



**BRIEFING DOCUMENT**

**CIVIL UNION AMENDMENT BILL**

**[B11B-2018]**

**1.Background**

The Civil Union Amendment Bill was introduced to the PC Home Affairs as a private member’s bill by Ms Deidre Carter (COPE) on 15 August 2018.

**2. Member’s Submission on the Bill**

Ms Carter’s submission to the Committee on the amendment to the Civil Union Act was based on the following:

The advent of our Constitutional Democracy created a constitutional and legal framework that allowed historically marginalised groups, including gays and lesbians, to challenge the ideological hegemony that dominated South African politics.

Following a number of court challenges and judgements, the Constitutional Court in the matter of the *Minister of Home Affairs v Fourie[[1]](#footnote-1)*, ruled unanimously that:

* same sex couples have a constitutional right to get married;
* that it was unconstitutional for the state to provide the benefits of marriage to opposite-sex couples whilst denying same-sex couples; and
* that this state of affairs infringed upon the right to equality before the law and the right not to be discriminated against by the state on grounds of sexual orientation; and
* declared, as a consequence, that the common law definition of marriage was inconsistent with the Constitution and invalid to the extent that it did not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accorded to heterosexual couples.

This landmark ruling ordered that the declaration of invalidity be suspended for twelve months from the date of the judgment to allow Parliament to correct the defect. As a consequence, Parliament adopted the Civil Union Act, 17 of 2006 which came into operation on 30 November 2006.

The Act extended the recognition of marriage rights to same-sex partners and provides same-sex partners the right to enter into a civil partnership known as a civil union. The Act creates the only means by which same-sex couples may formalise their union.

Importantly, the Preamble to the Act notes:

1. That section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law;
2. That section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;
3. That section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;
4. That section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion;
5. That the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; and
6. That the family law dispensation as it existed after the commencement of the Constitution did not provide for same-sex couples to enjoy the status and the benefits coupled with the responsibilities that marriage accords to opposite sex couples

**3.** **Recommendations for Amendments**

Ms Carter in her presentation to the PC Home Affairs, indicated that she in her capacity as a public representative, had received complaints from members of the public that same-sex couples seeking the services of marriage officers to solemnise their marriage were being turned away from Home Affairs offices as there were no marriage officers in the employ of the state that were prepared to solemnise same-sex marriages.

Section 6 of the Civil Union Act provides that designated marriage officers in the employ of the state, may in writing, inform the Minister that they object on the ground of conscience, religion and belief to solemnising civil unions between persons of the same sex whereupon that marriage officer shall not be compelled to solemnise such civil unions. Home Affairs revealed that only 28,6% (117 of the 409) of Home Affairs branches have marriage officers who are willing to marry same‐sex couples under the Civil Union Act.

Ms Carter submitted that the Constitutionality of section 6 of the Civil Union Act is questionable on the grounds that it offends the rights of same-sex couples to equality and human dignity as entrenched in sections 9 (Equality) and 10 (Human Dignity) of the Constitution. Section 6 of the Act appears to be in direct conflict with the objectives of the Civil Union Act and undermines the purpose of the Act: that is, to remove discrimination on the ground of sexual orientation and to uphold the constitutional rights to equality and dignity.

**Section 6 of the Act provides 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 grounds 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.”*
* The marriage officers envisaged in section 6 of the Civil Unions Act are those that solemnise civil unions in their capacity as civil servants – the same civil servants who as marriage officers have no legal rights to object to solemnising marriages under the Marriage Act, 25 of 1961.
* It is posited that section 6 of the Civil Union Act limits the right of same-sex partners to enter into a civil union, and that this limitation cannot be justified in an open and democratic society.
* The current provision also appears to contravene Chapter 10 of the Constitution which provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including that services must be provided impartially, fairly, equitably and without bias.
* The solution lies in the repeal of section 6 of the Civil Union Act which allows a marriage officer in the employ of the state to inform the Minister (of Home Affairs) that he or she objects on the grounds of conscience, religion, and belief, to solemnising a civil union between persons of the same sex.[[2]](#footnote-2)

**4**. **PC Home Affairs Process**

On **28 August 2018**, the PC Home Affairs adopted the motion of desirability on the Bill as follows:

“That in the opinion of the Committee, legislation is desirable to repeal section 6 of the Civil Union Act, 2006 (Act No. 17 of 2006), which allows a marriage officer in the employ of the state to inform the Minister of Home Affairs that he or she objects on the grounds of conscience, religion, and belief, to solemnizing a civil union between persons of the same sex.”

On **6 November 2018**, the PC Committee met and received an overview of the submissions on the bill which was as follows:

* In total there were 65 submissions against the Civil Union Bill representing religious and mostly Christian organisations and conscientious objecting individuals and related research organisations.
* The essence of these submissions was that while it is correct that the Constitution guarantees the right not to be unfairly discriminated against on the ground of sexual orientation, the Constitution equally guarantees the right not to be unfairly discriminated against on the grounds of religion, conscience and belief (s 9(3)). In addition, the Constitution guarantees every person (regardless of their occupation, or whom they are employed by) the right to freedom of conscience, religion, thought, belief and opinion (s 15), which includes the right to practise what it is one believes.
* In contrast there were 503 submissions in favour of the Bill, in large part persons signing pre-drafted statements of support by COPE, as well as from supporters of the Lesbian, Gay, Bisexual, Transexual, Queer and Intersex Organisations and Community. In addition, there were several submissions from human rights, democracy and labour based research organisations.
* The essence of these submissions, which influenced the Committee’s decision to endorse the Bill was that the Constitution and Constitutional Court findings in the Fourie case led to the drafting of the original Civil Union Bill in in 2006. According to the court findings, same sex couples being prevented from marrying was a 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 Constitution. Thus 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.
* It must be noted that it was the substance of the submissions that were considered and not an outright comparison of the numbers of submissions, which were misleading since several of the submissions both for and against were said to be supported by the larger community of the organisations submitting.

On **13 November 2018**, the Committee received a briefing from the parliamentary legal advisor (PLA). Based on the briefing, the Chairperson noted that it was clear that the State could not discriminate against the union of same-sex couples. The question was how to address the administrative operations, because the permission received could not be taken away. He noted from the brief that certain marriage officials might have been exempted by the DHA, but there was no basis for this, as the right not to solemnise same-sex marriages by these marriage officials could be homophobic, based on the PLA’s response, although it had not been proven. The private Member’s Civil Union Amendment Bill proposed the removal of Section 6 that empowered marriage officers to refuse solemnising the civil union of same-sex couples.

The DHA, stated that out of the 612 DHA offices, 111 offices had marriage officers who were willing to solemnise same-sex marriages under the Civil Union Act. There were 692 marriage officers, but 309 officials were able to solemnise same-sex marriages and 383 were exempted. Same-sex couples could approach any DHA office and arrangements would be made to assist with the civil union of their choice. The plan was to assign marriage officers to conduct civil unions by appointment, and arrangements would be made where there was no marriage officer in a particular DHA office. This would involve giving the same-sex couple appointments and transporting them to a DHA office that solemnised same-sex marriages.

The Chairperson noted that the Constitution was clear and that the State could not discriminate against any party on the basis of sexual orientation. Section 6 allowed marriage officers that worked at the DHA to write to the Minister for exemption. The DHA had proposed an arrangement that allowed everyone who sought the service of solemnising a civil union to get it, despite sexual orientation. He resolved that the DHA and the PLA must jointly prepare an amendment for inclusion in the Civil Union Bill on what the Committee and Ms D Carter had proposed, within one week.  The DHA must also look at regulations that would ensure that no one who seeks the service of solemnising a civil union would be turned back on the basis of sexual orientation. The DHA should also review the phase-in period, because it must be enforced once the Civil Union Amendment Bill becomes a law.

On **27 November 2018**, the legal advisor advised as follows:

* In the case before the Committee, there were competing rights between marriage officers who were given a right by section 6 of the Civil Union Act and the rights in terms of section 9 of the Constitution, not to be discriminated against.
* The proposal was to make the transitional provision retrospective and prospective at the same time. The exemption should be valid for 24 months in the hope that the Department in that period would be training and sensitising the officials on the constitutional rights of same sex couples.
* The new proposed transitional provision clause, the effect of which was that the marriage officers who were currently exempted would continue to be exempted for 24 months. In the interim, the Minister must make sure that every Home Affairs office had a marriage officer who must solemnise same sex marriages so that no one would be turned away because there was no officer available to marry same sex couples.

**5. Conclusion**

On 28 November 2018, the PC Home Affairs Committee adopted the Bill which consists of two clauses as follows:

**Clause 1** of the Bill repeals section 6 of the Act in its entirety:

**Section 6 of the Act**:

*“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 grounds 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.”*

**Clause 2** of the Bill is a transitional provision, which is consequential to the repeal of section 6 of the Act:

***Transitional provision***

***2.*** *(1) Any exemption granted by the Minister in terms of section 6 of the principal Act, prior to the commencement of this Act, lapses 24 months from the date of commencement of this Act.*

*(2) The Minister must ensure that there is a marriage officer, other than a marriage officer referred to in section 5 of the principal Act, available to solemnise a civil union at every Department of Home Affairs office.*

1. Minister of Home Affairs and Another v Fourie and Another, with Doctors For Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae) CCT 60/04 [↑](#footnote-ref-1)
2. PMG Minutes of meeting PC Home Affairs, 15 August 2018. [↑](#footnote-ref-2)