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To: Parliamentary Portfolio Committee on Home Affairs
For attention: Mr Eddie Mathonsi
Committee Secretary
Per e-mail: emathonsi@parliament.gov.za

Re: Comments on the Civil Union Amendment Bill [B11 - 2018]

From: Advocate N L Badenhorst
Legal Counsel, *Freedom of Religion South Africa (FOR SA)*
Per e-mail: legal@forsa.org.za

Date: 23 October 2018 (Deadline: 23 October 2018)

Dear Mr Mathonsi,

1. We refer to the call for written submissions by the Portfolio Committee on Home Affairs, on the Civil Union Amendment Bill [B11 - 2018] (the "Bill").
2. *Freedom of Religion South Africa (FOR SA)* previously, when the Bill was first published for comment (in March 2018), made submissions on the Bill which we again attach hereto for your reference. These previous submissions should be read as incorporated herein.
3. While we note the (mostly stylistic) amendments in the revised Bill (of September 2018), our concern that the Bill does not adequately protect the fundamental right to freedom of religion of State-employed marriage officers, remains unchanged.
4. In particular, we reiterate that there are practical solutions to what is evidently a practical problem, and that these should be preferred over the violation of State employees' fundamental human rights.
5. We would appreciate the opportunity to make verbal submissions with regard to the Bill, if and when such opportunity presents itself.

Summary of submissions:

6. *Freedom of Religion South Africa (FOR SA)* is a non-profit organisation working to protect and promote religious freedom in South Africa, and representing over 6 million people across denominations, churches and different faith groups.
7. *FOR SA's* interest in the Bill lies therein that it will not only affect, but effectively eradicate the religious freedom of State-employed marriage officers (including magistrates).
8. *FOR SA's* major concern is that the Bill departs from the framework, values and fundamental rights incorporated in the South African Constitution, and specifically infringes on the State's obligation to respect, protect, promote and fulfil (s 7(2)) the constitutional rights to:
 - 8.1. Human dignity of all persons (s 10), including therefore State employees who have a conscientious objection to (solemnising a) same-sex marriage;
 - 8.2. Freedom of religion, belief and opinion (s 15); and
 - 8.3. Not (directly or indirectly) unfairly discriminate against any person on grounds of their religion, conscience or belief (s 9(3)).
9. This duty is also incumbent on the State in terms of international covenants¹ the Republic of South Africa is signatory to, or to which the Republic is bound in terms of customary international law.²
10. Section 6 of the Civil Union Act, 2006 (i.e. the "conscientious objection clause") specifically provides that State-employed marriage officers who – because of their conscience, religion and belief – do not see their way open to solemnize same-sex marriages, will not be forced to do so.
11. This clause is not a "legal blunder" as has been argued by those in favour of removal of the "conscientious objection clause", but was specifically written into the Act by Parliament following the recommendation of the Constitutional Court in *Minister of Home Affairs v Fourie*³ (the case

¹ Freedom of religion is protected under the following international covenants: Article 18 of the Universal Declaration of Human Rights (UDHR); Article 18(1) of the International Covenant of Civil and Political Rights (ICCPR); and Article 8 of the African Charter on Human and Peoples' Rights (the "Banjul Charter").

² S 232 of the Constitution of the Republic of South Africa, 1996.

³ *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC).

that legalised same-sex unions in 2005), that:

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

12. The effect of removing the “*conscientious objection clause*” from the Civil Union Act, would be that State-employed marriage officers would be forced – potentially against their conscience, religion and belief – to solemnise same-sex marriage, or face the consequences (including potential unfair discrimination claims, and/or dismissal from employment).
13. This is a severe infringement of their constitutional rights to dignity⁴ and religious freedom⁵, as they are effectively forced to choose between obeying their faith (with potential eternal consequences if they do not), and obeying the law (with punitive consequences if they do not). It is trite law that the State should, as far as possible, avoid placing persons in such an invidious position.⁶
14. As such, we respectfully submit, the removal of the “*conscientious objections clause*” could potentially see Parliament face another constitutional challenge in the event that the Bill is passed into law.
15. While we accept that there may be a legitimate problem that the Bill seeks to address (namely the difficulties that LGBT people are allegedly experiencing at some Home Affairs offices, particularly in rural areas, to have their same-sex marriages solemnized), we do not agree that the solution proposed by the Bill (namely the removal of the “*conscientious objection clause*”) is the right solution. This is neither constitutional, nor necessary.
16. We reiterate our recommendations that this is a practical problem (as opposed to a legislative one) calling for practical solutions, and that these practical solutions (which will address the problem, while at the same time keeping the right to religious freedom in tact) should be adopted before resorting to legislative amendments that will have a dire impact on fundamental rights:

⁴ S 10 of the Constitution of the Republic of South Africa, 1996.

⁵ S 15, read with s 9(3), of the Constitution of the Republic of South Africa, 1996.

⁶ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (“*Christian Education*”) at paras 35 to 36.

16.1. **Roving Marriage Officers:**

16.1.1. The vast majority of State-employed marriage officers do not hold any objections to concluding same-sex marriages.⁷

16.1.2. As with judicial officers who go on circuit even to the most rural areas to ensure access to justice, these civil servants can be sent on circuit, to assist same-sex couples in getting married.

16.1.3. As stated by the Constitutional Court,

*“sometimes the community, whether it is the State... must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally.”*⁸

16.1.4. In the circumstances, budgetary constraints are, with respect, not an excuse and the additional expense may have to be specifically planned and catered for in the budget.

16.1.5. We have already pointed out that no empirical evidence has been put forward to substantiate the alleged “undue hardship” suffered by same-sex couples as a result of section 6 of the Act, or to explain the prevalence and/or extent of the alleged hardship.

16.1.6. In this regard, we respectfully point out that heterosexual couples too suffer a measure of “hardship” in having their heterosexual unions solemnized by State-employed marriage officers, in that they often (particularly in urban areas) have to wait weeks, if not months, in order to secure an appointment to have their union solemnized. They too may have to incur the time and expense of travelling to areas where there is a Home Affairs office who is able to assist them.

16.1.7. It is submitted that having a dedicated State-employed marriage officer who can assist same-sex couples in having their union solemnized, may even result in them having their union solemnized much quicker than in the case of many heterosexual couples who have to patiently wait their turn.

⁷ If media reports are anything to go by, it appears that 421 of the 1130 marriage officers in the Department of Home Affairs' employ, have exercised their statutory right not to solemnize same-sex marriages. See for e.g. “Home affairs minister rejects call to amend discriminatory same-sex law” in *Mail & Guardian* on 19 July 2017 - <https://mg.co.za/article/2017-07-18-home-affairs-minister-rejects-call-to-amend-discriminatory-same-sex-law>.

⁸ *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 73.

16.2. Assignment of employees to specific offices:

With better planning (as suggested by the Minister of Home Affairs), the State could also reasonably identify those marriage officers who have no conscientious objection, and ensure that at least one is placed in every Home Affairs office where marriages are solemnized.

16.3. "Affirmative Action" to redress any imbalance in staffing needs:

16.3.1. Finally, we submit that the State could, in order to address the practical difficulties that LGBT people are allegedly experiencing in some areas to have their same-sex unions solemnized, consider an approach similar to "affirmative action" (which is already recognised as a justice issue).

16.3.2. What this would entail is, for those Home Affairs offices and/or geographical areas that have been identified as lacking sufficient marriage officers who are able to solemnize same-sex marriages, and in order to meet a specific need, give preference to applicants who are able to solemnize same-sex marriage.

Conclusion:

17. In conclusion, where there are not enough marriage officers whose conscience allows them to solemnise same-sex unions, practical solutions should be considered.
18. The last thing Parliament should be considering, with respect, is the violation of State employees' rights to conscience, religion and belief, which it has a constitutional duty to respect, protect and promote.

We trust that you will find these submissions of assistance, and would appreciate your feedback with regard to any developments in this matter.

Kind regards,



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