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RainbowUCT

24 November 2006

Parliamentary Submission on Civil Unions Bill 2006

The passage of the Civil Unions Bill of 2006 marks an important milestone in the history of our young democracy, not only for those gay and lesbian South Africans whose rights will be expanded directly, but also for all South Africans committed to the principle of equality enshrined in our Constitution.

The Constitution of the Republic is amongst other things a statement of the common values of our society, the values that we as a country hold dear, the values and beliefs that we must strive to live up to. The equality of all persons in the way they are treated by the state is one of those values. The Civil Unions Bill is no more, and no less, than an extension of that principle to allow couples of the same sex to enjoy equal access to the institution of marriage. The Bill is simply the fulfilment of the commitment to a principle that we as a society agreed upon some ten years ago when our Constitution was written. In passing this bill the National Council of Provinces will be carrying forward the struggle against inequality in all its forms.

As a Gay, Lesbian, Bisexual, Transgender and Intersex (LGBTI) organisation at an institution as diverse as the University of Cape Town Rainbow UCT has over the years engaged in many debates over the treatment of LGBTI people and it is this experience that leads us to believe that the passage of the Civil Unions Bill is particularly important. Negative attitudes towards LGBTI people are usually based either on ignorance about what it means to have an alternative sexual orientation or on the idea that discrimination against LGBTI people is officially condoned. The Civil Unions Bill, by demonstrating the commitment of our country's leaders to the principle of equality for all people will go a long way towards helping to combat the prejudice that LGBTI people face elsewhere in society.

By acknowledging that LGBTI people are an important part of our society in a body as august as the NCOP this legislation helps to combat ignorance and particularly the notion that being gay is 'un-African.' By formally making same-sex couples equal in terms of the law this Bill destroys the idea that discrimination is officially condoned. Prejudice and ignorance continue to cause great pain and suffering to members of the LGBTI community and we are under no illusion that this bill will change that, but social change takes time and as we have seen with both racism and sexism the first step towards defeating these evils must be taken by our legislature. We applaud this bill for doing just that.

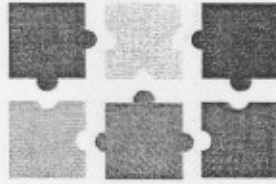
Rainbow UCT is aware that there is strong opposition from a large number of people and organisations to the idea of same sex couples being allowed to marry. We do not believe that allowing two people who love each other and want to make a commitment to each other for the rest of their lives can



possibly do anything to undermine the institution of marriage, no matter what sex those people may be. On the contrary, we believe that allowing all people access to the institution can only strengthen both the institution of marriage and the family more generally. Allowing gay and lesbian couples to marry accords our relationships the same dignity and status as those of straight couples and enables gay and lesbian people to be treated in the same way as other members of our society. We believe that one of the greatest harms within their own families. Giving same-sex marriages the same legal effect This can only help to strengthen the family. ... towards encouraging violent, what they are ...

... a society profess. Recognising same-sex relationships on a par with marriages in terms of this act with the Civil Unions Bill that is currently before to be treated equally by the state. This is of particular concern in small towns where an alternate marriage officer may not be available. To make gay and lesbian couples search from place to place to find somebody willing to marry understanding among people of all sexual ... the situation this act should

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**SUBMISSION OF THE JOINT WORKING GROUP TO THE NATIONAL COUNCIL OF PROVINCES  
ON THE CIVIL UNION BILL**

**24 November 2006**

**Submitted by members of the Joint Working Group:**

Activate WITS  
Behind the Mask  
Cape Town Pride Festival  
Durban Lesbian and Gay Community and Health Centre  
Forum for the Empowerment of Women  
Gay and Lesbian Archives  
Gender DynamiX  
Glorious Light Metropolitan Community Church  
Good Hope Metropolitan Community Church  
Hope and Unity Metropolitan Community Church  
Inner Circle  
Jewish OUTlook  
LEGBO Northern Cape  
Lesbian and Gay Equality Project  
Pietermaritzberg Gay and Lesbian Network  
OUT LGBT Well-being  
Out In Africa South African Gay & Lesbian Film Festival  
Rainbow UCT  
Triangle Project  
XX/Y FLAME

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The Joint Working Group, a national network of twenty lesbian, gay, bisexual and transgender (LGBT) organisations, welcomes the historic step taken by the National Assembly on 14 November 2006 to allow lesbian and gay people the choice to get married.

Three key changes to the original Civil Union Bill have led us to believe that the Bill passed by the National Assembly, and before you today, in the most part accords with the requirements and values of our Constitution regarding the legal recognition of same-sex relationships. These key changes are as follows:

- First, the current Bill before you does not set up a separate institution solely for lesbian and gay people. Both heterosexual and same-sex couples may choose to marry in terms of the current Civil Union Bill.

We objected to the initial version of the Civil Union Bill on a number of central grounds, the main one being that it created a 'separate and unequal' structure for the recognition of lesbian and gay relationships. Our submission to the Portfolio Committee on Home Affairs in the National Assembly argued that the creation of this separate structure did not accord with the requirements of the Constitution in that it violated the dignity, equality and freedom of lesbian and gay people. It thus failed to meet the requirements of the *Fourie* judgment in that it did not provide the same status, rights and responsibilities for lesbian and gay people that heterosexual people have in marriage. The Bill before you largely addresses this concern in that it applies to both opposite and same-sex couples.

- Secondly, lesbian and gay people have been unequivocally given the right to marry and will be able to achieve the same status that heterosexuals have in their marriages. Marriage has a long history, a particular standing in our society and a range of associated rituals. Marriage, for many, also has a religious and spiritual meaning. No other institution has these attributes and, particularly not one that is a recent creation of statute.<sup>1</sup> The Bill before you allows same-sex couples to solemnise their relationships as marriages and have them recognized in law as such. In this way, lesbian and gay relationships are accorded the same status as heterosexual relationships.

Interestingly, the National Assembly has in fact also expanded the choice for same- and opposite-sex couples, by allowing them both to choose to enter into civil partnerships

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<sup>1</sup> The following quotation by the famous philosopher Ronald Dworkin ("Three Questions for America" (2006) New York Review of Books) explains the unique importance of allowing gay and lesbian people to be included within the institution of marriage:

"The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social and personal meaning. It means something slightly different to each couple, no doubt. For some it is primarily a union that sanctifies sex, for others a social status, for still others a confirmation of the most profound possible commitment. But each of these meanings depends on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered: it enables two people together to create value in their lives that they could not create if that institution had never existed...If we allow a heterosexual couple access to that wonderful resource but deny it to a homosexual couple, we make it possible for one pair but not the other to realize what they both believe to be an important value in their lives".



instead of marriages. Some people regardless of their sexual orientation do not wish to link themselves to the status, history and traditions of marriage. The Civil Union Bill gives all couples the opportunity to decide whether they want to form a marriage or a civil partnership whilst at the same time acquiring the same legal rights and responsibilities for their relationships. This is a far-reaching, progressive move and we believe in time, it signals the possibility that the Civil Union Bill can become the overarching piece of legislation dealing with different forms of civil unions, including all forms of marriage and civil partnerships.

- Finally, Chapter 3 dealing with domestic partnerships has been severed from the Civil Union Bill. We believe that it is critical that legislation - a Domestic Partnership Bill - be tabled in Parliament as a matter of urgency so as to ensure that vulnerable people who are, for whatever reason, unable to marry are able to gain legal protection for their relationships. However, we do not believe that domestic partnerships should be regulated in the same Bill as marriages or civil partnerships.

Through making these changes and passing the Bill that is now before you today, the National Assembly has signaled its commitment to the transformation of our society from one based on unfair discrimination and exclusion to one based on equality and dignity for all, and that the values of our Constitution are made real for all people, irrespective of their sexual orientation or marital status. The Bill signals a rejection of previous attempts to render lesbian and gay people as second-class citizens through a separate legal institution. As such, the inclusion of lesbian and gay people within the institution of marriage powerfully demonstrates that law-makers wish to ensure that all human beings are treated with dignity.

Whilst welcoming the spirit of the Bill, the Joint Working Group still believes that there are a number of respects in which it can be improved. First, we believe that the current situation of having various separate pieces of legislation dealing with marriage - including the Marriage Act, the Recognition of Customary Marriages Act and the Civil Union Bill - should be regarded as an interim measure only. There is no need or justification for so many separate pieces of legislation that effectively perform the same legal function. A parallel administrative system for the different statutes only increases the burden on state machinery and is likely to lead to confusion. We urge the government in the medium term to rationalize our marriage laws and create one legal regime for all in South Africa. We believe that the Civil Union Bill as it stands could become the basis of an integrated law recognizing all forms of civil union - including marriage and civil partnerships.

In relation to the specific sections of the Bill, we believe that there are three main problems.

- First, in terms of section 5 of the Bill, any minister of religion or person holding a responsible position in any religious institution wishing to be registered as a marriage officer for the purposes of solemnising marriages is required to await the designation of his or her religious institution as an institution that may solemnise marriages in terms of this Bill<sup>2</sup>. Only then, may such a person submit a letter of request to the Minister of Home Affairs to be registered as a marriage officer him or herself. This provision will make it impossible for any minister or responsible person in a religious institution to solemnise

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<sup>2</sup> In terms of s5(2) read with s5(4).

marriages under this Bill where his or her religious institution has not made an application<sup>3</sup> to be designated or has not been so designated despite having made such application.<sup>4</sup>

This will have a negative impact on many ministers of religion who wish to be marriage officers and who may decide to act against the dictates of the majority of the denomination of which they form part. Some religions may also not wish to take the step of being designated under the Civil Union Bill but may be happy for individual marriage officers to perform marriages in terms of the Civil Union Bill. Moreover, some individual ministers may wish to object to discriminatory policies of the denominations of which they are part and yet they will be precluded by the State from doing so. In this way, the State will prioritise the interests of religious authoritarian structures over those of the individual. This would violate the individual's constitutional rights to freedom of religion, belief and conscience referred to in the preamble of this Bill and thus would inappropriately silence debate and dissent within religious denominations.

- Section 6 of the Bill is crafted in far wider terms than its counterpart in section 31 of the Marriage Act. In terms of section 6 of the Bill, any marriage officer may object on grounds of conscience to solemnising civil unions. By contrast, in terms of section 31 of the Marriage Act, only a minister of religion or a person holding a responsible position in a religious denomination or organisation may refuse to solemnize a marriage. Such a person may only refuse to perform a marriage on the basis that 'it would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organisation'.

We have no objection to religious denominations only marrying people according to the dictates of their faith. We do, however, object strongly to allowing civil marriage officers to decide who they will marry and who they won't. This is particularly problematic when the basis for exercising conscience is limited to sexual orientation. The space provided in the Marriage Act for respecting the religious beliefs of religious marriage officers has been vastly, and illegitimately, extended so as to allow all marriage officers under the Bill to object to solemnising marriages or civil partnerships of same-sex couples on the basis of conscience.

The differences between these two exclusions suggests that there is greater reason to object to the legal recognition of same-sex couples than to that of heterosexual couples: but why should this be unless the Bill were entrenching the view that same-sex relationships are in some sense inferior to heterosexual relationships? Again, the message is reinforced that same-sex relationships merit different and unequal treatment to heterosexual relationships. Public officials should be required to uphold the law and not cast judgment on people who approach them expecting them to fulfill an impartial official function. To be turned away by a civil marriage officer would be deeply insulting and hurtful. Public officials, particularly magistrates, are required to honour and operationalise the Constitution. For this reason, we believe that this section may legitimate prejudice and is unconstitutional.

We believe that parliament has two choices here: <sup>1</sup> either it restricts conscientious objection to religious marriage officers; <sup>2</sup> or it allows civil marriage officers to object to

<sup>3</sup> In terms of s5(1).

<sup>4</sup> In terms of s5(2).

marrying all couples that their religion does not allow them to marry. It cannot allow conscientious objection solely on the basis that parties to a marriage are of the same-sex.

- Section 8(6) has unfortunately survived the previous version of the Civil Union Bill and not been amended accordingly, as it refers specifically to same-sex couples where the Civil Union Bill applies both to heterosexuals and lesbian and gay people. It erroneously suggests that only lesbian and gay people may conclude civil unions in terms of the Civil Union Bill. This section consequently must be amended to clarify that lesbian and gay as well as heterosexual couples are subject to the provisions of the common law in relation to prohibited degrees of relationships.

Peter Jonathan Berger

In light of these aforementioned problems with the Civil Union Bill that is before you today, we make the following recommendations to assist this committee:

#### Section 5

Two new sections need to be added and another two amended, as follows:

Insert new section 5(5): "Any minister of religion or any person holding a responsible position in any religious denomination or organization, which has not been designated by the Minister in terms of subsection (2), may apply in writing to the Minister to solemnize marriages under this Act.

Insert new section 5(6): "The Minister and any officer in the public service authorized thereto by him or her may designate the person applying to him or her in terms of subsection (5), for as long as he or she is a minister of religion or is a person holding a responsible position in any religious denomination or organization, as a marriage officer for the purpose of solemnizing marriages in accordance with this Act."

Renumber existing section 5(5) as 5(7) and amend as follows: "Every designation of a person as a marriage officer under subsections (4) or (6) shall be by written instrument and the date as from which it shall have effect and any limitation to which it is subject shall be specified in such instrument".

Renumber existing section 5(6) as 5(8) and amend as follows: "The Minister and any officer in the public service authorized by him or her may upon receiving a written request from a person designated as a marriage officer under subsections (4) or (6), revoke in writing, the designation of such person as a marriage officer for purposes of solemnizing marriages under this Act".

#### Section 6

Amend section 6 as follows:

Section 6(1): "A marriage officer, other than a marriage officer referred to in section 5, may in writing inform the Minister that he or she has a sincere religious objection to officiating at marriages that do not conform to the rites, formularies, tenets,



doctrines or discipline of his or her religious denomination or organization, whereupon that marriage officer may not solemnize such marriages.”

Section 6(2): “Upon receipt of any communication referred to in subsection (1), the Minister must take all reasonable steps to ensure that there is at least one marriage officer available within the local municipality of which the marriage officer referred to in subsection (1) is a part to officiate at all marriages in terms of this Act”.

#### Section 8(6)

Amend section 8(6) as follows:

“A civil union may only be registered by prospective civil union partners who would not be prohibited by the common law, as amended by section 13(2) of this Act, from concluding a marriage”.

#### **Closing**

Minister of Defence Mosiuoa Lekota, when addressing the National Assembly on the Civil Union Bill, made a call to our leadership: “This country cannot afford to continue to be a prisoner of the backward, timeworn prejudices, which have no basis. The time has come that we as this society, as this Parliament, on behalf of our nation, must lead.” The National Council of Provinces now has the mandate to take this lead in our nation and pass the Civil Union Bill which will for the first time ensure that all citizens, irrespective of their sexual orientation, are entitled to have their relationships recognized fully by the law.

The South African Constitution both allows for and embraces a diversity of human relationships, and it does so, based on the foundational values of dignity and equality for all South Africans. The Minister of Home Affairs, Nosiviwe Mapisa-Nqakula reminded us in her address to the National Assembly on this Bill of “our nation’s commitment to this noble principle of equality [which] should be the cornerstone of the society we want to build. In breaking with our past, therefore, we need to fight and resist all forms of discrimination and prejudice, including homophobia.”

We believe that the Civil Union Bill, amended according to our proposals in this submission, will represent a step towards the realization of our important and compelling constitutional vision of seeking to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.<sup>5</sup>

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<sup>5</sup> Preamble to SA Constitution.



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## CIVIL UNION ACT (As separate but= to the Marriage Act

- (a) Civil union b) registration process c) legal consequences d) termination of civil unions.

- 1 In essence it only covers same-sex marriages.
- 2 It explores one side of the bill only – that of civil partnership – it does not define marriage. Civil union means the voluntary union of 2 persons of the same sex concluded in terms of this Act
- 3 Whilst we welcome the progressiveness of the bill with re to same sex marriage, clearly it is still unconstitutional that other religions and spiritual groupings cannot marry legally.
- 4 Interesting enough the current marriage act does not cover same sex marriages.
- 5 In a secular state such as ours it unthinkable that one dominant religion – Christianity can still manipulate legislation. In a true democracy this would have changed a long time ago. It's unthinkable that a secular state should have a bias toward certain Christian denominations.
- 6 By not clearly defining the union between heterosexual or same sex partners within the paradigm of a marriage, leaving it all to a 'civil' partnership, the current status quo remains unconstitutional and unchanged
- 7 There has been a call for a Reformed Marriage Act, which would run parallel to the Civil Union Act. It would include same same=sex marriages.
- 8 An important amendment is that the Minister of Home Affairs may now designate ministers of any religion or persons holding a responsible position in any designated religious institution to become religious marriage officers. We welcome this important amendment but at the same time do not see the practicality of this when other religions are not yet recognised.
- 9 There are therefore a no of things that will be challenged in the constitutional court. The concerns of non-Christian religions must be accommodated.
- 10 Other countries approaches to these dilemmas need to be looked at

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Arico Kotze - Civil Union Bill

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**From:** "Thomas, Heidi"  
**To:**  
**Date:** 2006/11/24 11:40 AM  
**Subject:** Civil Union Bill

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To Whom It May Concern:

I'm 24 year old proudly gay South African. I live and breathe in the same air that any other person does in this country whether straight or gay. I believe in the freedom that all those before us fought so hard for. I believe in the democracy that we as a nation stand for and the constitution that this young country holds so dear.

I'm a young gay coloured woman who believes strongly that I deserve as much respect and freedom as the next person. How is my loving someone regardless of sex such a sin? Do I not have the right to love who I see fit to receive my love? Do I not have the right to express my love in marriage? To share the benefits and recognition that straight couples have privilege to?

We come from a past where people hid behind bibles to promote apartheid, to segregate people and diminish the spirit of people. How can we regress back to that? Everyone is entitled to their spiritual and religious beliefs but can we justify those beliefs if it means denying people their basic freedom?

We are not asking for special rights. We are asking for our partnerships to be recognized and protected by the law. We are not asking for priests, rabbis or imams to marry us; we are not asking for religious recognition. We are asking the government to uphold the constitution that states you may not discriminate on the grounds of race, gender, sexual preference and religion.

Sincerely  
Heidi Thomas