

SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 101

Project 59

Islamic Marriages and Related Matters

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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PREFACE

This Discussion Paper has been prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The paper is published in full so as to provide persons and bodies wishing to comment or make suggestions with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit **written** comments, representations or requests to the Commission by 31 January 2002 at the address appearing on the previous page. The project co-ordinator, Mr H Potgieter, will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; if they wish, respondents may indicate that they abide by their previous comments, if that is the case.

The project leader responsible for the project is Mr Justice M S Navsa of the Supreme Court of Appeal. He is also the Chairperson of the project committee appointed to assist the Commission in the investigation. The other members of the project committee are Professor N Moosa (lecturer at the University of the Western Cape), Ms Z Seedat (member of the Commission), Ms F Mahomed (member of Parliament), Dr R A M Salojee (member of the Gauteng Legislature), Mr M S Omar (attorney, Durban), Moulana A A Jeena (United Ulama Council) and Sheikh/Advocate M F Gamielien (Islamic law consultant).

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CHAPTER 1

INTRODUCTION: THE PROBLEM

1.1 Muslim Personal Law is a substantive and comprehensive system of law. Its core principles are contained in the Holy *Qur'an* itself, as explained, in practice, through the Prophetic model, known as the *Sunnah*.¹

1.2 Because of its intrinsically divine basis and character, the preservation and effective implementation of this system is integral to, and is at the heart of, the preservation of the community itself, its distinct identity, character and ethos.²

1.3 In the context of a secular state in which Muslims constitute a minority community, the non-recognition by the state of the system of Muslim Personal Law, or aspects thereof, has caused serious hardships and produced grossly unjust consequences.³

1.4 Historically, and until the landmark 1999 Supreme Court of Appeal decision in **Amod v Multilateral Motor Vehicle Accidents Fund**,⁴ a marriage contracted according to Islamic Law was regarded by our courts as null and void *ab initio*, as being contrary to public policy, with the result that the marriage and its consequences were not legally recognised in any form.⁵

¹ The first and primary source of Islamic Law is the Holy *Qur'an*, which is regarded by Muslims as the Word of God (Allah). The second primary source of Islamic Law, which follows the Holy *Qur'an* in importance is the *Sunnah*. The *Sunnah* is an independent source of Islamic Law and may be defined as "a word spoken or an act done or a confirmation given by the Holy Prophet Muhammad". Muslims are ordered in the Holy *Qur'an* to obey Allah and his Holy Prophet, both forms of obedience being mandatory in all circumstances. For example, the Holy *Qur'an* states: "And obey Allah and the Messenger so that you may be blessed" (3:132). See also (4:59), (5:92), (8:1), (8:20), (8:46), (24:54), (47:33), (58:13) and (64:12). The third source of Islamic Law is the consensus of jurists, known as IJMA. The fourth source is known as *Qiyas* which is a form of analogical deduction based on the Holy *Qur'an* and *Sunnah*, to be applied in the specific case where no express text of the Holy *Qur'an* or *Sunnah* exists on a particular issue. The *Sunnah* has been authentically preserved in the form of the *Hadith*. See generally the authority of *Sunnah* Justice Mufti Muhammad Taqi Usmani – *Idaratul Qur'an*, Karachi, Pakistan.

² The main principles governing Muslim Personal Law is expounded by the Holy *Qur'an* itself in a number of verses. For example, *Surah Talaq* (being Chapter 65) is devoted primarily to the issues of *Talaq*, *Iddah* and maintenance.

³ See paragraph 1.6.

⁴ 1999 (4) SA 1319 (SCA).

⁵ The apparent rationale for not recognising Islamic marriages was because they were regarded by our courts as being polygamous. The Appellate Division reaffirmed this in **Ismail v Ismail** 1983 (1) SA 1006 (AD) when it stated that an Islamic marriage was "*contra bonos mores* in the wider sense of the phrase *ie* as being contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society" (at p 1026). This approach may be traced to as early as 1860, being the case of **Brown v Fritz**

1.5 The decision in **Amod**⁶ recognised a monogamous Islamic marriage for the purposes of support only, the case dealing with a widow's claim for loss of support suffered by her in the context of the common law dependant's remedy. The case itself focuses on the urgent need for a comprehensive recognition of aspects of Muslim Personal Law.

1.6 In the result, the current position is that the legislature has still not redressed the gross inequities and hardships arising from the non-recognition of Islamic marriages. The issues requiring attention *inter alia* are:

- * the status of a spouse or spouses in an Islamic marriage or marriages;
- * the status of children born of an Islamic marriage;
- * the regulation of the termination of an Islamic marriage;
- * the difficulties in enforcing maintenance obligations arising from an Islamic marriage;
- * the difficulties in enforcing custody of, and access to, minor children;
- * the proprietary consequences arising automatically from an Islamic marriage are not recognised at law, and therefore not enforceable.

1.7 Whilst appreciating the urgent and imperative need to redress the gross inequities and hardships through the legal recognition of aspects of Muslim Personal Law within the Constitutional framework, certain respondents have raised a crucial concern:⁷

Brown's Executors and Others (1860 3 Searle 313 at 318) which described an Islamic marriage as "recognized concubinage".

⁶ This case radically departed from previous decisions by recognising a duty of support flowing *ex lege*, as an incident of a *de facto* Islamic marriage, as being worthy of legal protection, having regard to the new ethos which prevailed on 25 July 1993 when the cause of action arose. The common law was developed to accommodate the new ethos.

⁷ This concern is premised on the fact that from a Muslim standpoint, any deviation from Islamic Law would amount to a violation of divine law. This, in turn, would negate the very purpose of recognising aspects of Muslim Personal Law.

Would recognition of the system or aspects thereof be consistent with Islamic Law?

1.8 The Project Committee⁸ in turn wishes to emphasise that it appreciates this concern. It has endeavoured to formulate the proposals contained in this Discussion Paper within the parameters of Islamic Law, and in accordance therewith.

1.9 The Project Committee invites all interested persons, bodies and institutions to make suggestions for improvement and to draw its attention to any shortcomings.

⁸ See paragraph 2.3 *et seq.*

CHAPTER 2

THE BACKGROUND TO THE INVESTIGATION

2.1 The political transformation in the country, commencing with the adoption of the Interim Constitution on 27 April 1994, (Act 200 of 1993) and a Final Constitution (Act 108 of 1996) which came into force on 4 February 1997, was the catalyst for renewed attempts at the legal recognition and enforcement of aspects of Muslim Personal Law.⁹

2.2 Both the Interim and Final Constitutions, in guaranteeing freedom of religion, provided that the State may pass legislation recognising systems of personal and family law, but subject to the Constitution. Section 15 of the Final Constitution provides as follows:

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.**
- (2) Religious observances may be conducted at state or state-aided institutions, provided that –**
 - (a) those observances follow rules made by the appropriate public authorities;**
 - (b) they are conducted on an equitable basis; and**
 - (c) attendance at them is free and voluntary.**
- (3) (a) This section does not prevent legislation recognising –**
 - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or**
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.**
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.**

2.3 Under the new dispensation various endeavours on the part of the Muslim community to seek legal recognition of aspects of Muslim Personal Law finally led to the establishment of a

⁹

The previous attempts, during the apartheid era, at securing recognition of Islamic marriages did not enjoy the support of the broader community, because they were *inter alia* perceived as giving legitimacy to the white minority regime and its unjust policies.

Project Committee of the South African Law Commission in respect of its investigation into Islamic Marriages and Related Matters.¹⁰

2.4 The then Minister of Justice established this Project Committee on 30 March 1999 in terms of section 7A(b)(ii) of the South African Law Commission Act, 1973.

2.5 The terms of reference of the Project Committee is “to investigate Islamic marriages and related matters with effect from 1 March 1999 for the duration of the investigation”.

2.6 The deliberations of the project committee since March 1999 led to the compilation of an Issue paper (Issue Paper 15) which was circulated for public comment in July 2000.

2.7 The purpose of the Issue Paper was to identify the issues and the problem areas, arising out of the investigation, with a view to maximum consultation with all interested parties and bodies, so as to obtain their responses and inputs in arriving at an appropriate solution to the issues and problems as identified therein.

2.8 The following tentative proposals were put forward in the Issue Paper:

- * Couples contemplating a marriage should have the right to choose a marital system which is compatible with their religious beliefs and with the Constitution.
- * To the extent that legislation is to give effect to the recognition of Islamic marriages, the new statute ought to provide for both new marriages and existing marriages.
- * In the case of new marriages, the legislation should provide at least for the following matters:

¹⁰ This was not the first Project Committee of the Commission to give attention to the recognition of Islamic marriages. As far back as 1990 a previous committee met to consider a working paper dealing with the nature of Islamic law and the conflict between the common law and Islamic law as well as the observance of Islamic law in South Africa. A comparative legal study received further attention during the year. Further work in the investigation was delayed by, amongst others, the finalisation of the 1996 Constitution. The Commission reconsidered the status of the project in 1996 and decided to accord the investigation the highest possible priority rating and to recommend the appointment of a Project Committee. During March 1997 two workshops were held in order to involve the public in the planning of the investigation and to elicit nominations for appointment to the Project Committee. As a result of advertisements in the press and the open invitation extended at the workshops 78 nominations were received. The constitution of the present Project Committee is the result of those nominations.

- (i) the age of consent, which should be 18 years;
- (ii) actual and informed consent to the conclusion of a marriage in written form;
- (iii) the designation of marriage officers who are entitled to perform Islamic marriages;
- (iv) the registration of marriages by the signing of a marriage register;
- (v) the formalities pertaining to the time, place and manner of solemnisation of Islamic marriages;
- (vi) the appropriate marriage formula for the solemnisation of an Islamic marriage;
- (vii) a prohibition on marriages within certain prohibited degrees of relationship, including the rules relating to fosterage according to Muslim Personal Law;
- (viii) a standard contractual provision in terms of which a Muslim Personal Law system is established in the event of parties contemplating a Muslim marriage;
- (ix) the prescription of penalties for false representations or statements.

* In the case of existing marriages, and in view of the decision in **Amod & Another v Multilateral Motor Vehicle Accidents Fund**, in which the Court gave legal recognition to a Muslim marriage for purposes of the duty of support, little difficulty arises in affording recognition to *de facto* monogamous marriages. It was suggested that such marriages would require registration upon satisfactory proof to a designated marriage officer that there is an existing Islamic marriage. Proposals were invited concerning the affording of recognition to polygamous marriages entered into before the commencement of a new statute, particularly in regard to potential complications such as existing proprietary rights, maintenance, succession and social welfare benefits.

* Regarding the consequences of registration of existing Islamic marriages, it was suggested that parties who choose to register existing Islamic marriages must reach agreement as to the appropriate matrimonial property regime. Again no particular difficulties were envisaged in respect of *de facto* monogamous marriages. In respect of existing polygamous marriages account would have to be taken of the rights of each of the parties. Proprietary rights and interests as well as the interests of the children born of the various marriages would have to be protected.

* Competing rights in the event of an existing civil marriage and a subsequent or prior Islamic marriage have to be addressed.

- * Regarding divorce and the issue of dissolution of a marriage by *Talaq*, it was suggested that the bonds of marriage should be dissolved on grounds contemplated in the Divorce Act, 1979. It was suggested that marriage officers should be required to recognise a *Talaq* in the presence of the parties and for record and official purposes and for consonance with the Constitution, a *Talaq* should be confirmed by a court. Moreover, it was suggested that legislation which recognises aspects of Muslim Personal Law must also provide for an effective system of dispute resolution.
- * In order to avoid abuse, it was suggested that any proposed legislation stipulating the grounds on which the conclusion of a polygamous marriage would be permissible, has to be narrowly circumscribed in recognition of the limitations set out by the *Qur'an* itself. Comment was required on whether a court should objectively decide that the factual (*Qur'anic*) circumstances exist justifying a second marriage.
- * In view of the fact that wives and children frequently require protection to ensure their continued welfare upon the dissolution of a marriage, it was proposed that protections similar to those in the Divorce Act, 1979, and the Recognition of Customary Marriages Act, 1998, should be included in any statute giving recognition to Muslim Personal Law.

2.9 As a result of the circulation of the Issue Paper, various interested parties responded. Those responses are summarised in Chapter 3. The responses were extremely useful in the proper consideration of all issues raised, and in developing both a vision, and practical solutions, to the legal implementation of Muslim Personal Law in South Africa. The Project Committee accordingly expresses its sincere appreciation to the respondents whose names appear in Annexure B of this Discussion Paper for their valuable inputs and representations.¹¹

¹¹ These inputs and representations were properly taken into account in the formulation of the draft Bill contained in Annexure A.

CHAPTER 3

SUMMARY OF SUBMISSIONS MADE BY RESPONDENTS IN RESPECT OF ISSUE PAPER 15: ISLAMIC MARRIAGES AND RELATED MATTERS

3.1 The submissions received by the Commission from the respective respondents are summarised in this Chapter:

(1) ***Islamic Unity Convention (IUC)***

3.2 The IUC was extremely critical of the Issue Paper published by the Commission and devoted, to this end, a substantial portion of its submission, criticising the 'nature and scope' of the research paper of Advocate Mohammed Vahed.¹² Its position was that the Issue Paper was an attempt by the SALC 'to impose its own ideological views on the Muslim community'. In particular, it held the view that the Issue Paper betrayed a 'Eurocentric bias', which ignored the value of *ubuntu*.

3.3 Its chief response to the introduction of Muslim Personal Law 'as a system of law into South African law' was that the proposals of the Commission 'stand rejected in their entirety'. Absent from this entire exercise, it is regrettably pointed out, is any meaningful contribution, by the IUC, to the proposals, which it stated, were 'fatally flawed'.

(2) ***Institute of Islamic Shari'ah Studies (ISS)***

3.4 The response of the ISS is based on its rationale that the Shari'ah (MPL) is irreconcilable with the South African Law and that either the former will have to 'give way' to the latter or the latter will have to be altered to 'accommodate' the former.

3.5 In its submissions proper it reiterates the existence of 'an insurmountable clash between the Shari'ah and South African Law'. However, notwithstanding the foregoing, it seemed to support much of the recommendations enshrined in the Issue Paper as will be evidenced from the summary below.

¹² Enclosed as an Annexure to Issue Paper 15.

Choice of marriage system

3.6 A true Muslim, it submits, has no choice whatsoever though issues pertaining to marital property and related issues can be contractually 'regulated'.

Recognition of Muslim marriages

Age of consent

3.7 It supported the suggestion in the Issue Paper subject to the rider that a 'proper and competent Islamic authority' be permitted to make a rule 'for a lower age'.

Actual consent

3.8 It supports the suggestion in the Issue Paper.

Marriage officers

3.9 It supports the suggestion subject to the rider that consideration be given to 'groupings, institutions or individuals who must have the requisite knowledge of the laws pertaining to Muslim marriages'.

Registration

3.10 It supports the suggestion but adds that prospective partners must get to know about 'the marriage history of each other as to divorce, anti-Muslim conduct, neglect of maintenance etc to prevent deceit of any party, something that had occurred quite often in our society'.

Time, place and manner of solemnisation of a Muslim marriage

3.11 It submits that all intending parties complete and execute an application form applying to be married indicating free and clear consent to marry their prospective or intended spouse. It supports the registration regime as proposed per its recommendation 16.

Marriage formula

3.12 It supports the suggestion through its own recommendation 17 supplemented with the rider that ‘the groom must unconditionally, unambiguously and verbally accept and sign his acceptance at the actual marriage ceremony.’

Prohibition on certain marriages

3.13 It supports the suggestion through its own recommendation 18 and further it submits that since there is no such thing as adoption in the Shari’ah, there is no prohibition for marriages ‘in an adoptive situation’.

Muslim marriage contract

3.14 It makes the recommendation that a ‘register of Muslim jurists’ be drawn up who will assist in drawing up such contracts. It also recommends that there be a specific clause prohibiting the issuing of *Talaq* ‘without a valid Shari’ah sanctioned reason should be included as well as reason when a *Faskh* should be granted to the wife’.

(3) ***Natal Law Society (NLS)***

3.15 The NLS, mindful of ‘other factors involved including resistance from the religious groups themselves’ supports, in principle, the recognition of Muslim marriages. It submitted that there were obstacles such as the issue of polygamy, which have to be overcome.

(4) ***Waheeda Carvello: Women’s Activist for Justice and Equality***

3.16 We would be failing in our duty to accurately summarise all submissions made without endeavouring to capture the essence of the thought processes and the thinking trenchant behind every submission made to the Commission. Accordingly Waheeda Carvello’s erudite submission deserves more than a cursory mention thereof.

3.17 Against the background that *Qur'anic* values have been dominated from a male perspective, Waheeda Carvello makes the point that the foregoing has had 'a direct negative impact on the implementation of Muslim Personal Law throughout the Muslim world'.

3.18 In her analysis of the Issue Paper her submissions are as follows:

Choice of marriage system

3.19 It is an erroneous assumption, itself in conflict with the constitutional right of freedom of religion, that Muslim couples will choose 'another system of marriage besides an Islamic marriage'. In sum she does not support the suggestion in the Issue Paper. Recognition of Islamic marriages, she posits, will negate the need for a dual system of marriage.

Age of consent

3.20 She supports the proposal in the Issue Paper. Her understanding is that the *Qur'an* does not mention a specific age but rather 'insists on the level on intellectual maturity' and that the importance of thus lies in the fact that both parties must be able to exercise their own judgment and power of attorney.

Form of consent

3.21 She supports the suggestion, through her recommendation 13, citing alleged abuse of the laws of Islam where consent by proxy is often the norm and she further makes the recommendation that the consent form *include a test to determine the HIV status of both parties* (our emphasis).

Registration of marriages

3.22 She supports the suggestions through her recommendation 14 on the grounds that it is in accordance with the constitutional right of Muslim South Africans. Registration would centralise records and prove beneficial to women and children of polygamous unions and thus prevent the alleged current abuse under the current system where 'unstructured records' maintained by local mosques.

Marriage officers

3.23 She supports the suggestions through her recommendation 15 which recommend that marriage officers should be familiar with both the civil as well as Muslim Personal Law and further makes the recommendation that such marriage officers conduct pre-marriage counselling.

Time, place and solemnisation of marriages

3.24 Whilst in principle she agrees with the suggestion pertaining to the foregoing, she makes the recommendation that *Qur'anic* provisions relating thereto be strictly adhered to with the bride having the option to be in the same room with the groom where the marriage is being solemnised.

Marriage formula

3.25 She makes the recommendation that the suggestion in the Issue Paper should ensure that 'legislation includes the current marriage formula in terms of Muslim Personal Law'.

Prohibition of certain marriages

3.26 She supports the suggestion supplemented by the rider that the *Qur'anic* law regulating provisions to the prohibitions of certain marriages must be applied.

Marriage contract

3.27 It is a *sine qua non* of Islamic marriages, she submits, that a marriage contract be drawn up in accordance with *Qur'anic* Law and that 'no compromise in this regard can be adhered to'. Concerns about HIV, divorce, maintenance and declaration of marital status compel a recommendation that the foregoing issues be incorporated in every marriage contract. She supports the suggestion in the Issue Paper, subject to the foregoing.

Recognition of polygamous marriages

3.28 She was highly critical that the Issue Paper failed to address adequately the issue of polygamous marriages. An understanding of Islamic polygamous marriages in terms of *Qur'anic* Law, she submits is imperative since the injunctions of the *Qur'an* pivot around ideals of justice, equality and balance in every sphere of life. Her exegesis on polygamy makes refreshing reading that was found to be very useful.

Matrimonial property regime

3.29 She makes an interesting comment that all Muslim marriages are marriages out of community of property and that this has often been misunderstood and abused due to women allegedly being robbed of their Islamic identity throughout the ages. She therefore submits that it is important that new legislation protect women.

Divorce

3.30 She agrees with the Issue Paper that divorce is one of the most potentially contentious issues in MPL and thus makes the recommendation that divorce procedures as stipulated in the *Qur'an* be strictly adhered to. In principle she appears to support the suggestion in the issue paper regarding the grounds for divorce as well as the recognition of 'additional grounds to cater for special facts and circumstances, which may arise in an Islamic marriage'.

Dispute resolution, registration of divorce and maintenance

3.31 She makes the suggestion that an arbitration procedure adhering to the *Qur'anic* Law be adopted and further that as regards divorce, that there be an appropriate registration procedure with an appropriate authority being charged to inform the couples of their respective rights and duties issuing from the divorce.

(5) ***Association of Accountants and Lawyers for Islamic Law (AMAL)***

3.32 AMAL, in its elaborate submission is in support of legislation recognising Islamic marriages provided that such legislation did not in any way change the principles enshrined in

the Shari'ah. It strongly believes that the mechanism enforcing such legislation 'must be appropriate in all the circumstances'. The current proposals in the Issue paper, however, are irreconcilable from its perspective. From its existing comments one can glean an outright rejection of almost all the suggestions contained in the Issue Paper. Its greatest concern surrounds the contentious issues of *Talaq*, polygamy, solemnisation of marriages etc.

3.33 In its preliminary remarks it categorically states that its review is 'a reasoned critique of the Issue Paper and not a legal rebuttal nor an Islamic counter proposal'. For the sake of completeness its standpoint on the choice of marriage system is that it is opposed to the 'freedom of choice' implicit in the suggestion in the Issue Paper. A choice afforded to couples could be construed as affording them an opportunity of leaving the fold of Islam or perpetrating a 'serious act of unbelief'. There are several unanswered questions in the submission of AMAL which, in its thinking, would open Muslims to 'some form of exploitation, victimisation, exclusion or discrimination now or in the future'. One can glean from its position that before a couple is afforded a choice they would first have to be instructed about their rights and duties to each other, to their children and to the wider society and to this end it envisages the establishment of an Islamic Counselling and Arbitration Service (ICAS). It also proposed that the suggestion in the Issue Paper regarding choice that a marriage contracted under a system of family, personal and succession laws in accordance with the religion of Islam be recognised as per sections 15(3)(a)(i) and (ii) of the Constitution.

3.34 Its response to the suggestion under Recognition of Islamic Marriages can be summarised as follows:

Age of consent

3.35 It submits that setting age barriers 'is ignoring reality' which in turn will not curb promiscuity and will instead 'encourage irresponsibility and a lack of accountability'. By setting such age barriers it expresses the concern that it will 'criminalise decent people who are doing nothing but living by their long-established norms and values'.

Actual consent

3.36 Its response to actual consent is that such consent can be 'verbal or by proxy, and does not have to be in written form'. Consent is usually obtained in the presence of two witnesses and it suggests that this would support the 'actual consent' requirement.

Muslim marriage officers

3.37 There seem to be no objection to the suggestion for the recognition and designation of Marriage Officers who are entitled to perform Islamic marriages.

Registration of marriages

3.38 It considers such registration as 'laudable and desirable' for administrative purposes from even a religion perspective. It proposes that the person overseeing an Islamic marriage should maintain a marriage register on behalf of the state.

Time, place and manner of solemnisation

3.39 It considers 'solemnisation' as an alien concept considering the fact that an Islamic marriage is contractual and not sacramental in nature. It does suggest that the method of 'solemnisation' should be that as sanctioned by Islamic law.

Marriage formula

3.40 It suggests that 'details as per Islamic law' be spelt out rather than referring to the Marriage Act.

Penalties for false representation

3.41 It suggests that Islamic law does provide for a similar principle and that perhaps the definition thereunder be incorporated.

Existing marriages / 'polygamous' marriages

3.42 It made no proposal or counter suggestion, but rather reacted to the 'subjective statements expressed under the above heads as being premised due to 'established eurocentric prejudices'.

3.43 Regrettably the remainder of its response contains no proposals and one can conclude that AMAL has adopted an irreconcilable posture to the suggestions as posited in the Issue Paper.

(6) ***Commission on Gender Equality (CGE)***

3.44 The CGE affirms the necessity of recognition of Muslim marriages as a means to bring to an end the hardships endured by many Muslim women and which emanates from non-recognition of Muslim marriages. It believes that the mechanisms to enable this need 'not be fundamentally divergent from existing South African law and our country's constitutional and international obligations'. The common thread inherent in its submission is the need to rid South Africa of all forms of unfair discrimination.

3.46 It views the debate not as one between the right to equality and the right to freedom of belief, but rather as one 'in terms of the divergent routes through which the constitutional framework and religious law approach the issues of equality, human dignity and non-sexism'. In this way the debate is expanded from one of competing rights to one of 'competing understandings and visions'.

3.47 Its assessment of prevailing perceptions in the Muslim community indicates an alarming lack of awareness amongst the ulama with the result that apart from the KZN and the 'Transvaal' chapters thereof none of them were able to make any substantive comments on the document and in fact there was a strong indication that they never examined the document itself.

3.48 In consultation with women's focus groups, it expressed noteworthy concerns regarding matters of divorce (*Talaq*) and difficulties faced by women in securing divorce against the refusal by the husband to agree to or to grant her divorce. On the issue of polygyny, whilst

women did not support a total ban thereon, the CGE reported that it was felt that it be strictly regulated in terms of the *Qur'anic* injunction and the ability of the husband to provide for his wives, and that the current accrual system did not take account of the women's non-financial contributions to a marriage.

3.49 'The varying community perspectives on MPL accompanied by the inherent power dynamics make obvious the less than even landscape whereupon MPL functions in South Africa presently'.

3.50 The foregoing quote highlights its standpoint and it is noteworthy that it is opposed to any system which perpetuates male dominance as well as providing legitimacy 'current discriminatory practices'. It does not define nor does it delineate what these are in any detail apart from its briefest summaries about the concerns expressed by women's focus groups in Cape Town. It can be safely concluded that it supports any move towards levelling the landscape whereupon MPL functioned.

3.51 In the light of the foregoing its proposals are:

- * Speedy amendments must be made to existing legislation to facilitate recognition of Muslim marriages.
- * Retrospective recognition of all existing Muslim marriages - both monogamous and polygynous.
- * The current property regime applicable to all civil law marriages must be extended to Muslim marriages.
- * New Muslim marriages must be conducted according to the civil law (appropriately amended to recognise Muslim marriages duly performed).
- * For all new marriages, 'as default the current property regime applicable to all other civil law marriages be extended to Muslim marriages'.

- * Divorce must be processed through a court according to civil law (appropriately amended to recognise Muslim marriages duly performed).

3.52 It recommends that both succession and custody of children born out of the union be treated according to civil law and that in terms of property regimes, there should be a general review of legislation towards ensuring that the value of non-financial contributions to a marriage are also considered.

(7) ***Women's Legal Centre (WLC)***

3.53 It supports legislative recognition of Muslim marriages as this would have beneficial legal consequences for spouses in areas like proprietary rights and inheritance and maintenance as well as access to justice.

Registration of marriages

3.54 Regarding the foregoing it submits that Muslim marriages should be registered with the Department of Home Affairs as is the case with marriages contracted in terms of the Marriages Act.

3.55 It provides a useful alternative where parties do not register their marriages. It proposes that the practice in the Recognition of Customary Act 120 of 1998, namely that a default position operates. It advocates that any proposed MPL Marriages Act adopt similar provisions and the effect is that from the date of its promulgation all marriages whether they are registered or not are automatically valid marriages.

Choice of marriage system

3.56 The WLC submits that though the Issue Paper proposes and in fact suggests that couples be accorded the right to choose the marital system 'which is compatible with their religious belief and the Constitution' the choices available to couples 'were not clearly stipulated' therein. It suggests that, the fact that a Muslim marriage is in the nature of a civil contract which required no written agreement for its validity, parties can still have clauses compatible with their

requirements introduced in the form of a written contract and that they be permitted access to an attorney for this purpose.

3.57 It suggests that couples be afforded the choice of -

- * concluding their marriage in terms of the Marriage act 25 of 1961 and their marriage would be treated like any other civil law marriage, or
- * concluding their marriage in terms of a statute which recognises and regulates Muslim marriages and divorces.

Age of consent

3.58 It does not agree with the 18 years suggestion as proposed and suggests that the Commission should perhaps consider something along the lines of section 26 of the Marriage Act.

Muslim marriage officers

3.59 It suggests that there should be a minimum requirement before someone qualifies as a Muslim marriage officer. It does not elaborate what these requirements should be.

Marriage register

3.60 It suggests that to avoid abuse in the case of polygamous marriages, the Department of Home Affairs register all marriages or alternatively that all marriages registered before an Imam should be forwarded to the Department of Home Affairs which records these marriages.

Time, place and manner of solemnisation

3.61 It suggests that these be adapted to the MPL context. It makes similar suggestion in respect of the heading 'prohibition of certain marriages'.

Choice of matrimonial property regime

3.62 Under this head it submits that whilst the Issue paper alludes to choices of matrimonial system for existing Muslim marriages, the same does not apply in respect of future marriages entered into after the new statute.

(8) ***Mr Fanyana Professor Nzuz***

3.63 The respondent supports the proposals contained in the Issue Paper. He charges that Islamic marriages are patriarchal as well as polygamous in nature and therefore suggests inclusion of a provision 'for status and capacity of spouses in the marriage' which will abolish the patriarchal system 'as it discriminates against women'. He also suggests that only courts should have the power to confirm dissolution of Islamic marriages by *Talaq*.

(9) ***Ittigaadun-Nisaa (IN) and the Women's Institute for Leadership development and Democracy (WILDD)***

3.64 The joint submission of the IN and the WILDD is premised along the thinking behind the necessity of legislating MPL. Its position is that in the absence of legislation Muslims have no recourse when it comes to issues like divorce, marriage, inheritance etc. Legislation enforcing and enacting the principles expounded in the Holy *Qur'an* will accord Muslim women their rights and security against oppression and injustice.

3.65 More specifically it makes the following submissions:

Age of consent

3.66 It finds the age of 18 acceptable though it feels that a marriageable age is when a person reaches an age of sound judgement.

Marriage officers

3.67 It suggests some sort of regulation to govern the appointment as well as qualification of Muslim marriage officers.

Polygamous marriages

3.68 It suggests that before a person embarks on a second or third marriage, he should be required to make a formal and legal declaration of all his assets in order to divide them equitably amongst his wives and offspring in the event of his demise.

3.69 In addition to the above it supports the suggestion (in the Issue Paper) that -

- * legislation should include the appropriate marriage formula of the solemnisation of an Islamic marriage;
- * a marriage contract be established and in written form;
- * polygamous marriages be dealt with in terms of a marriage contract; and
- * the provisions of the Matrimonial Property Act be incorporated in the new law.

(10) ***Haroon Yusuf Laher and Faizal Manjoo***

3.70 “Our view is that the issue paper seems to expose widely held misconceptions about the nature of Islamic law. No attempt is made to understand the issues at hand through the primary source of Islamic Law, being the *Qur’an* (the Holy Book of Islam) and Sunnah (which represents the authentic traditions of the Prophet of Islam in what he said, did or agreed to).”

3.71 The foregoing encapsulates the tenor and thinking behind the submission made by Messrs Laher and Manjoo. They reject the Issue Paper in its totality and their contribution in no way engage the proposals or suggestions contained in the Issue Paper as can be read into their conclusion, namely that ‘the Law Commission is respectfully requested to reconsider the issue paper in its totality’.

(11) ***Advocate R Carloo***

3.72 Advocate R Carloo considers it to be unthinkable to reform the Muslim Personal Law. This submission is based on the misperception that it is MPL that is being reformed rather than

South African law. She does seem to support the right of parties to choose their matrimonial regime, whether under civil or Islamic law.

(12) ***Al-ilmu Nur/ Knowledge is light***

3.73 This organisation crisply supports the proposals contained in the Issue Paper, except that it totally rejects incorporation of provisions of the Divorce Act 70 of 1979.

(13) ***Gender Research Project: Centre for Applied Legal Studies
University of the Witwatersrand (GRP)***

3.74 The GRP's submission is premised on the perception that Muslim marriages practice discrimination and the discriminatory position they find themselves under our law. It would like to see the creation 'of a single, coherent system of marriage in South Africa with full protection for the disadvantaged parties, generally women and children'.

3.75 It supports the various suggestions aimed at improving women's rights in Muslim marriages, but goes further in holding that -

- * there should be more than formal parity between men and women in marriage, and
- * work should be done to address the deep disadvantages that women face in society and which affect their ability to function as equal partners in marriage.

(13) ***Dr MNZ Adams***

3.76 In a sentence, this submission is against the entire project regarding MPL on the grounds that it lacks the legitimacy of participatory democracy and is seen as a means or 'a ploy to force something down unsuspecting throats by means of a false legitimacy...'

(14) ***Attorney Zehir Omar***

3.77 In a sentence, Mr Omar makes just one comment relevant to the 'permissible age for marriage'. He submits that any legislation 'intruding upon the Islamic permissible age for

marriage and legislation adding pre-requisites to Islamic *Talaq* (divorce) will violate the provisions of section 9(3) of the Constitution’.

(15) ***Attorney Mohamed Bham***

3.78 He welcomes, in principle, the proposals made by the Commission. He expresses the thought that very careful consideration has to be given to polygamous marriages especially the stringent conditions under Islam when a man takes on more than one wife. Secondly, in his opinion, there is no reason why a woman should not be in the position to institute divorce and there should be adequate protection for both the wife and children after divorce proceedings.

(16) ***Achmad Majiet***

3.79 This contributor makes no submissions but rather attacks the Commission for allegedly being selective in using authority relating to polygamy.

(17) ***The Law Society of the Cape of Good Hope (LSCGH)***

3.80 The LSCGH believes that the recognition of Islamic marriages is an important issue and that there is a need to establish legal certainty about such marriages. It supports the establishment of a law permitting persons of the Muslim faith to choose whether they want to be married in or out of community of property.

3.81 It makes the submission that any proposed legislation ought to provide for new and existing marriages and suggests that, to this end, the provisions of section 2 of the Recognition of Customary Act 120 of 1998 (RCA) should be used as a guideline.

3.82 As regards the Islamic law position that all marriages are out of community of property, it suggests that section 7(2) of the RCA should be used as guideline to incorporate the requirement that unless otherwise specifically agreed by way of contract, it shall be presumed that marriages entered into are in community of property.

3.83 Regarding the age of consent, the LSCGH points out that ‘several international charters provide that the age of consent should be 18 years’. It goes on to add that the fact that Muslims

enter into marriage at a much younger age than those of western faiths 'should be taken into account'.

3.84 It supports the suggestion that provision should be made for the recognition and designation of marriage officers and that they should be 'regulated by appropriate bodies which require the application of appropriate procedures'.

3.85 Regarding registration of marriages, the LSCGH is of the opinion that Islamic marriages should be registered and brought in line with section 4 of the RCA and it supports the suggestion that an Islamic marriage should comply with certain formalities in relation to time, place and manner of solemnisation 'appropriately amended to address Islamic law'.

3.86 Regarding the marriage contract, it expressed the view that parties to an Islamic marriage should be able to register an ante-nuptial contract. It went on to say that 'they should be able to contract into whatever system they prefer'. As regards the suggestion that the contract should also deal with the situation vis-a-vis the husband taking a further spouse, the LSCGH warned that this would be tantamount to a ground of divorce. It suggests that in such an event, a husband should apply to court for the approval of such a contract and suggests that section 7(6) of the RCA should apply.

(18) ***Advocate Abraham Louw***

3.87 Whilst he finds the proposals contained in the Issue Paper 'in general acceptable and appearing to be in line with constitutional principles', he suggests that the age of consent should be 21 years.

(19) ***Potchefstroomse Universiteit vir Christelike Hoër Onderwys (PUC)***

3.88 In a lengthy submission, much of which pertains to the locus of MPL within a constitutional democracy, Christa Rautenbach of PUC favours the proposals -

* regarding the age of consent;

- * that there should be actual and informed consent from both parties made without any duress. She submits that registering marriage officers be obliged to determine whether the consent is present. She recommends that the Marriage Act should be amended to make provision for explicit consent in all marriages in South Africa and supports the proposal that such consent be in a written form;
- * that marriage officers must be designated and suggests that section 3 of the Marriage Act be amended to include any religious denomination or organisation recognised by the minister by notice in the Gazette;
- * that there should be a process of registration of Islamic marriages as this would bring about legal certainty;
- * that there should be certain formalities regarding time, place and manner of conducting Islamic marriages;
- * that there should be an appropriate marriage formula for Islamic marriages;
- * regarding prohibition of certain marriages and in the case of MPL, she recommends that the spouses' capacity to marry each other should be regulated 'by their own personal laws';
- * that, in the absence of a contract, the marriage under Islamic Law should be one in community of property;
- * regarding penalties for false representations or statements;
- * that existing monogamous Islamic marriages should be recognised. She suggests that such recognition be by means of a general provision such as section 2(1) of the Recognition of Customary Marriages Act;
- * that parties to an Islamic marriage should be able to obtain a divorce on the grounds mentioned in the Divorce Act.

3.89 Regarding polygamous marriages, she is ambivalent. Whilst subscribing to the principle enunciated in **Ryland v Edros**¹³ that 'it (was) quite inimical to all the values of the new South Africa for one group to impose its values on another',¹⁴ she feels that there are reasons why polygamy 'should be treated with suspicion' namely on the grounds of discrimination against women. She recommends that the parties should not be allowed to conclude new polygamous marriages and doubts whether polygamy would stand the test of constitutionality.

3.90 She recommends that a provision similar to section 4 of the Recognition of Customary Marriages Act be enacted to regulate the consequences of registration of existing monogamous marriages.

(20) **Waterval Islamic Institute**

3.91 Except for the suggestion -

- * that both the husband and the wife be conferred with rights of *Talaq*;
- * that the *Talaq* be confirmed by a court, and that
- * the parties be given a choice regarding matrimonial regime

the WII seems *ad idem* with the majority of the proposals in the Issue Paper. It has made no adverse or contrary comments regarding the content of the Issue Paper.

(21) **Law School of the University of the Witwatersrand**

3.92 Dr Elsje Bonthuys of the Law School confined her submissions to issues of custody and guardianship of minor children, suggesting that the Commission does further research and make clear suggestions on certain aspects of the law relating to children.

3.93 She also makes the suggestion that the Commission investigate ways in which issues of maintenance in Islamic law could be accommodated and legislated.

¹³ 1997 (2) SA 690 (C).

¹⁴ At 707E.

(22) ***Saber Ahmed Jazbhay***

3.94 With minor reservations which in no way detract from the proposals in their totality, the proposals in the Issue Paper were supported.

(23) ***Islamic Council of South Africa (ICSA)***

3.95 This respondent endorsed the submission of Advocate Mohamed reflected below.

(24) ***Society of Advocates, Natal***

3.96 The submission on behalf of the Society of Advocates, Natal, was largely academic but nevertheless made interesting and educative reading.

3.97 The following emerges from the submission:

3.98 The fact that our Constitution creates a unitary and secular state with the ethos towards protecting individual freedom and liberty, makes it 'technically feasible' to implement MPL within the Constitutional framework without 'impugning its (MPL's) integrity'. It will be amenable, the submission goes on to say, that marriage by way of contract be governed by MPL with formalities and procedures not dissimilar to those of secular law.

3.99 To the extent that legislation is to give effect to the recognition of (both new and existing) Muslims marriages, the proposal is supported.

3.100 In the case of new marriages, it is proposed that any (proposed) legislation should at least provide for -

- * the age of consent to be 18 years;
- * actual and informed consent should be in written form;
- * marriage officers should be designated to perform Muslim marriages; and

* a marriage register should be signed as proof of registration.

3.101 Substantially the remainder of the proposals seems to find support in principle subject to this summary.

3.102 It is submitted that in order to deal with Constitutional concerns, any proposed legislation on which the conclusion of a polygamous marriage would be permissible, 'has to be narrowly circumscribed in recognition of the limitations set out by the *Qur'an* itself.'

3.103 In sum it supports the proposal without reservations on the grounds, *inter alia*, that it is 'entirely consistent with the objective of Islamic Law to the institution of polygamy, namely, to reform, restrict and finally to limit it'.

(25) ***Fathima Sabban and Washiella Mohammed***

3.104 They make a suggestion pertaining to custody of children as follows: boys should be cared for by the father from the age of seven years onwards.

(26) ***Murabitun***

3.105 This organisation finds it unacceptable that the Commission's underlying approach seems to be aimed at 'pitting Divine Law giving against secular law. It takes 'strong offence' that the constitutional law will prevail in the event of there being a conflict between the Shari'ah law and secular law.

3.106 Regarding choice of marriage system, it finds the words 'and the Constitution' unacceptable and repugnant and suggest that they be deleted. Essentially it finds every proposal objectionable and therefore unacceptable and recommends that the proposed law not be enacted at all.

(27) ***Lawyers for Human Rights
Gender Project Co-ordinator***

3.107 Many submissions by respondents contained a detailed preface or non-responsive comments reflecting personal or subjective positions without addressing or contributing towards the proposals contained in Issue Paper 15.

3.108 The submission by the LHR is, with respect, no exception. However, the Project Committee does not want to detract in any way from the excellence of the research and the erudite presentation thereof.

3.109 From what could be gathered from the contribution made by the LHR, it supported the proposals contained in the Issue Paper.

(28) ***Claremont Main Road Mosque (CMRM)***

3.110 Very crisply, the CRMM holds the view that any marital regime should be one out of community of property with the accrual system as this would protect 'housewives' in terms of the *Qur'anic* clause on *naqfah*, which is a system of remuneration in the context of earnings capacity of the husband. It supports the age of consent as proposed to be 18 years as well as the idea regarding marriage officers in the respect that they be regulated or 'state controlled'.

(29) ***Islamic Social and Welfare Association ISWA)***

3.111 ISWA supported all the proposals and suggested that in the case of polygamy any proposed law should stipulate the narrowly circumscribed circumstances in which a man could marry additional wives.

(30) ***United Ulama Council of South Africa (UUCSA)***

3.112 UUCSA believes that the proposals set out in Issue Paper 15 are practically achievable and can be implemented. It submits, however, that the proposals regarding *Talaq* are inconsonant with the Shari'ah law because in terms thereof divorce is issued and not obtained. It makes the point that even if the courts do not recognise the fact, the community would treat

the parties as divorced. It also points out that the issue of polygamy was not dealt with in accordance with the Shari'ah in the sense that it is not necessary to obtain the consent or the permission of the first wife.

3.113 Its major point of departure seems to be that it is not possible to alter the Shari'ah and that MPL must be enforced 'in its pure form'. It also believes that recognising MPL in its pure form would not offend any of the provisions of the Constitution.

(31) ***Muslim Youth Movement of South Africa (MYMSA)***

3.114 'The SALC Project Committee 59 is commended for its formulation of the Issue Paper 15 on Islamic Marriages and Related matters. The Issue Paper poses interesting and difficult questions that impact on the lives of approximately two million South Africans from diverse backgrounds'.

3.115 The foregoing signals the position of MYMSA which also makes the following submissions:

Choice of marital system

3.116 Whilst it supports the proposal in the Issue Paper, it points out a few problematic areas:

- * Since it envisages two systems (MPL and secular law), this allows for 'slippage' and in particular whether parties who marry according to civil law could switch to MPL and *vice versa*. This, it submits, is unclear.
- * The proposal does not take into account social pressure that may be brought upon parties to choose MPL 'because the average person in the street and more particularly people from previously disadvantaged backgrounds, may not be in a position to make an informed choice'.
- * There can be no choice if parties are obliged to go to a civil court to dissolve their civil marriage after they have dissolved their Islamic marriage.

Age of consent

3.117 Fundamentally concerned with so called 'child marriages', it supports the proposal that 18 years be the age of consent.

Actual consent

3.118 It supports the proposal vis-à-vis actual consent on the basis that in cases of 'arranged marriages' consent is often under 'social pressure'.

Muslim marriage officers

3.119 It supports the proposal for the recognition and designation of (Muslim) marriage officers and suggests that -

- * "marriage officers need not be religious figures";
- * they be appointed 'in terms of set criteria so that their power and functions are regulated in a manner that ensures maximum objectivity and professionalism';
- * their gender must not be a limitation; and
- * their decisions should be subject to judicial review.

Registration of marriages and time, place and manner of solemnisation

3.120 It suggests that a formal marriage certificate be made mandatory by law and that section 29A of the Marriage Act be incorporated into any new statute recognising Islamic marriages as well as regarding the time etc of solemnisation.

3.121 The respondent supported the proposals pertaining to –

- * the marriage formula;

- * the prohibition of certain marriages;
- * the idea of the marriage contract;
- * penalties for false representations;
- * the notion that spouses should enjoy equal rights to pronounce a divorce and that a husband should not be permitted to do so unilaterally;
- * the notion that parties in an Islamic marriage ought to be able to obtain a divorce on the same grounds as provided in the Divorce Act;
- * the idea that legislation must provide for an effective system of dispute resolution and an institutionalised mechanism to resolve differences without recourse to self-help;
- * the idea that marriage officers should be able to recognise a *Talaq* in the presence of the parties and that the said *Talaq* be confirmed by any court;
- * the notion that similar safeguards as found in section 8(4) of the Recognition of Customary Marriages Act should be permitted in the case of dissolution of Islamic marriages; and
- * the idea that consultation must take place before a polygamous marriage is concluded.

3.122 The respondent does not support the proposal -

- * that existing *de facto* marriages that have not been solemnised in terms of section 3 of the Marriage Act would require registration upon satisfactory proof to a designated marriage officer that there is an existing marriage. It suggests that all Islamic marriages be rendered valid and lawful automatically, with only the issue of the property regime requiring registration upon satisfactory proof thereof to the marriage officer that they are in agreement about the property regime;

- * that gives parties a choice to register an existing marriage. It suggests that Islamic marriages be automatically be rendered valid and lawful. It supports the idea about 'informed election concerning the appropriate property regime'.

(32) ***Tshwaranang Legal Advocacy Centre (TLAC) and Nisaa Institute for Women's Development (NIWD)***

3.123 Unlike MYMSA, the TLAC and NIWD supports the dual system (choice of marriage system) set out in the Issue Paper on the grounds that it is important in a constitutional democracy to respect and acknowledge the rights and beliefs of all the people of the country. It recommends that the *Qur'anic* version of MPL be applied because the *Qur'an* provides particular safeguards for women.

3.124 It also supports the proposal -

- * that the age of consent be 18 years;
- * regarding informed and actual consent; and
- * regarding formal registration of Islamic marriages.

(33) ***Muslim Judicial Council (MJC)***

3.125 The position of the MJC to the proposals is as follows:

Choice of marriage system

3.126 MPL should automatically apply, in its unadulterated form, to Islamic marriages. Just as the Constitution advocates tolerance, it holds the view that Muslims should be guaranteed the right to choose MPL in its unadulterated form. Such MPL should afford full recognition to the 'Shari'ah Courts' of the various Muslim Judicial Bodies who should have full power to rule over issues such as maintenance, custody and inheritance issues.

Recognition of Islamic marriages

3.127 It supports the proposal with the suggestion that legislation ought to provide for both new and existing marriages especially regarding -

- * the guardian or walee;
- * the age of consent which it agrees with. It points out that the Issue Paper ignores the position of the guardian or walee of the bride without whom it is submitted that the marriage would be considered null and void. The guardian's position is undoubtedly necessary irrespective of whether or not the bride is under or over the 18 year age group. This is essential for a valid Islamic marriage;
- * actual and informed consent which it submits should be made compulsory for the conclusion of an Islamic marriage and that marriage officers be duty bound to ascertain whether such consent has been attained;
- * marriage officers which, it is suggested, should be appointed from the ranks of Imams, Maulanas and Sheiks though, so long as all the formalities and conditions for a valid Islamic marriage have been observed, any male person can perform such marriage;
- * the marriage register which, it is suggested, should be made compulsory and should be signed by the marriage officer as well as the parties to the marriage including the walee. It also suggests that section 29 of the Marriage Act should be appropriately amended for the purpose of Islamic Law to be incorporated in any new statute;
- * prohibited types of marriages, the marriage contract and false representation, which proposals are accepted; and
- * polygamy, by supporting the view that any legislation must stipulate the narrowly circumscribed circumstances under which the taking of an additional wife becomes possible.

(34) ***Community Law Centre, Gender Unit and Legal Aid Clinic
University of Western Cape (UWC)***

Choice of marital system

3.128 It supports the proposal in principle on the grounds that it accords with the constitutional right to freedom of religion and belief. It calls for clarification of the property regime that would automatically apply in respect of new marriages where the parties elect to have their marriage regulated by MPL.

Registration of existing marriages

3.129 The UWC does not support the proposal that existing marriages should be registered. Instead they should be validated automatically without the necessity of registration. As reason therefore they point to the history of oppression and discrimination which non-recognition of Muslim marriages had suffered in the past at the hands of Judeo-Christian authorities.

Age of consent

3.130 It proposes that legislation regulating Muslim marriages should be brought into line with the current provisions of the Marriage Act regarding the age of consent.

Actual and informed consent

3.131 The UWC supports such a proposal as a measure to protect women from 'forced marriages'.

Muslim marriage officers

3.132 Like MYMSA, the UWC supports the proposal recognising the designation of marriage officers but recommends that provision should be made for the inclusion of women and non-Ulama persons as marriage officers.

Registration of marriages

3.133 It supports the proposal that the marriage officer should solemnise a marriage as well as that the parties and two competent witnesses should sign the marriage register. It adds that where the parties choose a property regime other than the default or automatic regime, this must be specifically noted at the time the marriage is registered.

Formalities pertaining to time etc

3.134 It supports the proposal but strongly recommends that marriage by proxy be done away with and that both parties must be present in person for the conclusion of the marriage. This would bring about more certainty regarding the offer and acceptance.

Prohibition on certain marriages

3.135 It supports this proposal but recommends that express provisions stipulating the permanent or temporary impediments to a valid marriage contract should be (clearly) set out in the legislation.

Polygamous marriages

3.136 It proposes that legislation on Muslim marriages should make no provision for the contracting of new polygamous marriages on the grounds that 'this practice in its current form violates the constitutional principle of sex and gender equality'.

CHAPTER 4

ANALYSIS OF RESPONSES IN PRINCIPLE

Rejection of State intervention

4.1 A minority of respondents were opposed to the passing of a law by the State recognising aspects of Muslim Personal Law.¹⁵ The main reason for opposing state intervention was the fear that Muslim Personal Law faced the danger of contamination, in the sense that its core principles would be altered in the context of a dominant system of secular law, where the Constitution was supreme. There was a clash of values between both systems, with the result that the Islamic law would be subsumed by the dominant secular law, according to this view. The purpose of Islamic Law is to achieve justice and equity, and these concepts are the rationale for all law, including the Constitution.

4.2 Due and careful consideration was given to the concerns expressed. The Project Committee is of the view that the thrust of this objection is met by ensuring that the proposed legislation is consistent with Islamic Law. It is apparent that proposed legislation which accords with Islamic principles would produce substantial benefits and alleviate serious hardships on the ground. Weighed in the balance, the advantages of legal recognition far outweigh any perceived disadvantages consequent upon non-recognition. Take the following simple examples:

4.3 H and W are married according to Islamic Law. The marriage has irretrievably broken down due to substantial misconduct on the part of H. H nevertheless maliciously refuses to issue a *Talaq* to W. H also refuses to accept the jurisdiction of any Muslim body, with the result that W is precluded from remarrying according to Islamic Law.

4.4 In the same example, assume that, in fact, H issues a *Talaq* to W but, despite his means, refuses to maintain his wife and minor children born of his marriage, with the result that

¹⁵ For example, the Murabitun held the view that the clash between Islamic Law and secular law (where the Constitution is supreme) was value-based and could not be resolved, hence the *status quo* should remain in order to avoid interference with the Islamic principles and values. The Murabitun's submission is dated 29/08/00.

H is able to evade his Islamic obligations particularly in respect of his wife because he knows that they are unenforceable at law.

4.5 If H issues a *Talaq*, but, as a consequence thereof, W refuses to allow him access to the minor children born of the marriage, H would experience difficulties in gaining access to his minor children.

4.6 In short, the power of enforcement and legal sanctions will guarantee compliance with and promote Islamic principles of justice and fairness. For the first time in the history of our country, important aspects of Muslim Personal Law will, if the proposals are accepted, assume legal recognition and force, bringing substantial relief.

Alternate dispute resolution: arbitration

4.7 As a consequence of their opposition to direct state intervention, some respondents¹⁶ suggested arbitration as a vehicle to resolve Muslim Personal Law disputes.

4.8 In their view, arbitration, as a legally enforceable means of adjudication, would ensure that the core principles of Muslim Personal Law would be preserved, and the danger of contamination would be averted.

4.9 The option of arbitration was carefully considered but unfortunately cannot be implemented for a number of reasons. Firstly, all questions of marriage and dissolution of marriage, because they impact upon status, are ultimately adjudicated by the secular courts. Secondly, the court is the upper guardian of minor children. As such, the court must be satisfied that the welfare of minor children is properly safeguarded, and the best that can be effected in the circumstances of a particular case. This is why the Arbitration Act, 1965, excludes matrimonial issues as arbitrable issues.

4.10 This, however, does not preclude parties from adopting mediation and conciliation as an effective means of resolving matrimonial disputes. Mediation æ a means of resolving family

¹⁶ H Y Laher and F Manjoo, for example, expressed the opinion that there was a conflict between recognising aspects of Muslim Personal Law in its pure form, and the requirements of the Constitution. Hence they suggested that the Arbitration Act, 1965, be amended to allow for the arbitration of matrimonial disputes before a Council of theologians.

disputes is enjoined by the Holy *Qur'an* itself. A settlement arrived at, through the mediation process, may be made an order of Court, thereby avoiding litigation. Muslims are free to establish a proper infrastructure to achieve the resolution of matrimonial disputes through an effective dispute resolution process, thereby avoiding unnecessary and costly litigation.

Choice of proprietary regime

4.11 In the past, many Muslims elected to have the proprietary consequences governing their marriage regulated by the civil law.

4.12 The proposed Bill, whilst providing that every Islamic marriage is a marriage out of community of property, allows Muslim couples to regulate the proprietary consequences of their marriage on a contractual basis consistent with Islamic law.

4.13 It follows that there is no need to resort to the civil law. To this extent, the use of the word “choice” in the Issue Paper was unfortunate and unnecessary. The proposed legislation now provides for a “choice” only in respect of a proprietary regime. This is in accordance with Islamic law.

CHAPTER 5

THE RATIONALE BEHIND, AND THE PRINCIPLES UNDERLYING, THE DRAFT BILL ON ISLAMIC MARRIAGES

Enforcement through the courts

5.1 The ideal method of legally enforcing Muslim Personal Law is through the establishment of separate Shari'ah courts, presided over by competent *Qadis* (or judges), who are expert jurists in Islamic law.

5.2 This option is not feasible¹⁷ at this stage having regard, *inter alia*, to limited state resources, and the fact that separate dispute resolution institutions cannot be provided for our country's many religions.

5.3 As an alternative to separate Shari'ah courts, it is proposed that aspects of Muslim Personal Law be implemented through the secular courts.

5.4 Because the judges of our secular courts are by and large non-Muslims, it is proposed that, in the adjudication of disputes relating to Muslim Personal Law, a judge be assisted by two assessors who are experts in Islamic Law.

5.5 The assessors will have the power, together with the judge, to determine disputes of fact and law, and the decision of the majority shall represent a decision of the court.

5.6 A decision of the court would be subject to appeal, in the usual way, to a higher court. It is envisaged that indigent Muslims will be entitled to state funded legal aid in matrimonial matters.

5.7 The appointment of assessors means that the court presiding over a dispute involving Islamic Law would have the necessary expertise in Islamic Law to resolve such dispute effectively.

¹⁷ According to the 1996 population census the population of Muslims in South Africa was recorded at 553 585 out of a total population of 40,5 million.

5.8 Where a wife applies for a dissolution of her marriage, on defined grounds, in the form of a *Faskh*¹⁸, the decree would be pronounced, in addition, by the two Muslim assessors. This resolves the debate as to whether a non-Muslim Judge has the power, acting on his or her own, to dissolve a marriage, as a decree of *Faskh*, on the application of the wife on a ground recognised by Islamic Law (eg: the failure of the husband to maintain his wife).

5.9 The provisions relating to assessors are contained in clause 13 of the draft Bill.

The scope of the Bill: clauses 2 and 4

5.10 The proposed Bill draws a clear distinction between an Islamic marriage and a civil marriage. It is only Islamic marriages that fall within the ambit of the proposed Bill. They are treated on par with civil marriages. Proprietary consequences are regulated. Provision is made for changes to matrimonial property systems, with due regard to existing and vested rights. Provision is also made to regulate polygamous marriages.

5.11 The proposed Bill recognises as a valid marriage, an Islamic marriage or marriages contracted in accordance with Islamic Law only (and not registered under the Marriage Act as a civil marriage).

Existing monogamous and polygamous Islamic marriages

5.12 All existing Islamic marriages would accordingly be recognised as valid marriages, for all purposes, upon the commencement of the proposed legislation. This would cover both monogamous and polygamous Islamic marriages which, if applicable, may exist alongside an existing civil marriage.

5.13 In the case of an existing registered civil marriage, therefore, the parties thereto are presumed to intend the civil consequences to apply to their marriage, hence the civil marriage would fall outside the ambit of the proposed Bill, but subject to paragraph 5.14 below.

¹⁸ A *Faskh* means a decree of dissolution of the marriage granted by a judge upon the application of the wife upon recognised grounds, such as the husband's failure to maintain his wife. A decree of *Faskh* has the effect of dissolving the marriage immediately. It must be distinguished from a *Talaq* which is the right of the husband to terminate the marriage and which is referred to in footnote 21.

5.14 Where the parties to an existing civil marriage, however, wish to cause the provisions of the proposed Bill to apply to their marriage, they are free to do so at any time after the commencement of the statute. Appropriate regulations would be formulated to enable both spouses to an existing civil marriage to adopt the provisions of the proposed Act by means of an appropriate declaration.

5.15 In short, therefore, the proposed legislation would apply retrospectively by validating all Islamic marriages which exist, at the commencement thereof, as valid marriages for all purposes upon such commencement.

Islamic marriages contracted after commencement of the Bill

5.16 As regards Islamic Marriages contracted after the commencement of the proposed Bill, a distinction must be drawn between monogamous and polygamous Islamic marriages.

5.17 In relation to monogamous Islamic Marriages, these would enjoy recognition as valid marriages, provided the requirements set out in clause 5 of the proposed Bill are complied with. These relate primarily to the minimum marriageable age, and consent of the prospective spouses.

Prospective polygamous Islamic marriages

5.18 In relation to the situation where a husband in an existing Islamic marriage wishes, after the commencement of the proposed statute, to conclude a further Islamic marriage, then the provisions of clause 8(7) of the proposed Bill apply. It is well established in Islamic Law that polygamy is circumscribed. The legislature is permitted in Islamic Law to regulate polygamy to ensure that it does not lead to abuse, hardship, and oppression of women.¹⁹ It is therefore proposed that a judge sitting with two Muslim assessors should objectively decide whether the husband, in all the circumstances, is able to exercise justice between his spouses as defined in the Holy *Qur'an* itself. At the same time, it is necessary to ensure that the proprietary consequences of the existing and proposed marriages are properly regulated to avoid prejudice to existing spouses, and avoid future disputes.

¹⁹ This appears to be the consensus of contemporary *Shari'ah* experts eg, the well-known *khalif umar (Ra)* regulated marriages and divorces.

Requirements for validity of Islamic marriages: clause 5 of the Bill

5.19 These provisions relate essentially to the minimum age of marriage and the question of consent.

5.20 The minimum age is proposed at 18 years, and this appears to be accepted by the majority of the respondents to the Issue Paper.

5.21 Should a prospective spouse be under the age of 18 years, provision is made in clause 5(5) for permission to marry to be granted by the Minister or a recognised body or person authorised by him or her.

Registration of Islamic marriages: clause 6 of the Bill

5.22 The provisions relating to the registration of Islamic Marriages are contained in clause 6 of the Bill.

5.23 These provisions, which include the requirements set out in section 12 of the Marriage Act, ensure certainty, thereby avoiding or minimising disputes.

5.24 The provisions cover the registration of Islamic marriages existing at the commencement of the Bill, and those concluded after the commencement thereof.

5.25 It is envisaged that, after the commencement of the Bill, Islamic marriages be registered at the time of the contracting thereof. This can easily be done if all persons presently involved in connection with the conclusion of Islamic marriages be registered as marriage officers.

Proprietary consequences of Islamic marriages: clause 8 of the Bill

5.26 The position under Islamic Law is that the conclusion of a marriage *per se*, results in the marriage being automatically out of community of property, with all forms of profit sharing being excluded. This, however, does not prevent the spouses from entering into a contractual

arrangement in terms of which they may mutually agree to enter into an acceptable partnership or proprietary arrangement.²⁰

5.27 Consistent with the Islamic Law position, all existing Islamic marriages, at the commencement of the proposed statute are deemed to be out of community of property (clause 8(1)).

5.28 The same applies to Islamic marriages concluded after the commencement of the Act, unless otherwise regulated contractually by the spouses (clause 8(2)).

5.29 Provision is made for spouses to change the matrimonial property system in respect of an Islamic marriage concluded before or after the commencement of the proposed Act (clause 8(3)). This is in line with section 21 of the Matrimonial Property Act, 1984. Those civic bodies involved in family matters are free to conduct public educational programs concerning the Bill, and to publicise various property regimes.

Dissolution of Islamic marriage: clause 9 of the Bill

5.30 The dissolution of an Islamic marriage is now recognised.

5.31 Provision is made to register an irrevocable *Talaq*²¹ immediately but not later than seven days from the pronouncement or issue thereof. This will ensure certainty, and at the same time

²⁰ Islamic Law recognises different types of partnership arrangements that may be concluded between spouses. A *mufaawadah* partnership concluded between the spouses means that existing and future assets would be owned in equal shares between the spouses, who would be jointly and severally liable to creditors. An *Inan* partnership, on the other hand, would permit the spouses to enter into a profit sharing arrangement in respect of future and present property, by mutual agreement. Community of property, *per se*, as a concept is unknown in Islamic law. The spouses may also separately enter into a pre-nuptial contract upon defined terms and conditions which are not contrary to the essence of the marriage contract itself. For example, the marriage contract may contain a provision to the effect that, in the event of the husband electing to conclude a second Islamic marriage, the existing wife shall be entitled (but not obliged) to apply for the dissolution of her own marriage. The Hanbali school of interpretation grants a wide latitude in respect of conditions that may be agreed upon by spouses in a pre-nuptial contract. (See the famous authoritative juristic work *Almugni* by Ibn Qudamah)

²¹ A *Talaq* pronounced by a husband is of two types: revocable and irrevocable. In the case of the revocable *Talaq (Raj'i)*, the marriage is not dissolved immediately upon pronouncement thereof but subsists until the expiry of the waiting period (*Iddah*). The marriage is only dissolved upon the expiry of the *Iddah*, with the result that the husband may take the wife back prior to the expiry of the *Iddah*, without concluding a fresh marriage contract. On the other hand, where the *Talaq* is pronounced in irrevocable form (*Ba'in*), the marriage is dissolved immediately, with the result that the husband has no right to take the wife back unless the former spouses conclude a fresh marriage contract.

will assist in avoiding situations where the husband issues the *Talaq* arbitrarily, to the detriment of his wife and any children.

5.32 A *Talaq* issued and properly registered, whilst effective, must be confirmed by the Court. The confirmation process will ensure that issues such as maintenance, proprietary arrangements, the welfare of minor children, etc is properly regulated and safeguarded, thereby leading to certainty and the avoidance of acrimony and abuse. It is crucial that all the issues arising from a dissolution of the marriage are properly resolved, for the benefit of all concerned, hence the need for a decree of confirmation together with ancillary relief.

5.33 Provision is made in clause 9(3) for the Court to grant a decree of *Faskh*, being a dissolution of the marriage, on defined grounds recognised by Islamic Law. This is a pivotal provision and substantially empowers women in accordance with Islamic tenets. The husband may pronounce a *Talaq*. He may delegate this right to his wife in the form of a *Tafwid ul Talaq*²². Where the husband has not delegated this right and refuses to pronounce a *Talaq*, the wife may on application to court and upon notice, seek a dissolution of the marriage, if there are grounds therefor, as defined in clause 1 of the Bill (in the definition of *Faskh*).

Custody and access: clause 11 of the Bill

5.34 The guidelines laid down by Muslim jurists relating to the custody of, and access to, minor children are based on the welfare of minor children as the paramount consideration.

5.35 This is also consistent with section 28(2) of the Bill of Rights which provides that -

A child's best interests are of paramount importance in every matter concerning the child.

The Divorce Act, other relevant statutory provisions, and the common law are to the same effect.

²² A delegation of the husband's power of *Talaq* to the wife may be absolute or conditional, with the result that, depending on the terms of the delegation, the wife may terminate the marriage by pronouncing a *Talaq*. Despite this delegation, the husband at all material times, retains his original right to terminate the marriage through the pronouncement of a *Talaq*, and never loses that right.

5.36 Clause 11, therefore, whilst providing that a child's best interests²³ are paramount in matters of custody and access, takes into account the age limits and guidelines furnished by Muslim jurists in this regard.

Maintenance: clause 12 of the Bill

5.37 In Islamic Law, the husband is obliged to support his wife and children. These Islamic principles are embodied in clause 12(2), and would provide substantial relief to spouses and children of Islamic marriages.

5.38 These maintenance obligations would be enforced through the Maintenance Act, 1998. Chapter 5 of this Act gives the Maintenance Court substantial powers to enforce maintenance orders by execution against property, by the attachment of emoluments and by the attachment of debts, having the effect of a civil judgment. At the same time, the failure to make payment in accordance with a maintenance order constitutes an offence and is penalised as set out in Chapter 6 of the Act.

Existing civil marriages: clause 14 of the Bill

5.39 Clause 14 has been specifically inserted to deal with an existing civil marriage as defined in clause 1 of the Bill. It is imperative that the accompanying Islamic marriage is dissolved prior to the dissolution of the civil marriage itself in terms of the Divorce Act. The failure to regulate this, could result in a situation where the existing civil marriage is dissolved, but the accompanying Islamic marriage remains in existence. This would obviously cause serious hardship to the wife, as she would be precluded from remarrying until her husband gives her a *Talaq*. Clause 14 ensures that both the existing civil and accompanying Islamic marriages are dissolved at almost the same time.

5.40 A comprehensive overview of the Islamic law of succession is beyond the brief of the project committee. However, provision has been made to amend the Intestate Succession Act 81 of 1987 by broadening the definition of a "spouse" to cover the spouse/s of an Islamic

²³ In interpreting what is in the best interests of a child, it may be necessary to take into account appropriate criteria from an Islamic perspective. These criteria could serve as guidelines for the family advocate and judges in dealing with custody cases.

marriage (see clause 16). A corresponding amendment has been made to the Maintenance of Surviving Spouses Act 27 of 1990. This will alleviate the hardships endured by Muslim spouses who in the past have not enjoyed such recognition.

ISLAMIC MARRIAGES ACT .. OF 20..

To make provision for the recognition of Islamic marriages; to specify the requirements for a valid Islamic marriage; to regulate the registration of Islamic marriages; to recognise the status and capacity of spouses in Islamic marriages; to regulate the proprietary consequences of Islamic marriages; to regulate the dissolution of Islamic marriages and the consequences thereof; to provide for the making of regulations; and to provide for matters connected therewith.

Definitions

1. In this Act, unless the context otherwise indicates -
- (i) **“court”** means a High Court of South Africa, or a Family Court established under any law, and for purposes of section 9, a Divorce Court established in terms of section 10 of the Administration Amendment Act, 1929 (Act No. 9 of 1929). The provisions of section 2 of the Divorce Act, 1979 (Act No. 70 of 1979), shall, with the necessary changes, apply in respect of the jurisdiction of a court for the purposes of this Act;
 - (ii) **“deferred dower”** means the dower or part thereof which is payable on an agreed future date but which, in any event, becomes due and payable upon dissolution of the marriage by divorce or death;
 - (iii) **“dispute,”** for the purposes of section 13, means a dispute or an alleged dispute relating to the interpretation or application of any provision of this Act or any applicable law;
 - (iv) **“dower”** means the money or property which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself in order to establish a family, and lay the foundations for affection and companionship;
 - (v) **“existing civil marriage”** means an existing marriage contracted according to Islamic Law which has also been registered and solemnized in terms of the Marriage Act, 1961 (Act No. 25 of 1961), prior to the commencement of this Act, and in relation to which the parties may elect in the prescribed manner at any time after the date of commencement of this Act, to cause the provisions of this Act to apply to their marriage, in which event the provisions of this Act apply from the date of such election, but without affecting

vested proprietary rights (unaffected by such election) and the rights of third parties including creditors;

- (vi) “**Faskh**” means a decree of dissolution of marriage granted by a court, upon the application of the wife, on any ground or basis permitted by Islamic Law, and including any one or more of the following grounds, namely, where the -
- (a) husband is missing, or his whereabouts are not known, for a substantial period of time;
 - (b) husband fails for any reason to maintain his wife;
 - (c) husband has been sentenced to imprisonment for a period of three years or more, provided that the wife is entitled to apply for a decree of dissolution within a period of one year as from the date of sentencing;
 - (d) husband is mentally ill, or in a state of continued unconsciousness as contemplated by section 5 of the Divorce Act, 1979 (Act No. 70 of 1979) which provisions shall apply, with the changes required by the context;
 - (e) husband suffers from a serious disease, including impotency, which renders cohabitation intolerable;
 - (f) husband treats his wife with cruelty in any form, which renders cohabitation intolerable;
 - (g) husband has failed, without valid reason, to perform his marital obligations for a reasonable period;
 - (h) husband is a spouse in more than one Islamic marriage, he fails to treat his wife justly in accordance with the injunctions of the *Qur’an*; or
 - (i) marriage has irretrievably broken down, despite reasonable attempts at reconciliation;
- (vii) “**Iddah**” means the mandatory waiting period for the wife, arising from the dissolution of the marriage by divorce or death during which period she may not remarry. The *Iddah* of a divorced woman who -
- (a) menstruates is three such menstrual cycles;
 - (b) does not menstruate for any reason, is three months;
 - (c) is pregnant, extends until the time of delivery;
- (viii) “**irrevocable Talaq**” means -
- (a) a *Talaq* pronounced by a husband which becomes irrevocable only upon the expiry of the *Iddah*, thereby terminating the marriage upon the expiry thereof;

- (b) according to the Hanafi School of Interpretation, a *Talaq* expressed to be irrevocable (*Bai'n*) at the time of pronouncement, thereby terminating the marriage immediately;
- (c) the pronouncement of a third *Talaq*;
- (ix) “**Islamic marriage**” means a marriage contracted in accordance with Islamic law only, but excludes an existing civil marriage, or a civil marriage solemnized under the Marriage Act, 1961 (Act No. 25 of 1961), before or after the date of commencement of this Act;
- (x) “**Khul'a**” means the dissolution of the marriage bond, at the instance of the wife, in terms of an agreement between the spouses according to Islamic Law;
- (xi) “**marriage officer**” means any Muslim person with knowledge of Islamic Law appointed as marriage officer for purposes of this Act by the Minister or an officer acting under the Minister's written authorisation;
- (xii) “**Minister**” means the Minister of Home Affairs;
- (xiii) “**prescribed**” means prescribed by regulation made under section 15;
- (xiv) “**prompt dower**” means the dower or part thereof which is payable at the time of conclusion of the marriage or immediately thereafter upon demand by the wife;
- (xv) “**revocable Talaq**” means a *Talaq* (“*Raj'i*”) which does not terminate the marriage before the completion of the *Iddah*, and which confers upon the husband the right to take back his wife before the expiry of the *Iddah* only;
- (xvi) “**Tafwid ul Talaq**” means the delegation by the husband of his right of *Talaq* to the wife, either at the time of conclusion of the marriage or during the subsistence of the marriage, so that the wife may terminate the marriage by pronouncing a *Talaq* strictly in accordance with the terms of such delegation;
- (xvii) “**Talaq**” means the termination of the marriage according to Islamic Law, by the husband or his agent or intermediary, through the use or pronouncement of specific words which indicate a clear intention to terminate the marriage; and includes the *Tafwid ul Talaq*;
- (xviii) “**this Act**” includes the regulations.

Application of this Act

2. The provisions of this Act -

- (a) shall apply to an Islamic marriage contracted before or after the commencement of this Act;
- (b) shall apply to an existing civil marriage insofar as the spouses thereto have elected in the prescribed manner to cause the provisions of this Act to apply to the consequences of their marriage, and otherwise to the extent specified in section 14; and
- (c) does not apply to a civil marriage solemnised under the Marriage Act, 1961 (Act No. 25 of 1961) before or after the commencement of this Act.

Equal status and capacity of spouses

3. A wife in an Islamic marriage is equal to her husband in human dignity and has, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.

Islamic marriages

4. (1) An Islamic marriage entered into before the commencement of this Act and existing at the commencement of this Act is for all purposes recognised as a valid marriage.

(2) An Islamic marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a valid marriage.

(3) If a husband is a spouse in more than one Islamic marriage, all Islamic marriages entered into by him before the commencement of this Act, are for all purposes recognised as valid marriages.

(4) If a husband is a spouse in more than one Islamic marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as valid marriages.

(5) If a husband is a spouse in an existing civil marriage, and in an Islamic marriage or marriages entered into before the commencement of this Act, such Islamic marriage or marriages are for all purposes recognised as valid marriages.

Requirements for validity of Islamic marriages

5. (1) For an Islamic marriage entered into after the commencement of this Act to be valid the prospective spouses-

- (a) must both have attained the age of 18 years, and
- (b) must both consent to be married to each other.

(2) No spouse in an Islamic marriage recognised in terms of this Act may, after the commencement of this Act, enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961) during the subsistence of such Islamic marriage.

(3) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her guardian, must consent to the marriage.

(4) If the consent of the parent or guardian as referred to in subsection (3) cannot be obtained, the provisions of section 25 of the Marriage Act, 1961, applies.

(5) Despite the prohibition in subsection (1)(a), the Minister or any person or body authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into an Islamic marriage if the Minister or the said person or body considers such marriage desirable and in the interests of the parties in question.

(6) Permission granted in terms of subsection (5) shall not relieve the parties to the proposed marriage from the obligation to comply with any other requirements prescribed by law.

(7) If a person under the age of 18 years has entered into an Islamic marriage without the written permission of the Minister or person or body authorised by him or her, the Minister or such person or body may, if he, she or it considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be, for all purposes, a valid Islamic marriage.

(8) Subject to the provisions of subsections (5) and (6), section 24A of the Marriage Act, 1961, applies to the Islamic marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(9) The prohibition of an Islamic marriage between persons on account of their relationship by blood or affinity or fosterage, or any other reason, is determined by Islamic law.

Registration of Islamic marriages

- 6.** (1) An Islamic marriage -
- (a) entered into before the commencement of this Act, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or
 - (b) entered into after the commencement of this Act, must be registered as prescribed at the time of the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.

(2) It shall be the duty of the parties to the marriages contemplated in paragraphs (a) and (b) of subsection (1) to cause such marriages to be registered.

- (3) No marriage officer shall register any marriage unless –
- (a) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act, 1986 (Act No. 71 of 1986);
 - (b) each of such parties furnishes to the marriage officer the prescribed affidavit; or
 - (c) one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b).

- (4) The marriage officer must –
- (a) if satisfied that the spouses concluded a valid Islamic marriage, record the identity of the spouses, the date of the marriage, the Dower agreed to, whether payable immediately or

deferred in full or part, and any other particulars prescribed, and must register the marriage in accordance with this Act and the regulations as prescribed;

- (b) issue to the spouses a certificate of registration, bearing the prescribed particulars; and
- (c) forthwith transmit the relevant records to a regional or district representative designated as such under section 21(1) of the Identification Act, 1986.

(5) An Islamic marriage shall be contracted in accordance with the formulae prescribed in Islamic law, including *Tazawwajtuha* and *Nakahtuha* ("I have married her"). Such a marriage shall be concluded by the parties or their proxies in the presence of a marriage officer. A marriage officer in so concluding an Islamic marriage shall, after the commencement of this Act, cause such marriage to be registered in accordance with the provisions of subsection (4).

(6) If for any reason an Islamic marriage has not been registered, any person who satisfies a marriage officer that he or she has a sufficient interest in the matter may apply to the marriage officer in the prescribed manner to enquire into the existence of the marriage.

(7) If the marriage officer is satisfied that a valid Islamic marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).

(8) If the marriage officer is not satisfied that a valid Islamic marriage was entered into by the spouses, he or she must refuse to register the marriage.

- (9) A court may, upon application made to that court, order -
- (a) the registration of any Islamic marriage; or
 - (b) the cancellation or rectification of any registration of a Islamic marriage effected by a marriage officer.

(10) A certificate of registration of an Islamic marriage issued under this section or any other law providing for the registration of Islamic marriages constitutes *prima facie* proof of the existence of the Islamic marriage and of the particulars contained in the certificate.

(11) Failure to register an Islamic marriage does not, by itself, affect the validity of that marriage.

Proof of age of parties to proposed marriage

7. If parties appear before a marriage officer for the purpose of contracting a marriage with each other and such marriage officer reasonably suspects that either of them is of an age which debars him or her from contracting a valid marriage without the consent or permission of some other person, he may refuse to solemnize a marriage between them unless he is furnished with such consent or permission in writing or with satisfactory proof showing that the party in question is entitled to contract a marriage without such consent or permission.

Proprietary consequences of Islamic marriages and contractual capacity of spouses

8. (1) An Islamic marriage entered into before or after the commencement of this Act shall be deemed to be a marriage out of community of property, unless the proprietary consequences governing the marriage are regulated, by mutual agreement of the spouses, in an ante-nuptial contract which shall be registered in the Deeds Registry –

- (a) in the case of a marriage entered into before the commencement of this Act, within six months from the date of commencement of this Act; and
- (b) in the case of a marriage entered into after the commencement of this Act, within six months from the date of execution of the contract

or within such extended period as the court may on application allow.

(2) Notwithstanding any provision to the contrary contained in any other law, an ante-nuptial contract referred to in subsection (1) need not be attested by a notary.

(3) Spouses in an Islamic marriage entered into before or after the commencement of this Act may jointly apply to a court for leave to change the matrimonial property system, which applies to their marriage or marriages and the court may, if satisfied that

-

- (a) there are sound reasons for the proposed change;

- (b) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and
 - (c) no other person will be prejudiced by the proposed change,
- order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

(4) In the case of a husband who is a spouse in more than one Islamic marriage, all persons having a sufficient interest in the matter, and in particular the husband's existing spouse or spouses, must be joined in the proceedings.

(5) Where the husband is a spouse in an existing civil marriage, and in an Islamic marriage, all his existing spouse or spouses must be joined in such proceedings.

(6) A husband in an Islamic marriage who wishes to enter into a further Islamic marriage with another woman after the commencement of this Act must make an application to the court for permission to do so, and to approve a written contract which will regulate the future matrimonial property system of his marriages.

(7) When considering the application in terms of subsection (6), the court may -

- (a) grant permission on the basis of Islamic law if the court is satisfied that -
 - (i) the husband has sufficient financial means;
 - (ii) there is no reason to believe, if permission is granted, that the husband shall not act equitably towards his spouses;
 - (iii) there will be no prejudice to existing spouses;
- (b) in the case of an existing marriage which is in community of property or which is subject to the accrual system -
 - (i) terminate the matrimonial property system which is applicable to that marriage; and
 - (ii) order an immediate division of the joint estate concerned in equal shares, or on such other basis as the court may deem just;

- (iii) order the immediate division of the accrual concerned in accordance with the provisions of chapter 1 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or on such other basis as the court may deem just;
- (c) make such order in respect of the prospective estate of the spouses concerned as is mutually agreed, or, failing any agreement, the marriage shall be deemed to be out of community of property, unless the court for compelling reasons decides otherwise;
- (d) grant the order subject to any condition it may deem just, or refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

(8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).

(9) If a court grants an application contemplated in subsections (3) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated.

(10) A husband who enters into a further Islamic marriage, whilst he is already married, without the permission of the court, in contravention of subsection (6) shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000.

Dissolution of Islamic marriages

9. (1) Notwithstanding the provisions of section 3(a) of the Divorce Act, 1979, (Act No. 70 of 1979), or anything to the contrary contained in any law or the common law, an Islamic marriage may be dissolved on any ground permitted by Islamic Law. The provisions of this section shall also apply, with the changes required by the context, to an existing civil marriage insofar as the parties thereto have in the prescribed manner elected to cause the provisions of this Act to apply to the consequences of their marriage.

(2) In the case of *Talaq* the following shall apply:

- (a) The husband shall be obliged to cause an irrevocable *Talaq* to be registered immediately, but in any event, by no later than seven days after its pronouncement, with a marriage officer, in the presence of the wife or her duly authorised representative and two competent witnesses.
- (b) If the presence of the wife or her duly authorised representative cannot be secured for any reason, then the marriage officer shall register the irrevocable *Talaq* only in the event that the husband satisfies the marriage officer that due notice in the prescribed form of the intended registration was served upon her by the sheriff or by substituted service.
- (c) The provisions of paragraphs (a) and (b) shall apply, with the changes required by the context, where the husband has delegated to the wife the right of pronouncing a *Talaq*, and the wife has pronounced an irrevocable *Talaq* (*Tafwid ul Talaq*).
- (d) Any spouse who knowingly and wilfully fails to register the irrevocable *Talaq* in accordance with this subsection shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000.
- (e) If a spouse disputes the validity of the irrevocable *Talaq*, according to Islamic Law, the marriage officer shall not register the same, until the dispute is resolved, if the marriage officer is of the opinion that the dispute relating to the validity of the irrevocable *Talaq* is not frivolous or vexatious and has otherwise been fairly raised.
- (f) A spouse shall, within fourteen days, as from the date of the registration of the irrevocable *Talaq* institute legal proceedings in a competent court for a decree confirming the dissolution of the marriage by way of *Talaq*. The action, so instituted, shall be subject to the procedures prescribed from time to time by the applicable rules of court. This does not preclude a spouse from seeking the following relief -
 - (i) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
 - (ii) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application.
- (g) An irrevocable *Talaq* taking effect as such prior to the commencement of this Act shall not be required to be registered in terms of the provisions of this Act.

(3) A court must grant a decree of divorce in the form of a *Faskh* on any ground which is recognised as valid for the dissolution of marriages under Islamic Law, including the grounds specified in the definition of *Faskh* in section 1. The wife shall institute action for a decree of divorce in the form of *Faskh* in a competent court, and the procedure applicable thereto shall be the procedure prescribed from time to time by rules of court, including appropriate relief *pendente lite*, referred to in subsection (2)(f). The granting of a *Faskh* by a court shall have the effect of an irrevocable *Talaq*.

(4) The spouses who have effected a *Khul'a* shall personally and jointly appear before a marriage officer and cause same to be registered in the presence of two competent witnesses. The marriage officer shall register the *Khul'a* as one irrevocable *Talaq*, in which event the provisions of subsection (2)(f) will apply with the changes required by the context.

(5) In the event of a dispute between the spouses with regard to the amount of compensation in the case of *Khul'a*, the court may fix such amount as it deems just and equitable having regard to all relevant factors.

(6) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) and sections 6(1) and (2) of the Divorce Act, 1979 (Act No. 70 of 1979), relating to safeguarding the welfare of any minor or dependent child of the marriage concerned, apply to the dissolution of an Islamic marriage under this Act.

(7) A court granting or confirming a decree for the dissolution of an Islamic marriage -

- (a) has the powers contemplated in sections 7(1), 7(7) and 7(8) of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);
- (b) may, if it deems just and equitable, on application by one of the parties to the marriage, and in the absence of any agreement between them regarding the division of their assets, order that such assets be divided equitably between the parties, where-
 - (i) a party has in fact assisted, or has otherwise rendered services, in the operation or conduct of the family business or businesses during the subsistence of the marriage; or

- (ii) the parties have contributed, during the subsistence of the marriage, to the maintenance or increase of the estate of each other, or any one of them, to the extent that it is not practically feasible or otherwise possible to accurately quantify the separate contributions of each party.
- (c) must, in the case of a husband who is a spouse in more than one Islamic marriage, take into consideration all relevant factors including the sequence of the marriages, any contract, agreement or order made in terms of section 8(3) and (7).
- (d) may order that any person who in the court's opinion has a sufficient Interest in the matter be joined in the proceedings;
- (e) may make an order with regard to the custody or guardianship of, or access to, any minor child of the marriage, having regard to the factors specified in section 11; and
- (f) must, when making an order for the payment of maintenance, take into account all relevant factors.

Age of majority

10. For the purposes of this Act, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act No. 57 of 1972).

Custody of and access to minor children

11. (1) In making an order for the custody of, or access to a minor child, the court shall at all times have regard to the welfare and best interests of the child as the paramount consideration.

(2) Unless the court directs otherwise having regard to the welfare and best interests of the child -

- (a) the custody of a male child until he reaches the age of nine years, and the custody of a female child until she attains puberty shall vest in the mother of that child;
- (b) the male child, when reaching the age of nine years, and the female child when attaining puberty, shall choose the parent with whom he or she wishes to be placed in custody;
- (c) the non-custodian parent shall enjoy reasonable access to the child at regular intervals, but at least once a week.

(3) Despite subsection (2), but subject to subsection (1), the court shall deprive a parent of custody, or, otherwise, shall not grant custody to that parent, if the court is at any time of the opinion that the custody of the child by that parent –

- (a) has exposed, or will expose, the child to circumstances which may seriously harm the physical, mental, moral, spiritual and religious well-being and development of the child;
- (b) has resulted, or will result, in the child being in a state of physical or mental neglect for any reason.

(4) In the absence of both parents, or, failing them, for any reason, but subject to subsection (1), the court must, in awarding or granting custody of minor children, award or grant custody to such person as the court deems appropriate, in all the circumstances.

(5) An order in regard to the custody or access to a child, made in terms of this Act, may at any time be rescinded or varied, or, in the case of access to a child, be suspended by a court if the court finds that there is sufficient reason therefore: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), the court shall consider the report and recommendations of the Family Advocate concerning the welfare of minor children, before making the relevant order for variation, rescission or suspension, as the case may be.

Maintenance

12. (1) The provisions of the Maintenance Act, 1998 (Act No. 99 of 1998) shall apply, with the changes required by the context, in respect of the duty of any person to maintain any other person. Without derogating from the provisions of that Act, the following provisions shall apply:

(2) Notwithstanding the provisions of section 15 of the Maintenance Act, 1998, or, the common law, the maintenance court shall, in issuing a maintenance order, or otherwise in determining the amount to be paid as maintenance, take into consideration that –

- (a) the husband is obliged to maintain his wife during the subsistence of an Islamic marriage according to his means and her reasonable needs;

- (b) the father is obliged to maintain his male child until the age of majority, or, until he is able to become self-supporting, whichever is earlier, and he is obliged to maintain his female child until she is married;
- (c) in the case of a dissolution by divorce of an Islamic marriage -
 - (i) the husband is obliged to maintain the wife for the mandatory waiting period of *Iddah*;
 - (ii) where the wife has custody in terms of section 11, the husband is obliged to maintain the wife, including the provision of separate residence, for the period of such custody only;
 - (iii) the wife shall be separately entitled to maintenance for a breastfeeding period of two years calculated from date of birth of an infant;
 - (iv) the husband's duty to support a child born of such marriage includes the provision of food, clothing, separate accommodation, medical care and education.
- (d) a major child is obliged to maintain his or her needy parents.

(3) Any amount of maintenance so determined shall be such amount as the maintenance court may consider fair and just in all the circumstances of the case.

(4) A maintenance order made in terms of this Act may at any time be rescinded or varied or suspended by a court if the court finds that there is sufficient reason therefor.

Assessors

13. (1) If any dispute is referred to a court for adjudication, the following provisions shall apply -

- (a) the court shall be assisted by two Muslim assessors who shall have specialised knowledge of Islamic Law;
- (b) the assessors shall be appointed by the Minister by proclamation in the Gazette and shall hold office for five years from the date of the relevant proclamation: Provided that the appointment of any such assessor may at any time be terminated by the Minister for any valid reason;

(c) any person so appointed shall be eligible for reappointment for such further period or periods as the Minister may think fit.

(2) The decision of the court on any question arising for decision before the court, shall be decided by the majority, and the court and the assessors shall give written reasons for their decision.

(3) Any decision of the court shall be subject to appeal in accordance with the applicable Rules of Court, save that the assessors shall participate in any application for leave to appeal, where such leave is necessary.

Dissolution of existing civil marriage

14. (1) In the event of a spouse to an existing civil marriage instituting a divorce action in terms of the Divorce Act, 1979 (Act No. 70 of 1979), after the commencement of this Act, the court shall not dissolve the civil marriage by the grant of a decree of divorce until the court is satisfied that the accompanying Islamic marriage has been dissolved.

(2) In the event of the husband refusing, for any reason, to pronounce an irrevocable *Talaq*, the wife to the accompanying Islamic marriage shall be entitled in the same proceedings to make an application for a decree of *Faskh* for the purposes of dissolving such Islamic marriage, in which event the provisions of this Act shall apply, with the changes required by the context.

(3) Where in addition to the existing civil marriage, the husband has concluded a further Islamic marriage or marriages registrable under this Act, the husband's existing spouse or spouses must be joined in the divorce action contemplated in subsection (1).

Regulations

15. (1) The Minister of Justice, in consultation with the Minister, may make regulations -

(a) relating to -

- (i) the requirements to be complied with and the information to be furnished to a Marriage officer in respect of the registration and dissolution of an Islamic marriage;
 - (ii) the manner in which a Marriage officer must satisfy himself or herself as to the existence or the validity of a Islamic marriage;
 - (iii) the manner in which any person may participate in the proof of the existence or in the registration of any Islamic marriage;
 - (iv) the form and content of certificates, notices, affidavits and declarations required for the purposes of this Act;
 - (v) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of Islamic marriages or of any document prescribed in terms of the regulations;
 - (vi) any matter that is required or permitted to be prescribed in terms of this Act; and
 - (vii) any other matter which is necessary or expedient to provide for the effective registration of Islamic marriages or the efficient administration of this Act; and
- (b) prescribing the fees payable in respect of the registration of an Islamic marriage and the issuing of any certificate in respect thereof.

(2) Any regulation made under subsection (1) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(3) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

Amendment of laws

16. (1) Section 17 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), is hereby amended by the substitution for paragraph (b) of subsection (2) of the following paragraph:

“(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property or whether the matrimonial property

system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or, is governed in terms of section 8 of the Islamic Marriages Act, 20.. .”

(2) Section 45*bis* of the Deeds Registries Act, 1937, is hereby amended -

(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorisation, under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under sections 8 or 9 of the Islamic Marriages Act, 20.. , or under section 7 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses;” and

(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph:

“(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorisation under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under section 7 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 198), or under sections 8 or 9 of the Islamic Marriages Act, 20.. , as the case may be, in terms of which the property, lease or bond is awarded to both spouses in undivided shares;”.

(3) Section 1 of the Intestate Succession Act, 1987 (Act No. 81 of 1987) is hereby amended by the addition to subsection (4) of the following paragraph:

“(g) “spouse” shall include a spouse of an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include the spouse of a deceased person in a union recognised as a marriage in accordance with the tenets of any religion: Provided that in the event of a

deceased man being survived by more than one spouse, the following shall apply -

- (i) for the purposes of subsection (1)(c), such surviving spouse shall inherit the intestate estate in equal shares;
- (ii) for the purposes of subsection (1)(c), such surviving spouses shall each inherit a child's share of the intestate estate or so much of the intestate estate in equal shares as does not exceed in value the amount so fixed as contemplated in this section."

(4) Section 1 of the Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990) is hereby amended by the insertion after the definition of "survivor" of the following definition:

"Marriage" shall include an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include a union recognised as a marriage in accordance with the tenets of any religion."

Short title and commencement

17. This Act is called the Islamic Marriages Act, 20.. , and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

ANNEXURE B**LIST OF RESPONDENTS WHO COMMENTED ON ISSUE PAPER 15**

1. The Institute of Islamic Shari'ah Studies
2. Adam S Gool
3. Islamic Information Services (South Africa)
4. Saber Ahmed Jazbhay
5. Muslim Assembly (Cape)
6. Islamic Council of South Africa
7. Society of Advocates of Natal
 - AB Mahomed SC
8. Fatima Saban and Washiella Mohamed
9. The Amir of the Murabitun
10. Lawyers for Human Rights
11. Claremont Main Road Mosque*
12. The Islamic Social and Welfare Association*
13. The United Ulama Council of South Africa*
 - Muslim Judicial Council
 - Jamiatul Ulama - Transvaal
 - Jamiatul Ulama - KwaZulu/Natal
 - Sunni Ulama Council
 - Sunni Jamiatul Ulama
14. Legal Resources Centre (Cape Town) for the Muslim Youth Movement of South Africa*
15. Tshwaranang Legal Advocacy Centre and Nisaa Institute for Women's Development*
16. Muslim Judicial Council (Cape)*
17. Gender Project: Community Law Centre and Gender Unit: Legal Aid Clinic (UWC)*
18. Muslim Assembly (Cape)
19. Majlisush Shura Al Islami
20. Commission on Gender Equality*
21. Women's Legal Centre*
 - Fatimah Essop
 - Adv Fay Mukaddam
 - Lulama Nongogo

- Michelle O' Sullivan
 - Adv Shanaaz Mia
22. Fanyana P Nzuzza
 23. Ittigaadun-Nisaa and the Women's Institute for Leadership Development and Democracy*
 24. Haroon Yusuf Laher and Faizal Manjoo
 25. Adv R Carloo
 26. A Kays
 27. Gender Research Project: Centre for Applied Legal Studies (Wits)
 28. Dr MNZ Adams
 29. Zehir Omar Attorneys
 30. Mohamed Bham
 31. Achmad Majiet
 32. The Law Society of the Cape of Good Hope
 33. Adv A Louw
 34. Ms Christa Rautenbach (PU for CHE)
 35. Nazeem Goolam (Vista University: Bloemfontein)
 36. Waterval Islamic Institute
 37. Dr Elsje Bonthuys (Law School: Wits)
 38. Islamic Unity Convention
 39. Waheeda Carvello
 40. Association of Accountants and Lawyers for Islamic Law
 - Dr Abu-Baker M Asmal
 - Abdul Rahim Kazi
 - Dr Moulana Ahmed Khalil Aziz

Respondents marked with an asterisk (*) indicated in their responses to the Commission that they consulted widely, by way of workshops, meetings and discussion groups with various Islamic constituencies in order to inform their submissions. These included: welfare organisations, religious institutions and mosques, youth organisations, women's focus groups and individual women, community groups and congregations.