

MEMORANDUM ON THE OBJECTS OF THE CIVIL UNION BILL, 2006

1. BACKGROUND

The Constitutional Court ("the Court"), in the matter of Minister of Home Affairs v Fourie (Doctors for Life International and Others, *Amici Curiae*) and Lesbian and Gay Equality Project and Others v Minister of Home Affairs 2006 (1) SA 524 (CC) ("the Fourie-case"), declared that the definition of marriage under the common law and the marriage formula as set out in section 30(1) of the Marriage Act, 1961 (Act No. 25 of 1961) ("the Marriage Act"), were inconsistent with the Constitution and invalid to the extent that they failed to provide the means whereby same-sex couples could enjoy the status and the benefits coupled with the responsibilities that marriage accorded to heterosexual couples. The Court ordered Parliament to correct these defects in the law by 1 December 2006, failing which section 30(1) of the Marriage Act will be read as including the words "or spouse" after the words "or husband". The Bill was drafted in response to the Court's judgment in the Fourie-case.

2. OBJECTS OF THE BILL

The objects of the Civil Union Bill, 2006 are to provide for the public solemnisation and registration of civil unions, by way of either a marriage or civil partnership and to provide for the legal consequences thereof.

3. DISCUSSION

In order to reflect values of equality and dignity consistent with sections 9 and 10 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), balanced with the right to freedom of conscience, religion, thought, belief and opinion, as provided for in section 15 of the Constitution, the Bill provides for the conclusion of civil unions. In terms of this Bill provision is made for opposite- and same-sex couples of 18 years or older to solemnise and register a voluntary union by way of either a marriage or a civil partnership. Care has been taken to ensure that a distinction is drawn between the responsibilities of State and church, as section 15(3) of the Constitution is indicative of sensitivity in favour of acknowledging diversity in matters of marriage. The Bill provides for same-sex couples to be

married by civil marriage officers and such religious marriage officers who consider such marriages not to fall outside the tenets of their religion.

4. DEPARTMENTS/BODIES CONSULTED

The Department of Justice and Constitutional Development;

The South African Law Reform Commission;

The Department and Ministry of Home Affairs consulted widely on the issue and received numerous submissions from individuals and organisations;

Public hearings were conducted by the Portfolio Committee on Home Affairs ("the Committee") in each of the nine Provinces in the Republic;

Based on the Committee's policy of consulting as widely as possible, an effort was also made to publicise the Bill as introduced into Parliament in order to elicit responses from interested groups and organisations, as well as from members of the public. A total of 5 822 petitions and a considerable amount of submissions were received from a wide spectrum of stakeholders in this regard. These petitions and submissions informed the Committee's final recommendations.

5. FINANCIAL IMPLICATIONS FOR STATE

There will be financial implications with regard to the development of new registration systems and forms pertaining to civil unions.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Home Affairs are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 Based on an opinion from the Joint Tagging Mechanism the Bill was referred 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).