuse of power by all branches of government - Judiciary, Executive and Legislature.