**SUBMISSION TO THE DEPARTMENT OF HOME AFFAIRS**

**IN RESPECT OF THE DRAFT MARRIAGE BILL, 2022.**

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WOMEN'S LEGAL CENTRE

## I. Introduction

1. We refer to the call for public comment in respect of the draft Marriage Bill in South Africa. We welcome the opportunity to participate in this process of public engagement on the draft Marriage Bill, 2022.
2. We welcome the Department's effort to rationalise the marriage laws pertaining to various types of marriages in our country.

3. The Centre is an African feminist public interest law clinic which seeks to advance substantive equality for women in South Africa. The Centre applies an intersectional feminist approach in its strategic litigation, advocacy, education and training and legal advice methodologies of work. The Centre has a dedicated focus area which speaks to equality in relationships, and which seeks to ensure that all relationships and families in South Africa in their diversity are legally recognised, respected and the rights of women in those relationships are protected.
4. One of the core objectives of the Centre is to advance and protect the human rights of women and girls in South Africa. In so doing the Centre seeks to contribute to redressing the systemic inequality faced by women in South Africa. These interventions are particularly necessary in respect of women who suffer multiple and intersecting forms of disadvantage.
5. The Centre provides legal assistance and advice to women who face systemic discrimination free of charge. It litigates on behalf of clients and in the name of the WLC Trust with the broader aim of developing feminist jurisprudence that recognises and advances women's rights in South Africa. The Centre also participates in litigation in the role of amicus curiae to assist Courts in constitutional and public interest matters that concern women's rights and promotes gender equality.

6. Since its inception, the Centre has participated in numerous cases concerning the rights of women. The Centre has been involved in the *Daniels* case[1] in a constitutional challenge to the provisions of the Intestate Succession Act, Maintenance of Surviving Spouses Act and the Wills Act in relation to Muslim marriage. The Centre also brought an application for the recognition of Muslim marriages in 2014, which case culminated in the Constitutional Court's judgement in *Women's Legal Centre Trust v President of the Republic of South Africa and Others.*[2] Through those proceedings, the Centre ensured women married in terms of Shari'a can have their marriages legally recognised and are now able to utilize the machinery of the Divorce Act to claim proprietary and maintenance relief.

7. The Centre was also admitted as amicus curiae in *Bwanya v Master of the High Court, Cape Town and Others*[3] ("*Bwanya*"). *Bwanya* was a landmark case for women in permanent life partnerships and finally recognized their rights to inherit and claim maintenance in terms of Intestate Succession Act and the Maintenance of Surviving Spouses Act. The majority judgement of the Constitutional Court overturned its earlier judgment in Volks N.O v Robinson[4] and, in doing so, relied on the Centre's evidence as to the many reasons women enter into and remain in permanent life partnerships. This evidence was relied upon to debunk the so-called "choice argument" – i.e., that women in permanent life partnerships "choose" not to marry and should, based on that fact alone, accept the consequences of their "choice".

8. The Centre has also litigated to advance the rights of women in customary marriages, to extend the protective provisions of the Recognition of Customary

[1] Daniels v Campbell & Others (2004) ZACC 14.
[2] Women's Legal Centre Trust v President of the Republic of South Africa and Others
[3] Bwanya v The Master of the High Court 2022 (3) SA 250 (CC)
[4] Volks NO v Robinson and Others (CCT12/04) (2005) ZACC 2.

Marriages Act to categories of women who initially fell outside of the ambit of that Act, in Gumede[5], Mayelane[6] and Ramuhovi[7].

9. The Centre has engaged with the process of law reform in respect of our marriage laws in the process being undertaken by the South African Law Reform Commission in respect of their Project 144. We have engaged the SALRC during their Issue Paper 35 process as well as made submission to them on their Discussion Paper 152 in 2021. We note that there has been significant overlap in the issues being explored in those processes and the processes undertaken by the Department of Home Affairs on the issue of marriage recognition and regulation.

## II. Intersectionality as an approach to legislative development

10. It is important for the Department of Home Affairs to note that patriarchy is deeply embedded in our society and impacts on the way marriage is negotiated, consented to, and solemnized. The Centre applies an African feminist intersectional lens to the work that we do. Due to the impact of South Africa's apartheid and colonial past on our current family law, we believe an intersectional and gendered lens is critically important as a tool by which to analyse the experiences of women and to develop policies and laws that speak to the lived reality of those women.

11. The dawn of democracy did not automatically reverse the sexist and racist laws that existed during the pre-Constitutional era. This apartheid and colonial past have additionally resulted in a history of discrimination against interpersonal relationships that black people engage(d) in. Social morality was used to justify the exclusion of recognition to marriages and relationships of people who were of a different faith than Christianity, the marriages of couples who were African, black,

[5] Gumede (born Shange) v President of the Republic of South Africa and Others 2009 (3) SA 152 (CC).
[6] Mayelane v Ngwenyama and Another 2013 (4) SA 415 (CC).
[7] Ramuhovhi and Others v President of the Republic of South Africa and Others 2018 (2) SA 1 (CC).

and entered into customary marriages and of course, the criminalisation of relationships and lives of gender and sexually diverse persons. We submit that the Department of Home Affair have an obligation to view the relationships of persons through an intersectional lens taking full account of our diversity and how to recognise and realise rights within that diversity.[8]

12. Women are not a homogenous group but are made up of diverse and intersecting identities and, therefore, one uniform approach would be a narrow way of addressing the issues women face in family law. Women have various intersecting identities within their interpersonal relationship, their homes, families, communities, and workplace. In *G v Minister of Home Affairs and Others*[9] ("*Greyling*") the Court accepted the expert evidence of Bonthuys and Dr Anzille Coetzee to the effect that "even today, 25 years after the transition to democracy, the intersecting inequalities of gender, race and class still render many women unable to access and realise their rights."[10]

13. Persistent racial, gendered inequalities play a role in sustaining forms of discrimination. Discrimination refers to the unequal treatment of persons or groups based on their social identity. In defining discrimination, many scholars distinguish between differential treatment and disparate impact, resulting in wider two-part definition of discrimination. Differential treatment happens when individuals are treated unequally because of their social identity such as race, class, sexuality, or gender. Disparate impact happens when individuals are treated equally according to a given set of procedures but when the latter are constructed in ways that favour members of one group over another.

14. The second element helps to broaden its scope to include aspects of discrimination that may not be explicitly bias but are still covertly discriminatory. This framework enables us to understand discrimination beyond more conventional forms of

[8] Puleng Segalo: Gender, social cohesion and everyday struggles in South Africa, 2015.
[9] G v Minister of Home Affairs and Others (40023/21) (2022) ZAGPPHC 311; (2022) 3 ALL SA 58 (GP); 2022 (5) SA 478 (GP) (11 May 2022).
[10] Greyling, para 13.

individual prejudice, but to also understand that discrimination can be institutional. An example of this is the discrimination experienced by women and persons with diverse sexual orientation gender identity and sexual characteristics ("SOGIESC"). Constitutionally, women and LGBTQI+ people ought to enjoy the same rights as everyone. However, the institutionalisation of patriarchy has meant that these groups' rights are often stepped on and overlooked; resulting in them being disadvantaged in various areas of their lives.

15. While the Draft Marriage Bill's goal is *"to provide for recognition of marriages regardless of the religious, cultural, sex, gender, sexual orientation or any other belief of the spouse"* this cannot be done at the expense of the diverse identities of women who wish to have their marriages protected under the Bill. Using an intersectional approach would allow for the consideration of the interaction of gender, race, and other categories of difference in individual lives, social practices, institutional arrangements, and cultural ideologies.

16. In the case of Mahlangu v the Minister of Labour and Others[11], the Court referred to this as a 'textured analysis' that would lead to a more substantive protection of equality. The Court further acknowledged that adopting intersectionality as an interpretative criterion allows for the consideration of social structures that shape the experience of marginalized people.[12]

## III. Regional and International Obligations

17. Norms of international law are derived from various sources, including international agreements that have been adopted by South Africa and customary international law. South Africa is thus bound by both international law and the injunctions contained in the Constitution[13].

[11] Mahlangu and Another v Minister of Labour and Other (2020) ZACC 24.
[12] Mahlangu, para 79.
[13] Section 39(2) of the Constitution provides, "When interpreting the Bill of Rights, a court, tribunal or forum, … must consider international law".

18. South Africa's obligation at international law to regulate all de facto marriages (including Muslim marriages) arises from the following international instruments:
    - UN Convention on the Elimination of all forms of Discrimination against Women ("CEDAW")[14]
    - International Covenant on Civil and Political Rights ("the ICCPR")[15]
    - Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ("the AC Women's Protocol")[16]
    - SADC Protocol on Gender and Development ("the SADC Gender Protocol")[17].

19. Each of these agreements has been duly signed, approved by the South African Parliament, and ratified and is therefore binding as a matter of international law and imposes obligations on South Africa in the international sphere (subject to the reservations and interpretative declarations by South Africa in the AC Women's Protocol).
20. The requirements in Articles 2(1), 5(a) and 16 of CEDAW requires member states to "pursue all appropriate means" and "take all appropriate measures" impose a positive obligation on South Africa to identify existing laws, regulations, customs and practices that have the effect of discriminating against women and, thereafter, to proactively modify or abolish the legislation, practice or customs so as to remove impediments that prevent the full realisation of equality between men and women.
21. In General Recommendation 21, the CEDAW Committee dealt specifically with the scope of the obligation in the context of marriage and family relations and expressed the following view regarding the duty to regulate the consequences of marriages, including marital property, inheritance and spousal maintenance:
    *"In most countries, a significant proportion of the women are single or divorced and many have the sole responsibility to support a family. Any discrimination in the*

[14] In force: 3 September 1981, ratified by South Africa: 15 December 1995.
[15] In force: 23 March 1976, ratified by South Africa: 10 December 1998.
[16] In force: 25 November 2005, ratified by South Africa: 17 December 2004.
[17] In force: 22 February 2013, ratified by South Africa: August 2011.

*division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person."*[18]

22. In General Comment 33 regarding "Women's Access to Justice", the CEDAW Committee recognised the potential existence of *"Multiple family law systems …, such as civil, indigenous, religious and customary law systems" and recommended that personal status laws should "provide for individual choice as to the applicable family law at any stage of the relationship"*[19]

23. The same applies to Article 23(4) of the ICCPR. In General Comment 19, the Human Rights Committee noted the following in relation to the requirement in this article to "take appropriate steps" to ensure quality of spouses and children during and after marriage. The ICCPR Committee emphasised that:

*"… any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited, bearing in mind the paramount interest of the children in this connection. States parties should, in particular, include information in their reports concerning the provision made for the necessary protection of any children at the dissolution of a marriage or on the separation of the spouses."*[20]

[18] CEDAW General Recommendation 21, Equality in Marriage and Family Relations, 1994 par 28.
[19] CEDAW General Comment 33, Women's Access to Justice, 2015 par 46(c).
[20] UNHRC CCPR General Comment 19: Protection of the Family, the Right to Marriage and Equality of the Spouses, 1990, par 3 and 4.

24. At a purely literal level, the obligation on State parties in Article 27 of the ICCPR regarding the rights of ethnic, religious or linguistic minorities appears to be a 'negative' one that only requires that States not take action that would interfere with the existing rights of communities to profess and practice their religion and language. However, General Comment 23 provides a well-considered interpretation of the nature of this obligation. CEDAW and the ICCPR require State parties to regulate the consequences of all marriages (including religious marriages) because they potentially affect the rights of women, children and religious minorities.

25. Therefore, when drafting legislation and policy, it is imperative to ensure that all international standards are met to ensure harmonization of domestic law with treaties and conventions that South Africa is signatory to.

26. DHA needs to ensure that the Draft Marriage Bill all promotes the rights of black women and does not unfairly discriminate on any grounds. Culture and religion have a strong gendered influence and directly impacts women's ability to access. The State therefore has a clear duty to develop an awareness of fundamental rights to promote a climate of understanding, mutual respect and equality.

## IV. Overarching concerns on the Draft Marriage Bill

Omission of Domestic Partnerships

27. Although the state has recognised that obligations exist for it to recognise and regulate domestic partnerships in as far back as 2001 when the South African Law Reform Commission ("SALRC") released Issue Paper 17 as part of its then Project 118. This Draft Marriage Bill has excluded any reference to domestic partnerships.

28. In the 1996 census conducted in South Africa, more than 1.2 million people reported themselves as unmarried but living together. In 2001 the number of

persons identifying themselves as living together nearly doubled to almost 2.4 million. According to the 2011 census, the number increased further to over 3.5 million.

29. Another significant observation is that, over the course of the three census', the percentage of cohabiting respondents among the 'African/Black' population has increased. In 2011, for example, more than 10% of the 'African/Black' respondents were recorded as cohabiting, making up nearly 3 million of the total 3.5+ million cohabiting respondents. In each census, more women recorded living together than men. This suggests further support for the view that women – particularly black women – are most vulnerable to the adverse effects of the continued non-recognition of domestic partnerships.

30. Our jurisprudence is fast developing recognition of the discrimination that women are experiencing because of the lack of legislative framework and has over the past years come to women's assistance to provide them the right to inheritance on the same basis as a spouse[21], the ability to claim maintenance from the Road Accident Fund[22] in cases where their partner has passed in the same manner as a spouse, and efforts are underway to amend the common law to recognise a duty to maintain in cases where domestic partnerships have irretrievably broken down in the same manner as spouses at the end of a marriage[23].

31. We therefore encourage the Department to not miss the opportunity to incorporate recognition of domestic partnerships into the Marriage Bill. We suggest that the Department incorporates domestic partnerships into the Bill in the same or similar

[21] Bwanya v The Master of the High Court 2022 (3) SA 250 (CC).
[22] Paixão v Road Accident Fund (640/2011) 2012 ZASCA 130.
[23] EW v VH (2023) ZAWHC 58.

manner that the South African Law Reform Commission has recommended in their Single Marriage Statute Discussion Paper and the accompanying draft Bills.

32. We are of the opinion that such an approach would enable not only the legal recognition of domestic partnerships, but also the registration thereof allowing for legal certainty on the rights of those in domestic partnerships and the ability for them to ensure that not only are the relationships regulated by statute, but also the legal consequences flowing therefrom.

33. We recommend the following definition be incorporated into the Marriage Bill to make provision for domestic partnerships, which we believe is in line with how the Courts have defined domestic partnerships over the past few years: “A domestic partnership is an interpersonal relationship between two or more people who live together and share a joint domestic life without being married”.

<u>The ongoing challenges of registering Customary Marriages</u>

34. Section 18 of the Draft Marriage Bill contradicts (or creates confusion with regards to) section 4(9) of the Recognition of Customary Marriages Act. Section 18 makes provisions for the registration of marriage and sets out how a “marriage entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after the commencement of this Act or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.” The Transitional provision in Chapter 9 of the Marriage Bill further states that any existing marriage that was valid in terms of any prior law, shall not be affected by commencement of this Act and shall continue to be valid in terms of this Act, meaning there will be no retrospective effect.

35. Although customary marriages concluded after the commencement of the RCMA are required to register their marriages within three months after the conclusion of the marriage or within such time as the Minister requires from time to time according to S4(3)(b) of the RCMA. Section 4(9) of the RCMA still states that "failure to register a customary marriage does not affect the validity of that marriage." It seems as if the Draft Marriage Bill will make registration of all marriage's compulsory. The legislature deliberately ensured section 3(1)(b) of the RCMA was *"left open"* to allow people to give their context to the section in accordance with their own customs and procedures as these develop and change over time, and that our jurisprudence and Courts impact the manner in which customary law develops and is interpreted. This reflects the flexible *"living"* nature of customary law that is recognised and protected by the Constitution.

36. Although we welcome an approach through which women can have legal certainty in respect of the validity of their marriage the existing legislative framework in the RCMA does not require registration and presumes the validity of a customary marriage where the requirements in terms of custom was followed when the marriage was concluded.

37. A cautious approach is therefore advised in this instance to ensure that existing unregistered marriages are recognised as valid despite not being registered while creating an enabling framework that will encourage registration of customary marriages those already concluded and those that will be concluded under the envisaged legislation.

<u>Omission of Act 49</u>

38. Born as a South African citizen, your parents are forced to register their baby as one of the binary genders, male (M) or female (F). A South African gender marker is used on Passports, Birth Certificates and Smart ID cards, and it formally identifies your sex. With only two options as a South African gender marker your

parents are forced to register their baby as a binary, male or female. That doesn't seem like a big problem for some people, but what about the estimated five hundred and thirty thousand South Africans who identify as non-binary or the minority group of South African citizens that do not identify themselves as a male (M) or female (F) but one of the other 107 gender identities that is currently listed in the sexualdiversity.org in 2023.[24]

39. The history of South African gender markers goes all the way back to the times of apartheid and the Population Registration Act of 1950 which made racial segregation and discrimination legally sanctioned, and this extended to gender roles as well.

40. The Population Registration Act of 1950 was a law that classified people into racial groups based on physical appearance. This Act required people to carry identity documents specifying their gender as well, which was binary and based on biological sex "primary sexual characteristics." This meant that people who did not identify as one of the traditional gender markers, male or female, were forced to choose between two options that did not accurately reflect their identity. The Act reinforced a system that did not recognize non-binary gender identities.

41. It is possible to change your gender marker in South Africa. You must apply at the Department of Home Affairs to change your sex description in the birth register in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003. Although Act 49 is important legislation for transgender and intersex people in South Africa in their pursuit for equal rights and protection under the law of South Africa. The Department of Home Affairs has implemented Act 49 narrowly. There are also

[24] https://www.africanews.com/2021/11/21/south-africa-plans-to-introduce-gender-neutral-identification/

unaddressed issues with the effects of the implementation of Act 49 is with regards to marriage.[25]

42. It is noteworthy that people of diverse Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (SOGIESC), are not a single homogenous community. Misconceptions, inadequate understandings, incomplete assessments of the issues, and inaccurate terms and statements have often surrounded processes of policy development and law reform in this regard. Persons with diverse SOGIESC comprise many different communities or groups based on diverse sexual orientations, gender identities, gender expressions and sex characteristics. This means that the language and provisions in policy and legislation need to be inclusive of sexual, gender and bodily diversity, and therefore also accommodate diverse forms of relationships and gender-inclusive or gender-neutral formulations rather than for instance limiting itself to exclusionary binary notions of "woman/female" and "man/male" and "opposite sex" and "same sex".

43. The three sets of legislation that govern marriage in South African law: the Marriages Act; the Recognition of Customary Marriages Act; and the Civil Union Act.[26] There are no regulations in Act 49 or any of the three marriage Acts pertaining to altering the sex description of spouses on marriage certificates.

44. In addition, Act 49 has no regulations which has made it challenging to implement and address Act 49 issues insofar as they relate to alterations needed on spouses' marriage certificates. DHA will continue to be challenged with inaccurate marriage certificates and duplicate identity profiles on its system because these issues have still not been adequately addressed by the Marriage Bill despite the KOS v Minister of Home Affairs[27] (KOS) judgment. The *KOS* judgment notes that the *"lack of*

[25] https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf
[26] Recognition of Customary Marriages Act 120 of 1998.
[27] KOS v Minister of Home Affairs (2298/2017) [2017] ZAWCHC 90.

*uniform approach"* to the implementation of the Act is striking. The Court also notes that the implementation of the Act is unsatisfactory. The Court goes further to note that the lack of clarity in the implementation and the lack of understanding of the Constitutional importance of the legislation link back to religious and cultural prejudice within the Department itself.

45. The *KOS* judgment is clear in stating that there is nothing in the existing Marriage Act 25 of 1961 that prohibits the alteration and continued marriage of the couples (and others similarly situated) that appeared before that Court. Neither the Marriage Act, nor the Recognition of Customary Marriages Act speaks to a prohibition against the alteration of an individual to their gender marker on the national population register. Such an alteration does not invalidate in law the marriage between the parties and does not give rise to any legal ground for divorce. KOS has proven that the issues raised above are not merely an issue of systems but also an issue of policy and implementation.

46. If an Act 49 applicant is married under the Marriage Act or the Recognition of Customary Marriages Act (RCMA) and has now been legally recognised as the same sex as their spouse, and wishes to change the sex description on their marriage certificate, they must:

(a) Apply for a divorce since same-sex marriages are not valid under the Marriages Act or the RCMA, and one can only be legally registered under one marriage Act at a time.

(b) Apply for a marriage or civil partnership under the Civil Union Act, which permits same-sex marriage.

47. The Centre had a transgender woman approach us who applied and successfully altered her forenames. After receiving confirmation of the new identity number and

the amendment to the population register, she discovered that her marriage had been deleted and this was done without them ever having obtained a divorce order from a competent Court. The process to correct this was marred with delays and blunders that resulted in our client, at one point, being married to themselves.

48. The marriage law and policy reform process seem to speak to the very lived realities of people and therefore must not be considered in isolation from other aspects of people's lives. We have noted discourses of neutrality, that risk the very non-recognition that the process seeks to address.

## V. COMMENTS ON THE CONTENT OF THE BILL

The Purpose and Preamble:

49. We welcome the attempt being made towards inclusion in respect of the preamble of the draft Bill. We should suggest that to ensure that inclusion and clarity in respect of same that the words "gender includes gender identity" is included in the language of the preamble.

50. Further as illustrated above we recommend that the Bill not restrict itself to the rationalisation of marriage, but that it extends to include domestic partnerships, and that provision is made for the inclusion of recognition of domestic partnerships.

51. We further welcome the recognition by the Department of Home Affairs that it has in terms of S7(2) of the Constitution to obligation to enact legislation to recognise and regulate all marriages in South Africa, and that it must do so in line with the provisions of S9 and 10 of the Constitution.

52. We also recognised that S15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion, but that these

rights are not absolute, and can be limited where justifiable to do so. The envisaged marriage legislation provides a unique opportunity to embrace the diversity of South African society, but at the same time we must be cautious to ensure that we do not create spaces within our society where discrimination is allowed to flourish and hide behind the freedom envisaged by S15(1).

The Definitions:

53. We are concerned about the definition of "customary marriage" in the draft Bill, which confines a customary marriage to one concluded under the Recognition of Customary Marriages Act when we know that a customary marriage is in practice much broader than merely how it was codified in the RCMA framework.

54. The RCMA itself defines a "customary marriage" as a marriage concluded in accordance with customary law, which in turn is defined as the customs and usages traditionally observed among the indigenous African people of South Africa and which forms part of the culture of those people. We see no reason why this language should not be incorporated into the definition of a customary marriage in the draft Bill.

*55.* We recommend that consideration be given to the following language in respect of a definition for a customary marriage: *"**A Customary marriage** is a marriage concluded in accordance with the customs and usages traditionally observed by the indigenous African people of South Africa and which has developed in line with the culture of the people of South Africa and in line with the values contained in the Constitution."*

56. The definition above will also ensure that those customary marriages which precedes the enactment of the draft Bill, and which were not registered in terms of the RCMA finds legal recognition and validity in the draft Bill.

57. Similarly, we are concerned about the definition of *"marriage"* which may be read to exclude persons married in terms of their custom, but who did not register their customary marriage in terms of the RCMA or persons married in terms of religious rites or other tradition who did not register their marriages either under the RCMA (as we understand Muslim couples are now able to do) or in terms of the Marriage Act whether monogamous or polygamous.

58. We need to ensure within the legislative framework that we account for every form of marriage that may have been concluded and seek to provide us much clarity of this intention through the language being used in the draft Bill. Without making it clear that the draft Bill will bring everyone left out previously under the recognition and protection of the law there will be legal uncertainty and women will continue to be prejudiced.

59. We would therefore suggest that the language here be changed in respect of the definition of marriage at paragraph (c) to read:

*"any subsisting customary marriage concluded and registered in terms of the Recognition of Customary Marriages Act or in terms of of any custom and usage traditionally observed by the indigenous African people of South Africa"*

60. In respect of the paragraph (d) under the definition of marriage we suggest that this be amended to read:

*"any subsisting monogamous, polygynous or polyamorous marriage concluded in terms of any religious, custom or tradition not previously recognised in law or domestic partnership concluded before or after the commencement of this Act."*

61. Lastly, we want to point out that that during the Green Paper process there was much discussion on the recognition of polygynous relationships as well as polyamorous relationships in South Africa and the need to ensure that the legislative framework is as inclusive as possible in recognition of the diversity of South African society, but also ensure that in the process of legislative development the rights of people are not violated.

62. We are therefore concerned that only polygamy is recognised in the draft Bill therefore only recognising the rights of men to have more than one wife. There is no legal basis for perpetuating the ongoing discrimination against women and people of diverse SOGIESC by denying their right on equal status to men to take more than one spouse should they choose to do so.

63. We therefore recommend that the DHA extends the relationships to which the draft Bill gives recognition thereby ensuring that the legislation does indeed meet its objective.

Objects and application of the Act:

64. S2 of the draft Bill sets out the objectives of the Act but given the content of the draft Bill and the presentations made by the DHA in respect of their objectives with the Bill we would submit that there are certain objectives that are absent from this section.

65. We would suggest that because officials at multiple engagements have said that the purpose of the legislation is to consolidate the designation and authority of marriage officers and the regulation of marriage officers, we think it's important that this is stipulated in the objects and application section of the draft Bill.

66. Further there are sections of the draft Bill that specifically speaks to issues related to matrimonial property regimes of certain types of marriages. S9(3) is an example of where the draft Bill speaks specifically to the matrimonial property regimes associated with customary marriages. It is important to ensure that this is acknowledged in the objects and application section of the draft Bill.

67. We therefore suggest that you amend the draft Bill to include:

*"2 (e) matrimonial property consequences of marriage and*

*(f) the powers and designation of marriage officers"*

Application of the Act

68. We submit that S3(1) is vague, and the language is confusing. We understand that the draft Bill seeks to ensure that all marriages concluded in South Africa falls within its ambit so that they can be recognised, regulated and the parties involved in the marriages have legal certainty on their rights and the consequences of the marriages that they have concluded. If that is the intended application, then we recommend that S3(1) needs to be revised to simply state this.

69. By seeking to couch marriages either in statute or common law, means that those marriages currently not recognised by either common law or statute remains outside of the ambit of the application of the draft Bill. The effect will be the opposite of what is intended.

70. An example of the implications of this section can be found in respect of religious marriages such as Hindu marriages that are not recognised in common law or statute and from which no common law or statutory consequences attaches itself. The criteria for inclusion under the application of the draft Bill can therefore not be linked to the existing common law or statutory recognition.

71. We welcome the inclusion of S3(2) in the draft Bill to ensure legal certainty, but also because we are aware of the lack of bargaining power that women have in relationships in respect of registration of marriages or even the conclusion of a marriage. By including S3(2) in the language of the draft Bill the DHA will ensure that women who are especially vulnerable in relationships are assured that their marriage falls within the ambit of the legislation and therefore recognised.

Recognition of Marriage, Age Determination and Consent:

Recognition of marriage:

72. We welcome the inclusion being sought in S4(1) of the draft Bill, but we are concerned that because custom, tradition and religion is not included in the language of the section that this may lead to legal uncertainty.

73. We therefore recommend that S4(1) be amended to read:

*"A marriage which is a valid marriage in terms of the Marriage Act, the Civil Union Act or the Recognition of Customary Marriage Act and any other marriage concluded in terms of custom, tradition or religion whether polygynous, polygamous, polyamorous or monogamous including any domestic partnership existing at the commencement of this Act, is for all purposes recognised as a marriage under this Act."*

74. The above language will ensure that those couples who currently do not enjoy legal recognition of their marriages or relationships in common law or statute have legal certainty that for the purposes of this draft Bill and going forward their marriages and relationships are legally recognised and have legal consequences.

Age determination:

75. We welcome the clear stipulation in the draft Bill that the state is addressing the plight of child marriage by setting the age of consent to enter a valid marriage as eighteen years or older. In our submission to the DHA on the Green Paper we

argued strongly that a legal age for marriage must be determined to address child marriage in the country. This further re-affirms the Courts position in *Jezile v The State*[28] where parental consent for minors to marry indirectly fuelled rape, abduction, trafficking and or coercion of children into marriages in the name of custom and or religious practices.

76. The DHA in responding to questions in parliament recently indicated that between 2015 and 2022 they have recorded 287 child marriages that have been recorded on the national population register. We know from Statistics South Africa's report to the African Union earlier this year that they have recorded more that 200 child marriages in 2021 alone. Although there is clearly uncertainty about how many children are married every year in South Africa there is clearly agreement that the number is much higher given the astronomical teenage pregnancy rate and the high number of girls forced out of the basic education system every year because of pregnancy.

77. Setting the age of consent to marry at 18 years and over ensures that we can begin to address the discriminatory impact of child marriage on the lives of girls.

78. We recommend that Chapter 2 of the Act should begin with the language contained in what is now S7 to ensure that the age of consent is first stipulation and serves as the introduction of the chapter. It can then be followed by what is now S5, which sets out the requirements on marriage officers to determine the age of consent and ensure compliance with the age of consent.

<u>Consent:</u>

[28] Jezile v S and Others [2015] ZAWCHC 31.

79. Section 6 of the draft Bill deals with consent, which is more than simply the age of consent, but also requires that the parties entering the marriage(s) have all given their consent in the prescribed form and manner. Because the prescribed form and manner in not dealt with in the draft Bill we presume that it will form part of the regulations to the legislation once it is passed.

80. We recommend that the prescribed manner and form is of such a nature that it recognises that challenges that women experience in negotiating relationships and marriage, and that consent is obtained in such a manner that will ensure compliance with the provisions of the legislation and not add to what is often a gender burden in respect of legal recognition of their relationships and marriages.

81. We raise this concern especially in relation to S6(2) of the draft Bill which makes provision for the Director General to determine the validity of a marriage that was concluded where a marriage officer was not present.

82. Majority of the women who approached us in 2021 and 2022 regarding their customary marriage wanted advice and assistance with enforcing their relationships rights. This was because many of them reported challenges doing so without proof of registration of their customary marriage. We have also established that there is confusion and uncertainty with regards to proving the existence of one's customary marriage. One of our clients was directed to three different Home Affairs when she attempted to get her marriage registered. Another one of our clients was rejected because the registering officer determined one of her witnesses were too young to be a family elder to provide valuable insight. Many of our clients have also reported being rejected because the registering officer determined their marriage was not concluded in accordance with customary law.

83. The lack of an internal appeal process creates greater challenges for women who do not have the financial means to enter into the long process of litigation. Many of the women who approach the Centre, approach us because their husbands are deceased. Although the section 4(9) of the RCMA explicitly states that a lack of a marriage certificate does not invalidate one's customary marriage, in practice, this makes proving the existence of a customary marriage difficult. In cases where a surviving spouse in a customary marriage is not able to prove that they were married to the deceased to give effect to their right to inherit, as the Master's Office usually only accepts a marriage certificate or proof of registration of a customary marriage. This has made registration, which was meant to be administrative, a determining factor for the validity of a customary marriage.

84. Customary law is considered as "living" and this notion is based on the fact that it is a system of law that continually develops and evolves, as the values and norms of the community that lives according to custom, needs and patterns change. It should be noted that customary law is inherently flexible, rather than a fixed body of formally classified and easily ascertainable rules.

85. Section 6(3) is vague and ambiguous as it appears to relate to the legal consequences of a marriage where consent has not been obtained by either of the parties to the marriage or relationship. It would be more prudent for the draft Bill to stipulate whether a marriage concluded without the consent of the parties being obtained is *void* or *voidable* first, because this will determine whether any consequences proprietary or otherwise can flow from the marriage.

86. There is also a distinction between consent not being obtained in the prescribed manner and consent not being present (i.e a party to the marriage does not wish to get married). These are two different scenarios, and we submit should have different consequences in law.

87. Our recommendation would be that a marriage concluded where a party did not consent to the marriage, because they are being forced to marry that marriage is void ab initio, and no legal consequences can flow from such a marriage.

88. Where a marriage was concluded but the prescribed form in respect of consent was not complied with the parties should be given the opportunity on application to court to have their marriage declared valid or voidable to ensure legal certainty and claim whatever consequences may be due in respect of the marriage including proprietary consequences.

Age of majority:

89. Again, we welcome that the age of majority has been set at 18 years or older to conclude a valid marriage, and that no opt out provisions have been included that would allow for child marriage.

90. We suggest that an additional section be included to declare any prospective marriages that are concluded where one or both of the parties are minors to be void.

Chapter 3: Requirements of valid monogamous and polygamous marriages

Requirements for validity of monogamous marriage:

91. We have already raised the issue of inclusivity and our recommendation that this section of the Bill should include all forms of marriages and relationships in South Africa whether monogamous, polygamous, polyganous as well as polyamorous. These different types of relationships are all deserving of legal recognition and the Department of Home Affairs has the constitutional imperative to ensure substantive equality.

92. The language is S8(3) is vague and ambiguous as it appears to imply that unless the first marriage was concluded in terms of custom or religion no subsequent marriages can be entered into by either spouse. This would preclude persons who were married in terms of the Marriage's Act or the Civil Unions Act from entering any subsequent marriages. Effectively reserving polygamy for religious or customary reasons only.

93. It also means that persons who may have entered a marriage under the Marriages Act because they wanted to have legal recognition of the marriage but who wants to have a polygamous marriage to give expression to their religious or customary beliefs would be excluded from doing so.

94. We know that for many Muslim citizens in our country they were compelled to in addition to their religious ceremonies enter subsequent marriage under the Marriage Act to obtain legal recognition. Some have entered subsequent religious marriages and by implications of this section in the draft Bill the subsequent marriages would all be invalid.

95. Since we are seeking to provide legal recognition to all marriages and relationships in the diversity of our family life our family law should not be unnecessarily burdened by the continued divisions that currently exist.

96. S8(6) then leads to further contradiction as it declares any marriage entered prior to the commencement of the draft Bill to be valid. Again, we refer to the definition of "marriage" that is vague in that is needs clarifying language to ensure that marriages which predates the draft Bill, but which has been concluded in terms of custom or religious rites and not in terms of any legislative framework is included in the recognition under S8(6). Again, this should include all types of marriages monogamous or polygamous.

97. Lastly under this section we wish to point out that by placing requirements related to obtaining documentation from foreign nationals may have a prejudicial impact on refugees and asylum seekers and may be a violation of international refugee law. Here we refer to S8(4) which requires that foreign nationals obtain a letter of non-impediment from their country of origin. A key principle of international refugee law is that refugees and asylum seekers cannot avail themselves to their countries of origin especially in cases where they have fled persecution from their state.

98. The section also implies that countries of origin have adequate and effective marriage registration processes and databases to provide these letters of non-impediment. In countries where customary marriages or religious marriages are not registered these letters would provide false narratives of the individuals relationship status. In addition, many countries in Africa that have experienced consistent civil unrest may not have national population registers or marriage registers.

Requirements for validity of polygamous marriage:

99. We welcome the inclusion of S9(2)(a) of the draft Bill that requires consent from spouses to enter subsequent marriages. This we believe is in line with the Constitutional Court judgment in *Mayelane v Ngwenyama*[29] in which the Constitutional Court found that by not obtaining the consent of a first spouse in a customary marriage prior to entering a subsequent marriage is a violation of the constitutional rights of the first spouse. Even though the judgment dealt with XiTsonga customary law we believe that the approach adopted by the Court applies to all marriages that involve multiple parties whether polygamous, polygynous or polyamorous.

[29] Mayelane v Ngwenyama 2013 4 SA 415 CC.

100. As pointed out by the Constitutional Court in the case o*f Ramahovhi*[30] it is important to recognise that there are different matrimonial property regimes at play within different marriages and relationships. It therefore becomes important for the law to provide a mechanism to recognise personal property, family property and marital property.

101. We welcome the engagement that the Department is planning with the Registrar of Deeds in respect of simplifying the process of registration of contracts envisaged in this section, and efforts being made to develop model contracts that people who wish to enter polygamous marriages could use. We however caution against an approach that seeks to simplify the process at the possible expense of one of the parties. A change in matrimonial property regimes has serious implications for especially women who where they are not able to negotiate marriage rely on the certainty that the default position in marriage is in community of property. It is therefore important for parties that are considering changing their matrimonial property regimes to consult with a qualified legal practitioner to ensure that they can protect their rights and interests.

102. Currently couples in monogamous marriages can change their matrimonial property status through an application to Court. Provision in the draft Bill is made for couples in polygamous marriage to change their status in S9(2) and (3) so the Bill should include and allow for this section to be included in the Chapter dealing with monogamous marriage ensuring that all couples are treated in the same or similar manner in law and practice.

103. The SALRC is currently busy investigating matrimonial property systems in South Africa as part of Project 100E and have just released a Discussion

[30] Ramuhovhi and Others v President of the Republic of South Africa and Others (CCT194/16) [2017] ZACC 41

Paper 160, we suggest that there be greater coordination between the Department of Home Affairs and the SALRC Project 100E Committee because of the significant overlap in the work being done and possible implications of contradictory recommendations or findings.

Chapter 4: Designation of marriage officers

Ex officio marriage officers and designation of persons in service of State as marriage officers:

104. The legal recognition and regulation of marriage is a state function and constitutional imperative as stated in the purpose and preamble of the draft Bill. It is therefore our submission that any person designated as a marriage officer by the Department of Home Affairs does so as part of the State's function and does so in service of the state.

105. We acknowledge the role and significance of the Civil Union Act in this context, and particularly its recent amendment through the Civil Union Amendment Act[31], which removed the discriminatory Section 6 that had allowed marriage officers to refuse to solemnise same-sex marriages. As a result, Home Affairs officials may no longer discriminate against same-sex or same-gender couples based on their sexual orientation. However, the draft Bill creates a separate dispensation for same-sex and same-gender marriages and civil unions and does so within an exclusionary sex and gender binary, resulting in a lack of recognition of SOGIESC diversity and continued barriers, discrimination and lack of access to marriage and relationship equality for all persons.

106. We submit that there is therefore no need to draw distinction between marriage officers in the employ of the state and those who fulfil a state function by

[31] Civil Union Amendment Act 8 of 2020

solemnising marriages. The duties and obligations in respect of ensuring that there is compliance with the law is the same regardless of the employment of the marriage officer.

107. We note that from the consultations undertaken by the Department of Home Affairs that there have been calls to reintroduce “objection clauses” in respect of state employed marriage officers. We want to strongly advise against such measures as we acknowledge that in October 2020 the President signed into law the Amendment to the Civil Unions Act that repealed the state sponsored discrimination that was present in that legislation. We would therefore advise against any steps to re-introduce discriminatory practices as the Department of Home Affairs.

108. It is our submission that this would be a regressive step and will undo the progress made under the Civil Union Amendment Act which removed the discriminatory Section 6 that had allowed marriage officers to refuse to solemnise same-sex marriages.

Designation of other persons as marriage officers

109. We welcome the designation of private individuals as marriage officers as envisaged in S11 but refer to our statement above that regardless of the religious, customary, traditional or secular designation of an individual the individual is fulfilling a state function.

110. We recognise that for many persons it is important to attach religious, customary, traditional importance and meaning to their marriage ceremonies, and that provision needs to be made to enable them to give expression to their identity and their full diversity in life. By extending the designation of marriage officers to

include this wide range of beliefs more people will benefit from lawful recognition of their marriage.

111. More women will be protected in that they will be able to ensure that the person marrying them is registered with the Department of Home Affairs and designated to perform the marriage ceremony.

112. We welcome the decision by the Department of Home Affairs to exclude an "objection" clause from the draft Bill under this section and ensuring that state sponsored discrimination couched as religious, cultural or other grounds for discrimination is not endorsed.

How designation as marriage officer to be made:

113. We welcome the set criteria for designation for marriage officers as envisaged by S12 of the draft Bill. We do however raise the following as concerns and suggest some reconsideration of language:

114. S12(1)(b) talks about a "fit and proper person" but note that this is not defined in the definition section of the draft Bill. We submit that it should be because being fit and proper may have different meanings to different people within different professions and positions. It may in this instance include the other criteria already listed i.e not having a criminal record for theft or fraud etc.

115. We also suggest including language on the fact that a designated marriage officer fulfils a state obligation and should therefore be prepared to meet that obligation without any prejudice or objection. This will ensure that persons seeking designation as marriage officers understand that their obligation and ability to

perform marriages does not stem from their religious, cultural, traditional right, but from a constitutional imperative.

116. Lastly, we want to ensure that designation of marriage officers is made up as much as possible from the full diversity of the south African public and that criteria or the means of being designated is not done in such a manner that it is prohibitory. Here we refer specifically to discriminatory practices that may not recognise women's right and ability to perform marriage ceremonies in certain religions or customs.

Certain persons may in certain circumstances be deemed to have been marriage officers:

117. As we understand this section it seeks to provide protection to members of the public who may suffer prejudice because either they were intentionally misled or mistakenly misled that the officiant of their marriage was not designated or authorised to legally marry them.

118. The section does require some clarification in respect of the validity of the actual marriage. We appreciate that the DG can designate the marriage officer as such after the fact but does that then mean that the marriage is automatically registered when the DG makes the decision to designate the marriage officer as such, and that the marriage is captured on the population register and a certificate of registration is issued. It appears to be the case, but the language is vague and emphasises the positionality of the marriage officer forgetting to address the issue of the actual validity of the marriage.

Chapter 5: Solemnisation and registration of marriage

Solemnisation of marriage:

119. S15(1) potentially contradicts S11(2) in that it implies that a designated marriage officer can solemnise a marriage anywhere in the country when S11(2) specifically speaks to restricting marriage officers to specific areas, religions, customs etc.

120. Consider rewording the section to read that *"a designated marriage officer may base on any restrictions or limitations in respect of their designation solemnise a marriage."* to bring clarity to the intention and purpose of the section and without contradicting other sections of the draft Bill.

121. We welcome the inclusion of S15(2) that requires the prospective spouses to be present at the solemnisation of their marriage. We recognise that there are some religions and cultural practices which may not allow the physical presence of women in places of worship or the room where marriages are negotiated and concluded. The requirement of being present therefore needs to clearly stipulate what that means in respect of being physically present together at the time of solemnisation.

122. We appreciate that the purpose of requiring the presence of parties to the marriage before the marriage officer will ensure that women are not coercively or forcibly married without their consent or full participation. The Department however needs to be mindful that in some contexts this requirement will require the development of certain religious and cultural practices.

123. S15(5) talks to the process of registration of marriage and as we have stated we welcome the legal certainty that registration will provide, but we know that not all marriages are concluded in the presence of a marriage officer, which means that in practice this section presents a challenge. In cases of custom the relevant customary practices precede the handing over of the bride and even then, there are practices in certain customs which occur after the handing over that solemnises the marriage. So, the solemnisation is not one moment or event in time, but based on the intention of the parties and the actions that they take thereafter in line with giving expression to their custom.

124. In the instances described in the paragraph above the parties would only be able to register that marriage once they attend a Home Affairs office and they then sign the necessary prescribed documents.

125. Perhaps some consideration should be given to separating the different forms of marriage solemnisation into different sections so that the practical implications can be addressed without causing confusion.

Prohibition of solemnisation of marriage without production of identity document or prescribed declaration:

126. The content of S16 is noted. We would recommend that a section be included that speaks to the status and validity of a marriage that was solemnised, but where the conditions of the section was not followed to ensure clarity and certainty.

Objection to marriage:

127. The content of S17 is noted as well as its intentions. What would be useful to avoid confusion is to indicate at which stage of the solemnisation process objection can be made or raised. On a simple reading it comes across as if objections must be raised prior to the solemnisation process being commenced, which would then allow for a process of weighing up the information provided in the objection and the marriage officer to decide on finalising the marriage or stopping the proceedings.

Registration of marriage:

128. We recommend that S18(1) be amended to include the words “collective” to emphasise that parties to a marriage have a collective responsibility to ensure that they comply with the legislative framework and that they register their marriages.

129. We know from our work that it is mostly women who carry the burden of registration of marriages as men benefit from the non-registration and non-recognition of marriages when they wish to enter a subsequent marriage or simply want to exist the marriage without incurring the cost of a divorce or the consequences of a divorce.

130. The alarming low rate of registration of customary marriages under the Recognition of Customary Marriages Act is an illustration of the gendered burden of registration and how we need to develop legislation to meet the lived realities of the people that must implement the legislation in their daily lives.

131. In respect of S18(2) we recommend moving this obligation on designated marriage officers to S15 which deals with the obligations of marriage officers in respect of the solemnisation of marriages, and we submit that it would be appropriate to deal with the keeping of records and the way records must be kept.

132. We understand S18(6)(a) to be attempting to bring legal recognition to those marriages that currently fall outside of the legislative and common law legal recognition framework. We however feel that since it does not expressly say this it causes ambiguity, and could in fact lead to legal uncertainty. We recommend that the language be amended to ensure that persons in Muslim marriages, Hindu marriages and any other form of customary or religious marriage that are currently not recognised in law understand that this section deals with them and makes provision for them to register their marriages.

133. S18 although dealing with registration of marriages concluded prior to the legislation coming into effect does not stipulate what the requirements for registration is, and does not make provision for such registration to be made in a prescribed manner that will be determined through regulations by the Minister. This oversight needs to be addressed to ensure that regulations can deal with a prescribed form and form marriage registration can take place for those marriages that are being registered after the commencement of the legislation and where the obligation to do so now falls the spouses rather than a marriage officer.

134. We note that S18(6)(a) makes provision for the registration of marriages concluded prior to the draft Bill within 12 months after the commencement of the legislation. Based on the continued lack of implementation of the Recognition of Customary Marriage Act we know that 12 months is insufficient to make the public aware of the existence of their newfound right to register their marriages and ensure that there is sufficient public education about the legislation and the obligation and right to register. Without a clear on-going public education campaign, we believe that the 12 months is insufficient and would recommend at least a 24-month period wherein the Department of Home Affairs undertakes education roadshows to ensure public education and awareness. The Department of Home Affairs has to also commit to ensuring that resources are available for purposes of visibility and access i.e mobile documentation and registration offices for people living in rural areas.

135. What is unclear is what the legal status of these marriages are prior to the registration, and this is why we submit it is critically important to include clarity in the definition of "marriage" in the draft Bill, and to ensure that even though registration is a requirement the non-registration does not invalidate a marriage concluded prior to the legislation coming into effect.

136. We submit that S18(8)(a) is ambiguous and vague in that we understand that the provision is intended to allow for the registration of a marriage by a single spouse or even a third party with an interest in the registration of the marriage. This will hopefully alleviate some of the burden on women to ensure the registration of their marriages where their male spouses refuse to accompany them to the Department of Home Affairs. The wording however limits the individual's ability by stating that they can only *"apply"* to "*enquire into the existence"* of the marriage.

137. However S18(8)(b) states that the DG if satisfied that a valid marriage exists or existed between the spouses, they must register the marriage and issue certificate. This implies that the part (a) is not merely an enquiry into whether a valid marriage exists, but an application process for the registration of a marriage. S18(9) the goes on to state that the DG can also refuse to register the marriage, which again

implies that the individual or third party at ss8(a) can seek the registration of the marriage and it's not merely an enquiry into the existence of a marriage. If our understanding is incorrect then we still advise an amendment as we seek to illustrate the section is badly worded which leads it to be vague and open to ambiguity.

138. S18(10) allows for where the DG has refused to register a marriage a Court to determine the validity thereof. We presume that this would be a High Court that has jurisdiction to hear the application and that based on the facts presented to that Court it can order the DG to register the marriage. Our concern with the section is the use of the word "investigation" which implies something completely different in litigation terms. To provide clarity we simply recommend that the section be amended and the words *"based on the facts presented to that court, order -"* be inserted.

Chapter 6: Proprietary Consequences and Dissolution of Marriage

Equal legal status and capacity of spouses

139. We welcome the inclusion of an equality clause that recognises the substantive equality between parties to a marriage. We know that the lived reality for many women in intimate partner relationships such as life partnerships or marriage are not always in a position to negotiate the terms of their relationships because of the presence of patriarchal stereotypes at play in our society. Custom, tradition and religion are spaces where gender stereotypes remain very present and where women are discriminated against in various ways. It is therefore important to recognise women's equality in marriage and her ability along with her partner to negotiate contracts, litigate and importantly acquire whether jointly or severally depending on the matrimonial property regime assets and other property.

Proprietary consequences of marriage and contractual capacity of spouses

140. We once again take the opportunity to remind the Department of the South African Law Reform Commission Project 100E that is currently underway and which is examining the law related to matrimonial property and the proprietary consequences of marriages in South Africa. We recommend that there be engagement between yourselves and this Project team to ensure that there is not a silo'd approach to legislative development and to avoid confusion and duplication of efforts.

141. In order to avoid confusion we suggest that this section be divided into two with one dealing with the proprietary consequences of marriages concluded before this legislative framework, and the other with prospective marriages. This will negate confusion in trying to decipher what each section deals with or speaks to. Currently it reads in an ambiguous manner.

142. For the sake of clarity we suggest commencing the section with an acknowledgement of the current default position in respect of matrimonial property for all marriages that are concluded under the existing statutory framework where coupled have not entered into a prenuptial agreement. In other words clearly stating that these marriages are in community of property profit and loss unless the parties have opted to conclude an agreement to the contrary. This will reassure spouses that their current status remains unchanged.

143. We suggest then dealing with the matrimonial property regimes of those marriages concluded prior to the legislative framework and for which no legislative framework was in place at the time of the conclusion of the marriage. This is important because for some of these marriages such as Muslim marriages or Hindu marriages the Roman Dutch concepts of in our out of community of property may not exist, and they would require legal certainty in respect of the proprietary consequences of their marriages. We understand for instance from the consultations with the Department of Home Affairs that Muslim marriages are currently being registered under the framework of the Recognition of Customary Marriages Act, which means that those marriages where monogamous are in community of property and where the parties have written contracts or the

marriages are polygamous in nature the marriages would be registered as out of community of property, but it is uncertain whether the prescribed court applications to register contracts under the provisions of the Recognition Act is in fact taking place.

144. A section clarifying the matrimonial property status of these marriages concluded without a legislative framework, but in terms of religion, custom or tradition is needed and currently absent.

145. S20(1) is drafted in a manner that leaves unanswered questions and therefore causes ambiguity. It appears to only relate to polygamous marriages concluded prior to the draft Bill which was not previously registered in terms of the Recognition of Customary Marriage Act, which effectively means it relates only to customary marriages and allows for the continuation of the matrimonial property system that the parties agreed to prior to the marriage in the form of a contract or their agreement, but this recognition is then limited by their undertaking to not enter into further marriages, which is confusing, because what then happens to those spouses who do wish to and who will enter into further marriages. It is unclear whether they are not able to do so under the new proposed draft Bill, even though the Bill seeks to give recognition to the existing marriages once same is registered.

146. We note that S20(5) deals with a change in matrimonial property systems, but this is already dealt with elsewhere in the draft Bill in respect of polygamous customary marriages. The process envisaged there is also different from the one set out in S20(5) and it becomes curious as to why there is a need for two different processes simply because the motivation for seeking to change a matrimonial property regime is different. It should perhaps be considered to have one streamlined process for all spouses wishing to change their matrimonial property regimes so as to avoid confusion in respect of what rights spouses hold in respect of the proprietary consequences of marriage.

Dissolution of Marriage

147. We welcome the clarity that all marriages can only be dissolved by death or a decree of divorce. Currently we know that those marriages outside of the legislative framework makes use of religious bodies to dissolve marriages on religious grounds so it is important to provide legal clarity that only a decree of divorce granted through a Court within the jurisdiction to grant divorces can in fact dissolve a marriage.

148. Based on our experience it is also necessary to provide this legal certainty in respect of customary marriages especially in cases where those customary marriages are not registered. Our experience is that men will still approach the respective families of the spouses to advise that they are dissolving a marriage in terms of custom and women are often left destitute because she is sent back to her family by her husband without any court order.

149. We therefore recommend including the word “court” prior to decree in S21(1) to make clear that only a court ordered divorce will be recognised as legally dissolving a marriage and not divorce orders by religious institutions or bodies or spouses pronouncing the termination of the marriage.

150. S21(4)(e) needs to be extended to bring it in line with the fact that the draft Bill is now including marriages and maintenance obligations which may not previously have existed in law, because those marriages and the obligations flowing from them were not previously recognised. By limiting the right to claim maintenance only where there are arrangements in place or a law that recognises it restricts and possibly excludes those spouses and especially women from claiming maintenance where no arrangements exist, and no legislative framework existed to recognise the duty to maintain. We therefore recommend including after any law *“custom, tradition, religious practice or common law”*.

Chapter 7: Offences and Penalties

Offences and penalties

151. The issue of child marriage presents a major challenge for South Africa because it remains unclear how many young girls are affected. We do know that we have extremely high rates of pregnancy amongst teenage girls without any real information about who the perpetrators are that are having sex with girls that do not have the legal capacity to consent to marriage. Of course, of concern is that in many instances to avoid arrest and criminal prosecution young girls are married to the perpetrators in exchange for lobola or to uphold the family honour or even for religious reasons. Hopefully by attaching a criminal offence to child marriage we will be able to better deter it from happening, but also hold those who perpetrate it to account.

152. We trust that the Department of Home Affairs will ensure that they consult with the South African Police as well as the National Prosecuting Authority to ensure actual implementation of the legislation.

153. We also welcome the inclusion and recognition that forced marriage amounts to an offence.

Chapter 9: Transitional Provision

Existing marriage

154. We refer to our initial submissions on the definition of "marriage" when commenting on S26(1) which seeks to make it clear that the Bill does not affect the validity of any marriage concluded either under a legislative framework or those concluded in terms of religious, traditional or other believes and for which no legislative recognition currently exists.

155. S26(1) should therefore state that: *"Any marriage (using the definition we suggest) that was concluded and valid in terms of any prior law, custom, religion or tradition*

*shall not be effected by the commencement of this Act and shall continue to be valid in terms of this Act."*

156. Lastly the Green paper on marriages in South Africa referred to the need to develop transitional processes that would align the marriage legislation with the practical implementation of the Alteration of Sex Description and Sex Status Act 49. No such transitional processes have been included in the draft Bill, and no explanation has been given in respect of same. We can only presume that whatever challenges the Department was experiencing in processing applications in terms of Act 49 for individuals who are spouses in opposite sex marriages whereas a result of the alteration would become a same sex marriage have now been resolved.

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