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Our reference: Green Paper on Marriage in South Africa

Date: 30 June 2021

**Director-General
Department of Home Affairs
PRETORIA**

**For attention: Mr Sihle Mthiyane
Chief Director: Policy and Strategic Management**

By email: marriagegreenpaper@dha.gov.za

Dear Mr Mthiyane,

RE: SUBMISSIONS ON GREEN PAPER ON MARRIAGE

1. We refer to the abovementioned matter, specifically to the notice issued by the Honourable Minister of Home Affairs, Dr Pakishe Aaron Motsoaledi, in the Government Gazette of 11 May 2021, calling for public comments in respect of the Green Paper on Marriages in South Africa ("the Green Paper").
2. Cause for Justice ("CFJ") hereby thanks the Department of Home Affairs ("DHA/the Department") for the opportunity to make these written submissions and to participate in the policy-making process.
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 an a-political, non-partisan human rights organisation that exists to act in the public interest and in the interest of justice by promoting and protecting constitutional rights, freedoms, and obligations in South Africa. The principal ways in which CFJ does this are through: (1) court proceedings; (2) public education and awareness campaigns; and (3) participating in the policy-making and legislative process, and other state decision-making structures.

CHIEF EXECUTIVE: SA SMIT | NON-EXECUTIVES: NC SNYDERS | JP DICKS

5. We focus our submissions on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights and related matters affecting the fundamental right to freedom of religion, belief and opinion.
6. All five of CFJ's core values give it a particular interest in the Green Paper, namely: (1) the responsible exercise of freedom; (2) and promotion of human dignity / worth; (3) protection of the vulnerable in society; (4) ensuring accountable government action; and (5) protecting the institutional authority of the family against undue encroachment from outside forces.
7. 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.
8. 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

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.

accommodated (so as not to force them to act contrary to their sincerely held beliefs)⁷ without denying service delivery to same-sex couples who want to have their unions solemnised by the state.

9. During May 2021 CFJ also sent in written submission for consideration by the South African Law Reform Commission (“SALRC”) on its Project 144 Discussion Paper 152 on Marriage Reform. In our submissions we highlighted the diversity of the pluralistic South African society. The preamble of the Constitution acknowledges and celebrates diversity and the right to be different. In light of this and the principle of reasonable accommodations we submitted that it is only reasonable to allow each institution or organisation to determine the meaning of marriage for themselves, and consequently remove the state’s involvement in the determination of the meaning of marriage. This diversity is further advanced by allowing marriage officers, either in the public or private sphere, the choice to only solemnise marriages that are in line with their personally or institutionally held beliefs. Every person should be able and free to enjoy their fundamental rights and freedoms including their freedom of religion, belief and opinion.

STRUCTURE OF SUBMISSIONS

10. Our submissions are structured under the following headings:

A	Equal consideration of public submissions	3
B	Advancement of unity in diversity	5
C	Least restrictive measures to limit marriage officers’ rights in terms of solemnisation	8
D	Support for premarital counselling	16
E	Potential future contested issues for consideration by the Department (best interest of children)	17

A EQUAL CONSIDERATION OF PUBLIC SUBMISSIONS

11. We agree that no opinion or view that amounts to unfair discrimination should be incorporated into the White Paper.⁸ It is however of vital importance that the state fulfils its constitutional duty to facilitate effective public participation in law-making.⁹ This Green Paper will inevitably influence the state’s position on the recognition of marriages in South Africa This will have a drastic effect on every single religious, cultural and even secular institution in South Africa. As stated by

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>.

⁸ DHA Green Paper page 7.

⁹ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC). Available at <http://www.saflii.org/za/cases/ZACC/2006/11.html>. *Matatiele Municipality & Others v President of the RSA & Others* 2006 (5) BCLR 622 (CC). Available at <http://www.saflii.org/za/cases/ZACC/2006/2.html>.

Minister Aaron Motsoaledi in the National Colloquium on Green Paper on Marriage in South Africa, held on 28 June 2021, this marriage Green Paper is a watershed moment in our democracy.¹⁰ It is thus necessary for the state to facilitate effective public participation in this Green Paper by allowing all persons to submit their consideration, without fear that the state will disregard their submission.

12. Furthermore, it is important to note that, as iterated by the Department in the Green Paper, there are no hierarchy of rights.¹¹ In the context of conflicting fundamental rights, the “*two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity.*”¹² Section 36 of the Constitution¹³ provides that rights can be constitutionally limited. Thus, to have a blanket exclusion on all submissions that might seem discriminatory cannot be in the interest of effective public participation.
13. Where fundamental rights come into conflict with one another, a careful balance needs to be struck within constitutional parameters to ensure equality is promoted and persons are protected from unfair discrimination, whilst simultaneously protecting freedom of religion and freedom of expression. We implore the Department to ensure the foundational values of, and the human rights enshrined by, the Constitution, are upheld.
14. According to Currie and De Waal, “*discrimination is a particular form of differentiation*”.¹⁴ Section 9 of the Constitution – the “equality clause” – only prohibits unfair discrimination. “Fairness” is a moral concept used to distinguish between fair discrimination (legal) and unfair discrimination (illegal), and is determined by the impact of the discrimination on the person receiving differential treatment.¹⁵ The concept of dignity is of central importance in determining whether discrimination is unfair,¹⁶ since unfair discrimination is “*principally means treating people differently in a way that*

¹⁰ <https://www.gov.za/speeches/minister-aaron-motsoaledi-leads-national-colloquium-marriage-policy-28-jun-28-jun-2021-0000>.

¹¹ DHA Green Paper pages 7, 18 and 46.

¹² *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at [98].

¹³ The Constitution of the Republic of South Africa, 1996. Available at

<https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf>. Section 36 reads:

(1) *The rights in the Bill of Rights may be limited only in terms of 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 right entrenched in the Bill of Rights*

¹⁴ I Currie and J De Waal Bill of Rights Handbook at p 222.

¹⁵ I Currie and J De Waal Bill of Rights Handbook at p 223.

¹⁶ I Currie and J De Waal Bill of Rights Handbook at p 223.

impairs their fundamental dignity as human being, who are inherently equal in dignity".¹⁷ To determine whether discriminate is unfair, its impact must be assessed objectively and not subjectively.¹⁸

15. We therefor submit that the Department should consider all submission in determination of its policy perspective that will be reflected in the future White Paper.

B ADVANCEMENT OF UNITY IN DIVERSITY

16. At the outset we support the acknowledgement that the nature of marriage is that of a societal institution and is integrated into basic social institutions.¹⁹ 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.²⁰ It is intimately and intricately interwoven into the rich fabric of culture, tradition, and the beliefs of different societal and cultural groups.
17. The Green Paper envisions that the new marriage policy will advance equality, non-discrimination, human dignity and unity in diversity.²¹ We agree and fully support that South Africa's laws should be in line with all the rights, freedoms and values as encapsulated in the Constitution. We especially believe that the law should advance the reasonable accommodation of diversity rather than unnecessarily restricting and limiting the enjoyment of rights and freedoms.²² We will be focusing on how the marriage policy should advance diversity as found in the preamble of the Constitution.²³
18. We fully support the Green Paper²⁴ in advancing the values of equality and diversity and commend the Department for allowing these values to underpin the policy and that religious and cultural practices are given equal recognition and status. Section 15(1) of the Constitution²⁵ advances diversity in the South African pluralistic society and this diversity has been emphasised by the Constitutional Court in numerous occasions.

¹⁷ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at [22]. Available at: <http://www.saflii.org/za/cases/ZACC/1997/5.html>.

¹⁸ I Currie and J De Waal Bill of Rights Handbook at p 223 to 224.

¹⁹ DHA Green Paper page 15.

²⁰ D Bethmann, M Kvasnicka "The Institution of Marriage" (2011) 24 *Journal of Population Economics* 1005. Available at <https://www.jstor.org/stable/41488338>.

²¹ DHA Green Paper page 6.

²² Section 36(1)(e) of the Constitution.

²³ The Preamble reads: *South Africa belongs to all who live in it, united in our diversity*.

²⁴ DHA Green Paper page 10.

²⁵ Section 15(1) reads: *Everyone has the right to freedom of conscience, religion, thought, belief and opinion*.

19. In *Minister of Home Affairs and Another v Fourie*²⁶ 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.

20. Furthermore, in *MEC for Education, KwaZulu-Natal v Pillay*²⁷ the Constitutional Court reiterated that diversity, through reasonable accommodation, has repeatedly been emphasised by the Constitutional Court in matters concerning religion.²⁸

21. We are in agreement that it is vital to facilitate diversity in South Africa and more accurately, reasonably accommodate diversity in the new marriage policy. This marriage policy accordingly acknowledges the impossibility to pass legislation that will govern every type of marriage found in such a pluralistic society such as South Africa.²⁹ This is why it is vital for the state to facilitate reasonable accommodation for the furtherance of diversity through maximum recognition of relationships and minimum regulation.

22. We accordingly agree that regulating every single type of relationship, that is considered by religious, cultural and secular groups worthy of state protection, is an impossible task in a pluralistic society such as South Africa. Therefore we reiterate the SALRC's Discussion Paper 152 in that it is not the state's responsibility to define what a valid marriage is.³⁰ The state does not (and neither should it attempt to) determine the nature, meaning and purpose of marriage; and it should limit itself to only recognising different types of relationships that warrant legal protection (and attach legal consequences to these).³¹ This is in line with the Green Paper's intention to conclude a marriage regime that is founded on the constitutional values of equality, non-discrimination and human dignity.³²

23. It is imperative that religious groups should be able to freely express and act in accordance with their religious beliefs without fear of reprisal.³³ The Constitutional Court recognised that some

²⁶ *Minister of Home Affairs and Another v Fourie* at [95].

²⁷ *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>.

²⁸ *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].

²⁹ DHA Green Paper page 11.

³⁰ [2.87] of SALRC Discussion Paper 152 page 74.

³¹ [2.87] of SALRC Discussion Paper 152 page 74.

³² DHA Green Paper page 11.

³³ *MEC for Education, KwaZulu-Natal v Pillay* at [90] and [106] to [107].

practices are inseparable from a person's religion and identity.³⁴ Such practices and the ability of religious persons to live and act in accordance therewith deserves legal protection.³⁵ 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.³⁶

24. In amplification of the above, we submit that it is incumbent upon the state to acknowledge the diversity of marriage in the different religions, cultures and social groups in South Africa. The Constitution acknowledges – and celebrates – diversity and the right to be different.³⁷ The Constitutional Court recognises the "*constitutional value of acknowledging diversity and pluralism in our society*",³⁸ 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*".³⁹ In the context of marriage law reform, the state's constitutional mandate⁴⁰ is to recognise and provide legal protection and consequences to various marriage relationships in a manner that to protects and promotes the fundamental rights of all who live in South Africa.⁴¹
25. As mentioned in various places in the Green Paper it is vitally important to recognise there is no hierarchy of rights in the Bill of Rights and that due considerations should be given to balancing conflicting rights.⁴² 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. When fundamental rights are limited, it must be done in accordance with the limitations clause found in section 36 of the Constitution. 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;

³⁴ *MEC for Education, KwaZulu-Natal v Pillay* at [62].

³⁵ At [61] to [64].

³⁶ At [71] to [79].

³⁷ The preamble of the Constitution reads, "...*South Africa belongs to all who live in it, united in our diversity.*"

³⁸ *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>.

³⁹ *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>.

⁴⁰ Section 7(2) of the Constitution.

⁴¹ Article 5 of the South African Charter of Religious Rights and Freedoms. Available at:

<https://www.strasbourgconsortium.org/content/blurp/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.

⁴² DHA Green Paper pages 7, 18 and 46.

- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.⁴³

26. Thus, we submit that it is in the interest of unity in diversity that the state reasonably accommodates marriage officers' rights in having the freedom to only solemnise marriage that are in line with their inherently and deeply held beliefs and views.

LEAST RESTRICTIVE MEASURES TO LIMIT MARRIAGE OFFICERS' RIGHTS IN TERMS OF SOLEMNISATION

27. Our submissions focus on the issue raised in the Green Paper of "*equitable recognition of the right to freedom of conscience, religion, thought, belief and opinion in the solemnisations and registration of marriages*."⁴⁴

28. The Green Paper mentions the limitation of the Marriage Act, 25 of 1961, in so far that only state and religious officers were in the past allowed to solemnise marriages.⁴⁵ This resulted in differentiation on who can solemnise marriages based on the involvement in specific institutions. Consequently, marriage officers that objected to solemnise marriages that conflicted with their beliefs were seen as discriminating against specific groups. However, a marriage officer's objection to solemnising marriages based on religious beliefs is not merely applicable to same-sex couple, but any and all marriages that do not conform to their specific institutions' beliefs of what marriage is. Be these marriages of minors, polygamous marriages, polyandrous marriages, same-sex marriages or any other form of marriage that does not fall into the specific institution's definition of marriage.

29. This is where the SALRC's Discussion Paper 152 provides an all-inclusive solution for preventing unfair discrimination and promoting equality in diversity.⁴⁶ It provides that the scope of categories of marriage officers should be widely extended. To this extent any institution, whether religious, cultural or secular, can have authorisation from the Minister to solemnise marriages. This approach is in line with the Green Paper's intention to create a legal marriage regime that advances unity in diversity, equality and human dignity.⁴⁷

30. The Green Paper lists options in the pursuit to try and balance the right to freedom of religion, conscience, thought, opinion and belief for a marriage officer to be free to refuse to solemnise a marriage that is contrary to their beliefs and views and the right to be treated equally by all marriage officers. This is an exercise of balancing the rights in section 9 with section 15 of the

⁴³ Section 36(1) Constitution.

⁴⁴ DHA Green Paper page 12.

⁴⁵ DHA Green Paper page 29.

⁴⁶ [2.75.1] and [2.75.2] of the SALRC Discussion Paper 152 page 67 to 69.

⁴⁷ DHA Green Paper page 6.

Constitution and an important opportunity to apply the constitutional principle of reasonable accommodation. As mentioned in the Green Paper the Department acknowledges that this would be necessary to advance and build a society that values dignity, equality and diversity.

31. 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.⁴⁸ 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. It is thus in line with the Constitution to choose the least restrictive option of solemnisation mentioned in the Green Paper for the new marriage law regime in South Africa.⁴⁹

Option 1: Non-discriminative solemnisation of marriages

32. Option 1 of the Green Paper would force all marriage officers to marry all persons irrespective of whether the particular marriage accords with their own or their institution's belief on what marriage is.⁵⁰ This will not only be applicable to the indiscriminate solemnising of same-sex marriages, but could for example, require an Imam to solemnise a Hindu marriage or a Jewish marriage - something which is patently unreasonable and a violation of the Imam's right to freedom of religion.⁵¹
33. When considering the section 36 limitation of the right to freedom of religion, conscience, though, opinion and belief it should be considered whether there are less restrictive means to achieve the purpose of non-discrimination when it comes to the solemnisation of marriages. The Green Paper validly criticises this option as one that places an unreasonable and unjustifiable limitation on marriage officers by forcing them to act contrary to their religion, conscience, thoughts, opinions and beliefs. The remaining three options mentioned in the Green Paper⁵² speaks of less restrictive means. The SALRC Project 144 Discussion Paper 152 also recognises less restrictive means of limiting a marriage officers' right to freedom of religion, conscience, thought and opinion in the solemnisation of marriages.
34. The non-discriminative approach⁵³ to solemnisation of marriage would not merely unreasonably and unjustifiably infringe on the section 15 rights of marriage officer, but it would also be contrary to the Green Paper's intention to advance diversity in the pluralistic South African society. Rather than reasonably accommodating diversity through recognising different marriages, marriage officers would need to "give up" their right to freedom of religion, conscience, thought, belief and

⁴⁸ Section 36 of the Constitution.

⁴⁹ DHA Green Paper page 51 to 53.

⁵⁰ DHA Green Paper page 52.

⁵¹ In accordance with section 15(1) of the Constitution.

⁵² DHA Green Paper page 52 to 53.

⁵³ DHA Green Paper page 52.

opinion. All of these rights protect and advance the diversity of South African society. This would be contrary to the Preamble of the Constitution and all the Constitutional Court decisions that advances diversity rather than diminishing it.

35. 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.⁵⁴ 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*⁵⁵ 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".*

36. 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 provision⁵⁶ 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."

37. 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

⁵⁴ Rights to human dignity, equality, and freedom of religion, conscience, opinion and belief.

⁵⁵ *Minister of Home Affairs and Another v Fourie* at [61].

⁵⁶ 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."

marriages would not themselves be obliged to do so if this resulted in a violation of their conscience.”

38. This option would not allow for the state to reasonable accommodate different marriage officers from different organisations and institution.⁵⁷ The lack of recognition of the diversity as found in society would amount to a failure on the part of 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.⁵⁸ Denying marriage officers this choice, is an infringement of their constitutional rights.⁵⁹
39. 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.⁶⁰ 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. The implication is that the religious sector relieves the Department of Home Affairs to a large degree of its obligation to solemnise marriages.
40. 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 borne 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.
41. Accordingly, *Option 1* is unlikely to pass constitutional muster and falls foul of the constitutional imperative to protect and celebrate diversity.

Option 2: Non-discriminative solemnisation of marriages by public servants

42. The Green Paper recognises the constitutional challenges of *Option 1* and consequently *Option 2* seeks to limit indiscriminate solemnisation to public servants only.⁶¹ *Option 2* would seem to be more in line with the Green Paper’s intention of advancing diversity in that it limits the forced solemnising of all marriages merely to state employed marriage officers rather than all marriage

⁵⁷ DHA Green Paper page 51.

⁵⁸ Section 7(2) and 15(1) of the Constitution.

⁵⁹ Section 7(2) and 15(1) of the Constitution.

⁶⁰ DHA “Keynote address by Home Affairs Minister Dr Aaron Motsoaledi at the marriage policy dialogue with religious leaders in Ekurhuleni on 26 September 2019” see <http://www.dha.gov.za/index.php/statements-speeches/1288-keynote-address-by-home-affairs-minister-dr-aaron-motsoaledi-at-the-marriage-policy-dialogue-with-religious-leaders-in-ekurhuleni> (accessed 30 June 2021).

⁶¹ DHA Green Paper page 52.

officers as found in *Option 1*.⁶² However, it is still an unjustified and unreasonable limitation of state-employed marriage officers' rights.⁶³

43. Forcing state employed marriage officers to solemnise all marriages is still an unnecessary limitation of their right to freedom of religion, conscience, thought, opinion and belief.⁶⁴ It would not withstand the section 36 constitutional limitation analysis in so far that there is yet again a less restrictive measure to obtain a balance between the marriage officer's rights and the rights of the parties desiring solemnisation of their marriage.⁶⁵
44. We further submit that it is problematic that the Green Paper equates administrative roles of state officials such as registration of births, deaths or marriages to the personal and religious role of solemnising a marriage.⁶⁶ We acknowledge that the Green Paper seeks to accommodate those state employed individuals whose rights would be infringed upon if they are forced to solemnise a marriage that is not in accord with their beliefs.⁶⁷ However merely limiting their role not to be obliged to participate in the ceremony does not absolve them from the obligation to solemnise marriages and endorse types of relationships that are contrary to their inherently held beliefs on marriage.⁶⁸
45. In this regard we see it fit to note the unanimous decision of the Supreme Court of the United States in *Fulton v City of Philadelphia*⁶⁹ which was decided on 17 June 2021. The court held that the City of Philadelphia's failure to accommodate the Catholic Social Services ("CSS") due to its policy in not certifying same-sex couples as foster parents was a violation of the Free Exercise clause in the US Constitution's First Amendment, which is similar to the right to freedom of religion in the South African Constitution.⁷⁰
46. The judgment reads:⁷¹

*The religious views of CSS inform its work in this system [Philadelphia foster care system]. CSS believes that "marriage is a sacred bond between a man and a woman." App. 171. Because the agency understands the certification of prospective foster families to be an **endorsement of their relationships**, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to*

⁶² DHA Green Paper page 52.

⁶³ According to section 36(1) of the Constitution.

⁶⁴ As found in section 15(1) of the Constitution.

⁶⁵ Section 36(1)(e) of the Constitution.

⁶⁶ DHA Green Paper page 52.

⁶⁷ DHA Green Paper page 52.

⁶⁸ DHA Green Paper page 52.

⁶⁹ Available at: https://www.supremecourt.gov/opinions/20pdf/19-123_g3bi.pdf.

⁷⁰ Section 15 of the Constitution.

⁷¹ *Fulton v City of Philadelphia* page 2 to 3.

one of the more than 20 other agencies in the City, all of which currently certify same-sex couples.

47. Similar to this many marriage officers, whether private or public, understand the solemnisation of marriages as an endorsement of the relationship. This is more than just an administrative function for them, such as registering a birth, but rather a deeply held belief. The question arises if the infringement of forcing a person to go against their beliefs and endorsing something they cannot reconcile themselves with to as a constitutionally justifiable limitation of their fundamental rights.⁷² The further question then arises if there would not be a less restrictive manner that solemnisation of marriages of different types of relationships in South Africa could be facilitated.
48. The current Green Paper and the Discussion Paper of the SALRC already sets out less restrictive measures by extending the scope of marriage officers so that no person can be forced to act contrary to their beliefs, but also allow for parties to have access to marriage officers and not be subject to unfair discrimination. Furthermore, the fact that marriage officers are allowed to choose which marriage they solemnise does not by any means show that they are imposing their views on marriage on the rest of society. However, they as individual rights bearers have the right to freedom of religion, conscience, belief, opinion and thought.⁷³ The court in *Fulton v City of Philadelphia*⁷⁴ came to the same conclusion that to allow one party to act in accordance with their religious belief does not amount to them imposing their views on any other person.

“CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else.”⁷⁵

49. In order to show equal respect for 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.⁷⁶ Based on the Green Paper’s emphasis on the accommodation of diversity in South African society, and taking into account the Constitutional Court’s judgment in the Fourie-case,⁷⁷ marriage officers employed by the state should enjoy the same reasonable accommodation as any other marriage officer.
50. 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

⁷² In accordance with section 36(1)(e) of the Constitution.

⁷³ According to section 15(1) of the Constitution.

⁷⁴ *Fulton v City of Philadelphia* page 15.

⁷⁵ *Fulton v City of Philadelphia* page 15.

⁷⁶ DHA Green Paper page 52.

⁷⁷ DHA Green Paper page 52.

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.

51. 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).
52. Accordingly, we submit that *Option 2* does not take into consideration and prevents the state from complying with its constitutional duty to reasonably accommodate state employed marriage officers whose beliefs are not in accordance with parties' seeking solemnisation.

Option 3: Broadening the scope for the designation of marriage officers

53. *Option 3* of the Green Paper makes provision for any person forming part of a social group, whether religious, cultural or secular, to be able to be recognised as a designated marriage officer. Thus, various different religious, cultural and secular groups would be able to have marriage officers that will solemnise marriages in accordance with that institution or groups' views of marriage. However, this broadening seems to stop short of state employed marriage officers who would still be forced to solemnise all marriages, even though contrary to their beliefs and views.
54. We agree that extending the scope of categories of marriage officers in a manner in which both section 9(3) and section 15(1) can be accommodated and would advance diversity in the South African marriage law regime. This is the same approach that the SALRC is taking in its Project 144 Discussion Paper 152 where the categories of marriage officers are proposed to be extended to a very wide scope. Due to this extension in both the Green Paper and the Discussion Paper there is a strong indication that the state intends to recognise, protect and promote diversity in accommodating different religious, cultural and secular views on marriage.⁷⁸ This laudable approach also encapsulates the requirements for the state to reasonably accommodate the fundamental rights of marriage officers' 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.⁷⁹
55. However, it is problematic that state employed marriage officers are not afforded the free enjoyment of these rights because they are not absolved from objecting to the solemnisation of marriages that are not in line with their views and beliefs.⁸⁰ The mere fact that someone is

⁷⁸ SALRC Discussion Paper 152 page 20, supporting Issue Paper 35.

⁷⁹ See our discussion under Part B above.

⁸⁰ DHA Green Paper page 53.

employed by the state does not amount to them being able to lose their constitutionally protected freedoms and rights. This cannot be seen as reasonable and justifiable in an open and democratic society.⁸¹

56. If, however the scope of marriage officers is extended so that no person could be obliged to solemnise all marriages this would be a valid solution to the limitations of the Marriage Act, as indicated by the Green Paper.⁸² The limitation that does not make provision for the solemnisation of marriages by other social groups.⁸³ These categories would extend to any religious, cultural and secular group. In doing so it can only be logical not to force any marriage officer, whether private or public, to solemnise all marriage, due to the sure vast amount of different marriage that would be recognised. It is not reasonable to expect any marriage officer to have the knowledge of what would constitute a valid marriage in terms of so many different definitions, doctrines beliefs, opinions and views of the different religious and social groups.
57. 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.⁸⁴ When the state provides legal recognition to different types of marriages through broadening the scope of designated marriage officers and absolving public servants from solemnising all 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.⁸⁵
58. We accordingly submit that a legal regime wherein the different categories of marriage officers are established to allow for the freedom to choose to object from solemnising marriages that fall outside their own views and doctrines of what a marriage is, would be the only conceivable constitutionally compliant regime.⁸⁶

Option 4: Solemnising marriages without marriage officers

59. *Option 4* makes provision for the solemnisation of marriages to be merely a state administrative role. This would mean that no marriage officer would be forced to solemnise a marriage that is contrary to their beliefs but will merely be acting as an administrator in registering the marriage. Because there would be no solemnisation of marriage there would be no discrimination.
60. The only involvement that state would have with marriage is to recognise the legal consequence and protection on the relationship. This would be in accordance with the SALRC's Discussion

⁸¹ See above discussion.

⁸² DHA Green Paper page 29

⁸³ DHA Green Paper page 29

⁸⁴ In accordance with section 7(2) of the Constitution.

⁸⁵ In accordance with *MEC for Education, KwaZulu-Natal v Pillay* at [72].

⁸⁶ *Minister of Home Affairs and Another v Fourie* at [97].

Paper 152 that argues that the state does and should not prescribe any definition of marriage to religious, cultural and secular groups. Rather the nature, meaning and purpose of marriage should be left to each individual organisation; and that the state should limit itself to only recognising different types of relationships that warrant legal protection (and attach legal consequences to these).

61. 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 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.⁸⁷ The constitutional principle of reasonable accommodation demands that the views and beliefs of different groups of people are accorded equal respect and value.
62. 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. *Option 4* would thus facilitate this reasonable accommodation, because the state is restricted to being a "registering authority" fulfilling an administrative function. The only role the state would have is to register marriages. We support this separation of the state from the social institution of marriage.
63. The only practical consideration is that which we mentioned earlier that 90% of all marriage officers are that of religious nature. If the administrative role of marriage officer is separated from the religious role, it would constitute an approximately 90% reduction in the availability of marriage officers are unable to register marriages. This would have a drastic effect on the administrative role of the Department of Home Affairs to register marriages. This also has the potential of prejudice parties who have been married according to their ceremonial beliefs, but wait months for legal protection and recognition of the marriage due to a lack of capacity to register marriages at the Department.

D SUPPORT FOR PREMARITAL COUNSELLING

64. We support the Green Paper proposal of adding premarital counselling to the South African legal marriage regime.⁸⁸ We agree with the Green Paper that marriage has societal benefits, and the state should take measure to support this structure.⁸⁹ We also support that the parties should be informed of the legal implications on the patrimony of the parties. This would be to advance an

⁸⁷ In accordance with *Minister of Home Affairs and Another v Fourie* at [97].

⁸⁸ DHA Green Paper page 57.

⁸⁹ DHA Green Paper page 57.

informed society that can make decisions that are best for their families and in the best interest of children.⁹⁰

E POTENTIAL FUTURE CONTESTED ISSUES FOR CONSIDERATION BY THE DEPARTMENT (BEST INTEREST OF CHILDREN)

65. One consideration we would like to bring under the attention of the Department is the public benefits that are attached to the recognition of certain types of relationships and the legal protection and consequences given to those specific relationships. We would specifically like to highlight the vital importance that the state fulfils its role in protecting children's rights and promoting their best interest as required by the Constitution.⁹¹
66. The best interest of children is of paramount importance in all matters relating to children.⁹² We thus put the question to the Department as to what the benefits would there be for children if any relationship could be solemnised and registered as a marriage.
67. The reason monogamous marriages have enjoyed state protection for centuries is that as an institution it benefits society in a manner that no other relationship does. The state's recognition of marriage protects children by encouraging men and women to have a permanent commitment to each other and to take responsibility of their children.
68. The state's recognition of marriage supports the economic well-being of a country. This benefit was explored by Professor W. Bradford Wilcox and he summarised his part of a study at the University of Virginia's National Marriage Project in this way: "*The core message...is that the wealth of nations depends in no small part on the health of the family.*"⁹³ This study also suggests that marriage and fertility inclinations "*play an underappreciated and important role in fostering long-term economic growth, the viability of the welfare state, the size and quality of the workforce, and the health of large sectors of the modern economy.*"⁹⁴ One further study in the United States found that marriage reduced the probability of child poverty by 80%.⁹⁵ Children who are raised in single-parent households are statistically more likely to abuse drugs and alcohol, portray poor social behaviours, commit violent crimes and drop out of school.⁹⁶

⁹⁰ According to section 28 of the Constitution.

⁹¹ According to section 28 of the Constitution.

⁹² Section 28(2) of the Constitution.

⁹³ Social Trends Institute, "The Sustainable Demographic Dividend: What Do Marriage and Fertility Have to Do with the Economy?" 2011, <http://sustaindemographicdividend.org/articles/the-sustainable-demographic> (accessed 29 June, 2021).

⁹⁴ H. Brevy Cannon, "New Report: Falling Birth, Marriage Rates Linked to Global Economic Slowdown," UVA Today, October 3, 2011, <https://news.virginia.edu/content/new-report-falling-birth-marriage-rates-linked-global-economic-slowdown> (accessed 29 June, 2021).

⁹⁵ Robert Rector, "Marriage: America's Greatest Weapon Against Child Poverty," Heritage Foundation Special Report No. 117, September 5, 2012, <http://www.heritage.org/research/reports/2012/09/marriage-americas-greatest-weapon-against-child-poverty>.

⁹⁶ <https://www.heritage.org/marriage-and-family/heritage-explains/why-the-declining-marriage-rate-affects-everyone>.

69. Social science affirms the importance a stable family environment founded on a committed monogamous marriage has on children. According to sociological evidence, children who are raised by their wedded biological parents perform the best in almost every examined indicator. Various studies on poverty and even genetics suggest that children in stable homes fare the best on educational achievement, emotional health, familial and sexual development, and delinquency and incarceration.⁹⁷ Fathers play particularly important roles in the formation of both their sons and their daughters. David Popenoe, a sociologist at Rutgers University, explains that “*The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable.*”⁹⁸
70. Specific relationships have been recognised for the legal protection of marriage because it serves a public purpose. In recognising various relationships with the legal protection and consequences of marriage the state should be clear as to what the public benefits or interests are of these relationships. This applies specifically in the case of advancing the best interest of children in such relationships.⁹⁹
71. Scientific research evidence proves that certain relationship - monogamous marriage - is the most beneficial to the healthy development of children. We request the Department to seriously consider the impact of recognising different relationships as marriages on children and ultimately, society. The Department must allow itself to be guided accordingly in order to ensure it acts in the best interest of children and the public.
72. Thus we put this information to the Department for further consideration.

CONCLUSION

73. 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, this submission has set out the least restrictive mean to balance all parties’ rights.
74. It is the state’s duty to reasonably accommodate diversity in South Africa. In doing so we are moving away from the injustices of the past and towards a society that celebrates the differences of its people. By allowing all marriage officers the opportunity to exercise and enjoy their right to freedom of religion, conscience, thought and opinion, by extending the scope of persons

⁹⁷ For the relevant studies, see Witherspoon Institute, “Marriage and the Public Good: Ten Principles,” August 2008, pp. 9–19, <https://www.socialtrendsinsitute.org/publications/family/marriage-and-the-public-good-ten-principles> (accessed 29 June, 2021). “Marriage and the Public Good,” signed by some 70 scholars, corroborates the philosophical case for marriage with extensive evidence from the social sciences about the welfare of children and adults.

⁹⁸ David Popenoe, *Life Without Father: Compelling New Evidence That Fatherhood and Marriage Are Indispensable for the Good of Children and Society* (New York: The Free Press, 1996), p. 146.

⁹⁹ In accordance with section 28 of the Constitution.

functioning as marriage officers and by leaving the meaning of marriage to religious, cultural or secular societal groups would truly be in line with the celebration of unity in diversity in South Africa.

75. We trust that the above comments and inputs are of assistance to the Department. We look forward to your response thereto in due course.
76. Cause For Justice remains at the Department's disposal to assist in the further execution of its mandate in respect of the South African Legal Marriage Reform, and specifically in relation to protecting and promoting the values of human dignity, equality and freedom.
77. We would appreciate any opportunity that the Department 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.

Yours faithfully,

Stefanie Kotze

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Directorate: Law and Policy