FOR SA
FOR FAITH & FREEDOM

**Phone:** 021 556 5502

**Email:** info@forsa.org.za
**Website:** www.forsa.org.za

P.O. Box 50110, West Beach
Cape Town 7441

**To:** **The Director-General: Department of Home Affairs**

For attention: Mr Sihle Mthiyane
Chief Director. Policy and Strategic Management
Per e-mail: marriagegreenpaper@dha.gov.za

**Re:** **Invitation for Comments on Green Paper on Marriages in South Africa**

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

**Date:** 21 June 2021 (Deadline for comments: 30 June 2021)

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**INTRODUCTION:**

1. We refer to the invitation by the Department of Home Affairs ("DHA") for comments on the Green Paper on Marriages in South Africa ("the Paper") by 30 June 2021.

2. The Paper, which was published in the *Government Gazette*,[1] proposes several options for the solemnisation of marriages, a new (single) Marriage Act, and a corresponding Marriage Policy.

3. *Freedom of Religion South Africa (FOR SA)* makes the following submissions with regard to the Paper, having previously participated in the DHA's ministerial dialogues (with academics, and religious stakeholders respectively) on the proposed Marriage Policy during 2019, and attended the virtual workshops hosted by the DHA during June 2021.

4. At the outset, and as a departure point in our submissions, we wish to point out that during the DHA's ministerial dialogues with religious leaders in both Johannesburg and Cape Town, the Minister of Home Affairs (Dr Aaron Motsoaledi) addressed religious leaders with regard to the proposed Marriage Policy and answered (some of) their questions. He explained that the Policy would recognise that as South Africans, we live in a diverse society where people have different cultures, religions and gender orientations. As such, the Policy would give effect to the constitutional principles of equality, "no discrimination" and human dignity.

5. At both events, it was evident that a major question and concern for many religious leaders from across the faith spectrum, was whether Government would – through the new Policy, and ultimately the new marriage law – force religious marriage officers ("**RMOs**") to solemnise unions or marriages that do not accord with their religious convictions and beliefs (e.g. polygamous, or same-sex unions or marriages)?[2]

6. In reply to the questions and concerns in this regard, the Minister assured religious leaders that he was not there to impose on religious leaders, or to change their religious beliefs. In the Minister's own words, "*I want to ensure you that freedom of religion is assured*".

7. Against the above background, it thus comes as a great surprise that the DHA, in its Paper:

   7.1. Openly and unreservedly condemns RMOs' refusal to solemnise civil unions on grounds of religious beliefs, and describes it as "*unfair*" (p 11), "*discriminatory*" (pp 22 and 33), and "*discriminatory behaviour disguised as religious doctrine*" (p 29), "*subjective and tends to lend itself to discriminatory behaviour*" (p 52).

[1] *Government Gazette* No. 44557, dated 11 May 2021.
[2] Green Paper page 22.

7.2. As a result, proposes the "*non-discriminative solemnisation of marriages*" by all marriage officers, i.e. serving *"all members of the public who wish to marry, without exception*" (the implication being even if doing so, violates the religious convictions and beliefs of the RMO and/or the religious organisation to which he/she belongs) (p 52).

8. These statements smack, with respect, of a lack of insight and appreciation regarding the nature, content, scope and importance of the constitutional right to religious freedom (s 15) and related rights – and indeed, shows a complete disregard for the Constitutional Court's explicit finding in ***Minister of Home Affairs v Fourie***[3] (the case that legalised same-sex marriage in 2005) that:

> "*acknowledgement by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples, is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages*".[4] (Own emphasis.)

9. **The Paper's proposal that RMOs be forced by law to marry all members of the public, also directly contradicts the Minister's verbal assurance to religious leaders – during the ministerial dialogues - that the Department would not force them to solemnise marriages that go against their and/or their religious institutions' convictions and beliefs.**

10. We mention also at this point that it is not correct, as suggested by the Paper[5], that the right to conscientious objection also extends to Government employees. The Civil Union Amendment Act, which removed the right of Civil Marriage Officers to – on grounds of conscience, religion and belief - object to solemnising same-sex unions, was signed into law and came into effect on 22 October 2020 already.

## EXECUTIVE SUMMARY OF *FOR SA*'s SUBMISSIONS:

11. We note that the Department's purpose in promulgating a Marriage Policy, for which the Paper is the basis and the product of public engagement,[6] is to establish a policy foundation for regulating all marriages for all people in South Africa (according to the principles of equality, non-discrimination, dignity, and unity in diversity).[7]

[3] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC)
[4] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 98.
[5] Green Paper pages 52 and 61.
[6] Green Paper pages 6 and 7.
[7] Green Paper page 6.

12. We recognise that there are certain "gaps" in the present regulatory framework, including particularly the non-recognition of some religious marriages (Hindu, Jewish, Muslim, Rastafarian, etc)[8], and support the equal legal recognition and protection of these marriages.

13. While we appreciate that there are a broad range of issues arising from the Paper that could potentially be commented on, *FOR SA's* submission has a narrow focus and will be limited to the following issues:

**13.1.** ***The solemnisation of marriages: the need to expressly protect RMOs' religious freedom.***

13.1.1. *FOR SA* argues that the refusal by a RMO to solemnise a marriage that does not conform to his/her own religious convictions and beliefs, and/or the rites, formularies, tenets, doctrines or discipline of his/her denomination or organisation, is *fair discrimination* (which is permissible in our law).

13.1.2. For this reason, *FOR SA* argues for the express inclusion of a clause protecting the freedom of conscience, religion, thought, belief and opinion (section 15 of the Constitution) of RMOs, and the religious organisations to whom they belong.

13.1.3. The practical effect of such a clause would be to protect RMOs, and the religious institutions to whom they belong, from being forced to solemnise marriages that potentially go against their conscience, religion and belief (whether polygamous, same-sex, or because one or both of the spouses are ex-communicated, divorced, or from a different religion altogether, etc).

13.1.4. From a comparative law perspective, most Western countries and indeed countries on the African continent expressly protect the fundamental right of RMOs and the religious organisations to which they belong, not to solemnise marriages that go against their religious convictions and beliefs.

13.1.5. Failure to include such an express protection is likely to open up the Marriage Policy and new Marriage Act to constitutional challenge.

13.1.6. From a practical point of view, the failure to expressly protect the religious rights of RMOs and the religious organisations to which they belong, will likely result in the vast majority of RMOs (of which there are 14,945 in the country)[9] handing in their marriage licences. This will put massive strain on the already burdened resources / capacity of the State (who has only 1,418 Civil Marriage Officers in its employ).[10]

[8] Green Paper pages 10, 12, 23 and 34.
[9] Chapter 2, Section I, para 2.70 at page 65 of the South African Law Reform Commission's Discussion Paper 152.
[10] Chapter 2, Section I, para 2.70 at page 65 of the South African Law Reform Commission's Discussion Paper 152.

**13.2.** ***New Marriage Act options: Why the adoption of an Omnibus Act is to be preferred over the adoption of a Single Marriage Act.***

13.2.1. In this regard, *FOR SA* argues that the adoption of an Omnibus Act, with different chapters and/or sections dedicated to dealing with the different types of unions that can be entered into (including culturally and/or religiously), is the best solution to achieve both equality and practicality.

**13.3.** ***Marriage Policy options:***

13.3.1. In this regard, *FOR SA* contends that a Marriage Policy should be designed to dovetail with an Omnibus Act – e.g. the Policy should provide for different marriage licences and state the practical requirements for persons applying for a specific type of marriage licence.

14. We would appreciate an opportunity to make verbal submissions, should the opportunity arise.

**ABOUT *FOR SA*, AND OUR INTEREST IN THE PAPER:**

15. *Freedom of Religion SA NPC (2014/099286/08)* (*FOR SA*) is a legal advocacy organisation mandated to protect and promote the religious freedom rights of all South Africans, regardless of their specific religious or ideological beliefs. *FOR SA* is, therefore, neutral and non-partisan in terms of any interpretation of doctrine, faith or belief to the extent that it complies with the rule of law.

16. *FOR SA* currently has an endorsement base of religious leaders representing 6 million+ people in South Africa. Its constituency spans across various denominations, churches, faith groups, and includes numerous RMOs.

17. Our constituency has a direct interest in this matter because they are directly affected by any law that could potentially force religious ministers who are also marriage officers, to indiscriminately solemnise all types of marriages (i.e. even marriages that potentially go against that minister's conscience, religion and belief, and/or against the doctrines and beliefs of the religious organisation to which he/she belongs). This would infringe their constitutional rights to equality and no unfair discrimination on grounds of conscience, religion and belief (s 9), religious freedom (section 15 of the Constitution), freedom of association (section 18 of the Constitution), and also to practise one's faith in community (section 31 of the Constitution).

18. In this regard, we point out that for millions of South Africans, marriage is a deeply religious sacrament where RMOs solemnise the couple's holy union according to the dictates and tenets

of their specific faith or religion, and of the religious organisation to which they (and their minister) belong.

19. *FOR SA*'s interest in the Paper is limited only to those aspects that could have a bearing on the fundamental right to religious freedom and related rights, specifically focusing on the religious freedom of ministers of religion to only solemnise marriages in accordance with their (and their organisation's) own conscience and religious / moral convictions and beliefs.

**PROCEDURAL CONCERNS:**

20. It is common knowledge that the South African Law Reform Commission ("SALRC") is running a concurrent, but separate process to develop a new (single) Marriage Act for South Africa, which process the DHA expects to amalgamate with its own process at some future point.

21. The SALRC's Discussion Paper 152: Single Marriage Statute was opened for public comment until 17 May 2021. (In this regard, we mention that *FOR SA* has actively participated in the SALRC's process, by attending workshops and submitting comments on both the initial Issue Paper and the aforementioned Discussion Paper.)

22. The duplication of process is concerning - not only from a taxpayer point of view, but also because many citizens and organisations may confuse the concurrent processes, or be under the false impression that it is (already) one process and that if they comment on the one, they do not need to comment on the other.

23. The two (concurrent, but separate) processes will likely lead to much misunderstanding amongst the public, and likely result in either the SALRC or the DHA receiving public input on their process that is also relevant to the other, but which the other side does not receive.

24. As a further result, meaningful public participation in one - or both - processes will be seriously undermined. This in itself could potentially open up the Bills (and the processes in relation thereto) to judicial review.

25. In this regard, we point out that it is trite law that the State has a constitutional duty to facilitate effective public participation in law-making. (See, for example, *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC); *Matatiele Municipality & Others v President of the RSA & Others* 2006 (5) BCLR 622 (CC)).

## THE LEGAL FRAMEWORK - THE LEGAL POSITION IN SA:

### THE CONSTITUTION:

#### Hierarchy of rights:

26. As accurately (and repeatedly) stated by the Paper, the Constitution knows no hierarchy of rights.[11] It is trite law that when two or more entrenched rights come into conflict, the constitutional standard is one of proportionality (as envisaged in section 36 of the Constitution), and the starting point is to see the rights, not as contradicting one another, but harmonising them, and with a proper interpretation that reconciles them with one another.[12]

#### Constitutional rights (of RMOs and Religious Institutions):

27. The Constitution expressly protects the right to freedom of conscience, religion, thought, belief and opinion (commonly referred to as "religious freedom") in section 15 of the Constitution - without any internal limitation, as is the case in section 31. This right applies to both individuals and juristic persons[13] such as, for example, religious organisations. This right can only be limited in accordance with section 36 of the Constitution.

28. This right has to be read together with s 9 of the Constitution, which guarantees the right to equality before the law and to equal protection and benefit of the law. The same section also specifically prohibits the State, or anyone else, from unfairly discriminating against any person (including both individuals and juristic persons such as, for example, religious organisations) on grounds of, *inter alia*, conscience, religion and belief. As such, the right not to be unfairly discriminated against on grounds of conscience, religion and belief is no less an "equality right" than, for example, the right not to be unfairly discriminated against on grounds of sexual orientation, gender, etc.

29. Additionally, section 31 of the Constitution also protects the rights of religious communities to practise their religion and to form, join, and maintain religious associations. This right to "maintain" religious institutions includes the right to exclude non-adherents from (membership, or leadership

[11] Green Paper pages 7, 18 and 46.
[12] See, for example, *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another 2008 (5) SA 31 (CC)* at para 84; *The Citizen 1978 (Pty) Ltd and Others v Mcbride (Johnstone and Others, Amici Curiae) 2011 (4) SA 191 (CC)* at para 148; *Qwelane v South African Human Rights Commission and Another 2020 (2) SA 124 (SCA)* at para 82; *Gaum v Van Rensburg NO (Commission for Gender Equality and Alliance Defending the Autonomy of Churches in South Africa Amicus Curiae) 2019 JDR 0482 (GP)* at para 83.
[13] Section 8(4) of the Constitution of the Republic of South Africa, 1996.

of) those institutions.[14] Section 31 is subject to an internal limitation that states that it may not be exercised in a manner that is inconsistent with any provision of the Bill of Rights.

30. Section 18 of the Constitution also guarantees freedom of association as a basic human right, and this freedom also extends to, and protects, religious associations. In the context of religious associations, freedom of association "*guarantees an individual the right to choose his or her associates, and a group of individuals their rights to choose their associates. The right of a group to choose their associates of necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform*".[15]

31. In other words, freedom of association implies institutional autonomy. In *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa*,[16] the Supreme Court of Appeal (SCA) held that associational rights are important in that they not only grant individuals, but members of a particular religion, the right to practise their religion "*in association with others and in conformity with the dictates, precepts, ethical standards and moral discipline which that faith exacts*".[17]

32. The freedom of individuals to share and practise the same interests of substance (such as that which pertains to a religious association) with one another, is important because it forms a foundational part of a democratic and pluralistic society. This freedom implies the right that an individual has to collectively experience and practise their views on "freedom" itself, with other like-minded individuals.

33. A religious association is an example of a collectively exercised interest, where the members fulfil and maintain not only their basic right to religious freedom, but also their basic right to human dignity (section 10 of the Constitution), mainly due to their acceptance of, and participation in, the core creeds of such an association. It is such creeds that, in many instances, provide the framework for the believer's sense of self, which adds to a dignified experience for the believer.[18]

34. It is trite law that, read together, sections 15, 18 and 31 of the Constitution guarantee religious institutions a certain degree of institutional autonomy, which is vital to a conscience-honouring society. This means that religious institutions have the right to decide "internal matters" (matters

[14] *Taylor v Kurtstag* 2005 (1) SA 363 (W). See also, by way of analogy, *Wittmann v Deutscher Schülverein, Pretoria* 1998(4) SA 423 (T).
[15] *Taylor v Kurtstag* at para 37.
[16] 2015 (1) SA 106 (SCA).
[17] *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* 2015 (1) SA 106 (SCA) at para 40.
[18] De Freitas, "*Freedom of Association as a Foundational Right*", p 267.

of doctrine and governance of the organisation), internally. This is known as the **doctrine of (non-)entanglement**. See, for example, *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* where the Court stated:[19]

> "*It is so that our Constitution protects an individual's rights to practise his or her religion as well as the rights of members of a particular religion to practise that religion in association with others and in conformity with the dictates, precepts, ethical standards and moral discipline which that faith exacts. Protecting the autonomy of religious associations is considered a central aspect of protecting religious rights. Indeed such protection has been described as 'vital to a conscience-honouring social order'. As the Constitutional Court held in Minister of Home Affairs v Fourie (Doctors for Life International & others, amici curiae); Lesbian and Gay Equality Project v Minister of Home Affairs [2005] ZACC 19; 2006 (1) SA 524 (CC) para 94: 'In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other.'* "
> (Own emphasis.)

**CONSTITUTIONAL COURT DECISIONS:**

35. We now turn to various decisions by our highest court relating to religious freedom, and which support the argument that:

    35.1. the religious freedom of RMOs and the religious organisations to which they belong, allow them to fairly discriminate by only solemnising marriages that accord with the dictates and tenets of their specific faith or religion, and of the religious organisations to which they belong as ministers; and

    35.2. RMOs' and religious organisations' rights ought to be expressly protected in any policy and/or legislation to be adopted.

36. **Religious Freedom:**

    36.1. The Constitutional Court has repeatedly delivered judgments that cover the ambit of the right to religious freedom contained in section 15 of the Constitution, its relationship with other fundamental rights and the need to reasonably accommodate one another in our diverse society.

[19] *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* 2015 (1) SA 106 (SCA) at para 31.

36.2. Amongst others, it has held that the right to religious freedom includes not only "*the right to entertain such religious beliefs as a person choose, [but] the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination*"[20] and that "*freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs".*[21] (Own emphasis.)

36.3. Furthermore, the Constitutional Court has also explained the close link between the right to religious freedom and the right to human dignity, by saying that "*[t]he right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity"*[22] and that the … "*State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law".*[23]

36.4. On just how closely connected this right is with the institution of democracy and with a free society, the Court has said that "*[t]he constitutional right to practise one's religion … is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society"*.[24]

37. **Equality:**

37.1. With regard to the right to equality (section 9 of the Constitution), the Court has expressly stated that: "*Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as a supreme, and another as inferior, but an acknowledgment and acceptance of difference…. it celebrates the vitality that difference brings to society*".[25]

37.2. The above, of course, is completely congruent with our Constitutional Court's jurisprudence on "the right to be different" - first mentioned in *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC), where the Court stated that because of South Africa's history and dictatorial past "*the*

[20] *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC), at para 36 citing *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC).
[21] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 95.
[22] *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at para 36.
[23] *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC)at para 35.
[24] *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 25.
[25] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 60.

*right to be different has emerged as one of the most treasured aspects of our new constitutional order*,"[26] and that similarly, *"[t]he protection of diversity is the hallmark of a free and open society. It is the recognition of the inherent dignity of all human beings. Freedom is an indispensable ingredient of human dignity*".[27]

37.3. Importantly, and stated before already, we point out that religion itself is an equality right – "conscience", "religion" and "belief" are specifically included in section 9 of our Constitution as "prohibited grounds" on which neither the State, nor any person, may (unfairly) discriminate against another person.[28]

38. **Reasonable Accommodation:**

38.1. In considering the different rights guaranteed by the Bill of Rights, it is important to bear in mind that no one right is more important than another. [29] (As stated above in paragraph 26, our Constitutional Court has expressly and repeatedly stated that there is no hierarchy of rights.)

38.2. What this means is that when two or more fundamental rights in the Bill of Rights come into conflict (e.g. the right to not be unfairly discriminated against on grounds of sexual orientation, and the right to religious freedom and related rights), one right does not trump one another. Rather, what is required, is a balancing of rights,[30] "*[w]hen rights come into conflict, the constitutional standard is one of proportionality as envisaged in s 36 of the Constitution*."[31]

38.3. One of the ways to achieve this, is through the principle of reasonable accommodation, which allows for competing interests to be balanced against one another,[32] and in so doing, to respect and protect all rights - something the State is constitutionally required to do.[33]

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[26] Paragraph 170.
[27] Paragraph 49.
[28] Section 9(3) and (4) of the Constitution of the Republic of South Africa, 1996.
[29] See, for example, *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at para 84; *The Citizen 1978 (Pty) Ltd and Others v Mcbride (Johnstone and Others, Amici Curiae)* 2011 (4) SA 191 (CC) at para 148.
[30] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at para 84.
[31] *Qwelane v South African Human Rights Commission and Another* 2020 (2) SA 124 (SCA) at para 82.
[32] *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) at para 76, where the Court states that the balancing exercise requires reasonable accommodation.
[33] Section 7(2) of the Constitution of the Republic of South Africa, 1996.

38.4. Reasonable accommodation, as defined by the Court, at its core is "*the notion that sometimes the community, whether it is the State, an employer or a school, 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. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms*."[34]

38.5. One such positive measure is section 31 of the Marriage Act,[35] which has been referred to by our Constitutional Court as a "*strong protection of the right of religious communities not to be obliged to celebrate marriages not conforming to their tenet*".[36] Furthermore, in the same matter, the Court has also said that "*acknowledgement of the right of same-sex couples to enjoy the same rights as heterosexual couples, is in no way inconsistent with the right of religious organisations to continue to refuse to celebrate same-sex marriages … The two sets of interests do not collide; they co-exist in a constitutional realm based on accommodation of diversity*".[37]

38.6. On the issue of reasonable accommodation, the Constitutional Court case of *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) (which legalised same-sex marriage in the first place) is pertinent. In this case, the highest court in no uncertain terms stated that strong protections (ought to) exist for RMOs. In this regard, we refer to the following statements by the Constitutional Court:

38.6.1. "*The extension of the common law definition of marriage does not compel any religious denomination or minister of religion to approve or perform same-sex marriages.*"[38]

38.6.2. *"As was said by this Court in Christian Education there 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*

[34] *MEC for Education, KwaZulu-Natal & others v N Pillay & Others* 2008 (1) SA 474 (CC) at para 73.
[35] Act 25 of 1961.
[36] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 97.
[37] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 98. (Own emphasis.)
[38] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 20. (Own emphasis.)

*norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'."*[39]

38.6.3. *"… the fact that in the open and democratic society contemplated by the Constitution, although the rights of non-believers and minority faiths must be fully respected, the religious beliefs held by the great majority of South Africans must be taken seriously."*[40]

38.6.4. *"One respects the sincerity with which Mr Smyth… From a constitutional point of view, what matters is for the Court to ensure that he be protected in his right to regard his marriage as sacramental, to belong to a religious community that celebrates its marriages according to its own doctrinal tenets, and to be free to express his views in an appropriate manner both in public and in Court."*[41]

38.6.5. *"…**acknowledgement by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages….The two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity**."*[42]

38.6.6. Justice Sachs, furthermore, remarked that the legislature might accommodate marriage officers who objected on the ground of sincere religious grounds to conduct same-sex marriage:

*"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."* [43]

[39] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 61. (Own emphasis.)
[40] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 89. (Own emphasis.)
[41] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 93. (Own emphasis.)
[42] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 98. (Own emphasis.)
[43] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 159. (Own emphasis).

Although this relates to the reasonable accommodation of Civil Marriage Officers, as is clear from the above, even stronger protection (than reasonable accommodation) is afforded to RMOs.

39. **Religious Autonomy and the Doctrine of (Non-)Entanglement:**

39.1. Another important consideration, is our courts' decisions on religious (or institutional) autonomy and the doctrine of (non-)entanglement.

39.2. This is because RMOs are part of, and belong to, religious institutions which have their own doctrines and faith tenets.

39.3. Our courts have always held the view that the judiciary should not involve itself in, and pronounce on, "internal" matters of a religious association – also referred to as the "doctrine of (non-)entanglement".

39.4. This doctrine was recently confirmed by the SCA in the matter of *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa*, where the Court, after examining South African case law, as well as foreign case law (including from Australia, Canada, the United Kingdom and the United States of America) held that:

> "*As the main dispute in the instant matter concerns the internal rules adopted by the Church, such a dispute, as far as is possible, should be left to the Church to be determined domestically and without interference from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine, which fall within the exclusive realm of the Church*."[44] (Own emphasis.)

39.5. Furthermore, from the International Law (more fully cited in the annexure to this document), it is evident that religious freedom is explicitly recognised as a fundamental human right,[45] and like section 8(4) of the South African Constitution, recognise further that the right to religious freedom is not limited to individuals but also extends collectively to religious communities and associations. This is so,

[44] *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* 2015 (1) SA 106 (SCA) at para 39.
[45] Article 18 of the Universal Declaration of Human Rights (1948) and Article 18 of the International Covenant on Civil and Political Rights (1966), cited above in paragraph 16.

because religious communities are the necessary means by which individuals effectively exercise their religious freedom rights.

39.6. In turning to examine Foreign Law specifically on the subject of the doctrine of (non-)entanglement, we see that:

39.6.1. The European Court of Human Rights (ECtHR) in the last fifteen (15) years has consistently recognised the need for churches and religious organisations to operate freely without State intervention. In balancing competing rights, the Court – in the overwhelming majority of cases – upheld the autonomy of religious communities over and against competing claims:

(i) In *Hasan and Chaush v Bulgaria*,[46] the Court made several striking observations regarding the nature of article 9 of the European Convention on Human rights (ECHR) guaranteeing the right to religious freedom, in particular:

(a) The personality of religious ministers is vitally important to every member of the religious community.

(b) The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is at the very heart of the protection which article 9 affords.

(c) Church autonomy has a direct impact on the organisation of the community, but also the effective enjoyment of the right to religious freedom by all its active members.

(d) If the organisational life of the community is not protected by article 9, all other aspects of the individual's freedom of religion would become vulnerable.[47]

(e) The Court's decision in *Hasan* significantly developed the complementary principles of State neutrality and church autonomy, and has since been reinforced in later decisions.

(ii) In *Metropolitan Church of Bessarabia and Others v Moldova*,[48] the Court ruled that:

(a) The State could not interfere with the internal workings of a church even to ensure healthy and peaceful relationships among

[46] Application no 30985/96, judgment on 26 October 2000. § 62.
[47] § 62.
[48] Application no 45701/99, judgment on 13 December 2001. §117.

the adherents and clergy. The Court held that the State had a positive obligation to ensure judicial protection of the church while at the same time protecting the church's autonomy.[49]

(b) Citing *Hasan*, the Court emphasised that the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very centre of the article 9's (religious freedoms) protections.[50]

(c) Moreover, it was held that *"a State's duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs*".[51]

(iii) In *Holy Synod of the Bulgarian Orthodox Church and Others (Metropolitan Inoketiy) v Bulgaria*,[52] the Court reaffirmed this reasoning and correctly posited that:

(a) If church autonomy was not protected, all other aspects of an individual's religious freedom would become vulnerable.[53]

(b) The Court warned that, in order to uphold the collective aspect of religious freedom as enshrined in article 9 of the Convention, States must avoid interfering with the internal working of the church. Not only does article 9 impose religious autonomy, but it also *"impose[s] on the State authorities a duty of neutrality*".[54]

(c) Thus, in this case, while unity may be a matter of utmost importance for adherents of the Bulgarian Orthodox Church and believers and for Bulgarian society in general, it cannot justify State action imposing unity by force in a deeply divided religious community.[55]

(iv) A major component of church autonomy is the ability to select, appoint, and replace personnel without undue interference by the State. Religious communities constitute themselves through their clergy and those carrying out clerical functions. In *Obst v Germany*,[56]

[49] At §118.
[50] At §118.
[51] At §123.
[52] Applications nos 412/03 and 35677/04, judgment on 22 January 2009. §119.
[53] At §149.
[54] At §139.
[55] At §149.
[56] No 425/03, judgment 23 September 2010, paras 48 to 49.

the ECtHR held that they need to be able to rely on the loyalty of those serving in these capacities, because compliance with church discipline goes directly to the religious community's credibility. Religious communities are not free to be themselves and to follow their own internal beliefs and practices if the State interferes in these sensitive relationships. In many, if not all religious traditions, the organisation of clerical personnel and the structuring of the relations of spiritual leaders to laity are a matter of central doctrinal concern. State intervention that interferes with the autonomy of religious communities in managing interactions with their ministerial personnel strikes at the core of religious freedom.

(v) In *Sindacatul "Pastorul Cel Bun" v Romania*,[57] the Court held that respect for the autonomy of religious communities recognised by the State implies, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity. The Court held that it is, therefore, not the task of the national authorities to act as the arbiter between religious communities and the various dissident factions that exist or may emerge within them.[58]

(vi) More recently, in September 2017, the Grand Chamber of the ECtHR – in full accord with the approach taken by the Court in *Hasan* – upheld the principle of church autonomy in the seminal case of *Nagy v Hungary*.[59]

39.6.2. In Canada, the institutional autonomy of religious institutions is jealously guarded. In the recent decision of *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*,[60] Canada's highest court, the Supreme Court, unanimously upheld church autonomy, and affirmed that "*issues of theology are not justiciable.*"[61]

[57] No 2330/09, judgment 9 July 2013.
[58] At §165.
[59] Application no 56665/09.
[60] 2018 SCC 26.
[61] At para 12.

39.6.3. In the United States of America (USA), the same holds true. The key principles on the institutional autonomy of religious organisations are set forth in two Supreme Court of Appeal of the United States ("SCOTUS") cases, namely:

(i) *National Labour Relations Board v Catholic Bishop of Chicago*[62] ("Catholic Bishop") – here SCOTUS held that government (despite good intentions) cannot force religious institutions to allow trade unions, because that would both intrude into the internal affairs of the religious institution; and force government officials into an unacceptable inquisitorial role with respect to religious institutions.

(ii) *Hosana-Tabor Evangelical Lutheran Church and School v. EEOC*:[63]

(a) SCOTUS unanimously – in explaining the purpose of the "ministerial exception doctrine" (grounded in the Fist Amendment of the USA Constitution) – again held that questions of "internal church governance" must remain off-limits to government interference both in order to preserve autonomy for religious organisations; and because civil courts are not competent to decide how churches should be organised or who should carry out the church's mission. The Court stressed that State interference with the selection process for employees with ministerial responsibilities "*intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs*."[64]

(b) An important additional aspect of the case, was the contrast SCOTUS drew between *"government regulation of … outward physical acts*" and *"government interference with an internal church decision that affects the faith and mission of the church itself*"[65] Internal church decisions that affect the church's faith and missions are largely immune to government regulation, while physical acts in the world external to the church can be regulated

[62] 440 U.S. 490 (1979).
[63] 565 U.S. 132 S.Ct. 694 (2012).
[64] At §706.
[65] At §707.

just as other manifestations of religious belief. This internal-external distinction marks an important milestone in American constitutional law concerning religious groups. Like the fundamental right of an individual to believe, SCOTUS has now declared that a religious group has a fundamental right to choose the people that "*personify its beliefs*".[66] In other words, just as individuals can make up their own minds about what they do or do not believe, churches can make up their own minds about their doctrines, teachings and beliefs without State interference.

(c) *FOR SA* submits that this internal-external distinction (which has also long been recognised in European Law)[67] is particularly helpful in the present issue of the religious freedom of RMOs. RMOs are ministers of religion in their religious institutions, which have doctrinal tenets and sincerely held beliefs about the religious sacrament of marriages. To force RMOs (and through them the religious institutions they are ministers of) to solemnise marriages that potentially go against their conscience, religion and belief, and doctrine, strikes at the heart of the institutional autonomy, and religious freedom of both the RMOs and of their religious institutions.

40. What the above brief examination of the relevant Constitutional Court decisions shows, is that religious freedom is inextricably linked with other fundamental rights and cannot just be ignored, but needs to be reasonably accommodated within the public realm - even if this means the State has to go through additional hardship to do so.

41. Furthermore, we see from the decisions of our own Supreme Court of Appeal (SCA), as well as the Foreign Law cited, that the limitation of State jurisdiction over the doctrinal and internal affairs of religious institutions, is well recognised and enforced by courts around the world.

42. Rather than seeing religious institutions as being "above the law", such systems operate on the basis that the State is not best placed to adjudicate internal religious matters, which are

[66] At §706.
[67] In respect of the individual, European law has long distinguished between the *forum internum* (where the freedom to believe is absolute), and the *forum externum* (where the freedom to manifest those beliefs is necessarily limited). See, for example, Isik v Turkey (no 21924/05). This distinction, usually thought of in connection to individuals, may thus be extended by analogy to the collective internal beliefs of religious communities, and the process by which those beliefs are formed and articulated.

necessarily linked to doctrinal questions beyond the State's expertise or remit. Thus, restraining the State in interfering in religious institutions' institutional autonomy, is vital for the proper functioning of both religious institutions and the State.

43. **RMOs are therefore, in our law <u>and</u> in foreign law, permitted to only solemnise marriages that conform to their religious convictions and beliefs. This is *fair* discrimination (which is permitted in law, because to do otherwise would unjustifiably limit their constitutional rights), rather than unfair discrimination (which is prohibited). This right should continue to be <u>expressly</u> protected in any new policy or law, because the failure to do so will be unconstitutional as set out below.**

**WHETHER THE LIMITATION IS REASONABLE AND JUSTIFIABLE (S 36 ANALYSIS):**

44. Currently, and in terms of the Marriage Act,[68] the religious freedom rights of RMOs in South Africa - in particular to only solemnise marriages that conform to their/their organisation's own religious convictions and beliefs - are expressly protected.[69]

45. Furthermore, RMOs also have direct protection under the Civil Union Act:[70] section 5 requires that a religious denomination first has to apply to be able to solemnise marriages in terms of that Act, whereafter its religious minsters can apply to be a marriage officer in terms of the same Act. Thus, the Civil Union Act protects both the religious freedom of religious ministers, and the religious freedom and freedom of association of their religious organisations.

46. However, it needs to be pointed out that the Civil Union Amendment Act[71], which was signed into law (and came into effect on) 22 October 2020, <u>repealed</u> the right of State-employed marriage officers (i.e. "Civil Marriage Officers") to object to solemnising a same-sex union on the grounds of conscience, religion and belief.[72] In so far as the Paper, therefore, refers to a limitation of the Civil Union Act being that "*[s]ection 6… allows marriage officer to object to solemnising a civil union between persons of the same sex on grounds such as conscience, religion and belief, and they cannot be compelled to do so*",[73] it is incorrect.

[68] Act 25 of 1961.
[69] See section 31 of the Act.
[70] Act 17 of 2006.
[71] Act 8 of 2020.
[72] Previously contained in section 6 of the Civil Union Act 17 of 2006.
[73] Green Paper page 33.

47. In this regard, however, we comment as follows:

    47.1. The Civil Union Amendment Act, ***only*** removes the right to conscientious objection from Civil Marriage Officers – not from RMOs.

    47.2. The mere fact that the religious freedom of Civil Marriage Officers has been limited in this way, does not automatically mean that RMOs' constitutional rights can legally be limited for the same reasons, in the same manner and/or to the same extent. Different (legal and practical) considerations apply, and any limitation of the rights of RMOs and the organisations to which they belong, must be considered on its own merits to test whether it meets the test for limitation in terms of s 36 of the Constitution.

    47.3. As we will show in the analysis of the international legal framework annexed hereto, the (general trend) in comparative foreign law is to make a clear distinction between State marriage officers, and RMOs (whose religious freedom rights are expressly protected in foreign legislation).

48. Given the existing legal protection afforded to RMOs, any new policy or law that either fails to extend the same protection to them, or expressly excludes such protection, will be subjected to legal scrutiny to determine if the limitation on fundamental rights passes constitutional muster in terms of section 36.

49. In this regard, section 36(2) provides that no law may limit any right entrenched in the Bill of Rights, except as provided in section 36(1), or in any other provision of the Constitution.

50. Section 36(1) states that 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.

51. In this regard, firstly, we remind that none of the open and democratic societies examined under the annexed section dealing with Foreign Law, have limited these freedoms. On the contrary, their laws expressly protect the religious freedom both of RMOs and the religious institutions to which they belong. In the circumstances, a strong argument can be made that it is very unlikely that such limitation can be reasonable and justifiable in an open and democratic society based on dignity, equality and freedom.

52. Turning to examine the factors mentioned in section 36(1):

52.1. The nature of the rights. As discussed above, religious freedom (section 15) is foundational to democratic societies and closely linked to both dignity (section 10) and equality (section 9) – two fundamental rights, as well as founding values of our democracy. Similarly, as seen from the jurisprudence above, freedom of association (section 18) is vital to the healthy functioning of pluralistic societies and, as a result, jealously protected by the judiciaries across different countries.

52.2. The importance of the purpose of the limitation. Any failure to expressly protect the religious freedom of RMOs and the religious institutions to which they belong, as well as the latter's institutional autonomy (freedom of association), will likely be understood as deliberate. This is due to the current express protection of such rights across South Africa's marriage laws.

52.3. The perceived purpose this omission could have, would be to force RMOs (and by extension the religious institutions to which they belong), to indiscriminately solemnise all types marriages - including marriages that potentially go against that minister's conscience, religion and belief, or against their religious organisation's doctrines etc. The importance of forcing RMOs and institutions to indiscriminately solemnise all types of marriages, is unclear. There is no assertion or proof submitted that people are struggling to get their marriages solemnised and registered with RMOs, or that such a limitation is needed in order to achieve equality. This is especially so, in light of the practical implication of them handing in their licences and the entire burden falling on the State.

52.4. Given that there is nothing preventing the State from extending marriage licences to other communities, and that this is an option put forward by the State itself in the Paper,[74] the purpose of the limitation will be understood not to be addressing a practical need, or problem, but to force RMOs and religious institutions to accept and endorse marriages that contradict their deeply held doctrine and tenets of faith. The same can be said for a provision expressly forcing RMOs to indiscriminately solemnise all marriages.

52.5. The nature and extent of the limitation. As stated right at the start, for millions of South Africans, marriage is a deeply religious sacrament, with RMOs solemnising the couple's holy union according to the religious dictates and tenets of their specific faith and of the religious organisations to which the ministers (and often those who they are marrying)

[74] Green Paper page 53.

belong. Given that RMOs and institutions can potentially be forced to go against their conscience, religion, belief and doctrine if they were to be forced to indiscriminately solemnise all marriages – e.g. a Roman Catholic priest can be forced to marry a divorcee, or an Islamic imam can be forced to marry a Hindu couple – this limitation will go to the very heart of freedom of religion. As stated above, our Constitutional Court has already held that religious freedom can "*be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs*".[75] Likewise, it will involve the State forcing religious institutions to act contrary to their doctrines, which would be for the State to become entangled in the very essence of the religious institution's nature and internal affairs, and thereby to destroy completely its associational freedom.

52.6. The relation between the limitation and its purpose. As said above, the purpose of the limitation is unclear and neither has any proof been put forward as to why this drastic change of the *status quo* (i.e. express protection) or going *against* the international norm, is needed.

52.7. Less restrictive means to achieve its purpose. Again, the purpose of forcing RMOs and institutions to indiscriminately solemnise all marriages, is unclear. It is submitted that in an open and democratic society, there are less restrictive options available to enable all South Africans and residents (of all sexual orientations, genders, religious and cultural persuasions, etc) to conclude legal marriages that accord with the constitutional rights to equality, dignity and unity etc. Such less restrictive means include, but are not limited to: under existing laws, the freedom of association allows anyone to start religious associations built on their convictions and beliefs, who can then appoint ministers in line with those beliefs. In terms of any new Marriage Act, there is nothing preventing the State from extending marriage licences to other communities (an option put forward by the State itself in the Paper).

53. ***FOR SA* is concerned that unless there is express protection in such law, RMOs and/or their organisations may well be pressurised, threatened with legal action, and/or forced by law to solemnise marriages and protected relationships even against their conscience, religion and belief, thereby violating their fundamental rights - even if this was not the intention of the DHA.**

[75] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 95.

54. **In light of the above, *FOR SA* submits that, should any policy or law fail to expressly protect RMOs' and religious institutions' guaranteed constitutional freedoms, it will not pass constitutional muster under section 36 of the Constitution.**

**SUBSTANTIVE SUBMISSIONS ON THE PAPER:**

**Foundational policy principles:**

55. We note that the protection of religious rights and freedoms (section 15, read with sections 9 and 31 of the Constitution), and associational rights and freedoms (section 18), have not been included amongst the "foundational policy principles" (p 47), and submit that they ought to have been so included.

**Solemnising marriages: the need to expressly protect RMOs' religious freedom:**

56. We note that the Paper views the provision (in the current Marriage Act)[76] that allows a RMO to refuse to solemnise a marriage that does not conform to the rites, formularies, tenets, doctrines or discipline of his/her denomination or organisation, as appearing to be "*subjective"* and "*tend[ing] to lend itself to discriminatory behaviour*".[77]

57. We also note that during the DHA's engagement with various stakeholders, human rights and gender activists and civil society and academics shared the view that religious leaders' objection to solemnising same-sex marriages is "*discriminatory*".[78]

58. The constitutionality of RMOs' right to only solemnise marriages that accord with their conscience, religion and belief, and/or their religious organisation's doctrine, is discussed above at paragraphs 35 to 43. The unconstitutionality of forcing them to do otherwise, is discussed at paragraphs 44 to 54.

59. The Paper fails to understand (when it states that it is important to distinguish that when a RMO assumes the position voluntarily, they perform a public function and not a cultural or religious function[79]) that marriage is a religious sacrament and rite. When solemnising a marriage, a marriage officer performs both a cultural and a religious function. The very word "solemnise"

[76] s 31 of the Marriage Act 25 of 1961.
[77] Green Paper page 52.
[78] Green Paper pages 23 and 24.
[79] Green Paper page 52.

means to perform a religious ceremony.[80] A distinction can, however, be drawn between solemnising a marriage, and registering a marriage – the latter would be a purely administrative function.

60. To align the envisioned new (single) Marriage Act with section 9 of the Constitution, the Paper recommends the following remedies:[81]

60.1. Option 1 - Non-discriminative solemnisation of marriages:

In terms of this option, RMOs will not be permitted to refuse to perform their duties on the grounds of religion, conscience and belief. As a matter of policy, marriage officers must therefore serve all members of the public who wish to marry, without exception. DHA acknowledges that the challenge to this option is section 15, which provides for refusal on the basis of conscience, religion, thought, belief and opinion.

The practical effect, should this option be enforced in the envisioned new (single) Marriage Act or Marriage Policy, is that a Roman Catholic priest may, for example, be forced to solemnise a marriage involving an ex-communicated, divorced member; a Christian marriage officer may, for example, be forced to solemnise a Hindu, or a polygamous, marriage; a Hindu marriage officer may be forced to solemnise a Muslim marriage; and a Muslim marriage officer may be forced to solemnise a same-sex marriage even if it violates his/her religious convictions and beliefs, etc.

It is concerning that this option is offered, in spite of the DHA's repeated recognition of the constitutional right to religious freedom in this Paper.[82] As set out above, forcing RMOs to violate their freedom of conscience, religion and belief (section 15), and/or the autonomy of the religious organisations to whom they belong (sections 15, read with 18 and 31), would be unconstitutional as set out above in paragraphs 44 to 54 above. This option is, therefore, unconstitutional.

**In this regard, we also point out that the issue of the conscientious protection of RMOs and/or the organisations to which they belong, was the focal point and concern of RMOs' questions and submissions during the DHA's consultations on the proposed Marriage Policy held with religious leaders in Johannesburg and Cape Town during 2019. Furthermore, during the ministerial dialogue with**

[80] https://www.oxfordlearnersdictionaries.com/definition/english/solemnize?q=solemnise
[81] Green Paper pages 52 and 53.
[82] Green Paper pages 5, 10, 17, 46, 52 and 53.

**religious leaders in Cape Town, the Minister of Home Affairs specifically stated that the Department would not force religious ministers to perform marriages against their conscience, religion and belief.**

Practically, if RMOs had to be forced to "indiscriminately" solemnise all marriages and unions even if it goes against their conscience, religion and belief, it will likely also result in the majority of the 14,945 RMOs[83] in South Africa handing in their marriage officer licences. This burden would then fall entirely upon the State[84]. Given that the majority of marriage officers are voluntary RMOs, this is an extremely serious consideration. It is impossible that DHA's current approx. 1,418 State marriage officers[85] would be able to cope with the burden of (solemnising and) registering all marriages if this fell on them alone. This would necessitate the State hiring (and budgeting for the remuneration of) more State marriage officers to replace the voluntary RMOs who have handed in their licences. Fiscally, this is non-sensical for the country in our current economic status and after the havoc that COVID-19 has wreaked upon all spheres of the economy.

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

The second option put forward by DHA is that the State could limit the application of the non-discriminative solemnisation provision to public servants, i.e. what is already the status following the adoption of the Civil Union Amendment Act.[86] DHA further notes that in order to accommodate Civil Marriage Officers with objections, the solemnisation of marriages must be as gender, culture and religion neutral as possible. DHA also states that this could mean marriage officers will not perform the ceremonial part of the marriage, which requires people to express their love for each other. Rightly so, DHA stressed that the ceremonial part of the marriage is not a State, but a religious or cultural function (thereby seeming to contradict itself when it says that RMOs perform a public function and not a cultural or religious function.)[87]

[83] Chapter 2, Section I, para 2.70 at page 65 of the South African Law Reform Commission's Discussion Paper 152.
[84] In this regard, see Chapter 2, Section I, para 2.70 at page 65 of the South African Law Reform Commission's Discussion Paper 152, which notes that *"large numbers of marriage officers of religious organisations expressed the view that they would prefer no longer to perform the function of marriage officers if they no longer were to enjoy the right to refuse officiating at a marriage in terms of the envisaged legislation*".
[85] Chapter 2, Section I, para 2.70 at page 65 of the South African Law Reform Commission's Discussion Paper 152.
[86] Act 8 of 2020.
[87] Green Paper page 52.

60.3. Option 3 - Broadening the scope for the designation of marriage officers:

The third option is a policy that makes provision for all social groups to apply to be designated as marriage officers. DHA views this as catering for the competing interests of all social groups. However, DHA stressed that this option does not absolve public servants from solemnising all marriages.

In this regard, we note the following excerpt from former Minister Pandor's letter to the SALRC:[88]

> *"Given our diversity, it is virtually impossible to pass legislation governing every single religious or cultural marriage practice, and it appears to be me that this is not the best practice internationally. …. Beyond the above considerations, the state should have no interest in who one marries, how the religious or cultural rituals are conducted and should therefore have no interest in giving legal legitimacy to one or other practice in relation to the conclusion of a marriage*."

*FOR SA* has no objection to broadening the scope for the designation of marriage officers, as long as the same legal requirements and limitations for appointment apply to all marriage officers.

60.4. Option 4 - Solemnising marriages without marriage officers:

The final option put forward by DHA entails the splitting of the solemnisation (i.e. religious ceremonial part) and registration (i.e. administrative part) components of a marriage. Thus, the DHA envisages that in this option, people getting married would be required to approach the DHA to officially register their marriage after the religious ceremonial component (if any) has been concluded. Thus, the marriage officer would not perform any of the ceremonial functions generally associated with marriage, but simply an administrative function of registering the marriage on the DHA system.

We point out that this option accords with the State's interests – which are only that the legal requirements for concluding a marriage or protected relationship are met. The State (as indicated by former Minister Pandor) has no intention of (or business in) prescribing, or interfering with, cultural or religious beliefs and customs. (This was also

[88] Chapter 1, Section A, para 1.2 at page 1 of the South African Law Reform Commission's Discussion Paper 152.

confirmed by the SALRC during the virtual workshop that *FOR SA* attended on 15 April 2021).

However, for many couples, marriage is a not just an administrative change of legal status, but a deeply religious sacrament participated in before God and in the presence of other witnesses. As such, and as a recognition of the religious significance that marriage has for millions of South Africans across different faith groups, it is desirable to retain RMOs as marriage officers in South African law. Furthermore, and from a practical perspective, it makes sense to retain RMOs to assist the State with the performance of the administrative functions involved in the solemnisation and registration of marriages. There are approximately 16,500 marriage officers in the nation. Of these, approximately 15,000 are RMOs. If RMOs had to no longer fulfil this role, not only would couples who want to get married potentially have to wait months before they can get an appointment with the State to register their union, but it would place an impossible burden on the already burdened DHA offices and administration.

61. In light of the discussion on the South African legal framework above, which makes it clear that it would be unconstitutional to force RMOs to solemnise marriages that do not accord with their religious convictions and beliefs, *FOR SA* is in favour of options three and four:

61.1. Option 3's proposal of broadening the scope for the designation of marriage officers accords with the principle of reasonable accommodation and allows everyone to celebrate their right to be different. This will also impose the least burden on the State, compared with option four.

61.2. Option 4's proposal of splitting the religious ceremonial component from the administrative, registering component, will impose a heavier burden on the State – in terms of having to increase its capacity in order to effectively register all marriages nationwide. However, it will also offer the greatest protection for the religious rights of Civil Marriage Officers (who will then be the only marriage officers), religious ministers, as well as religious institutions. This is because Civil Marriage Officers will be involved simply in registering the marriage – i.e. entering it into DHA's records – and not in the ceremonial and religious aspect of it. Religious ministers would no longer be marriage officers (i.e. they cannot register the marriage) and are then only occupied with performing the ceremonial and religious component of marriages.

62. **However, and irrespective of which option is adopted, any law or policy that seeks to regulate marriage in the nation will need to <u>expressly</u> protect religious ministers' (whether they be marriage officers or not) and religious institutions' religious freedom and other rights – particularly <u>not</u> to be forced to participate in the ceremonial and religious aspect of any marriages that goes against the religious minister's personal beliefs, or that goes against the doctrines of the religious institution to which he/she belongs**. It may well be that, at some point in the future should such express protection not be included, activists may lobby for religious ministers and institutions to conclude the ceremonial and religious aspects of all marriages, even where such religious and ceremonial aspects carry no legal weight.

63. *FOR SA* submits that such <u>express</u> protection is indispensable, especially if Option 3 should be adopted. Such protection is crucial to protecting the religious and associational freedom of religious ministers' (whether they be marriage officers or not) and their religious institutions. As set out in the analysis of the international legal framework, the general trend in comparative foreign jurisdictions – both from Africa and liberal Western countries – is to <u>explicitly</u> protect the religious freedom of RMOs and the religious organisations to which they belong in the relevant legislation. Absent such express protection, any policy or bill that is ultimately adopted into law will be open to constitutional challenge.

**New Marriage Act options: Why an Omnibus Act is preferable**

64. In designing the envisioned new Marriage Act, the Paper recommends following options:[89]

64.1. <u>Option 1 – Single Marriage Act:</u>

This option would entail one uniform Act with a single set of requirements and consequences applying to <u>all</u> marriages. It would completely replace the different current marriage laws,[90] as well as regulate marriages that are currently unregulated (e.g. Hindu, Islam, Khoi-San, Rastafarian etc.) As rightly pointed out by the DHA, this option may have the unintended consequence of harmonising irreconcilable legal systems.

[89] Green Paper pages 50 and 51.
[90] Marriage Act 25 of 1961, Civil Union Act 17 of 2006 (as amended by Act 8 of 2020), Recognition of Customary Marriages Act 120 of 1998.

64.2. Option 2 – Omnibus or Umbrella Marriage Act:

The second option put forward by the DHA, is a single Act containing different chapters to reflect the diverse set of legal requirements for civil marriages, civil unions, customary marriages and other marriages that are not accommodated by the legislation, with all legal provisions being retained only after they were tested against the key principles of the Marriage Policy derived from the Bill of Rights.

As pointed out by the DHA, this option would be consistent with the principle of reasonable accommodation, and would ensure that conflicting gender, religious and cultural rights are able to coexist.

64.3. Option 3 – Parallel Marriages Act:

The third option is to retain the current *status quo*, while also amending various interlinked legislation and promulgating new legislation to govern a variety of religious and cultural marriages that are excluded by the current legal regime.

65. When considering how to design a new (single) Marriage Act, it is important to consider the above analysis of South Africa's legal framework, specifically the right to be different in our diverse nation. Furthermore, one should bear in mind the following:

65.1. The Preamble to the South African Constitution makes it clear that "*South Africa belongs to all who live in it, united in our diversity*".[91]

65.2. In a similar vein, the Constitutional Court has stated that "***the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect****."*[92]

66. In light of the above, *FOR SA* submits that Option 2 – i.e. an Omnibus Marriage Act - is preferable and that its benefits far outweigh a Single Marriage Act, or Parallel Marriage Acts. This is because each section and/or chapter of such an Act can be tailored to adequately deal with the nuances of marriages and other unions concluded according to each tradition and/or religion.

[91] Preamble of the Constitution of the Republic of South Africa, 1996.
[92] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 42.

67. An Omnibus Marriage Act with different chapters allows for each chapter to have a unique definition tailored to suit the type of union dealt with by that chapter, as opposed to a "*one-size-fits-all*" approach which is not suitable. This would allow for the sections on, for example, customary marriages or Islamic marriages, to have definitions tailored that include polygyny etc.

68. Such an Omnibus Act would be the best means by which to achieve the substantive equality aimed for in our Constitution[93] as it would not strip each union of its uniqueness, but rather allow for an even-handed and fair (i.e. equitable) consideration in relation to the requirements and needs of each union type of union. Such an approach would be best suited to give each type of union the best form of legal recognition and/or protection, as well as regulate their consequences and dissolution (which, conveniently, can then be inserted in each chapter at a later instance once finalised).

69. Another benefit of such an Omnibus Act, where it is envisioned that different chapters will deal with different types of unions - e.g. chapter 1 can deal with marriages traditionally concluded under the Marriage Act, chapter 2 with civil unions, etc - is that each chapter can cater for marriage officer license applications in terms of *that* chapter. This option would thus dovetail perfectly with Option 3 put forward in respect of the solemnisation marriages.

70. Practically, one can thus apply to have a marriage officer licence to solemnise marriages traditionally concluded under the Marriage Act[94] under one chapter, to solemnise civil unions, Muslim marriages, etc each under another. This approach of voluntarily applying to be a marriage officer under a particular chapter, will mimic the current approach under the Civil Union Act,[95] where RMOs can apply to have a licence to solemnise marriages in terms of that Act. The immediate benefit is that this will respect and protect both the religious freedom of RMOs, and the institutional autonomy of the religious organisations to which they belong - and thereby their associational freedom (section 18). Another benefit is that only people who are "specialised" in the tenets, rites, formulae etc of certain cultural and/or religious marriages will be able to solemnise same.

71. Given that each type of union may have unique requirements that sets it apart from the other types of unions contained in the Omnibus Act (e.g. in relation to polygyny), this will allow religious practitioners who wish to become voluntary marriage officers, to be specifically trained in the legal requirements for the type of union they wish to perform according to their cultural and/or religious rites.

[93] Section 9 of the Constitution of the Republic of South Africa, 1996.
[94] Act 25 of 1961.
[95] Act 17 of 2006.

72. Practically, this will mean, for example, that an imam can apply to be a marriage officer authorised to only register marriages performed under that section of the Omnibus Act specifically dealing with Islamic marriages. In other words, he will be able to register marriages with the State as a marriage officer in Islamic marriages, but not in e.g. Hindu marriages.

73. **Finally, and as will be clear from the foreign law annexed hereto, the overwhelming majority of foreign marriage legislation examined from the African continent, is in the form of an Omnibus Act.**

**Marriage Policy Options:**

74. *FOR SA* agrees with the DHA that the State is obliged to craft a marriage policy that respects, protects, promotes and fulfils the rights in the Bill of Rights.[96]

75. The Paper proposes the following policy interventions as remedies to the deficiencies of the current legal regime that fails to govern various marriages, such as Hindu, Islam, Khoi-San, Rastafarian etc:[97]

75.1. Option 1 – Inclusive customary and religious marriage regime:

This option would entail amending the Recognition of Customary Marriages Act[98] to cater for all polygamous marriages irrespective of race, cultural and religious persuasions.

(This option would seem to fit into the continued use of Parallel Marriage Acts proposed as Option 3 for the design of a new Single Marriage Act, which *FOR SA* has already submitted is less desirable than an Umbrella Marriage Act.)

75.2. Option 2 - Religion and culture-neutral marriage regime:

The second option is adopting a dual system of either monogamous or polygamous marriages. The Paper states that monogamous marriages will either be homogeneous or heterogeneous, by which we assume the Paper means monogamous marriages will either be heterosexual or homosexual.

[96] Green Paper page 46.
[97] Green Paper pages 47 and 49.
[98] Act 120 of 1998.

(It seems that such a dual system would fit into the continued use of Parallel Marriage Acts proposed as Option 3 for the design of a new Single Marriage Act. *FOR SA* has already submitted that this is considerably less desirable than an Umbrella Marriage Act.)

75.3. Option 3 - Gender neutral marriage regime:

The final option involves adopting a dual system of either monogamous or polygamous marriages (as in Option 2), the difference being that Option 3 is gender neutral. This accommodates both polygyny and polyandry, because all marriages (whether monogamous or polygamous) could be concluded regardless of the sex or sexual orientation of the person.

(It seems that such a dual system would fit into the continued use of Parallel Marriage Acts proposed as Option 3 for the design of a new Single Marriage Act. *FOR SA* has already submitted that this is considerably less desirable than an Umbrella Marriage Act.)

76. None of the Marriage Policy options proposed, dovetail with an Umbrella Marriage Act. Nor would Option 2 and 3 be necessary should the State broaden the scope of who can be a marriage officer (Option 3 in solemnising marriages), or if the registration and ceremonial religious aspects of a marriage are split (Option 4 in solemnising marriages).

77. *FOR SA* submits that a Marriage Policy should dovetail with an Umbrella Marriage Act, which would have different chapters dealing with different types of unions, and where people can apply for a marriage licence in terms of a specific chapter. This would best meet the objective of remedying the current situation that excludes certain cultural and religious groups for concluding legally valid marriages.

78. To pass constitutional muster, any Marriage Policy will have to expressly protect RMOs and the religious institutions to which they belong, from being forced to solemnise marriages that do not accord with their religious convictions and beliefs. (In this regard see paragraphs 44 to 54 above.)

**RECOMMENDATIONS:**

79. *FOR SA* recommends, regarding the solemnisation of marriages, that the scope for the designation of marriage officers be broadened - or *alternatively,* that the solemnisation (i.e. religious ceremonial part) and registration (i.e. administrative part) components of a marriage be

split. Thus, people getting married would approach the State only to officially register their marriage, with the State playing no part in the religious ceremonial component.

80. *FOR SA* recommends, regarding the design of the new (single) Marriage Act, that an Umbrella Marriage Act be adopted which contains a clause, similar to that of Australia, as follows:

**Proposed Clause:**

*(1) Notwithstanding anything to the contrary in this Act or in any other Act of Parliament, a religious marriage officer may refuse to solemnise a marriage.*

*(2) In particular, a religious marriage officer may refuse to solemnise a marriage by reason of, but not limited to, any of the following:*

*(a) the religious marriage officer's religious convictions and beliefs do not allow solemnisation of the marriage; or*

*(b) the refusal conforms to the religious convictions, beliefs, doctrines, disciplines, formularies, rites and/or tenets of the religious organisation or body to which the religious marriage officer belongs; or*

*(c) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion, or the religious organisation or body to which the religious marriage officer belongs.*

81. *FOR SA* recommends, regarding the design of a Marriage Policy, that it dovetails with an Umbrella Marriage Act. This can be done by the Policy providing for <u>different marriage licences</u> (which dovetail with the Umbrella Marriage Act's chapters). Furthermore, the Policy should state the practical requirements for persons applying for a <u>specific</u> marriage licence and for alternative methods for lodging documentation at DHA for the registration of a marriage – e.g. electronic filing similar to SARS's e-filing. This Marriage Policy should also contain a clause as follows:

**Proposed Clause:**

*(1) Notwithstanding anything to the contrary in this Policy or in any Act of Parliament, a religious marriage officer may refuse to solemnise a marriage.*

*(2) In particular, a religious marriage officer may refuse to solemnise a marriage by reason of, but not limited to, any of the following:*

*(a) the religious marriage officer's religious convictions and beliefs do not allow solemnisation of the marriage; or*

*(b) the refusal conforms to the religious convictions, beliefs, doctrines, disciplines, formularies, rites and/or tenets of the religious organisation or body to which the religious marriage officer belongs; or*

*(c) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion, or the religious organisation or body to which the religious marriage officer belongs.*

Kind regards,

**ADV N.L. BADENHORST**
Legal Counsel
*Freedom of Religion South Africa (FOR SA)*
E-mail: legal@forsa.org.za
&
**DANIELA ELLERBECK**
Attorney / Legal Advisor
*Freedom of Religion South Africa (FOR SA)*
E-mail: daniela.ellerbeck@forsa.org.za

**THE END.**

**Annexure**

**THE LEGAL FRAMEWORK - THE INTERNATIONAL POSITION:**

INTERNATIONAL LAW - TREATIES AND DECLARATIONS:

1. ***In terms of section 39(1)(b) of the South African Constitution, a court "must consider international law" when interpreting the Bill of Rights***. It would thus be prudent for the SALRC to (also) do so when drafting legislation that directly affects fundamental rights, including the right to religious freedom.

2. South Africa has signed, *inter alia,* the following international and regional treaties and declarations protecting religious freedom:

    2.1. The Universal Declaration of Human Rights (UDHR);[99]
    2.2. The International Covenant on Civil and Political Rights (ICCPR);[100]
    2.3. The African Charter on Human and People's Rights (Banjul Charter);[101]
    2.4. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief;[102] and
    2.5. Durban Declaration and Programme for Action which promotes an inclusive society where all participate on the basis of equality.[103]

3. All of these treaties and declarations are explicit in their protection of the fundamental right to religious freedom, and includes – as an integral component of that right - the right to manifest one's religious convictions and beliefs through observance and practice.

[99]Article 18 states that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
[100] Article 18 of the ICCPR provides that everyone has the right to religious freedom and that this includes the freedom to meet in community with others to manifest such belief in worship, observance, practice and teaching. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
[101] Article 8 guarantees that freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.
[102]Article 1 states that everyone shall have the right to freedom of thought, conscience and religion, and that this right shall include the freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
[103]Article 14 *Urges* States to recognize the particularly severe problems of religious prejudice and intolerance that many people of African descent experience and to implement policies and measures that are designed to prevent and eliminate all such discrimination on the basis of religion and belief, which, when combined with certain other forms of discrimination, constitutes a form of multiple discrimination; and Article 79 *Calls upon* States to promote and protect the exercise of the rights set out in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in its resolution 36/55 of 25 November 1981, in order to obviate religious discrimination which, when combined with certain other forms of discrimination, constitutes a form of multiple discrimination.

4. This includes, therefore, the right of RMOs to manifest their religious convictions and beliefs by only solemnising marriages and other unions which conform to their (and/or their religious organisation's) religious convictions and beliefs, and not being forced to solemnise marriages and other unions which do not conform to their (and/or their religious organisation's) religious convictions and beliefs.

FOREIGN LAW – MARRIAGE LEGISLATION & CASE LAW:

5. ***Section 39(1)(c) of the Constitution provides further that, when interpreting the Bill of Rights, "a court, tribunal or forum may consider foreign law."***

6. Set out below, are the legal positions of several countries. As our exposition of the foreign law will show***, express protection of RMOs' religious freedom rights is the international norm***. (Of all the countries cited below, it is only Botswana who does not have express protection for RMOs in their marriage legislation).

7. In this regard further, we point out several countries make a legal distinction between religious marriage officers whose religious freedom is expressly protected by law, and State marriage officers who are not given the same legal protection. (In South Africa, the Civil Union Act[104] has already been amended[105] to remove the "conscientious objection" clause that previously existed for State marriage officers who had a conscientious objection against solemnising a particular marriage or union).

8. Australia:
   8.1. Australia's Marriage Act[106] was amended in 2017 by the Marriage Amendment (Definition and Religious Freedoms) Act[107] to allow for same-sex marriages, by altering the definition of marriage to simply refer to two people.[108]
   8.2. There are different types of "*authorised celebrants*", or marriage officers, in Australia.[109] One of these types of authorised celebrants, is ministers of religion.
   8.3. What is important to note, is that the Amendment Act's objectives[110] expressly include, *inter alia*, to allow ministers of religion to solemnise marriage, respecting the doctrines, tenets and beliefs of their religion, the views of their religious community or their own

[104] Act 17 of 2006.
[105] Civil Union Amendment Act 8 of 2020.
[106] Act 12 of 1961.
[107] Act 129 of 2017.
[108] Section 3 of the Act.
[109] Section 2 of the Act.
[110] Section 2A of the Act.

religious beliefs; and to allow equal access to marriage while protecting religious freedom in relation to marriage.

8.4. Furthermore, section 20 of the Amendment Act expressly states that ministers of religion may refuse to solemnise marriages, on the basis of their religious beliefs. Religious ministers may refuse to solemnise the marriage if the marriage does not conform to the doctrines, tenets or beliefs of the minister's religious body or religious organisation, or if the minister's refusal is necessary to avoid "*injury to the religious susceptibilities of adherents of that religion*", or if the minister's religious beliefs do not allow the minister to solemnise the marriage.

8.5. Thus, Australia has included an express protection for ministers of religion's religious freedom (and conscientious objection) rights throughout the legislation.

8.6. *FOR SA* submits that the Bills proposed by the SALRC should follow a similar model by including the protection of religious freedom, not only in the Bills' objectives, but also as an express clause in the legislation itself.

9. Canada:

9.1. Canada's Civil Marriage Act[111] also expressly protects RMOs' religious freedom rights, by recognising "*officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.*"

9.2. However, similar to Australia, Canada was not satisfied with just this one express protection of religious freedom when it comes to RMOs. Recognising that the Act's legalisation of same-sex marriage may result in conflict with the religious beliefs of some of their citizens, their Parliament went further still, and in section 3.1 clearly states that: "*Freedom of conscience and religion and expression of beliefs - For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom*".

9.3. Canada's laws therefore expressly protect not only the religious freedom of RMOs, but also the religious freedom and freedom of expression of anyone who believes that marriage is the union of a man and woman to the exclusion of all others.

[111] S.C. 2005, c. 33

9.4. Something that should be noted, is that the Canadian case of *In the Matter of Marriage Commissioners appointed under the Marriage Act*[112] ("the Saskatchewan Court of Appeal case"), only deals with a "*marriage commissioners appointed by the Minister*", not RMOs.[113] In other words, the case only deals with State marriage officers, similar to marriage officers employed by the Department of Home Affairs in South Africa. There is a specific distinction between various types of RMOs and marriage commissioners appointed by the Minister,[114] in that case.

9.5. As such, the case is not applicable to the religious freedom rights of RMOs in Canada – as their rights are clearly protected in the aforementioned Civil Marriage Act.

10. England and Wales:

10.1. In England and Wales section 2 of the Marriage (Same Sex Couples) Act,[115] under the heading "*Marriage according to religious rites: no compulsion to solemnize etc*.", also expressly protects the religious freedom rights of RMOs who are not compelled to conduct or be present at, or carry out, or otherwise participate etc. in marriage (against their conscience).

11. France:

11.1. The South African Law Reform Commission cites several French cases in its Discussion Paper[116] and concluded that French local officials were denied the right to opt out of conducting same-sex marriages.[117]

11.2. As is easily ascertainable from the cases cited, these (as in Canada's case) also only deals with State officials – not RMOs.

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[112] 2011 SKCA 3

[113] *In the Matter of Marriage Commissioners appointed under the Marriage Act* at paras 1 and 5.

[114] Sections 3 and 4 of the Saskatchewan Marriage Act, 1995.

[115] 2013 c. 30

[116] European Centre for Law and Justice "Mayors' freedom of conscience on same-sex marriage: complaint at the Human Rights Committee" https://eclj.org/conscientious-objection/un/libert-de-conscience-des-maires-face-au--mariage-homosexuel---recours-au-comit-des-droits-de-lhomme?lng=en; Adelgren Stephen "France Constitutional Council rejects 'conscience clause' for same-sex marriage laws" 18 Oct 2013 *Jurist.org* https://www.jurist.org/news/2013/10/french-constitutional-council-rejects-conscience-clause-for-same-sex-marriage-laws/; BBC "France mayors cannot block gay marriage" - top court' 18 October 2013 https://www.bbc.com/news/world-europe-24579037; Voice of America "French Mayors Can't Refuse to Perform Same-sex Marriages" 18 Oct 2013 https://www.voanews.com/europe/french-mayors-cant-refuse-perform-same-sex-marriages; Kölner Stadt-Anzeiger "Homo-Ehe in Frankreich: Bürgermeister müssen trauen" 18 Oct 2013 https://www.ksta.de/politik/homo-ehe-in-frankreich-buergermeister-muessen-trauen-3288326; Luxmoore Jonathan "French court: no conscience clause for mayors in same-sex marriage" 24 Oct 2013 *National Catholic Reporter* https://www.ncronline.org/news/world/french-court-no-conscience-clause-mayors-same-sex-marriage accessed 5 June 2020.

[117] Annexure D, Section D, para 30 at page 194 of the South African Law Reform Discussion Paper 152.

12. New Zealand:

12.1. New Zealand's Marriage Act,[118] which has been amended numerous times, allows for religious ministers to be appointed as "*marriage celebrants*"[119] (i.e. RMOs).

12.2. Interestingly, New Zealand requires the marriage certificate to be issued first, before a marriage can be solemnised.[120] However, the "*marriage licence shall authorise but not oblige any marriage celebrant to solemnise the marriage to which it relates.*"[121]

12.3. Furthermore, New Zealand also expressly protects the religious freedom of RMOs by stating in section 29(2) that *"..no celebrant who is a minister of religion recognised by a religious body enumerated in Schedule 1, and no celebrant who is a person nominated to solemnise marriages by an approved organisation, is obliged to solemnise a marriage if solemnising that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation."*

13. Ghana:

13.1. In Ghana, the Marriages Act[122] is an example of an omnibus act, with different sections dealing with, for example, customary, Islamic and Christian marriages.

13.2. Importantly, Ghana also explicitly protects the religious freedom rights of RMOs – section 38(3) states that "*A minister who is appointed a marriage officer is not compellable to act as a marriage officer with respect to a marriage which is contrary to the rules of the religious denomination to which the Minister belongs".*

14. Kenya:

14.1. In Kenya, although same-sex marriages are not recognised,[123] the Marriage Act[124] is another example of an omnibus act, with different parts of the Act dealing with Christian marriages, civil marriages, customary marriages, Hindu marriages and Islamic marriages.

14.2. Section 52 of the Act allows for ministers of religion to apply to the Registrar to be a marriage officer, but importantly, such RMOs are only permitted to officiate at marriages celebrated according to the traditions of the faith in which the minister of faith serves.[125]

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[118] Act 92 of 1955.
[119] Section 8 of the Act.
[120] Section 24 of the Act, read with section 30(1) of the Act which reads: "*A marriage shall not be solemnised by a marriage celebrant until the marriage licence issued in respect of the marriage has been delivered to him or her."*
[121] Section 29(1) of the Act.
[122] 1884-1985 CAP. 127
[123] Section 3(1) of the Marriage Act 4 of 2014 defines marriage as: "*the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act*".
[124] Act 4 of 2014.
[125] Section 52(4).

14.3. This serves as an express protection for the religious freedom rights of RMOs and the religious bodies to which they belong, as they cannot be forced to contravene the traditions of their faith.

15. Malawi:

15.1. Malawi's Marriage, Divorce and Family Relations Act[126] is yet another example of an omnibus marriage act which deals with civil, customary and religious marriages separately.

15.2. The Act allows for clerics to perform the function of a registrar of marriages,[127] and to register marriages that have taken place at their place of worship,[128] but requires that a place of worship has to be licenced by the Minister in order to celebrate religious marriages there.[129]

15.3. Section 26 of the Act states that religious marriage are to accord with the rites of that religious sect. As with Kenya, this serves as an express protection for the religious freedom rights of RMOs and the religious bodies to which they belong, as they cannot be forced to conclude a religious marriage that is not according to the rites of their sect.

16. Tanzania:

16.1. The Law of Marriage Act,[130] although not recognising same-sex marriages,[131] does allow for minister of religion to be licenced as registrars[132] – i.e. marriage officers.

16.2. In addition, section 30(1) of the Act expressly protects RMOs by stating that: "*no minister of religion shall be compelled to celebrate any marriage*".

17. Trinidad and Tobago:

17.1. Trinidad and Tobago appears to have separate statutes governing the different types of marriages, with separate Acts for civil marriages and the different religious marriages such as Hindu marriages, Islamic marriages and Orissa marriages – all of which were amended by the Miscellaneous Provisions (Marriage) Act.[133]

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[126] Act 4 of 2015.
[127] Section 4(3)(c) of the Act.
[128] Section 8(1) of the Act.
[129] Sections 11 and 39(1) of the Act.
[130] Act 5 of 1971.
[131] Section 9 of the Act.
[132] Section 6 of the Act reads: *"Every district registrar and every [Muslim priest or preacher or a leader of a Muslim community who has been licensed under this Act to celebrate marriages in Islamic form] and minister of religion who is licensed under section 30 shall be a registrar for the purposes this Act."*
[133] Act 8 of 2017.

17.2. The Marriage Act,[134] which deals with civil marriages, allows for ministers of religion to apply to be marriage officers.[135] RMOs' religious freedom (and conscientious objection) rights are expressly protected in section 33 of this Act.

18. Uganda:

18.1. Uganda does not have RMOs. Instead, Uganda's Marriage Act[136] requires the parties wishing to get married, to first obtain a certificate or a licence to do so from the registrar[137] or relevant Cabinet Minister.[138] The marriage can then take place at a licenced place of worship.[139] (This is, therefore, an example of a clear separation between registering the marriage with the State, and then concluding the religious aspect of the marriage.)

18.2. However, section 20(1) of the Act still protects ministers of religion who could be asked to perform the marriage celebration / ceremony at their licenced place of worship, by stating that the marriage is to be celebrated "*according to the rites or usages of marriages observed in that church, denomination or body*". Thus, even though the religious minister is not a marriage officer, he / she cannot be forced to participate in a marriage that is contrary to that religious institution's rites or usages.

19. Zimbabwe:

19.1. Marriages in Zimbabwe are still governed by the Marriage Act[140] which is currently still in force. In terms of this Act, ministers of religion can be designated as marriage officers,[141] and only have to solemnise marriages according to "*the rites usually observed by his religious denomination or organization*".[142]

19.2. Furthermore, the religious freedom rights of RMOs are expressly protected by the Act, which states that they cannot be compelled "*to solemnize a marriage which would not conform to the rites or discipline of his religious denomination or organization*".[143]

[134] Act 13 of 1923.
[135] Sections 7 through 11 of the Act.
[136] Act of 1904.
[137] Section 10 of the Act.
[138] Section 12 of the Act.
[139] Section 5 of the Act.
[140] Act 81 of 1964.
[141] Section 4 of the Act.
[142] Section 26 of the Act.
[143] Section 27(a) of the Act.

20. Botswana:

20.1. Although on the African continent, Botswana is not comparable to South Africa, because Botswana only decriminalised same-sex relationships in 2019[144] and still does not recognise same-sex marriage.

20.2. Nonetheless, in looking at how Botswana deals with customary, Muslim, Hindu and other religious marriages, section 23(1) and (2) of Botswana's Marriage Act[145] places the onus on either of the parties to such a marriage, to apply to the Registrar of Marriages for the registration of their marriage within two months of contracting such marriage.

20.3. Although section 7(2)(b) provides for ministers of religion to be marriage officers, there is no express protection of their religious freedom and/or conscientious objection.

21. ***FOR SA, therefore, submits that to not include an express protection of the religious freedom rights of RMOs and the religious organisations to which they belong, would be contrary not only to binding international law, but also contrary to (the general trend in) foreign law.***

[144] See for example: https://www.amnesty.org/en/latest/news/2019/06/botswana-decriminalisation-of-consensual-same-sex-relations-should-inspire-other-african-countries/
[145] Act 18 of 2001.