

POSITION PAPER

The Right to Marriage of the LGBTQIA+ Community in Mauritius

*A Legal Analysis of the Right to Marriage for Same-Sex Couples under Mauritian
Law, Constitutional Law, and International Human Rights Law*

NATIONAL HUMAN RIGHTS COMMISSION

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EXECUTIVE SUMMARY

This position paper examines the right to marriage for persons of the LGBTQIA+ community in Mauritius. It advances three principal propositions.

First, there is no express statutory prohibition on same-sex marriage in Mauritius. The conditions prescribed by the Code Civil Mauricien (CCM) for a valid marriage are limited to age and consent; they are silent as to the sex of the parties. The Civil Status Act likewise imposes no restriction. The administrative refusal by the Civil Status Office to solemnise same-sex marriages does not appear to rest on any identifiable legal foundation.

Second, the exclusion of same-sex couples from the institution of marriage may constitute discrimination on the basis of sexual orientation contrary to section 16 of the Constitution of Mauritius, as authoritatively interpreted by the Supreme Court in *Ah Seek v State* 2023 SCJ 399, in which the Court held that the word "sex" under section 16 encompasses sexual orientation.

Third, Mauritius's international obligations under the International Covenant on Civil and Political Rights (ICCPR) affirmatively require the State to take all necessary measures to eliminate discrimination against LGBTQIA+ persons with regard to marriage, as specifically directed by the UN Human Rights Committee in its Concluding Observations on Mauritius.

It is also noteworthy that the recent Domestic Abuse Act 2026 introduced, for the first time, the definition of "*adult inter-dependent relationship*", which would now include same-sex relationships, within the domestic abuse legal framework.

These arguments are reinforced by a substantial body of comparative jurisprudence from United Kingdom, South Africa, the United States, and the European Court of Human Rights, all of which point in the same direction: the equal right of same-sex couples to access the institution of marriage.

The paper concludes with concrete recommendations for legislative reform, administrative action, and, where necessary, constitutional challenge.

I. INTRODUCTION

Marriage is among the most fundamental and valued institutions in human society. It confers on those who enter into it not only a profound personal and social status but a comprehensive body of legal rights and responsibilities – in succession, property, inheritance, family life, and welfare – that the law extends to no other civil relationship with equivalent generosity. To be excluded from that institution is therefore not a minor inconvenience. It is to be told by the law, in the most public way available to it, that one's capacity for love, commitment, and mutual care is of a lesser order than that of one's fellow citizens.

This position paper concerns the exclusion of LGBTQIA+ persons from marriage in Mauritius, and makes the case, grounded in domestic law, constitutional law, and international human rights, that such exclusion cannot be legally sustained.

The LGBTQIA+ community in Mauritius has faced, and continues to face, discrimination in multiple domains of life. Section 250 of the Criminal Code, which criminalises same-sex intimacy between consenting adults, remains unrepealed notwithstanding the recommendations of the UN Human Rights Committee and the judgement of **Ah Seek**. The Civil Status Office has issued a *Certificat de Coutume* to the effect that marriage between persons of the same sex is not permitted in Mauritius. Yet no statute of Mauritius provides any such prohibition. The conditions prescribed by law for a valid marriage are age and consent and impose no restriction whatsoever on the sex or sexual orientation of the parties.

The purpose of this paper is fourfold: to demonstrate that Mauritius law erects no legal bar to same-sex marriage; to show that the administrative refusal to solemnise such marriages may infringe section 16 of the Constitution; to set out the international human rights obligations that affirmatively require equal access to marriage; and to draw on the comparative experience of other jurisdictions to chart the principled path forward.

II. FACTUAL BACKGROUND

1. On 02 Feb 2026, the NHRC received written complaints from four members of the Young Queer Alliance who claimed that the Civil Status Office refused on 25 Nov 2025 to register their marriage even if they fulfilled all the criteria.
2. As part of their complaints, the Complainants provided written statements of the prejudice suffered as a result of the failure of the State to register their marriage, a “*constat d’huissier de justice*” under the hand of Mr Jugnarain and a “*certificat de coutume*” under the hand of Y Naidoo dated 25 Nov 2025, where it is clearly stated that “*le mariage n’est pas permis entre deux personnes du meme sexe.*”
3. Hearings were held at the NHRC and apart from the Complainants, a number of persons belonging to the LGBTQIA+ community testified and explained the prejudice being caused to them because their relationship status is not recognised by the State.
4. In order to preserve the personal life and identities of the complainants and witnesses, the essence of their testimony is being reproduced below, without attributing same to a specific individual.
 - a. One Complainant explained that being unable to marry would deprive his partner of inheritance rights inasmuch as upon the death of one of the partners, the other partner cannot become the sole owner of the jointly purchased property and family members of the deceased partner would be entitled to the property. Preparing a will may remedy the situation but would entail additional cost which heterosexual married couples do not have to incur;
 - b. In addition, being unmarried does not give rights, normally available to husbands and wives, to the partners. For example, one same-sex couple was subject to excessive questioning by hospital staff when one partner became very sick and the SAMU had to be called. Partners also do not become beneficiaries on each other’s medical insurance, do not enjoy widow pension rights and cannot declare each other as “spouses” for tax purposes;
 - c. The Complainant highlighted the stigmatisation he faced in society if he attempted to display affection, such as hand holding, in public. Being married would give recognition to his relationship and enable the couple to live freely;
 - d. It was also highlighted that same-sex partners would not be able to legally adopt a child as a family unit and that only one partner would be able to declare the child as his own;

- e. Another complainant highlighted that she could not benefit from the first-time home buyers' scheme by the government as same applied only for married couples.
- f. The Complainant highlighted that her family tried to force her into a heterosexual marriage and she was not on talking terms with her father. She was of the view that legal recognition of her relationship would help restore her dignity;
- g. One witness explained how he was estranged by his partner's family upon the latter's death and he was not even allowed to participate in his partner's funeral. He was forcibly removed from house of his deceased partner by his partner's family and denied access to his personal belongings. He only recovered his passport after repeated requests. He was physically and verbally abused. He got into a depression following his partner's death and the discrimination he faced;
- h. One witness recalled how he was unable to marry his partner (a foreigner), due to the laws in Mauritius, and the latter left. He believed that had he been married, he could still have been with his partner;
- i. Another witness related how her partner's family called the police and tried to implicate her with a case of larceny. She had a panic attack and her partner was blackmailed that if she (the witness) passed away, the partner would be criminally responsible. The couple had to pretend to be co-workers in order to have a safe home to rent. When they are in public, they cannot openly display affection and need to pretend to be relatives or colleagues when going to a restaurant. The witness has faced derogatory remarks and feel that the failure of the State to give legal recognition to their relationship is causing a constant emotional burden on the couple. She says:
"It sends the painful message that our love, commitment, and future together are somehow less worthy of respect and protection under the law because of our sexual orientation."
- j. A witness, who has been with his same-sex partner, for the past 36 years, expressed sadness that his relationship did not have legal recognition even if his *"relationship does not pose any risk to society, public morality and to heterosexual marriages"*. He explained that he continually faces discrimination and questions as to why he was not married and what his sexual encounters would look like. He urged for the need to urgently recognise access to marriage for all citizens regardless of gender identity or sexual orientation;
- k. A witness who is in a relationship with a transgender male (assigned female at birth but identifying as male – no sex change surgery carried

out), also experienced uncertainty and fear of living their relationship openly as marriage between two persons of the same sex is not recognised in Mauritius. The couple felt excluded, insecure and invisible.

5. A number of witnesses expressed feeling isolated, ashamed of their identities, unsafe and having mental health issues, leading to self-harming and suicidal tendencies.

- a. A young witness explained how she faced bullying and social exclusion. She has been pressured to dress “like a girl” so that family members would not know about her sexual orientation during family gatherings, like weddings;

- b. A witness in his mid-twenties went at length to recall how he was abandoned by his father while he was in Grade 13 and poignantly stated:
*“This day marked a turning point, which many queer persons, like myself face: we lose our birth family, and despite bearing a surname, **we have no one to call family.**”*

He was still a child and he had no where to go after his tuition. He contemplated sleeping in the school toilets to pass the night. He was able to get some support from an uncle and eventually his mother, although the latter harassed him because of his sexual orientation. He was rejected by both his parents and an aunt supported him until she passed away. He felt that he has been treated in a dehumanising way due to his sexual orientation and was left without a family.

6. Testimonies were also received from a gay person who was legally married to his husband in Australia and reported having been “*exiled*” due to persecution faced in Mauritius and the refusal of his immediate family to accept his sexual orientation. He related that there had been attempts to admit him to a psychiatric institution and to date he remains “*permanently estranged from my(his) family.*” Although legally married in Australia, his marriage is not recognised in Mauritius, denying his spouse of residency status, contrary to heterosexual couples. He also claimed to have been disowned by his family and had no entitlement to family inheritance. As a result, he believed that his right to life, to be treated with dignity and respect and his right to found a family have been infringed.

III. LEGAL POSITION IN MAURITIUS

A. The Code Civil Mauricien and the Civil Status Act

7. The law governing marriage in Mauritius is principally found in **Articles 144 to 154 of the Code Civil Mauricien (CCM)** and in the Civil Status Act. A careful reading of these provisions reveals that the law imposes only two conditions for the valid conclusion of a marriage:
 - a. Both spouses must have attained the age of 18 years (Article 144 CCM); and
 - b. Both parties must give their free and full consent to the marriage (Article 145 CCM).
8. Article 150 of the CCM additionally prohibits bigamy and marriage between certain relatives, namely, ascendants and descendants in the direct line, siblings, and uncles or aunts with nephews or nieces. These are the only restrictions enacted by the CCM.
9. There is no provision in the CCM that requires the parties to a marriage to be of different sexes. The legislature did not prohibit same-sex marriage. It simply did not address the matter.
10. The Civil Status Act, which supplements the CCM and regulates the registration of civil marriages, is equally silent. The Act refers throughout to "spouses" without defining that term in a manner that restricts it to a man and a woman. The Act further defines marriage as "civil or religious marriage", a definition that is likewise silent on the sex of the parties.
11. It follows that, in the absence of any statutory restriction, there is no legal basis in the law of Mauritius for a prohibition on same-sex marriage. The law prescribes the conditions for a valid marriage; those conditions are met by same-sex couples with the same readiness as by opposite-sex couples.

B. The Administrative Position and its Legal Weakness

12. Notwithstanding the above, the Civil Status Office has issued a Certificat de Coutume in which it is stated that:

"le mariage n'est pas permis entre deux personnes du même sexe."
13. This statement does not appear to have any identifiable legal basis. Neither the CCM, nor the Civil Status Act, nor any other piece of primary or secondary legislation of Mauritius provides for such a prohibition. The position expressed in the Certificat de Coutume reflects a customary understanding of marriage that has never been enacted into positive law.
14. It is unclear on which legal authority did the Civil Status Officer refuse to solemnise a marriage between persons of the same sex?

C. The Constitutional Framework: Section 16 of the Constitution

15. The relevant parts of **section 16 of the Constitution** has been summarised below:

- a. Section 16(1): No law shall make any provision that is discriminatory either of itself or in its effect.
- b. Section 16(2): No person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- c. Section 16(3): The term "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed.
- d. Section 16(4)(c): Any law which makes provision for matters in respect of adoption, marriage, divorce, burial, devolution of property or death, falling within the personal law of a class of individuals shall be excluded from section 16(1).

16. Any restriction on same-sex marriage, whether arising from written law or administrative practice, must be assessed against these provisions. The critical constitutional development that directly governs this question is the Supreme Court's landmark decision in **Ah Seek v State**.

D. Ah Seek v State 2023 SCJ 399: A Constitutional Landmark

17. In **Ah Seek v State 2023 SCJ 399**, the Supreme Court of Mauritius held that the word "sex" in section 16 of the Constitution encompasses sexual orientation.

18. If "sex" within the meaning of section 16 includes sexual orientation, then any differential treatment accorded to a person on the ground of their sexual orientation falls within the constitutional prohibition on discrimination. The refusal to permit same-sex couples to marry, while freely permitting opposite-sex couples to do so, would constitute differential treatment attributable in its entirety to the sexual orientation of the persons concerned. There is potentially discrimination on the ground of "sex" as that term is now authoritatively understood.

19. Such discrimination, carried out by a public official in the performance of public functions, is in breach section 16(2) of the Constitution. Furthermore, should any provision of written law be found to mandate such discrimination, it would be susceptible to challenge under section 16(1).

20. Any argument based on the exceptions in section 16(4)(c) of the Constitution must be approached with care. Such exceptions do not extend to the arbitrary exclusion of an entire class of persons from a fundamental legal institution. A margin of appreciation afforded to the State cannot go so far as to permit an

effective bar on the enjoyment of a constitutional right. This principle is well-established in both domestic and international human rights law.

E. The Domestic Abuse Act 2026

21. The **Domestic Abuse Bill 2026 (No. VIII of 2026)** was introduced in Parliament on 23 June 2026. The purpose of the Bill is to repeal the Protection from Domestic Violence Act and to enact a legislation which widens the definition of domestic abuse, gives maximum protection to victims of domestic abuse and creates accountability for perpetrators of domestic abuse.
22. On 10 July 2026, the Bill was ready a third time and passed. It became the **Domestic Abuse Act 2026**.
23. Of note, the **Domestic Abuse Act 2026** introduces the definition of “*adult interdependent relationship*” which would now include same-sex relationships within the domestic abuse legal framework.
24. In **section 2 of the Domestic Abuse Act 2026**, “*adult interdependent relationship*” is defined as:

“adult interdependent relationship” means a committed and mutually supportive relationship between 2 adults, whether or not of the opposite sex, characterised by emotional and economic interdependence, where –

 - (a) the adults share a close personal connection that extends beyond mere co-residence or financial convenience;*
 - (b) one adult provides significant care, support or assistance to the other adult on account of the other adult’s disability, health condition, vulnerability or dependence, where, owing to such disability, health condition, vulnerability or dependence, the other adult reasonably relies on the adult for daily living, decision-making, support or personal care; and*
 - (c) the nature of the relationship is such that the adults function, in substance, as members of the same family, having regard to the stability, duration and responsibilities assumed by either adult;”*
25. Section 2 defines an “*adult interdependent relationship*” as a committed and mutually supportive relationship between two adults, whether or not of the opposite sex, characterised by emotional and economic interdependence, subject to three cumulative conditions:
 - a. the adults share a close personal connection beyond mere co-residence or financial convenience;
 - b. one adult provides significant care or support to the other on account of disability, health condition, vulnerability or dependence; **and**
 - c. that the nature of the relationship is such that the adults function, in substance, as members of the same family.

26. The Commission welcomes this as a progressive development. It represents the first occasion on which the State has formally acknowledged the existence of same-sex relationships in legislation.
27. However, the Commission notes that the three conditions are cumulative, meaning that all must be satisfied simultaneously for a relationship to fall within the definition. This may, in practice, restrict the protective reach of the Domestic Abuse Act 2026 and leave certain same-sex couples outside its scope. The Commission would encourage the legislature to keep this limitation under active review.

IV. THE EUROPEAN CONVENTION ON HUMAN RIGHTS: PERSUASIVE AUTHORITY

28. While Mauritius is not a State Party to the European Convention on Human Rights (ECHR), the jurisprudence of the European Court of Human Rights (ECtHR) constitutes significant persuasive authority. Mauritian courts have consistently had regard to ECtHR decisions in interpreting constitutional rights, particularly those concerning personal status and non-discrimination.

A. Article 12 ECHR and *Christine Goodwin v United Kingdom*

29. Article 12 of the ECHR provides:

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

30. The text of Article 12 explicitly refers to "men and women," which, on its face, appears to restrict the right to marry to persons of different sexes. Nevertheless, the ECtHR has consistently declined to read Article 12 in a manner that strips the right of its substance.

31. In ***Christine Goodwin v United Kingdom* (Application No. 28957/95, 11 July 2002)**, the Court held that gender could no longer be determined exclusively by biological criteria. Acknowledging major social changes and developments in medicine and science, the Court held that Article 12 must be interpreted in light of contemporary conditions. The Court articulated a principle that resonates directly in the present context: the margin of appreciation afforded to States cannot extend so far as to create an effective bar on the exercise of the right to marry. On this basis, the Court found that barring a post-operative transsexual from marrying a person of the opposite sex would impair the very essence of the right.

32. The following extract is of particular importance:

"99. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired."

101. ...The Court finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex...The margin of appreciation cannot extend so far. The Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances."

B. *Schalk and Kopf v Austria*: The Progressive Development

33. The Court took the matter materially further in ***Schalk and Kopf v Austria* (Application No. 30141/04, 24 June 2010)**. The Court explicitly held that it:

"61. ...would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants"

complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.

62. The Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.

63. In conclusion, the Court finds that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple such as the applicants access to marriage."

34. The significance of **Schalk and Kopf** for the Mauritius context is twofold. First, the Court confirmed that the right to marry is not inherently, as a matter of human rights law, a right confined to opposite-sex couples. Second, and critically, while the Court found that States retained a margin of appreciation on whether to legislate for same-sex marriage, the Court's reluctance to impose an obligation arose precisely because the question was one for national law to determine.

35. The position in Mauritius is, in an important respect, *more favourable* than that confronted in *Schalk and Kopf*: the Mauritian legislature has not enacted any prohibition on same-sex marriage. The language of "men and women" that gave the ECtHR pause is entirely absent from Mauritius's domestic law. The question in Mauritius is therefore not whether a domestic prohibition should give way to an international standard, but whether an administrative refusal unsupported by any law can be treated as having any legal force at all.

V. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

36. Mauritius is a State Party to the International Covenant on Civil and Political Rights (ICCPR). The obligations arising under the ICCPR are directly relevant to the right to marriage for LGBTQIA+ persons.

A. The Relevant ICCPR Provisions

37. Article 23(2) of the ICCPR recognises the right of men and women of marriageable age to marry, and Article 23(3) provides that no marriage shall be entered into without the free and full consent of the intending spouses. Read in conjunction with:

- a. Article 2(1): the obligation to ensure the rights of the ICCPR without distinction of any kind, including sex; and
- b. Article 26: the guarantee of equality before the law and prohibition of discrimination on any ground, including sex;

38. The ICCPR provides a strong and binding international law framework requiring that the right to marry be enjoyed on an equal basis, without discrimination on the ground of sexual orientation.

B. Concluding Observations on Mauritius (CCPR/C/MUS/CO/5)

39. Of decisive importance are the Concluding Observations issued by the UN Human Rights Committee on the fifth periodic report of Mauritius on the International Covenant on Civil and Political Rights (11 Dec 2017). The Committee expressed specific concern that LGBTQIA+ persons in Mauritius are not authorised to officially enter into marriage or civil partnerships and are denied other rights relating to personal status. The Committee stated:

"9. The Committee is concerned about reported cases of hate speech and violence, including death threats, brutality and humiliation, against lesbian, gay, bisexual and transgender persons. The Committee is also concerned that lesbian, gay, bisexual and transgender persons are not authorized to officially enter marriage or civil partnerships and are denied other rights relating to personal status. The Committee is further concerned that the provision of article 250 of the Criminal Code of Mauritius, which criminalizes 'sodomy' and 'bestiality', has not yet been repealed (arts. 2 and 23).

10. The State party should firmly prevent, and protect lesbian, gay, bisexual and transgender persons from, all forms of discrimination based on sexual orientation and gender identity, and include this as grounds of discrimination in all relevant legislation, including in the Criminal Code. The State party should also take all the necessary measures to eradicate discrimination against lesbian, gay, bisexual and transgender persons with regard to marriage or civil partnerships and repeal article 250 of the Criminal Code..."

40. The Concluding Observations, while not of the same formal character as the treaty text itself, constitute an authoritative interpretation of Mauritius's obligations under the ICCPR by the body mandated with supervising the Covenant. They establish, unambiguously, that the denial of equal access to marriage is incompatible with Mauritius's existing international commitments.

VI. COMPARATIVE JURISPRUDENCE

A. United Kingdom: From Civil Partnerships to Marriage Equality

41. The legislative experience of the United Kingdom provides a further instructive reference point, both in respect of the formal extension of marriage to same-sex couples and in respect of the relationship between anti-discrimination law's definition of "sex" and the scope of marriage law. The UK's trajectory – from a civil partnership regime to full marriage equality, and the recent judicial reasoning on the meaning of "sex" – carries lessons that are directly applicable to the Mauritius context.

(i) *The Civil Partnership Act 2004: A Parallel but Unequal Regime*

42. In 2004, the United Kingdom took the intermediate legislative step of recognising same-sex unions through the **Civil Partnership Act 2004**. That Act created the legal status of "civil partner" and extended to civil partners a body of rights broadly analogous to those enjoyed by married spouses. These included: rights of inheritance and succession on intestacy; mutual duties of financial provision; pension and next-of-kin rights; immigration status; rights under the law of evidence; and legal entitlements upon dissolution of the partnership.

43. However, civil partnership was not marriage – and the distinction was not merely one of label:

- a. Civil partners could not describe themselves as "married." The relationship carried a different legal name and a different social status.
- b. Adultery was not, in law, a ground for the dissolution of a civil partnership; only "unreasonable behaviour" was available – a distinction that, however technical, underscored the divergence between the two regimes.
- c. Religious organisations were not authorised to conduct civil partnership registrations; the institution was confined to civil registration, foreclosing the option of a religious ceremony for those who desired one.
- d. Civil partnerships were not universally recognised as equivalent to marriage by foreign legal systems, creating practical difficulties for civil partners travelling, relocating abroad, or seeking to rely upon their status in cross-border legal proceedings.
- e. The institution itself, by virtue of its separateness from marriage, conveyed a social message: that same-sex relationships, however legally recognised, occupied a different and lesser category than opposite-sex marriages.

(ii) *The Marriage (Same Sex Couples) Act 2013*

44. The **Marriage (Same Sex Couples) Act 2013** addressed the deficiency in the civil partnership regime directly. The Act extended the right to marry to same-sex couples in England and Wales, amending the Marriage Act 1949, which specifically rendered void marriage between any person, other than a male and female, to enable same-sex couples to solemnise their unions through civil ceremonies and, where religious organisations have voluntarily opted in, through religious rites. Scotland followed with the Marriage and Civil Partnership (Scotland) Act 2014, and Northern Ireland with equivalent provision in 2019.
45. The manner in which the 2013 Act achieved marriage equality is significant. It did not create a new parallel institution. It extended the existing institution of marriage – with all its legal force, social recognition, and dignitary meaning – to same-sex couples. The Civil Partnership Act 2004 was retained, and has since been extended to opposite-sex couples as well, but the 2013 Act placed same-sex couples within the institution of marriage itself, on equal terms with their opposite-sex counterparts.
46. However, it is argued that the position in Mauritius is even more straightforward inasmuch as the legal provisions in relation to marriage contain no apparent restriction in relation to sex of the spouses. It is therefore a question of interpretation as opposed to legislative amendments, per se.

B. South Africa: Minister of Home Affairs v Fourie

47. The most instructive comparative authority is the decision of the Constitutional Court of South Africa in ***Minister of Home Affairs v Fourie* CCT 60/04, 01 December 2005**, in which the Court held the exclusion of same-sex couples from the institution of marriage to be unconstitutional as a violation of the rights to equality and human dignity.
48. The Court's reasoning encompasses two distinct but related dimensions of the harm: the practical harm arising from denial of the material benefits of marriage, and the dignitary harm arising from the symbolic statement that the law makes by excluding a class of persons.
49. The Commission has found it wise to reproduce extracts of the judgments in full inasmuch as a mere summary of the powerful words of Justice Sachs would not do justice to them.

"[60] A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self... Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting. [...]

The significance of marriage and the impact of exclusion from it

[63] It is true that marriage, as presently constructed under common law, constitutes a highly personal and private contract between a man and a woman in which the parties undertake to live together, and to support one another. Yet the words 'I do' bring the most intense private and voluntary commitment into the most public, law-governed and state-regulated domain. [...]

[65] One of the most important invariable consequences of marriage is the reciprocal duty of support. It is an integral part of the marriage contract and has immense value not only to the partners themselves but to their families and also to the broader community. The duty of support gives rise to the special rule that spouses, even those married out of community of property, can bind one another to third parties in relation to the provision of household necessities which include food, clothing, and medical services. The law sees the spouses as life partners and jointly and severally responsible for the maintenance of their common home. This obligation may not be excluded by antenuptial contract. Another invariable legal consequence of the marriage is the right of both parties to occupy the joint matrimonial home. This obligation is clearly based on the premise that spouses will live together. The party who owns the home may not exclude or evict the other party from the home. Limited exceptions to this rule have been created under the Domestic Violence Act.

[66] The way in which the marriage affects the property regime of the parties to the marriage is variable at common law. The ordinary common law regime is one of community of property including profit and loss in terms of which the parties to a marriage share one joint estate which they manage jointly. Historically, of course, our common law provided that the power to manage the estate ('the marital power') vested in the husband. This rule was altered by statutory intervention in 1984. Major transactions affecting the joint estate must now be carried out with the concurrence of both parties.

[67] Marriage also produces certain invariable consequences in relation to children. Children born during a marriage are presumed to be children of the husband. Both parents have an ineluctable duty to support their children (and children have a reciprocal duty to support their parents). The duty to support children arises whether the children are born of parents who are married or not.

[68] The law also attaches a range of other consequences to marriage – for example, insolvency law provides that where one spouse is sequestered, the estate of the other spouse also vests in the Master in certain circumstances, the law of evidence creates certain rules relating to evidence by spouses against or for one another, and the law of delict recognises damages claims based on the duty of support.

[69] It should be added that formalisation of marriages provides for valuable public documentation. The parties are identified, the dates of celebration and dissolution are stipulated, and all the multifarious and socially important steps which the public administration is required to make in connection with children and forward planning, are facilitated. Furthermore, the commitment of the parties to fulfil their responsibilities is solemnly and publicly undertaken. This is particularly important in imposing clear legal duties on the party who is in the stronger position economically. Marriage stabilises relationships by protecting the vulnerable partner and introducing equity and security into the relationship.

[70] Marriage law thus goes well beyond its earlier purpose in the common law of legitimising sexual relations and securing succession of legitimate heirs to family property. And it is much more than a mere piece of paper. As the SALRC Paper comments, the rights and obligations associated with marriage are vast. Besides other important purposes served by marriage, as an institution it was (at the time the SALRC Paper was produced) the only source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.

[71] The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

[72] It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. To begin with, they are not entitled to celebrate their commitment to each other in a joyous public event recognised by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture. It may be that, as the literature suggests, many same-sex couples would abjure mimicking or subordinating themselves to heterosexual norms. Others might wish to avoid what they consider the routinisation and commercialisation of their most intimate and personal relationships, and accordingly not seek marriage or its equivalence. Yet what is in issue is not the decision to be taken, but the choice that is available. If heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as to 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.

[73] Equally important as far as family law is concerned, is the right of same-sex couples to fall back upon state regulation when things go wrong in their relationship. Bipolar by its very nature, the law of marriage is invoked both at moments of blissful creation and at times of sad cessation. There is nothing to suggest that same-sex couples are any less affected than are heterosexual ones by the emotional and material consequences of a rupture of their union. The need for comprehensive judicial regulation of their separation or divorce, or of devolution of property, or rights to maintenance or continuation of tenancy after death, is no different. Again, what requires legal attention concerns both status and practical regulation.

[74] The law should not turn its back on any persons requiring legal support in times of family breakdown. It should certainly not do so on a discriminatory basis; the antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, and the third with varying degrees of denial, shame or embarrassment. Similarly, 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."

[emphasis is ours]

50. On the practical consequences of exclusion, the Court undertook a detailed enumeration of the rights that marriage law affords. These include:

- a. Reciprocal duties of support – legally enforceable and not excludable by antenuptial contract.

- b. The right to occupy the joint matrimonial home, which cannot be denied even by the spouse who holds title.
- c. Property rights, including rights under the community of property regime or antenuptial contracts.
- d. Rights in relation to children – including presumptions of parentage and duties of maintenance.
- e. Rights in insolvency, evidence, and delict;
- f. Access to social and economic benefits including inheritance on intestacy, medical insurance coverage, tax advantages, bereavement leave, spousal benefits, and post-divorce rights.

51. The Court rejected the argument that the constitutional defect could be cured by creating a separate legal framework outside of marriage. A law that enables heterosexual couples to have their unions publicly recognised and legally regularised, but provides no equivalent mechanism for same-sex couples, discriminates against the latter as surely as if it expressly excluded them:

"[81] ...A law that creates institutions which enable heterosexual couples to declare their public commitment to each other and achieve the status, entitlements and responsibilities that flow from marriage, but does not provide any mechanism for same-sex couples to achieve the same, discriminates unfairly against same-sex couples."

52. South Africa subsequently enacted the Civil Union Act 17 of 2006, giving legislative effect to the Constitutional Court's order and making same-sex marriage legally available throughout the country. South Africa remains the only country on the African continent to have done so. Its precedent, both judicial and legislative, is directly instructive for Mauritius.

B. United States: Obergefell v Hodges

53. In ***Obergefell v Hodges* 576 US 644 (2015)**, the Supreme Court of the United States held that the Constitution confers a fundamental right to marry on same-sex couples, and that States are required both to license and to recognise same-sex marriages. The Court held that the right to marry is so fundamental to individual dignity and liberty that it cannot be denied to any class of persons without constitutional violation.

54. The closing words of the majority opinion bear reproduction in the conclusion of this paper. They capture, with unusual eloquence, the human reality that lies behind the legal questions addressed:

"No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

VII. IMPORTANCE OF RECOGNISING THE RIGHT TO MARRIAGE

A. Dignity and Equal Concern

55. As the South African Constitutional Court recognised in *Fourie*, a democratic and egalitarian society is one that embraces everyone and accepts people for who they are. Equality does not require the elimination of difference; it requires that difference not be made the basis of exclusion, marginalisation, or stigma. The Constitution of Mauritius, in its protection of fundamental rights, reflects this same commitment.
56. The continued refusal to recognise the right of same-sex couples to marry is a failure to accord them equal concern and respect. It treats their capacity for commitment and love as legally irrelevant, and their intimate unions as invisible to the law. This is inconsistent with the dignity that the law is obliged, as a matter of constitutional command, to extend to every person within the jurisdiction of Mauritius.

B. Practical Consequences of Exclusion

57. The practical consequences of being unable to marry are immediate and far-reaching. They encompass:
- a. The inability to inherit on intestacy – leaving the surviving partner without legal recourse on the death of their companion;
 - b. The absence of reciprocal duties of legal support – leaving the more economically vulnerable partner exposed;
 - c. The lack of enforceable rights of occupation of a shared home – which may have been the parties' shared residence for years or decades;
 - d. Inaccessibility to spousal benefits in insurance, taxation, and social security;
 - e. The vulnerability of each partner in the event of the other's incapacity – including the absence of automatic rights to make decisions on behalf of an incapacitated partner;
 - f. The absence of a legal framework for the equitable resolution of property and financial matters upon breakdown of the relationship.
58. These consequences fall disproportionately upon the most vulnerable partner in any relationship. The law of marriage exists, in significant part, precisely to protect the economically weaker party and to impose duties on the stronger. By excluding same-sex couples from that protection, the current state of the law leaves some of the most vulnerable members of the LGBTQIA+ community without recourse.

C. Social and Psychological Dimensions

59. The inability to marry does not affect only the couple directly concerned. Its effects are felt by their children, their extended families, and their communities. Same-sex couples who are parents are denied the ability to provide their children with the legal security that flows from a recognised parental

relationship within a legally constituted family. The harm is thus multi-generational.

60. There is also a social dimension of profound importance. As the South African Constitutional Court observed, same-sex couples in the absence of marriage rights are "*obliged to live in a state of legal blankness in which their unions remain unmarked*" by the public recognition that the law otherwise provides. This is not merely a private matter. It is a statement made by the law about the relative worth and dignity of same-sex relationships within the community.

D. Parenting and Family Continuity

61. Marriage is, in law, the principal gateway to the formation and protection of family life, and its denial to same-sex couples produces consequences for family continuity that the testimony recorded in Part II renders concrete. Witnesses explained that same-sex partners are unable to adopt a child as a family unit, with the result that only one partner may be recognised in law as the child's parent. A child raised within a same-sex household is thereby left without the legal security of a recognised relationship with both of the persons who care for the child, and the second partner enjoys no settled status in respect of that child should the legally recognised parent die or become incapacitated. The harm, as Part VII(C) observes, is multi-generational: it is the child, as much as the couple, who is left exposed.
62. The evidence discloses a further dimension of family continuity particular to the lived experience of LGBTQIA+ persons in Mauritius. Several witnesses described estrangement from their families of origin on account of their sexual orientation or gender identity. One witness recounted being abandoned by his father while still a schoolchild, and observed that many queer persons lose their birth family and, despite bearing a surname, "*have no one to call family.*" Another related being disowned and rendered "*permanently estranged*" from his relatives, with attempts made to have him committed to a psychiatric institution. A complainant described being pressured towards a heterosexual marriage and the rupture of her relationship with her father. For persons in this position, the bond formed with a partner is not a supplement to family but, in a real sense, the family that remains to them. The refusal of the State to recognise that bond compounds the original loss: it withholds from those already rejected by their families of origin any legally constituted family at all.
63. This engages Mauritius's obligations under Article 23(1) of the ICCPR, which recognises the family as the natural and fundamental group unit of society entitled to protection by the State, and affirms the right to found a family. Where the law affords opposite-sex couples the means to constitute a protected family unit while denying any equivalent to same-sex couples, because of their sexual orientation ("sex" within the meaning of section 16 of the Constitution as construed in *Ah Seek v State*), there is potentially an infringement of section 16 of the Constitution.

E. Financial and Legal Vulnerability

64. The exclusion of same-sex couples from marriage exposes each partner to financial and legal vulnerabilities that arise directly from the absence of spousal status, and the testimony recorded in Part II illustrates their breadth. On the death of one partner, the survivor cannot take the jointly acquired home as sole owner; in the absence of a will, the relatives of the deceased succeed to the property to the exclusion of the person with whom it was acquired and shared. A will may mitigate this outcome, but only at a cost – and a cost borne by same-sex couples alone, since opposite-sex couples obtain the same protection automatically by operation of the law of marriage. The differential is itself a form of unequal treatment: the same security is available to one class of couples without charge and to the other only on payment.
65. The disadvantages extend across the range of benefits ordinarily attached to spousal status. Witnesses explained that partners cannot be named as beneficiaries on one another's medical insurance, cannot declare one another as spouses for the purposes of taxation, and are excluded from the first-time home-buyers' scheme, which the State reserves for married couples. In a medical emergency, one couple was subjected to intrusive questioning by hospital staff because the partners had no recognised relationship entitling either to act for the other; the law confers on neither partner the authority to take decisions on behalf of an incapacitated companion. A witness lawfully married abroad described the denial of residency to his spouse and the loss of any entitlement to family inheritance – disadvantages that an opposite-sex couple in the identical situation would not encounter.
66. As Part VII(B) records, the law of marriage exists in significant part to protect the economically weaker partner and to impose enforceable duties on the stronger. By placing same-sex couples outside that framework, the present state of the law removes its protective operation precisely from those who may have the greatest need of it, and obliges them to reconstruct, through private arrangements that are costly, incomplete, and in some respects – residency, intestate succession, and benefits restricted to married couples – unattainable, a fraction of what marriage would secure as of right.

F. Social Recognition and Acceptance

67. Beyond its material consequences, the denial of marriage inflicts a distinct dignitary harm through the message that non-recognition conveys. The testimony recorded in Part II describes lives lived, of necessity, in concealment. Couples reported being unable to display affection in public, and presenting themselves as colleagues or relatives in order to secure rented accommodation or to share a meal without exposure to hostility. A witness in a relationship of thirty-six years' standing recounted facing continued questioning and discrimination notwithstanding the evident stability of his union, observing that the relationship "*does not pose any risk to society, public morality and to heterosexual marriages.*" One complainant captured the expressive dimension of the exclusion in her own words: it "*sends the painful message that our love, commitment, and future together are somehow less worthy of respect and protection under the law because of our sexual orientation.*"

68. This is the harm that the Constitutional Court of South Africa, in the passage reproduced at Part VI(A), identified as a “harsh if oblique statement by the law” that same-sex couples are outsiders whose capacity for love and commitment is of lesser worth. The witnesses’ accounts establish that the harm is not theoretical. A number described feelings of isolation, shame, and a lack of safety, and the testimony records mental-health consequences extending, in some instances, to self-harm and suicidal ideation. A young witness described bullying, social exclusion, and pressure to conceal her identity at family occasions; a couple, one of whom is a transgender man, described feeling “*excluded, insecure and invisible*.” The withholding of legal recognition does not merely leave private prejudice unaddressed; it lends the authority of the State to the message that these relationships are of diminished standing.

69. The recognition of marriage would not, of itself, dissolve social prejudice. It would, however, withdraw the State’s endorsement of that prejudice and substitute a public affirmation of equal worth. As Part VII(A) records, the dignity that the Constitution commands the law to extend to every person within the jurisdiction is incompatible with a regime that renders the unions of an entire class of citizens invisible to the law. What is at stake is not the compulsion of any couple to marry, but the availability of the choice – the same choice that the law already affords, without question, to their fellow citizens.

G. Additional issues – Rights of the Trans Community

70. Throughout the hearing, it became evident that members of the LGBTQIA+ community continue to face discrimination in their daily lives. This situation is particularly acute for those who identify as transsexual or transgender, whose difficulties are compounded by the complete absence of any legal framework recognising their gender identity. Where a State confines gender recognition to the binary, trans persons are effectively left living in a legal vacuum – one that compromises their right to health, freedom of movement, access to housing and social security, and their right to work, thereby fuelling discrimination and exclusion across health, educational and employment settings.

71. The Mauritian government has itself acknowledged this legal gap. In its 9th and 10th Combined Periodic Report submitted to the African Commission on Human and Peoples’ Rights, at paragraph 299, it stated that “*the possibility of sex change on ID/Birth Certificate at the Civil Status Office is not yet authorized by law*.” The consequences of this admission are far-reaching. Trans persons are left holding official identity documents, national identity cards and passports, which do not correspond to their physical appearance or chosen name, potentially exposing them to discrimination and harassment.

72. The consequences extend to the right to marry. Trans persons who have undergone sex reassignment surgery abroad remain legally recognised by their sex assigned at birth. Although they are, physically and socially, a man or a

woman and wish to marry a person of the opposite sex, they are prevented from doing so since same-sex marriage is not registered in Mauritius and their legal gender remains unchanged.

VIII. LEGAL ANALYSIS

73. The foregoing analysis gives rise to the following principal legal arguments in favour of the recognition of the right of same-sex couples to marry in Mauritius:

Argument 1 – The Existing Law Does Not Prohibit Same-Sex Marriage

74. The CCM and the Civil Status Act prescribe the conditions for a valid marriage. Those conditions are age and consent. They impose no restriction on the basis of sex or sexual orientation. No other statute establishes such a restriction. The administrative position expressed in the *Certificat de Coutume* is unsupported by any statute or regulation; it reflects an assumption that marriage must be between people of opposite sex, not enacted law.

Argument 2 – The Administrative Refusal Is Unconstitutional

75. Following *Ah Seek v State*, "sex" within **section 16 of the Constitution** includes sexual orientation. The refusal by a civil status officer to solemnise a marriage between persons of the same sex, while permitting opposite-sex couples to marry freely, constitutes differential treatment on the ground of sexual orientation – and therefore on the ground of "sex." Such conduct in the performance of public functions is contrary to section 16(2) of the Constitution and is susceptible to constitutional challenge under section 17.

76. Should any statutory provision be found to mandate such differential treatment, it would be subject to challenge under section 16(1) as a discriminatory provision either of itself or in its effect. The court would be empowered to declare any such provision unconstitutional and of no effect.

77. Section 16(4)(c) of the Constitution provides that any law which makes provision for matters in respect of adoption, marriage, divorce, burial, devolution of property or death, falling within the personal law of a class of individuals shall be excluded from section 16(1). However, in the present case, there are no personal laws applicable to members of the LGBTQIA+ community and section 16(4)(c) would not find its application.

Argument 3 – International Obligations Require Equal Access to Marriage

78. The ICCPR Concluding Observations call explicitly on Mauritius to take all necessary measures to eradicate discrimination against LGBTQIA+ persons in relation to marriage. This obligation, arising under Mauritius's own treaty commitments and interpreted by the body mandated to supervise them, is both clear and directly applicable. Courts in Mauritius are entitled, and indeed are required, to have regard to Mauritius's international obligations in interpreting the Constitution and domestic legislation.

Argument 4 – The Progressive Interpretation of Marriage Rights

79. The trajectory of human rights law – from *Goodwin* through *Schalk and Kopf*, from *Fourie* to *Obergefell* – consistently moves in one direction: towards the extension of the right to marry to same-sex couples and against interpretations that perpetuate exclusion. Even systems whose foundational instruments

appear to limit marriage to opposite-sex couples have adopted progressive interpretations that move away from that limitation.

80. The law of Mauritius contains no such limitation in the first place. It should be interpreted consistently with the progressive trend of international human rights law and the comparative constitutional experience of democratic societies, in a manner that gives full effect to the constitutional protection against discrimination and the fundamental right to dignity.

IX. RECOMMENDATIONS

81. On the basis of the foregoing legal analysis, the Commission recommends that:

- a. **Setting up of an inter-ministerial committee:** The Committee shall consider all necessary measures to eradicate discrimination against the LGBTQIA+ community, regarding marriage and civil partnerships and issue directives accordingly, the more so that in light of the pronouncements of the Supreme Court in *Ah Seek v State* 2023 SCJ 399 on the meaning of “sex”, that a refusal to solemnise a marriage between persons of the same sex may constitute a breach of section 16(2) of the Constitution and in light of the Concluding Observations of the UN Human Rights Committee on the fifth periodic report of Mauritius on the International Covenant on Civil and Political Rights (11 Dec 2017);
- b. **Repeal of section 250 of the Criminal Code:** Consistent with the Concluding Observations of the UN Human Rights Committee on the fifth periodic report of Mauritius on the International Covenant on Civil and Political Rights (11 Dec 2017) and the pronouncements of the Supreme Court in *Ah Seek v State* 2023 SCJ 399, the provision criminalising same-sex intimacy between consenting adults should be repealed.
- c. **Creation of a gender clinic in all major hospitals:** The State should establish dedicated gender clinics within all major public hospitals in Mauritius, staffed by multidisciplinary teams comprising medical practitioners, endocrinologists, mental health professionals, and social workers trained in gender-affirming care. These clinics should be equipped to provide, at a minimum: psychological support and counselling; gender dysphoria assessment and management; and ongoing medical follow-up.
- d. **Setting up of a national committee for transgender and transsexual rights:** There should be a national committee to discuss ways to recognise transgender and transsexual status and facilitate their legal recognition for administrative purposes, such as national identity cards, birth certificates, and passports, and the identification and removal of administrative barriers that prevent transgender and transsexual persons from participating in civic and economic life.

X. CONCLUSION

82. The law of Mauritius, as it stands, does not prohibit same-sex marriage. The right to marry is not a privilege granted by the state at its discretion. It is a fundamental right, deeply rooted in human dignity, and its enjoyment cannot lawfully be conditioned on the sexual orientation of the persons who seek to exercise it. The constitutional protection against discrimination on the basis of sexual orientation provides a direct basis on which to challenge any refusal to solemnise same-sex marriages. Mauritius' international obligations under the ICCPR reinforce this position with clarity and authority.

83. The comparative experience of South Africa, the United States, the United Kingdom and the growing number of jurisdictions across the world that have extended marriage equality demonstrates that such recognition is not only legally required but socially and humanly transformative. As the South African Constitutional Court observed, the strength of a nation comes from its capacity to embrace all its members with dignity and respect. Same-sex couples in Mauritius seek no more and no less than what the law already offers to their fellow citizens: the right to have their love publicly recognised, their commitment legally protected, and their dignity affirmed.

84. The words with which the Supreme Court of the United States closed its judgment in *Obergefell* are a fitting conclusion to this paper:

"No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

85. In the absence of timely legislative or administrative action, those adversely affected by the refusal to recognise their right to marry are encouraged to seek relief from the Supreme Court of Mauritius, including by way of a constitutional challenge under section 17 of the Constitution.

86. The law of Mauritius, properly construed, grants them that right too.