

REPUBLIC OF SOUTH AFRICA

CIVIL UNION BILL

(As presented by the Portfolio Committee on Home Affairs (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF HOME AFFAIRS)

[B 26B—2006]

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BILL

To provide for the solemnisation of civil unions, by way of either a marriage or civil partnership; the legal consequences of civil unions; and to provide for matters incidental thereto.

PREAMBLE

WHEREAS section 9(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone is equal before the law and has the right to equal protection and benefit of the law;

AND WHEREAS section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;

AND WHEREAS section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;

AND WHEREAS section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion;

AND WHEREAS the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;

AND NOTING that the family law dispensation as it existed after the commencement of the Constitution did not provide for same-sex couples to enjoy the status and the benefits coupled with the responsibilities that marriage accords to opposite-sex couples,

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—
 - “**civil union**” means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others; 5
 - “**civil union partner**” means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act; 10
 - “**Customary Marriages Act**” means the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);
 - “**Identification Act**” means the Identification Act, 1997 (Act No. 68 of 1997);
 - “**Marriage Act**” means the Marriage Act, 1961 (Act No. 25 of 1961);

“marriage officer” means—

- (a) a marriage officer ex officio or so designated by virtue of section 2 of the Marriage Act; or
- (b) any minister of religion, or any person holding a responsible position in any religious denomination or organisation, designated as marriage officers under section 5 of this Act;

“Minister” means the Cabinet member responsible for the administration of Home Affairs;

“prescribed” means prescribed by this Act or by regulation made under this Act; and

“this Act” includes the regulations.

Objectives of Act

2. The objectives of this Act are—

- (a) to regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership; and
- (b) to provide for the legal consequences of the solemnisation and registration of civil unions.

Relationships to which Act applies

3. This Act applies to civil union partners joined in a civil union.

Solemnisation of civil union

4. (1) A marriage officer may solemnise a civil union in accordance with the provisions of this Act.

(2) Subject to this Act, a marriage officer has all the powers, responsibilities and duties, as conferred upon him or her under the Marriage Act, to solemnise a civil union.

Designation of ministers of religion and other persons attached to churches as marriage officers

5. (1) Any religious denomination or organisation may apply in writing to the Minister to be designated as a religious organisation that may solemnise marriages in terms of this Act.

(2) The Minister may designate such a religious denomination or organisation as a religious institution that may solemnise marriages under this Act, and must, from time to time, publish particulars of all religious institutions so designated in the *Gazette*.

(3) The Minister may, on request of any designated religious institution referred to in subsection (2), revoke the designation under that subsection and must publish such revocation in the *Gazette*.

(4) The Minister and any officer in the public service authorised thereto by him or her may designate, upon receiving a written request from any minister of religion or any person holding a responsible position in any designated religious institution to be, as long as he or she is such a minister or occupies such position, a marriage officer for the purpose of solemnising marriages, in accordance with this Act, and according to the rites of that religion.

(5) Every designation of a person as a marriage officer under subsection (4) shall be by written instrument and the date as from which it shall have effect and any limitation to which it is subject shall be specified in such instrument.

(6) The Minister and any officer in the public service authorised thereto by him or her may, upon receiving a written request from a person designated as a marriage officer under subsection (4), revoke, in writing, the designation of such person as a marriage officer for purposes of solemnising marriages under this Act.

Marriage officer not compelled to solemnise civil union

6. A marriage officer, other than a marriage officer referred to in section 5, may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union.

Prohibition of solemnisation of civil union without production of identity document or prescribed declaration

7. No marriage officer may solemnise a civil union unless—
- (a) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act; 5
 - (b) each of such parties furnishes to the marriage officer the prescribed affidavit; or
 - (c) one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b). 10

Requirements for solemnisation and registration of civil union

8. (1) A person may only be a spouse or partner in one marriage or civil partnership, as the case may be, at any given time.
- (2) A person in a civil union may not conclude a marriage under the Marriage Act or the Customary Marriages Act. 15
- (3) A person who is married under the Marriage Act or the Customary Marriages Act may not register a civil union.
- (4) A prospective civil union partner who has previously been married under the Marriage Act or Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership under this Act, must present a certified copy of the divorce order, or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous marriage or civil union has been terminated. 20
- (5) The marriage officer may not proceed with the solemnisation and registration of the civil union unless in possession of the relevant documentation referred to in subsection (4). 25
- (6) A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act.

Objections to civil union

9. (1) Any person desiring to raise any objection to any proposed civil union must lodge such objection in writing with the marriage officer who is to solemnise such civil union. 30
- (2) Upon receipt of any such objection the marriage officer concerned must inquire into the grounds of the objection and if he or she is satisfied that there is no lawful impediment to the proposed civil union, he or she may solemnise the civil union. 35
- (3) If he or she is not so satisfied, he or she must refuse to solemnise the civil union and record the reasons for such refusal in writing.

Time and place for and presence of parties and witnesses at solemnisation and registration of civil union

10. (1) A marriage officer may solemnise and register a civil union at any time on any day of the week, but is not obliged to solemnise a civil union at any other time than between the hours of eight in the morning and four in the afternoon. 40
- (2) A marriage officer must solemnise and register a civil union in a public office or private dwelling-house or on the premises used for such purposes by the marriage officer, with open doors and in the presence of the parties themselves and at least two competent witnesses, but the foregoing provisions of this subsection do not prohibit a marriage officer to solemnise a civil union in any place other than a place mentioned herein, if the civil union must be solemnised in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties. 45
- (3) No person is competent to enter into a civil union through any other person acting as his or her representative. 50

Formula for solemnisation of marriage or civil partnership

11. (1) A marriage officer must inquire from the parties appearing before him or her whether their civil union should be known as a marriage or a civil partnership and must thereupon proceed by solemnising the civil union in accordance with the provisions of this section. 5

(2) In solemnising any civil union, the marriage officer must put the following questions to each of the parties separately, and each of the parties must reply thereto in the affirmative:

“Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage/civil partnership with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful spouse/civil partner?”, and thereupon the parties must give each other the right hand and the marriage officer concerned must declare the marriage or civil partnership, as the case may be, solemnised in the following words: 10

“I declare that A.B. and C.D. here present have been lawfully joined in a marriage/civil partnership.”. 15

(3) If the provisions of this section relating to the questions to be put to each of the parties separately or to the declaration whereby the marriage or civil partnership shall be declared to be solemnised, or to the requirement that the parties must give each other the right hand, have not been strictly complied with owing to— 20

(a) an error, omission or oversight committed in good faith by the marriage officer;

(b) an error, omission or oversight committed in good faith by the parties; or

(c) the physical disability of one or both of the parties,

and such civil union has in every other respect been solemnised in accordance with the provisions of this Act, that civil union shall, provided there was no other lawful impediment thereto, be valid and binding. 25

Registration of civil union

12. (1) The prospective civil union partners must individually and in writing declare their willingness to enter into the civil union with one another by signing the prescribed document in the presence of two witnesses. 30

(2) The marriage officer and the two witnesses must sign the prescribed document to certify that the declaration made under section 11(2) was made in their presence.

(3) The marriage officer must issue the partners to the civil union with a registration certificate stating that they have, under this Act, entered into a marriage or a civil partnership, depending on the decision made by the parties under section 11(1). 35

(4) This certificate is *prima facie* proof that a valid civil union exists between the partners referred to in the certificate.

(5) Each marriage officer must keep a record of all civil unions conducted by him or her. 40

(6) The marriage officer must transmit the civil union register and records concerned to the official in the public service with the delegated responsibility for the population register in the area in question.

(7) Upon receipt of the said register the official referred to in subsection (6) must cause the particulars of the civil union concerned to be included in the population register in accordance with the provisions of section 8(e) of the Identification Act. 45

Legal consequences of civil union

13. (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.

(2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to— 50

(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and

(b) husband, wife or spouse in any other law, including the common law, includes a civil union partner. 55

Offences and penalties

14. (1) Any marriage officer who purports to solemnise a civil union which he or she is not authorised under this Act to solemnise or which to his or her knowledge is legally prohibited, and any person not being a marriage officer who purports to solemnise a civil union, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding 12 months. 5

(2) Any marriage officer who demands or receives any fee, gift or reward for or by reason of anything done by him or her as marriage officer in terms of this Act, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months. 10

(3) Any marriage officer who knowingly solemnises a civil union in contravention of the provisions of this Act, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months.

(4) Any person who, for the purposes of this Act, makes any false representation or false statement knowing it to be false, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury. 15

Regulations

15. (1) The Minister may make regulations relating to—

(a) the form and content of certificates, notices, affidavits and declarations for the purposes of this Act; 20

(b) the fees payable for any certificate issued or any other act performed in terms of this Act; and

(c) generally, any matter which by this Act is required or permitted to be prescribed or which he or she considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that the provisions of this Act may be effectively administered. 25

(2) Such regulations may prescribe penalties for a contravention thereof, of—

(a) a fine not exceeding the amount that, in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), may be imposed as an alternative to imprisonment for a period of six months; or 30

(b) in lieu of payment of a fine referred to in paragraph (a), imprisonment for a period not exceeding six months.

(3) Any regulation made under the Marriage Act shall, in the absence of a regulation made under subsection (1), apply to the extent that it is practicable and necessary, in order to promote or facilitate the application of this Act: Provided that this subsection shall lapse after a period of one year from the date of the commencement of this Act. 35

Short title and commencement

16. This Act is called the Civil Union Act, 2006, and comes into operation on 30 November 2006 or an earlier date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CIVIL UNION BILL, 2006

1. BACKGROUND

The Constitutional Court (“the Court”), in the matter of Minister of Home Affairs v Fourie (Doctors for Life International and Others, *Amici Curiae*) and Lesbian and Gay Equality Project and Others v Minister of Home Affairs 2006 (1) SA 524 (CC) (“the Fourie-case”), declared that the definition of marriage under the common law and the marriage formula as set out in section 30(1) of the Marriage Act, 1961 (Act No. 25 of 1961) (“the Marriage Act”), were inconsistent with the Constitution and invalid to the extent that they failed to provide the means whereby same-sex couples could enjoy the status and the benefits coupled with the responsibilities that marriage accorded to heterosexual couples. The Court ordered Parliament to correct these defects in the law by 1 December 2006, failing which section 30(1) of the Marriage Act will be read as including the words “or spouse” after the words “or husband”. The Bill was drafted in response to the Court’s judgment in the Fourie-case.

2. OBJECTS OF THE BILL

The objects of the Civil Union Bill, 2006 are to provide for the public solemnisation and registration of civil unions, by way of either a marriage or civil partnership and to provide for the legal consequences thereof.

3. DISCUSSION

In order to reflect values of equality and dignity consistent with sections 9 and 10 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), balanced with the right to freedom of conscience, religion, thought, belief and opinion, as provided for in section 15 of the Constitution, the Bill provides for the conclusion of civil unions. In terms of this Bill provision is made for opposite- and same-sex couples of 18 years or older to solemnise and register a voluntary union by way of either a marriage or a civil partnership. Care has been taken to ensure that a distinction is drawn between the responsibilities of State and church, as section 15(3) of the Constitution is indicative of sensitivity in favour of acknowledging diversity in matters of marriage. The Bill provides for same-sex couples to be married by civil marriage officers and such religious marriage officers who consider such marriages not to fall outside the tenets of their religion.

4. DEPARTMENTS/BODIES CONSULTED

The Department of Justice and Constitutional Development; The South African Law Reform Commission; The Department and Ministry of Home Affairs consulted widely on the issue and received numerous submissions from individuals and organisations; Public hearings were conducted by the Portfolio Committee on Home Affairs (“the Committee”) in each of the nine Provinces in the Republic; Based on the Committee’s policy of consulting as widely as possible, an effort was also made to publicise the Bill as introduced into Parliament in order to elicit responses from interested groups and organisations, as well as from members of the public. A total of 5 822 petitions and a considerable amount of submissions were received from a wide spectrum of stakeholders in this regard. These petitions and submissions informed the Committee’s final recommendations.

5. FINANCIAL IMPLICATIONS FOR STATE

There will be financial implications with regard to the development of new registration systems and forms pertaining to civil unions.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Home Affairs are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 Based on an opinion from the Joint Tagging Mechanism the Bill was referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).