

INFORMATION SHEET

What is the Civil Union Bill all about? Why does it falls short of equality, for same sex couples?



Parliament has tabled the Civil Union Bill to regulate same sex partnerships. The purpose of this document is to explain the Civil Union Bill and to outline some of the problems it poses for the achievement of full equality for gay and lesbian people.

We hope this information will assist individuals and organisations to participate in the public hearings on same sex marriage, and to draft written submissions to Parliament.

Background

In late 2005, the Constitutional Court gave judgement in the case of *Minister of Home Affairs v Fourie; Gay and Lesbian Equality Project v Minister of Home Affairs*. This matter had begun in the High Court, proceeded to the Supreme Court of Appeal and finally reached the Constitutional Court. At the heart of the matter in *Fourie* and *Lesbian and Gay Equality Project* was the common-law definition of marriage and the formula used by marriage officer when they marry couples. A formula is the words spoken by the marriage officer during the marriage ceremony. Marriage, at common law, is defined as the union of one man with one woman, to the exclusion, while it lasts, of all others. It was alleged that the definition and marriage formula discriminated unfairly against same-sex couples as a result of being excluded from both the definition and the formula. The Constitutional Court found the Marriage Act and the common law definition of marriage to be unconstitutional in that they discriminated unfairly against lesbian and gay people by failing to provide for lesbian and gay people to be able to acquire the same status, rights and responsibilities for their relationships. In addition to being unfairly discriminatory, it was found that the Marriage Act and common law definition of marriage infringed the dignity and privacy of lesbian and gay people. The Court gave Parliament one year to correct the legal defect and to provide a legal remedy that would allow same sex couples to marry with equal legal and social status to opposite sex couples.

In passing new legislation for same sex couples, parliament will need to comply with the sentiments expressed by the Constitutional Court:

"..whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved. In a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples."

Justice Albie Sach, Constitutional Court judgment on same sex marriage, 1 December 2005, footnotes omitted.

1. What Constitutional Rights are at stake for lesbian and gay people with regard to same-sex marriage?

In adopting our constitution, South Africans committed themselves to a social contract that would never again allow unfair discrimination against anybody by another person or by the State. The Bill of Rights, Section 9, was designed to prohibit any form of unfair discrimination, including on the basis of sexual orientation.

The social and legal argument in support of same sex marriage hinges on three constitutionally protected values that underpin a number of rights in the Constitution:

- **Equality.** The failure to afford people the opportunity to marry simply because of their sexual orientation is a violation of the right to equality. If heterosexual people are entitled to marry, homosexual people should also be entitled to marry. Similarly, the separate treatment of people where there is no good reason for separate treatment purely on grounds of sexual orientation is also a violation of this right.

- **Dignity.** The creation of a separate institution for same-sex couples to celebrate their commitment to each other treats them as being unworthy of entering into mainstream society. This represents a serious violation of the dignity of such individuals.
- **Freedom.** The decision to marry is a fundamentally important choice of serious significance in the lives of individuals. In a free society, gay people should be entitled to decide whether or not they wish to make the choice to marry or not. Depriving gay people of this freedom represents a serious violation of freedom.

The arguments in favour of the inclusion of gay people within marriage are thus supported by the *foundational values* of our constitutional democracy. Throughout the Constitution reference is made to a society based on equality, human dignity and freedom. The state has the obligation to respect, promote, protect and fulfil all of the rights within our Bill of Rights that realise these values. Therefore, it is obliged to pass legislation, for example, gives proper effect to these values and rights.

2. What is the Civil Union Bill?

The Civil Union Bill is a draft law that aims to regulate the recognition of same sex couples and domestic partnerships. The Bill is broken into two sections: the first creates ‘civil partnerships’ for same sex couples only and the second introduces ‘domestic partnerships’ for both same and opposite sex couples who chose not to marry.

A civil partnership is a union of two people of the same sex to the exclusion of all others. It is *not* a marriage, but appears to grant the same legal and civil rights as marriage to same sex couples. This would include the right to benefit from the estate of your partner if they die, and the right to make decisions in hospital when your partner is terminally ill.

3. Does the Civil Union Bill allow same-sex couples to get married?

If the Civil Union Bill is passed, same sex relationships will not be recognised as ‘marriage’ in the eyes of the law. The Marriage Act will regulate heterosexual marriage, whilst civil partnerships will be exclusively for same-sex couples. Civil partnerships will be placed on a separate register to marriages. A civil partnership is similar to marriage in most of its legal consequences, but it is not a marriage in the eyes of the law.

4. Can heterosexual people enter civil partnerships?

No. The Civil Union Bill is explicitly for same sex couples only. This exclusivity adds to the already present notion that lesbian and gay people are fundamentally “different” and separate from mainstream society. It does not recognise the commonality between lesbian/gay and straight permanent relationships that are both expressions of love and commitment between the partners. Therefore, the creation of a new institution exclusively for lesbian and gay people only adds to the stigma and discrimination that lesbian and gay people already face.

5. What are the legal consequences of a civil partnership?

The Civil Union Bill confers the same legal rights and benefits to marriage. This means, for instance, that a duty of support exists between spouses, a property regime governs the use of property in the union (this will have to be chosen by civil partners), and civil partners will be entitled to inherit from one another if a partner dies without a will. On termination, provisions relating to divorce will apply including provisions relating to the custody of children and maintenance after termination.

6. Why should we oppose civil partnerships?

Our opposition to civil partnerships revolves around the Constitutional values at stake for lesbian and gay people, namely equality, dignity and freedom. The adoption of South Africa’s Constitution represents a radical rupture for our discriminatory past.

The idea that lesbian and gay people’s relationships should be treated separately to heterosexual relationship undermines the notion of an inclusive, tolerant society that so many sacrificed so much for.

Although the Bill accords same-sex couples the same legal benefits that would that are conferred by marriage, the state and society will not recognise these partnerships as marriages with the history and status that it has in society. Instead, civil partnerships, a term that exclusively refers to same-sex relationships, would be regulated by a separate legal institution and administered separately. This would relegate same-sex couples to a second-class citizenry and perpetuate the stigmatisation of our relationships rather than promoting the notion of one status for all, whether one is lesbian, gay or straight.

Key reasons why the Civil Union Bill falls short of ensuring equality for lesbian and gay people:

- Our Constitution provides that that no-one can be unfairly discriminated against on grounds of, for instance, race and sexual orientation. The Civil Union Bill discriminates against lesbian and gay people because it still does not allow same sex couples to enter the institution of marriage. Rather it provides same-sex couples with a different law under which they can enter a different institution: a civil partnership. Civil partnerships lack the tradition, status and social meanings that marriage has. This means that the Civil Union Bill is inconsistent with the Constitution.
- The Civil Unions Bill provides that civil partnerships for lesbian and gay people must be placed on a separate register to marriages between heterosexuals. This entrenches the institutional segregation of lesbian and gay people from straight people. No matter how equal the law tries to make such a regime, the fact is that it remains segregated. The notion of a 'sexual apartheid' has no place in the new South Africa.
- Lesbian and gay people have traditionally been relegated to the fringes of society. By denying lesbian and gay people the opportunity of entering into mainstream society through the right to marry, they remain second-class citizens in South Africa. This is a grave violation of the dignity of lesbian and gay people, which in turn violates the Constitutional protection of dignity. It also entrenches homophobia and the idea that lesbian and gay people are different and lesser.
- The traditional African value of ubuntu can described in the phrase "I am because you are". This means that in order for you to fully realise your humanity, you must recognise and accept my humanity. Underlying ubuntu are values of tolerance and acceptance. The Civil Union Bill fails to recognise fully the humanity of lesbian and gay people by denying them the opportunity to marry. By failing to recognise the humanity of same-sex couples, the Civil Union Bill falls short of what ubuntu requires.
- The existing Marriage Act provides amply for religious marriage officers to refuse to marry couples because of religious objections. Section 31 of the Marriage Act provides that any person who is a designated marriage officer may refuse to solemnise a marriage if it doesn't comply with the rules and rites of their religion. In addition, the existing Marriage Act [Section 30(1)] allows religious institutions to determine their own marriage formula and in no way compels them to marry under a formula which is not inline with their religious doctrine. This gives full effect to the constitutionally protected right to freedom of religion. There is therefore no need to introduce a new legal regime (i.e. Civil Union Bill) simply because of religious objections to same-sex marriages as religions that do not wish to recognise same-sex marriage do not have to.
- The Civil Union Bill grants civil servants that are marriage officers the opportunity to register as having conscientious objections to marrying same-sex couples. This is totally unacceptable. If a civil servant could refuse to marry a mixed-race, heterosexual couple because her/his conscience, there would correctly be a public outcry. The Civil Union Bill seems to suggest that homophobia is acceptable in the public domain. This is completely contrary to Constitutional protection of equality and the dignity of all human.
- The verdict of the Constitutional Court in the Fourie case was explicit in one area - whatever Parliament chooses to give effect to the judgement must afford same-sex couples the same status as marriage. Civil partnerships patently do not afford the same status as marriage. They are a new legal creation that has none of the tradition, recognition, rituals and social meanings associated with marriage. This will open the door for further litigation which is both expensive and could create more uncertainty regarding this area law, thus keeping the status of lesbian and gay people hanging in the balance.
- Because they would be treated separately from marriages, civil partnerships will add to the administrative burden already born by the Department of Home Affairs. Civil partnerships need to be registered separately. They need additional forms. Staff will need to be trained to deal with civil partnerships. We believe that this extra expense could be avoided by accommodating same-sex couples within the existing framework.

- The concept of family has undergone extensive revision in South Africa since 1994. This is especially true since same-sex couples have been allowed to adopt children jointly. Internationally, the institution of marriage has been recognised as granting certain benefits that no other, equivalent institution grants. The inability of same-sex couples to enter into marriage therefore denies them such benefits and is inconsistent with South Africa's international obligations and the concept of the best interests of the child for children of same sex couples.
- The fact that the State Legal Adviser has declined to certify the Civil Union Bill, is a further cause for concern. It is against the advice of the SLA that the Ministry is pushing forward the Bill, adding further doubt to its constitutionality.

7. What are domestic partnerships?

The positive aspect of the Bill is that, for the first time, it provides legal protection for couples who are not married through 'domestic partnerships'. What a domestic partnership does is that it provides some of the features of marriage, for example the duty for each partner to support the other one financially, and other protections. Domestic partnerships should be made available for couples who chose not to, or who are not able to, marry.

8. What happens if the 1 December deadline is missed?

If Parliament does not pass the Civil Union Bill before 1 December 2006, then the common-law definition of marriage and the Marriage Act will both be changed so as to allow same-sex couples the right to marry. We would welcome this solution. It is a simple, effective and constitutionally valid way of affording same-sex couples the right to marry.

9. What do we propose?

Lesbian and gay equality can coexist alongside religious freedom. In line with our history and our Constitution, the Department of Home Affairs released a Marriage Amendment Bill on 1 August, 2006 (available at www.pmg.org.za/docs/2006/060801draftbill.pdf). This legal option is capable of balancing the rights of equality and religious freedom. It will not require religious institutions to recognize same sex marriages nor will it require officials to marry same sex couples. In this way everyone is protected and treated with equal respect. The Marriage Amendment Bill includes a gender-neutral definition of marriage which would finally permit same sex couples to socially and legally sanction their relationships under the existing marriage law. This legal option is clearly constitutional, easy to administer and as such is a more just and appropriate legal remedy than the convoluted and confusing Civil Union Bill.

10. Closing

Parliament now has the task of assessing whether the Civil Union Bill stands the scrutiny of constitutionality and the important challenge of creating a law that repudiates the history of discrimination against gay and lesbian people and embraces a society of openness and respect for all. Same sex couples should be granted the right to marry, in both word and content, nothing less.

11. Where you can get more information about the Civil Union Bill

All information around the Bill, such as the minutes of the various committees that are involved as well as the Civil Union Bill itself is available from the Parliamentary Monitoring Group website. The website address is <http://pmg.org.za/bills/060824draftcivilunion.pdf>.

For more information contact **Fikile Vilakazi**, Advocacy Officer, at:

OUT LGBT Well-being
Tel: (012) 344 5108
Email: advocacy@out.org.za
Website: www.out.org.za

12. What can you do?

- Write letters to the press expressing your thoughts and opinions on same sex marriage.
- Make your voice heard at the public hearings which will take place in each province.
- Make a written submission to parliament. It doesn't matter how long or short this is, each one makes a difference.

Submissions can be sent to the Home Affairs Portfolio Committee secretary:

Mr. Rousseau Mankge
Email: mmankge@parliament.gov.za
Tel: 021 403 3826
Fax: 021 403 2808

- Sign onto the petition in support of equal marriage for same sex couples at www.out.org.za

This fact sheet was compiled by OUT LGBT Well-being. OUT is a registered non-profit organisation that has been in existence for 11 years. OUT provides mental and sexual health service to lesbian, gay, bisexual and transgender people. OUT also engages in advocacy, research and mainstreaming programmes aimed at reducing homophobia.