



1 Newtown Avenue, Level L3, Soul City Offices, Johannesburg, 2193, South Africa
Tel +27 11 339 1468 | getinfo@iranti.org.za | www.iranti.org.za

SUBMISSIONS ON THE CIVIL UNION AMENDMENT BILL

Prepared by: Letlhogonolo Mokgoroane

Email: letlhogonolo@iranti.org.za

“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

Introduction

Iranti is a Johannesburg-based media-advocacy organisation which advocates for the rights of LGBTI+ persons, with specific focus on lesbian, transgender (including gender non-conforming) and intersex persons in Africa. Iranti works within a human rights framework, raising issues on gender identities, and sexuality, through the strategic use of multimedia storytelling, research and activism.

Iranti welcomes the opportunity to make submissions on the amendments to the Civil Union Amendment Bill. Iranti’s submissions are fully in support of the amendment.

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.



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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 homosexual 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:

Province	Number of Marriage officers	Number of Marriage officers who marry homosexual couples
Gauteng	57	17 (29.9%)
Eastern Cape	59	10 (16.95)
Free State	28	5 (17.9%)
Mpumalanga	58	10 (17.2%)
Limpopo	61	16 (26.4%)
Western Cape	34	10 (29.41%)
Northern Cape	22	9 (40.9%)
Kwa-Zulu Natal	68	29 (42.65%)
North West	22	10 (45%)

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-will-marry-gay-people/>.



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This means only that 34 percent of marriage officers are willing to solemnise marriages between homosexual couples. The implementation of this section has created practical difficulties for homosexual 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 solemnisation of homosexual marriages on specific days of the week.⁵ The refusal to marry homosexual couples means that homosexual people do not have full access to constitutionally enshrined rights.

In 2017, the concerns around the difficulty created by section 6 were discussed in a parliamentary debate. A call to amend section 6 of the Civil Union Act was posed to then Minister 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 LGBTIAQ+ communities have argued that this exemption is absurd and that public servants of a secular state must leave their personal politics when they enter the workplace.⁶

³*Id.*

⁴*Id.*

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-south-africa-part-2-second-class-citizens/>.

⁶ Carl Collison, *Home affairs minister rejects call to amend discriminatory same-sex law*, MAIL AND GUARDIAN



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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 homosexual couple and object to solemnising a civil union.⁸ It is submitted 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 homosexual couples seeking to solemnise their unions pursuant to the Civil Union Act.⁹ This can be seen as state-sanctioned homophobia.

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 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

(Jul. 19, 2017), <https://mg.co.za/article/2017-07-18-home-affairs-minister-rejects-call-to-amend-discriminatory-same-sex-law>.

⁷ Henriët 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.



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solemnise 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 homosexual 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 homosexual 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, which is to remove discrimination on the grounds of sexual orientation and to uphold the constitutional rights to equality and dignity.

Moreover, section 6 of the Civil Union Act infringes upon the equality provision in that it allows marriage officers to exercise their discretion not to officiate a homosexual marriage on grounds of religious or conscientious objection.¹³ In *President of the Republic of South Africa v Hugo*,¹⁴ Goldstone J emphasised

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).

¹² See Preamble of the Civil Union Act.

¹³ James Dumisani Lekhuleni The Constitutionality of the Civil Union Act 17 of 2006 LLM Thesis, (on website of University of Pretoria) at 33.

¹⁴ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).



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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 directly discriminate against homosexual couples seeking to get married on the basis of their sexual orientation. 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 womxn, 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 homosexual couples.¹⁸

¹⁵ *Id* at para 41.

¹⁶ *Id* at para. 41. See Lekhuleni, at 34.

¹⁷ *Id* at 36.

¹⁸ Henriët De Ru, *The Civil Union Act 17 of 2006: A transformative act or substandard product of a failed conciliation between social, legal and political issues*, THRHR 553, 566 (2010)



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Furthermore, section 6 infringes upon homosexual couples' the right to human dignity in the Constitution.¹⁹ The right to human dignity involves the right to family life for homosexual 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 great 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

Conclusion

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*.



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We have submitted various reasons that show the unconstitutionality of section 6 of the Civil Union Act. Section 6 infringes on section 7, 9 and 10 of the Constitution. This infringement cannot be justified in terms of the limitation of rights under section 36. Section 6 should be repealed. We support the Civil Union Amendment Bill to repeal section 6. We echoed the words of Justice Sachs in the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*²⁷, where he emphatically said “[like] justice, equality delayed is equality denied”.²⁸

²⁷[1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517.

²⁸Id at para 60.