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To: The South African Law Reform Commission (SALRC)

For attention: **Mr Pierre van Wyk**

Researcher

Per e-mail: pvanwyk@justice.gov.za

Re: Invitation for Comments on SALRC Issue Paper 35: Single Marriage Statute

From: Advocate N L Badenhorst

Legal Counsel, *Freedom of Religion South Africa (FOR SA)*

Per e-mail: legal@forsa.org.za

Date: 26 August 2019 (Deadline for comments: 31 August 2019)

Dear Mr van Wyk,

1. We refer to the invitation by the South African Law Reform Commission (SALRC) for comments on **Issue Paper 35: Single Marriage Statute** ("the Paper").
2. *Freedom of Religion South Africa (FOR SA)* is a non-profit organisation working to protect and promote religious freedom in South Africa and representing approximately 6 million people.
3. Our interest in the Paper is limited only to those aspects that could have a bearing on the religious freedom of parties to enter into marriages, and/or ministers of religion to solemnise marriages, in accordance with their own conscience and religious / moral convictions and beliefs.
4. We make the following written submissions **but would also appreciate the opportunity to appear and make verbal submissions at any hearings to be held regarding the Paper.**

SUBMISSION OVERVIEW:

5. The Paper concerns the issue of adopting a single marriage law for all marriages in South Africa.

6. FOR SA argues that the adoption of an **omnibus marriage act**, that has different chapters and/or sections dedicated to dealing with the different type of unique unions that can be entered into either culturally and / or religiously, is the best solution to achieve both equality and practicality.
7. FOR SA further believes that unmarried intimate relationships having marriage-like rights goes against the reasoning of the Constitutional Court and that marriage-like rights should be removed from unmarried homosexual couples who are now free to marry under the Civil Union Act,¹ to give effect to the Court's reasoning in *Volks v Robinson*² and thereby achieve equality.

CHAPTER 1: Questions About a Single or Omnibus Statute:

8. The questions posed in this Chapter pertain to the adoption of a single marriage law and the advantages and/or disadvantages of it being drafted either as a unified statute or an omnibus statute (paras 1.47 – 1.50 of the Paper).
9. It also raises the question of whether the above statute should cover only the requirements for entering into a valid marriage and/or unmarried intimate partnership, or if it should also include the consequences of such relationships for its duration and the grounds upon which it can be ended (para 1.51 of the Paper).
10. The preamble of the Constitution states that South Africa belongs to all who live in it, united in our diversity.³ The Constitutional Court has also defined equality as: **“the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect.”**⁴
11. In light of this, FOR SA submits that the benefits of an omnibus marriage act outweigh a single marriage act, in that each section and / or chapter of such an act can then be tailored to adequately deal with the nuances of marriages concluded according to each tradition. FOR SA argues that this would be the best means by which to achieve the equality aimed for in our Constitution⁵ as it would not strip each union of its uniqueness, but rather allow for an even-handed and fair (i.e. equitable) consideration in relation to the requirements and needs of each union type of union. Such an approach would be best suited to give each type of union the best form of legal recognition and/or protection, as well as regulate their consequences and dissolution.
12. Given that one of the reasons for endeavouring to draft and promulgate a single marriage statute is to achieve legal certainty, such an omnibus statute will need to include the consequences of such marriages as well as the requirements for their dissolution.

¹ Act 17 of 2006.

² 2009 JDR 1018 (CC).

³ Preamble of the Constitution of the Republic of South Africa, 1996.

⁴ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 42.

⁵ Section 9 of the Constitution of the Republic of South Africa, 1996.

13. The Paper also raises the question of whether unmarried partnerships should be included in such a statute.
14. The judgment by the Constitutional Court in *Volks v Robinson*⁶ made it clear that the legal position in South Africa is that **differentiating** between the rights of married and unmarried couples is **fair**, as the Constitution recognises the importance of marriage as a fundamental societal institution.⁷
15. The answer to addressing the discrepancy that exists between the rights of unmarried heterosexual couples and homosexual couples is therefore **not to bestow marriage-like rights upon all**. To do so would be to treat marriage as a fundamental societal institution **unfairly** and would go directly against the Court's reasoning in the above judgment. This would leave the omnibus statute open to a **constitutional challenge**.
16. Rather, equality is achieved by giving effect to the Court's judgment in *Volks v Robinson*. This requires the removal of marriage-like rights from unmarried homosexual couples, who now have the right to marry under the Civil Union Act.⁸
17. This can be achieved by a simple section in the omnibus act that states that in light of the Constitutional Court's decision that there needs to be differentiation between the rights of unmarried and married couples, and the promulgation of the Civil Union Act which affords same-sex couples the choice to enter into a marriage or civil union (and by implication, not to enter into a marriage or conclude a civil union), both same- and opposite-sex couples who choose to remain unmarried, do not derive any marriage-like rights from their cohabitation and/or relationship.
18. Given that the above would bring the law in line with the ruling by the highest court, it would insulate the omnibus statute against any constitutional challenges on this score.

CHAPTER 2: Questions regarding the definition of marriage (paras 2.3 - 2.5 of the Paper):

19. An omnibus marriage act with different chapters allows for each chapter to have a unique definition tailored to suit the type of union dealt with by that chapter, as opposed to a "*one-size-fits-all*" approach which is not suitable. This would allow for the sections on, for example, customary marriages or Islamic marriages, to have definitions tailored that include polygyny etc.

⁶ 2009 JDR 1018 (CC).

⁷ *Volks v Robinson* at paras 50 -57, 80 – 87.

⁸ Act 17 of 2006.

CHAPTER 2: Questions regarding consent and the minimum age to marry (paras 2.17 – 2.21 and paras 2.28 – 2.29 of the Paper):

20. The Constitution is the supreme law of the land and is the law by which every law and all conduct are ultimately judged.⁹ Its founding provisions state that South Africa is founded on the values **of dignity, equality, freedom and non-sexism**.¹⁰
21. Section 31(2) of the Constitution provides that no community's cultural and / or religious rights may be exercised in a manner inconsistent with any provision of the Bill of Rights.
22. The modern-day abuses of *ukuthwala*¹¹ are a case in point. To allow for practises where both parties' free and voluntary consent is in question, is **not permissible in a country where freedom is guaranteed and dignity is the cornerstone** of all our other human rights.
23. *FOR SA*, therefore, submits that it should be compulsory for the marriage officer to ascertain each party's free and voluntary consent.
24. In an omnibus statute with different sections dealing with each unique type of cultural and / or religious union, marriage formulas can vary slightly to accommodate the nuances of each tradition. However, to pass constitutional muster, it is argued that each of these marriage formulas must include questions about each party's free and voluntary consent.
25. This does not negate cultural and / or religious traditions, which can still be followed, but safeguards the dignity and other rights of the parties involved.
26. Considering the above, *FOR SA* does not believe it is adequate for proxies to represent a party at the legal registration of the marriage where consent must be determined in order for the State to grant married status to the parties. Rather, as this is a religious and cultural practice for proxies to represent one party, these can still be done at the religious and / or cultural ceremony.

CHAPTER 2: Questions regarding the issuing of marriage licences and marriage officers (paras 2.41 – 2.43 of the Paper):

27. From the outset *FOR SA* wishes to point out the difference between a religious ceremony and the registration of a marriage. Although a religious ceremony may incorporate the registration of a marriage, it only does so if the priest, reverend, imam, rabbi etc. is also the voluntary holder of a marriage licence.

⁹ Section 1(c) of the Constitution of the Republic of South Africa, 1996.

¹⁰ Section 1(a) and (b) of the Constitution of the Republic of South Africa, 1996.

¹¹ SALRC Issue Paper 35 at page 20.

28. *FOR SA* is in favour of the current regime whereby only holders of a marriage officer's licence can validly solemnise marriages (i.e. represent the State, which is the one granting the married status to the parties). Many couples have opted for a religious ceremony where if, their rabbi for example, does not have a marriage licence, they simply register their marriage with the Department of Home Affairs ("the Department") beforehand. Alternatively, if the rabbi is the holder of a marriage officer licence, the legal solemnisation is done simultaneously with the religious ceremony.
29. The current system allows religious officials to become marriage officers (in terms of the legislation best aligned with their religious beliefs) if they so wish,¹² but also to cease being one if they so choose.
30. It is also not a requirement for the religious minister to be a marriage officer in order for religious ceremonies to be conducted. To do otherwise will limit the rights of religious officials who do not wish to be marriage officers and only to conduct the religious ceremony – an event that the government does not have jurisdiction over.
31. In an omnibus statute,¹³ it is envisioned that different chapters will deal with different types of unions – e.g. chapter 1 can deal with marriages traditionally concluded under the Marriage Act, chapter 2 with civil unions, etc. One of the benefits of this approach is that each chapter can cater for marriage officer license applications in terms of that chapter – i.e. one can apply to have a marriage officer licence to solemnise marriages traditionally concluded under the Marriage Act under one chapter, to solemnise civil unions, Muslim marriages, etc under another. This approach of voluntarily applying to be a marriage officer under a particular chapter, will mimic the current approach where religious marriages officers can apply to have a licence to solemnise marriages in terms of the Marriage Act, but not the Civil Union Act. The benefit is that only people specialised in certain cultural and / or religious marriages will be able to conclude them (see below), and it will also protect the religious freedom rights of those who - on grounds of conscience, religion and belief – are unable to solemnise certain types of unions.
32. Given that each type of union may have unique requirements that sets it apart from the other types of unions contained in the omnibus act (e.g. when it comes to polygyny), this will allow religious practitioners who wish to become voluntary marriage officers, to be specifically trained in the legal requirements for the type of union they wish to perform according to their cultural and / or religious rites.
33. Practically, this will mean that for example, an imam who wishes to not only perform the religious wedding ceremony according to Islamic rites but also to represent the State by granting married status to the parties, can apply to be a marriage officer under the section dealing specifically with Islamic marriages. In other words, he will be able to represent the State as a marriage officer in Islamic marriages, but not in e.g. Hindu marriages.

¹² Section 3 of the Marriage Act, Act 25 of 1961. Section 5 of the Civil Union Act, Act 17 of 2006.

¹³ Paragraph 11 above.

34. This approach - namely issuing a separate marriage officer's licence for each specific type of union, as is currently the case - will also allow for the protection of religious ministers who wish - for reasons based on their conscience, religion and belief - not to perform all types of unions. It respects these marriage officers' religious freedom (i.e. their right to "*conscientious objection*") that is currently protected by being able to hold a marriage officer's licence under the Marriage Act, but not under the Civil Union Act.
35. Another benefit of an omnibus marriage statute with chapters for each type of union, is that the section pertaining to customary marriages can continue to make the registration of such optional. This approach will solve the problems expressed by the SALRC and allow spouses in customary marriages to continue proving that their marriage exists by other means¹⁴ (should the SALRC come to conclusion that compulsory registration for customary marriages is inadvisable.)
36. An altogether alternative solution to the issuing of marriage officer licences is to go the route the SALRC took when it considered the opposition in traditional societies to a state official "*solemnising*" a marriage, namely that of a State official simply *registering* the marriage.¹⁵ Instead of a marriage officer, Home Affairs would thus have a registering officer who simply registers marriages. This will completely remove the religious / cultural ceremony aspects (including religious ministers) from the granting of legal married status to parties by the State.
37. Practically, the State official will simply register the marriage and issue a certificate of registration. The religious and/or cultural aspect will be done independently altogether and performed by the couples' e.g. imam. This will serve to reinforce the division canvassed in paragraph 27 above.

CHAPTER 2: Questions regarding registration of marriages (paras 2.63 – 2.71 of the Paper):

38. *FOR SA* is in favour of parties registering a marriage if they wish the marriage to be formally recognised by the State and thereby enjoy legal consequences.
39. As per the position set out above in paragraphs 13 through 1818, *FOR SA* believes that unmarried intimate relationships having marriage-like rights will go against the reasoning of the Constitutional *Volks v Robinson*¹⁶ and open up any such law to a constitutional challenge.

CHAPTER 2: Questions regarding marriage ceremonies (paras 2.77 – 2.78 of the Paper):

40. *FOR SA* agrees that the State should not have an interest in how religious and / or cultural rituals are conducted in the religious and / or cultural marriage ceremony.¹⁷

¹⁴ SALRC Issue Paper 35 at page 35.

¹⁵ SALRC Issue Paper 35 at page 28.

¹⁶ 2009 JDR 1018 (CC).

¹⁷ SALRC Issue Paper 35 at page 36.

41. However, as religious ministers often also have a marriage officer's licence, the legal and religious and / or cultural ceremonies can occur simultaneously.
42. A formula allows for legal certainty in that it is a statement of each parties' free and voluntary consent to enter into the marriage. *FOR SA* submits that an omnibus marriage act will allow for an appropriate formula to be set for each unique type of union. This formula can then be followed by religious ministers who are also marriage officers for that specific type of union.

CHAPTER 2: Questions regarding the consequences of marriages (paras 2.86 – 2.88 of the Paper):

43. *FOR SA* submits that an omnibus marriage statute can deal with the patrimonial consequences of each unique type of union individually. It should also incorporate the existing legal provisions that already regulate a specific type of union's patrimonial consequences, into the sections dealing with unions of that type.
44. This approach allows for Islamic marriages concluded under *Sharia* law to remain out of community of property, for monogamous customary marriages to be in community of property, and for provisions granting the court's discretion to alter the chosen matrimonial property regime in the interests of justice and gender equality when the relationship ends.
45. As per the position set out above in paragraphs 13 through 1818, *FOR SA* believes that unmarried intimate relationships having marriage-like rights will go against the reasoning of the Constitutional Court in *Volks v Robinson*¹⁸ and open up any such law to a constitutional challenge. *FOR SA* is thus against unmarried intimate relations having marriage-like patrimonial consequences that are regulated by statutory law.

CHAPTER 2: Questions regarding spousal support (paras 2.100 – 2.101 of the Paper):

46. As per the position set out above in paragraphs 13 through 1818, *FOR SA* believes that unmarried intimate relationships having marriage-like rights will go against the reasoning of the Constitutional in *Volks v Robinson*¹⁹ and open up any such law to a constitutional challenge.

CHAPTER 2: Questions regarding ante-nuptial contracts (para 2.107 of the Paper):

47. *FOR SA* submits that an omnibus marriage statute can deal with the patrimonial consequences of each unique type of union individually. It should also incorporate the existing legal provisions, regulating a specific type of union's patrimonial consequences, into the sections dealing with unions of that type.

¹⁸ 2009 JDR 1018 (CC).

¹⁹ 2009 JDR 1018 (CC).

48. In as far as ante-nuptial contracts would not contravene the religious freedom rights of the parties to a specific type of union, the omnibus marriage statute can make provision for the conclusion, registration and enforcement of such contracts.

Kind regards,

A handwritten signature in black ink, appearing to read 'pp Allu', is written above a horizontal line.

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