

REPUBLIC OF SOUTH AFRICA

CIVIL UNION AMENDMENT BILL

*(As amended by the Portfolio Committee on Home Affairs (National Assembly))
(The English text is the official text of the Bill)*

(Ms. D CARTER, MP)

[B 11B—2018]

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GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
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BILL

To amend the Civil Union Act, 2006, by repealing a section; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Repeal of section 6 of Act 17 of 2006

1. Section 6 of the Civil Union Act, 2006 (hereinafter referred to as the principal Act),
is hereby repealed. 5

Transitional provision

2. (1) Any exemption granted by the Minister in terms of section 6 of the principal Act, prior to the commencement of this Act, lapses 24 months from the date of commencement of this Act.

(2) The Minister must ensure that there is a marriage officer, other than a marriage officer referred to in section 5 of the principal Act, available to solemnise a civil union at every Department of Home Affairs office. 10

Short title and commencement

3. This Act is called the Civil Union Amendment Act, 2018.

MEMORANDUM ON THE OBJECTS OF THE CIVIL UNION AMENDMENT BILL, 2018

1. INTRODUCTION

The Civil Union Act, 2006 (Act No. 17 of 2006) (“the Act”), was enacted as a result of the Constitutional Court decision in *Minister of Home Affairs v Fourie 2006 1 SA 542 (CC)*. The Constitutional Court ruled that it was unconstitutional for the State to provide the benefits of marriage to opposite-sex couples whilst denying them to same-sex couples. This infringed the right to equality before the law and the right not to be discriminated against by the State on grounds of sexual orientation. The Act extended recognition of marriage rights to same-sex partners and gives same-sex partners the right to enter into a civil partnership known as a civil union.

Civil unions may be solemnised either by religious marriage officers, by *ex officio* marriage officers, or by designated marriage officers who are civil servants. The Bill seeks to address an area of concern that stems from section 6 of the Act, which provides that:

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

The Act defines a marriage officer to mean:

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

In terms of section 2 of the Marriage Act, 1961 (Act No. 25 of 1961) (“Marriage Act”):

“(1) Every magistrate, every special justice of the peace and every Commissioner shall by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office.

(2) The Minister and any officer in the public service authorised thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area.”

In the case of civil marriages (i.e. couples of the opposite sex), the Marriage Act provides that a marriage officer must solemnise all marriages placed before him or her and is not allowed to refuse to solemnise a marriage on the grounds of conscience, religion or belief. However, the same marriage officer is permitted in terms of section 6 of the Act to object on the grounds of conscience, religion and belief in respect of solemnising same-sex civil unions. By submitting this objection notice, the marriage officer is relieved of any obligation to solemnise such unions.

The marriage officers envisaged in section 6 of the Act are those who solemnise civil unions in their capacity as civil servants—the same civil servants who as marriage officers have no legal rights to object to solemnising marriages under the Marriage Act. For instance, a devoutly Christian civil servant may not object to solemnising a marriage for an opposite-sex couple who are atheist or Muslim. A

marriage officer who has racist views, may not object to marrying an interracial opposite-sex couple.¹

Civil servants may therefore object only to solemnising unions under the Act and, moreover, only to same-sex unions under that Act. The only ground for objection is therefore the sexual orientation of the couple, which is in violation of section 9(3) of the Constitution.²

In the context of South African same-sex partnerships, many same-sex couples may be obliged to have their marriages conducted by civil servants because the religious bodies they attend are unwilling to do so. The prevalence of homophobia in our society could mean that a large number of civil servants will avail themselves of the statutory right to lodge objections, resulting in same-sex marriage becoming available in theory only, especially in rural areas. This would clearly constitute undue hardship for same-sex couples.³ This therefore leads to a conclusion that section 6 of the Act limits the rights of same-sex partners to enter into a civil union, and this limitation cannot be justified in an open and democratic society.

2. OBJECT OF THE BILL

The purpose of the Bill is to repeal section 6 of the Act, which allows a marriage officer to inform the Minister that he or she objects on the ground of conscience, religion, and belief to solemnising a civil union between persons of the same sex.

3. CONTENT OF THE BILL

Clause 1 of the Bill repeals section 6 of the Act in its entirety.

Clause 2 of the Bill is a transitional provision, which is consequential to the repeal of section 6 of the Act.

4. FINANCIAL IMPLICATIONS FOR THE STATE

The Bill does not hold any financial implications for the State.

5. DEPARTMENTS, BODIES OR PERSONS CONSULTED

None.

6. PARLIAMENTARY PROCEDURE

6.1 The Member proposes that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, as it does not affect provinces.

6.2 The Member is of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

¹ Bonthuys: ‘Irrational accommodation: conscience, religion, and same sex in South Africa’

² Bonthuys: ‘Irrational accommodation: conscience, religion, and same sex in South Africa’

³ Bonthuys : ‘Irrational accommodation: conscience, religion, and same sex in South Africa’.