

# Joint Submission to the Portfolio Committee on Home Affairs:

## CIVIL UNION AMENDMENT BILL [B11-2018]



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**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 For this reason, Section 6 must be repealed.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 equality<sup>1</sup> and human dignity<sup>2</sup> 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

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<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

is closely connected with the right to dignity. The right to dignity includes the right to family life.<sup>3</sup> This in turn consists of the right to marry.<sup>4</sup>

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.”<sup>5</sup>*

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*

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<sup>3</sup> *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.

<sup>4</sup> *Ibid* at para 28.

<sup>5</sup> *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.

*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.”<sup>6</sup>*

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?”<sup>7</sup>

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*

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<sup>6</sup> Ibid, at para 42.

<sup>7</sup> At Par 5.

*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>8</sup>*

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.

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<sup>8</sup> At Par 15.

**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 Identity*<sup>9</sup>.

Additionally, the African Commission, in the *245/02 Zimbabwe Human Rights NGO Forum v Zimbabwe* case<sup>10</sup>, 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.<sup>11</sup> 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.”<sup>12</sup>*

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*

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<sup>9</sup> 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>

<sup>10</sup> Available at [http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39\\_245\\_02\\_eng.pdf](http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf)

<sup>11</sup> At Par 169.

<sup>12</sup> At Par 170.

*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.”<sup>13</sup>*

Further, most international human rights bodies already recognise LGBT rights as part of their non-discrimination regimes.<sup>14</sup> 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.”<sup>15</sup>

## **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

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<sup>13</sup> At Par 171.

<sup>14</sup> 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.

<sup>15</sup> 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>

different Home Affairs offices in their city.<sup>16</sup> 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."*<sup>17</sup>

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;*

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<sup>16</sup> <https://citizen.co.za/news/south-africa/1056226/home-affairs-accused-of-bias-against-gay-marriage/>

<sup>17</sup> <http://www.mambaonline.com/2014/04/11/home-affairs-still-rejecting-gay-couples/>

- 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.”<sup>18</sup> We submit that once

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<sup>18</sup> At Par 92.

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."<sup>19</sup> 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>20</sup>. 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.

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<sup>19</sup> At Par 35.

<sup>20</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)

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.<sup>21</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.

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.<sup>22</sup>

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<sup>21</sup> At Par 94.

<sup>22</sup> <https://www.dailymaverick.co.za/article/2015-04-16-equality-court-religious-belief-does-not-override-equality/#.WrygQ4hubb0>

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,<sup>23</sup> but they were unsuccessful in the Equality Court. 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.

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<sup>23</sup>Ibid.