

ADVOCATING FOR THE LEGAL RECOGNITION OF DOMESTIC PARTNERSHIPS

The term “domestic partnership” refers to a permanent and intimate relationship between two adult persons.

1. What are the consequences of the current lack of legal recognition and regulation of domestic partnerships?

- There is no legal duty on partners to support each other during or after the relationship;
- There is no protection for the property rights of partners and there is no law which says how property should be divided once the relationship ends. The law currently does not recognise that one partner may have contributed indirectly to the maintenance and improvement of the property;
- A partner does not need the consent of the other partner before deciding to sell, donate, mortgage or let the joint property;
- The partner who owns or rents the family home can evict the other partner from the house and the other partner has no right to live in the family home;
- There is no right to inherit when one partner dies, no matter how long partners lived together, and no right to be maintained out of a deceased partner’s estate;
- There is no right to sue for damages if a supporting partner was killed;
- The father of children born in the relationship does not have any automatic rights over the child.

2. Why do we need law reform to recognise domestic partnerships?

A large number of South Africans live together in intimate relationships without marrying, either because both parties do not wish to marry but most often because one of the partners does not wish to assume the responsibilities and obligations relating to marriage. These relationships have never been legally recognised, although there is a mistaken belief that they are common law marriages. However, there is no such a thing as a “common-law” marriage in South Africa.

Until recently, the only legally recognised form of marriage was that contracted between a man and a woman in terms of the Marriage Act or the Recognition of Customary Marriages Act. Parties married in terms of these laws enjoy a wide range of legal rights and responsibilities, which include:

- A mutual duty of support while the marriage lasts;
- The right to claim maintenance and a share of the spouse’s property on divorce; and
- The right to inherit on the death of a spouse.

3. What are the current developments regarding domestic partnerships?

Although domestic partnerships have historically received very little protection from the South African legal system, current developments in the law suggest that it is an appropriate time to advocate for reform. These developments have established that the South African Constitution’s provisions on equality, dignity, and non-discrimination can offer protections to many diverse types of partnerships. Through court cases and legislation, these provisions have successfully been used to expand protections for customary marriages, Muslim marriages, same sex marriages, and civil partnerships.

While these are positive developments, there are still very limited protections given to couples, whether they are opposite or same sex, who choose not to register a "civil partnership" or a "marriage", or do not have the power to negotiate the registration of the relationship. This gap in the current legal framework means that a large category of people cannot access the law and the courts when their relationships dissolve. They are denied fair access to assets accumulated during the relationship, maintenance and other benefits that people who are married are accorded by the law.

In the Constitutional Court case of Volks NO v Robinson, Justice Skweyiya recognized that unmarried couples who live together face many obstacles because their relationships are not recognised. The court urged Parliament to correct this reality through legislation and policy reform.

"The consequences are that women are taken advantage of and the essential contributions by women to a joint household through labour and emotional support is not compensated for".

The majority judgement in this case found that the fault was not with the law that was being challenged but with the absence of any law that places obligations on people who are in life partnerships. The minority judgements found that there was discrimination against partners who choose not to marry, and partners who do not have the power to insist that their partners marry them. The minority judges also said that the social function of the partnership is no different to that of marriage and so to treat them differently is unfair discrimination.

The one element that all the judges agree on is the need for an Act to be passed to recognise domestic partnerships and extend the legal protections attached to marriage to domestic partnerships.

The proposals for legal recognition of domestic partnerships were initially included in the Civil Union Bill but were removed from the Bill by the Home Affairs Portfolio Committee in November 2006 so that they can be dealt with in a separate Bill in 2007.

The Domestic Partnerships Bill will be introduced in Parliament in 2007 to provide some recognition to parties in domestic partnerships. The Bill is expected to be published for comment soon. For more information about the draft Bill see fact sheet 3.

This fact sheet was produced by the Alliance for the Legal Recognition of Domestic Partnerships. The Alliance was formed in March 2007 for the specific purpose of advocating for legislation which will recognise and regulate domestic partnerships and provide protection for parties in such relationships.

The Alliance is comprised of the following organisations:

Aids Legal Network, Behind the Mask, OUT LGBT Well-being (OUT), People Opposing Women Abuse (POWA), Pro Bono-Org, Lesbian and Gay Equality Project, NACTU, ADAPT, NISAA, Legal Resources Centre (LRC), Human Sciences Research Council (HSRC), Forum for the Empowerment of Women (FEW), Tshwaranang Legal Advocacy Centre (TLAC), Centre for Applied Legal Studies (CALS), Media Workers Association (MWASA), Women's Legal Centre (WLC)

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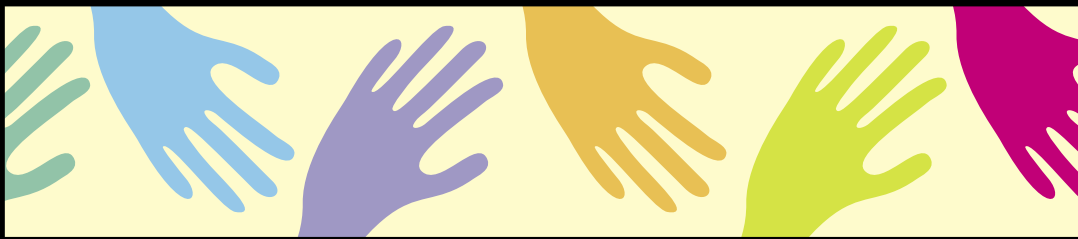
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CREATING DOMESTIC PARTNERSHIP LEGISLATION

What are the legal options?

There are several factors that should be considered when creating legislation on domestic partnerships:

- 1. Parliament must determine how domestic partnerships are going to be recognised by the legal system.**
 - a. Will only those partners who have formally registered their relationship be given rights and protections?**
 - b. Will partners who have not registered their relationships be given rights and protections?**
 - c. Will the consequences of recognition (i.e. what rights and protections are granted) be different based on whether the partners have registered their relationship or not?**

- 2. If Parliament chooses to recognise unregistered domestic partnerships, it must decide when a relationship will be recognised as a domestic partnership. There are two primary options open to parliament:**
 - a. Parliament could give legal status to a de facto partnership. This means the legal system would automatically give domestic partnership status to a relationship when certain conditions exist.**

For example, Parliament could say that a domestic partnership exists when the partners have cohabitated for a number of years, intend to live together forever, and contribute jointly to the upkeep and maintenance of the family home.
 - b. Parliament could give legal status ex post facto. This means that their relationship will only be legally recognised when a dispute arises after the relationship has ended. To avoid abuse, this system should also require evidence that the partnership did exist.**

- 3. Parliament must also consider how to protect the autonomy of partners who may wish to decline the automatic protections and rights granted through the recognition of unregistered domestic partnerships. Parliament could do this by creating an opt-out clause that would allow partners to agree to decline legal recognition as domestic partners. Parliament should also consider whether partners would be allowed to create their own partnership agreement that could override the rights, protections and duties that may automatically attach to their partnership.**

- 4. Parliament must determine what rights and protections will attach to legally recognised domestic partnerships.**
 - a. Will domestic partners receive different rights and protections from civil partnerships and marriages?**
 - b. Will these consequences be determined on a case-by-case basis depending on the specific relationship, or will there be a universal standard for all domestic partnerships?**

- 5. Some of the specific factors which frequently arise during domestic partnership disputes, and which should be addressed by Parliament, include:**

Children:

- *What will the rights of registered and unregistered domestic partnerships be regarding maintenance, custody, and guardianship of children?*
- *Will the consequences differ based on whether the children are biological or non-biological?*

Intestate succession:

- *How will the property of a deceased partner who dies intestate be divided?*

Termination of partnerships:

- *How will a domestic partnership be terminated, both when it has been registered and when it has not been registered?*
- *What are the notification requirements when one partner wishes to end the partnership?*
- *How will property be divided when a partnership has been terminated?*

Duty of support and/or maintenance:

- *Will a duty of support attach to a domestic partnership?*
- *How long will this duty attach?*
- *Will it extend beyond the partnership, if a duty exists during the partnership?*
- *Under what circumstances will this duty dissolve?*
- *How will the extent of this duty be determined?*

Medical decisions:

- *How will partners be allowed to participate in making medical decisions for their partners?*
- *Compellable to disclose communications:*
- *Will partners be compelled to disclose communications they had with their partners in court, or will this be protected communication?*

Evidence on behalf of accused:

- *Will partners be compelled to turn over evidence on their partner?*

Rights of Occupation:

- *Will each partner have the right to occupy the family home?*
- *How will this right be implemented when the partnership ends?*
- *Will a partner be allowed to evict a current or former partner, and under what circumstances may she do so?*

Delictual claims:

- *Will partners be allowed to sue for damages when their partner was harmed or killed?*

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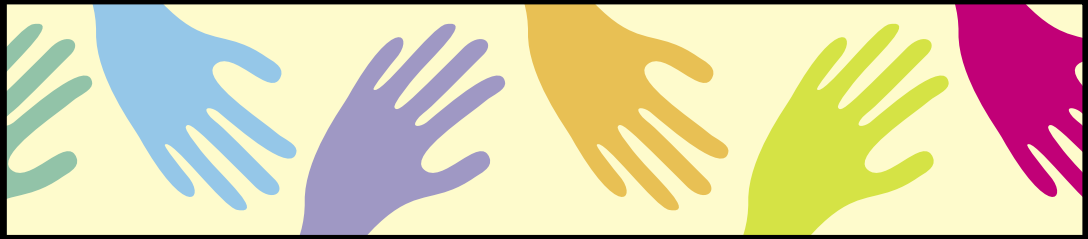
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ABOUT THE DOMESTIC PARTNERSHIP BILL

The proposals for legal recognition of domestic partnerships were initially included in the Civil Union Bill but were removed from the Bill by the Home Affairs Portfolio Committee in November 2006 so that they can be dealt with in a separate Bill in 2007. This first draft of a Domestic Partnership Bill, which was contained in Chapter 3 of the initial Civil Union Bill, is available on the <http://www.info.gov.za/documents/bills/2006.htm>

The Bill aims to protect the rights of parties in domestic relationships to dignity and equality. The Bill:

- *Legally recognises domestic partners, whether of the same or opposite sex;*
- *Sets out the rights and obligations of domestic partners;*
- *Protects the interests of both domestic partners and interested parties when the relationship ends; and*
- *Sets out how the financial relationships between domestic partners must be resolved when the relationship comes to an end.*

The Bill will deal with two types of relationships:

Registered domestic partnerships – *This is a relationship between two adults that has been registered as a domestic partnership under the Act. Partners who register their relationship will be given some of the benefits married couples have. This section might be deleted from the Bill because couples can now also register their partnership in terms of the Civil Union Act.*

Unregistered domestic partnerships – *This is a relationship between two adults who live as a couple and who are not related by family. At the moment the law does not protect such relationships, no matter how long the parties lived together.*

This fact sheet summarises parts of the Bill relating to unmarried partners who do not register a partnership agreement to govern their relationship.

What does the Bill provide for unregistered domestic partnerships?

An unregistered domestic partnership refers to two adults who live together as a couple but who do not get married or register their relationship.

The Domestic Partnerships Bill will give some help to parties once an unregistered domestic partnership ends as a result of death or separation. In such cases, an unregistered partner can apply to a court for a maintenance order, an intestate succession order or a property division order. This application must be made within two years from the date when the relationship ended.

a) Division of property

A partner may apply to court for an order that the court divides the property of the other partner in a fair manner. The partner who applies for the order must be able to show that he/she contributed (directly or indirectly) to the maintenance or increase in the other partner's separate property during the relationship.

b) Maintenance

Unregistered partners do not have a legal duty to maintain each other. A court may however, after the relationship ends, make an order for the payment of maintenance by one partner to the other for a specified period. The court must look at:

- *The age of the partners;*
- *The length of the domestic partnership;*
- *The standard of living of the partners before separation;*

- *The applicant's ability to support himself or herself adequately where he or she also has custody of a minor child of the domestic partnership;*
 - *"child of a domestic partnership" includes—*
 - *Any child born from the relationship*
 - *Any child of either domestic partner*
 - *Any child adopted by the domestic partners jointly*
 - *Any other child who was a dependant of the domestic partners*
 - *The personal contributions of each partner to the domestic partnership;*
- "contribution" means -*
- *The direct or indirect financial and non-financial contributions made*
 - *The contributions made to the welfare of the other partner and the family.*
- *The current and future income of each partner;*
 - *The earning capacity, future financial needs and obligations of each partner; and*
 - *Whether there is another existing unregistered domestic partnership or unregistered customary marriage.*

c) Death of a domestic partner

Maintenance for surviving partner

The surviving partner may apply to court for an order for the provision of his or her reasonable maintenance needs from the estate of the deceased.

Inheriting where there is no will

If the partner dies without a will, his or her surviving partner may apply to court for an order that he or she may inherit in terms of the law of intestate succession.

How can you comment on the Bill?

Once the Bill is published in the Government Gazette, there will be a chance for civil society to make comments on the proposed law.

The Alliance on the Recognition of Domestic Partnerships can be contacted if any organization wants assistance to make a submission on the proposed Domestic Partnerships Bill.

You can also fill in a questionnaire with examples of what women in your community experience and this can then be included in the Alliance's submission to the Portfolio Committee on Home Affairs. For copies of the questionnaire, contact Anneke Meerkotter at Tel: 011 403 426, Fax: 011 403 4275, E-mail: anneke@tlac.org.za

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