Submission in response to the Civil Union Amendment Bill, 2018

(General Notice no. 96 of 2018, Gazette no. 41475)

1. Introduction

The Helen Suzman Foundation ("**HSF**") welcomes the opportunity to make submissions to the Portfolio Committee on Home Affairs ("**the Committee**") on the Civil Union Amendment Bill, 2018 ("**the Bill**"). Should the opportunity arise, the HSF wishes to make oral presentations to the Committee.

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability.

The HSF notes that the Bill was introduced as a Private Member's bill and was, subsequently, adopted by the Committee, and is now under consideration by the National Assembly. Congratulations should be extended to Ms Carter for initiating this process and recognising the defect in law in the promotion of equal rights for same-sex couples. The HSF supports the process undertaken by the Committee to improve and strengthen the law governing civil unions.

2. The Proposed Repeal of Sec 6

The Bill proposes only one amendment to the Civil Union Act[1] ("**the Act**"), which is the repeal of Sec 6 in its entirety. The HSF endorses this amendment. It is troubling that more than a decade since the *Fourie*[2] case was handed down, giving rise to the Act, there are still significant barriers to same-sex marriage. As a result of the provisions in Sec 6, a couple may find themselves in the difficult position where no one is immediately willing to solemnise their marriage, and they cannot realise their constitutionally enshrined rights to equality and human dignity in the same way an opposite-sex couple can.

[1] 17 of 2006.

[2] *Minister of Home Affairs v Fourie* 2006 (1) SA 542 (CC).

The HSF is of the view that the repeal of Sec 6 would be futile unless Sec 4(1) of the Act is also amended. This subsection states that:

> Solemnisation of civil union
> 4. (1) A marriage officer may solemnise a civil union in accordance with the provisions of this Act.
>
> (2) Subject to this Act, a marriage officer has all the powers, responsibilities and duties as conferred upon him or her under the Marriage Act to solemnise a civil union.

If Sec 6 is repealed, the word 'may' in Sec 4(1) incorrectly confers some level of discretion on marriage officers to refuse to solemnise civil unions. The HSF therefore recommends that Sec 4(1) reads:

> 4. (1) A marriage officer shall solemnise a civil union in accordance with the provisions of this Act.

3. Substantiating the HSF's position

The HSF agrees with the argument made in the Memorandum on the Objects of the Bill in support of the proposed amendment. We fear that there is a double standard of who is exempt from presiding over marriages in terms of both pieces of legislation.

The Marriage Act (the legislation which governs heterosexual marriages) states that a religious marriage officer cannot be compelled to solemnise a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organisation (Sec 31). No similar provision exists for civil servants who are marriage officers. A a civil marriage officer (other than those in Sec 31) must solemnise all (heterosexual) marriages placed before him or her and is not allowed to refuse to solemnise a marriage on the grounds of conscience, religion or belief.

In terms of Sec 6 of the Civil Union Act, a civil servant who is a marriage officer may object to the solemnisation of a marriage on the grounds of conscience, religion or belief. In the Civil Union Act there is no similar provision that applies to religious marriage officers. An explanation for this could lie in the fact that both the religious institution and the individual religious official must apply separately to conduct civil unions therefore they are 'exempt' until they opt in.[3]

[3] Bonthuys 'Irrational accommodation: conscience, religion and same sex in South Africa' *The South African Law Journal* p 475 points to a further difference between religious and civil marriage officers:

With the allowance made in Sec 6 of the Act, compounded by the fact that it is cumbersome for religious marriage officers to apply to conduct civil unions, the number of marriage officers who are willing to conduct same-sex marriages is diminished. According to one source[4], 421 of the total 1 130 civil marriage officers fall under the category of exemption in terms of Sec 6 of the Act. Furthermore, as articulated in the tenets or doctrines of most religious organisations, the religious solemnisation of same-sex marriage is prohibited and therefore congregants must rely on the willingness of a civil marriage officer to realise their right to enter into a civil union. The fact therefore remains that it is more difficult for same-sex couples to get married than it is for opposite-sex couples as a consequence of the governing legislation. In some instances, the cost of this discrepancy amounts to the infringement of the right to equality and human dignity.

4. The duties binding a civil servant

Sec 239 of the Constitution defines an organ of state as follows:

> "organ of state" means –
> (a) any department of state or administration in the national, provincial or local sphere of government; or
> (b) any other functionary or institution –
>
> (i) exercising power or performing a function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

In terms of the definition in the Constitution and how case law has interpreted the 'exercise of public power' it is reasonable to assume that marriage officers could be considered organs of state. The act of solemnising a marriage or civil union may constitute the 'exercise of public power' (a concept that has been broadly interpreted[5]) and it is indisputable that this power is exercised in terms of legislation (either the Civil Union Act or the Marriage Act). This assertion is based on precedent

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"In the case of civil unions both the institution and the individual religious official must apply separately, while in the case of marriages, one application suffices". She further points to the fact that the process of appointment of religious marriages officers is more onerous and this decreases the chances of religious marriage officers applying to solemnise civil unions.
At p 479: Compared to Sec 31 of the Marriage Act, Sec 6 is actually framed in far broader terms. In addition to Sec 6 being so broadly phrased, there is nothing that requires the belief for which the accommodation is sought is genuinely held and there 'is no requirement that civil marriage officers motivate or justify their beliefs, nor can the Minister reject their objections on any grounds whatsoever. …The Civil Union Act is far too wide and invites abuse."

[4] James Lotter, Daily Maverick Op-Ed: It is time to secularise marriage in South Africa, 20 Feb 2018.

[5] *M & G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another* 2011 (5) SA 163 (GSJ).

from distinguishable cases heard in the Superior Courts but the exact facts must still be tested to establish legally binding authority.[6]

The question then arises whether an organ of state can refuse to exercise this power on behalf of the state on the ground of conscience, belief or religion and moreover if that refusal infringes on the right of an individual. Allowing a functionary of the state this discretion amounts to a negation of the State's overarching role in regulating both its own behaviour and that of its servants/functionaries, and could amount to an endorsement by the state of unfair discrimination.

The analogy of a judge presiding over a divorce matter can be used to demonstrate how the act of conferring a new legal status on individuals on behalf of the state has to be done impartially and cannot be obstructed on the ground of religion, conscience or belief. A judge who may be a devout member of a religion that condemns divorce cannot lawfully refuse to grant a divorce order to a couple who seek to have their marriage annulled. Similarly, a state functionary should not be permitted to refuse to bestow a new legal status (from unmarried to married) on two individuals on behalf of the state on the ground of religion, conscience or belief (especially when their right to equal treatment is guaranteed by the Constitution).

It must be emphasised that even if this interpretation fails, it does not undo the principle. A marriage officer when acting to solemnise a marriage – either in terms of the Marriage Act or the Civil Union Act – does so on behalf of the state and not his or her religious organisation. While a marriage officer may refuse to officiate the religious celebrations of a marriage for personal reasons, this allowance should not extend to the duty to act as an agent of the state. The duty is simple: the marriage officer, on behalf of the state – through the solemnisation of a marriage – bears witness to the *legal* process.

5. Public law/private law distinction

The argument made in paragraph 4 of this submission is easier to comprehend when one draws a clear distinction between civil and religious marriages. Marriage under both Acts has different implications, depending on whether the couple opts for a religious marriage in addition to a civil marriage. A marriage must first be solemnised in terms of the prescribed formula (Sec 30 of the Marriage Act and Sec 11 of the

[6] What constitutes the exercise of a public power is hotly contested and has to be determined on a case by case basis. In the case of *Airports Company SA v ISO Leisure OR Tambo (Pty) Ltd* 2011 (4) SA 642 (GSJ) at para 55 it was held that the essential enquiry was 'whether the said conduct arises from the exercise of a governmental function or not'. If you also consider other factors (listed in *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA)) such as how closely regulated the employee is by statute it is easy to reach the conclusion that the solemnisation of a marriage by a civil marriage officer is the exercise of a public power.

Civil Union Act) that is composed of secular words. If a religious marriage officer (who has been issued with a licence to conduct civil marriages) is presiding over the ceremony he/she may, with the couple's consent, then proceed to bless the marriage according to the rites of the religious denomination.

Civil marriage officers are only permitted to perform the first part of the ceremony described. A religious marriage officer may perform both functions. For one part of the ceremony they are acting in terms of legislation on behalf of the state recognising the new legal status being conferred on two individuals. For the other part they are bestowing recognition of the couple's union on behalf of the religious body they represent and this is governed by the rites of that religion. These are in fact two entirely distinct processes serving separate purposes and the conflation (and subsequent confusion) arises from the dual function a religious marriage officer can play.

It is helpful to consider these two functions in terms of public and private law. While the solemnisation of a civil marriage falls within the realm of public law in so far as it relates to the relationship between the individual and the state, the celebration of a religious marriage is a private law matter as it concerns the relationship between the individual and the religious institution.

The HSF accepts the discretion granted to religious officials to decide which religious weddings they are willing to officiate. The HSF however does not support the position that this discretion should extend to any marriage officer in deciding which civil weddings they will preside over. It is understood that religious marriage officers are afforded this duty for convenience but this has allowed for a confusing conflation between religious and civil marriages. As a starting point for reconsidering the legal framework governing marriage in South Africa, insight can be gleaned from other jurisdictions.

6. Jurisdictional comparison

In light of the distinction discussed in paragraph 5 of this submission it may be useful to consider how other jurisdictions manage this dilemma. A comparative study of same-sex marriage rights identifies certain trends in the legislative history of LGBTIQ rights.[7] The progression of moving towards legalising same-sex marriage was relatively slow and gradually moved from protecting same-sex relationships to finally allowing for same-sex marriage and equal adoption rights for same-sex couples. The final step to achieving equality was reworking the marriage legislation to be 'gender neutral' rather than enacting a separate piece of legislation to govern same-sex unions. What makes this approach easier to facilitate is the fact that only civil

[7] Glass, Kubasek and Kiester 'Toward A 'European Model' of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?' *Berkley Journal of International Law* vol 29: 1, 2011.

marriages are recognised and although couples can have a religious marriage ceremony those are purely the business of the couple and the religious body or institution. In almost all of those jurisdictions which have proceeded along these progressive lines, religious officials are not entitled to perform civil marriages.

Although far beyond the scope of this Bill, a strong argument can be made for moving the law that governs marriage and civil unions in South Africa to reflect the above systems. The HSF is of the view that South Africa must adopt a model that achieves the following:

- The separation of religious and traditional marriage ceremonies from civil marriage ceremonies.
- The establishment of one legal framework that governs Marriage in South Africa. This would mean the integration of the Civil Union Act, The Recognition of Customary Marriages Act, the law to be enacted governing Muslim marriages and the Marriage Act into one or two comprehensive pieces of legislation.
- A consequence of the HSF's recommendation is that there will be far fewer holders of civil marriage licences. To rectify this deficiency the category of those who can function as marriage officers should be broadened to include other non-religious offices such as diplomatic or consular representatives.

7. Current/ future difficulties

The case of *KOS and Others v Minister of Home Affairs and Others* 2017 (6) SA 588 (WCC) highlights an additional problem caused by the dual legislation governing marriage and civil unions. The discrimination and bureaucratic obstruction the plaintiffs faced[8] make a strong argument for integrating the Civil Union Act and the Marriage Act and framing all related legislation in gender-neutral terms. While this case was resolved and the plaintiffs were granted the primary remedies they sought it raises bigger concerns about the inclusion of transgender rights in the discussions of same-sex marriage, civil unions and the legal framework.

The HSF would strongly urge this Committee to rethink the legal framework governing marriage and civil unions to enhance the realisation of rights held by everyone in the LGBTIQ community. The legal uncertainty facing transgender individuals will inevitably lead to further legal challenges like the case cited above.

[8] The Plaintiffs were three couples married under the Marriage Act. One partner in each couple experienced gender dysphoria and commenced the gender transition process. The Department of Home Affairs (one of the Respondents) highlighted the confusion caused by the dual legislation, a general misunderstanding of the rights these couples had and ultimately the bureaucratic mess caused by an alleged inconsistency between the application of the Alteration of Sex Description and Sex Status Act 49 of 2003 and the Marriage Act.

Finally, it must be acknowledged that many South Africans in the LGBTIQ are extremely vulnerable in society. Much more work needs to be done to afford these individuals protection at a more basic level. To realise one's right to same-sex marriage, one first has to feel safe to identify as gay in your community or openly have a partner of your choice. Unfortunately, that is not the reality for far too many.

8. Resources

In 2001, the South African Law Reform Commission produced a very thorough report, reviewing the Marriage Act.[9] The report was compiled by a highly qualified team and was the result of a 1999 Discussion Paper on the Marriage Act.[10] The Report includes a draft Marriage Act Amendment Bill which seeks to update both the terminology and procedure to be more relevant. The recommendations should not be adopted verbatim because since the Report's publication, same-sex marriage was legalised. Nonetheless, the HSF urges that the recommendations made be revisited as some could provide for a helpful starting point for an overhaul of the legislation governing marriage in South Africa.

9. Conclusion

What this submission seeks to do:

- First, to consider the proposed repeal of Sec 6 of the Bill which the HSF endorses. For consistency, one further technical recommendation is made which is the substituting of the word 'shall' for 'may' in Sec 4(1) of the Act
- Secondly, to bring attention to the complicated system that governs marriage of both opposite-sex and same-sex couples in South Africa and advocates for the adoption of a simplified, more secular model in line with the Constitution.

The HSF is very pleased that this Committee adopted the Bill and is committed to promoting the rights of all who live in this country. In engagements going forward and future consideration of legislative amendments, the HSF would encourage greater awareness of transgender issues and the additional protection needed for those exposed to homophobia on a daily basis in order to realise the promises contained in the Constitution.

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[9] South African Law Commission, *Report on the Review of the Marriage Act 25 of 1961,* May 2001.
[10] South African Law Commission, *Discussion Paper 88: Review of the Marriage Act (Project 109)*, September 1999.

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