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Mr Chauke

**Presentation to the Portfolio Committee of the Department of Home Affairs
regarding the amendment to the Marriage Act (Act No. 25 of 1961): response
regarding the Civil Unions Bill**

The Dutch Reformed Church (DRC) would like to make this written presentation on behalf of most of South African churches of a reformed tradition. We also request the opportunity to present it verbally at the Portfolio Committee's session in Cape Town in October 2006.

INTRODUCTION:

The DRC and other reformed churches support the principle of the equality and dignity of all people. As South Africans we are proud of our country and all its people. Membership of our churches is open to everyone, regardless of race or sex. We are proud of our Constitution, which protects the equality and dignity of all people as a fundamental value, but also legally. Our Christian beliefs require us to recognize and defend the equivalent status of the Christian marriage in terms of our religiously and culturally diverse society. We would like to see that that which we regard as our right, also be available to all the citizens of our country. Therefore we would like to participate in the public debate about the revision of the Marriage Act of 1961 as part of the total corpus of legislation which has been anticipated since the acceptance of the current Constitution in 1994. We are also officially involved in the constructive revision of our entire legislation, and would appreciate the opportunity to make a contribution to the assessment of the recently published Civil Unions Bill following the latest demand of the Constitutional Court in terms of the Marriage Act.

THE MORAL NECESSITY FOR AND IMPERATIVE TO REWRITE THE MARRIAGE ACT OF 1961 (Act 25 of 1961)

Since the start of the process of rewriting legislation (with the acceptance of the Constitution in 1994) we have supported the necessity that all the laws of our country should adhere to the fundamental principles contained in our Constitution and the Human Rights Charter (including art. 9, 10, 14). The Marriage Act of 1961 clearly needs to be rewritten in the light of our new democratic dispensation. We recognize the fact that the existing Marriage Act (25/1961) originated from the European Christian context (as part of our Roman-Dutch legal heritage), and that during the apartheid era it was also read in conjunction with the Population Registration Act of 1950, the Immorality Act of 1957 and the Prohibition of Mixed Marriages Act of 1949 – all of which have since been repealed.

Due to the origin and purpose of this act no recognition was given to marriages in other religions (i.e. Moslem, Jews, Hindus, Buddhist and traditional Africa religions). In fact, as recently as 2003 the court declared in the case *Daniels v Campbell NO and Others* “[M]arriages by Muslim rites have . . . not been recognised by South African courts as valid . . . marriages, firstly, because such marriages are potentially polygamous and hence contrary to public policy (whether or not the actual union is in fact monogamous) and secondly, because such marriages are not solemnised by authorised marriage officers in accordance with the provisions of the Marriage Act 25 of 1961”.

In 1998 customary marriages were legalized and people in Africa traditions gained the option of a polygamous marriage system – i.e. one man could have more than one wife (the Recognition of Customary Marriages Act 120 of 1998). Here we have more than one contradiction: This arrangement directly contradicts the current Marriage Act which defines a marriage as a contract between one man and one woman, with the exclusion of any other. While the act is mostly phrased neutrally in terms of sexes (referring to “spouses” in most instances), it still raises an urgent question whether the execution thereof in terms of the general custom (that men may have more than one wife, but not the other way around) undermines the principle of the equality of all people, as it offers this discrimination between sexes. This paternalistic custom (one husband with more than one wife, but not the other way around) can also be derived from Articles 6; 7(4)(b);7(6) and 8(4)(b) of Act 120 of 1998. In fact this seems to be a legal and constitutional contradiction in terms of the equality of all people (enhanced by the fact the we have a separate law for African traditions), which also necessitate the rewriting of the current Marriage Act as part of a total new law.

During the past three years constructive work has been done regarding the rewriting of the Marriage Act. When the Constitutional Court ordered the expansion of the Marriage Act to recognize the equality of relationships of the same sex with heterosexual marriages in terms of rights, duties and status at the end of 2005, the rewriting of this act gained renewed urgency. It was always clear that the Marriage Act could not simply be adjusted by amending a couple of words – although this may have been sufficient for the main concern of the case serving before the Constitutional Court. The complete rewriting of the act in terms of the diverse religious and cultural contexts and the history of South Africa, is an urgent necessity. Art 9 of the Constitution, which clearly states the

fundamental principle of the equality of all people, regardless of sexual orientation, implies that relationships between people of the same sex (homosexual orientation) should also be addressed in this new act.

CHRISTIANS HAVE DIFFERENT VIEWS ABOUT MARRIAGE AND HOMOSEXUALITY

Unfortunately Christians' perceptions of marriage and homosexuality vary. For those of us of the reformed tradition the recognition of marriage between one man and one woman is not negotiable. However, single parent families are becoming more common and family structures often differ from the traditional structure. Yet marriage is still perceived as the core of the Christian family structure. And although marriage is not primarily focused on reproduction, it is the generally accepted Christian structure within which children are conceived, born and nurtured. Anything that threatens this core structure of the Christian family will be regarded as a serious threat to the religious convictions of the reformed churches.

Any future legislation that does not protect this fundamental conviction, will not only contradict our Constitution (which recognizes the right to freedom of religion), but will also be unacceptable for millions of Christians of reformed and other traditions.

The State should also recognize the important role that healthy marriages and family structures plays in the wider South African community in terms of peace, stability and progress, and establishing of healthy values. Within a marriage the values of love, fidelity, caring and responsibility are taught and promoted – some of the fundamental cornerstones of a healthy nation. It is the responsibility of the State to ensure that legislation does not threaten this necessary function of the religious community regarding the peaceful future of our country. Of course we understand and accept that legislation is not solely responsible for healthy or poor marriage relationships and families. The primary responsibility lies with the churches (and religions) as the custodians of the Christian marriage.

Likewise Christians of the reformed tradition don't always share the same views about homosexuality. As in most churches there are radical differences of opinion about the question of whether people of the same sex can legitimately be joined in a relationship of love and fidelity. Despite this an overwhelming majority of churches are of the opinion that sexual orientation (as distinguished from sexual behavior) is a component of a person's sexual identity which leave the person little choice. The reformed churches will also have serious objections to discrimination against homosexual persons based on their sexual orientation. Many Christians make abstaining from sexual behavior by persons of homosexual orientation the condition for acceptance, as homosexual behavior is perceived as sin. For others this conditional acceptance of gay people is a serious problem as they see sexuality as a gift from God with the potential to enrich any relationship in the context of the basic need for caring and intimacy that all people share.

The fact that these differences are based on differing interpretations of the Bible as the Word of God, is not relevant for the purposes of the rewriting of the Marriage Act. It is simply mentioned to indicate that this is a deeply emotional issue raising strong feelings – and an enormous challenge to church leaders worldwide in this moment in the history of

the church. All of us should be sensitive enough to this emotion. For some people it would be deeply problematic to conceive of a "marriage" in terms of people of the same sex. For others nothing less will indicate the acceptance of the equality of all people in our legal system.

Homosexual people don't always agree about this issue (whether their union should be termed a "marriage) either. Due to the questionable reputation of heterosexual marriages in terms of contributing to a stable community (not only measured by our high divorce statistics, but also in terms of abuse and violence in families), many homosexual and heterosexual people prefer not to call their unions marriages. Yet many gays, understandably, insist on equal status with the existing marriage act in terms of legal rights. An act that includes legal rights for people of the same sex should thus be comprehensive enough to accommodate these various points of view.

STATE AND RELIGIOUS COMMUNITIES HAVE DIFFERENT RESPONSIBILITIES

In a secular legal state – like South Africa under our present Constitution – the territories of the State and religion (in general) and churches (specifically) are separated. Initially the relationship between church and State was considered *neutral*, but gradually in the past decade there has been a significant philosophical shift in this relationship. This is particularly clear in the discussions about religion and education. At present it is accepted that the relationship between State and church is an *impartial* one. The State recognizes the important role of religion in the community in our country (art 15.2 of the Constitution), without giving precedence to any religion or denomination (thus impartial). Hence the State and religious communities should respect one another's roles and responsibilities without being judgmental or prescriptive except in terms of the accepted Constitution of 1994.

It is the State's responsibility to write legislation, apply it and ensure healthy administration of justice. This should be done in such a way that, for instance, a safe space is created for religious practices in terms of the beliefs of the relevant group as long as it does not oppose the Constitution. During the Codesa negotiations a secular constitution was chosen as opposed to the previous dispensation in which the Christian religion played a dominant role, even in the formulation of legislation. Particularly legislation regulating marriages (as mentioned above), as well as acts regulating trade and organized sports on Sundays come to mind. But many more of the 150 apartheid laws included the principle of Christian Nationalism. The result was a serious violation of the equal rights of all people.

On the other hand the church has the right to organize and structure itself according to the principle of religious freedom (Art 15) and conforming to the theological and clerical points of view of the relevant church and religious tradition. And individuals willingly commit themselves to the regulations of churches and religions in terms of the principle of freedom of association (Art 18). In this regard the Bible serves as guideline for the arrangement of church activities in the reformed churches. Legislation must create space and protect everything pertaining to the doctrine, management and activities of the church. While the church has a responsibility to continuously search for the will of God

regarding ethical and moral issues like contracting marriages, as well as dealing with divorces of church members (even though the church is in principle opposed to divorce). It is also the responsibility of the church to keep investigating questions about the legitimacy of same sex relationships in the light of the Word. And to discuss the legalization thereof with other role players – as in the case of divorce.

Few churches worldwide are at present prepared to confirm a marriage (or legitimate relationship) between people of the same sex. But this should not necessarily be a reason for the state not to formulate legislation in this regard and have it accepted by Parliament. The reformed churches in our country recognize the authority of the State. It is not the responsibility of the State to interpret the Bible (or the Quoran). But it is the responsibility of the State to interpret the Constitution and to apply it in terms of legislation. The State must test our legislation according to constitutional principles – and ensure equal rights for all our people. At the same time the State must defend religious freedom by assuring churches that they retain control over their various religious rites, including the religious aspect of marriage.

ASSESSMENT OF THE CIVIL UNIONS BILL

We understand that the decision of the Constitutional Court left the relevant state departments insufficient time to fully investigate this matter and to give all the role players in South Africa the opportunity to deal with it.

We understand and appreciate the fact that the Department of Home Affairs attempted to comply with the demand of the Constitutional Court to give legal status to permanent relationships amongst people of the same sex equal to those of heterosexual marriages by drafting the Civil Unions Bill.

However we are of the opinion that the writing of a separate act for the regulation of civil unions and domestic partnerships instead of inclusion in one new act achieves the opposite – bearing in mind the warning by Judge Sachs “that separate but equal is not an option.” This obviously also applies to the Customary Marriage Act.

The situation is even more unacceptable in terms of the equal rights of all people in view of the fact that the bill does not include any reference to repealing of the current Marriage Act (which is insufficient in terms of the rights of other non-Christian religious communities) – or acknowledging the existence of yet another act for customary marriages for Africa cultures (Recognition of Customary Marriages Act 120 of 1998).

The reference to unregistered domestic partnerships in part IV of the bill is however a move in the direction of recognizing the rights of minorities and possible victims of injustice (as a result of extended informal relationships). This should receive more attention in terms of future legislation.

THE FUTURE

We are of the opinion that there should be one law for everyone. It is the only way in which we will truly recognize the equality of all people. As time is insufficient to meet the demands of the Constitutional Court, we recommend that the suggestion of the

Constitutional Court be accepted and the current Marriage Act be amended by expanding certain definitions to give same sex relationships equal status and rights. However, this should be considered an interim arrangement and clearly of a temporary nature. According to the court's decision this will happen by default anyway if Parliament does not offer alternative, acceptable suggestions by December 2006.

We further suggest that the Department of Home Affairs (or relevant state structure) give notice of the complete rewriting of the existing Marriage Act bearing in mind at least all the abovementioned issues.

In other words we favour one comprehensive act, possibly named the Civil Unions Act, but incorporating all the possible categories of marriages and unions and giving them all equal status. This would not only recognize Christian marriages, but also similar unions in other religions and cultures (i.e. Jewish, Moslem, Hindu, Buddhist, African traditional and same sex unions).

The responsibility of religions to legalize marriages and unions according to their beliefs will then remain the prerogative of the relevant religious institutions.

The history of our country painfully illustrates the injustice of multiple legal and administrative mechanisms aimed at categorizing people while striving to achieve a single purpose. Separate legislation for specific groups (race, culture, sex) can never conform to the principle of equality. We have a history of discriminating against people based on differences people have no control over. We cannot afford to again create a situation in which the law discriminates between people, compromising their dignity and equality.

CONCLUSION

In the light of these arguments we encourage the National Parliament to act with all speed to reconcile current marriage legislation with Art 9 of the Constitution by passing a new law that recognizes the equality of all people. We trust that the Parliament will refrain from passing any legislation which will in any way prevent religious communities from experiencing the blessing of healthy marriages and family structures according to the beliefs of that religious community.

Thank you for the opportunity to make this presentation.

Kind regards

Yours truly

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