



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: Marriage Law Reform – SALRC Project 144

Date: 14 May 2021

**The Secretary
South African Law Reform Commission
Private Bag X668
PRETORIA 0001**

For Attention: Mr Pierre van Wyk

By Email: pvanwyk@justice.gov.za

Dear Mr Pierre van Wyk,

RE: SUBMISSIONS ON SALRC DISCUSSION PAPER 152 / PROJECT 144 SINGLE MARRIAGE STATUTE

1. We refer to the South African Law Reform Commission (“SALRC” and “the Commission”) Discussion Paper 152 on Project 144: Single Marriage Statute (“Discussion Paper” and “Project 144”) and accompanying invitation to comment on the Discussion Paper.
2. Cause for Justice (“CFJ/we/us/our”) hereby thanks the SALRC for the opportunity to make these written submissions.
3. We focus our submissions on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights as well as related matters affecting the public interest in the context of the foundational values of human dignity, equality, the advancement of human rights and freedoms, and the interplay with the constitutional rights of equality, human dignity, and freedom of conscience, religion, thought, belief and opinion.

BACKGROUND TO CAUSE FOR JUSTICE

4. CFJ is a non-partisan, non-profit human rights and public interest organisation that exists 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: NC SNYDERS | JP DICKS

Cause for Justice is a registered public benefit organisation for South African income tax purposes and may issue section 18A receipts, which entitle donors to claim tax deductions in respect of donations made to Cause for justice. PBO number: 930045148

5. All five of CFJ's core values give it a particular interest in Project 144, namely (1) the responsible exercise of freedom; (2) the protection and promotion of human dignity (inherent worth); (3) the 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 dates back to September 2014 with the advent of the court case, *Organisasie vir Godsdienstige-Onderrig en Demokrasie v Laerskool Randhart*.¹ CFJ took part in the proceedings as *amicus curiae* (or a '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. From 2018 to 2020, CFJ actively participated in the Parliamentary process around the Civil Union Amendment Bill² (now the Civil Union Amendment Act).³ We delivered substantive written submissions to the Speaker of the National Assembly,⁴ the Portfolio Committee on Home Affairs,⁵ and the Select Committee on Security and Justice.⁶ Our submissions focused on the constitutional requirement that fundamental rights should be balanced in a just and equitable manner in order that the enjoyment of rights by all persons can be maximised. We proposed practical, cost effective solutions that would balance the conflicting rights of same-sex couples with the rights of religious civil servant marriage officers in a fair way – maximising the protection and promotion of the human dignity, equality, and freedom of both groups. We supported the Constitutional Court's assertion that state-employed marriage officers could be reasonably accommodated (so as not to force them to act contrary to their sincerely held beliefs)⁷ without

¹ *Organisasie vir Godsdienstige-Onderrig en Demokrasie v Laerskool Randhart* 2017 6 SA 129 (GJ). Available at: <http://saflii.org/za/cases/ZAGPJHC/2017/160.html>.

² Civil Union Amendment Bill [B11-2018]. Available at: <https://pmg.org.za/bill/789/>.

³ Civil Union Amendment Act 8 of 2020. Available at: https://www.gov.za/sites/default/files/gcis_document/202010/43832gon1108.pdf.

⁴ CFJ Submissions Civil Union Amendment Bill [B11-2018] (26 April 2018).

⁵ CFJ Submissions Civil Union Amendment Bill [B11-2018] (23 October 2018). Available at: https://causeforjustice.org/wp-content/uploads/2018/12/Civil-Union-Amendment-Bill-2018_CFJ-Submissions_23.10.2018.pdf.

⁶ CFJ Submissions Civil Union Amendment Bill [B11-2018] (6 December 2019). Available at: https://causeforjustice.org/wp-content/uploads/2020/06/CFJ-Submissions_Civil-Union-Amendment-Bill.pdf.

⁷ *Minister of Home Affairs and Another v Fourie* 2006 (1) SA 524 (CC) at [61], [95], [98] and [159]. Available at: <http://www.saflii.org/za/cases/ZACC/2005/19.html>.

denying service delivery to same-sex couples who want to have their unions solemnised by the state.

CONTENTS OF SUBMISSIONS

8. Our submissions are structured as follows:

A	<i>Celebrating Diversity in a Pluralistic Society</i>	3
B1	<i>Categories of Marriage Officers</i>	7
B2	<i>Clarity on the Meaning of ‘With or Without Limitations’ in Section 10(1)</i>	10
C1	<i>Marriage Formula</i>	10
C2	<i>Time, Place and Form of Marriage</i>	11
D	<i>Support for Protected Relationships Draft Bill</i>	11

A CELEBRATING DIVERSITY IN A PLURALISTIC SOCIETY

9. At the outset, it is appropriate to acknowledge the nature of marriage as a societal institution. This would include recognising that marriage is not a creature of statute, in other words it was not invented by law makers, but is rather an age-old and meaningful social and cultural institution of humankind existing outside of the state – pre-dating the existence of the state and the legal recognition of marriage.⁸ It is intimately and intricately interwoven into the rich fabric of culture, tradition, and the beliefs of different societal and cultural groups.

10. The Discussion Paper refers in the explanatory appendix to the letter written by the honourable Minister Pandor (then Minister of Home Affairs) to the SALRC, emphasising the intention of the Department of Home Affairs to enhance religious and cultural diversity in accordance with the fundamental values and rights enshrined in the Constitution.⁹ The letter further states that the state should have no interest in determining how religious or cultural rituals are conducted and consequently has no interest in providing legal consequences to only *some* of the types of marriages found in South Africa.¹⁰ Instead, the Minister and Department favours “*according due recognition to all religious and cultural marriage practices*” if a minimum set of universal provisions (which adequately cover *legitimate* interests of the state) is met.¹¹

11. We accordingly agree with and support the Commission’s recognition that the state does not (and neither should it attempt to) determine the nature, meaning and purpose of marriage; and that it

⁸ D Bethmann, M Kvasnicka “The Institution of Marriage” (2011) 24 *Journal of Population Economics* 1005. Available at <https://www.jstor.org/stable/41488338>.

⁹ [1.2] of the Discussion Paper page 1.

¹⁰ [1.2] of the Discussion Paper page 2.

¹¹ [1.2] of the Discussion Paper page 2.

may only recognise different types of relationships that warrant legal protection (and attach legal consequences to these).¹²

12. In amplification of the above, we submit that it is incumbent upon the state to acknowledge the diversity of marriage in the different cultures and traditions in South Africa. The Constitution acknowledges – and celebrates – diversity and the right to be different.¹³ The Constitutional Court recognises the “*constitutional value of acknowledging diversity and pluralism in our society*”,¹⁴ and has warned that “*our future as a nation depends in large measure on how we manage difference*” and where, in the past “*difference has been experienced as a curse, today it can be seen as a source of interactive vitality*”.¹⁵ In the context of marriage law reform, the state’s constitutional mandate¹⁶ is to recognise and provide legal protection and consequences to various marriage relationships in a manner that to protects and promotes fundamental rights of all who live in South Africa.¹⁷
13. In *Minister of Home Affairs and Another v Fourie*¹⁸ the Constitutional Court held 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.

¹² [2.87] of Discussion Paper page 74.

¹³ The Constitution of the Republic of South Africa, 1996. Available at <https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf>. The Preamble of the Constitution reads, “...South Africa belongs to all who live in it, united in our diversity.”

¹⁴ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at [24]. Available at: <http://www.saflii.org/za/cases/ZACC/2000/11.html>.

¹⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 at [135]. Available at: <http://www.saflii.org/za/cases/ZACC/1998/15.html>.

¹⁶ Section 7(2) of the Constitution.

¹⁷ Article 5 of the South African Charter of Religious Rights and Freedoms. Available at:

<https://www.strasbourgconsortium.org/content/blurbs/files/South%20African%20Charter.pdf>

Every person has the right to maintain traditions and systems of religious personal, matrimonial and family law that are consistent with the Constitution. Legislation that is consistent with the Constitution may be made to recognize marriages concluded under any tradition, or a system of religious, personal or family law, or to recognize systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

¹⁸ *Minister of Home Affairs and Another v Fourie* at [95].

14. Furthermore, in *MEC for Education, KwaZulu-Natal v Pillay*¹⁹ the Constitutional Court reiterated that diversity, through reasonable accommodation, has repeatedly been emphasised by the Constitutional Court in matters concerning religion.²⁰
15. It is imperative that religious groups should be able to freely express and act in accordance with their religious beliefs without fear of reprisal.²¹ The Constitutional Court recognised that some practices are inseparable from a person's religion and identity.²² Such practices and the ability of religious persons to live and act in accordance therewith deserves legal protection.²³ Religious diversity and freedom should be affirmed and reasonably accommodated, and meaningful steps need to be taken in order to give practical effect to this purpose.²⁴
16. The Constitutional Court jurisprudence places an obligation on the state to further diversity as well as to reasonably accommodate religious and cultural beliefs and views on what 'marriage' is.²⁵ When the state provides legal recognition to different types of marriages, it recognises and accommodates the fact that people hold different beliefs, and as a corollary must also respect that people with different beliefs may not be forced to act in a manner or perform certain acts that are against their sincerely held beliefs.²⁶
17. Whilst it is true that no constitutional right is absolute, and exercise of the right in section 15 of the Constitution may be limited as any other right, rights should only be restricted where absolutely necessary to achieve a legitimate public purpose, which may include making room for the exercise of the rights of others. Some relevant factors enumerated in the Constitution to take into account in determining whether limitation of a right is reasonable and justifiable include:
 - 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.²⁷

¹⁹ *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) at [72]. Available at: <http://www.saflii.org/za/cases/ZACC/2007/21.html>.

²⁰ *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) at [17]. Available at <http://www.saflii.org/za/cases/ZACC/2000/28.html>. *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC) at [76], [146] to [148] and [170] to [172]. Available at: <http://www.saflii.org/za/cases/ZACC/2002/1.html>. *Minister of Home Affairs and Another v Fourie* at [159].

²¹ *MEC for Education, KwaZulu-Natal v Pillay* at [90] and [106] to [107].

²² At [62].

²³ At [61] to [64].

²⁴ At [71] to [79].

²⁵ In accordance with section 7(2) of the Constitution.

²⁶ In accordance with *MEC for Education, KwaZulu-Natal v Pillay* at [72].

²⁷ Section 36(1) Constitution.

18. Were the state to impose a legal obligation on *all* marriage officers to solemnise *all* marriages, such indiscriminate obligation would constitute an infringement of some marriage officers' rights in terms of sections 10, 9 and 15 of the Constitution.²⁸ Failure to reasonably accommodate marriage officers in this manner, would constitute unreasonable and unjustifiable limitation of their rights. This is due to the diverse nature of and the requirements that apply to the different religious and/or cultural expressions of marriage within various faiths, religions, spheres, organisations and institutions in South Africa. This view is supported by the Constitutional Court in *Minister of Home Affairs and Another v Fourie*²⁹ which acknowledged that:

*"[T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression **without being forced to subordinate themselves to the cultural and religious norms of others**, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different".*

19. In respect of ministers of religion or a person holding a responsible position in a religious denomination or organization, the Court held specifically that:

"The effect of this provision³⁰ is that no minister of religion could be compelled to solemnise a same-sex marriage if such a marriage would not conform to the doctrines of the religion concerned. There is nothing in the matters before us that either directly or indirectly trenches in any way on this strong protection of the right of religious communities not to be obliged to celebrate marriages not conforming to their tenets."

20. In respect of marriage officers who are employees of the state or who have been designated as such ex officio, the Court pronounced as follows:

"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."

21. The state's *legitimate* interest and corresponding institutional mandate/authority is limited to giving legal recognition to different types of relationships and providing the necessary

²⁸ Rights to human dignity, equality, and freedom of religion, conscience, opinion and belief.

²⁹ *Minister of Home Affairs and Another v Fourie* at [61].

³⁰ Section 31 of the Marriage Act, 1961:

"Certain marriage officers may refuse to solemnize certain marriages.—Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization."

protection/benefits (legal consequences) associated with such relationships. However, the state's legitimate mandate/authority does not extend to forcing different cultural and religious groups to conform to each other's beliefs and views of marriage.³¹ The constitutional principle of reasonable accommodation demands that the views and beliefs of different groups of people are accorded equal respect and value.

22. Therefore, to accommodate diversity the state is necessitated to leave the meaning of marriage and the requirements for valid marriages to each cultural, religious, or secular institution.³² This would also imply and require that each individual marriage officer be allowed to act in accordance with their specific cultural or religious understanding of the nature, meaning, content and purpose of marriage.
23. The Discussion Paper furthermore notes that according to Statistics South Africa ("Stats SA") in 2019, 14 945 of the 16 363 marriage officers in South Africa were marriage officers from faith-based groups.³³ This means that 90% of all marriage officers are private/religious marriage officers. This indicates that the religious community bears the majority of the burden of solemnising marriages.³⁴ The implication is that the religious sector relieves the Department of Home Affairs of the vast majority of its obligation to solemnise marriages.
24. If the state were to compel *all* marriage officers to solemnise *all* types of marriages, it could have a devastating effect in so far as the burden currently born by religious marriage officers may likely shift to the Department of Home Affairs. If marriage officers from specific religions are forced to solemnise the marriages of people in contravention of their own belief systems, many of these religious marriage officers are likely to choose rather to abstain completely from acting as a marriage officers at all, as opposed to going against their religious views of what a marriage is.

B1 CATEGORIES OF MARRIAGE OFFICERS.

25. Both the proposed draft Bills provide for marriage officers to be appointed for the purpose of solemnising marriages or protected relationships.³⁵ Section 10(1) of each the draft Bill lists various categories of marriage officers.³⁶ The wide scope of this section is a strong indication that the state intends to recognise, protect and promote diversity in accommodating different religious, cultural and secular views on marriage.³⁷ This laudable approach also encapsulates the requirement for the state to reasonably accommodate the fundamental rights of marriage officers'

³¹ In accordance with *Minister of Home Affairs and Another v Fourie* at [97].

³² [1.43] of the Discussion Paper page 20.

³³ [2.70] of the Discussion Paper page 65.

³⁴ [2.7.2] of the Discussion Paper page 66.

³⁵ [2.75.1] and [2.75.2] of the Discussion Paper page 67 to 69.

³⁶ *Ibid.*

³⁷ [1.43] of the Discussion Paper page 20, supporting Issue Paper 35.

to human dignity, equality, and freedom of religion, conscience, opinion and belief by allowing them to solemnise marriages in terms of their particular views and beliefs of what marriage is.³⁸

26. The different categories create the scope for marriage officers to solemnise marriages in accordance with the current dispensation as found in section 3 of the Marriage Act, 1961 (“Marriage Act”)³⁹ and section 5 of the Civil Union Act, 2006 (“Civil Union Act”).⁴⁰ Both of these sections provide that the Minister and any officer in the public service authorised thereto by the Minister may authorise a designated minister of religion or a person holding a responsible position in any religious denomination or organisation to be a marriage officer for the purpose of solemnising marriages.
27. We support the proposal that there should be separate categories of marriage officers for different beliefs or doctrines in a diverse society such as South Africa.⁴¹ We agree with the proposed draft Bills’ section 10(1)(a) to (d) that lists a range of categories of designated marriage officers:⁴²

10. Marriage officers

(1) The Minister and any officer in the public service authorised thereto by him or her may designate –

- (a) any officer or employee in the public service to be, by virtue of his or her office and so long as he or she holds such office;*
- (b) any religious official, or any person holding a responsible position in any religious denomination or organisation;*
- (c) any person holding a responsible position in a non-religious organisation that engages in solemnising marriages; or*
- (d) any traditional or Khoi-San council or any person duly authorised by the council*

28. The draft Bills’ continuation of the regime found in the Marriage Act and Civil Union Act allows for the state to reasonably accommodate different marriage officers from different organisations.⁴³ The recognition of the diversity found in society also enables the state to protect and promote marriage officers’ human dignity, rights to equality and freedom of religion, conscience, opinion and belief by allowing them to solemnise those marriages that accord with their own understanding and beliefs about marriage.⁴⁴

³⁸ See our discussion under Part A above.

³⁹ Marriage Act, 25 of 1961. Available at: https://www.gov.za/documents/marriage-act-21-apr-1961-0000?gclid=EAlaIqobChMlyfOlwMDD8AIVFOd3Ch3HZwtEAAAYASAAEgIolVd_BwE#.

⁴⁰ Civil Union Act 17 of 2006. Available at: https://www.gov.za/documents/civil-union-act?gclid=EAlaIqobChMlwp6KysDD8AIVBeh3Ch02FQxaEAAAYASAAEgLh9PD_BwE.

⁴¹ [2.72] of the Discussion Paper page 66.

⁴² [2.75.1] and [2.75.2] of the Discussion Paper page 67 to 69.

⁴³ [2.75.1] and [2.75.2] of the Discussion Paper page 67 to 69.

⁴⁴ Section 7(2) and 15(1) of the Constitution.

29. We accordingly submit that a legal regime wherein the different categories of marriage officers are not obliged to solemnise marriage that falls outside their own views and doctrines of what a marriage is, would be the only conceivable constitutionally compliant regime.⁴⁵
30. We propose inserting the following underlined wording into section 10(1)(b) of both the proposed draft Bills:
- “any religious official, or any person holding a responsible position in any religious denomination or organisation, acting in accordance with the rites, formularies, tenets, doctrines or discipline of the denomination or organisation in question.”
31. The inserted wording provides clarity and certainty – expressly confirming that marriage officers have the right to choose to solemnise only those marriages that form part of their institution’s views and doctrines of what marriage is. It will also recognise and protect their ability to exercise and enjoy their right to freedom of religion, conscience, opinion and belief.⁴⁶
32. In order to show equal respect of the constitutional rights of marriage officers as individual right bearers, the freedom to choose which type of marriages to solemnise should not be viewed as something belonging only to marriage officers who belong to “private” institutions or organisations, but also to those who fulfil the role of marriage officer in their capacity as government official.⁴⁷ Based on the Discussion Paper’s emphasis on the accommodation of diversity in the South African society, and taking into account the Constitutional Court’s judgment in the Fourie-case,⁴⁸ marriage officers employed by the state should enjoy the same reasonable accommodation as any other marriage officer.⁴⁹
33. To equate a *person employed in the public service* with the *state* would be equal to accepting the flawed ideological position that employees of the state automatically lose or give up their individual constitutional rights once they enter the state’s employ. Such a position would constitute a gross violation of human rights and the foundational values of the South African democracy.
34. The state, as a neutral actor, cannot dictate to individual human rights bearers – the marriage officers employed by the state – what their concept of marriage should or should not be (or force them to act contrary to their sincerely held beliefs regarding their conception of the institution of marriage).
35. In our opinion it would be preferable for both the proposed draft Bills to provide expressly for the reasonable accommodation of diversity of views on the nature of marriage amongst marriage

⁴⁵ *Minister of Home Affairs and Another v Fourie* at [97].

⁴⁶ *Minister of Home Affairs and Another v Fourie* at [97].

⁴⁷ At [159].

⁴⁸ *Ibid.*

⁴⁹ [1.2] of the Discussion Paper page 2.

officers, in order to ensure their human dignity, and rights to equality and freedom of religion, conscience, opinion and belief is protected. No marriage officer should be forced to solemnise marriages that do not accord with what they (or the institution they belong to) consider to be a marriage according to their doctrine and personally held beliefs.

B2 CLARITY ON THE MEANING OF ‘WITH OR WITHOUT LIMITATIONS’ IN SECTION 10(1)

36. Section 10(1) of both the proposed draft Bills contain the phrase “with or without limitations”.⁵⁰ This section provides that a marriage officer can solemnise marriages or protected relationships “with or without limitations”. It is unclear if these limitations stem from the Minister or from the institution to which the marriage officer belongs. The only logical approach would be that it refers to limitations imposed by the marriage officer’s own organisation, since it is this organisation that appointed the marriage officer and that determines (in accordance with that organisation’s religious and/or cultural views and practices) what relationships can be solemnised as marriages.
37. We support this section 10(1) to the extent that whatever limitations are imposed, these are set by the institution to which the marriage officer belongs (i.e. that determines what the meaning of marriage or protected relationships are according to its own views or doctrines). This would align with the constitutional mandate to reasonable accommodate diversity in South Africa.⁵¹
38. In light of the above we propose that the Commission give consideration as to amend the proposed draft Bills in order that clarity can be provided for the meaning of “with or without limitation” in the proposed section 10(1). This will serve in the public interest and prevent any uncertainty that this section might cause in the future.

C1 MARRIAGE FORMULA

39. The marriage formula is of central significance to religious and cultural groups’ views on marriage. We agree with the Commission’s view that the state has no interest in dictating how cultural and religious rituals are to be conducted, including prescribing what ‘marriage’ or the ‘marriage formula’ should entail.⁵²
40. We note that section 30 of the Marriage Act and section 11 of the Civil Union Act each prescribe a set formula for the solemnisation of marriages and civil unions – a specific set of words that must be uttered by the marriage officer to create certainty that the marriage or civil union is lawful. However, according to the Discussion Paper religious and cultural organisations are of the view

⁵⁰ [2.75.1] and [2.75.2] of the Discussion Paper page 67 and 68.

⁵¹ *Minister of Home Affairs and Another v Fourie* at [97].

⁵² [2.87] of the Discussion Paper page 74.

that the state should not prescribe a marriage formula.⁵³ They argue that the marriage formula is at the heart of what different religious and cultural groups consider a marriage to be, and that its formulation and implementation is best left to them (and not the state).

41. We fully support the Commission's view that the state has no interest in prescribing a specific marriage formula.⁵⁴ We also support the freedom of religious and cultural groups to choose if they want to use a specific marriage formula or make use of their own. This protects and promotes diversity and is the only logical approach a state that does not dictate the meaning of marriage can follow.

C2 TIME PLACE AND FORM OF MARRIAGE

42. We support the Commission's view that marriage officers should be able to solemnise marriages and conduct ceremonies based on any religious, cultural or secular practice.⁵⁵ This provides legal recognition and protection "*that no minister of religion could be compelled to solemnise a same-sex marriage if such a marriage would not conform to the doctrines of the religion concerned*"⁵⁶ or any other form of marriage.

43. This stance is encapsulated in section 11(1) of both the proposed draft Bills – marriage officers are given the right (and freedom) to solemnise a marriage at any place, at any time of the week, in accordance with any mode of solemnisation, and in accordance with any religious or cultural practice.⁵⁷

D SUPPORT FOR PROTECTED RELATIONSHIPS DRAFT BILL

44. The Discussion Paper calls for comments in respect of which one of the two draft Bills would be best suited to the needs of a diverse society such as South Africa.⁵⁸ Taking into consideration the practical implications of each Bill, we submit that the Protected Relationships Draft Bill contains the most suitable wording. We base our view on the fact that different religious organisations hold particular and often diverging views of what 'marriage' is. For these organisations and religious belief systems and the individuals belong to or ascribing to them, using the word 'marriage' as an overarching term to describe any type of protected relationship, may not be appropriate and could lead to illegitimate totalitarianism. For this reason, the more neutral and inclusive phrase 'protected relationships' is to be preferred.

⁵³ [2.81] of the Discussion Paper page 72.

⁵⁴ [2.87] of the Discussion Paper page 74.

⁵⁵ [2.87] of the Discussion Paper page 74.

⁵⁶ *Minister of Home Affairs and Another v Fourie* at [97].

⁵⁷ [2.89.1] and [2.89.2] of the Discussion Paper page 74 to 75.

⁵⁸ [2.2] of the Discussion Paper page 23.

45. This approach would prevent any person from being forced to marry under the terminology of 'marriage', which terminology they may or may not agree with. Instead, using the phrase 'protected relationships', would enable a person to situate solemnising of their particular relationship within the contours of the beliefs and practices of a particular religious or cultural organisation or institution. In this way, the state steers clear from prescribing a definition for 'marriage' and limits itself to recognising and attaching legal protection and consequences to certain protected relationships.
46. In light of the above, we support the Protected Relationships Draft Bill.

CONCLUSION

47. We trust that the above comments and inputs are of assistance to the Commission. We look forward to your response thereto in due course.
48. Cause for Justice remains at the Commission's disposal to assist in the further execution of its mandate in respect of Project 144, and specifically in relation to protecting and promoting the values of human dignity, equality and freedom.
49. We would appreciate any opportunity that the Commission is willing and able to afford us to take further part in discussions with yourselves and/or to make further contributions to your work on this project.

Your faithfully,

Stefanie Kotze

Liesl Pretorius

Ryan Smit

Directorate: Law and Policy