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|  | 1. alupheli ndudula, 2. Anele Mavukuza, 3. Carl Williams, 4. Chris De Vries 5. Dan Mafora, 6. David Collett 7. Dr Miles Warrington 8. Elliot Oliver 9. Graeme Hendricks, 10. Hannah Williams, 11. Hugh Wetmore 12. Ingrid Bruynse, 13. Jacques Rousseau, 14. Jacqui Kok, 15. Jarryd hesom, 16. Jed Davidson, 17. Jesse Stevens 18. Judy Engela 19. Larry White 20. Luvuyo Equiano Nyawose 21. Malusi Mabanga 22. Marion Hentschel, 23. Melanie Pieterkosky, 24. Merryn Carver, NI Maseko, 25. Michael Bishton 26. Mosweunyana Mokoena 27. Mr Thabo Khoza 28. Nobesuthu Cele, 29. Palesa Mkwanazi 30. Patson Manda, 31. Phaahle Makola 32. Pieter GreyTravel 33. Pieter du Plessis | | 1. Shaun Diakos 2. Siya Zulu, 3. Tabitha Paine 4. Thato Phatlane, 5. Trevi-jean Le Pere, 6. Wakithi Mabaso 7. Mnotho Makhoba 8. Louise Westerhout 9. Kirsten Whitfield 10. Lerato Phalakatshela OUT Hate Crime Manager 11. Nathaniel D Bricknell Secretary-General African Democratic Change 12. Willemien Calitz 13. Rod Suskin 14. Daniel Gray 15. Tariq Munshi 16. Arnaud Busquet-Craucamp 17. Keely Shinners 18. Courtney Abbott 19. Jordan van der Westhuizen 20. Yana Abrahams 21. Nodiggity Nodiggity 22. Jennifer Jacobs 23. Keslyn Swartz 24. Nick Mulgrew 25. Nompilo Sibisi 26. Michael Botha 27. Lara Jacobs 28. Marianne Thesen Law 29. Katie Thomas 30. Marion Stevens 31. Amie Soudien | |
|  | We strongly support the proposed Bill, and the repealing of section 6 of the Civil Union Act, 2006 (Act No. 17 of 2006). Our reasons are as follows:  1.As Ms Carter (COPE) previously noted in her submission to the Committee, S6 creates a clear opportunity for prejudice against same-sex couples, in that “a marriage officer … could object to solemnising the marriage of a same sex couple under the Civil Union Act, but solemnise a marriage for opposite sex couples that were atheist or Muslim”.  2. The Civil Union Act was created exactly for the purpose of allowing same-sex couples to be married, so for it to include the possibility for state officials to refuse to provide this service is perverse and illogical.  3.Only 28.6% of Home Affairs branches have marriage officers who are willing to marry same sex couples under the Civil Union Act, and approximately 37% of DHA officials have requested exemption on the grounds of conscience. This means that a state service will be provided on a deeply inequitable basis to South African citizens, who are all equal under the law.  4.The DHA officials who are granted exemption will not be equally distributed across the country. A gay couple wishing to marry in Cape Town, or Johannesburg, might have no difficulty in doing so. But gay couples in rural areas could potentially be further prejudiced against, first by not having convenient access to state services, and second by having to spend money and time getting to a DHA branch where they might find someone who is willing to respect their rights.  5.If you are in government employ, you should be willing to provide equal respect and treatment to all, as prescribed in the Constitution and relevant laws. Freedom of conscience is protected at an earlier stage, in that people should not seek jobs which ask them to be impartial on such matters if they are not willing to provide equal treatment to all citizens, regardless of their (inter alia) race, gender and/or sexual identity.  **6.State officials have a fundamental right to believe whatever they like, but public servants should not be able to pick and choose which laws they will follow or which services they will provide.**  **7.We are sympathetic to potential labour law implications following the possible repeal of S6, in that existing staff might reasonably object to conditions of service being changed. However, this is no impediment to any *new* job applicants being asked to affirm that they will indeed provide the same services to all citizens.**  8.However, given the complication raised in [7] above, DHA nevertheless have a clear obligation to ensure that couples have access to officiants who are willing to officiate gay marriages, and also to ensure that people seeking gay marriages are not subjected to being “insulted and called derogatory names” by DHA officials, as is reportedly sometimes the case | | | |
|  | 1. Albert Ferreira 2. Alex McIntosh 3. Alexa Bessinger 4. Andrea Kuti 5. Azzy Brellick 6. Barbara McCann 7. basil Kleinbooi 8. Belinda Katz 9. Bevin Reynolds 10. Bianca Lewis 11. Bruce J. Little 12. Casey Blake 13. Cassandra van Rooyen 14. Clara 15. Clarke's Bookshop 16. Diane Sandler 17. Dimitri Liountris 18. Dori van Loggerenberg 19. Dr Anastacia Tomson 20. Dr Jacquelyn Loren Schultz 21. Emiliano.Altamura 22. Emily Djock 23. Gareth Brimelow 24. Hannes Lourens 25. Ingrid Hofhuis 26. Jacqui Benson 27. James Combrink 28. James Lomberg 29. jan cape 30. Janine Engelbrecht 31. Jared Thompson 32. Jonathan Newman 33. Katelyn Anderson 34. Chanél 35. Morgan Jenkins 36. Ramathikhithirs 37. Iman Mbili 38. Junaid Bitterbos 39. Raakesh Misser 40. Alli Appelbaum 41. Ryan Kuscus 42. Samantha Jayne 43. Zoewestfall 44. Mark Bönker 45. Jennifer Bonker 46. Angie Hattingh | 1. Katharine White 2. Kathy Rabkin 3. Louise Make 4. Luke Styles 5. Lyn van Rooyen 6. Marlene Silbert 7. Martin Bredell 8. Mathilde Myburgh 9. Maxine Bezuidenhout 10. Michelle Duraan 11. Mieke van der Merwe 12. Mieke van Zyl 13. Mitchel Hunter 14. Mnngcobo 15. Nadia Vermeulen 16. nicole.lxndr 17. Nina Hoffman 18. Paula Werth 19. Peter 20. Petrus Beets 21. Pierre Groenewald 22. Ryan Canin 23. Salomon Erasmus 24. Sephiwe Joyce Sithole. 25. Simon Slabber 26. Skye Forrester 27. Stacey Ford 28. Stephen Laverack 29. Sven Smit 30. Tamara Radloff 31. Tamara Radloff 32. Thobeka Silwane 33. Sinazo Chiya 34. Kopano Maroga 35. Roland Hunter 36. Thomas Coggin & Guy Trangoš. 37. Brandon Gregory 38. Monique 39. Pi Delport 40. Dr Jabulile Mavuso 41. Trent Ayling 42. Cal Desmond-Pearson 43. Sinethemba Vumazonke 44. Zanie Nxazisa 45. Mvelisibusisonhlapo 46. Brianna Purdon 47. Alex Irwin | | 1. Tshidi Ramabu 2. Katlegomoloele 3. Nwabisa Mazana 4. Kevin Rosman 5. Ntandomacings Nokwanda 6. Zakiyyah Shabangu 7. ML Ramela 8. Sinesipho Mbusi 9. Rene Kitshoff 10. Isabel Ritchie 11. Rui Simoes 12. Lauren Fonto 13. Abigail Godsell 14. judyblom 15. bronwynhornby 16. Azeeza Rangunwala 17. Elma de Vries 18. Tish Lumos 19. Cal Desmond-Pearson 20. Bronwyn Du Plessis 21. Gabrielle Bönker 22. Aurelia Allara 23. Aurora Starlight 24. First Last superumbreon 25. Sapphic Queen 26. Sylvana Karrae 27. Jemmaleeloppnow 28. chi mhende 29. Marisa Els 30. Enrique Robbertze 31. Jennifer Ball 32. Alixisnotastalker 33. Crazy\_ Wolf 34. luan van Deventer 35. shannoncoetzee 36. Leonard Van Deventer 37. Laurinda van Tonder 38. Bellaunderwood 39. Mardene van Schalkwyk 40. Esethu Khambule 41. Sisipho Njongwe 42. Julia Osorio 43. Yuvthi Misser 44. ricardo Fernandez 45. jessearle23 46. Zandile Nxazisa |
|  | I submit this comment to you to express that I am strongly in favour of the proposed Bill, and of repealing section 6 of the Civil Union Act, 2006.  Section 6 allows for prejudice against same sex couples by marriage officers, by giving those officials grounds to object to solemnising such unions. **No such allowance is made for any other factor, bar for sexual orientation**.  As it stands, fewer than 30 percent of Home Affairs offices will marry same sex couples, and more than one third of officials working in the DHA will refuse to solemnise these unions. This contradicts the principles of freedom, equality, and respect that underpin the South African constitution.  It is the officer's duty to solemnise marriages; it is not that person's role to pass judgment, but to perform the duty for which they are appointed, and to do so with respect and dignity for all citizens of this nation, including those who are not straight.  I strongly support repealing Section 6 of the Civil Union Amendment Act, which serves only to legitimise prejudice.  I hope that you will consider this comment and show of support in making your decision. | | | |
|  | **230 signed hard copies of submission 3** | | | |
|  | 1. This submission is hereby made to provide written comment on the Civil Union Amendment Bill, 11 of 2018 (the Bill).  2. Before any comments are provided on the Bill, I wish to express my gratitude for the opportunity to make written submissions. I am available to make oral representations on the submissions made should I be called upon to do so.  3. In its present form, the Civil Union Act allows marriage officers, including those employed at the Department of Home Affairs, to refuse to marry same-sex couples because of their sexual orientation. I submit that this is discriminatory against same-sex couples.  4. In support of the Civil Union Bill, I believe that Section 6 must be removed from the Civil Unions Act as doing so would protect the rights of same-sex couples seeking to solemnise their unions and afford them Constitutional rights including the right to dignity and equality. Arguments made in support of the Civil Union Bill  **a. Equality**  5. The Civil Unions Act was intended to create laws that allow same-sex couples to marry in order to afford them the same rights and protections enjoyed by heterosexual couples. Following the decision from our highest court in the Fourie case, the Civil Union Act was passed.  6. In this case, the Court emphasised the rights of same-sex to dignity and equality before the law. The court also emphasised the importance of allowing people to be who they want to be and not deny them the ability to decide about their identity and sexuality in promoting a diverse and equal South Africa. When people make these decisions about their bodies, self and sexuality, the differences in who people are must not be used to exclude and marginalise people.  7. Section 6 of the Civil Unions Act makes it harder for same-sex couples to marry compared to heterosexual couples because they are fewer marriage officers available to marry same-sex couples. It has been reported that only 29% of Department of Home Affairs offices nationwide provide same-sex civil unions.1 These offices are not evenly distributed across the country; in the Eastern Cape, Free State, and Mpurnalanga only 17-18% of the Horne Affairs offices provide civil unions. This may mean that **same-sex couples have to travel to more than one office before they can get married. Same-sex couples that are poor cannot afford to travel to different offices. Section 6 could prevent poorer same-sex couples from getting married**. The enforcement of the Civil Union Act presently reinforces inequalities between same-sex and heterosexual couples' access to marriage  8. Even if a couple were to find a Home Affairs office that provides for civil unions, many Home Affairs officials still turn away and/or insult same-sex couples. Some same-sex couples have reported that Home Affairs officials instructed them to return at a later time. Home Affairs officers also use insulting and/or incorrect language (e.g. "husband" and "wife") to refer to their partner. Section 6 of the Civil Unions Act allows state officials to refuse to offer a service to one group while offering exactly that service to another group, and they may deny that service on prejudicial grounds rooted in homophobia and stigma. It is clear therefore that Section 6 threatens same-sex couples' rights to equality and dignity - both of which are promised in legislation for civil unions.  **b. Religion**  9. On this issue, I stand in support of the argument made by the Constitutional Court that it would be out of order **to allow religious beliefs and values of some to guide the constitutional rights of others. 2 The state is separate from individuals' personal religious beliefs. Individuals' personal beliefs should not determine who receives services from the government.** Instead, government should provide public services equally regardless of the sexuality, religion or any other identity of the persons involved. Section 6 violates this principle by allowing state officials to use their personal religious views as a rationale for denying public services to same-sex couples.  **c.** **Religion vs Prejudice/Homophobia**  10. The basis for religion as a reason to deny public services is particularly problematic because of the Civil Union Act's unclear wording. There is **no way of knowing** for sure in the Civil Union Act if an officer refusing to marry same-sex couples really **holds such religious values, or simply does not like LGBTI persons**.  11. In practice, this means that marriage officers may object to marrying a same-sex couple purely or in part due to their personal prejudice and/or stigma against LGBTI persons. A marriage officer could refuse to marry same-sex couples because of his dislike/hatred of same-sex couples and the Civil Union Act would permit it. This is because Section 6 lists "same-sex unions" as the only reason a civil marriage officer may object, meaning that it endorses discrimination by state officials on the basis of sexual orientation alone.  12. It is not acceptable to allow marriage officers, especially civil servants who provide services to the public on behalf of government, to refuse to solemnise a same-sex marriage. This undermines same-sex couples' Constitutional right to non-discrimination on the basis of sexual orientation. As a result, a Bill that aims to ensure that we do away with the hatred, dislike or prejudice against LGBTI persons is welcome and should be passed as law in order for South Africa to be more equal, tolerant and diverse  Conclusion  13. In conclusion, Section 6 of the Civil Unions Act marginalizes and excludes same-sex couples. I therefore strongly support The Civil Union Amendment Bill, which would remove Section 6 from the Civil Union Act in its entirety. **In solidarity with promoting equality and dignity for LGBTI persons and everyone's right to marry**  1 http://www.mambaonline.com/201 6/09/08/farce-28-home-affairs-offices-will-marry-gay-peopl e/  2 Fourie para 92. | | | |
|  | 1. Free Gender hereby submits written comments on the proposed draft Civil Union Amendment Bill, 2018. This submission is made by Free Gender supported by their legal representatives from the Equality and Non-Discrimination Project of the Legal Resources Centre (LRC).  2. Before we provide any comments on the Bill, we wish to take this opportunity to express our gratitude to the Portfolio Committee for allowing us the opportunity to participate in the engagement process of the Bill. We also take this opportunity to note that we will be able to avail ourselves to make oral representations on the submissions made herein should we be called upon to do so.  3. During the deliberations on the desirability of the bill Ms Carter from the Congress of the People (COPE) informed the Portfolio Committee members that 101 representations were received in response to the statutory advertising of the bill and call for representations. **84 of these submissions indicated their support of the repeal of section 6 of the Civil Union Act. 17 of these submissions did not support the Bill.**  4. We note from the outset that Free Gender and the Legal Resources Centre supports the repeal of Section 6 of the Civil Union Act 17 0f 2006 as proposed by the Civil Union Amendment Bill for reasons provided below.  5. We wish to also bring it to the Committee’s attention that Free gender and LRC have developed a publication that looks at the intersection of religion and equality within the context of marriage. We believe that this publication maybe useful to the Portfolio Committee. We will be happy to let the Portfolio Committee have hard copies of the publication. However, in the meantime, the this publication is available on the website of LRC at:  **http://lrc.org.za/art\_external/pdf/2018%20LRC%20Civil%20Unions%20Advocacy%20Report.pdf**  II. INTRODUCTION TO THE ORGANISATIONS  6. Free Gender is a **black lesbian organisation based in Khayelitsha** Township of Cape Town. As human rights defenders, Free Gender is gender inclusive in that our work also includes transgender and intersex persons in our community. The organisation was founded in 2008 and has since participated in various protests/ political meetings/ guest talks at academic and public forums.  7. We also support different stakeholders whose common objectives are relevant to our mandate. In its work, Free Gender hopes that communities are non-discriminatory, accepting and tolerant of all gender variants and that there is space for LGBTI persons to be open about their identity without fear of prejudice, stigma and violence.  Legal Resources Centre  8. In making this submission, Free Gender is represented and supported by their legal representatives at the LRC. The LRC is a public interest law clinic that uses law as an instrument of justice for poor and marginalized persons. Through its Equality and Non-Discrimination project, the LRC focuses on empowering LGBTI persons, among other classes of persons that are marginalized, by providing legal advice, legal representation, and by participating in advocacy and law reform. The Equality and Non-Discrimination project therefore promotes the constitutional rights of LGBTI persons, communities and organisations through providing legal advice, legal representation, strategic and impact litigation and by participating in multi-pronged advocacy and law reform. These include using a range of strategies including impact litigation, law reform initiatives, participation in development processes, as well as education and networking within and outside of South Africa.  III. BRIEF ANALYSIS OF THE FINDINGS IN THE MINISTER OF HOME AFFAIRS AND ANOTHER V FOURIE AND ANOTHER1 (FOURIE JUDGMENT)  Brief analysis of the Findings in the Fourie Judgment  9. It is common knowledge that the Civil Union Act 17 of 2006 was enacted after the decision by the Constitutional Court in the Fourie judgment. It is therefore appropriate for us to briefly discuss the findings in this case.  Facts  10. Pursuant to the desire to get married and acquire status, responsibilities and benefit which stem from marriages between heterosexual couples, the applicants in the Fourie case approached Court for an order affording same sex couples the right to marry.  11. The Constitutional Court found that:  11.1 The failure by the common law definition of marriage to permit same sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples was inconsistent with the Constitution and invalid.2 11.2 Further that the omission from section 30(1) of the Marriage Act 25 of 1961 after the words “or husband” of the words “or spouse” is declared to be inconsistent with the Constitution, and the Marriage Act is declared to be invalid to the extent of this inconsistency.3  11.3 The Court suspended the two declarations above for 12 months from the date of the judgment to enable Parliament to correct the identified defects in law.  Findings of Court  12. In coming to the findings above the Court highlighted a number of constitutional tenets that are relevant for the discussions on the Civil Union Act Amendment Bill, 2018. We highlight some of these here (this is by no means an exhaustive discussion of the Constitutional Court’s decision on this issue).  Right to Equality  13. The Court concluded that failure of the common law and the Marriage Act to provide means to enable same-sex couples to enjoy the same status, entitlements and responsibilities accorded  to heterosexual couples through marriage, constitutes an **unjustifiable violation of their right to equal protection of the law under section 9(1), and not to be discriminated against unfairly in terms of section 9(3)** of the Constitution4 and was a denial of their right to equal protection and benefit of the law.5  14. The Court found that the failure to provide same sex couples with equal protection was not because of an oversight, but because of the **legacy of severe historic prejudice** and marginalization against them.6 This exclusion was inconsistent with section 9(3) of the Constitution.  15. The Court found the violation of section 9(3) of the Constitution was unjustifiable because **affording same sex couples the right to marry did not in any way lessen the capacity of heterosexual couples to marry** in the manner they wished and according to their religion.7  Right to Dignity  16. The Court found that the failure to provide same sex couples the opportunity to marry as done for heterosexual couples was an unjustifiable **violation of their right to dignity in section 10 of the Constitution.8** The exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of South African society. In coming to this conclusion, the Court specifically found that the sting of past and continuing discrimination against both gays and lesbians was the clear message that it conveyed, namely, that they, whether viewed as individuals or in their same-sex relationships, did not have the inherent dignity and were not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.9  The right to be different  17. The Constitutional Court emphasized that there are four contexts that must always be borne in mind when analysing the prohibition of unfair discrimination on the basis of sexual orientation: diversity of family, the imperative constitutional need to acknowledge the long history of marginalisation and persecution of LGBTI persons in South Africa and abroad, lack of comprehensive family rights for LGBTI persons, and that our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all.10  18. Within this context, the court emphasized that a democratic, universalistic, caring and aspirationally equal society embraces everyone and accepts people for who they are and to treat people differently because of who they are is profoundly disrespectful of the human personality and violates the right to equality.11 The Court went on to state that respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling  or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. (own emphasis)  19. Understood in this context, the Court found that the Constitution of South Africa acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.12  The significance of marriage and impact of exclusion from it  20. Because of the manner in which marriage is concluded and its consequences, it is taken seriously by the parties to it, their families, the state and society at large. **Rights and obligations associated with marriage are vast and they include the duty of support, right to inheritance, medical insurance coverage, and adoption, access to wrongful death claims, spousal benefits, and bereavement leave, among others**. The Court found that the exclusion of same sex couples to marriage represented a harsh, 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.13 This exclusion further signifies that the capacity for love by lesbian and gay persons, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.**14  Religion  21. The Court emphasized, among other things that, it would be **out of order to employ the religious sentiments of some as a guide to the constitutional rights of others.**15 The Court also emphasized that:  In the open and democratic society contemplated by the Constitution there must be **mutually respectful co-existence between the secular and the sacred**. The function of the Court is to **recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group**, the law will legitimately acknowledge a diversity of strongly held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights.16  22. As such, an open and democratic society like South Africa must have capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. Specifically, the Court stated that recognition of same sex marriages and granting them the same status, entitlements and responsibilities as heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages.17 Further, the Court stated that, regardless of their strength or sincerity, **religious beliefs opposing same sex couples from marrying, cannot through the medium of state-law be**  **imposed upon the whole of society and in a way that denies the fundamental rights of those negatively affected**.18  IV. CURRENT CONSEQUENCES AND IMPLEMENTATION OF SECTION 6 IN THE CIVIL UNION ACT AS ENACTED  23. Writing for the Court, Judge Sachs cautioned that:  “The second guiding consideration is that Parliament be sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation. Historically the concept of ‘**separate but equal’** served as a threadbare cloak for **covering** distaste or **repudiation by those in power** **of the group subjected to segregation**. The very notion that integration would lead to miscegenation, mongrelisation or contamination was offensive in concept and wounding in practice. Yet, just as is frequently the case when proposals are made for recognising same-sex unions in desiccated and marginalized forms, proponents of segregation would vehemently deny any intention to cause insult. …Ignoring the context, once convenient is no longer permissible in our current constitutional democracy,… our equality jurisprudence accordingly emphasises the importance of the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected ...It is when **separation implies repudiation, connotes distaste or inferiority and perpetuates a caste like status that it becomes constitutionally invidious**. In the context of the present matter, this means that whatever **legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples**, both in terms of the tangibles as well as the intangibles involved. In a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples.”19 (own emphasis)  24. It is our submission that, while the Civil Union Act provides the means for the recognition and solemnization of same-sex marriages; it however **continues to marginalize same-sex couples**. We note from experience that, while the marginalization of same-sex couples through the Civil Union Act manifests itself in a variety of ways, this submission focuses on the marginalization caused by section 6.  25. Section 6 of the Civil Union Act states that:  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.  26. As can be ascertained from the text of section 6, it allows non-religious marriage officers to refuse to solemnize same sex marriages on the basis of religion, conscience and belief. Further, **section 6 has no requirement of a “sincere religious objection” or any measure of establishing whether the objection maybe motivated purely or in part by prejudice and/or stigma against LGBTI persons.** This means that a conscientious objection could be submitted based purely on homophobic beliefs and the Civil Union Act would permit it.20 More concerning, section 6 specifically lists “**same-sex unions” as the only reason a civil marriage officer may object, meaning that it endorses discrimination by state officials on the basis of sexual orientation alone**.21 Giving civil servants the right to refuse to solemnise a same-sex marriage undermines same-sex couples’ Constitutional right to equal protection and benefit from the law and it limits their access to basic services that are freely available to heterosexual couples, which the Constitutional Court specifically required parliament to address when enacting the Civil Union Act.22  27. In practice, Free Gender has received many complaints from couples relating to the implementation of section 6. This discrimination caused by section 6 is not just theoretic. Some of practical experiences of this section for same-sex couples include:  27.**1 Couples are sent away from certain DHA offices** when they approach such offices to get married because, as they are informed, there is no one in the applicable office who can marry them (because of their sexual orientation).  27.2 **Some complained about being asked to return on a different day** so that DHA could ensure that a marriage officer from another DHA office is brought to the specific office to marry them.  27.3 Some couples were advised **to approach different offices** in order to get married there.  27.4 Further those who are married are **forced to identity each other as ‘husband’ and ‘wife’** or similar terms which are insensitive towards same-sex couples. Even when the union is conducted, same-sex couples express dissatisfaction in the heternonormative, and non-inclusive language used to refer to their partnerships.  28. The reality of section 6 is evident when one considers the limitation it causes in the ability for same-sex couples to easily access DHA offices to solemnize their marriages at a practical level. Same-sex couples, as explained above, are not always guaranteed that every DHA office they walk into will be able to marry them on their appointment date.  28.2 Further, there is also a **list of marriage officers** in each province who can conclude same-sex marriages in each province. This list has been attached to this **submission marked A** for your ease of reference.24 As is clear from this list, **the number of marriage officers willing to conclude same sex marriage and the number of Department of Home Affairs’ office that can solemnise same sex civil unions are very limited clearly** indicating that same-sex couples will continue to struggle generally to solemnise their marriages given the limited marriage officers.  28.3 In addition, on 5 June 2017, the then Minister of Home Affairs informed parliament that there were 1130 designated **marriage officers** employed by the Department and **421 of these have objected to concluding same sex marriages**.25 This amounts to **37 percent of marriage officers objecting to conclude same-sex civil unions**.  29. It is clear from the above that, although the Civil Union Act was enacted in order to provide equal protection for same-sex couples [“specifically section 13, which states that legal consequences of marriage in the Marriage Act apply, with such changes as may be required by the context to a civil union apply”]. However, the reality is that the Civil Union Act has continued to marginalize same-sex couples, especially because of section 6, as same-sex couples still struggle to solemnize their marriages at DHA.  30. Put bluntly, section 6 of the Civil Union Act **allows state officials to refuse to offer a service to one group while offering exactly that service to another group**, and they may do so on prejudicial grounds rooted in homophobia and stigma—the very reason LGBTI persons have been denied the right to marriage by society for so long. As LGBTI persons are a protected group in terms of section 9(3) of the constitution – this is automatically unfair discrimination. Because same-sex couples have suffered marginalisation in the past and section 6 essentially allows homophobic religious views to be tolerated and used as a means to continue to deny LGBTI persons the same right to marriage as heterosexual couples, we submit that this unfair discrimination cannot be justified under section 36 of the Constitution.  31. It is therefore our submission that the inclusion of section 6 in the Act has created an environment in which there is continued marginalization and exclusion of same-sex couples from getting married. **It is far more difficult for same-sex couples to conclude a marriage than it is for heterosexual couples. In addition to encountering resistance from family, colleagues and friends, they have to deal with the barriers and limitations posed by the Civil Union Act. Same-sex couples are denied the certainty, excitement and comfort that heterosexual couples experience in regards to solemnising a marriage**, not having to experience the fear and uncertainty that the date of their marriage will be postponed if a DHA official refuses to solemnise the marriage and turns them away.  32. Regardless of the type of marriage, all persons should have the same access to the institution of marriage, this is not the case for same-sex couples who still have to fear, up until the date of their marriage, that they will be denied the right and ability to marry and solemnise such marriages for any of the number of reasons stated above. Same-sex couples can therefore **never be sure that on the date of their appointment to get married at DHA offices they will in fact be married because of the additional burden that they must overcome relating to the religious exemptions of marriage officers**. Section 6 has also produced new forms of marginalization in that non-religious marriage officers can now object to solemnize same-sex marriages. **This ability for non-religious marriage officers to object to solemnizing marriages did not exists before the enactment of the Civil Union Act** and as mentioned earlier, this is only available in relation to same-sex couples.  33. The legislative context chosen in the enactment of the Civil Union Act, specifically the inclusion of section 6, therefore falls short of the rights emphasized in the Fourie judgment. As it stands, section 6 completely undermines the rights to equality, dignity, and the right to be different, in order to preserve and prioritise the rights of marriage officers employed in a non-religious capacity.  34. In order to ensure that the rights of same-sex couples are affirmed and realised as contemplated in the Constitution and as discussed in the Fourie judgement, section 6 of the Act cannot continue to afford marriage officers and DHA an opportunity to arbitrarily discriminate against same-sex couples. It is imperative for the state to ensure that the Civil Union Act does in theory and in practice afford same-sex couples the equal opportunity to legally marry as heterosexual couples, without the impediments and barriers that continue to marginalize and stigmatise this class of persons while simultaneously undermining the constitution.  35. We note further that **other countries that have recognised same sex marriages have taken steps to ensure that at least marriage officers employed by the state or employed in a non-religious setting are obliged to solemnise** same sex marriages in an effort to ensure that the right to equality among other rights is realised. A similar obligation is applicable on South Africa as explained above. Some of these countries includes:  **Australia**  35.1 The Marriage Amendment (Definition and Religious Freedom) Act, passed in December 2017, allows for same-sex marriage in Australia. Marriages are solemnised by an authorised celebrant, and includes both state and religious marriage celebrants.26 State or civil celebrants are not allowed to conscientiously object to  26 The Marriage Amendment (Definition and Religious Freedom) Act, passed in December 2017  solemnising a same-sex marriage. They are required as agents of the Commonwealth ‘to uphold the definition of marriage under the Marriage Act without discrimination.’27 Should a state celebrant wish to refuse to perform a same-sex marriage then they must register as a religious marriage celebrant.  **Argentina**  35.2 Same sex marriages were first introduced in 2010 (Law 26618) and they are currently regulated by the Civil and Commercial Civil Code (2014). Neither of these laws have a clause that enables conscientious objection to the solemnisation of same sex marriages.  **Brazil**  35.3 As in South Africa, same sex unions were recognised through litigation and a court ruling by the Brazilian Federal Supreme in 2011. Following this decision, a resolution was passed (Resolution 175/2013) which **prohibits any public authority from excusing themselves from solemnising same sex marriages and unions. This resolution is binding on the judiciary and employees of registries that solemnise marriages**. Refusal to comply with this Resolution can lead to the institution of procedures and sanctions.  **Belgium**  35.4 Article 21 of the Belgian Constitution provides an exception to the separation of church and state, stating that a religious wedding ceremony requires a civil marriage to be performed by a state officer first before it can have the legal effects of a marriage. Civil marriages are performed by the mayor or “alderman” of a municipality. Belgium’s equality law, **Anti-Discrimination Law 2007 (amended in 2013), prohibits discrimination on the grounds of sexual orientation and religion**, among others. **State marriage officers are not allowed to conscientiously object to solemnising a same-sex marriage. Religious marriage officers, however, may be allowed to choose whether or not they will perform a same-sex marriage or union**, but the allowance to object to performing such marriages is determined by the internal organisation of the religion. The Belgian Constitution respects the separation of church and state, and ensures freedom of religion in Articles 19 and 20. Each religion is free in its own organisation.  35.5 State marriage officers may only refuse to perform a marriage in instances where they suspect the marriage to be one of convenience, or where one of the formal requirements for a marriage has not been met by one or both parties. Beyond these two instances, state marriage officers cannot refuse to marry a couple, let alone a same-sex couple, and cite religious reasons for their refusal. They are expected to take a neutral attitude to the marriage, as civil servants.  **New Zealand**  35.6 Section 28 of the Marriages Act of 1955 does not provide a right to state marriage officers to be exempted from solemnising same sex unions. However religious marriage officers affiliated to a listed religious body or approved organisation are exempted from performing same sex marriages.  35.7 The exemption is only allowed if the solemnisation of a same sex marriage violates the religious beliefs of the religious body or the approved organisation and not applicable for personal beliefs or convictions of individual members of the organisation.  **Germany**  35.8 Same sex marriages were recognised in the Federal Law Gazette BGBl. I 2017, 2787. Before same sex couples could enter into recognised life partnerships. Section 1310(1) sentence 2 of the German Civil Code (BGB) mandates marriage officers of the state to perform same-sex marriages if the statutory requirements are fulfilled. In the event of a recusal of a marriage officer, the registrar office can be directed by the court to perform the marriage. In case of refusal, the officer may be subject to proceedings under employment law, depending on the status of the individual state marriage officer.  **England and Wales**  35.9 Same sex marriages in England and Wales are governed by the Marriage (Same Sex Couples) Act 2013. In this legislation there is no exemption for state marriage officers (registrars) who object to performing same-sex unions.  36. Should more information about these examples and other states be needed, we would be in a position to provide a detailed analysis of a number of countries and their position on conscientious objections to same sex marriages.  37. It is therefore our firm submission that section 6 of the Civil Union Act is unconstitutional and accordingly we support the provisions of the Bill to repeal it in its entirety as a way to cure this shortcoming as well as affirm the rights of same sex couples in South Africa.  V. CONCLUSION AND RECOMMENDATIONS  38. We submit the amendment to the Civil Union Act as proposed by COPE as a necessary stride in ensuring that the discrimination and marginalization faced by same-sex couples, even after the enactment of the Civil Union Act, is effectively addressed and that the state embraces equality and dignity as both values and rights in the Constitution.  39. Free Gender and the LRC therefore submits that all **marriage officers employed and designated by the state in terms of section 2 of the Marriage Act 25 of 1961 should perform their service and duties without favour, discrimination and inequality** – consequently Free Gender and LRC support the proposed repeal of section 6 of the Civil Union Act.  40. We believe that this step will also ensure that the DHA and the government of South Africa fully and permanently **rejects deep-seated patterns of past discrimination, continuing homophobia**, while also affirming the diversity of identities in South Africa and acknowledging that religion is not a sufficient reason to marginalize this diversity.  41. Further, we submit that it is clear from the experiences received by some of Free Gender constituents **that sensitisation training of all DHA officials is necessary to facilitate positive service delivery for all persons but especially for LGBTI persons.** It is imperative that DHA adopts a more inclusive approach to identity and promote tolerance and difference for all persons in South Africa. We therefore also recommend that DHA accordingly continue to offer training in this regard in order to ensure that all services offered by its department are in line with the purport and object of our constitution.  1 2006 (1) SA 524 (CC).  2 Order 1 and 2 of the Fourie judgment.  3 Ibid.  4 Ibid at para 114.  5Ibid at para 75.  6 Ibid at para 76.  7 Ibid at para 111.  8 Ibid at para 114.  9 Ibid para 50.  10 Ibid at para 58.  11 Ibid at para 60.  12 Ibid at para 60.  13 Ibid at para 71  14 Ibid at para 71.  15 Ibid at para 92.  16 Ibid at para 94.  17 Ibid at para 98.  18 Ibid at para 113.  19 Ibid at para 150 - 152  20 Helen Kruuse ‘Conscientious Objection to Performing Same-Sex Marriage in South Africa’ (2014) 28 International Journal of Law, Policy and The Family 153.at 156.  21 Pierre de Vos ‘A judicial revolution? The court-led achievement of same-sex marriage in South Africa’ (2008) 4 Utrecht Law Review 162.  22 Elsje Bonthuys ‘Irrational accommodation: conscience, religion and same-sex marriages in South Africa’ (2008) 125 SALJ 475.at 477.  23 http://www.mambaonline.com/2016/09/08/farce-28-home-affairs-offices-will-marry-gay-people/  Free State 28 5 Mpumalanga 58 10 Limpopo 61 16 Western Cape 34 10 Northern Cape 22 9 KwaZulu Natal 68 29 North West 22 10 Total 409 117  24 The list is also available on http://www.mambaonline.com/images/Same%20sex%20civil%20marriage%20list%20of%20offices%20and%20names%20of%20off\_1.pdf [Accessed on 21 March 2018]  25 https://pmg.org.za/committee-question/5631/ [Access on 21 March 2018].  27 Ibid.  We trust that you will find the submissions made by **Free Gender** in this document useful. Should you have any comments or questions please do not hesitate to contact you can contact **Ms. Mandivavarira Mudarikwa at** [**mandy@lrc.org.za**](mailto:mandy@lrc.org.za)**.** | | | |
|  | I am writing this email in support of the amendment of Section 6 of the Civil union act which allows government officials or officers who perform matrimonial ceremonies to refuse to perform them on the grounds of religion.  South Africa is pegged as a democratic and fair country FOR All and what kind of message are we sending when we refuse to marry a couple who are in love and wish to cement that love by getting married?  The LGBTQ+ community in South Africa barely has any safe spaces and places who fully embrace them for being who they are and this bill, although it won't have much of an impact in the kind of situation they are in, in this country, they deserve an opportunity to solidify their love without some bigot citing religious reasons for their hate.  Please consider my submission in support of the amending of the Act.  Xolisile Zibula | | | |
|  | I thank National Government for considering the Bill on the Amendment to Section 6 of The Civil Union Act. I note my full support and faith in Ms. Deidre Carter, of Congress The People (COPE), in representing the issue in parliament on behalf of all affected and disenfranchised South Africans. I would like to emphasise the points raised in the first round of submissions and due to my unavailability to travel to Cape Town for the oral submissions, herewith my key talking points.  1. The Constitution protects of all South Africans and those that live in it.  2. Discrimination by Home Affairs officials is not only a breach of Constitutional Rights but also a crime against citizens on Right to Dignity and Freedom of Association .  3. After 21 years of Democracy its is unfathomable a minority group is still marginalised, and civil servants refuse to treat them with dignity and respect as enshrined in the Bill of Rights  4. I appeal to government to avoid making the same mistake/s as America, whereby this type of humiliation has led to increases of hate crimes and homophobic attacks  5. **I also note the infamous (and international) rise of people like Kim Davis, county clerk for Rowan County in Kentucky, and the Westboro Church, fearing this is where South Africa may end without the Amendment to Section 6 of The Civil Union Act**  6. I refer to point #5, and with embarrassment, reference Reverend Oscar Bougardt and his hateful rhetoric in a democratic South Africa  Gavin Borrageiro | | | |
|  | We as South Africans can be extremely proud of our Constitution which prohibits discrimination against race, gender, sexual orientation or any other characteristic of its constituents.  **As a Christian I strongly believe that we are all created in the image of God** and as such, has intrinsic dignity and worth regardless of our sexual or gender orientation, which are in line with our Constitution. People of our country must always be **protected against discrimination**, and should be treated equally in terms of the law. Based on the above, I find it **unacceptable that people working for the state are given the choice to discriminate based upon their beliefs/faith**. A person who’s believes or faith are in clash with these laws have the freedom to resign from their positions, but should not be allowed or given the choice to discriminate and act in contradiction to the law. The mere fact that this is only allowed when it comes to same sex couples, is unconstitutional and biased. How can one also ensure that these allowable actions by officers are based on their believes and not their hates? Any other believe does also not allow any person to break any laws. I also do not see the right to freedom of religion being transgressed in any way by amending this bill as it is a totally separate issue. Unfortunately some “religious” persons want to use it to discriminate.  I therefore strongly support the amendments to the bill as put forward by COPE MP Ms D Carter to ensure that the fundamental rights, and human dignity of same-sex couples are respected and protected by the State.  Lex Kirsten | | | |
|  | I would like to make my submission to the Civil Union Amendment Bill.  I completely support the amendment. As a member of the bigger LGBTIA+ community all I ask is the be treated like any other South African citizen. The foundation of our constitution is that all South Africans should be treated equal. If home affairs officers expect me to adhere to their constitutional rights, certainly they should adhere to mine?  Cobus Benade | | | |
|  | I would like to comment on the Civil Union Amendment Bill:  Please can officials at Home Affairs be mandated to serve South Africans as equals, without discriminating against any individual based on their sexual or gender preferences when choosing to marry at Home Affairs.  An official at Home Affairs should be required to serve the Constitution above personal religious preference and ensure all South Africans experience a warm and professional marriage service.  **Emily Munton** | Accounts | | | |
|  | My name is Brandon Starr and I am a 21 year old South African citizen.  While I respectfully recognise the rights of marriage officers, and fully support fellow human beings to live as they see fit, I believe that it is wrong that marriage officers are allowed to object to solomnise same-sex civil unions on the basis of conscience, religion or belief. The fact is that **same sex couples have endured discrimination for hundreds of years**. South Africans are particularly lucky in that the supreme law of our land, the Constitution, as well our Constitutional Court, has acted to protect and advance this group where possible. It goes without saying that South Africa is a leader in this sense, especially when considering the views and laws of our fellow African nations.  I understand that to support this amendment will mean that individual liberties of certain marriage officers will be curtailed. While this is usually not a desirable state of affairs, I submit **that in the discharge of their duties they are acting only as representatives of the State. In other words, they act not as individuals, but rather as a vessel for the State**.  Furthermore, as reported in the Citizen newspaper (<https://citizen.co.za/news/south-africa/1996244/mps-look-to-change-law-that-allows-officials-not-to-marry-same-sex-couples/>) approximately 40% of state employed marriage officers are expert from marrying same-sex couples. This has the effect of forcing couples to travel to other jurisdictions, towns and even provinces in order to vindicate their constitutional rights. This is a *prima facie* case of indirect discrimination and can have no place in the society we are attempting to build.  To this end I support the Civil Union Amendment Bill.  Brandon Starr | | | |
|  | * **Home Affairs employees are public servants – paid by the taxes of all taxpayers.  They are not funded by only those taxpayers who share the same perspectives as them.** * They are duty bound to provide access to all citizens.  Again not only those with whom they agree or share a common perspective with. * There should not be any opportunity to “opt out” of providing all services as provided by the Department.  **Any employee who refuses to perform their duties should either find alterntive employment outside of the department**, or should be charged with misconduct. * For too long, certain public servants have **treated law abiding citizens with contempt based on their “beliefs”;**  well that sounds a lot **like the apartheid state.  Bigotry is bigotry** – prejudice is prejudice and should be vehemently sanctioned. * If the department is going to allow discrimination against same-sex couples then it will have to: * Allow discrimination against other clients based on whatever “conscience” occurs to them. * Design a system of Redress for those customers who are being wilfully prejudiced and discriminate against.   Brandon Rennie | | | |
|  | I would like to submit a comment to Parliament with respect to the proposed amendment to the Civil Union Act that will remove the section allowing Home Affairs officials to refuse to marry same-sex couples on the grounds of "conscience, religion [or] belief".  I am for the amendment and I believe that, while acting in their official capacity, a public servant should carry out their sworn duties irrespective of their "conscience, religion, and belief". To deny citizens the opportunity to be married at the time and place of their choosing is something I am strongly against.  Julius Stopforth | | | |
|  | In February 2008, the South African Pagan Rights Alliance (SAPRA) was designated by the Department of Home Affairs as a religious organisation in terms of section 5 (1) and (2) of the Civil Union Act (Act 17 of 2006).  On behalf of religious marriage officers nominated by SAPRA, this Alliance wishes to indicate its support for the proposed Civil Union Amendment Bill.  Mr Gary Leff  Director: South African Pagan Rights Alliance | | | |
|  | I hereby strongly support the proposed Bill that will seek to amend Section 6 of the Civil Union Act, Act No. 17 of 2006.  My reason for such support stems from the fact that the Act in its current form, creates a clear opportunity for prejudice and discrimination against same-sex couples. This is due to the fact that marriage officers, employed by the State, have the option to opt-out of performing such marriages and leaves same-sex couples open for discrimination.  As far as i understand it, the Civil Union Act was enacted to remove the discrimination against same-sex couples who were not able to get married before the law was introduced. However, by allowing marriage officers to opt-out of performing such marriages, leaves us, more or less, in the same position as before. As a gay couple, we are already discriminated against by churches who do not allow us to get married in our churches. Do you really need to suffer the same from our civil servants?  Hendrik Oosthuizen | | | |
|  | **RE: Comment on the Civil Union Amendment Bill (B11-2018)**  Dear Hon. Chauke,  My name is Marius Redelinghuys, an adult male South African citizen and former Member of the National Assembly (2014 – 2017), and I am writing to you in support of the Civil Union Amendment Bill (B11-2018).  I married my husband in November 2014 at the **Centurion Home Affairs Office and while the process went smoothly and the official overseeing it was incredibly professional, this is unfortunately not the experience of many Lesbian, Bisexual, Gay, Transgendered, Queer or Intersexed (LGBTQI) couples in our country**.  A recent example reported on includes the experience of a 32-year-old lesbian woman from **Khayelitsha** who recently tried to marry her partner at the Khayelitsha Home Affairs office, but the official refused claiming her partner’s ID had expired. The official also asked her **irrelevant, offensive and discriminatory questions like “who was the top, who was the bottom**?”  Unfortunately, such incidents and officials like these undermine the image and good work done by the Department.  The landmark Constitutional Court judgment in the *Fourie* case and the subsequent Civil Unions Act passed by Parliament in 2006 brought our country one step closer to realising the vision, rights and freedoms enshrined in our progressive Bill of Rights, and our country should be proud of the pioneering role it has played and continues to play on the continent and in the world in this regard.  However, section 6 of the Act remains an impediment to the realisation of the full enjoyment of the rights and freedoms in the Bill of Rights and an obstacle to the achievement of true, substantive equality among South Africans.  The proposed amendment, apart from giving further effect to the provisions of section 9 of the Constitution, will also ensure the right to just and procedurally fair administrative action (section 33) and promote public administration governed by the democratic values and principles enshrined in the Constitution, as demanded in section 195.  The amendment is also a small, but significant, step in further rationalising and standardising a disparate, fragmented and inconsistent statutory matrimonial framework, which is one of the persistent legacies of our Apartheid and colonial past.  I hope that the Committee will ultimately undertake a comprehensive re-examination of the existing legislation governing marriages and unions to ensure that every person enjoys the extensive rights and freedoms enshrined in our Constitution. This includes equal recognition of religious marriages (other than traditional Christian marriages) and life partnerships (for which the tabling of the draft Bill is long overdue).  This should also include amending section 26 of the Births and Deaths Registration Act (No. 51 of 1992) by removing the gendered references and to provide the opportunity both heterosexual and homosexual males to alter their surnames upon marriages.  The current fragmented matrimonial framework and piecemeal recognition of the diversity of marriages and unions in the country ensures that a system of “separate, but equal” persists; and none of us are equal until we all can claim to be equal.  I accordingly fully support the Bill, and wish to thank Hon. Carter for her efforts in preparing it and starting this process, and for the Committee and all the representatives on it for their work and reported support.  Yours faithfully,  Marius Redelinghuys | | | |
|  | Good afternoon sir, I hope this message finds you well.  I write this email in response to public input on the upcoming Civil Union Bill, and following learning of the many additional obstacles put in the way of same-sex couples seeking to marry one another, formally and officially declaring their love before one another.  This right to a formal declaration of love is one that should be afforded to all, irregardless of sexual orientation. Indeed, one would think that in terms of the constitutional rights of both equality and human dignity, that such a right would be constitutionally guaranteed. And yet, due to an absurd exception allowing Home Affairs officials to decline from doing their jobs when it comes to marrying gay couples, while raising no issues around marrying heterosexual couples, gay couples have been subjected to being treated as second class citizens in a nation with a very long and very troubling history of such discrimination.  As a student of history, the comparison to the Prohibition of Mixed Marriages Act of 1949 must be drawn. This Apartheid era law prohibited interracial marriage, essentially banning certain forms of love and entrenching white supremacist beliefs on the intrinsic, separate and superior nature of the actively constructed 'white' 'race'. Fortunately this racist law has since been fully repealed, yet it is clear that the underlying core of the law, that the state or employees of the state can view one type of marriage as 'inferior' and 'wrong' while others as 'correct', has not been fully done away with. This toxic and authoritarian view must be done away with, and disposed of in the dustbin of history where it belongs, alongside the rotting remains of Apartheid, colonialism and slavery.  Perhaps some would argue that it should be down to the conscience, religion or belief of the individual Home Affairs official to decide on this matter. To these individuals the question must be asked as to whether such officials should also be allowed to decline marriages between those of different races, should they hold racist beliefs around 'upholding racial purity'. Should such officials also be allowed to decline the marriage of those from different religions? Or of different nationalities? Or even simply those who they simply do not believe should be together? Surely such a proposal is absurd. **Why should a state official be allowed to decide who should and should not be allowed to formally declare their love for one another? And if such a official truly does have such a deep and moral objection to doing their job, they are fully welcome to resign and seek gainful employ elsewhere**.  While they remain employed by us however, the people of South Africa, they should be bound to fulfill their duties to ALL South Africans, irregardless of race, gender, religion, nationality or sexuality. While they remain employed by us they should not be allowed to pick and choose who they value as those deserving of their services, and those who should have unjust obstacles put before them and be demoted to being second class citizens.  If the elected representatives of the state are to take seriously the constitutional rights of equality and human dignity, if they are to seek to continuously challenge and overturn the odious legacy of Apartheid era racism and homophobia, if they are to make a better South Africa, then they must and will vote for this bill.  Dylan Scott | | | |
|  | It seems I have misread the proposed amendment to the Act. I was unaware that Home Affairs officials are **currently** in a position where they can turn same-sex couples away. **I find this abhorrent.** If the amendment to the Act is to remove their ability to turn people away, then I FULLY support that. I cannot understand how, in a country that has one of the most liberal and inclusive constitutions, we can allow people to turn same-sex couples away and deny them services from a government institution.  Please do not hesitate to contact me should you require clarity.  Barbara Briggs-Davies | | | |
|  | I strongly support the proposed Bill, and the repealing of section 6 of the Civil Union Act, 2006 (Act No. 17 of 2006). Our reasons are as follows:  If you are in government employ, you should be willing to provide equal respect and treatment to all, as prescribed in the Constitution and relevant laws. Freedom of conscience is protected at an earlier stage, in that people should not seek jobs which ask them to be impartial on such matters if they are not willing to provide equal treatment to all citizens, regardless of their (inter alia) race, gender and/or sexual identity.  What if i hold back my services even as a private citizen because some one is not the same race as me, that would be deemed Racist and amounts to the same thing as DHA officers being able to choose who they want to help, and how much longer must LGBT person wait then to get married if they must bring in people to marry them.  Lester J Linde Vermeulen | | | |
|  | **TOWARDS QUEER EQUALITY: CHALLENGING THE CIVIL UNION ACT’S EXEMPTION FROM THE DUTY TO SOLEMNISE A CIVIL PARTNERSHIP OR MARRIAGE *Nigel Patel***  **1 Introduction**  South Africa is a global pioneer in the legal protection of queer sexual orientation rights. However, marring this progressive legal landscape of equal treatment is section 6 of the Civil Union Act 17 of 2006, which permits marriage officers to exempt themselves from solemnising civil partnerships or marriages under this Act. This article will argue that the movement to repeal section 6 ought to be supported because it is in accordance with international and domestic human rights law. To do this, I will briefly contextualise the issue. I then set out the relevant international law to show that while there is no state obligation to recognize queer marriages, there is an obligation to treat people equally and protect people with queer sexual orientations from discrimination. Finally, I shift focus to show how the domestic human rights law strongly supports the movement to repeal the impugned section. Importantly, while this issue is about marriage, the central legal issue here is ensuring that people with queer sexual orientations are treated the same way as heterosexual people.[[1]](#footnote-1)  **2 The issue in context: What is meant by queer?**  It is beneficial to explain the use of the word queer before delving into the issue. An umbrella term for sexualities that transgress heterosexual norms, it is used in this article to signify the fluidity of sexual orientation and promote associations between those whose sexualities include lesbian, gay, bisexual and pansexual.  Placing the issue of section 6 in context, a South African queer rights association, Triangle Project, has stated that this exemption has allowed government staff to openly discriminate against same-sex couples.[[2]](#footnote-2) This is founded on the fact that the Marriage Act 25 of 1961, which applies only to heterosexual couples, requires marriage officers to solemnise all marriages with which they are placed. On the other hand, the same marriage officers can make use of section 6 to refuse to solemnise a partnership or a marriage in terms of the Civil Union Act. Importantly, these marriage officers contemplated in section 6 are civil servants of the secular state.[[3]](#footnote-3)  Building the fact that this is a case of discrimination, out of the current 1120 marriage officers, 421 are exempt in terms of section 6.[[4]](#footnote-4) The implication of this is that officers who will solemnise a queer partnership or marriage are less available. People with queer sexual orientations are placed in a position that makes it substantially harder for them to realise their rights under the Civil Union Act, especially in rural areas.[[5]](#footnote-5) It is from this context that the Civil Union Amendment Bill was drafted.[[6]](#footnote-6) Attempting to repeal section 6, this article argues that the Bill is supported by international and domestic human rights law on non-discrimination and the right to be equal before the law.[[7]](#footnote-7)  It is uncontroversial that section 6 of the Civil Union Act differentiates between heterosexual people and those who have queer sexual orientations. But what is contentious is the legality of this differentiation. As such, this article will show that in international law state non-recognition of queer marriages does not currently amount to a violation of human rights. However, the treatment under section 6 amounts to discrimination and violates the international obligation on states to protect people with queer sexual orientations. Ahead of the international position, South African law explicitly protects against unfair discrimination based on sexual orientation and affords people with queer sexual orientations the right to have a civil partnership or marriage. Hence, section 6 constitutes unfair discrimination.[[8]](#footnote-8)  While the issue of section 6 relates directly to the right of non-discrimination and equal treatment, it is beneficial to briefly note the law relating to the right to marry as this highlights how South African law has gone beyond the international law position.  **3 The** **international framework**  The Universal Declaration of Human Rights (‘UDHR’) was adopted 70 years ago.[[9]](#footnote-9) Relevant to the Civil Union Act is the marriage provision which states “[men] and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family.”[[10]](#footnote-10) Importantly, this must be read with Article 1 and 2 which respectively state that all humans are born free and equal in dignity and rights, and that: “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.”[[11]](#footnote-11)  Additionally, Article 7 builds on the principle of non-discrimination by stating that all people are equal before the law and are entitled, without any discrimination, to equal protection by the law.[[12]](#footnote-12) Evident from these provisions is that the UDHR’s core principles are universality, equality, and non-discrimination. Despite this the interpretation of the marriage provision has been debated. It has been contended that the correct position is that only marriage between a man and woman is provided for.[[13]](#footnote-13) Others argue that it also provides for queer marriages.[[14]](#footnote-14) Affirming the inclusive interpretation, the South African courts have interpreted it not as literal or prescriptive, but as historically descriptive.[[15]](#footnote-15)  The International Covenant on Civil and Political Rights (‘ICCPR’) makes the international law position on marriage and discrimination based on sexual orientation slightly clearer.[[16]](#footnote-16) Adopted eighteen years after the UDHR, Article 23(2) provides for “[t]he right of men and women of marriageable age to marry and to found a family.” [[17]](#footnote-17) Important for building a case against section 6 of the Civil Union Act is Article 2(1), that provides for the “respect [of] rights … without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*.”[[18]](#footnote-18) Additionally, Article 26 makes an explicit link between equality and non-discrimination and prohibits discrimination on the different grounds.[[19]](#footnote-19) Like the UDHR, the ICCPR does not explicitly recognize sexual orientation as a prohibited ground for discrimination. The effect of this is that the right to queer marriage became an issue of interpretation.  In *Joslin v New Zealand*, the United Nations’ Human Rights Committee (‘UNHRC’), who are tasked with the operation of the ICCPR, found that not allowing people to marry based on their sexual orientation was not a violation of the ICCPR.[[20]](#footnote-20) Unlike in *Joslin*, the argument against section 6 of the Civil Union Act is based on equality and non-discrimination *within* the right to marriage, and not *for* the right to marriage itself. Accordingly, there are UNHRC decisions which support the position that the discrimination evident in the difference between the Marriage Act and the Civil Union Act is not in line with international law.  In *Toonen v Australia*, laws which made homosexuality a criminal offence were found to have violated Article 2 as “sexual orientation” was included under the ground of “sex”.[[21]](#footnote-21) It could be argued from this that the right to marry must be respected without distinction to sexual orientation.[[22]](#footnote-22) After *Toonen*, there has been a movement to protect against discrimination based on sexual orientation using Article 26 under “other status” rather than “sex”.[[23]](#footnote-23)  In *Young v Australia*, the state was found to have violated Article 26 by denying a pension claim because of sexual orientation.[[24]](#footnote-24) Importantly, the UNHRC noted that not all differentiation will be discrimination that violates the ICCPR.[[25]](#footnote-25) On the face of differentiation, such as in section 6 of the Civil Union Act, South Africa would have an obligation to show that the differentiation is reasonable and objective. In line with this it could be argued that the exemption is protecting the right to religion. [[26]](#footnote-26) However, it is unlikely that it will be found to be reasonable because the exemption renders the realisation of the right to equality a marriage officer’s choice.[[27]](#footnote-27) In doing so it treats queer people us unequal to heterosexual people and so is unreasonable.  The International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) also does not explicitly recognize sexual orientation as a prohibited ground for discrimination.[[28]](#footnote-28) However, like the current interpretation of the ICCPR, the Committee on Economic, Social and Cultural Rights have found that sexual orientation is captured by “other status” as a prohibited ground of discrimination.[[29]](#footnote-29)  Similarly, many other bodies of international law have taken a comparable approach,[[30]](#footnote-30) a regional example of this is the African Charter on Human and Peoples’ Rights (‘ACHPR’).[[31]](#footnote-31) Article 2 and 28 provide for the right to equality and non-discrimination that implicitly allows for a ground like “sexual orientation”.[[32]](#footnote-32) The slight difference that might make it difficult to challenge section 6 of the Civil Union Act using the ACHPR is that rights can be limited in terms of its Article 27(2). South Africa could argue that section 6 provides for “due regard to the rights of others, collective security, morality and common interest”.[[33]](#footnote-33) A proportionality test would be used. To successfully challenge the limitation government would have to fail to defend that the exemption is necessary for “the advantages that are to be obtained.”[[34]](#footnote-34) There is still a good chance of success as the limitation is not meant to render the right meaningless, which it does if equality is rendered a mere choice.[[35]](#footnote-35)  Further supporting the argument that section 6 of the Civil Union Act violates international law are the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.[[36]](#footnote-36) They locate sexual orientation within the right to human dignity; flowing from this it must not be the basis for discrimination or abuse.  Finally, in 2011 we saw the first United Nations Resolution and Official Report on queer rights.[[37]](#footnote-37) The Report reflected on the “denial of recognition of relationships and related access to State and other benefits.” It notes that “states are not required, under international law, to allow same-sex couples to marry” but qualifies this by recognising “the obligation to protect individuals from discrimination on the basis of sexual orientation.”[[38]](#footnote-38) Thus, in South Africa where queer couples can already get married, the differentiation in the separate Acts violate equality. Section 6 of the Civil Union Act is discriminatory as no state marriage officer can refuse to marry heterosexual couples.  **4 The domestic framework**  South African law goes further than the international law in providing for the human rights of people with queer sexual orientations. The South African Constitution sets out categories in section 9(3) that make distinctions based on them problematic.[[39]](#footnote-39) **Unlike the international instruments, section 9(3) explicitly provides that sexual orientation is a prohibited ground for discrimination**.[[40]](#footnote-40)  Section 9(4) then goes on to state that no person may unfairly discriminate, directly or indirectly, against anyone on grounds that include sexual orientation.[[41]](#footnote-41) Finally, section 9(5) provides that “discrimination on one or more of the grounds in subsection (3) is unfair unless it is established that the discrimination is fair.”[[42]](#footnote-42)  This means that once differentiation on sexual orientation is shown it will be assumed that it is unfair. The party who discriminated would then have to show that the discrimination is not unfair, making it easier to prove a case of discrimination. These provisions have been used to provide the right to marry for people with queer sexual orientations.[[43]](#footnote-43) The exclusion of queer partnerships in the definition of spouse was unconstitutional and the definition extended.[[44]](#footnote-44) In *Minister of Home Affairs v Fourie*, it was ordered that Parliament should provide queer people with the rights and duties of marriage afforded to heterosexual couples.[[45]](#footnote-45) Responding to this Parliament adopted the Civil Union Act.  As section 6 of the Civil Union Act is legislation, section 9(3) will have to be used to challenge the provision.[[46]](#footnote-46) The equality right has been framed through the lens of substantive equality, which focuses on the past and present systemic and structural barriers that are placed before people to achieve equality. This is captured in the seminal case of *Harksen v Lane NO*.[[47]](#footnote-47)  Drawing from this judgment, the constitutionality of section 6 of the Civil Union Act would be tested under a twofold analysis. Firstly, whether the differentiation in section 6 amounts to discrimination. As it differentiates on sexual orientation it is discrimination. Secondly, the issue would then be whether the discrimination amounts to being unfair. To establish this, the court must consider all relevant factors in a proportionality test.[[48]](#footnote-48) As argued, the State is unlikely to be able to successfully defend the provision which renders the equality right a mere choice.[[49]](#footnote-49) Following a finding of unfairness there would be a section 36 analysis to assess if this limitation was justifiable.[[50]](#footnote-50) This analysis considers similar factors as the unfairness test and would likely result in a finding that the limitation is unjustifiable.  In this article, I have shown how in relation to queer rights the South African Constitution is more progressive than the extensive international framework. Nevertheless, section 6 of the Civil Union Act is inconsistent with the international and domestic human rights frameworks. The movement to repeal the impugned section will bring the Act further in line with these frameworks.  **6 Conclusion**  While different judicial challenges to section 6 have been considered in this article, it is the position of this article that the current parliamentary amendment process is the best way to address the issue as it involves queer political activism which is often more effective and less limiting than litigating for queer rights.[[51]](#footnote-51) Thus, this contribution is intended to highlight the legal backing behind the current political amendment process.  The article has shown how in relation to queer rights the South African Constitution is more progressive than the extensive international framework. Nevertheless, section 6 of the Civil Union Act is inconsistent with the international and domestic human rights frameworks. The movement to repeal the impugned section will bring the Act further in line with these frameworks. | | | |
|  | I would like to take the opportunity to give my support for the proposed Bill, and the repealing of section 6 of the Civil Union Act, 2006 (Act No. 17 of 2006).  The Civil Union Act, in accordance with our Constitution, allows for equal treatment under the law for all citizens, but the current exemption whereby state officials can refuse to carry out their duty to certain members of our population based on their own beliefs means that same-sex couples wishing to marry face uncertainty and risk additional difficulty. This results in unequal treatment and marginalisation of certain sectors of the population, which goes against all that our Constitution stands for.  Although freedom of religion and the practice thereof is an important constitutional right, an individual working as a representative of our state should not be able to impact upon the delivery of state services to other individuals on the basis of their personal beliefs.  Thank you very much for your time and consideration. I'm sure you are busy with many such comments from like-minded members of the public (and no doubt some messages from those who oppose the Constitutionally enshrined principles of equal treatment for all citizens).  (Anthony) James Archibald | | | |
|  | I hope this email finds you well. I send this email with the intention of making clear that my submission is that the Civil Union Amendment Bill ought to be supported and passed.  There is no good reason for differentiating between same sex and heterosexual marriages. Distinguishing between the two and allowing home affairs officials to refuse to officiate a same sex marriage perpetuates and allows discrimination, marginalization and hatred towards a group of people arbitrarily. This is not constitutionally aligned and nor is it in line with international human rights law. In fact this violates s9 and s10 of the Constitution, undoubtedly.  I hope that we can move forward towards realizing a more equal society where people aren’t treated differently in the eyes of the law and the government based on their sexual orientations.  Sarah Donde | | | |
|  | Please remove section 6 of the civil union act. It is wrong to allow officials to choose to act against the law and our South African constitution.  Emily Buchanan | | | |
|  | Submission 1 and :  9. When Dorothy Mfaco was detained and tortured by Aparheid police, she was fighting for a South African government that defends the rights of every citizen. The role of government is to protect the rights of everyone in its territory. Thus, Parliament has a duty to ensure that laws passed do not impede on my right to equality. Section 9 (3) of the constitution of the Republic of South Africa Act No. 108 of 1996 states 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".  10. Section 6 clearly allows for a Home Affairs official to discriminate against human being on the grounds of their sexual orientation. While some may argue that the section is in place to respect or uphold the official's right to freedom of religion, belief, and conscience, it is important to remember that the right to religious freedom, belief, and conscience does not come with the right to impose those beliefs upon other people. When an official refuses to officiate a marriage between people of the same sex, that official is imposing their beliefs. A bureaucracy is meant to be neutral thus cannot choose not to provide a service to a citizen because that citizen is gay.  Bulelani Mfaco | | | |
|  | I believe Section 6 of the Civil Union bill is a clear violation of human rights.  No one should legally be allowed to discriminate against another, for whatever reason.  Please note my support of the Bill to amend the Civil Union Act and repeal Section 6.  Kind regards,  Andrea Johnson | | | |
|  | I was not actually aware until very recently that Section 6 of the Civil Union Act permitted government officials to refuse marriage services to same-sex couples.  I am in the fortunate position where I could travel and pay the cost for a certified marriage official to conduct a marriage ceremony outside of Home Affairs.  However, a large proportion of our society rely on services provided by government via the Home Affairs offices.  It is not fair that same-sex couples can be humiliated or discriminated against by an official refusing to marry them due to the official’s own personal views.  All should be equal before the law, and by extension, all citizens should be offered the same government services, irrespective of race, gender, age, sexual orientation, religion, etc.  Furthermore, when government officials, or anyone offering services to the public, are allowed to have their personal views override equal services to citizens it legitimizes discrimination and adds credence to the notion that somehow homosexuals are second-class citizens.  I fully support the proposed Bill, and the repealing of section 6 of the Civil Union Act, 2006 (Act No. 17 of 2006).  Ryan Hendra | | | |
|  | Submission 1 plus:  I implore members of parliament to legislate in such a way that no other same-sex couple has to have the experience my partner, our families and I had on what was supposed to be one of the happiest occasions in our lives.  There should be no clause allowing a government official to make someone feel like a second rate citizen in their country of birth. Sincerely,**Ncebakazi Lutuli** | | | |
|  | This email serves to support the call for the Civil Union Amendment Bill - that will remove the section of the Civil Union Act to allow Home Affairs officials to refuse to marry same-sex couples on the ground of "Conscious, religion (or) belief".  I fully support Parliament to remove this section from the bill, to ensure that no South African should be treated a second-class citizen and be discriminated against.  People that live in rural areas are especially affected by this discrimination by home affairs. It is the duty of our parliament to protect our citizens from discrimination.  Marinus Uys | | | |
|  | With this email I would kindly like to express that I support the amendment to the Civil Union Act to ensure that no home affairs person can deny a same-sex couple being married.  Marishka Bosch | | | |
|  | This email serves to lend my unwavering support for Amendment to Section 6 of the Civil Union Act. As a citizen born on South African soil and as a person part of the LGBTI+ community I wholeheartedly support this amendment as afforded to us citizens as part of our democratic freedom in South Africa.  All citizens should be treated equally and fairly under the law - and it is heartbreaking and wrong for same sex marriages to be denied based on the personal beliefs of marriage officers.  Livashlin Naidoo | | | |
|  | I SUPPORT the amendment to ensure that no Home Affairs person can deny a same-sex couple being married.  Huldah van Wyk. | | | |
|  | The Law Society of South Africa is in support of the proposed amendment captured in the Bill.  Lizette Burger Professional Affairs Manager | | | |
|  | As a citizen of the Republic, I am deeply concerned about Section 6 of the ***Civil Union Act*** (“Act No. 17 of 2006”) which states that a "marriage officer” (as defined in Section 5 of the legislation) can refuse to solemnise a civil union between “persons of the same sex.” Although not every person would like to enter into a civil union at the Department of Home Affairs, the outright refusal based on sexual orientation or possible gender identity by a civil servant is wholly discriminatory and serves as a gross violation of human dignity. Furthermore, the objection of civil servants is contradictory to the provisions stated in Section 2 of the ***Marriage Act*** (“Act No. 25 of 1961”)  and subsequently highlights the urgency for Section 6 of the ***Civil Union Act*** (“Act No. 17 of 2006”) to be repealed.  The South African Constitution is regarded as one of the most progressive examples of constitutional law. I trust that the National Assembly will take the necessary measures to protect our Constitution and discontinue the discrimination that the abovementioned Bill allows.  Thabiso Beau | | | |
|  | The Civil Union Act was created exactly for the purpose of allowing same-sex couples to be married, so for it to include the possibility for state officials to refuse to provide this service is perverse and illogical.  Amy Lilley | | | |
|  | I would like to pledge my support to the Civil Union Amendment Bill (B11-2018). Section 6 should be removed because the South African Constitution enshrines the integral human rights to equality and dignity. To offer a marriage officer the choice in granting same sex marriages is offering them the choice to discriminate thus violating a person's equality and dignity. Legislation should exist to better the lives of a country's citizens and not oppress and demean them. Duncan McIntosh | | | |
|  | COSATU and its affiliates, welcomed the Constitutional Court judgment as enhancing the values of the Constitution to all who live in South Africa, including same sex partners.  COSATU supports the CU Amendment Bill as it follows a Constitutional Court judgment and call to Parliament and seeks to ensure the CU Act is in line with the Constitution.  **COSATU understood why marriage officers were allowed to opt out of presiding over same sex marriages when the Marriages Act was amended to allow for same sex partnerships due to its religious and cultural sensitivity. However we believe that society has evolved since then and the act must be amended accordingly to be in line with the Constitution.**  **It is important to note that the LGBQTI community frequently experience serious discrimination in many forms. It is important that we all seek to continuously seek to combat this and to further advance and deepen the constitutional rights of all South Africans. This bill will be an important progressive step in this direction.**  We understand that some marriage officers may not support same sex marriages. However personal beliefs cannot be allowed to undermine the constitutional and legal rights of other persons. Persons who do not feel that they are able to adhere to and implement the values of the Constitution should not feel obliged to remain marriage officers. Public servants in particular are compelled by law to serve all persons without fear or favour. Unfair discrimination is expressly prohibited by our Constitution.  **COSATU and its affiliates represent more than two thirds of public servants, including those officials tasked to preside over marriages. We will work as COSATU and our affiliates to sensitise our members on the need to reflect the values of the Constitution and to educate and prepare them to implement the progressive objectives of the bill once enacted into law.**  We urge Parliament to process the bill speedily to ensure its passage into law before the 2019 elections.  We encourage the Portfolio Committee on Home Affairs to process the bill as a matter of urgency.  Public hearings should be held on it. COSATU would like to be provided space during such public hearings to motivate its support for the bill. We expect that there would be some resistance to the bill, however this should not induce Parliament to shy away from it, as the Constitution must reign supreme at all times for all South Africans.  COSATU would like to thank the Honourable Carter for drafting this progressive bill. COSATU fully supports it and is committed to assisting with and supporting its passage.  We look forward to engaging with the Portfolio Committee on Home Affairs on the CU Amendment Bill.  COSATU Matthew Parks Parliamentary Coordinator | | | |
|  | Dear sir  I would like to state my full support for the Civil Union Amendment Bill (B11-2018) and the removal of **Section 6 that allows for public servants to refuse this service to be delivered to me as a tax paying citizen of South Africa which the Law and our Constitution allows me.** The fact that individuals can opt out of performing a Civil Union for me and my chosen life partner at the nearest delivery point to me (Home Affairs office) amounts to discrimination against me which is contrary to my rights as provided for in the Bill of Human rights. Persons who opt for employment as civil servants and recieve a salary paid for by the tax money contributed by the citizens have a duty to perform all tasks as required by the Law of the country and their own personal views have to take second place to the duty they have to perform. It is their choice to take up this employment and if that is against their conscience then the job is not for them and they have a choice to not enter into this employment opportunity.  Please amend the Bill to prohibit any form of discrimation against LGBT+ person's in South Africa.  Kind regards  Johann Fischer | | | |
|  | I refer to the call for public comment on the Civil Union Amendment Bill (B11-2018). Kindly receive herewith, my letter in support of the call to repeal section 6 of the Civil Union Act; which allows a marriage officer to object, on the ground of conscience, religion and belief, to solemnising a civil union between persons of the same sex.  As a human rights activist, I consider that the fundamental human rights principle of equality, which is enshrined in the Bill of Rights in the Constitution of the Republic of South Africa, means that civil marriage should be available, without discrimination, to all couples, regardless of sex, sexual orientation or gender identity.  Furthermore, South Africa is a party to regional and international treaty instruments focusing on the protection and expansion of civil and political rights, including the UN International Covenant on Civil and Political Rights (ICCPR) African Charter on Human and Peoples’ Rights (ACHPR). Under these instruments, South Africa has a legal obligation to protect and promote human rights. Like the Bill of Rights in the Constitution of the Republic of South Africa, these treaties include the principles of equality, non-discrimination, and preservation of human dignity.  Section 6 of the Civil Union Act is a direct violation to these principles.  I await your response to these submissions and comments in due course.  Sandisiwe Gwele | | | |
|  | I was shocked when I found out that Home Affairs officials are allowed to refuse to marry same sex couples, I had always believed South Africa was rather progressive in that respect, if not culturally, then legally. It seems completely illogical to me that people can refuse to marry same sex couples when it has absolutely no effect on their life and every effect on the life of the couple. They should not have to travel to a different Home Affairs office that is more accepting to have access to something they are legally entitled to.  I am a 17 year old queer person and I know I'm idealistic and liberal but not denying someone something they are legally entitled to does not seem so unrealistic to me.  I hope you will take into consideration the views of the people that this will actually affect.  Kale Boyes. | | | |
|  | I am a 17 year old homosexual female that resides in Cape Town, South Africa. Reading the article about Home Affairs branches being able to refuse marrying same sex couples broke my heart and made me question the fate of homosexual couples in this country. I always believed that South Africa was advanced when it came to the rights of queer individuals, but I seem to be mistaken.  I do not believe that the excuse for branches to deny same sex marriages is in any way sufficient. "Conscience, religion [or] belief" does not give a branch the right to deny people of their basic human rights. Who someone chooses to love should not dictate how they get treated in this country and should be something completely irrelevant to the branches of Home Affairs.  Same sex couples are no different than heterosexual couples. We are not defined as a human being by the people that we love, but by our morals and actions. The fact that branches get to decide against something that every human being should be granted without question makes me physically ill. The philosophy of one branch could mean the inability of hundreds of couples to be legally wed, which is horrifying.  Regardless of beliefs or religious views, people should not be discriminated against. Home Affairs should not be able to decide who gets to fulfils their wishes and who has to go home feeling lost, empty and hopeless. Couples should be able to get married and celebrate the love that they have for each other irrespective of gender. The fact that couples have to drive to different branches to try and gain legal acceptance of their love should not even be a possibility, and homosexual couples deserve the exact same treatment of that given to heterosexual couples.  I hope you find it in your heart to understand that this Civil Union Amendment is challenging the lives of people who have done nothing wrong. All they are wanting is to be acknowledged legally with the love of their lives. Denying someone something that they are  legally entitled to is dehumanising and wrong.  Jenna Maxwell | | | |
|  | I am aware of the changes that parliament has called for public comments on the Civil Union Amendment Bill and that the aim of this is to remove Section 6 of the Civil Union Act.  In regard to this, that home affairs officials will be able to refuse to marry same sex couples as they see fit, this is unfair and unjust. To not allow anyone the right to marriage because you disagree with the union is against all the laws this country has in place, the highest form of degradation and inequality. I ask that you do not allow this, as someone who would like to get married one day, as a gay women, this is stripping me of my rights.  Kristina Nichol | | | |
|  | As expressed in my previous email, I agree with the premise of Ms Carter's (COPE) submissions to the committee that Section 6 of the Civil Union Act, 2006 (Act No. 17 of 2006) creates a clear opportunity for prejudice against same-sex couples.  The core of my disagreement with the current act is that it allows a service provided by the government for all people, to be selectively denied to some of our citizens purely based on their sexual orientation. There would be a massive outcry if this applied to medical services, police protection, or other vital services for the very same reasons - a government service, provided by people employed by the government, should be equally available to all citizens and should not be denied to some based on physical or other characteristics of these citizens.  As Jacques Rousseau says (https://www.synapses.co.za/the-civil-union-amendment-bill/): "State officials have a fundamental right to believe whatever they like, but public servants should not be able to pick and choose which laws they will follow or which services they will provide."  I am fully in support of this amendment, and the motivations behind it.  Paul Sainsbury | | | |
|  | I write this letter to you today to express my full support for the proposed Bill, and the repealing of section 6 of the Civil Union Act, 2006 (Act No. 17 of 2006).  It is alarming that section 6 of the Civil Union Act which allows discriminatory treatment towards couples of the same gender seeking to marry, has resulted in a situation where only 28,6% of Home Affairs branches have marriage officers who are willing to marry same-sex couples. This is clearly unacceptable, and has severe consequences on the rights of LGBTI persons.  I write this submission not only as a citizen of South Africa, but also as a committed public servant who has worked for the public sector for twenty years. It is unacceptable that any public servant should be allowed to opt out of serving every citizen in our country and is completely contrary to Batho Pele.  The Amendment will address this inequality and create access to marriage for many in the LGBTI community.  I trust you will consider this submission.  Melinda Swift | | | |
|  | I write to you as a citizen of South Africa in support of the Bill to Amend the Civil Union Act brought by COPE MP Diedre Carter.  I am in support of the Bill on the grounds that it seeks to address the apparent fundamental flaw arising from Section 6 of the current legislation which allows for marriages officers to "opt-out" of performing their duties and that the result has been unequal access to marriage for LGBTQ citizens of South Africa. From my own reading out of interest on the matter it would appear that the current legislation has resulted in some of our citizens being unable to access the services of a marriage offer prepared to marry them in their area of residence. Those who cannot afford to travel to a Home Affairs office to seek the services of an officer prepared to marry them would therefore be marginalized today.  I support equality in all spheres of life and would like to see an amendment which does not leave space for discrimination to South Africans debated in parliament as I believe it serves the interest of all South Africans in our commitment to equality in this country.  Darryn Brackenridge | | | |
|  | I believe the government officials should marry homosexual couples!  What's is the purpose to legalize Gay Marriage if government official don't marry Us? After all we are tax paying citizens and deserve equality in every stance. Regards T.Pillay | | | |
|  | I would like to give my support for the Civil Union Amendment Bill of 2018 and would like that Section 6 of the Civil Unions bill be repealed. In a non-discriminatory society where we all should enjoy equal rights, it is not acceptable that Home Affairs Marriage Offers can refuse to marry same-sex couples. The current provisions of Section 6 of the Bill is discriminatory and unconstitutional. Jonathan Bishop | | | |
|  | I am writing to let you know that myself and my colleagues all stand firmly by the idea that the Civil Unions Act must be amended as a matter of urgency.  I am willing to do whatever it takes to show my support for the Civil Unions Amendment Bill.  Kellyn Botha | | | |
|  | I strongly support the proposed Bill, and the repealing of section 6 of the Civil Union Act, 2006 (Act No. 17 of 2006).If you are in government employ, you should be willing to provide equal respect and treatment to all, as prescribed in the Constitution and relevant laws. Freedom of conscience is protected at an earlier stage, in that people should not seek jobs which ask them to be impartial on such matters if they are not willing to provide equal treatment to all citizens, regardless of their (inter alia) race, gender and/or sexual identity. Tyra Naidoo | | | |
|  | I would like to show my support for the Civil Union Amendment Act proposed by the Honourable Carter from COPE.  Pierre du Plessis | | | |
|  | As per 43 above Melissa Hutchons | | | |
|  | As above Sibusiso Nqunqeka | | | |
|  | As above Jenny Chadwick | | | |
|  | Introduction  The Women's Legal Centre welcomes the opportunity to make submissions to the Portfolio Committee in relation to the Civil Unions Bill Bllof 2018. The Women's Legal Centre is an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy, education and training. The Centre has a vision of women in South Africa who enjoy equal and substantive access to their rights, being free from violence, empowered to ensure their own sexual health and reproductive rights, free to own their own share of property and resources, having a safe place to stay, access to work in a safe and equitable environment. The Centre was founded in 1998 and remains uniquely placed as the only dedicated women's rights legal centre of its kind in South Africa. Our programmatic focus areas are shaped by the needs of the women who seek assistance from us. These submissions fall into our programmatic work on relationship rights.  Purpose of the Civil Unions Act  The Civil Unions Act 17 of 2006 ("the Civil Unions Act") came into effect to realize governments obligations to recognise it obligations in respect of the institution of marriage and to provide for and ensure that marital relationships between homosexual couples are treated in the same manner as marriages concluded by heterosexual couples. Thereby government ensuring that they do not continue to perpetuate discrimination and entrench discrimination based on sexual orientation'.  The Constitution as well as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("the Equality Act") prohibits unfair discrimination and seeks to promote equality in respect of persons or social groups who have historically suffered discrimination.  The history of discrimination and criminalisation against homosexual people in South Africa therefore cannot be ignored, and the Civil Unions Act' s role in addressing such past discrimination needs to be acknowledged. The Civil Unions Act is therefore a response to the past criminalisation and discrimination faced by a particular social group within our country.  Our courts have found that such discrimination was present in our society and as a result in our law, and that steps needed to be taken in order address discrimination based on sexual orientation and gender identity. One of the earliest cases to address discrimination based on sexual orientation is the matter of National Coalition v The Minister of Justice' in the matter dealing with the criminalisation of sodomy the Court stated:  "At the heart of equality juris prudence is the rescuing of peo ple from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow /ram institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disad vantaged group itself, as happens in the case of the disabled. In the case of gays it comes from compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundl y disrespectful of the human personality and violatory of equality"  The passage and adoption of the Civil Unions Act  The passage of the then Civil Unions Bill4 was not without controversy, disagreement and dissent. The legislation was introduced flowing from litigation in the litigation and judgment in the Constitutional Court of the M inister of Home Affairs and Another v Fourie and Another' case. On 14  November 2006 the Bill was debated by parliamentarians and the question of recognition of rights to homosexual couples to marry was debated as well as section 6 of the Bill.  A number of political parties refused to vote in favour of the Bill7, the State Law Advisor's refused to  certify the Bill as it believed that it was not in compliance with the Constitutional Court judgment and would not hold Constitutional muster, and Chapter 9 institutions such as the South African Human Rights Commission believed strongly that the Bill created a system of 'separate but equal' doctrine that would contribute towards the ongoing discrimination and stigmatization of gay and  lesbian people. The issue of section 6 and the manner in which it allows for state sanctioned discrimination was identified at this juncture and raised as a serious violation of the Constitution and the rights of homosexual couples. **Civil Society Organisations equally raised the concern about section 6 most notably the Joint Working Group' ('JWG') who made submissions during the public participation process of the Bill. The JWG specifically stated that they object to allowing for conscientious objection by public officials based purely on a couple's sexual orientation. They reiterated that section 6 reinforces discrimination against same sex relationships, which is exactly what the Constitutional Court ordered the state to address. It was however retained in the legislation when it was passed by the National Assembly.**  The doctrine of separate but equal is now part of our family and marriage laws in particular as we have marriage recognition in relation to the heterosexual couples in the Marriages Act, the Recognition of Customary Marriages Act for those wanting to solemnise their marriages in terms of their African customs and traditions and the Civil Unions Act. The age requirements to conclude such marriages vary with those wishing to enter into a marriage under the Marriages Act and the Recognition of Customary Marriages Act for instance may apply for exemptions in terms of the age  Health Centre, Forum for the Empowerment of Women, Gay and Lesbian Archives, Gender Health Centre, Gender Dynamix, amongst others.  requirements and allowing for minors to enter into marriages. No such exemption or exception is available to homosexual minors wanting to enter into a Civil Union.  The unequal treatment implies that there is ' something wrong' with homosexuality and couples entering into marriages when they do not conform to what are acceptable norms and values. It takes us back to an area referenced in the National Coalition judgment in which the Court said that:  "... Post unfair discrimination frequentl y has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied. Section 6 is such an ongoing negative consequence as it continues to perpetuate discrimination.  The right to equality  Section 9 of the Constitution defines equality as "the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken." The proactive burden that is placed on the state to address discrimination was further set out by the Constitutional Court in the case of Carmichele v The Minister of Safet y and Security10 where the Court said:  [T]here is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.  On the issue of equality in the National Coalition case the Court said that:  "The present case shows well that equality should not be confused with uniformity; in fact, uniformity can be the enemy. Equality means concern and respect across difference. It does not pre-su ppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equalit y therefore does not imply a levelling or homogenisation of behaviour but an acknowled gement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma, and punishment. At very best, it celebrates the vitality that difference brings to any societ y 11 "  The right to religion  The South African Constitution also acknowledges the right to religious believes and practices. Section 15 of our Constitution recognises that "[E]veryone has the right to freedom of conscience, religion, thought, belief and opinion." Section 31 of the Constitution establishes the right to culture, religion and linguistics by stating:  "[P]ersons belonging to cultural, religious or linguistic community may not be denied the right with other members of that community  (a] To enjoy their culture, practice their religion and use their language; and  (b)To form, join and maintain cultural, religious and ling uistic associations and other organs of civil societ y."  Section 9 of the Constitution off course also recognises the right to religion by specifically listing religion, conscience, belief or culture as listed grounds under which one cannot be discriminated against.  Balancing of rights  In many ways the repeal of section 6 deals with the intersection between the right to equality and the right to religious observance or conscience. The intersection appears to be addressed in the Civil Unions Act in both the definition and distinction that is drawn between marriage officers which is:  (a) A marriage officer ex officio or so designated by virtue of section 2 of the M arriages Act;  (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.  Those persons who subscribe to a particular religious faith or denomination who is a designated marriage officer is clearly different from persons who are designated in their official capacity to serve a government purpose as a marriage officer. The Civil Unions Act goes further to distinguish two clearly different roles and responsibilities for the two different types of marriage officers that it has identified.  Section 5 of the Civil Unions Act speaks to the process that needs to be followed by a religious denomination or organisation whereby in writing it seeks to be recognised as a designated religious organisation or denomination which will solemnise marriages under the Act. The same section sets out a process whereby the authority or designation can be revoked. This section clearly speaks to persons who are marriage officers within designated religious organisations and institutions and who as part of such organisations and institutions solemnises marriages in terms of the doctrine and ideology of the religion which they prescribe to.  Our understanding is that the proposed Bill does not deal in any way with the repeal of this section or the rights conferred to these marriage officers in section 5. These are not the individuals referred to in part (a) of the definitions and these are not the individuals which the Bill seeks to address.  The focus of the Bill is on those marriage officers who are designated as such in their official capacity and who for all intense purposes are fulfilling a state obligation in giving effect to the marriages legislation. In our experience these are marriage officers employed by the Department of Home Affairs and who as employees of the Department of Home Affairs is tasked with the implementation of the Civil Unions Act in that they perform / solemnise marriages on behalf of the state.  The question which arises is whether there is a balancing of rights at play and whether the state can in fact have a religious position that would allow for it to exempt itself from fulfilling a Constitutional duty. Our submission is therefore that there is no balancing of rights required in this instance where effectively the state has a duty to realize the rights of persons belonging to a social group within our country.  This question has been dealt with in other jurisdictions internationally and we draw attention particularly to Canadian case law where couples who were denied same sex marriages on the basis that the marriage commissioner refused to solemnise such marriages because of religious convictions. The Saskatchewan Human Rights Tribunal and later the Saskatchewan Court of Queen's Bench 12 upheld the decision that to deny same sex couples the right to marry was in fact discrimination. The Court held that a marriage commissioner is empowered by the legislation to perform marriages. The duty is therefore to fulfil a government function on behalf of the  government. The Court held that when acting in such a capacity the marriage commissioner's personal religious rights can legitimately be limited to exclude discrimination on the basis of sexual orientation.  The question has also been dealt with by the French Constitutional Court in the case of M. Franck M et autres13, which dealt with conscientious objection by seven mayors to performing same sex  marriages. The submitted that their constitutional right to freedom of conscience was sufficient for them to refuse to solemnise same sex marriages. The Constitutional Court was very clear in stating that public interest and proper functioning of government instruments were of greater consequence. The Court went on to say that there was an obligation on the state and public services to remain neutral in the provision of services to citizens.  These two examples indicate that the challenge which section 6 currently presents are not unique and have been dealt with by other countries in relation to same sex marriages. Unlike the Civil Unions Act, which currently allows for the continued discrimination by the State these jurisdictions have found that the continued discrimination cannot be justified.  South African Courts have similarly dealt with the intersection of equality and religion. In the matter of Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park14 the Court distinctly was faced with the balancing of the right to equality and discrimination based on sexual orientation. This was a case pertaining to the balancing of freedom of religion and equality rights. The plaintiff, John Strydom, was employed by the Moreleta Park congregation of the Dutch Reformed Church (NGK) until his contract was terminated because he was in a same-sex relationship.  This termination was found to be unfair discrimination that was unlawful under the Promotion of Equality and Prevention of Unfair Discrimination Act. The Court emphasised:  "I repeat that the impact on religious freedom of not granting the church an exemption from the anti-discriminatory legislation is minimal in the case of the complainant remaining an in his position as a lecturer of music. On the other hand, the fact of being discriminated against on the ground of his homosexual orientation hod an enormous impact on the complainant's right to equality, protected as one of the foundations of our new constitutional order. Likewise his right to dignity is seriously impaired due to the unfair discrimination."  If the Church in the above matter was found to have discriminated against an employee. The Court weighed the Churches right to its religious believes and found that the impact of that belief system discriminated against the teacher, and that the impact of the Church was minimal, but in terms of its impact on the complainant goes to heart of the Constitutional values what we seek to uphold as a country.  That section 6 reinforces a separate but equal system cannot be in doubt. No other marriage legislation in the country makes provision for conscientious or religious objection on the part of a state employee to fulfil a state obligation. The state has no religion and has a duty to ensure that the right to religion is not practices in such a way that it perpetuates discrimination on a daily basis. The state cannot justify such discrimination.  Conclusion  The preamble to the South African Constitution states that:  "[W]e therefore, through our freel y elected representatives, adopt this Constitution as the supreme law of the Republic so as to -  Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights..."  The Civil Unions Act was a critical step in our road to healing the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights. Section 6 therefore cannot be permitted as it perpetuates discrimination based on sexual orientation. In choosing to accept a position of employment especially a position where one assumes the responsibilities and obligations of the state there cannot be an instance where individual conscience or religion can be allowed to trump the rights of the very people that the state has rights and obligations towards.  1 Section 9(3) of the Constitution  2 National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCTll/98) [1998]  3 [129]  4 Civil Union Bill B26 of 2006  5 2005 (3) BCLR 355 (CC)  6 www.info.gov.za/gazette/bills/2006/b26b-06.pdf  7 Many parties objected not because it did not meet Constitutional muster, but because parties raised conscientious objection to the Bill and its purpose.  8 Members of the JWG included Activate Wits, Behind the Mask, Durban Lesbian and Gay Community and  9 [60]  10 2001 (10) BCLR 995 (CC) para. 44  12 Nichols v Saskatchewan (Human Rights Commission) 2009 SKQB 299, [2009] 10 WWR 513  13 Franck M., decision no. 2013 -353 QPC, Oct. 18 2013, at para. 10; Alkotmanybirosag [AB] [Constitutional Court] Mar. 25, 2010, No. 32/2010 (Hung.)  **Women’s Legal Centre Aretha Louw** | | | |
|  | **Joint Submission Matthew Clayton Triangle Project matthew@triangle.org.za**  **Sanja Bornman Lawyers for Human Rights sanja@lhr.org.za**  Introduction ........................................................................................................................................  1. Section 6 results in direct discrimination against same-sex couples ..........................................  a. South Africa’s fundamental constitutional rights to equality and dignity ..............................  b. The Fourie case and the constitutional rights of same-sex couples to marry.........................  c. Our regional and international legal obligations towards same-sex couples .........................  2. Section 6 of the Civil Union Act violates the equality and dignity rights of same-sex couples ..  3. This limitation of the rights of same-sex couples by Section 6 is not justifiable in law ............  4. The Bill does not violate the religious rights of state officers...................................................  5. Balancing competing rights in an open and democratic society ..............................................  Conclusion ......................................................................................................................................  Introduction  Triangle Project and Lawyers for Human Rights welcome the opportunity to make written submissions on the Civil Union Amendment Bill (the Bill).  Triangle Project has been offering professional services to ensure the full realisation of constitutional and human rights for lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, their partners and families since 1996. The organisation is involved in the provision of direct services to LGBTI people, strengthening community organising and ensuring a consistent LGBTI voice in policy development.  Lawyers for Human Rights (LHR) has a 39 year track record of human rights activism and public interest litigation in South Africa. LHR uses the law as a positive instrument for change and to deepen the democratisation of South African society. To this end, it provides free legal services to vulnerable, marginalised and indigent individuals and communities, both non-national and South African, who are victims of unlawful infringements of their constitutional rights. The LHR Gender Equality Programme specifically pursue systemic remedies in respect of gender-based violence and inequality in South Africa and the region, serving women, girls, and the LGBTIQ+ community.  Both Triangle Project and LHR strongly support the Bill, and in this brief submission we wish to advance three distinct arguments in favour of the Bill:  1. Our law has firmly entrenched the principle that individuals deserve dignity and equal treatment by the state, no matter their sexual orientation. Consequently, the state has a constitutional obligation to ensure same-sex couples are treated by the state using the same standards as different-sex couples. The effect of Section 6 of the Civil Union Act is to give statutory discretion to officers of the state to discriminate against same-sex couples on the basis of those officers’ religious beliefs, in violation of their constitutional obligation. Officers of the state should not have discretion to unfairly discriminate against any individual requiring state services on the basis of their personal beliefs. For this reason, Section 6 must be repealed.  2. The right to religious belief, conscience and practice is also fundamental to our constitution. Some might argue that the proposed Bill conflicts with this right. We disagree. The amendments do not encroach on the freedom of officers to hold beliefs, or practice religion, as private citizens. Further, the right to practice and hold religious beliefs, like all rights, is subject to fair and reasonable limitations. We believe that the right to religious belief, conscience and practice does not extend so far as to allow officers of the state to discriminate against the rights of others because of their personal religious beliefs. Anyone in the role of an officer of the state must act in accordance with the state’s constitutional obligations and not on the basis of their personal prejudices. Section 6 of the Civil Union Act unjustifiably and unreasonably extends the right of religious belief, conscience and practice to limit the equality rights of same-sex couples.  3. Though we do not believe the repeal of Section 6 creates a conflict of rights, sometimes rights do come into opposition or conflict. In these cases, the state can look to guidance from the courts on how it can accommodate all rights. To this end, the law has already held that the right to religious belief, conscience and practice cannot limit the right to equality. Thus repealing Section 6 of the Civil Union Act will accord with the state’s constitutional obligations.  While the Civil Union Act is a response to obligations set out in the Bill of Rights, it is also a response to obligations set out by the Constitutional Court. We submit that the presence of Section 6 in the Civil Union Act results in the failure of the act to meet the obligations created by the Constitutional Court.  We also urge the government to put in checks and standards to ensure state officers are, in practice, granting marriage certificates to same-sex couples using the same standards as for different-sex couples. The repeal of Section 6 of the Civil Union Act will address formal direct discrimination, but stigma and prejudice against same-sex couples seeking marriage registrations may persist if the state does not effectively train officers that will be affected by the change and dispel myths. We believe this positive action is necessary and recommend that the state consult organizations such as Triangle Project and LHR in its implementation process.  1. Section 6 results in direct discrimination against same-sex couples  We believe that Section 6 as currently written and applied amounts to direct violation of the rights to equality1 and human dignity2 on the ground of sexual orientation. These fundamental constitutional rights may only be limited in accordance with Section 36 of the Bill of Rights. We believe that Section 6 of the Civil Union Act fails the test in Section 36 of the Bill of Rights, the so-called limitations clause, completely. As a result, Section 6 of the Civil Union Act allows the state, through its officers, to practice direct unfair discrimination against people based on their sexual orientation.  a. South Africa’s fundamental constitutional rights to equality and dignity  The right to equality is a foundational one of our democracy. Violations of the right to equality, which do not seek to redress past injustices, should be viewed with suspicion. The right to equality  is closely connected with the right to dignity. The right to dignity includes the right to family life.3 This in turn consists of the right to marry.4  The Constitutional Court considered these rights in regards to gay and lesbian South African Permanent Residents who are in permanent same-sex relationships with foreign nationals in the case of National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others CCT10/99. In this case, Ackermann J stated in his judgment:  “The rights limited, namely equality and dignity, are important rights going to the core of our constitutional democratic values of human dignity, equality and freedom. The forming and sustaining of intimate personal relationships of the nature here in issue are for many individuals essential for their own self-understanding and for the full development and expression of their human personalities. Although expressed in a different context and when marital status was not a ground specified in section 8(2) of the interim Constitution, the following remarks of O’Regan J in Harksen, are apposite:  “I agree that marital status is a matter of significant importance to all individuals, closely related to human dignity and liberty. For most people, the decision to enter into a permanent personal relationship with another is a momentous and defining one.””5  Ackermann J further considered the importance of these rights to same-sex couples:  “The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.”6  Consequently, the court recognized the equality rights of gay and lesbian South African Permanent Residents who are in permanent same-sex relationships with foreign nationals under the Aliens Control Act 96 of 1991.  Equality and human dignity is at the core of what makes Section 6 of the Civil Union Act untenable. As it currently stands, Section 6 legally allows state officers to exercise personal discretion in denying couples the right to marry because of their sexual orientations.  b. The Fourie case and the constitutional rights of same-sex couples to marry  On 1 December 2005 the Constitutional Court decided the matter of Minister of Home Affairs and another v Fourie and Bonthuys CCT60/04, commonly known as the Fourie case. The central question the court had to decide, was: “does the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amount to denial of equal protection of the law and unfair discrimination by the state against them because of their sexual orientation?7”  In its judgment, the court reflected that:  ‘gays and lesbians are a permanent minority in society who have suffered patterns of disadvantage and are consequently exclusively reliant on the Bill of Rights for their protection; the impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels; family as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family  and what constitutes family life should change as social practices and traditions change; permanent same-sex partners are entitled to found their relationships in a manner that accords with their sexual orientation and such relationships should not be subject to unfair discrimination; and same-sex life partners are “as capable as heterosexual spouses of expressing and sharing love in its manifold form.8”’  The court further held, “(i)n a long line of cases, most of which were concerned with persons unable to get married because of their sexual orientation, this Court highlighted the significance for our equality jurisprudence of the concepts and values of human dignity, equality and freedom. It is these cases that must serve as the compass that guides analysis in the present matter, rather than the references made in argument to North American polemical literature or to religious texts.”  By the time the case got to the Constitutional Court, it had already traveled through the Supreme Court of Appeal (SCA), where “far-reaching doctrines of dignity, equality and inclusive moral citizenship” were articulated. The court in the SCA articulated that the capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations. It offers a social and legal shrine for love and commitment and for a future shared with another human being to the exclusion of all others.  The Fourie case was re-affirmed in the Constitutional Court in the cases of Gory v Kolver NO [2006] ZACC 20, and Laubscher N.O. v Duplan and Another [2016] ZACC 44. These cases dealt with the rights of permanent same-sex partners to inherit each other’s estates on the death of one of the partners.  Notably, the court in Fourie pre-empted the reality that “(l)egislative developments… have ameliorated but not eliminated the disadvantages same-sex couples suffer.” This is precisely what Section 6 of the Civil Union Act represents – the failure of the Civil Union Act to eliminate discrimination against same-sex couples, seeking marriage services from the state. For this reason, Section 6 must be repealed.  c. Our regional and international legal obligations towards same-sex couples  The African Commission on Human and Peoples’ Rights addresses the right to non-discrimination on the basis of sexual orientation and right to have equal protection before the law in its Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity9.  Additionally, the African Commission, in the 245/02 Zimbabwe Human Rights NGO Forum v Zimbabwe case10, accepted that Article 2 of the African Charter, which provides for the enjoyment of all human rights, incorporates equality of treatment on the basis of sexual orientation.11 In that decision, the Commission notably stated:  “Discrimination can be defined as applying any distinction, exclusion, restriction or preference which is based on any ground such as […] religion […], and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms. From the definition of discrimination provided above, we can conclude that a universal ‘composite concept of discrimination’ can contain the following elements, stipulates a difference in treatment, has a certain effect and is based on a certain prohibited ground.”12  We argue that the effect of Section 6 of the Civil Union Act is to impair the recognition, enjoyment, and exercise of same-sex couples to marry because the provision allows state officials to exercise a discriminatory preference based on religious grounds. The African Commission, in the case above, further stated that States have an obligation to prevent this sort of effect:  “The general obligation is on States Parties to the different human rights treaties to ensure through relevant means that persons under their jurisdiction are not discriminated on any of the grounds in the relevant treaty. Obligations under international human rights law are generally addressed in the first instance to States. Their obligations are at least threefold: to respect, to ensure and to fulfil the rights under international human rights treaties. A State complies with the obligation to respect the recognised rights by not violating them. To ensure is to take the requisite steps, in accordance with its constitutional process and the provisions of relevant treaty (in this case the African Charter), to adopt such legislative or other measures which are necessary to give effect to these rights. To fulfil the rights means that any person whose rights are violated would have an effective remedy as rights without remedies have little value.”13  Further, most international human rights bodies already recognise LGBT rights as part of their non-discrimination regimes.14 The ‘Yogyakarta Principles’, developed by the International Commission of Jurists (ICJ), are internationally recognized principles on the application of international human rights law in relation to sexual orientation and gender identity. Principle 24 affirms the right of everyone to found a family, regardless of sexual orientation or gender identity. Principle 24 emphasizes, “Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members,” and further states that States must “[t]ake all necessary legislative, administrative and other measures to ensure the right to found a family… without discrimination on the basis of sexual orientation or gender identity.”15  2. Section 6 of the Civil Union Act violates the equality and dignity rights of same-sex couples  Section 6 harms the dignity of same-sex couples both in law and in practice. In practice, numerous same-sex couples have been turned away from Home Affairs offices across the country by staff who refuse to preside over their ceremony. One same-sex couple was turned away from four different Home Affairs offices in Tshwane. Another couple in Ekurhuleni were turned away from two different Home Affairs offices in their city.16 For these couples, which cannot travel around the country in search of a favourable Home Affairs office, there is no practical difference between being denied a marriage certificate from an individual officer in their city due to that officer’s personal beliefs, and being denied marriage rights by the state. The officer and the state are one and the same – the officer acts with the full weight of the state. The result is the denial of privileges that same-sex couples are constitutionally entitled to receive, as stated in Fourie.  There are many other stories from across the country, which speak to the indignity same-sex couples must endure in order to formalise their relationship. On what should be a joyful day, LGBTI people speak of their humiliation “It was just very humiliating. I was very upset because they had given the commitment that this would not happen again. It was a complete shock. Every time I talk about it, even now, I get upset.”17  In effect, Section 6 gives officers of the state the rights to discriminate against a vulnerable minority. Consequently, it is unsurprising that so many state employees within Home Affairs treat LGBTI people with contempt; and do so with seemingly little fear of consequences. This cannot stand.  3. This limitation of the rights of same-sex couples by Section 6 is not justifiable in law  Where it has been established that someone’s rights are invoked by a government action or law, any limitation to these rights must be done in accordance with Section 36 of the Bill of Rights, the so-called ‘limitations clause.’ Section 36 of the Bill of Rights states:  The rights in the Bill of Rights may only be limited in terms of law of general application to the extent the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including -  a) the nature of the right;  b) the importance of the purpose of the limitation;  c) the nature and extent of the limitation;  d) the relationship between the limitation and its purpose; and,  e) less restrictive means to achieve the purpose.  Except as provided above or elsewhere in the constitution, no law may limit any right entrenched in the Bill of Rights.  We argue that the limitations clause cannot justify officers acting for the state in providing discriminatory services to same-sex couples based on personal religious belief or conscience.  The relationship between the limitation and its purpose is a fragile one given that the offending section aims to protect the rights of individuals who are providing service as the state. This means that when assessing the connection between the limitation and the purpose, it is the right of the state as an entity and not the right of the individuals who render a service, which is of primary concern.  Notably, Section 8 of the Constitution provides: “(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”. Government officers fulfill the duties of the state, and have the requisite obligations to provide service that is non-discriminatory.  Considering that the nature of the right is that of equality and dignity of same-sex couples to be recognized by the state, the purpose of the limitation, which affords those state officers whose religious beliefs do not recognize same-sex unions the ability to deny those individuals, results in an unreasonable and unjustifiable restriction on those rights by the state.  The Fourie decision also references Ackermann J’s judgment in the so-called Sodomy case, where he stated, “(i)t is nevertheless equally important to point out that [religious views against homosexuality] views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation.”18 We submit that once again, in this matter, we must be guided by our country’s equality and dignity jurisprudence, and evaluate the impact of Section 6 on that basis.  Furthermore, as the National Coalition for Gay and Lesbian Equality judgment emphasized, “Discrimination does not take place in discrete areas of the law, hermetically sealed from one another, where each aspect of discrimination is to be examined and its impact evaluated in isolation. Discrimination must be understood in the context of the experience of those on whom it impacts.”19 The nature of the limitation of the right to equality in this case is a serious one. Documents from the Department of Home Affairs show that less than 30% of Home Affairs offices in the country performed same-sex civil unions20. As a result of Section 6, same-sex couples cannot practically exercise their rights in the vast majority of cases. This is a severe and unreasonable limitation on their rights.  4. The Bill does not violate the religious rights of state officers  Some are concerned that the Bill will encroach on the rights of marriage officers to their religious beliefs, conscience and practices. We argue that the proposed amendment to the Civil Union Act does not violate these rights. Rather, it allows state employees to exercise a discriminatory preference against only one specific social group – namely, same-sex couples.  In the Fourie case, the Constitutional Court highlighted the fact that “the Court’s decision… [does not] in any way impinge on religious freedom. The extension of the common law definition of marriage does not compel any religious denomination or minister of religion to approve or perform same-sex marriages.” We wholeheartedly agree with this aspect of the judgment, in that religious authorities, such as ministers, preachers and Imams, should not be compelled by the law to perform solemnisation of same-sex unions.  However, we believe that the position cannot remain the same in respect of employees of the state, if we are to safeguard the human dignity of same-sex couples. The state is definitively secular, and its employees, in the course of carrying out their duties, act as its agents. We do not argue that that state employees forget their religious beliefs and personal opinions when they report for work. However, as with any employer-employee relationship, the employee is subject to the state’s values and principles while at work, and the state in turn is governed by what is contained in the Constitution, in which the rights to equality and dignity are central.  As the court emphasized in the Fourie case: “In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred.21” In the light of this, Section 6 clearly does more harm than good, by conflating the secular and the sacred, and allowing the secular to transform itself into a particular brand of the sacred, at the personal will of individual state employees.  Moreover, we believe that since Section 6 allows officers to specifically deny same-sex couples marriage, and not any other marriages that an officer might find objectionable, it cannot be said to have the purpose of protecting religious belief and conscience. A purported religious exemption that effectively denies rights to only one specific social group is prejudicial and discriminatory.  **5. Balancing competing rights in an open and democratic society**  Though we do not believe that the Bill creates a conflict of rights, below we lay out the process on which this conflict would be settled. As we argued above**, Section 6 of the Civil Union Act unreasonably limits the equality and dignity rights of same-sex couples, while extending the religious rights of officers of the state to more than their justifiable limits.** We believe that the proposed Bill to repeal Section 6 will re-establish the right balance to these rights. Notwithstanding, in a conflict of rights between religious belief, conscience and practice and the right to equality, **the Constitutional Court has previously held that the right to religious belief, conscience and practice - the supposed purpose of the limitation - is an insufficient reason to limit the right to equality**.22  **The primacy of the right to equality in our law has been confirmed several times.** In 2015, for example, a mediation ordered as part of an Equality Court case found that the owners of a bed and breakfast discriminated against a same-sex couple when they denied the couple service, citing a religious objection. The final settlement held that the owners must apologise to the couple and that the owners were furthermore ordered to undertake not to discriminate against anyone else going forward. In this matter Neil Coulson and husband Jonathan Sedgwick were told by guesthouse owners that the establishment was not “gay friendly” after they tried to book a shared room. **The guest house owners argued that forcing them to provide services to LGBTI people would violate their own right to freely practice their religion,23 but they were unsuccessful in the Equality Cour**t. For the same reasons, a state employee should not be entitled to refuse to provide civil services to anyone in South Africa, on the basis of their personal beliefs, whether these pertain to sexual orientation or any other prohibited ground for discrimination.  Conclusion  In conclusion, we strongly support the repeal of Section 6 from the Civil Union Act, and support the Private Member’s Bill that is the subject of this submission.  We do so in the interest of the transformation agenda, and a progressive society in same-sex couples’ core constitutional rights are consistently respected and protected by the state and its employees, not only 30% of the time.  We take this opportunity to express our wish and availability to make an oral presentation, in the event of public hearings on this Bill.  1 Section 9, Constitution of the Republic of South Africa, 1996  2 Section 10, Constitution of the Republic of South Africa, 1996  3 Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 36.  4 Ibid at para 28.  5 National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others, [further referred to as National Coalition for Gay and Lesbian Equality case] [1999] ZACC 17 2000 (2), SA 1 (CC) 2000 (1), BCLR 39 (CC), at para 58.  6 Ibid, at para 42.  7 At Par 5.  8 At Par 15.  9 African Commission on Human and Peoples' Rights Resolution 275, meeting at its 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014. Available at http://www.achpr.org/sessions/55th/resolutions/275  10 Available at http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39\_245\_02\_eng.pdf  11 At Par 169.  12 At Par 170.  13 At Par 171.  14 These include the UN Human Rights Committee; UN High Commissioner for Human Rights; the UN Committee on Economic, Social and Cultural Rights; the UN Committee on the Elimination of Discrimination against Women; the UN Committee on Torture; and the UN Committee on the Rights of the Child.  15 International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at: http://www.refworld.org/docid/48244e602.html  16 https://citizen.co.za/news/south-africa/1056226/home-affairs-accused-of-bias-against-gay-marriage/  17 http://www.mambaonline.com/2014/04/11/home-affairs-still-rejecting-gay-couples/  18 At Par 92.  19 At Par 35.  20Available at http://www.mambaonline.com/images/Same%20sex%20civil%20marriage%20list%20of%20offices%20and%20names%20of%20off\_1.pdf  21 At Par 94.  22 https://www.dailymaverick.co.za/article/2015-04-16-equality-court-religious-belief-does-not-override-equality/#.WrygQ4hubb0  23Ibid. | | | |
|  | Gender Justice Is a non-partisan, non-profit organisation, established in 2006. Today, Sonke has established a growing presence on the African continent and plays an active role internationally. Sonke works to create the change necessary for men, women, young people and children to enjoy equitable, healthy and happy relationships that contribute to the development of just and democratic societies.  Submissions: “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.”1  SECTION 6 OF THE CIVIL UNION ACT Section 6 of the Civil Union Act provides that “[a] marriage officer…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 two persons of the same sex…”. In 2016, the Department of Home Affairs released a list of offices across South Africa that solemnise same-sex marriages. The list revealed that only 117 of the 409 offices nationwide will solemnise marriages of same-sex couples.2  We attach the list marked ANNEXURE A. A summary for the numbers of officers per province which provide the service is provided in a table below: This means that 28,6% of marriage officers are willing to solemnise marriages between same-sex couples. The implementation of this section has created practical difficulties for same-sex couples who want to get married. For instance, in 2011, Micheal Cronje and Donovan Wynne were told by their local Home Affairs office that the office did not solemnise gay marriages.3  In 2013, the same office turned Kevin De Lange and Cobus Steyn away for the same reasons.4  Similarly, in 2015, Maude Moudi and Vavi Swartz wanted to get married and had to visit numerous Home Affairs offices before finding an official to marry them. They found out that certain offices only had appointments for the soleminisation of same-sex marriages on specific days of the week.5    The concerns around the difficulty created by section 6 were discussed in a parliamentary debate in July 2017. A call to amend section 6 of the Civil Union Act was posed to then Minster of Home Affairs, Hlengiwe Mkhize, who replied that it was not a ministerial prerogative to amend the provision as it is a provision of law. She further said that “[a]s can be imagined, we have a duty to protect the rights of all, including legal rights of workers, in this case, marriage officers.” Various organisations supporting the LGBTIAQQP+ communities have argued that this exemption is objectionable and that public servants of a secular state must leave their personal politics or convictions when they enter the workplace.6  This provision accommodates the religious beliefs of marriage officers and provides for objections on the grounds of conscience and belief.7 Section 6 is problematic as it allows a marriage officer to impose a moral judgment often based on irrational and homophobic beliefs on a same-sex couple and object to solemnising a civil union.8  It could be argued that the accommodation of the rights of conscience and belief is too broad and that it confers upon marriage officers the “right” to be homophobic by reinforcing the systemic marginalisation facing same-sex couples seeking to solemnise their unions pursuant to the Civil Union Act.9  Section 6 of the Civil Union Act creates a tension between two rights in the Constitution, namely the right to equality and the right to freedom of religion, conscience, and belief.10 UKZN’s Professor Nomthandazo Ntlama argues that the equal contest between these two rights has made the development of the principles of non-discrimination subject to the social, moral, and legal convictions of those authorised to soleminise marriages. This allows the enforcement of equal rights to depend on the willingness of marriage officers to use their discretion in balancing their constitutional rights to religion and the right of same-sex couples to equal benefit of the law. This contest has made the substantive translation of the right to equality subject to mere choice. The choice enables the marriage officers to use their discretion, permitting them to draw a distinction between people, which perpetuates the privileges enjoyed by couples in heterosexual relationships.11  The primary purpose of the Civil Union Act is to protect the rights to dignity and equality of same-sex couples and to remedy the intentional discrimination imposed upon them. The preamble of the Civil Union Act acknowledges that the family law dispensation that existed after the commencement of the Constitution failed to “provide for same-sex couples to enjoy the status and benefits coupled with the responsibilities that marriage accords heterosexual couples”.12  It is submitted that section 6 of the Civil Union Act is in direct conflict with the objectives of the Civil Union Act and undermines the purpose of the Civil Union Act to remove discrimination on the groups of sexual orientation and to uphold the constitutional rights to equality and dignity. Moreover, section 6 of the Civil Union Act infringes the equality provision in that it allows marriage officers to exercise their discretion not to officiate a samesex marriage on grounds of religious or conscientious objection.13 In President of the Republic of South Africa v Hugo, 14  Goldstone J emphasised the importance of the prohibition of unfair discrimination against people who are members of disadvantaged groups.15 Furthermore, he held that at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.16  Section 6 permits marriage officers to discriminate against same-sex couples on the basis of their sexual orientation. This directly discriminates unfairly against same-sex couples seeking to get married. Moreover, the limitation in section 6 violates the founding provisions of our Constitution which provides that the Republic of South Africa is based on values of “human dignity, the achievement is equality and the advancement of human dignity and freedoms”. 17 Furthermore, Section 6 of the Civil Union Act reinforces discrimination between heterosexual and homosexual couples, particularly, in view of the legal and social history of gay men and lesbian women, it is submitted that the religious accommodation violates the equality provision. This limitation cannot be justified.  Moreover, section 7(2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights contained in the Bill of Rights. Section 6 is inconsistent with the entrenched provisions of section 7(2) of the Constitution in that it fails to respect and promote dignity and equality for same-sex couples.18  Furthermore, section 6 infringes homosexual couples’ the right to human dignity in the Constitution.19 The right to human dignity involves the right to family life for same-sex couples.20 In Dawood and Others v Minister of Home Affairs,21 the Constitutional Court emphasised that marriage and the family are social institutions of vital importance. 22 In addition, the Court found that these institutions provide security, support, and companionship of members of society.23 Furthermore, the Court found that the celebration of a marriage gives rise to moral and legal obligations – the reciprocal duty of support placed upon spouses.24 Moreover, the Court held that the decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many people and to prohibit the establishment of such a relationship, impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance.25 As a result, the Court concluded that it is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that impairs the ability of spouses to honour their obligations to one another would also limit their right to dignity.26  For these reasons, section 6 infringes section 7, 9 and 10 of the Constitutional and therefore, section 6 is unconstitutional. Thus, Sonke supports the amendment of the Civil Union Act by removing section 6.  1 Minister of Home Affairs v. Fourie (Doctors for life International and Others, Amici Curiae); Lesbians  and Gay Equality Project and Others 2006 1 SA 524 (CC) at para. 71.  2 Shocking! Only 28% of Home Affairs offices will marry lesbian and gay couples, MAMBA ONLINE (Sep.  8, 2016), http://www.mambaonline.com/2016/09/08/farce-28-home-affairs-offices-willmarry-  gay-people/.  3Id.  4Id.  5 Luiz DeBarros, Lesbian & Gay Marriage in South Africa: Part 2 – Second Class Citizens, MAMBA  ONLINE (Mar. 29, 2016), http://www.mambaonline.com/2016/03/29/lesbian-gay-marriage-southafrica-  part-2-second-class-citizens/.  6 Carl Collison, Home affairs minister rejects call to amend discriminatory same-sex law, MAIL AND  GUARDIAN  (Jul. 19, 2017), https://mg.co.za/article/2017-07-18-home-affairs-minister-rejects-call-to-amenddiscriminatory-  same-sex-law.  7 Henriet DE RU, The Recognition of Homosexual Unions in South Africa LLM Thesis, (Nov. 2009)  (online with the author and on website of University of South Africa at para. 3.5.1.2.)  8 James Dumisani Lekhuleni, The Constitutionality of the Civil Union Act 17 of 2006 LLM Thesis, (on  website of University of Pretoria) at 30.  9 Id.  10 S.AFR. CONST., § 15 provides:  (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.  (2) Religious observances may be conducted at state or state-aided institutions, provided that—  (a) those observances follow rules made by the appropriate public authorities;  (b) they are conducted on an equitable basis; and  (c) attendance at them is free and voluntary.  (3) (a) This section does not prevent legislation recognising—  (i) marriages concluded under any tradition, or a system of religious, personal or family law; or  (ii) systems of personal and family law under any tradition, or adhered to by persons professing  a particular religion.  (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions  of the Constitution.  11 Nomthandazo Ntlama, A brief overview of the Civil Union Act: A messy compromise or giant leap  forward in TO HAVE AND TO HOLD: THE MAKING OF SAME-SEX MARRIAGE IN SOUTH  AFRICA 157 (Judge et al, 2008) at 202/234.  12 See Preamble of the Civil Union Act.  13Lekhuleni, above note 8 at 33.  14President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC).  15 Id at para 41.  16 Id at para. 41. See Lekhuleni above 8 at 34.  17 Id at 36.  18 Du Ru, above note 7 at note 32.  19 S. AFR. CONST., § 10 of the Constitution states that everyone has inherent human dignity and the  right to have their dignity respected and protected.  20 National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others 1999  (1) SA 6 (CC) at para. 58.  21 Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of  Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others (2000 (3) SA  936 (CC)  22 Id at para. 30.  23 Id at para. 31.  24 Id at para. 31.  25 Id at para. 37.  26 Id.  Letlhogonolo Mokgoroane Sonke Gender Justice | | | |
|  | Marriage officers should have no right to discriminate against same-sex couples, regardless of their personal feelings on the matter, religious or otherwise. They have not been hired to proselytise or to police other people for God; they have been hired to do their jobs according to the laws and Constitution of South Africa. It is completely unacceptable and in fact hypocritical to hide behind your religious feelings in order to deny other people their rights.  Martha Soteriades | | | |
|  | I, Luiz De Barros, am editor of Mambaonline.com, South Africa's longest running and leading LGBT / gay news platform, established more than 17 years ago.  I have over the years reported on numerous incidents in which same-sex couples who sought to marry or enter into a civil union have been humiliated, degraded, belittled and inconvenienced when turned away from Home Affairs offices that have refused to provide this service to them.  I hereby state my full support for the Civil Union Amendment Bill, 2018. I believe that repealing Section 6 of the Civil Union Act, 2006 (Act No. 17 of 2006), as proposed by the Bill, is vitally important for the following reasons:  1) It is unconstitutional to allow civil servants employed by the state to refuse to serve same-sex couples (or any other South African citizens). The state has a duty to provide services equally, fairly and without discrimination.  2) While civil servants may hold personal, religious or other views or beliefs opposing same-sex unions or marriages these views or beliefs should not interfere with their duties as employees of the State.  3) Section 6 of the Civil Union Act has been repeatedly shown to effectively restrict access by same-sex couples to equal and non-discriminatory service and treatment at Home Affairs.  4) Section 6 of the Civil Union Act allows for unfair discrimination against same-sex couples and the LGBTQ community.  5) Section 6 of the Civil Union Act impairs the dignity of same-sex couples and of the LGBTQ community as a whole.  6) Section 6 of the Civil Union Act perpetuates homophobia in South Africa and implies that the State condones this kind of unconstitutional prejudice.  7) The use of Section 6 to refuse service to same-sex couples adds to the long-term "minority stress" and trauma felt by the LGBT community that negatively impacts on its members' self esteem, place in society and mental well-being.  Luiz De Barros | | | |
|  | Please stop discriminating against same sex marriages!!! Marinda Bishop | | | |
|  | I would like to give my support for the Civil Union Amendment Bill of 2018 and would like that Section 6 of the Civil Unions bill be repealed. In a non-discriminatory society where we all should enjoy equal rights, it is not acceptable that Home Affairs Marriage Offers can refuse to marry same-sex couples. The current provisions of Section 6 of the Bill is discriminatory and unconstitutional. Herman Bok | | | |
|  | My daughter told us in 2012 that she tried to like men but know it did not feel right. She met a girl in 2015. They travel the world and are so happy together. My daughter was not in a good place before she met her friend. She has a different outlook into the world. She was unhappy in school because she knew she was different. She knows where she belongs. We weren't happy at first but I knew if we are not going to accept the way she feels we are going to loose her as a daughter. I know she was born as a lesbian. She never played with dolls or with her barbies. She always prefered to play cricket. Although she does not look gay she likes to dress smart and wears make up. She loves nice things arround her. She is what she is and nobody can force her any other way. They want to get married in two years time and we will support her. Wanda van Jaarsveld | | | |
|  | Gender DynamiX welcomes the opportunity to make a written submission on the Civil Union Amendment Bill [B11-2018] of Ms. D Carter, MP (the Bill).  Gender DynamiX is a Cape Town-based organisation, founded in 2005 to advance, promote and defend the rights of trans and gender diverse persons in South Africa, Africa and globally, using community mobilisation, media engagement, public education, research and training.  Gender DynamiX strongly supports the Bill’s repeal of Section 6 of the Civil Union Act, No.17 of 2006, for the reasons set out below.  Violation of Human Rights of Trans and Gender Diverse Persons  Trans and gender diverse persons face multiple forms of discrimination from the Department of Home Affairs on the basis of their gender identity, gender expression and sex characteristics.  They often face human rights violations and insurmountable barriers at Home Affairs when attempting to access legal gender recognition in terms of the Alteration of Sex Description and Sex Status Act, No.49 of 2003.1 Trans and gender diverse persons who were married under the Marriage Acts have been subject to unlawful forced divorces2 and unlawful rejection by Home Affairs of their applications to alter their legal gender markers. Discriminatory attitudes and actions on the basis of gender and sex by Home Affairs officials has a devastating impact on nearly every aspect of the lives of any trans and gender diverse persons.  By allowing marriage officers to refuse to solemnise a civil union between persons of the same sex/gender on the grounds of conscience, religion or belief, Section 6 of the Civil Union Act endorses and reinforces discriminatory actions and attitudes by Home Affairs officials on the basis of gender and sex. This severely limits access to civil unions and other services provided by Home Affairs. It contributes to societal stigmatisation and marginalisation of trans, gender diverse and other persons, and constitute severe violations of their human rights.  Gender DynamiX therefore strongly endorses the removal of Section 6 from the Civil Union Act so that the Act will comply with the rights to equality, non-discrimination on the basis of gender, sex and sexual orientation, and dignity in the Bill of Rights of the Constitution of South Africa.  We would also like to take the opportunity to point out that the Civil Union Act also requires other additional amendments to ensure that its language does not discriminate against persons on the basis of their gender identity, gender expression and sex characteristics. In particular, by using language that only refers to “same-sex couples” and “opposite-sex couples”, and for instance only referring to people who “are of the same sex” (Section 8(6)), the Act currently reinforces the idea that there are only two sexes/genders (female and male) and that these two sexes/genders constitute mutually exclusive opposites, thereby erasing and excluding a whole spectrum of people whose gender identities and/or sex characteristics are more diverse than these two categories. The language of the Act therefore needs to be amended in future to be more inclusive of a diversity of genders and bodily characteristics.  The Marriage Acts and Civil Union Act also need to be aligned with the Alteration of Sex Description and Sex Status Act, No.49 of 2003, to ensure that married persons who change their legal gender markers, do not face administrative obstacles and do not lose their marital status.  Conclusion  In conclusion, we strongly support the urgent removal of Section 6 from the Civil Union Act through the Civil Union Amendment Bill [B11-2018] of Ms. D Carter, MP.  We do so in the interest of advancing the realisation of the rights of transgender and gender diverse persons in South Africa, as well as all other persons who require access to non-discriminatory, unbiased and inclusive services from the Department of Home Affairs.  We would like to indicate our wish to make an oral presentation on the Bill.  Lastly, as indicated above, we would like to draw attention again to the fact that, apart from the need to urgently remove Section 6 from the Civil Union Act, the Act also requires other amendments to ensure that it becomes fully inclusive of the rights of trans and gender diverse persons to enter into marriages and civil unions, as well as to enable them to more generally access Home Affairs services in a way that respects and recognises their gender identities and that fully complies with the rights to equality, non-discrimination and dignity in the Bill of Rights of the Constitution of South Africa.  1 Gender DynamiX & Legal Resource Centre. 2015. Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003. Cape Town: Gender DynamiX & Legal Resources Centre. Available at https://drive.google.com/file/d/1xvXcmoa5OZ1gsrzMk-z7JbCvd\_T0zz5W/view.  2 Kos v Minister of Home Affairs, 2017 (6) SA 588 (WCC) (6 September 2017).  Greyson Thela & Estian Smit Gender Dynamics | | | |
|  | 1. Introduction  The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions to the Portfolio Committee on Home Affairs (“the Committee”) on the Civil Union Amendment Bill, 2018 (“the Bill”). Should the opportunity arise, the HSF wishes to make oral presentations to the Committee.  The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability.  The HSF notes that the Bill was introduced as a Private Member’s bill and was, subsequently, adopted by the Committee, and is now under consideration by the National Assembly. Congratulations should be extended to Ms Carter for initiating this process and recognising the defect in law in the promotion of equal rights for same-sex couples. The HSF supports the process undertaken by the Committee to improve and strengthen the law governing civil unions.  2. The Proposed Repeal of Sec 6  The Bill proposes only one amendment to the Civil Union Act1 (“the Act”), which is the repeal of Sec 6 in its entirety. The HSF endorses this amendment. It is troubling that more than a decade since the Fourie2 case was handed down, giving rise to the Act, there are still significant barriers to same-sex marriage. As a result of the provisions in Sec 6, a couple may find themselves in the difficult position where no one is immediately willing to solemnise their marriage, and they cannot realise their constitutionally enshrined rights to equality and human dignity in the same way an opposite-sex couple can.  The HSF is of the view that the repeal of Sec 6 would be futile unless Sec 4(1) of the Act is also amended. This subsection states that:  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.  If Sec 6 is repealed, the word ‘may’ in Sec 4(1) incorrectly confers some level of discretion on marriage officers to refuse to solemnise civil unions. The HSF therefore recommends that Sec 4(1) reads:  4. (1) A marriage officer shall solemnise a civil union in accordance with the provisions of this Act.  3. Substantiating the HSF’s position  The HSF agrees with the argument made in the Memorandum on the Objects of the Bill in support of the proposed amendment. We fear that there is a double standard of who is exempt from presiding over marriages in terms of both pieces of legislation.  The Marriage Act (the legislation which governs heterosexual marriages) states that a religious marriage officer cannot be compelled to solemnise a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organisation (Sec 31). No similar provision exists for civil servants who are marriage officers. A a civil marriage officer (other than those in Sec 31) must solemnise all (heterosexual) marriages placed before him or her and is not allowed to refuse to solemnise a marriage on the grounds of conscience, religion or belief.  In terms of Sec 6 of the Civil Union Act, a civil servant who is a marriage officer may object to the solemnisation of a marriage on the grounds of conscience, religion or belief. In the Civil Union Act there is no similar provision that applies to religious marriage officers. An explanation for this could lie in the fact that both the religious institution and the individual religious official must apply separately to conduct civil unions therefore they are ‘exempt’ until they opt in.3  4. The duties binding a civil servant  Sec 239 of the Constitution defines an organ of state as follows:  “organ of state” means –  (a) any department of state or administration in the national, provincial or local sphere of government; or  (b) any other functionary or institution –  (i) exercising power or performing a function in terms of the Constitution or a provincial constitution; or  (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;  In terms of the definition in the Constitution and how case law has interpreted the ‘exercise of public power’ it is reasonable to assume that marriage officers could be considered organs of state. The act of solemnising a marriage or civil union may constitute the ‘exercise of public power’ (a concept that has been broadly interpreted5) and it is indisputable that this power is exercised in terms of legislation (either the Civil Union Act or the Marriage Act). This assertion is based on precedent  “In the case of civil unions both the institution and the individual religious official must apply separately, while in the case of marriages, one application suffices”. She further points to the fact that the process of appointment of religious marriages officers is more onerous and this decreases the chances of religious marriage officers applying to solemnise civil unions.  At p 479: Compared to Sec 31 of the Marriage Act, Sec 6 is actually framed in far broader terms. In addition to Sec 6 being so broadly phrased, there is nothing that requires the belief for which the accommodation is sought is genuinely held and there ‘is no requirement that civil marriage officers motivate or justify their beliefs, nor can the Minister reject their objections on any grounds whatsoever. …The Civil Union Act is far too wide and invites abuse.”  from distinguishable cases heard in the Superior Courts but the exact facts must still be tested to establish legally binding authority.6  The question then arises whether an organ of state can refuse to exercise this power on behalf of the state on the ground of conscience, belief or religion and moreover if that refusal infringes on the right of an individual. Allowing a functionary of the state this discretion amounts to a negation of the State’s overarching role in regulating both its own behaviour and that of its servants/functionaries, and could amount to an endorsement by the state of unfair discrimination.  The analogy of a judge presiding over a divorce matter can be used to demonstrate how the act of conferring a new legal status on individuals on behalf of the state has to be done impartially and cannot be obstructed on the ground of religion, conscience or belief. A judge who may be a devout member of a religion that condemns divorce cannot lawfully refuse to grant a divorce order to a couple who seek to have their marriage annulled. Similarly, a state functionary should not be permitted to refuse to bestow a new legal status (from unmarried to married) on two individuals on behalf of the state on the ground of religion, conscience or belief (especially when their right to equal treatment is guaranteed by the Constitution).  It must be emphasised that even if this interpretation fails, it does not undo the principle. A marriage officer when acting to solemnise a marriage – either in terms of the Marriage Act or the Civil Union Act – does so on behalf of the state and not his or her religious organisation. While a marriage officer may refuse to officiate the religious celebrations of a marriage for personal reasons, this allowance should not extend to the duty to act as an agent of the state. The duty is simple: the marriage officer, on behalf of the state – through the solemnisation of a marriage – bears witness to the legal process.  5. Public law/private law distinction  The argument made in paragraph 4 of this submission is easier to comprehend when one draws a clear distinction between civil and religious marriages. Marriage under both Acts has different implications, depending on whether the couple opts for a religious marriage in addition to a civil marriage. A marriage must first be solemnised in terms of the prescribed formula (Sec 30 of the Marriage Act and Sec 11 of the  6 What constitutes the exercise of a public power is hotly contested and has to be determined on a case by case basis. In the case of Airports Company SA v ISO Leisure OR Tambo (Pty) Ltd 2011 (4) SA 642 (GSJ) at para 55 it was held that the essential enquiry was ‘whether the said conduct arises from the exercise of a governmental function or not’. If you also consider other factors (listed in Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another 2010 (5) SA 457 (SCA)) such as how closely regulated the employee is by statute it is easy to reach the conclusion that the solemnisation of a marriage by a civil marriage officer is the exercise of a public power.  Civil Union Act) that is composed of secular words. If a religious marriage officer (who has been issued with a licence to conduct civil marriages) is presiding over the ceremony he/she may, with the couple’s consent, then proceed to bless the marriage according to the rites of the religious denomination.  Civil marriage officers are only permitted to perform the first part of the ceremony described. A religious marriage officer may perform both functions. For one part of the ceremony they are acting in terms of legislation on behalf of the state recognising the new legal status being conferred on two individuals. For the other part they are bestowing recognition of the couple’s union on behalf of the religious body they represent and this is governed by the rites of that religion. These are in fact two entirely distinct processes serving separate purposes and the conflation (and subsequent confusion) arises from the dual function a religious marriage officer can play.  It is helpful to consider these two functions in terms of public and private law. While the solemnisation of a civil marriage falls within the realm of public law in so far as it relates to the relationship between the individual and the state, the celebration of a religious marriage is a private law matter as it concerns the relationship between the individual and the religious institution.  The HSF accepts the discretion granted to religious officials to decide which religious weddings they are willing to officiate. The HSF however does not support the position that this discretion should extend to any marriage officer in deciding which civil weddings they will preside over. It is understood that religious marriage officers are afforded this duty for convenience but this has allowed for a confusing conflation between religious and civil marriages. As a starting point for reconsidering the legal framework governing marriage in South Africa, insight can be gleaned from other jurisdictions.  6. Jurisdictional comparison  In light of the distinction discussed in paragraph 5 of this submission it may be useful to consider how other jurisdictions manage this dilemma. A comparative study of same-sex marriage rights identifies certain trends in the legislative history of LGBTIQ rights.7 The progression of moving towards legalising same-sex marriage was relatively slow and gradually moved from protecting same-sex relationships to finally allowing for same-sex marriage and equal adoption rights for same-sex couples. The final step to achieving equality was reworking the marriage legislation to be ‘gender neutral’ rather than enacting a separate piece of legislation to govern same-sex unions. What makes this approach easier to facilitate is the fact that only civil marriages are recognised and although couples can have a religious marriage ceremony those are purely the business of the couple and the religious body or institution. In almost all of those jurisdictions which have proceeded along these progressive lines, religious officials are not entitled to perform civil marriages.  Although far beyond the scope of this Bill, a strong argument can be made for moving the law that governs marriage and civil unions in South Africa to reflect the above systems. The HSF is of the view that South Africa must adopt a model that achieves the following:  • The separation of religious and traditional marriage ceremonies from civil marriage ceremonies.  • The establishment of one legal framework that governs Marriage in South Africa. This would mean the integration of the Civil Union Act, The Recognition of Customary Marriages Act, the law to be enacted governing Muslim marriages and the Marriage Act into one or two comprehensive pieces of legislation.  • A consequence of the HSF’s recommendation is that there will be far fewer holders of civil marriage licences. To rectify this deficiency the category of those who can function as marriage officers should be broadened to include other non-religious offices such as diplomatic or consular representatives.  7. Current/ future difficulties  The case of KOS and Others v Minister of Home Affairs and Others 2017 (6) SA 588 (WCC) highlights an additional problem caused by the dual legislation governing marriage and civil unions. The discrimination and bureaucratic obstruction the plaintiffs faced8 make a strong argument for integrating the Civil Union Act and the Marriage Act and framing all related legislation in gender-neutral terms. While this case was resolved and the plaintiffs were granted the primary remedies they sought it raises bigger concerns about the inclusion of transgender rights in the discussions of same-sex marriage, civil unions and the legal framework.  The HSF would strongly urge this Committee to rethink the legal framework governing marriage and civil unions to enhance the realisation of rights held by everyone in the LGBTIQ community. The legal uncertainty facing transgender individuals will inevitably lead to further legal challenges like the case cited above.  8 The Plaintiffs were three couples married under the Marriage Act. One partner in each couple experienced gender dysphoria and commenced the gender transition process. The Department of Home Affairs (one of the Respondents) highlighted the confusion caused by the dual legislation, a general misunderstanding of the rights these couples had and ultimately the bureaucratic mess caused by an alleged inconsistency between the application of the Alteration of Sex Description and Sex Status Act 49 of 2003 and the Marriage Act.  Finally, it must be acknowledged that many South Africans in the LGBTIQ are extremely vulnerable in society. Much more work needs to be done to afford these individuals protection at a more basic level. To realise one’s right to same-sex marriage, one first has to feel safe to identify as gay in your community or openly have a partner of your choice. Unfortunately, that is not the reality for far too many.  8. Resources  In 2001, the South African Law Reform Commission produced a very thorough report, reviewing the Marriage Act.9 The report was compiled by a highly qualified team and was the result of a 1999 Discussion Paper on the Marriage Act.10 The Report includes a draft Marriage Act Amendment Bill which seeks to update both the terminology and procedure to be more relevant. The recommendations should not be adopted verbatim because since the Report’s publication, same-sex marriage was legalised. Nonetheless, the HSF urges that the recommendations made be revisited as some could provide for a helpful starting point for an overhaul of the legislation governing marriage in South Africa.  9. Conclusion  What this submission seeks to do:  • **First, to consider the proposed repeal of Sec 6 of the Bill which the HSF endorses. For consistency, one further technical recommendation is made which is the substituting of the word ‘shall’ for ‘may’ in Sec 4(1) of the Act**  • **Secondly, to bring attention to the complicated system that governs marriage of both opposite-sex and same-sex couples in South Africa and advocates for the adoption of a simplified, more secular model in line with the Constitution.**  The HSF is very pleased that this Committee adopted the Bill and is committed to promoting the rights of all who live in this country. In engagements going forward and future consideration of legislative amendments, the HSF would encourage greater awareness of transgender issues and the additional protection needed for those exposed to homophobia on a daily basis in order to realise the promises contained in the Constitution.  1 17 of 2006.  2 Minister of Home Affairs v Fourie 2006 (1) SA 542 (CC).  3 Bonthuys ‘Irrational accommodation: conscience, religion and same sex in South Africa’ The South African Law Journal pg 475 points to a further difference between religious and civil marriage officers:  With the allowance made in Sec 6 of the Act, compounded by the fact that it is cumbersome for religious marriage officers to apply to conduct civil unions, the number of marriage officers who are willing to conduct same-sex marriages is diminished. According to one source4, 421 of the total 1 130 civil marriage officers fall under the category of exemption in terms of Sec 6 of the Act. Furthermore, as articulated in the tenets or doctrines of most religious organisations, the religious solemnisation of same-sex marriage is prohibited and therefore congregants must rely on the willingness of a civil marriage officer to realise their right to enter into a civil union. The fact therefore remains that it is more difficult for same-sex couples to get married than it is for opposite-sex couples as a consequence of the governing legislation. In some instances, the cost of this discrepancy amounts to the infringement of the right to equality and human dignity.  4 James Lotter, Daily Maverick Op-Ed: It is time to secularise marriage in South Africa, 20 Feb 2018.  5 M & G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another 2011 (5) SA 163 (GSJ).  7 Glass, Kubasek and Kiester ‘Toward A ‘European Model’ of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?’ Berkley Journal of International Law vol 29: 1, 2011.  9 South African Law Commission, Report on the Review of the Marriage Act 25 of 1961, May 2001.  10 South African Law Commission, Discussion Paper 88: Review of the Marriage Act (Project 109), September 1999.  Helen Suzman Foundation Francis Antonie  Kimera Chetty  Mira Menell Briel | | | |
|  | I am in full support of the ammendment and removal of section 6 of the Civil Union Act.  Besides leaving open legal opportunities for marriage officials to be homophobic with no legal consequences - it is deeply traumatic for couples wishing to be married. This too especially in areas of SA were there are less officiators willing to marry same-sex couples.  Section 6 renders the Civil Union Act redundant and useless - providing 100% opportunity to opt out on the side of the official. The Act was drafted exactly to legalise same sex marriage.  Leaving it up to marriage officials personal 'conscience' is dangerous and not to mention ridiculous. Opting out on grounds of conscience implies holding a moral high ground - one that does not include homosexuality.  Julia de Rosenwerth | | | |
|  | As above Arthur Bishop | | | |
|  | The Simon Nkoli Collective is a loose collective of young activists based in various tertiary institutions in the Johannesburg area. The Collective seeks, through art, debate and activist organising to create various platforms where young Black activists can come together and debate around contemporary struggles of the Black LGBTI community.  RIGHT TO EQUALITY  6. The Constitution of the Republic of South Africa, Act 108 of 1996, dedicates it very first section to these principles:  “The Republic of South Africa is one sovereign, democratic state founded on the following values:  (a) Human Dignity, the achievement of equality and the advancement of human rights and freedoms.  (b) Non-racialism and non-sexism  7. This is complemented by section 9 of the Bill of Rights:  (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.  (2) Equality includes the full enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”  (3) 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.  (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”  SUBMISSIONS REGARDING THE CONSITUTIONALITY OF SECTION 6 OF THE CIVIL UNION ACT 17 OF 10 OF 2006  8. Section 6 of the Civil Union Act 17 of 2006 provides:  “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.”  9. The enactment of the Civil Union Act 17 of 2006 was an attempt to bridge the gap of equality of access to the rights and entitlements of marriage as mandated by the Constitutional Court in Minister of Home Affairs v Fourie and Others.1  10. In its decision, the Court set out guiding principles to Parliament which would guide Parliament in enacting legislative provisions which gave equal access to same-sex couples.  “At the heart of these principles lies the notion that in exercising its legislative discretion Parliament will have to bear in mind that the objective of the new measure must be to promote human dignity, the achievement of equality and the advancement of human rights.”2  11. One of these guiding principles included the principle against the creation of a “separate but equal” legal regime which would in its attempt to achieve equality create other forms of exclusion and marginalisation of same-sex couples. The court observed;  “Parliament to be sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation.”3  12. The court held that such a system “is unthinkable in our constitutional democracy today not simply because our law has changed dramatically, but because our society is completely different. What established the visible or invisible norm then is no longer a point of reference for legal evaluation today.”4  13. Thus although the Civil Union Act achieves the objectives of affording same-sex couples access to the same rights, entitlements and legal recognition of their relation. Section 6 permits public officials the ability of public officers to “in writing inform the Minister that he or she objects on the grounds of conscience, religion and belief to solemnising a civil union between persons of the same sex…”5  14. This provision violates section 9 of the Bill of Rights in the Constitution of South Africa by curtailing same-sex couple’s right to enter into a civil union as freely as their heterosexual counterparts can. Further it has been argued that section 6 “could render some same-sex couples to enter into a civil union illusory – especially in rural areas where refusal by the local secular marriage officer would compel same-sex couples to either abandon their planned civil unions or travel to a town or city where a marriage officer might be willing to perform the ceremony.”6  15. The situation created by Section 6 violates the rights of same-sex couples to equal “protection and benefit of the law” in terms of Section 9(1) of the Bill of Rights. The situation is unjustifiable as it only exists in relation to same-sex couples as no provision similar to section 6 exists in respect of heterosexual couples. Parliament could amend the Marriage Act, however, we would advise against such a provision as it would violate the first principle set down by the Constitutional Court in the Fourie Case.  16. The court stated that a remedy which sought to be inclusive of same-sex couples should not create a situation of “equal disadvantage for all”7.  “Thus the achievement of equality would not be accomplished by ensuring that if same-sex couples cannot enjoy the status and entitlements couples with the responsibilities of marriage, the same should apply to heterosexual couples. Levelling down so as to deny access to civil marriage to all would not promote the achievement of the enjoyment of equality”8  IV. IS CONSCIENTOUS OBJECTION A JUSTIFIABLE LIMITATION TO THE RIGHT TO EQUALITY?  17. Conscientious objection is the refusal to participate in an activist that an individual considers incompatible with his/her religious, moral, philosophical, or ethical beliefs.9 Although this practice originated within the military context, it has become widely used and raised in a wide variety of contested contexts such as education, capital punishment, driver’s license requirements, marriage licenses for same-sex couples, and medicine and healthcare.10  18. Within the military context, conscientious objectors must satisfy numerous requirements and must provide evidence that their beliefs are sincere, deeply held, and consistent. “These requirements aim to parse genuine objectors from those who conflate conscientious objection with political or personal opinion.”11 Consequently within the military context, there exists formal procedures and rules through which the authenticity of a person’s conscientious objection is determined.  19. However there are distinct differences between the conscientious objections of a military conscript versus conscious objectors within other fields such as state administrative services and health practioners.  20. Firstly, it is important to recognise the power dynamics which differentiate the two contexts. Military conscripts are often in a positon of less power within the military and therefore require more protections which include their ability to protest by way of conscientious objection to actions of a state institution such as the military. Conversely health practioners and officials occupying administrative positions occupy a different position of power as their positions confer on them the power to provide access to essential services. Therefore their refusal, even on the basis of  genuinely held beliefs can constitute a barrier of access to individuals who require access to rights to health, citizenship and in the case of same-sex couples their rights to equality and human dignity as conferred by the Bill of Rights.  21. Consequently the position occupied by home affairs officials places on them “special obligations…due to their privileged, quasi-monopoly status as health practitioners [and marriage officers]…”12 As a result of this position they are mandated by the constitution to provide non-discriminatory access to lawful services provided by the state.13  22. Thus without the provision of internal referral systems within all regional Departments which ensure that when a marriage officer within that office is on duty there is a secondary officer who is able to perform same-sex marriages. Thus the continued existence of Section 6 unjustifiably infringes on the right to equality of same-sex couples. Further it allows officiating officials the ability to deny citizens access to a constitutionally mandated right. The impact of section 6 disproportionately impacts same-sex couples additionally infringing upon their rights to equality and human dignity.  1 Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005 ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC), available at <http://www.saflii.org.za/za/cases/ZACC/2005/19.html>.  2 Above, para [149]  3 Above, para [150]  4 Above, para [151]  5 Civil Union Act 17 of 2006, section 6.  6 Jacqueline Heaton “The Right to Same-Sex Marriage in South Africa” (28) Law Context: A Socio-Legal J., page 113.  7 Note 1 above, para [149]  8 Above.  Simon Nkoli CollectiveBusisiwe Deyi and Aquilar L. Monnatlala | | | |
|  | I believe as a non-secular society that the department of home affairs should have no right to deny service to any of its citizens. Be they black, white, straight, gay, Christian, Muslim, Hindu or atheist. I, therefore, request that the part of the civil union bill allowing a choice to marry people or not be scrapped in favour of service to all citizens of South Africa.  Gilbert Terblanche | | | |
|  | Marriage is a right for all people, all humans, and noone has the right to judge another for being different from them. The constitution of South Africa is founded on nothing less than that very ideal, and for any person to be deemed human or not from the ashes of Apartheid, is incredibly sad.  MARRIAGE IS A RIGHT OF ALL HUMANS. And noone has the right to judge the validity of one human over any other.  Legalise all marriages. ALL marriages. It is between the people in the marriage, and not for anyone else to judge.  Steven Tu | | | |
|  | I think with the history of discrimination we have in this country that for us to discriminate and take away peoples rights based on their sexuality and choice of partner is wrong. We must learn from the past and give freedom to all people. Including their right to marry whom ever they want to ( as long as they are both adults :) ) Thank you From a “straight” lady Joanne | | | |
|  | I was married by a marriage officer back in the day. It was a mixed race marriage. Imagine what would have happened if the marriage officer was allowed to refuse to marry us?  Noone should have to go through that. Marriage officers should do all of their job or not be marriage officers. I support the Civil Union Amendment Bill. Andrea Foster | | | |
|  | [Please note queer is being used to mean LGBTIAP++ and not in the discriminatory sense.]  I have seen queer people get mocked, spat on, hit, kicked, and murdered in cold blood. Those were done, not because they "provoked someone or they teased someone. Those were done because they are queer. Those were done because queer people exist. Recent surveys suggest that queer people are heavily affected when it comes to hate crimes, with some 38% of hate crimes being done to queer folk, which is shocking considering only about 550 000 of the population, or about 1% of the population identify as LGBT++. And the Justice that wrote Home Affairs v Fourie said:the dignity of queer people have been severely impeached on in the past and these figures clearly show that it continues until today.  The showing people away that are requesting a right of theirs that should be protected sounds incredibly similiar to how people of colour were treated during apartheid.  The equality clause in section 9 states that you can't discriminate against people and a range of things are explicitly listed. One of the listed aspects are sexual orientation. Marriage officials can't discriminate on any of those basisses; besides orientation (due to the provisions in the CIvil Union Act). What the State does when they allow this, is they tell queer people that they are second class citizens. And queer people have been told this for centuries, they are treated as such until today.  Our country has a secular constitution. The religious argument is one which swayed strongly in talking about people not wanting to marry same-sex couples. To this I would say that while religion has a place in our society, it should never be one with as much power as it had with this Act one; in a country with a secular Constitution and it must certainly not be at the expense of queer people. it is unfair to let it have such a prominent say that it has he effects of more then 70% of our country's home affairs not marrying due to "religious or conscience objection." It is not fair that straight couples can get married in every single church in this country as well as every single Home Affairs while queer couples can't even get married in the nearest home affairs because of the objection of the same people that can get married in both. It is not fair.  Queer people are not second class citizens. Because of their orientation they have faced rejection from a range of people. Even well known athlete such as Sunette Viljoen are not immune to this.  When citizens rights are infringed on they rely on the State to protect them.For many queer people this is the only sense of protection they have. I beg of you, please protect queer people. Please amend the Civil Union's Act.  Sheldan Dolf | | | |
|  | This email serves to lend my unwavering support for Amendment to Section 6 of the Civil Union Act. As a citizen born on South African soil and as a person part of the LGBTI+ community I wholeheartedly support this amendment as afforded to us citizens as part of our democratic freedom in South Africa.  All citizens should be treated equally and fairly under the law - and it is heartbreaking and wrong for same sex marriages to be denied based on the personal beliefs of marriage officers.  I thank you for this opportunity to express my opinion on the matter.  Waseem | | | |
|  | Written Submission: Civil Union Amendment Bill  As a preliminary matter, I find it appropriate to introduce myself. I am Thembalethu Seyisi, a 19 year-old student at the Stellenbosch University currently pursuing a LLB degree. I consider myself to be a social justice activist who is well acquainted with the South African Bill of Rights. I serve on the Salesian Life Choices NGO Board, I however make this submission in my personal capacity.  The preamble to the Constitution of the Republic of South Africa, 1996 declares that “South Africa belong to all those who live in it, united in our diversity”. To ensure this noble sentiment, the Bill of Rights guarantees everyone the right to equality, human dignity and the right to life. It has become evident that section 6 of the Civil Union Act 17 of 2006 (“Civil Union Act”), since it undermines these constitutional rights. I am of the view that it constitutes unfair discrimination; hence it should be done away with.  The right to marry whomever one wishes, is a fundamental right. Political philosopher Drucilla Cornell links this decision to marry, or not to marry, to freedom. I agree with this sentiment. Section 6 of the Civil Union Act prevents same-sex couples from enjoying such freedom if a marriage officer can refuse to marry them based on the marriage officer’s religion, conscience and belief. Marriage officers are civil servants and in my view should represent the State as best as they could. They should deliver the highest standard of public service to the citizens without fear, favour or prejudice. The same argument that was made in the landmark judgement of S v Makwanyane in 1995, that the state should not kill its citizens if it wishes that the citizens be civil towards each other, can be made here. If the State can discriminate, even indirectly so, how can it expect its citizens not to.  The primary purpose of the Civil Union Act, as it is explained in its preamble, is to ‘’provide that everyone is equal before the law and has the right to equal protection and benefit of the law’’. I emphasis that this ‘everyone’ encompasses especially those who were marginalised in the past, such as, for example, homosexual persons. Section 6 of this act may be then regarded to be in direct conflict with not only the Act’s preamble but also section 9 of the Constitution. Section 9(3) of the Constitution states that no one should be discriminated against because of, inter alia, their race, gender, colour, sexual orientation and religion. It is important to note that the right to equality is a fundamental right that should not be limited but upheld in all circumstances.  It is my submission that the accommodation of a marriage officer refusing to marry same-sex couples based on the grounds listed in section 6 of the Act is irrational and there is no justification for it. Moreover, I submit that if a marriage officer can refuse to marry a gay or  lesbian couple, they are directly contravening section 10 of the Constitution, enshrining the right to human dignity. I share the same views as Prof Elsje Bonthuys, a Professor of Law in University of the Witwatersrand when she persuasively states in her article Irrational Accommodation: Conscience, Religion and Same-Sex Marriages in South Africa, that the right to dignity includes the right to family life. Section 6 therefore undermines this right. As a result, section 6 also undermines the positive duty imposed by section 7(2) of the Constitution on the state to “respect, protect, promote and fulfil the rights in the Bill of rights”.  To conclude, as emphasised by Justice O’Regan in Dawood and others v Minister of Home Affairs 2000 (3) SA 936 (CC), marriage and family are social institutions and the cornerstone of society. It provide one with security, support and companionship. Marriage is more than just a piece of paper and all those who choose to get married should not be subjected to refusal by any marriage officer, especially because of their sexual orientation. The Constitution requires us to respect diversity in our society and that the views of some should not be used to justify discrimination against others. As it is my submission that section 6 of the Civil Union Act be amended to protect the inherent human dignity of homosexuals - whose rights have been marginalised for decades – and to afford them equal enjoyment of law, I do not overlook the marriage officer’s right to religion, as per section 15 of the Constitution. However, I am of the opinion that the right to equality combined with the right to human dignity trump, especially in such a diverse country.  Therefore I find the grounds of refusal to marry same sex couples unreasonable and unjustifiable, leading to unfair discrimination against a group which has already been, and continues to be subjected to different forms of discrimination. As a result, section 6 of the Civil Union Act and hence it should be deleted. This will bring relief to the LGBTI community, lessen discrimination in our society and enhance the quest to fulfil our Constitutional mandate of a non-sexist, non-racist and non-discriminatory society that belongs to all those who live in it.  Thembalethu Seyisi  Stellenbosch University, LLB (I) | | | |
|  | I strongly support the proposed Bill, and the repealing of section 6 of the Civil Union Act, 2006 (Act No. 17 of 2006).  Equal marriage rights will not truly exist in South Africa until the amendment is made. Personal belief should not stand in the way of executing the Constitution in the spirit in which it was intended, a way of preventing discrimination based on race, sex, gender or class.  By allowing civil servants to use personal belief to suspend the marriage rights of others, same-sex couples without the benefit of money and access to major metropolitan areas are being discriminated against. Choosing to become a civil servant should also be seen as a choice to uphold the rights of others, regardless of personal belief.  Anything less stands in the way of a truly equal South African society.  Khanya Mashabela | | | |
|  | **We had a terrible experience when we got married** and all south Africans should feel a part of this lovely country and no one should ever feel like a second grade citizen. Never again. Sue Marais | | | |

1. It is for this reason that this article considers the recognition of queer marriages which contextualises the focus on discrimination based on sexual orientation within the Civil Union Act. [↑](#footnote-ref-1)
2. C Collison “Home affairs minister rejects call to amend discriminatory same-sex law” (2017-07-18) *Mail & Guardian* <https://mg.co.za/article/2017-07-18-home-affairs-minister-rejects-call-to-amend-discriminatory-same-sex-law> (accessed 2018-05-01). [↑](#footnote-ref-2)
3. The Memorandum on the Objects of the Civil Union Amendment Bill 2017. Note that it is *state* marriageofficers and not *religious* marriage officers that this article is concerned with. [↑](#footnote-ref-3)
4. Collison *Mail & Guardian*. [↑](#footnote-ref-4)
5. Memorandum on Civil Union Amendment Bill. [↑](#footnote-ref-5)
6. The Civil Union Amendment Bill 2017 (draft) in GN 96 *GG* 47475 No. 41475 of 01-03-2018. [↑](#footnote-ref-6)
7. That is to say that section 6 conflicts with these bodies of law that require proactive state protection of human rights relating to queer sexual orientation. [↑](#footnote-ref-7)
8. It could be further argued that the separate acts are a problem, but this is not the focus of this article. [↑](#footnote-ref-8)
9. United Nations General Assembly, Universal Declaration of Human Rights (1948-12-10). [↑](#footnote-ref-9)
10. Universal Declaration of Human Rights at Article 16(1). [↑](#footnote-ref-10)
11. Universal Declaration of Human Rights at Article 1 and 2. [↑](#footnote-ref-11)
12. Universal Declaration of Human Rights at Article 7. [↑](#footnote-ref-12)
13. *Minister of Home Affairs & Another v Fourie & Another* 2006 (3) *BCLR* 355 (CC) at paragraph 99; P Yarnell et al. (eds) *Sexual Orientation, Gender Identity, and International Human Righs Law: A Practitioner’s Guide no. 4* (2009) at 29. [↑](#footnote-ref-13)
14. P de Vos & J Barnard “Same-sex marriage, civil unions, and domestic partnerships in South Africa: Critical reflections on an ongoing saga” (2007) 4 *SALJ* at 802. [↑](#footnote-ref-14)
15. P de Vos & J Barnard (2007) at 802. [↑](#footnote-ref-15)
16. United Nations General Assembly, the International Covenant on Civil and Political Rights (1968-12-16). [↑](#footnote-ref-16)
17. International Covenant on Civil and Political Rights at Article 23(2). [↑](#footnote-ref-17)
18. International Covenant on Civil and Political Rights at Article 2(1) (emphasis added). [↑](#footnote-ref-18)
19. International Covenant on Civil and Political Rights at Article 26. [↑](#footnote-ref-19)
20. *Joslin v New Zealand* (CCPR/C/75/D/902/1999) 10 *IHRR* 40 (2003). [↑](#footnote-ref-20)
21. *Toonen v Australia* (CCPR/C/50/D/488/1992) 1-3 *IHRR* 97 (1994); International Covenant on Civil and Political Rights at Article 2. [↑](#footnote-ref-21)
22. M Hayworth “Marriage equality as a human right” (2017) *Amnesty* <https:\\www.amnesty. org.au/marriage-equality-human-right/ (accessed 2018-05-01). [↑](#footnote-ref-22)
23. P Yarnell *Sexual Orientation* at 34. [↑](#footnote-ref-23)
24. *Young v Australia* (CCPR/C/78/D/941/2000) 5 *IHRR* 747 (2003). [↑](#footnote-ref-24)
25. *Young v Australia*. [↑](#footnote-ref-25)
26. N Ntlama “A brief overview of the Civil Union Act” (2010) 13 *PELJ* 1 at 204-205. [↑](#footnote-ref-26)
27. J Lekhuleni *The Constitutionality of the Civil Union Act 17 of 2006* LLM thesis University of Pretoria (2016) at 30-32. [↑](#footnote-ref-27)
28. United Nations General Assembly International Covenant on Economic, Social, and Cultural Rights(1966-12-16). [↑](#footnote-ref-28)
29. Committee on Economic, Social, and Cultural Rights, *General Comment No. 14: The rights to the highest attainable standard of health (Article 12)* at paragraph 18; Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The right to water* at paragraph 13. [↑](#footnote-ref-29)
30. Committee on the Rights of the Child, *General Comment No. 4*; Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by State Parties* at paragraph 21. [↑](#footnote-ref-30)
31. Organisation of African Unity OAU, The African Charter on Human and Peoples’ Rights (1981-06-27), [↑](#footnote-ref-31)
32. P Yarnell *Sexual Orientation* at 42; African Charter on Human and Peoples’ Rights at Article 2:

    “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”;

    African Charter on Human and Peoples’ Rights at Article 28:

    “Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.” [↑](#footnote-ref-32)
33. African Charter on Human and Peoples’ Rights at Article 27(2). [↑](#footnote-ref-33)
34. P Yarnell *Sexual Orientation* at 42. [↑](#footnote-ref-34)
35. J Lekhuleni *Constitutionality of the Civil Union Act* at 30. [↑](#footnote-ref-35)
36. International Commission of Jurists, Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007-03-01). [↑](#footnote-ref-36)
37. United Nations Human Rights Resolution A/HR/RES/17/19 (2011); United Nations High Commissioner Report for Human Rights “Discriminatory Laws and Practices and Acts of Violence Against People Based on Their Sexual Orientation and Gender Identity” A/HRC/19/41 (2011). [↑](#footnote-ref-37)
38. United Nations High Commissioner Report for Human Rights at 22. [↑](#footnote-ref-38)
39. The Constitution of the Republic of South Africa, 1996 at section 9(3). [↑](#footnote-ref-39)
40. Constitution at section 9:

    “Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken. 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 and birth. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in

    terms of subsection (3).” [↑](#footnote-ref-40)
41. Constitution at section 9(4). [↑](#footnote-ref-41)
42. Constitution at section 9(5). [↑](#footnote-ref-42)
43. *Gay and Lesbian Equality & Another v Minister of Justice & Others* 1998 (12) *BCLR* 1517 (CC). [↑](#footnote-ref-43)
44. *National Coalition for Gay and Lesbian Equality & Another v Minister of Home Affairs & Others* 2000 (1) *BCLR* 39 (CC). [↑](#footnote-ref-44)
45. *Minister of Home Affairs & Another v Fourie & Another* 2006 (3) *BCLR* 355 (CC). [↑](#footnote-ref-45)
46. While the Promotion and Prevention of Unfair Discrimination Act 4 of 2000 protects against discrimination on sexual orientation in this instance it would not be directly used because the law with a higher authority needs to be invoked. [↑](#footnote-ref-46)
47. *Harksen v Lane NO & Others* 1997 (11) *BCLR* 1489 (CC). [↑](#footnote-ref-47)
48. The general approach considers the nature and extent of the discrimination; whether and to what extent the discrimination achieves its purpose; whether there are less restrictive and less disadvantageous means to achieve the purpose. Relevant consider as per *Harksen* considerations include but are not limited to the position of the complainants in society, nature of the provision and its purpose, was the impact of the discrimination such that it impinges on the dignity on the group that is being discriminated against or causes a comparably serious harm. [↑](#footnote-ref-48)
49. J Lekhuleni *Constitutionality of the Civil Union Act* at 30. [↑](#footnote-ref-49)
50. Constitution at section 36. [↑](#footnote-ref-50)
51. [↑](#footnote-ref-51)