



## home affairs

Department:  
Home Affairs  
REPUBLIC OF SOUTH AFRICA

### INTERVIEW SCHEDULE FOR THE MARRIAGE POLICY

The interview **schedule is structured in 8 main themes and subthemes**. These themes and their subthemes include open-ended questions which are aimed at capturing the participants' knowledge of the framework for recognising marriages in South Africa. The input that will be provided by participants will assist the Department of Home Affairs research team in drafting the first policy on marriages in South Africa.

#### **About FOR SA:**

Freedom of Religion South Africa (FOR SA) ([www.forsa.org.za](http://www.forsa.org.za)) is a legal advocacy organisation that works to protect the constitutional right to religious freedom in South Africa. We work before government and Parliament where we make submissions on policies and Bills affecting religious freedom, and also appear before government commissions and the Courts where religious freedom is threatened. We currently represent religious leaders representing approx. 6 million people in South Africa.

#### **Thematic area 1: Solemnisation of marriages**

1. Kindly share your experience on the solemnisation of the following marriages:

a. Civil Marriages (Marriage Act 25 of 1961)

Many religious leaders who form part of FOR SA's constituency, are designated marriage officers in terms of section 3 of the Marriage Act ("religious marriage officers") which provides as follows: "*The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.*"

In our experience, the solemnisation of marriages under the Marriage Act is fairly clear and uncomplicated. What is less clear, is the position / process that applies when religious marriage officers move from one denomination or organisation to another – whether notice should be given to the Department of Home Affairs, and if so, in what manner. Many religious officers who have given notice of this to the Department, have

experienced considerable delay (or no response whatsoever) in having their marriage licence amended to reflect the new denomination or organisation they are associated with.

**b. Customary Marriages (Recognition of customary marriages 120 of 1998)**

In our experience, there is a large degree of ignorance in predominantly white religious denominations and organisations with regard to customary marriages.

**c. Civil Union (Civil Union Act 17 of 2006)**

**Religious marriage officers:**

In terms of s 5 of the Civil Union Act, "*any religious denomination or organisation may apply in writing to the Minister to be designated as a religious organisation that may solemnise marriages in terms of this Act.*" The implication of this provision is that the law does not compel any denomination or organisation (and by implication, any minister of religion including a minister of religion who has been designated as a marriage officer under the Marriage Act, 1961) to solemnise civil unions, including specifically same-sex unions. In order to solemnise civil unions under the Act, a denomination or organisation (and by implication, a minister of religion) has to have a specific licence to do so. (This position has in no way been altered by the recent High Court judgment in ***Gaum v General Synod of the Dutch Reformed Church***, which applies to the Dutch Reformed Church only and does not have universal application.)

In our experience, the vast majority of religious marriage officers designated as such under the Marriage Act, hold the Scriptural conviction and belief that marriage is the permanent union of one man and one woman to the exclusion of all others. As a result of their religious beliefs, they are unable to (apply for a licence to) solemnise same-sex unions under the Civil Union Act.

**State marriage officers:**

Section 6 of the same Act allows State marriage officers to refuse – on grounds of conscience, religion and belief – to solemnise same-sex marriages. The conscientious exemption for State marriage officers who on grounds of their religious conviction and belief find themselves unable to solemnise same-sex marriages, was specifically written into the Civil Union Act to protect the constitutional right to religious freedom of (religious and State) marriage officers. In ***Minister of Home Affairs v Fourie*** (the case which legalized same-sex marriage in 2005 and precipitated the drafting of the Civil Union Act), the Constitutional Court stated (with regard to State marriage officers) as follows: "*the principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience.*" (paragraph [159]).

The National Assembly has recently passed a Bill (the Civil Union Amendment Bill) in terms of whereof the conscientious exemption for State marriage officers will only apply for another 24 months, whereafter it will no

longer be available. This is in direct conflict with the *Fourie* judgment above, and therefore potentially unconstitutional. The Bill is currently pending before the NCOP for concurrence.

\*To see FOR SA's submission on the Civil Union Amendment Bill, see [www.forsa.org.za/document-library](http://www.forsa.org.za/document-library), click on folder "Civil Union Amendment Bill".

2. Are there any challenges that you have encountered or observed during the solemnisation of the above marriages?

- a) In terms of section 31 of the Marriage Act, "nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organisation."

In the *Fourie* case, the Constitutional Court recognised this provision as "strong protection of the right of religious communities not to be obliged to celebrate marriages not conforming to their tenets." (paragraph [97]).

There is however increasing (legal and social) pressure on religious marriage officers to solemnise same-sex marriages. Should they be forced to do so by law, not only will this violate the constitutional right to religious freedom but the State will leave them no choice but to hand in their marriage licences, perform only the religious ceremony and leave it to the State to solemnise the marriage. This will place a massive additional burden on the State.

- b) In some instances, pastors do not know that they need to be formally recognised as a marriage officer before they can legally solemnise a marriage.

3. What should be done by government and other stakeholders (solutions) in order to improve the solemnisation of the above marriages?

- a) Bring clarity to process with regard to the transfer of marriage licences from one denomination or organisation to another, and deal with unnecessary delays.
- b) Education of religious marriage officers – particularly with regard to customary marriages.

## Thematic area 2: Registration of marriages

4. Kindly share your experience on the registration of the following marriages:

a. Civil Marriages (Marriage Act 25 of 1961)

b. Customary Marriages (Recognition of customary marriages 120 of 1998)

c. Civil Union (Civil Union Act 17 of 2006)

5. What do you attribute to the persistence of unregistered marriages?

6. Are there any challenges that you have encountered or observed during the registration of the above marriages?

7. What should be done by government and other stakeholders (solutions) in order to improve the registration of the above marriages?

### **Thematic area 3: Registration of marriages that involve foreign nationals**

8. Kindly share your experience on the registration of marriages that involve foreign nationals.

9. Are there any challenges that you have encountered or observed during the registration of the marriages that involve foreign nationals?

10. What should be done by government and other stakeholders (solutions) in order to improve the process for the registration of marriages that involve foreign nationals?

### **Thematic area 4: Recognition of the equality principle in the marriage legislation**

11. What should be done by government and other stakeholders (solutions) in order to align the marriage legislation with Section 9 of the Constitution?

FOR SA is in favour of a single act with different chapters reflecting the current diverse set of legal requirements for and consequences of civil marriages, civil unions, customary marriages, Muslim and possibly other religious marriages (i.e. “omnibus” or “umbrella marriage statute”, as contemplated also by the SALRC’s Issue Paper 36).

We submit that this will best protect and promote not only the equality principle, but the constitutional principle of religious freedom which includes the autonomy of religious organisations to determine their own doctrines and regulate their own affairs - also with regard to the issue of marriage.

### **Thematic area 5: Marriages that are not recognised by the current legislation**

12. Kindly share your knowledge on marriages that exist but are not recognised by the law of the Republic.

13. In your view, why such marriages are not covered by the current legislation?

14. What should be done by government and other stakeholders (solutions) in order to

legalise such marriages or to align such marriages with the law, including the Constitution?

**Thematic area 6: Marriages that involve minors (persons under 18 years)**

15. The legislation makes provision for the solemnisation of marriages that involve minors. Kindly share knowledge or experience on the solemnisation of marriages that involve minors.

16. In your view, should this practice (marriage of minors) be continued or discontinued? Please substantiate your response.

**Thematic area 7: Fraudulent marriages and marriages of convenience**

17. Kindly share knowledge or experience on dealing with fraudulent or marriages of convenience.

18. In your view, what gives rise to fraudulent or marriages of convenience?

**Thematic area 8: Regulation of life and domestic partnerships**

19. The current marriage legislation does not regulate life and domestic partnerships. Kindly share your thoughts on whether or not such partnerships should be regulated under the marriage legislation?

FOR SA submits that unmarried intimate relationships should not have the same rights and consequences as marriage, as this would go against the Constitutional Court's reasoning in *Volks v Robinson* (2009). In that case, the Court made it clear that the legal position in South Africa is that differentiating between the rights of married and unmarried couples is fair as the Constitution recognises the importance of marriage as a fundamental societal institution.

**Thematic area 9: General**

20. Is there any issue related to the recognition of marriages that the Department of Home Affairs should take into consideration during this study?