



12 August 2020

President Cyril Ramaphosa

President of South Africa
c/o Office of the Presidency
Union Buildings
Government Avenue
Pretoria

BY EMAIL:

malebo@presidency.gov.za / presidentrsa@presidency.gov.za

Dear President Ramaphosa,

RE: CIVIL UNION AMENDMENT BILL B11B OF 2018

1. This letter is addressed to you as a joint effort by the following human rights organisations – Free Gender, Gender Dynamix, Iranti.Org, Legal Resources Centre, Sonke Gender Justice, Triangle Project and Women's Legal Centre.
2. We refer to the adoption of the Civil Union Amendment Bill B11B (**the Bill**) of 2018 by both houses of Parliament with the National Council of Provinces (**NCOP**) adopting the Bill on 1 July 2020. In terms of the legislative process, following its passing in the NCOP, the Bill has now been referred to your office for assent.
3. We have noted with concern the contents of a letter addressed to your office by the Freedom of Religion South Africa (hereinafter 'FORSA letter') on 9 July 2020. The FORSA letter

specifically requests that you not sign the Bill into law but rather send it back to the National Assembly for reconsideration. The letter also makes some problematic proposals about how to address the issue of religious refusals by state-employed officials.

4. We have taken the decision to address this letter to your office to ensure that you also hear from those who are in support of this Bill. We are of the view that this is critical in your consideration of the Bill and an opportune moment to also remind you of the rights and status of lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI+) persons in South Africa.
5. The history of discrimination, human rights violations and criminalisation of LGBTQI+ people in South Africa continues to have a severe impact today. Despite decriminalisation and adoption of constitutional and legislative protections focused on sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC), widespread discrimination, hate crimes, lack of access to services and other human rights violations continue to riddle the daily lives of LGBTQI+ communities. LGBTQI+ communities remain extremely marginalised, victimised, excluded and discriminated against on the basis of sexual orientation, gender identity, gender expression and sex characteristics.
6. The experience of marginalisation and exclusion exists even when seeking governmental services. Same-sex or same-gender couples attempting to enter into civil partnerships in terms of the Civil Union Act 17 of 2006 have reported persistent systematic refusals by some officials of the Department of Home Affairs (“DHA”) to offer services to them because of their sexual orientation. Transgender, gender diverse and intersex persons face extraordinary barriers and multiple forms of discrimination from the DHA on the basis of their gender identity, gender expression and/or sex characteristics. When attempting to access legal gender recognition in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003 and other services, human rights violations are a common occurrence for these classes of persons at the DHA.
7. Indeed, the State and its various organs have a constitutional mandate to eliminate discrimination and stigma that continue to manifest itself through the provisions of laws, policies and practices. The State has a duty to publicly signal its strong, unreserved commitment to the protection of LGBTQI+ people, SOGIESC human rights and rights to dignity and equality among other constitutional rights. The discrimination perpetrated against LGBTQI+ by officials at the DHA and other public and private actors sits starkly in conflict with Sections 9 and 10 of the Constitution of the Republic of South Africa.
8. We acknowledge the role of the Civil Union Act in addressing aspects of such discrimination within the context of marriage and relationships. In our view, the Civil Union Act is therefore a

response to the past discrimination and the discrimination still being faced by LGBTQI+ people within our country. We note however that, while the Civil Union Act provides the means for the recognition and solemnisation of same-sex marriages, it continues to marginalise and discriminate against same-sex and same-gender couples and LGBTQI+ communities as a whole.

9. The marginalisation of same-sex and same-gender couples through the Civil Union Act manifests itself in a variety of ways. For the sake of brevity and given the contents of the Civil Union Amendment Bill, our letter focuses exclusively on the marginalisation caused by Section 6.
10. It is our firm submission that Section 6 of the Civil Union Act marginalises and violates the rights of same-sex and same-gender couples and LGBTQI+ persons in the following ways:
 - 10.1 Section 6 of the Civil Union Act allows non-religious marriage officers employed by the State to refuse to solemnise same-sex marriages on the basis of religion, conscience and belief.
 - 10.2 There is no requirement of a “sincere religious belief” or any measure of establishing whether the objection may be motivated purely, or in part, by prejudice and/or stigma against LGBTQI+ persons. This means that a conscientious objection could be submitted based purely on homophobic, transphobic or intersexphobic beliefs and the Civil Union Act would permit it. We pause to note that our courts, while recognising the need for sincere religious belief, have qualified this recognition and stated that *“It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others.”*¹ Sincere religious belief is therefore not a justification to discriminate against LGBTQI+ individuals.
 - 10.3 More concerning, Section 6 specifically lists same-sex unions as the only reason a civil marriage officer may object to their solemnisation. Section 6 therefore endorses discrimination by state officials on the basis of sexual orientation alone.
 - 10.4 Essentially, Section 6 allows a marriage officer to impose a moral judgment often based on irrational, homophobic, transphobic and intersexphobic beliefs about LGBTQI+ people and consequently object to solemnising civil unions.

¹*Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* (CCT 10/05) [2005] ZACC 20; 2006 (3) BCLR 355 (CC) para 92.

11. Indisputably, giving civil servants the right to refuse to solemnise same-sex marriages undermines same-sex and same-gender couples' Constitutional right to equal protection and benefit from the law.
 - 11.1 Section 6 inherently violates same-sex and same-gender couples' right to dignity and in the most solemn of practices, questions and violates their self-worth. It limits their access to basic services that are freely available to cisgender heterosexual couples, which the Constitutional Court specifically required Parliament to address when enacting the Civil Unions Act.
 - 11.2 By promoting and reinforcing discriminatory attitudes and behaviour on the basis of gender and sex, Section 6 directly contributes to the further stigmatisation and marginalisation of LGBTQI+ persons and communities.

12. Discriminatory laws, policies and practices have a much greater, disproportionately detrimental impact on the lives of LGBTQI+ persons and communities than the obligation to render services equally and respectfully would have on unwilling officials. It has an impact far beyond the individual couples and their families, and creates a broader public perception that there is something wrong with LGBTQI+ people and that it is permissible to discriminate against them and refuse to provide services to them. This is utterly inexcusable in a context where hate crime and discrimination against LGBTQI+ people are rife and access to services already minimal.

13. It has been argued that Section 6 of the Civil Union Act is necessary to protect the freedom of religion of state marriage officers. As such, the argument goes, the amendment to Section 6 which seeks to repeal the section in its entirety, is a violation of the freedom of religion of state marriage officials. We believe that this argument is quite mistaken and based entirely on the view that it is acceptable to limit the rights of LGBTQI+ persons. We emphasise that:
 - 13.1 The right to freedom of religion cannot be exercised in a way that violates the right not to be discriminated against on the basis of SOGIESC. The protection guaranteed for freedom of religion, belief and opinion cannot be exercised in a manner that is incongruent with or violates a person's other fundamental rights, including the rights to equality and dignity.
 - 13.2 Prejudice cannot be allowed to hide behind the right to freedom of religion. Homophobia, transphobia and intersexphobia are forms of prejudice and neither healthy nor legal expressions of conscience, religion or spirituality.
 - 13.3 The amendment to Section 6 does not encroach on the freedom of religion of state-employed officers in their capacity as private citizens as they are still able to practice their religion freely. The intention of Section 15 of the Constitution is never to allow officers of the State to discriminate against others because of beliefs that they hold as private citizens. State officials must act in accordance with the State's constitutional obligations and not based on their personal beliefs and certainly not their prejudices.

- 13.4 The limitation clause does not give justification for state-employed officials to provide discriminatory services to same-sex or same-gender couples based on personal religious belief or conscience. It is the right of the State as an entity and not the right of individuals who render the service on behalf of the State that should be considered when determining the connection between the limitation and its purpose.
- 13.5 The interpretation of freedom of religion that supports the retention of Section 6 offers an accommodation of religion that is too broad. As we have indicated above, it has no limitations at all and can therefore confer upon marriage officers the ability to be homophobic, transphobic and intersexphobic without any consequences. Certainly, this reinforces the systemic marginalisation facing same-sex and same-gender couples seeking to solemnise their unions pursuant to the Civil Union Act. This creates a context in which the rights of LGBTQI+ persons depend on the willingness of marriage officers' discretionary views on their rights and the need for equal benefit of the law. This context has made the substantive translation of the right to equality subject to mere choice.
14. What the legislature has rightfully done with the repeal of Section 6 in its entirety is to clearly state that there can be no constitutional basis to continue discrimination against LGBTQI+ communities based on an incorrect understanding of freedom of religion. It has reached this conclusion after seeking and obtaining public input and considering same. The Civil Union Amendment Bill therefore is a positive step towards addressing discrimination against already vulnerable and marginalised populations.
15. It has also been argued that the amendment of Section 6 is not necessary as the DHA is currently in the process of revising the Marriages Act. As you know, the process to enact a new Marriage Act may take years to come into effect. In the meantime, the rights of same-sex and same-gender couples to equality and dignity will continue to be infringed every day until that "single Marriage Act" is enacted. Furthermore, it is not guaranteed that this new Marriage Act will protect the rights of same-sex and same-gender couples. We emphasise that the rights to equality and dignity are rights that must be immediately realised – there would therefore be no justification to continue the discrimination against LGBTQI+ persons. Signing the Bill into law requires only the signature of the President. In our view, this is not an onerous process that will result in a duplication of efforts with the process of enacting a new Marriage Act.
16. It has been argued that the State should leave Section 6 as is and rather offer services to same-sex couples through the implementation of roving marriage officers. The idea here is that roving marriage officers will be sent on circuit to offer their services. This suggestion on its own clearly indicates the belief that it is permissible to discriminate against LGBTQI+ persons, as such a suggestion would never be made in the context of race, religion or disability, for instance. Imagine a similar scenario where some marriage officers would go on circuit to only offer services to people of a certain race, religion or disability, because many or

most of the State's marriage officers do not wish to offer services to them because of their religious views of these particular groups of people. This would not be tolerated at any cost – and neither should it be for LGBTQI+ persons. We cannot continue to operate in a manner that says LGBTQI+ persons are not worth the protection of law.

17. Other measures proposed continue to discriminate against LGBTQI+ persons because it requires that special marriage officers be employed to only offer services to them. It is a reinforcement of the separate but equal concept and relegates LGBTQI+ persons to an inferior status. In many instances this is the discrimination that is currently taking place at our Home Affairs offices and the practice is discriminatory and hurtful. State services must be offered without prejudice or fear, and most critically, it must be offered fairly and in a manner that respects the dignity of all.
18. Since the introduction of the Civil Union Amendment Bill to parliament as a private members Bill, there has been engagement with civil society organisations, engagements with the DHA and other members of the public in the parliamentary processes of the Bill. Those that seek to oppose the Bill have also publicly participated in these forums and were provided ample opportunity to express their opinions. We would therefore appeal that you ensure that all people in South Africa enjoy their Constitutional rights and that those who are vulnerable to discrimination and prejudice find their rights recognised as well.
19. For the reasons set out in this letter, we support in the strongest terms the adoption of the Civil Union Amendment Bill and urge the President to sign this bill into law. It is time to bring the Civil Union Act in line with the rights to equality and dignity as enshrined in the Bill of Rights in the Constitution of the Republic of South Africa.
20. Please do not hesitate to contact the following persons as representatives of the collective of organisations for any further comments, or queries:
 - a. Free Gender - freegender2008@gmail.com
 - b. Gender Dynamix - advocacy2@genderdynamix.org.za
 - c. Irant.org - jabu@iranti.org.za
 - d. Legal Resources Centre – mandy@lrc.org.za
 - e. Sonke Gender Justice - kayan@genderjustice.org.za
 - f. Triangle Project – estian@triangle.org.za
 - g. Women's Legal Centre – charlene@wlce.co.za

ENDS

COPY TO: Minister of Home Affairs
Dr Aaron Motsoaledi

BY EMAIL: Minister@dha.gov.za

AND TO: **Deputy Minister of Home Affairs**
Mr Njabulo Nzuza
BY EMAIL: thulane.ngubane@dha.gov.za