**COLLATION OF SUBMISSIONS ON DISCUSSION PAPER 101: ISLAMIC MARRIAGES AND RELATED MATTERS**

This document summarises and collates the written responses received by the Commission from interested persons and bodies after the publication of Discussion Paper 101. It is divided into two parts: the first deals with comment specifically directed at the provisions of the proposed draft Bill as embodied in the Discussion Paper, and the second with more general or miscellaneous comment. The latter includes criticisms, concerns, alternative proposals as well as negative and positive comment.

A. Comment on the draft Bill

***Clause 1: Definitions***

*Court:*

The **Institute of Islamic Shari'ah Studies** suggests that the words "or any Muslim specialist jurist committee established for the granting of *faskh* applications and hearing and deciding of *talaq*, *khul'* and other form of separation applications" be inserted after the words "Act 90 of 1929".

In view of its endorsement of the later proposal that the concept of Muslim Family Courts must be introduced, the **Muslim Judicial Council** proposes that the words "or a Muslim Family Court established in terms of this Act" be inserted after the words "High Court of South Africa".

**Jamiatul Ulama (Transvaal)** recommends that the definition should read "... means the Muslim Family Court or the High Court of South Africa consisting of a full *Shari'ah* bench or any Arbitration Tribunal established for the sole purpose of hearing Islamic marriage issues and related matters".

*Dower:*

The **Mowbray Mosque Congregation** suggests that "dower" should be replaced by "dowry", and that the substantive provisions found in some of the definitions be located in separate clauses in the draft Bill. The latter proposal is echoed by both **Mr M S Sulaiman** and the **Women's Legal Centre** in respect of the definition of "existing civil marriage". The

**Women's Legal Centre** states that the definition also includes the means by which parties to an existing civil marriage can cause the provisions of the Bill to apply to their marriage. It is suggested that this be provided for in detailed manner in the Bill rather than in the definition section. The respondent recommends the incorporation of a provision which allows parties to change their proprietal regime but protects vested rights by an accounting process at the time of registration under the Bill, with oversight by marriage officers, the courts and the Registrar of Deeds. **Mr Sulaiman** contends that the phrase "but without affecting vested proprietary rights (unaffected by such election)" in the definition of existing civil marriage contains a tautology. In his interpretation the provision provides that the rights not so affected, will not be affected.

A joint submission, endorsed by the Black Lawyers Association (Western Cape), was received from the Gender Unit & General Practice Unit: Legal Aid Clinic (UWC); Shura Yabafazi (Consultation of Women); the National Association of Democratic Lawyers (NADEL: Western Cape) and the National Association of Democratic Lawyers (Human Rights Research and Advocacy Project). These respondents will hereafter be referred to as the **Gender Unit**. They submit that the dower contains something of patrimonial value, and its purpose is to ensure that the woman acquires a form of security for herself when entering the marriage union. It is suggested that the definition should be amended to read "... means the money or property which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself".

The **Muslim Judicial Council** proposes that the words "or anything of value, including benefits" be inserted after the word "property".

**Jamiatul Ulama (Transvaal)** submits that the issue of dower needs to be elaborated in the Bill. Though dower is not a condition for the validity of *nikah*, it is compulsory and the spouses may provide for same in their contracts if they so wish.

*Faskh:*

**Darul Uloom Zakariyya** contends that the term "substantial" in paragraph (a) is too broad and that the principle is a period of four years, although the *Shari'ah* takes extra-ordinary circumstances into account. The respondent also submits that paragraph (i) needs to be rephrased, as the term "irretrievably broken down" is all encompassing. This may imply that a wife can apply for *faskh* even after 30 or 40 years on the grounds of mere dislike.

The **Young Men's Muslim Association** and the **Islamic International Research Institute** who, incidentally, submitted responses that are verbatim the same, submit that the proposed definition is wholly erroneous and confirms their view that the concept will be totally abused and mismanaged by the secular courts.

The **Waterval Islamic Institute** contends that in the case of a missing husband, *faskh* does not apply, but rather a "*Tafreeq*" or "*Shar'iy*" separation. The same goes for the instance where the husband treats his wife with cruelty and where the husband is a spouse in more than one Islamic marriage. The respondent also contends that the one year period stipulated in paragraph (c) is un-Islamic and that the words "from the start of the marriage" should be added to the beginning of paragraph (e).

**Mr M S Sulaiman** argues that if the word "and" in the phrase "and including any one or more..." is meant to imply that the list contains grounds not permitted by Islamic law, the prospect of the legislature legislating Islamic law becomes a reality. He is also concerned that some of the grounds listed could be regarded as foreign to the scheme of Islamic law in the manner that they are formulated in the draft Bill. **Mr Sulaiman** further contends that the schools of Islamic law differ as to what may be regarded as a "substantial period of time" in paragraph (a); that the term "marital obligations" in paragraph (g) is vague and needs clarification; that the phrase "reasonable period" in the same paragraph be amended to read "for an unreasonably long period"; and that paragraph (h) is incoherent as it stands. The conjunction "and" should be inserted between the words "marriage" and "he".

The **Gender Unit** submits that there is gender inequality with regard to the differentiations applicable to a husband and wife for the purposes of dissolving an Islamic marriage, and that the definition of *faskh* should be omitted from the draft Bill. If it is decided to retain the definition, it should only contain the ground of 'irretrievable breakdown of the marriage to the extent that the marriage relationship has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties'. The **Commission on Gender Equality** appears to support this proposal.

The **Islamic Careline** points out that the four Madhahib have slight differences in the eligibility of being granted a *faskh*, but current Islamic jurisprudence favours the Maliki Madhab. The respondent suggests that the words "for any reason" in paragraph (b) should be omitted, and submits that the phrase "for a reasonable period" in paragraph (g) is confusing in the light of the different Madhahib. Paragraph (g) also appears to be superfluous in view of the fact that all the other listed factors clearly indicate an irretrievable

breakdown of the marriage.

The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, holds that the definition of *faskh* should either be given in its entirety, or briefly, with the qualifying phrase "according to Islamic law". It also proposes that distinction should be made between permanent insanity or temporary mental illness as far as the ground "mentally ill" is concerned, and that the concept "irretrievably broken down" should be removed from the Bill as it is not consistent with the *Shari'ah* position. These proposals are supported by **Jamiatul Ulama (KwaZulu-Natal)** and **Jamiatul Ulama (Transvaal)**. The latter respondent also suggests that proper research should be done with regard to the type of *talaq* that will fall depending on the type of grounds used to ask for *faskh*, as it will not always be a *talaq ba'in* as stipulated in the Bill in clause 9(3). The respondent additionally refers to other grounds of *faskh* as set out in the other four schools of interpretation, namely there must be a real great necessity; the necessity must be persistent; and there must not be a possibility of *talfiq* when adopting *udul 'an al-Maslak*.

Four institutions submitted petitions to which signatures were appended (the number of signatures are reflected in the Annexure setting out the list of respondents). The petitions, all with the same content, came from **Nurul Islaam Jamaat Khana**; **Colenso Mosque**; **Siraatul Haq Islamic School** and **Bergville**. The petitioners submit that the phrase "irretrievable breakdown" is vague and should be deleted and further that the entire clause on *faskh* should be redrafted to make it *Shari'ah* compliant. In a joint submission by **F Noormohamed, H Rawat and F Mall** the phrases "irretrievable breakdown" and "does not treat the wife justly" are criticised as being too vague and open to many interpretations. **Ms Z Bulbulia** argues that the phrase "irretrievable breakdown" should be omitted because if it remains an individual ground, it will be abused and the rate of divorces would increase significantly. **Madresah In'aamiyyah** indicates that case history has shown that the mentioned phrase is interpreted very broadly and in a manner which will certainly be open to abuse from a *Shari'ah* perspective. **Mr M I Patel** submits that the mentioned phrase, apart from being extremely subjective, has no basis in Islamic law. **Khalid Dhorat** argues that by incorporating "irretrievable breakdown" as a ground for faskh, the *stare decisis* doctrine will most probably apply.

**Imran Khamissa** holds the view that the conditions stated as grounds for *faskh* should be reformulated.

**Jameah Mahmoodiyah** suggests that the definition of *faskh* and paragraphs (a), (d) and (i)

be rephrased as follows:

> *Faskh* means a decree of dissolution of marriage granted by a court, upon the application of the wife, on any one or more of the following grounds, permitted by Islamic law, namely, where the -
> (a) husband is missing and his whereabouts are not known, for a lengthy period of time;
> (d) insanity of the husband is so serious that the wife apprehends that he will either molest her physically or kill her;
> (i) differences and hatred between the spouses is so acute that they fear that they will not be able to uphold the limits prescribed by Allah Ta'ala.

The **Muslim Judicial Council** proposes that the definition of *faskh* and paragraphs (a), (b) and (e) be reformulated as follows:

> *Faskh* means a decree of dissolution of marriage granted by a court upon the application by the wife or husband on any ground ...
> (a) husband is missing or his whereabouts are not known for a period of four years or more; (this proposal is also supported by **Masjidul Quds**)
> (b) husband fails to maintain his wife adequately for a period of one year or more;
> (e) ... in the case of impotency, the court shall grant the husband a period of one year in which to seek medical treatment. If he refuses, or the treatment is unsuccessful, the court may grant an order for dissolution.

*Iddah:*

The **Women's Legal Centre**, expressing concern about the constitutionality of *Iddah*, submits that if the concept is to be retained in the Bill, it is to be redefined to reflect that it is a period of reconciliation applying to both parties and that the notion of consent of both parties for the reconciliation is also included. It is also suggested that the provisions of section 4(3) of the Divorce Act regarding reconciliation be incorporated in the Bill rather than entrenching the *Iddah* period.

The **Gender Unit** holds the view that the *Iddah* should not be a mandatory requirement applicable to women only. In the respondent's view the historical reason for the *Iddah* which is to establish certainty about the paternity of an unborn child should the wife discover that she is pregnant during the *Iddah* period, is no longer applicable because current medical science allows parties to obtain clarity in respect of paternity through various paternity tests.

**Jameah Mahmoodiyah** suggests that the *Iddah* of a *widowed* woman, which is 130 days if she is not pregnant, and if she is pregnant, extends until the time of delivery, be added to the definition.

The **Muslim Judicial Council**, supported by **Jamiatul Ulama (Transvaal)** and **Masjidul Quds**, proposes that a paragraph be added to the effect that the *Iddah* of a widowed woman shall be four (lunar) months and ten days.

*Irrevocable talaq:*

The **Waterval Islamic Institute** submits that the words "which becomes irrevocable only upon the expiry of the *Iddah*, thereby terminating the marriage upon the expiry thereof" in subparagraph (a) should be deleted.

The **Institute of Islamic Shari'ah Studies** suggests that a *talaq* be pronounced and signed by a husband as far as subparagraph (a) is concerned, and contends that subparagraph (b) is difficult to understand, as any *talaq* which the issuer intends to be irrevocable, is such irrespective of whether it is the first or second *talaq*. The respondent submits that this is not only the Hanafi rule.

**Mr I Manjra** contends that the definitions of a revocable and irrevocable *talaq* is vague and confusing and does not conform to the procedures laid down in the *Qur'an* and the *Sunnah*. He also avers that the Commission has not paid due regard to the practice of pronouncing three *talaqs* simultaneously and the consequent problems and hardships arising from this. After setting out the position of three simultaneous *talaqs* in the light of the *Qur'an* and the *Sunnah*, the respondent refers to countries where Muslim Personal law has been implemented and steps taken to change the juristic rulings to conform with the *Qur'an* and the *Sunnah*, among which India, Pakistan and Egypt. **Mr Manjra** calls upon the Commission to change the position in South Africa as well.

The **Association of Muslim Lawyers** submits that the irrevocable *talaq* is not clearly defined, and should be more specific as to the form it should take and the time period between the *talaqs* should be noted.

The **Gender Unit** contends that as all forms of *talaq* addressed in the draft Bill are the sole preserve of a husband, and seeing that differentiation on the grounds of gender constitutes unfair discrimination, all definitions relating to *talaq* should be removed from the Bill. If the definitions are retained, the respondent suggests that, with regard to paragraph (a), clarity must be given regarding how many pronouncements must be given, the periods between pronouncements as well as at which stage the period of *Iddah* commences and expires. In

respect of paragraph (c) it is contended that clarity must be given regarding the length of the periods between the pronouncements of the first and second *talaqs*, as well as the length of the *Iddah* during those periods.

The **Islamic Careline** welcomes the specific reference to the Hanafi School of Interpretation, but holds the view that this differentiation is necessary in many other instances in the draft Bill.

**Masjidul Quds** poses the question whether the reference to *Talaq-e-ba'in* subjects the proposed Bill to interpretative rules that favour the Hanafi School of Islamic law.

*Islamic marriage:*

The **Islamic Forum Azaadville** holds the view that the definition of "marriage" must be spelt out and should include the contractual nature of the marriage and the fact that such contracts can only be entered into between a male and female. The **Muslim Assembly (Cape)** argues that "marriage" should refer to a marriage of a man to a woman and *vice versa*. The **Islamic Careline** suggests that the name of the draft Bill be changed to the Muslim Marriages Act as the term "Muslim" would relate to some Muslim practice instead of the whole of Shari'ah law as the term "Islamic" would denote. The respondent also believes that the definition of marriage requires further elaboration, namely that it is a contract between two parties, one being male and the other female.

**Ms Z Bulbulia** is of the opinion that the definition should be reconsidered taking into account that according to the classical jurist definition, marriage is a contract prescribed by the legislator, and it denotes the lawful entitlement of each of the parties thereto to enjoy the other in the lawful manner.

*Khul'a*:

The **Waterval Islamic Institute** suggests that the word "mutual" be inserted before the word "agreement". **Mr M S Sulaiman** concedes that transliteration of Arabic terms can be a complex affair, but contends that the term "*Khul'a*" may deserve further consideration since the original Arabic term does not have the English letter "a" at the end, and should perhaps read "*Khul'un*".

The **Gender Unit** submits that the definition should be omitted from the Bill as it is not

similarly applicable to a husband, but if the definition is retained, it should be worded as follows: "... means the dissolution of the marriage bond, at the instance of the wife, on the ground of irretrievable breakdown of the marriage to the extent that the marriage relationship has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties".

The **Islamic Careline** suggests that the definition should read "the dissolution of the marriage bond, at the instance of the wife in terms of a mutual agreement between the spouses according to Islamic law".

The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre** and **Jamiatul Ulama (KwaZulu-Natal)**, submits that the inclusion of monetary or material exchange needs to be considered in the definition.

In the joint submission by **F Noormohamed, H Rawat and F Mall** it is stated that the definition of *khul'a* in the Bill differs from the Islamic definition. *Khul'a* is divorce by mutual consent with compensation decided on by the two parties. It is submitted that the courts cannot fix the amount as this would deviate from the principle of *khul'a*. This view is endorsed by **Khalid Dhorat**.

**Ms Z Bulbulia** opines that the definition is not very clear to the layman, and should expressly state that *khul'a* is a dissolution of the marriage bond where the husband and wife mutually agree that the husband will divorce his wife if the wife returns the dower or other compensation.

**Masjidul Quds** states that the definition as given is incomplete.

*Marriage officer:*

**Darul Uloom Zakariyya** submits that, due to the intricate responsibilities of marriage officers, they should be qualified scholars from recognised Islamic institutes and that they should be proficient in the fields of *Qada* procedures, Arabic, *tafseer* and *usool-ul-tafseer*, *Hadith* and *usool-ul-hadith*, as well as *Fiqh* and *usool-ul-fiqh*. This view is shared by **Jamiatul Ulama (Transvaal)**. **Moulana Y A Musowwir Tive** argues that appointing marriage officers with Islamic knowledge being the only prerequisite is not enough and calls for them to be selected from the highly learned Ulama only. The **Islamic Careline** holds the view that the qualifications of marriage officers should include competency in the Arabic

language; qualification in *Fiqh/tafseer*; adequate knowledge of the South African legal system as well as being practising Muslims.

The **Islamic Forum Azaadville** opines that marriage officers' duties, qualifications, powers, methods of appointment and their removal should be clearly spelt out. They should not be given arbitrary powers which would overrule those of the Islamic guardian unless specifically allowed in Islamic jurisprudence.

Both the **Women's Legal Centre** and the **Commission on Gender Equality** express agreement with the definition as it currently stands, as it does not preclude the appointment of women as marriage officers. The latter respondent further recommends that marriage officers should be persons of good standing, have knowledge of the Islamic Marriage Act and its Regulations and who are also familiar with Islamic principles in respect of marriage.

The **Young Men's Muslim Association** and the **Islamic International Research Institute** argues that there is no need for marriage officers, as the mutual consent and agreement of the spouses, with the presence of Muslim witnesses, are sufficient in *Shari'ah*.

The **Gender Unit** suggests that the definition should be replaced with the following: "... means any person with knowledge of the Islamic Marriages Act and knowledge of the consequences of contracting an Islamic marriage on the terms agreed upon by the parties, appointed as marriage officer for purposes of this Act by the Minister or an officer acting under the Minister's written authorisation".

*Minister:*

The **Association of Muslim Lawyers** contends that as Islam does not allow consent to be obtained from a person who is not a Muslim, the paragraph should be amended by referring to a duly appointed Director-General of Muslim Affairs.

*Revocable Talaq*:

The **Muslim Judicial Council** proposes that the following be added to the definition: "Every *Talaq* shall be revocable, except a third *Talaq*, that given before consummation, that for a consideration (*khul'a*), and that expressly pronounced as irrevocable".

*Tafwid ul Talaq:*

The **Islamic Careline** submits that the definition should be specific to the contract of *Nikah* which the couple enter into preferably prior to the solemnization of the marriage.

**Jameah Mahmoodiyah** suggests that the phrase “or any other person” be inserted after the word “wife” where it appears for the first time and the phrase “or the appointed person” be inserted after the same word where it appears for the second time.

*Talaq:*

According to **Darul Uloom Zakariyya** the definition of *talaq* is incomplete and not inclusive of certain important aspects of *talaq*. Only if the husband pronounces a word or phrase, which has amongst many meanings the possibility of meaning *talaq*, will the husband be asked to disclose his intention, and the decision of *talaq* being issued or not will rest upon this intention provided that the situation does not indicate that *talaq* was intended - e.g. the husband was in a state of anger threatening to issue *talaq*, in which case *talaq* would be given even if the husband claims that he had not intended to give *talaq*.

The **Women’s Legal Centre** contends that the husband’s right to take his wife back before the expiration of the *Iddah*, is in violation of the right of freedom and security of the person. The revocable *talaq* violates the notion of women’s capacity and consent and their equal status to men, and treats women as property. They also criticise the involvement of an intermediary, and suggests that both spouses must be present for a *talaq* to take place. Moreover, the grounds for a *talaq* under Islamic law are not contained in the Bill, and the respondent suggests that they be defined. Ideally the same grounds should be included under the *faskh* and the *talaq*.

The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre** and **Jamiatul Ulama (KwaZulu-Natal)**, holds the view that some reference to *Kinayah-Talaq* (implied or ambiguous divorce) is required.

**Ms Z Bulbulia** proposes the following definition: “*Talaq* means the dissolution of a valid marriage, forthwith or at a later stage, by a man, or his agent, or his wife, duly authorised by him to do so, using the word *Talaq* or a synonym or derivative thereof”.

***Clause 2: Application of this Act***

The **Gender Unit** indicates that it supports the proposals contained in this clause.

The **Society of Advocates of KwaZulu-Natal** holds the view that subclause (2)(b), to the extent that it places an onus on the parties to an existing civil marriage to apply to adopt the provisions of the proposed Act, will cause considerable difficulties. The respondent avers that it will be preferable and more consistent with justice and equity that in such "existing registered civil marriages" the parties are presumed to intend the consequences of Islamic Marital laws to apply to their marriage. It is therefore recommended that existing registered civil marriages, as defined, should, by a deeming provision, fall within the ambit of the proposed Act but subject to the provision that appropriate regulations would be formulated to enable both spouses to an existing civil marriage to apply for the exclusion of the provisions of the proposed Act by an application to the High Court.

***Clause 3: Equal status and capacity of spouses***

**Darul Uloom Zakariyya**, proposing that the clause should be deleted, contends that the way in which it will be interpreted in South African law will have a negative effect on Islamic law. Many issues, which Islam deems strictly impermissible, will be entertained in this clause. For instance, if the wife wishes to have an abortion or if either of the parties wishes to become sterile, the other spouse will have no say in the matter.

The **Islamic Forum Azaadville** opines that the question of "equality" has the potential for conflict unless recognition is given that different values and criteria between secularism and Islam exist with regard to application of the term. Since the application in Islam is based more on 'equilibrium' rather than the concept 'same', this clause will have to be more specific.

The **Muslim Assembly (Cape)** submits that the *Mahr* and *Nafaqa* requirements as applied to women who through inheritance or own effort acquire a high degree of financial independence should be considered.

The **Community Law Centre**, abiding by its comments submitted upon the release of Issue Paper 15, specifically points out that it supports the inclusion in the draft Bill of a clause guaranteeing women's equality in the context of Islamic marriages.

The **Muslim Judicial Council** proposes that the first part of the provision be reformulated to read as follows: “A wife and a husband in an Islamic marriage are equal in human dignity and both have, on the basis of equality ...”.

**Masjidul Quds**, posing the question whether the contents of clause 3 should not perhaps be encapsulated in a preamble to the Bill, states that a woman’s dignity should not be limited in comparison to that of a man, but rather as a creation of Allah and as the mother of mankind, she possesses human dignity, which knows no limits.

***Clause 4: Islamic marriages***

**Darul Uloom Zakariyya** argues that this clause can be summarised as follows:

> All Islamic marriages entered into either before or after the commencement of this Act, whether monogamous or polygynous, provided that they are correct by Islamic law, are for all purposes recognised as valid marriages.

**Mr M S Sulaiman** submits that it may well be queried whether, in principle, any particular reason or policy consideration exists why marriages, whether monogamous or not, that are terminated prior to the commencement of the Act should be declared invalid. Since numerous monogamous marriages can in the normal course of events be expected to be terminated shortly before the commencement of the Act, non-recognition of these marriages will have a clear and harmful impact on issues of legitimacy, custody, maintenance and inheritance arising from such marriages.

The **Association of Muslim Lawyers** suggests that a proviso should be added to subclause (1) reading: “Provided that the procedure laid down in section 6(1)(a) is followed.”.

The **Women’s Legal Centre** supports the proposed scheme for the recognition of the validity of Islamic marriages in principle, and particularly clause 4(5). The respondent contends, however, that this formal recognition does little to ameliorate the financial position of women in Islamic marriages as such marriages are out of community of property.

***Clause 5: Requirements for validity of Islamic marriages***

**Darul Uloom Zakariyya** calls upon the Commission to lower the minimum age for marriage to 15 years, as it will provide a solution to the many cases of teenage pregnancies, juvenile sexual harassment and many other vices that have become endemic in modern societies.

The respondent also contends that an additional requirement for the validity of Islamic marriages, namely the necessity of the presence of two witnesses, should be included. The **Women's Cultural Group** also point to the fact that Muslims generally get married at a much younger age than other communities and there should be no reason why the age of consent under the Bill should be different and higher than that required by civil law.

**Moulana Y A Musowwir Tive** submits that the age of consent should not be confined to 18 years but other factors such as the ability to differentiate between good and bad, right and wrong, the attainment of puberty and parental consent should also be taken into consideration. The **Mowbray Mosque Congregation** concurs with this view and states that agreement between the parties involved should constitute consent. Maturity of the parties should also be a determining factor. This is echoed by the **Muslim Assembly (Cape)**.

A number of senior students of Islamic jurisprudence at the Zakariyya Islamic University (hereafter "**Zakariyya Islamic University**") urges the Commission, in a combined comment, to review the age restriction of 18 years. In their view the youth, irrespective of laws, will most certainly seek sexual outlets and should not be forced by the law to resort to unwholesome acts which not only destroy themselves, but the nation as a whole. Thus Islam promotes marriage as a valid alternative and cannot condone an age restriction. Regarding subclause (7), the respondents submit that the authorisation to the Minister to post-validate the marriage of a minor who has entered into a marriage requires clarification. In their view there is no mechanism to protect the adult husband from being charged with statutory rape. The **Mowbray Mosque Congregation** holds the view that the powers concerned should be vested in the court and not the Minister.

**Ms F H Amod**, supported by the views expressed in the joint submission by **Mss S Khan**, **A Randaree**, **F Ajam**, **F Rawat** and **Y Khan**, raises similar concerns regarding teenage pregnancies and the spread of AIDS, and recommends that the clause referring to the age of consent be deleted.

The **Waterval Islamic Institute** suggests that the age restriction be replaced by words to the following effect: "marriageable in Islam is the time of maturity which varies in relation to male and female". The respondent also proposes that subclauses (6) and (7) should make it clear that the permission referred to is not essential or necessary in Islam.

The **Society of Advocates of KwaZulu-Natal** proposes that the minimum age be adjusted to 17 years in the case of a bride as such threshold provides a measure of flexibility in the

selection process that is sanctioned by the laws of Islam. Regarding subclause (5) the respondent submits that the Minister's delegation of power should be to a qualified Imam of not less than ten years standing or a judicial authority recognised as such.

The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, **Jamiatul Ulama (KwaZulu-Natal)** and **Jamiatul Ulama (Transvaal)**, avers that by imposing the age of 18 years as the minimum age, the realisation of the Prophetic directives are denied and that the draft Bill should contemplate ways and means to reduce formalities in achieving this objective. Regarding permission of the parents as a requirement for validity of the marriage, the respondent refers to different requirements in the Hanafi and Shafi Schools of Interpretation and submits that subclause (3) be reformulated. **Jamiatul Ulama (Transvaal)** further submits that a clause be included in the draft Bill to the effect that should a couple wish to enter into an Islamic marriage but do not want to be regulated by the Bill, they should be free to do so without being penalised.

The petitioners, namely **Nurul Islaam Jamaat Khana**; **Colenso Mosque**; **Siraatul Haq Islamic School** and **Bergville** hold the view that the minimum age requirement should be omitted from the draft Bill. This view is endorsed in the joint submission by **F Noormohamed, H Rawat and F Mall**, as well as by **Madresah In'aamiyyah**, **Mr M I Patel** and **Fatima Asmal**. The latter respondent argues that at most the marriage of minors can be made subject to the consent of the parents.

The **Islamic Forum Azaadville** is concerned that this clause may outlaw the authority to marry non-South Africans, and although confident that this is not the intention, feels that amplification is required.

The **Women's Legal Centre** supports the provision as it currently stands, but suggests that the provisions of section 11(1) and (2) of the Marriage Act be incorporated: a marriage may be solemnized by a marriage officer only and unauthorised solemnization should be an offence.

The **Gender Unit** declares that consent to the marriage should be actual, informed and in writing; that special provision should be made for illiterate parties; that both parties be required to complete a prescribed 'consent form' reflecting their consent, the matrimonial property regime and dower; that the marriage officer must inform the parties about what they are consenting and the consequences thereof; and that the marriage officer must be satisfied about the parties' consent and their understanding of the consequences. The

respondent also suggests that subclause (9) should not contain the words “or any other reason” as it is too vague.

The **Young Men’s Muslim Association** and the **Islamic International Research Institute** submit that the age restriction is not recognised in Islamic law; that the intervention of the Minister and his or her consent is totally unacceptable; and that the clause clearly indicates the right of a non-Muslim to override an Islamically valid *nikah*.

The **Association of Muslim Lawyers** suggests that an application by a minor for permission to enter into a marriage contract must be directed to the Director-General of Muslim Affairs, who must be a Muslim person and who has acquired, under certification, knowledge of Muslim Personal law. All references to the Minister in this clause must consequently be adapted to incorporate the suggestion.

**Mr M S Sulaiman** argues that the competency of the legislature to legislate for the validity of Islamic marriages is extremely questionable. He does not place in dispute the legislature’s competency to recognise an Islamic marriage, or to recognise an Islamic marriage satisfying certain requirements as a valid marriage in *South African law*, without qualifying it as a valid *Islamic marriage*. The respondent also refers to the fact that the Islamic rules regarding minority and majority, particularly in the context of marriage, differ from what is set out in the draft Bill. Finally the respondent suggests that the introductory words in subclause (5) be amended to read “Notwithstanding the age requirement in subsection 5(1)(a) ...” as subclause (1)(a) does not contain a prohibition, but merely a requirement for validity. The **Muslim Assembly (Cape)** submits that subclause (4) should be deleted as it contradicts the provisions of subclause (1).

The **Muslim Assembly (Cape)** as well as the **Institute of Islamic Shari’ah Studies** submit that “minority” in subclause (3) should be defined.

The **Islamic Careline** submits that the validity of Islamic marriages need to include the express injunction of ‘offer and acceptance’ by the prospective spouses. The respondent also points out that there seems to be no mention of witnesses to the *Nikah* which is also an injunction for the validity of an Islamic marriage. In the joint submission by **F Noormohamed, H Rawat and F Mall** concern is expressed about the omission of the requirement of witnesses, as such omission will result in the dilution and distortion of the true Islamic requirements and consequently result in Muslims deviating form the proper practice of Islam. This view is echoed by **Madresah In’aamiyyah**.

**Jameah Mahmoodiyah** suggests that clause 5(1)(a) should be deleted and replaced by the following:

> (1) For an Islamic marriage entered into after the commencement of this Act to be valid -
>
> (a) the prospective spouses must mutually consent or their agents or *Shar'i* guardians must consent to their marrying each other in specified Islamic wordings; and
>
> (b) this consent must be given in the presence of two males or one male and two females.
>
> (2) If either or both of the spouses are minors, then his or her *Shar'i* guardian must consent to the marriage.

The respondent also submits that subclauses (5), (7) and (8) should either be deleted or the words "person under the age of 18 years" must be replaced by the word "minor".

**Ms Z Bulbulia** considers it to be essential to additionally list the requirements of a valid marriage contract. These would include offer and acceptance, legal capacity, sanity, the presence of witnesses (either two males or a male and two females), eligibility and the contract form. **Jamiatul Ulama (Transvaal)** submits that the conditions for a valid *nikah* are legal capacity, eligibility, guardianship and proxy, witnesses and form.

The **Muslim Judicial Council** proposes that a new subclause be inserted after subclause (2), reading as follows: "A woman never previously married, may not enter into marriage unless with the express permission of her guardian, or in his absence or refusal, with the permission of the head of the marriage officers' organisation".

**Masjidul Quds** points out that there are differences among the various Schools of Interpretation regarding permission to get married, and suggests that an arbitration system with agreed terms of reference will resolve the problem appropriately in terms of the School of Interpretation chosen by the parties.

***Clause 6: Registration of Islamic marriages***

**Prof A Tayob** draws attention to the difference in time period allowed for the registration of the marriage in terms of subclause (1)(a) - (12 months) and that allowed for entering an ante-nuptial contract or other property regime in terms of clause 8(1)(a) - (six months). In his view there should be no time difference. The **Society of Advocates of KwaZulu-Natal** argues that the 12 month period leaves a window for potential prejudice, particularly for the

wife and children, and recommends that the period be reduced to six months. The **Commission on Gender Equality** on the other hand suggests that the period be extended to 24 months, since delays may be expected in the various Home Affairs departments.

**Darul-Ihsan Research and Education Centre**, referring to the duty of the parties to cause marriages to be registered, holds the view that such duty infringes on the individual's choice and constitutional rights to register or not to register the marriage. Regarding subclause (5) the respondent submits that no mention is made of witnesses and dower, which are basic elements of the marriage contract. These views are shared by **Jamiatul Ulama (KwaZulu-Natal)** and **Masjidul Quds**. The latter respondent also suggests that the marriage certificate should be made out in quadruplicate, a copy to be divided between each of the married spouses, one to the marriage registrar and one to serve as a record for the marriage officer.

**Jamiatul Ulama (Transvaal)** argues that a marriage officer should be a second choice when it comes to the registration of marriages, and that a well established recognised Islamic institution would better fit the profile.

**Moulana Y A Musowwir Tive** argues that the Ministry of Home Affairs should not find it problematic in registering an Islamic marriage as long as the basic conditions of marriage have been fulfilled, ie consent was given, the parties are of the required age or are mature enough for differentiating between right and wrong, and the marriage officers met the stated conditions and prerequisites.

The **Women's Legal Centre**, concerned about ignorance of the existence of the Act even after implementation, suggests that there should always be an opportunity for a marriage which was entered into prior to the Act to be registered and that lack of registration should never prejudice the parties to a marriage when they seek to dissolve the marriage and to assert their maintenance or other proprietal rights. The respondent also argues that only one party needs to register the marriage, as it will assist a party in those cases where there is a recalcitrant spouse. It is also pointed out that there may be a contradiction regarding the issue of consent, as clause 6(5) provides for proxies, which may be insufficient. The respondent suggests that both parties should always be present for a valid marriage to be concluded. Although expressing agreement with the flexibility included in clause 6(6), the **Women's Legal Centre** suggests that it is essential to provide that either of the parties to a marriage may apply to register the marriage.

The **Society of Advocates of KwaZulu-Natal** submits that the reference to proxies in

clause 6(5) should either be elaborated to conform to the general rules of *Shari'ah* on proxy or to add the words "or their proxies in conformity with the *Shari'ah*".

The **Association of Muslim Lawyers** points out that the onus of registering a marriage rests on the marriage officer in terms of subclause (5). It is suggested that failure to register a marriage should involve a penalty for the marriage officer and that such officer's authority to act as marriage officer be withdrawn. The respondent further recommends that a paragraph (d) be added to subclause (3), requiring each of the parties to provide the marriage officer with a medical certificate with regard to their HIV-status. The **Society of Advocates of KwaZulu-Natal** also submits that it is fit and proper that the interest of an unborn child be protected by a declaration of the spouses' HIV-status prior to the conclusion of the marriage.

The **Commission on Gender Equality** submits that subclause (3)(c) should be removed, as it is not clear why it is necessary.

The **Young Men's Muslim Association** and the **Islamic International Research Institute** state that the entire clause undermines the sacred bond of *nikah*, whose conclusion is outlined in clear *Shar'i* terms and that it grants the State to interfere in what Islam has validated. It opens the way for *Fitna* and interference by interested parties.

**Prof A Tayob**, on the other hand, commends the Commission for making a strong case for registering existing marriages, and at the same time allowing for the fact that not everybody would do so. In his view it may be particularly interesting to see how often those who are opposed to the Bill will nevertheless find it useful for the courts to recognise such marriages when disputes arise.

**Mr M S Sulaiman** submits that there is confusion regarding the presence of the marriage officer and the role of this officer in the conclusion of the marriage. In his view the confusion is created by an insufficient distinction being drawn between marriages in terms of Islamic law and in terms of the general South African law regarding marriages. He calls upon the Commission to attach more weight - or rather that weight be more clearly attached - to the Islamic law requirements in this regard. He also suggests that the role of the marriage officer be restricted to registration of the marriage, ensuring that all the necessary requirements have been satisfied, and that the role of the marriage officer in actually concluding the marriage be limited to those circumstances in which such officer would in terms of Islamic law be entitled to do so. It may be prudent to require the presence of the

marriage officer at the conclusion of the marriage, even though this would not be a requirement of Islamic law for its validity.

The **Gender Unit**'s submission in regard to the registration of Islamic marriages is reflected under the heading 'new proposals' in the second part of this document.

The **Islamic Careline** is particularly concerned about clandestine marriages which are entered into and is not sure how the draft Bill will address this problem. The respondent submits that a massive education and awareness campaign should be mobilised so that marital couples as well as young people can become acquainted with the responsibilities, obligations and privileges of a marital relationship. Programmes also need to be put in place where the abuse of spouses can be discussed and dealt with.

**Ms Z Bulbulia** submits that the registration of the marriage should include the particular *mazhab* of the parties to the marriage, as it will be relevant in the event of disputes arising between the parties.

The **Muslim Judicial Council** proposes that a new paragraph be added to subclause (3), reading:

> (d) A marriage officer or any other person who performs a marriage of a party, with the full knowledge that such party is a spouse in an existing marriage, and without the permission of the court, shall be liable to:
> (i) a fine not exceeding R ...; or
> (ii) have his registration as a marriage officer cancelled.

The same respondent also proposes that paragraph (a) of subclause (4) should be amended by inserting the words "gifts, in the form of jewelry, precious coins etc. whether given as dowry, gifts or on loan" after the words "deferred in full or part"; that the first two sentences of subclause (5) should be deleted and commence with the words "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); and that the words "marriage officer" in subclauses (7) and (8) should be replaced with the word "registrar".

***Clause 7: Proof of age of parties to proposed marriage***

The **Young Men's Muslim Association** and the **Islamic International Research Institute**

contend that this clause appears to necessitate *be-pardagee* (the need for a woman to expose her face to a *ghair-mahram*). Thus far, it is submitted, marriages have been concluded without the need for the bride to appear in person at the venue of solemnization.

The **Waterval Islamic Institute** suggests that the provision be expanded by adding the words "all this to be carried out in terms of Islamic law" at the end of the clause.

**Jameah Mahmoodiyah** submits that the phrase "of an age" should be replaced by "a minor" and the words "of some other person" by "his or her *Shar'i* guardian".

The **Gender Unit** supports the Commission's proposals contained in clause 7.

***Clause 8: Proprietary consequences of Islamic marriages and contractual capacity of spouses***

**Darul Uloom Zakariyya** submits that subclause (1) should exclude the applicability of the accrual system as it goes against Islamic law.

**Ms Z Bulbulia** holds the view that it should be expressly stated that an Islamic marriage is a marriage out of community of property, out of profit and loss and excludes the accrual system. The parties to the marriage may, however, state in a separate contract whether a partnership agreement is intended. **Khalid Dhorat** also states that an Islamic marriage is not only out of community of property, but excludes the accrual system. The respondent is concerned that as our case law has already awarded a universal partnership in some instances, where 50% of the assets went to the wife, it in effect rendered it to be an in community of property regime, which is not permissible in the *Shari'ah*.

The **Association of Muslim Lawyers**, referring to subclause (1)(a), submits that the provision creates an anomaly. It provides for the registration of an ante-nuptial contract within a period of six months if the marriage was entered into before the commencement of the Act. A marriage before the commencement of the Act must be registered in terms of clause 6(1)(a). The contract can only be registered within the period of six months after the date of registration of the marriage, which period should in any event be reduced to three months. With regard to subclause (2), the respondent avers that the services of a notary public must be retained to maintain the standard demanded by the law and that the contract should be registered in the Deeds Registry within three months of the date of its execution. The **Association of Muslim Lawyers** further submits that subclause (3) should be

amended to stipulate a time frame in which to make application to court for leave to change the matrimonial property system. An indefinite period should not be allowed. In any event, the respondent proposes that the application be made within two years of the date of registration of the marriage in terms of clause 6(1)(a). The respondent finally considers subclause (6) to be an onerous provision and against the spirit of Islam. In the respondent's view what could be provided for is that no spouse in an existing marriage may enter into a second marriage unless the first marriage has been registered. The parties to a second marriage will then have to make a declaration with regard to their marital status prior to the proposed second marriage, so as to enable the marriage officer to advise parties of the implications of the second marriage and its consequences. The appointment of a Muslim Tribunal should be considered, to whom the marriage officer may refer an application by the parties to enter into a second marriage.

The **Society of Advocates of KwaZulu-Natal** considers it to be preferable and closer to justice and equity that a presumption operates in favour of the party seeking to change the matrimonial regime from community of property to one excluding community of property if there is evidence that, in addition to the civil marriage, the parties had concluded a matrimonial contract in terms of the laws of Islam.

The **Institute of Islamic Shari'ah Studies** submits that subclause (6) should be redrafted to read as follows:

> A husband in an Islamic marriage who wishes to enter into a further Islamic marriage with another Muslim woman must make an application to the relevant Muslim jurist committee herein who shall have to ascertain through factual information and tested documentation supplied by the applicant and prospective husband to see if he is entitled to another wife in terms of the Islamic law and issue a Document of Consent if he fulfills the conditions and if not, to refuse the application. If the application is consented to, such will be formally admitted by the required judicial process for administrative confirmation. If the application is refused, both the applicant, his existing wife or wives and the woman whom the applicant intended to marry, shall be so informed of the refusal and ground(s) thereof. Such a duly signed and dated notice must be sent by registered mail to the parties mentioned.

The **Muslim Judicial Council** proposes that subclause (6) be reformulated as follows:

> 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 court to approve a written contract which will regulate the future matrimonial property system of his existing marriage.

The same respondent also recommends that paragraph (a) of subclause (7) should be

deleted.

The **Women's Legal Centre**, supported by the **Commission on Gender Equality**, urges the Commission, on the grounds of the ignorance and illiteracy of many Muslim women, to reconsider the provision in order to allow the default position to be a marriage in community of property which may then be changed by mutual agreement. The respondent also points out that there are Islamic schools of thought who argue that MPL provides for a concept of alimony, the recognition of a partner's tangible and intangible contributions to the joint estate and division of the joint estate based on equity. In the alternative the respondent suggests that it is necessary to include a provision which provides for a court to divide the assets of the parties equitably upon dissolution of the marriage or change of the proprietary system where the existing system causes injustice or inequity, on application by one of the parties to the marriage. The respondent further submits that provision be made for only one party to apply to court change the matrimonial property system and to join the other party. In addition, it is suggested that provision be made for parties to enter into the accrual system and that the provisions of the Matrimonial Property Act be applicable in this regard.

The **Gender Unit** recommends that the envisaged matrimonial property regime should be changed from an out of community of property to either an automatic 'in community of property' or automatic 'out of community of property subject to accrual' regime in respect of monogamous marriages entered into before or after the commencement of the Act, while simultaneously affording the parties the option to contract out of the automatic regime.

**Ms Nazeema du Toit**, although fully agreeing with the proposed legislation to recognise Islamic marriages, also disagrees with the proposal that the default position should be a marriage out of community of property. She states:

> I have been married by Muslim rites since 1974. At the time of our marriage my husband was an architectural student. I was the sole bread winner during and after his graduation for several years. I brought my administrative skills to his practice, paid child maintenance for two children from his previous marriage, was responsible for rent, food, medical aid, insurance premiums, etc. He runs a successful architectural practice and owns two houses, the office premises and two plots. All the assets are in his name. I regard the above assumption of anc or the "accrual system" to be grossly unfair if my contribution in the marriage is taken into account. I have never been maintained or given an allowance. The financial arrangements have had to change since 1997 when I became ill and was hospitalised for 12 weeks and thereafter was unemployable. I work at his practice on a part-time basis and am paid a salary way below what I could have earned in the market place.

The views expressed by the **Islamic Careline** correspond with those of **Ms du Toit** above.

The respondent also urges that provision should be made for rehabilitative maintenance as most Muslim wives have little or no work experience due to the fact that they prefer to remain homemakers during the course of their marriages. Such maintenance would allow women to become skilled in some activity so that they can then be able to maintain themselves after the *Iddah* period.

The **Waterval Islamic Institute** proposes that the mutual agreement referred to in subclause (1) must be individual and not marital. Regarding subclauses (4) and (5), the respondent submits that instead of the wives being joined in the proceedings, they be informed. The respondent also considers subclauses (7) to (10) to be un-Islamic and calls for their deletion.

Regarding subclauses (6) and (7)(a), **Darul Uloom Zakariyya** considers court permission for entering into more than one marriage to be un-Islamic and submits that the clauses be removed. **Moulana Y A Musowwir Tive**, arguing that Muslim Personal law should automatically comply with *Shari'ah* being its only constituent (and no other judicial system or secular law added to it), also points out that this clause is a violation of section 14 of the Constitution in that the person entering into another marriage without (secular) court permission will now be guilty of an offence. **Zakariyya Islamic University** also condemns the restrictions placed on polygamous marriages, stating that Islam does not require permission to be obtained to contract further marriages. The **Women's Legal Centre** recommends that a further condition be added to subclause (7)(a), namely that the existing spouse has consented to the marriage. Regarding subclause (7)(c), the respondent suggests that it is preferable that a court will make an order that is just and equitable in the circumstances and that deeming all marriages to be out of community of property is not going to advance the equality for women.

**Prof A Tayob**, referring to subclause (7)(a)(iii) which provides that there should be no prejudice to existing spouses, submits that the clause is not wide enough. There should at least be an obligation on the part of the courts to expressly take the views of the existing wife into consideration (perhaps in a formally presented affidavit). The respondent also commends the Commission for what he calls the "safety-nets", such as the legal requirements for polygamous marriages, that have been built into the proposals. The **Society of Advocates of KwaZulu-Natal**, referring to the same subclause, holds that the requirement relating to no prejudice will cause considerable difficulties to the presiding officer in the exercise of a discretionary power, which power has to be exercised judicially. The respondent refers to legislation in Iraq and Syria which encompasses the fulfilment of

two conditions, namely, that the husband is financially capable of supporting more than one wife and that there is a legitimate interest. In the respondent's view the finding of a legitimate interest will be more practical in the exercise of a judicial discretion than a finding that there will be no prejudice to existing spouses.

Although the **Mowbray Mosque Congregation** is of the opinion that polygamy should not be permitted at all, the respondent submits that financial considerations should not be considered a dominant factor in this regard as it will mean that only rich men will be permitted polygamous marriages. Moreover, where application is made for a further marriage, evidence of the applicant's ability to support more than one family financially and also supporting evidence that he is physically sound and capable of satisfying the physical needs of more than one woman must be produced.

The **Gender Unit** submits that the practice of polygyny should be made unlawful after the commencement of the Act, and that the parties who have entered into such marriages before the commencement of the Act should be required to conclude a written agreement, registered by a marriage officer and confirmed by the court, which addresses the division of property and sharing of profits. If, however, the practice is retained, the respondent suggests the following amendments to clause 8:

* Subclause (10) should include a period of imprisonment in the event that the husband fails to pay a fine.
* In respect of subclause (6), the written contract should incorporate a matrimonial property regime that sets out the following: each spouse to bear her or his own losses; the wives to be entitled to retain their own assets; and each wife to be entitled to share in the husband's profits.
* In respect of subclause (7)(c), and in the event that the written contract does not reflect the above matrimonial property arrangement, the court should not deem the marriage to be out of community of property, but should make an order directing that the matrimonial property regime will be set out as follows: each spouse to bear her or his own losses; the wives to be entitled to retain their own assets; and each wife to be entitled to share in the husband's profits.
* A husband must obtain the written consent of the existing wife/wives that she/they consent/s to him taking a subsequent wife. In considering an application by a husband to enter into a polygynous marriage, the court must have regard that such consent was obtained, and that the consent was given freely and voluntarily, without duress or undue influence. Failure to obtain written consent should constitute

sufficient ground for the annulment of the subsequent polygynous marriage, should the husband enter into it without the permission of the court.

* Should the existing wife or wives give their consent to the husband to enter into a subsequent marriage and she or they choose to remain in the existing Islamic marriage, the wife or wives should receive remuneration or compensation from the husband.
* Should the existing wife or wives refuse to give their consent to the husband to enter into a subsequent marriage and she or they choose to dissolve their existing Islamic marriage, she or they would have the option of instituting divorce proceedings in accordance with the respondent's proposal regarding dissolution of the Islamic marriage set out under the discussion of clause 9 below. A new written contract must then be entered into between the husband and the remaining spouse/s and confirmed by a court.

From the **Islamic Forum Azaadville**'s reading of the Bill, polygamous marriages are discouraged and the door for abolishing this practice will have been opened. In the respondent's view the moral obligation rests with the individual and not the State. These views are endorsed by **Ms F H Amod** and in the joint submission by **Mss S Khan**, **A Randaree**, **F Ajam**, **F Rawat** and **Y Khan**. The **Muslim Assembly (Cape)** would prefer the emphasis of the provisions regarding polygamy to be on ensuring reduction in adultery rather than deterring polygamous marriages. The respondent is concerned that too strict a policy towards applicants for a second marriage would drive men to adultery. The respondent suggests that in the event of an application for a second marriage, a religious marriage be concluded without the requirement of secular registration; that such marriages be noted on the records of the husband, thus alerting unsuspecting marriage officers; and that co-operation with the Department of Social Development be secured so that the person seeking a second polygamous marriage should produce a court document stating whether he has dependants and/or a marriage with another woman which has not been recorded.

**Darul-Ihsan Research and Education Centre** avers that although the draft Bill has not outlawed the practice of polygamy summarily, such restrictions have been placed around this valid Islamic practice that makes its practical realisation virtually impossible or extremely difficult. This is tantamount to interference in Islamic law and an imposition of that which has not been imposed by the Supreme Law Maker Himself in the Holy *Qur'an*. Pointing to divergent schools of thought and pronouncements on the institution of polygamy, the respondent states that the position taken in the draft Bill resembles very closely the wording and arguments of Tanzil-ur-Rahman, who espoused support for state regulation of

polygamy. It has to be borne in mind that his position on state regulation is posited in the context of a Muslim country such as Pakistan, with a Muslim judiciary, of whom it would be expected to respect and uphold the values of *Shari'ah*. The respondent continues that the draft Bill overplays the role of financial capacity, which in any event is a relative concept, and also perceives the absence of 'prejudice to existing spouses' as a highly subjective and nebulous requirement. It is also impossible, in the respondent's view, for a court to determine beforehand whether a husband will act inequitably towards his wives if permission for polygamy is granted. **Darul-Ihsan Research and Education Centre** proposes that instead of attempting to regulate polygamy on the basis laid out in the draft Bill, it would be more appropriate for the law to take its due process in the instance of abuse in a polygamous marriage. If the husband is guilty of inequality or abuse towards any of his spouses, appropriate sanction could be applied to him and relief accorded to the aggrieved spouse. The respondent further proposes that in order to ensure that spouses do not transgress or violate mutual duties and rights, the draft Bill should contemplate the imposition of some kind of assessment criteria in determining the knowledge level of spouses on basic matrimonial duties and rights. This could assume the form of a written examination, administered and regulated by *bona fide* Islamic educational institutes for prospective spouses before contracting marriage so as to minimise the prospects of abuse and infringement of rights. The respondent also criticises the imposition of what is considered to be an excessive and disproportionate fine which has no precedent in either the Customary Marriages Act or civil law marriages.

The views set out by the previous respondent are endorsed by the **United Ulama Council**. This respondent additionally questions the highly subjective criteria of "sufficient financial means" and "prejudice to existing spouses". The following reformulation of subclause (7)(a) is proposed:

> When considering the application in terms of subsection (6), the court shall not withhold permission unless it is satisfied that the husband is not able to maintain equality between his spouses as prescribed by the Holy *Qur'an*.

**Jamiatul Ulama (KwaZulu-Natal)** is not convinced that there is any legal basis for the regulation of polygyny, and suggests that the issue requires further research and investigation. The respondent also holds that the proposed fine appears excessive and disproportionate, and should either be omitted or reconsidered.

**Jamiatul Ulama (Transvaal)**, agreeing with the views set out in the previous paragraphs, suggests that the consequences of a polygynous marriage should be regulated by contract.

**Mr M I Patel**, holding that the restriction of polygamy is not acceptable in *Shari'ah*, suggests that in order to curb abuse, provision should be made that if a person who has contracted a polygamous marriage is found guilty of not treating his spouses equally, he should be held liable for specified punitive measures. **Fatima Asmal** considers that the Bill makes polygamous marriages virtually impossible, in direct contrast to Islamic law.

In the joint submission by **F Noormohamed, H Rawat and F Mall** a concern, echoed by **Masjidul Quds**, is expressed regarding the requirement relating to the husband's financial means. Besides being vague, the respondents submit that neither the *Qur'an* nor *Sunnah* stipulates financial means as a requirement for the acceptability of polygamy. The respondents recommend that the law should specify a requirement for compulsory counselling provided by the State for spouses and families of polygamous marriages.

The following institutions aver that the position regarding polygamy in the draft Bill is not the correct Islamic position; that it must be removed and that the penalty of R50 000 must also be eliminated: **Woodstock Moslem Congregation**; the **Careers Research and Information Centre**; **Masjidul Jumu'ah Westridge**; **Goldfields Muslim Jamaat**; **Goolhurst Islamic Educational Society**; **Islamic Da'wah Movement**; **Siddique Islamic Centre**; **Heidelberg Muslim Jamaat**; **Al-Jaamia Madrassa**; **Nylstroom Muslim Community and Welfare Society**; **Moulana M J Rahmatullah**; **Wellington Muslim Community**; **Homestead Park Islamic Institute**; **Sunni Ulama Council (Transvaal)**; **Masjid-E-Noor**; **Baitul - Mahmood**; **Kempton Park Jamaat Khana**; **Masjid-E-Omar Farouk**; **Darul Quraan Lenasia**; **Soofie Masjid**; **Vanderbijl Civic Centre Ibaadat Khana**; **Crescent of Hope**; **Jaame Masjid**; **Saaberie Jumma Masjid and Madressa Trust**; **Ermelo Muslim Jamaat**; **Shaanul Islam Masjid and Madressah Trust** and **Masjidus Salaam**. This view is also supported by the petitioners, namely **Nurul Islaam Jamaat Khana**; **Colenso Mosque**; **Siraatul Haq Islamic School** and **Bergville**, as well as by **Madresah In'aamiyyah**.

**Zakariyya Islamic University** foresees that, since many couples contracted civil marriages in community of property due to ignorance, they would now seek to remedy that. The respondent calls upon the Commission to adapt the Bill so that such couples are allowed to mutually agree to alterations to the matrimonial property system and division of their joint estate as they deem fit and to dispense with the requirements imposed under subclauses (3) and (7)(b).

According to **Darul Uloom Zakariyya** subclause (10) marks the destruction of the institution of polygyny, as it ignores the fact that at times it can be compulsory to take numerous wives. The respondent also disagrees with the proposed penalty, stating that if the justice system is attempting to protect the first wife, the money should not go to the Government. The **Women's Cultural Group** is concerned that the penalty imposed under this subsection, as well as the one contemplated in clause 9(2)(d), may impoverish the joint estate and suggest that flexibility should be given to the court to award some, or the whole, of the fine to the aggrieved party or dependents instead of making payments to the fiscus. The **Islamic Careline** also expresses concern about the penalty and the rationale for the proposed amount. The **Women's Legal Centre** and the **Commission on Gender Equality** support the penalty provision, but also suggest that all marriage officers should by law be required to enquire into the existence of prior Islamic marriages as part of the marriage ceremony. **Ms Z Bulbulia** submits that where a couple is able to reasonably justify the marriage in the absence of the court's permission, a fine should not be imposed but if it is to be imposed, should not exceed R10 000. If it was a marriage of convenience, however, a fine not exceeding R30 000 should be payable. **Masjidul Quds** holds that the fine is disproportionate to the offence and should not exceed R5 000. **Khalid Dhorat** considers the proposed fine to be exorbitant, especially when one considers the income of an average Muslim male, and feels that the proposed provisions regarding polygamous marriages are unfair to the Muslim male because the second wife too would most probably induce him into such relationship.

**Jameah Mahmoodiyah** suggests that the penalty provision be removed and replaced by a reasonable sentence of imprisonment.

The **Young Men's Muslim Association** and the **Islamic International Research Institute** attack the entire clause on the grounds of too much interference in, especially, the wealth and property of the husband. Other criticisms, apart from those already raised by some respondents above, relate to the first wife's consent to subsequent marriages which is Islamically unacceptable and "is laughable, to say the least". According to the respondents the imposition of a penalty under this clause and clause 9(2)(d) is *Zulm* (oppression).

**Mr M S Sulaiman** cautions that the contract of universal partnership often referred to as a basis for arranging matrimonial property rights in Islamic law in a manner reminiscent of South African law matrimonial property regimes, is not universally recognised by the schools of Islamic law. This form of partnership is, furthermore, subject to significant qualifications by some of the schools of Islamic law that do recognise it. Regarding subclause (3), the respondent is concerned that the provision provides too much potential for an extended

period of uncertainty after the court order, regarding the applicable property regime. It would be preferable, in his view, that the parties present to the court their contract for approval, along with their request for termination of the previous property regime, in a manner similar to the provisions of subclause (6).

**Mr Sulaiman** further suggests that subclause (4) be amended to read: "In the case of *an application in terms of subsection 8(3)* by a husband who is a spouse in more than one Islamic marriage, all persons having a sufficient interest in the *application*, ...". He also queries the rationale for addressing the authorisation of polygamous marriages under a clause dealing with the proprietary consequences of Islamic marriages. Regarding subclause (7)(a)(iii) he submits that "prejudice" is too widely stated and should be suitably qualified of defined. The respondent finally suggests that subclause (9) be amended to read: "... must furnish each spouse with *a copy of the* order of the court ...".

The **Institute of Islamic Shari'ah Studies** suggests that the words "... the court may deem just and which is not in conflict with the contractual marriage agreement of the parties or its spirit." be added to subclause (7)(b)(ii).

***Clause 9: Dissolution of Islamic marriages***

**Moulana Y A Musowwir Tive** contends that the matters dealt with in this clause must be handed to competent Ulama only to determine the status of a Muslim couple's marriage situation and secular courts should have no power in dissolving an Islamic marriage at all.

The **Women's Legal Centre** and the **Commission on Gender Equality**, pointing to the provision in subclause (1) that an Islamic marriage may be dissolved on any ground permitted by Islamic law, submit that although *faskh* is defined, the grounds for a *talaq* are not similarly defined and that it is uncertain what constitutes a valid ground for a *talaq*. Moreover, it is not clear what <u>other</u> grounds which are valid under Islamic law are <u>not</u> contained in the definition of *faskh*. This needs to be spelt out in the Bill. The **Commission on Gender Equality** also suggests an amendment to subclause (2)(b) so that it reads "if neither the wife nor her duly authorised representative as designated by her are not present, then the husband must satisfy the marriage officer that due notice of the registration of the *talaq* was served on the wife."

The **Association of Muslim Lawyers** contends that the reference in subclause (1) to the Divorce Act should be omitted, and that an Islamic marriage may be dissolved on any

ground permitted under Islamic law. The respondent, supported by **Darul-Ihsan Research and Education Centre** and by **Jamiatul Ulama (KwaZulu-Natal)**, also suggests that the period of seven days in subclause (2)(a) be changed to 21 days, and that the registration of a *talaq* must be lodged with the Registrar of the court to which application will be made for the dissolution of the marriage. Regarding subclause (2)(d), the respondent submits that if the *talaq* is not registered, it shall be of no force and effect and the spouse issuing that *talaq* will have to re-issue it. The respondent also calls for the deletion of subclause (7)(a), stating that the reference to the current Divorce and Matrimonial Property Acts should be omitted. The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, holds that the power to decide the validity of the *talaq* should not vest with the marriage registrar but rather with a judicial authority, as the qualifications of a registrar are far too basic to pronounce a ruling on the validity or invalidity of a divorce according to Islamic law.

**Ms Z Bulbulia** proposes that a sympathetic period of 30 days be allowed during which the pronouncement of the irrevocable *Talaq* should be registered. **Masjidul Quds** also calls for an extension of the proposed period of seven days.

**Jameah Mahmoodiyah** proposes that the following be added to subclause (2)(a): "... an irrevocable *Talaq* and revocable *Talaq* to be registered immediately ... and two competent witnesses. In the case of the revocable *Talaq*, if the husband makes *rujoo'* (ie takes his wife back), he shall be obliged to cause it to be registered immediately. A certificate will be issued stating the amount of *Talaqs* that were issued by the husband and how many *Talaqs* are left."

The **Muslim Judicial Council** proposes that subclause (2)(a) should be amended by inserting the words "by no later than 21 court days after it has become irrevocable" after the word "event". The same respondent also proposes the following changes to the rest of clause 9:

> **Subclause (2)(f)(iii)**
> an application for maintenance for the *Iddah* period;
>
> **Subclause (2)(f)(iv)**
> an application for a conciliatory gift (*mut'ah*), where the husband has pronounced a Talaq without a just and reasonable cause.
>
> **Subclause (8)**
> (I) Where it is clear to the court that a spouse does not wish to consent to divorce or it appears to the court that there is a reasonable possibility of a reconciliation between the parties, the court shall refer the matter for

compulsory mediation to a mediation forum recognised by the court, or approved by the parties.

(2) Such forum shall endeavour to effect reconciliation within a period of six months from the date of referral by the court, or such further period as may be allowed by the court.

(3) If the mediation forum is unable to effect reconciliation, it shall issue a certificate to that effect and may append to the certificate such recommendations as it thinks fit regarding maintenance and custody of the minor children, if any, regarding division of property and other matters related to the marriage.

**Darul Uloom Zakariyya** submits that registration of a *talaq* is important for public record purposes only and that subclause (2)(d) is un-Islamic. The **Waterval Islamic Institute** also considers subclause (2)(d) to be un-Islamic and adds, regarding subclause (2)(f), that monetary capacity in such cases is an un-Islamic burden. **Jameah Mahmoodiyah** proposes that the monetary fine be deleted and that a reasonable sentence of imprisonment should be considered in its place. **Jamiatul Ulama (Transvaal)** submits that the proposed fine is exorbitant and should not exceed R500, while **Masjidul Quds** suggests the amount of R5 000. The **Women's Cultural Group** does not fully appreciate the requirement to register an irrevocable *talaq*, and avers that it has not been properly thought out. It is suggested that the marriage officer must reside within the area where the divorced wife (or husband in the case of a delegated *talaq*) resides, as it seems impractical for a spouse to have to seek out a marriage officer in the most distant parts of the country.

The **Institute of Islamic Shari'ah Studies** submits that subclause (2)(a) makes an irrevocable *talaq* compulsory for the husband, and that this is in conflict with the clauses dealing with a revocable *talaq*.

The **Waterval Islamic Institute** disagrees with the proposal that the granting of a *faskh* by a court shall have the effect of an irrevocable *talaq* in terms of subclause (3), as *faskh* does not constitute *talaq*. **Mr M S Sulaiman** is also concerned about this provision, as it is unclear what implications it may have for the fact that the occurrence of a *talaq* generally has an effect on the number of revocable *talaqs* that may still be exercised, while *faskh* may not have the same effect. Regarding subclause (2)(e), the latter respondent suggests that the provision be amended to read as follows:

> If a spouse disputes the validity of the irrevocable *Talaq* according to Islamic law, the marriage officer shall not register it until the dispute is resolved, provided that the marriage officer is of the opinion that the dispute relating to the validity of the irrevocable *Talaq* has been fairly raised and is not frivolous or vexatious.

Referring to subclause (2)(f), **Mr Sulaiman** is uncertain as to the relevance of or need for a judicial order of confirmation. In his view it should be stated explicitly if the aim is to confirm the validity of the divorce *in terms of Islamic law* and to finalise the consequences of the dissolution of the marriage. As far as subclause (3) is concerned (read together with the definition of *faskh* in clause 1(vi)), he points out that the right to apply for *faskh* is not necessarily restricted to the wife, which may imply that a husband may, in appropriate circumstances, opt for the *faskh* procedure rather than the *talaq* procedure. **Mr Sulaiman** finally suggests that subclause (7) be amended to read: "A court *confirming, or granting a decree for*, the dissolution of ...", and that subclause (7)(b) should read: "... may, if it deems *it* just and ...".

The **Society of Advocates of KwaZulu-Natal** refers to legislative provisions in Syria, Jordan, Morocco and Egypt providing for compensation to the wife if the husband repudiated her without just or reasonable cause and recommends that subclauses (2)(f) and (7) be amended to include this situation.

**Jameah Mahmoodiyah** submits that subclause (2)(f) should clearly indicate whether the *talaq* is revocable, irrevocable or *faskh* and also the amount of times that the *talaq* was given to the wife by the husband. Regarding subclause (2)(g) the respondent suggests it be reformulated as follows: "An irrevocable *Talaq* or revocable *Talaq* taking effect as such prior to the commencement of this Act must be registered in terms of the provisions of this Act and a certificate will be issued stating the amount of *Talaqs* that were issued by the husband and how many *Talaqs* are left."

Regarding subclause (5) **Darul Uloom Zakariyya**, supported by **Ms Z Bulbulia** and **Jamiatul Ulama (Transvaal)**, contends that the court is not entitled to fix the amount of *khul'a* as it is predetermined by mutual consent as the definition of *khul'a* demands. This may apparently seem to imprison the wife if the husband demands preposterous amounts but the Islamic law will provide an easier alternative if the marriage has valid grounds to be terminated, in the form of *faskh*. The **Waterval Islamic Institute** seems to support this contention. **Darul-Ihsan Research and Education Centre**, supported by **Jamiatul Ulama (KwaZulu-Natal)**, contends that the provision on *khul'a* is ambiguous. It is essentially an institution that requires mutual consent of the spouses as its core constituent, and the intervention of the court flies in the face of the very definition of *khul'a*. The respondent argues that if the marriage cannot be terminated through *khul'a*, the wife still has the option of bringing a *faskh* application against the husband to have the marriage annulled.

Regarding subclause (2)(g), the **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, submits that if the draft Bill wishes to regulate and record the instance and number of divorces issued, it would be appropriate to call for a registration of previous divorces issued for the purposes of record-keeping and regularisation. The respondent argues that the statistic form should be adequate to fulfil the requirement.

**Jamiatul Ulama (KwaZulu-Natal)** states, with reference to subclause (6), that the Family Advocate must be competent in the *Shari'ah* to compile a report for court purposes. If this is not considered, it would result in severe prejudice and the position of the *Shari'ah* being overlooked in the Family Advocate's recommendation.

The **Women's Legal Centre** argues that subclause (7) limits the cases where the court can amend the proprietary system to those where there is a joint business or where it is not feasible to quantify the separate contributions of each party. It is recommended that the Bill should provide a court with a general equitable jurisdiction to divide the assets equitably between the parties, particularly if the default matrimonial regime is out of community of property. Regarding subclause (7)(f), the respondent argues that the inclusion of this subclause is confusing as maintenance is again dealt with under clause 12.

The **Waterval Islamic Institute** submits that Islamic law must be applied in the instances referred to in subclauses (7)(b) and (e).

The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre** and **Jamiatul Ulama (KwaZulu-Natal)**, contends that subclause (7)(b)(i) is premised on a ruling of Shami, which is considered to be a weak view as it is narrated with the expression "*Qeela*" which indicates towards weakness of a view. The respondent proposes that the verdicts of jurists need to be sought in this respect.

The **Young Men's Muslim Association** and the **Islamic International Research Institute's** aggressive rejection of the clause in its entirety is in principle based on their view that secular interference with Islamic principles, practices and procedure is objectionable and inconceivable. Although the respondents have also addressed further issues in subsequent clauses such as the age of majority, custody of and access to minor children, maintenance, assessors, the dissolution of existing civil marriages, regulations and the amendment of laws, their objections are similar, namely, that the proposals are Islamically unsound and unacceptable. Their conclusion is set out under the heading: "miscellaneous comments" below.

The **Gender Unit** does not support the distinction in the draft Bill between *talaq*, *faskh* or *khul'a*, as each party should be equally entitled to institute an action for divorce on the grounds of irretrievable breakdown of the marriage. If, however, the distinction is to be retained, the respondent suggests that in each instance the relevant party should be entitled to pronounce his or her intention to dissolve the marriage in writing, which written pronunciation should be followed by the plaintiff instituting an action for divorce in court within 14 days thereof. The only ground for dissolution of the marriage to be considered by the court should be irretrievable breakdown.

***Clause 10: Age of majority***

The **Waterval Islamic Institute** proposes that the words "in Islam" be added to this clause.

The **Association of Muslim Lawyers** submits that the clause should be deleted as it is the general law of the country that the age of majority is the age of 21 years.

The **Gender Unit** supports the proposal contained in clause 10.

***Clause 11: Custody of and access to minor children***

**Zakariyya Islamic University** submits that Islamic law already provides for a custody system in the event of divorce, death or absence of parents and that there is no need to resort to court decisions as espoused by subclause (4). In the respondent's view this custody system, called *Al-Hadaanah*, should replace subclause (4).

**Mr M S Sulaiman** cautions that there is, in Islamic law, a hierarchy of entitlements regarding who is entitled to custody in the absence of the parents or failing them, and that the draft Bill does not take this hierarchy into account.

The **Waterval Islamic Institute** suggests that the words "in terms of Islam" be added to subclauses (1) and (5), and that the words "in terms of Islamic law with religious well-being being paramount" be added to subclause (3). The suggestion regarding subclauses (1) and (5) is echoed by the **Institute of Islamic Shari'ah Studies**, who also considers that words to a similar effect should be incorporated in subclauses (2)(a) and (2)(c). The latter respondent further suggests that the following provisos should be added to subclauses (2)(b) and (4) respectively:

> ... provided that the parent chosen by the child or children satisfies the conditions for custodial guardianship especially those relating to the proper and correct Islamic upbringing of such a child or children with special regards to exercising proper discipline in all spheres of Muslim life.
>
> and
>
> ... provided that such persons shall be Muslim persons and as far as possible follow such rules and order of preferences as contained in Islamic law sources.

The **Muslim Judicial Council** proposes the addition of a paragraph (d) to subclause (2), reading "a mother, in terms of Islamic law, shall lose her right to custody if she marries a man who is not in a prohibited degree to her female ward". The respondent also recommends that the words "award or grant custody to such persons as designated by Islamic law" be added at the end of subclause (4).

The **Women's Legal Centre**, disagreeing with the provisions relating to custody and the distinction between the custody of male and female children, suggests that provisions relating to custody and access are universal and must be applied to all children in South Africa. The respondent further suggests that a provision be incorporated providing for a custodial parent who is a respondent in an application by the other parent to amend or vary the custody or maintenance order of the court, to claim a contribution towards the costs of defending such an application where they do not have the means to do so.

The **Office of the Family Advocate** (Cape Town) submits that subclause (2)(a) lends itself to Constitutional challenge in respect of the equality clause and that it prioritises a mother's right to custody above that of the father; that subclause (2)(b) not only places a difficult burden on a child who has to choose his or her custodial parent, but disputes in the arena of custody and access are also often utilised as vehicles of vendetta between warring parents; and that subclause (2)(c) presents a double barrel situation as reasonable access, the duration and nature of which is normally determined by the custodian parent, is specified. In the respondent's view this infringes on the best interests principle. It is recommended that the provisions relating to custodial preference by the minor child or that custody should be awarded to the mother, be deleted and that the best interests principle should be applicable. It is also proposed that provision be made for reasonable access by the non-custodian parent without any conditions. The respondent refers to the decision in ***McCall v McCall*** 1994 (3) SA 201 in which the guidelines regarding the best interests principles has been set out. The **Office of the Family Advocate** finally points out that the draft Bill does not address the rights of guardianship of parents who are divorced in terms of Islamic law. It proposes

that provision should be made for guardianship as described in the civil law Guardianship Act.

The **Association of Muslim Lawyers** submits that the award of custody of minor children should be determined in accordance with Islamic law which determination should be made by a Muslim Tribunal who must have regard to all the circumstances of the parties involved and in particular the interests of the children. With regard to subclause (2)(d), the respondent calls for clarity in that the onus to maintain needy parents needs to be better defined.

The **Gender Unit** recommends that subclauses (2) to (4) be omitted, and that the legislation should provide for both parents having inherent rights of guardianship, custody and access of the minor children, including children conceived before and after conclusion of the Islamic marriage, and subject to the court limiting those rights upon dissolution of the marriage by having regard to the paramount consideration of the best interests of the child. The **Commission on Gender Equality** opines that the universally recognised test of the best interest of the child should apply in all instances concerning the welfare of the child, and that the Guardianship Act should also be applicable.

**Jameah Mahmoodiyah** contends that the words “when reaching the age of nine years” should be omitted from subclause (2)(b) as the *Shari’ah* stipulates that the custody of the male child vests in the father from the age of nine years up to his attaining the age of puberty, and that the words “ according to Islamic law” be added to subclause (4).

The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, **Jamiatul Ulama (KwaZulu-Natal)** and **Mr M I Patel**, submits that the age of custody for boys and girls in the draft Bill does not conform with Islamic law on this issue which rules the ages for boys and girls as seven and nine respectively. The respondent proposes that all the other provisions, namely subclauses (3) and (4) need to be subjected to Islamic regulation on *Hadanah* (custody) rather than the jurisdiction of the court.

In the joint submission by **F Noormohamed, H Rawat and F Mall** it is pointed out that South African law and Islamic law differ regarding the grounds for custody.

**Ms Z Bulbulia** is concerned that the situation may arise where it is in the best interest of a child to live with the mother while the mother is married to the child’s *ghayr mahram*. According to the *Shari’ah*, the mother forfeits the right of custody over the child and certain

other rules come into play. The respondent contends that the Bill does not provide for such a scenario and that the courts may grant custody orders in contravention of the *Shari'ah*.

**Jamiatul Ulama (Transvaal)** proposes that the term "best interests" be expanded to include Islamic underpinnings so as to eschew violation of the *Shari'ah*. **Masjidul Quds** argues that the best interests of a child should be taken into consideration from an Islamic perspective, and also calls for a definition of "puberty".

***Clause 12: Maintenance***

**Darul Uloom Zakariyya**, referring to the ***Shah Banu*** case in India in 1985, is concerned that this section places too much authority in the courts and that it can lead to abuse of Islamic law. The respondent recommends that a detailed section regarding those who must shoulder the financial burden according to Islamic law in terms of maintenance be included in the Bill. In the respondent's view there is no need for the ex-husband being ordered to maintain his ex-wife after dissolution of the marriage and completion of *Iddah* in which state there is no longer any form of relationship between the two.

The **Mowbray Mosque Congregation** is of the opinion that clause 12(2)(b) is in contradiction to the principle of gender equality, and submits that clause 12(2)(d) requires further clarity with regard to -

* which major child is obliged to care for the "needy parents";
* what constitutes a "needy parent"; and
* the method of enforcement.

The **Women's Legal Centre**, arguing that the maintenance obligations do not appear to conform with international norms and the Constitution, proposes that sections 6, 7(1) and (2), 8 and 10 of the Divorce Act be incorporated in the Bill by reference or by inclusion of similar provisions.

The **Waterval Islamic Institute** suggests that the words "in Islam" be added to subclause (2)(b).

**Mr M S Sulaiman**, referring to subclause (2), clarifies the Islamic position. He contends that the father is obliged to maintain the child if it is in need of support, even after the age of majority; that the ex-husband is not obliged to maintain the ex-wife purely on the basis that

she enjoys custody; that the ex-wife is, in the context of subclause (2)(c)(iii), entitled to a fee (and not maintenance); and that the duty to maintain needy parents is conditional on the financial ability of the child to maintain, and not on whether the child has reached majority or not.

The **Institute of Islamic Shari'ah Studies** suggests that the following should be added to subclause (2)(c)(iii): "This shall only apply where actual breastfeeding is taking place or where most of the feeding is by natural breastfeeding of the actual mother.". The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, **Jamiatul Ulama (KwaZulu-Natal)** and **Jamiatul Ulama (Transvaal)**, avers that the provision that the wife shall be entitled to maintenance for a breastfeeding period of two years is incorrect, as the wife is not entitled to maintenance for breastfeeding, but rather, *ujrah* (entitlement). Generally it is understood that if the wife opts to breastfeed her child, she will be entitled to a remuneration based on a market-related entitlement rate as envisaged in Islamic law and this shall be limited to the period of breastfeeding, which shall not exceed two years. The respondent contends that the draft Bill fixes the period at two years, without consideration of this detail.

**Jameah Mahmoodiyah** suggests that the words "if she does not have her own residence" be inserted after the word "residence" in subclause (2)(c)(ii), and that the words "excluding the mandatory period of *iddah* of a revocable *Talaq*" be added after the word "infant" in subclause (2)(c)(iii).

The **Gender Unit** recommends that subclause (2)(b) should be amended to place an obligation on the father to maintain both male and female children until they become self-supporting; that a father's duty of support in respect of his children continues when the child reaches the age of majority and is still studying, or if not studying but is unable to find employment after having conducted a diligent search to find employment. The respondent also suggests that subclause (2)(c)(ii) should be amended to place an obligation on the husband to maintain his wife after divorce until her death or remarriage, and that subclause (2)(d) be deleted. The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre** and **Jamiatul Ulama (KwaZulu-Natal)**, also suggests that subclause (2)(d) be removed as it appears totally incongruous and unrelated in the context of the draft Bill. It is suggested that it be replaced by a general rule covering all the obligations of maintenance laid out by Islamic law in a single statement.

**Ms Z Bulbulia** avers that it should also be stated that once the *Iddah* period is completed,

the duty to maintain his wife rests with her father or her agnates as determined by Islamic law. She also proposes that the concept of rehabilitative maintenance should be introduced here, taking into account that the divorcee's father or agnates may not be in an immediate position to provided such maintenance.

The **Commission on Gender Equality** is concerned about the differentiation between boy and girl children with regard to maintenance, as well as the fact that only the father is obliged to maintain his children.

**Ms R Toefy-Salie** considers it to be fair that unemployed divorced women who have custody of children should be maintained. Referring to the high costs of litigation, she calls for streamlined administrative measures to facilitate the determination of ex-husbands' financial position as well as the imposition of penalties where former spouses make fraudulent representations regarding their financial position where it would be detrimental to the children who are to be maintained.

The **Muslim Assembly (Cape)** submits that "majority" in subclause (2)(b) should be defined, as well as "needy parents" in subclause (2)(d). Regarding subclause (2)(b), the respondent suggests that the words "or longer if the male child is disabled" should be added, and that restrictions should be imposed, for example, "until the female child is capable, to a reasonable degree, of supporting herself".

The **Society of Advocates of KwaZulu-Natal** refers to its earlier suggestion that provision be made for compensation for arbitrary repudiation and submits that it may appropriately be repeated in clause 12.

In the joint submission by **F Noormohamed, H Rawat and F Mall** it is recommended that, as there are differences between South African law and Islamic law on issues of maintenance, such issues should be resolved through arbitration.

Both the **United Ulama Council** and **Jamiatul Ulama (KwaZulu-Natal)** contend that the sweeping generalisation in terms of the courts' powers to determine the amounts of maintenance could be prone to misinterpretation as Islamic law has its own values and viewpoints as to what may be considered fair and just. It is submitted that the court should be guided by a *fatwa* (legal edict) from case to case to be obtained from a qualified Muslim Judicial body. The determination of what is fair and just according to Islamic law should be delegated to a recognised Islamic Judicial Authority, rather than the court.

**Masjidul Quds** submits that a wife should not be allowed personal maintenance by virtue of custody, but adequate maintenance should be provided for the minor child. The respondent also poses the question whether disobedient children should be entitled to maintenance.

***Clause 13: Assessors***

In general **Darul Uloom Zakariyya** has reservations about the use of assessors, pointing to problems such as the following: if there is no majority then the judge, who may be a non-Muslim, will cast a decision which will be un-Islamic. Non-Muslim judges cannot pass Islamic laws. The respondent also contends that in view of the right to appeal the inclusion of two Muslim assessors is purely superficial, carries no weight and will inevitably cause a legitimacy crisis. **Darul Uloom Zakariyya** submits that arbitration, endorsed and supported by the *Qur'an*, is the proper and legitimate alternative to litigation. The views held by this respondent are endorsed by **Madresah In'aamiyyah**.

**Jameah Mahmoodiyah** suggests that as only a Muslim judge may give judgement in these matters, the words "of the Muslim judge" should be inserted after the word "court" in subclause (1)(a); that the words "of Muslim judges and assessors" should be inserted after the word "majority" in subclause (2), and that the word "shall" in subclause (3) should be replaced by the word "must".

The **Muslim Judicial Council** proposes that the words "shall sit with a Muslim judge" be inserted after the word "court" in subclause (1)(a), and that the words "of Islamic law arising for decision, shall be decided by consensus between the assessors, who shall give written reasons for their decision" be inserted after the word "question" in subclause (2).

The **Islamic Forum Azaadville** argues that the same clarifications indicated by it under its comment on marriage officers above will need to be outlined.

The **Women's Legal Centre** is concerned that the requirements relating to assessors will delay the implementation of the Bill due to the budgetary constraints faced by the Department of Justice and Constitutional Development. The respondent suggests that time frames should be set out in the Bill for the implementation process with a phased approach to the appointment of assessors. The absence of assessors should not prevent spouses who seek dissolution of an Islamic marriage from approaching the courts. Moreover, the appointment of assessors should only be required in cases where a divorce is contested or opposed.

**Mr M S Sulaiman** submits that the area of Islamic law in which knowledge by assessors is required, be qualified with reference to the area of Islamic law in which the functions of marriage officers are to be performed, namely the Islamic law of marriage and divorce. He also suggests that an objective standard be prescribed whereby the minimum standard of knowledge required could be identified and in light of which the distinction between "knowledge" and "specialised knowledge" could be properly made. The respondent also points out that, although perhaps innovative, assessors should be appointed in the event that an appeal is heard by the Supreme Court of Appeal as well.

The **Islamic Careline** feel strongly that assessors need to be suitably qualified in terms of both Muslim Family law as well as marital/divorce/family counselling.

The **Association of Muslim Lawyers** submits that it is not desirable that a non-Muslim judge presides when hearing applications for divorce by Muslim couples. In the respondent's view there are sufficient practising Muslim advocates who should sit with the assessors.

The **Waterval Islamic Institute** suggests that the decision of the court referred to in subclause (2) should be a consensus and not a majority decision, whereas the **Institute of Islamic Shari'ah Studies** opines that the words "this clause is unalterable" should be added. Regarding subclause (1)(b), the latter respondent suggests that it be redrafted to read as follows:

> The Muslim assessors shall be appointed by the Minister by proclamation in the Gazette and such Muslim assessors shall be appointed from the Special Register of Muslim proven qualified jurists in Islamic law and especially Islamic Family and Personal law and such appointments shall be for five years from date of relevant proclamation.

The **Gender Unit** recommends that the requirement of specialised knowledge of Islamic law in subclause (1)(a) should be omitted and replaced with the following criteria for assessors:

* A university level education that has included one or more courses in Islamic law;
* an in depth knowledge of the provisions of the Act;
* a proven track record of understanding and applying gender-sensitive approaches, particularly in the area of Muslim Personal law; and
* a legal qualification as a recommendation.

The **United Ulama Council**, **Darul-Ihsan Research and Education Centre** and **Masjidul Quds** propose that the minimum requirements for assessors should include first-class knowledge of –

* the Arabic language;
* Science of *Qur'anic* Interpretation and its Principles;
* Hadith text and sciences;
* Islamic law and jurisprudence;
* Science of Islamic legal verdicts with practical experience in this field under a *bona fide*, recognised Islamic judicial institute coupled with some training in the adjudication of disputes.

In the joint submission by **F Noormohamed, H Rawat and F Mall** as well as in the submissions by **Jamiatul Ulama (KwaZulu-Natal)** and **Ms Z Bulbulia**, similar requirements to those listed above are suggested. The latter respondents, including the **United Ulama Council** and **Jamiatul Ulama (Transvaal)**, also propose the appointment of a Muslim Advisory Council to assist the Minister in the appointment of assessors. **Masjidul Quds** submits that the assessors can be appointed by the Minister, on recommendation of the United Ulama Council.

The petitioners, namely **Nurul Islaam Jamaat Khana**; **Colenso Mosque**; **Siraatul Haq Islamic School** and **Bergville**, refer to the fact that the Bill makes no reference to the qualifications of and selection procedures for assessors.

The **Institute of Islamic Shari'ah Studies** also submits that the words "An appeal shall be on the administrative process followed by the court which issued the initial ruling and shall not deal with Islamic law per se" should be added to subclause (3). This suggestion would appear to address a similar concern expressed by the **Islamic Careline**. In similar vein both the **United Ulama Council** and **Darul-Ihsan Research and Education Centre** hold the view that it is crucial that due consideration be given to the institution of appropriate mechanisms whereby assessors also become involved at the level of appeal to ensure that the ultimate judgement on appeal is at all times *Shar'iah* compliant. **Jamiatul Ulama (KwaZulu-Natal)** also points out that no provision has been made for assessors at the appeal level, and raises the danger that if the Supreme Court of Appeal or the Constitutional Court were to give a decision contrary to the *Shari'ah*, the lower courts will be bound to follow suit, which will have the effect of altering the *Shari'ah*. **Jamiatul Ulama (Transvaal)** suggests that when cases are heard by the Supreme Court of Appeal, the judge should be

assisted by three Muslim assessors, and that the matter be heard in accordance with *Shari'ah* imperatives. The ultimate judgement should then be pronounced by the Chief Assessor, and in the case of *faskh*, all three assessors must agree.

The concerns about non-Muslim judges supported by two Muslim assessors and the lack of assessors at the level of appeal are echoed by **Ms F H Amod**, in the joint submission by **Mss S Khan**, **A Randaree**, **F Ajam**, **F Rawat** and **Y Khan**, and by **Khalid Dhorat**. Their recommendation is that the assessors including the judge should be Muslims who are competent in Islamic law. **Khalid Dhorat** also objects against the possibility of non-Muslim judges being able to pronounce on Islamic issues, and points to the fact that all South African judges take an oath of upholding the Constitution as the supreme law of the land before assuming office.

The **Society of Advocates of KwaZulu-Natal** argue that without being tied to too much legal and technical formalities, the assessor must indeed be a "fit and proper person" with experience in Islam applied rather than just theoretical knowledge. As assessors, these persons will be required to determine both questions of law and fact. In the respondent's view their understanding of the *Shar'iah* should not be confined narrowly to consist only of a set of dogmatic rules divorced from everything of spiritual, social or political substance.

***Clause 14: Dissolution of existing civil marriage***

The **Women's Legal Centre** is unclear as to the rationale for the provision that the court shall not dissolve a civil marriage until satisfied that the accompanying Muslim marriages have been dissolved. The question is posed whether the court would first have to confirm the dissolution of an Islamic marriage by way of a *talaq* and then grant the civil divorce.

The **Waterval Islamic Institute** submits that the words "when applicable" should be added to the third line of subclause (2), and that the spouse or spouses referred to in subclause (3) need not be joined but merely informed.

The **Association of Muslim Lawyers** contends that subclause (3)(c) must be further qualified by the addition of the words "for purposes of determining their proprietary rights in the estate of the husband".

The **Society of Advocates of KwaZulu-Natal** states that as the legislation currently stands, the court makes a finding that the marriage has irretrievably broken down and before

granting a dissolution order requires the spouse concerned to remove the religious impediment if he has not already done so. The pronouncement of *talaq* would take place without a mediation procedure being followed in the manner regulated and properly envisaged in the *Qur'an*. The respondent submits that it is desirable that this inconsistency be removed by an appropriate amendment and that the allegation is made in the plaintiff's particulars of claim that the procedure was followed and the Islamic dissolution had been effected.

The **Gender Unit** supports the proposals contained in clause 14.

***Clause 15: Regulations***

The **Waterval Islamic Institute** suggests that the introductory sentence in subclause (1) should read "The Minister of Justice, in consultation with the Minister, may make regulations *within the purview of Islamic law* -".

The **Institute of Islamic Shari'ah Studies** suggests that the following words be substituted for the words currently appearing after the word "therewith" in subclause (3): "... shall be guilty of an offence and on conviction be liable to a fine or community service with Muslim community organisations of a charitable nature in the first instance. A second offence shall warrant a prison sentence".

The **Gender Unit** supports the proposals contained in clause 15.

***Clause 16: Amendment of laws***

The **Women's Legal Centre** welcomes the proposed amendments to the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

In the **Association of Muslim Lawyers**'s view section 45 of the Deeds Registries Act only applies to marriages in community of property. Accordingly the amendment to this section is superfluous as it cannot apply nor is it intended to cover marriages out of community of property.

Attorney **M S Nacerodien** expresses his surprise that clauses 16(3) and (4) have been included in the draft Bill, despite the fact that the implications of such provisions becoming applicable to Islamic marriages in South Africa would in fact create a situation whereby the

*Shari'ah* would in fact not be complied with at all. Firstly, he argues, the intention of clause 16(3) presumes that there is a fundamental difference between testate and intestate succession in Islam. This is not correct, as there is only a difference as regards bequests. The proposed amendment provides that the surviving spouse will, in the absence of a will, inherit more that the 8th share allocated according to the *Shari'ah*. The respondent proposes that the Intestate Succession Act be amended by the addition to subsection (4) of the following paragraph:

> (g) Notwithstanding the provisions of this Act, where the surviving spouse(s) is/are a spouse(s) of an Islamic marriage recognised in terms of the Islamic Marriages Act, their inheritance shall be as follows:
>
> (i) The Muslim male surviving spouse shall receive half of the intestate estate in the event of there being no children or one female child of the deceased, and a quarter in the event of there being children.
>
> (ii) The Muslim female surviving spouse or spouses shall inherit an 8th share of the intestate estate. Multiple female spouses equally share the 8th share. This shall apply where the deceased leaves children. Where the deceased leaves no children or only one female child and no other heirs, the female surviving spouse shall receive a quarter of the intestate estate and joint spouses shall equally share a quarter.;

and that clause 16(4) be deleted and replaced with the following:

> (4) The Maintenance of Surviving Spouses Act shall not be applicable to survivors where the parties were married in an Islamic marriage. The survivor shall, however, be entitled to a claim for maintenance in so far as provided for under Islamic law.

The **Institute of Islamic Shari'ah Studies** avers that subclause (3) is completely repugnant and in conflict with the consequences of an Islamic marriage. The respondent suggests that paragraph (g) to be added to section 4 of the Intestate Succession Act should read as follows:

> An estate of a deceased Muslim, whether he or she left a written Will or not and if such a deceased person was married in terms of Islamic law, then such a deceased estate of such a deceased person shall devolve compulsorily upon his or her Muslim heirs and in such shares as prescribed in the Islamic law of Succession. The Master of the High Court is obliged to consult with a proven qualified Muslim Shari'ah jurist therein and obtain a written and duly dated and signed certificate of distribution of such a deceased estate and execute its instructions.

The **Waterval Islamic Institute** also submits that inheritance details must be in terms of Islam.

**Mr M S Sulaiman** points out that subclause (3) does not address the Islamic law of inheritance at all, but alleviates some of the difficulties in the context of inheritance resulting from the non-recognition of Muslim marriages. He suggests that more substantive steps be taken to give recognition to the Islamic law of inheritance. This suggestion is echoed by **Mr M I Patel**, in the joint submission by **F Noormohamed, H Rawat and F Mall** and also by the **United Ulama Council**.

The **Muslim Assembly (Cape)** argues that in order to alleviate the hardships from situations where daughters make significant contributions to parental homes yet inherit less than sons, parents be educated to make use of bequests to daughters and that the contribution of daughters to parental homes be regarded as an expense against the estate of a deceased parent.

The **Association of Muslim Lawyers** explains that surviving spouses cannot inherit the estate of the deceased husband in equal shares. Each surviving spouse is entitled to an eighth share and if there are no children, surviving spouses are entitled to a quarter share. The respondent holds the view that Islamic laws of inheritance are complex and should be enacted separately.

The **Gender Unit** supports the proposals contained in clause 16, but also suggests that the Prescription Act 18 of 1943 should be amended to exclude all claims arising from the Islamic contract of marriage from the operation of prescription.

B. Miscellaneous comments

***Arbitration***

**Darul Uloom Zakariyya** reiterates its recommendation that those couples who wish to abide by *Shari'ah,* be allowed to have their disputes resolved by arbitration (*Tahkeem*), which is a trend in developed countries such as Pakistan, Australia and the USA, which have lawyers specialising in family arbitration. It is recommended that Islamic marriages and related matters be exempted from section 2 of the Arbitration Act, 1965, and thus be in line with present trends. The respondent avers that it is most likely that *Shari'ah* will be adulterated

due to factors such as -

* assessors of different schools of thought;
* the Constitution overruling Islamic law;
* State intervention in freedom of religion.

In similar vein **Zakariyya Islamic University** calls for Muslims' right to have arbitration in matrimonial affairs and that all matters requiring court decisions in terms of the draft Bill be instead referred to Muslim arbitration, which will have, *inter alia*, the following benefits: alleviating the work burden on the courts; financial savings to the State and the community; community-building via internal dispute settlement; avoidance of duplication of work, and others.

The **Gender Unit** also proposes that the legislation should make provision for parties contemplating a separation or divorce to refer the dispute to an alternative dispute resolution forum. In addition to this proposal the respondent recommends that alternative dispute resolution mechanisms should be voluntary for marriage partners and that an extra-judicial alternative dispute resolution forum should be registered and regulated by a body with governing rules.

The **United Ulama Council**, **Darul-Ihsan Research and Education Centre** and **Jamiatul Ulama (KwaZulu-Natal)**, submit that although the Discussion Paper made encouraging reference to mediation being an option that could be adopted by the Muslim community, such option need to be explored more deeply with a view to considering mandatory mediation and voluntary arbitration, before a dispute is referred to court, as an integral part of the Bill. In the respondents' view the inclusion of mandatory mediation would be a big step towards allaying fears of Muslims of possible interference by the courts in Islamic law. Pointing to the benefits of arbitration, the respondents add that further research and study is required to establish the viability of the option of arbitration in relation to constitutional requirements. The ideal situation would be one where the award of arbitration is converted into an order of court so as to give it legal binding effect. In such a scenario the court will play an important supervisory role by examining and then confirming the awards. The respondents propose that an appropriate clause be inserted in the draft Bill providing for voluntary arbitration, preferably by an accredited arbitration council, which provisions must override section 2 of the Arbitration Act,1965, allowing for arbitration in Muslim matrimonial disputes. The latter proposal is supported by **Madrasah Taleemuddeen**, **Potgietersrus Muslim Association** and **Jamiatul Ulama (Transvaal)**. The latter respondent additionally

argues that before an arbitration review is embarked upon, an in-built appeal mechanism should be provided for the in the Arbitration Act. A panel consisting of Muftis and a Muslim judge from the High Court should be established to enable aggrieved parties to lodge an internal appeal, whereby the substantive side of Islamic law will be ascertained, and this panel should have the status of a *Qada* system. The views expressed in this paragraph are endorsed by **Khalid Dhorat**.

The **Association of Muslim Lawyers of Gauteng** proposes that parties be given the right to arbitrate any disputes between them that occur under Muslim Personal law. In the respondent's view the court process envisaged in the draft Bill is problematic since there is a jurisprudential debate in Islamic law as to whether a non-Muslim judge can make decisions which would be binding under *Shari'ah* law; since the Supreme Court of Appeal does not sit with Muslim Assessors; and also because the Bill does not regulate the procedural law of evidence to be applied by the court. The respondent is further concerned that the Project Committee, in rejecting the proposal of arbitration, has not given proper consideration to foreign models that have adopted arbitration as an alternative dispute resolution mechanism in family law disputes. Referring to the fact that the case for arbitration in family law disputes is supported by the primary source of Islamic law, namely the *Qur'an*, the respondent points to the following advantages of arbitration:

* Arbitrations are usually cheaper, more flexible, less complex and much speedier than litigation;
* they are conducted in private;
* the costs of arbitration are more predictable than those of litigation;
* arbitration hearings can be as formal or informal as the parties wish;
* arbitrators make themselves available to suit the convenience of disputants;
* the arbitrator's award is final;
* parties to an arbitration are entitled to provide the arbitrator with agreed terms of reference;
* there is less of a possibility that judicial precedent would interfere with long and well established principles of Islamic law;
* arbitration has the advantage of avoiding a legitimacy crisis which may be possible if the court makes a pronouncement which is not supported by the majority of scholars in a particular locality;
* it reduces court congestion and saves money for the State;
* it necessarily avoids anomalies created by the judicial process envisaged by Muslim Personal law consequent upon conflicts between the substantive law to be applied

and the procedural laws governing the trial.

The respondent, referring to foreign provisions allowing for arbitration as an alternative dispute resolution mechanism to courts in family law disputes such as in Pakistan, Singapore, Australia, the United States and Canada, proposes the following: a clause should be inserted in the Bill allowing parties the right to refer any disputes, without restriction, concerning their rights under Muslim Personal law in terms of the Bill or contract to private arbitration. The Bill should also provide that where parties choose by way of written terms of reference to refer any dispute to private arbitration, the outcome of the arbitration is final and binding, provided that the parties may appoint an appeal tribunal. A provision for review may be included, and the grounds of review should be those stated in section 33 of the Arbitration Act. Finally, the remaining provisions of the Arbitration Act ought to be applicable to arbitrations conducted under Muslim Personal law. The respondent concedes that the underlying rationale for the exclusion of matrimonial issues and matters relating to status from the ambit of the Arbitration Act is based on the High Court's jurisdiction as upper guardian of minor children, together with its jurisdiction over status matters, but points out that matters such as proprietary consequences and maintenance do not involve status matters.

The views expressed by the **Association of Muslim Lawyers of Gauteng** appear to be supported by the **United Ulama Council**, **Jamiatul Ulama (KwaZulu-Natal)** and **Madrasah In'aamiyyah**. The latter respondent adds that one of the clauses in the arbitration agreement could be that the two parties bind themselves to the award being made an order of the court. This implies that all awards should be submitted to the High Court which will convert the award to an order of the court which leaves the issue of status finally in the hands of the court. This proposal is endorsed by **Masjidul Quds**.

The following institutions also propose that the draft Bill should provide for alternative dispute resolving mechanisms: the **Muslim Judicial Council**, **Woodstock Moslem Congregation**; the **Careers Research and Information Centre**; **Masjidul Jumu'ah Westridge**; **Goldfields Muslim Jamaat**; **Goolhurst Islamic Educational Society**; **Islamic Da'wah Movement**; **Siddique Islamic Centre**; **Heidelberg Muslim Jamaat**; **Al-Jaamia Madrassa**; **Nylstroom Muslim Community and Welfare Society**; **Moulana M J Rahmatullah**; **Wellington Muslim Community**; **Homestead Park Islamic Institute**; **Sunni Ulama Council (Transvaal)**; **Masjid-E-Noor**; **Baitul - Mahmood**; **Kempton Park Jamaat Khana**; **Masjid-E-Omar Farouk**; **Darul Quraan Lenasia**; **Soofie Masjid**; **Vanderbijl Civic Centre Ibaadat Khana**; **Crescent of Hope**; **Jaame Masjid**; **Saaberie Jumma Masjid and Madressa Trust**;

**Ermelo Muslim Jamaat**; **Shaanul Islam Masjid and Madressah Trust** and **Masjidus Salaam**.

The petitioners, namely **Nurul Islaam Jamaat Khana**; **Colenso Mosque**; **Siraatul Haq Islamic School** and **Bergville** likewise suggest that the draft Bill should provide for compulsory mediation and voluntary arbitration at the request of either or both of the parties. This is echoed by **Imran Khamissa** and the joint submission by **F Noormohamed, H Rawat and F Mall**.

**Ms Z Bulbulia** also endorses a move towards wider use of the arbitration process.

**Masjidul Quds** respectfully submits that the Project Committee has not carefully considered the option of arbitration and mediation. If this had been done, it would have been realised that the system of arbitration and mediation cannot be divorced from legislation pertaining to Islamic marriages and related matters. In the respondent words, “to separate the two will leave us with the bones and no meat to give the law the form and structure that we know it to be”.

***Concerns***

The **Women’s Cultural Group**, although of the opinion that the relief envisioned by the Bill is urgently required and that the Bill is on the whole well drafted, is concerned about the Bill seeking to impose a regime that does not enjoy universal support from amongst the Muslim community. In their view the Bill seems to enjoy support from many eminent Muslim religious bodies, while at the same time there appears to be a great deal of opposition from important groupings within the Muslim community, who are of the view that the Bill needs to be drastically amended, whilst some even advocate that it be jettisoned. Against this background the respondent cautions that a speedy implementation of the Bill, in spite of any perceived imperfections and notwithstanding the opposition from certain quarters, would spell danger. There could be a host of constitutional challenges from persons who feel aggrieved for whatever reason. Another undesirable result could be that Muslims may simply defy the Act and not register their *nikahs*.

**Jamiatul Ulama (KwaZulu-Natal)** contends, with reference to the summary of responses in the Discussion Paper, that those who were supportive of the proposals in the Issue Paper appear to be the majority, but in reality they are not, as they represent themselves only or just a few people. The respondent states that the United Ulama Council of South Africa, who

had alternative views, represents over 70% of Muslims in South Africa and that its views were hardly considered.

The **Islamic Forum Azaadville** holds the view that Islamic marriages should not be seen in isolation but proposals should be made with regard to all the other aspects of Muslim Personal law and such legislation must be put in place simultaneously. The respondent regards the proposed draft Bill almost as an experiment to see how it will work. It cautions that, as much as it welcomes the consideration given by the Law Commission to Muslims, the understanding of the total Islamic way of life and the spirit of its jurisprudence must be seen in its totality and not in segments. Any proposed legislation must take this into account. The respondent is also concerned that the proposals appear not to embody procedures and the process of resolving disputes as well as the necessary steps required before a marriage is dissolved.

The **Women's Forum** requests that much more consultation must take place before the proposed Bill becomes law. The consultation should be two-fold: education of the masses, most of whom are not even aware of what marriage by means of civil law means, and wider consultation amongst Muslims who have the interest of the masses at heart, and who have the expertise in both the *Shari'ah* as well as the South African legal system. In similar vein **Mr I Fataar** is concerned that the proper consultation procedure was not followed especially with regard to the man in the street who does not understand all the legal jargon. He adds that there is an additional problem in that the Ulama have not succeeded in educating the general public about what the Qur'anic laws are regarding Muslim Personal law and all that it entails.

**Mr M A Moosagie** from the Academy of Islamic Research is of the view that the very flexible nature of Islamic law constitutes a problem which, if not adequately addressed, will have serious ramifications for the effective implementation of Muslim Personal law in South Africa. He avers that the Discussion Paper, although constantly referring to "Islamic law", neither provided a clear definition of this term, nor did it attempt to indicate what its referent is. The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, states that since diverse interpretations of Islamic law prevail, problems in this respect could arise in the foreseeable future. A comprehensive definition of Islamic law, as well as who will be considered to be Muslims, would therefore be most appropriate in the draft Bill. This view is endorsed by **Jamiatul Ulama (KwaZulu-Natal)** and **Masjidul Quds**. **Mr Moosagie** argues that in a diverse community such as ours in South Africa, there are a number of pertinent issues that need to be addressed before a working definition of "Islamic law" could

be adopted. He refers to the following problem areas:

* Is the term to be confined to a specific *madhab* or extended to the famous four *madhabs*, or indeed, beyond the scope of the four, to the Shi'i or Zahiri schools, for example, or to modern rulings and legislation passed in the many Muslim countries around the world?

* If it is decided to adopt a very wide and inclusive definition of Islamic law, there is the very real risk of not having sufficient expertise, adequately trained and equipped to determine the law based on this huge and ever increasing corpus of Muslim Personal law.

* Who and by which process is the scope of Islamic law to be defined?

* The problem with having to deal with the fact that in some cases Islamic law incorporates two diametrically opposing rules, either of which could be classified as equally authentic and relevant.

* The determination of authentic sources and references.

In **Mr Moosagie's** view it is futile to scrutinise the Discussion Paper in the absence of an adopted working definition of Islamic law. The same concerns are raised in the joint submission by **F Noormohamed, H Rawat and F Mall**.

In similar vein the petitioners, namely **Nurul Islaam Jamaat Khana**; **Colenso Mosque**; **Siraatul Haq Islamic School** and **Bergville** calls for a definition of *Shari'ah* to be included in the draft Bill.

**Jamiatul Ulama (Transvaal)** proposes the following definition of Islamic law: "A communication from Allah, the Exalted, related to the acts of the servants through a demand or option, or through a declaration".

**Mr M S Sulaiman** suggests that the Discussion Paper should be more widely publicised. He also calls for more time to be allowed for the deliberation thereof and the preparation of submissions. The respondent refers to the fact that since Islamic law today exists mostly as an "informal legal system", personal and individual preferences in the context of Islamic law are myriad. He holds the view that it is critical in developing a legislative framework for the

recognition of Islamic law that approaches that can be regarded as esoteric and reflective of personal tendencies should give way to those approaches to Islamic law enjoying greater grassroots support when measured against international and local standards among Muslims themselves. Although **Mr Sulaiman** concedes that the Bill appears to have been drafted to cater for as wide a range of the Islamic schools of law as possible, it should be noted that the approach of specific schools is sometimes adopted. This may create a crisis of conscience for adherents of other schools, and could result in a form of 'undermining'. He also points to the danger that if it is perceived by Muslims that the proposed legislation does not comply with Islamic law, it is quite possible that they will resort to an informal system of enforcing and practising their personal, as has been the case under the previous political dispensation and even now. The new legislation may simply be ignored, and complied with - to the extent to which it cannot in some sense be undermined - for the sake of convenience and to escape legal censure.

The **Association of Muslim Lawyers**, pointing to the fact that a radical shift has been effected from the current position that civil marriages are automatically in community of property to one where Islamic marriages will be deemed to be out of community of property, submits that if the parties were married in community of property and now marry in terms of the proposed Act, they would simultaneously have two property regimes applying. Surely they cannot enter into an ante-nuptial contract if they wish to remain married in community of property. If, the respondent continues, they wish to convert to a marriage out of community of property, it renders the conclusion of an ante-nuptial contract obsolete. Moreover, for those who do not wish to conclude an ante-nuptial contract in terms of a civil marriage, the proposed legislation would be convenient to obtain the consequences of a marriage out of community of property. The respondent is concerned that the anomaly will create all kinds of practical difficulties in both property and succession law. The respondent is also uncertain as to whether the Act can be invoked by persons of any other faith or whether it is reserved for Muslims only (which may perhaps then render the Act unconstitutional). The **Association of Muslim Lawyers** finally suggests that the Act be renamed to the "Islamic Marriages and Divorce Act" as it also contains provisions relating to divorce and the consequences thereof.

**Darul-Ihsan Research and Education Centre**, **Jamiatul Ulama (KwaZulu-Natal)** and the **United Ulama Council** are concerned that many other details relating to Islamic marriages, divorce, maintenance, custody and succession seem to have been omitted in the draft Bill. Although it is conceded that this omission may have been intentional, the respondents emphasise the importance of appointing highly qualified and competent persons to serve as assessors. They are further concerned that the issue of the law of evidence could pose a

major problem. Since the issue of the law of evidence could influence the outcome of a judgement substantially, it needs to be addressed in detail in the draft Bill and perhaps expanded further in the form of Regulations to the Bill. The concern regarding the law of evidence is echoed by the petitioners, namely **Nurul Islaam Jamaat Khana**; **Colenso Mosque**; **Siraatul Haq Islamic School** and **Bergville**, as well as by **Imran Khamissa**, **Jamiatul Ulama (KwaZulu-Natal)** and in the joint submission by **F Noormohamed, H Rawat and F Mall**. **Ms Z Bulbulia** also expresses concern regarding the question as to which law of evidence should apply. **Madresah In'aamiyyah** avers that it is undeniable that the choice of the system of the law of evidence will have a profound bearing on the outcome of any case. Thus, in all probability, using a foreign system of law of evidence in even a proper *Shari'ah* court will produce an outcome which does not comply with the *Shari'ah*. **Jamiatul Ulama (Transvaal)** submits that the Islamic law of evidence should be applied throughout.

**Saders Attorneys**, commending the Commission on its willingness to investigate the complex issue of the recognition of Islamic marriages, express concern that a lack of understanding of Islamic law and the *Shari'ah* is an obstacle to a proper understanding of the issues. Keeping in mind the need to uphold the Constitution and the authority of the courts, it is also important to recognise that an individual Muslim is bound in terms of his *Qur'anic* and divine law. The respondent cautions that it is necessary to strike a fine balance between the two if a just and proper Islamic Marriages Act is to be evolved. To this end the view is held that much more consultation is required, and that the Commission should embark not only on a comparative study but also travel to countries abroad to study their legal structures and legislation. The respondent lists a number of issues which need special attention and further debate, which includes voluntary arbitration, the role of assessors in dispute resolution, the taking of a second wife, the issue of *faskh* and *khul'a*, and the matrimonial property regime.

The petitioners, namely **Nurul Islaam Jamaat Khana**; **Colenso Mosque**; **Siraatul Haq Islamic School** and **Bergville**, hold the view that at least six months of extension should be given to study the Discussion Paper in greater detail.

**Jamiatul Ulama (KwaZulu-Natal)** refers to the immense problems encountered with the execution of Muslim Personal law in India and states that this raises justified apprehensions of a similar experience in South Africa not being remote and far-fetched. The respondent contends that the fears raised by the Indian experience and the concerns of the *Shari'ah* being subjected to the "whims of judges" prompted the consideration of alternative

approaches to the execution of the draft Bill such as the inclusion of mandatory mediation before formal court proceedings and the option of arbitration.

The **Jamiatul Ulama (Transvaal)** rejects a scenario whereby two sets of paradoxical jurists argue vociferously for a particular standpoint. The respondent cautions that if the Project Committee wishes to modify any entrenched law set out by the *Qur'an* and *Sunnah*, or adduces any such law based on any conception besides that of the spirit of *Shari'ah*, it cannot be accepted.

**Ms F H Amod**, supported by the joint submission from **Mss S Khan**, **A Randaree**, **F Ajam**, **F Rawat** and **Y Khan**, is concerned about a presumption that the *Shari'ah* discriminates against women and that they require protection. In the respondents' words, "this is not correct and is unfounded. We follow our religion and do not view as discriminatory or oppressive. In fact, we test the laws of the religion by what we view as having been revealed to us by the Almighty. It is not fair nor desirable to suggest to recognise a religious system only to the extent that it is consistent with a constitution. This is an offence against the freedom of religion".

**Khalid Dhorat** warns that the Constitution has an entrenched Bill of Rights which has been extensively interpreted in a eurocentric way. The respondent states that case laws have already been created, and that we will be bound by the doctrine of *stare decisis*. "Some rights are non-revocable, whilst others have been given priority in the hierarchy of rights in the interest of balancing the process of conflicting rights in litigation. The equality clause, for example, has been interpreted in a way not in conformity to Islamic standards. The tendency is towards the recognition of marriages of people of the same sex in order to shun discrimination between people who have the same sexual orientation. Such interpretations may be extended to Islamic marriages too!"

***Alternative proposals***

The **Women's Legal Centre** contends that a major problem faced by its clients is that when obtaining a *faskh*, women are charged significantly more than men for obtaining a *talaq*. The respondent submits that it is essential that the legislation provides that if marriage officers are able to charge for granting a *talaq* or *faskh* that this is done for a fixed rate.

In addition, the **Women's Legal Centre**, although supportive of the Commission's proposals in general but concerned about violation of Constitutional principles, proposes the following

scheme concerning the proprietary consequences of Islamic marriages:

(i) Islamic marriages entered into prior to operation of the Act:

| **Type of marriage** | **Matrimonial property regime** | **Court's powers** |
|---|---|---|
| Monogamous marriages | Out of community | Equitable jurisdiction upon dissolution |
| Polygamous marriages:<br>All Islamic | Out of community | Equitable jurisdiction upon dissolution |
| Polygamous marriages:<br>One Islamic<br>One civil | Out of community<br>In community | Has right to interfere only if undue hardship for Islamic wife after consideration of:<br>* duration of relationship<br>* age<br>* earning capacity<br>* property purchased |

(ii) Islamic marriages entered into after operation of the Act:

All monogamous marriages in community of property as default position with parties able to contract out; alternatively, upon retention of the out of community of property system, the court must always have an equitable jurisdiction to amend the property system where the parties have not amended that system by a contract.

(iii) Existing civil marriages to be registered under the Act:

Prior to registration of regime as in or out of community of property, either retain existing system or account for division of the estate at the time of election. If there is an agreement between the parties, this can be produced to the marriage officer with a copy to the Deeds Registry or subject to oversight by the court.

Another respondent, the **Women's Cultural Group**, submits that it is possible to remain true to the freedom of choice in religion enshrined in the Constitution and to overcome the majority of objections against the Bill if the following proposed system is adopted:

* Any person who before the commencement of the Islamic Marriages Act is party to a marriage under the Marriage Act of 1961, should be governed by the civil law (the provisions of the draft Bill regarding an "existing civil marriage" are maintained).

* Any person who before the commencement of the Islamic Marriages Act is party to a *nikah* only, should be entitled to -

(a) convert such *nikah* to a civil marriage;
(b) convert such nikah to a marriage governed by the Islamic Marriages Act (and thus be afforded all the protection and obligations of the Act);
(c) let the status quo remain in which case the parties will fall outside the ambit of the civil law and outside the ambit of the Islamic Marriages Act (and enjoy the same rights and duties and uncertainties as are currently being enjoyed by Muslims and other South Africans, who wish to remain in unregulated marriage unions).

* Any person who after the commencement of the Islamic Marriages Act becomes a party to a marriage under the Marriage Act (without being party to a prior Islamic marriage registered under the Islamic Marriages Act) should be governed by the civil law.

* Any person who after the commencement of the Act becomes party to an Islamic marriage registered under the Islamic Marriages Act (without being party to a prior civil marriage under the Marriage Act), should be governed by the Act.

The **Women's Cultural Group** believes that the scheme proposed above will satisfy most South African Muslims, who will then enjoy full freedom to their own dictates and preferences. The respondent further contends that the problems facing the judges in the ***Edros*** and ***Amod*** cases will be eased, because Muslims will consciously elect the regime to be applicable to them.

The **Women's Cultural Group**, finally, submits that if ante-nuptial contracts are under civil law required to be registered by a notary, the same requirement should be imposed under the Bill. Attorneys need to keep records for five years only, whereas notarial protocols are retained even after a notary dies.

The **Gender Unit** proposes the following scheme with regard to the registration of marriages:

* Existing monogamous Islamic marriages entered into before the commencement of the Act should not have to be registered. The matrimonial property regimes of these marriages should revert to the automatic regime provided for in the legislation. In the event that parties agree that their matrimonial property regimes should be something other than the automatic regime provided for in the legislation, only then should they be required to register such written agreement.

* Should the final legislation incorporate a requirement for registration of existing monogamous marriages entered into before the commencement of the Act, the period of registration should be 24 months after the date of commencement of the Act.

* With regard to existing polygynous marriages entered into before the commencement of the Act, these marriages should be registered by the husband within 24 months from the date of commencement of the Act, and he should make application to court to have a written contract regulating the matrimonial property regimes of the marriages approved by the court. In this instance, clauses 8(7) - (9) of the draft Bill could apply. A husband who fails to register the existing polygynous marriages and fails to make the aforementioned application to court should be found guilty of an offence and on conviction, should be liable to a fine, failing which a period of imprisonment.

* The conclusion of an Islamic marriage should not be limited to a prescribed formula including the *Tazawwajtuha* and *Nakahtuha.* The minimum requirement should be an agreement between the two parties in the presence of two witnesses and a marriage officer (which agreement should be recorded in writing and signed by the two parties, the two witnesses, and the marriage officer) that the two parties wish to be married to each other.

* Provision should be made for a standard 'consent form' and a standard marriage contract *(nikahnama).*

The **Islamic Careline** submits that Muslim Personal law should be highlighted by the establishment of an Islamic Family Affairs Council. This body should have the following duties:

* Educating the Muslim public about MPL;

* Enforce the significance of the contractual basis of marriage by insisting on spouses concluding and signing an Islamic marriage contract;
* Establish an Arbitration Council which is representative of a learned scholar, a professional marital counsellor or person with similar qualifications and representatives of each of the spouses.

The respondent continues that people should be made aware of the Arbitration Council as well as the Islamic Family Affairs Council and that they are there to protect their rights rather than to oppress them.

Referring to the empowering provision in article 166(e) of the Constitution, the **United Ulama Council**, **Darul-Ihsan Research and Education Centre**, **Jamiatul Ulama (KwaZulu-Natal), Jamiatul Ulama (Transvaal)** and the **Muslim Judicial Council** propose the establishment of a Muslim Family court in the major centres of the country which could operate as a circuit court, thereby eliminating the costs for establishing separate courts in various districts or provinces. The respondents contend that this would overcome the issue of misinterpretation of Islamic law and would allow the free and unhindered realisation of Islamic values through the full implementation of Islamic law. If such a court is not to be established, the establishment of a Muslim bench in major centres should be considered where cases can be adjudicated according to Islamic law. The respondents suggest that this bench should comprise of a Muslim judge to be assisted by two qualified and competent assessors. The rationale behind the proposal is aimed at eliminating the impermissibility of a non-Muslim judge presiding over Muslim matrimonial disputes. **Jamiatul Ulama (Transvaal)** further submits that if the proposition of a *Qadhi* court is accepted, a person to be *Qadi* should have a minimum of three years experience in the issuing of *Fatawa* (legal edicts), should have a sound knowledge of the mechanics of *Qada*, and his credentials should be approved by the leading Muslim councils of South Africa to judge his competency in this field. If, however, the proposition is not accepted, two other alternatives should be considered: firstly, the appointment of a full Shar'iah bench consisting, in part, of one Muslim judge and two Muslim assessors, or, secondly, a compulsory arbitration mechanism, the award of which is to be approved by a judge in chambers before becoming effective.

The following institutions also support the establishment of a Muslim Family Court, presided over by a knowledgeable Muslim judge and two competent Muslim assessors: **Woodstock Moslem Congregation**; the **Careers Research and Information Centre**; **Masjidul Jumu'ah Westridge**; **Goldfields Muslim Jamaat**; **Goolhurst Islamic Educational Society**; **Islamic Da'wah Movement**; **Siddique Islamic Centre**; **Heidelberg Muslim**

**Jamaat**; **Al-Jaamia Madrassa**; **Nylstroom Muslim Community and Welfare Society**; **Moulana M J Rahmatullah; Wellington Muslim Community**; **Potgietersrus Muslim Association**; **Homestead Park Islamic Institute**; **Sunni Ulama Council (Transvaal)**; **Masjid-E-Noor**; **Baitul- Mahmood**; **Kempton Park Jamaat Khana**; **Masjid-E-Omar Farouk**; **Darul Quraan Lenasia**; **Soofie Masjid**; **Vanderbijl Civic Centre Ibaadat Khana**; **Crescent of Hope**; **Jaame Masjid**; **Saaberie Jumma Masjid and Madressa Trust**; **Ermelo Muslim Jamaat**; **Shaanul Islam Masjid and Madressah Trust** and **Masjidus Salaam**. The mentioned institutions also hold the view that all provisions in the draft Bill must comply with the requirements of Islamic law, and that the Ulama should be an integral component of the process relating to the interpretation of Islamic law. **Imran Khamissa** considers it to be of fundamental importance that the judge presiding over matters of Muslim family law be a Muslim who is well acquainted with Islamic law and its related sciences.

The views expressed above are endorsed in the joint submission by **F Noormohamed, H Rawat and F Mall**, as well as by **Ms F H Amod** and in the joint submission by **Mss S Khan**, **A Randaree**, **F Ajam**, **F Rawat** and **Y Khan**. Another respondent, **Dr Abu-Bakr M Asmal**, points to the fact that in each province Muslims already have a religious body adjudicating numerous cases of Muslim Personal law with the consent of the parties involved.

The **Muslim Judicial Council** proposes that the following new clauses be inserted in the draft Bill:

> **Clause 1(xix)**:
> "*nafaqah*" - the provision of maintenance shall include food, clothing, accommodation, medical expenses and all essentials of human life according to custom.
>
> **Marriage officers**
> (a) Marriage officers shall be appointed upon application to the Minister, with the written certification by a judicial body that the applicant complies with the Islamic requirements of knowledge and moral integrity, for such an office;
> (b) The marriage officers of each province shall be organised in a group with a head known as the chief marriage officer of that province;
> (c) The chief marriage officer or representative shall act as the guardian of any party to a marriage who does not have a guardian.

The **United Ulama Council** also contends that the *Shari'ah* position as far as apostacy and same-sex marriage need to be dealt with, and that concepts such as custody (Hadanah), maintenance (*Nafaqah*) and majority (*Bulugh*) should be defined.

**Jamiatul Ulama (Transvaal)** proposes that since an Islamic marriage is sacred in that it is a

form of worship as well as a contract, the Bill should contain a prototype of a *nikah* contract to provide guidance on issues that need clarification, thus avoiding future litigation. The respondent also suggests that married couples should be given a moratorium of two years in order to fulfil the requirements pertaining to proprietary consequences.

***Negative comment***

A number of respondents appears to reject the proposals in Discussion Paper 101 in their entirety and calls upon the Commission to "allow us to practice our religion without interference from anybody" (**Miftahuddin Islamic Institute**); "to allow the Muslim community to conduct their marriages in accordance to the Islamic *Shari'ah*" (**Madresah Taaliemul Banaat**); "the draft should remain a draft, in fact, shelved for good" (the **Islaamic Research Organisation**); "the present Bill stifles freedom of religion and contradicts it" (**Fatima Asmal**); and "the Discussion Paper should be shredded and recycled for use as toilet paper" (**Mr A K Kadwa**). In a highly critical submission the **Institute of Islamic Shari'ah Studies** considers the Commission's efforts to be, *inter alia*, "a failure", "disappointing" and "calculated interference and regimentation of community life". The latter respondent not only criticises several aspects of the draft Bill, as indicated above, but also many of the statements made and conclusions drawn as reflected in Chapter 5 of Discussion Paper 101. **Madrasah Taleemuddeen**, an institution of higher Islamic education, considers the Discussion Paper to be a disappointment, permeated by many fundamental flaws. The respondent avers that there is no real need to have a detailed Bill in place if the route of arbitration is followed. It also holds that the very process of gaining recognition of Muslim Personal law has been flawed from the inception and that it has not been in agreement with the process.

In view of the aggressive stance taken by the **Young Men's Muslim Association** and the **Islamic International Research Institute** in their respective (but wordily similar) submissions, their conclusion is quoted:

> The proposed Act in its entirety will be unworkable and unacceptable to Muslims. There is too much of interference in Islamic matters and there is a clear emphasis placed on secular courts deciding over and consenting to issues which are ordained and stipulated in the *Shari'ah*.
>
> It is extremely clear that wherever a conflict arises between Islamic Law and secular law, the former will be discounted in favour of the latter which has made clear that everything will be subject to its Constitution.
>
> The secular courts will now be in the position to 'decide' whether the Islamic

perspectives and laws are rational and acceptable according to its fallible understanding.

There is no real need for State recognition of Islamic marriages. However, since there is a clamour for this amongst some circles, the ONLY feasible and acceptable way is for the State to accept as binding the Islamic Law in ALL aspects. Islam is a TOTAL way of life. The issue of marriages (*Nikah*) is extensively covered in the *Kitaabs* of *Fiqh*. There is absolutely no need for *kuffaar* intervention. The suggestion of *kuffaar* intervention and recognition implies a vote of no-confidence in the *Shari'ah*.

The imposition of Islamic Law is only enforceable in an Islamic country.

There is the overwhelming possibility of alien ideologies gaining momentum in propagating their views amongst the Muslim masses via the agency of the secular *kuffaar* courts. The various *Mathaahib* are at great risk of being contaminated by 'Salafiasm' and other *kufr* sects.

We have suitably qualified Muftis and Ulama who are able enough to issue *Shar'i* rulings in the various disputes. Their rulings can be accepted provided they are based on sound Islamic principles.

Whilst there is a permissibility for making use of *kuffaar* courts in protecting one's rights, the passing of this Act will signify the beginning of the end of Islamic sanity amongst the Muslim masses. An attempt is being made to secularise Islamic Law. An active effort is being made to force secularism down the throat of Muslims. The Islamic Law will be changed and altered to make way for alien laws and regulations.

May Allah Ta'ala save His Deen from this mass contamination. Aameen.

In a highly critical submission **Dr Abu-Bakr M Asmal** remarks as follows:

The project committee has sufficiently demonstrated its incompetence or its lack of concern for the *Shari'ah* and the values of the South African Muslim community. Clearly it has ignored the concerns of the specialists in Islamic law. By preferring a modernised, progressive, reformed 'Islam', it seems to have chosen a secular, liberal paradigm over Islam itself. The Draft Bill conforms more to President Bush's vision of life and religion than with the Almighty's prescription for a holistic way of life.

***Positive comment***

Contrary to the opinions expressed above, **Prof A Tayob** (Professor of Religious Studies, University of Cape Town), also commending the Commission and project committee for excellent work on promoting debate and discussion on an important issue in South African public life, has the following views on the debate on non-recognition and contamination:

The Discussion Paper has taken the time to reflect on the consequence of non-recognition of Islamic marriages, vis-a-vis the risk of contamination. I want to support the position of the committee, but add in fact that Islamic law has never been free of so-called contamination. By its very nature, Islamic law has always been in

> conversation with caliphal decrees, customs, and urgent societal needs. The talk of a pure uncontaminated Islamic law as reflected in some responses to the first draft fails to take into consideration the dynamism and responsiveness of the Islamic legal tradition to its broader environment. In fact, such sentiments only reflect the views of small ideological groupings who rarely work with Islamic law as practised by people in the towns and cities of the country.
>
> Similarly, one should reject the notion that *Shari'ah* courts are necessarily the ideal way for Muslim Personal law as reflected in some of the responses, and apparently accepted by the committee. The present proposal is, in my view, ideal as it will bring Islamic law more directly in the public debate where a mutual conversation can take place between it and other equally dynamic notions of justice, equity and fairness. *Shari'ah* courts for the exclusive preserve of Muslim Personal law have the potential of depriving both themselves and other courts from a fruitful relationship, and mutual reciprocal influence. A *Shari'ah* court could and has sometimes become the symbol of a separate community of believers isolated from the wider world with which Muslims themselves are inextricably linked.

Notwithstanding his concerns and suggestions for improvement pointed out elsewhere in this document, **Mr M S Sulaiman**, in a comprehensive, analytical and thorough submission remarks that the proposed draft Bill is evidence of a careful balancing act by the project committee, and that it is to be commended that the proposals, in most cases, give careful consideration to the requirements of Islamic law. This is reiterated by the **Office of the Family Advocate** (Cape Town) who states that the Commission's efforts at affording recognition to Islamic marriages is commendable and can best be described as "tightrope walking" - an attempt to create a balance between the spirit of Muslim Personal law and the spirit of the Constitution.

The **Islamic Careline**, a voluntary counselling service, commends the Commission on the work done and believes that the Discussion Paper was an absolute necessity for the appropriate implementation of Shari'ah regarding Muslim Personal law.

The **Society of Advocates of KwaZulu-Natal** compliments the Commission on presenting a fairly balanced Bill, stating that contentious issues have been dealt with a degree of sensitivity, sound logic and argument. Regarding contamination of Muslim Personal law within the context of a dominant system of secular law, the respondent holds the view that as the proposed legislation is to be interpreted with the objectives that are consistent with Islamic law, the fear that MPL would be subsumed by a dominant system is misplaced.

The **Commission on Gender Equality** commends the Commission on the work that it has done. In their view the draft Bill will go a long way towards alleviating the problems that existed as a result of non-recognition of Islamic marriages and will assist many women who

have been suffering as a result of the manner in which Islamic law has been practised.

The joint submission by **F Noormohamed, H Rawat and F Mall** acknowledges that a great deal of effort has been put in to ensure compatibility and consistency between the proposed draft Bill and Islamic law.

***Endnote:***

This collation includes all responses received up to and including 10 April 2000. The following submissions were received after that date and have not been taken into account for purposes of the collation:

1. Darul Uloom Newcastle
2. Masjidul Ishraaq (Lotus River)
3. Khairul Madaaris Masjid Baitul-Khair (Mayfair West)
4. Mujlisul Ulama of South Africa (Port Elizabeth)
5. Azaadville Women's Forum
6. Bertrams Muslim Association
7. Madrasah Arabia Islamia (Ifta Department)
8. Shaamillah Davis
9. Galielol Raghmaan Jamaa (Gatesville)
10. Association of Accountants and Lawyers for Islamic Law
11. Jamiatul Ulama (Eastern Cape)
12. Shaheda Gool
13. M Gamieldien
14. Jamiah Masihiyyah Ashrafiyyah
15. South African Muslim Women's Forum
16. Call of Imaan
17. F Patel
18. H Mohamed
19. A1-Mu Minaat Publications
20. Zaqqoom