



TEL: +27 (0)74 355 0775

FAX: +27 (0)86 725 0837

EMAIL: INFO@CAUSEFORJUSTICE.ORG

WEBSITE: WWW.CAUSEFORJUSTICE.ORG

POSTAL ADDRESS: P.O. BOX 12622, DIE BOORD, 7613, SOUTH AFRICA

Our Reference: Civil Union Amendment Bill, 2018

Date: 6 December 2019

Select Committee on Security and Justice
National Council of Provinces
Parliament of South Africa

For Attention: Honourable Mr S Shaikh, MP
Chairperson of the Select Committee on Security and Justice

By Email: gdixon@parliament.gov.za
zrento@parliament.gov.za

Honourable Mr S Shaikh, MP,

RE: SUBMISSIONS ON THE CIVIL UNION AMENDMENT BILL [B11B-2018]

- 1 We refer to the abovementioned matter, specifically to the invitation issued by the Select Committee on Security and Justice (“the Committee”), calling for public comments in respect of the Civil Union Amendment Bill [B11B-2018] (“the Bill”).
- 2 Cause for Justice (“CFJ”) hereby wants to thank the Committee for the opportunity to present these written submissions and to participate in the law-making process.
- 3 CFJ’s submissions consist of:
 - 3.1 Our **request** for the Committee to hold **public hearings** in respect of the Bill, and
 - 3.2 Our **substantive submissions** in respect of the Bill.

BACKGROUND TO CAUSE FOR JUSTICE

- 4 CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness on matters of public importance.

CHIEF EXECUTIVE: SA SMIT | NON-EXECUTIVES: WW VILJOEN (CHAIRPERSON) | NC SNYDERS

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- 5 All five of CFJ's core values give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, (2) protection and promotion of human dignity / worth, (3) protection of the vulnerable in society (social justice), (4) ensuring accountable government action and (5) protecting the institutional authority of the family against undue encroachment from outside forces.
- 6 CFJ's involvement in matters pertaining to the protection and promotion of religious freedom date back to September 2014 when the "Organisasie vir Godsdienstige-Onderrig en Demokrasie"¹ instituted legal proceedings in the Johannesburg High Court against six public schools. CFJ joined the proceedings as *amicus curiae* (friend of the court). CFJ's contributions to the resolution of the constitutional questions included that a school system that tolerates diversity of religious practices and views should be favoured against a system that is essentially secular, denying all but agnostic or atheistic views in the life of a public school, since the South African constitutional order allows for the state to support and promote a variety of religious and irreligious views fairly and equitably. While CFJ acknowledged in its legal papers that accommodating religion in schools in a manner that ensures that the dignity and beliefs of all involved is respected, may at times not be an easy task, the answer cannot be to jettison religion – and along with it the enriching role that religious belief and practice play within the South African public sphere.
- 7 CFJ initially submitted written submissions in respect of a Draft Bill before its introduction into the National Assembly to the Speaker and to Ms D Carter, former MP and introducer of this Private Members' Bill, on 26 April 2018. On 23 October 2018 CFJ submitted substantive written submissions to the Portfolio Committee on Home Affairs (PCHA) pursuant to a call for comments in respect of the Bill.
- 8 The submissions hereby delivered to the Committee is based on our written submissions to the Portfolio Committee on Home Affairs, **and includes further insights gained since 23 October 2018.**

REQUEST FOR PUBLIC HEARINGS

- 9 The PCHA adopted the Bill without holding public hearings. The public accordingly was not allowed or enabled to meaningfully engage with their elected representatives in the formal forum created for that purpose. Although the PCHA received written submissions, opportunity to make written submissions alone does not satisfy the requirement for meaningful engagement and adequate public participation.

¹ *Organisasie vir Godsdienstige-Onderrig en Demokrasie v Laerskool Randhart and Others* (29847/2014) [2017] ZAGPJHC 160; [2017] 3 All SA 943 (GJ); 2017 (6) SA 129 (GJ) (27 June 2017) (<http://saflii.org/za/cases/ZAGPJHC/2017/160.html>).

- 10 This is particularly so in a matter such as the present one: Two groups' section 9(3) non-discrimination rights are on the table and multiple solutions are available to uphold both groups' rights, without the need to affirm the one at the expense of the other's rights. As we argue hereinbelow, failure to investigate and consider practical solutions that will prevent extinguishing the enjoyment of one group's constitutional rights in order to affirm another group's fundamental rights, is wholly inadequate work on the part of Parliament.
- 11 It is unfathomable that Parliament could pass a Bill, that affects two groups' equality and non-discrimination rights, through two houses (NA and NCOP) without providing a single opportunity for public participation by way of public hearings. If this were to happen, we submit that the process of the passing of the Bill through and by Parliament undoubtedly would be unconstitutional.
- 12 Therefore, we again hereby ***specifically request the Committee to provide the public with an opportunity to make oral representations by holding public hearings on the Bill.***

SUBSTANTIVE SUBMISSIONS

- 13 Our substantive submissions are structured under the following headings:

- A The facts**
- B The law - Constitutional rights analysis**
- C Application of the law to the facts**
- D Administrative problems require administrative solutions**
- E Ostensible lack of DHA mandate in respect of the Bill**
- F Conclusion**

A THE FACTS

- 14 Same sex couples can have their relationships solemnised as a civil union in terms of the Civil Union Act ("the Act").²
- 15 The Act provides marriage officers who are employed by the Department of Home Affairs ("DHA") with the right to object to solemnising civil unions of same sex couples on the basis of their conscience, religion or belief (referred to as a "conscientious objection").
- 16 Section 6 of the Act, the 'conscientious objection clause' it may be called, reads:

² Act 17 of 2006.

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 ground 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.

- 17 Due to the exercise of the right of conscientious objection by marriage officers who are employed by the state and their current geographical deployment, same sex couples are not able to have their civil unions solemnised at each and every Home Affairs Offices (“HAO”) in South Africa.

Supply of services – HOA and Marriage Officers (non-conscientious objectors)

- 18 According to the data at our disposal,³ there are 382 HAO in South Africa, of which 106 offices (or 27.8%) have marriage officers who are willing to solemnise civil unions between same sex couples. Therefore, civil unions between same sex couples cannot be solemnised at 276 offices (or 72.2%). These percentages, however, do not take into account the percentage distribution of where marriages and civil unions are solemnised and the ease with which a couple may be able to obtain the same services due to the proximity of an HAO which is able to solemnise civil unions. The aforementioned percentages accordingly are not a fair reflection of the extent to which same sex couples are in fact currently being denied services by the state. Because of the practical solutions we propose later herein, the aforementioned lack of clarity on the extent of the issue, however becomes practically irrelevant.
- 19 In addition and more significantly, the latest known head count of marriage officers in the employ of the state shows that 62.74% are willing and able to solemnise civil unions. A clear minority of 37,26% are conscientious objectors.⁴

³ The most up-to-date data may be confirmed with the Department of Home Affairs.

⁴ On 15 August 2018, the Honourable Ms Deidre Carter, MP briefed the Portfolio Committee on Home Affairs on the Bill. In her own presentation, Ms Carter stated that:

“In a written reply to my enquiry the then Minister of Home Affairs advised in writing that of the then 1130 designated marriage officers in the employ of the state 421 had sought and been exempted from solemnizing same-sex couple marriages.”

https://pmg.org.za/files/180815CIVIL_UNION_ACT.pptx

Demand for services – Civil Unions compared to Civil Marriages

- 20 According to Statistics South Africa, in 2017 a total of 135 458 civil marriages were registered at the Department of Home Affairs (“DHA”), making the 2017 crude civil marriage rate 2,4 per 1 000 estimated resident population.⁵
- 21 In comparison:
- 21.1 In 2013 a total of 158 642 civil marriages were registered, making the 2013 crude civil marriage rate 3,0 per 1 000 estimated resident population.⁶
- 21.2 In 2015 a total of 138 627 civil marriages were registered, making the crude civil marriage rate 2,5 per 1 000 estimated resident population.⁷
- 21.3 In 2016 a total of 139 512 civil marriages were registered, making the crude civil marriage rate 2,5 per 1 000 estimated resident population.⁸
- 22 In 2017, a total of 1 357 civil unions were registered, making the 2017 crude civil union rate 0,02 per 1 000 estimated resident population.⁹
- 23 In comparison:
- 23.1 In 2013, a total of 993 civil unions were registered, making the 2013 crude civil union rate 0,02 per 1 000 estimated resident population.¹⁰
- 23.2 In 2015, a total of 1 185 civil unions were registered, making the 2015 crude civil union rate 0,02 per 1 000 estimated resident population.¹¹

⁵ Statistics South Africa Statistical Release P0307: Marriages and Divorces 2017 (28 February 2019) at 2. (<http://www.statssa.gov.za/publications/P0307/P03072017.pdf>).

⁶ Statistics South Africa Statistical Release P0307: Marriages and Divorces 2013 (30 April 2015) at 2. (<http://www.statssa.gov.za/publications/P0307/P03072013.pdf>).

⁷ Statistics South Africa Statistical Release P0307: Marriages and Divorces 2015 (5 July 2017) at 2. (<http://www.statssa.gov.za/publications/P0307/P03072015.pdf>).

⁸ Statistics South Africa Statistical Release P0307: Marriages and Divorces 2016 (30 May 2018) at 2. (<http://www.statssa.gov.za/publications/P0307/P03072016.pdf>).

⁹ Statistics South Africa Statistical Release P0307: Marriages and Divorces 2017 (28 February 2019) at 5.

¹⁰ Statistics South Africa Statistical Release P0307: Marriages and Divorces 2013 (30 April 2015) at 5.

¹¹ Statistics South Africa Statistical Release P0307: Marriages and Divorces 2015 (5 July 2017) at 5.

- 23.3 In 2016, a total of 1 331 civil unions were registered, making the 2016 crude civil union rate 0,02 per 1 000 estimated resident population.¹²
- 24 A combined total of 136 815 civil marriages and civil unions were registered in 2017, of which 99% were civil marriages and 1% were civil unions.
- 25 In comparison:
- 25.1 A combined total of 159 635 civil marriages and civil unions were registered in 2013, of which 99.4% were civil marriages and 0.6% were civil unions.
- 25.2 A combined total of 139 812 civil marriages and civil unions were registered in 2015, of which 99.2% were civil marriages and 0.8% were civil unions.
- 25.3 A combined total of 140 843 civil marriages and civil unions were registered in 2016, of which 99.1% were civil marriages and 0.9% were civil unions.
- 26 In 2017, the highest number of civil unions (nearly 66,2%) were registered in Gauteng (507 or 37,4%) and the Western Cape (391 or 28,8%).¹³ In Gauteng 64.6% of HAO have marriage officers willing to register civil unions between same sex couples. In the Western Cape, 35.7% of HAO have marriage officers willing to register civil unions between same sex couples.
- 27 In comparison:
- 27.1 In 2013, the highest number of civil unions (nearly 73.6%) were registered in Gauteng (411 or 41.4%) and the Western Cape (320 or 32.2%).¹⁴
- 27.2 In 2015, the highest number of civil unions (nearly 66.6%) were registered in Gauteng (443 or 37.4%) and the Western Cape (346 or 29.2%).¹⁵
- 27.3 In 2016, the highest number of civil unions (nearly 64,0%) were registered in Gauteng (494 or 37.11%) and the Western Cape (358 or 26.9%).¹⁶

¹² Statistics South Africa Statistical Release P0307: Marriages and Divorces 2016 (30 May 2018) at 5.

¹³ Statistics South Africa Statistical Release P0307: Marriages and Divorces 2017 (28 February 2019) at 5.

¹⁴ Statistics South Africa Statistical Release P0307: Marriages and Divorces 2013 (30 April 2015) at 5.

¹⁵ Statistics South Africa Statistical Release P0307: Marriages and Divorces 2015 (5 July 2017) at 5.

¹⁶ Statistics South Africa Statistical Release P0307: Marriages and Divorces 2016 (30 May 2018) at 5.

FACTUAL CONCLUSION #1: OVERSUPPLY OF MARRIAGE OFFICERS IN COMPARISON TO DEMAND FOR CIVIL UNIONS REGISTRATION

- 28 What these statistics bear out is that irrespective of the true extent of the issue (lack of service delivery to same sex couples), the DHA is able to deliver the services at 27.8% of its HAO - in answer to a need of less than 1%.
- 29 From a staff complement of 1130 marriage officers, 709 (or 62.74%) of marriage officers are willing to register same sex civil unions in answer to a need of less than 1%. The DHA currently has a **significant over-supply of marriage officers** who are willing to register same sex marriages. Any lack of service delivery to same sex couples accordingly is not the result of a shortage of marriage officers who are willing and able to perform the functions to enable the state to deliver such services.

FACTUAL CONCLUSION #2: TRUE CAUSE OF THE PROBLEM: EXECUTIVE / ADMINISTRATIVE INADEQUATE PLANNING AND MANAGEMENT

- 30 That same sex couples' ability to have their civil unions solemnised at any Home Affairs Office of their choice is presently being impinged, is a fact and may be a cause for intervention. However, even before considering the status of the law – and after considering the statistical facts set out above – it becomes clear that **the status of the law is not the real or true cause of the issue.**
- 31 A proper examination of the facts reveals that the **true cause of the imposition experienced by same sex couples is the geographic distribution/deployment of marriage officers** and not the legislative acknowledgement of marriage officers' right to conscientious objection.

IMPORTANT: Implications of Factual Conclusions

- 32 Problems of a **geographical, planning and/or budgetary** nature are *not* legislative problems in the first instance, but are problems falling within the purview of the **executive branch** of government – i.e. not the legislature – and **public administration**. Therefore in this instance, **the solution to the imposition experienced by same sex couples, must first and foremost be an executive or administrative intervention** and not – as a first resort – a legislative intervention (i.e. by amending the Act).
- 33 A legislative response, while it may be able to partly solve an executive/public administration problem in certain circumstances, would **not** be a **rational response** in circumstances where the cause and the solution to the executive/administrative problem lie within the responsibility and capabilities of the executive branch of government and the public administration.

- 34 It is important to note that the current legislation – including section 6 of the Act – is **constitutionally compliant** and has Constitutional Court backing.¹⁷ It gives effect to sec 9(3) of the Constitution¹⁸ for both state-employed marriage officers who are conscientious objectors (non-discrimination grounds such as *religion, conscience, belief and culture*) and same sex couples (non-discrimination grounds such as *gender, sex, and sexual orientation*).¹⁹
- 35 ***It is unnecessary – and undesirable – in a pluralistic and diverse society like South Africa, to pit the constitutional rights of groups with opposing views but which are capable of co-existence, against each other – to affirm some and reject others. That is not the society that the Constitution envisages – a society where the Constitution makes winners of some and losers of others.***
- 36 The Constitution envisages a society in which – wherever it is possible – we are to reasonably accommodate difference and diversity. The proposal to delete section 6 of the Act goes the other way and accordingly does not affirm the Constitution’s vision for South African society.

¹⁷ In the landmark Constitutional Court judgment of *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005), Justice Albie Sachs noted at [159] that:

*“...the principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would **not** themselves be obliged to do so if this resulted in a violation of their conscience.”*

[own emphasis]

At [95] of the same judgment, Justice Sachs notes that:

*“[t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a **reasonable and fair manner**. The objective of the Constitution is to **allow different concepts** about the nature of human existence to **inhabit the same public realm**, and to do so in a **manner that is not mutually destructive** and that at the same time enables government to function in a way that **shows equal concern and respect for all.**”*

[own emphasis]

(<http://www.saflii.org.za/za/cases/ZACC/2005/19.html>).

¹⁸ Constitution of the Republic of South Africa, 1996 (“the Constitution”).

¹⁹ **Section 9(3) of the Constitution**,¹⁹ 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.**”*

[own emphasis]

- 37 To put it in legal terms, the proposed deletion of section 6 of the Act **does not** 'promote the spirit, purport and objects of the Bill of Rights'²⁰, **nor does it** 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'²¹ (also referred to as the 'objective normative value system' encapsulated in the Bill of Rights).²²
- 38 Section 6 of the Act however **does** 'promote the spirit, purport and objects of the Bill of Rights', **and does** 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom' (also referred to as the 'objective normative value system' encapsulated in the Bill of Rights).
- 39 Not only is it both **constitutionally undesirable and unjustifiable** to amend the Act, but also – as we've touched on above and as will be set out in more detail below – there is **no rational basis for a legislative intervention**.

B THE LAW – CONSTITUTIONAL RIGHTS ANALYSIS

RIGHTS OF SAME SEX COUPLES

- 40 In terms of the Constitution, same sex couples who want to solemnise a civil union, have (amongst others) the right to equality and non-discrimination,²³ and the right to human dignity.²⁴
- 41 Same sex couples are equal before the law and have the right to equal protection and benefit, including the full and equal enjoyment of all rights and freedoms, of the law. The state may not unfairly discriminate directly or indirectly against same sex couples on the basis of their sexual orientation, gender or sex. Such discrimination is presumed unfair unless proven to be fair.

²⁰ Section 39(2) of the Constitution.

²¹ Section 39(1)(a) of the Constitution.

²² *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) [56].

²³ In terms of s 9 of the Constitution:

(1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*

(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

(3) *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.*

(4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

(5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

²⁴ S 10, Constitution: *Everyone has inherent dignity and the right to have their dignity respected and protected.*

- 42 Discriminating against a person on the basis of their gender, sex or sexual orientation infringes on their human dignity. Therefore, not providing same sex couples with the public service of solemnising civil unions at their nearest HAO impinges on their enjoyment of service delivery and may even, taking into account all relevant factors and circumstances, constitute an infringement of the right to equality (equal benefit of the law and full and equal enjoyment of all rights) and human dignity of same sex couples.
- 43 The right to non-discrimination of same sex couples, is further protected by the Promotion of Equality and Prevention of Unfair Discrimination Act (“PEPUDA”).²⁵ By applying PEPUDA to the current factual circumstances, same sex couples should not be discriminated against ***unfairly*** by the State.²⁶ When a person is discriminated against on a prohibited ground, the discrimination is presumed to be unfair, unless it is proved to be fair.
- 44 ***Not all discrimination***, even discrimination on the basis of a prohibited ground, ***is*** however ***necessarily unfair***. PEPUDA provides criteria for determining whether discrimination is fair or unfair.²⁷ Discrimination will not be unfair where, for example, it can be shown that the discrimination serves a legitimate purpose.

RIGHTS OF MARRIAGE OFFICERS

- 45 In terms of the Constitution, marriage officers who object to solemnise civil unions between same sex couples, amongst others have the right to equality and non-discrimination,²⁸ the right to freedom of religion, belief and opinion,²⁹ and the right to human dignity.³⁰
- 46 State-employed marriage officers are equal before the law and have the right to equal protection and benefit, including the full and equal enjoyment of all rights and freedoms, of the law. The state may not unfairly discriminate directly or indirectly against these state employees on the basis of their conscience, religion, belief or culture. Such discrimination is presumed unfair unless proven to be fair.
- 47 Conscience and religious conviction, including the expression thereof and living in accordance therewith, are constitutive of identity and therefore intrinsically linked to human dignity. Same sex couples who want their civil unions to be solemnised and marriage officers who conscientiously

²⁵ Act 4 of 2000.

²⁶ S 6 of PEPUDA. ‘Sex, gender and sexual orientation’ are specifically listed as ‘prohibited grounds’ based on which a person may not be unfairly discriminated against.

²⁷ S 14 of PEPUDA.

²⁸ S 9 of the Constitution.

²⁹ In terms of s 15 of the Constitution.

³⁰ S 10 of the Constitution.

object to themselves solemnising such unions, are equal in dignity, equal before the law and equally entitled to non-discrimination and the full and equal enjoyment of all rights and freedoms.

- 48 While there are some who may rightly be called religious bigots, there are also sincere conscientious objectors. It must be accepted that marriage officers who are conscientious objectors are not motivated by a desire to prejudice or harass others on the basis of their sexual orientation, but rather by a desire to live in accordance with their conscience and/or sincerely held beliefs regarding intimate partner relationships, marriage and family. If the law (by denying conscientious objection) or the State (by refusing to employ conscientious objectors) were to discriminate against such marriage officers by preventing them to act in accordance with their conscience and/or sincerely held convictions, it would infringe their rights to equality and non-discrimination, freedom of religion, belief and opinion, and human dignity at a fundamental level.

LIMITATION OF RIGHTS

- 49 The rights in the Bill of Rights may be limited in terms of a 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.³¹ The limitation of rights entails a balancing exercise of which the purpose is to maximise the promotion, protection and enjoyment of the rights of all persons in a fair manner. Therefore, the least restrictive manner to limit rights, is to be preferred.
- 50 The Civil Union Act is a law of general application. The right of same sex couples to have civil unions solemnised may be limited, if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (as provided in the limitations clause).
- 51 The Civil Union Act grants same sex couples the right to have civil unions solemnised. The Civil Union Act also grants marriage officers the right to conscientious objection. The right to conscientious objection does not extinguish the rights of same sex couples, nor does it necessarily limit such right. It is however accepted that the right to conscientious objection **has the potential** to limit same sex couples' right to equal services. **Whether there is a real**

³¹ S 36 of the Constitution (the "limitations clause"), reads:

(1) The rights in the Bill of Rights may be limited in terms of a 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, 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;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any entrenched right in the Bill of Rights.

limitation/infringement, will depend on the facts, and the status of the law would not necessarily be the cause of any limitation/infringement.

52 It is clear that in a hypothetical society where there are no persons who are or will ever be willing to solemnise civil unions, a law of general application containing a conscientious objection exemption would infringe/limit same sex couples' right to full and equal enjoyment of all rights afforded by law. ***This is obviously not the state of play in South Africa; there are HAO where civil unions between same sex couples can be solemnised.***

C APPLICATION OF THE LAW TO THE FACTS

53 As noted above, the constitutional rights of same sex couples who want to solemnise civil unions and marriage officers who conscientiously object to the solemnising such unions on the basis of their conscience and/or sincerely held beliefs, may come into conflict in certain factual scenarios.

54 Although it is clear that same sex couples' right to have their civil unions solemnised at any HAO of their choice is being infringed at present, in our opinion the fact that the law provides for a conscientious objection for marriage officers employed by the state, is not the cause of such infringement. There is still a large over-supply of marriage officers/HAO able to solemnise civil unions, when comparing demand with supply.

55 **The true cause is therefore not the alleged unconstitutionality of the law, but the geographic distribution/deployment of marriage officers. If the status of the law is not the cause of the infringement/limitation of same sex couples' rights, there can be no basis/rationale for amending the law. Especially not so if the proposed amendment would lead to the unreasonable and unjustifiable limitation of others' (marriage officers employed by the state) rights.**

56 **If the proposed amendment (deletion of section 6 of the Act) is continued with in these circumstances, it would raise questions about a potential tyrannical invasion into constitutional freedoms that is not warranted by real world facts or the achievement of any legitimate purposes.**

57 Despite the abovementioned, same sex couples currently cannot get their civil unions solemnised at all HAO, and because a conscientious objection exemption could in circumstances other than what is at play in South Africa at present, potentially be a cause of infringement of same sex couples' rights, we conduct brief discrimination, accommodation and limitations analyses hereinbelow.

58 At the outset, it should be acknowledged that the goal is and the best solution will be, one in which both the right of same sex couples to be provided with the public service of having civil

unions solemnised **and** the right of marriage officers to object to solemnising same sex unions on the basis of their conscience and/or sincerely held beliefs, are balanced and preserved. This will be a win-win situation for all and is preferred above any other outcome.

CRITICAL CONSIDERATIONS: PROPER CONTEXT

59 The critical considerations in these analyses, and which provides the proper context to arrive at a constitutionally sound outcome in the circumstances, are the following:

59.1 The state –

59.1.1 May **not** discriminate unfairly based on a prohibited ground (section 9(3) of the Constitution);

59.1.2 **May** discriminate **fairly**, as provided in PEPUDA (section 9(3) of the Constitution).

59.2 Marriage officers in the employ of the state –

59.2.1 Are **not the state** (i.e. although **the state** must deliver services to all, that does not mean that every single **person who works for the state** must necessarily deliver each and every service to everyone);

59.2.2 **May** discriminate **fairly**, as provided in PEPUDA (section 9(4) of the Constitution);

59.2.3 **May** exercise their freedom of conscience, religion and/or belief in public and work life (section 15(1) of the Constitution) (which could be a justification for discrimination, i.e. making discrimination **fair** in terms of PEPUDA);

59.3 The state **has an obligation** to respect, protect, promote and fulfil the rights of **both** –

59.3.1 Same sex couples, to adequate service delivery; and

59.3.2 Marriage officers in its employ who are conscientious objectors.

(section 7(2) of the Constitution)

59.4 Accordingly, where it is possible for the state to deliver services to same sex couples, whilst also reasonably accommodating marriage officers' right to conscientious objection, it is duty-bound by the Constitution to do so.

- 59.5 If, in the process of or by reason of reasonably accommodating marriage officers who are conscientious objectors, the state *fairly* discriminates against same sex couples, the state would be acting in accordance with the Constitution.
- 59.6 Upholding section 6 of the Act and putting in place executive or administrative interventions to address the current inadequate service delivery to same sex couples in some parts of the country, would enable both conscientious objectors and same sex couples to exercise and enjoy their constitutional rights – i.e. a win-win outcome.³²
- 59.7 Striking down section 6 of the Act will affirm only same sex couples' rights, while annihilating conscientious objectors' rights – i.e. a win-lose outcome.³³

FAIR DISCRIMINATION

- 60 Section 9(3) of the Constitution lists grounds based on which a person may not be discriminated against unfairly. Sex, gender and sexual orientation are specifically listed grounds. Therefore, denying same sex couples the right to have civil unions solemnised at some HAO's could constitute discrimination. However, the Constitution does not prohibit discrimination, but rather only *unfair* discrimination.³⁴ According to Curry and De Waal,³⁵ in order to determine whether discrimination is unfair, the impact of the discrimination on the persons discriminated against, has to be considered. Discrimination has an unfair impact when it infringes the fundamental human dignity of persons by subjecting them to differential treatment that is demeaning or hurtful.³⁶
- 61 The Constitutional Court has identified certain factors to determine whether discrimination has an unfair impact.³⁷ These factors have been adopted into (codified in) section 14(3) of PEPUDA.
- 62 When discrimination occurs on the basis of a listed ground, such as sexual orientation, it is presumed to be unfair. In this instance, the mere discrimination against same sex couples, whether on the basis of their sex, gender or sexual orientation would accordingly be presumed to be unfair, since these are listed grounds.
- 63 In terms of PEPUDA, to determine whether discrimination is unfair, the context of the discrimination, the section 14(3) factors, and whether the discrimination reasonably and justifiably

³² Refer our discussion in paras 32 to 38 hereinabove.

³³ Ibid.

³⁴ Currie & J De Waal "The Bill of Rights Handbook" 6th Edition, 2013 Juta, at 222-223.

³⁵ Ibid at 223.

³⁶ Ibid.

³⁷ *Harksen v Lane NO 1998 (1) SA 300 (CC)* at [52].
(<http://www.saflii.org/za/cases/ZACC/1997/12.pdf>).

differentiates between persons according to objectively determinable criteria, intrinsic to the activity, have to be considered.³⁸

- 64 In terms of section 14(3)(c) of PEPUDA, the position of homosexual persons in society and whether they belong to a group that suffers from patterns of disadvantage is an important consideration. Homosexual persons are a minority and, due to past prejudice, have not traditionally held positions of power in society and suffer from past patterns of discrimination/disadvantage. The nature of the discrimination is that same sex couples are denied certain services at a number of specific HAO where those same services are delivered to heterosexual couples. While there will no doubt be religious bigots in the ranks of marriage officers, there are also persons who want to live in accordance with their conscience and/or sincerely held beliefs. True conscientious objectors do not harbour a desire to harass or discriminate against homosexual persons.
- 65 However, the purpose of the discrimination is not to deprive same sex couples of their human dignity or to communicate a message that they or their relationships are inferior to other couples. In our opinion, the discrimination is without purpose, as there is already an over-supply of the services required by same sex couples. We submit that the real cause of the discrimination is accordingly lack of planning on the part of the DHA in addressing an issue which is purely geographic and budgetary in nature. In so far as there may be an underlying purpose which may be relevant to the cause of the discrimination, such purpose could be enunciated as - granting marriage officers, whose conscience and/or sincerely held beliefs are a fundamental part of their identity (and therefore human dignity), the right to conscientious objection. The underlying purpose is therefore the protection of the right to freedom of religion, belief and opinion of marriage officers, which we submit is a legitimate purpose and important societal goal.
- 66 When considering the number of HAO where all marriage officers have a conscientious objection to solemnising same sex civil unions (276 out of 382 HAO), it is clear that being able to live in accordance with their religious beliefs is important to a large percentage of marriage officers. The locations of most HAO where all marriage officers are conscientious objectors, being rural Limpopo, Mpumalanga, KwaZulu-Natal and the Eastern Cape, also suggest that cultural beliefs regarding marriage, family and intimate partner relationships are important to many marriage officers.
- 67 We are willing to accept that the discrimination experienced by same sex couples is unfair. In the circumstances however, we submit that the unfairness of the discrimination does not reside in the granting of a right to conscientious objection to marriage officers. Rather, the cause of unfair discrimination is geographic and budgetary in nature, flowing from a lack of proper planning by

³⁸ S 14(2) of PEPUDA.

the appropriate public authority. If this could be rectified by employing an appropriate practical solution(s), the discrimination would disappear.

68 If after applying an appropriate solution, a residue of discrimination may remain, such remainder would in our view not constitute unfair discrimination, as its extent would be small, would be the least restrictive and disadvantageous means employed and would be the result of the State having taken reasonable steps in the circumstances to accommodate diversity.³⁹ Such future adapted regime would recognise the equal human dignity of both same sex couples and marriage officers. Any residue of discrimination would not be totally restrictive as there will be HAO where marriage officers will solemnise same sex civil unions. Our suggested practical solution of roving marriage officers, will further restrict the discrimination against same sex couples. It must be noted that religion, conscience, belief and culture are all prohibited grounds on the basis of which discrimination is deemed prima facie unfair. Therefore, the fundamental rights of both same sex couples and marriage officers should be balanced in a way that best preserves, promotes and protects both.

69 **Emphatically, it is not for the state to decide whether or not sexual orientation is more constitutive of the identity/human dignity of the same sex attracted person, than the conscience/religious convictions of the conscientious objector is to his/her identity/human dignity. To make such a call, would result in tyranny and fly in the face of an open and democratic society based on the values of human dignity, equality and freedom.**

REASONABLE ACCOMMODATION

70 South Africa is not a secular state. The Constitution welcomes religion in the public sphere.⁴⁰ The State is obliged to reasonably accommodate the exercise of freedom of conscience, religion and/or belief of marriage officers who object the solemnising same sex civil unions.

³⁹ As contemplated in s 14(3) of PEPUDA.

⁴⁰ S 15(2) of the Constitution.

Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart and Others (29847/2014) [2017] ZAGPJHC 160; [2017] 3 All SA 943 (GJ); 2017 (6) SA 129 (GJ) (27 June 2017) at para [95].

(<http://saflii.org/za/cases/ZAGPJHC/2017/160.html>).

MEC for Education, KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC) at para [146] to [148].

(<http://www.saflii.org/za/cases/ZACC/2007/21.pdf>).

S v Lawrence 1997 (4) SA 1176 (CC) at [92] to [119].

(<http://www.saflii.org/za/cases/ZACC/1997/11.pdf>).

71 In the landmark Constitutional Court judgment of *Minister of Home Affairs and Another v Fourie and Another*⁴¹, Justice Albie Sachs commented on the importance of reasonable accommodation in an open and democratic society:⁴²

“[t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.”

[own emphasis]

72 In respect of marriage officers who are employed by the state, the honourable justice further noted that:⁴³

“...the principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience.”

[own emphasis]

73 Based on the foregoing, it is clear that the state, whether by the mechanism of law (section 6 of the Act) or some other legitimate and lawful mechanism, can apply the constitutional principle of reasonable accommodation to state-employed marriage officers who have a sincere religious or conscientious objection against solemnising same sex marriages. In doing so, the state will be promoting the values of an open and democratic society where differences are accommodated and managed in a way that shows equal concern and respect for all.

74 In order to determine whether it is reasonable to accommodate the right to conscientious objection of marriage officers, the cost (hardship) of conscientious objection to the DHA should be weighed against importance of being able to do their work in accordance with their conscience and/or religious convictions and the cost to marriage officers with conscientious objections of not being able to exercise a conscientious objection in law.

⁴¹ *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).
(<http://www.saflii.org.za/za/cases/ZACC/2005/19.html>).

⁴² Ibid at [95].

⁴³ Ibid at [159].

- 75 The cost to the DHA of delivering services to same sex couples on an equal basis with heterosexual couples, with a work force that includes conscientious objectors, will depend on the practical solution(s) chosen to address the current lack of service delivery at HAO in certain geographical areas. No matter the specific practical solution (or combination of practical solutions) employed, same sex couples will in no circumstance be completely deprived of their rights, but may experience some logistical complications or delay in the exercise of their rights.
- 76 For true conscientious objectors, their conscience and/or religious belief regarding intimate partner relationships, marriage and the family is foundational to their existence and an important constitutive factor of their identity (human dignity). The cost to marriage officers of forfeiting the right to conscientious objection, will be the complete deprivation of the ability to live and act in accordance with their sincerely held religious beliefs in executing their work functions. This is an infringement of their rights to freedom of religion, belief and opinion, and human dignity and equality. The rights and conscience of these marriage officers may potentially be violated repeatedly and at no notice, at each instance when they are required to solemnise civil unions between same sex couples.
- 77 In the case of *MEC for Education, KwaZulu-Natal v Pillay*,⁴⁴ the Constitutional Court held that diversity should be reasonably accommodated.⁴⁵ It is important for religious groups to be able to freely express (and act in accordance) with their religious beliefs and identity.⁴⁶ The Court recognised that some practices are inseparable from a person's religion.⁴⁷ Such practices and the ability of religious persons to live and act in accordance with their religion deserves protection.⁴⁸ Religion should be affirmed and reasonably accommodated, and meaningful steps need to be taken in order to achieve this purpose.⁴⁹
- 78 The granting of the right to conscientious objection to marriage officers is a reasonable accommodation of their conscience, religion and/or beliefs in the work place. To not grant this right to marriage officers, would unfairly discriminate against them on the basis of their conscience, religion, belief and/or culture and constitute an unreasonable and unjustifiable infringement of their right to freedom of religion, belief and opinion.

LIMITATIONS ANALYSIS

- 79 As a result of the current geographic staffing deployment of marriage officers at HAO across the country by the DHA and the lack of measures to address the lack in service delivery to some same sex couples requiring solemnising of their civil unions in certain geographic areas, the

⁴⁴ 2008 (1) 474 (CC).

⁴⁵ Ibid at para [65] and para [71] to [79].

⁴⁶ Ibid at para [90] and para [106] to [107].

⁴⁷ Ibid at para [62].

⁴⁸ Ibid at para [61] to [64].

⁴⁹ Ibid at para [71] to [79].

practical outworking or exercise of the conscientious objection exemption by marriage officers employed by the DHA (section 6 of the Act) infringes on the aforementioned same sex couples' equality rights.

80 Once practical solutions are employed to address the lack in service delivery at all HAO, the infringement will disappear. In our opinion, section 6 of the Act was never meant to constitute or result in a limitation on the rights of same sex couples requiring solemnising of their civil unions. Its purpose is merely to preserve the right to freedom of conscience, religion, belief and opinion of marriage officers employed by the state.

81 Both these rights, the right to equal service delivery and the right to do work without infringing one's conscience, religious convictions and/or beliefs, can co-exist if appropriate practical (executive or administrative) measures are adopted to address shortcomings in the current service delivery system.

82 If section 6 of the Act were to be deleted, as is proposed, marriage officers with a conscientious objection will be given an untenable choice – to either violate their consciences through the work they do or to resign and face unemployment in order to avoid the violation of their consciences. Based on the aforementioned, a system without a legal right to conscientious objection would be unconstitutional, as it would be an unreasonable and unjustifiable limitation of marriage officers' right to equality and non-discrimination, human dignity and freedom of conscience, religion and/or belief.

83 We submit that section 6 of the Act, together with appropriate practical solutions, would not result in a limitation of the rights of same sex couples requiring the solemnising of their civil unions. And even if after employing such appropriate solutions, a residue of infringement might remain, such residue/limitation would be reasonable and justifiable as the least restrictive means of achieving the purpose of section 6 of the Act, which is to enable marriage officers to do their jobs without having to violate their conscience in the process.

D ADMINISTRATIVE PROBLEMS REQUIRE ADMINISTRATIVE SOLUTIONS

84 By implementing appropriate practical solutions, the DHA will be able to do away with the discrimination currently experienced by some same sex couples requiring the solemnising of their civil unions at certain HAO where the delivery of these services is currently lacking.

85 The solutions which the DHA may choose to employ in order to address the issue include, but is not limited to (any one or any combination of these solutions could be considered):

85.1 Making use of roving/visiting marriage officers to HAO where services currently are not being delivered;

- 85.2 Redeploying marriage officers who do not have conscientious objections to offices where services currently are not being delivered;
- 85.3 Swapping out marriage officers between offices where services are delivered and offices where services are not being delivered, i.e. relocating marriage officers in accordance with the geographic need.
- 86 We submit that one of the easiest ways of addressing the lack of services, is for the DHA to implement a system of roving marriage officers who on a regular basis⁵⁰ attend at each HAO where all resident marriage officers conscientiously object to solemnising civil unions between same sex couples. This system will balance and maximise the enjoyment of constitutional rights by both same sex couples and marriage officers.
- 87 The DHA could, for example, publish a schedule of days on which roving marriage officers attend specific HAO's and may even provide a mechanism whereby same sex couples can make a special request for a roving marriage officer to attend at a specific HAO at an earlier date. Although it is possible that same sex couples might experience very slight delays in service delivery, they will be able to solemnise civil unions at the HAO of their choice and would not be deprived of their constitutional rights.
- 88 If in future, the need for solemnising civil unions were to increase above the current levels (currently less than 1% of the total of all marriages and civil unions), the DHA could even consider reserving one post for a marriage officer who is not a conscientious objector at each HAO. This solution however, should not disadvantage marriage officers in their current posts, but when a post becomes available at a HAO where **all** marriage officers are conscientious objectors, to employ a person who specifically states that they do not object to solemnising same sex civil unions. Such a person should be free to, at a later stage, become a conscientious objector should they become an adherent to a religion or belief that marriage is the union between one man and one woman and wish to be exempted from solemnising same sex civil unions.

E OSTENSIBLE LACK OF DHA MANDATE IN RESPECT OF THE BILL

- 89 It must be borne in mind that the Bill is *not* a bill of the Executive – it was not introduced by the DHA – but a *private members' Bill* introduced by Ms D Carter, MP (as she was then). Since May 2018, CFJ has been attempting to determine where the DHA obtained its mandate in respect to the Bill. However, we have not received any response to date.
- 90 CFJ is a stakeholder and participant in the *Ministerial Dialogue on the Development of the Marriage Policy (the Ministerial Dialogue)*, which is currently being hosted across the country by

⁵⁰ At the very least on a monthly basis, but preferably more frequently to minimise the delay in service delivery to same sex couples.

the Minister of Home Affairs. From our engagement in the Ministerial Dialogue – which included our participation in the engagement with academics and legal practitioners held on 14 November 2019 in Cape Town – it has become clear that the DHA is only now engaging the public to formulate its mandate in respect of section 6 of the Act. The *Concept Paper: The Consultative Stakeholder Engagement for the Development of the Marriage Policy*,⁵¹ which was handed out at the stakeholder engagement, includes within its scope the “(i)ndiscriminate solemnization of all marriages by marriage officers (DHA and possible religious marriage officers)”.⁵²

- 91 Given our repeated unanswered requests – including requests for meeting with DHA in person – the above stated facts create a strong presumption that the DHA did not have a mandate from the people of South Africa when it engaged with the Bill in the PCHA and still does not yet have any such mandate. In such circumstances, the question arises whether the position adopted by DHA in the PCHA and which it may present in the Committee, represents personal views of certain officials employed by the Ministry/Department, rather than the legitimately formulated view of the DHA, as obtained from and mandated by the people.
- 92 We implore the Committee to demand that DHA provide hard evidence / facts, if such exist, to show that the position they have adopted in respect of the Bill does not merely reflect the personal views and preferences of select state officials acting in unison.

F CONCLUSION

- 93 The Constitution requires that constitutional rights should be balanced in manner that is fair and maximises the enjoyment of the rights of all persons. In order to achieve this objective, the relatively simple and practical solution of providing roving marriage officers is to be preferred. This solution balances the potentially conflicting rights of same sex couples and marriage officers and maximises respect for and the protection/fulfilment of human dignity, equality and freedom of conscience, religion, belief and opinion of both groups.
- 94 Same sex couples will be able to exercise their right to have their civil unions solemnised, while the right to conscientious objection of marriage officers will be preserved and not permanently extinguished.

Proposal in respect of legislative text

- 95 We accordingly propose the deletion/scrapping of clause 1 of the Bill.

⁵¹ Department of Home Affairs *Concept Paper: The Consultative Stakeholder Engagement for the Development of the Marriage Policy* (September 2019).

⁵² Ibid at page 5.

96 Due to our proposal in respect of clause 1 of the Bill, we propose the deletion/scrapping of clause 2.(1), as it is obsolete in the absence of clause 1.

97 We propose the following amendment to clause 2.(2) of the Bill, to provide for adequate service delivery to all citizens without placing an undue weight on the public administration and fiscal budget:

2.(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 **as regularly as is reasonably required** to solemnise a civil union at every Department of Home Affairs office.

98 We trust that the above submissions will be of assistance and look forward to your response thereto (if any) in due course.

99 **We hereby also specifically request an opportunity to address the Committee in person by way of oral representations at the public hearings on the Bill.**

Yours faithfully,

Liesl Stander (Preparer)
Legal Advisor: Law and Policy

and

Ryan Smit (Reviewer)
Director: Law and Policy