

## **Submission to the Speaker:**

**CIVIL UNION AMENDMENT BILL  
(PRIVATE MEMBERS' BILL OF MS DEIDRE CARTER OF  
THE CONGRESS OF THE PEOPLE)**



**For further queries:**

Matthew Clayton    Triangle Project

[matthew@triangle.org.za](mailto:matthew@triangle.org.za)

## Contents

|   |   |
|---|---|
| <b>Introduction</b>                           | 3 |
| <b>Direct discrimination</b>                  | 3 |
| <b>Section 6 and requirements from Fourie</b> | 5 |
| <b>Conclusion</b>                             | 8 |

This submission is endorsed by:



## Introduction

Triangle Project welcomes the opportunity to make written submissions on this Private Member's Bill, which seeks to amend the Civil Union Act (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.

Triangle Project strongly supports the Bill, and in this brief submission we wish to advance two distinct arguments **in favour** of the amendments proposed in this Bill.

### 1. Direct discrimination

We believe that Section 6 as currently written and applied amounts to direct violation on the grounds of equality<sup>1</sup> and human dignity.<sup>2</sup> With that in mind, any limitation to these rights must be done in accordance with Section 36 of the Bill of Rights, the so-called 'limitations clause.'

*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;*

---

<sup>1</sup> Section 9, Constitution of the Republic of South Africa, 1996

<sup>2</sup> Section 10, Constitution of the Republic of South Africa, 1996

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.*

The right to equality is a foundational one of our democracy and violations to it which do not seek to redress past injustices should be viewed with suspicion. Furthermore, the importance of the purpose of the limitation is not comparable to the right which is being limited.

The right to religious belief, conscience and practice - the supposed purpose of the limitation - has previously been deemed an insufficient reason to limit the right to equality.<sup>3</sup> 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.

Furthermore, 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 unions<sup>4</sup>.

The balancing of rights is a complicated process, but where the practice of religious belief results in a violation of the right to equality which causes harm, 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 must apologise to a same-sex couple they discriminated against by denying them service on the basis of religious beliefs. 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

---

<sup>3</sup> See fn 5

<sup>4</sup> Available at

[http://www.mambaonline.com/images/Same%20sex%20civil%20marriage%20list%20of%20offices%20and%20names%20of%20off\\_1.pdf](http://www.mambaonline.com/images/Same%20sex%20civil%20marriage%20list%20of%20offices%20and%20names%20of%20off_1.pdf)

their own right to freely practice their religion,<sup>5</sup> but they were unsuccessful in the Equality Court. For the self-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.

We strongly argue that Section 6 of the Civil Union Act fails the test in the limitations clause completely, and amounts to direct unfair discrimination by the state against people based on their sexual orientation.

## **2. Section 6 and requirements from *Fourie***

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?<sup>6</sup>”

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.<sup>7</sup> Cameron J, writing for the majority in the SCA, held 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.<sup>8</sup>

Sachs J, writing for the majority, held that the SCA had already established that:

---

<sup>5</sup><https://www.dailymaverick.co.za/article/2015-04-16-equality-court-religious-belief-does-not-override-equality/#.WrygQ4hubb0>

<sup>6</sup> At Par 5

<sup>7</sup> At Par 15

<sup>8</sup> At Par 16

*'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."<sup>9</sup>'*

It was prophetic that Cameron J, in his SCA judgment for the majority further held 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 removed.

Sachs J also referenced Cameron J's emphasis on 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 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 belief and personal opinions when they report for work. However, as with any employer-employee relationship, the employee is subject to the

---

<sup>9</sup> At Par 15

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.

Human dignity is at the core of what makes Section 6 untenable. Sachs J 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." She also referenced Ackerman 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.<sup>10</sup>" 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.

Sachs J emphasised: "In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred.<sup>11</sup>" 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.

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 argue 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 in *Fourie*.

Section 6 harms the dignity of same-sex couples both in law and 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

---

<sup>10</sup> At Par 92

<sup>11</sup> At Par 94

Home Affairs offices in their city.<sup>12</sup> 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.”*<sup>13</sup>

Where the right to discriminate against a vulnerable minority has been protected in Section 6, 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.

## **Conclusion**

In conclusion, we strongly support the removal 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 Private Members Bill.

\*\*\*

---

<sup>12</sup> <https://citizen.co.za/news/south-africa/1056226/home-affairs-accused-of-bias-against-gay-marriage/>

<sup>13</sup> <http://www.mambaonline.com/2014/04/11/home-affairs-still-rejecting-gay-couples/>