



PROJECT 144

SINGLE MARRIAGE STATUTE

DISCUSSION PAPER 152

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Introduction

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

The members of the South African Law Reform Commission are –

The Honourable Mr Justice Narandran (Jodie) Kollapen (Chairperson);
Mr Irvin Lawrence (Vice-Chairperson);
Prof Mpfariseni Budeli-Nemakonde;
Adv Johan de Waal SC;
Prof Wesahl Domingo;
Prof Karthi Govender;
Adv Retha Meintjes SC;
Adv Anthea Platt SC; and
Adv Tshepo Sibeko.

The members of the Advisory Committee appointed for this investigation are:

Prof Ronald Thandabantu Nhlapo, emeritus professor of private law and former Deputy Vice-Chancellor of the University of Cape Town (Chairperson) (until his resignation as Chairperson in August 2020);
Prof Christa Rautenbach of the North-West University (Chairperson from 5 September 2020)
Prof Wesahl Domingo of the University of the Witwatersrand (Project Leader);
The honourable Mr Justice Mahomed Navsa of the Supreme Court of Appeal;
Prof Amanda Barratt of the University of Cape Town;
Prof Elsje Bonthuys of the University of the Witwatersrand;
Ms Mothokoa Phumzile Mamashela; emeritus senior researcher of the University of KwaZulu-Natal;
Mr Motseotsile Clement Marumoagae of the University of the Witwatersrand; and

The Secretary of the SALRC is Mr Nelson Matibe. The project leader responsible for this investigation is Prof Wesahl Domingo.

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Preface

This Discussion Paper is the second paper the SALRC published on this investigation. The first paper published in April 2019 was Issue Paper 35. This Discussion Paper has been prepared considering the comment the Commission received on Issue Paper 35. The Discussion Paper serves to elicit responses and to serve as basis for the Commission's further deliberations. It contains the Commission's **preliminary proposals**. The views, conclusions and recommendations which follow should therefore not be regarded as the Commission's final views on this investigation.

This Discussion Paper (which includes draft legislation) is published in full to provide persons and bodies wishing to comment with enough background information to enable them to place focused submissions before the Commission. Responses to the discussion paper will be collated and evaluated to prepare a report setting out the Commission's final recommendations. The report (with draft legislation) will be submitted to the Minister of Justice and Correctional Services for submission to the Minister of Home Affairs.

A summary of the background to this investigation, a summary of the proposals made and questions for comment appear on pages x to xviii. Two legislative options are proposed in this Discussion Paper. The first option is proposed in the Protected Relationships Bill (in Annexure B1) on pages 135 to 152 and in option two in the Recognition and Registration of Marriages and Life Partnerships Bill (in Annexure B2) on pages 153 to 171 of this Discussion Paper.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

Respondents are requested to submit written comment and representations to the Commission by 17 May 2021 at the address appearing on the previous page. Comment can be sent by post or fax, but comments sent by e-mail in electronic format are preferable.

This Discussion Paper is available on the Internet at <http://www.justice.gov.za/salrc/discpapers.htm>.

Any enquires should be addressed to the Secretary of the Commission or the researcher allocated to the project, Mr Pierre van Wyk. Contact particulars appear on page ii.

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Executive summary

1. In 2013 the Minister of Home Affairs requested the SALRC to investigate the possible adoption of a single marriage statute for South Africa. The SALRC conducted a pre-investigation which resulted in the Minister of Justice and Correctional Services approving in November 2017 the inclusion of the investigation in the SALRC research programme. The Minister shortly thereafter appointed the advisory committee which commenced its activities at its first meeting in April 2018. In April 2019 the Commission of the SALRC approved the first paper developed in this investigation, namely Issue Paper 35, which was published in April 2019 for general information and comment. The closing date for comment was initially 31 July 2019 which was extended to 31 August 2019. Forty-eight respondents, who are listed in Annexure C to this discussion paper, favoured the SALRC with comment on Issue Paper 35.
2. There was no clear majority support or preference by respondents for the approach to be followed in this investigation with equal support for a single and an omnibus statute. This discussion paper suggests a unitary approach. The Constitution does not prevent the adoption of unitary or unified requirements for the recognition of protected relationships or marriages and life partnerships in South Africa. Unified requirements for all protected relationships and their registration are proposed in option one in the Protected Relationships Bill (in Annexure B1) and in option two in the Recognition and Registration of Marriages and Life Partnerships Bill (in Annexure B2) unified requirements for marriages and life partnerships. Comment is invited on the practicalities, viability and implementability of these proposals (par 1.46).
3. Some topics, discussed in Issue Paper 35 are not taken included in this discussion paper for the reasons stated (par 1.49):
 - 3.1 Notice of intention to marry: the majority of respondents opposed the re-introduction of a marriage notice and marriage license requirement, arguing that they are unnecessary (see Annexure E). Therefore, these issues are not included in this discussion paper or Bill (par 1.49.1);
 - 3.2 Matrimonial and patrimonial consequences of marriage: respondents' comments on this topic will be considered as part of the investigation (Project 100E) into matrimonial property and relationship property (par 1.49.2);

- 3.3 Spousal support and maintenance: these issues will also be dealt with in the investigation (Project 100) into relationship property and maintenance (par 1.49.3);
- 3.4 Alternative dispute resolution: dispute resolution mechanisms and options will be addressed in Project 100D (par 1.49.4).
4. We propose, as a first option, that the name of the Bill should be the 'Protected Relationships Bill'. As a second option we propose the title the 'Recognition and Registration of Marriages and Life Partnerships Bill' which provides for the recognition and registration of marriages and life partnerships. We invite respondents to comment in particular on the name of the Bill and the two options we propose (par 2.2).
5. The Bills seek to provide for the recognition, in terms of option one, of protected relationships, or, in terms of option two, of marriages and life partnerships, entered into by parties regardless of the religious, cultural or any other beliefs of the parties, or the manner in which the relationship was entered into; to provide for the requirements for entering into a protected relationship or a marriage or a life partnership; to provide for registration of protected relationships or marriages and life partnerships; to provide for the legal consequences of entering into protected relationships or marriages and life partnerships; and to provide for matters incidental thereto (par 2.3).
6. The preamble of the proposed Bill refers to sections 9, 7, 10, and 15(1), and 15(3) of the Constitution. The preamble notes the fragmented way in which relationships and marriages were recognised under the RCMA, the Marriage Act and the Civil Union Act and that legislative benefits should be extended to all relationships worthy of protection, to ensure a fair outcome to the parties when disputes arise. It is further noted that the state was ordered in December 2020 to adopt amending or new legislation to recognise marriages concluded under the tenets of Muslim law and to regulate the consequences arising from such recognition; and the State's international obligations to take appropriate and reasonable measures to eradicate discrimination against women in relationships, and to prevent child marriages (paras 2.4 and 2.5).
7. The objects of the legislation are to rationalise the marriage laws pertaining to all types of relationships; to prescribe the validity requirements, in terms of option one, for protected relationships, or, in terms of option two, for marriages and life partnerships; to provide for the registration of protected relationships or marriages and life partnerships; and to

provide formal recognition of protected relationships or marriages and life partnerships to facilitate and enable enforcement of their rights (par 2.6).

8. Whenever legislation or the common law attaches consequences, in terms of option one, to protected relationships, or, in terms of option two, to marriages or life partnerships, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of the proposed legislation or the Marriage Act of 1961, the Civil Union Act of 2006 or the Recognition of Customary Marriages Act of 1998. We propose parties in a protected relationship (marriage and life partnership) cannot exclude the application of the legislation to their relationship. The question, however, arises whether we are necessarily correct in assuming that women or the weaker party in these relationships would necessarily want the relationship to have legal consequences, ie trigger a duty of support. The question is therefore, whether our thinking in this regard is problematic? We would therefore appreciate the views of respondents on why able and willing partners should not be allowed to opt out, ie the law will visit the relationship with legal consequences unless the parties explicitly record (even register) that they want to opt out (par 2.7).
9. As option one in Schedule 1 to the Protected Relationships Bill we propose amendments to 20 statutes which insert the phrase 'Protected Partnerships Act' into these statutes and as option two in Schedule 1 to the Recognition and Registration of Marriages and Life Partnerships Bill we propose the insertion of the phrase 'Recognition and Registration of Marriages and Life Partnerships Act' (par 2.8).
10. We propose that as option one in the Protection Relationships Bill that the definition for a monogamous protected relationships should be that a 'monogamous protected relationship' means the relationship of two people regardless of their sex, sexual orientation, or gender identity, to the exclusion of all others, unless dissolved by divorce or death of one or both parties. We propose that as option two in the Recognition and Registration of Marriages and Life Partnerships Bill a 'monogamous marriage or life partnership' means the relationship of two people regardless of their sex, sexual orientation, or gender identity, to the exclusion of all others, unless dissolved by divorce or death of one or both parties (par 2.12).
11. We propose as option one in the Protected Relationships Bill that a 'polygynous or potentially polygynous protected relationship' means a relationship in which a male party may, during the subsistence of the relationship, be in a relationship with a female person or female persons. As option two we propose in the Recognition and Registration of

Marriages and Life Partnerships Bill that a 'polygynous or potentially polygynous marriage or life partnership' means a relationship in which a male party may, during the subsistence of the relationship, be in a relationship with a female person or female persons (par 2.12 and 2.13).

12. In terms of option one in the Protected Relationships Bill a 'protected relationship' means —
- (a) any subsisting marriage concluded in terms of the Marriage Act, 1961 (Act No. 25 of 1961), any old order marriage legislation or any other prior legislation before the commencement of this Act; any subsisting marriage or union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006) before the commencement of this Act; and any subsisting customary marriage concluded in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);
 - (bb) any subsisting monogamous or polygynous marriage or relationship concluded or entered into in terms of the tenets of any religion or culture before or after the commencement of this Act; or
 - (cc) any life partnership, where the parties cohabit and have assumed permanent responsibility for supporting each other (par 2.16.1).
13. In terms of option two in the Recognition and Registration of Marriages and Life Partnerships Bill 'marriage or life partnership' means —
- (aa) any subsisting marriage concluded in terms of the Marriage Act, 1961 (Act No. 25 of 1961), old order marriage legislation or any other prior legislation before the commencement of this Act; any subsisting union or marriage concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006) before the commencement of this Act; and any subsisting customary marriage concluded in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);
 - (bb) any subsisting monogamous or polygynous marriage or relationship concluded or entered into in terms of the tenets of any religion or culture before or after the commencement of this Act; or
 - (cc) any life partnership, where the parties cohabit and have assumed permanent responsibility for supporting each other.
14. The validity requirements for a protected relationship (option one) are that all the parties must be at least 18 years on the date of entering into the relationship; that the parties must give free and informed consent; and must have capacity to enter into a protected relationship. If the parties do not comply with the requirements the relationship is void (par 2.17.1).
15. The validity requirements of marriages and life partnerships (option two) are that all the parties must be at least 18 years or older on the date of entering into the marriage or life

partnership; all the parties must give free and informed consent to enter into a marriage or life partnership; and all the parties must have capacity to enter into a marriage or life partnership. We propose further if the parties do not comply with the requirements the relationship is void (par 2.17.2).

16. The minimum age to enter into a protected relationship or marriage or life partnership is 18 years, without exception. The age of any of the parties must be determined by means of a birth certificate, an identity card or document, or, if any of the parties is not in possession of a birth certificate, an identity card or document, by the prescribed affidavit of the parents, or parent of a party, or a guardian if he or she has no parents. If there is uncertainty about the age of majority of any of the parties the age of that party must be established in terms of the Children's Act 38 of 2005 by the presiding officer of a children's court. If a court dissolves a relationship to which a minor is a party on the ground of want of compliance with the proposed clause, the court may make such order with regard to the division of the relationship property of the parties to the relationship as it may deem just (paras 2.25, 2.26.1 and 2.26.2).
17. We propose if, in terms of option one, a protected relationship, or, if in terms of option two, a marriage, is solemnised by a marriage officer, the consent of the parties shall be obtained by the marriage officer in the presence of two competent witnesses. We further propose that if, in terms of option one, the protected relationship, or, in terms of option two, the marriage, was not solemnised by a marriage officer, the registering officer has a duty to determine if all the parties consented to the relationship (par 2.41).
18. It is proposed that a proxy may represent party to enter, in terms of option one, a protected relationship, or, in terms of option two, a marriage, if the custom of the parties to the relationship require a proxy to represent a party to the relationship, as is the custom in Muslim marriages. We further propose that the marriage officer or registering officer should be required to ascertain from the proxy whether the parties to, in terms of option one, the prospective protected relationship, or, in terms of option two, the prospective marriage, have consented to enter into the protected relationship or marriage. The marriage officer must indicate such consent in the prescribed manner in the prescribed marriage register (par 2.42).
19. If a male party, in terms of option one, to a subsisting polygynous protected relationship, or, in terms of option two, to a subsisting marriage or life partnership, wishes to enter into a further relationship, he must obtain consent from the wife or wives to enter into a further relationship. If he enters into a further relationship without the consent of all his wives that

further relationship entered into will be void. The registering officer must enquire into the existence of such consent having been sought and granted when the further relationship is registered. Where consent for a party entering into a relationship is lacking due to a failure to comply with the proposed legislation, the court must be empowered to make a just property division order about the relationship property of the parties to the relationship (paras 2.45, 2.46.1 and 2.46.2).

20. Every person in terms of option one, in a protected relationship, or in terms of option two, a marriage or life partnership, must have the capacity to understand the legal consequences of the relationship at the time it was entered into. All parties, in terms of option one in a protected relationship, or, in terms of option two, in a marriage or life partnership, have equal status and capacity (paras 2.47, 2.47.1 and 2.47.2).
21. The Minister of Home Affairs may designate categories of persons as marriage officers, including public servants; religious officials; persons holding responsible positions in non-religious organisations; and any traditional or Khoi-San council, or any person duly authorised by the council. The Minister may revoke designations at the request of the religious denomination or organisation, the non-religious organisation or the marriage officer. Any affected person may appeal to the Minister about any decision taken by a person acting under a power delegated by the Minister regarding a designation. The Minister is empowered on appeal to confirm, set aside or vary any decision or limitation or take any other appropriate decision (par 2.72).
22. Marriage officers must verify the identities of the parties intending to enter, in terms of option one, into a protected relationship, and, in terms of option two, into a marriage, and keep records of protected relationships or marriages conducted. A marriage officer is required to transmit the marriage register and records to the official in the public service who is responsible for the population register in the area in question. The latter must include the particulars of the protected relationship (or marriage) in the population register. A transitional provision is also proposed that a marriage officer who was authorised to solemnise protected relationships (or marriages) in terms of prior legislation, shall continue to have authority to solemnise such relationships under the proposed legislation (par 2.74, 2.47.1 and 2.47.2).
23. The state has no interest in any marriage formula used to solemnise, in terms of option one, a protected relationship or, in terms of option two, a marriage. A marriage officer may solemnise a protected relationship or marriage at any place and at any time in accordance with any mode of solemnisation, or in accordance with any religious or cultural practice. A

marriage officer shall not solemnise a protected relationship or marriage unless satisfied that each party has the capacity to understand that he or she enters into a protected relationship or marriage and what the consequences of that relationship are (par 2.87, 2.89.1 and 2.89.2).

24. A marriage officer must ask the parties whether they declare that they freely consent to the formalisation of their intended relationship; that there is no lawful impediment to their relationship; they are not related on account of consanguinity, affinity or an adoptive relationship; and that they call two persons present to witness that they each take the other to be their legal partner in the case of a protected relationship and spouse in the case of a marriage (par 2.88).
25. If, in terms of option one, a protected relationship, or, in terms of option two, a marriage was not solemnised by a marriage officer, the parties to the relationship have the duty to ensure that their relationship is registered. All the parties to the protected relationship or marriage must appear in person before a registering officer to confirm individually and in each other's presence on the prescribed form that they have entered into a protected relationship or marriage or life partnership. If all the parties cannot appear in each other's presence, either partner must apply for the registration of the protected relationship or marriage or life partnership. Furthermore, if for any reason a protected relationship or marriage or life partnership is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter, may apply to the registering officer to enquire into the existence of the relationship (par 2.120).
26. The applicants must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence, in terms of option one, of the protected relationship, or, in terms of option two, of the marriage or life partnership. A protected relationship or marriage or life partnership entered into before the commencement of the proposed legislation, and which was not registered, must be registered within 12 months after the commencement of the legislation or within such a period as the Minister may from time to time prescribe by notice in the Gazette. All the parties to the unregistered protected relationship or marriage or life partnership must appear in person before a registering officer to confirm individually and in each other's presence on the prescribed form that they have entered into a protected relationship or marriage or life partnership. If all the parties cannot appear in each other's presence, any party must apply for the registration of the protected relationship or marriage or life partnership to the registering officer (par 2.121).

27. A registering officer must, if satisfied that in terms of option one, a protected relationship, or in terms of option two, a marriage or life partnership has been entered into, register the relationship. The registering officer must record the identity of the parties; the date of the relationship; the consent of the parties; that there is no lawful impediment against the registration of the relationship; that the parties are not related on account of consanguinity, affinity or an adoptive relationship; the property system and whether it is in or out of community of property, and when out of community of property with or without accrual; a partnership agreement, if any. Once the registering officer has registered the relationship, he or she must issue to the parties a certificate of registration (par 2.122).
28. A registering officer must, after he or she has registered, in terms of option one, a protected relationship, or in terms of option two, a marriage or life partnership, transmit the relationship register and records to the official responsible for the population register for inclusion in the population register. If a registering officer is not satisfied that a valid protected relationship or marriage or life partnership was entered into by the parties, he or she must refuse to register the relationship (par 2.123).
29. A court may order the registration, in terms of option one, of any protected relationship, or in terms of option two, any marriage or life partnership; or the cancellation or rectification of any registration of a protected relationship or marriage or life partnership. A certificate of registration of a protected relationship or marriage or life partnership issued in terms of the legislation constitutes prima facie proof of the existence of the protected relationship or marriage or life partnership and of the particulars contained in the certificate (par 2.124).
30. Failure to register, in terms of option one, a protected relationship, or, in terms of option two, a marriage or life partnership, does not lead to the invalidity of a protected relationship (par 2.124).
31. The Minister may designate officers or employees in the public service as registering officers, in terms of option one, for protected relationships, or, in terms of option two, marriages or life partnerships. A party to a protected relationship or marriage or life partnership who is a member of a traditional community or Khoi-San community may report his or her protected relationship or marriage or life partnership to his or her traditional council or Khoi-San council who must facilitate and assist the registration of that protected relationship or marriage or life partnership by a registering officer (par 2.125).
32. It is possible to prove the existence of a life partnership other than by proof of registration (par 2.141).

33. As regards sham or bogus marriages, the continued involvement of marriage officers who will verify the identification documentation of prospective partners and who will conduct interviews with the parties can play a role in determining whether the relationship is genuine. Registering officers of the DHA will also be able to scrutinise and verify the particulars of the parties when they consider applications for the registration of relationships at DHA registering offices (par 2.155).
34. Support was expressed by respondents for the introduction of pre-marital counselling and education. The question arises whether this function ought to be performed by non-governmental organisations or whether it should be a government supported programme. Respondents are requested to share their views on this. This issue could also be addressed in the SALRC's investigation into family arbitration (par 2.158).
35. We propose regarding consequences of relationships, whenever legislation or the common law attaches consequences, in terms of option one, to protected relationships, or, in terms of option two, to marriages or life partnerships, the relationships as defined in the proposed legislation are deemed to be referred to regardless of whether they have been registered in terms of the proposed legislation or the Marriage Act of 1961, the Civil Union Act of 2006 or the Recognition of Customary Marriages Act of 1998 (paras 1.47 – 1.48 and 2.159).
36. Respondents are invited to provide suggestions on issues not already covered in this discussion paper insofar as they may contribute towards this investigation (par 2.160).

Chapter 1

A. The inclusion of the investigation in the SALRC's research programme

1. Request that this investigation be conducted

- 1.1 In response to an invitation from the Minister of Justice and Constitutional Development, Minister Radebe, in 2013 to suggest areas of research for consideration of the South African Law Reform Commission (SALRC), Minister Pandor, then Minister of Home Affairs, replied that:

The ministry of Home Affairs would like to propose the investigation of the development of a single Marriage Act for South Africa.

Such an Act will enable South Africans of different religious and cultural persuasions to conclude legal marriages that will accord with the doctrine of equality as set out in the Constitution of the Republic of South Africa.

We propose that the study should be a comparative study that will serve to inform our country's reform of the marriage dispensation in South Africa. This will, I believe, create a legal marriage regime that will create universal provisions that adequately cover the interests that the state holds in marriage contracts while providing due recognition to all religious and cultural marriage practices.

- 1.2 Minister Pandor attached an explanatory appendix to her letter which set out the Department's concerns and interests of the Department of Home Affairs, including the possibility that:

a single marriage Act that will enable South Africans of different religious and cultural persuasions to conclude legal marriages that will accord with the doctrine of equality as encapsulated in the Constitution of the Republic of South Africa ...

We inherited a marriage regime that was based on the Calvinist Christian tradition which stemmed from the era where the state and church were mutually reinforcing if not synonymous. Accordingly there are strong references in some of the laws governing marriage that harken to the religious marriage rituals practiced in the Christian marriages. In the new era of democracy the values of equality and diversity underpin our quest for nationhood, and all religious and cultural practices are given equal recognition and status.

However instead of developing a single marriage regime that would take adequate cognizance of the separation between the state and churches, it appears as though the department together with the Justice department sought to give recognition to different marriage rituals through passing a range of different marriage laws. Instead of creating a harmonized system of marriage in South Africa, there are now parallel structures that stand side by side.

Given our diversity it is virtually impossible to pass legislation governing every single religious or cultural marriage practice, and it appears to me that this is not the best practice internationally.

The state has a few vested interests as it pertains to the institution of marriage in regard to its citizens primarily: some of these relate to the acquisition of citizenship; the establishment of consent and the marital age. Polygamy is also practiced by a wide range of religious and cultural traditions in South Africa. In this regard the issue of social justice is required to be maintained and the state in recognizing marriages in this context extends its protection over each of these relationships. In addition, our department has a duty to ensure that each person's status is accurately captured on our data base which is ultimately going to underpin many other digital systems of government and will in future also extend into our broader economy. The accuracy and integrity of our data base is therefore a major concern for our department as we invest huge sums of money to evolve into a more secure and trusted system of identity and status.

Beyond the above considerations, the state should have no interest in who one marries, how the religious or cultural rituals are conducted and should therefore have no interest in giving legal legitimacy to one or other practice in relation to the conclusion of a marriage. In our endeavour to do so however, government has expended much time and resources without achieving integrity in relation to those aspects of primary concern to the state ...

It is therefore my submission that the Law Reform Commission be requested to embark on a comparative study to inform the department's reform of the marriage dispensation in South Africa, in order to instil universal provisions that adequately cover the interests that the state holds in marriage contracts while according due recognition to all religious and cultural marriage practices.

2. Consideration by the Commission of the request for inclusion of proposal

1.3 Minister Pandor's request was considered according to the SALRC selection criteria and a proposal paper compiled for consideration by the Commission.

1.4 The Deputy Minister of Home Affairs raised the issue of sham marriages with the Chairperson shortly before the Commission's first meeting in 2016. The proposal paper of 17 September 2016 did not include issues around sham or bogus marriages.

1.5 The proposal paper identified the scope of the proposed investigation as follows:

- determining the possible development of a comprehensive single marriage statute to allow persons of all religious persuasions and cultural practices in South Africa to conclude legal marriages that will accord with the doctrine of constitutional equality, the acquisition of citizenship by marriage;
- determining whether parties consent to marriage;
- what the marital age ought to be;
- affording recognition to all polygynous marriages;
- regulating marriage notice requirements;

- certification of marriage officers from all religious denominations and recognised traditional leaders;
- comparative practices in other countries with diverse communities and with similar constitutions to the South African Constitution; and
- ensuring that the interests of the state are adequately and properly taken into account by the proposed legislation.

1.6 The Commission decided at its meeting on 17 September 2016 that the proposal paper should be adapted for purposes of a meeting which was to be held between the Chairperson of the SALRC and the Deputy Minister of the DHA to clarify the scope of the investigation. Sham marriages were addressed in the adapted proposal paper. The meeting between the Chairperson and the Deputy Minister of the DHA was finally held on 22 May 2017. The Chairperson, the Secretary of the SALRC, a DHA official and the Deputy Minister of the DHA attended the meeting where clarity about the scope of the investigation was obtained.

3. Approval by the Commission for the inclusion of the investigation in the programme

1.7 At its meeting on 17 September 2017 the Commission approved the recommendation to the Minister to approve the inclusion of the investigation in the SALRC's research programme.

4. Approval by the Minister of the inclusion of the investigation in the research programme

1.8 In October 2017 The Commission recommended to the Minister of Justice and Correctional Services that he approves, in terms of section 5(1) of the South African Law Reform Commission Act 19 of 1973, the inclusion of an investigation into the possible adoption of a single marriage statute, including measures against sham marriages in our law reform programme; and that an 'A' priority rating be allocated to this investigation.

1.9 On 1 November 2017 the Minister approved the inclusion into the Commission's research programme of an investigation into the possible adoption of a single marriage statute including measures against sham marriages.

B. Appointment of an advisory committee to assist the SALRC

- 1.10 The Commission considered and nominated the following candidates for appointment as advisory committee members to the Minister of Justice and Correctional Services for this investigation:
- 1.10.1 Professor Amanda Barratt of the University of Cape Town;
 - 1.10.2 Professor Elsje Bonthuys of the University of the Witwatersrand;
 - 1.10.3 Ms Mothokoa Phumzile Mamashela; emeritus senior researcher of the University of KwaZulu-Natal;
 - 1.10.4 Mr Motseotsile Clement Marumoagae of the University of the Witwatersrand;
 - 1.10.5 Professor Ronald Thandabantu Nhlapo, emeritus professor of private law and former Deputy Vice-Chancellor of the University of Cape Town; and
 - 1.10.6 Professor Christa Rautenbach of the North-West University.
- 1.11 The Minister approved the appointment of the advisory committee members on 24 January 2018.
- 1.12 At its first meeting on 21 April 2018 the advisory committee resolved that its committee membership be increased with one additional member. Judge of Appeal Mahomed Navsa of the Supreme Court of Appeal – who was the chairperson of the SALRC’s investigation into Muslim personal law in the early 2000s – was nominated as advisory committee member to the Minister and appointed by the Minister on 22 August 2018.

C. The advisory committee’s recommendations on the scope of the investigation

- 1.13 The advisory committee met for the first time on 21 April 2018 and proposed that the Issue Paper should deal with the following issues:
- 1.13.1 The different forms of marriages provided for by present legislation, namely the civil and religious marriages in terms of the Marriage Act of 1961; the customary marriages in terms of the RCMA of 1998 (RCMA); civil unions in terms of the Civil Unions Act of 2006; and other types of unrecognised religious marriages and intimate unrecognised relationships.

- 1.13.2 Intimate unmarried partnerships.
- 1.13.3 The meaning of marriage as compared with sham marriages.
- 1.13.4 The meaning and consequences of pluralism in the South African family context.
- 1.13.5 Ensuring that the interests of the state are adequately taken into account by the proposed legislation.
- 1.13.6 The constitutional imperatives and South Africa's treaty obligations in relation to marriage and civil partnerships.
- 1.13.7 A comparative study with emphasis on other jurisdictions with similar pluralistic systems.
- 1.13.8 Whether the investigation should include consequences of marriages in relation to maintenance and the division of property given the ongoing investigations by the SALRC on maintenance and matrimonial property.
- 1.13.9 Dissolution of marriages and unmarried intimate relationships.
- 1.13.10 The use of alternative dispute resolution to resolve issues around property distribution when marriages and unmarried intimate relationships come to an end.
- 1.13.11 The impact of the single marriage statute in relation to associated legislation, including the Divorce Act, the Matrimonial Property Act, guardianship, succession, etc.

D. Approval of the Issue Paper for publication

- 1.14 The advisory committee considered a first draft issue paper at its second meeting held on 29 September 2018. It decided about amendments which had to be effected. The advisory committee considered a further draft issue paper at its third meeting held on 2 March 2019. The advisory committee approved recommending to the Commission the publication of the draft issue paper subject to further amendments which were subsequently effected.
- 1.15 The Commission considered the draft issue paper at its meeting on 16 March 2019 and approved the publication of the issue paper for general information and comment.

E. Publication of Issue Paper 35 for comment

- 1.16 Issue Paper 35 was published for general information and comment on 8 April 2019. The SALRC issued a media statement announcing the availability for comment of Issue Paper 35 which was posted on the SALRC website on the same date. The closing date for comment was initially 31 July 2019.¹
- 1.17 In July 2019 individuals and organisations requested extension of the closing date for comment. We prepared a media statement which was posted on our website on 25 July 2019 and which announced that the closing date was extended to 31 August 2019.² We further announced that the questions we posed in our Issue Paper 35 had been consolidated into the format of a questionnaire. The questionnaire was also translated into Afrikaans, isiNdebele, isiXhosa, isiZulu, Sepedi, Setswana, Tshivenda and Xitsonga. The questionnaires were also posted on the Commission’s website.³

F. SALRC collaboration with DHA

- 1.18 In June 2019 officials of the Department of Home Affairs (DHA) communicated with the Secretariat of the SALRC. They advised that the DHA was in the process of developing a marriage policy White Paper which will inform the review of the marriage legislation, that there are elements of the marriage legislation that are outdated and non-compliant to the Constitution, and thus, the DHA is undertaking a comprehensive study that will guide the development of the marriage policy. The DHA explained that the main objective of the DHA study is to close policy and legislative gaps which deprive certain groups of the South African population of their Constitutional rights, and the critical component of the study

¹ Legalbrief Today “Input sought on single marriage statute” 8 April 2019 <https://legalbrief.co.za/story/input-sought-on-single-marriage-statute/> Fokazi Sipokazi “Proposal to reform marriage law in SA” 5 May 2019 <https://www.timeslive.co.za/sunday-times/news/2019-05-05-proposal-to-reform-marriage-law-in-sa/> Sithole Sethabile “A Single Marriage Statute?” 22 Aug 2019 <https://www.probono.org.za/a-single-marriage-statute/> Phatshoane Henney Group “Input Sought On Single Marriage Statute” Bulletin 15 of 2019 Period: 5 April 2019 – 12 April 2019 https://www.phfirms.co.za/Publications/ Bulletin%2015%20of% 202019_ER.pdf; PMG “South African Law Reform Commission – Project 144 Single Marriage Statute Issue Paper 35” 8 April 2019 <https://pmg.org.za/call-for-comment/830/> and <https://pmg.org.za/policy-document/1181/> accessed 4 Nov 2020.

² Legalbrief Today “SALRC extends single marriage statute comment period” 26 July 2019 <https://legalbrief.co.za/story/salrc-extends-single-marriage-statute-comment-period/> accessed 4 Nov 2020.

³ See <http://www.justice.gov.za/salrc/qnr.htm> accessed 4 Nov 2020.

entails conducting research on the entire marriage value chain; that is, solemnisation, registration and dissolving of marriages.

- 1.19 Since the DHA was aware of the work that we were undertaking regarding a single marriage statute the DHA requested a meeting with SALRC officials to discuss the proposed scope of the DHA policy and issues that we might want their policy to take into consideration, also to avoid any duplication and map a way forward.
- 1.20 Officials from the DHA and the SALRC and the DDG of the branch Legislative Development met on 30 July 2019. We discussed the envisaged development of the DHA marriage policy and our processes leading to the publication of our Issue Paper 35 and the envisaged process for the development of a discussion paper and report on a possible single marriage statute. At this meeting it was resolved that a workshop would be arranged for 21 August 2019 to be attended by DHA officials, SALRC officials and DOJCD officials to further discuss and plan on the DHA marriage policy and our investigation into a single marriage statute.
- 1.21 At the workshop on 21 August 2019 DHA officials provided an overview of the DHA marriage policy project. They explained the problem statement of the development of a marriage policy as follows:
 - 1.21.1 The legislation that regulates marriages in South Africa has been developed without an overarching policy that is based on Constitutional principles (e.g. equality and non-discrimination) and the understanding of modern society dynamics.
 - 1.21.2 The current legislation does not regulate some religious marriages such as the Hindu, Muslim and other customary marriages that are practiced in some African or royal families.
 - 1.21.3 The Recognition of Customary Marriages Act 120 of 1998 (RCMA) does not make provision for entering into a polygynous marriage with non-citizens of the Republic of South Africa. This poses a serious challenge when such marriages are entered into especially amongst community members who are members of the same clan but are separated by a borderline.
 - 1.21.4 The legislation does not make provision for couples who change their sex status but want to retain their marital status.

- 1.21.5 While in terms of the African tradition chiefs/traditional leaders have a recognised role in the conclusion of a customary marriage, the legislation does not extend a similar responsibility to traditional leaders. However, a role in the registration process is envisaged for them in the Traditional Leadership and Governance Framework Act 41 of 2003. This Act was repealed by the Traditional and Khoi-San Leadership Act 3 of 2019. The latter provides that a traditional council, a traditional sub-council, a Khoi-San council and a branch has the functions conferred by customary law, customs and statutory law consistent with the Constitution.
- 1.21.6 Given the diversity of the SA population it is virtually impossible to pass legislation governing every single religious or cultural marriage practice.
- 1.21.7 It is against this background that the DHA is embarking in the process of developing a marriage policy that will lay a policy foundation for drafting a new single legislation.
- 1.21.8 The new single marriage statute will enable South Africans of different religious and cultural persuasions to conclude legal marriages that will accord with the doctrine of equality as encapsulated in the Constitution of the RSA.
- 1.22 DHA officials explained that the scope of the DHA marriage policy would cover the following key issues:
- 1.22.1 The role of various stakeholders in the solemnisation, registration and dissolution of marriages, including traditional leaders);
- 1.22.2 Indiscriminative solemnisation of all marriages by marriage officers (DHA and possibly religious marriage officers) as provided for by the Civil Union Amendment Bill which is a Private Member's Bill which removes the religious exemption for public service marriage officers [the most relevant possible case is *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*];⁴
- 1.22.3 Recognition of the equality principle in the marriage legislation, especially in polygynous marriages;

⁴ (26926/05) [2008] ZAGPHC 269; (2009) 30 ILJ 868 (EqC) (27 August 2008) see <http://www.saflii.org/za/cases/ZAGPHC/2008/269.html> accessed 23 Oct 2020.

- 1.22.4 Alignment of marriage, matrimonial property and divorce legislation to address matrimonial property and intestate succession matters in the event of the marriage dissolution;
 - 1.22.5 Change of sex status for married transgender/inter-sexed people and implications for couples who want to retain their marital status pursuant to the case of *KOS and Others v Minister of Home Affairs and Others* of September 2017 on the rights of married transgender people;⁵
 - 1.22.6 Marriages that involve foreign nationals (couples and marriage officers);
 - 1.22.7 Marriages that involve minors (persons under 18 years);
 - 1.22.8 Fraudulent marriages and marriages of convenience;
 - 1.22.9 Religious and customary marriages that are not recognised by the current legislation such as the case of *Women's Legal Centre Trust v President of the RSA; Faro v Bingham; Esau v Esau* of August 2018 in the Western Cape High Court on the recognition of Muslim marriages;
 - 1.22.10 Polygynous marriages that involve non-citizens; and
 - 1.22.11 Challenges associated with marriages that are not registered with DHA.
- 1.23 At the workshop on 21 August 2019 the SALRC provided an overview of the SALRC's Issue Paper 35. The workshop on 21 August 2019 also considered deliverables, time lines and responsibilities. The DHA undertook to be presenting stakeholder engagements or dialogues from August 2019. It was resolved that representatives of the SALRC would attend the DHA dialogues and opportunity be given to disseminate information about the SALRC single marriage investigation. The DHA hosted consultations called ministerial dialogues which were divided by different sectors and hosted as follows: on 30 August 2019 at Constitutional Hill with gender and human rights activists;⁶ on 26 September 2019

⁵ (2298/2017) [2017] ZAWCHC 90; [2017] 4 All SA 468 (WCC); 2017 (6) SA 588 (WCC) (6 September 2017) <http://www.saflii.org/za/cases/ZAWCHC/2017/90.html> accessed 4 Nov 2020.

⁶ Department of Home Affairs "Media statement on Minister Motsoaledi's marriage policy dialogue with gender and human rights activists" see <http://www.dha.gov.za/index.php/statements-speeches/1282-media-statement-on-minister-motsoaledi-s-marriage-policy-dialogue-with-gender-and-human-rights-activists> and Polity "DHA: Aaron Motsoaledi: Address by Minister of Home Affairs, for the Marriage Policy Dialogues (30/08/2019)" see <https://www.polity.org.za/article/dha-aaron-motsoaledi-address-by-minister-of-home-affairs-for-the-marriage-policy-dialogues-30082019-2019-08-30> accessed 4 Nov 2020.

with religious leaders at Ekurhuleni;⁷ on 11 October 2019 with traditional leaders in Durban;⁸ on 23 October 2019 with religious leaders in Cape Town;⁹ on 14 November 2019 with academics and gender and human rights activists in Cape Town; on 22 November with the National Khoi-San Council in Bloemfontein;¹⁰ and on 6 December 2019 with the Congress of Traditional Leaders of South Africa (CONTRALESA).¹¹ Further DHA dialogues were planned to be hosted in 2020.

G. The quest for uniform marriage legislation

- 1.24 Over time the SALRC has investigated the idea of a single statute regulating different forms of protected relationships and the initial resistance to this idea was gradually replaced by an increasing perception that such legislation may be both necessary and practical.
- 1.25 There have been various initiatives towards unification of marriage laws in other countries like India, Malawi, Kenya, Uganda, Tanzania etc. The possibility of a single marriage statute in the form of a unified marriage law has therefore been raised frequently not only in South Africa in the past but also in other jurisdictions. It has also enjoyed a great measure of support in the academic literature (despite the presence of a few dissenting

⁷ Department of Home Affairs “Minister Motsoaledi to engage in marriage policy dialogue with religious leaders” <http://www.dha.gov.za/index.php/statements-speeches/1287-minister-motsoaledi-to-engage-in-marriage-policy-dialogue-with-religious-leaders> and Department of Home Affairs “Keynote address by Home Affairs Minister Dr Aaron Motsoaledi at the marriage policy dialogue with religious leaders in Ekurhuleni” <http://www.dha.gov.za/index.php/statements-speeches/1288-keynote-address-by-home-affairs-minister-dr-aaron-motsoaledi-at-the-marriage-policy-dialogue-with-religious-leaders-in-ekurhuleni> accessed on 4 Nov 2020.

⁸ Department of Home Affairs “Keynote address by Home Affairs Minister Dr Aaron Motsoaledi on the occasion of the marriage policy dialogue with traditional leaders – KwaZulu-Natal” <http://www.dha.gov.za/index.php/statements-speeches/1292-keynote-address-by-home-affairs-minister-dr-aaron-motsoaledi-on-the-occasion-of-the-marriage-policy-dialogue-with-traditional-leaders-kwazulu-natal> accessed 4 Nov 2020.

⁹ Lepule Tshego “It’s not working for South Africans’: Marriage policy to be changed” 27 Oct 2019 <https://www.iol.co.za/news/south-africa/its-not-working-for-south-africans-marriage-policy-to-be-changed-36042226> accessed 4 Nov 2020.

¹⁰ Department of Home Affairs “Khoi’san Council Speaks to Minister Motsoaledi on marriage” <http://www.dha.gov.za/index.php/statements-speeches/1296-khoi-san-council-speaks-to-minister-motsoaledi-on-marriage> accessed 4 Nov 2020.

¹¹ Department of Home Affairs “Minister Motsoaledi to engage Contralesa on marriage policy” <http://www.dha.gov.za/index.php/statements-speeches/1305-minister-motsoaledi-to-engage-contralesa-on-marriage-policy> accessed 4 Nov 2020.

views).¹² However, for a variety of reasons, this path was not pursued, and we currently have a pluralist system of laws applying to marriage in South Africa.

H. Legal pluralism in South Africa and its meaning in family law

1.26 South Africa is a multicultural society with 11 official languages.¹³ According to the 2011 Census the statistics by first language of the population expressed by percentage was as follows: Afrikaans 13.5%; English 9.6%; IsiNdebele 2.1%; IsiXhosa 16.0%; IsiZulu 22.7%; Sepedi 9.1%; Sesotho 7.6%; Setswana 8.0%; sign language 0.5%; SiSwati 2.5%; Tshivenda 4.5%; and other languages 1.6%.¹⁴ South Africa is also home to a large number of religions. Statistics released by Statistics South Africa in 2014 indicates that approximately 85% of the population described in the 2013 household survey to follow the Christian religion; 5% ancestral, tribal, animist or other traditional African religions; 2% of the population described themselves Muslim; 0,2% Jewish; 1% Hindu; and 5,6% of the population is not affiliated to any religion.¹⁵

¹² Rautenbach C “Some comments on the current (and future) status of Muslim personal law in South Africa” (2004) Vol 7 No 2 *PER/PELJ* 96 – 129 at 122; Rautenbach Christa “Deep legal pluralism in South Africa: judicial accommodation of non-state law” 2010 *Journal of Legal Pluralism* Nr 60 143 – 178 at 172; Bakker P “Towards the recognition of diversity: Muslim marriages in South Africa” (2009) *THRHR* 394 – 406 at 405; Van der Vyver Johan ‘Multi-tiered marriages in South Africa’ at 200 in *Marriage and divorce in a multicultural context: Multi-tiered marriage and the boundaries of civil law and religion* (University Cambridge Press 2012); Bonthuys E “A Patchwork of Marriages: The Legal Relevance of Marriage in a Plural Legal System” (2106) Vol 6 no 6 *Oñati Socio-legal Series* 1303 – 1323 at 1307 <http://opo.iisj.net/index.php/osls/article/viewFile/707/962>; Kruse Helen “You reap what you sow: regulating marriages and intimate partnerships in a diverse, post-apartheid society” (2013) *International Survey of Family Law* at 342 – 362 at 343; Bakker P ‘Chaos in family law: a model for the recognition of intimate relationships in South Africa’ (2013) Vol 16 n 3 *PER/PELJ* pages 116 – 151 at 139; Amien Waheeda “Reflections on the recognition of African customary marriages in South Africa: seeking insights for the recognition of Muslim marriages” (2013) Issue 1 *Acta Juridica* 357 – 384 at 381 (Amien (2013) *Acta Juridica*); Prinsloo MW “Pluralism or unification In family law in South Africa” 1990 XXIII *CILSA* 324 – 336 at 335 – 336 (Prinsloo (1990) *CILSA*).

¹³ Section 6(1) of the Constitution.

¹⁴ Statistics SA *Census 2011 Census in brief* Table 2.8: Population by first language and population group (percentage) available at http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf accessed on 4 Nov 2020 .

¹⁵ Statistics SA *Statistical release P0318: General household survey 2013* 18 June 2014 available at <https://www.statssa.gov.za/publications/P0318/P03182013.pdf> accessed 4 Nov 2020. The 1996 Census established that roughly 30,0 million people followed one of the Christian religious groups. See Statistics SA *Census 2001: Primary tables South Africa Census '96 and 2001 compared 5 Religion* page 24 available at http://www.statssa.gov.za/census/census_2001/primary_tables/RSAPrimary.pdf. This number showed an increase to 35,8 million followers in the 2001 Census. The Christian churches were the primary or conventional Christian churches and included the reformed churches, Anglican, Methodist, Presbyterian, Lutheran, Roman Catholic and Orthodox churches and the United Congregational Church of South Africa. In the 1996 Census roughly 4,6 million persons indicated following no religious group, whilst by the 2001 Census the figure grew to 6,8. This represented 11,7% of the population in the 1996 Census and 15,1% in the 2001.

- 1.27 As a result of our colonial and apartheid history, and in common with other many societies, South Africa has a pluralist system of marriage and family laws, which means that multiple legal or normative orders regulate marriages and families within the same state.¹⁶ The pluralist system of marriage and families laws is hierarchical in the sense that the historical privilege afforded to certain European-derived forms of marriage continues to shape the legal recognition and, consequently, the rights afforded to partners in different marital and unmarried relationships.¹⁷
- 1.28 Historically dominant is a marriage in terms of the 1961 Marriage Act, which is derived from the principles of, Christian, Roman-Dutch and English law. It is essentially monogamous and heterosexual. These marriages can be conducted by state officials as purely secular marriages, but certain of the Act's provisions relating to the appointment of marriage officers together with longstanding practices by mainstream Christian and Jewish institutions mean that some Judaeo-Christian marriages are automatically also recognised as civil marriages.
- 1.29 Closely aligned with the Marriage Act is the Civil Union Act 17 of 2006, which largely mirrors the requirements and consequences of civil marriage, but which is open to both same-sex and heterosexual monogamous couples. Religious organisations may apply to conclude civil unions in terms of this Act and some religious marriages may therefore also coincide with civil unions.¹⁸ People who conclude civil unions in terms of this legislation may choose to have their unions registered either as marriages or civil partnerships, essentially a matter of terminology, because the designation does not have any effect on the rights of the partners.¹⁹ The legal rights and responsibilities flowing from civil unions

Approximately 33% of the population reported in 2001 following one of the independent churches which include the Zionist churches, iBandla lamaNazaretha and Ethiopian type churches.

¹⁶ Von Benda-Beckmann Franz "Who's afraid of legal pluralism?" (2002) Vol 34 *Journal of Legal Pluralism and Unofficial Law* 37 – 83 at 37; see Rautenbach Christa and Bekker and Jan Christoffel (eds) *Introduction to legal pluralism in South Africa* (LexisNexis 2018). For customary law see Rautenbach Christa and Du Plessis Willemien "African customary marriages in South Africa and the intricacies of a mixed legal system: Judicial (in)novation or confusio?" (2012) *McGill LJ* 749-780 at 755 – 8; Bennett TW *Customary law in South Africa* (Juta 2004) chapters 6 – 11; Himonga Chuma & Moore Elena *Reform of customary marriage, divorce and succession in South Africa: Living customary law and social realities* (Juta 2015) (Himonga & Moore *Reform of customary marriage, divorce and succession in SA*).

¹⁷ Bonthuys (2016) *Oñati Socio-Legal Series* 1308 – 9.

¹⁸ Civil Union Act s 5.

¹⁹ Civil Union Act s 12(3).

are the same as those which arise from marriage in terms of the Marriage Act, except insofar as they may also apply to partners of the same sex.

- 1.30 Marriages in terms of the Marriage Act and the Civil Union Act are often referred to as 'civil marriage'. Customary marriages are the potentially polygynous²⁰ marriages of indigenous African people. They have received limited legal recognition since colonial times, but never had the same status as marriages under the Marriage Act and were termed 'unions' rather than marriages. Since November 2000 customary marriages have been fully valid and their consequences determined by the Recognition of Customary Marriages Act 120 of 1998. They are now governed by a mixture of statute, common law and norms of customary law.²¹ Customary marriages can be monogamous or polygynous.
- 1.31 Because the Marriage Act historically offered certain advantages not available under customary marriage and because many African people are Christian, many African people have in the past and continue at present to enter into simultaneous customary marriages and marriages under the Marriage Act. Alternatively, civil marriages of African people often entail customary elements, like the payment of bridewealth.²²
- 1.32 Muslim, Hindu and other religious marriages could also potentially be conducted in terms of the Marriage Act, because the Act provides for the appointment of marriage officers 'for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion'.²³ However, unless these marriages also comply with the other requirements of the Marriage Act, including the marriage formula, presence of both parties and so forth, they would not be valid in terms of the Marriage Act. For this reason, members of religions other than mainstream Christian and Jewish institutions often enter into both civil and religious marriages. When they are not also married

²⁰ Polygyny refers to the type of marriage where a husband marries more than one wife. Polygamy refers to the situation where either a man or a woman may have more than one spouse, and polyandry refers to the situation where only a wife can marry more than one husband.

²¹ For an overview of the plural South African marriage laws see Rautenbach and Bekker eds *Introduction to legal pluralism in South Africa*. For customary law see Rautenbach Christa and Du Plessis Willemien "African customary marriages in South Africa and the intricacies of a mixed legal system: Judicial (in)novatio or confusio?" (2012) *McGill LJ* 57 749 – 780 at 755 – 8; Bennett TW *Customary law in South Africa* chapters 6 – 11; Himonga & Moore *Reform of customary marriage, divorce and succession in SA: Living customary law and social realities* (Himonga & Moore *Reform of customary marriage, divorce and succession in SA*).

²² Rautenbach and Du Plessis (2012) *McGill LJ* at 758 – 776.

²³ Section 3(1).

according to the Marriage or Civil Union Acts, the religious marriages have no legal validity.

- 1.33 The 2003 SALRC Report on Islamic Marriages recommended the adoption of legislation to give legal effect to Muslim marriages. Although the Muslim Marriages Bill was published for comment by the Justice Ministry in January 2011,²⁴ no statute has yet been enacted. In August 2018 in *Women's Legal Centre Trust v President of the RSA; Faro v Bingham; Esau v Esau* the Western Cape High Court ordered government to enact legislation²⁵ which resulted in government lodging an appeal at the Supreme Court of Appeal (SCA).²⁶ On 18 December 2020 the SCA gave judgment in *President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others*.²⁷ The SCA held that the Marriage Act and the Divorce Act fail to recognise Muslim marriages solemnised in terms of *Sharia* law and not registered as civil marriages, and that these statutes also fail to regulate the consequences of Muslim marriages.²⁸ The SCA further held that section 6 of the Divorce Act is inconsistent with sections 9, 10, 28(2) and 34 of the Constitution to the extent that the Divorce Act fails to provide mechanisms when a Muslim marriage is dissolved to preserve the welfare of minor or dependent children of Muslim marriages in the same or similar manner which the Divorce Act provides mechanisms preserving the welfare of minor or dependent children

²⁴ See https://www.gov.za/sites/default/files/gcis_document/201409/33946gen37.pdf.

²⁵ 2018 (6) SA 598 (WCC). The judgment was delivered on 31 August 2018.

²⁶ Etheridge Jenna "South Africa: Muslim Marriages Case Heads to Supreme Court of Appeal" 25 May 2019 World News <https://theworldnews.net/za-news/south-africa-muslim-marriages-case-heads-to-supreme-court-of-appeal> accessed 8 Dec 2020; Nkosi Bongani "Battle for recognition of Muslim marriages heads to Supreme Court of Appeal" 9 July 2020 IOL <https://www.iol.co.za/the-star/news/battle-for-recognition-of-muslim-marriages-heads-to-supreme-court-of-appeal-50682679> accessed 8 Dec 2020; Masiteng Makgala "Case regarding recognition of Muslim marriages to resume in SCA" 26 Aug 2020 SABC News <https://www.sabcnews.com/sabcnews/case-regarding-recognition-of-muslim-marriages-to-resume-in-sca/> accessed 8 Dec 2020; WLC "The recognition of Muslim marriages in South Africa" 1 Oct 2020 <https://wlce.co.za/the-recognition-of-muslim-marriages-in-south-africa/> accessed 30 Nov 2020.

²⁷ *President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* (Case no 612/19) [2020] ZASCA 177 (18 December 2020) (*President of the RSA v WLC*) <http://www.saflii.org/za/cases/ZASCA/2020/177.html> accessed 21 Dec 2020. See also Nombene Philani "Non-recognition of Muslim marriages a violation of women and children's rights: Supreme Court of Appeal" 20 Dec 2020 *Timeslive* <https://www.timeslive.co.za/news/south-africa/2020-12-20-non-recognition-of-muslim-marriages-a-violation-of-women-and-childrens-rights-supreme-court-of-appeal/> accessed 21 Dec 2020.

²⁸ Par 1.1.

of other marriages when they are dissolved.²⁹ The SCA further held that section 7(3) of the Divorce Act is inconsistent with sections 9, 10, and 34 of the Constitution to the extent that the Divorce Act fails to provide for a redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just.³⁰ The SCA also held that section 9(1) of the Divorce Act is inconsistent with ss 9, 10 and 34 of the Constitution to the extent that it fails to provide for the forfeiture of the patrimonial benefits of a Muslim marriage at the time of its dissolution in the same or similar terms as the Divorce Act provides for forfeiture in respect of other marriages.³¹ The SCA further declared the common law definition of marriage inconsistent with the Constitution and invalid to the extent that the definition excludes Muslim marriages.³² The SCA ordered the President and Cabinet, with Parliament, to remedy the identified defects by the adoption of amending existing legislation, or the passing of new legislation within 24 months, in order to ensure the recognition of Muslim marriages as valid marriages for all purposes and also to regulate the consequences arising from the recognition of Muslim marriages.³³ The Women's Legal Centre also argued in this case that section 7(2) of the Constitution, which provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights, creates an enforceable obligation upon the government to adopt legislation to recognise and regulate the consequences of Muslim marriages.³⁴ The SCA did not agree with this assertion, holding that 'for a court to order the State to enact legislation, on the basis of s 7(2) alone, in order to realise fundamental rights would be contrary to the doctrine of separation of powers, in light of the express provisions of ss 43, 44, and 85 of the Constitution'.³⁵ These constitutional provisions provide the power to the President and Cabinet to initiate legislation and to Parliament to adopt legislation. The Women's Legal Centre further requested the SCA to include in its judgment those Muslim marriages which have since 1994 been dissolved in terms of Sharia law.³⁶ The SCA was not prepared to accede to this request. The SCA held that as profound consequences are involved in a backdated ruling this was a matter better left to the legislature to consider and to decide

29 Par 1.2.

30 Par 1.3.

31 Par 1.4.

32 Par 1.6.

33 Par 1.7.

34 Par 25.

35 Par 43.

36 Par 48.

how the legislation it may pass might apply from a retrospective date.³⁷ The SCA's declarations of constitutional invalidity in the case of *President of the RSA v Women's Legal Centre* will be considered by the Constitutional Court in the foreseeable future to decide whether it confirms these rulings.

- 1.34 Apart from the December 2020 judgment by the SCA, and as a result of numerous cases brought by women who are spouses in unrecognised Muslim marriages, the courts have extended many marriage-like rights and processes to spouses in Muslim marriages.³⁸ There has been less litigation on behalf of adherents of the Hindu³⁹ and other faiths, and the recognition of these marriages seems to be less of a problem than in the case of Muslim marriages. Spouses in unrecognised religious marriages, except for some consequences of Muslim marriages, are generally in the same position as unregistered life partners.
- 1.35 Partners in life partnerships have very few legal rights, except for the occasional cases granting rights to share in partnership assets on the basis that the partners had concluded tacit partnership agreements.⁴⁰ In 2012, the Supreme Court of Appeal in the *Paixão* case recognised a right to mutual support for opposite-sex life partners who had undertaken such duties in the context of a claim against a third party for the loss of support.⁴¹ The Constitutional Court judgment in *Volks v Robinson* has, however, precluded the wholesale extension of marriage-like rights to opposite-sex unmarried cohabitants on the basis that differentiating between rights of married and unmarried couples is fair because the Constitution and international law recognises the importance of marriage as a fundamental social institution.⁴² Justice Ngcobo held that heterosexual partners have a choice to marry and thereby gain their entitlement to legal protection associated with marriage.⁴³ However,

³⁷ Par 48.

³⁸ For instance, *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA); *Daniels v Campbell* 2004 5 SA 331 (CC); *Hassam v Jacobs* 2009 5 SA 572 (CC); *Hoosein v Dangor* [2010] 2 All SA 55 (WCC) see the case discussed in Rautenbach C and Bekker JC (ed) *Introduction to Legal Pluralism in South Africa* 4th edition Lexis Nexis 2014 64 – 74.

³⁹ For instance, *Govender v Ragavayah* 2009 3 SA 178 (D); *Singh v Ramparsad* 2007 3 SA 445 (D).

⁴⁰ See generally Bonthuys Elsje “Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law” (2016) *PER/PELJ* 19 <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1192> accessed 22 Oct 2020; Barratt Amanda “Whatever I acquire will be mine and mine alone: Marital agreements not to share in constitutional South Africa” (2013) *SALJ* 688 – 704.

⁴¹ *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA).

⁴² *Volks v Robinson* 2005 5 BCLR 446 (CC) paras 50 – 57, 80 – 87.

⁴³ Par [90].

in September 2020 the Court in *Bwanya v Master of the High Court, Cape Town and Others* ruled in a case that involved heterosexual life partners that ‘there is no reason why, in section 1(1) of the ISA [Intestate Succession Act] wherever the words “spouse” is found the words “or partner in a permanent opposite-sex life partnership in which the partners has undertaken reciprocal duties of support” should not be read into the Act giving substantive relief to the Applicant and to those in similar circumstances’.⁴⁴

- 1.36 However, it must be noted that, as a result of litigation in respect of same-sex unmarried partners which preceded the adoption of the Civil Union Act, the courts have extended stronger rights to same-sex unmarried partners than is available for heterosexual unmarried partners. These rights continue to exist for same-sex life partners, despite the fact that they can now marry under the Civil Union Act.⁴⁵
- 1.37 The complexity and interconnected nature of the South African marriage law landscape is represented by the following diagram:⁴⁶

⁴⁴ (20357/18) [2020] ZAWCHC 111 (28 September 2020) par [225] see <http://www.saflii.org/za/cases/ZAWCHC/2020/111> accessed 21 October 2020.

⁴⁵ *Gory v Kolver* 2007 4 SA 97 (CC); *Laubscher v Duplan* 2017 2 SA 264 (CC).

⁴⁶ Based on the scheme provided by Bradley S Smith in JA Robinson *et al Introduction to South African Family Law* 6 ed (Printing Things Potchefstroom 2016) 40, also in Smith BS *The development of South African matrimonial law with specific reference to the need for and application of a domestic partnership rubric* submitted in partial fulfilment of the requirements for the degree Doctor Legum at the Faculty of Law Department of Private Law University of the Free State Bloemfontein (2009) 141 see <https://scholar.ufs.ac.za/handle/11660/1645> and adapted by Christa Rautenbach.

religion, conscience, belief, culture, language and birth.⁴⁹ However, not only the protection of human rights is involved, there is also a need for practical purposes to unify the variety of legislative provisions which regulate relationships.

I. Way forward with investigation: single marriage statute or omnibus legislation?

- 1.40 In the DHA request for the investigation it is observed that '[i]nstead of creating a harmonised system of marriage in South Africa, there are now parallel structures that stand side by side'. This situation creates inequality between married couples and life partners and questions of practicality and legal certainty arise when different rules apply to relationships.
- 1.41 The main aim of this investigation is therefore to explore the questions whether and how provision should be made in South Africa for the adoption of a single marriage statute. One often sees accounts of legislation which sought to harmonise or unify different statutes. Unification of law could entail the complete replacement of different legal systems with one uniform legal system.⁵⁰ Integration on the other hand means a limited integration of rules taken from different legal systems into one statute and can be effected circumspectly and slowly. Harmonisation aims to remedy and eliminate conflicts between different legal systems although they are allowed their distinct recognition and continuation.⁵¹
- 1.42 A single marriage statute can take two different forms – either a unified set of requirements (and possibly consequences) applying to all marriages, which we refer to as a single or unified marriage act, or alternatively a single act which contains different chapters which reflect the current diverse set of legal requirements for and consequences of civil marriages, civil unions, customary marriages, Muslim and possibly other religious marriages. The latter could be thought of as an omnibus or umbrella marriage statute.

⁴⁹ Constitution s 9(3).

⁵⁰ Prinsloo (1990) XXIII *CILSA* 324 – 336 at 325; see also Rautenbach C “South African common and customary law of intestate succession: a question of harmonisation, integration or abolition” (2008) *Electronic Journal of Comparative Law* 1 – 15 at 6.

⁵¹ Prinsloo (1990) *CILSA* at 325.

- 1.43 Issue Paper 35 explained that the academic consensus seems to be in favour of the creation of a single basic statute to govern different cultural, religious and secular marriages rather than retaining the current piecemeal situation.⁵²
- 1.44 The question to be answered is which option or model should the envisaged legislation follow? Should the legislation regulate marriages according to different cultures and religions and partnerships in different parts of the legislation or in an integrated way? There are three options which the envisaged legislation could follow, namely –
- 1.44.1 a single marriage act which has a unified or unitary set of requirements for all marriages and partnerships;
- 1.44.2 a single marriage statute with chapters which provide the current legal requirements for civil marriages, civil unions, customary marriages, and other marriages and partnerships; and
- 1.44.3 preservation of the current position with separate statutes to regulate every form of marriage presently recognised, including civil and religious marriages, customary marriages, civil unions, and the adoption of additional statutes to regulate Muslim and Hindu marriages.
- 1.45 We value the energy and effort respondents invested in favouring us with their comment on Issue Paper 35. Annexure E to this Discussion Paper contains the summary of views of respondents to the questions posed in our Issue Paper 35 Issue Paper. We will therefore not repeat in detail all the comment we received from respondents in what follows in this Discussion Paper.
- 1.46 There was no clear majority support or preference by respondents for the approach to be followed in this investigation with equal support for a single and an omnibus statute. This discussion paper suggests a unitary approach. The Constitution does not prevent the adoption of unitary or unified requirements for the recognition of protected relationships in South Africa. We therefore propose unified requirements for protected relationships and their registration in option one in the Protected Relationships Bill (in Annexure B1) and in

⁵² Rautenbach (2004) *PER/PELJ* Vol 7 96 – 129 at 122; Rautenbach (2010) *Journal of Legal Pluralism* Nr 60 143 – 178 at 172; Bakker (2009) *THRHR* 394 – 406 at 405; Bonthuys (2016) *Oñati Socio-legal Series* at 1307; Kruuse *International* (2013) *Survey of Family Law* at 343; and Bakker (2013) *PER/PELJ* at 139. See, however, Van der Vyver “Multi-tiered marriages in South Africa” at 200 in *Marriage and divorce in a multicultural context: Multi-tiered marriage and the boundaries of civil law and religion* and Amien (2013) *Acta Juridica* at 384 who remarks ‘there is no one-size-fits-all solution for the recognition of different types of religious and cultural marriages’.

option two in the Recognition and Registration of Marriages and Life Partnerships Bill (in Annexure B2) for marriages and life partnerships. We invite comment on the practicalities, viability and implementability of these proposals.

- 1.47 We state upfront that it is the view of the committee that the legal consequences of all protected relationships ought to be determined in the other SALRC investigations and existing legislation, for example the investigations into the review of the law of maintenance and matrimonial property and the legislation which deal with consequences of recognising relationships such as the Divorce Act, and the Maintenance Act.
- 1.48 We are of the view that the investigation into matrimonial property ought to consider and resolve relationship property issues and that it not be confined to matrimonial property. By adopting such an approach, we would join jurisdictions which address relationship property issues holistically and no longer matrimonial property only, meaning the envisaged reform addressing all property issues arising from all relationships and not marital property issues only. The therefore provide a minimalist provision on the legal consequences of protected relationships in par 2.159 below.

J. Issues not covered in this paper

- 1.49 In Issue Paper 35 we raised issues and requested comment on matter which we do not take forward in this discussion paper for the following reasons:
- 1.49.1 Notice of intention to marry: the majority of respondents opposed the re-introduction of a marriage notice and marriage license requirement, arguing that they are unnecessary (see Annexure E). Therefore, these issues are not included in this discussion paper or Bill;
- 1.49.2 Matrimonial and patrimonial consequences of marriage: respondents' comment on this topic will be considered as part of the investigation (Project 100E) into matrimonial property and relationship property;
- 1.49.3 Spousal support and maintenance: these issues will also be dealt with in the investigation (Project 100) into relationship property and maintenance;
- 1.49.4 Alternative dispute resolution: dispute resolution mechanisms and options will be addressed in Project 100D and options will be fully explored and addressed in that investigation.

K. Consideration of draft discussion paper by advisory committee and Commission

- 1.50 The advisory committee met on 1 February 2020 to consider a draft discussion paper containing the collated comment received on Issue Paper 35. The advisory committee decided on the further development of the draft discussion paper. Further advisory committee meetings were held on 5 September 2020 and 11 November 2020 to consider further drafts of the discussion paper.
- 1.51 The Commission considered the draft discussion paper at its meeting on 9 December 2020 where it approved the discussion paper for publication subject to amendments being effected.
- 1.53 Further amendments were effected to the discussion paper which were finalised during December 2020.

Chapter 2

A. Title of the Bill

- 2.1 Which relationships need to be recognised and protected by the envisaged legislation? Respondents pointed out to the SALRC already in the early 2000s, and also in response to our Issue Paper 35, that families should be afforded legal protection based on their social and economic functions rather than reserving protection only for those who fit into the monogamous, nuclear, heterosexual family form. A comment was that it is not marriage exclusively that should be protected. Internationally the same comments are made. We heed these comments.
- 2.2 The proposed legislation deals with recognition and protection of protected relationships. We considered different options for the title of the proposed legislation. The title 'single marriage statute' was considered and found to exclude all relationships other than marriages. We also considered the phrase 'intimate relationships'. We were, however, of the view that not all relationships which persons enter into are necessarily intimate in nature such as where two parties share lodgings to save their expenses or where related parties share a common dwelling for various purposes including their mutual support or care. We are of the view that the phrase 'protected relationships' is the most inclusive phrase for including all relationships formed in terms of the envisaged legislation. We therefore propose, as a first option, that the name of the Bill should be the 'Protected Relationships Bill'. As a second option we propose a Bill with the title 'Recognition and Registration of Marriages and Life Partnerships' which provides for the recognition and registration marriages and life partnerships. We invite respondents to comment in particular on the name of the Bill and the two options we propose.

B. Long title of the Bill

- 2.3 What is an appropriate long title for the Bill? The long title explains what the Bill seeks to achieve. The Bill seeks to rationalise the marriage laws pertaining to various types of relationships; to provide for the recognition, in terms of option one, of protected relationships, or, in terms of option two, of marriages and life partnerships, entered into by parties regardless of the religious, cultural or any other beliefs of the parties, or the manner in which the relationship was entered into; to provide for the requirements for entering into a protected relationship or a marriage or life partnership; to provide for registration of protected relationships or marriages and life partnerships; to provide for the legal

consequences of entering into protected relationships or marriages and life partnerships; and to provide for matters incidental thereto. The question arises whether we succeeded in identifying what exactly the purpose of the Bill is. Is the purpose of the Bill simply to provide for the recognition of all protected relationships or, as the second option, the recognition of all marriages as well as life partnerships which have legal consequences and to provide for a uniform system of registration for these relationships?

C. Preamble

2.4 We propose a preamble should be included in the proposed legislation. We consider the proposed legislation should refer to sections 9, 7, 10, 15(1), and 15(3) of the Constitution similar to the preamble to the Civil Union Act. We propose that the preamble should note the fragmented way in which relationships and marriages were recognised under the RCMA, the Marriage Act and the Civil Union Act and that legislative benefits should be extended to all relationships worthy of protection, to ensure a fair outcome to the parties whenever disputes arise. We further note the state in December 2020 being ordered by the Supreme Court of Appeal to adopt amending or new legislation to recognise marriages concluded under the tenets of Muslim law and to regulate the consequences arising from such recognition;⁵³ that we have international obligations to take appropriate and reasonable measures to eradicate discrimination against women in relationships; and also to prevent child marriages. Here too, we need to ask is it clear from the long title and preamble what exactly the purpose of the Bill is. We cite many constitutional provisions in the preamble, but is it clear how the Bill promotes or fulfils these rights? We would appreciate views of respondents.

2.5 We propose the following preamble in the Bill:

Preamble

WHEREAS section 9(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone is equal before the law and has the right to equal protection and benefit of the law;

⁵³ See *President of the RSA v WLC*:

[50] The importance of recognising Muslim marriages in our constitutional democracy cannot be gainsaid. In South Africa, Muslim women and children are a vulnerable group in a pluralistic society such as ours. The non-recognition of Muslim marriages is a travesty and a violation of the constitutional rights of women and children in particular, including, their right to dignity, to be free from unfair discrimination, their right to equality and to access to court. Appropriate recognition and regulation of Muslim marriages will afford protection and bring an end to the systematic and pervasive unfair discrimination, stigmatisation and marginalisation experienced by parties to Muslim marriages including, the most vulnerable, women and children. ...

AND WHEREAS section 9(2) of the Constitution prescribes legislative measures to achieve equality for previously disadvantaged persons or categories of persons;

AND WHEREAS section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;

AND WHEREAS section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;

AND WHEREAS section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion;

AND WHEREAS section 15(3)(a) of the Constitution provides the opportunity for legislative recognition of marriages concluded under any tradition, or a system of religious, personal or family law consistent with section 15 and other provisions of the Constitution;

AND WHEREAS the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;

AND WHEREAS section 7(2) of the Constitution places a responsibility on the state to respect, protect, promote and fulfil the rights in the Bill of Rights;

AND NOTING that existing family law has developed in a fragmented manner by way of the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) and the Civil Union Act, 2006 (Act No. 17 of 2006), and that legislative benefits should be extended to all relationships worthy of protection, to ensure a fair outcome to the parties to a protected relationship whenever disputes arise;

AND NOTING that the Supreme Court of Appeal ordered the state to amend existing legislation or to enact legislation within 24 months to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition;

AND NOTING that South Africa has international obligations to take appropriate and reasonable measures to eradicate discrimination against women in relationships;

AND NOTING that South Africa has international obligations to take appropriate and reasonable measures to prevent child marriages;

D. Objects of proposed legislation

2.6 We further consider there should be an objects clause in the proposed legislation. The objects of the legislation are to rationalise the marriage laws pertaining to various types of relationships; to prescribe the validity requirements, in terms of option one, for protected relationships, or, in terms of option two, for marriages and life partnerships; to provide for the registration of protected relationships or marriages and life partnerships; and to

provide formal recognition of protected relationships or marriages and life partnerships to facilitate and enable enforcement of their.

2.6.1 We propose as option one in the Protected Relationships Bill, the following clause:

2. The objects of this Act are to—

- (1) rationalise the marriage laws pertaining to all various types of relationships;
- (2) prescribe the validity requirements of such relationships;
- (3) provide for the registration of protected relationships; and
- (4) provide formal recognition of protected relationships to facilitate and enable enforcement of their rights.

2.6.2 We propose as option two in the Recognition and Registration of Marriages and Life Partnerships Bill the following objects clause:

The objects of this Act are to—

- (1) rationalise the marriage laws pertaining to all various types of relationships;
- (2) prescribe the validity requirements of such relationships;
- (3) provide for the registration of marriages and life partnerships; and
- (4) provide formal recognition of marriages and life partnerships to facilitate and enable enforcement of their rights.

E. Application of the proposed legislation

2.7 We further consider the Bill should clarify the application of the proposed legislation. Whenever legislation or the common law attaches consequences, in terms of option one, to protected relationships, or, in terms of option two, to marriages or life partnerships, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of the proposed legislation or the Marriage Act of 1961, the Civil Union Act of 2006 or the Recognition of Customary Marriages Act of 1998. We further propose that the parties involved in a protected relationship cannot exclude the application of the legislation to their relationship. The question, however, also arises whether we are necessarily correct in assuming that women or the weaker party in these relationships would necessarily want the relationship to have legal consequences, ie trigger a duty of support. The question is therefore, whether our thinking in this regard is problematic? We can imagine a situation, for example, where the man is financially better off but much older than the woman. As his finances get drained her position improves.

May she then not with some justification be upset if the law visits her with a life-long duty of support? We further imagine that in the gay and lesbian community the imposition of a “*common law marriage*” may also be resisted. We would therefore appreciate the views of respondents on why able and willing partners should not be allowed to opt out, ie the law will visit the relationship with legal consequences unless the parties explicitly record (even register) that they want to opt out.

2.7.1 We propose the following clause for the application of the proposed legislation in terms of option one to protected relationships:

3. Application of the Act

- (1) Whenever legislation or the common law attaches consequences to protected relationships, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of this Act or the Marriage Act, 1961, the Civil Union Act, 2006 or the Recognition of Customary Marriages Act, 1998.
- (2) The parties to a protected relationship cannot exclude the application of this Act to their relationship.

2.7.2 We propose the following application clause as option two for the application of the proposed legislation to marriages and life partnerships:

3. Application of the Act

- (1) Whenever legislation or the common law attaches consequences to marriages or life partnerships, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of this Act or the Marriage Act, 1961, the Civil Union Act, 2006 or the Recognition of Customary Marriages Act, 1998.
- (2) The parties to a marriage or life partnership cannot exclude the application of this Act to their relationship.

2.8 We propose as option one in Schedule 1 to the Protected Relationships Bill amendments to 20 statutes which insert the phrase ‘Protected Partnerships Act’ into these statutes. We propose as option two in Schedule 1 to the Recognition and Registration of Marriages and Life Partnerships Bill the insertion of the phrase ‘Recognition and Registration of Marriages and Life Partnerships Act’ into these 20 statutes. These statutes include the Insolvency Act of 1936; the Pension Funds Act of 1956; the Military Pensions Act of 1976; the Births and Deaths Registration Act of 1992; the Maintenance of Surviving Spouses Act of 1990; the Long-term Insurance Act of 1998; the Maintenance Act of 1998; the Immigration Act of 2002; the Children’s Act of 2005 etc, which will further regulate and clarify the application of the proposed legislation in effecting amendments to other statutes

defining terms such as dependant, marriage, spouse, and survivor. The Divorce Act of 1979 and Matrimonial Property Act of 1984 do not presently define the term 'marriage'. We propose this needs to be addressed in this legislation. We further propose that the Marriage Act, the Transkei Marriage Act, the Bophuthatswana Marriage Act, the Ciskei Marriage Act, and the Civil Union Act be repealed in whole. We also propose the repeal of sections 3(3) to 3(5) which deal with third party consent for marriages by minors and the repeal of section 4 of the RCMA which deals with the registration of customary marriages.

F. Protected relationships: requirements or essentials for relationships in South Africa

1. Definitions for a protected relationship or marriage and life partnerships

- 2.9 As indicated, we consider that the Bill should provide for protected relationships. Forms of relationships which have been protected in South Africa in the past are marriages in terms of the Marriage Act, the RCMA and the Civil Union Act. A civil marriage is defined in South Africa as 'the legally recognised voluntary union of a man and a woman to the exclusion of all other persons'.⁵⁴
- 2.10 The distinguishing feature of civil marriages and civil unions in South Africa is that civil marriages involve exclusively a man and a woman whereas civil unions involve either heterosexual or same sex partners.⁵⁵ The distinguishing feature of customary marriages, and some religious marriages is that the husband to these marriages is allowed to conclude marriages with more than one wife.⁵⁶
- 2.11 Issue Paper 35 asked how the proposed legislation should define marriage. One response was that marriage is a legally recognised voluntary union that encompasses all forms of customs, religions and beliefs between persons.⁵⁷ Another was that by definition, a marriage should be defined as a union that is negotiated, celebrated and concluded in terms of indigenous African customary law.⁵⁸ Yet another comment was that there ought

⁵⁴ Heaton Jacqueline & Hanneretha Kruger *South African Family Law* 4 ed (LexisNexis 2015) 13 (Heaton & Kruger *South African Family Law*).

⁵⁵ Heaton & Kruger *South African Family Law* 13 and 203.

⁵⁶ Heaton & Kruger *South African Family Law* 13.

⁵⁷ Commission for Gender Equality.

⁵⁸ The National House of Traditional Leaders (NHTL).

to be one definition for marriages and civil unions.⁵⁹ It was also proposed that the statute should not define marriage but rather define an intimate relationship that is protect-worthy by the law and should not differentiate between married and unmarried partners.⁶⁰ Another comment was that the distinction between same sex and heterosexual marriages is discriminatory.⁶¹

2. Conclusion

2.12 We consider that we should follow the example of the large number of countries which have allowed heterosexual and same-sex couples to enter into relationships which use a gender-neutral approach of allowing two adult persons to marry. We favour the definition introduced in New Zealand which provides that marriage means the union of two people, regardless of their sex, sexual orientation, or gender identity. We further consider that a distinction should be made in the proposed legislation between monogamous and polygynous relationships. We propose as option one in the Protection Relationships Bill that the definition for a monogamous protected relationships should be that a 'monogamous protected relationship' means the relationship of two people regardless of their sex, sexual orientation, or gender identity, to the exclusion of all others, unless dissolved by divorce or death of one or both parties. We propose as option two in the Recognition and Registration of Marriages and Life Partnerships Bill that a 'monogamous marriage or life partnership' means the relationship of two people regardless of their sex, sexual orientation, or gender identity, to the exclusion of all others, unless dissolved by divorce or death of one or both parties.

2.13 One response was that the envisaged legislation would have to recognise the marriages of women married in polygynous marriages, that to exclude them from the recognition and protection in respect of their rights to housing, land and property would be a violation of their constitutional rights as the Constitutional Court has found time and again.⁶² Another response was that the statute must stipulate that consent be mandatory for all spouses (as well in the case of the first wife) that intend to enter into a polygynous marriage.⁶³ We agree with this comment. We consider we ought to provide for polygynous relationships in the sense of allowing a male party during the subsistence of the relationship, to be in a

⁵⁹ Free State Society of Advocates.

⁶⁰ Prof Pieter Bakker.

⁶¹ Legal Resources Centre.

⁶² Women's Cultural Group.

⁶³ The Commission on Gender Equality.

relationship with a female party or parties. Hence, we are proposing that polygynous relationships ought to be recognised by the envisaged legislation in South Africa for the time being. We propose the following definition, as option one in the Protected Relationships Bill that a 'polygynous or potentially polygynous protected relationship' means a relationship in which a male party may, during the subsistence of the relationship, be in a relationship with a female person or female persons. As option two we propose in the Recognition and Registration of Marriages and Life Partnerships Bill that a 'polygynous or potentially polygynous marriage or life partnership' means a relationship in which a male party may, during the subsistence of the relationship, be in a relationship with a female person or female persons.

- 2.14 The Marriage Act, Extension Act 50 of 1997 extended the application of the Marriage Act to the whole of South Africa. The RCMA repealed certain sections of the KwaZulu Act on the Code of Zulu Law 16 of 1985⁶⁴ and the Natal Code of Zulu Law Proclamation R151 of 1987.⁶⁵ Prior to the adoption of the Marriage Act, Extension Act marriages were conducted in the Transkei, Bophuthatswana, Ciskei and in Natal in terms of these marriages statutes. Therefore, we ought to provide also for the marriages concluded or entered into in terms of these marriage statutes to qualify as protected relationships. We consider an appropriate term for these marriage statutes is 'old order marriage legislation'. We therefore propose the definition of 'old order marriage legislation' to mean the Black Administration Act 38 of 1927, the Transkei Marriage Act 21 of 1979, the Bophuthatswana Marriage Act 16 of 1980, the KwaZulu Act on the Code of Zulu Law 16 of 1985, the Natal Code of Zulu Law Proclamation R151 of 1987 and the Ciskei Marriage Act 24 of 1988.
- 2.15 Do the present definitions adequately provide for persons eligible to marry in terms of the RCMA? The RCMA defines 'customary marriage' to mean a marriage concluded in accordance with customary law and 'customary law' means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples. The DHA has at the ministerial dialogues reported that the RCMA does not allow cross-border kinsmen and kinswomen of Lesotho, Botswana and Mozambique to marry in terms of the RCMA as it provides for the custom

⁶⁴ Section 22 which dealt with inmates of a family home being under the control of a family head and section 27(3) dealt with a woman being under the marital power of her husband provided that a husband's marital power in a civil marriage out of community of property may be excluded by an ante-nuptial contract

⁶⁵ Section 27(3) also provided for the wife being under the marital power of her husband and that this power could be excluded by ante-nuptial contract in a civil marriage out of community of property.

of the indigenous African peoples of South Africa.⁶⁶ Should the definition of customary marriages be amended to include the cross-border marriages of communities to clarify that these people are practising the same customary practices who are not confined to the borders of South Africa or should this issue be left to private international law?

2.16.1 In view of the different viewpoints on the meaning of marriage and marriage-like relationships, we favour neutral terminology to describe all types of relationships worthy of legal protection, namely 'protected relationships'. We propose as option one that a 'protected relationship' means –

- (a) any subsisting marriage concluded in terms of the Marriage Act, 1961 (Act No. 25 of 1961), any old order marriage legislation or any other prior legislation before the commencement of this Act; any subsisting marriage or union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006) before the commencement of this Act; and any subsisting customary marriage concluded in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);
- (bb) any subsisting monogamous or polygynous marriage or relationship concluded or entered into in terms of the tenets of any religion or culture before or after the commencement of this Act; or
- (cc) any life partnership, where the parties cohabit and have assumed permanent responsibility for supporting each other.

2.16.2 We propose as option two, that 'marriage or life partnership' means —

- (aa) any subsisting marriage concluded in terms of the Marriage Act, 1961 (Act No. 25 of 1961), old order marriage legislation or any other prior legislation before the commencement of this Act; any subsisting union or marriage concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006) before the commencement of this Act; and any subsisting customary marriage concluded in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);

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At the Ministerial dialogue with traditional leaders in Durban on 11 October 2019 the Minister of Home Affairs, Minister, Dr Aaron Motsoaledi, noted this issue as follows (<http://www.dha.gov.za/index.php/statements-speeches/1292-keynote-address-by-home-affairs-minister-dr-aaron-motsoaledi-on-the-occasion-of-the-marriage-policy-dialogue-with-traditional-leaders-kwazulu-natal> accessed 4 Nov 2020):

The Recognition of Customary Marriages Act also does not make provision for entering into a polygamous marriage with non-citizens. This poses a serious challenge when such marriages are entered into especially amongst the community members who are members of the same clan but are separated by a borderline. For an example, the community led by Inkosi Mandlenkosi Mahlalela of Mlambo Tribal Authority in Mbuzini in Mpumalanga is spread around three countries; South Africa, Mozambique and Eswatini. This community see themselves as one people. So they interact normally as people with little regard to colonial borders. Marriages across the border are normal here and in other communities separated by borders.

- (bb) any subsisting monogamous or polygynous marriage or relationship concluded or entered into in terms of the tenets of any religion or culture before or after the commencement of this Act; or
- (cc) any life partnership, where the parties cohabit and have assumed permanent responsibility for supporting each other.

2.17.1 We further propose as option one that the validity requirements for a protected relationship are that all the parties must be at least 18 years on the date of entering into the relationship; that the parties must give free and informed consent; and they must have capacity to enter into a protected relationship. We propose further if the parties do not comply with the requirements the relationship is void. We propose the following clause:

4. Validity requirements for protected relationships

- (1) A protected relationship entered into after the commencement of this Act is valid if the following requirements have been met –
 - (a) all the parties must be at least 18 years or older on the date of entering into the protected relationship;
 - (b) all the parties must give free and informed consent to enter into a protected relationship; and
 - (c) all the parties must have capacity to enter into a protected relationship.
- (2) A protected relationship entered into after commencement of this Act that does not comply with the requirements of this section will be null and void.
- (3) Nothing in this section shall render invalid any otherwise valid protected relationship entered into prior to the commencement of this Act.

2.17.2 We propose as a second option for the validity requirements of marriages and life partnerships that all the parties must be at least 18 years or older on the date of entering into the marriage or life partnership; all the parties must give free and informed consent to enter into a marriage or life partnership; and all the parties must have capacity to enter into a marriage or life partnership. We propose further if the parties do not comply with the requirements the relationship is void. We propose the following clause:

4. Validity requirements for marriages and life partnerships

- (1) A marriage or life partnership entered into after the commencement of this Act is valid if the following requirements have been met –
 - (a) all the parties must be at least 18 years or older on the date of entering into the marriage or life partnership;
 - (b) all the parties must give free and informed consent to enter into a marriage or life partnership; and

(c) all the parties must have capacity to enter into a marriage or life partnership.

(2) A marriage or life partnership entered into after commencement of this Act that does not comply with the requirements of this section will be null and void.

(3) Nothing in this section shall render invalid any otherwise valid marriage or life partnership entered into prior to the commencement of this Act

G. Minimum age for entering a relationship

1. Background

2.18 In October 2017 the local media reported about South Africa's 2016 Community Survey⁶⁷ which revealed the worrying statistics and the effects of girls below the age of 18 getting married preventing them to complete secondary education.⁶⁸ Many commentators have highlighted the extent and adverse effects of child marriages internationally including South Africa and called for measures against child marriages.⁶⁹

2.19 The Marriage Act distinguishes between marriages contracted by majors and those by minors. The Marriage Act provides in section 24 that no marriage officer shall solemnise a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has

⁶⁷ Statistics SA *Community Survey 2016: An exploration of nuptiality statistics and implied measures in South Africa Report no.: 03-01-25 par 2.4.1 age group at 17* see <http://www.statssa.gov.za/publications/03-01-25/03-01-252016.pdf> accessed 5 Nov 2020.

⁶⁸ Mbude Phelokazi "Shocking child marriage stats paint a dire picture" *Citypress* 31 October 2017 <https://city-press.news24.com/News/shocking-child-marriage-stats-paint-a-dire-picture-20171031>; see also Staff reporter "SA child-bride stats paint a grim picture" *IOL* 31 October 2017 <https://www.iol.co.za/lifestyle/family/parenting/sa-child-bride-stats-paint-a-grim-picture-11770447>; Mmakgomo Tshetlo "Stats SA: KZN and Gauteng have the highest underage marriages in South Africa" *702* 30 October 2017 <http://www.702.co.za/articles/278451/stats-sa-kzn-and-gauteng-have-the-highest-underage-marriages-in-south-africa>; Abrahams Marcelle "SA's dark under belly of under-age marriage" *Cape Argus* 23 Nov 2017 <https://www.pressreader.com/south-africa/cape-argus/20171123/281522226393013> accessed 5 Nov 2020.

⁶⁹ Centre for Human Rights University of Pretoria "A Report on Child Marriage in Africa" 2018 at 11 see https://www.chr.up.ac.za/images/publications/centrepublishments/documents/childmarriage_report.pdf accessed 5 Nov 2020; see also Mokati Noni "Commission for Gender Equality calls for end to child marriages" *IOL* 14 December 2017 at <https://www.iol.co.za/news/south-africa/commission-for-gender-equality-calls-for-end-to-child-marriages-12419270>; Lebitse Palesa "Underage, marginalised, married" *Mail & Guardian* 22 June 2018 <https://mg.co.za/article/2018-06-22-00-underage-marginalised-married>; Bornman Jan "More needs to be done to address child marriages – Centre for Child Law" *News24.com* 9 July 2018 <https://www.news24.com/SouthAfrica/News/more-needs-to-be-done-to-address-child-marriages-centre-for-child-law-20180709>; and Mudarikwa Mandivavarira, Elgene Roos & Nombuso Mathibela "Girls must not be brides" Legal Resources Centre 2018 see <https://lrc.org.za/girls-must-not-be-brides-2018/> accessed 6 Nov 2020.

been granted and furnished to him or her in writing.⁷⁰ The Marriage Act further provides that a minor does not include a person who is under the age of twenty-one years and previously contracted a valid marriage which has been dissolved by death or divorce.⁷¹ The Children's Act reduced the age of majority to 18 years. The Marriage Act does not yet reflect this amendment. Furthermore, a concern is that the Marriage Act allows for children below the age of 18 years to get married with the permission of the Minister of Home Affairs. This provision also differentiates between girls and boys. Girls can marry at a younger age of 15 years than boys at 18 years, which is *prima facie* discriminatory. The second concern is the difference between the various statutes on marriageable age, with the Civil Union Act not allowing marriage under the age of 18. The RCMA allows for underage marriage with consent of the parents.

- 2.20 There are discrepancies between the Marriage Act and the RCMA on the one hand, and the Civil Union Act on the other hand as the latter sets the minimum age of marriage at 18 without any exceptions. Under the Marriage Act and the RCMA parents, functionaries and courts are empowered to grant consent for a marriage of parties below the age of 18. The Marriage Act provides that a commissioner of child welfare⁷² may, if satisfied after proper inquiry that a minor has no parent or guardian or is for any good reason unable to obtain the consent of his or her parents or guardian to enter into a marriage, in his or her discretion grant written consent to the minor to marry a specified person. It further provides that the commissioner of child welfare shall not grant consent if one or other parent of the minor whose consent is required by law or the guardian refuses to grant consent to the marriage.
- 2.21 The SALRC noted in its *Report on Islamic Marriages and Related Matters*⁷³ that it had considered all the submissions by stakeholders in relation to the age of the parties and it agreed that the age of the parties should be the same, namely 18 years. The SALRC remarked further that consent may in any event in appropriate circumstances be obtained for persons under that age to marry.

⁷⁰ Section 24(1).

⁷¹ Section 24(2).

⁷² As defined in section 1 of the repealed Child Care Act 74 of 1983. The Children's Act 38 of 2005 does not provide power to presiding officers of children's courts to adjudicate or make orders permitting the marriage of minors.

⁷³ SALRC *Report on Islamic Marriages and Related Matters* par 3.115.

2. Views of respondents

2.22 There was overwhelming support that the discrepancies in the three marriage statutes be remedied and the minimum age for marriage be set at 18.⁷⁴ There were, however, also views that there is no need to remedy the age discrepancies set by the legislation for marriage.⁷⁵ A minority view was that there should be uniformity regarding the minimum age for marriage being 18, but that Ministerial consent (which may be delegated) is required for any marriage below this age.⁷⁶ Another view was that South Africa has its own unique environment and this environment rather than international norms should be used.⁷⁷ A comment was that separate legislative frameworks for each religious or cultural grouping is required in order to ensure that by applying such specific standards the social justice concept will be met, that South Africa has a major problem of teenage pregnancies, education has not assisted in resolving the problem and the rigid application of the minimum age may exacerbate the problem.⁷⁸ Another view was that in terms of Islam a person becomes a major once he or she reaches puberty, that person is then free to contract a marriage, and therefore there is no Shariah basis for introducing a minimum standard age for marriage.⁷⁹

2.23 There is overwhelming support by respondents that the discrepancies between the different statutes need to be remedied. There are also the cases from our immediate neighbours, Zimbabwe, and from further afield, who held that it is unconstitutional to allow minors to get married.⁸⁰ There was also overwhelming support from respondents that South Africa has a duty to comply with international and regional instruments to set a uniform minimum age for marriage of 18 without any exceptions for third party consent by parents, courts, or any other official to prevent children being married or to enter into

⁷⁴ Prof Pieter Bakker; the CRL Commission; the Pretoria Society of Advocates; the Department of Communications; the Women's Cultural Group; the Office Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional; Muslim Lawyers for Social Justice; the Women's Legal Centre; the NHTL; the Commission for Gender Equality; the Free State Society of Advocates; Mr Craig Allan; Cause for Justice; the Bahá'í community; the NHKA; the LRC; Ms Gabrielle Feher; Adv Velaphi Juliet Mukhari; Ms Micholene O'Haher; Ms Meaghan Essel; Mr Ralph Mabasa; Ms Chaneez Leonard; Mr Romeo Sungharandan; Mr Jordan Jacob; Ms Angie Floyd; and CALS.

⁷⁵ UUCSA; the Darhul Ihsan Centre.

⁷⁶ The Jamiatul Ulama KZN.

⁷⁷ The Islamic Forum Azaadville.

⁷⁸ Sunni Ulama Council.

⁷⁹ Muslim Lawyers Association.

⁸⁰ See Annexure D for a comparative overview regarding minimum age requirements in other jurisdictions.

unmarried intimate relationships.⁸¹ One view was that the focus should shift from marriage to intimate relationships and that a party to an intimate relationship should be at least 18 years of age.⁸² Views were also that the proposed statute should make provision for exemptions⁸³ in exceptional circumstances by the Minister of Home Affairs or any Muslim body authorised by him if the marriage is regarded to be desirable and in the interests of the parties in question,⁸⁴ and that the legislature should be able to depart from the international instruments.⁸⁵ Another view was that the current minimum marriage age in the Marriage Act is appropriate and that the current exceptions for consent by parents, Courts or the Minister should be retained.⁸⁶ A further suggestion was that the minimum age for marriage should be 21 years.⁸⁷

3. Proposals

2.24. In many other jurisdictions there is a non-negotiable minimum age of marriage of 18 applicable to both boys and girls. No parental or official permission can allow a deviation from this. These measures are compliant with international and regional instruments. We agree that as regards minimum age for entering into a protected relationship, South Africa has to comply with its international and regional responsibilities in this regard.

2.25 We propose that the minimum age to enter and register a protected relationship or marriage or life partnership should be 18 years. Third-party consent for minors to enter into a relationship is impermissible. The age of any of the parties must be determined by means of a birth certificate, an identity card or document, or, if any of the parties is not in possession of a birth certificate, an identity card or document, by the prescribed affidavit of the parents, or parent of a party, or a guardian if he or she has no parents. If there is uncertainty about the age of majority of any of the parties the age of that party must be established in terms of the Children's Act 38 of 2005 by the presiding officer of a children's court. We further propose that it must constitute a criminal offence to enter a relationship with a person who is below the age of 18. The Matrimonial Property Act regulates the

⁸¹ The Free State Society of Advocates; Muslim Lawyers for Social Justice; the NHTL; the NHKA; The Pretoria Society of Advocates; the Department of Communications; the Women's Legal Centre Mr Craig Allan; the LRC.

⁸² Prof Pieter Bakker.

⁸³ The Muslim Lawyers Association.

⁸⁴ Darhul Ihsan Centre; UUCSA.

⁸⁵ Jamiatul Ulama KZN.

⁸⁶ Women's Cultural Group.

⁸⁷ CRL Commission; Mr Romeo Sungharandan; Ms Meaghan Essel; Mr Ralph Mabasa.

distribution of matrimonial property upon dissolution of marriage for want of consent of parents or guardian. It provides that the court which dissolves such a marriage may make such order with regard to the division of the matrimonial property of the spouses as it may deem just.⁸⁸ We consider that this power should be given to courts when a minor enters into a relationship in contravention of the proposed legislation. We therefore propose the following; if a court dissolves a relationship to which a minor is a party on the ground of want of compliance with the proposed clause, the court may make such order with regard to the division of the relationship property of the parties to the relationship as it may deem just.

2.26.1 We propose the following clause as option one regulating the minimum age requirements for protected relationships:

5. Minimum age requirement

- (1) No person or institution can provide consent for any person under the age of 18 years to enter into a protected relationship in terms of this Act.
 - (2) The age of any of the parties must be determined by means of a birth certificate, an identity card or document, or, if any of the parties is not in possession of a birth certificate, an identity card or document, by the prescribed affidavit of his or her parents, or parent if he or she has only one parent, or a guardian if he or she has no parents.
 - (3) If there is uncertainty about the age of majority of any of the parties referred to in subsection (1), his or her age must be established in terms of section 48 of the Children's Act, 2005 (Act No. 38 of 2005) by the presiding officer of a children's court who shall issue the prescribed certificate as proof of the estimated age of that party.
 - (4) If a court dissolves a relationship to which a minor is a party on the ground of want of compliance with this section, the court may make such order with regard to the division of the relationship property of the parties to the protected relationship as it may deem just.
- 13(1) Any adult who is or enters into a protected relationship with a person who is not at least 18 years of age or any person who participates knowingly in such a relationship, shall be guilty of an offence and liable on conviction to a fine or in

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24.(1) If a court dissolves a marriage to which a minor is a party on the ground of want of consent of the parents or guardian of that minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, it may make such order with regard to the division of the matrimonial property of the spouses as it may deem just.

(2) If such a marriage is not dissolved, the patrimonial consequences of the marriage are the same as if the minor were of age when the marriage was entered into and any antenuptial contract in terms of which the accrual system is included and which has been executed with a view to such a marriage is deemed to have been validly executed.

default of payment, to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.

2.26.2 We propose the following clause as an option two regulating the minimum age requirements for marriages and life partnerships:

5. Minimum age requirement

- (1) No person or institution can provide consent for any person under the age of 18 years to enter into a marriage or life partnership.
 - (2) The age of any of the parties must be determined by means of a birth certificate, an identity card or document, or if any of the parties is not in possession of a birth certificate, an identity card or document, by the prescribed affidavit of his or her parents, or parent if he or she has only one parent, or a guardian if he or she has no parents.
 - (3) If there is uncertainty about the age of majority of any of the parties referred to in subsection (1), his or her age must be established in terms of section 48 of the Children's Act, 2005 (Act No. 38 of 2005) by the presiding officer of a children's court who shall issue the prescribed certificate as proof of the estimated age of that party.
 - (4) If a court dissolves a relationship to which a minor is a party on the ground of want of compliance with this section, the court may make such order with regard to the division of the relationship property of the parties to the marriage or life partnership relationship as it may deem just.
- 13(1) Any adult who is or enters into a marriage or life partnership with a person who is not at least 18 years of age or any person who participates knowingly in such a relationship, shall be guilty of an offence and liable on conviction to a fine or in default of payment, to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.

H. Consent and capacity to enter into a relationship

1. Consent and capacity to enter into relationships

2.27 In line with many international policies, the general rule in South Africa is that every person has the capacity and is entitled to marry whoever he or she wishes to marry.⁸⁹ This rule is subject to absolute and relative incapacity to marry. Absolute incapacity exists, firstly, when one or both of the prospective spouse or spouses are already married to someone else; secondly, in regard to persons who have serious mental incapacities rendering them incapable of understanding the nature of marriage and the responsibilities involved in marriage; and finally, minors below the minimum marriageable age of 15 years for girls and 18 years for boys, unless the permission of the Minister of Home Affairs is obtained

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Hahlo HR *The South African law of husband and wife* 5 ed (Juta 1985) at 64 to 73.

for their marriage. Relative incapacity to marry existed, firstly, in the past when marriages between the different race groups in South Africa was prohibited; secondly, in regard to persons of the same sex, before the adoption of the Civil Union Act; thirdly, and this is the position which still applies today which prohibits persons within prohibited degrees of relationship to marry; and fourthly, a marriage between the legal guardian and his or her ward under his or her guardianship as the guardian cannot provide consent for his or her own marriage to his or her ward, therefore the consent of a court is required for this marriage.

- 2.28 The Marriage Act requires that a marriage takes place in the presence of the parties to the marriage and at least two witnesses.⁹⁰ The Marriage Act also prohibits a proxy representing a party to the marriage.⁹¹
- 2.29 In 2015 in *Hardie v Jansen and Others*⁹² the marriage officer had concerns to proceed with the marriage of Prof Hardie. She shared her concerns with the supervisor and noted them electronically on the DHA system. The marriage officer noted that Prof Hardie was shaking, frail, disorientated and not aware that he was at DHA offices. The Court noted the legal position for the presence of legal capacity to marry in South Africa is that '[a] person who, owing to mental disease or defect, is incapable of understanding the nature of the marriage contract, or the duties and responsibilities which it creates, free from the influence of morbid delusions, cannot contract a valid marriage, nor can his incapacity be cured by the consent of his Curator' and that '[t]he reason is not the mental disease or defect as such, but the absence of a mind capable of understanding'.⁹³ The Court held that that '[t]he authorities therefore establish that the contract of marriage is a simple one which can be readily be understood by anyone of normal intelligence' that '[i]t is not sufficient that someone appreciates that he is taking part in a marriage ceremony or understands its words, but he must understand the nature of the contract' and that '[t]he enquiry is therefore, "Did the deceased understand the duties and responsibilities that normally attach to marriage?"'⁹⁴

⁹⁰ Section 29(2).

⁹¹ Section 29(4).

⁹² (19339/2014) [2015] ZAWCHC 104 (30 July 2015) [2015] ZAWCHC 104 <http://www.saflii.org/za/cases/ZAWCHC/2015/104.html>. See Schroeder Fatima "Prof with dementia duped into marriage" 1 Aug 2015 *Weekend Argus* <https://www.pressreader.com/south-africa/weekend-argus-saturday-edition/20150801/281616714077836> accessed 5 Nov 2020.

⁹³ Par [22].

⁹⁴ Par [29].

- 2.30 The parties to a marriage must have an understanding that they are participating in a marriage ceremony and consenting to being married in order to constitute a valid marriage.⁹⁵ Where the bride is brought under the mistaken belief she is participating in an engagement and is unaware of the nature of the ceremony she does not consent to it as a marriage ceremony.⁹⁶
- 2.31 Marriages of convenience have also been considered in South African courts. In *Maseko v Maseko*⁹⁷ the court noted that [i]t has been held on a number of occasions that a marriage of convenience is a valid marriage and a Court will not set it aside on that ground. In *Martens v Martens*⁹⁸ the parties argued that they did not intend that there should be a marriage, with none of the consequences of marriage, therefore they did not really intend to be married. The Court held that [t]his is not a case where the parties did not intend the ceremony to have the effect of making them married' and that '[b]y their contemplation of a later divorce it is obvious that they intended that very thing'.⁹⁹
- 2.32 In our *Report on customary marriages* we considered how to determine whether the spouses genuinely consented to their marriage.¹⁰⁰ We felt that legislation would be most effective in fixing a specific age at which individuals may be presumed mature enough to decide their marital destiny. We considered that although there was no harm in requiring marriage or registering officers to establish consent, such a requirement was less likely to be effective on its own. It seemed to us in 1998 that, if the marriage is formally registered, the most convenient time for settling the issue of consent would be at the date of registration.¹⁰¹
- 2.33 Our investigation into the practice of *ukuthwala* is also of relevance in the context of consent to marriage. We explained in Discussion Paper 132¹⁰² that *ukuthwala* involves the act of taking a marriage partner in unconventional ways, seemingly forceful ways, sometimes with the sanction of certain adults who have a stake in the possibility of

⁹⁵ *Benjamin v Salkinder and Another* (1908) 25 SC 512.

⁹⁶ *Rubens v Rubens & Another* (1909) 26 SC 617 at 619.

⁹⁷ [1992] 3 All SA 207 (W) at 213.

⁹⁸ [1952] 2 All SA 190 (W) at 191.

⁹⁹ Page 192.

¹⁰⁰ SALRC *Report on Customary Marriages project 90* Aug 1998 par 4.2.11 https://justice.gov.za/salrc/reports/r_prj90_cstm_1998aug.pdf.

¹⁰¹ SALRC *Report on Customary Marriages* par 4.2.14.

¹⁰² SALRC *Discussion Paper 132 the Practice of Ukuthwala project 138* May 2014 see <http://www.justice.gov.za/salrc/dpapers/dp132-Ukutwala.pdf>.

formalising a resulting partnership.¹⁰³ It was noted that is practised among indigenous African communities in Southern Africa, in various mutations, within the context of many other customary practices related to marriage. Many of these practices are aimed at satisfying the traditional standards or norms relating to marriage, and sometimes accommodate unconventional ways of doing so.¹⁰⁴ The case of *Jezile v the State* made it clear that modern-day abuses of *ukuthwala* are criminal offences. The accused in this case was charged with human trafficking, rape, assault with intent to cause grievous bodily harm and common assault. He was convicted and sentenced to 22 years of imprisonment, a verdict and sentence that were upheld on appeal.¹⁰⁵ The *Jezile* judgment has resulted in critical comment about both the RCMA and Marriages Act providing for parental consent enabling minors to conclude marriages and ‘indirectly fuelling the rape, abduction, assault, trafficking and coercion of women into marriages in the name of custom’.¹⁰⁶ A call has been made for amendments to the RCMA to protect minor children and to prevent their

¹⁰³ SALRC *Discussion Paper 132 the Practice of Ukuthwala* par 2.4.

¹⁰⁴ See Nhlapo RT “Customary law in post-apartheid South Africa: constitutional confrontations in culture, gender and living law” (2017) Vol 33 *SAJHR* 1 – 24 see https://journals.co.za/content/journal/sajhr_v33_n1 accessed 5 Nov 2020.

... this question of flexibility and adaptability to changed circumstances may be amongst the more attractive attributes of customary law yet there is no guarantee that all ‘home grown’ solutions will be constitutionally compliant – what should a court do with bad living laws? The issue of *ukuthwala* (the abduction of under-age girls ostensibly for purposes of customary marriage) is a good example. It is a clear and definite practice increasingly prevalent in certain communities which is, just as clearly, a wholesale violation of the constitutional rights of young girls and an affront to many values that indigenous communities hold dear.

¹⁰⁵ *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015) <http://www.saflii.org/za/cases/ZAWCHC/2015/31.html> accessed 5 Nov 2020.

¹⁰⁶ See Mudarikwa Mandivavarira “The Practice of *ukuthwala* in *Jezile v The State*” Legal Resources Centre see <http://resources.lrc.org.za/the-practice-of-ukuthwala-in-jezile-v-the-state/> accessed 5 Nov 2020. See also the suggestions on how law reform should be approached as regards *ukuthwala* the comment by Mwambenea Lea & Helen Kruuse “The thin edge of the wedge: *ukuthwala*, alienation and consent” (2017) Vol 33 *SAJHR* 25 – 45 see https://journals.co.za/content/journal/sajhr_v33_n1 accessed 5 Nov 2020:

... reform efforts will have limited success ‘as long as we still suffer under the paradigms of liberal legalism where we think that changing rules is enough’. The SALRC and courts’ efforts (as shown in the *Jezile* case) to address the challenges that are associated with *ukuthwala* are laudable, but this research – we believe – shows that these efforts are not enough. Much more needs to be done in terms of understanding why practices, which appear archaic and patriarchal to outsiders, continue. We need to understand the legitimate cultural goals which the community wishes to achieve, and seek alternative means to achieve them. While public participation and engagement with the community will not necessary resolve post-colonial tensions, it will allow communities to have their voice heard. We also believe that it could potentially improve law reform efforts by bringing a dynamic to the law reform table. That dynamic, not often utilised, is the ability of customary law – through its people (not just traditional leaders) – to remake, remodel and reconstitute itself in the light of societal changes. (Footnotes omitted.)

parents from arranging marriages for them and to safeguard South Africa complying with its international and regional instruments regarding child marriage.¹⁰⁷ The practice of non-consensual bride abduction is not a practice confined to South Africa but is faced by many countries. Questions are asked what the appropriate legal response is to combat non-consensual bride abduction.¹⁰⁸

2.34 In cases such as *N v D*,¹⁰⁹ *Mbungela v Mkabi*¹¹⁰ and *Tsambo v Sengadi*¹¹¹ our courts had to determine whether rituals and ceremonies performed amounted to consent within the

¹⁰⁷ See Moore Elena and Chuma Himonga “Living Customary Law and Families in South Africa” in *South African Child Gauge 2018 Children, families and the state collaboration and contestation* edited by Katharine Hall, Linda Richter, Zitha Mokomane and Lori Lake Children’s Institute University of Cape Town 61 – 69 at 63 http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_2018/Chapters/living%20customary%20law%20and%20families%20in%20South%20Africa.pdf accessed 5 Nov 2020 .

¹⁰⁸ Werner Cynthia “Bride Abduction in Post-Soviet Central Asia: Marking a Shift Towards Patriarchy through Local Discourses of Shame and Tradition” (June 2009) Vol 15 No 2 314 – 331 *The Journal of the Royal Anthropological Institute* <https://oaktrust.library.tamu.edu/handle/1969.1/154306>; Brooks Courtney & Amina Umarova “Despite official measures bride kidnapping endemic in Chechnya” 21 Oct 2010 *Radio Free Europe* https://www.rferl.org/a/Despite_Official_Measures_Bride_Kidnapping_Endemic_In_Chechnya/2197575.html; Kennan Institute “The Rise of Non-Consensual Bride Kidnapping in Kazakhstan: Developing a Culturally-Informed and Gender-Sensitive Response” <https://www.wilsoncenter.org/publication/the-rise-non-consensual-bride-kidnapping-kazakhstan-developing-culturally-informed>; Moorhead Audrey Leigh *A Thorough Glance at the Social Framework of Bride Abduction from a Feminist Lens: Themes of Power, Dominance, and Shame* 23 April 2015 at 44 Honours Thesis 499 Wittenberg University http://www6.wittenberg.edu/cgi-bin/lib/honors/audrey_moorhead_2015.pdf accessed 5 Nov 2020:

Bride abduction, bride kidnapping, bride theft, forced marriage. The practice takes so many forms, yet it is somehow so prevalent and arching over so many modern and past societies. There are many components that feed into the social practice at different outlets: bride price, parental controls of marriage, power systems, roles of dominance, economic units. However, it still can be boiled down to one overarching idea: Patrilineal society and misogynistic approaches of control. The practice does not exist outside of patrilineal society, that is a fact.

...

¹⁰⁹ (2011/3726) [2016] ZAGPJHC 163 (15 June 2016). See also Manthwa Aubrey “Lobolo, consent as requirements for the validity of a customary marriage and the proprietary consequences of a customary marriage” (2017) Vol 38 No 2 *Obiter* 438 – 445 at 445 https://journals.co.za/content/journal/obiter_v38_n2 accessed 5 Nov 2020.

¹¹⁰ (820/2018) [2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA) (30 September 2019) see <http://www.saflii.org/za/cases/ZASCA/2019/134.html> accessed 5 Nov 2020:

[28] Thus, for example, a woman could consent to a customary marriage, followed by payment of lobola, after which she cohabited, built a home with her suitor, and bore him children, with the full knowledge of his family. When the man died, she and those children could be rejected and disinherited by his family simply on the basis she was not handed over or properly introduced to his family and was therefore not his lawful wife and that the children were illegitimate. Needless to say, that consequence would be incongruous with customary law’s inherent flexibility and pragmatism which allows even the possibility of compromise settlements among affected parties (contemplated in cases such as *Bhe*), in order to safeguard protected rights, avoid unfair discrimination and the violation of the dignity of the affected individuals. (Footnote omitted.)

¹¹¹ (244/19) [2020] ZASCA 46 (30 April 2020) see <http://www.saflii.org/za/cases/ZASCA/2020/46.html> accessed 5 Nov 2020 the Court held at par [30] ‘the respondent and the deceased concluded a

language of s3(1)(b) of the RCMA, which requires parties to consent to marry 'each other under customary law'.

- 2.35 The SALRC also explained in its 2003 report on *Islamic Marriages and Related Matters* that the proposed provision provides that there should be consent, and that Islamic law makes it obligatory for marriage officers to be satisfied in this respect.¹¹²

2. Views of respondents

- 2.36 The majority of respondents supported that the prospective spouses need to be present when marrying¹¹³ and that proxy marriages opens the door to abuse and potential fraud.¹¹⁴ A comment was who, logistically, will be responsible to monitor a system of proxy marriages, if permitted.¹¹⁵ A view was that in order to address the concerns around sham marriages, forced marriages and under-age marriages individuals must present themselves in person in order to conclude a legally valid marriage.¹¹⁶ A contrary view was that whether the parties to marriage should be present or not will only be an extra judicial requirement by the parties' religion or custom and will not affect the validity of their intimate relationship.¹¹⁷ There was also support for proxy marriages saying that in Muslim marriages it is customary for marriages to be concluded by way of proxy.¹¹⁸
- 2.37 Respondents referred to the practice of *ukuthwala* which highlights the need for consent by both parties to conclude a legitimate marriage.¹¹⁹ One comment suggested that provision ought to be made for exceptional circumstances such as a soldier being on deployment which prevents his or her presence at the marriage, that the present state of technology can be useful, and a video conference, coupled with appropriate paperwork being certified and submitted through official channels, may be sufficient for both parties

customary marriage that complied with all the requirements for a valid customary marriage as contemplated in s 3(1) of the Act'.

¹¹² SALRC *Report on Islamic Marriages and related matters project 59* Par 3.117 https://justice.gov.za/salrc/reports/r_prj59_2003jul.pdf accessed 16 Sept 2020.

¹¹³ Such as the Legal Resources Centre; the Christian View Network; FORSA.

¹¹⁴ The Free State Society of Advocates.

¹¹⁵ The Pretoria Society of Advocates.

¹¹⁶ The Women's Legal Centre.

¹¹⁷ Prof Pieter Bakker.

¹¹⁸ UUCSA; Muslim Lawyers for Social Justice; Darhul Ihsan; the Jamiatul Ulama KZN.

¹¹⁹ Commission on Gender Equality; FORSA.

being deemed to be present.¹²⁰ A suggestion was that customary law should be developed to allow the involvement of the prospective spouses at the lobolo negotiations.¹²¹ Relevant to this issue is 2020 case of *Tsambo v Sengadi* where the bride only realised that on the same day lobolo negotiations were conducted and that her customary marriage was taking place when the aunts of her prospective husband dressed her in clothes matching those of her future husband.¹²² We concur that the involvement of spouses in lobolo negotiations will also facilitate subsequent proof by the spouses of the coming into being and existence of their customary marriage.

2.38 There was clear support for informed consent by the prospective spouses.¹²³ One view was that if a relationship contract exists between the parties then consent can be determined in accordance with the legal requirements for consent to any agreement with particular sensitivity to the power relationships within intimate relationships.¹²⁴ A comment was whether marriage officers have the ability to assess mental capacity and that it would be irresponsible to further burden the Department of Home Affairs with difficult to administer rules in a country like South Africa with its limited resources.¹²⁵ Another comment is that capacity to marry is part of the common-law, that only parties who have mental capacity may validly enter into contracts and there is no need for special mention.¹²⁶ A view was that capacity should not play a role in determining whether an intimate relationship is worthy of protection, although it may play a role where the relationship contract is concerned or where sexual intercourse with such a person might lead to a crime.¹²⁷

2.39 The majority view was that a husband needs to obtain the consent of a wife for a further customary marriage.¹²⁸ A comment was that in the event polyandry and polygamous

¹²⁰ Free State Society of Advocates.

¹²¹ Profs Himonga and Moore in their comment on the issue paper.

¹²² (244/19) [2020] ZASCA 46 (30 April 2020) par [5] see <http://www.saflii.org/za/cases/ZASCA/2020/46.html> accessed on 5 Nov 2020.

¹²³ The CRL Commission; the Pretoria Society of Advocates; Department of Communications; Mr Craig Allan; NHKA; LRC; the Women's Legal Centre; Darhul Ihsan the UUCSA; the Women's Cultural Group; the Jamiatul Ulama KZN; the NHTL.

¹²⁴ Prof Pieter Bakker.

¹²⁵ Women's Cultural Group.

¹²⁶ The Jamiatul Ulama KZN.

¹²⁷ Prof Pieter Bakker.

¹²⁸ NHTL; the CRL Commission; Free State Society of Advocates; Muslim Lawyers for Social Justice Department of Communications; the Eastern Cape Cooperative Governance and Traditional Affairs Policy and Legislation Development; LRC; the Women's Legal Centre.

marriages are recognised, the principle should be extended to these unions as well.¹²⁹ Another comment¹³⁰ was that in current customary marriages the consent of the first wife should not be required, and that it discriminates against the second wife who has no control over the actions of her husband who is usually not aware of the first wife.¹³¹ As regards the husband being required to obtain consent to marry a further wife the validity of a subsequent marriage does not depend upon the permission of existing wife/wives in terms of Islamic law.¹³² A comment was that although the consent of a prior Muslim wife might not be required to a further marriage, notification to her or them must be mandatory and appropriate proprietary arrangements made, as is done with regard to customary marriages, to enable a further marriage to be registered.¹³³ A Muslim (whether first or second or third or fourth) wife should be notified that she has the right to include in her premarital contract that she is entitled, though not obliged, to obtain a divorce should the husband conclude a further marriage. We note that most of our respondents commented that the consent of the first wife should be required for subsequent marriages.

¹²⁹ Pretoria Society of Advocates.

¹³⁰ Prof Pieter Bakker.

¹³¹ See also Bakker Pieter "The validity of a customary marriage under the Recognition of Customary Marriages Act 120 of 1998 with reference to sections 3(1)(b) and 7(6)" (2016) Vol 79 Part 2 *THRHR* 257 to 368 at 368 https://www.researchgate.net/publication/317584406_The_validity_of_a_customary_marriage_under_the_Recognition_of_Customary_Marriages_Act_120_of_1998_with_reference_to_sections_31b_and_76_part_2/link/5abb81d20f7e9b5df39d6c58/download who concludes, among others, as follows:

... The commendable approach of the Supreme Court of Appeal in *MN v MM* which focused on the interests of all spouses concerned was negated by the Constitutional Court's decision in *MM v MN*. Under the auspices of respecting the living customary law, the Constitutional Court imposed a Western world view on living customary law by emphasising the rights of the first wife to the detriment of the second wife. The development of customary law has come full circle from the initial question whether the second wife's rights should be protected. The Constitutional Court placed greater emphasis on the rights of the first wife and, in the process, yet again disregarded the rights of the further spouse in a polygynous customary marriage concluded after the Recognition of Customary Marriages Act came into operation. Although the Constitutional Court limited its decision to Tsonga law, the arguments advanced in the majority decision can be advanced in regard to all first wives in a customary marriage. It follows that the consent of the first wife is a requirement for a valid customary marriage concluded after the Constitutional Court decision in *MM v MN*. The Constitutional Court acted as court of first and last instance and the legislature is the only avenue to protect the further wife's rights that remains. It is time to re-evaluate the current marriage law and develop a new legislative framework that can accommodate all forms of marriage within the ambit of the Constitution. (Footnotes omitted.)

¹³² UUCSA; the Women's Cultural Group; Muslim Lawyers Association.

¹³³ The Women's Cultural Group.

3. Proposals

- 2.40 Most of our respondents were of the view that the parties to a marriage must be able to appreciate what their actions give rise to, and the serious legal personal and financial consequences which flow from a marriage. We had the applicable Australian provisions in mind when asking in the issue paper whether the envisaged legislation should require specifically that parties should have mental capacity to enter into marriage as the Australian Marriage Act does in this regard. In hindsight it is, however, not that clear that the parties must understand the nature and effect of the ceremony. The question arises whether similar wording as contained in the Mental Capacity Act in England and Wales would provide more clarity and safeguards for determining legal capacity to marry. We are of the view that this would require a further investigation considering the adequacy of the South African legal framework governing legal capacity.
- 2.41 The proposed legislation should require unequivocal proof of consent to enter into a relationship. We therefore propose that the legislation provide that if, in terms of option one, a protected relationship, or, if in terms of option two, a marriage, is solemnised by a marriage officer, the consent of the parties shall be obtained by the marriage officer in the presence of two competent witnesses. We further propose that if, in terms of option one, the protected relationship, or, in terms of option two, the marriage, was not solemnised by a marriage officer, the registering officer has a duty to determine if all the parties consented to the relationship.
- 2.42 The majority of respondents do not favour a proxy presenting prospective spouses. The question was how a marriage officer will be able to establish the consent of the prospective spouse if one of the parties is represented by a proxy and is not present at a marriage. We note the safeguards provided in the Marriage Act of New Zealand which provides for proxy marriages under specified circumstances, namely absence of one of the parties by reason of the existence of a state of war or armed conflict or by reason of the conditions of service as a member of the armed forces of any Commonwealth country, or of any country for the time being allied with any Commonwealth country. The question was considered in England and Wales whether provision should be made for proxy marriages during periods of national emergencies such as during the COVID-19 or any other pandemic.¹³⁴ The Law Commission of England and Wales noted that a pandemic might

¹³⁴ Law Commission of England and Wales *Getting Married: A Consultation Paper on Weddings Law* par 11.68 3 Sept 2020 see <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Getting-Married-A-Consultation-Paper-on-Wedding-Law-web.pdf> (Law Commission of England and Wales *Getting married: consultation paper*).

require social distancing of persons and travel restrictions being imposed, preventing parties to reach the same destination and to socialise together. They provisionally considered that provision for proxy marriages would not be an option for emergencies. We however consider we need to provide for a proxy representing a party to enter, in terms of option one, into a protected relationship, or, in terms of option two, into a marriage, if the custom of the parties to the relationship require a proxy to represent a party to the relationship, as is the custom in Muslim marriages. We further propose that the marriage officer or registering officer should be required to ascertain from the proxy whether the parties to, in terms of option one, the prospective protected relationship, or, in terms of option two, the prospective marriage, have consented to enter into the protected relationship or marriage. The marriage officer must indicate such consent in the prescribed manner in the prescribed marriage register.

- 2.43 We further propose that it be an offence if a marriage officer conducts a marriage where he or she knows or has reason to suspect that the capacity of a party to freely consent to a relationship is impaired due to an intellectual disability or by being under the influence of alcohol or any other intoxicating substance. We also propose that any person who knowingly solemnises, in terms of option one, a protected relationship, or, in terms of option two a marriage, or registers a relationship or fails to register a relationship in contravention of the provisions of the legislation, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months.
- 2.44 The RCMA provides in section 6 for the equal status and capacity of spouses. A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law. Section 7(6) of the RCMA provides that a husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of the RCMA must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages. In *Ngwenyama v Mayelana*¹³⁵ the

¹³⁵ (474/11) [2012] ZASCA 94 (1 June 2012) <http://www.saflii.org/za/cases/ZASCA/2012/94.pdf> accessed 11 Dec 2020:

[24] ... The proper context of the Act is elucidated above. Clearly the determination of s 7(6) must be in a manner that is consistent with the Constitution. An interpretation which holds that s 7(6) affects the validity of a subsequent marriage relegates customary marriages, once again, to the very status the Act sought to elevate it from as, based on it, there would be no

Supreme Court of Appeal considered the effect of the failure of a husband to make such an application to a court and held such a failure does not invalidate the subsequent marriage. The Constitutional Court held in *Mayelane v Ngwenyama*¹³⁶ if the husband does not obtain the consent of the first wife to take a further wife then the subsequent marriage is invalid. We consider the example Justice Jafta raised in *Mayelane v Ngwenyama*¹³⁷ of the husband intending to marry wife number 14, and where 12 of the 13 wives consent to the marriage but wife number 13 not, that such refusal of consent ought to lead to the invalidity of relationship number 14. However, calls were made for legislative intervention to clarify the proprietary consequences of such relationships. We therefore propose that where consent is lacking for a party entering into a relationship, the court be empowered to make a just property division order.¹³⁸

- 2.45 We further propose that if a male party, in terms of option one, to a subsisting polygynous protected relationship, or, in terms of option two, to a subsisting marriage or life partnership, wishes to enter into a further relationship, he must obtain consent from the wife or wives to enter into a further relationship. If he enters into a further relationship without the consent of all his wives that further relationship entered into will be void.¹³⁹ The

second customary marriage without the approval of the court. Concerns about proprietary interests are sufficiently addressed in the Act as courts have been given a wide discretion to determine what is just and equitable in a given case. I have in this judgment already stated that a purposive interpretation of this section compels a conclusion.

¹³⁶ (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013) <http://www.saflii.org/za/cases/ZACC/2013/14.html> accessed 11 Dec 2020:

85. The finding that the consent of the first wife is a necessary dignity and equality component of a further customary marriage in terms of section 3(1)(b) of the Recognition Act means that, from now on, further customary marriages must comply with that consent requirement. A subsequent marriage will be invalid if consent from the first wife is not obtained. One potential difficulty raised in argument is that the effect of the judgment may not become widely and promptly known. To this end the order makes provision for its wider publication and distribution.

¹³⁷ Par [144] with Chief Justice Mogoeng and Justice Nkabinde concurring.

¹³⁸ Bakker Pieter “The validity of a customary marriage under the Recognition of Customary Marriages Act 120 of 1998 with reference to sections 3(1)(b) and 7(6) – Part 2” (2016) 79 *THRHR* 357 – 368 at 366 http://uir.unisa.ac.za/bitstream/handle/10500/23744/2016_Bakker_validity%20of%20customary%20part%202%20upload.pdf?sequence=1&isAllowed=y accessed 11 Dec 2020; Maithufi IP “The validity of a second or further customary marriage: call for the amendment of the Recognition of Customary Marriages Act of 1998 *Ngwenyama v Mayelane* (474/11) [2012] ZASCA 94 (1 June 2012)” 2013 (76) *THRHR* 688 – 696 at 696 https://repository.up.ac.za/bitstream/handle/2263/41171/Maithufi_Validity_2013.pdf?sequence=1&isAllowed=y accessed 14 Dec 2020.

¹³⁹ See *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013) <http://www.saflii.org/za/cases/ZACC/2013/14.html> accessed 9 Dec 2020:

85. The finding that the consent of the first wife is a necessary dignity and equality component of a further customary marriage in terms of section 3(1)(b) of the Recognition Act means that, from now on, further customary marriages must comply with that consent requirement. A

registering officer must enquire into the existence of such consent having been sought and granted when the further relationship is registered. We also propose that where consent for a party entering into a relationship is lacking due to a failure to comply with the proposed legislation, the court must be empowered to make a just property division order about the relationship property of the parties to the relationship.

2.46.1 We propose the following clause on consent for parties to enter into a protected relationship:

6. Consent requirement

- (1) If a protected relationship is solemnised by a marriage officer, the consent of the parties shall be obtained by the marriage officer in the presence of two competent witnesses.
 - (2) If a party to a protected relationship is represented by a proxy, if required by the customs of the parties to enter into a protected relationship, the marriage officer or registering officer must ascertain from the proxy whether the parties to the prospective protected relationship have consented to the protected relationship, and the marriage officer shall indicate such consent in the prescribed manner in the prescribed marriage register.
 - (3) If the protected relationship was not solemnised by a marriage officer, and if it is registered by a registering officer, he or she has a duty to determine if all the parties consented to the relationship in the prescribed manner.
 - (4) The male party to a subsisting polygynous protected relationship who wishes to enter into a further protected relationship must notify all the female parties to their subsisting relationship in the prescribed form of his intention to enter into a further relationship to obtain the consent of all the female parties who must indicate their consent in the prescribed form, before he may enter into such a further relationship; provided that if he enters into a further relationship without the consent of all the female parties to the subsisting polygynous relationship, that further relationship entered into will be void; provided further that the registering officer must enquire into the existence of such consent having been sought and granted when the further relationship is registered.
 - (5) In an application on the ground of want of compliance with this section, a court may make such order with regard to the division of the relationship property of the parties to the protected relationship as it may deem just.
- 13(4) Any person who solemnises a protected relationship or registers a protected relationship where he or she knows or has reason to suspect that the capacity of a party to freely consent to the relationship is impaired due to an intellectual disability or by being under the influence of alcohol or any other intoxicating

subsequent marriage will be invalid if consent from the first wife is not obtained. One potential difficulty raised in argument is that the effect of the judgment may not become widely and promptly known. To this end the order makes provision for its wider publication and distribution.

substance, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months

2.46.2 We propose the following clause on consent for parties to enter into a marriage or life partnership:

6. Consent requirement

- (1) If a marriage is solemnised by a marriage officer, the consent of the parties shall be obtained by the marriage officer in the presence of two competent witnesses.
 - (2) If a party to a marriage is represented by a proxy if the customs of the parties to the relationship require a proxy to enter into a marriage, the marriage officer or registering officer must ascertain from the proxy whether the parties to the prospective marriage have consented to the marriage, and the marriage officer shall indicate such consent in the prescribed manner in the prescribed marriage register.
 - (3) If the marriage was not solemnised by a marriage officer, and if it is registered by a registering officer, he or she must determine if all the parties consented to the relationship in the prescribed manner.
 - (4) The male party to a subsisting polygynous marriage or life partnership who wishes to enter into a further marriage or life partnership must notify all the female parties to their subsisting relationship in the prescribed form of his intention to enter into a further relationship to obtain the consent of all the female parties who must indicate their consent in the prescribed form, before he may enter into such a further relationship; provided that if he enters into a further relationship without the consent of all the female parties to the subsisting polygynous relationship, that further relationship entered into will be void; and provided further that the registering officer must enquire into the existence of such consent having been sought and granted when the further relationship is registered.
 - (5) In an application on the ground of want of compliance with this section, a court may make such order with regard to the division of the relationship property of the parties to the marriage or life partnership as it may deem just.
- 13(4) Any person who solemnises a marriage or registers a marriage or life partnership where he or she knows or has reason to suspect that the capacity of a party to freely consent to the relationship is impaired due to an intellectual disability or by being under the influence of alcohol or any other intoxicating substance, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months.

2.47 There was support that the envisaged legislation should require specifically that parties should have mental capacity to enter into marriage,¹⁴⁰ such as to the extent that a person must be able to appreciate what their actions give rise to, and the legal consequences

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The CRL Commission; the NHTL; the Department of Communications; Muslim Lawyers for Social Justice; Mr Craig Allan; the LRC; the Bahá'í community.

thereof,¹⁴¹ and especially due to the serious personal and financial consequences, which flow from a marriage.¹⁴² We therefore propose that the legislation should provide that every person in terms of option one, in a protected relationship, or in terms of option two, a marriage or life partnership, must have the capacity to understand the legal consequences of the relationship at the time it was entered into. All parties, in terms of option one in a protected relationship, or, in terms of option two, in a marriage or life partnership, have equal status and capacity. We encourage respondents to provide comment on our proposal and the legislative provision to be adopted to ensure that the parties in all religious marriages or customary marriages or any other relationship have exactly the same rights and equal status and capacity.

2.47.1 We propose the following clauses on capacity to enter into protected relationships:

7. Capacity requirement

Every person in a protected relationship must have the capacity to understand the legal consequences of the relationship at the time it was entered into.

9. Equal status and capacity of parties to a protected relationship

All parties in a protected relationship have equal status and capacity.

2.47.2 We propose the following clauses on capacity to enter into marriages and life partnerships.

7. Capacity requirement

Every person in a marriage or life partnership must have the capacity to understand the legal consequences of the relationship at the time it was entered into.

9. Equal status and capacity of parties to a marriage or life partnership

All parties in a marriage or life partnership have equal status and capacity.

I. How should relationships be established in terms of the envisaged legislation

1. Introduction

2.48 In South Africa marriage officials are involved in civil marriages, in civil unions and in most religious marriages in terms of the doctrines of religious organisations. Do they still need to play a part and should they? In customary marriages and life partnerships in South

¹⁴¹ The Free State Society of Advocates.

¹⁴² The Pretoria Society of Advocates.

Africa marriage officers play no role in the customary marriage coming into existence. We note in Annexure D below that in a small number of USA states provision is explicitly made for self-uniting marriages by the spouses without the involvement of a marriage officer or celebrant. In South Africa in *Ex Parte L (Also Known As A)* the court explained the rule that only authorised marriage officers are empowered in terms of the Marriage Act to conduct valid marriages in South Africa by saying: 'The Court is not vested with any general jurisdiction where-under it can declare to be legally binding a ceremony of marriage, which, whatever its religious solemnity, was not performed by a Marriage Officer duly appointed as such according to law'.¹⁴³

2. Marriage officers in terms of the Marriage Act

2.49 The following is the position regarding marriage officers conducting marriages in terms of the Marriage Act:

2.49.1 The holders of public office such as magistrates, special justices of the peace, and the former Native Commissioners were marriage officers for the area or district in which they held office. In 1986 the Native Courts were abolished, and the powers of Native Commissioners lapsed.¹⁴⁴ Since 1 June 1996 magistrates no longer conduct marriages¹⁴⁵ and since then, officials of the Department of Home Affairs take responsibility for conducting civil marriages.

2.49.2 Officers or employees in the public service or the diplomatic or consular service of the RSA are designated marriage officers by virtue of their office.

2.49.3 Ministers of religion and other persons attached to religious institutions may apply in writing to be designated as marriage officers by the Minister of Home Affairs.

2.49.4 Where someone has acted as a marriage officer during any period or within any area in respect of which he or she was not a marriage officer the DHA may direct in writing that such person shall for all purposes be deemed to have been

¹⁴³ [1947] 3 All SA 216 (C).

¹⁴⁴ The Native Courts were abolished by the Special Courts for Blacks Abolition Act 34 of 1986.

¹⁴⁵ Statistics SA *Statistical release P0307 Marriages and Divorces 2002* (26 April 2005) at 3 see <https://www.statssa.gov.za/publications/P0307/P03072002.pdf>.

a marriage officer if satisfied that the person acted under the genuine belief that he or she was a duly designated marriage officer.

- 2.49.5 The designation of a person as a marriage officer may be revoked on the ground of misconduct or for any other good cause, and the authority of a marriage officer to conduct marriages can be limited.
- 2.49.6 A marriage officer who is authorised to solemnise marriages in any country outside the RSA may solemnise a marriage only if the parties thereto are both South African citizens domiciled in the RSA.
- 2.49.7 Marriages may be conducted by a designated marriage officer only meaning that a person who is not a marriage officer and who purports to conduct a marriage is guilty of an offence. A marriage ceremony conducted in accordance with the rites or formularies of any religion does which not purport to effect a valid marriage is not in contravention of the Marriage Act.
- 2.49.8 Parties wishing to be married must submit their identity documents for verification to the marriage officer or a party who is not in possession of an identity document must complete the prescribed declaration.
- 2.49.9 If a marriage officer reasonably suspects that either of the parties intending to marry is of an age which prevents him or her from contracting a valid marriage without the consent or permission of some other person, the marriage officer may refuse to solemnise a marriage. The marriage officer must then be furnished with consent or permission in writing or with satisfactory proof showing that the party in question is entitled to contract a marriage without consent or permission.
- 2.49.10 Upon receipt of an objection to any proposed marriage the marriage officer concerned must inquire into the grounds of the objection. If satisfied that there is no lawful impediment to the proposed marriage, the marriage officer may solemnise the marriage. If not so satisfied the marriage officer will refuse to solemnise the marriage.
- 2.49.11 The Marriage Act does not compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation to solemnise a marriage which would not conform to the rites,

formularies, tenets, doctrines or discipline of the religious denomination or organisation.

3. Marriage officers in terms of the Civil Union Act

- 2.50 The provisions of the Civil Union Act largely correspond with the provisions of the Marriage Act as regards solemnisation of civil unions without any substantial differences. The one difference is section 6 of the Act which allows marriage officers objecting to solemnising a civil union between persons of the same sex on the grounds of conscience, religion and beliefs to solemnising a civil union between persons of the same sex. That marriage officer shall not be compelled to solemnise such civil union. This provision was enacted pursuant to the case of *Home Affairs v Fourie* in which Justice Sachs remarked that the legislature might accommodate marriage officers who objected on the ground of sincere religious grounds to conduct same-sex marriages.¹⁴⁶
- 2.51 In 2018 the legislature promoted a Private Members Bill the aim of which was the deletion of section 6 of the Civil Union Act and the introduction of a transitional provision which would mean exemptions granted to marriage officers would lapse 24 months from the commencement of the amendment Act.¹⁴⁷ The repeal of the provision was adopted by the Home Affairs Portfolio Committee on 28 November 2018. The Portfolio Committee on Home Affairs included a transitional clause in the Bill which provides that the existing exemption from solemnising same sex marriages by DHA marriage officers under the Civil Union Act would be valid for 24 months. Training and sensitising of officials would have been provided to DHA officers on the constitutional rights of same sex couples. On 6 December 2018 the National Assembly passed the Bill which was then sent to the NCOP Select Committee on Social Services for concurrence, but the Bill lapsed in May 2019.

¹⁴⁶ Justice Sachs held in *Minister of Home Affairs v Fourie* as follows:

161. Reading-in of the words “or spouse” has the advantage of being simple and direct. It involves minimal textual alteration. The values of the Constitution would be upheld. The existing institutional mechanisms for the celebration of marriage would remain the same. Budgetary implications would be minimal. The long-standing policy of the law to protect and enhance family life would be sustained and extended. Negative stereotypes would be undermined. Religious institutions would remain undisturbed in their ability to perform marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only. The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience. If Parliament wished to refine or replace the remedy with another legal arrangement that met constitutional standards, it could still have the last word.

¹⁴⁷ PMG “Civil Union Amendment Bill [B11-2018]” <https://pmg.org.za/committee-meeting/26833/>; <https://pmg.org.za/bill/789/>.

The Bill was revived in Parliament in 2019. On 5 November 2019 the NCOP Select Committee on Security and Justice called for comment on the Bill.¹⁴⁸ On 1 July 2020 the NCOP passed the Civil Union Amendment Bill.¹⁴⁹ The Civil Union Amendment Act 8 of 2020 commenced on 22 October 2020.¹⁵⁰ The Act retained the transitional clause that any exemption granted by the Minister in terms of section 6 of the principal Act, prior to the commencement of the amendment Act, lapses 24 months from the date of commencement of the Act.¹⁵¹ The Act now contains a second transitional clause¹⁵² which provides that the Minister must ensure that there is a marriage officer, other than a marriage officer referred to in section 5 of the principal Act,¹⁵³ available to solemnise a civil union at every DHA office.

- 2.52 A person may only be a spouse or partner in one marriage or civil partnership at any given time. A person in a civil union may not conclude a marriage under the Marriage Act or the Customary Marriages Act. A person who is married under the Marriage Act or the Customary Marriages Act may not register a civil union. A prospective civil union partner who has previously been married under the Marriage Act or Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership, must present a certified copy of the divorce order, or death certificate of the former spouse or partner, to the marriage officer as proof that the previous marriage or civil union has been terminated. The marriage officer may not proceed with the solemnisation and registration of the civil union unless in possession of the relevant documentation. A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act.

¹⁴⁸ PMG “Civil Union Amendment Bill [B 11B-2018]” <https://pmg.org.za/call-for-comment/871/>.

¹⁴⁹ See Parliament “NCOP passed the Cybercrimes Bill, Civil Union and the Science and Technology Laws Amendment Bills” 1 July 2020 <https://www.parliament.gov.za/press-releases/ncop-passed-cybercrimes-bill-civil-union-and-science-and-technology-laws-amendment-bills> accessed 23 October 2020.

¹⁵⁰ See Legalbrief Today “Legislation: Civil Union, Judicial Matters Amendment Acts in force” 23 October 2020 https://legalbrief.co.za/media/filestore/2020/10/43831_22-10_Act12of2020JudicialMattersAmendmentAct.pdf accessed 23 October 2020.

¹⁵¹ Section 2(1).

¹⁵² Section 2(2).

¹⁵³ This section deals with marriage officers who are religious officials or persons attached to religious denominations or organisations.

4. Traditional leaders as marriage officers

- 2.53 The request for this investigation suggested that recognised traditional leaders be appointed as marriage officers in South Africa. In our Report on Customary Marriages (project 90) we explained the question arose whether the spouses' customary marriage should be given a greater degree of certainty by having their marriage formally solemnised before state authorities and then registered.¹⁵⁴ We noted that in 1985, we had proposed the following as essential elements of customary marriage: competence of the parties at customary law to marry one another; consent of the husband, the wife and legal guardian of either of them if they were below the age of 21; and solemnisation by a marriage officer and registration.¹⁵⁵ These proposals were broadly in line with then existing statutory regimes in KwaZulu-Natal and Transkei although outside KwaZulu-Natal and Transkei, South Africa had never insisted on formal solemnisation of customary marriages.¹⁵⁶ It was also doubtful whether in uncodified customary law the many consents listed in university curricula were ever really observed in practice.¹⁵⁷
- 2.54 Calls were also made when we developed the RCMA that provision ought to be made for marriage officers in the conclusion of customary marriages.¹⁵⁸ During the consultations in the late 1990s we grappled with the issue, conscious of the fact that a marriage officer represents the state, which is the one granting married status to the parties. However, in African custom the parties negotiate the marriage themselves as an alliance between two kinship groups. That is why we settled for the concept of a registering officer instead of a marriage officer. The notion of a customary marriage being 'solemnised' by a state official continues to divide opinion in traditional circles. Section 20 of the Traditional Leadership Governance and Framework Act of 2003 provided the possibility of allocating a role for traditional councils or leaders in the registration of marriages.¹⁵⁹ The Traditional and Khoi-

¹⁵⁴ See http://www.justice.gov.za/salrc/reports/r_prj90_cstm_1998aug.pdf par 4.5.1.

¹⁵⁵ SALRC *Report on Customary Marriages* par 4.5.2.

¹⁵⁶ SALRC *Report on Customary Marriages* par 4.5.3.

¹⁵⁷ Himonga & Moore *Reform of customary marriage, divorce and succession in SA* 100.

¹⁵⁸ Statistics SA 'The Customary Marriages Act: background and rationale towards improving the registration of marriages and divorces in South Africa' Workshop 24 February 1999 page 3.

¹⁵⁹ Section 20 Guiding principles for allocation of roles and functions

(1) National government or a provincial government, as the case may be, may, through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of—

San Leadership Act 3 of 2019, which has not commenced yet, repealed, among others, the Traditional Leadership Governance and Framework Act. The Traditional and Khoi-San Leadership Act provides in section 20(1)(l) that a traditional council, a traditional sub-council, a Khoi-San council and a branch has the functions conferred by customary law, customs and statutory law consistent with the Constitution.¹⁶⁰

5. Should marriage officers in future be involved in establishing relationships?

a. Background

b. Possible options regarding marriage officers suggested by the DHA

2.55 In July 2019 the DHA met with marriage officers, including the organisation FOR SA, informing them that they were developing a marriage policy. The DHA discussed three possible options which might be adopted in the DHA policy, without indicating a preference for any of the options, namely:¹⁶¹

1. Maintain the *status quo* (i.e. religious marriage officers have the right to, on grounds of conscience, religion and belief, only solemnise heterosexual marriages);
2. Compel all religious officers by law to solemnise heterosexual and homosexual marriages (i.e. you have the right to choose to be a religious marriage officer or not, but if you choose to be one, you have to be prepared to solemnise all marriages); or
3. Remove the right of religious organisations / leaders to solemnise marriages altogether, with the result that only the State can solemnise (and register) marriages.

2.56 The DHA also considered the difficulties marriage officers face to verify information when one of the parties wishing to marry is a foreign national. The view of the DHA is that as part of their strategy for curbing fraudulent marriages, marriages that involve foreign nationals will only be conducted by DHA officials and that this will also reduce the amount of time it takes to conclude such marriages.

c. Comment by respondents on involvement of marriage officers

2.57 The majority of respondents supported the future involvement of marriage officers in conducting and registration of marriages. A comment was that all solemnising officers

(h) the registration of births, deaths and customary marriages; see http://www.saflii.org/za/legis/consol_act/tlagfa2003431/ accessed 24 Oct 2020.

¹⁶⁰ See https://www.gov.za/sites/default/files/gcis_document/201911/4286528-11act3of2019trad_khoisanleadership.pdf accessed 24 October 2020.

¹⁶¹ FOR SA 'Proposed Changes to Marriage Laws Underway 19 July 2019 <https://forsa.org.za/proposed-changes-to-marriage-laws-underway/> accessed on 20 Sept 2020.

should be registered in accordance with the faith/culture/religion that they represent.¹⁶² Ministers of religion and other persons attached to religious institutions who are designated as marriage officers in terms of the Marriage Act should be enrolled to conduct weddings in terms of a new consolidated act – or should be allowed to apply in writing to be designated as marriage officers if not enlisted yet. Religious marriage officers not in the employ of the state should retain the right, in terms of section 15 of the Constitution, to only solemnise weddings in accordance with the tenets and creeds of their belief-systems as endorsed by the official resolutions of their religious institutions.¹⁶³ A religious ceremony may incorporate the registration of a marriage, it only does so if the priest, reverend, imam, rabbi etc. is also the voluntary holder of a marriage licence.¹⁶⁴ The current system allows religious officials to become marriage officers (in terms of the legislation best aligned with their religious beliefs) if they so wish, but also to cease being one if they so choose. It is also not a requirement for the religious minister to be a marriage officer in order for religious ceremonies to be conducted.¹⁶⁵ In Islam a valid marriage can be conducted without the need for a priest or any particular ceremony.¹⁶⁶ It is sufficient that that person is an adult and the parties consent to that person conducting the marriage ceremony.¹⁶⁷ The difference between the officiating officer (i.e. priest, traditional leader or imam) and the marriage officer (a state appointed official) must be identified.¹⁶⁸

- 2.58 Respondents suggested about possible functions of marriage officers and other functionaries that they are there to ensure that the contractual requirements are met such as that the persons are properly identified and of sufficient age, that the parties are of sound mind or seem to be of sound mind, that there is free consent and informed consent and that signatures of signatories and witnesses are not forged.¹⁶⁹ Further, that any administrative processes that facilitate the solemnisation of marriages are in order.¹⁷⁰ The

¹⁶² The CRL Commission; Mr Craig Allan; The Commission on Gender Equality; UUCSA and Muslim Lawyers for Social Justice; Darhul Ihsan; Department of Communications; Free State Society of Advocates; Pretoria Society of Advocates; The Women's Legal Centre.

¹⁶³ NHKA.

¹⁶⁴ *FOR SA.*

¹⁶⁵ *FOR SA.*

¹⁶⁶ The Women's Cultural Group.

¹⁶⁷ Muslim Lawyers Association.

¹⁶⁸ The Islamic Forum Azaadville.

¹⁶⁹ Mr Craig Allan.

¹⁷⁰ Darhul Ihsan.

role marriage officers play ensures that the requirements of valid marriages are met,¹⁷¹ they issue a certificate to reflect compliance with the relevant legislation; record all documents pertaining to the marriage including contracts of marriage; and effect the necessary registration of the marriage.¹⁷² A view was instead of having marriage officers there should be registration officers¹⁷³ with their function being simply to record the coming into existence of a secular legal marriage. The registration officer needs not be an official or leader within a cultural or religious community as his/her function is merely administrative, is different from the registration officer in terms of the RCMA whose duty is to determine whether a customary marriage is in existence and would not be concerned with the existence of any customary marriage but to bring into existence a secular legal marriage.

- 2.59 A further suggestion was that a marriage certificate from a registered traditional authority or religious body (which must be a long-established, recognised traditional or religious authority, or functionaries approved and nominated by them) will be the only acceptable document as proof of the marriage completed by customary, or religious rites; as proof that consent of the contracting parties has been obtained; and as satisfying the definition of a marriage or marital union.¹⁷⁴ There was also support for the involvement of traditional leaders in the solemnisation of customary marriages, as registering officers and with solemnisation to be done by the state.¹⁷⁵ Another view was that senior traditional leaders should be provided marriage licences, and be given a role in the solemnisation and registration of any or all forms of marriages.¹⁷⁶ By designating specified traditional and specified religious leaders as marriage officers, there will be additional certainty regarding the status of the marriage and safeguards for the verification of identities, any aspirant spouses may still enjoy the benefit of having a separate ceremony performed by a celebrant or traditional leader (who for some reason may not be recognised as a marriage officer) which ceremony may be conducted according to customs or preferences.¹⁷⁷

¹⁷¹ Pretoria Society of Advocates.

¹⁷² The Islamic Forum Azaadville.

¹⁷³ Jamiatul Ulama KZN.

¹⁷⁴ Dr Abu-Bakr Asmal.

¹⁷⁵ The NHTL

¹⁷⁶ The Office Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs.

¹⁷⁷ Free State Society of Advocates.

2.60 It was also pointed out that marriage officers should not be restricted to appointed officials or anyone who identifies as a ‘minister of religion or any person holding a responsible position in any religious denomination or organisation’ as a significant proportion of the population do not identify as religious,¹⁷⁸ or cannot or do not wish to take up a position in a religious organisation, but nonetheless would like to perform or participate in a marriage ceremony reflecting their beliefs.¹⁷⁹ It was also said that is there a need not to mention religion at all in the legislation governing marriage, except where it is relevant to recognising a particular cultural practice and protecting the rights of women, such as in Muslim marriages.¹⁸⁰ There was also opposition to the continued exemption for DHA marriage officers from solemnising certain marriages.¹⁸¹ The opposite view was that the right of conscientious objection of marriage officers (both private and state marriage officers) to act in accordance with their conscience and/or sincerely held beliefs regarding marriage, should remain protected,¹⁸² and that exemptions should be granted to marriage officers who wish not to solemnise and register certain types of marriages on religious grounds.¹⁸³

2.61 It was noted that the provisions of the Marriage Act already cater for the appointment of Jewish marriage officers and longstanding practices of the Jewish faith, meaning that Jewish marriages enjoy recognition under both religious and civil law without the need for double registration.¹⁸⁴ There is therefore ideally no need to alter the current marriage regulatory framework as Jewish parties are free to marry and have their marriage solemnised in accordance with their Jewish faith. The ante nuptial contract is a powerful tool for Muslim couples¹⁸⁵ and these relationships should be governed by contract and not legislation. The Registrars of Deeds should be trained to be more accommodating to the registration of Muslim ante nuptial contracts. The DHA had a specific campaign to register

¹⁷⁸ Statistics SA *Community Survey 2016* available at: http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-Statistical-releas_1-July-2016.pdf accessed 18 Sept 2020.

¹⁷⁹ The LRC; CALS.

¹⁸⁰ CALS.

¹⁸¹ The NHKA. The Commission on Gender Equality; the LRC saying that they take no position for or against marriage officers.

¹⁸² Cause for Justice; FOR SA.

¹⁸³ UUCSA; Darhul Ihsan.

¹⁸⁴ Office of the Chief Rabbi.

¹⁸⁵ The Women’s Cultural Group.

Muslim imams as marriage officers, and it should introduce a similar campaign to register Muslim females as marriage officers.¹⁸⁶

- 2.62 Not everyone supported the involvement of marriage officers in conducting marriages. It was said that if the focus of the Act is not on marriages but rather intimate relationships, marriage officers will not be required, parties should be able to register their intimate relationship and intimate relationship agreement with a functionary at DHA regardless whether the relationship takes the form of a marriage or partnership.¹⁸⁷
- 2.63 As regards the requirements for the involvement of marriage officers it was said that appointed marriage officers should have passed a written examination for solemnisation and registration of marriages in terms of specific religions or cultures.¹⁸⁸ A view was that spouses will likely prefer that the marriage officer also be an officer of their religious institution.¹⁸⁹ It was also said that the present requirements are sufficient, but that traditional and religious leaders be granted marriage officer status upon written request and be required to ensure that all requirements are observed in addition to customary or religious rites.¹⁹⁰ It was further suggested that we note the requirements of the Australian Marriage Act relating to the solemnisation of marriages; appointment of authorised celebrants, the publication, registration and evidence of registration of authorised celebrants; that marriage officers should be properly trained with an accredited body and that a marriage officer does not need to be a member of the clergy or a government official to qualify to become a marriage officer.¹⁹¹ It was further suggested that marriage officers need to understand their role in Muslim marriages to enable the parties making informed decisions and choices in respect of the marriage contract, but where their roles conflict they need to advise the parties.¹⁹² It was also said registration as a marriage officer and/or functionary with the DHA should be required to be renewed after a specified period; that an oversight body must be created to regulate the conduct of marriage officers to protect

¹⁸⁶ The Women's Cultural Group.

¹⁸⁷ Prof Pieter Bakker.

¹⁸⁸ The CRL Commission.

¹⁸⁹ Mr Craig Allan.

¹⁹⁰ Free State Society of Advocates.

¹⁹¹ Free State Society of Advocates.

¹⁹² The Women's Legal Centre.

against bogus and sham marriages; and adequate training should be provided to marriage officers to conduct their responsibilities with competence.¹⁹³

2.64 It was further said that marriage officers face difficulties in their attempts to submit the required marriage documentation to the nearest DHA office after the solemnisation of a marriage; that this process has proven to be unnecessarily time consuming and inefficient meaning a revised submission protocol is required to expedite the process, by way of online submissions or via third party submissions on behalf of the marriage officer with his/her written instructions.¹⁹⁴ Furthermore, marriage officers are often hindered by the administrative hurdles in obtaining a clearance certificate for the purposes of officiating a marriage between a foreign national and South African citizen; confusion lies with the formalities that must be observed for the interview process to be duly authorised and conducted by an immigration officer of the DHA, therefore clarity is required about the requirements to be complied with in preparing for the interview and the interview itself, the supporting documents that must be submitted, the steps to be taken in obtaining documentation, the expected waiting period for the receipt of clearance, as well as any other expectations of the marriage officer and interviewees in this process.

2.65 Issue Paper 35 asked if marriage officers should still be involved in solemnising marriages what their function should be. The issue paper suggested the recording the marriage, assisting with registration of the marriage or anything else to provide evidence of the marriage for official purposes. Comments supported the functions we suggested in our issue paper;¹⁹⁵ the recording the identity of the spouses; the date of the marriage; previous marital status of the parties; whether or not the parties have entered into an antenuptial contract;¹⁹⁶ keeping a record of the marriages;¹⁹⁷ submitting the completed forms to the DHA for processing and issuing of the marriage certificate. It was said marriage officers should continue to perform the functions that they presently fulfil, and that traditional leaders, imams, Hindu pujari or pundits and other recognised religious leaders, should now undertake the same tasks.¹⁹⁸ It was also said that a marriage officer should be a supervisor and signatory to the prescribed contract, similar to a commissioner of oaths,

¹⁹³ Muslim Lawyers for Social Justice.

¹⁹⁴ Office of the Chief Rabbi.

¹⁹⁵ Muslim Lawyers for Social Justice; The CRL Commission; The NHTL; The Department of Communications; The LRC.

¹⁹⁶ The Pretoria Society of Advocates; The Jamiatul Ulama KZN.

¹⁹⁷ The Pretoria Society of Advocates.

¹⁹⁸ The Free State Society of Advocates.

and should communicate the marriage to the DHA and the participation of the marriage officer in any accompanying cultural or religious ceremony is permitted but optional.¹⁹⁹ The Marriage Officer must record that she has enquired whether the couple elect the Muslim Chapter to apply to their marriage; notify the couple that they may conclude a pre-marital contract; and notify the couple that the wife is entitled, but not obliged, to insert a clause in the pre-marital contract that she may exit the marriage if the husband takes a further spouse.²⁰⁰

2.66 A further comment was the marriage officer must ensure that the parties understand the commitment they are entering into in terms of their partnership agreement, should the relationship be registered;²⁰¹ ensure the eligibility and free and full consent of both parties,²⁰² the potential spouses are of marriageable age, and that the marriage is not in any way a forced marriage. It was said the Civil Unions Act draws the distinction between religious marriage officers and the DHA marriage officers tasked with fulfilling a public duty or obligation on the part of the state, therefore retain these distinctions and build the criteria for their roles accordingly.²⁰³

2.67 A comment was that the registration process and the solemnisation process must be treated as two different functions as the skills required in one is different to the skills required in the other and where a marriage officer is able and available to perform both duties with the consent of the marrying couple than that should be allowed.²⁰⁴ It was also suggested that an alternative solution to the issuing of marriage officer licences is to go the route the SALRC took when it considered the opposition in traditional societies to a state official "*solemnising*" a marriage, namely that of a State official simply *registering* the marriage; instead of a marriage officer. The DHA would thus have a registering officer who simply registers marriages which completely removes the religious / cultural ceremony aspects (including religious ministers) from the granting of legal married status to parties by the State.²⁰⁵ The State official will simply register the marriage and issue a certificate

¹⁹⁹ Mr Craig Allan.

²⁰⁰ The Women's Cultural Group.

²⁰¹ Prof Pieter Bakker.

²⁰² The LRC; The Jamiatul Ulama KZN.

²⁰³ The Women's Legal Centre.

²⁰⁴ The Sunni Ulama Council.

²⁰⁵ FOR SA.

of registration and the religious and/or cultural aspect will be performed independently altogether and performed for example by the imam of the couple.

d. *Evaluation*

2.68 A number of respondents noted the cumbersome process of submitting returns to the DHA. In Uganda this issue was raised too.²⁰⁶ A number of respondents also noted marriage officers who are public servants employed by the DHA and who have religious objections to conduct same-sex marriages. We consider the matter has been settled by the Saskatchewan Court of Appeal in 2011 in *the Matter of Marriage Commissioners appointed under the Marriage Act*.²⁰⁷

2.69 Suggestions have been made already in 2012 locally that the DHA civil servants should perform a purely administrative function when conducting marriages in South Africa.²⁰⁸ Furthermore, the amendments to the Civil Union Act to remove the conscientious objections of DHA marriage officers to conduct same-sex marriages have now been passed in Parliament in 2020. The NCOP Security and Justice Committee adopted the Bill without amendment on 11 June 2020.²⁰⁹ On 1 July 2020 the NCOP passed the Civil

²⁰⁶ See Annexure D under item D marriage officers about the establishment of a digital platform which was suggested by the Ugandan Registry Services Bureau to address the challenges hard copy documentation create for marriage and registry officers.

²⁰⁷ 1995, S.S. 1995, c. M-4.1 2011 SKCA 3 <https://www.canlii.org/en/sk/skca/doc/2011/2011skca3/2011skca3.pdf> accessed 19 September 2020. See Annexure D under item D marriage officers.

²⁰⁸ MacDougall Bruce, Elsje Bonthuys, Kenneth McKenzie Norrie & Marjolein van den Brink “Conscientious Objection to Creating Same-Sex Unions: An International Analysis” *Canadian Journal of Human Rights* (2012) 1:1 127 – 164 at 162 https://commons.allard.ubc.ca/fac_pubs/216/ accessed 17 Nov 2020:

Another practical solution would be for the legal creation of either a marriage or a civil union to be reduced to a simple bureaucratic function, similar to the registration of births, deaths, and adoptions. There is no reason why the state should be responsible, or even able, to provide a celebratory element to what is simply a change of legal status. Parties should be free to celebrate their marriages or civil unions, whether by way of religious ceremonies or otherwise, but this does not have to be coupled to the governmental function. Such a secularization of marriage would remove the basis for religious objections, since marriage officers would be engaged in a simple administrative act. The United Kingdom’s civil union regimes are entirely secular, with the role of registrars being entirely administrative. Although this regime did not prevent the registrar in *Ladele* from objecting, it did make the rejection of her objections much easier. For this reason the breach of the principle of secularism in allowing civil partnership registrations on religious premises in England and Wales may be seen as a retrograde step ... (Footnote omitted.)

²⁰⁹ PMG “Cybercrimes Bill; Civil Union Amendment Bill; Firearms Amnesty; Magistrates Regulations; with Deputy Minister” [https://pmg.org.za/committee-meeting/30454/?utm_campaign=minute-alert&utm_source=trans actional&utm_medium=mail](https://pmg.org.za/committee-meeting/30454/?utm_campaign=minute-alert&utm_source=trans%20actional&utm_medium=mail) .

Union Amendment Bill.²¹⁰ Calls have been made that the President ought to refer the Bill back to Parliament for reconsideration based on constitutional grounds.²¹¹ Concerns have also been raised about the adequacy of the parliamentary consultation on the Bill as oral presentations were not allowed during the parliamentary process.²¹² As we noted above, the Civil Union Amendment Act commenced on 22 October 2020.²¹³

- 2.70 South Africa's estimated 58,8 million population²¹⁴ is served by 16 363 marriage officers, with 14 945 marriage officers from faith groups and 1 418 being Home Affairs officials.²¹⁵ A number of 543 marriage officers are designated to conduct civil unions, of which 309 are Home Affairs officials and 234 are from faith groups. At the Home Affairs ministerial dialogues with stakeholders in 2019 the Minister of Home Affairs proposed that designation of marriage officers should be for a period of five years and be renewed upon the writing of an exam to test the knowledge of marriage officers. Large numbers of marriage officers of religious organisations expressed the view that they would prefer no longer to perform the function of marriage officers if they no longer were to enjoy the right to refuse officiating at a marriage in terms of the envisaged legislation.

²¹⁰ Parliament "NCOP passed the Cybercrimes Bill, Civil Union and the Science and Technology Laws Amendment Bills <https://www.parliament.gov.za/press-releases/ncop-passed-cybercrimes-bill-civil-union-and-science-and-technology-laws-amendment-bills>; Mabuza Ernest "Refusal by marriage officers to perform same-sex unions could be a thing of the past" 12 June 2020 <https://www.timeslive.co.za/news/south-africa/2020-06-12-refusal-by-marriage-officers-to-perform-same-sex-unions-could-be-a-thing-of-the-past/> accessed 11 Sept 2020.

²¹¹ De Freitas Shaun 'Marriage officers should have the right to object on religious grounds' 4 Aug 2020 <https://mg.co.za/opinion/2020-08-04-marriage-officers-should-have-the-right-to-object-on-religious-grounds/>, 'Freedom of Religion SA petitions for review of same-sex marriages bill' <https://www.iol.co.za/news/south-africa/freedom-of-religion-sa-petitions-for-review-of-same-sex-marriages-bill-50922495> and Van Coller Helene "The Constitutional problem with South Africa's Civil Union Amendment Bill" 30 July 2020 <https://www.iol.co.za/news/opinion/the-constitutional-problem-with-south-africas-civil-union-amendment-bill-a489a48e-9f79-49dd-94c0-4147fbf8dc6c> accessed 12 Sept 2020.

²¹² 'Freedom of Religion SA petitions for review of same-sex marriages bill'.

²¹³ IAFrica 'Ramaphosa Passes The Civil Union Amendment Bill Into Law' <https://iafrica.com/ramaphosa-passes-the-civil-union-amendment-bill-into-law/> accessed 24 October 2020.

²¹⁴ Statistics SA "SA population reaches 58,8 million" <http://www.statssa.gov.za/?p=12362>; Statistics SA P0302 - *Mid-year population estimates, 2019* 29 July 2019 <http://www.statssa.gov.za/publications/P0302/P03022019.pdf> accessed 24 Oct 2020.

²¹⁵ DHA "Keynote address by Home Affairs Minister Dr Aaron Motsoaledi at the marriage policy dialogue with religious leaders in Ekurhuleni on 26 September 2019" see <http://www.dha.gov.za/index.php/statements-speeches/1288-keynote-address-by-home-affairs-minister-dr-aaron-motsoaledi-at-the-marriage-policy-dialogue-with-religious-leaders-in-ekurhuleni> accessed 24 Oct 2020.

e. *Proposals*

- 2.71 The fact that customary law generally does not require the presence of a marriage officer for a customary marriage to be established, needs to be considered. Normally, a life partnership also does not involve a marriage officer either. In view of the general support by respondents, we need to retain the involvement of marriage officers in conducting marriages.
- 2.72 We propose that provision should be made for different categories of marriage officers designated by the Minister as marriage officers such as employees in the public service; religious officials of, or persons holding responsible positions in, religious denominations or organisations; persons holding responsible positions in non-religious organisations that engage in solemnising marriages; and any traditional or Khoi-San council, or any person duly authorised by the council. We propose that such designations may be made with or without limitations. The Minister may also revoke designations at the request of the religious denomination or organisation, the non-religious organisation or the marriage officer. We also propose that any affected person may appeal to the Minister about any decision taken by a person acting under a power delegated by the Minister regarding a designation. The Minister is empowered on appeal to confirm, set aside or vary any decision or limitation or take any other appropriate decision.
- 2.73 We consider that provision should be made that the Minister may by regulation further determine the requirements for appointment of marriage officers, the duration and renewal of a designation, the required qualifications or training to be provided; revocation of a designation; etc.
- 2.74 We further propose that marriage officers must be required to verify the identities of the parties intending to enter, as option one, into a protected relationship or option two, a marriage. The marriage officer, the parties to the protected relationship (or marriage) and the two witnesses must sign the marriage register immediately after the solemnisation of the relationship in each other's presence. Marriage officers must keep records of protected relationships (or marriages) conducted. The marriage officer must issue a copy of the marriage register to the parties to the relationship. A marriage officer is required to transmit the marriage register and records to the official in the public service who is responsible for the population register in the area in question. The latter must include the particulars of the protected relationship (or marriage) in the population register. A transitional provision is also proposed that a marriage officer who was authorised to solemnise protected

relationships (or marriages) in terms of prior legislation, shall continue to have authority to solemnise such relationships under the proposed legislation.

2.75.1 We propose the following clause on marriage officers solemnising protected relationships:

10. Marriage officers

- (1) The Minister and any officer in the public service authorised thereto by him or her may designate –
- (a) any officer or employee in the public service to be, by virtue of his or her office and so long as he or she holds such office;
 - (b) any religious official, or any person holding a responsible position in any religious denomination or organisation;
 - (c) any person holding a responsible position in a non-religious organisation that engages in solemnising marriages; or
 - (d) any traditional or Khoi-San council or any person duly authorised by the council,

as a marriage officer for the purpose of solemnising protected relationships with or without limitations which designation the Minister may revoke on the request of the religious denomination or organisation, the non-religious organisation or the marriage officer.

- (2) The application for and designation of a marriage officer must be in such form as the Minister may prescribe.
- (3) No marriage officer shall solemnise a protected relationship unless each of the parties to a protected relationship–
- (a) produces to the marriage officer his or her identity card or identity document or his or her birth certificate; or
 - (b) who does not have an identity card or identity document –
 - (i) gives to the marriage officer proof of application for an identity card or identity document or a birth certificate; or
 - (ii) gives to the marriage officer the prescribed affidavit.
- (4) The prescribed marriage register must be signed immediately after the solemnisation by the marriage officer, the parties to the protected relationship and the two witnesses in each other's presence the marriage officer, the parties to the protected relationship and the two witnesses.
- (5) Each marriage officer must keep a record of all protected relationships conducted by him or her.
- (6) A marriage officer must issue a copy of the marriage register to the parties once the protected relationship is solemnised.

- (7) A marriage officer must within one month after the solemnisation of a relationship transmit the marriage register and all other prescribed records to a registering officer in the prescribed form for registration of the relationship who must cause the particulars of the protected relationship concerned to be included in the population register.
- (8) Any person who, at the commencement of this Act, or prior laws, was authorised to solemnise any protected relationships, shall continue to have authority to solemnise such relationships as if such law had not been repealed, but shall exercise such authority in accordance with the provisions of this Act and its regulations.
- (9)(a) Any affected person may appeal to the Minister about any decision taken by a person acting under a power delegated by the Minister which –
 - (i) refuses the grant or renewal of a designation;
 - (ii) imposes a condition on the grant or renewal of a designation; or
 - (iii) suspends or revokes a designation.
- (b) The Minister may, after considering an application referred to in paragraph (a), confirm, set aside or vary any decision or limitation or take any other appropriate decision.

2.75.2 We propose the following clause on marriage officers solemnising marriages:

10. Marriage officers

- (1) The Minister and any officer in the public service authorised thereto by him or her may designate –
 - (a) any officer or employee in the public service to be, by virtue of his or her office and so long as he or she holds such office;
 - (b) any religious official, or any person holding a responsible position in any religious denomination or organisation;
 - (c) any person holding a responsible position in a non-religious organisation that engages in solemnising marriages; or
 - (d) any traditional or Khoi-San council or any person duly authority authorised by the council,

as a marriage officer for the purpose of solemnising marriages with or without limitations which designation the Minister may revoke on the request of the religious denomination or organisation, the non-religious organisation or the marriage officer.
- (2) The application for and designation of a marriage officer must be in such form as the Minister may prescribe.
- (3) No marriage officer shall solemnise a marriage unless each of the parties to a marriage–

- (a) produces to the marriage officer his or her identity card or identity document or his or her birth certificate; or
- (b) who does not have an identity card or identity document –
 - (i) gives to the marriage officer proof of application for an identity card or identity document or a birth certificate; or
 - (ii) gives to the marriage officer the prescribed affidavit.
- (4) The prescribed marriage register must be signed immediately after the solemnisation by the marriage officer, the parties to the marriage and the two witnesses in each other's presence.
- (5) Each marriage officer must keep a record of all marriages conducted by him or her.
- (6) A marriage officer must issue a copy of the marriage register to the parties once the marriage is solemnised.
- (7) A marriage officer must within one month after the solemnisation of a marriage transmit the marriage register and all other prescribed records to a registering officer in the prescribed form for registration of the relationship who must cause the particulars of the marriage concerned to be included in the population register.
- (8) Any person who, at the commencement of this Act, or prior laws, was authorised to solemnise any marriages, shall continue to have authority to solemnise such relationships as if such law had not been repealed, but shall exercise such authority in accordance with the provisions of this Act and its regulations.
- (9)(a) Any affected person may appeal to the Minister about any decision taken by a person acting under a power delegated by the Minister which –
 - (i) refuses the grant or renewal of a designation;
 - (ii) imposes a condition on the grant or renewal of a designation; or
 - (iii) suspends or revokes a designation.
- (b) The Minister may, after considering an application referred to in paragraph (a), confirm, set aside or vary any decision or limitation or take any other appropriate decision.

J. Time, place and form of marriage

1. Background

2.76 The DHA request that this investigation be conducted explains that 'the state should have no interest ... how the religious or cultural rituals are conducted and should therefore have no interest in giving legal legitimacy to one or other practice in relation to the conclusion of a marriage' and that 'any marriage officer ... may conduct the marriage ceremony according to any religious; cultural or secular practice'. Furthermore, the DHA noted

already in 1996 when it required the SALRC to review the Marriage Act that '[t]here is ever increasing pressure on the Department to provide for less formal requirements regarding places where a marriage might take place'.²¹⁶

2.77 The Marriage Act provides for two eventualities as regards the marriage formula to be used by marriage officers. The first instance is a marriage officer who is a designated minister of religion or a person holding a responsible position in a religious denomination or organization may in solemnising a marriage follow the formula and rites usually observed by the religious denomination or organisation concerned if the marriage formula has been approved by the Minister of Home Affairs. The second instance is that a designated minister of religion or a person holding a responsible position in a religious denomination or organization if the marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the prescribed questions to each of the parties separately, each of whom shall reply thereto in the affirmative.²¹⁷ The formula further provides that thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnised in the following words: 'I declare that A.B. and C.D. here present have been lawfully married'.

2.78 The Marriage Act also provides for the validity of a marriage where the marriage formula has not been strictly been complied with relating to the questions be put to each of the parties or to the declaration whereby a marriage is declared solemnised or to the requirement that the parties shall give each other the right hand. The requirements are that there was not strict compliance due to an error, omission or oversight committed in good faith by the marriage officer; or an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties. The further conditions are that the marriage has in every other respect been solemnised in accordance with the provisions of the Act or a former law, that marriage shall, provided there was no other lawful impediment thereto and provided further that such marriage, if it was solemnised before the commencement of the Marriage Amendment Act 51 of 1970,²¹⁸ has not been dissolved or declared invalid by a competent court and neither of

²¹⁶ SALRC *Report on the Review of the Marriage Act* at page 2.

²¹⁷ Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?

²¹⁸ The long title of the Marriage Amendment Act of 1970 indicates the range of amendments this Act effected namely: 'To amend the Marriage Act, 1961, so as to assign the administration of the provisions thereof in respect of any Bantu in the Republic and any member of any of the native nations in the territory of South-West Africa to the Minister of Bantu Administration and

the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

- 2.79 The Civil Union Act also prescribes a formula for the solemnisation of a marriage or a civil partnership.²¹⁹ A marriage officer must inquire from the parties appearing before him or her whether their civil union should be known as a marriage or a civil partnership.²²⁰ In solemnising any civil union, the marriage officer must put the prescribed questions to each of the parties separately, and each of the parties must reply thereto in the affirmative.²²¹ Thereupon the parties must give each other the right hand and the marriage officer concerned must declare the marriage or civil partnership, as the case may be, solemnised in the following words: 'I declare that A.B. and C.D. here present have been lawfully joined in a marriage/civil partnership'.²²²
- 2.80 If the provisions relating to the questions to be put to each of the parties separately or to the declaration whereby the marriage or civil partnership shall be declared to be solemnised, or to the requirement that the parties must give each other the right hand, have not been strictly complied with owing to— an error, omission or oversight committed in good faith by the marriage officer; an error, omission or oversight committed in good faith by the parties; or the physical disability of one or both of the parties, and such civil union has in every other respect been solemnised in accordance with the provisions of the Civil Union Act, that civil union shall, provided there was no other lawful impediment thereto, be valid and binding.²²³

2. Views of respondents

- 2.81 Issue Paper 35 noted that the DHA request for this investigation said that the state should have no interest in how the religious or cultural rituals are conducted in a marriage

Development, and to provide that the administration of certain other laws may be assigned to the said Minister in respect of any Bantu; to abolish banns of marriage, notices of intention to marry and special marriage licences; to enable girls of the age of fifteen year to marry without the permission of the Minister; to apply the said Act to the territory of South-West Africa, including the Eastern Caprivi Zipfel: and to provide for incidental matters'.

²¹⁹ Section 11 of the Civil Union Act.

²²⁰ Section 11(1) of the Civil Union Act.

²²¹ Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage/civil partnership with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful spouse/civil partner?'

²²² Section 11(2) of the Civil Union Act.

²²³ Section 11(3) of the Civil Union Act.

ceremony. The Issue paper explained that the Marriage Act and Civil Union Act prescribe the formulae to be used during certain marriage ceremonies and asked whether respondents agree and if not why. A number of respondents were of the view that the state should have no interest in prescribing a marriage formula.²²⁴ A view shared by respondents was that that religious or cultural groups should be allowed to choose if they want to use a specific formula,²²⁵ and if they choose not to have a formula, then only registration should take place in terms of the legislation governing the specific religion or culture.²²⁶

- 2.82 A view was that a form of marriage formula or prescribed formal requirements must, however, be imposed in addition to the religious or cultural rituals, before or after the ceremony, should the parties not wish for it to interfere with the ceremony, and the formula or formal requirements ought to relate to verifying the identity and age of the aspirant spouses and confirming that each party consents to the marriage.²²⁷ A further view was that the State should have an interest if certain religious and cultural rituals used in a marriage ceremony may be used to discriminate and/or oppress women, therefore there should be a minimum requirement in all of these rituals that both parties to the marriage must be present, at least 18 years of age and enter the marriage out of their own free will, to ensure that the constitutional values are not violated by religious and/or cultural rituals.²²⁸ This latter view is also shared by other respondents who commented that child marriages are often concluded in religion or customary marriages²²⁹ or as a cultural practice that leads to a valid marriage.²³⁰
- 2.83 Further views were that the principal task of the marriage officer is to ensure that the couple consent to be married; if this objective is achieved there is no need for any other ceremony or formula; there is no prescribed ceremony for a Muslim marriage except for the handing over or promise of the *mahr* (or obligatory gift by the husband to the wife as part of the marriage contract); other rituals are merely custom; many monogamous

²²⁴ The NHTL; The Office Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs; The Free State Society of Advocates; Mr Craig Allan; UUCSA; The Sunni Ulama Council; the Bahá'í community; Muslim Lawyers Association.

²²⁵ The Islamic Forum Azaadville; The CRL Commission.

²²⁶ The CRL Commission; the Jamiatul Ulama KZN.

²²⁷ The Free State Society of Advocates.

²²⁸ The Pretoria Society of Advocates; FOR SA; Muslim Lawyers for Social Justice; The NHKA.

²²⁹ The LRC.

²³⁰ Women's Legal Centre.

Muslims marry under their religious customs, thereafter they register the marriage with a marriage officer.²³¹ It was said that Muslim marriages are formulaic by definition and therefore, are closer to the Marriage Act of 1961's position.²³²

- 2.84 The development of a new marriage formula was supported by some respondents,²³³ saying that the formula should contain gender inclusive language; it should be devoid of references to religiously-ordained roles for the different partners; the religious/cultural rituals conducted in a marriage ceremony correspond with the Bill of Rights; and a consequentialist ethical approach rather than a deontological ethical approach should be followed.²³⁴ Another view was that if all intimate relationships are recognised and not the marriage per se, then religious and cultural formulae will not play any role in the conclusion of an intimate relationship, the parties will merely be required to register their relationship or prove the existence of such a relationship should they want the consequences of recognised intimate relationships.²³⁵
- 2.85 We also asked in the issue paper whether a prescribed marriage formula contributes in any way towards effecting legal certainty as to a marriage having been conducted? Views were that a prescribed formula would bring about legal certainty regarding the requirements that should be met in order for a valid marriage to be concluded in terms of the religion or culture;²³⁶ that to an extent, as the marriage officer is entitled to accept that there is no lawful impediment, and there are two individuals present to witness the conclusion of the marriage;²³⁷ and that defining the minimum legal requirements ensures legal certainty and prevents abuse of the system.²³⁸
- 2.86 Similar qualified views were that although to some extent the exchange of the marriage formula in front of witnesses provide legal certainty that the marriage was entered between the parties, it is the confirmation of the witnesses and the parties that provide legal certainty and not just the formula, and that the content of the words is therefore not what

231 The Women's Cultural Group.

232 UUCSA.

233 Darhul Ihsan; The NHKA; FOR SA.

234 The NHKA.

235 Prof Pieter Bakker.

236 The CRL Commission.

237 The Free State Society of Advocates.

238 The Pretoria Society of Advocates.

is critically important, but that the contract was witnessed.²³⁹ Similar views were that the formula at the time of solemnisation does give legal certainty to the marriage,²⁴⁰ by virtue of the binding contractual nature of the wording.²⁴¹ There were outright views saying no,²⁴² that registration effects certainty of the existence of an intimate relationship,²⁴³ and that legal certainty about any contract is enforced by ensuring that the signatories are adult, clearly identified, of sound mind, willing, informed, and physically present at the signing ceremony.²⁴⁴

3. Proposals

- 2.87 We agree with respondents that the state has no interest in any marriage formula used by a marriage officer to solemnise, in terms of option one, a protected relationship, or in terms of option two, a marriage, or that the prescribed words of a marriage formula effects certainty. We propose that the legislation should allow a marriage officer to solemnise a protected relationship or marriage at any place and at any time on any day of the week in accordance with any mode of solemnisation, or in accordance with any religious or cultural practice. We further propose that a marriage officer shall not solemnise a protected relationship or marriage unless satisfied that each party has the capacity to understand that he or she enters into a protected relationship or marriage and what the consequences of that relationship are.
- 2.88 We propose that a marriage officer must ask the parties whether they declare that they freely consent to the formalisation of their intended relationship; that there is no lawful impediment to their relationship; they are not related on account of consanguinity, affinity or an adoptive relationship; and that they call two persons present to witness that they each take the other to be their legal partner in the case of a protected relationship and spouse in the case of a marriage.
- 2.89.1 We propose the following clause on the time, place and form of protected relationships:

11. Time, place and form of protected relationships

²³⁹ The Women's Legal Centre.

²⁴⁰ UUCSA

²⁴¹ Darhul Ihsan.

²⁴² The Jamiatul Ulama KZN.

²⁴³ Prof Pieter Bakker.

²⁴⁴ Mr Craig Allan.

- (1) A marriage officer may solemnise a protected relationship at any place and at any time on any day of the week in accordance with any mode of solemnisation, or in accordance with any religious or cultural practice.
- (2) A marriage officer shall not solemnise a protected relationship unless he or she is satisfied that each party has the capacity to understand that he or she enters into a protected relationship and what the consequences of that relationship are.
- (3) A marriage officer shall ask each party who intends to enter into a protected relationship whether—
 - (a) he or she freely consents to the formalisation of the intended relationship;
 - (b) there is no lawful impediment to the formalisation of their intended relationship;
 - (c) they are not related on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); and
 - (d) that they call two persons present to witness that they each take the other to be their legal partner.

2.89.2 We propose the following clause on the time, place and form of marriages:

11. Time, place and form of marriages

- (1) A marriage officer may solemnise a marriage at any place and at any time in accordance with any mode of solemnisation, or in accordance with any religious or cultural practice.
- (2) A marriage officer shall not solemnise a marriage unless he or she is satisfied that each party has the capacity to understand that he or she enters into a marriage and what the consequences of that relationship are.
- (3) A marriage officer shall ask each party who intends to enter into a marriage whether—
 - (a) he or she freely consents to the formalisation of the intended relationship;
 - (b) there is no lawful impediment to the formalisation of their intended relationship;
 - (c) they are not related on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); and
 - (d) that they call two persons present to witness that they each take the other to be their legal spouse.

K. Registration of relationships

1. Registration of marriages as required by international instruments

- 2.90 The UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962 provides in article 3 that all marriages shall be registered in an appropriate official register by the competent authority. The UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979 provides also in article 16(2), among others, that necessary action, including legislation, shall be taken to make the registration of marriages in an official registry compulsory. The African Charter on the Rights and Welfare of the Child deals in article 21 with protection against harmful social and cultural practices. It requires that states take effective action, including legislation to make registration of all marriages in an official registry compulsory.²⁴⁵ The Committee on the Elimination of Discrimination against Women adopted its General Recommendation 21, on equality in marriage and family relations in 1994. Paragraph 39 of its recommendations provides that States parties should also require the registration of all marriages whether contracted civilly or according to custom or religious law.²⁴⁶ The 2008 SADC Protocol on Gender Development²⁴⁷ provides in article 8(2)(c) that legislation on marriage shall ensure, among others, that every marriage, including civil, religious, traditional or customary, is registered in accordance with national laws.
- 2.91 On 2 July 2015 the Human Rights Council of the United Nations adopted resolution 29/8 on strengthening efforts to prevent and eliminate child, early and forced marriage.²⁴⁸ It urged States, among others, to strengthen their efforts to ensure free marriage, divorce and death registration as part of the civil registration and vital statistics systems, especially for individuals living in rural and remote areas, including by identifying and removing all physical, administrative, procedural and any other barriers that impede access to registration and by providing, where lacking, mechanisms for the registration of customary

²⁴⁵ Available at http://www.un.org/en/africa/osaa/pdf/au/afr_charter_rights_welfare_child_africa_1990.pdf accessed 21 Aug 2020.

²⁴⁶ General Recommendation No. 21 (13th session, 1994) adopted on 4 February 1994 see <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> accessed 21 Aug 2020.

²⁴⁷ See https://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf accessed 21 Aug 2020.

²⁴⁸ See <https://digitallibrary.un.org/record/803360?ln=en#record-files-collapse-header> accessed 21 Aug 2020.

and religious marriages. On 8 May 2019 the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child issued its joint general recommendation and general comment on harmful practices.²⁴⁹ They recommended that the States parties to the Conventions adopt or amend legislation with a view to effectively addressing and eliminating harmful practices, that States parties ensure, among others, that a legal requirement of marriage registration is established and effective implementation is provided through awareness-raising, education and the existence of adequate infrastructure to make registration accessible to all persons within their jurisdiction; and that a national system of compulsory, accessible and free birth registration is established in order to effectively prevent harmful practices, including child marriage.

2. Civil registration of vital events

2.92 Justice Sachs noted in *Minister of Home Affairs v Fourie* the benefits which the regularisation of a marriage holds:²⁵⁰

[69] ... formalisation of marriages provides for valuable public documentation. The parties are identified, the dates of celebration and dissolution are stipulated, and all the multifarious and socially important steps which the public administration is required to make in connection with children and forward planning, are facilitated. ...

2.93 The DHA request for the investigation explains that it 'has a duty to ensure that each person's status is accurately captured on our data base which is ultimately going to underpin many other digital systems of government and will in future also extend into our broader economy' and that '[t]he accuracy and integrity of our data base is therefore a major concern for our department as we invest huge sums of money to evolve into a more secure and trusted system of identity and status'.

²⁴⁹ See <https://undocs.org/en/CRC/C/GC/18/REV.1> par 55 and for a discussion of child and or forced marriage paras 20 to 24. See further the Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices of 4 Nov 2014 https://reliefweb.int/sites/reliefweb.int/files/resources/CEDAW_C_GC_31_CRC_C_GC_18_7557_E.pdf; UN Human Rights Experts Set Out States' Obligations To Address Child Marriage <https://www.girlsnotbrides.org/un-human-rights-experts-set-states-obligations-address-child-marriage/> accessed 21 Aug 2020.

²⁵⁰ See <http://www.saflii.org.za/za/cases/ZACC/2005/19.html> accessed 21 Aug 2020.

2.94 In 2018, 131 240 civil marriages were registered at the DHA.²⁵¹ In 2018 there was a decrease of 3,1% of registered civil marriages compared to the 135 458 registered civil marriages of 2017.

3. Registration of customary marriages

2.95 The RCMA provides that the spouses of a customary marriage have a duty to ensure that their marriage is registered.²⁵² A customary marriage entered into after the commencement of the RCMA, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.²⁵³ Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy him or herself as to the existence of the marriage.²⁵⁴ A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed.²⁵⁵ The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.²⁵⁶ If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.²⁵⁷

2.97 If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration.²⁵⁸ If a registering officer is not satisfied that a valid customary marriage was

²⁵¹ Statistics SA *Statistical Release P0307 Marriages and divorces 2018* 2.1 Civil marriages 25 March 2020 <http://www.statssa.gov.za/publications/P0307/P03072018.pdf> accessed 14 Aug 2020 (Statistics SA *Marriages and divorces 2018*).

²⁵² Section 4(1).

²⁵³ Section 3(2)(b). The latest notice was issued in GN 484 of 2 June 2017 in (Government Gazette No. 40883) whereby the then Minister of Home Affairs prescribed a further period for the registration of customary marriages up to 30 April 2019.

²⁵⁴ Section 4(2).

²⁵⁵ Section 4(4)(a).

²⁵⁶ Section 4(4)(b).

²⁵⁷ Section 4(5)(a).

²⁵⁸ Section 4(5)(b).

entered into by the spouses, he or she must refuse to register the marriage.²⁵⁹ A court may, upon application made to that court and upon investigation instituted by that court, order the registration of any customary marriage or the cancellation or rectification of any registration of a customary marriage effected by a registering officer.²⁶⁰ A certificate of registration of a customary marriage constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate.²⁶¹ Failure to register a customary marriage does not affect the validity of that marriage.²⁶²

- 2.98 The SALRC, in its *Report on Customary Marriages*,²⁶³ recommended that registration of a customary marriage should not be compulsory. To allow registration at the instance of one of the parties would sensibly acknowledge the fact that this formality has no intrinsic merit: it is a pragmatic means of proving marriage when the spouses find it necessary to do so. It followed that, if spouses did not have their marriage registered, they could prove its existence by other means.²⁶⁴
- 2.99 Himonga and Moore suggest that traditional leaders who are not designated registration officers would be able to fulfil a crucial role in the registration of customary marriages particularly in promoting protection of women to customary marriages and also in providing proof of the existence and validity of a customary marriage, and for purposes of succession and inheritance.²⁶⁵ Himonga and Moore reflect also on the decline in the statistics of registration of customary marriages.²⁶⁶ They remark that their findings support the argument that officials of the DHA were giving priority to registering marriages in terms of the civil marriage legislation instead of a customary marriage in terms of the RCMA. They mention a number of reasons why this might happen such as the paperwork being more elaborate to investigate and register a customary marriage; and officials might be ignorant of the differences between customary and civil marriages and especially the different consequences which apply when a civil marriage gets registered when it actually a customary marriage was entered into. Although the RCMA provides that either spouse

²⁵⁹ Section 4(6).

²⁶⁰ Section 4(7).

²⁶¹ Section 4(8).

²⁶² Section 4(9).

²⁶³ SALRC *Report on Customary Marriages* par 4.5.6 and further https://www.justice.gov.za/salrc/reports/r_prij90_cstm_1998aug.pdf.

²⁶⁴ SALRC *Report on Customary Marriages* par 4.5.7.

²⁶⁵ Himonga & Moore *Reform of customary marriage, divorce and succession in SA* 118.

²⁶⁶ Himonga & Moore *Reform of customary marriage, divorce and succession in SA* 128.

can apply to have a customary marriage registered this is not what necessarily happens at a DHA office when one spouse attends an office wishing to register the customary marriage:²⁶⁷

- 2.100 Provision is also made in the Code of Zulu Law for an official witness which is defined as a person appointed to officiate at the celebration of customary marriages.²⁶⁸ When a marriage has been arranged, the family head of the parties must report the date of marriage to the chief, deputy chief or headman who directs the official witness to attend the marriage.²⁶⁹ The duties of the official witness include to ascertain publicly at an early stage of the marriage ceremony whether the bride enters the marriage of her own free will and consent to the marriage with her intended husband.²⁷⁰ If the bride declines to announce her consent, declares her dissent or is otherwise appears unwilling to proceed with the marriage, then the official witness is empowered to prohibit the marriage to proceed. The official witness is further entitled to take the bride under his protection if necessary and without delay report the matter to the then Commissioner or magistrate. A further function of the official witness is that at a convenient time during the marriage ceremony the bridegroom, his father, or his family head or the person who contributed towards the lobolo must publicly declare the source of the lobolo to the official witness.²⁷¹
- 2.101 In 2018, 3 160 customary marriages had been registered at the DHA.²⁷² This figure presented an increase of 22,1% from the 2 588 customary marriages which were

²⁶⁷ The Law, Race and Gender Research Unit UCT “The Recognition of Customary Marriages in South Africa: Law, Policy and Practice” at 4 http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/FactSheets/CLS_RCMA_Factsheet_2012_Eng.pdf accessed 14 Aug 2020. See also Dewar Bell “South Africa: The effect of the draft Recognition of Customary Marriages Amendment Bill, 2009 on the Recognition of Customary Marriages Act 120 of 1998” 1 Feb 2012 *Mondaq.com* <https://www.mondaq.com/southafrica/family-law/161784/the-effect-of-the-draft-recognition-of-customary-marriages-amendment-bill-2009-on-the-recognition-of-customary-marriages-act-120-of-1998> accessed 14 Aug 2020 who comments, among others: ‘... both parties together must register the marriage. The problem is that if one spouse refuses to register the marriage there is no affordable remedy available to the other spouse compelling them to register the marriage. The other spouse would have to bring a court application to do this. Many women in customary marriages cannot always afford to do this.’

²⁶⁸ KwaZulu Act on the Code of Zulu Law No 16 of 1985.

²⁶⁹ Section 40 of the KwaZulu Act on the Code of Zulu Law.

²⁷⁰ Section 42 of the KwaZulu Act on the Code of Zulu Law.

²⁷¹ Section 43 of the KwaZulu Act on the Code of Zulu Law.

²⁷² Statistics SA *Marriages and divorces 2018* 2.2 Customary Marriages.

registered in 2017. Approximately 16,1% of customary marriages were registered in the same year in which parties negotiated their customary marriage.²⁷³

2.102 Calls have been made for the involvement of traditional leaders in the registration of customary marriages at the DHA Ministerial dialogues in 2019. The NHTL repeated this call in commenting to the 2019 amendments to the RCMA proposing the insertion of a section to provide for the appointment of traditional leaders as registering officers to be able to participate in the registration of any customary marriage.²⁷⁴ The RCMA currently provides for a 'registering officer' being any person appointed as registering officer for purposes of the Act by the Minister or an officer acting under the Minister's written authorisation. We consider traditional councils have a crucial role to play in facilitating and assisting registering officers to register customary marriages and to provide councils with the required resources to execute this task.

4. Registration of civil unions and marriages

2.103 Prospective civil union partners must under the Civil Union Act individually and in writing declare their willingness to enter into their civil union with one another by signing the prescribed document in the presence of two witnesses.²⁷⁵ In terms of the Civil Union Act a marriage officer must keep a record of all civil unions conducted by him or her.²⁷⁶ The marriage officer must transmit the civil union register and records concerned to the official in the public service with the delegated responsibility for the population register in the area in question.²⁷⁷ Upon receipt of the said register the official must cause the particulars of the civil union concerned to be included in the population register.²⁷⁸

²⁷³ Minister Motsoaledi provided the following customary marriage statistics at the ministerial dialogue in Durban on 11 October 2019 (see DHA "Minister Aaron Motsoaledi: Marriage Policy Dialogue with Traditional Leaders" <https://www.gov.za/speeches/marriage-policy-dialogue-traditional-11-oct-2019-0000>) accessed 14 Aug 2020:

... To date there are 342 809 registered customary marriages on the National Population Register. The majority of these marriages, 333 387, are registered with one spouse. Another 8 410 are registered with two spouses. Marriages registered with three spouses to nine range from 814 to two. Only one is registered with 10 spouses. ...

²⁷⁴ PMG "Judicial Matters Amendment Bill and Recognition of Customary Marriages Amendment Bill: Department response to submissions; Magistrate Commission on disciplinary matters; International Treaties" 3 March 2020 <https://pmg.org.za/committee-meeting/29930/> accessed 14 Aug 2020.

²⁷⁵ Section 12(1).

²⁷⁶ Section 12(5).

²⁷⁷ Section 12(6).

²⁷⁸ Section 12(7).

2.104 In 2018, 1 650 civil unions were registered in South Africa.²⁷⁹ In 2017, 1 357 civil unions were registered in South Africa.

5. Registration of Muslim marriages

2.105 In its report on Islamic Marriages and Related matters the SALRC recommended the registration of both future and existing marriages, but that the failure to register existing marriages would not invalidate such marriages.²⁸⁰ The rationale was that there are sections of the Muslim community who because of illiteracy, lack of means or infirmity are unable to comply with the prescribed formalities. It was felt that these persons should not be deprived of the benefits of the Act. Registration, however, would promote legal certainty and was encouraged.

2.106 In *Women's Legal Centre Trust v President of the RSA* the court noted in August 2018 the DHA project initiated for the registering of imams to conduct Muslim marriages, that the DHA would be involved in the registration of Muslim marriages, and the DOJCD in dissolving Muslim marriages and possible legislative amendments or the development of *omnibus legislation* on religious marriages.²⁸¹

7. Views of respondents on registration of marriages, alternatives to proof a relationship, etc

a. *Should all relationships be registered?*

2.107 Issue paper 35 noted that the DHA supports the registration of all marriages and asked do respondents support registration of marriages. There was generally support for registration of marriages, however concluded.²⁸² There was also opposition to registration, it being argued that the parties should be provided with the option to register any intimate relationship including marriages but the protection of parties in intimate relationships can

²⁷⁹ Statistics SA *Marriages and divorces 2018* 2.2 Civil Unions.

²⁸⁰ Par 3.362.

²⁸¹ *Women's Legal Centre Trust v President of the RSA* par [23] <http://www.saflii.org/za/cases/ZAWCHC/2018/109.html>.

²⁸² The CRL Commission; The Free State Society of Advocates; the Department of Communications; The Office Policy and Legislation Development Facilitation; Eastern Cape Cooperative Governance and Traditional Affairs; Mr Craig Allan; The Pretoria Society of Advocates; The LRC; Darhul Ihsan; The NHTL; Islamic Forum Azaadville; The Women's Legal Centre; the Muslim Lawyers Association; UUCSA; The Women's Cultural Group; Muslim lawyers for Social Justice; NHKA; FirstRand Bank; Dr Abu-Bakr Asmal; FOR SA; Bahá'í ceremony.

also be determined when the need for protection arises.²⁸³ Another comment expressed support only for the registration of the secular legal marriage, which, because of its neutral nature, shall be available to all on an equal footing.²⁸⁴ It was also said that unmarried intimate relationships having marriage-like rights will go against the reasoning of the Constitutional Court in *Volks v Robinson* and be vulnerable to a constitutional challenge.²⁸⁵ We agree that there should be a duty on parties to register their protected relationship.

b. Should failure to register a relationship affect the validity of the relationship

2.108 Issue Paper 35 asked should failure to register affect the validity of a marriage. One view was that registration should be preemptory and that a penalty should be created for those who do not register within a prescribed period.²⁸⁶ There was support that failure to register a relationship should lead to its invalidity,²⁸⁷ if the failure was intentionally and negligently,²⁸⁸ and that a reasonable period within which to register ought to be provided.²⁸⁹ Contrary views were that failure to register a relationship should not lead to invalidity,²⁹⁰ if there is one husband and one wife there ought not to be invalidity;²⁹¹ that retroactive registration should be allowed, with permission of a court;²⁹² that couples married prior to the Single Marriage Act should automatically be registered under the new statute, and that couples not married under marriage legislation prior to the Single Marriage Act, should be given the election to opt in within a specific time frame.²⁹³ Another view was that registration of an intimate relationship should not affect the protection of the relationship.²⁹⁴ We consider that failure to register a relationship should not lead to the invalidity of the relationship.

²⁸³ Prof Pieter Bakker.

²⁸⁴ The Jamiatul Ulama KZN.

²⁸⁵ FOR SA.

²⁸⁶ The CRL Commission.

²⁸⁷ The Department of Communications

²⁸⁸ CRL Commission.

²⁸⁹ Free State Society of Advocates.

²⁹⁰ The Commission on Gender Equality; The Pretoria Society of Advocates; UUCSA; Muslim Lawyers for Social Justice; Darhul Ihsan Centre; LRC; Women's Legal Centre; Muslim Lawyers Association; Sunni Ulama Council Gauteng.

²⁹¹ The NHTL.

²⁹² Mr Craig Allan; Free State Society of Advocates

²⁹³ Women's Cultural Group.

²⁹⁴ Prof Pieter Bakker.

c. *If a relationship is not registered should there be alternative ways to proof the relationship*

2.109 Issue Paper 35 asked if a marriage can still be valid without registration, should there be alternative ways to prove the existence of a marriage and what would those alternatives be? Views were that where spouses cannot or will not convince a court of a reason for registration or retroactive registration should not be recognised as marriage;²⁹⁵ and that there is no need for such alternatives, as the only valid marriage would be one which is registered.²⁹⁶ Contrary views were that the parties need to prove the existence of a marriage by providing *inter alia*, a lobolo letter, a letter from the tribal authority, confirmatory affidavits from two witness from the bride and groom families, pictures of the ceremony (if any).²⁹⁷

2.110 Another view was that there would be a marriage officer, preferably the person conducting or solemnising the marriage in terms of any religion or culture, required to be present when the marriage is conducted, and would then register the marriage.²⁹⁸ Further proposals were dowry can prove the existence of the customary marriage;²⁹⁹ the marriage officer's certificate;³⁰⁰ a Nikah certificate or through other forms of verification such as witnesses to the marriage;³⁰¹ marriages recorded in a marriage register at the local Masjid;³⁰² a rectification process so that the marriage may be registered;³⁰³ an investigation by an official of the DHA, or by application, supported by adequate evidence, to Court, for an order declaring the existence of the marriage;³⁰⁴ the notification and publication of the intended marriage; the marriage certificate; oral and/or evidence under oath regarding the *de facto* position relating to the marriage that was entered into;³⁰⁵ the lobolo letter, letter

²⁹⁵ Mr Craig Allan.

²⁹⁶ The Jamiatul Ulama KZN.

²⁹⁷ Commission on Gender Equality.

²⁹⁸ The CRL Commission.

²⁹⁹ Department of Communications.

³⁰⁰ UUCSA.

³⁰¹ Darhul Ihsan Centre.

³⁰² Muslim Lawyers Association.

³⁰³ Muslim lawyers for Social Justice.

³⁰⁴ Free State Society of Advocates.

³⁰⁵ The Pretoria Society of Advocates.

from the tribal authority, confirmatory affidavits from two witnesses from the bride and groom's families, and pictures of the ceremony (if any).³⁰⁶

2.111 It was also said that the alternatives in the regulations in the RCMA are too onerous and leave women vulnerable;³⁰⁷ it should not be a closed list of requirements, but could include proof of the of permanence of the relationship, support, common household, wedding rituals, payment of *lobolo* or any other objective fact that proves the subjective intention of the parties;³⁰⁸ practices and processes performed at marriages³⁰⁹ the *lobolo* negotiations and the celebrations, handing over of negotiated lobolo, the formalities and handing over of the bride to the man's family;³¹⁰ that traditional leaders are informed after the marriage negotiations had taken place,³¹¹ meaning that the chief is a witness to the negotiations and the conclusion by the registration or physical inspection of *lobolo* cattle for the parties at the chief's kraal, and that traditional leaders are therefore potential sources of evidence in matters concerning the proof of the existence of a customary marriage.³¹² We therefore consider that there should be alternative ways than registration to proof the existence of an unregistered relationship.

d. *Should any party be able to register a relationship*

2.112 There was support for any party to the marriage being able to register a customary marriage,³¹³ which is what the RCMA requires; the same respondent however supports, since marriage is a joint venture where two parties are involved, that both parties must apply for the registration of their customary marriage, and the respondent opposes the promotion of individualism.³¹⁴ Another view is that either of the parties must be permitted to register the marriage,³¹⁵ males in general are reluctant to register their customary marriages; to prevent bogus marriages, one spouse needs to provide a lobolo letter, letter from the tribal authority, and confirmatory affidavits from two witnesses from the bride and

³⁰⁶ The Commission on Gender Equality

³⁰⁷ The LRC.

³⁰⁸ Prof Pieter Bakker.

³⁰⁹ The Women's Legal Centre.

³¹⁰ NHTL.

³¹¹ Himonga & Moore *Reform of customary marriage, divorce and succession in South Africa* 318.

³¹² Profs Moore and Himonga.

³¹³ The NHTL.

³¹⁴ The NHTL.

³¹⁵ Commission on Gender Equality.

groom's families, and before the marriage is registered, the DHA needs to contact the other spouse to establish whether he/she objects to the registration of the customary marriages, whether such objection is based on substantive grounds such as lack of knowledge of the person attempting to register the marriage, and ultimately, the other spouse needs to provide reasons why the marriage should not be registered in his or her absence. Another view is that both or all the parties to an intimate relationships should apply for registration, that registration will only play an evidentiary role to determine whether an intimate relationship exists and what the intention of the parties were at the time of registration.³¹⁶ Another comment was that this appears to be specific to customary marriages and they are, therefore, not in a position to comment.³¹⁷

2.113 Views were that it is necessary and important that both parties be present at the same time to register their marriage in order to avoid abuse and bogus marriages;³¹⁸ preferably both parties must register the marriage to ensure free and full consent, have capacity for marriage, and meet the minimum age of 18 years;³¹⁹ the parties must submit affidavits and identity documents as supporting documentation;³²⁰ in the event that a marriage officer solemnises and registers the marriage, as per current practice, they will verify the identities of the aspirant spouses and submit the register to the DHA but if this practice is not adopted, then both parties ought to register the marriage, and if there are compelling reasons why one party cannot register the marriage, then an affidavit may be deposed to by the absent party and submitted by the registering party.³²¹

2.114 It was also said that one of the spouses should also be able to register the marriage with proof of consent from spouse not present, to record the marriage as for a customary marriages;³²² and that the current framework of the RCMA is flawed by requiring couples and witnesses to attend the DHA for registration as women are not able to compel their spouses to register their marriages and struggle to convince family members who

³¹⁶ Prof Pieter Bakker.

³¹⁷ UUCSA.

³¹⁸ The CRL Commission; Mr Craig Allan; the Department of Communications; Muslim Lawyers for Social Justice; Darhul Ihsan Centre; the Jamiatul Ulama KZN; The Pretoria Society of Advocates; the Women's Cultural Group.

³¹⁹ The LRC.

³²⁰ The Pretoria Society of Advocates.

³²¹ The Free State Society of Advocates.

³²² The LRC.

witnessed the marriage to attend the DHA with them.³²³ Although we consider that there should be a duty on all the parties to a relationship to register their relationship, any party should be able to register the relationship.

e. Should parties be able to register a relationship at any time after its establishment

2.115 Responses were received that registration should be done within a reasonable time;³²⁴ that marriages should be registerable retrospectively, subject to proving the existence of a relationship of maybe two years;³²⁵ within 30 days after the marriage has been concluded to avoid future challenges;³²⁶ that customary marriages should be registered at the time of the conclusion of the marriage, and not any time after the conclusion of the marriage,³²⁷ since failure to register the marriage poses a problem when one party dies. Another view was that it would be preferable that marriages should be registered within three months of their conclusion, that this mitigates the risks of disputes arising at a later stage, that provision need to be made for marriages concluded and not registered prior to the enactment of the new Act.³²⁸ Another comment was registration of marriages should take place within 6 months, of the marriage being concluded, that there would be no benefit to register the marriage at any time before the end of the marriage, since it creates grey areas as one party may refuse to register the marriage in anticipation of the end of the marriage.³²⁹

2.116 Support was expressed for a proper inquiry to be conducted when customary marriages are registered after the death of one spouse, that it is trite that most customary marriages are registered after the death of one of the parties of the marriages, usually the man in the marriage and that this exposes women, particularly those in the rural areas to harm which extends beyond the dynamics of 'rural vs town' wife, that where there are family divisions, unscrupulous family members of the deceased might deny the existence of a customary

³²³ The Women's Legal Centre.

³²⁴ CRL Commission.

³²⁵ Mr Craig Allan.

³²⁶ Department of Communications.

³²⁷ The NHTL.

³²⁸ Free State Society of Advocates.

³²⁹ The Pretoria Society of Advocates.

marriage in order to inherit from the estate or they might present a wife of their own choosing in order to benefit from the estate.³³⁰

2.117 There was support for parties being able to register their marriages at any time³³¹ or prior to the dissolution of the marriage to ensure that women are able to access their rights to housing, land and property.³³² Another supporting view was for registration of marriages at any time after the conclusion of a marriage, during the subsistence of the marriage, prior to dissolution by divorce and after death;³³³ that no significant disadvantages were identified for allowing registration after the immediate conclusion of a marriage; conversely that the benefit for allowing for registration of marriages at any stage past the marriage's conclusion allows more opportunity for couples to register their marriage, and may allow a woman time to persuade her husband to register their marriage, thus better protecting her assets in the marriage.

2.118 Another view was that no value should be attached to the marriage per se but rather to the intimate relationship the parties formed through their marriage; that an intimate relationship between the parties can be registered at any time during the existence of the relationship by both parties; that circumstances change during the existence of any partnership, therefore the parties should be able to amend their intimate relationship agreement as the relationship develops and the needs of the parties change; that a disadvantage might be the protection of the interests of third parties, but that the commercial environment is usually quick in adapting to any policy change and will be able to adapt to any new development in family law.³³⁴ We consider there ought to be timeframes set for the registration of relationships, such as 12 months after the commencement of the proposed legislation or such further periods as the Minister may determine from time to time. We further consider, if for any reason a protected relationship is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter, must be able to apply to a registering officer to enquire into the existence of a protected relationship.

330 CALS.

331 The Women's Cultural Group; the Darhul Ihsan Centre.

332 Women's Legal Centre.

333 LRC.

334 Prof Pieter Bakker.

8. Registration proposals

a. *Registration of protected relationships*

- 2.119 We consider that the main way of ensuring registration of all relationships is to deprive the benefits of recognition from relationships which are not registered. So, for instance, the tax laws confer many benefits on married and life partners. If the marital home is left to the surviving spouse / partner, then there is no inheritance tax. It seems to us that the benefits could be withheld in such laws if the relationship is not registered but the duties remain regardless of whether the relationship is registered. We are not convinced that the duty contained in our proposals will otherwise ensure the registration of religious marriages and life partnerships. There does not seem to be any real carrot or stick in the Bills to achieve registration of relationships. We invite respondents to voice their views.
- 2.120 We propose if, in terms of option one, a protected relationship, or, in terms of option two, a marriage was not solemnised by a marriage officer, the parties to the relationship have the duty to ensure that their relationship is registered. All the parties to the protected relationship or marriage or life partnership must appear in person before a registering officer to confirm individually and in each other's presence on the prescribed form that they have entered into a protected relationship or marriage or life partnership. If all the parties cannot appear in each other's presence, either partner must apply for the registration of the protected relationship or marriage or life partnership to the registering officer.
- 2.121 We propose that the applicants must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence, in terms of option one, of the protected relationship, or in terms of option two, of a marriage or life partnership. We further propose that a protected relationship or marriage or life partnership entered into before the commencement of the proposed legislation, and which was not registered, must be registered within 12 months after the commencement of the legislation or within such a period as the Minister may from time to time prescribe by notice in the Gazette. All the parties to the unregistered protected relationship or marriage or life partnership must appear in person before a registering officer to confirm individually and in each other's presence on the prescribed form that they have entered into a protected relationship or marriage or life partnership. In this case too, if all the parties cannot appear in each other's presence, any party must apply for the registration of the protected relationship or marriage or life partnership to the registering officer. Furthermore, if for any reason a

protected relationship or marriage or life partnership is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter, may apply to the registering officer in the prescribed manner to enquire into the existence of the relationship.

- 2.122 We propose that the applicants must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence, in terms of option one, of the protected relationship, or, in terms of option two, the marriage or life partnership. A registering officer must, if satisfied that a protected relationship or marriage or life partnership has been entered into, register the relationship. The registering officer must record the identity of the parties; the date of the relationship; the consent of the parties; that there is no lawful impediment against the registration of the relationship; that the parties are not related on account of consanguinity, affinity or an adoptive relationship; the property system and whether it is in or out of community of property, and when out of community of property with or without accrual; a partnership agreement, if any; and any other prescribed particulars. Once the registering officer has registered the relationship, he or she must issue to the parties a certificate of registration.
- 2.123 A registering officer must, after he or she has registered a protected relationship in terms of option one, or a marriage or life partnership in terms of option two, transmit the relationship register and records to the official responsible for the population register in the area in question to include the particulars in the population register. If a registering officer is not satisfied that a valid protected relationship or marriage or life partnership was entered into by the parties, he or she must refuse to register the relationship.
- 2.124 We also propose that a court may, upon application made to that court and after investigation by the court, order the registration, in terms of option one, of any protected relationship, or, in terms of option two, any marriage or life partnership; or the cancellation or rectification of any registration of a protected relationship or marriage or life partnership. A certificate of registration of a protected relationship or marriage or life partnership issued in terms of the legislation constitutes prima facie proof of the existence of the protected relationship or marriage or life partnership and of the particulars contained in the certificate. Failure to register a protected relationship or marriage or life partnership does not lead to the invalidity of a protected relationship or marriage or life partnership.
- 2.125 We further propose that the legislation provides for the designation by the Minister of officers or employees in the public service as registering officers in terms of option one for

protected relationships, or in terms of option two for marriages or life partnerships. We also propose that a party to a protected relationship or marriage or life partnership who is a member of a traditional community or Khoi-San community may report his or her protected relationship or marriage or life partnership to his or her traditional council or Khoi-San council who must facilitate and assist the registration of that protected relationship or marriage or life partnership by the registering officer.

2.126.1 We propose the following clauses on registration of protected relationships:

8. Registration of protected relationships

- (1) If a protected relationship was solemnised by a marriage officer, he or she shall transmit the marriage register and all other prescribed records within one month to a registering officer in the prescribed form for registration of the relationship who must cause the particulars of the protected relationship concerned to be included in the population register.
- (2) If a protected relationship was not solemnised by a marriage officer, the parties to the relationship have the duty to ensure that their relationship is registered; provided that—
 - (a) all the parties to the protected relationship shall appear in person before a registering officer to confirm individually and in each other's presence on the prescribed form that they have entered into a protected relationship in terms of the Act;
 - (b) if all the parties to a protected relationship cannot appear in each other's presence, any of the parties must apply for the registration of the protected relationship to the registering officer in the prescribed form,

and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the protected relationship.
- (3) A protected relationship entered into before the commencement of this Act, and which is not registered, must be registered within 12 months after commencement of this Act or within such a period as the Minister may from time to time prescribe by notice in the Gazette; provided that –
 - (a) all the parties to the protected relationship shall appear in person before a registering officer to confirm individually and in each other's presence in the prescribed form that they have entered into a protected relationship in terms of the Act;
 - (b) if all the parties to the protected relationship cannot appear in each other's presence, any of the parties must apply for the registration of the protected relationship to the registering officer in the prescribed form; or
 - (c) if for any reason a protected relationship is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the

matter, may apply to the registering officer in the prescribed manner to enquire into the existence of the relationship,

and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the protected relationship.

- (4) A registering officer must, if satisfied that a protected relationship has been entered into, register the relationship by recording –
- (a) the identity of the parties;
 - (b) the date of the relationship;
 - (c) the consent of the parties;
 - (d) that there is no lawful impediment to the registration of the relationship;
 - (e) that the parties are not related on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);
 - (f) the property system which will apply to the relationship, and whether it is –
 - (i) in or out of community of property; or
 - (ii) out of community of property, with or without accrual;
 - (iii) the particulars of a partnership agreement, if any; and
 - (g) any other particulars prescribed; and
- issue to the parties a certificate of registration, bearing the prescribed particulars.
- (5) A registering officer must, after he or she has registered a protected relationship, transmit the relationship register and records concerned to the official in the public service with the delegated responsibility for the population register in the area in question.
- (6) If a registering officer is not satisfied that a valid protected relationship was entered into by the parties, he or she must refuse to register the relationship.
- (7) A court may, upon application made to that court and after investigation by the court, order—
- (a) the registration of any protected relationship ; or
 - (b) the cancellation or rectification of any registration of a protected relationship.
- (8) A certificate of registration of a protected relationship issued under this section or any other prior law providing for the registration of relationships constitutes prima facie proof of the existence of the protected relationship and of the particulars contained in the certificate.

- (9) Failure to register a protected relationship does not lead to the invalidity of the relationship.
- (10) The Minister, and any officer in the public service authorised thereto by him or her, may, in writing, designate any officer or employee in the public service to be, by virtue of his or her office and so long as he or she holds such office, as a registering officer for protected relationships, either generally or for any specified area and the date as from which it will have effect and specify any limitation to which it is subject.
- (11) A party to a protected relationship who is a member of a traditional community or Khoi-San community may report his or her protected relationship to his or her traditional council or Khoi-San council who must facilitate and assist in the registration of that protected relationship by the registering officer in the prescribed manner.

2.126.2 We propose the following clauses on registration of marriages and life partnerships:

8. Registration of marriages and life partnerships

- (1) If a relationship was not solemnised by a marriage officer, the parties to the marriage have the duty to ensure that their relationship is registered; provided that—
 - (a) all the parties to the relationship shall appear in person before a registering officer to confirm individually and in each other's presence on the prescribed form that they have entered into a relationship in terms of the Act;
 - (b) if all the parties to a relationship cannot appear in each other's presence, any of the parties must apply for the registration of the relationship to the registering officer in the prescribed form,

and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the relationship.
- (2) A marriage or life partnership entered into before the commencement of this Act, and which is not registered, must be registered within 12 months after commencement of this Act or within such a period as the Minister may from time to time prescribe by notice in the Gazette; provided that –
 - (a) all the parties to the marriage or life partnership shall appear in person before a registering officer to confirm individually and in each other's presence in the prescribed form that they have entered into a marriage or life partnership in terms of the Act;
 - (b) if all the parties to the marriage or life partnership cannot appear in each other's presence, any of the parties must apply for the registration of the marriage or life partnership to the registering officer in the prescribed form; or
 - (c) if for any reason a marriage or life partnership is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in

the matter, may apply to the registering officer in the prescribed manner to enquire into the existence of the relationship,

and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage or life partnership.

- (3) A registering officer must, if satisfied that a marriage or life partnership has been entered into, register the relationship by recording –
- (a) the identity of the parties;
 - (b) the date of the relationship;
 - (c) the consent of the parties;
 - (d) that there is no lawful impediment to the registration of the relationship;
 - (e) that the parties are not related on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);
 - (f) the property system which will apply to the relationship, and whether it is –
 - (i) in or out of community of property; or
 - (ii) out of community of property, with or without accrual;
 - (g) the particulars of a partnership agreement, if any; and
 - (h) any other particulars prescribed; and
- issue to the parties a certificate of registration, bearing the prescribed particulars.
- (4) A registering officer must, after he or she has registered a marriage or life partnership, transmit the relationship register and records concerned to the official in the public service with the delegated responsibility for the population register in the area in question.
- (5) If a registering officer is not satisfied that a valid marriage or life partnership was entered into by the parties, he or she must refuse to register the relationship.
- (6) A court may, upon application made to that court and after investigation by the court, order—
- (a) the registration of any marriage or life partnership; or
 - (b) the cancellation or rectification of any registration of a marriage or life partnership.
- (7) A certificate of registration of a marriage or life partnership issued under this section or any other prior law providing for the registration of relationships constitutes prima facie proof of the existence of the marriage or life partnership and of the particulars contained in the certificate.

- (8) Failure to register a marriage or life partnership does not lead to the invalidity of the relationship.
- (9) The Minister, and any officer in the public service authorised thereto by him or her, may, in writing, designate any officer or employee in the public service to be, by virtue of his or her office and so long as he or she holds such office, as a registering officer for marriages and life partnerships, either generally or for any specified area and the date as from which it will have effect and specify any limitation to which it is subject.
- (10) A party to a marriage or life partnership who is a member of a traditional community or Khoi-San community may report his or her marriage or life partnership to his or her traditional council or Khoi-San council who must facilitate and assist in the registration of that marriage or life partnership by the registering officer in the prescribed manner.

L. Unregistered life partnerships

1. Views of respondents

2.127 We requested respondents to comment on specific questions relating to what we called unmarried intimate partnerships in our Issue paper 35. We asked what constitutes an unmarried intimate partnership which would qualify partners to share in legal protections in terms of the envisaged statute. One view was that all the legal consequences should be covered.³³⁵ Another view was that domestic partnership or cohabitation partners, who regardless of gender, live together without being validly married to each other, do not have the rights and duties married couples have; irrespective of the duration of the relationship; should the cohabitants stay for a longer period together, say twelve months or more, then they should qualify to share in the legal protection; should only share property that they accumulated together during the partnership;³³⁶ whereas a relationship period of more than five years was also suggested.³³⁷

2.128 It was also said that registered unmarried partners would be treated like married partners; that unregistered partnerships would get no protection, except that a court may decide on application, or of its own accord, that a partnership may (or must) be registered retrospectively if a long relationship can be proven by either party; that any party to a marriage may choose to apply to court for retrospective registration without consent of other parties; a court may choose to apply for registration of a marriage without the consent of any party to the marriage such as where a spouse owes a duty of care to

³³⁵ CRL Commission.

³³⁶ The NHTL.

³³⁷ Department of Communications.

another spouse, or to a child or other dependant; all parties to the marriage shall be notified of the application and shall have the right to object to registration of the marriage in a proper hearing.³³⁸

2.129 It was further suggested that partners who have entered into a cohabitation agreement should be afforded legal protection, to the extent that their cohabitation agreement allows or justifies the existence of the extension of “spousal support” and the bones mores of society would determine is just and equitable.³³⁹ The following requirements must be met: 2 persons in the partnership should share a household and live together as if married to each other; must be freely and voluntarily entered between 2 persons, who are both majors and have the mental capacity to understand the commitment to the partnership; should be of a specific duration (for example should be at least 5 years); there must be a common intention to have entered into such partnership for life, to the exclusion of others; there must be a common intention to financially support each other and share resources and funds for the benefit of the partnership; must be registered and some form of publication of the parties intent to enter into the partnership.³⁴⁰

2.130 It was further suggested that the requirements should be a permanent, intimate relationship between two adults (aged 18 years) of the same or opposite sex who live together and have consented to do so.³⁴¹ Another comment was that any couple choosing to opt into a single marriage statute would qualify as partners to share in its legal protection or disadvantage.³⁴² It was said *Cawood v Road Accident Fund* provides guidance for the definitional aspects of an unmarried intimate partnership; these factors must not be a closed list or cumulative or mandatory for a domestic partnership to exist;³⁴³ and that the Domestic Partnerships Bill should be revived without forcing reluctant couples to define their bond in marital terms.³⁴⁴ The opposite view was that such partnerships should not be

338 Crain Allan.

339 The Free State Society of Advocates.

340 The Pretoria Society of Advocates.

341 The Women’s Legal Centre.

342 Women’s Cultural Group

343 LRC.

344 NHKA.

recognised;³⁴⁵ that if persons in unmarried partnership sought the protection and consequences that flow from a marriage they would elect to be married.³⁴⁶

- 2.131 A further comment was that the test for protection should not be that the relationship is marriage-like but rather that the relationship has an important social function in protecting the parties within such a relationship; there should be some form of inter-relationship between the parties for intimate and social and/or economic benefit for all the parties in the relationship and a social benefit to the larger community; an intimate relationship does not necessarily have to have a sexual nature, intimacy can take on many other forms; should polygyny be recognised it should be extended to intimate relationships, perhaps the number of intimate partners should not be limited in a statute regulating intimate relationships, it might be a partnership between two men and three women.³⁴⁷
- 2.132 There was support for unmarried intimate relationships being registered to afford the partners legal rights as registration would confer formal recognition, certain legal and spousal rights and the property contractual arrangements of marriage,³⁴⁸ and that that the envisaged statute should recognise a statutory duty of support between unmarried partners if they can prove interdependency as under section 37C of the Pension Funds Act.³⁴⁹ A view was that registration of unmarried intimate relationships most likely bestows formality or connotations (similar to that of a marriage) upon the parties which they elect not to enter into, there is merit in having cohabitation agreements reduced to writing and notarised.³⁵⁰ A respondent indicated that the majority of its members agreed that unmarried relationships must be registered to afford the partners legal rights, although other members disagreed and contended that registration should not be a requirement.³⁵¹
- 2.133 One view was the current registration options for intimate unmarried partnerships is costly and requires a notarised agreement to be registered at the Deeds Office by a lawyer; this process hinders people from benefitting from protection awarded to their relationships; the system does enable the registration of these relationships on the population register; an alternative would be for parties to register their relationship at DHA offices for keeping a

³⁴⁵ Jamiatul Ulama KZN.

³⁴⁶ Muslim Lawyers for Social Justice.

³⁴⁷ Prof Pieter Bakker.

³⁴⁸ Mr Craig Allan; Dr Abu-Bakr Asmal.

³⁴⁹ The Commission on Gender Equality.

³⁵⁰ The Free State Society of Advocates.

³⁵¹ The Pretoria Society of Advocates.

record of existing relationships; registration should not be a requirement for the recognition of these relationships or of the legal rights arising from these relationships, but registration should be encouraged; registration should simply be one way to prove the existence of the relationship.³⁵² The view that registration should merely serve as proof of the existence of an intimate relationship, that parties should be able to register their intimate relationship and relationship agreement and non-registration should not affect the rights of parties within an intimate relationship is shared by another respondent.³⁵³ A confirming view is that registration of domestic partnerships should not be a requirement for the validity of the relationship and the duties that flow from the relationship, since women are not able to negotiate marriage in the South African patriarchal society and registration would only become an additional burden to women to negotiate.³⁵⁴

2.134 There was also opposition to registration of intimate unmarried relationships.³⁵⁵ A view was that registration should not be required at all in unmarried intimate relationships as there is no reason to give recognition to unmarried intimate relationships as if they were marriages;³⁵⁶ that unmarried parties who live in marriage-like relationship who do not enter into a secular legal marriage elect not to have legal consequences flowing from their relationship;³⁵⁷ that the envisaged statute should only cover marriages and not unmarried partnerships as marriage;³⁵⁸ that the registration of unmarried relationships is not required as partners may conclude a cohabitation contract in which they spell out what must happen to their assets on the dissolution of the relationship;³⁵⁹ that where cohabiting parties do not register their intimate relationships they choose to remain as single individuals and be recognised as such for all administrative and legal purposes and likewise for any consequences of such a relationship.³⁶⁰

2.135 Issue paper 35 asked if unmarried intimate relationships should be registered, what information should be required and what the best registration process would be. A comment was the same information as for marriage, with similar registration at Home

³⁵² The LRC.

³⁵³ Prof Pieter Bakker; The Department of Communications.

³⁵⁴ Women's Legal Centre.

³⁵⁵ The CRL Commission; Muslim Lawyers for Social Justice.

³⁵⁶ Muslim Lawyers for Social Justice.

³⁵⁷ The Jamiatul Ulama KZN.

³⁵⁸ The Darhul Ihsan Centre.

³⁵⁹ The NHTL.

³⁶⁰ Dr Abu-Bakr Asmal.

Affairs, and two adult witnesses; where spouses are implacably opposed to the principle of marriage, then the certification of identification, presence, sound mind, consent etc. could be performed by any registered professional with a post-graduate academic qualification and valid statutory medical, legal, accounting or engineering society membership; and the prescribed forms providing for entering the detail about this certifying person.³⁶¹ Further comment were information about witnesses to prove that the partners have been living together for at least two years, both 18 years and over, and there must be intent to live together on a permanent basis;³⁶² the identity number and the marital status;³⁶³ details relating to the partners' identities, and approximate commencement of the cohabitation;³⁶⁴ the same detail as contained on the marriage certificates including the property regime that would apply during the subsistence of the relationship, with registration at the DHA.³⁶⁵

2.136 The one reason opposing registration was that it should not be a requirement as domestic partnerships need to be registered by notarial deed, very few people make use of this option because of a lack of knowledge that such an option is available, it is onerous, expensive and women cannot negotiate or compel their partners to enter into contractual relationships with them.³⁶⁶ There was opposition to the use of the term unmarried intimate relationship, saying that this implies that such a relationship is immediately measured against a marriage, that all relationships including marriages should be regarded as intimate relationships, marriage being but a form of intimate relationship and that the registration of an intimate relationship will require all the normal personal information including names, addresses, identity numbers etc, that the registration can further make provision for the nature of the intimate relationship, whether it is a marriage or a partnership; and the parties should further be able to register an intimate relationship contract, which will replace ANCs for intimate relationships that are in the form of a marriage.³⁶⁷

2.137 We asked if registration of unmarried intimate relationship merely serves as evidence of the relationship, what other ways should there be to prove the existence of such

³⁶¹ Mr Craig Allan.

³⁶² The NHTL.

³⁶³ The Department of Communications.

³⁶⁴ The Free State Society of Advocates.

³⁶⁵ The LRC.

³⁶⁶ Women's Legal Centre.

³⁶⁷ Prof Pieter Bakker.

relationships and what evidence should be considered as proof of such relationships. A comment was that in immigration cases DHA checks purported marriages to determine if they are 'fake' for immigration fraud, we can learn from them, and existence of an intimate relationship can be proven in many ways, such as correspondence history, social media, old photos, witnesses, shared memories, shared accounts, shared children, shared bed, shared tube of toothpaste, shared property, shared wounds; and a court or a family advocate shall be required and enabled to make such a decision.³⁶⁸ Other suggestions were the evidence of family, friends and associates, evidence of credit applied for jointly, or joint occupation of residential property;³⁶⁹ affidavits from family members and friends of the parties, and to consider Australian legislation in this respect;³⁷⁰ proof of any purchased item and the delivery of such item to the physical address of the party or any other sensitive private information;³⁷¹ there should not be a closed list of requirements to prove whether a relationship should be protected, as far as the relationship is to the benefit of the parties and the larger community such a relationship should be recognised, by surrounding circumstances including factors that clearly indicate the parties' intention, factors might include permanence of the relationship, support, common household, wedding rituals, payment of lobolo or any other objective fact that proves the subjective intention of the parties, the intention should not necessarily be determined at the time of entering the relationship but also during the existence thereof, a temporary agreement can evolve into a more permanent relationship or vice versa.³⁷²

- 2.138 It was also said that the criteria were dealt with by the SALRC as part of its research on domestic partnerships, that the Draft Domestic Partnership Bill provided criteria that can be used to evaluate the existence of a domestic partnership, and although this is not a closed list, it does provide guidance for consideration of what is just and equitable.³⁷³ Another view was that current alternatives to proving relationships should take into account the difficulties to prove the existence of customary marriages, that the requirement should not be too onerous and must take into account the circumstances of each person seeking to have their marriage registered.³⁷⁴

³⁶⁸ Mr Craig Allan.

³⁶⁹ Free State Society of Advocates.

³⁷⁰ The Pretoria Society of Advocates.

³⁷¹ The Department of Communications.

³⁷² Prof Pieter Bakker.

³⁷³ The Women's Legal Centre.

³⁷⁴ The LRC.

2. Recommendation in *Domestic Partnerships* report

- 2.139 In our report on *Domestic Partnerships* the SALRC proposed factors to enable a court to determine whether the parties concerned were in an unregistered partnership including such of the following matters as may be relevant in a particular case:³⁷⁵ the duration and nature of the relationship; the nature and extent of common residence; the degree of financial dependence or interdependence, and any arrangements for financial support, between the unregistered partners; the ownership, use and acquisition of property; the degree of mutual commitment to a shared life; the care and support of children of the domestic partnership; the performance of household duties; the reputation and public aspects of the relationship; and the relationship status of the unregistered partners with third parties. It was also recommended that a court may not make an order regarding a relationship of a person who, at the time of that relationship, was also in a civil marriage or registered partnership with a third party.
- 2.140 We further recommended that a finding in respect of any of the matters mentioned, or in respect of any combination of them, is not essential before a court may make an order, and regard may be had to further matters and weight be attached to such matters as may seem appropriate in the circumstances of the case. We also recommended that a court may not make an order regarding a relationship of person who, at the time of that relationship, was also in a civil marriage or registered partnership with a third party.

3. Conclusion

- 2.141 We agree that provision ought to be made for life partnerships in the proposed legislation and that it should be possible to prove the existence of an unregistered life partnership. We propose that life partnerships be defined as follows, as option one in the definition of protected relationship, and as option two in the definition of marriage and life partnership: any life partnership where the parties cohabit and have assumed permanent responsibility for supporting each other.

³⁷⁵ Clause 26 and see par 7.4.16 https://www.justice.gov.za/salrc/reports/r_prj118_2006march.pdf.

M. DHA compelling married transgendered persons to divorce partner before changes on population register are effected to reflect partnership status

1. Background

2.142 Issue Paper 35 asked are there any other issues regarding registration of marriages respondents wish to highlight which need further consideration. Respondents noted that the issue paper did not deal with the registration of marriages of transgender or intersex persons who alter their gender legally but who are in existing marriages.³⁷⁶ It was said that one of the challenges that trans and gender diverse persons still struggle with is the manner in which marriage registers are kept and how this intersects with the alteration of gender markers in identification documents for trans and gender diverse and intersex persons; that the DHA requires transgender persons who are married in terms of the Marriages Act 25 of 1961 to divorce their partners to enable them way to legally alter their sex description; and even though the DHA accepted that marital status was not a necessary consideration for an application to alter sex description, the DHA considers that the sex description of a person married in terms of the Marriage Act cannot be altered as contemplated in the Alternation of Sex Description and Sex Status Act.³⁷⁷

2.143 Respondents noted that in *KOS vs Minister of Home Affairs* the court held that the Alternation of Sex Description and Sex Status Act obligates the DHA to consider applications submitted to alter a sex description by any person, irrespective of the person's marital status; that the Court ordered the Department to reconsider the applications of the three transgender spouses within 30 days of the judgment and to reinstate the deleted marriage; that it is unclear whether the department effected the change in the system relating to how marriage is recorded in the system – essentially ensuring that the registration of marriages does not continue to capture husband and wife but rather spouse 1 and spouse 2 for all marriages; and further ensuring that the capturing system also does not restrict recording of altered gender markers because of the gender markers in the identity number.

³⁷⁶ Women's Legal Centre; The LRC.

³⁷⁷ The LRC.

- 2.144 In *KOS v Minister of Home Affairs*³⁷⁸ the Western Cape High Court held that the DHA 'has not been absolutely consistent, however, about its inability to register an alteration of sex in terms of the Alteration Act when the applicant has been party to a subsisting marriage in terms of the Marriage Act',³⁷⁹ that '[t]he essence of the respondents' contentions is that the first to sixth applicants are the victims of a legislative conundrum' and the DHA 'accept that on their approach the resultant situation would impel a finding that some (unspecified) law or conduct involved was inconsistent with the Constitution'.³⁸⁰
- 2.145 Respondents noted challenges transgendered persons married in terms of the Marriage Act face and being required to obtain a divorce before their new identity is recognised. We note the recent legal developments in Australia where most of the states previously required a married person to obtain a divorce before a new gender identity was recognised.³⁸¹ The introduction of same-sex marriages resulted in the federal government adopting the position that the divorce requirement should no longer apply within Australia. The views of the United Nations Human Rights Committee in *G v Australia* are also instructive. It confirms the discriminatory nature of a divorce requirement determining

³⁷⁸ *KOS and Others v Minister of Home Affairs and Others* (2298/2017) [2017] ZAWCHC 90; [2017] 4 All SA 468 (WCC); 2017 (6) SA 588 (WCC) (6 September 2017) <http://www.saflii.org/za/cases/ZAWCHC/2017/90.html> ('*KOS v Minister of Home Affairs*').

³⁷⁹ *KOS v Minister of Home Affairs* par [29].

³⁸⁰ *KOS v Minister of Home Affairs* par [61]. See also Sloth-Nielsen Julia "KOS v Minister of Home Affairs and its relevance to the law of marriage in South Africa – case note" (2019) Vol 35 No 3 *South African Journal on Human Rights*, , p. 298 - 310 at 309 to 310 <https://journals.co.za/content/journal/10520/EJC-192d7cee7b> accessed 4 Nov 2020 who remarks, among others, as follows:

It is arguable that due to the past discrimination against same-sex couples, their exclusion from marriage under the Marriage Act – unless they undergo an alteration of gender – might render the overall scheme constitutionally suspect. This could be reinforced by the fact that different-sex couples have a choice of legal regimes, and by the finding in *KOS* that an alteration of sex of one party to a marriage does not result in any change to the marriage status of that couple.

However, it must be borne in mind that Binns Ward AJ concluded that the two legislative enactments do not create parallel marriage systems (but merely different routes to solemnisation). This finding may have a bearing on the question (were it to arise) as to the constitutionality of the separate marriage regimes, since it is, in essence, a finding that there are only different solemnisation paths established by the Marriage Act and the Civil Union Act. The *KOS* decision could, therefore, potentially obstruct any constitutional challenge to the underinclusivity of the Marriage Act to samesex couples.

However, this may in time become moot, as the recent SALRC issue paper outlining the possibility of a unified, harmonised or single marriage statute would appear to indicate. This statute would potentially cover all marriage forms, including religious and customary marriages, civil unions and marriages currently solemnised under the Marriage Act. However, a long path must still be walked before that becomes a reality. (Footnotes omitted.)

³⁸¹ See Annexure D item H: is a divorce requirement imposed on transgendered persons in other jurisdictions to recognise relationship status?

recognition of the new gender identity. The South African *KOS* case also confirmed in South Africa the discriminatory requirement of a divorce for recognising the new gender identity for all purposes.

2. Proposal

2.146 We agree that it should not matter under which legislation parties have married in the past, their relationships ought to be recognised and protected for all legal purposes. Therefore, if a person who complied with all the requirements of the Alteration of Sex Description and Sex Status Act that person ought not to be compelled to divorce the partner to overcome population register system challenges. We consider the administrative challenges marriage officers face under the different regulatory marriage frameworks and documentation as highlighted by respondents can be addressed by the DHA promoting training of its marriage officers to disseminate information about the marriage regulatory framework. These concerns highlight the need for the adoption of a less complicated and fragmented marriage framework.

2.147 We consider that there is no need for a legislative provision to clarify the relationship status of a person who was granted an order for the alteration of his or sex description as referred to in the Alteration of Sex Description and Sex Status Act 49 of 2003.³⁸² The relationship status of the parties prior to such alteration order being granted, must be recognised as a protected relationship in terms of the proposed legislation. If a person was granted an order for the alteration of his or sex description then the required changes need to be effected on the population register, including the applicable relationship status of the parties in the relationship without imposing conditions which do not exist in terms of the Alteration of Sex Description and Sex Status Act.

³⁸²

See *KOS v Minister of Home Affairs*:

[85]... Apart from its provision of a gender neutral marriage formula, there are no pertinent differences between the prescribed formalities in respect of the solemnisation of marriages under the Civil Union Act and those under the Marriage Act. Unlike the Marriage Act, the Civil Union Act deals with the legal consequences of the unions that are solemnised under its auspices. As mentioned, it does so by providing that the legal consequences are the same '*with such changes as may be required by the context*' as those of a marriage solemnised in terms of the Marriage Act. As discussed, both acts treat marriage as 'a union of *two persons*, to the exclusion, while it lasts, of all others'. There is thus no parallel system of civil marriage, as contended by the respondents; there is only a parallel system for the solemnisation of marriages. The notion propounded by the respondents that there is scope for a 'conversion' from one type of duly solemnised marriage to another has accordingly been advanced on a false premise. ...

N. Sham or bogus marriages

1. Background

2.148 We were requested by the DHA to also consider sham marriages as these marriages proved to pose a particular challenge in South Africa.³⁸³ Already in 2004 the media reported about the existence of large numbers of fake or sham marriages in South Africa.³⁸⁴ In some instances brides learnt that they were unknowingly already married when they attempted to register a marriage or when applying for the issue of identity documents.³⁸⁵ We believe that sham or bogus relationships are also a possibility and that therefore this paper need to consider the broader issue of sham and bogus relationships and not be confined to the question posed in the issue paper of bogus marriages.

2.149 At the Ministerial dialogues in 2019 with stakeholders the Minister of Home Affairs also addressed the issue of fake or sham marriages in South remarking as follows on 26 September 2019 at Ekurhuleni about the statistics involved:³⁸⁶

The second challenge I was confronted with shortly after I assumed office as Minister of Home Affairs in May was the scourge of fake marriages. I became aware of this challenge when the Wits Law Clinic threatened a class action for women who were married to people they had never met. I decided to approach the Wits Law Clinic to see how we can help their clients without prejudicing the legal recourse they wanted to pursue. In preparing for a meeting with them, I was informed that the Department receives around 2 000 queries of fake marriages a year. In the period between 01 April 2018 and 31 May 2019, the Department came across 2132 cases of fraudulent marriages. Of

³⁸³ See the Department of Home Affairs *2004 – 2005 Annual Report* for information about measures taken by the Department to address marriages fraudulently concluded see http://www.dha.gov.za/files/Annual%20Reports/Annual_Report_2004-2005.pdf accessed 14 Aug 2020.

³⁸⁴ News 24 “600 fake marriages: Priest held” *News 24 Archives* 7 September 2004 <https://www.news24.com/News24/600-fake-marriages-Priest-held-20040907> accessed 14 Aug 2020.

³⁸⁵ News 24 “Find out if you're married” *News 24 Archives* 19 August 2004 <http://www.news24.com/SouthAfrica/News/Find-out-if-youre-married-20040819> accessed 14 Aug 2020. See also BBC News “SA women warned on fake weddings” *BBC News* 26 July 2004 <http://news.bbc.co.uk/2/hi/africa/3927491.stm> accessed 14 Aug 2020; Political Bureau ‘7 000 locals in fraudulent marriages’ *IOL* 22 July 2010 <http://www.iol.co.za/news/politics/7-000-locals-in-fraudulent-marriages-670475> accessed 14 Aug 2020.

³⁸⁶ DHA “Keynote Address by Home Affairs Minister Dr Aaron Motsoaledi at the marriage policy dialogue with religious leaders in Ekurhuleni 26 Sept 2019; Sibeko Ntombikayise “New single marriage Act proposed” 2 Oct 2019 <https://boksburgadvertiser.co.za/350197/new-single-marriage-act-proposed>; SA Government “Minister Aaron Motsoaledi: Marriage Policy Dialogue with Traditional Leaders” 11 Oct 2019 <https://www.gov.za/speeches/marriage-policy-dialogue-traditional-11-oct-2019-0000>; Thando Kubheka “Motsoaledi: We Are Taking Steps To Improve SA Marriage Laws” 30 Aug 2019 <https://ewn.co.za/2019/08/30/motsoaledi-we-are-taking-steps-to-improve-sa-marriage-laws>; see also Fokazi Sipokazi “South Africa: Marriage fraudsters could have their citizenship revoked” 15 Feb 2020 *Sowetan* <http://citizenshiprightsafrika.org/south-africa-marriage-fraudsters-could-have-their-citizenship-revoked/> accessed 14 Aug 2020.

these 1160 were found to be indeed fake and were annulled by the Department. But 646 were found to be legitimate, even though undesirable, meaning that they can only be annulled through a court process.

These 646 cases are what we refer to as Marriages of Convenience. These occur when people marry each other for convenience. This happens between a South African and a non-South African. The South African, mostly a woman, is rewarded with huge sums of money and the non-South African gain easy citizenship through this marriage.

The marriages that we found to be truly fraudulent were 1160. Guess what, some of these happen because of fraud syndicates consisting of Home Affairs officials and some marriage officers outside Home Affairs. Such marriage officers knowingly submit fictitious marriages for registration and working with Home Affairs officials, such marriages get registered on the National Population Register. This practice used to be common mostly before 2013. Since 2013, each step in the marriage registration process is authenticated by the fingerprints of a Home Affairs officials. This enables us to pinpoint exactly which official was engaged in malfeasance.

Other ways in which these fraudulent marriages take place is through identity theft where syndicates posed as employment agencies who ask people to hand over all their documentation with a promise of securing them a job.

We also have instances where there is duplicated identity where somebody is impersonating another.

- 2.150 Marriages of convenience have also been the subject of consideration by courts in South Africa. In *Maseko v Maseko*³⁸⁷ the parties reached agreement to marry in order to conceal property from creditors. The Court noted that [i]t has been held on a number of occasions that a marriage of convenience is a valid marriage and a Court will not set it aside on that ground. In *Martens v Martens*³⁸⁸ the Court the parties argued that they did not intend that there should be a marriage, with none of the consequences of marriage, therefore they did not really intend to be married. The Court found that the parties ‘got married because they thought that they could easily be divorced afterwards’. The Court held that ‘they fully realised that there would be a binding marriage needing divorce to dissolve it’.³⁸⁹
- 2.151 The question is how one should distinguish between marriages of convenience, genuine marriages and sham or bogus marriages. We note in Annexure D that the European Union in the *Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals* provides a useful definition distinguishing between genuine and sham marriages.³⁹⁰

³⁸⁷ [1992] 3 All SA 207 (W) at 213.

³⁸⁸ [1952] 2 All SA 190 (W) at 191.

³⁸⁹ Page 192.

³⁹⁰ ‘Genuine marriages are characterised by the **intention of the married couple to create together a durable family unit** as a married couple **and to lead an authentic marital life**. Marriages of convenience are characterised by the lack of such an intention.’ See [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0284 &from=IT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0284&from=IT) page 11.

- 2.152 Issue Paper 35 requested respondents to suggest suggestions how to best prevent bogus marriages and to deal with them after they have been concluded. We are of the view that the question not only addresses sham marriages but all bogus, sham or fraudulent relationships and that the responses to the question needs to be considered. One view was by reporting of marriage.³⁹¹ Another view was there is merit in considering granting the DHA the ability to de-register a sham or bogus marriage, without the necessity of a court order, as the marriage is void ab initio, and no change of status in fact occurred.³⁹² Another respondent also favoured the DHA deregistering the marriage where a party reports a fraudulent marriage which was fraudulently registered on the national population register within the department itself then the DHA must put in place standard operating procedures to deregister such a marriage.³⁹³ It was suggested that the failure to comply with the requirements of marriage, such as a marriage without the consent or knowledge of one of the parties, renders the marriage void ab initio, that such marriages may with the submission of an affidavit setting out the facts, be set aside and deregistered by the DHA; and that it is in the interests of justice and fairness to fast-track and simplify this process.³⁹⁴ It was also said that bogus marriages are as a result of corruption and every effort should be made to root out corruption through robust legal procedures.³⁹⁵ It was also suggested that legislation should be adopted for this purpose and heavy sentences imposed.³⁹⁶
- 2.153 Another view was that a bogus marriage is not valid; a marriage is valid when there is agreement between the two families and all the necessary or required processes as the custom requires have been performed, and that after the lobolo negotiations have been concluded the involved parties are to register their marriage for it to be valid.³⁹⁷ It was said that each couple must be required to register their marriage under the Single Marriage Act.³⁹⁸ It was further recommended that the following be considered: contractual arrangements for all marriages; a proper registration process; to provide adequate

³⁹¹ The CRL Commission.

³⁹² The Free State Society of Advocates. The Pretoria Society of Advocates referred to their reply to registration of marriages and unmarried partnerships, notice of marriage, the issue of marriage licenses and both parties being present at the time of the conclusion of the marriage.

³⁹³ The Women's Legal Centre.

³⁹⁴ The HDKA.

³⁹⁵ Darul Ihsan.

³⁹⁶ The Department of Communications.

³⁹⁷ The Office Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs.

³⁹⁸ The Women's Cultural Group.

incentives to buy into the process but not punitive as this will defeat the purpose; that bogus marriages arise in the majority of cases from inadequate administration and requires an administrative oversight by the marriage officers.³⁹⁹ Another response was that bogus or sham marriages would never be eliminated completely; to mitigate this problem enforce the process of registration together with proper scrutiny of the required documents such as a pre-marital contract; a mediation and arbitration process may also alleviate this problem as those caught in the trap of these marriages will be less afraid to take their marriages to be resolved in an extra judicial process than in the courts; and the basis of any action against these kinds of marriages is the criminal and not civil law and ought not be dealt with in the envisaged legislation.⁴⁰⁰ A response was that this is a criminal matter and beyond their expertise.⁴⁰¹ It was also said these are valid concerns, but given the very personal nature of marriage and the meaning of marriage in the modern context, it is difficult to police.⁴⁰²

2.154 A further view was that only intimate relationships that serve a benefit to the larger community will be recognised; that a contribution to the larger community might include the fact that the parties care for each other and therefore takes that responsibility away from the state and other community members or the raising of children in a healthy family relationship etc; that a bogus marriage will not comply with the requirement that the relationship should contribute to the larger community, and therefore should not receive protection under the Act recognising intimate relationships.⁴⁰³

2. Proposal

2.155 We consider the continued involvement of marriage officers who will verify the identification documentation of prospective partners and who will conduct interviews with the parties can play a role in determining whether the relationship is bogus or genuine. We further consider registering officers of the DHA will also be able to scrutinise and verify the particulars of the parties when they consider applications for the registration of relationships at DHA registering offices. We agree with the comment received that failure to comply with the requirements of a relationship, such as the absence of consent or knowledge of one of the parties, renders the relationship void *ab initio* and that such

³⁹⁹ The Sunni Ulama Council Gauteng.

⁴⁰⁰ The Islamic Forum Azaadville.

⁴⁰¹ UUCSA.

⁴⁰² The Jamiatul Ulama KZN.

⁴⁰³ Prof Pieter Bakker.

relationships may with the submission of an affidavit setting out the facts, be set aside by the DHA. We also agree that on the strength of the affidavit, the department ought to deregister such a relationship from the population register, thereby restore the previous status, and that it is in the interests of justice and fairness to fast-track and simplify this process. We believe the facts of the case will also determine whether the parties or one of them played a part in establishing a fake relationship with or without the knowledge of the other party and whether it was a bogus relationship or one of convenience to which both parties apparently consented.⁴⁰⁴ If it is established that a relationship was established and registered then the parties will have to follow the formal route of dissolving the relationship by approaching a court to make the required order.

O. Introduction of pre-marital counselling or education

1. Background

2.156 Issue Paper 35 invited respondents to provide suggestions not already covered by the issues raised in issue paper 35 in so far as they may contribute towards the investigation. Some respondents suggested in their comment that provision ought to be made in the envisaged legislation for pre-marital counselling or education.

2.157 We note in Annexure D that pre-marital counselling or education is also addressed in other jurisdictions.

2. Proposal

2.158 We consider that we are not able to attempt to answer the question what the benefits would be for introducing a government supported relationship counselling and education program in South Africa. The question arises whether this function ought to be performed by non-governmental organisations and institutions or whether it should be a government supported programme. We request respondents to share their views with us. This issue could also in our view be addressed in the SALRC's investigation into family arbitration.

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See also the decision of the Supreme Court of Ireland who held on 24 July 2020 in *M.K.F.S. (Pakistan) and A.F. and N.F.J. v the Minister for Justice and Equality and Another* Supreme Court Appeal No. 2018/69 [https://www.courts.ie/acc/alfresco/62731429-025f-485f-95c7-8ceb67c95d52/2020_IESC_48\(Unapproved\).pdf/pdf](https://www.courts.ie/acc/alfresco/62731429-025f-485f-95c7-8ceb67c95d52/2020_IESC_48(Unapproved).pdf/pdf) accessed 16 Nov 2020.

110. ... the learned High Court judge erred in concluding that because it is a marriage of convenience, no family/private rights arising from the underlying relationship between the parties arise to be considered in the deportation context ...

P. Legal consequences of protected relationships

2.159 The legal consequences of relationships are dealt with in legislation such as the Divorce Act, the Maintenance Act, the Maintenance of Surviving Spouses Act, the Matrimonial Property Act, the Intestate Succession Act, Estate Duty Act and others listed in Schedule 1 to the Protected Relationships Bill. We consider that the legislation should provide for the legal consequences and the dissolution of protected legal relationships in option one and in option two of marriages and life partnerships.

2.159.1 We propose the following clause on the legal consequences and dissolution of protected relationships:

12. Legal consequences and dissolution of protected relationships

Whenever legislation or the common law attaches consequences to protected relationships, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of this Act or the Marriage Act, 1961, the Civil Union Act, 2006 or the Recognition of Customary Marriages Act, 1998.

1.159.2 We propose the following clause on the legal consequences and dissolution of marriages and life partnerships:

12. Legal consequences and dissolution of marriages and life partnerships

Whenever legislation or the common law attaches consequences to marriages or life partnerships, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of this Act or the Marriage Act, 1961, the Civil Union Act, 2006 or the Recognition of Customary Marriages Act, 1998.

Q. Have we covered everything in this discussion paper

2.160 Respondents are invited to provide suggestions on issues not already covered in this discussion paper insofar as they may contribute towards this investigation.

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Annexure B1: Option 1: Draft Bill: Protected Relationships

Bill

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments

_____ Words underlined with a solid line indicate insertions in existing enactments

BILL

To rationalise the marriage laws pertaining to various types of relationships; to provide for the recognition of protected relationships entered into by parties regardless of the religious, cultural or any other beliefs of the parties, or the manner in which the relationship was entered into; to provide for the requirements for entering into a protected relationship; to provide for registration of protected relationships; to provide for the legal consequences of entering into protected relationships; and to provide for matters incidental thereto.

Preamble

WHEREAS section 9(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone is equal before the law and has the right to equal protection and benefit of the law;

AND WHEREAS section 9(2) of the Constitution prescribes legislative measures to achieve equality for previously disadvantaged persons or categories of persons;

AND WHEREAS section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;

AND WHEREAS section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;

AND WHEREAS section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion;

AND WHEREAS section 15(3)(a) of the Constitution provides the opportunity for legislative recognition of marriages concluded under any tradition, or a system of religious, personal or family law consistent with section 15 and other provisions of the Constitution;

AND WHEREAS the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;

AND WHEREAS section 7(2) of the Constitution places a responsibility on the state to respect, protect, promote and fulfil the rights in the Bill of Rights;

AND NOTING that existing family law has developed in a fragmented manner by way of the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) and the Civil Union Act, 2006 (Act No. 17 of 2006), and that legislative benefits

should be extended to all relationships worthy of protection, to ensure a fair outcome to the parties to a protected relationship whenever disputes arise;

AND NOTING that the Supreme Court of Appeal ordered the state to amend existing legislation or to enact legislation within 24 months to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition;

AND NOTING that South Africa has international obligations to take appropriate and reasonable measures to eradicate discrimination against women in relationships;

AND NOTING that South Africa has international obligations to take appropriate and reasonable measures to prevent child marriages;

BE IT ENACTED by the **PARLIAMENT** of the Republic of South Africa as follows:—

Chapter 1

1. Definitions

In this Act unless the context otherwise indicates –

- (i) 'birth certificate' means the birth certificate contemplated in Births and Deaths Registration Act, 1992 (Act No. 51 of 1992);
- (ii) 'civil union' means a civil union entered into in terms of the Civil Union Act, 2006 (Act No. 17 of 2006) before the commencement of this Act;
- (iii) 'court' means a High Court or a court for a regional division contemplated in section 29 (1B) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944);
- (iv) 'customary law' means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples;
- (v) 'customary marriage' means a marriage entered into in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) before the commencement of this Act;
- (vi) 'High Court' means a High Court of South Africa referred to in section 6(1) of the Superior Courts Act, 2013 (Act No. 10 of 2013);
- (vii) 'Director-General' means the Director-General of the Department of Home Affairs;
- (viii) 'identity card or identity document' means the identity card referred to in section 14 of the Identity Act, 1997 (Act No. 68 of 1997);
- (ix) 'identity number' means the identity number referred to in section 7 of the Identity Act, 1997 (Act No. 68 of 1997);
- (x) 'marriage officer' means –
 - (a) any officer or employee in the public service;

- (b) any religious official of, or any person holding a responsible position in, any religious denomination or organisation;
- (c) any person holding a responsible position in a non-religious organisation that engages in solemnising marriages; or
- (d) any traditional or Khoi-San council, or any person duly authorised by the council;

who has been designated by the Minister as a marriage officer in terms of section 10 of this Act;

- (xi) 'Minister' means the minister responsible for the administration of home affairs;
- (xii) 'monogamous protected relationship' means the relationship of two people regardless of their sex, sexual orientation, or gender identity, to the exclusion of all others, unless dissolved by divorce or death of one or both parties;
- (xiii) old order marriage legislation means the Black Administration Act, 1927 (Act No. 38 of 1927), the Transkei Marriage Act, 1979 (Act No. 21 of 1979), the Bophuthatswana Marriage Act, 1980 (Act No. 16 of 1980), the KwaZulu Act on the Code of Zulu Law, 1985 (Act No. 16 of 1985), the Natal Code of Zulu Law Proclamation R151 of 1987 and the Ciskei Marriage Act, 1988 (Act No. 24 of 1988);
- (xiv) 'polygynous or potentially polygynous protected relationship' means a relationship in which a male party may, during the subsistence of the relationship, be in a relationship with a female person or female persons;
- (xiv) 'population register' means the population register referred to in section 5 of the Identity Act, 1997 (Act No. 68 of 1997);
- (xv) 'prescribed' means prescribed by regulation;
- (xvi) 'protected relationship' means —
 - (aa) any subsisting marriage concluded in terms of the Marriage Act, 1961 (Act No. 25 of 1961), old order marriage legislation or any other prior legislation before the commencement of this Act; any subsisting union or marriage concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006) before the commencement of this Act; and any subsisting customary marriage concluded in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);
 - (bb) any subsisting monogamous or polygynous marriage or relationship concluded or entered into in terms of the tenets of any religion or culture before or after the commencement of this Act;
 - (cc) any life partnership, where the parties cohabit and have assumed permanent responsibility for supporting each other.
- (xvii) 'registering officer' means any person appointed by the Minister or an officer acting under the Minister's written authorization, as registering officer for purposes of registering protected relationships in terms of section 8 of this Act;
- (xviii) 'traditional council or Khoi-San Council' means a Council established in terms of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019); and

(xix) 'this Act' includes the regulations made in terms of this Act.

2. Objects of this Act

The objects of this Act are to—

- (1) rationalise the marriage laws pertaining to all various types of relationships;
- (2) prescribe the validity requirements of such relationships;
- (3) provide for the registration of protected relationships; and
- (4) provide formal recognition of protected relationships to facilitate and enable enforcement of their rights.

3. Application of the Act

- (1) Whenever legislation or the common law attaches consequences to protected relationships, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of this Act or the Marriage Act, 1961, (Act No. 25 of 1961), the Civil Union Act, 2006 (Act No. 17 of 2006) or the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998).
- (2) The parties to a protected relationship cannot exclude the application of this Act to their relationship.

4. Validity requirements for protected relationships

- (1) A protected relationship entered into after the commencement of this Act is valid if the following requirements have been met –
 - (a) all the parties must be at least 18 years or older on the date of entering into the protected relationship;
 - (b) all the parties must give free and informed consent to enter into a protected relationship; and
 - (c) all the parties must have capacity to enter into a protected relationship.
- (2) A protected relationship entered into after commencement of this Act that does not comply with the requirements of this section will be null and void.
- (3) Nothing in this section shall render invalid any otherwise valid protected relationship entered into prior to the commencement of this Act.

5. Minimum age requirement

- (1) No person or institution can provide consent for any person under the age of 18 years to enter into a protected relationship.
- (2) The age of any of the parties must be determined by means of a birth certificate, an identity card or document, or if any of the parties is not in possession of a birth certificate, an identity card or document, by the prescribed affidavit of his or her parents, or parent if he or she has only one parent, or a guardian if he or she has no parents.

- (3) If there is uncertainty about the age of majority of any of the parties referred to in subsection (1), his or her age must be established in terms of section 48 of the Children's Act, 2005 (Act No. 38 of 2005) by the presiding officer of a children's court who shall issue the prescribed certificate as proof of the estimated age of that party.
- (4) If a court dissolves a relationship to which a minor is a party on the ground of want of compliance with this section, the court may make such order with regard to the division of the relationship property of the parties to the protected relationship as it may deem just.

6. Consent requirement

- (1) If a protected relationship is solemnised by a marriage officer, the consent of the parties shall be obtained by the marriage officer in the presence of two competent witnesses.
- (2) If a party to a protected relationship is represented by a proxy, if the customs of the parties require a proxy to enter into a protected relationship, the marriage officer or registering officer must ascertain from the proxy whether the parties to the prospective protected relationship have consented to the protected relationship, and the marriage officer shall indicate such consent in the prescribed manner in the prescribed marriage register.
- (3) If the protected relationship was not solemnised by a marriage officer, and if it is registered by a registering officer, he or she must determine if all the parties consented to the relationship in the prescribed manner.
- (4) The male party to a subsisting polygynous protected relationship who wishes to enter into a further protected relationship must notify all the female parties to their subsisting relationship in the prescribed form of his intention to enter into a further relationship to obtain the consent of all the female parties who must indicate their consent in the prescribed form, before he may enter into such a further relationship, provided that if he enters into a further relationship without the consent of all the female parties to the subsisting polygynous relationship, that further relationship entered into will be void; and provided further that the registering officer must enquire into the existence of such consent having been sought and granted when the further relationship is registered.
- (5) In an application on the ground of want of compliance with this section, a court may make such order with regard to the division of the relationship property of the parties to the protected relationship as it may deem just.

7. Capacity requirement

Every person in a protected relationship must have the capacity to understand the legal consequences of the relationship at the time it was entered into.

8. Registration of protected relationships

- (1) If a protected relationship was not solemnised by a marriage officer, the parties to the relationship have the duty to ensure that their relationship is registered; provided that—
 - (a) all the parties to the protected relationship shall appear in person before a registering officer to confirm individually and in each other's presence on the prescribed form that they have entered into a protected relationship in terms of the Act;

- (b) if all the parties to a protected relationship cannot appear in each other's presence, any of the parties must apply for the registration of the protected relationship to the registering officer in the prescribed form,

and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the protected relationship.

- (2) A protected relationship entered into before the commencement of this Act, and which is not registered, must be registered within 12 months after commencement of this Act or within such a period as the Minister may from time to time prescribe by notice in the Gazette; provided that –

- (a) all the parties to the protected relationship shall appear in person before a registering officer to confirm individually and in each other's presence in the prescribed form that they have entered into a protected relationship in terms of the Act;
- (b) if all the parties to the protected relationship cannot appear in each other's presence, any of the parties must apply for the registration of the protected relationship to the registering officer in the prescribed form; or
- (c) if for any reason a protected relationship is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter, may apply to the registering officer in the prescribed manner to enquire into the existence of the relationship,

and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the protected relationship.

- (3) A registering officer must, if satisfied that a protected relationship has been entered into, register the relationship by recording –

- (a) the identity of the parties;
- (b) the date of the relationship;
- (c) the consent of the parties;
- (d) that there is no lawful impediment to the registration of the relationship;
- (e) that the parties are not related on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);
- (f) the property system which will apply to the relationship, and whether it is –
 - (i) in or out of community of property; or
 - (ii) out of community of property, with or without accrual;
- (g) the particulars of a partnership agreement, if any; and
- (h) any other particulars prescribed; and

issue to the parties a certificate of registration, bearing the prescribed particulars.

- (4) A registering officer must, after he or she has registered a protected relationship, transmit the relationship register and records concerned to the official in the public service with the delegated responsibility for the population register in the area in question.
- (5) If a registering officer is not satisfied that a valid protected relationship was entered into by the parties, he or she must refuse to register the relationship.
- (6) A court may, upon application made to that court and after investigation by the court, order—
 - (a) the registration of any protected relationship ; or
 - (b) the cancellation or rectification of any registration of a protected relationship.
- (7) A certificate of registration of a protected relationship issued under this section or any other prior law providing for the registration of relationships constitutes prima facie proof of the existence of the protected relationship and of the particulars contained in the certificate.
- (8) Failure to register a protected relationship does not lead to the invalidity of the relationship.
- (9) The Minister, and any officer in the public service authorised thereto by him or her, may, in writing, designate any officer or employee in the public service to be, by virtue of his or her office and so long as he or she holds such office, as a registering officer for protected relationships, either generally or for any specified area and the date as from which it will have effect and specify any limitation to which it is subject.
- (10) A party to a protected relationship who is a member of a traditional community or Khoi-San community may report his or her protected relationship to his or her traditional council or Khoi-San council who must facilitate and assist in the registration of that protected relationship by the registering officer in the prescribed manner.

9. Equal status and capacity of parties to a protected relationship

All parties in a protected relationship have equal status and capacity.

10. Marriage officers

- (1) The Minister and any officer in the public service authorised thereto by him or her may designate –
 - (a) any officer or employee in the public service to be, by virtue of his or her office and so long as he or she holds such office;
 - (b) any religious official, or any person holding a responsible position in any religious denomination or organisation;
 - (c) any person holding a responsible position in a non-religious organisation that engages in solemnising marriages; or
 - (d) any traditional or Khoi-San council or any person duly authority authorised by the council,

as a marriage officer for the purpose of solemnising protected relationships with or without limitations which designation the Minister may revoke on the request of the religious denomination or organisation, the non-religious organisation or the marriage officer.

- (2) The application for and designation of a marriage officer must be in such form as the Minister may prescribe.
- (3) No marriage officer shall solemnise a protected relationship unless each of the parties to a protected relationship—
 - (a) produces to the marriage officer his or her identity card or identity document or his or her birth certificate; or
 - (b) who does not have an identity card or identity document —
 - (i) gives to the marriage officer proof of application for an identity card or identity document or a birth certificate; or
 - (ii) gives to the marriage officer the prescribed affidavit.
- (4) The prescribed marriage register must be signed immediately after the solemnisation by the marriage officer, the parties to the protected relationship and the two witnesses in each other's presence.
- (5) Each marriage officer must keep a record of all protected relationships conducted by him or her.
- (6) A marriage officer must issue a copy of the marriage register to the parties once the protected relationship is solemnised.
- (7) A marriage officer must within one month after the solemnisation of a relationship transmit the marriage register and all other prescribed records to a registering officer in the prescribed form for registration of the relationship who must cause the particulars of the protected relationship concerned to be included in the population register.
- (8) Any person who, at the commencement of this Act, or prior laws, was authorised to solemnise any protected relationships, shall continue to have authority to solemnise such relationships as if such law had not been repealed, but shall exercise such authority in accordance with the provisions of this Act and its regulations.
- (9)(a) Any affected person may appeal to the Minister about any decision taken by a person acting under a power delegated by the Minister which —
 - (i) refuses the grant or renewal of a designation;
 - (ii) imposes a condition on the grant or renewal of a designation; or
 - (iii) suspends or revokes a designation.
- (b) The Minister may, after considering an application referred to in paragraph (a), confirm, set aside or vary any decision or limitation or take any other appropriate decision.

11. Time, place and form of protected relationships

- (1) A marriage officer may solemnise a protected relationship at any place and at any time in accordance with any mode of solemnisation, or in accordance with any religious or cultural practice.
- (2) A marriage officer shall not solemnise a protected relationship unless he or she is satisfied that each party has the capacity to understand that he or she enters into a protected relationship and what the consequences of that relationship are.
- (3) A marriage officer shall ask each party who intends to enter into a protected relationship whether—
 - (a) he or she freely consents to the formalisation of the intended relationship;
 - (b) there is no lawful impediment to the formalisation of their intended relationship;
 - (c) they are not related on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); and
 - (d) that they call two persons present to witness that they each take the other to be their legal partner.

12. Legal consequences and dissolution of protected relationships

Whenever legislation or the common law attaches consequences to protected relationships marriage or life partnerships, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of this Act or the Marriage Act, 1961, (Act No. 25 of 1961), the Civil Union Act, 2006 (Act No. 17 of 2006) or the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998).

13. Offences and penalties

- (1) Any adult who is or enters into a protected relationship with a person who is not at least 18 years of age or any person who participates knowingly in such a relationship, shall be guilty of an offence and liable on conviction to a fine or in default of payment, to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.
- (2) Any person who, for purposes of exercising a right or complying with a duty under the Act, makes any false representation or false statement knowing it to be false, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.
- (3) Any person who knowingly solemnises a protected relationship or registers a relationship or fails to register a protected relationship in contravention of the provisions of this Act, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months.
- (4) Any person who solemnises a protected relationship or registers a protected relationship where he or she knows or has reason to suspect that the capacity of a party to freely consent to the relationship is impaired due to an intellectual disability or by being under the influence of alcohol or any other intoxicating substance, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months.

- (5) Any person who enters into a protected relationship knowing that he or she related to the other party to the protected relationship on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), shall be guilty of an offence and liable on conviction to a sentence which a court may impose, as provided for in section 276 of the Criminal Procedure Act, 1977 (Act 51 of 1977), which that court considers appropriate and which is within that court's penal jurisdiction, and, in addition, the court shall have the power to make a declaratory order declaring that relationship void and may make such order with regard to the division of the relationship property of the parties to the protected relationship as it may deem just.

14. Regulations

- (1) The Minister may make regulations relating to –
- (a) the form and content of certificates, notices, affidavits and declarations for the purposes of this Act;
 - (b) the fees payable for any certificate issued or any other act performed in terms of this Act;
 - (c) the form and content of an application for the registration of a protected relationship; the procedure for such application; and the matters to be taken into account in determining whether to proceed with the registering of a protected relationship;
 - (d) the form and content of an application submitted to him or her by any party or body for the designation as a marriage officer; the procedure for such application; the matters to be taken into account in determining whether to designate a marriage officer with or without limitations; the qualifications, awarded by such persons or bodies, as the Minister may consider appropriate; the duration and renewal of a designation; the conditions that shall or may be imposed on the grant or renewal of a designation; the training of marriage officers; the determination and charging of prescribed fees in respect of the grant of or renewal of a designation and for the charging for the training of a person designated or to be designated as a marriage officer; the circumstances in which a designation shall or may be granted, renewed, suspended or revoked; and an appeal of any decision to refuse to grant or renew a designation, impose a condition on the grant or renewal of a designation or suspend or revoke a designation; and
 - (e) generally, any matter which by this Act is required or permitted to be prescribed or which he or she considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that the provisions of this Act may be effectively administered.
- (2) Such regulations may prescribe penalties for a contravention of the provisions of this Act, of –
- (a) a fine not exceeding the amount that, in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), may be imposed as an alternative to imprisonment for a period of six months; or
 - (b) in lieu of payment of a fine referred to in paragraph (a), imprisonment for a period not exceeding six months.

- (3) Any regulation made under subsection (1) must, before publication thereof in the *Gazette*, be submitted to Parliament.

15. Amendment of laws

The laws specified in the second column of Schedule 1 are hereby amended to the extent set out in the fourth column thereof.

16. Repeal of laws

- (1) The laws specified in Schedule 2 are repealed to the extent set out in the fourth column thereof.
- (2) Any protected relationship that was valid in terms of any prior law repealed by subsection (1), shall not be affected by such repeal and shall continue to be valid in terms of this Act.

17. Short title and commencement

This Act is called the Protected Relationships Act, 20 ... and will come into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE 1

(Section 15)

Item no	No. and year of law	Title	Extent of amendment
1.	Act No. 24 of 1936	Insolvency Act	The substitution for section 21(13) of the following sub section: (13) In this section the word "spouse" means [not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another,] <u>the partner of such person in a relationship referred to in the Protected Partnerships Act, (Act No. ... of 20 ...)</u> ;
2.	Act No. 40 of 1949	Transfer Duty Act	The substitution for the definition of "spouse" of the following definition – "spouse" in relation to any person, means the partner <u>or partners</u> of such person [— (a) in a marriage or customary union recognised in terms of the laws of the Republic; (b) in a union recognised as a marriage in accordance with the tenets of any religion; or (c) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent:] <u>in a</u>

			<p><u>relationship referred to in the Protected Relationship Act, (Act No. ... of 20...):</u> Provided that a [marriage or union contemplated in paragraph (b) or (c)] any such relationships shall, in the absence of proof to the contrary, be deemed to be a [marriage or union without] relationship in community of property.</p>
3.	Act No. 45 of 1955	Estate Duty Act	<p>The substitution for the definition of “spouse” of the following definition – “spouse” in relation to any person, means the partner <u>or partners</u> of such person— [(a) in a marriage or customary union recognised in terms of the laws of the Republic; (b) in a union recognised as a marriage in accordance with the tenets of any religion; or (c) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent] in a relationship referred to in the Protected Relationship Act, (Act No. ... of 20...): Provided that [a marriage or union contemplated in paragraph (b) or (c)] any such relationships shall, in the absence of proof to the contrary, be deemed to be [a marriage or union without] a relationship in community of property.</p>
4.	Act No. 24 of 1956	Pension Funds Act	<p>The substitution for the definition of “spouse” of the following definition – “spouse” means a person who is the [permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 68 of 1997), or the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of a religion;] partner in a relationship in terms of the Protected Partnerships Act, (Act No. ... of 20 ...);</p>
5.	Act No. 58 of 1962	Income Tax Act	<p>The substitution for the definition of “spouse” of the following definition – “spouse”, in relation to any person, means a person who is the partner of such person— [(a) in a marriage or customary union recognised in terms of the laws of the Republic; (b) in a union recognised as a marriage in accordance with the tenets of any religion; or (c) [in a same-sex or heterosexual union which is intended to be permanent], in a</p>

			<p>protected relationship in terms of the <u>Protected Relationships Act, ... (Act No. ... of ...)</u>; and "married", "husband" or "wife" shall be construed accordingly: Provided that [a marriage or union contemplated in paragraph (b) or (c)] <u>such a relationship</u> shall, in the absence of proof to the contrary, be deemed to be a relationship [marriage or union out of] <u>in</u> community of property;</p>
6.	Act No. 84 of 1976	Military Pensions Act	<p>The substitution for the definition of "spouse" of the following definition: "spouse", in relation to any member, means—</p> <ul style="list-style-type: none"> (a) [a husband or wife in terms of the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or the Civil Union Act, 2006 (Act No. 17 of 2006); (b) a life partner (including a same sex life partner); (c) a husband or wife according to the tenets of any religion of the member at the date of the member's death] a partner of such person in a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...) or; (d) a person who is the natural parent of a child under the age of 18 years who is regularly maintained by the member; [or (e) a person with whom the member lived together as a husband, wife or life partner for a period of at least five years immediately before the commencement of the member's military services within the meaning of section 2 (3);] <p>"wife", in relation to a member, means the lawful wife of the member and includes a woman who is legally entitled to maintenance for herself from the member, and a woman who is the natural mother of a child under the age of eighteen years who is regularly maintained by the member [, and a woman with whom the member lived together as man and wife for a period of at least five years immediately prior to the commencement of his military service within the meaning of section 2 (3)].</p>
7.	Act No. 70 of 1979	Divorce Act	<p>The insertion after the definition of "rules" of the following definition: <u>"Spouse" for the purposes of this Act must be construed to mean in relation to any person, the partner of such person in a protected</u></p>

			<u>relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...);</u>
8.	Act No. 88 of 1984	Matrimonial Property Act	The insertion after the definition of "listed securities" of the following definition: <u>"Spouse" for the purposes of this Act must be construed to mean in relation to any person, the partner of such person in a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...);</u>
9.	Act No. 81 of 1987	Intestate Succession Act	The insertion of the following subsection in section 1: <u>(8) "Spouse" for the purposes of this Act must be construed to mean in relation to any person, a person who is the partner of such person in a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...);</u>
10.	Act No. 27 of 1990	Maintenance of Surviving Spouses Act	The substitution for the definition of "survivor" of the following definition: "survivor" means the surviving spouse in a marriage dissolved by death, and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)) <u>or the partner of such person in a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...);</u>
11.	Act No. 51 of 1992	Births and Deaths Registration Act	The substitution for the definition of "marriage" of the following definition: "marriage" means – [(a) a marriage concluded in terms of – (i) the Marriage Act, 1961 (Act No. 25 of 1961); (ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); (b) a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); or] <u>a relationship in terms of the Protected Relationships Act, or</u> [(c)]b a marriage concluded in terms of the laws of a foreign country;
12.	Act No. 88 of 1995	South African Citizenship Act	The substitution for the definition of "marriage" of the following definition: "marriage" means – [(a) a marriage concluded in terms of –

			<p>(i) the Marriage Act, 1961 (Act No. 25 of 1961);</p> <p>(ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);</p> <p>(b) a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); or]</p> <p><u>a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...); or</u></p> <p>[(c)] a marriage concluded in terms of the laws of a foreign country.</p>
13.	Proclamation No. 21 of 1996	Government Employees Pension Law	<p>The substitution for the definition of “spouse” in Schedule 1 of the Rules of the Government Employees Pension Fund of the following definition:</p> <p>“spouse”, shall mean the following for the purpose of eligibility to benefits: A person who is—</p> <ul style="list-style-type: none"> - [a lawful husband or wife; or - a life partner (including same sex life partner); or - a husband or wife in terms of the Recognition of Customary Marriages Act, 1998 or the tenets of any religion,] <u>the partner of such person in a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...);</u> of the member or pensioner at the date of the member’s or pensioner’s death: Provided that a member or pensioner— <p>(a) should register with the Fund his or her spouse;</p> <p>(b) should register with the Fund all spouses in terms of the Recognition of Customary Marriages Act, 1998 or the tenets of any religion;</p> <p>[(c) who has (a) spouse(s) in terms of the Recognition of Customary Marriages Act, 1998 or the Marriages Act, 1961, or the tenets of any religion may not register a life partner with the Fund];</p> <p>Provided further that registration of a person as a spouse will be <i>prima facie</i> proof of being a spouse:</p> <p>Provided further that a person who is not registered as a spouse may provide proof to the satisfaction of the Board that he or she is a spouse.</p>

14.	Act No. 69 of 1996	Special Pensions Act	<p>The substitution for the definition of “spouse” of the following definition –</p> <p>(xx) “spouse” means an <i>applicant</i> who, at the date on which another person died or disappeared, was the partner of that person in a marriage relationship;</p> <p>(2) In the application of the definition of—</p> <p>(a) “spouse” mentioned in <u>subsection (1)</u> “marriage relationship” means[—</p> <p>[(i) a marriage;</p> <p>(ii) a union contracted in accordance with customary law or which is recognised as marriage in accordance with the tenets of any religion;</p> <p>(iii) a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years;] <u>the partner of such person in a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...);</u></p>
15.	Act No. 99 of 1996	Demobilisation Act	<p>The substitution for the definition of “dependant” the following definition:</p> <p>“dependant”, for the purposes of section 7, includes—</p> <p>(a) Any person in respect of whom the deceased was legally liable for maintenance at the time of his or her death;</p> <p>(b) any child of the deceased born after his or her death;</p> <p>(c) any surviving spouse of the deceased by virtue of a [marriage or a union contracted in accordance with customary law or which is recognized as a marriage in accordance with the tenets of a religion;] <u>a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...);</u></p>
16.	Act No. 52 of 1998	Long-term Insurance Act	<p>The substitution for section 26(5) of the following section:</p> <p>26(5) For the purposes of this section “related party”, in relation to—</p> <p>(a) a natural person, means—</p> <p>(i) a person who is recognised in law or [the tenets of a religion as the spouse, life partner or civil union] <u>the partner of that person[;] in a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...);</u></p>

			<ul style="list-style-type: none"> (ii) a child of that person, including a stepchild, adopted child and a child born out of wedlock; (iiA) a parent or stepparent of that person; (iiB) a person in respect of whom that person is recognised in law or appointed by a Court as the person legally responsible for managing the affairs of or meeting the regular care needs of the first-mentioned person; (iiC) a person who is the permanent life partner or spouse or civil union partner of a person referred to in subparagraphs (ii), (iiA) and (iiB); (iiD) a person who is in a commercial partnership with that person; (iii) another person who has entered into an agreement or arrangement with that natural person, relating to the acquisition, holding or disposal of, or the exercising of voting rights in respect of, shares in the long-term insurer concerned; (iv) a juristic person whose board of directors acts in accordance with his or her directions or instructions; (v) a trust controlled or administered by him or her;
17.	Act No. 99 of 1998	Maintenance Act	<p>The insertion after the definition of 'regulation' of the following definition:</p> <p><u>"Spouse" for the purposes of this Act must be construed to mean in relation to any person, the partner of such person in a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...);</u></p>
18.	Act No. 130 of 1998	Refugees Act	<p>The substitution for the definition of "marriage" of the following definition:</p> <p>"marriage" means—</p> <ul style="list-style-type: none"> (a) [either a marriage or a civil partnership concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); (b) a marriage concluded in terms of— <ul style="list-style-type: none"> (i) the Marriage Act, 1961 (Act No. 25 of 1961); [or] (ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); [or]

			<p><u>a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...); or</u> [(c)b] a marriage concluded in terms of the laws of a foreign country;</p>
19.	Act No. 13 of 2002	Immigration Act	<p>The substitution for the definition of “marriage” of the following definition: “marriage” means – (a) [a marriage concluded in terms of – – (i) the Marriage Act, 1961 (Act No. 25 of 1961); (ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); (b) a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); or] <u>a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...); or</u> [(c)b] a marriage concluded in terms of the laws of a foreign country;</p>
20.	Act No. 38 of 2005	Children’s Act	<p>The substitution for the definition of “marriage” of the following definition: “marriage” means a [marriage] relationship — [(a) recognised in terms of South African law or customary law; or (b) concluded in accordance with a system of religious law subject to specified procedures,] in terms of the Protected Relationships Act, ... (Act No. ... of ...) and any reference to a husband, wife, widower, widow, divorced person, married person or spouse must be construed accordingly.</p>

Schedule 2
(Section 16)

Item	No and year of law	Short title	Extent
1	Act No. 25 of 1961	Marriage Act	The whole
2	Act No. 21 of 1978	Transkei Marriage Act, (Transkei)	The whole
3	Act No. 15 of 1980	Bophuthatswana Marriage Act, (Bophuthatswana)	The whole
4	Act No. 24 of 1988	Ciskei Marriage Act, (Ciskei)	The whole
5	Act No. 120 of 1998	Recognition of Customary Marriages Act	Sections 3(3), 3(4), 3(5) and 4.
6	Act No. 17 of 2006	Civil Union Act	The whole

Annexure B2: Option 2: Draft Bill: Recognition and Registration of Marriages and Life Partnerships Bill

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments

_____ Words underlined with a solid line indicate insertions in existing enactments

BILL

To rationalise the marriage laws pertaining to various types of relationships; to provide for the recognition of marriages and life partnerships entered into by parties regardless of the religious, cultural or any other beliefs of the parties, or the manner in which the relationships were entered into; to provide for the requirements for entering into a marriage and life partnership; to provide for registration of marriages and life partnerships; to provide for the legal consequences of entering into marriages and life partnerships; and to provide for matters incidental thereto.

Preamble

WHEREAS section 9(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone is equal before the law and has the right to equal protection and benefit of the law;

AND WHEREAS section 9(2) of the Constitution prescribes legislative measures to achieve equality for previously disadvantaged persons or categories of persons;

AND WHEREAS section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;

AND WHEREAS section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;

AND WHEREAS section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion;

AND WHEREAS section 15(3)(a) of the Constitution provides the opportunity for legislative recognition of marriages concluded under any tradition, or a system of religious, personal or family law consistent with section 15 and other provisions of the Constitution;

AND WHEREAS the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;

AND WHEREAS section 7(2) of the Constitution places a responsibility on the state to respect, protect, promote and fulfil the rights in the Bill of Rights;

AND NOTING that existing family law has developed in a fragmented manner by way of the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) and the Civil Union Act, 2006 (Act No. 17 of 2006), and that legislative benefits

should be extended to all relationships worthy of protection, to ensure a fair outcome to the parties to a marriage and life partnership whenever disputes arise;

AND NOTING that the Supreme Court of Appeal ordered the state to amend existing legislation or to enact legislation within 24 months to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition;

AND NOTING that South Africa has international obligations to take appropriate and reasonable measures to eradicate discrimination against women in relationships;

AND NOTING that South Africa has international obligations to take appropriate and reasonable measures to prevent child marriages;

BE IT ENACTED by the **PARLIAMENT** of the Republic of South Africa as follows:—

Chapter 1

1. Definitions

In this Act unless the context otherwise indicates –

- (i) 'birth certificate' means the birth certificate contemplated in Births and Deaths Registration Act, 1992 (Act No. 51 of 1992);
- (ii) 'civil union' means a civil union entered into in terms of the Civil Union Act, 2006 (Act No. 17 of 2006) before the commencement of this Act;
- (iii) 'court' means a High Court or a court for a regional division contemplated in section 29 (1B) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944);
- (iv) 'customary law' means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples;
- (v) 'customary marriage' means a marriage entered into in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) before the commencement of this Act;
- (vi) 'High Court' means a High Court of South Africa referred to in section 6(1) of the Superior Courts Act, 2013 (Act No. 10 of 2013);
- (vii) 'Director-General' means the Director-General of the Department of Home Affairs;
- (viii) 'identity card or identity document' means the identity card referred to in section 14 of the Identity Act, 1997 (Act No. 68 of 1997)
- (ix) 'identity number' means the identity number referred to in section 7 of the Identity Act, 1997 (Act No. 68 of 1997);
- (x) 'marriage officer' means –
 - (a) any officer or employee in the public service;

- (b) any religious official of, or any person holding a responsible position in, any religious denomination or organisation;
- (c) any person holding a responsible position in a non-religious organisation that engages in solemnising marriages; or
- (d) any traditional or Khoi-San council, or any person duly authorised by the council;

who has been designated by the Minister as a marriage officer in terms of section 10 of this Act;

- (xi) 'marriage or life partnership' means —
 - (aa) any subsisting marriage concluded in terms of the Marriage Act, 1961 (Act No. 25 of 1961), old order marriage legislation or any other prior legislation before the commencement of this Act; any subsisting union or marriage concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006) before the commencement of this Act; and any subsisting customary marriage concluded in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);
 - (bb) any subsisting monogamous or polygynous marriage or relationship concluded or entered into in terms of the tenets of any religion or culture before or after the commencement of this Act; or
 - (cc) any life partnership, where the parties cohabit and have assumed permanent responsibility for supporting each other.
- (xii) 'Minister' means the minister responsible for the administration of home affairs;
- (xiii) 'monogamous marriage or life partnership' means the relationship of two people regardless of their sex, sexual orientation, or gender identity, to the exclusion of all others, unless dissolved by divorce or death of one or both parties;
- (xiv) old order marriage legislation means the Black Administration Act, 1927 (Act No. 38 of 1927), the Transkei Marriage Act, 1979 (Act No. 21 of 1979), the Bophuthatswana Marriage Act, 1980 (Act No. 16 of 1980), the KwaZulu Act on the Code of Zulu Law, 1985 (Act No. 16 of 1985), the Natal Code of Zulu Law Proclamation R151 of 1987 and the Ciskei Marriage Act, 1988 (Act No. 24 of 1988);
- (xv) 'polygynous or potentially polygynous marriage or life partnership' means a relationship in which a male party may, during the subsistence of the relationship, be in a relationship with a female person or female persons;
- (xvi) 'population register' means the population register referred to in section 5 of the Identity Act, 1997 (Act No. 68 of 1997);
- (xvii) 'prescribed' means prescribed by regulation;
- (xviii) 'registering officer' means any person appointed by the Minister or an officer acting under the Minister's written authorization, as registering officer for purposes of registering marriages and life partnerships in terms of section 8 of this Act;
- (xix) 'traditional council or Khoi-San Council' means a Council established in terms of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019); and

- (xx) 'this Act' includes the regulations made in terms of this Act.

2. Objects of this Act

The objects of this Act are to—

- (1) rationalise the marriage laws pertaining to all various types of relationships;
- (2) prescribe the validity requirements of such relationships;
- (3) provide for the registration of marriages and life partnerships; and
- (4) provide formal recognition of marriages and life partnerships to facilitate and enable enforcement of their rights.

3. Application of the Act

- (1) Whenever legislation or the common law attaches consequences to marriages or life partnerships, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of this Act or the Marriage Act, 1961, (Act No. 25 of 1961), the Civil Union Act, 2006 (Act No. 17 of 2006) or the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998).
- (2) The parties to a marriage or life partnership cannot exclude the application of this Act to their relationship.

4. Validity requirements for marriages and life partnerships

- (1) A marriage or life partnership entered into after the commencement of this Act is valid if the following requirements have been met –
 - (a) all the parties must be at least 18 years or older on the date of entering into the marriage or life partnership;
 - (b) all the parties must give free and informed consent to enter into a marriage or life partnership; and
 - (c) all the parties must have capacity to enter into a marriage or life partnership.
- (2) A marriage or life partnership entered into after commencement of this Act that does not comply with the requirements of this section will be null and void.
- (3) Nothing in this section shall render invalid any otherwise valid marriage or life partnership entered into prior to the commencement of this Act.

5. Minimum age requirement

- (1) No person or institution can provide consent for any person under the age of 18 years to enter into a marriage or life partnership.
- (2) The age of any of the parties must be determined by means of a birth certificate, an identity card or document, or if any of the parties is not in possession of a birth certificate, an identity card or document, by the prescribed affidavit of his or her parents, or parent if he or she has only one parent, or a guardian if he or she has no parents.

- (3) If there is uncertainty about the age of majority of any of the parties referred to in subsection (1), his or her age must be established in terms of section 48 of the Children's Act, 2005 (Act No. 38 of 2005) by the presiding officer of a children's court who shall issue the prescribed certificate as proof of the estimated age of that party.
- (4) If a court dissolves a relationship to which a minor is a party on the ground of want of compliance with this section, the court may make such order with regard to the division of the relationship property of the parties to the marriage or life partnership relationship as it may deem just.

6. Consent requirement

- (1) If a marriage is solemnised by a marriage officer, the consent of the parties shall be obtained by the marriage officer in the presence of two competent witnesses.
- (2) If a party to a marriage is represented by a proxy if the customs of the parties to the relationship require a proxy to enter into a marriage, the marriage officer or registering officer must ascertain from the proxy whether the parties to the prospective marriage have consented to the marriage, and the marriage officer shall indicate such consent in the prescribed manner in the prescribed marriage register.
- (3) If the marriage was not solemnised by a marriage officer, and if it is registered by a registering officer, he or she must determine if all the parties consented to the relationship in the prescribed manner.
- (4) The male party to a subsisting polygynous marriage or life partnership who wishes to enter into a further marriage or life partnership must notify all the female parties to their subsisting relationship in the prescribed form of his intention to enter into a further relationship to obtain the consent of all the female parties who must indicate their consent in the prescribed form, before he may enter into such a further relationship; provided that if he enters into a further relationship without the consent of all the female parties to the subsisting polygynous relationship, that further relationship entered into will be void; and provided further that the registering officer must enquire into the existence of such consent having been sought and granted when the further relationship is registered.
- (5) In an application on the ground of want of compliance with this section, a court may make such order with regard to the division of the relationship property of the parties to the marriage or life partnership as it may deem just.

7. Capacity requirement

Every person in a marriage or life partnership must have the capacity to understand the legal consequences of the relationship at the time it was entered into.

8. Registration of marriages and life partnerships

- (1) If a relationship was not solemnised by a marriage officer, the parties to the relationship have the duty to ensure that their relationship is registered; provided that—
 - (a) all the parties to the relationship shall appear in person before a registering officer to confirm individually and in each other's presence on the prescribed form that they have entered into a relationship in terms of the Act;

- (b) if all the parties to a relationship cannot appear in each other's presence, any of the parties must apply for the registration of the relationship to the registering officer in the prescribed form,

and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the relationship.

- (2) A marriage or life partnership entered into before the commencement of this Act, and which is not registered, must be registered within 12 months after commencement of this Act or within such a period as the Minister may from time to time prescribe by notice in the Gazette; provided that –

- (a) all the parties to the marriage or life partnership shall appear in person before a registering officer to confirm individually and in each other's presence in the prescribed form that they have entered into a marriage or life partnership in terms of the Act;
- (b) if all the parties to the marriage or life partnership cannot appear in each other's presence, any of the parties must apply for the registration of the marriage or life partnership to the registering officer in the prescribed form; or
- (c) if for any reason a marriage or life partnership is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter, may apply to the registering officer in the prescribed manner to enquire into the existence of the relationship,

and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage or life partnership.

- (3) A registering officer must, if satisfied that a marriage or life partnership has been entered into, register the relationship by recording –

- (a) the identity of the parties;
- (b) the date of the relationship;
- (c) the consent of the parties;
- (d) that there is no lawful impediment to the registration of the relationship;
- (e) that the parties are not related on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);
- (f) the property system which will apply to the relationship, and whether it is –
 - (i) in or out of community of property; or
 - (ii) out of community of property, with or without accrual;
- (g) the particulars of a partnership agreement, if any; and
- (h) any other particulars prescribed; and

issue to the parties a certificate of registration, bearing the prescribed particulars.

- (4) A registering officer must, after he or she has registered a marriage or life partnership, transmit the relationship register and records concerned to the official in the public service with the delegated responsibility for the population register in the area in question.
- (5) If a registering officer is not satisfied that a valid marriage or life partnership was entered into by the parties, he or she must refuse to register the relationship.
- (6) A court may, upon application made to that court and after investigation by the court, order—
 - (a) the registration of any marriage or life partnership; or
 - (b) the cancellation or rectification of any registration of a marriage or life partnership.
- (7) A certificate of registration of a marriage or life partnership issued under this section or any other prior law providing for the registration of relationships constitutes prima facie proof of the existence of the marriage or life partnership and of the particulars contained in the certificate.
- (8) Failure to register a marriage or life partnership does not lead to the invalidity of the relationship.
- (9) The Minister, and any officer in the public service authorised thereto by him or her, may, in writing, designate any officer or employee in the public service to be, by virtue of his or her office and so long as he or she holds such office, as a registering officer for marriages and life partnerships, either generally or for any specified area and the date as from which it will have effect and specify any limitation to which it is subject.
- (10) A party to a marriage or life partnership who is a member of a traditional community or Khoi-San community may report his or her marriage or life partnership to his or her traditional council or Khoi-San council who must facilitate and assist in the registration of that marriage or life partnership by the registering officer in the prescribed manner.

9. Equal status and capacity of parties to a marriage or life partnership

All parties in a marriage or life partnership have equal status and capacity.

10. Marriage officers

- (1) The Minister and any officer in the public service authorised thereto by him or her may designate –
 - (a) any officer or employee in the public service to be, by virtue of his or her office and so long as he or she holds such office;
 - (b) any religious official, or any person holding a responsible position in any religious denomination or organisation;
 - (c) any person holding a responsible position in a non-religious organisation that engages in solemnising marriages; or
 - (d) any traditional or Khoi-San council or any person duly authority authorised by the council,

as a marriage officer for the purpose of solemnising marriages with or without limitations which designation the Minister may revoke on the request of the religious denomination or organisation, the non-religious organisation or the marriage officer.

- (2) The application for and designation of a marriage officer must be in such form as the Minister may prescribe.
- (3) No marriage officer shall solemnise a marriage unless each of the parties to a marriage—
 - (a) produces to the marriage officer his or her identity card or identity document or his or her birth certificate; or
 - (b) who does not have an identity card or identity document —
 - (i) gives to the marriage officer proof of application for an identity card or identity document or a birth certificate; or
 - (ii) gives to the marriage officer the prescribed affidavit.
- (4) The prescribed marriage register must be signed immediately after the solemnisation by the marriage officer, the parties to the marriage and the two witnesses in each other's presence.
- (5) Each marriage officer must keep a record of all marriages conducted by him or her.
- (6) A marriage officer must issue a copy of the marriage register to the parties once the marriage is solemnised.
- (7) A marriage officer must within one month after the solemnisation of a marriage transmit the marriage register and all other prescribed records to a registering officer in the prescribed form for registration of the relationship who must cause the particulars of the marriage concerned to be included in the population register.
- (8) Any person who, at the commencement of this Act, or prior laws, was authorised to solemnise any marriages, shall continue to have authority to solemnise such relationships as if such law had not been repealed, but shall exercise such authority in accordance with the provisions of this Act and its regulations.
- (9)(a) Any affected person may appeal to the Minister about any decision taken by a person acting under a power delegated by the Minister which —
 - (i) refuses the grant or renewal of a designation;
 - (ii) imposes a condition on the grant or renewal of a designation; or
 - (iii) suspends or revokes a designation.
- (b) The Minister may, after considering an application referred to in paragraph (a), confirm, set aside or vary any decision or limitation or take any other appropriate decision.

11. Time, place and form of marriages

- (1) A marriage officer may solemnise a marriage at any place and at any time in accordance with any mode of solemnisation, or in accordance with any religious or cultural practice.

- (2) A marriage officer shall not solemnise a marriage unless he or she is satisfied that each party has the capacity to understand that he or she enters into a marriage and what the consequences of that relationship are.
- (3) A marriage officer shall ask each party who intends to enter into a marriage whether—
 - (a) he or she freely consents to the formalisation of the intended relationship;
 - (b) there is no lawful impediment to the formalisation of their intended relationship;
 - (c) they are not related on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); and
 - (d) that they call two persons present to witness that they each take the other to be their legal spouse.

12. Legal consequences and dissolution of marriages and life partnerships

Whenever legislation or the common law attaches consequences to marriages or life partnerships, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of this Act or the Marriage Act, 1961, (Act No. 25 of 1961), the Civil Union Act, 2006 (Act No. 17 of 2006) or the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998).

13. Offences and penalties

- (1) Any adult who is or enters into a marriage or life partnership with a person who is not at least 18 years of age or any person who participates knowingly in such a relationship, shall be guilty of an offence and liable on conviction to a fine or in default of payment, to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.
- (2) Any person who, for purposes of exercising a right or complying with a duty under the Act for the purposes of this Act, makes any false representation or false statement knowing it to be false, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.
- (3) Any person who knowingly solemnises a marriage or life partnership or registers a relationship or fails to register a marriage or life partnership in contravention of the provisions of this Act, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months.
- (4) Any person who solemnises a marriage or registers a marriage or life partnership where he or she knows or has reason to suspect that the capacity of a party to freely consent to the relationship is impaired due to an intellectual disability or by being under the influence of alcohol or any other intoxicating substance, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months.
- (5) Any person who enters into a marriage or life partnership knowing that he or she related to the other party to the marriage or life partnership on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), shall be guilty of an offence and liable on conviction to a sentence which a court may impose, as provided

for in section 276 of the Criminal Procedure Act, 1977 (Act 51 of 1977), which that court considers appropriate and which is within that court's penal jurisdiction, and, in addition, the court shall have the power to make a declaratory order declaring that relationship void and may make such order with regard to the division of the relationship property of the parties to the relationship as it may deem just.

14. Regulations

- (1) The Minister may make regulations relating to –
 - (a) the form and content of certificates, notices, affidavits and declarations for the purposes of this Act;
 - (b) the fees payable for any certificate issued or any other act performed in terms of this Act;
 - (c) the form and content of an application for the registration of a marriage or life partnership; the procedure for such application; and the matters to be taken into account in determining whether to proceed with the registering of a marriage or life partnership;
 - (d) the form and content of an application submitted to him or her by any party or body for the designation as a marriage officer; the procedure for such application; the matters to be taken into account in determining whether to designate a marriage officer with or without limitations; the qualifications, awarded by such persons or bodies, as the Minister may consider appropriate; the duration and renewal of a designation; the conditions that shall or may be imposed on the grant or renewal of a designation; the training of marriage officers; the determination and charging of prescribed fees in respect of the grant of or renewal of a designation and for the charging for the training of a person designated or to be designated as a marriage officer; the circumstances in which a designation shall or may be granted, renewed, suspended or revoked; and an appeal of any decision to refuse to grant or renew a designation, impose a condition on the grant or renewal of a designation or suspend or revoke a designation; and
 - (e) generally, any matter which by this Act is required or permitted to be prescribed or which he or she considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that the provisions of this Act may be effectively administered.
- (2) Such regulations may prescribe penalties for a contravention of the provisions of this Act, of –
 - (a) a fine not exceeding the amount that, in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), may be imposed as an alternative to imprisonment for a period of six months; or
 - (b) in lieu of payment of a fine referred to in paragraph (a), imprisonment for a period not exceeding six months.
- (3) Any regulation made under subsection (1) must, before publication thereof in the *Gazette*, be submitted to Parliament.

15. Amendment of laws

The laws specified in the second column of Schedule 1 are hereby amended to the extent set out in the fourth column thereof.

16. Repeal of laws

- (1) The laws specified in Schedule 2 are repealed to the extent set out in the fourth column thereof.
- (2) Any marriage or life partnership that was valid in terms of any prior law repealed by subsection (1), shall not be affected by such repeal and shall continue to be valid in terms of this Act.

17. Short title and commencement

This Act is called the Recognition and Registration of Marriages and Life Partnerships Act, 20 ... and will come into operation on a date fixed by the President by proclamation in the Gazette.

SCHEDULE 1

(Section 15)

Item no	No. and year of law	Title	Extent of amendment
1.	Act No. 24 of 1936	Insolvency Act	The substitution for section 21(13) of the following sub section: (13) In this section the word “spouse” means [not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another,] <u>the partner of such person in a relationship referred to in the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of 20 ...);</u>
2.	Act No. 40 of 1949	Transfer Duty Act	The substitution for the definition of “spouse” of the following definition – “ spouse ” in relation to any person, means the partner <u>or partners</u> of such person [— (a) in a marriage or customary union recognised in terms of the laws of the Republic; (b) in a union recognised as a marriage in accordance with the tenets of any religion; or (c) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent:]

			<p>in a relationship referred to in the <u>Recognition and Registration of Marriages and Life Partnerships Act ... (Act No. ... of 20...)</u>;</p> <p>Provided that a [marriage or union contemplated in paragraph (b) or (c)] any such relationships shall, in the absence of proof to the contrary, be deemed to be a [marriage or union without] <u>relationship in</u> community of property.</p>
3.	Act No. 45 of 1955	Estate Duty Act	<p>The substitution for the definition of “spouse” of the following definition –</p> <p>“spouse” in relation to any person, means the partner <u>or partners</u> of such person—</p> <p>[(a) in a marriage or customary union recognised in terms of the laws of the Republic;</p> <p>(b) in a union recognised as a marriage in accordance with the tenets of any religion; or</p> <p>(c) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent]</p> <p><u>in a relationship referred to in the Recognition and Registration of Marriages and Life Partnerships Act ... (Act No. ... of 20...)</u>; Provided that [a marriage or union contemplated in paragraph (b) or (c)] any such relationships shall, in the absence of proof to the contrary, be deemed to be [a marriage or union without] a <u>relationship in</u> community of property.</p>
4.	Act No. 24 of 1956	Pension Funds Act	<p>The substitution for the definition of “spouse” of the following definition –</p> <p>“spouse” means a person who is the [permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 68 of 1997), or the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of a religion;]</p> <p><u>partner in a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act ... (Act No. ... of 20 ...)</u>;</p>
5.	Act No. 58 of 1962	Income Tax Act	<p>The substitution for the definition of “spouse” of the following definition –</p>

			<p>“spouse”, in relation to any person, means a person who is the partner of such person—</p> <p>[(a) in a marriage or customary union recognised in terms of the laws of the Republic;</p> <p>(b) in a union recognised as a marriage in accordance with the tenets of any religion; or</p> <p>(c) [in a same-sex or heterosexual union which is intended to be permanent], in a protected relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act ... (Act No. ... of ...); and “married”, “husband” or “wife” shall be construed accordingly: Provided that [a marriage or union contemplated in paragraph (b) or (c)] <u>such a relationship</u> shall, in the absence of proof to the contrary, be deemed to be a relationship [marriage or union out of] <u>in</u> community of property;</p>
6.	Act No. 84 of 1976	Military Pensions Act	<p>The substitution for the definition of “spouse” of the following definition:</p> <p>“spouse”, in relation to any member, means—</p> <p>(a) [a husband or wife in terms of the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or the Civil Union Act, 2006 (Act No. 17 of 2006);</p> <p>(b) a life partner (including a same sex life partner);</p> <p>(c) a husband or wife according to the tenets of any religion of the member at the date of the member’s death] a partner of such person in a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...) or;</p> <p>(d) a person who is the natural parent of a child under the age of 18 years who is regularly maintained by the member;</p> <p>[or</p> <p>(e) a person with whom the member lived together as a husband, wife or life partner for a period of at least five years immediately before the commencement of the member’s military services within the meaning of section 2 (3);]</p>

			<p>“wife”, in relation to a member, means the lawful wife of the member and includes a woman who is legally entitled to maintenance for herself from the member, and a woman who is the natural mother of a child under the age of eighteen years who is regularly maintained by the member [, and a woman with whom the member lived together as man and wife for a period of at least five years immediately prior to the commencement of his military service within the meaning of section 2 (3)].</p>
7.	Act No. 70 of 1979	Divorce Act	<p>The insertion after the definition of "rules" of the following definition: <u>“Spouse” for the purposes of this Act must be construed to mean in relation to any person, the partner of such person in a protected relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...);</u></p>
8.	Act No. 88 of 1984	Matrimonial Property Act	<p>The insertion after the definition of "listed securities" of the following definition: <u>“Spouse” for the purposes of this Act must be construed to mean in relation to any person, the partner of such person in a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...);</u></p>
9.	Act No. 81 of 1987	Intestate Succession Act	<p>The insertion of the following subsection in section 1: <u>(8) “Spouse” for the purposes of this Act must be construed to mean in relation to any person, a person who is the partner of such person in a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...);</u></p>
10.	Act No. 27 of 1990	Maintenance of Surviving Spouses Act	<p>The substitution for the definition of “survivor” of the following definition: “survivor” means the surviving spouse in a marriage dissolved by death, and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and</p>

			Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)) <u>or the partner of such person in a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...);</u>
11.	Act No. 51 of 1992	Births and Deaths Registration Act	The substitution for the definition of "marriage" of the following definition: "marriage" means – (a) [a marriage concluded in terms of – (i) the Marriage Act, 1961 (Act No. 25 of 1961); (ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); (b) a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); or] a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act ... (Act No. ... of ...); or ([c]b) a marriage concluded in terms of the laws of a foreign country;
12.	Act No. 88 of 1995	South African Citizenship Act	The substitution for the definition of "marriage" of the following definition: "marriage" means – [(a) [a marriage concluded in terms of – (i) the Marriage Act, 1961 (Act No. 25 of 1961); (ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); (b) a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); or] a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...); or ([c]b) a marriage concluded in terms of the laws of a foreign country.
13.	Proclamation No. 21 of 1996	Government Employees Pension Law	The substitution for the definition of "spouse" in Schedule 1 of the Rules of the Government Employees Pension Fund of the following definition: "spouse", shall mean the following for the purpose of eligibility to benefits: A person who is— - [a lawful husband or wife; or - a life partner (including same sex life partner); or

			<p>- a husband or wife in terms of the Recognition of Customary Marriages Act, 1998 or the tenets of any religion,] <u>the partner of such person in a relationship in terms of the Marriage and Life Partnerships , ... (Act No. ... of ...);</u> of the member or pensioner at the date of the member's or pensioner's death: Provided that a member or pensioner—</p> <p>(a) should register with the Fund his or her spouse;</p> <p>(b) should register with the Fund all spouses in terms of the Recognition of Customary Marriages Act, 1998 or the tenets of any religion;</p> <p>[(c) who has (a) spouse(s) in terms of the Recognition of Customary Marriages Act, 1998 or the Marriages Act, 1961, or the tenets of any religion may not register a life partner with the Fund]:</p> <p>Provided further that registration of a person as a spouse will be <i>prima facie</i> proof of being a spouse:</p> <p>Provided further that a person who is not registered as a spouse may provide proof to the satisfaction of the Board that he or she is a spouse.</p>
14.	Act No. 69 of 1996	Special Pensions Act	<p>The substitution for the definition of “spouse” of the following definition –</p> <p>(xx) “spouse” means an <i>applicant</i> who, at the date on which another person died or disappeared, was the partner of that person in a marriage relationship;</p> <p>(2) In the application of the definition of—</p> <p>(a) “spouse” mentioned in <u>subsection (1)</u> “marriage relationship” means[—</p> <p>[(i) a marriage;</p> <p>(ii) a union contracted in accordance with customary law or which is recognised as marriage in accordance with the tenets of any religion;</p> <p>(iii) a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years;] <u>the partner of such person in a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...);</u></p>

15.	Act No. 99 of 1996	Demobilisation Act	<p>The substitution for the definition of “dependant” the following definition: “dependant”, for the purposes of section 7, includes—</p> <ul style="list-style-type: none"> (a) Any person in respect of whom the deceased was legally liable for maintenance at the time of his or her death; (b) any child of the deceased born after his or her death; (c) any surviving spouse of the deceased by virtue of a [marriage or a union contracted in accordance with customary law or which is recognized as a marriage in accordance with the tenets of a religion;] <u>a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...);</u>
16.	Act No. 52 of 1998	Long-term Insurance Act	<p>The substitution for section 26(5) of the following section: 26(5) For the purposes of this section “related party”, in relation to—</p> <ul style="list-style-type: none"> (a) a natural person, means— <ul style="list-style-type: none"> (i) a person who is recognised in law or [the tenets of a religion as the spouse, life partner or civil union] <u>the partner of that person[;] in a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...);</u> (ii) a child of that person, including a stepchild, adopted child and a child born out of wedlock; (iiA) a parent or stepparent of that person; (iiB) a person in respect of whom that person is recognised in law or appointed by a Court as the person legally responsible for managing the affairs of or meeting the regular care needs of the first-mentioned person; (iiC) a person who is the permanent life partner or spouse or civil union partner of a person referred to in subparagraphs (ii), (iiA) and (iiB); (iiD) a person who is in a commercial partnership with that person; (iii) another person who has entered into an agreement or arrangement with that natural person, relating to the acquisition, holding or disposal of, or the exercising of voting rights in

			<p>respect of, shares in the long-term insurer concerned;</p> <p>(iv) a juristic person whose board of directors acts in accordance with his or her directions or instructions;</p> <p>(v) a trust controlled or administered by him or her;</p>
17.	Act No. 99 of 1998	Maintenance Act	<p>The insertion after the definition of ‘regulation’ of the following definition: <u>“Spouse” for the purposes of this Act must be construed to mean in relation to any person, the partner of such person in a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...);</u></p>
18.	Act No. 130 of 1998	Refugees Act	<p>The substitution for the definition of “marriage” of the following definition: “marriage” means—</p> <p>(a) [either a marriage or a civil partnership concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006);</p> <p>(b) a marriage concluded in terms of—</p> <p>(i) the Marriage Act, 1961 (Act No. 25 of 1961); [or]</p> <p>(ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); [or] a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...); or</p> <p>([c]b) a marriage concluded in terms of the laws of a foreign country;</p>
19.	Act No. 13 of 2002	Immigration Act	<p>The substitution for the definition of “marriage” of the following definition: “marriage” means –</p> <p>(a) [a marriage concluded in terms of –</p> <p>(i) the Marriage Act, 1961 (Act No. 25 of 1961);</p> <p>(ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);</p> <p>(b) a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); or] a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...); or</p> <p>([c]b) a marriage concluded in terms of the laws of a foreign country;</p>
20.	Act No. 38 of 2005	Children’s Act	<p>The substitution for the definition of “marriage” of the following definition: “marriage” means a [marriage] relationship —</p>

			<p>[(a) recognised in terms of South African law or customary law; or</p> <p>(b) concluded in accordance with a system of religious law subject to specified procedures,] in terms of <u>the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...)</u> and any reference to a husband, wife, widower, widow, divorced person, married person or spouse must be construed accordingly.</p>
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Schedule 2
(Section 16)

Item	No and year of law	Short title	Extent
1	Act No. 25 of 1961	Marriage Act	The whole
2	Act No. 21 of 1978	Transkei Marriage Act, (Transkei)	The whole
3	Act No. 15 of 1980	Bophuthatswana Marriage Act, (Bophuthatswana)	The whole
4	Act No. 24 of 1988	Ciskei Marriage Act, (Ciskei)	The whole
5	Act No. 120 of 1998	Recognition of Customary Marriages Act	Sections 3(3), 3(4), 3(5) and 4.
6	Act No. 17 of 2006	Civil Union Act	The whole

Annexure C: list of respondents who commented on Issue Paper 35

1. Allan Craig Mr;
2. Amien Waheeda Associate Prof in the Department of Public Law, University of Cape Town;
3. Apostolic Faith Mission of South Africa: Dr HJ Weideman: General Secretary;
4. Abu-Bakr Asmal PhD, Lecturer: University of KZN (Temporary) School of Religion, Philosophy & Classics;
5. Association of Muslim Accountants and Lawyers (AMAL): MR AC Khan AMAL Secretariat;
6. Bakker Pieter Prof, Department of Private Law, Unisa
7. Centre for Applied Legal Studies, University of the Witwatersrand: Thandeka Kathi, Attorney; Lee-Anne Bruce, Communications Specialist; & Sheena Swemmer, Head of Gender Programme;
8. Cape Bar Council: Eduard Fagan SC, Julia Anderssen & Piet Olivier;
9. Cause for Justice: Liesl Stander: Legal Advisor, Parliamentary Liaison;
10. Commission for Gender Equality: Keketso Maema, Chief Executive Officer;
11. Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission);
12. Christian View Network Submission: Mr Philip Rosenthal;
13. Darul Ihsan Centre: Mufti Zubair Bayat: Chairman;
14. Department of Communications: Ms Nomvuyiso Batyi: Acting Director-General;
15. Dutch Reformed Church (Nederduitse Gereformeerde Kerk): Dr Gustav Claassen: General Secretary;
16. Essel Meaghan Ms;
17. Feher Gabrielle Ms, final year LLB student studying at the Stellenbosch University who did her dissertation in 2019 on the possible advantages and disadvantages of having a single marriage statute in South Africa and who attached parts of her paper for the purpose of comment to the SALRC;
18. Floyd Angie Ms;
19. Freedom of Religion South Africa (FOR SA): Advocate NL Badenhorst, Legal Counsel;
20. Free State Society of Advocates: Advocate N Snellenburg SC, Chairperson & subcommittee Advv SJ Reinders & JF Mitchley;
21. FirstRand Bank: Ms Chantel Smal, Legal Head, FNB Legal;
22. Jacob Jordan Mr;
23. Jamiatul Ulama KZN: Secretary General: Moulana Rafiek Mohamed;
24. Inkatha Freedom Party: Inkosi RN Cebekhulu (Chairperson IFP Caucus);
25. Islamic Forum Azaadville;

26. Legal Resources Centre: Mandivavarira Mudarikwa (Attorney, Cape Town), Cecile van Schalkwyk (Attorney, Makhanda), Amy-Leigh Payne (Candidate Attorney, Cape Town) and Sipesihle Mguga (Attorney, Makhanda);
27. Leonard Chaneez, Ms;
28. Mabasa Ralph Mr;
29. Masekwameng Kedibone Herman: Advocate;
30. Moore Elena Prof: Department of Sociology University of Cape Town and National Research Foundation Chair in Customary Law, Indigenous Values and Human Rights at the University of Cape Town & Prof Chuma Himonga Emeritus Prof: University of Cape Town, currently based at the University of Zambia;
31. Mpumalanga Provincial Government: Office of the Premier: Mr KM Mohlasedi: Acting Director-General;
32. Mukhari Velaphi Juliet, Assistant Director: Gender and the Law, Office Of the Director-General: Pretoria;
33. Muslim Lawyers Association (MLA): Yousha Tayob on behalf of the MLA;
34. Muslim Lawyers for Social Justice: Ms Saadia Ismail;
35. Muslim Personal Law Network: Ms Farhana Ismail on behalf of the MPL Network;
36. National House of Traditional Leaders;
37. National Spiritual Assembly of the Bahá'ís of South Africa: Ms Charlotte Matdat, Secretary-General
38. Nederdutch Reformed Church of Africa (Nederduitsch Hervormde Kerk van Afrika – NHKA): Dr Wouter van Wyk, Secretary: Commission of the General Church Assembly;
39. Office of the Director Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs;
40. O'Haer Micholene Ms;
41. South African Orthodox Jewish community, represented by the Office of the Chief Rabbi Warren Goldstein;
42. South African Pagan Council: Mr Adriaan Roos, SAPC Convener and Member of the Executive Committee
43. South African Pagan Right Alliance: Mr Gary Leff, Director,
44. Sungharandan Romeo Mr;
45. Sunni Ulama Council Gauteng;
46. United Ulama Council of South Africa (UUCSA) Yusuf Patel (MI) Secretary General;
47. Wasim Sheik;
48. Women's Cultural Group: Ms Shameema Mayat: President;

Annexure D: comparative research

A. Relationships defined

1. Approximately 25 countries provide presently for marriages for opposite-sex and same-sex couples and a number of countries still for civil unions.¹ The Civil Marriage Act of Canada of 2005 provides that ‘marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others’.² It further provides that for greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.³ The Marriage Act of New Zealand provides since April 2013 that “marriage” means a union between 2 people regardless of their sex, sexual orientation, or gender identity’.⁴ Provision is also made in New Zealand for couples entering into civil unions.⁵ The requirements for civil unions are that two people, whether they are of different or the same sex, may enter into a civil union if they are both aged 16 or over⁶ (but people aged 16 or 17 must obtain consent)⁷; if they are not within the prohibited degrees of civil union;⁸ they are not currently married or in a civil union with someone else (but married couples may enter into a civil union with each other, therefore they are able to change their marriage into a civil union).⁹ Since December 2017 marriage is defined in the Marriage Act of

¹ World Population Review “Countries Where Gay Marriage Is Legal” 2020 <https://worldpopulationreview.com/countries/countries-where-gay-marriage-is-legal/>; Maschi David & Drew Desilver “A global snapshot of same-sex marriage” 29 Oct 2019 [Pewresearch.org https://www.pewresearch.org/fact-tank/2019/10/29/global-snapshot-same-sex-marriage/](https://www.pewresearch.org/fact-tank/2019/10/29/global-snapshot-same-sex-marriage/) accessed 5 Nov 2020.

² Section 2 see <https://laws-lois.justice.gc.ca/eng/acts/c-31.5/page-1.html>. See also Hogg Peter “Canada: The Constitution and same-sex marriage” (Oct 2006) Vol 4 Issue 4 *International Journal of Constitutional Law* 712–721 <https://doi.org/10.1093/icon/mol019> accessed 5 Nov 2020.

³ Section 4.

⁴ The Marriage (Definition of Marriage) Amendment Act 20 of 2013 see <http://www.legislation.govt.nz/act/public/2013/0020/latest/DLM4505003.html> accessed 5 Nov 2020.

⁵ Marriage Act 1955 see <http://www.legislation.govt.nz/act/public/1955/0092/latest/whole.html> accessed 5 Nov 2020.

⁶ In terms of section 6 of the Civil Union Act a person who has not reached the age of 16 is prohibited from entering into a civil union (see <http://www.legislation.govt.nz/act/public/2004/0102/latest/DLM323385.html> accessed 4 Nov 2020).

⁷ Section 19(3): A party to an intended civil union who is aged 16 or 17 years must apply to the Family Court for a Family Court Judge’s consent to the intended civil union, and a joint application may be made if both parties to the intended civil union are aged 16 or 17 years.

⁸ Section 10: Two people who are within the prohibited degrees of affinity, but who are not within the prohibited degrees of consanguinity, may apply to the Family Court for an order dispensing with the prohibition against civil union.

⁹ In terms of section 18 of the Civil Union Act of 2004.

Australia 'as *the union of 2 people to the exclusion of all others, voluntarily entered into for life*'.¹⁰

2. In Tanzania the Law of Marriage Act defines marriage to mean the voluntary union of a man and a woman, intended to last for their joint lives.¹¹ In Kenya the 2014 Marriage Act defines marriage as *the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Marriage Act*.¹² The 2019 Zimbabwe Marriages Bill distinguishes between civil law and customary marriages and civil partnerships.¹³ It defines 'civil partnership' to mean the relationship referred to in section 40; 'civil marriage' to mean a marriage contracted under the general law; 'customary law' to mean the customary law of any section or community of Zimbabwe's people; 'customary law marriage' to mean a marriage solemnised in accordance with customary law; 'general law' means the law of Zimbabwe other than customary law; and 'marriage' means a marriage solemnised, registered or recognised as such in terms of the Act.

B. Consent and capacity

3. The Law of Marriage Act of Tanzania provides that no marriage shall be contracted except with the consent, freely and voluntarily given, by each of the parties thereto.¹⁴ It further provides that consent shall not be held to have been freely or voluntarily given if the party who purported to give it was influenced by coercion or fraud; was mistaken as to the nature of the ceremony; or was suffering from any mental disorder or mental defect, whether permanent or temporary, or was intoxicated, so as not fully to appreciate the nature of the ceremony.
4. The Mental Capacity Act of 2005 governs the determination of legal capacity in England and Wales.¹⁵ The general principles of the Act are that a person must be assumed to have capacity unless it is established that he or she lacks capacity; a person is not to be treated

¹⁰ The Marriage Amendment (Definition and Religious Freedoms) Act 129 of 2017 see <https://www.legislation.gov.au/Details/C2017A00129> accessed 5 Nov 2020.

¹¹ Section 9(1) https://www.tanzania.go.tz/egov/uploads/documents/The_Law_of_Marriage_Act,_5-1971_sw.pdf accessed 4 Nov 2020.

¹² Section 3(1) see http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf accessed 5 Nov 2020.

¹³ See http://veritaszim.net/sites/veritas_d/files/MARRIAGES%20BILL%2C%202019.pdf accessed 5 Nov 2020.

¹⁴ Section 16.

¹⁵ See <http://www.legislation.gov.uk/ukpga/2005/9/contents>.

as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success; a person is not to be treated as unable to make a decision merely because she makes an unwise decision; an act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in his or her best interests; and before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.¹⁶

5. The Mental Capacity Act of 2005 of England and Wales provides that a person lacks capacity in relation to a matter if at the material time he or she is unable to make a decision for himself or herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.¹⁷ It does not matter whether the impairment or disturbance is permanent or temporary.¹⁸ A lack of capacity cannot be established merely by reference to a person's age or appearance, or a condition of his or her, or an aspect of his or her behaviour, which might lead others to make unjustified assumptions about his

¹⁶ See *Southwark, (The London Borough of) v KA (Capacity to Marry)* [2016] EWCOP 20 (23 March 2016) <https://www.bailii.org/ew/cases/EWCOP/2016/20.html> accessed 17 Sept 2020:

76. The test for capacity to marry is also a simple one:

- a) Marriage is status specific not person specific.
- b) The wisdom of the marriage is irrelevant.
- c) P must understand the broad nature of the marriage contract.
- d) P must understand the duties and responsibilities that normally attach to marriage, including that there may be financial consequences and that spouses have a particular status and connection with regard to each other.
- e) The essence of marriage is for two people to live together and to love one another.
- f) P must not lack capacity to enter into sexual relations.

77. The decision is about capacity and not welfare. Thus I do not take into account aspects of his decision making which affect the consequence of his decision making, so long as they do not affect the decision making process in itself.

80. KA is on the borderline of understanding in respect of some of the more refined evaluations, as I have indicated. I have concluded after reflection, exacerbated by the complexity and detail of the legal argument, that, since capacity must be assumed until disproved, KA overall has the capacity to have sexual relations and to marry. I leave out of account the welfare considerations.

81. I do not know whether a marriage will truly bring happiness to KA. His disabilities will provide challenges for any wife, and they will be different for a wife who has capacity from one who lacks it. A marriage might lead to distress, conflict and misery for KA and his family, as opposed to enhancement of his life and of his personal autonomy. But it is not for me to weigh up the relative chances of finding a wife who is prepared to love and cherish KA with all his needs against that of finding one who is unequal to the task.

¹⁷ Section 2(1).

¹⁸ Section 2(2).

or her capacity.¹⁹ Further a person is unable to make a decision for himself if he or she is unable to understand the information relevant to the decision; to retain that information; to use or weigh that information as part of the process of making the decision; or to communicate his or her decision (whether by talking, using sign language or any other means).²⁰ A person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to him or her in a way that is appropriate to his or her circumstances including using simple language, visual aids or any other means.²¹ The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.²² The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision.²³ The Mental Capacity Act also contains a list of family relationship and other decisions²⁴ which may not be made on behalf of a person which the Court of Protection must make.²⁵

6. The Marriage Act of New Zealand provides for proxy marriages under very specific circumstances.²⁶ The Act provides that a Family Court Judge may, on application in that behalf, authorise the marriage in New Zealand of any person who is resident in New Zealand to any person who is outside New Zealand if the Judge is satisfied that the person who is outside New Zealand is unable to come to New Zealand by reason of the existence of a state of war or armed conflict or by reason of the conditions of his or her service as a member of the armed forces of any Commonwealth country, or of any country for the time being allied with any Commonwealth country.
7. The Australian Commonwealth Marriage Act provides that a person shall not solemnise a marriage, or purport to solemnise a marriage, if the person has reason to believe that there

¹⁹ Section 2(3).

²⁰ Section 3(1).

²¹ Section 3(2).

²² Section 3(3).

²³ Section 3(4).

²⁴ Section 27.

²⁵ Consenting to marriage or a civil partnership; consenting to have sexual relations; consenting to a decree of divorce being granted on the basis of two years' separation; consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation; consenting to a child's being placed for adoption by an adoption agency; consenting to the making of an adoption order; discharging parental responsibilities in matters not relating to a child's property; and giving a consent under the Human Fertilisation and Embryology Act 2008.

²⁶ Section 34.

is a legal impediment to the marriage or if the person has reason to believe the marriage would be void.²⁷ The Australian Marriage Act requires that the parties to the marriage understand the nature and effect of the marriage ceremony. Sections 23(1)(d) and 23B(1)(d) of the Marriage Act 1961 provide that a marriage may be void because the consent of either of the parties is not a real consent as it was obtained by duress or fraud; that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or that party is mentally incapable of understanding the nature and effect of the marriage ceremony. The Family Law Act 1975 (Cth) provides that a marriage is void where: that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed or that party was mentally incapable of understanding the nature and effect of the marriage ceremony.²⁸

8. The *Guidelines on the Marriage Act 1961 for Marriage Celebrants*²⁹ provide guidance how a marriage celebrant is to proceed if he or she has concerns about the capacity of a party to understand the nature and effect of a marriage ceremony.³⁰ One guideline suggests if the celebrant has concerns then the marriage celebrant ought to speak to parties separately and also in the absence of the other parties.³¹ The following guidelines further seeks to provide assistance to celebrants in determining the presence of free consent by the parties wishing to marry:³²

- Is one party silent or looking down all the time?
- Has the couple been accompanied by extended family or friends who do some or much of the talking in response to the authorised celebrant's questions?

²⁷ Section 100 see <https://www.legislation.gov.au/Details/C2016C00938>.

²⁸ See for section 51 on nullity of marriage and void marriages <https://www.legislation.gov.au/Details/C2017C00385> and http://www5.austlii.edu.au/au/legis/cth/num_act/fla1975114/s51.html. A marriage is void if either of the parties is, at the time of the marriage, lawfully married to some other person; the parties are within a prohibited relationship; the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnisation of marriages; the consent thereto of either of the parties is not a real consent because- it was obtained by duress or fraud; that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or that party is mentally incapable of understanding the nature and effect of the marriage ceremony; or either of the parties is not of marriageable age.

²⁹ Australian Government *Guidelines for marriage celebrants Australia 2018* July 2018 see <https://www.ag.gov.au/sites/default/files/2020-03/guidelines-marriage-act-1961-authorized-celebrants.pdf> accessed 5 Nov 2020.

³⁰ *Guidelines for marriage celebrants Australia 2018* par 8.5.2 at 88.

³¹ *Guidelines for marriage celebrants Australia 2018* par 8.6.1.

³² *Guidelines for marriage celebrants Australia 2018* par 8.6.6.

- Does one party answer all of the questions for the other party as well as for himself or herself?
 - Is there any sign that a party cannot manage their own affairs, for example, being in full care in a nursing home or being subject to a guardianship order?
 - Does one of the parties seem vague or unclear about the purpose of the meeting with the authorised celebrant, or are they unable to give any information about themselves and why they want to be married?
 - Does the party understand English? If not, the authorised celebrant should insist that an interpreter is used or, if an interpreter is not available, pass the marriage onto an authorised celebrant who speaks that language.
9. The 2005 federal Canadian Civil Marriage Act provides that marriage requires the free and enlightened consent of two persons to be the spouse of each other.³³ The Ontario Marriage Act requires that no person may issue a marriage license or conduct a marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason.³⁴ The Marriage Act of British Columbia provides likewise that an issuer of marriage licences who issues a licence for a marriage, and a religious representative, marriage commissioner or treaty first nation designate who solemnises a marriage, knowing or having reason to believe that either of the parties to the intended marriage or to the marriage is a mentally disordered person or is impaired by drugs or alcohol, commits an offence and is liable on conviction to a penalty of not more than \$500.³⁵
10. The Marriage Act of Prince Edward Island provides that every person who (a) issues a license; or (b) solemnises a marriage, knowing or having reason to believe that either of the parties to the intended marriage or to the marriage is mentally incompetent, is guilty of an offence and liable on summary conviction to a fine of not more than \$500.³⁶ The Northwest Territories Marriage Act likewise provides that no issuer shall issue a marriage license without first having obtained all the documents required by this Act; or if the issuer knows or has reason to believe that either party to the intended marriage is ineligible to

³³ Section 2.1 see <https://laws-lois.justice.gc.ca/eng/acts/c-31.5/page-1.html> accessed 5 Nov 2020.

³⁴ Section 7 of the Ontario Marriage Act <https://www.ontario.ca/laws/statute/90m03> accessed 5 Nov 2020.

³⁵ Section 35 see https://www.bclaws.ca/civix/document/id/complete/statreg/96282_01 accessed 5 Nov 2020.

³⁶ Section 23 of the Marriage Act M-03 Prince Edward Island see <https://www.princeedwardisland.ca/sites/default/files/legislation/M-03-Marriage%20Act.pdf> accessed 1 Dec 2020.

marry, incapable of freely consenting, or under the influence of alcohol or drugs at the time of the application for the license.³⁷

C. Minimum age

11. In many jurisdictions there is a non-negotiable minimum age of marriage of 18 applicable to both boys and girls. No parental or official permission can allow a deviation from this. These measures are compliant with international and regional instruments.³⁸ In February 2015 the Malawian Parliament passed the Marriage, Divorce and Family Relations Act which sets the minimum age of marriage at 18 for boys and girls.³⁹ The Constitution of Malawi was amended in 2017⁴⁰ to provide that a child is a person under the age of 18 years. The Constitution provided before this amendment that children are persons under sixteen years of age.
12. Courts have also ruled in Africa on the unconstitutionality of allowing children below the age of 18 to marry.⁴¹ In 2019 the Tanzanian Court of Appeal ruled on the differentiation their Law of Marriage Act provides regarding the marriageable age of girls of 15 and for

³⁷ Section 43(1) see <https://www.justice.gov.nt.ca/en/files/legislation/marriage/marriage.a.pdf> accessed 5 Nov 2020.

³⁸ See on the issue of responses by States to implement the recommended minimum marriageable age of 18 Melchiorre Angela “A minimum common denominator: minimum ages for marriage reported under the Convention on the Rights of the Child” <https://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/AngelaMelchiorre.pdf> accessed 6 Nov 2020 who concludes and recommends, among others:

... a general minimum age for marriage could be set, and set at 18 for that matter, but then be either deprived of its effectiveness through unclear exceptions or not implemented or enforced in practice. Moreover, even when exceptions to a general minimum age for marriage are valid, these often do not foresee an absolute minimum age below which marriage is never permitted. This is why the complexity of child marriage demands rigorous analysis of all the multiple factors mentioned above as well as more careful attention to exceptions and their link with both protection and autonomy. In addition, it is important to recognise that quantitative data on the statutory minimum age for marriage reveal only one part of the legal landscape. Human rights standards for children and marriage demand attention to qualitative aspects, too. ...

³⁹ Nyasatimes “Malawi Passes the Marriage, Divorce and Family Relations Bill, 2015” *Nyasatimes.com* see <https://www.nyasatimes.com/malawi-marriage-divorce-and-family-relations-bill-passed-by-parliament/> and Girls Not Brides “Malawi’s constitutional change: a step towards ending child marriage” at 1 *Girlsnotbrides.org* <https://www.girlsnotbrides.org/wp-content/uploads/2017/12/Malawi-case-study-template-19.12-FINAL.pdf> accessed 6 Nov 2020.

⁴⁰ See <https://malawilaws.com/Malawipdf2017/Act%20no.%2015.pdf>. Girls Not Brides “Malawi’s Constitutional Change: a step towards ending child marriage” at 1 *Girlsnotbrides.org* <https://www.girlsnotbrides.org/wp-content/uploads/2017/12/Malawi-case-study-template-19.12-FINAL.pdf>

⁴¹ See Mwambene Lea “Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi” (2018) Vol 18 n 2 *African Human Rights Law Journal* <http://dx.doi.org/10.17159/1996-2096/2018/v18n2a5> <http://dx.doi.org/10.17159/1996-2096/2018/v18n2a5> (Mwambene (2018) *African Human Rights Law Journal*).

boys the age of 18. It held that the 'international legal instruments which Tanzania has ratified and domesticated, expressly provide that men and women should be equal partners in marriage' and that 'the impugned provisions provide for unequal treatment between girls and boys'.⁴²

13. In 2016 the Zimbabwe Constitutional Court⁴³ declared legislative provisions providing for marriage of parties younger than 18 years unconstitutional: 'No law can validly give a person in Zimbabwe who is aged below eighteen years the right to exercise the right to marry and found a family without contravening s 78(1) of the Constitution. To the extent that it provides that a girl who has attained the age of sixteen can marry, s 22(1) of the Marriage Act is inconsistent with the provisions of s 78(1) of the Constitution and therefore invalid.' The 2019 Marriages Bill of Zimbabwe introduced the minimum marriageable age of 18 years for parties to a civil marriage, customary marriage and unregistered civil partnership.⁴⁴

⁴² *Attorney General vs Rebeca Z. Gyumi* (Civil Appeal No.204 of 2017) [2019] TZCA 348 (23 October 2019) see <https://tanzlii.org/tz/judgment/court-appeal-tanzania/2019/348-0> at 37 and also Rickard Carmel 'No More Child Brides Says Tanzania's Highest Court' 24 Oct 2019 *Africanlii.org* <https://africanlii.org/article/20191024/no-more-child-brides-says-tanzanias-highest-court> and regarding the 2016 case the comment by Msuya Norah Hashim 'The analysis of child marriage and thirdparty consent in the case of *Rebeca Z. Gyumi v Attorney General* Miscellaneous Civil Case no 5 of 2016 Tanzania High Court at Dar es Salaam' 2019 *De Jure Law Journal* <http://www.saflii.org/za/journals/DEJURE/2019/14.pdf> who concluded at 315 that 'it is hoped that the Tanzania court of appeal will follow the lead of the Zimbabwean Constitutional Court in Mudzuru's case by rejecting arguments defending child marriages based on custom, culture and belief in clear contravention of human rights commitments'. The Court of Appeal also held on the argument that religious and customary law exist in parallel to the Law of Marriage Act at 44:

... we need to pause and consider this statement particularly, by considering what it means by parallel system. The Concise Oxford English Dictionary, Eleventh Edition defines the term parallel to mean "occurring or existing at the same time or in a similar way". By this definition, it is our respective observation that the two are dispensable and they cannot co-exist in a parallel system. As we stated earlier on, all matters to which the law applicable is LMA, the rules of customs and religious values are inoperative.

⁴³ *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* [2015] ZWCC 12 see <https://zimlii.org/zw/judgment/constitutional-court-zimbabwe/2016/12> and <http://www.veritaszim.net/node/1559>. The judgment has been welcomed by academics who argue that a uniform non-negotiable minimum marriage age reduces the incidence of child marriage and thereby also the exploitation of girl children, see Sloth-Nielsen Julia and Hove Kuda "*Mudzuru v Minister of Justice Legal and Parliamentary Affairs: A review*" (2016) Vol 16 No 2 554 - 568 *African Human Rights Law Journal* <https://www.ahrlj.up.ac.za/sloth-nielsen-j-hove-k> accessed 9 Oct 2020.

⁴⁴ Section 3 Minimum age of marriage see http://www.veritaszim.net/sites/veritas_d/files/MARRIAGES%20BILL%2C%202019.pdf

(1) No person under the age of eighteen years may contract a marriage or enter into an unregistered customary law marriage or a civil partnership.

(2) For the avoidance of any doubt, it is declared that child marriages are prohibited and under no circumstances shall any person contract, solemnise, promote, permit, allow or coerce or aid or abet the contracting, solemnising, promotion, permitting, allowing or coercion of the

14. In May 2018 the African Court on Human and Peoples' Rights in *Association Pour Le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*⁴⁵ ruled on the alleged violation of the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Maputo Protocol) and the African Charter on the Rights and Welfare of the Child (Children's Charter) regarding the minimum age of marriage. The Court analyses the obligations Mali had to comply with and holds that Mali contravened the Maputo Protocol and Children's Charter.⁴⁶ The applicants argued that the Family Code allows for special exemption for marriage from the age of 15 years, with the father's or mother's consent for boys, and only the father's consent, for the girl. The Court holds that the respondent violated the Maputo Protocol and Children's Charter.
15. In Kenya in the 2015 case of *Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others* was the marriage of the 17 year old girl.⁴⁷ The Court framed the issue to be decided as follows: 'Can a child contract a marriage in the context of the Constitution and Laws in Kenya and secondly can a child professing Islam contract a Muslim marriage in the context of the Constitution and laws in Kenya?' The Court held that the Constitution of Kenya outlaws marriages of people below 18 years, irrespective of the religious belief concerned.⁴⁸
16. The age of majority in Botswana is 18 years in terms of the Interpretation Act.⁴⁹ In terms of the Marriage Act, however, persons other than widows or widowers under the age of 21 require third party consent for marriage.⁵⁰ The Marriage Act also provides that part 1

marriage, unregistered customary law marriage, civil partnership, pledging, promise in marriage or betrothal of a child.

- (3) Any person, other than the child concerned, who contravenes subsection (2), shall be guilty of an offence and liable to a fine not exceeding level 10 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.
- (4) It shall be an aggravating factor in an offence referred to in subsection (3) that the contravention was by a parent or a person in *loco parentis* to the child concerned.

⁴⁵ Available at <http://en.african-court.org/index.php/55-finalised-cases-details/942-app-no-046-2016-apdf-ihrda-v-republic-of-mali-details> accessed 22 April 2020.

⁴⁶ *ADDF and IHRDA v Republic of Mali* par 76 to 78.

⁴⁷ [2015] eKLR available at <http://kenyalaw.org/caselaw/cases/view/115306/> accessed 22 April 2020.

⁴⁸ Par 23 and 24.

⁴⁹ See <http://www.elaws.gov.bw/law.php?id=1399>. Section 15 Consent to marriage by minors.

⁵⁰ Genderindex "Social institutions and gender index" <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/BW.pdf>; Girls Not Brides "Child Marriage Botswana" <https://www.girlsnotbrides.org/child-marriage/botswana/> and Kuhlmann Mpho "Child Marriages –

of the Act applies to all marriages solemnised in Botswana except marriages contracted in accordance with any customary law of Botswana or Muslim, Hindu or other religious rites.⁵¹ This means that the age requirements which apply to civil marriages in terms of the Marriage Act does not similarly apply to customary marriages, or Muslim, Hindu or other religious marriages.⁵² The Children's Act of Botswana defines a child as any person who is below the age of 18 years.⁵³ It further provides every child has a right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being and shall not be subjected, by any person, to among others, a forced marriage and a child betrothal.⁵⁴

17. Concerns were also raised in Germany particularly about marriages concluded outside Germany involving minors.⁵⁵ In 2016 there were about 1 600 married minors mainly from Syria, Afghanistan, Irak and EU-Member States. This figure dropped in April 2018 to approximately 300 registered married minors.⁵⁶ German law allowed marriages by parties

Botswana's A Perfect Crime" 16 Sept 2019 *Sunday Standard* <https://www.sundaystandard.info/child-marriages-botswanas-a-perfect-crime/> accessed 22 April 2020.

⁵¹ Part 1 of the Act deals with issues such as publications of banns, special licences, protection of minors, marriage officers, inquiries to be made by marriage officers, the solemnization of marriages, the marriage formulary to be followed, registration of marriages, consecration of marriages already solemnized, impediments to marriage, insane persons and persons below age, consent to marriage by minors, prohibited degree of marriages, and offences and penalties.

⁵² Lesemela Keikantse "MP Keorapetse pushes for abolition of child marriages" 22 Jan 2019 *Botswana Guardian* <http://www.botswanaguardian.co.bw/news/item/3909-mp-keorapetse-pushes-for-abolition-of-child-marriages.html> and also Xuequan Mu 'UN agency partners Botswana to end child marriages official' 30 June 2019 *Africa CGTN* <https://africa.cgtn.com/2019/06/30/un-agency-partners-botswana-to-end-child-marriages-official/> accessed 22 April 2020 which notes, among others, statistics in Botswana on children in relationships:

... Latest statistics show that 1,644 children were found to be in marriage relationships while 3,748 were living in cohabitation in the southern African country, said Makatane. "Sixty percent of the 1,644 were made of children aged between 12 and 15 years while the remainder is 16 to 17 year olds," said Makatane, adding that of the 3,748 children who are cohabiting, 41 percent were 12 to 16 year olds while 59 percent were 16 to 17 year olds. ...

⁵³ See <http://jafbase.fr/docAfrique/Botswana/Children%20act.pdf>.

⁵⁴ Section 62.

⁵⁵ Deutsche Welle "German cabinet proposes national ban on child marriage 5 April 2017 *Deutsche Welle.com* <https://www.dw.com/en/german-cabinet-proposes-national-ban-on-child-marriages/a-38306852>; PT-Magazin "Die Kinderehe – wenn Minderjährige heiraten" 11 Oct 2017 *PT-Magazin* https://www.pt-magazin.de/de/gesellschaft/recht/die-kinderehe-%E2%80%93-wenn-minderj%C3%A4hrige-heiraten_j8lpp3p9.html accessed 16 April 2020.

⁵⁶ Hoffman Meredith "For young refugees, marriage is a form of protection" 27 Sept 2016 https://www.vice.com/en_ca/article/mvkbqg/for-young-refugees-marriage-is-a-form-of-protection; Ninja Charbonneau "Kinderehen Weltweit: die wichtigsten Fragen und Antworten" 1 Oct 2019 *UNICEF.de* <https://www.unicef.de/informieren/aktuelles/blog/kinderehen-weltweit-fragen-und-antworten/199066> accessed 16 April 2020.

under the age of 18 years but above 16 years⁵⁷ with court permission. Legislation was passed in 2019 outlawing child marriages⁵⁸ resulting in concerns about the effects of the legislation on underage brides from non-German countries.⁵⁹ The Karlsruhe Federal Supreme Court held that the legislation was unconstitutional.⁶⁰ The German Constitutional Court has yet to decide on the constitutionality of the legislation prohibiting marriages by persons younger than 18.⁶¹

18. In 2015 the Dutch government adopted measures against forced marriages.⁶² The Dutch Civil Code requires both partners to be at least 18 years old to marry. The Netherlands also does not recognise marriages conducted abroad involving a party who is below the age of 18 until both partners reach the age of 18.⁶³ The Marriage Act of Norway also

⁵⁷ Saarländisches Oberlandesgericht Beschluss vom 24.05.2007 - 6 UF 106/06 <https://openjur.de/u/57894.html> accessed 16 April 2020.

⁵⁸ The Local “German parliament passes law ending child marriage” 2 June 2017 *The Local* <https://www.thelocal.de/20170602/german-parliament-passes-law-ending-child-marriage> accessed 16 April 2020.

⁵⁹ Knipp Kersten “Child marriages in Germany present a challenge for authorities” *Deutsche Welle.com* 23 Sept 2019 <https://www.dw.com/en/child-marriages-in-germany-present-a-challenge-for-authorities/a-50540043>; Rath Christian “Underage, married, separated: A German law abolishes child marriages in general – not always in the interest of those affected” 9 March 2019 *Max Plank Gesellschaft* <https://www.mpg.de/12797223/childmarriage-legislation-germany>; and *Frauen Gegen Gewalt* „What is the situation of married underage refugees in Germany?” *Frauen Gegen Gewalt* <https://www.frauen-gegen-gewalt.de/en/what-is-the-situation-of-married-underage-refugees-in-germany.html> accessed 16 April 2020.

⁶⁰ *Tagespiegel* “BGH hält Kinderehe-Gesetz für verfassungswidrig” 14 Dec 2018 *Tagespiegel.de* <https://www.tagespiegel.de/politik/karlsruhe-bgh-haelt-kinderehe-gesetz-fuer-verfassungswidrig/23761878.html>; Antomo Dr. Jennifer “BGH legt dem BVerfG das Kinderehegesetz vor” 21 Dec 2018 *lto.de* <https://www.lto.de/recht/hintergruende/h/kinderehen-gesetz-vorlage-bgh-bverfg-harbach-befangenheit/>; Bois Paul “Globalist Insanity: German Supreme Court Rules Anti-Child Marriage Law Unconstitutional” 26 Dec 2018 *Dailywire.com* <https://www.dailywire.com/news/german-supreme-court-child-marriage-constitutional-paul-bois>; Kern Soeren “Germany: New Law Banning Child Marriage Declared Unconstitutional” 22 Dec 2018 *Gatestone Institute* <https://www.gatestoneinstitute.org/13444/germany-child-marriage-law> accessed 16 April 2020. See also Christian Rath “Urteil über Jugendehe: Der Einzelfall entscheidet” 14 Aug 2020 *Taz DE* [Urteil über Jugendehe: Der Einzelfall entscheidet – taz.de](https://www.taz.de/Urteil-ueber-Jugendehe-Der-Einzelfall-entscheidet) accessed 30 Oct 2020.

⁶¹ Moses Julia “Foreign Ideas about “Child Marriage”? Diversity, the Family and Legal Reform in Contemporary Europe” 20 Sept 2019 *Verfassungsblog* <https://verfassungsblog.de/foreign-ideas-about-child-marriage/> accessed 16 April 2020.

⁶² Government Netherlands “What is the government’s policy on child brides and forced marriages?” see <https://www.government.nl/topics/asylum-policy/question-and-answer/dutch-government-policy-on-child-brides-forced-marriages> and Government Netherlands “Tackling forced marriage” <https://www.government.nl/topics/forced-marriage/tackling-forced-marriage> accessed 20 April 2020.

⁶³ Forced Marriage (Prevention) Act (Wet tegengaan huwelijksdwang) <https://wetten.overheid.nl/BWBR0037085/2015-12-05#Artikel1> accessed 23 April 2020. ‘De nietigverklaring van een huwelijk en de erkenning van in het buitenland gesloten huwelijken and en voorts te verduidelijken wanneer de erkenning van rechtsgeldig in het buitenland gesloten huwelijken in strijd is met fundamentele beginselen van de Nederlandse rechtsorde’.

provides since 1 July 2018 that no person under 18 years of age may enter into a marriage.⁶⁴ In January 2017 Denmark also introduced a ban on marriage by under-18s in reaction to a number of underage female spouses of asylum seekers in Denmark.⁶⁵ In Finland legislation provides since June 2019 that the minimum marriageable age is with no exceptions 18.⁶⁶ Legislation was adopted in the USA state of Delaware in 2018 to ban child marriage which sets the minimum age for marriage as 18.⁶⁷ Many USA states still allow for exceptions to allow persons under the age of 18 to get married, such as the State of Florida where legislation set the minimum marriageable age at 17.⁶⁸

⁶⁴ Government Norway “Proposal to ban child marriages in Norway” 26 April 2018 <https://www.regjeringen.no/en/aktuelt/proposal-to-ban-child-marriages-in-norway/id2599521/> and Government Norway “Norway bans child marriages” 25 July 2018 Government Norway <https://www.regjeringen.no/en/aktuelt/endringer-i-ekteskapsloven-fra-1.-juli/id2606465/>. Government Norway “Conditions for marriage” 4 Dec 2019 <https://www.regjeringen.no/en/topics/families-and-children/innsiktsartikler/marriage-and-cohabitation1/vilkar-for-ekteskap/id672620/> accessed 23 April 2020.

⁶⁵ The Local “Denmark bans marriage for under-18s” *TheLocal.de* 19 Jan 2017 <https://www.thelocal.dk/20170119/denmark-bans-marriage-for-under-18s> and Bulman May “Denmark bans marriage for under-18s after report suggests dozens of asylum seeking teens arriving with spouses” 20 Jan 2017 *Independent.co.uk* <https://www.independent.co.uk/news/world/europe/denmarkban-under-18-marriage-under-18-asylum-seeking-teens-arrive-spouses-minors-a7537441.html>; Stromme Lizzie “Denmark bans underage marriage to ‘protect migrant child brides’ in landmark case” 19 Jan 2017 *Express.co.uk* <https://www.express.co.uk/news/world/756435/Denmark-BANS-underage-marriage-protect-migrant-child-brides>; Gender Index “Denmark – Social Institutions and Gender Index” <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/DK.pdf> accessed 20 April 2020.

⁶⁶ *Uutiset* “Finnish justice ministry plans outright ban on underage marriages” 25 Oct 2018 *Uutiset* https://yle.fi/uutiset/osasto/news/finnish_justice_ministry_plans_outright_ban_on_underage_marriages/10475894; *Uutiset* “Justice Minister calls for child marriage ban in Finland” 29 June 2019 *Uutiset* https://yle.fi/uutiset/osasto/news/justice_minister_calls_for_child_marriage_ban_in_finland/10281751; *Uutiset* “Child marriage ban takes effect in Finland: exemptions to the law are no longer allowed, beginning 1 June 2019” 1 June 2019 *Uutiset* https://yle.fi/uutiset/osasto/news/child_marriage_ban_takes_effect_in_finland/10811843; *Uutiset* “Finnish Lutheran Church seeks ban on underage marriages” 22 Aug 2018 *Uutiset* <https://yle.fi/uutiset/osasto/news/article10365039.ece> accessed 20 April 2020.

⁶⁷ Thomsen Jacqueline “Delaware becomes first state to ban child marriage” 10 May 2018 *Thehill.com* <https://thehill.com/homenews/state-watch/387212-delaware-becomes-first-state-to-ban-child-marriage?amp> accessed 17 April 2020.

⁶⁸ Savransky Rebecca “Florida passes ban on marriages for those under 17” 3 Nov 2018 *Thehill.com* <https://thehill.com/blogs/blog-briefing-room/news/377834-florida-passes-ban-on-child-marriage> see also Wilson Reid “New momentum seen in legislative fight to ban child marriage” 19 March 2018 *Thehill.com* <https://thehill.com/homenews/state-watch/379135-new-momentum-seen-in-legislative-fight-to-ban-child-marriage> accessed 17 April 2020.

19. The Australian Commonwealth Marriage Act sets 18 as the marriageable age for marriage⁶⁹ of a person domiciled in Australia, wherever that marriage takes place.⁷⁰ The Act provides for third party for consent for minors between the ages of 16 and 18 by parents or a judge or magistrate in exceptional and unusual circumstances when the parents refuse their consent.⁷¹ In 2017 the Marriage (Court Consent to Marriage of Minors) Amendment Bill effected amendments in New Zealand whereby 16 and 17 year old parties require the consent of a judge and no longer allow parental consent if 16 and 17 year olds wish to marry or enter a civil union.⁷² Views were expressed that the legislation did not go far enough in addressing 18 as the minimum age for marriage.⁷³ The 2019 Marriage and Civil Partnership (Minimum Age) Bill [HL] in England and Wales seeks to revoke parental or judicial consent which permits the marriage or civil partnership of a child and to criminalise child marriage or civil partnership under the age of 18.⁷⁴ In 2017 the legislature of Trinidad and Tobago passed amendments to the Marriage Act⁷⁵ providing for the minimum marriageable age as 18 without any third party consent.

D. Marriage officers

20. Officials are also involved in marriages being conducted in African jurisdictions. In Tanzania provision is made for the appointment of registrars,⁷⁶ and for marriages

⁶⁹ Section 11 see also Foster Neil 'Opinion: Minimum lawful age for marriage is clear' 10 Feb 2014 *Newcastleherald* <https://www.newcastleherald.com.au/story/2078882/opinion-minimum-lawful-age-for-marriage-is-clear/>.

⁷⁰ Section 10(2)(a).

⁷¹ Sections 12 to 21 of the Marriage Act.

⁷² See *Marriage (Court Consent to Marriage of Minors) Amendment Bill 2017: Bills Digest 2554 - New Zealand Parliament* (www.parliament.nz) <https://www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/52PLLaw25541/marriage-court-consent-to-marriage-of-minors-amendment> accessed 17 April 2020.

⁷³ See the submission of the Salvation Army of New Zealand, Fiji and Tonga Territory at https://www.salvationarmy.org.nz/sites/default/files/uploads/20170824sppumarriage_court_consent_to_marriage_of_minors_amendment_bill_-_the_salvation_army_submission.pdf) accessed 17 Sept 2020.

⁷⁴ See <https://services.parliament.uk/bills/2019-21/marriageandcivilpartnershipminimumage.html> accessed 24 April 2020.

⁷⁵ The Miscellaneous Provisions (Marriage) Act 8 of 2017, an Act to amend the Marriage Act, Chap. 45:01, the Muslim Marriage and Divorce Act, Chap. 45:02, the Hindu Marriage Act, Chap. 45:03, the Orisa Marriage Act, Chap. 45:04 and the Matrimonial Proceedings and Property Act, Chap. 45:51, see <http://www.tparliament.org/legislations/a2017-08.pdf> accessed 30 April 2020.

⁷⁶ Section 3 regarding the appointment of Registrar-General, Deputy and Assistant Registrars-General of the Law of Marriage Act Tanzania.

according to religious rites and the licensing of ministers.⁷⁷ Provision is likewise made in Kenya for the registrar appointing marriage officers and for ministers of faith applying to the registrar to be appointed as marriage officers.⁷⁸ Zimbabwe is one of the exceptions which provides for the involvement of marriage officers in the conclusion of customary marriages. The Customary Marriages Act defines a 'customary marriage officer' to mean a magistrate; or an official or chief appointed to be a customary officer.⁷⁹ The 2019 Zimbabwe Marriage Bill also provides for marriage officers for customary marriages as well as civil marriages.⁸⁰ A marriage officer in relation to a customary law marriage is defined to mean a magistrate, minister of religion or a Chief and in relation to a civil marriage, means a magistrate; and a minister of religion.

21. The Ghanaian Marriages Act provides for the licencing of Muslim priests to conduct marriages,⁸¹ for the appointment of registrars of marriages,⁸² and for the appointment of ministers of religion as marriage officers.⁸³ The Act is silent about marriage officers officiating at customary marriages. It provides for the registration of customary marriages and Muslim marriages and regulates in detail the issue of licenses for marriages, banns and the registration of marriages. The Marriage Act of Malawi 2015 also provides for the involvement of a registrar in the conclusion of customary marriages.⁸⁴ The Marriage Act of Uganda also provides for the appointment of registrars,⁸⁵ the licensing of places of worship to be places for the celebration of marriages⁸⁶ and marriages in licensed places of worship by recognised ministers.⁸⁷ It was reported in Uganda that the Uganda Registry

⁷⁷ Section 30 on the marriages according to religious rites and licensing of ministers of the Law of Marriage Act Tanzania.

⁷⁸ Part VIII —appointment of registrar of marriages and marriage officers.

⁷⁹ Section 2 <http://unstats.un.org/unsd/vitalstatkb/Attachment186.aspx?AttachmentType=1>.

⁸⁰ Marriages Bill 2019 http://www.veritaszim.net/sites/veritas_d/files/MARRIAGES%20BILL%2C%202019.pdf.

⁸¹ Section 21 of the Marriages Act see <https://www.refworld.org/pdfid/548edd8f4.pdf> accessed on 19 Sept 2020.

⁸² Section 36 of the Marriages Act.

⁸³ Section 38 of the Marriages Act.

⁸⁴ 40. A registrar celebrating a customary or religious marriage shall administer an oath, if any, as prescribed either by the religion or custom of one or both of the parties to the marriage. ...

43.(1) A registrar who celebrates a customary or religious marriage under this Act shall keep a register of the celebration in Form H in the *First Schedule*, and shall make and sign in the Marriage Register Book an entry of every marriage celebrated by him or her.

⁸⁵ See section 3 of the Marriage Act of 1904 <https://ulii.org/ug/legislation/consolidated-act/251>.

⁸⁶ Section 5 of the Marriage Act of 1904.

⁸⁷ Section 20 of the Marriage Act of 1904.

Services Bureau was ‘considering introducing a digital platform for Chief administrative officers, and religious leaders to file marriage returns from their offices, to address the hassle of carrying hard copies to URSB offices in Kampala’.⁸⁸ The Marriage Act of Botswana also provides that no marriage shall be valid unless solemnised by a marriage officer.⁸⁹ Marriage officers in Botswana are administrative officers and ministers of religion or persons holding responsible positions in any religious denomination or community, whom the Minister has by notice published in the Gazette appointed a marriage officer.

22. The Australian Marriage Act provides for marriages conducted in Australia by marriage celebrants⁹⁰ and for marriages of Defence Force members conducted overseas.⁹¹ There are four categories of marriage celebrants for marriages conducted in Australia, namely ministers of religion of a recognised denomination, authorised by their denomination’s Nominating Authority and registered by the State and Territory Registries of Births, Deaths and Marriages;⁹² State and Territory officers; marriage celebrants; and religious marriage celebrants who are authorised to solemnise marriages for religious organisations that are not recognised denominations.⁹³ Foreign diplomatic or consular officers are empowered

⁸⁸ Jjingo Malik Fahad “Uganda: couples cautioned against flouting marriage registration rules” 4 Feb 2019 *Allafrica* <https://allafrica.com/stories/201902040450.html> accessed 21 June 2020.

⁸⁹ Section 7 see <https://unstats.un.org/unsd/vitalstatkb/KnowledgebaseArticle50030.aspx> accessed 19 Sept 2020.

⁹⁰ The Celebrants Network notes the statistics of marriage celebrants in Australia as follows: ‘There are currently 9,177 Commonwealth Registered marriage celebrants who perform civil ceremonies as at January 2020. In addition there are 23,000 ministers of recognised religions and 733 religious celebrants – generally these are from less well recognised religious groups.’ See Celebrants.org Celebrants “How to become a celebrant – commonly asked questions” 29 Jan 2020 <https://www.celebrants.org.au/home/celebrants/being-a-civil-celebrant/becoming-a-civil-celebrant/becoming/1857-how-to-become-a-celebrant-commonly-asked-questions> accessed 26 Nov 2020; see also the Marriage (Recognised Denominations) Proclamation 2018 21 Nov 2018 <https://www.legislation.gov.au/Details/F2018L01607> accessed 26 Nov 2020.

⁹¹ See the definition of ‘authorised celebrant’ in section 5 of the Australian Commonwealth Marriage Act.

⁹² See information about the recognised religious denominations Australian Government Attorney-General’s Department “Recognised religious denominations” <https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Pages/recognised-religious-denominations.aspx> and the explanatory memorandum to the Marriage (Celebrant Registration Charge) Bill 2014 <https://www.legislation.gov.au/Details/C2014B00049/Explanatory%20Memorandum/Text> accessed 26 Nov 2020.

⁹³ The Marriage Amendment (Definition and Religious Freedoms) Bill 2017, among others, identified religious marriage celebrants as a new category of celebrants including: ministers of religions from religious denominations that are not recognised under the Marriage Act (e.g. independent religious organisations), and existing marriage celebrants wanting to perform marriages consistent with their religious beliefs <https://www.legislation.gov.au/Details/C2017B00244/Explanatory%20Memorandum/Text>; Australian Government Attorney-General’s Department “New subcategory of ‘religious marriage celebrant’” Dec 2019 <https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/Fact-Sheet-New-subcategory-of-religious-marriage-celebrant.pdf> accessed 26 Nov 2020.

to conduct marriages in accordance with the law or custom of a proclaimed overseas country, between parties of whom one at least possesses the nationality of that country.⁹⁴

23. The Australian Marriage Act provides that a marriage can only be solemnised by or in the presence of an authorised celebrant who is authorised to solemnise marriages at the place where the marriage takes place.⁹⁵ The role of the marriage celebrant in Australia starts with the parties wishing to marry need to give notice of their intended marriage to their marriage celebrant.⁹⁶ Both parties are required to submit to the marriage celebrant documentary proof of the date and place of birth of the party concerned.⁹⁷ The parties need to make a declaration in writing to the celebrant as to their conjugal status; and their belief that there is no legal impediment to the intended marriage. The Marriage Act also requires the marriage celebrant, as soon as practicable after receiving the marriage notice, to give to the parties a document outlining the obligations and consequences of marriage and indicating the availability of marriage education and counselling.⁹⁸
24. In New Zealand there are four categories of celebrants,⁹⁹ namely state officials who are registrars; independent celebrants who are from the community and who are appointed to solemnise marriages or civil unions and who operate independent of churches and organisations; ministers of religious bodies in terms of the Marriage Act who are nominated by their religious bodies to solemnise marriages; and organisational marriage

⁹⁴ The Marriage Amendment (Definition and Religious Freedoms) Bill 2017, among others, established a new category of officers to solemnise marriages of members of the Australian Defence Force overseas see <https://www.legislation.gov.au/Details/C2017B00244/Explanatory%20Memorandum/Text>. Coalition of Celebrant Associations ‘Which marriage celebrants are regulated by the Commonwealth and pay an annual fee?’ <https://www.coalitionofcelebrantassociations.org.au/for-celebrants/84-the-marriage-act-and-celebrants/328-which-marriage-celebrants-are-regulated-by-the-commonwealth-and-pay-an-annual-fee> accessed 26 Nov 2020.

⁹⁵ Section 41 of the Marriage Act.

⁹⁶ Section 42(1)(a) of the Marriage Act, and as regards time frames, not earlier than 18 months before the marriage and not later than one month before the marriage. See also Australian Government Attorney-General’s Department “Checklist – Marriage Celebrant Obligations When Solemnising Marriage” see <https://www.ag.gov.au/FamiliesAndMarriage/Marriage/resources-for-marriage-celebrants/Documents/celebrants-obligations.pdf> 26 Nov 2020.

⁹⁷ Section 42(1)(b) of the Marriage Act.

⁹⁸ Section 42(2)(5A) of the Marriage Act; see the brochure Australian Government Attorney-General’s Department “Happily ever before and after: information for couples planning to marry” see <https://www.ag.gov.au/sites/default/files/2020-03/happily-ever-before-and-after.pdf> accessed 2 Dec 2020.

⁹⁹ Government New Zealand Te Tari Taiwhenua Department of Internal Affairs “Marriage and Civil Union Celebrants: A guide to the role of celebrants in New Zealand” Nov 2020 4 see <https://www.govt.nz/assets/Documents/Celebrants/Guide-to-being-a-celebrant.pdf> accessed 26 Nov 2020.

celebrants who are designated and nominated to solemnise marriages by organisations the principal objects of which are the upholding or promotion of religious beliefs or philosophical or humanitarian convictions.¹⁰⁰ Since October 2020 the Marriage Act of Ontario¹⁰¹ provides for the registration as a marriage officiant a member of a band,¹⁰² First Nation, Métis or Inuit organisation or community or Indigenous entity if such a person is duly recognised by the band, First Nation, Métis or Inuit organisation or community or Indigenous entity as entitled to solemnise marriage according to its customs and traditions.¹⁰³

25. In the Netherlands,¹⁰⁴ Germany¹⁰⁵ and France¹⁰⁶ a mandatory civil registry marriage is required with an optional religious ceremony being performed after the civil registry marriage took place. The USA State of Colorado is one of 10 states in the USA which presently allows, among others, parties to self-unite their relationship.¹⁰⁷ As is the case in most of the states in the USA Colorado also requires the parties wishing to marry to apply for a marriage licence.¹⁰⁸ A marriage may be solemnised in the state of Colorado by a judge of a court, a court magistrate, a retired judge of a court, a public official whose

¹⁰⁰ Costs for Commonwealth-registered marriage celebrants.

¹⁰¹ Section 20.2 of the Marriage Act.

¹⁰² The Indian Act (Canada) defines 'band' to mean a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951, (b) for whose use and benefit in common, moneys are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purposes of this Act; (*bande*) see <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html> accessed 30 Nov 2020.

¹⁰³ Pashagumskum Jamie "Changes made in Ontario Marriage Act to recognize Indigenous marriage ceremonies" 14 Nov 2020 *APT News* <https://www.aptnnews.ca/national-news/changes-made-in-ontario-marriage-act-to-recognize-indigenous-marriage-ceremonies/> accessed 30 Nov 2020.

¹⁰⁴ Government Netherlands "What do I need to take into account if I decide to marry or enter into a registered partnership?" <https://www.government.nl/topics/marriage-cohabitation-agreement-registered-partnership/question-and-answer/marriage-or-entering-into-a-registered-partnership> accessed 26 Nov 2020.

¹⁰⁵ German Federal Foreign Office "Marriage in Germany" <https://www.germany.info/us-en/service/04-FamilyMatters/marriage-in-germany/922550> accessed 26 Nov 2020.

¹⁰⁶ United States of America Department of State "Marriage in France" https://fr.usembassy.gov/wp-content/uploads/sites/50/2017/07/acs_marriage-in-france.pdf accessed 26 Nov 2020.

¹⁰⁷ Seaver Maggie "9 States Where You Can Officiate Your Own Wedding: Here's what you need to know about a having self-uniting marriage" 14 Jan 2019 *The Knot* <https://www.theknot.com/content/self-uniting-marriage> accessed 27 Nov 2020.

¹⁰⁸ See Colorado Revised Statutes Title 14 Domestic Matters article 2 marriage and rights of married women Part 1 Uniform Marriage Code [Colorado Revised Statutes Title 14. Domestic Matters | FindLaw](#) accessed 27 Nov 2020; Colorado Revised Statutes Title 14. Domestic Matters § 14-2-105. Marriage license and marriage certificate <https://codes.findlaw.com/co/title-14-domestic-matters/co-rev-st-sect-14-2-105.html> accessed 6 October 2020.

powers include solemnisation of marriages, by the parties to the marriage, or in accordance with any mode of solemnisation recognised by any religious denomination or Indian nation or tribe.¹⁰⁹ Either the person solemnising the marriage or, if no individual acting alone solemnised the marriage, a party to the marriage must complete the marriage certificate form and forward it to the county clerk and recorder within sixty-three days after the solemnisation. Any person who fails to forward the marriage certificate to the county clerk and recorder is required to pay a late fee in an amount of not less than twenty dollars. An additional five-dollar late fee may be assessed for each additional day of failure to comply with the forwarding requirements up to a maximum of fifty dollars. For purposes of determining whether a late fee shall be assessed, the date of forwarding shall be deemed to be the date of postmark.

26. In the USA state of Wisconsin, a marriage may be solemnised and contracted after a marriage license has been issued. The mutual declarations of the two parties to be joined in marriage that they take each other as husband and wife, made before an authorised officiating person and in the presence of at least two competent adult witnesses other than the officiating person, is required.¹¹⁰ Authorised officiating persons in Wisconsin are: any ordained member of the clergy of any religious denomination or society; any licentiate of a denominational body or an appointee of any bishop serving as the regular member of the clergy of any church of the denomination to which the member of the clergy belongs; the two parties themselves, by mutual declarations that they take each other as husband and wife, in accordance with the customs, rules and regulations of any religious society, denomination or sect to which either of the parties may belong; any judge of a court of record or a reserve judge; any circuit court commissioner or supplemental court commissioner; or any municipal judge. Any officiating person must be at least 18 years old. However, '[t]his option is restricted by law to instances in which at least one of the

¹⁰⁹ Colorado Revised Statutes Title 14. Domestic Matters § 14-2-109. Solemnization and registration of marriages--proxy marriage <https://codes.findlaw.com/co/title-14-domestic-matters/co-rev-st-sect-14-2-109.html> accessed 6 October 2020.

¹¹⁰ 2019 Wisconsin Statutes & Annotations Chapter 765. Marriage [Wisconsin Statutes Chapter 765 \(2019\) — Marriage. :: 2019 Wisconsin Statutes & Annotations :: US Codes and Statutes :: US Law :: Justia](https://legis.wisconsin.gov/statutes/2019/chapter-765). accessed 27 Nov 2020; Wisconsin Statutes § 765.16 marriage contract, how made; officiating person <https://law.justia.com/codes/wisconsin/2019/chapter-765/section-765-16/> accessed 16 Sept 2020.

marrying parties belongs to a religious organization that believes in self-marriage' and that' [t]here are very few religions or sects that allow this option'.¹¹¹

27. The USA State of Pennsylvania also requires that all parties wishing to marry to obtain marriage licences.¹¹² If parties intend to solemnise their marriage in a religious ceremony without the involvement of an officiating clergy, their marriage cannot take place until on application by the parties the Court of Common Pleas certifies by declaration that legal evidence having been furnished by the parties, the court is satisfied that there is no legal impediment against the parties joining themselves in marriage.¹¹³ If the marriage was solemnised by the parties themselves, the original marriage certificate must be signed by the parties to the marriage, attested by two witnesses and retained by the parties contracting the marriage.¹¹⁴ The duplicate certificate must be signed by the parties to the marriage, attested by the same two witnesses and returned for recording within ten days to the court which issued the marriage license.
28. In August 2019 in the USA state of Alabama legislative developments commenced which changed the way in which marriages are established and recognised. Until August 2019 parties wishing to marry were required to give notice of their intention to marry and obtain a marriage licence.¹¹⁵ These requirements were repealed in 2019. Since August 2019 the parties need to complete a marriage certificate form which can be downloaded electronically.¹¹⁶ The marriage document to be executed by the parties must contain the

¹¹¹ Burnett County Clerk "General information about marrying in Wisconsin and instructions for the applicants and officiant" <https://www.burnettcounty.com/DocumentCenter/Home/View/126> 27 Nov 2020;

¹¹² Pennsylvania Consolidated Statutes 2019 Title 23: Domestic Relations 23 Pennsylvania Consolidated Statutes (2019) - DOMESTIC RELATIONS :: 2019 Pennsylvania Consolidated Statutes :: US Codes and Statutes :: US Law :: Justia accessed 27 Nov 2020; Pennsylvania Statutes: Marriage License § 1306 see <https://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/23/23.HTM> accessed 20 Sept 2020.

¹¹³ Pennsylvania Statutes: Marriage Ceremony § 1502 Forms where parties perform ceremony see 23 Pennsylvania Consolidated Statutes § 1502 (2019) - Forms where parties perform ceremony :: 2019 Pennsylvania Consolidated Statutes :: US Codes and Statutes :: US Law :: Justia accessed 27 Nov 2020.

¹¹⁴ Pennsylvania Statutes § 1504 Returns of marriage 23 Pennsylvania Consolidated Statutes § 1504 (2019) - Returns of marriages :: 2019 Pennsylvania Consolidated Statutes :: US Codes and Statutes :: US Law :: Justia accessed 27 Nov 2020.

¹¹⁵ Jefferson County Alabama "Marriage Certificates" <https://jeffcoprobatocourt.com/marriage-certificates/> accessed 19 Sept 2020; Alabama Public Health "Getting married in Alabama? Changes you need to know" 20 Aug 2019 <http://www.alabamapublichealth.gov/news/2019/08/20.html> accessed 19 Sept 2020.

¹¹⁶ See Jefferson County Alabama "Marriage Certificates"; Baldwin County "Marriage certificates" <https://www.baldwincounty.al.gov/Government/probate/licenses/marriage-license>; Gore Leada "Alabama's new marriage law: How to apply for a certificate" 19 Aug 2019

following information: the full names of both of the parties; a notarised affidavit from each party declaring that the affiant is not currently married; the affiant is either at least 18 years of age, or the affiant is at least 16 and under 18 years of age and has the consent of a parent or guardian; the affiant is legally competent to enter into a marriage; the parties are not related by blood or adoption; the affiant is entering into the marriage voluntarily and of his or her own free will and not under duress or undue influence; and the signatures of the parties.¹¹⁷

29. A marriage is valid in the USA state of Alabama on the date the marriage is executed by both parties, provided the affidavits, forms, and data are recorded in the office of the judge of probate within 30 days of the date of the last party's signature.¹¹⁸ The parties, an officiant or other presiding person selected by the persons entering into the marriage may conduct or engage in a civil, independent or religious ceremony of marriage, celebration of marriage, solemnisation of marriage, or any other officiation, or administration of the vows of marriage.¹¹⁹ The state has no requirement for any ceremony or proceeding. Whether or not a ceremony or proceeding is performed or not performed has no legal effect on the validity of the marriage. The affidavits, forms, and data must be filed in the office of the judge of probate and constitutes a legal record of the marriage of the parties. The office of the judge of probate must transmit a copy of the form to the Office of Vital Statistics and it be made a part of its record.¹²⁰ This section does not affect any other legal aspects of marriage in the State of Alabama, including, but not limited to, divorce, spousal support, child custody, or child support.¹²¹ The State of Alabama All abolished all requirements to obtain a marriage license. The requirement of a ceremony of marriage to solemnise the marriage was also abolished.¹²²

<https://www.al.com/news/2019/08/alabamas-new-marriage-law-how-to-apply-for-a-certificate.html> accessed 19 Sept 2020.

¹¹⁷ Alabama Code title 30 Marital and Domestic Relations Alabama Code Title 30. Marital and Domestic Relations | FindLaw; Alabama Code § 30-1-9.1.(b) Requirements for marriage; validity; construction with other laws https://www.lawserver.com/law/state/alabama/al-code/alabama_code_title_30_chapter_1 accessed 27 Nov 2020.

¹¹⁸ Alabama Code title 30 Marital and Domestic Relations § 30-1-9.1.(c).

¹¹⁹ Alabama Code title 30 Marital and Domestic Relations § 30-1-9.1.(d).

¹²⁰ Alabama Code title 30 Marital and Domestic Relations § 30-1-9.1.(e).

¹²¹ Alabama Code title 30 Marital and Domestic Relations § 30-1-9.1.(f).

¹²² Alabama Code title 30 Marital and Domestic Relations § 30-1-9.1.(g).

30. In 2011 in the Saskatchewan Court of Appeal in *the Matter of Marriage Commissioners appointed under the Marriage Act*¹²³ the court held that it would neither be constitutionally permissible to pass legislation, providing for marriage officers appointed before 5 November 2004 (when Court of Queen’s Bench struck down the prohibition against same-sex marriage in Saskatchewan) to refuse conducting same-sex marriages as being contrary to their religious beliefs or, allowing marriage officers whenever appointed to refuse conducting same sex-marriages based on their religious beliefs.¹²⁴ In France cases were brought in the Constitutional Council which in October 2013 denied French local officials the right to opt out of conducting same-sex marriages.¹²⁵ In October 2018 the European Court of Human Rights (ECHR) declared inadmissible the application filed in 2015 by 146 French mayors and deputy mayors refusing to celebrate marriages between same-gender persons.¹²⁶ In February 2016 the Central Board of Appeal, the highest

¹²³ 1995, S.S. 1995, c. M-4.1 2011 SKCA 3
<https://www.canlii.org/en/sk/skca/doc/2011/2011skca3/2011skca3.pdf> accessed 19
 September 2020.

¹²⁴ The court held, among others, as follows:

[97] ... Persons who voluntarily choose to assume an office, like that of marriage commissioner, cannot expect to directly shape the office’s intersection with the public so as to make it conform with their personal religious or other beliefs. Any idea of this sort would sit uneasily with the principle of the rule of law to the effect that “the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.” ...

[98] Marriage commissioners do not act as private citizens when they discharge their official duties. Rather, they serve as agents of the Province and act on its behalf and its behalf only. Accordingly, a system that would make marriage services available according to the personal religious beliefs of commissioners is highly problematic. It would undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis..

¹²⁵ European Centre for Law and Justice “Mayors’ freedom of conscience on same-sex marriage: complaint at the Human Rights Committee” <https://eclj.org/conscientious-objection/un/libert-de-conscience-des-maires-face-au-mariage-homosexuel---recours-au-comit-des-droits-de-lhomme?lng=en>; Adelgren Stephen “France Constitutional Council rejects ‘conscience clause’ for same-sex marriage laws” 18 Oct 2013 *Jurist.org* <https://www.jurist.org/news/2013/10/french-constitutional-council-rejects-conscience-clause-for-same-sex-marriage-laws/>; BBC “France mayors cannot block gay marriage” - top court’ 18 October 2013 <https://www.bbc.com/news/world-europe-24579037>; Voice of America “French Mayors Can’t Refuse to Perform Same-sex Marriages” 18 Oct 2013 <https://www.voanews.com/europe/french-mayors-cant-refuse-perform-same-sex-marriages>; Kölner Stadt-Anzeiger “Homo-Ehe in Frankreich: Bürgermeister müssen trauen” 18 Oct 2013 <https://www.ksta.de/politik/homo-ehe-in-frankreich-buergermeister-muessen-trauen-3288326>; Luxmoore Jonathan “French court: no conscience clause for mayors in same-sex marriage” 24 Oct 2013 *National Catholic Reporter* <https://www.ncronline.org/news/world/french-court-no-conscience-clause-mayors-same-sex-marriage> accessed 5 June 2020.

¹²⁶ Mannschaft.com “EU-Gericht: Bürgermeister dürfen Trauung von Homopaaren nicht verweigern” 17 Oct 2018 <https://mannschaft.com/2018/10/17/eu-gericht-buergermeister-duerfen-trauung-von-homopaaren-nicht-verweigern/>; European Centre for Law and Justice “The ECHR against the right to freedom of conscience for mayors” <https://eclj.org/conscientious-objection/echr/>; Welt “Gericht: Bürgermeister dürfen Homo-Trauung nicht verweigern” 17 Oct 2018 <https://www.welt.de/newsticker/news1/article182245794/Diskriminierung-Gericht-Buergermeister-duerfen-Homo-Trauung-nicht-verweigern.html>.

tribunal for government officials in the Netherlands, confirmed the dismissal by the municipality of Den Haag of a marriage officer who refused to conduct same-sex marriages.¹²⁷

E. Time, place and form of marriages

31. In Australia a marriage must be solemnised by or in the presence of an authorised celebrant who is authorised to solemnise marriages at the place where the marriage takes place.¹²⁸ In 1998 in *W v T*¹²⁹ the Family court held where the marriage ceremony was performed by a person who was not an authorised celebrant the court explained that ‘the person solemnizing the marriage or deemed to do so should make that known to the parties and to the congregation’.¹³⁰
32. A marriage may be solemnised in Australia on any day, at any time and at any place.¹³¹ Australian marriage celebrants are advised not to solemnise marriages on aircraft or boats due to issues about the recognition of such marriage which may arise in other countries.¹³² A marriage may not be solemnised unless at least 2 persons who are, or appear to the

¹²⁷ COC NI “Gemeente Den Haag mocht weigerambtenaar ontslaan” 29 Feb 2016 <https://www.coc.nl/jouw-belangen/gemeente-den-haag-mocht-weigerambtenaar-ontslaan>; AD NI “Haagse weigerambtenaar mocht ontslagen worden” 29 Feb 2016 <https://www.ad.nl/den-haag/haagse-weigerambtenaar-mocht-ontslagen-worden~a55463f3/?referrer=https://www.google.com/> accessed 5 June 2020.

¹²⁸ Section 41 of the Marriage Act <https://www.legislation.gov.au/Details/C2016C00938>.

¹²⁹ *W and T* [1998] FamCA 49 (7 May 1998) Justice Fogarty held at par 6.59 ‘the person solemnizing the marriage or deemed to do so should make that known to the parties and to the congregation, and that ordinarily there should be a closer physical proximity than this case demonstrated’ see http://www.austlii.edu.au/au/cases/cth/family_ct/1998/49.html accessed 30 Nov 2020. Judge Baker held, among others, similarly as follows:

106. For these reasons therefore, I think it both sensible and desirable that the person having the right at law to celebrate a marriage be part of the ceremonial group or, at the very least, be in reasonable proximity to it. This is because the celebrant bears the responsibility to ensure that the marriage ceremony is carried out in accordance with the law and he or she must therefore be available to intervene if some procedure is adopted or steps taken, which would be in direct conflict with what the legislature has intended.

¹³⁰ Judge Lindenmayer held in *W and T*, among others, as follows:

2. ... the consensual presence of an authorized celebrant is essential to the validity of a marriage in Australia. However, I am also of the view that beyond that consensual presence, the authorized celebrant (in the case of one who is a minister of religion) is not required by law to take any particular part or occupy any particular place during the marriage ceremony. In saying that that presence must be "consensual" I mean that it must be both voluntary and with knowledge on the part of the celebrant that he/she is at the ceremony in the capacity of the supervising authorized celebrant. The fact that neither of the parties to the marriage knows of that presence, or is aware of its significance, is irrelevant.

¹³¹ Section 43 of the Marriage Act <https://www.legislation.gov.au/Details/C2018C00441>.

¹³² “Guidelines on the Marriage Act 1961 for Marriage Celebrants” par 5.1 Time and Place 60.

person solemnising the marriage to be, over the age of 18 years are present as witnesses.¹³³ Furthermore, where a marriage is solemnised by or in the presence of an authorised celebrant, being a minister of religion, it may be solemnised according to any form and ceremony recognised as sufficient for the purpose by the religious body or organisation of which he or she is a minister.¹³⁴ Where a marriage is solemnised by or in the presence of an authorised celebrant, not being a minister of religion, it is sufficient if each of the parties says to the other, in the presence of the authorised celebrant and the witnesses, the words: 'I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband, or spouse); or words to that effect'.¹³⁵ Where a marriage has been solemnised by or in the presence of an authorised celebrant, a certificate of the marriage prepared and signed is conclusive evidence that the marriage was solemnised. Nothing makes a certificate conclusive where the fact that the marriage ceremony took place is in issue – as to that fact; or where the identity of a party to the marriage is in issue – as to the identity of that party.

33. Marriage celebrants other than ministers of religion are required to explain the nature of marriage relationships during the marriage ceremony. Therefore, before a marriage is solemnised by or in the presence of an authorised celebrant, not being a minister of religion of a recognised denomination, the authorised celebrant must say to the parties, in the presence of the witnesses, the words: 'I am duly authorised by law to solemnise marriages according to law. Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter. Marriage, according to law in Australia, is the union of 2 people to the exclusion of all others, voluntarily entered into for life'; or words to that effect.¹³⁶ Where, in the case of a person authorised to solemnise marriages, the Minister is satisfied that the form of ceremony to be used by that person sufficiently states the nature and obligations of marriage, the Minister may, either by the instrument

¹³³ Section 44 of the Marriage Act.

¹³⁴ Section 45 of the Marriage Act which regulates the form of the marriage ceremony; Queensland Government Registry of Births, Deaths and Marriages "Registry celebrant handbook January 2018 Queensland https://www.publications.qld.gov.au/dataset/697f9b44-22fe-4bc1-9f58-955e287fd30d/resource/f18f5d5b-76cf-46f4-b316-80db2dbf4fce/fs_download/ceremoniesregistrycelebrant_handbook.pdf accessed 30 Nov 2020.

¹³⁵ Section 45(2) <https://www.legislation.gov.au/Details/C2018C00441>.

¹³⁶ Section 46(1) of the Marriage Act.

by which that person is so authorised or by a subsequent instrument, exempt that person from compliance with this requirement.¹³⁷

34. The Marriage Act of Ontario provides similarly to the formula one sees in many other jurisdictions about the questions the officiant needs to ask the prospective spouses or partners. A distinguishing factor of the Act which is not part of marriage statutes in many other jurisdictions is the officiant or celebrant declaring the parties married by the power vested in him or her by the Marriage Act.¹³⁸
35. The Law Commission of England and Wales is currently consulting on possible reform of the places where marriages are permitted to take place, the form of the wedding ceremony and allowing non-religious organisations to conduct weddings.¹³⁹ A recent example which illustrates the invalidity of a marriage when spouses do not comply with the requirements for a valid marriage is the February 2020 case of *Attorney General v Akhter & Ors* in England.¹⁴⁰ In issue was the December 1998 Islamic marriage ceremony, a *Nikah*, in a London restaurant which the parties knew would have no legal effect. The parties envisaged that they would also have a civil marriage ceremony later to comply with the Marriage Act of England and Wales but that never happened. The Marriage Act allows the parties to adopt the marriage ceremony they see fit. The Court considers the requirements the parties need to comply with, those that apply to the marriage ceremony and the duties of the marriage officer in ensuring that a valid marriage is concluded. The Court found that no valid marriage was concluded.¹⁴¹

¹³⁷ Section 46(1) of the Marriage Act.

¹³⁸ Section 24(3) of the Marriage Act of Ontario see <https://www.canlii.org/en/on/laws/stat/rso-1990-c-m3/latest/rso-1990-c-m3.html> accessed 30 Nov 2020.

¹³⁹ Law Commission of England and Wales *Getting married: consultation paper*.

¹⁴⁰ [2020] EWCA Civ 122 (14 February 2020) [2020] WLR(D) 95, [2020] EWCA Civ 122 <http://www.bailii.org/ew/cases/EWCA/Civ/2020/122.html>. See also Fouzder Monidipa "Couple's Islamic ceremony 'did not create a marriage' – Court of Appeal" 14 February 2020 <https://www.lawgazette.co.uk/news/couples-islamic-ceremony-did-not-create-a-marriage-court-of-appeal/5103098.article> and Patel Siddique "Akhter v Khan: the law is clarified but reform is needed" 19 Feb 2020 <https://www.shoosmiths.co.uk/insights/articles/akhter-v-khan-the-law-is-clarified-but-reform-is-needed> accessed 30 Nov 2020.

¹⁴¹ 13. ... Section 44 of the 1949 Act provides that a marriage in a registered building "may be solemnized ... according to such form and ceremony as [the parties] may see fit to adopt". There are some additional formal requirements, in particular that the ceremony must take place in the presence of a registrar or an authorised person and two witnesses and that at "some part of the ceremony" the parties must state that they are legally free to marry and the "words of contract" (i.e. that they are marrying each other), as set out in ss. 44(3) or (3A). The section makes clear, however, that the marriage ceremony can take any form, which would obviously include an Islamic religious ceremony. An "authorised person" is a person authorised by the trustees or governing body of the registered building to be present at the solemnisation of marriages: ss. 43 or 43B. In

36. Legislation also regulates in the Netherlands the place, time and the civil registry official establishing the prospective spouses consenting to marriage. A marriage must be contracted in the Netherlands¹⁴² in public in the town hall before the Registrar of Civil Status in the presence of at least two and at the most four adult witnesses. The marriage must be contracted in the municipality of the place of domicile of one of the prospective spouses at the date of the certificate of notice of marriage or in another Dutch municipality than the one in which one of them has his domicile at the moment on which the formal notice of marriage is given as identified in the notice. A marriage can be contract outside a town hall if one of the parties is prevented to proceed to the town hall due to a proven impediment, then the marriage may be contracted in a house within the same municipality, but in the presence of six adult witnesses.¹⁴³ The prospective spouses must appear in person before the Registrar of Civil Status for contracting their marriage.¹⁴⁴ Marriage by

saying that it is not difficult, we recognise, as highlighted by The Scoping Paper, at p.49, and in the article The Legal Treatment of Islamic Marriage Ceremonies, at p.382, that a smaller proportion (and number) of places of worship for religions other than Christian have been registered for the solemnisation of marriages.

14. We would also point to the obligations imposed by the 1949 Act on those who are placed in a position of responsibility in respect of each of the above routes to ensure that there has been compliance with the required formalities. This is demonstrated by the existence of offences, now under the 1949 Act, which can be committed by those who solemnize a marriage (s. 75) and by authorised persons (s. 77) when they act contrary to certain of the required formalities. Although, as explained below, these offences only apply to ceremonies of marriage within the scope of the 1949 Act, their existence emphasises the important role those responsible for ceremonies of marriage have in ensuring that the parties know the legal effect of the ceremony in which they are participating.

...

66. ... Having considered whether we should seek further to define when a marriage will "purport to be a marriage" within the scope of the 1949 Act, we have decided not to do so. This is for a number of reasons. First, the Law Commission is conducting a comprehensive review of the law governing how and where couples can marry, which would seem likely to include consideration of this issue. Secondly, we doubt whether it is possible or, indeed, sensible, to seek to delineate when the cumulative effect of the failure to comply with the required formalities will result in a non-qualifying ceremony and when it will result in a void marriage. Rather, we would suggest that the focus of the parties who want to marry and of those officiating at a ceremony of marriage, should be on complying with the required formalities so that they can be confident that they have contracted a valid marriage. Thirdly, although there may be ceremonies, such as in *A v A*, when the cumulative effect of compliance with the required formalities is to create a valid or, alternatively, a void marriage, we would not want to encourage parties who want to marry to rely on such partially compliant ceremonies because the outcome will, inevitably, be uncertain. ...

¹⁴² Article 1:63 of the Dutch Civil Code <http://www.dutchcivillaw.com/legislation/dcctitle055.htm> accessed 30 Nov 2020.

¹⁴³ Article 1:64 of the Dutch Civil Code and see for the Dutch text the Burgerlijk Wetboek Boek 1 Afdeling 4 De voltrekking van het huwelijk see <https://wetten.overheid.nl/BWBR0002656/> accessed 30 Nov 2020.

¹⁴⁴ Article 1:65 of the Dutch Civil Code and the Burgerlijk Wetboek Boek 1 Afdeling 4 De voltrekking van het huwelijk.

means of proxy can take place when on compelling reasons the Minister of Justice grants permission to the prospective spouses to be represented by a person who is specifically authorised to act as their representative or as the representative of one of them.¹⁴⁵

37. The prospective spouses in the Netherlands must state before the Registrar of Civil Status and in the presence of the witnesses that they accept each other as husband and wife and that they will faithfully fulfil all duties which the law connects to their marital status.¹⁴⁶ Immediately after they have made this declaration, the Registrar of Civil Status declares the parties lawfully joined in matrimony and he will draw up a marriage certificate to that effect.¹⁴⁷ No religious ceremonies may take place before the parties have shown to the minister of the religious service that their marriage has been contracted before a Registrar of Civil Status.¹⁴⁸
38. The Marriage Act of Uganda provides for religious marriages and marriages in a registrar's office. A minister may not celebrate any marriage except in a building which has been duly licensed by the Minister, or in such place as the Minister's licence may direct.¹⁴⁹ The parties may contract a marriage before a registrar, in the presence of two witnesses in his or her office, with open doors, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon.¹⁵⁰
39. In Botswana a marriage must be solemnised in the presence of at least two witnesses competent to give evidence in a court of law and between the hours of six o'clock in the morning and six o'clock in the afternoon.¹⁵¹ The public must have access to any place or any part of any building in which a marriage is being solemnised.¹⁵² In solemnizing a marriage a minister of religion or person holding a responsible position in any religious denomination or community must follow the formulary in use in the

¹⁴⁵ Article 1:66 of the Dutch Civil Code and the Burgerlijk Wetboek Boek 1 Afdeling 4 De voltrekking van het huwelijk.

¹⁴⁶ Article 1:67.1 of the Dutch Civil Code and see for the Dutch text the Burgerlijk Wetboek Boek 1 Afdeling 4 De voltrekking van het huwelijk.

¹⁴⁷ Article 1:67.2 of the Dutch Civil Code.

¹⁴⁸ Article 1:68 of the Dutch Civil Code.

¹⁴⁹ Section 22 of the Marriage Act Chapter 251 of Uganda <https://unstats.un.org/unsd/vitalstatkb/KnowledgebaseArticle50857.aspx>

¹⁵⁰ Section 26 of the Marriage Act Chapter 251 of Uganda.

¹⁵¹ Section 9(1) of the Marriage Act <http://unstats.un.org/unsd/vitalstatkb/Attachment31.aspx?AttachmentType=1>.

¹⁵² Section 9(1) of the Marriage Act.

congregation to which he or she belongs.¹⁵³ An administrative officer who solemnises a marriage must require the bridegroom and bride to repeat separately after him or her the prescribed words.¹⁵⁴ Before solemnising the marriage, the marriage officer must explain to the parties the consequences and implications of the proposed marriage, namely— (i) the fact that the intended marriage will, during its subsistence, be a bar to either party thereto entering into any other marriage, whether that other marriage is contracted as a civil marriage or in accordance with customary, Muslim, Hindu or other religious rites; (ii) that the marriage cannot be dissolved during the lifetime of the spouses except by a valid decree of divorce; (iii) that if either spouse, before the death of the other, contracts another marriage, whether that other marriage is contracted as a civil marriage or in accordance with any customary, Muslim, Hindu or other religious rites whilst the existing marriage remains undissolved, he or she will be guilty of bigamy and liable to punishment for that offence.

F. Registration of relationships

40. There are many examples in African jurisdictions which provide for registration of customary, Muslim, Hindu, other religious and civil marriages. Registration of all civil marriages, customary, Muslim, Hindu and other religious marriage is required by marriage legislation in Botswana.¹⁵⁵ It is required of the marriage officer to enter the civil marriage immediately in the register after the solemnisation of the marriage. The parties to a customary, Muslim, Hindu and other religious marriage must ensure that their marriage is registered within two months of contracting their marriage. Only civil marriages concluded in Botswana in accordance with the Marriage Act are registered but not a customary law or Muslim, Hindu or any other religious marriage.¹⁵⁶ Both the Marriage Act of Zimbabwe

¹⁵³ Section 10(1) of the Marriage Act.

¹⁵⁴ Section 10(2) of the Marriage Act:

"I (name of bridegroom or bride) do solemnly declare that I know not of any lawful impediment why I (name of bridegroom or bride) may not be joined in matrimony to (name of bridegroom or bride) here present," and each of them, the bridegroom and bride, shall say to the other "I call upon these persons here present to witness that I (name of bridegroom or bride) do take (name of bridegroom or bride) to be my lawful wedded (husband or wife)." Thereupon the bridegroom and bride shall give each other the right hand and the administrative officer shall declare the marriage solemnised in these words: "I declare that (name of bridegroom) and (name of bride) here present are lawfully joined together in matrimony."

¹⁵⁵ The Marriage Act 18 of 2001 sections 11 and 23 Chapter 29:01 Marriage <https://unstats.un.org/unsd/vitalstatkb/KnowledgebaseArticle50030.aspx>.

¹⁵⁶ Government Botswana "Marriage Registration" <https://www.gov.bw/civil-registration/marriage-registration> accessed 30 Nov 2020.

and the Customary Marriages Act of Zimbabwe provide for registration of marriages. The 2019 Marriages Bill would allow that a marriage contracted according to customary law but not solemnised in terms of the Marriage Act must be registered by the parties to such marriage within three months of the date the union was entered into or such later date as may be prescribed.¹⁵⁷ In accordance with the 2019 Marriages Bill failure to register a marriage contracted at customary law would not affect the validity of the marriage at customary law with respect to the status, guardianship, custody and the rights of succession of the children of such marriage. It is estimated that the percentage of women in unregistered customary marriages in Zimbabwe might be as high as 70%.¹⁵⁸

41. In Malawi the Marriage, Divorce and Family Relations Act¹⁵⁹ and National Registration Regulations¹⁶⁰ regulate registration of marriage in detail. In Uganda five statutes regulate African Marriages, customary marriages, Muslim marriages, Hindu marriages, and civil and religious marriages.¹⁶¹ In June 2016 it was estimated that 70% of customary marriages of couples aged below 40 are not registered in Uganda with the Ugandan state having no knowledge about these marriages.¹⁶²

¹⁵⁷ Clause 35(4) of the Marriages Bill.

¹⁵⁸ Mambondiyani Andrew “Zimbabwe’s widows left in the cold as in-laws seize property” *Reuters* 12 Dec 2017 <https://af.reuters.com/article/zimbabweNews/idAFL8N1N85MA> ‘... at least 70 percent of women in rural areas are in unregistered traditional marriages and are living under customary law, say rights groups, which offers no protection when it comes to property’. See also Human Rights Watch “‘You Will Get Nothing:’ Violations of Property and Inheritance Rights of Widows in Zimbabwe” 24 Jan 2017 <https://www.hrw.org/report/2017/01/24/you-will-get-nothing/violations-property-and-inheritance-rights-widows-zimbabwe> accessed 30 Nov 2020 which addresses, among others, the consequences of unregistered customary law marriages, the hurdles women face to prove the existence of customary marriages and calls for the registration of all marriages.

¹⁵⁹ The Marriage, Divorce and Family Relations Act 4 of 2015 <https://malawilii.org/mw/legislation/act/2015/4>.

¹⁶⁰ National Registration Regulations, 2015 (Act No. 13 of 2010) Part V Registration Of Marriages <https://www.nrb.gov.mw/index.php/forms-documents/policy-documents?download=9:national-registration-regulations> accessed 30 Nov 2020.

¹⁶¹ Section 7 of the Marriages of Africans Act 1904 (Cap 253) <https://ulii.org/ug/legislation/consolidated-act/253> accessed 30 Nov 2020.

¹⁶² Kasujja Carol “Ugandans not registering their customary marriages” 15 Sept 2016 *New Vision* <https://www.newvision.co.ug/news/1435399/ugandans-registering-customary-marriages> accessed 21 June 2020; Daily Monitor “URSB tells couples to register marriages” 29 Nov 2016 <https://www.monitor.co.ug/News/National/URSB-couples-register-marriages/688334-3467984-ydepeq/index.html> accessed 1 Dec 2020; Ainebyoona Emmanuel “All marriages must be registered – government” 6 June 2016 *Daily Monitor* <https://www.monitor.co.ug/News/National/All-marriages-must-be-registered--government/688334-3233852-n1vcglz/index.html> accessed 21 June 2020; *Daily Monitor* “Couples cautioned against flouting marriage registration rules” 4 Feb 2019 <https://www.monitor.co.ug/News/National/Couples-cautioned-flouting-marriage-registration-rules/688334-4965230-5bhpskz/index.html> accessed 1 Dec 2020.

42. Provision is made in Ghana for customary marriages, Muslim marriages and Christian and other marriages. Registration of customary marriages is voluntary in Ghana. The Marriages Act provides that a marriage contracted under customary law before or after the commencement of the Act may be registered in accordance with the Act. The failure to register a customary marriage contracted before or after the commencement of the Act initially constituted an offence, punishable with a fine or imprisonment of up to three years or both.¹⁶³ An unregistered marriage meant it was invalid. The legislation was amended in 1991 to make registration of marriages voluntary. In Ghana a statutory declaration is required for an application for the registration of a customary marriage which states the names of the parties to the marriage, the places of residence of the parties at the time of the marriage, and that the conditions essential to the validity of the marriage in accordance with the applicable customary law have been complied with.¹⁶⁴ The declaration must be supported by the parents of the spouses, or the persons standing in the place of the parents living at the time of the application for registration.¹⁶⁵
43. Failure to register a civil marriage in Kenya constitutes a criminal offence and a fine not exceeding five thousand shillings or an order of community service or both may be imposed.¹⁶⁶ Where a person authorised by the Registrar celebrates a Hindu marriage in Kenya, that person must record the details of the marriage in the prescribed form and deliver the record to the Registrar and the Registrar must register the marriage after the Registrar has confirmed that the marriage complies with the provisions of the Marriage Act. Where a Kadhi, sheikh, Mukhi or imam authorised by the Registrar celebrates a Muslim marriage, the Kadhi, sheikh, Mukhi or imam must record the details of the marriage; issue the parties to the marriage with a certificate of marriage; and deliver the record and certificate to the Registrar.¹⁶⁷ Where the Registrar receives a record and certificate of a Muslim marriage and the Registrar is satisfied that the provisions of the Act have been complied with, the Registrar must register the marriage.

¹⁶³ Ghana Statistical Service “Civil registration and vital statistics system in Ghana: Report on the comprehensive assessment July 2015” par 121 <http://www2.statsghana.gov.gh/docfiles/publications/CRVS%20Assessment%20Report%20Final%202018.04.17.pdf> accessed 1 Dec 2020; Section 2(2) of the Marriages Act.

¹⁶⁴ Section 3(1) of the Marriages Act.

¹⁶⁵ Section 3(2) of the Marriages Act.

¹⁶⁶ Section 42(3) of the Marriage Act 4 of 2014 http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf.

¹⁶⁷ Section 57(1) of the Marriage Act 4 of 2014.

44. The Marriage Act of Tanzania imposes a duty on kadhis and registration officers to attend marriages. This means that it is the duty of every kadhi or registration officer to whom notice has been given that a marriage is intended to be contracted in Islamic form; and every registration officer to whom notice has been given that a marriage is intended to be contracted according to rites recognised by customary law, so far as is reasonably practicable, to attend that marriage.¹⁶⁸ When a marriage has been contracted in the presence of a district registrar or kadhi or celebrated by a minister of religion, the district registrar, kadhi or minister, forthwith completes in duplicate a marriage certificate in the prescribed form and sign it and cause it to be signed by the marriage parties and by two witnesses to the marriage and hands one part to the parties and retains the other.¹⁶⁹
45. The Marriage Act of Tanzania also provides for the registration of subsisting unregistered marriages contracted before the commencement of the Act.¹⁷⁰ Either party to a subsisting marriage contracted under customary law before the commencement of the Act, which has not been registered under the provisions of any written law in force, may apply to the district registrar or to a kadhi or to a registration officer for the registration of that marriage.¹⁷¹ The district registrar, kadhi or registration officer must upon receipt of an application make such inquiries as he or she may think necessary to satisfy himself or herself that the alleged marriage was validly contracted.¹⁷² Where an application has been made to a registration officer, and he or she has satisfied himself or herself, he or she shall send a statement of particulars relating to the marriage to the district registrar, with a certificate that he or she is satisfied that the marriage was validly contracted under customary law.¹⁷³ Where an application has been made to a district registrar or kadhi and he or she has satisfied himself or herself or where a district registrar has received a statement of particulars from a registration officer, with his certificate, he or she shall register the marriage.¹⁷⁴ Where an application for registration has been made by one party to an alleged marriage and the other party denies that there was such a marriage or cannot be found and the marriage is disputed by any member of his or her immediate family, the

¹⁶⁸ Section 32 of the Law of Marriage Act Chapter 29 <https://www.coursehero.com/file/32410646/Marriage-Ordinance-cap-29pdf/>.

¹⁶⁹ Section 33(1) of the Law of Marriage Act Chapter 29.

¹⁷⁰ Section 44 of the Law of Marriage Act Chapter 29.

¹⁷¹ Section 44(1) of the Law of Marriage Act Chapter 29.

¹⁷² Section 44(2) of the Law of Marriage Act Chapter 29.

¹⁷³ Section 44(3) of the Law of Marriage Act Chapter 29.

¹⁷⁴ Section 44(4) of the Law of Marriage Act Chapter 29.

district registrar or kadhi shall not register the alleged marriage unless there is produced to him a declaratory decree of the court that the alleged marriage was validly contracted.¹⁷⁵

46. In Australia where an authorised celebrant solemnises a marriage, the celebrant prepares a certificate of the marriage, issues it to the parties to the marriage; and prepares two official certificates of the marriage.¹⁷⁶ The celebrant, each of the parties to the marriage and two witnesses over the age of 18 years sign each of the certificates.¹⁷⁷ One of the official certificates or the official certificate, contain the declarations made by the parties regarding their conjugal status, their belief that there is no legal impediment to the marriage, and such other matters as are prescribed.¹⁷⁸ The celebrant hands the certificate to one of the parties to the marriage on behalf of the parties.¹⁷⁹ If the celebrant dies without having prepared and signed the certificates of the marriage, or where by reason of other special circumstances the Minister thinks it necessary to do so, the Minister may, if satisfied that the marriage was duly solemnised, prepare and sign the certificates with such modifications as are appropriate.¹⁸⁰ Such a certificate has the same force and effect as if it had been prepared and signed by the authorised celebrant.¹⁸¹

G. Requirements for recognition of intimate relationships

47. One of the most recent attempts to provide recognition to partners in intimate unmarried partnerships was in the 2019 Marriages Bill in Zimbabwe.¹⁸² The requirements set in the Bill for the proposed civil partnership was a relationship between a man and a woman who are both over the age of eighteen years; who have lived together without legally being married to each other; who are not within the degrees of affinity or consanguinity; and having regard to all the circumstances, have a relationship as a couple living together on a genuine domestic basis. These circumstances may include (a) the duration of the relationship; (b) the nature and extent of their common residence; (c) whether a sexual relationship exists; (d) the degree of financial dependence or interdependence, and any

¹⁷⁵ Section 44(5) of the Law of Marriage Act Chapter 29.

¹⁷⁶ Section 50(1) of the Australian Commonwealth Marriage Act <https://www.legislation.gov.au/Details/C2018C00441>.

¹⁷⁷ Section 50(2) of the Australian Commonwealth Marriage Act.

¹⁷⁸ Section 50(3) of the Australian Commonwealth Marriage Act.

¹⁷⁹ Section 50(4) of the Australian Commonwealth Marriage Act.

¹⁸⁰ Section 50(5) of the Australian Commonwealth Marriage Act.

¹⁸¹ Section 50(6) of the Australian Commonwealth Marriage Act.

¹⁸² Clause 40 see http://www.veritaszim.net/sites/veritas_d/files/MARRIAGES%20BILL%2C%202019.pdf.

arrangements for financial support, between them; (e) the ownership, use and acquisition of their property; (f) the degree of mutual commitment to a shared life; (g) the care and support of children; (h) the reputation and public aspects of the relationship. No particular factor in relation to any circumstance may be regarded as necessary in determining whether or not the persons concerned have a civil partnership. A court determining whether a civil partnership exists is entitled to have regard to such matters and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case. Provision is also made that a civil partnership exists notwithstanding that one or both of the parties are legally married to someone else or they are in another civil partnership.¹⁸³

48. Tanzania recognises a presumption of marriage for cohabitants.¹⁸⁴ Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there is a rebuttable presumption that they were duly married. The woman is entitled to apply for maintenance for herself and for every child of the union, the court may make an order for maintenance and, to grant other relief to the parties, including custody of children.
49. Trinidad and Tobago has recognised cohabitation relationships since 1998. The Cohabitation Relationships Act¹⁸⁵ defines ‘cohabitant’ to mean— (a) in relation to a man, a woman who is living or has lived with a man as his wife in a cohabitational relationship; and (b) in relation to a woman, a man who is living with or has lived with a woman as her husband in a cohabitational relationship; and ‘cohabitational relationship’ to mean the relationship between cohabitants, who not being married to each other are living or have lived together as husband and wife on a bona fide domestic basis.¹⁸⁶ The criteria which apply are that — (a) the parties to the application are or either of them is domiciled in Trinidad and Tobago; and (b) both parties lived together in Trinidad and Tobago for at least one-third the duration of their cohabitational relationship a cohabitant may apply to the Court for an order or other relief. The criteria the Court applies are that — (a) the

¹⁸³ Dracos Andrea “Unpacking the Marriages Bill” 24 May 2019 *The Herald* <https://www.herald.co.zw/unpacking-the-marriages-bill/> accessed 1 Dec 2020.

¹⁸⁴ Law of Marriage Act Section 160. Presumption of marriage [https://rita.go.tz/eng/laws/History%20Laws/Marriage%20Ordinance,%20\(cap%2029\).pdf](https://rita.go.tz/eng/laws/History%20Laws/Marriage%20Ordinance,%20(cap%2029).pdf).

¹⁸⁵ See Chapter 45:55 https://rgd.legalaffairs.gov.tt/laws2/Alphabetical_List/lawspdfs/45.55.pdf; Gibson Jenell “Rights of cohabitants” 3 Jan 2016 <http://www.guardian.co.tt/article-6.2.349472.19f7f56644>; Westmin James “The rights of a common-law spouse” 22 Jul 2012 *The Guardian* <http://www.guardian.co.tt/article-6.2.427354.b235e8bc98> accessed 1 Dec 2020.

¹⁸⁶ Section 3.

applicant lived in a cohabitational relationship with the respondent for a period of not less than five years; or (b) the applicant has a child arising out of the cohabitational relationship; or (c) the applicant has made substantial contributions of the kind referred to in section 10,¹⁸⁷ and that failure to make the order would result in grave injustice to the applicant.¹⁸⁸

50. The British Columbia Family Law Act is an example of Canadian provincial legislation which recognises both the relationships of persons who are married and those who are unmarried. The British Columbia Family Law Act provides that a person is a spouse for the purposes of the Act if the person is married to another person, or has lived with another person in a marriage-like relationship, and has done so for a continuous period of at least 2 years, or has a child with the other person.¹⁸⁹ The British Columbia Family Law Act also clarifies when a relationship between spouses and partners begins by providing that a relationship between spouses begins on the earlier of the following the date on which they began to live together in a marriage-like relationship; and the date of their marriage.¹⁹⁰
51. The Manitoba Family Property Act likewise provides protection to married and unmarried couples.¹⁹¹ The Family Property Act defines the term ‘common-law partner of a person’ to mean (a) another person who, with the person, registered a common-law relationship or (b) subject to subsection 2.1(2),¹⁹² another person who, not being married to the person, cohabited with him or her in a conjugal relationship for a period of at least three years commencing either before or after the coming into force of this definition.¹⁹³ It also defines

¹⁸⁷ 10.(1) On an application for an adjustment order, the High Court may make any such order as is just and equitable, having regard to— (a) the financial contributions made directly or indirectly by or on behalf of the cohabitants to the acquisition or improvement of the property and the financial resources of the partners; and (b) any other contributions, including any contribution made in the capacity of homemaker or parent, made by either of the cohabitants to the welfare of the family constituted by them; (c) the right, title, interest or claim of a legal spouse in the property.

¹⁸⁸ Section 7.

¹⁸⁹ Section 3(1) of the Family Law Act of British Columbia [SBC 2011] Chapter 25 see https://www.bclaws.ca/civix/document/id/complete/statreg/11025_00 accessed 1 Dec 2020.

¹⁹⁰ Section 3(1) of the Family Law Act of British Columbia.

¹⁹¹ CCSM c F25 <http://web2.gov.mb.ca/laws/statutes/ccsm/pdf.php?cap=F25> accessed 1 Dec 2020.

¹⁹² Section 2.1(2) deals with common-law partners living separate and apart: The provisions of this Act respecting an application for an accounting and equalization of the assets of common-law partners during the lives of the common-law partners do not apply to parties who cohabited in a conjugal relationship for at least three years before the coming into force of this section but who were living separate and apart from each other on the day this section comes into force, unless those common-law partners, after that date, resume cohabitation and (a) register their relationship under section 13.1 of the Vital Statistics Act; or (b) continue to cohabit for a period of at least 90 days after the day this section comes into force.

¹⁹³ Section 1, the definitions of the Family Property Act see <http://web2.gov.mb.ca/laws/statutes/ccsm/pdf.php?cap=F25>.

the term ‘common-law relationship’ to mean the relationship between two persons who are common-law partners of each other’. The qualifying cohabitation period in terms of the Manitoba Wills Act is one year if the cohabiting couple are together the parents of a child.¹⁹⁴

52. The Adult Interdependent Relationships Act of Alberta of 2002 governs the relationships of unmarried cohabiting persons in Alberta.¹⁹⁵ The Act defines ‘relationship of interdependence’ as meaning a relationship outside marriage in which any 2 persons (i) share one another’s lives, (ii) are emotionally committed to one another, and (iii) function as an economic and domestic unit.¹⁹⁶ It further provides that in determining whether 2 persons function as an economic and domestic unit,¹⁹⁷ all the circumstances of the relationship must be taken into account, including such of the following matters as may be relevant: (a) whether or not the persons have a conjugal relationship; (b) the degree of exclusivity of the relationship; (c) the conduct and habits of the persons in respect of household activities and living arrangements; (d) the degree to which the persons hold themselves out to others as an economic and domestic unit; (f) the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being; (g) the degree of financial dependence or interdependence and any arrangements for financial support between the persons; (h) the care and support of children; (i) the ownership, use and acquisition of property.
53. The aim of the Property (Relationships) Act of New Zealand is to determine how the property of married couples, civil union couples and couples who have lived in a de facto relationship is to be divided when they separate or one of them dies.¹⁹⁸ This Act also regulates cohabitation relationships termed ‘de facto relationships’. The Property (Relationships) Act defines a de facto relationship as a relationship between 2 persons

¹⁹⁴ ‘Common-law partner’ of a testator means, except in sections 12, 13 and 14,

- (a) a person who, with the testator, registers a common-law relationship under section 13.1 of *The Vital Statistics Act*, or
- (b) a person who, not being married to the testator is cohabiting or has cohabited with him or her in a conjugal relationship, commencing either before or after the coming into force of this definition,
 - (i) for a period of at least three years, or
 - (ii) for a period of at least one year and they are together the parents of a child.

¹⁹⁵ Chapter A-4.5 see <http://www.qp.alberta.ca/documents/Acts/A04P5.pdf> accessed 1 Dec 2020.

¹⁹⁶ Section 1(f) of the Alberta Adult Interdependent Relationships Act.

¹⁹⁷ For the purposes of subsection (1)(f)(iii) of the Alberta Adult Interdependent Relationships Act.

¹⁹⁸ See <http://www.legislation.govt.nz/act/public/1976/0166/latest/whole.html> accessed 1 Dec 2020.

(whether a man and a woman, or a man and a man, or a woman and a woman who are both aged 18 years or older; who live together as a couple; and who are not married to, or in a civil union with, one another.¹⁹⁹ In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case, namely: the duration of the relationship; the nature and extent of common residence; whether or not a sexual relationship exists; the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties; the ownership, use, and acquisition of property; the degree of mutual commitment to a shared life; the care and support of children; the performance of household duties; and the reputation and public aspects of the relationship.²⁰⁰

54. The Family Law Act 1975 of the Commonwealth of Australia provides protection to persons in de facto relationships.²⁰¹ It defines a de facto relationship as meaning a person being in a de facto relationship with another person if the persons are not legally married to each other; the persons are not related by family; and having regard to all the circumstances of their relationship, they have a relationship as a couple living together on

¹⁹⁹ Section 2D(1) Meaning of de facto relationship. The Legislation Act 58 of 2019 defines the meaning of de facto relationship as follows in clause 14: (<http://www.legislation.govt.nz/act/public/2019/0058/latest/096be8ed81a2c9ab.pdf>):

- (1) In any legislation, de facto relationship means a relationship between 2 people (regardless of their sex, sexual orientation, or gender identity) who—
 - (a) live together as a couple in a relationship in the nature of marriage or civil union; and
 - (b) are not married to, or in a civil union with, each other; and
 - (c) are both aged 16 years or older.
- (2) However, a relationship involving a person aged 16 or 17 years is not a de facto relationship unless that person has obtained consent for the relationship in accordance with section 46A of the Care of Children Act 2004.
- (3) In determining whether 2 people live together as a couple in a relationship in the nature of marriage or civil union, the court or person required to determine the question must have regard to—
 - (a) the context, and the purpose of the law, in or for which the question is to be determined; and
 - (b) all the circumstances of the relationship.
- (4) A de facto relationship ends if—
 - (a) the de facto partners cease living together as a couple in a relationship in the nature of marriage or civil union; or
 - (b) one of the de facto partners dies.

²⁰⁰ Section 2D(2).

²⁰¹ See <https://www.legislation.gov.au/Details/C2019C00182> accessed 26 September 2020.

a genuine domestic basis.²⁰² In working out if persons have a relationship as a couple those circumstances may include any or all of the following, namely the duration of the relationship; the nature and extent of their common residence; whether a sexual relationship exists; the degree of financial dependence or interdependence, and any arrangements for financial support, between them; the ownership, use and acquisition of their property; the degree of mutual commitment to a shared life; whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship; the care and support of children; and the reputation and public aspects of the relationship.²⁰³ No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have de facto relationship²⁰⁴ and a court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.²⁰⁵ A de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.²⁰⁶

55. In most states in Australia provision is made for registered relationships. The 2008 Relationship Act of Victoria provides for establishing a relationships register.²⁰⁷ The relevant part of the definition of ‘registrable domestic relationship’ is that it means a relationship (other than a registered relationship) between two adult persons who are not married to each other but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof. The Act further provides that persons who are in a registrable domestic relationship or a registrable caring relationship may apply to the Registrar, in a form approved by the Registrar, for registration of that relationship if— (a) one of the persons in the relationship lives in the State; and (b) each of the persons in the

²⁰² Section 4AA(1).

²⁰³ Section 4AA(2).

²⁰⁴ Section 4AA(3).

²⁰⁵ Section 4AA(4).

²⁰⁶ See section 4AA(5) of the Family Law Act 1975. See also Makela Michelle “De facto relationships in Australia” Go to court lawyers <https://www.gotocourt.com.au/family-law/de-facto-relationships/> accessed 1 Dec 2020.

²⁰⁷ See section 5 of the Relationships Act <https://www.legislation.vic.gov.au/in-force/acts/relationships-act-2008/011> accessed 26 September 2020.

relationship— (i) is not married or in a registered relationship; and (ii) is not in another relationship that could be registered.²⁰⁸

56. The 2011 Civil Partnerships Act of Queensland²⁰⁹ provides that a civil partnership is a legally recognised relationship that may be entered into by any 2 adults, regardless of their sex.²¹⁰ The eligibility criteria²¹¹ for a person entering into a civil partnership are that (a) the person is not married or in a civil partnership; and (b) the person does not have any of the following relationships (a prohibited relationship) with the person's proposed civil partner, namely (i) lineal ancestor; (ii) lineal descendent; (iii) sister; (iv) half-sister; (v) brother; (vi) half-brother; and (c) the person or the person's proposed civil partner lives in Queensland.
57. The 2010 Relationship Register Act of New South Wales²¹² provides legal recognition of persons in a relationship as a couple, regardless of their sex, by registration of the relationship.²¹³ The eligibility for registration²¹⁴ is that two adults who are in a relationship as a couple, regardless of their sex, may apply to the Registrar for registration of their relationship²¹⁵ and a relationship cannot be registered unless at least one of the adults resides in New South Wales.²¹⁶ A relationship cannot be registered if: either adult is married, either adult is registered under the Act or a corresponding law as being in a registered relationship or an interstate registered relationship, either adult is in a relationship as a couple with another person, or the adults are related by family.²¹⁷
58. Two adults who are in a relationship as a couple, irrespective of their sex or gender identity, are eligible to apply to the Registrar for registration of their relationship in South

²⁰⁸ See section 6 of the Relationships Act <https://www.legislation.vic.gov.au/in-force/acts/relationships-act-2008/011> accessed 26 September 2020.

²⁰⁹ See <https://www.legislation.qld.gov.au/view/whole/html/inforce/2018-04-28/act-2011-046> accessed 1 Dec 2020.

²¹⁰ Section 4.

²¹¹ Section 5.

²¹² <https://legislation.nsw.gov.au/#/view/act/2010/19/full> accessed 1 Dec 2020.

²¹³ Section 3.

²¹⁴ Section 5.

²¹⁵ Section 5(1).

²¹⁶ Section 5(2).

²¹⁷ Section 5(3). In terms of section 5(4) two adults are related by family if: one is the child (including an adopted child) of the other; one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); they have a parent in common (including an adoptive parent of either or both of them); and even if in terms of section 5(5) an adoption has been declared void or is of no effect, and it also applies to adoptions under the law of any place (whether in or out of Australia) relating to the adoption of children.

Australia.²¹⁸ A relationship cannot be registered unless at least 1 of the adults resides in South Australia²¹⁹ or if either adult is in a union that is recognised as a marriage under the Marriage Act 1961 of the Commonwealth;²²⁰ either adult is already registered under the Act or a corresponding law as being in a registered relationship or a corresponding law registered relationship; either adult is in a relationship as a couple with another person; or the adults are related by family.²²¹

H. Is a divorce requirement imposed on transgendered persons in other jurisdictions to recognise their relationship status?

59. In 2012 when the Marriage (Definition of Marriage) Amendment Bill²²² was promoted in New Zealand the distress caused to married transgender persons who were required to divorce their partners or change their marriage to a civil union to obtain recognition of the acquired gender of a party to the marriage, was also highlighted.²²³

60. In England and Wales and Northern Ireland a transgendered person who wishes to have the acquired gender recognised needs to apply to the Gender Recognition Panel for a Gender Recognition Certificate.²²⁴ Transgendered spouses are able to remain in their

²¹⁸ Section 5(1) of the Relationships Register Act 67 of 2016 see https://www.legislation.sa.gov.au/LZ/V/A/2016/RELATIONSHIPS%20REGISTER%20ACT%202016_67/2016.67.UN.PDF accessed 1 Dec 2020 .

²¹⁹ Section 5(2).

²²⁰ Section 5(3).

²²¹ Section 5(4): Two adults are related by family if (a) 1 is the child (including an adopted child) of the other; or (b) 1 is another descendant of the other (even if the relationship is traced through an adoptive parent); or (c) they have a parent in common (including an adoptive parent or either or both of them).

²²² See <http://www.legislation.govt.nz/bill/member/2012/0039/latest/versions.aspx> accessed 2 Dec 2020.

²²³ Commentary on the Marriage (Definition of Marriage) Amendment Bill 2012 as reported from the Government Administration Committee at 5 see <http://www.legislation.govt.nz/bill/member/2012/0039/latest/096be8ed80a2cf97.pdf> accessed 2 Dec 2020:

We wish to highlight an issue brought to our attention by transgender people. At present, married transgender people wanting their sex changed on their birth record (to enable them to fully adopt the gender of their choice) must either divorce their spouse or change their relationship from a marriage to a civil union. We are aware of how distressing this can be for transgender people in this position, and how disruptive it can be for their families.

We consider that transgender people should be able to change sex without being subject to these constraints. The bill as consequentially amended would enable any transgender people to continue to be married regardless of their gender identity.

²²⁴ Gov UK “Apply for a Gender Recognition Certificate” <https://www.gov.uk/apply-gender-recognition-certificate/if-youre-married-or-in-a-civil-partnership> accessed 1 Dec 2020; HM Courts & Tribunals Service “The General Guide for all Users: Gender Recognition Act 2004” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file

marriage as long as the other spouse consents by way of a statutory declaration that they wish to remain married. When the spouse or partner does not consent to remain married or in the partnership or does not complete the declaration the Gender Recognition Panel issues an interim certificate and based on the certificate either spouse then may obtain a divorce or annulment. A partner in a civil partnership needs to convert the partnership in a marriage or end the partnership to be issued a full Gender Recognition Certificate unless both partners apply for Gender Recognition Certificates which are issued on the same day.²²⁵ The UK Government explained that instead of requiring the consent of the spouse for the gender change the requirement of the Gender Recognition Act could be amended to one of informing the spouse of the intended gender recognition certificate process.²²⁶

61. In 2009 the Australian Human Rights Commission recommended that the marital status criterion which prevents the recognition of a change in gender identity be removed in Australian state and territory legislation saying ‘[i]t is the Commission’s view that a person should not be forced to end their marriage in order to have a change in sex legally recognised’.²²⁷ It further said ‘there does not appear to be any legal basis upon which a person can challenge the discrimination against married persons inherent in relevant state and territory legislation dealing with amendments to birth certificates’ that ‘this puts

[/786910/t455-eng.pdf](#) accessed 1 Dec 2020; Woman’s Place UK “Spousal consent and the Liberal Democrats” 21 Sept 2019 <https://womansplaceuk.org/2019/09/21/spousal-consent-and-the-liberal-democrats/> accessed 1 Dec 2020; Catherine Fairbairn “Briefing Paper: the gender recognition process” House of Commons Library Number 08746 5 Dec 2019 <https://core.ac.uk/download/pdf/286358521.pdf> accessed 1 Dec 2020 (Fairbairn ‘The gender recognition process’).

²²⁵ “Apply for a Gender Recognition Certificate”; Fairbairn “The gender recognition process” at 8.

²²⁶ Gov UK “Reform of the Gender Recognition Act – Government Consultation July 2018” par 79 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf accessed 1 Dec 2020:

On the other hand, it could be argued that as marriage is an agreement between two individuals, it is appropriate that both spouses should have an equal say in the future of that contract in the event of a fundamental change like a change in the gender of one of the parties to it. This was the principal rationale behind introducing the spousal consent provisions in the same-sex marriage legislation. It could be argued that this could be achieved with a requirement to inform your spouse if you apply for a GRC, rather than a requirement to gain their consent.

²²⁷ Australian Human Rights Commission “2009 Sex files: the legal recognition of sex in documents and government records: the sex and gender diversity project: concluding paper” par 10.3 https://humanrights.gov.au/sites/default/files/content/genderdiversity/SFR_2009_Web.pdf accessed 1 Dec 2020.

Australia in breach of its international obligations in relation to marital status discrimination' and that '[l]egislative change is therefore required to remedy this situation'.²²⁸

62. At the time of the passing of the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 in Australia the Australian Capital Territory and South Australia were the exceptions in the Australian Commonwealth which did not require persons to divorce their spouses if they wished to have their identified gender officially recognised. Noteworthy is one of the consequential amendments effected by this legislation which imposed on the remaining states and territories the obligation within 12 months to repeal the divorce requirement preventing the recognition of the identified gender.²²⁹

²²⁸ Australian Human Rights Commission "The sex and gender diversity project: concluding paper" par 10.3.

²²⁹ Marriage Amendment (Definition and Religious Freedoms) Bill 2017 explanatory memoranda see http://www5.austlii.edu.au/au/legis/cth/bill_em/maarfb2017469/index.html accessed 1 Dec 2020; and the Marriage Amendment (Definition and Religious Freedoms) Act of 2017 which repealed in section 4(1) of the Sex Discrimination Act 1984, the definition of 'official record of a person's sex' which allowed the gender alteration in an official record of a person's sex being refused if the parties were married. See also Gregoire Paul & Ugur Nedim "It's Time to Repeal Australia's Discriminatory Transgender Laws" 19 Jan 2018 <https://www.sydneycriminallawyers.com.au/blog/its-time-to-repeal-australias-discriminatory-transgender-laws> and Human Rights Law Centre "Trans Equality FAQs" 3 forced divorce <https://www.hrlc.org.au/faqs-trans-equality> accessed 2 Dec 2020. The explanatory note to the Miscellaneous Acts Amendment (Marriages) Bill 2018 [NSW] explains that 'Schedule 3 removes restrictions from the Births, Deaths and Marriages Registration Act 1995 so that persons who change their sex and are married may have that change of sex recorded on the Births, Deaths and Marriages Register' see [https://www.parliament.nsw.gov.au/bill/files/3520/XN%20Miscellaneous%20Acts%20Amendment%20\(Marriages\)%20Bill%202018.pdf](https://www.parliament.nsw.gov.au/bill/files/3520/XN%20Miscellaneous%20Acts%20Amendment%20(Marriages)%20Bill%202018.pdf). See also the media statement of the Queensland Attorney-General and Minister for Justice, the Honourable Yvette D'Ath "Queensland first with Marriage Equality" on 7 March 2018 Queensland Government <http://statements.qld.gov.au/Statement/2018/3/7/queensland-first-with-marriage-equality> who announced, among others: "Today I'll also be introducing amendments to the Births, Deaths and Marriages Registrations Act 2003 to ensure a person who undertakes gender reassignment doesn't have to divorce their current spouse. Section 22 of Act has previously meant that any Queenslanders who has undergone sexual reassignment surgery had to divorce their partner to have their gender legally recognised. This has caused significant anguish for many gender diverse Queenslanders and must change. It has been unjust and unfair that some members of our community have been forced to face the distressing decision of choosing between their marriage and the legal recognition of their gender identity." In the second reading speech of the Attorney General of Victoria on the Births, Deaths and Marriages Registration Amendment Bill 2016 the AG remarked, among others, as follows (the bill was, however, defeated): (see http://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2016/Assembly_Daily_Extract_Thursday_15_September_2016_from_Book_12.pdf) "Secondly, the bill removes the current requirement for a person to be unmarried in order to make an application to alter the record of their sex in their birth registration. This requirement can force a person to choose between a birth certificate that reflects their sex or affirmed gender identity, and the maintenance of the legal relationship with their spouse, even where that relationship is ongoing. Such a choice can have both financial and emotional consequences for the people involved. By removing these requirements, the bill promotes the right to equality in the Charter of Human Rights and Responsibilities." Section 4 of the Justice Legislation Amendment (Access to Justice) Act 15 of 2018(Vic) effected the required amendment in section 30A(1) of the Births, Deaths and Marriages Registration Act of 1996 by substituting for the expression 'An unmarried person' the term 'A person' and thereby removed the unmarried status limitation, see <http://classic.austlii.edu.au/>

I. Sham or bogus marriages

63. On 26 September 2014 the European Union Commission Staff made available a *Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens*.²³⁰ The *EU Handbook* notes that there are different types of genuine marriages and marriages of convenience:²³¹ A genuine marriage is explained in the *EU Handbook* as follows:

Genuine marriages are characterised by the **intention of the married couple to create together a durable family unit** as a married couple **and to lead an authentic marital life**. Marriages of convenience are characterised by the lack of such an intention.

64. The *EU Handbook* provides the following guidance on bogus or sham marriages and marriages of convenience:²³²

Sometimes, marriages of convenience are labelled as bogus or sham but this is, strictly speaking, not correct. Unlike marriages of convenience, which are formally valid, **bogus or sham marriages are invalid** or entirely fictitious. Bogus marriages may involve forgery or the misuse of documents relating to another person.

The formal validity of marriages of convenience is their '*competitive advantage*' over bogus marriages.

65. In *R (on the application of Baiai and others) v Secretary of State for the Home Department* Baroness Hale of Richmond explained the effect of sham marriages in English law, among others, as follows:²³³

34. A “sham” marriage is still a valid marriage in English law. “The fact is that in the English law of marriage there is no room for mental reservations or private arrangements regarding the parties’ personal relationships once it is established that the parties are free to marry one another, have consented to the achievement of the married state and observed the necessary formalities” ... This has long been recognised as a rule of public policy. The ecclesiastical courts from whom our marriage law was derived did not want parties to an apparently valid marriage claiming that it was void because of some private reluctance to accept all of the obligations it entailed.

[au/legis/vic/num_act/jlatja201815o2018496_/s4.html](https://www.parliament.gov.au/legis/vic/num_act/jlatja201815o2018496_/s4.html) and Liberty Victoria & Ashlea Johnson “Briefing Paper: reforms to the Births, Deaths and Marriages Registration Amendment Bill 2019” (Vic) <https://libertyvictoria.org.au/sites/default/files/Birth%20Certificate%20Law%20Reform%20Briefing%20Paper.pdf> accessed 2 Dec 2020.

²³⁰ *European Commission Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens* available at 11 see [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0284 &from=IT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0284&from=IT) accessed 2 Dec 2020.

²³¹ Section 2.2 page 10.

²³² *European Commission Handbook on alleged marriages of convenience* at page 14.

²³³ See <https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/rhome.pdf> accessed 2 Dec 2020.

How would one single out which obligations were essential and which not? There are many happily married couples who do not live together and many more who do not have children together. Nor are all so-called “sham” marriages entered into for “a nefarious purpose”; as Lord Simon of Glaisdale has pointed out, “Auden married the daughter of the great German novelist, Thomas Mann, in order to facilitate her escape from persecution in Nazi Germany” ...

66. The Supreme Court of Ireland on 24 July 2020 held in *M.K.F.S. (Pakistan) and A.F. and N.F.J. v the Minister for Justice and Equality and Another* about the alleged marriage of convenience, among others, as follows:²³⁴:

73. As is obvious and to be hoped for, a great number of people marry for love, but it would be a naive view of the world to assume that this holds true for everyone. Some marry for money, or security, or status, or fame. Others marry to secure some tax or inheritance advantage. Certainly there are some others, without referring to any couple in particular, who marry to secure an immigration advantage for one or other of them. Sometimes marriage will be motivated by some mix of the foregoing, as well as other factors. And while it was more a feature of times gone by, in this country, at least, sadly some people are still married off to secure some advantage for others: to gain power, to form alliances, or simply because that is the will of the family. The same would of course require to be looked at in light of the essential component of voluntariness discussed in *H.A.H.* and the prohibition on forced marriages. But leaving aside such marriages which really do give rise to entirely different considerations, the point remains that people voluntarily chose to contract marriage for all sorts of reasons, whether it be love, convenience, self-interest or otherwise. Certainly one could not say that in all such cases “legal consent” was absent. Sometimes the parties will make their motivations known to all; other times only the couple themselves will know the truth behind the marriage; occasionally, one spouse may keep his or her secret intention entirely to himself or herself. So, the reasons can be as diverse as the parties themselves.

97. ...The established grounds for the granting of decrees of nullity have been developed judicially in the context of an application by either party to the marriage to that end. In my view, if the fact that a marriage is a marriage of convenience is to be recognised as a ground for nullity, it should arise in such a context, wherein a party to such a marriage seeks an annulment on that ground. It is clear that there are two views, or schools of thoughts, concerning this issue, with case law and policy considerations leaning either way. It will be for the parties to such an annulment application to make their legal arguments to the appropriate court. If the fact of it being a marriage of convenience is to be a ground for nullity, it will be for court to make the underlying factual determination concerning the marriage, with all of the attendant procedures that attach to the court process.

J. Pre-marital counselling or education

66. The Australian Commonwealth Marriage Act provides for marriage education to be provided to a couple intending marriage. The Australian federal Marriage Act requires the marriage celebrant, as soon as practicable after receiving the marriage notice, to give to the parties a document outlining the obligations and consequences of marriage and

²³⁴

See https://www.bailii.org/ie/cases/IESC/2020/2020IESC48_0.pdf accessed 2 Dec 2020. See also McKeown Andrew “Supreme Court decision on Marriage of Convenience – Marriage of convenience does not nullify a marriage” 27 July 2020 *Irish Legal News* <https://irishlegal.com/article/supreme-court-finding-of-marriage-of-convenience-does-not-nullify-marriage> accessed 2 Dec 2020.

indicating the availability of marriage education and counselling.²³⁵ The Australian Marriage Act also provides for grants by government²³⁶ to approved organisations²³⁷ to enable approved organisations to conduct programs of marriage education and these approved organisations furnishing to the Minister annually reports and financial statements of the approved organisations about their receipts and payments; and their marriage education activities, as to the programs conducted and the number of participants in those programs.²³⁸

67. Pre-marital or pre-partnership education or care was raised in Scotland too in 2014 in the context of sham marriages.²³⁹ It was noted that courses or pastoral care will be presented to couples and would have the benefit of a reduced likelihood that relationships are sham or forced. The Scottish Government explained that their preliminary view was that ‘it might be hard for regulations laying down qualifying requirements to make statutory provision on pre-marital courses or pastoral care’. However, they noted that ‘an alternative option would be to provide in the qualifying requirements that religious and belief bodies outline what they do by way of preliminary discussions and contact with the couple before marrying them or registering their civil partnership’ and that the ‘evidence of discussion and contact with the couple would be a good sign that the relationship is genuine’.
68. Ten states have adopted premarital education promotion legislation in the United States of America. They are Florida, Oklahoma, Maryland, Minnesota, Tennessee, Georgia, South Carolina, Texas, West Virginia, and Utah.²⁴⁰ A common feature of these statutes are that they provide marriage license fee discounts and or a reduction of the waiting

²³⁵ Section 42(2)(5A) of the Marriage Act; see the brochure Australian Government Attorney-General’s Department “Happily ever before and after: information for couples planning to marry” see <https://www.ag.gov.au/sites/default/files/2020-03/happily-ever-before-and-after.pdf> accessed 2 Dec 2020.

²³⁶ Section 9B of the Marriage Act: grants to approved organisations.

²³⁷ Section 9C of the Marriage Act: approval of voluntary organisations.

²³⁸ Section 9E of the Marriage Act: reports and financial statements of approved organisations.

²³⁹ Marriage And Civil Partnership (Scotland) Act 2014; Scottish Government “The qualifying requirements: an initial discussion paper” 18 Sept 2014 page 6 and 7 paras 26 to 38 <https://www2.gov.scot/Topics/Justice/law/17867/samesex/qualifying-requirements-discussion-paper> accessed 2 Dec 2020.

²⁴⁰ Clyde Tiffany Lura *The effects of premarital education promotion policies on US divorce rates* 1 July 2019 Brigham Young University Theses and Dissertations 7514 <https://scholarsarchive.byu.edu/etd/7514> accessed 2 Dec 2020.

period for eligibility for marriage once prospective partners submit proof of having attended an approved pre-marital education course.²⁴¹

²⁴¹

Twotogetherintexas Frequently asked questions <https://twogetherintexas.com/UI/Faq.aspx>; See sec. 2.013.AA which regulates the premarital education courses <https://statutes.capitol.texas.gov/Docs/FA/pdf/FA.2.pdf>; 741.0305 Marriage fee reduction for completion of premarital preparation course http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0741/0741.html; Tennessee Code Title 36 Domestic Relations § 36-6-413 <https://codes.findlaw.com/tn/title-36-domestic-relations/tn-code-sect-36-6-413.html>; West Virginia Code 301§48-2-701 [http://www.wvlegislature.gov/wvcode/chapterentire.cfm?chap=48&art=2§ion=.](http://www.wvlegislature.gov/wvcode/chapterentire.cfm?chap=48&art=2§ion=)

Annexure E: Summary of comments on Issue Paper 35

Chapter 1: A single or omnibus marriage or unmarried intimate relationship statute?

	If fundamental rights required separate statutes in the 1990s, what has changed in the meantime?	Should South Africa continue with different regulatory regimes for different forms of marriages?	What would be the advantages and disadvantages of a single or unified statute?	What would be the advantages and disadvantages of an omnibus statute containing all the different requirements for all marriages?	Should the statute only cover marriages and should a separate statute on unmarried partnerships be adopted?	Should the statute only set out the requirements for valid marriages and/or unmarried intimate partnerships, or should it also cover the legal consequences?
Abu-Bakr Asmal	State should steer away from engaging in religious and cultural issues. A marital Union Act should be for purely administrative purposes that empowers the state to register and recognise intimate unions, partnerships, all types of marriages, etc.				Only marriage, unmarried partnerships in a separate act.	
Allan Craig				D: Complicated. Requirements are the same, only the celebrations differ.		Legislation does not guide marriage, the framework should be minimal, only dealing with the essential requirements.
Amien Waheeda Prof		Omnibus by incorporating existing legislation, because a single act is normatively problematic.				

Apostolic Faith Mission of SA (AFM of SA)		Retain status quo but single act might work if it does not complicate religious objection.				
Association of Muslim Accountants and Lawyers (AMAL)		Different regulatory regimes for different marriages.				Recognise and regulate the consequences of marriages and unmarried partnerships.
Bakker Pieter Prof	Unofficial hierarchy was created by separate statutes. Separate but equal does not work.	No, recognise intimate relationships of which marriage is only one form.	Advantages: legal certainty, promote dignity and equality, clear regulation of all intimate relationships, application of secular law will circumvent religious and cultural issues, cultural practices will be limited to the social sphere. Disadvantages: lack of awareness of changes, legislature will not be involved in culture and religion (private sphere), protection of third parties might be an issue, objection against secular regulation of religious and cultural marriages.	A: Status quo will be maintained and Muslim marriages recognised. D: Status quo will be maintained, will create more confusion that certainty, lengthy piece of legislation which create risk of errors and interpretation issues.	Should cover both.	Prefer use of 'intimate relationship' as umbrella term, instead of 'marriage'. Requirements and consequences can be regulated in one statute
Cape Bar Council			Disadvantage: Constitutional concerns (equality & diversity).			
Cause for Justice						

Centre for Applied Legal Studies (CALs)						
Christian View Network	State cannot marry people it only recognises marriages. Integration will have major impact on existing marriages. Unified act impossible - incompatibility of different types of marriage.	Separate statutes but in the process cleanse the legal system of polygyny and same sex marriages.				
Commission on Gender Equality		No, support one statute	Advantage: Elimination of injustices of current legal framework,		Both in a single marriage statute.	
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)	No change.	Yes, diversity must be promoted.	Advantage: simplifies process for government. D: Ignores cultural differences.	A: Recognises diversity. D: Might negate freedom of association.		All legal consequences should be covered.
Darhul Ihsan Centre	Position remains unchanged - Muslim marriages should be recognised separately.	Different statutes for different marriages.				Only requirements for valid marriages and not unmarried partnerships.
Department of Communications	The compromise made in the 1990s of different laws was weak and unnecessary.	No, single statute.	Advantages: Uniformity and certainty, and easier to adapt one statute to changing needs. D: Will need to be adapted from time to time.	A: High rate of illiteracy might complicate the conclusion of customary marriages which will be to the benefit of the state trying to prevent scam marriages. D: It will be complicated.	Should cover everything.	Include everything.

Dutch Reformed Church (NGK)		Omnibus, that allows diversity. Proposes an outline.				
Feher Gabrielle			Advantages: equal application of the law, legal certainty, abolition of child marriages, registration of all types of marriages.			
Free State Society of Advocates	Constitution requires re-evaluation of different marriage practices.	No, support one statute	Advantages: Legal certainty & promote equality. D: burden on resources for DHA, tribal & religious councils.	D: Difficult to codify individual requirements.	Should regulate all in one statute although cultural and religious diversity might complicate the codification of the different rules.	It should deal with all issues relating to marriage and unmarried partnership, up to dissolution.
Freedom of Religion SA (FOR SA)		Omnibus.			No, unmarried partnerships should be treated differently.	Regulate everything in omnibus statute.
Inkatha Freedom Party		Even in this mooted change from polygamy to monogamy it is the Africans who must abandon their polygamy and embrace monogamy. IFP finds it difficult to recommend and support single marriage status				
Islamic Forum Azaadville		Separate statutes.				
Jamiatul Ulama KZN	Perception that African Customary Marriages were being forced into rubric of Western marriages & dualism was proposed,	No, one secular legal marriage with 4 forms: monogamous heterosexual marriage; actual or potential polygynous marriage;	A: four objectives, consolidate various Acts; legal certainty; project is not about recognition of cultural or religious marriages; virtually	State will have to descend into arena & decide what Christian, Muslim, Hindu, African Customary marriages are.	Only cover marriages parties requiring legal consequences should register for Secular Legal marriage, legal	consequences should be spelt out, not be left for the common-law and courts to determine, to broadest extent possible,

	position has not changed	monogamous same-sex marriage; or monogamous same-sex partnership. A single marriage statute will go a long way towards achieving legal certainty & uniformity	impossible to pass legislation governing every single religious or cultural marriage practice. D: many other policy considerations will have to be sacrificed at the altar of legal certainty	Legislature will have to define concepts & give sanction to one interpretation over other accommodation will have to be extended to every single religion and custom	uncertainty would ensue from the recognition of unmarried partners	consequences should be capable of being varied by way of a registered antenuptial contract
Legal Resources Centre (LRC)		Does not matter, as long as all forms are protected.	Advantages: Makes regulation easier from viewpoint of the state. Disadvantages: Discrimination on the grounds of religion and culture.		Both in omnibus.	
Muslim Lawyers Association (MLA)		Separate statutes.				
Muslim Lawyers for Social Justice	Muslims fear legislative regulation of marriages. The Constitution allows for separate statutory recognition of Muslim marriages.	Separate statutes.	Advantages: protection of vulnerable members of society. Disadvantages: impossibility of including various forms of marriage into one code.	N/a, there should be separate acts.		Only consequences of a marriage and not unmarried partnerships.
Muslim Personal Law Network (MPIL Network)	The MPL Bill must be transformed into law to protect women and children.	Single or omnibus - just as long as Muslim marriages are recognised.	Advantages: Legal certainty, promotion of equality. Disadvantages: Forcing all marriage forms into what is considered as the mainstream marriage regime, does not promote diversity.	A: Provide diversity and uniformity that recognises plurality in marriage laws.		
National House of Traditional Leaders		One statute.	Disadvantage: Codification of an customary system that is living law	Diversity means different types of marriages.		

National Spiritual Assembly of the Bahá'ís of SA	Claim recognition of their marriages into Constitution.	Omnibus				
Nederdutch Reformed Church of Africa (NHKA)		Single statute.				
Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs						
Pretoria Society of Advocates	Different laws imply that everyone is not equal.		Advantages: legal certainty, simplified process, one reference document, uniform approach, equality, better protection of vulnerable persons. Disadvantage: do not promote diversity.	Advantages: Recognises all the differences of religious and cultural ceremonies, legal certainty, one reference document. D: Cumbersome document, and not conducive for simplifying the processes.		Only requirements of a valid marriage with cross reference to Divorce Act and Matrimonial Property Act.
SA Orthodox Jewish community	No need to alter existing legal framework. Opposes omnibus. There should be a unified set of broad generic requirements.			D: Will not be to the benefit to Jewish community, would lead to unfairness and inequality.		
South African Pagan Council (SAPC)	Marriage Act is apartheid era legislation. In favour of omnibus act based on the Civil Union Act.				Both should be included.	
Sunni Ulama Council Gauteng	No material changes - not against single marriage statute that allows difference.					

United Ulama Council of SA (UUCSA)	Position remains unchanged - Muslim marriages should be recognised separately.		D: dilution of distinct ethos of different marriage forms, against first generation rights in s15, transmutation of religious law, impossibility of blending of some forms, practical difficulties of merging different forms of marriage.		Only marriage, if parties choose unmarried partnership it does not make sense to impose consequences of a marriage on them.	Only requirements of a valid marriage and not unmarried partnerships. In the case of a Muslim marriage, the consequences is regulated by means of contract.
Van Schalkwyk Niel Prof	Fundamental rights are the same. Integration will still allow for different marriage forms.	Single act.	A: legal uniformity, equality, reducing complexity of legal pluralism, legal certainty, promote national unity.	A: Legal pluralism recognise minority rights. D: Legal uncertainty, conflicting rules, inequality.	Should cover both.	Combination of requirements and consequences. Prefer the use of 'union' instead of marriage.
Women's Cultural Group	Impractical to cover all types of marriages - omnibus legislation with "many doors" will be ideal.					Requirements and consequences of marriages and unmarried partnerships.
Women's Legal Centre	Ongoing review of legislation is necessary to ensure that they still protect vulnerable women and children.	The aim must be equal protection regardless of the form it takes.	A: All marriages on equal footing. D: Development of existing cultural marriages to ensure uniformity.	Difficult to answer question because content of such legislation is unknown.	Imply both - Continued fragmentation will leave domestic partnerships out of the legal framework again.	

Chapter 2: Marriage requirements or essentials

A. Marriage requirements or essentials

1. Definitions for marriage

	How should the proposed legislation define marriage?	Should the envisaged legislation make provision for polygynous marriages, and if so, how?	What constitutes an unmarried intimate partnership which would qualify partners to share in legal protections in terms of the omnibus statute?
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Allan	A contract between two or more parties whereby all parties to the contract agree to provide each other with continuous mutual emotional and material support, subject to the default property regime or to that conditions in an ante-nuptial agreement	Poly marriages should be recognised.	Registered unmarried partners should be treated the same as are married partners. Unregistered partnerships would get no protection.
Amien			
Bakker	The statute should not define marriage but rather define an intimate relationship that is protect-worthy by the law	Ideally it should not be recognised because it impacts negatively on women's rights and dignity.	The test for protection should not be that the relationship is marriage-like but rather that the relationship has an important social function in protecting the parties within such a relationship. Polygyny should be allowed for other intimate relationships.
Centre for Applied Legal Studies (CALs)	Only one term should be used to describe all forms of marriages or unions, as separate terms only re-entrench discriminatory perceptions around forms of relationships that are not seen as 'traditional' and make those perceptions legally permissible		
Christian View Network	The conditions for a legitimate marriage thus include a biological man and a biological woman of consensual age not disqualified by relationship, entering into an intended covenantal lifelong and consummated union of physical body and shared life.		
Commission on Gender Equality	A civil marriage is 'the legally recognised voluntary union of a man and a woman to the exclusion of all other persons'.		

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)		yes	All the legal consequences should be covered
Darhul Ihsan Centre	A marriage contracted in accordance with the tenets of Islamic law between a male and female.	Polygynous marriages should be contractually regulated.	
Department of Communications	A marriage is a voluntary union for life of the two parties to the exclusion of all others		The parties should have stayed together for at least 5 years.
First Rand Bank	Any proposed definitions in the legislative reform should be clear, precise and lead to legal certainty, not just for the parties to a marriage but also for third parties with whom parties to a marriage engage. May be important to legislate general <i>essentialia</i> for a valid marriage which should be agnostic regarding religion, culture or beliefs		
Free State Society of Advocates	The legally recognised voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered, in accordance with the procedures prescribed in this Act". (Act refers to the proposed unified or omnibus statute.)	Yes	Partners who have entered into a cohabitation agreement should be afforded legal protection, to the extent that their cohabitation agreement allows or justifies the existence of the extension of "spousal support" and the bones mores of society would determine is just and equitable
Freedom of Religion SA (FOR SA)	Omnibus Marriage Act with different chapters allows for each chapter to have a unique definition tailored to suit the type of union dealt with by that chapter		
Inkatha Freedom Party		From time immemorial Africa & Zulus knew only polygamous marriage	

Islamic Forum Azaadville	The definition of marriage considering three different scenarios, namely a Single Marriage Act; an all-inclusive omnibus Single Marriage Act; and the current position of separate Acts.		
Jamiatul Ulama KZN	Secular Legal marriage, one of four forms: monogamous heterosexual marriage; actual or potential polygynous marriage; monogamous same-sex marriage; monogamous same-sex partnership	Polygynous marriage either potentially actually polygynous, will suit members of African cultures which practice polygyny, will also suit members of the Muslim community & to the best of knowledge, polyandry is not practiced in SA, no accommodation has been made	No comment, such partnerships should not be recognised
Legal Resources Centre (LRC)	Whatever decision that is adopted continues to recognise all these types of marriages currently in existence	The constitutionality of polygyny is not yet settled.	This is a growing trend in South Africa and consequently unmarried intimate partnerships must be recognised
Mukhari	A contract between two or more parties whereby all parties to the contract agree to provide each other with continuous mutual emotional and material support, subject to the default property regime or to that conditions in an ante-nuptial agreement		
Muslim Lawyers Association (MLA)			The issue of what constitutes an unmarried intimate partnership which require all partners to share in legal protections in terms of the omnibus statute would not even occur in an Islamic setting because such relationships are prohibited
Muslim Lawyers for Social Justice		Due to their uniqueness, polygynous marriages should be regulated in a separate act.	If persons in unmarried partnership sought the protection and consequences that flow from a marriage they would elect to be married and that to impose upon an intimate married relationship the consequences that flow from a marriage would breach the freedom of choice and association of those parties who elect to remain unmarried

Muslim Personal Law Network (MPIL Network)	Any definition given marriage must recognise the diverse forms that marriage take within the diversity of religions, cultures and life choices made by the people within the country.		
National House of Traditional Leaders (NHTL)	A marriage is a union that is negotiated, celebrated and concluded in terms of indigenous African Customary law.	Yes, customary law allows it.	If the cohabitants stay for a longer period together, say twelve months or more, then they should qualify to share in the legal protection. considered reviving of the long forgotten Domestic Partnerships Bill and similar remedies would go a long way in alleviating the possible unfair discrimination, without forcing reluctant couples to define their bond in marital terms
National Spiritual Assembly of the Bahá'is of SA	A union between two consenting individuals: a woman and a man; and the stated intention is to unite the couple both physically and spiritually		
Nederdutch Reformed Church of Africa (NHKA)	The legally or formally recognised union of two people as partners in a personal relationship	Religious institutions should be free to arrange their own affairs since it is difficult to comment on the culture and religion of all groups.	
Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs	All marriages are to be recognised under one qualification and that unmarried intimate partnerships should be given a legal status		
Pretoria Society of Advocates	Marriage be defined as the union of 2 people (who are both majors with sufficient mental capacity to understand the decision to marry) to the exclusion of all others, freely and voluntarily entered into for life solemnised before a registered official	Yes	Parties entering into unmarried partnerships should also share the joint intent and expression to freely and voluntarily enter such partnership. The partnership should be registered and published, and comply with certain requirements.

Sunni Ulama Council Gauteng	Impossible to have a universal definition which would accommodate all the different parties, this would prejudice the principles of social justice and social equity which would then point to separate legislation as is currently in practice		
United Ulama Council of SA (UUCSA)	“Muslim Marriage” means a marriage between a man and a woman contracted in accordance with Islamic law.	Yes	
Women’s Cultural Group	Marriage should include marriages and unions by heterosexual and same sex couples, including those potentially or actually polygynous or polygamous	To avoid constitutional challenges, polygyny and polygamy should be provided for.	Any couple choosing to opt into a Single Marriage Act (Unified or Omnibus) would qualify as partners to share in its legal protection or disadvantage
Women's Legal Centre	Any new definition that is developed would have to ensure that it does not restrict the parties to a marriage to only being between persons in a heterosexual relationship to the exclusion of other persons	Polygyny has impacted negatively on women.	A domestic partnership is a permanent, intimate relationship between two adults (aged 18 years) of the same or opposite sex who live together and have consented to do so

2. Consent and capacity to marry

	Is the common law test and the statutory requirement to determine capacity to marry adequate or is there a need for reform in South African law?	Do respondents consider a proxy should be allowed to represent a party to a marriage?	Is there support for legislative measures which adequately take into account autonomy and informed consent to take decisions about marriage?	Should the envisaged legislation require specifically that parties should have mental capacity to enter into marriage as the Australian Marriage Act does in this regard?	Should the consent of the first wife be required if the husband wishes to conclude a second marriage?
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Allan	As for court proceedings, the parties must be present in person, simultaneously, for the legal aspect of marriage. Religious ceremonies can do otherwise, but the religious ceremony would not constitute any aspect of the contractual consent required in marriage.	No, a proxy representing a spouse is not permissible	Legislation should require demonstration of freely given and informed consent	Yes, the mental inability to enter into a contract would disqualify a person from entering into a marriage	The consent and presence at the ceremony of all existing partners should be required for the addition of any further partner to the contract.
Bakker	If the legislature moves away from recognising marriages this will no longer be an issue. Relationships should either be registered by all the major parties to the relationship or determined ex post facto if not registered. Whether the parties to marriage should be present or not will only be an extra judicial requirement by the parties' religion or custom and will not affect the validity of their intimate relationship.	This should be irrelevant to the validity of the intimate relationship	This should not be a concern and that the Act should merely determine whether a particular relationship is protect-worthy regardless of the presence of informed consent	This should not even be considered	Consent of the first wife should be considered if the parties enter into relationship contracts, however whether an intimate relationship is protect worthy should not necessarily be influenced by the consent of the first wife
Commission on Gender Equality	Consent of third parties where minors are involved should be taken away.				
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)	Yes	No	Yes	Yes	In line with the traditional practice

Darhul Ihsan Centre	There is a need for reform as in the Islamic Law there is a concept of marriage by proxy	A proxy should be allowed as there are circumstances in which it would be required	Supported the principle of informed consent as it is a requirement in Islamic Law	The concept of “mental capacity” is open to many definitions. Due to this, it may be difficult to adopt a particular position. Each matter may have to be viewed on its independent merit. However, they are not opposed to the concept in principle.	
Department of Communications	The common law test to determine capacity to marry which requires the parties to be present when concluding a marriage should be applied due to the fact that the concept of capacity to act applies on a case by case basis		Yes	Yes	Yes
Free State Society of Advocates	Yes, consideration might need to be applied to instances such as where both parties wish to be married, but due to circumstances outside of their control, they cannot both be present. i.e. soldiers on deployment.	No, this opens the door to abuse and potential fraud	Consideration must be given to whether minors should still be entitled to enter into marriage, and scrapping of parental consent for minors, as it may lend to undue influence		Yes - the first wife could hardly be considered to be an equal in the marital relationship if the husband was entitled to introduce a second wife into their home or family dynamic, without her knowledge or consent
Freedom of Religion SA (FOR SA)	It should be compulsory for the marriage officer to ascertain each party's free and voluntary consent				
Islamic Forum Azaadville	The capacity to marry has different criteria and to simply reduce all the criteria only to age will be an injustice.				
Jamiatul Ulama KZN	The requirements are adequate	Should be allowed, there may be valid reasons why contracting party is not	Fact that parties appear before a Registration Officer	Part of common-law that only parties who have mental capacity	No, where 1 st marriage was in community of property, or with accrual, then the estates

		able to appear before Registering Officer. To offer protection from marriages against a person's will, the party who cannot appear before Registration Officer should at least appear before a Legal Practitioner who should interview the party, and be satisfied that consent is freely given, & that there are grounds for not appearing in person. The Legal Practitioner should place this on affidavit. Registration Officer should only accept the appearance of proxy if presented with affidavit, & if satisfied with contents.	express wish to register a Secular Legal marriage is adequate, would be onerous for Government to go beyond this	may validly enter into contracts, there is no need for special mention	should be separated and settled prior to a subsequent marriage. If 1 st marriage was out of community of property, no further formality should be required & this will apply only to the polygynous marriages
Legal Resources Centre (LRC)	An individual's ability to act in appreciation of the consequences of their actions is paramount when concluding a marriage contract	No proxy should be allowed to represent a party to marriage	Support the requirement that both spouses must consent to the marriages as stated in section 3 of the RCMA as it dispels past practices where women's consent was often not sought during the conclusion of a marriage	The envisaged legislation should specifically require that parties have mental capacity to enter into marriage	The consent of the first wife should be required if the husband applies to take a second wife
Moore Elena & Himonga Chuma Profs	The State takes note of consent required in customary marriages to provide safeguards to vulnerable parties against forced marriages				

Muslim Lawyers Association (MLA)					There is no requirement in Islam that the consent of the first wife be required if her husband wishes to conclude a second marriage
Muslim Lawyers for Social Justice		Yes		Yes	This is an issue relating to dignity of the earlier spouses
National House of Traditional Leaders (NHTL)	Yes, both parties must be present when the marriage is concluded, and no one must act on behalf of the other party when concluding a marriage	A proxy should not be allowed to represent a party when concluding a marriage	Supports the principle of informed consent	Yes, making decisions is an important part of our lives	Consent to subsequent marriage is required from the first wife
National Spiritual Assembly of the Bahá'is of SA	Both parties must be present when concluding a marriage			Explicit provision for the degree of mental capacity required to enter marriage would be an effective measure against abuse or exploitation of those with diminished mental capacities	
Nederdutch Reformed Church of Africa (NHKA)			Matter of consent should be considered with the following in mind: <i>Free choice</i> (no coercion) and the <i>ability</i> to make that choice (autonomy); information about <i>the consequence</i> of that choice (informed consent); and finally there should not be a difference between 'marriageable' age of 'boys' and 'girls'.		

Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs					<p>There should be a consent and capacity to marriages including the polygamous relationships</p>
Pretoria Society of Advocates		<p>No as it is open to abuse and logistically who will be responsible to monitor such system, if permitted</p>	<p>Yes</p>	<p>Yes, especially due to the serious personal and financial consequences, which flow from a marriage</p>	<p>Yes - in the event polyandry and polygamous marriages are recognised, the principal should be extended to these unions as well</p>
Sunni Ulama Council Gauteng	<p>The entering into a contract (the validity of the contract would require capacity as well as consent) would enforce the “informed consent” principle. The contract would/should also inform as to the use of proxy as well as consent to subsequent marriages</p>				
United Ulama Council of SA (UUCSA)	<p>There is a need for reform</p>	<p>Yes</p>	<p>Supports the principle of informed consent</p>	<p>The concept of “mental capacity” is wide-ranging and difficult to determine. However, they are not opposed to this in principle and the concept of proxy marriages may provide relief in this regard.</p>	<p>The validity of a subsequent marriage does not depend upon the permission of existing wife/wives in terms of Islamic law.</p>

Women's Cultural Group	Both parties must be present and consent when concluding a marriage	Proxies should not be permitted	The current Marriage Act is sufficient with regard to autonomy and informed consent	The current Marriage Act is sufficient with regard to mental capacity	The consent of a prior Muslim wife should not be required to a further marriage. However, notification to her or them must be mandatory and appropriate proprietary arrangements made, as is done with regard to customary marriages, to enable a further marriage to be registered
Women's Legal Centre	The requirement of having both parties present is critical to ensure that consent was exchanged and that any other requirement was met such as age of consent etc	In order to address the concerns around sham marriages, forced marriages and under-age marriages individuals must present themselves in person in order to solemnise a legally valid marriage	During the SALRC investigative process on forced marriages and ukuthwala there was significant research conducted and opinions sought on the issue of autonomy perhaps this process should incorporate some of that existing work	Marriage is very much a contract between two individuals and as such both parties must be in a legal position to contract and to be held accountable to the contract entered into as it has very real consequences	This point of law has been clarified in respect of Xitsonga customary marriages by the Constitutional Court in <i>Mayelane v Ngwenyama</i> in that the Court has found that to not obtain consent violates the Constitutional rights of the first wife to equality and dignity. - this should apply to all marriages.

3. Minimum age for marriage

	Should discrepancies between the Marriage Act, Recognition of Customary Marriages and the Civil Union Act as regards the minimum age for marriage be remedied?	Does South Africa has a duty to comply with international and regional instruments to set a uniform minimum age for marriage of 18 without any exceptions for third party consent?
Allan	Yes, marriage is a serious business that requires full contractual consent	No marriage allowed for under 18 children nor registered unmarried intimate relationships
Amien		
Bakker	Yes	A party to an intimate relationship should be at least 18 years of age
Cape Bar Council		
Cause for Justice	Answer in the affirmative agrees that there should be a uniform minimum age for marriage of 18 years	Answer in the affirmative agrees there should be a uniform minimum age for marriage of 18 years

Centre for Applied Legal Studies (CALs)	numerous rights, as set out in the Constitution, of the female children are violated through permitting child marriage we argue that no child marriages should be lawful in South Africa whatsoever as this an affront to the rights of the individual child	
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)	Yes	Suggested that 21 years be is the recommended age
Darhul Ihsan Centre	Does not believe that the discrepancies in the legislation need to be remedied	The Act should make provision for exemptions in exceptional circumstances via duly authorised persons such as the Minister of Home Affairs or any Muslim body authorised by him if the marriage is regarded to be desirable and in the interests of the parties in question
Department of Communications	Yes	
Essel Meaghan	The age of marriage should be raised to 18 or even 21 for both sexes	
Feher Gabrielle	The minimum age of marriage to 18 years, with no exceptions	
First Rand Bank		
Floyd Angie	Supports the abolishment of the South African Marriage Act of 1961 that allows girls as young as 15 and boys as young as 18 to wed	
Free State Society of Advocates	Yes, these discrepancies should be remedied	Yes
Islamic Forum Azaadville	South Africa has its own unique environment and this environment rather than international norms should be used	
Jacob Jordan	The law allowing 15 year old girls to get married should be scrapped	
Jamiatul Ulama KZN	Uniformity, minimum age should be 18, with Ministerial consent (which may be delegated) required for any marriage below age 18	Whilst International Law should set ideals, SA legislature must always be guided by own unique circumstances, otherwise it may have the effect of being bound by laws formulated by bodies not democratically elected by citizens. If required, legislature should be able to depart from these instruments
Legal Resources Centre (LRC)	By allowing children younger than 18 to enter into valid marriages, our legislative framework contradicts the protection afforded in the Constitution	SA is internationally obliged to consider international law
Leonard Chaneez	Minimum age for a young girl should be at least 18 years of age	

Mabasa Ralph	Given the rate of divorce and all dysfunctional marriages in the country he would propose this age be raised to 21 for males and 18 for females	
Mukhari Velaphi Juliet	South Africa has a duty to comply with international and regional instruments to set a uniform minimum age for marriage of 18 without any exceptions for third party consent by parents, courts, or any other official to prevent children being married or to enter into unmarried intimate relationships	
Muslim Lawyers Association (MLA)	Having a Single Marriage Statute regulating a minimal marriageable age for boys and girls will bring contradictions between the secular view of the legitimacy of a marriage and an Islamic view of the legitimacy of a marriage	Not in favour of this and that the international and regional instruments do not properly accommodate the beliefs of Muslims
Muslim Lawyers for Social Justice	Minimum age of marriage must be uniformly applied to protect vulnerable children, irrespective of religion and that the age of majority as in the Children's Act should be applied uniformly	Yes
National House of Traditional Leaders	Yes - age of the parties should be the same, 18 years	Yes, a uniform minimum age for marriage of 18 should be set out without exceptions and the age of the parties should be the same, 18 years
National Spiritual Assembly of the Bahá'ís of SA	Bahá'u'lláh has set the minimum age for marriage as the age of spiritual maturity for both women and men, being 15. Should the marriage age be set at a higher threshold in South Africa, for instance at the current legal age of majority, Bahá'ís and Bahá'í institutions would faithfully and scrupulously uphold the law of the land.	
Nederdutch Reformed Church of Africa (NHKA)	There should not be a difference between 'marriageable' age of 'boys' and 'girls'	South Africa has a duty to comply with international and regional instruments to set a uniform minimum age for marriage of 18 without any exceptions for third party consent by parents, courts, or any other official, to prevent children being married or to enter into unmarried intimate relationships
O'Haer Micholene	18 yrs but better still 21 years for both male and female	
Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs	Minimum age for marriage should be 18 and above	
Pretoria Society of Advocates	Yes	Yes, this is long overdue

Sungharandan Romeo	It is alarming to even consider that 15-year olds get married given the fact of all the divorces and unemployment that is affecting our country. Maturity is over 21 years	
Sunni Ulama Council Gauteng	The rigid application of the minimum age may exacerbate societal and economic problems	
United Ulama Council of SA (UUCSA)	No.	The statute contemplated should make provision for exemptions
Women's Cultural Group	There should be one standard for minimum age for marriage and commented that it will also reduce the administrative burden	The current minimum marriage age in the Marriage Act is appropriate and that the current exceptions for consent by parents, Courts or the Minister should be retained
Women's Legal Centre	The discrepancy is discriminatory and appears to have no rational justification	The South African government indeed has a duty to ensure that child marriage is not legally supported and allowed in South Africa and that the minimum age for marriage is set at 18 years

4. Giving notice and marriage licences

	Do respondents agree with the re-introduction of the giving of notice and the issue of marriage licences in South Africa	Will the giving of notice or the issue of a marriage licence contribute towards safeguarding government interests in marriages being concluded?	What information should the notice contain?
Allan	No	No	
Bakker	No		
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)	Yes	Yes	Name and identity number (privacy on ID Number?) and direct contacts of Home Affairs
Darhul Ihsan Centre	Not in favour of "marriage licenses" due to the undue administrative burden on both the state and the populace	No	
Department of Communications	Yes		Copies of identification documents of the parties in order to verify their marriage status

Islamic Forum Azaadville	Giving of notices will not serve any real purpose in law nor will it serve as a deterrent to sham/bogus marriages		
Jamiatul Ulama KZN	Notices and licences do not serve any meaningful purpose. The Secular Legal marriage will only be attractive and practically workable if it involves the least amount of encumbrance. Unnecessary "Red-tape" will render it a "white elephant". People will gravitate towards living outside of the system, which will defeat the objective to achieve legal certainty	No	No comment
Legal Resources Centre (LRC)	No opinion on this		
Muslim Lawyers for Social Justice	Yes		The parties to the marriage, the age of the parties to the marriage, whether the parties were previously married, whether the previous marriage has been dissolved, proof of the dissolution of the marriage, if the marriage is a polygynous marriage- what the marital estate of the first marriage has been dissolved and a new marital property regime entered into and proof thereof
National House of Traditional Leaders (NHTL)	Yes, would assist in the determination of foreign nationals.	Yes	Indicate Marriage status (age, not related to one another, unmarried, they understand the nature of their marriage); Residence; Declaration of Immigration Status; and About your parents (adopted, same sex parents)
Nederdutch Reformed Church of Africa (NHKA)	No modern day legitimate governmental purpose is served by this relic from the past		
Pretoria Society of Advocates	Yes, would avoid bogus marriages	Yes	Full names and identity numbers; Physical address of each party; Time, date and place of proposed marriage; Record type of marital regime; Record previous marital status and include case number in the event of a divorce and date of death of former spouse if a party is widowed

Sunni Ulama Council Gauteng	Re-introduction of giving notice of marriage or issuing of marriage license would amount to the re-introduction of red tape which will not be abided by and it cannot be a principle of legislating that unenforceable and impracticable acts of law should be introduced		
United Ulama Council of SA (UUCSA)	Not in favour of “marriage licenses” due to the undue administrative burden on both the state and the populace	No	
Women’s Cultural Group	This will merely delay, make more costly and unnecessarily increase the administrative burden for no tangible benefit		
Women's Legal Centre	The process of the application / obtaining such a license is unclear so it is difficult to assess the impact of such a process on women	Difficult to comment because the impact the legislation would have is unknown	

5. Role of marriage officers and other functionaries

	Is there support for marriage officers and other functionaries being involved in the solemnisation and registration of any or all forms of marriages?	What should the requirements be for the involvement of marriage officers?	If marriage officers should still be involved in solemnising marriages what should their function be?
Allan	Marriage officers and other functionaries are there to ensure that the contractual requirements are met – mainly that the persons are properly identified and of sufficient age, that the parties are of sound mind or seem to be of sound mind, that there is free consent and informed consent and that signatures of signatories and witnesses are not forged. There should be no question on what kind of marriages they can certify.	All parties, including the marriage officer, should be willing to do the certification of the marriage	Marriage officers should be a supervisor and signatory to the prescribed contract, rather similar to a commissioner of oaths, and should optionally communicate the marriage to Home Affairs through the normal channels with the normal paperwork. Participation of the marriage officer in any accompanying cultural or religious ceremony is permitted but optional.

Asmal Abu-Bakr	Where such registrations are from parties who indicate a customary or religious preference, then a Marriage Certificate from a registered traditional authority or religious body (which must be a long-established, recognised traditional or religious authority, or functionaries approved and nominated by them) will be the only acceptable document to prove the existence of the marriage		
Bakker	If the focus of the Act is not on marriages but rather intimate relationships, marriage officers will not be required.	Do not support involvement	The function of a registration functionary should be to ensure that the parties do understand the commitment they are entering into in terms of their partnership agreement should the relationship be registered.
Cape Bar Council			
Cause for Justice			<p>The DHA is able to deliver marriage services at 27.8% of its HAO - in answer to a need of less than 1%. From a staff complement of 1130 DHA marriage officers, 709 (or 62.74%) of marriage officers are willing to register same sex civil unions in answer to a need of less than 1%. The DHA currently has a significant over-supply of marriage officers who are willing to register same sex marriages. Any lack of service delivery to same sex couples is not the result of a shortage of marriage officers who are willing and able to perform the functions to enable the state to deliver such services. There is an early indication that the status of the law is not the real or true cause of the issue. The true cause(s) seems to be geographical, planning and/or budgetary in nature.</p> <p>One of the easiest ways of addressing the lack of services, is for the DHA to implement a system of roving marriage officers who on a regular basis attend at each HAO where all resident marriage officers conscientiously object to solemnising civil unions between same sex couples. This system will balance and maximise the enjoyment of constitutional rights by both same sex couples and marriage officers</p>

Centre for Applied Legal Studies (CALs)	Should marriage officers be restricted to appointed officials or anyone who identifies as a 'minister of religion or any person holding a responsible position in any religious denomination or organisation'		
Commission on Gender Equality	Solemnisation of a marriage has a significance in other religious marriages. The Commission therefore submits that the marriage officers and other functionaries being involved in the solemnisation should be retained.		
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)	Yes, each solemnizing officer should be registered in accordance with the faith/culture/religion that they represent	The persons appointed should have passed a written examination with regard to the laws governing solemnisation and registration of marriages in terms of the specific religion or culture	They should assist with registration of marriage, administering oath of marriage, and sending the completed forms to the department of Home Affairs for processing and issuing of the marriage certificate
Darhul Ihsan Centre	Any administrative processes that facilitate the solemnisation of marriages are in order	Adequate training should be given to such personnel to conduct their responsibilities with competence	Marriage officers should solemnize and register the marriages, however, exemptions should be granted to marriage officers who wish not to solemnize and register certain types of marriages on religious grounds
Department of Communications	Supports Marriage Officers and other functionaries to avoid a long queue at the Offices of the Home Affairs	Supports ministers of religion.	
Free State Society of Advocates	There is support for marriage officers and other functionaries being involved in the solemnisation and registration of any or all forms of marriages. By designating specified traditional and specified religious leaders as marriage officers, there will be additional certainty regarding the status of the marriage and safeguards for the verification of identities.	The present requirements are sufficient, with the proviso that the new statute should make provision for traditional and religious leaders being granted such status upon written request and being subjected to ensuring that all formal requirements are observed over and above any customary or religious rites	

Freedom of Religion SA (FOR SA)	In favour of the current regime whereby only holders of a marriage officer's licence can validly solemnise marriages (ie. represent the State, which is the one granting the married status to the parties).		This approach – namely issuing a separate marriage officer's licence for each specific type of union, as is currently the case – will also allow for the protection of religious ministers who wish – for reasons based on their conscience, religion and belief – not to perform all types of unions
Islamic Forum Azaadville	The current position of separate marriage statutes that the difference between the officiating officer (i.e. priest, traditional leader or imam) and the marriage officer (a state appointed official) must be identified		
Jamiatul Ulama KZN	No, rather support the registration of only one marriage, Secular Legal marriage, because of its neutral nature, shall be available to all on an equal footing	State is only concerned with Secular Legal marriages, instead of having Marriage Officers there should be Registration Officers. Their function is simply to record the coming into existence of a Secular Legal marriage. It is not their function to determine whether a religious or cultural marriage exists or not, since the latter exists on a separate plain	Simply be to record the details of the parties, confirm that consent is free and willing, and if there is a Ante Nuptial Contract. It is not their function to be involved in any ceremony
Legal Resources Centre (LRC)	No position for or against marriage officers - regardless of the type of marriage, all persons should have the same access to the institution of marriage	A key requirement for the involvement of marriage officers should be their willingness and ability to solemnize all marriages in South Africa without favour or prejudice	A key function of marriage officers should be ensuring the eligibility and free and full consent of both parties.
Muslim Lawyers Association (MLA)	In Islam it is not necessary for a person who officiates a marriage to be recognised by the state.		
Muslim Lawyers for Social Justice	Yes	Registration as a marriage officer and/or functionary with the Department of Home Affairs which registration is to be renewed over a specified period and an oversight body must be created to regulate the conduct of marriage officers to protect against bogus and sham marriages	Supported all of the suggested functions mentioned in the issue paper

National House of Traditional Leaders (NHTL)	Supports the involvement of marriage officers in the solemnisation of marriages, saying that traditional Leaders in particular should be involved in the solemnization of Customary Marriages, as registering officers and with solemnization to be done by the state.	Proposed that marriage officers should submit the marriage register with Home Affairs	Assisting with the registration of Marriages and submitting the marriage register at Home Affairs, ie recording the identity of the spouses, and the date of the marriage
National Spiritual Assembly of the Bahá'ís of SA	A certificate issued on the authority of the Local Spiritual Assembly of a given locality, attesting that a Bahá'í marriage has been celebrated, should suffice without any further ceremony or formal requirement to constitute a valid civil marriage in South Africa.		
Nederdutch Reformed Church of Africa (NHKA)	Ministers of religion and other persons attached to religious institutions who are designated as marriage officers in terms of the Marriage Act should by extension be enrolled to conduct weddings in terms of a new consolidated act – or should be allowed to apply in writing to be designated as marriage officers if not enlisted yet		
Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs	Senior Traditional Leaders should be given marriage licences, an amendment should be in the Act for this provision. Senior Traditional Leaders should be given a role in the solemnisation and registration of any or all forms of marriages.		

Pretoria Society of Advocates	Support the role of marriage officers and that this further ensures the requirements of valid marriages are met.	Marriage officers should be properly trained with an accredited body	A marriage officer must record the marriage and assist with the registration of the marriage. Furthermore, before recording the marriage, they must verify the identity of the parties and previous marital status of the parties and confirm whether or not the parties have entered into an antenuptial contract. The marriage officer must keep a record of the marriages.
SA Orthodox Jewish community	From a Judaic perspective, there is ideally no need to alter the current marriage regulatory framework as Jewish parties are free to marry and have their marriage solemnised in accordance with their Jewish faith.	Administrative issues with registration process should be rectified.	
South African Pagan Council (SAPC)	SAPC's religious marriage officers have solemnised civil union marriages in terms of the Civil Union Act, between both heterosexual and same-sex couples.		
Sunni Ulama Council Gauteng			In essence the duty of the marriage officer can best be defined as a person who is the clerk of the government ensuring that the necessary documents are correctly filled in and effecting registration on the national data base
United Ulama Council of SA (UUCSA)	Yes	Yes	Exemptions should be granted to marriage officers who wish not to solemnize and register certain types of marriages on religious grounds. Marriage officers should solemnize and register the marriages
Women's Cultural Group	Marriage Officers should be required and their role should be to record the registration of the marriage.		
Women's Legal Centre		Their roles have included the solemnisation of the marriage, performance of religious practices as well as the registration of the marriage with the Department of Home Affairs.	The Civil Unions Act draws the distinction between religious marriage officers and marriage officers tasked with fulfilling a public duty or obligation on the part of the state such as the Department of Home Affairs officials for instance. They suggest retaining these distinctions and building the criteria for their roles accordingly.

B. Registration of marriages

		Do respondents support registration of marriages?		Should failure to register affect the validity of a marriage?	If a marriage can still be valid without registration, should there be alternative ways to prove the existence of a marriage?		Should parties be able to register marriages at any stage after their conclusion?	Should unmarried intimate relationships be registered to afford the partners legal rights?	If unmarried intimate relationships should be registered, what information should be required?	If registration of unmarried intimate relationships merely serves as evidence of the relationship, what other ways should there be to prove the existence of such relationships?	Are there any other issues regarding registration of marriages respondents wish to highlight which need further consideration?
Abu-Bakr Asmal											
Allan		Yes, marriages should be registered, like a company, freehold land purchase, birth, death, gun, car and a plane has to be registered		Retroactive registration should be allowed, with permission of a court. Failure to register or to retroactively register should affect validity.	No, a purported marriage in which spouses cannot or will not convince a court of a reason for registration or retroactive registration should not be recognised as marriage	The granting of a certificate of marriage requires a licenced marriage officer to certify that both parties were physically present, unambiguously identified, sane, willing, consensual etc. at the ceremony	Yes, marriages should be registerable retrospectively, subject to serious need for proving the existence of a real relationship for a long time – maybe 2 years	Registration would confer formal recognition, certain legal rights and the property contractual arrangements of marriage. Registration of any relationship should not be required, but not registering would have	The same information as marriage, similar registration at Home Affairs, and two adult witnesses.	In immigration cases Home Affairs does check purported marriages to determine if they are “fake” for immigration fraud. How do they do this? We can learn from them.	No, just keep it simple and don’t legislate for cultural rituals

Asmal								Where cohabiting parties do not come forth to register their intimate relationships implies that they choose to remain as single individuals and be recognised as such (in terms of marital status) for all administrative and legal purposes and likewise for any consequences of such a relationship.			
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<p>Bakker</p>		<p>No, parties should be provided with the option to register any intimate relationship including marriages but the protection of parties in intimate relationships can also be determined when the need for protection arises.</p>		<p>No, registration of an intimate relationship should not affect the protection of the relationship in the South African law</p>	<p>There should not be a closed list of requirements to prove whether a relationship should be protected. As far as the relationship is to the benefit of the parties and the larger community such a relationship should be recognised. This can be proved by surrounding circumstances including factors that clearly indicates the parties' intention</p>	<p>Registration of intimate relationships should be done by both or all the parties and that registration will only play an evidentiary role to determine whether an intimate relationship exists and what the intention of the parties where at the time of registration</p>	<p>No value should be attached to the marriage per se but rather to the intimate relationship the parties formed through their marriage. However, the intimate relationship between the parties can be registered at any time during the existence of the relationship by both parties.</p>	<p>Registration should merely serve as proof of the existence of an intimate relationship. Parties should be able to register their intimate relationship and relationship agreement and non-registration should not affect the rights of parties within an intimate relationship.</p>	<p>The registration of an intimate relationship will naturally require all the normal personal information including names, addresses, identity numbers etc. The registration can further make provision for the nature of the intimate relationship i.e. is it a marriage or partnership. The parties should further be able to register an intimate relationship contract, which will replace ANCs for intimate relationships that are in the form of a marriage.</p>	<p>There should not be a closed list of requirements to prove whether a relationship should be protected. As far as the relationship is to the benefit of the parties and the larger community such a relationship should be recognised. This can be proved by surrounding circumstances including factors that clearly indicate the parties' intention. Factors might include permanence of the relationship, support, common household, wedding rituals, payment of</p>	<p>No differentiation should be made between marriages and intimate relationships but marriage should be seen as a form of intimate relationship</p>
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<p>Commission on Gender Equality</p>		<p>The failure to register should not affect the validity of a marriage and this is primarily because most married couples in the rural areas do not easily have access to services that assists in the registration of marriages</p>		<p>Yes, if not registered within a certain period</p>	<p>The way out here would be for a marriage officer (who is also preferably the person conducting or solemnising the marriage) to be present when the marriage is conducted in terms of the religion or culture</p>			<p>It is an undisputed fact that in South Africa many people prefer to live together without entering a marriage or civil union. A registration of unmarried intimate relationships will closely resemble civil marriage in both form and function and this is what most cohabitees avoid. The statute should recognise a statutory duty of support between unmarried partners if they can prove interdependency.</p>			
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Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)		Support registration of marriages, irrespective of how they were concluded, religious or cultural				Important that both parties be present at the same time to register their marriage	It should be within a reasonable time	No	No	No	Witnesses should be involved. Registration should be peremptory and penalty for non-registration within a certain period.
Darhul Ihsan Centre		support the registration of all marriages		Failure to register a marriage should not impact on the validity of a marriage	The existence of a marriage which has not been registered should be proven through the Marriage Officer's Certificate, a Nikah Certificate or through other forms of verification such as witnesses to the existence of the marriage	both parties should be party to the registration process	Parties should be at liberty to register their marriage at any point in time	The Act should only cover marriages and not unmarried partnerships as marriage is regarded as a sacred institution by society at large and, hence the sanctity of marriage should be treated distinctly under a separate act.			

<p>Department of Communications</p>		<p>supported fully the registration of marriages by DHA</p>		<p>The failure to register the marriage should affect the validity of the marriage</p>	<p>It may be difficult to prove the existence of the civil unions but dowry can prove the existence of the customary marriage</p>	<p>To verify the marital status and identity number</p>	<p>The time period should be specified by the legislation (i.e. the parties must register their marriage within 30 days after their marriage has been concluded) to avoid future challenges</p>	<p>Registration should not be required in relation to unmarried intimate relationships to avoid unnecessarily long queue at Home Affairs, the affected party shall merely prove the existence of their relationship</p>	<p>The identity number and the marital status.</p>	<p>Proof of any purchased item and the delivery of such item to the physical address of the party or any other sensitive private information</p>	
<p>First Rand Bank</p>		<p>Registration of marriages (or any other formal recording of the marriage) does not just lead to certainty for the State but also creates certainty for third parties engaging with the married persons. Aligned to the SALRC's</p>		<p>Registration may only be an effective preventative mechanism if the non-adherence to this obligation is linked to a sanction.</p>							

<p>Free State Society of Advocates</p>		<p>Yes, the registration of marriages is supported, saying that it provides certainty to spouses, their families, the State, the public and creditors</p>		<p>Spouses should be afforded a reasonable period within which to register their marriage. In the event that a marriage has not been registered, it ought to be deemed to be invalid, save for instances in which a declaratory Court order has been obtained to the contrary.</p>	<p>It would be preferable that registration be peremptory. In the event that a marriage is still valid, then proof of existence of the marriage could be obtained either by means of an investigation by an official of the DHA, or by application, supported by adequate evidence, to Court, for an order declaring the existence of the marriage</p>	<p>In the event that marriage officers solemnise and register all marriages, then as per current practice, they will verify the identities of the aspirant spouses and submit the register to the local branch of the DHA. In the event that this practice is not adopted, it is submitted that both parties ought to register the marriage.</p>	<p>It would be preferable that marriages should be registered within three months of their conclusion</p>	<p>Registration of unmarried intimate relationships most likely bestows a formality or connotations (similar to that of a marriage) upon the parties which they elected not to enter into. There is merit however in having cohabitation agreements reduced to writing and notarised</p>	<p>Details relating to the partners' identities, and approximate commencement of the cohabitation</p>	<p>The evidence of family, friends and associates and evidence of credit applied for jointly, or joint occupation of residential property</p>	<p>The likelihood exist that certain traditional and religious leaders may refuse to solemnise or register same sex, inter-cultural or inter-religious marriages</p>
<p>Freedom of Religion SA (FOR SA)</p>		<p>in favour of parties registering a marriage if they wish the marriage to be formally</p>									

		recognised by the State and thereby enjoy legal consequences									
Islamic Forum Azaadville		Registration of marriages is of the utmost importance and failure to implement registration could lead to a host of problems including human trafficking									
Jamiatul Ulama KZN		No, rather support the registration of only one marriage, Secular Legal marriage, because of its neutral nature, shall be available to all on an equal footing		In the model suggested, there is only one marriage which cannot exist without registration	There is no need for such alternatives in the model suggested, as the only valid marriage would be one which is registered	Both parties are necessary in order that the Registration Officer can be satisfied that there is willing consent	This question does not apply to their proposed model	Unmarried partners (parties who live in marriage-like relationship) who do not enter into a Secular Legal marriage shall be deemed to have elected not to have legal consequences flowing	No comment in light of their comment to the previous question	No comment in light of their comment to the previous question	The process needs to be as smooth, accessible and stress-free as reasonably possible

								from their relationship. This is in line with the <i>ratio</i> contained in the <i>Fourie</i> judgment. They considered that without such a deeming provision, the objective of maintaining a database of all individuals who owe one another marriage-like duties will not be achievable			
Legal Resources Centre (LRC)		Support the registration of all marriages		Failure to register a marriage does not automatically invalidate a marriage	Yes there should be alternative ways to prove the existence of a marriage	Preferably both parties must register the marriage to ensure free and full consent on behalf of both parties, and that both parties have the capacity for marriage, with particular	Support the registration of marriages during the subsistence of the marriage, prior to dissolution by divorce and being able to register after death	An alternative option would be for parties to rather register at DHA offices and keeping of a record of the existing relationships. Registration should however not be	The same detail as contained on the marriage certificates including the property regime that would govern the parties' during the subsistence of the relationship	Women bear the brunt to prove the existence – men choose not to register because this often protects their interests. It is their view that the alternatives presented by the	Issue Paper does not deal with the registration of marriages of transgender or intersex persons who alter their gender legally but who are in existing marriages

		marriage in the event that the validity of a marriage that they were informed about or witnessed is disputed								
Muslim Lawyers for Social Justice		Support registration saying it protects against sham marriages, is important for statistics, creates certainty regarding the status of the person, protects proprietary rights			Support alternative ways to prove the existence of a marriage proposing that the legislation must make provision for a rectification process so that the marriage may be registered after it was solemnised where the parties failed to do so at the date that the marriage was entered into	In order to avoid abuse and bogus marriages it is necessary that both parties register a marriage		Registration should not be required at all in unmarried intimate relationships. Where individuals elect to remain in unmarried partnerships they chose for that relationship not to be regulated.	Unmarried intimate relationships should not be registered	

<p>National House of Traditional Leaders (NHTL)</p>		<p>When you go through a legal marriage you must register it for it to be legal</p>		<p>Registration is encouraged as if constitutes prime facie proof of the existence of a customary marriage</p>	<p>Yes, the marriage must be negotiated and entered into, or celebrated in accordance with the customary law</p>	<p>Any party to the marriage should be able to register the customary marriage</p>	<p>Registration of a customary marriage is encouraged as it constitutes proof of the existence of the marriage</p>	<p>People should not cohabit but should get married, and therefore, the registration of unmarried parties is not required</p>	<p>If intimate relationships are to be registered, the information required may be to bring witnesses to prove that the partners have been living together for at least two years, both 18 years and over, and there must be intent to live together on a permanent basis</p>		
<p>National Spiritual Assembly of the Bahá'ís of SA</p>		<p>The registration of Bahá'i marriages celebrated within a given locality is the bounden duty of the Local Spiritual Assembly of that locality</p>									

<p>Nederdutch Reformed Church of Africa (NHKA)</p>		<p>The registration of all marriages concluded in terms of the single statute should be compulsory without exception and from this logically flows the necessity of a single marriage register kept by the DHA.</p>									
<p>Policy and Legislation Development Facilitation : Eastern Cape Cooperative Governance and Traditional Affairs</p>		<p>All marriages must be registered with DHA</p>									
<p>Pretoria Society of Advocates</p>		<p>Yes</p>		<p>No, the following factors can be used regarding the validity of the marriage: The notification</p>	<p>The marriage certificate should be <i>prima facie</i> evidence of the conclusion of the marriage.</p>	<p>both parties must register a marriage</p>	<p>Registration of marriages should take place within a specified period, for example 6 months, of the</p>	<p>Majority of its members agreed that unmarried relationships must be registered to afford the partners</p>	<p>Full names and identity numbers; physical address of each party; time, date and place of proposed marriage;</p>	<p>Should parties be able to register marriages at any stage after their conclusion above and</p>	

				and publication of the intended marriage; the marriage certificate; oral and/or evidence under oath regarding the de facto position relating to the marriage that was entered into.			marriage being concluded	legal rights, although other members disagreed and contended that registration should not be a requirement	record type of marital regime; and record previous marital status and include case number in the event of a divorce and date of death of former spouse if a party is widowed	that one member has suggested additional affidavits from family members and friends of the parties	
Sunni Ulama Council Gauteng				The registration process should not be seen as the source of the consequences as the consequences must flow from a pre-marital contract							
United Ulama Council of SA (UUCSA)		Yes		No		This appears to be specific to issues related to customary marriages and we are, therefore, not in a	This appears to be specific to issues related to customary marriages and they, therefore, not in a				

						position to comment	position to comment				
Women's Cultural Group		All couples who elect to be governed by the Single Marriage Act must be required to register the marriage		Those couples not electing to opt in shall not have the consequences of "marriage" (or intimate union recognised by law) apply to them		Both parties must be present before the Marriage Officer in order to register the marriage	To be governed by the Single Marriage Act, the parties must register under the Act and they should be allowed to do so at any time				
Women's Legal Centre		Women's lived experience informs us that their rights are more protected where their marriages are registered		Registration cannot affect the validity of the marriage as too many women within our South African context will be left destitute and without access to their rights	It is therefore important to examine how they can proof the existence of marriages for the purposes of registration after the marriage has been concluded.	The purpose of registration is not to validate the marriage in law. Once the requirements were met to enter into the marriage it is already valid in law, we therefore need to allow for the purpose of registration a model whereby	Parties should be able to register their marriages at any time prior to the dissolution of the marriage to ensure that women are able to access their rights to housing, land and property	The SALRC has done detailed work on the recognition of domestic partnerships and this work should form part of these current processes. It is critically important for the legal system to develop to recognise domestic partnerships. Registration	They would not advise that registration is a requirement		The Draft Domestic Partnership Bill in fact speaks to criteria that can be used to evaluate the existence of a domestic partnership and although this is not a closed list it does provide guidance for consideration of what is

						individuals can register the marriage without the spouse being present		of domestic partnership s should not be a requirement for the validity of the relationship and the duties that flow from them			just and equitable
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C. Marriage ceremony

	The Marriage Act and Civil Union Act prescribe the formulae to be used during certain marriage ceremonies. Do respondents agree and if not why?	Does a prescribed marriage formula contributes in any way towards effecting legal certainty as to a marriage having been conducted?
Allan	The legislation should NOT prescribe the cultural form of a marriage ritual. The state should have no interest in cultural or religious ceremonies. The state in South Africa is not the private state of any religious organisation or cultural group.	No.
Bakker	If all intimate relationships are recognised and not the marriage per se, then religious and cultural formulae will not play any role in the conclusion of an intimate relationship.	No, registration effects certainty of the existence of an intimate relationship
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)	The specific religious or cultural should be allowed to choose if they would want to have a specific formula that should be used. If they choose not to have a formula, then only registration should take place in terms of the chapter in the legislation governing the specific religion or culture	The formula would bring about legal certainty as far as the requirements that should be met in order for a valid marriage to be concluded in terms of the religion or culture
Darhul Ihsan Centre	The solemnisation of marriages should be based on a marriage formula, however, the state should not be prescriptive with regards to the mode of how the religious or cultural rituals are conducted in a marriage ceremony	The formula they contemplate at the time of solemnization does give legal certainty to the marriage, by virtue of the binding contractual nature of the wording.
Free State Society of Advocates	The state shouldn't have an interest in religious or cultural rituals conducted in a marriage ceremony. However, either a form of marriage formula or prescribed formal requirements must be imposed in addition to the religious or cultural rituals. This can be done before or after the ceremony, should the parties not wish for it to interfere with the ceremony. Such marriage formula or formal requirements ought to relate to verifying the identity and age of the aspirant spouses and confirming that each party consents to the marriage	Yes, to an extent, saying that the marriage officer is entitled to accept that there is no lawful impediment, and there are two individuals present to witness the conclusion of the marriage

Freedom of Religion SA (FOR SA)	The State should not have an interest in how religious and / or cultural rituals are conducted in the religious and / or cultural marriage ceremony. However, as religious ministers often also have a marriage officer's licence, the legal and religious and / or cultural ceremonies can occur simultaneously.	
Islamic Forum Azaadville	There is no need for legislation as it will serve no purpose in law. Their view is that this should be left to the separate religious or cultural groupings.	
Jamiatul Ulama KZN	The new statute should not contain any formula. The function should simply be registration	NO
Legal Resources Centre (LRC)	As long as the religious and customary ceremony and the rituals do not violate the Constitution, the state should not interfere	Marriage certificates are prima facie proof that a marriage was concluded. In their view, there are therefore legal proof that a marriage was concluded and not the marriage formulae
Muslim Lawyers Association (MLA)	It is enough that the statute recognises all religious marriages concluded in accordance with the dictates of those religions as well as the religious consequences that flow from there	
Muslim Lawyers for Social Justice	No, parties should be permitted to exercise their choice in this regard, provided that it is within the confines of the law	
National House of Traditional Leaders (NHTL)	The prescribed marriage formula does not contribute towards affecting legal certainty as to a marriage been conducted	
National Spiritual Assembly of the Bahá'ís of SA	The Bahá'í marriage ceremony itself is simple and dignified	
Nederdutch Reformed Church of Africa (NHKA)	The development of a new marriage formula is supported, with due consideration to some guidelines	
Policy and Legislation Development Facilitation: Eastern Cape Cooperative	The state should have no interest on how the religious or cultural rituals are conducted for one reason that the custom cannot be regulated.	

Governance and Traditional Affairs		
Pretoria Society of Advocates	The State should have an interest in so far as that certain religious and cultural rituals conducted in a marriage ceremony may be used to discriminate and/or oppress women. Therefore there should be a minimum requirement in all of these rituals that both parties to the marriage must be present, at least 18 years of age and enter the marriage out of their own free will.	Yes and that defining a minimum legal requirement ensures legal certainty and prevents abuse of the system
Sunni Ulama Council Gauteng	This matter is subject to many different variations within the various groupings and because of its specific and spiritual nature should be left out of legislation as this will in no way impact (positively or negatively) on any area of legality.	
United Ulama Council of SA (UUCSA)	The state should have no interest in how the religious or cultural rituals are conducted in a marriage ceremony	The formula they contemplate at the time of solemnization does give legal certainty to the marriage
Van Schalkwyk		
Women's Cultural Group	The principal task of the Marriage Officer is to ensure that the couple consent to be married. If this objective is achieved there is no need for any other ceremony or formula.	
Women's Legal Centre	The Department of Home Affairs therefore cannot divorce itself from its legal obligation to ensure that religion and custom does not violate the rights of vulnerable members of our society.	To some extent the exchange of the marriage formula in front of witnesses provide legal certainty that the marriage was entered between the parties. It is the confirmation of those witnesses in writing and the parties themselves that in their opinion provide legal certainty and not just the formula. The content of the words is therefore not what is critically important, but that the contract was witnessed.

D. Matrimonial and patrimonial consequences

	If there is support for a single marriage statute or omnibus legislation, what should it provide for in regard to matrimonial property?	Should the matrimonial consequences of all marriages and intimate unmarried relationships being regulated by a single marriage statute or omnibus legislation?
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Allan	A default position for matrimonial property should be part of the legislation. However such should be freely ignored if the couples have a valid ante-nuptial agreement regarding property.	No, problems should arise and that yes, some religious adherents will always complain that we are not heeding God's will, but South Africa is a secular state.
Bakker	The default position should be similar to the current community of property regime but make provision for sharing between more than two partners for polygynous intimate relationships.	All intimate relationships, including marriages, should be in community of property and profit and loss as default option (adopted to also include polygynous marriages). He further considered that parties should be able to regulate the matrimonial consequences by an intimate relationship contract.
Commission on Gender Equality	The current three marital property regimes be maintained and in turn included in the single / omnibus statute	The current three marital property regimes be maintained and in turn included in the single / omnibus statute. Consideration must be provided to cohabitation agreements between persons whom are intimate relationships.
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)	Matrimonial issues should be left to the Matrimonial Property Act	Matrimonial consequences of all marriages should be dealt with in the Matrimonial Property Act, which should be amended to conform to single marriage statute, by deletion of provision which will no longer be useful
Darhul Ihsan Centre	A Muslim marriage is deemed to be a marriage out of community of property excluding the accrual system	
First Rand Bank	<p>Legal certainty regarding maintenance and duty of support obligations of married persons (whether during or at the end of a marriage) is also important for third parties like FRB. These obligations and duties would be considered when a person applies for credit and an affordability assessment is conducted in alignment with the National Credit Act 34 of 2005. The maintenance and duty of support obligations would also be considered when goods, services or products are provided to the person, especially in instances where the payment for the goods, services or products is deferred or the level of supply is determined based on the risk rating of the contracting party obliged to perform in terms of payment</p> <p>There should be public education regarding the legal and economic consequences of a marriage; the legal and economic consequences of various marital property regimes; the rights and obligations of the parties to a marriage (including the obligations</p>	

	of maintenance and the duty of support) and the legal and economic consequences flowing from a termination of a marriage. Their experience is that persons are often not aware of the consequences and their rights and obligations regarding marriage and the impact a marriage as well as a marital property regime has on engagements with third parties like banks, credit providers, financial services providers and financial product providers	
Free State Society of Advocates	It would be prudent to include separate sections relating to marriages concluded according to specific cultures or religions.	It will afford more certainty to the parties as well as the public as a whole. It will lend recognition to marriages not previously adequately recognised.
Freedom of Religion SA (FOR SA)	An omnibus marriage statute can deal with the patrimonial consequences of each unique type of union individually. It should also incorporate the existing legal provisions that already regulate a specific type of union's patrimonial consequences, into the sections dealing with unions of that type. This approach allows for Islamic marriages concluded under <i>Sharia</i> law to remain out of community of property, for monogamous customary marriages to be in community of property, and for provisions granting the court's discretion to alter the chosen matrimonial property regime in the interests of justice and gender equality when the relationship ends.	
Inkatha Freedom Party	In pursuit of equality it is the African people who must sacrifice their cultural norms. Africans had already forfeited their traditional rights of marriage out of community of property. Presently if an African wants to marry out of community of property, they must first conclude an agreement known as antenuptial Contract. Many African husbands who enter into this contract do not even know how to spell it or what it means. It was a concept that was adopted from Roman Dutch and English Law. Dramatically both the colonial and the apartheid government recognised this African marriage. Many Africans are unhappy with this legal provision, but because in Europe marriage has always been in community of property and an antenuptial contract has always been their instrument to separate their common estate, the African is at the losing end.	
Islamic Forum Azaadville	The consequences should arise from the underlying agreements entered into or understood from the relevant religious or cultural groupings	

Jamiatul Ulama KZN	The default propriety regime should be out of community of property, without accrual. Parties may then choose to alter this in their ante nuptial contract	A single marriage statute will go a long way towards achieving legal certainty and uniformity
Masekwameng Kedibone Herman	Marriage should in his opinion and experience in his line of work be changed from in community of property to compulsory out of community of property. If one of the spouses in a marriage wants to bequeath a property or anything of value to the other spouse, that should be done in writing and recorded by the marriage officer at Home Affairs.	
Muslim Lawyers Association (MLA)	It is sufficient if legislation simply records that the matrimonial consequences of a religious marriage are regulated by the dictates of that religion as chosen by the parties.	
National House of Traditional Leaders (NHTL)	Legislation should provide for the three forms of matrimonial property regimes in South Africa: in community of property; out of community of property with accrual; out of community of property without accrual.	
Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs	Matrimonial property should be distributed equally between the parties that are involved.	
Pretoria Society of Advocates	Some of their members hold the view that all marriages entered from the commencement of the new single marriage statute should be out of community of property with the inclusion of the accrual system. If parties wish to be married in community of property or out of community of without the accrual system, the parties are required to stipulate such marriage in an antenuptial contract.	
Sunni Ulama Council Gauteng		The matrimonial consequences must flow from the contract of marriage.

United Ulama Council of SA (UUCSA)	A Muslim marriage is deemed to be a marriage out of community of property excluding the accrual system, unless the proprietary consequences governing the marriage are regulated by mutual agreement of the spouses	The consequences of each matrimonial regime should be legislated independently
Wasim	All marriages whether registered or not should be treated as in community of property as both parties have contributed, that nobody sees divorce coming and that all genders are equal.	
Women's Cultural Group	The consequences of a marriage are really the crux of the debate. Whether the status quo ought to remain namely the couple will be married IN community of property unless they adopt an out of community of property regime (which could be with or without accrual); alternatively they should default out of community, is something that they reserve a response on until they have considered the matter further.	In as much as each person (including those in intimate relationships) is given the choice of being subject to the provisions of the Single Marriage Act, those who do not elect to opt in should not be regarded as "married" (or whatever the appropriate terminology is). Those couples not electing to opt in shall not have the consequences of "marriage" (or intimate union recognised by law) apply to them
Women's Legal Centre	Matrimonial property regimes in future need to consider the different ways in which people acquire property, contribute to the accumulation of assets and financial interest as well as the contribution made by women in the form of unpaid care work. The matrimonial property regime must be based on a system that is just and equitable.	

E. Spousal support

	Should the law recognise a statutory duty of support between unmarried partners?	Should the duty of support also extend to circumstances where one of the unmarried partners is also in an unmarried partnership or a spouse in a marriage?
Allan	Bigamy rules should apply	
Bakker	Statutory support should be recognised in all intimate relationships provided that the party requires support	If the new Act does not differentiate between intimate relationships and marriages and allow for polygyny (perhaps also polyandry) in all intimate relationships it will naturally follow that a duty of support will exist in all the intimate relationships a person is partner to.
Centre for Applied Legal Studies (CALs)	Domestic partnerships need to be recognised by our law.	

Christian View Network		
Commission on Gender Equality	The unintended consequences of the repeal of the Black Administration Act No 38 of 1927 should be dealt with. As per section 22(6) of the apartheid law, all civil marriages of Black persons were automatically out of community of property. All the marriages which were conducted under the Black Administration Act as in community and those who wished to be out of community would be provided the window period to do so.	
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)	No	
Darhul Ihsan Centre	In view of the fact that they do not support the regulation of unmarried partnerships the question is not relevant	In view of the fact that they do not support the regulation of unmarried partnerships the question is not relevant to them
Free State Society of Advocates	In order to avoid vexatious litigation and claims without merit, this should be avoided, save for instances where persons have registered their unmarried intimate partnership and have registered a cohabitation agreement.	
Freedom of Religion SA (FOR SA)	Unmarried intimate relationships having marriage-like rights will go against the reasoning of the Constitutional in <i>Volks v Robinson</i> and open up any such law to a constitutional challenge	
Islamic Forum Azaadville	Spousal support must have its basis on the understanding of the duties and rights owing to and by each of the married couple at the outset of the marital regime where such relationship will be encapsulated by a written contract.	
Jamiatul Ulama KZN	No, unmarried partners (parties who live in marriage-like relationship) who do not enter into a Secular Legal marriage shall be deemed to have elected not to have legal consequences flowing from their relationship	No, it should not be extended

Muslim Lawyers Association (MLA)	It is enough if the statute simply recognises that the duty of support in a Muslim marriage is as per the dictates of the religious law and nothing more. Islam does not recognise a reciprocal duty of support between spouses as the Quran is clear.	
National House of Traditional Leaders (NHTL)	Spousal support where there is no valid married should not be regulated, and the law should not recognise a statutory duty of support between unmarried partners	
Nederdutch Reformed Church of Africa (NHKA)		It is trite that one of the invariable consequences of a civil marriage is the reciprocal duty of support between spouses in a civil marriage. Obligatory spousal support between unmarried partners only exists where the partners had either expressly or tacitly created a contractual reciprocal duty of support.
Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs	Spousal support should be recognised in terms of unmarried partners but there should time limes in terms of the relationship.	
Pretoria Society of Advocates	Consideration should be also be given to the proposed default position that all marriages are entered into out of community of property subject to the accrual unless otherwise stated in an antenuptial contract. subject to the meeting of certain requirements, for example a partnership of long duration, whether children were born during the partnership, evidence of financial support for a partner, the age of the parties, the financial position of the parties and a factual enquiry confirming that it would be just for spousal maintenance to be granted.	No
Sunni Ulama Council Gauteng	The law should recognise the duty of support based on the contractual arrangement which has been entered into.	
United Ulama Council of SA (UUCSA)	Marriage contracts should play a central role in regulating property regimes	In view of the fact that they do not support the regulation of unmarried partnerships the question is not germane to them
Van Schalkwyk		

Women's Cultural Group	No, to obtain the benefits of spousal support the couple must elect to opt into the Single Marriage Act	
Women's Legal Centre	Yes, as previously discussed women do not always negotiate marriage because of patriarchy and discrimination	Yes, because the duty to support must be based on the relationship commitments within each relationship that parties enter.

F. Ante-Nuptial agreements

	Should the single marriage statute make provision for the conclusion, registration and enforcement of antenuptial agreements?	
Bakker	Yes, the agreements should take on the form of an intimate partnership agreement.	
Cape Bar Council	They do not understand the question to be whether the conclusion of an antenuptial agreement should be a prerequisite for marriage, but rather whether the legislation should recognise the enforceability of such an agreement	
Centre for Applied Legal Studies (CALs)	The requirement that antenuptial agreements must be notarised is anti-poor.	
Commission on Gender Equality (CRL Commission)	Supports specific provisions in respect of the three property regimes. However, the need for an Attorney to draw the antenuptial agreement and in turn the costs associated with the registration thereof, often is a direct barrier to persons who are not financially resourced to affect the associated costs. The Commission suggests that Legal Aid South Africa be cited as implementing agent for those persons who are unable to afford a private attorney and the costs associated with registration	
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)	Yes, if not dealt with in the Matrimonial Property Act or other provisions governing the marriage	
Darhul Ihsan Centre	The ante nuptial contract be abolished and replaced with a pre-marital contract. Such a contract will deal with all matters relating to the marriage including but not limited to the consequences of dissolution and spousal support. This contract will also allow for the varied approaches and principled positions of each group to be legally expressed. The changing of the contractual relationship will also have to be addressed. This contract should be part of the required documents on registration of marriages. This would also facilitate registration of the unregistered marriages currently in place	
Free State Society of Advocates	It would be prudent to either amend the Matrimonial Property Act significantly or repeal same and include all relevant provisions in the new Act	

Freedom of Religion SA (FOR SA)	In as far as ante-nuptial contracts would not contravene the religious freedom rights of the parties to a specific type of union, the omnibus marriage statute can make provision for the conclusion, registration and enforcement of such contracts.
Jamiatul Ulama KZN	Yes, it forms an important component of the model proposed by them
Muslim Lawyers Association (MLA)	Ante nuptial agreements should be given legal status and if the parties choose to conduct their marriage in accordance with the Ante Nuptial Contract this would be given the force of law.
Nederdutch Reformed Church of Africa (NHKA)	The default matrimonial property system does not seem to cater for the needs of the large majority of uneducated, indigent or sub-economic groups of South Africa, who have little or no resources to access information about the proprietary consequences of their marriage.
O'Haher	
Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs	Yes, there should be a provision, for the conclusion, registration and enforcement of antenuptial agreements
Pretoria Society of Advocates	Yes
Sunni Ulama Council Gauteng	In favour of a contractual relationship which informs us that the solemnization, conclusion, registration and enforcement of pre-marital contracts should be part of the intended bill. They however wish to stress that such a contract which in essence would be on the basis of the ante-nuptial contract must be any contract which is enforceable either through extra-judicial processes (the preferred method) or the courts of the land and not necessary be informed or limited by the current view or understanding of the ante-nuptial contract.
United Ulama Council of SA (UUCSA)	Provision should be made for conclusion, registration and enforcement of antenuptial agreements.
Women's Cultural Group	Muslim statute Chapter should have provision for the conclusion, registration and enforcement of ante nuptial contracts.
Women's Legal Centre	The proposed single marriage statute must ensure that it speaks to people's lived realities and experiences

G. Dissolution of relationships and alternative dispute resolution

	How could alternative dispute resolution mechanisms be applied to resolve family law disputes?
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Asmal	Just as the recognition of an intimate relationship is for administrative purposes only, so also the consequences of a marital union (viz. its subsistence and dissolution) should be for administrative purposes only
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)	The chapter dealing with the specific religion or culture must provide for ADR mechanisms that should be used before approaching the courts for adjudication
Free State Society of Advocates	Care must be taken to ensure that mediation and ADR is not made peremptory, but rather offered as a service
Islamic Forum Azaadville	To enable the expression of the various principled positions being held by the various religious and cultural groupings and to make informed decisions based on the many differences it is their view that the mediation and arbitration process is a necessity
Jamiatul Ulama KZN	Parties should be allowed to resolve their disputes by way of voluntary arbitration. They proposed that parties could include a clause referring to arbitration in their Ante Nuptial Contract. The law will have to be amended to provide for this. Such development has the potential of vastly reducing the courts involvement in marital disputes, whilst still maintaining oversight
Muslim Lawyers Association (MLA)	In favour of the arbitration act being amended to allow for arbitration of religious disputes between parties to an Islamic marriage.
National Spiritual Assembly of the Bahá'is of SA	During a year of waiting the couple lives separately and makes every attempt to reconcile their differences. Divorce may be granted only after the year of waiting if the attempts to reconcile fail.
Nederdutch Reformed Church of Africa (NHKA)	The extension of mandatory statutory alternative dispute resolution in respect of the marriage should be encouraged, including issues with regard to the division of marital assets and liabilities as well as spousal support.
Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs	In the Traditional Leadership setup there is a provision in relation to dispute resolution within the family so therefore the disputes on marriages are resolved in that platform, then on instances where they are unable to resolve they can proceed to seek the intervention of the courts

SA Orthodox Jewish community	A court must dissolve a Jewish marriage on the grounds applicable and in doing so be satisfied that a ' <i>get</i> ', which is the divorce document in Jewish religious law, has been presented by a husband to his wife. This is to affect the dissolution of a Jewish marriage and ensure the freedom of either party to remarry.
Sunni Ulama Council Gauteng	The international trend is the moving towards extra-judicial resolutions and this mechanism must be addressed in this issue paper despite the fact that another parallel investigation is being conducted
United Ulama Council of SA (UUCSA)	Supports ongoing engagements with the SALRC for amendments to the Arbitration Act to allow for arbitration of family law matters
Women's Cultural Group	Mediation to attempt reconciliation must be compulsory

H. Sham or bogus marriages

	How are bogus marriages best prevented and to deal with them after they have been concluded?
Bakker	A bogus marriage will not comply with the requirement that the relationship should contribute to the larger community, and therefore not receive protection under the Act recognising intimate relationships
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)	Through reporting of marriage
Darhul Ihsan Centre	Bogus marriages are as a result of corruption and every effort should be made to root out corruption through robust legal procedures
Department of Communications	Legislation should be established to prevent bogus marriages and the sentence should be very harsh
Free State Society of Advocates	There would be merit in considering granting the DHA the ability to de-register a sham or bogus marriage, without the necessity of a Court Order
Islamic Forum Azaadville	Bogus or sham marriages would never be able to be eliminated completely however to mitigate this problem they suggest that the process of registration together with proper scrutiny of the required documents such as the pre-marital contract be enforced.
Jacob	
Jamiatul Ulama KZN	Whilst they do acknowledge that these are valid concerns, given the very personal nature of marriage and the meaning of marriage in the modern context, it is difficult to police

Nederdutch Reformed Church of Africa (NHKA)	This is a serious problem that needs to be addressed.
Policy and Legislation Development Facilitation: Eastern Cape Cooperative Governance and Traditional Affairs	Bogus or Sham Marriages are not considered as valid marriages as long as the families are not formally united and the lobolo has been negotiated and paid
Pretoria Society of Advocates	Registration of marriages and unmarried partnerships, notice of marriage and the issue of marriage licenses as well the requirement that both persons be present at the time of the conclusion of the marriage
Sunni Ulama Council Gauteng	The incidence of bogus or sham marriages would in the majority of cases arise from inadequate administration and as such requires an administrative oversight by the marriage officers.
United Ulama Council of SA (UUCSA)	This is a criminal matter and beyond their domain
Women's Cultural Group	Each couple must be required to register their marriage under the Single Marriage Act
Women's Legal Centre	W omen who have approached them had all been married in unlawful/fraudulent marriages where they were not present when the marriage was concluded, did not know the individual who they were registered to be married to and had all found out about the marriage accidentally when trying to access some form of service or obtain an id number. Based on their assessments these marriages were recorded on the National Population Register as a result of fraud within the department itself.

I. Have we covered everything?

	Are there any other suggestions not already covered by issues raised above in so far as they may contribute towards the investigation?
Bakker	It is important to move away from a marriage centered approach to the recognition of intimate relationships. Marriage should be regarded as but one form of intimate relationship.
Centre for Applied Legal Studies (CALs)	The problem of <i>lex domicilii matrimonii</i> and foreign marriages

<p>First Rand Bank</p>	<p>Important to FRB as a <i>bona fide</i> third party engaging with a married person that any legislative reform being considered regarding marital status and marital regimes should achieve legal certainty and prevent any confusion regarding the following:</p> <ul style="list-style-type: none"> o The marital status of a person, that is whether the person is married or not; o The status of the formal relationship and the consequences of the formal relationship between persons in a marriage; o The validity of a marriage or the formal relationship; o The marital property regime applicable; o The consequences flowing from the marital status and marital property regime of a person; and o When the marriage or formal relationship comes to an end (by way of death, divorce or dissolution) and the consequences flowing from such a termination of the marriage or formal relationship. <p>Request that any legislative reform should consider the impacts on ancillary or connected legislation. For example:</p> <ul style="list-style-type: none"> o The National Credit Act 34 of 2005; o The Deeds Registries Act 47 of 1937; o The Matrimonial Property Act 88 of 1984; o The Alienation of Land Act 68 of 1981; and o The Administration of Estates Act 66 of 1965. <p>The transitional provisions relating to the legislative reform of a Single Marriage Statute should be carefully considered in light of the possible intended and unintended legal, economic and financial impacts on or consequences for existing relationships. The rights of third parties whom have or will engage married persons should also be considered.</p>
<p>Inkatha Freedom Party</p>	<p>One of the reasons for embracing diversity is that absolute uniformity is not possible. For instance, IFP fears that next thing from our government will be that since man pay ilobolo woman must pay ilobolo. This does not fit in with who we are. Even worse, this government will proceed to do away with ilobolo so as to accommodate the other races who do not pay ilobolo</p>
<p>Islamic Forum Azaadville</p>	<p>Three important aspects which would need to be included for discussion are: the role of the contracts; the clear delineation of law and religion/culture; and any ambiguity which may arise from different usage between law and religious/cultural practices such as solemnization must be erased.</p>
<p>Pretoria Society of Advocates</p>	<p>Study the Australian Family Law Act 1975, with specific reference to sections 72 to 79A, which provides the court with a discretion regarding the issue of spousal maintenance and factors to be considered in relation to spousal maintenance as well as the alteration of the property consequences of a marriage</p>

**Sunni Ulama
Council
Gauteng**

The question of pre-marital contracts needs to have more emphasis. They considered a clear distinction between civil matters and criminal matters must be made.

