

The missing Bill to my marriage

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As the world celebrated Pride month this past June, the issue of same-sex marriages in South Africa came before Parliament again, for consideration of the Civil Union Amendment Bill to address and enforce the existing rights of same-sex couples.



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In the matter of *Minister of Home Affairs v Fourie*, the Constitutional Court in 2005 found that the principle maxim regarding the entering of marriage between a man and a woman to the exclusion of others (which was legally permissible under common law and later codified in terms of the Marriages Act), was an infringement of the rights of same-sex couples wishing to do the same.

In addition, the court found that discrimination on the basis of sexual orientation by the state against persons wishing to enjoy the benefits of marital life was a violation of section 9 of the Constitution and, as such, had no place in an open and democratic society.

Parliament, in consequence of the judgment of *Fourie* enacted the Civil Union Act (the Act) which came into effect on 30 December 2006. In terms of the Act, same-sex couples can now enter into a civil partnership, civil union or marriage in order for them to enjoy the same benefits as heterosexual relationships.

However, section 6 of the Act created an anomaly, allowing civil servants employed as marriage officers to refuse to perform civil unions between persons of the same sex on grounds of religion, conscience and belief. This exclusion raised much the same concerns of violation of dignity and equality that caused the Act to be enacted in the first place.

The primary object of the Amendment Bill is to repeal section 6, removing this provision from the Act. The Bill is structured in two parts: firstly, the repeal of section 6 in its entirety and secondly, it introduces a transitional provision to address consequences of the repeal.

Section 6 of the Act provided that:

"A marriage officer, other than a marriage officer referred to in section 5, may in writing inform the Minister that he or she objects on the ground of conscience, religion, and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union."

Furthermore, the Act defines a marriage officer as including:

*"(a) a marriage officer ex officio or so designated by virtue of section 2 of the Marriage Act; or
(b) any minister of religion, or any person holding a responsible position in any religious denomination or organisation, designated as marriage officers under section 5 of the Act."*

The Bill declares that section 6 is unconstitutional as it creates a mechanism for state officials not to apply the law. The structure of the Marriages Act does not give the state official the same powers and thus two different standards are created between the two pieces of legislation.

By repealing section 6, the Bill removes the indirect indiscrimination that marriage officers could apply under the provision. The Bill now provides that marriage officers can no longer object to the solemnisation of same-sex marriages before him or her.

The Bill also introduces a transitional period for any exemptions already granted by the Minister in terms of section 6, which will remain valid for 24 months following the passing of the Amendment Bill. Furthermore, the Minister must ensure that a marriage officer is available to solemnise civil unions at every Department of Home Affairs office while the Bill is yet unsigned by the President. It is anticipated that during the transitional period, marriage officers in the employ of the state will receive further training on their duties in the advancement of the right to equality and their role in strengthening substantive equality under the law for same-sex persons.

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