



**DISCUSSION PAPER 130**  
**LEGISLATION ADMINISTERED**  
**BY THE DEPARTMENT OF JUSTICE AND**  
**CONSTITUTIONAL DEVELOPMENT**  
(Family law and marriage)

**PROJECT 25:**  
**STATUTORY LAW REVISION**

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# **SOUTH AFRICAN LAW REFORM COMMISSION**

The South African Law Reform Commission (SALRC) was established by the South African Law Commission Act, 1973 (Act No. 19 of 1973).

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The Honourable Mr Justice Willie Seriti (Vice-Chairperson)

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## Preface

This paper has been prepared to elicit responses and to serve as basis for the SALRC's further deliberations. It contains the SALRC's preliminary findings and recommendations. The views, conclusions and recommendations which follow should not be regarded as the SALRC's final views.

This discussion paper, which includes a draft Bill proposing the repeal or amendment of redundant, obsolete or unconstitutional legislation or provisions in legislation administered by the Department of Justice and Constitutional Development, is published in full so as to provide persons and bodies wishing to comment with sufficient background information to enable them to place focused submissions before the SALRC. A summary of the preliminary findings and recommendations in relation to the redundancy, obsolescence or unconstitutionality of family law and marriage legislation administered by the Department of Justice and Constitutional Development appear on page (v). The proposed Bill is contained in Annexure A. Annexure B contains the list of principal Acts, including those recommended for repeal or amendment in this discussion paper, that are currently administered by the Department of Justice and Constitutional Development and which were enacted between 1910 and 2008.

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

Respondents are requested to submit written comment and representations to the SALRC by 30 April 2012 at the address appearing on the previous page. Comments can be sent by post or fax, but comments sent by email in electronic format are preferable.

This discussion paper is also available on the internet at:  
<http://www.justice.gov.za/salrc/dpapers.htm>

Any inquiries should be addressed to the Secretary of the SALRC or to the SALRC

official assigned to this investigation, Adv Fanyana Mdumbe. Contact details appear on page (ii).

## Preliminary recommendations

1. The SALRC has been mandated with the task of revising the South African statute book with a view to identifying and recommending for repeal or amendment statutes or provisions in statutes that are inconsistent with the right to equality in the Constitution of the Republic of South Africa of 1996, redundant or obsolete. Pursuant to this mandate, the SALRC has established that there are 2800 Acts in the statute book. Furthermore, the SALRC has identified 11 pieces of legislation dealing with marriage and family law as being statutes that are administered by or partly administered by the Department of Justice and Constitutional Development. After a careful and thorough analysis of these Acts for redundancy or constitutionality, the SALRC proposes that the Acts set out in the Schedule of the proposed Justice Laws Repeal and Amendment Bill, 2011 contained in Annexure A be repealed or amended to the extent set out in the third column of the proposed Bill for the reasons set out in Chapter 2 of this discussion paper.

2. It is possible that some of the statutes recommended for repeal are still useful, and thus should not be repealed. It is also possible that there are other pieces of legislation that have not been identified as possible candidates for repeal which are of no practical utility anymore and which should be repealed. These statutes must be identified and brought to the attention of the SALRC.

3. Aspects of this investigation overlap with three other SALRC investigations. Two investigations form part of project 100 on family law and the law of persons. These investigations review, in the first instance, the custody of and access to minor children, and secondly, aspects of matrimonial property law. The SALRC has not yet published any publications on these two reviews and the scope of those investigations differs from this review. It is explained in paragraph 1 above that the scope of the review conducted in this paper is limited to compliance of the legislation reviewed with the equality provisions of the Constitution and their possible redundancy or obsolescence. The SALRC therefore makes interim proposals in this discussion paper dealing with redundancy and obsolescence of provisions in statute law regulating custody of and access to children and aspects of matrimonial property. The comprehensive reviews into these latter issues will at a later stage seek to remedy the other existing deficiencies in these areas of the law. The third investigation deals with a review of the legislation administered by the Department of

Home Affairs. The SALRC envisages submitting its consultation paper setting out the SALRC's preliminary findings and proposals to the Department of Home Affairs for comments soon and the publication of its discussion paper for general information and comments during the course of 2012. Overlaps between this investigation and the other SARLC investigations will be indicated in the body of this discussion paper. Any comments received relating to the overlapping three other investigations will be forwarded to the respective advisory committees.

# TABLE OF CONTENTS

<b>South African Law Reform Commission</b>	<b>ii</b>
<b>Preface</b>	<b>iii</b>
<b>Preliminary recommendations</b>	<b>v</b>

## Chapter 1

### Project 25: Statutory Law Revision

A	Introduction	1
	1 Background of the investigation	1
	2 Initial investigation	2
	3 Reports of the SALRC proposing reform or the repeal of discriminatory provisions	3
	4 Commencement of the project	4
B	What is statutory law revision?	5
C	Scope of the project	8
D	Assistance by Government departments and other stakeholders	9
E	Appointment of experts to increase research capacity	9
F	Consultation with the Department of Justice and Constitutional Development	12

## Chapter 2

### Explanatory notes on the proposed repeals and amendments

A	Introduction	13
	1 Matrimonial Affairs Act 37 of 1953	13
	2 Matrimonial Property Act 88 of 1984	16
	3 Divorce Act 70 of 1979	24
	4 Mediation in Certain Divorce Matters Act 24 of 1987	35
	5 Dissolution of Marriages on the Presumption of Death Act 23 of 1979	41
	6 Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996	42
	7 Reciprocal Enforcement of Maintenance Orders Act 80 of 1963	42
	8 Prevention of Family Violence Act 133 of 1993	43
	9 Maintenance Act 99 of 1998	43
	10 Domestic Violence Act 116 of 1998	44
	11 Recognition of Customary Marriages Act 120 of 1998	48
	(a) Further issues arising from the review of this Act	53
	(i) Consent requirements	53
	(ii) Notice requirements	55
	(iii) Continued existence of legislation or provisions in legislation regulating customary marriages enacted prior to the promulgation of the Recognition of Customary Marriages Act	56

## List of Annexures

Annexure A	Justice Laws Repeal and Amendment Bill, 2011	58
Annexure B	List of statutes administered by the Department of Justice and Constitutional Development	79



# Chapter 1

## Project 25: Statutory Law Revision

### A. INTRODUCTION

#### 1 Background of the investigation

1.1 The objects of the SA Law Reform Commission (SALRC) as set out in the South African Law Reform Commission Act, 1973 (Act 19 of 1973) are to do research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernization or reform thereof, including –

- the repeal of obsolete or unnecessary provisions;
- the removal of anomalies;
- the bringing about of uniformity in the law in force in the various parts of the Republic; and
- the consolidation or codification of any branch of the law.

1.2 In short, the SALRC is an advisory statutory body whose function is the renewal and improvement of the law of South Africa on a continuous basis.

1.3 Shortly after its establishment in 1973, the SALRC undertook a revision of all pre-Union legislation as part of its project 7. This resulted in the repeal of approximately 1200 laws, ordinances and proclamations of the former Colonies and Republics. In 1981 the SALRC finalised a report on the repeal of post-Union statutes as part of its project 25 on statute law: the establishment of a permanently simplified, coherent and generally accessible statute book. This report resulted in Parliament enacting the Repeal of Laws Act, 1981 (Act No. 94 of 1981) which repealed approximately 790 post-Union statutes.

1.4 In 2003 Cabinet approved that the Minister of Justice and Constitutional Development co-ordinates and mandates the SALRC to review provisions in the legislative framework that would result in discrimination as defined by section 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution). This section prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion,

conscience, belief, culture, language and birth.

1.5 In 2004 the SALRC included in its law reform programme an investigation into statutory law revision, which entails a revision of all statutes from 1910 to date. While the emphasis in the previous investigations was to identify obsolete and redundant provisions for repeal, the emphasis in the current investigation is on compliance with the Constitution. All redundant and obsolete provisions identified in the course of the current investigation will also be recommended for repeal. Furthermore, it should be stated right from the outset that the constitutional inquiry primarily focuses on statutory provisions that blatantly violate the provisions of section 9 (the right to equality) of the Constitution.

1.6 With the advent of constitutional democracy in 1994, the legislation enacted prior to that year remained in force. This has led to a situation where numerous pre-1994 provisions are constitutionally non-compliant. The matter is compounded by the fact that some of these provisions were enacted to promote and sustain the policy of apartheid. A recent provisional audit by the SALRC, of national legislation remaining on the statute book since 1910, established that there are in the region of 2 800 individual statutes, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts and partially repealed Acts. Three hundred and ninety-four of these Acts, comprising of 159 principal Acts, 46 amendment Acts reflecting *prima facie* substantive provisions and 188 amendment Acts that do not reflect substantive provisions, are administered by the Department of Justice and Constitutional Development (the DOJCD). A substantial number of the Acts in the statute book serve no useful purpose anymore, while many others still contain unconstitutional provisions that have already given rise to expensive and sometimes protracted litigation.

## **2 Initial investigation**

1.7 In the early 2000s, the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies of the University of the Witwatersrand to conduct a study to determine the feasibility, scope and operational structure of revising the South African statute book for constitutionality, redundancy and obsolescence. The Centre for Applied Legal Studies of the University

of the Witwatersrand pursued four main avenues of research in their study conducted in 2001:<sup>1</sup>

First, a series of role-player interviews were conducted with representatives of all three tiers of government, Chapter 9 institutions, the legal profession, academia and civil society. These interviews revealed a high level of support for the project.

Second, an analysis of all Constitutional Court judgments until 2001 was undertaken. Schedules reflecting the nature and outcome of the cases, and the statutes impugned were compiled. The three most problematic categories of legislative provisions were identified, and an analysis made of the Constitutional Court's jurisprudence in relation to each category. The three categories were: reverse onus provisions; discriminatory provisions; and provisions that infringe on the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled in respect of each category.

Third, sixteen randomly selected national statutes were tested against these guidelines. The outcome of the test was then compared against a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. A comparison of the outcomes revealed that a targeted revision of the statute book, in accordance with the guidelines, produced surprisingly effective results.

Fourth, a survey of five countries (United Kingdom, Germany, Norway, Switzerland and France) was conducted. With the exception of France, all these countries have conducted or are conducting statutory revision exercises, although the motivation for and the outcomes of these exercises differ.

### **3 Reports of the SALRC proposing reform or the repeal of discriminatory provisions**

1.8 The following reports, proposing reform of discriminatory areas of the law or the repeal of specific discriminatory provisions, were finalised by the SALRC:

1. The Recognition of Customary Marriages (August 1998).
2. The Review of the Marriage Act 25 of 1961 (May 2001).

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<sup>1</sup> "Feasibility and Implementation Study on the Revision of the Statute Book" prepared by the Law & Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand.

3. The Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001).
4. Traditional Courts (January 2003).
5. The Recognition of Muslim Marriages (July 2003).
6. The Repeal of the Black Administration Act 1927 (March 2004).
7. Customary Law of Succession (March 2004).
8. Domestic Partnerships (March 2006).

## **4 Commencement of the project**

1.9 Early in 2004 the SALRC informed all national Government departments of the priority of the investigation into statutory law revision. The SALRC conducted a workshop with representatives from these departments to secure their participation in the revision process. From the outset it was clear that the available capacity at the SALRC and in government departments meant that the review would initially focus on national legislation.

1.10 As mentioned previously, a provisional audit of all national legislation on the statute book — from 1910 to 2004 — was conducted by the SALRC, in 2004. This audit determined that there were in the region of 2 800 individual statutes, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts and partially repealed Acts. Government departments were then requested, in August 2004, to study the provisional audit of national legislation and to confirm their respective responsibilities for administering the statutes that were allocated to them. A number of statutes, however, remained unaccounted for and were not claimed by any of the departments. Consequently, the SALRC launched its own investigation in order to establish which Ministers introduced these statutes. A significant problem encountered in this regard was that some departments, which existed at the time the legislation was promulgated, are no longer in existence. Furthermore, it was not clear which of the current Government departments inherited the legislation administered by these “old” departments. The SALRC then grouped the remaining legislation into various categories, and submitted this information, during 2005 to those departments the SALRC believed had responsibility for administering the remaining statutes and requested them to investigate and provide feedback.

1.11 In 2006, the SALRC once again corresponded with Government departments informing them that it wished to secure their assistance in reducing the number of obsolete or redundant pieces of legislation on the statute book. The number of statutes that each department is responsible for were set out in lists which were forwarded to them. It was pointed out to the departments that it was possible that although some of these statutes may be redundant or obsolete, they still remain on the statute book, since they have never been formally repealed. In some instances, principal Acts may have been repealed while their corresponding Amendment Acts were never listed in a Schedule to the repealing Act — thus causing the Amendment Acts, although of no legal force, to clutter up the statute book (unless, of course, they contain substantive provisions).

## **B WHAT IS STATUTORY LAW REVISION?**

1.12 Statutory law revision ordinarily focuses on the identification and repeal of statutes that are no longer useful in practice. As the Law Reform Commission for England and Wales explains, the purpose of statute revision is to modernise and simplify statutes that need updating, and to reduce the size of the statute book to the benefit of legal professionals and other people who use it.<sup>2</sup> Revision lessens the chance of people being misled by redundant laws that still appear in the statute book and seem to be relevant or “live”. If statutory provisions appear in the statute book and are referred to in legal textbooks, readers may reasonably assume they still serve a purpose.

1.13 As is the case in other jurisdictions (and will be evident in this review), once legislation is deemed no longer to apply, the question arises whether it should remain in the statute book or be repealed.<sup>3</sup> Usually such legislation no longer has any legal effect and is considered obsolete, redundant, or spent. A statutory provision may be identified for repeal because the grounds for which it was passed have lapsed or are presently remedied by another measure or provision.

1.14 In the context of this investigation, the statutory law revision primarily targets

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<sup>2</sup> See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 1 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

<sup>3</sup> See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 6 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

statutory provisions that are obviously at odds with the Constitution, particularly section 9.

1.15 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that are candidates for repeal:<sup>4</sup>

- (a) references to bodies, organisations, etc. that have been dissolved or wound up or which have otherwise ceased to serve any purpose;
- (b) references to issues that are no longer relevant as a result of changes in social or economic conditions (e.g. legislation about tithes or tin mines);
- (c) references to Acts that have been superseded by more modern (or EU) legislation or by international Convention;
- (d) references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;
- (e) repealing provisions e.g. “Section 33 is repealed/shall cease to have effect”;
- (f) commencement provisions once the whole of an Act is in force;
- (g) transitional or savings provisions that are spent;
- (h) provisions that are self-evidently spent - e.g. a one-off statutory obligation to do something becomes spent once the required act has duly been done;
- (i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

1.16 The Law Commission of India notes that in England the terms “expired”, “spent”, “repealed in general terms”, “virtually repealed”, “superseded”, and “obsolete” were defined in memoranda to Statute Law Revision Bills as follows:<sup>5</sup>

- Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had as their object the continuance of previous temporary enactments for periods now gone by effluxion of time
- Spent – that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required
- Repealed in general terms – that is, repealed by the operation of an enactment expressed only in general terms, as

<sup>4</sup> See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 7 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

<sup>5</sup> Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March 1984; p 3 of Chapter 2 (p 6 of 21) accessed from <http://lawcommissionofindia.nic.in/51-100/Report96.pdf> on 29 January 2010.

distinguished from an enactment specifying the Acts which it is to operate

- Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one
- Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise
- Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

1.17 Statutory provisions usually become redundant as time passes.<sup>6</sup> Generally, the redundancy of legislation is not signalled by a single occurrence; rather, legislation is often simply overtaken by social and economic changes. Inevitably some provisions fade away more quickly than others. Relatively short-lived provisions include commencement and transitional provisions and those that confer powers to be exercised during the period between the passing of legislation and its implementation (in some jurisdictions known as “pump-priming” provisions). Provisions that provide for delegated legislation-making powers might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

1.18 Substantial revision of statutory law is possible in South Africa because of the general savings provisions of section 12(2) of the South African Interpretation Act. The South African Interpretation Act, 1957 (Act 33 of 1957) mirrors section 16(1) of the Interpretation Act of 1978 of England and Wales.<sup>7</sup> Section 12(2) of the South African Interpretation Act provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or

<sup>6</sup> *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 9 and 10 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

<sup>7</sup> *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 8 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

1.19 The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms this means that this leg of the investigation is limited to those statutes or provisions in statutes that:

- Differentiate between people or categories of people, and which are not rationally connected to a legitimate government purpose; or
- Unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- Unfairly discriminate on grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.

1.20 Consequently, a law or a provision in a law which appears, on the face of it, to be neutral and non-discriminatory but which has or could have discriminatory effect or consequences has been left to the judicial process.

## **C SCOPE OF THE PROJECT**

1.21 This investigation accordingly, focuses on the question of the constitutionality of provisions in statutes with special attention paid to consonance with section 9 of the Constitution. The investigation also attends to obsolescence or redundancy of provisions. In 2003 Cabinet agreed that the highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The SALRC agreed that the project should proceed by scrutinising and revising national legislation which discriminates unfairly.<sup>8</sup> However, even the section 9 inquiry is fairly limited, dealing primarily with statutory provisions that are blatantly in conflict with section 9 of the Constitution. This was necessitated by, among other considerations,

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<sup>8</sup> Professor Cathi Albertyn prepared a 'Summary of Equality Jurisprudence and Guidelines for Assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution', specifically for the SALRC in February 2006.

time and capacity. However, any other obvious inconsistencies with the Constitution and anomalies have been identified and recommendations made on how to address them.

## **D ASSISTANCE BY GOVERNMENT DEPARTMENTS AND OTHER STAKEHOLDERS**

1.22 In 2004, Cabinet endorsed the proposal that government departments should be requested to participate in and contribute to this investigation. In certain instances, legal researchers cannot decide whether to recommend a provision for repeal unless they have access to factual information that might be considered “inside” knowledge – of the type usually accessible within a specific department or organisation. Examples include savings or transitional provisions that are instituted to preserve the status quo until an office-holder ceases to hold office or until a loan has been repaid. In such cases, the consultation paper drafted by the SALRC invited the department or organisation being consulted to supply the necessary information. Any help that can be given to fill in the gaps is much appreciated. It is important that the departments feel that they have ownership over this process and that it is not something that is being imposed upon them, so open lines of communication with each department are essential for the success of this project.

## **E APPOINTMENT OF EXPERTS TO INCREASE RESEARCH CAPACITY**

1.23 The review of the statutes administered by the Departments of Transport, Public Works, National Treasury, Foreign Affairs, Arts and Culture, and Sport and Recreation commenced in 2006 and 2007 respectively. At its meeting on 23 June 2007 the SALRC noted that there was limited research capacity at the SALRC to conduct statutory law review due to most of its researchers attending to other projects on its programme. At this meeting the SALRC approved in principle the appointment of experts by the Minister of Justice and Constitutional Development to conduct statutory review and thereby increase the SALRC’s research capacity in respect of 14 National Government Departments administering a high number of statutes, including the statutes administered by the DOJCD. The statutes of the remaining 12 Departments which administer a low number of statutes were to be reviewed by SALRC researchers.

1.24 Section 7A(1)(b)(ii) of the South African Law Reform Commission Act 19 of 1973 provides as follows on the establishment of committees by the SALRC:

- (1) The Commission may, if it deems it necessary for the proper performance of its functions-
  - (a) . . .
  - (b) establish such other committees as it may deem necessary, and which shall consist of-
    - (i) such members of the Commission as the Commission may designate; or
    - (ii) such members of the Commission as the Commission may designate and the other persons appointed by the Minister for the period determined by the Minister.

1.25. Section 7(4)(a) of the South African Law Reform Commission Act provides that a committee referred to in subsection (1) shall, subject to the directions of the Commission, perform those functions of the Commission assigned to it by the Commission.

1.26 The SALRC may also employ persons with special knowledge of any matter relating to its work. Section 8(2) of the South African Law Reform Commission Act provides as follows:

- (2) The Commission may, with the approval of the Minister in consultation with the Minister of Finance, on a temporary basis or for a particular matter which is being investigated by it, employ any person with special knowledge of any matter relating to the work of the Commission, or obtain the co-operation of any body, to advise or assist the Commission in the performance of its functions under this Act, and fix the remuneration, including reimbursement for travelling, subsistence and other expenses, of such person or body.

1.27 The SALRC approved that the statutes of the following 12 national government departments would be reviewed by researchers of the SALRC, namely Arts and Culture; Correctional Services; Foreign Affairs; Housing; National Intelligence; Public Enterprises; Public Service and Administration; Science and Technology; Social Development; Safety and Security; Sport and Recreation; and Water Affairs and Forestry. The SALRC further approved that experts should be appointed in respect of the following 14 government departments, namely Agriculture; Communications; Defence; Education; Environmental Affairs and Tourism; Health; Home Affairs; Justice and Constitutional Development; Labour; Land Affairs; Minerals and Energy Affairs; National Treasury (for income tax

legislation); Provincial and Local Government; and Trade and Industry.

1.28 The scope of this statutory review was mainly to assess whether the provisions of various statutes administered by the Department of Justice and Constitutional Development are in conformity with the anti-discriminatory provisions of section 9 of the Constitution. However, whilst not an intensive statutory review process vis-à-vis the Constitution, the project also involved the identification of statutory provisions that have become obsolete, redundant, are conflicting between them, as well as outdated, but not necessarily obsolete.

1.29 At the beginning of this project, all statutes administered by the Department of Justice and Constitutional Development were thematically divided into nine clusters. These clusters are as follows:

1. Legal Profession
2. Courts and Institutions
3. Criminal Procedure and Evidence
4. Civil Procedure and Evidence
5. Substantive Criminal Law
6. Civil Law
7. Family Law and Marriage
8. Wills, Estates and Insolvency
9. Constitutional and Political

1.30 Each category was allocated to a specific advisory committee member or members for review and the findings and proposals were peer-reviewed by a fellow member or members. The preliminary findings and proposals following the review of legislation regulating the legal profession; courts and institutions; civil procedure and evidence; substantive criminal law; civil law; wills, estates and insolvency; and constitutional and political legislation; will be published for public information and comments soon. This discussion paper contains the preliminary findings of the SALRC in relation to the constitutionality or redundancy of legislation dealing with family law and marriage.

## **F CONSULTATION WITH THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

1.31 The SALRC has reviewed 11 statutes regulating family law, including marriage, that are currently administered by the DOJCD for constitutionality and redundancy. In January 2011 and in accordance with its policy to consult widely, the SALRC submitted a consultation paper to the DOJCD containing preliminary findings and proposals for remedial legislative action and requested the DOJCD to peruse the document and provide it with comments. In May 2011, the DOJCD submitted comprehensive comments, but only in respect of findings, conclusions or proposals with regard to which it differed with the SALRC. The SALRC has reviewed its preliminary findings and proposals in the light of the comments it received from the DOJCD, conducted additional research, and where necessary, amended or abandoned its preliminary findings and proposals for legislative reforms.

## **CHAPTER 2**

# **EXPLANATORY NOTES ON THE PROPOSED REPEALS AND AMENDMENTS**

## **A Introduction**

2.1 The South African Law Reform Commission (SALRC) has reviewed 11 pieces of legislation relating to family law and marriage that are currently administered by the Department of Justice and Constitutional Development (DOJCD) to determine whether they contain provisions that are inconsistent with the Constitution of the Republic of South Africa of 1996 (Constitution), particularly with the right to equality, or provisions that no longer serve any useful purpose as a result of redundancy or obsolescence. The subject-matter of these Acts varies and includes marriage; maintenance; prevention of family violence; divorce and mediation in divorce matters. The SALRC has found that some of these statutes and/or a number of provisions contained in them require amendment or repeal. Furthermore, the SALRC has, as it is authorised by section 5(5) of the South African Law Reform Commission Act 19 of 1973, included a draft Bill in this discussion paper entitled the 'Justice Laws Repeal and Amendment Bill, 2011' which, if enacted, will give effect to its recommendations. This chapter provides a detailed explanation why the selected Acts and/or provisions have been identified as candidates for repeal or amendment as indicated in the proposed Bill.

### **1 Matrimonial Affairs Act 37 of 1953**

2.2 This Act was enacted to amend the law relating to the property rights of spouses, to orders of maintenance, to the guardianship and custody of minors and to divorce. However, a majority of sections of this Act have been repealed by various other laws, leaving a fragmented law on the statute book. Only section 5, containing numerous subsections and regulating the guardianship and custody of minors, is still standing. It is recommended here that it be repealed in its entirety, as it has been superseded by the Children's Act 38 of 2005 (the Children's Act). Each subsection is set out below, indicating the sections in the Children's Act that superseded the relevant subsections. The Children's Act does not expressly repeal any provisions of

the Matrimonial Affairs Act.

2.3 Section 5(1) of this Act empowers a court to make any order it deems fit with regard to 'custody', 'guardianship' or 'access' in relation to a 'minor'. The section specifically mentions the power to grant 'sole guardianship' or 'sole custody', and that the court may order that if the parent to whom sole guardianship is granted dies, another person can get guardianship either jointly with, or to the exclusion of, the surviving parent. This provision has been superseded by various provisions of the Children's Act which set up a comprehensive codified scheme dealing with parental responsibilities and rights. The new approach is more holistic, recognizes family forms beyond the standard mother, father and child picture, and encourages 'shared parental responsibilities and rights'. Nevertheless the court retains the power to make any order granting contact with or care of the child (section 23) or any order relating to guardianship (section 24). The court can also terminate, extend, suspend or restrict parental responsibilities and rights (section 28) which implies that sole guardianship can be achieved. It is recommended that section 5(1) of the Matrimonial Affairs Act be deleted, as it has been superseded and is also somewhat obsolete. Any slight gap that may be left can be filled by the inherent powers of the High Court to act as upper guardian of minors.

2.4 Section 5(2) provides that if an order is made with regard to the custody, guardianship or access to a minor whilst parents are living apart, it will lapse if they become reconciled and live together again. There is no identical provision in the Children's Act. However, it would not make sense to leave this one section standing in the Matrimonial Affairs Act, and it appears to encompass a rather narrow factual circumstance. It is therefore recommended that it be deleted. Furthermore, this section is under-inclusive in that it uses the terms 'husband and wife' instead of 'parties to a marriage', and it has also been superseded by the Civil Union Act 17 of 2006 which recognizes marriage between people of same sex. The DOJCD has submitted that this provision should, for the sake of legal certainty, be retained in the statute book and incorporated into the Children's Act. The SALRC supports this proposal.

2.5 Section 5(3)(a) and (b) deal with the right of a sole guardian or custodian to pass on sole guardianship by way of testamentary disposition. This has been superseded by section 27 of the Children's Act, which provides that a parent who is a sole guardian may appoint a fit and proper person as guardian of the child in the

event of the death of the parent. A person who has sole care of a child may appoint a fit and proper person to be vested with the care of the child. These appointments must be made in a will, and the person who is vested with guardianship or care must, after the death of the parent, give express or implied acceptance. It is thus recommended that section 5(3) be deleted.

2.6 Section 5(5) provides that, in the event of the death of the sole guardian or custodian who has conferred guardianship to someone else, the other parent can bring an application to challenge this and the court can make any order deemed to be in the interests of the minor. The SALRC recommends that this provision be repealed. The surviving parent can approach the court in terms of section 28 of the Children's Act<sup>9</sup> for an order terminating or suspending the right of that person to act as guardian or have the custody of the child. Therefore, section 5(5) has been superseded by section 28 of the Children's Act.

2.7 Section 5(6) relates to subsections (1) and (3)(a) and deals with the lapsing and rescinding of any orders, and the consequent lapsing of dispositions. It does not play any significant role and it is recommended that it be deleted.

2.8 In view of the fact that section 5 is the only section remaining in this Act, the SALRC recommends that this Act be repealed in its entirety, subject to the proposal

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<sup>9</sup> Section 28 of the Children's Act of 2005 provides that:  
**28 Termination, extension, suspension or restriction of parental responsibilities and rights**  
 (1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order-  
 (a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or  
 (b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.  
 (2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section.  
 (3) An application for an order referred to in subsection (1) may be brought-  
 (a) by a co-holder of parental responsibilities and rights in respect of the child;  
 (b) by any other person having a sufficient interest in the care, protection, well-being or development of the child;  
 (c) by the child, acting with leave of the court;  
 (d) in the child's interest by any other person, acting with leave of the court; or  
 (e) by a family advocate or the representative of any interested organ of state.  
 (4) When considering such application the court must take into account-  
 (a) the best interests of the child;  
 (b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;  
 (c) the degree of commitment that the person has shown towards the child; and  
 (d) any other fact that should, in the opinion of the court, be taken into account.

made in paragraph 2.4 above that a provision similar to section 5(2) of the Matrimonial Affairs Act of 1953 be included in the Children's Act. This issue is dealt with in more detail in the review of legislation administered by the Department of Social Development.

## **2 Matrimonial Property Act 88 of 1984<sup>10</sup>**

2.9 The purpose of this Act was to amend the matrimonial property law. Like many other statutes enacted prior to 1994, this Act makes references to the Black Administration Act. However, these are historical references to marriages concluded under that Act, and as there may still be marriages concluded under that Act, it is not advisable to delete these references. The gender-neutral word spouse is used throughout except where the terms 'husband' and 'wife' are necessary in respect of the abolition of marital power. Therefore, only minor legislative amendments are required and these are set out in the ensuing paragraphs.

2.10 All the definitions contained in section 1 of this Act, except the definition of 'separate property', require updating.

2.11 This Act provides that "banking institution" means a banking institution as defined in section 1 of the Banks Act, 1965 (Act 24 of 1965).' The Banks Act of 1965 was repealed by the Banks Act 94 of 1990. Section 93 of the Banks Act of 1990 provides that reference in any law in force immediately prior to the coming into effect of the Deposit-taking Institutions Amendment of 1993 to, among others, a banking institution registered under or in terms of the Banks Act of 1965 must be construed as reference to a bank. It is recommended, for the sake of legal certainty, that the definition of 'banking institution' be amended to read "banking institution" means a bank as defined in section 1 of the Banks Act, 1990 (Act 94 of 1990)'.

2.12 Section 1 of this Act also provides that "building society" means a building society as defined in section 1 of the Building Societies Act, 1965 (Act 24 of 1965)'. The Building Societies Act referred to in this definition was repealed by the Mutual Banks Act 124 of 1993. Section 94 of the Mutual Banks Act of 1993 provides that: 'A

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<sup>10</sup> The Matrimonial Property Act will be reviewed comprehensively in a separate investigation entitled "Review of Aspects of Matrimonial Property Law" (Project 100). It is envisaged that an issue paper relating to this review will be published during the course of 2012.

reference in any law in force immediately prior to the commencement of this Act to a mutual building society as defined in section 1 of, or registered under, the Mutual Building Societies Act, 1965 (Act 24 of 1965), shall, in so far as it is a reference to a permanent mutual building society and unless inconsistent with the context or otherwise clearly inappropriate, be construed as a reference to a mutual bank registered as such in terms of this Act.' Although this Act refers to a 'building society' and not to a 'mutual building society', it is submitted that section 94 of the Mutual Banks Act of 1993 applies to the interpretation of the expression 'building society' in section 1 of this Act. In the light of section 94 of Act 124 of 1993, the SALRC recommends that the definition of 'building society' be amended to read "'building society" means a mutual bank registered in terms of the Mutual Banks Act, 1993 (Act 124 of 1993).' The DOJCD proposes that the words 'mutual bank' be substituted for the words 'building society' wherever these words occur in the Act. Consequentially, this would also require the insertion of 'mutual bank' in section 1 of this Act. The SALRC invites comments on which of the two remedial legislative actions should be adopted.

2.13 Section 1 of this Act also provides that 'court' means:

a provincial or local division of the Supreme Court of South Africa or a divorce court instituted under section 10 of the Black Administration Act, 1927, Amendment Act, 1929 (Act 9 of 1929), and includes, for the purposes of section 16, a judge in chambers, and, for the purposes of section 16(1), a magistrate's court which has jurisdiction in the matter concerned.

2.14 This definition was amended in 1993 by the Magistrates' Courts Amendment Act 120 of 1993, a provision yet to come into operation.<sup>11</sup>The SALRC recommends that this definition, which is still in force,<sup>12</sup> be amended for the following reasons: Firstly, it requires alignment with the provisions of the Constitution dealing with the

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<sup>11</sup> In terms of this new definition "'court" means a provincial or local division of the Supreme Court of South Africa or a family court established under section 2(k) of the Lower Courts Act, 1944 (Act 32 of 1944), and includes, for the purposes of section 16, a judge in chambers, and, for the purposes of section 16(1), a lower court which has jurisdiction in the matter concerned'.

<sup>12</sup> Section 11(2) of the Interpretation Act 33 of 1957 provides that when a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation.

judicial system that obtains in the Republic.<sup>13</sup> Secondly, it needs to be reviewed in the light of the new Jurisdiction of Regional Courts Amendment Act 31 of 2008 which has amended the Magistrates' Courts Act 32 of 1944 by conferring jurisdiction on courts for regional divisions which are distributed throughout the country to deal with certain civil matters, including matters dealt with by the Divorce Courts established under section 10 of the Administration Amendment Act of 1929. Thirdly, it needs to be aligned with the clauses of the Superior Courts Bill, which is likely to become law soon. This Bill lists the divisions of the High Courts, but the legislature seems likely to abandon the adjectives 'provincial' or 'local' when referring to the divisions of the High Courts.<sup>14</sup> In the light of the legislative provisions referred to above and the changes likely to be introduced by the enactment of the Superior Courts Bill to the formation of the superior courts, the SALRC recommends that the definition of 'court' be amended as follows:

'court' means a [**provincial or local division of the Supreme Court of South Africa**]High Court having jurisdiction or a [**divorce court instituted under section 10 of the Black Administration Act, 1927, Amendment Act, 1929 (Act 9 of 1929)**] court for a regional division as contemplated in the Magistrates' Courts Act, 1944 (Act 32 of 1944), and includes, for the purposes of section 16, a judge in chambers, and, for the purposes of section 16(1), a [**magistrate's**]district court which has jurisdiction in the matter concerned.

2.15 This Act also states that 'financial institution' means a financial institution as defined in section 1 of the Financial Institutions (Investment of Funds) Act, 1984 (Act 39 of 1984). Act 39 of 1984 was repealed by the Financial Institutions (Protection of Funds) Act 28 of 2001. Since the 2001 Act contains a definition of financial institution, the SALRC recommends that the definition of 'financial institution' be amended to

<sup>13</sup> Section 166 of the Constitution provides that the courts in the Republic are the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates' Courts and any other court established or recognized in terms of an Act of Parliament.

<sup>14</sup> Clause 6 of the proposed Superior Courts Bill 7 of 2011 (available at <http://www.info.gov.za/view/DownloadFileAction?id=146753>) provides that:

**Constitution of High Court of South Africa**

- 6.** (1) The High Court of South Africa consists of the following Divisions:
- (a) Eastern Cape Division, with its main seat in Grahamstown.
  - (b) Free State Division, with its main seat in Bloemfontein.
  - (c) Gauteng Division, with its main seat in Pretoria.
  - (d) KwaZulu-Natal Division, with its main seat in Pietermaritzburg.
  - (e) Limpopo Division, with its main seat in Polokwane.
  - (f) Mpumalanga Division, with its main seat in Nelspruit.
  - (g) Northern Cape Division, with its main seat in Kimberley.
  - (h) North West Division, with its main seat in Mafikeng.
  - (i) Western Cape Division, with its main seat in Cape Town.

read “financial institution” means a financial institution as defined in section 1 of the Financial Institutions (Protection of Funds) Act, 2001 (Act 28 of 2001)’.

2.16 This Act also provides that ‘joint estate’ means the joint estate of husband and wife married in community of property. The import of this definition can be fully understood if it is read in conjunction with the provisions of this Act pertaining to marriages in community of property; and in particular those dealing with the powers, rights and duties of the spouses in relation to the joint estate. This Act makes it clear that the spouses have equal powers with regard to the joint estate.<sup>15</sup> It also provides that each of the spouses may, subject to few exceptions where written consent<sup>16</sup> or consent<sup>17</sup> of the other spouse is required, perform any juristic act with regard to the joint estate without the consent of the other spouse. In addition, a spouse may request the court to divide the joint estate.<sup>18</sup>

2.17 The question therefore is whether these rights and duties, initially enjoyed by spouses married in community of property, also apply to partners who have entered into a civil union in terms of the Civil Union Act.<sup>19</sup> The Civil Union Act allows persons entering into a civil union to register it either by way of marriage or a civil partnership.<sup>20</sup> Furthermore, the Civil Union Act also distinguishes between a spouse

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<sup>15</sup> Section 14 of this Act provides that a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act.

<sup>16</sup> For example, a spouse is prohibited from alienating or burdening with servitude or conferring any real right in any immovable property; entering into a contract for the alienation or conferring any real right in immovable property forming part of the joint estate; withdrawing money held in the name of the other spouse in any account in a banking institution; binding himself or herself as surety. See section 15(2) for other instances where a spouse is required to obtain written consent of the other spouse.

<sup>17</sup> A spouse is barred by this legislation from alienating or pledging furniture forming part of the joint estate; receiving any money due or accruing to the other spouse or the joint estate by way of, for example remuneration, damages for loss of income, inheritance or the proceeds of any insurance, donating to any other person any asset of the joint estate, without the consent of the other spouse. See section 15(3) for other instances.

<sup>18</sup> Section 20(1). The court must be satisfied that the interest of the spouse in question in the joint estate is being or will be seriously prejudiced by the conduct or proposed conduct of the other spouse.

<sup>19</sup> Act 17 of 2006.

<sup>20</sup> Section 1 of the Civil Union Act provides that “civil union’ means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and

in a marriage and a partner in a civil partnership, concluded in terms of that Act.<sup>21</sup> The SALRC is of the view that it would be discriminatory to exclude civil union partners from enjoying the rights and protection afforded by these provisions of the Matrimonial Property Act. The Civil Union Act also makes it clear, first, that references to marriage in any other law, for example, in this Act, includes a civil union and that references to husband, wife or spouse in any other law includes a civil union partner.<sup>22</sup> Therefore, it is clear that the legislature intended that these protections, rights and duties should also apply to the civil union partners irrespective of whether their union is registered as a marriage or as a civil partnership. For the sake of legal certainty and because definitions are important in guiding the application and interpretation of the Act, the SALRC recommends that the definition of 'joint estate' be amended by expressly including civil union partners as proposed below. This raises the question whether this approach should not be used consistently throughout this Act where the terms "marriage", "husband", "wife" and "spouse(s)" are used.

'joint estate' means the joint estate of husband and wife married in community of property or the joint estate of civil union partners who have entered into a civil union in accordance with the Civil Union Act, 2006 (Act 17 of 2006).

2.18 Lastly, this Act provides that "'listed securities" means securities as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act 1 of 1985).' The Stock Exchanges Control Act of 1985 was repealed by the Securities Services Act 36 of 2004. The SALRC recommends that the definition of 'listed securities' be amended to read "'listed securities" means listed securities as defined in section 1 of the Securities Services Act, 2004 (Act 36 of 2004)'.

2.19 Section 21(1) of this Act allows a husband and wife to jointly apply to court to change their matrimonial property system 'including the marital power'. The words 'including marital power' are superfluous because this Act also abolished marital

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registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others."

<sup>21</sup> The Civil Union Act defines a "civil union partner as a spouse in a marriage or a partner in a civil in a civil partnership, as the case may be, concluded in terms of this Act.

<sup>22</sup> Section 13(2)(a) and (b) of the Civil Union Act.

power – with retrospective effect.<sup>23</sup> It is recommended that the words ‘including the marital power’ in this subsection be deleted. Furthermore, the use of ‘husband and wife’ in this section too, is under-inclusive. As stated above, the Civil Union Act provides that references to husband, wife or spouse in any other law includes a civil union partner. Therefore, the power to change the matrimonial system provided for in this section (section 21(1)), which was initially available only to a husband or wife, can today also be invoked by civil union partners and the SALRC recommends that this section be retained in its current form, subject to the amendment proposed above.

2.20 Section 21(2) of this Act has expired. It allowed couples to cause the accrual system contemplated in Chapter 1 of this Act to apply to their marriage provided they applied within two years after the commencement of the Act or 2 years after the commencement of the Marriage and Matrimonial Property Law Amendment, 1988 for leave to change their matrimonial property system. These two dates have long since passed. It is recommended that this subsection be deleted. Section 25(2) and (3) of this Act<sup>24</sup> also allowed spouses whose marriage was entered into before the

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<sup>23</sup> Section 11 of the Matrimonial Property Act of 1984.

<sup>24</sup> Section 25 of this Act reads:  
**Application of Chapters II and III**

(1)...

(2) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage entered into before the commencement of this Act and in respect of which the matrimonial property system was not governed by section 22 of the Black Administration Act, 1927 (Act 38 of 1927), may-

(a) if they are married in community of property, cause the provisions of Chapters II and III of this Act to apply to their marriage; or

(b) if they are married out of community of property and the wife is subject to the marital power of the husband, cause the provisions of Chapter II of this Act to apply to their marriage,

by the execution and the registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by the Minister by notice in the Gazette, of a notarial contract to that effect, and in such a case those provisions apply from the date on which the contract concerned was so registered.

(3) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, and in respect of which the matrimonial property system was governed by section 22 of the Black Administration Act, 1927 (Act 38 of 1927), may-

(a) if they are married in community of property, cause the provisions of Chapters II and III of this Act to apply to their marriage; or

(b) if they are married out of community of property and the wife is subject to the marital power of the husband, cause the provisions of Chapter II of this Act to apply to their marriage,

by the execution and registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by

commencement of this Act or whose matrimonial property system was governed by section 22 of the Black Administration Act 38 of 1927 to make the provisions of chapter II (which abolished marital power) and III (which conferred on women the power to participate in the management of the joint estate which, hitherto, was exclusively the domain of men) of this Act applicable to their marriage by registering within two years or such longer period determined by the Minister of a notarial contract to that effect. The dates set out in this Act have long since passed. In any event women who did not avail themselves of these provisions, or who are still subject to marital power and those who are denied the right to participate in the management of the joint estate could challenge these practices on the basis of the right to equality enshrined in the Constitution. The SALRC thus recommends that section 25(2) and (3) of this Act be repealed on the ground that these provisions have expired.

2.21 Section 24 of this Act provides:

(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.

2.22 The expression 'Commissioner of Child Welfare' is not defined in this Act. To decipher the meaning of this expression one must look at the Marriage Act which provides that if the Commissioner of Child Welfare as defined in section of the Child Care Act of 1983 is satisfied that a minor has no parents or guardian or is unable to obtain consent of his parents or guardian to enter into a marriage, such a commissioner of child welfare may grant written consent.<sup>25</sup> In view of this provision,

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the Minister by notice in the Gazette, of a notarial contract to that effect, and in such a case those provisions apply from the date on which the contract was so registered.

<sup>25</sup> Section 25(1) of the Marriage Act 25 of 1961 provides:

"If a commissioner of child welfare defined in section 1 of the Child Care Act, 1983, is after proper inquiry satisfied that a minor who is resident in the district or area in respect of which he holds office has no parents or guardian or is for any good reason unable to obtain the consent of his parents or guardian to enter into a marriage, such

the SALRC assumes that the phrase as used in this Act (the Matrimonial Property Act) bears the same meaning assigned to it in the Child Care Act. In terms of that Act, every magistrate was a commissioner of child welfare and every additional magistrate and assistant magistrate was deemed to be an assistant commissioner of child welfare. However, the Child Care Act has been repealed by the Children's Act 38 of 2005. The Children's Act does not specify whose consent should be obtained if the consent of the parents or the guardian of a minor cannot be obtained. Therefore, there is a *lacuna* in the Children's Act in respect of this aspect. The SALRC has proposed that the power exercised by the erstwhile commissioner of child welfare to consent to the marriage of a person who is below the age of 18 be exercised by a presiding officer as defined in section 1 of the Children's Act of 2005.<sup>26</sup> The SALRC, therefore, recommends that the expression 'presiding officer of the children's court as defined in the Children's Act' be substituted for the expression 'commissioner of child welfare' in subsection (1) of section 24 of this Act.

2.23 There are also references to 'he', 'him' or 'his' throughout this Act. The SALRC recommends that the expression 'he or she' be substituted for the word 'he', wherever it occurs in sections 3(1); 4(1)(b)(ii); 5(1); 6(1); 6(2); 15(9)(b); 17(4)(b); 19; 23(3),(4) and (6). It is also recommended that the expression 'him or her' be substituted for the word 'him' wherever it occurs in sections 8(3); 8(4); 15(3)(b)(i); 16; 17(1)(b), (3),(4); and 19. It is further recommended that the expression 'his or her' be substituted for the word 'his' in section 3(1); 4(1)(a) and 4(1)(b)(ii) and (iii); 5(1); 6(1),(2),(4);8(1); 8(4); 15(3)(b)(i); 15(6); 15(7)(b)(i); 17(1)(a) and (b); 19 and 23(2). Lastly, the SALRC recommends that the expression 'himself or herself' be substituted for the word 'himself' in section 15(2)(h) of this Act.

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a commissioner of child welfare may in his discretion grant written permission to such minor to marry a specified person...".

<sup>26</sup> Section 1 of the Children's Act provides that: "presiding officer' means a presiding officer of the children's court designated in terms of section 42." Section 42(2) of the Children's Act provides that: "Every magistrate shall be a presiding officer of a children's court and every additional magistrate shall be an assistant presiding officer of a children's court for the district of which he is magistrate, additional magistrate or assistant magistrate." This section of the Children's Act is strikingly similar to section 6 of the Child Care Act of 1983.

### 3 Divorce Act 70 of 1979<sup>27</sup>

2.24 The purpose of this Act was to amend the law relating to divorce. Three pieces of legislation impacting on the provisions of this Act were enacted between 2004 and 2007, namely the Mental Health Care Act of 2002, the Children's Act of 2005 and the Civil Union Act of 2006. However, this Act was not amended consequentially to bring it in line with these pieces of legislation.

2.25 In a number of provisions this Act refers to "custody", "access", "minor or dependent child", and "sole guardianship".<sup>28</sup> These concepts are not defined in this Act and thus retain the common-law meaning ascribed to them by the courts. The Children's Act contains provisions that are undeniably in *pari materia* with some of the provisions of the Divorce Act. However, in the Children's Act the legislature has introduced new concepts of "parental rights and responsibilities"<sup>29</sup>; "care"<sup>30</sup> and

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<sup>27</sup> Care of and contact with a child will be comprehensively reviewed in a separate SALRC investigation entitled "Custody of and Access to Minor Children" (Project 100). It is envisaged that an issue paper relating to this investigation will be published during the course of 2012.

<sup>28</sup> See paragraph (a) of the definition of "divorce action"; section 6(1) and (3); and 8(1).

<sup>29</sup> Section 18(2) of the Children's Act states:

- “(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-
- (a) to care for the child;
  - (b) to maintain contact with the child;
  - (c) to act as guardian of the child; and
  - (d) to contribute to the maintenance of the child.”

<sup>30</sup> Section 1(1) of the Children's Act provides that:

- “‘care’, in relation to a child, includes, where appropriate-
- (a) within available means, providing the child with-
    - (i) a suitable place to live;
    - (ii) living conditions that are conducive to the child's health, well-being and development; and
    - (iii) the necessary financial support;
  - (b) safeguarding and promoting the well-being of the child;
  - (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
  - (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
  - (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;

“contact”<sup>31</sup>, both of which are components of parental responsibilities and rights; has jettisoned the adjectives “minor” and “dependent” when referring to a child or children.<sup>32</sup> The coming into operation of the Children Act has resulted in uncertainty not only as regards its impact on statutes in *pari materia* which were promulgated prior to 1994, but, as shown in recent cases, also as regards the manner in which the relief sought in relation to minor children in divorce actions is couched and the framing of orders in divorce matters.

2.26 The Divorce Act of 1979 undoubtedly requires alignment with the Children’s Act. The SALRC in its report which was finalized in 2002 entitled “Review of the Child Care Act” stated in respect of the anachronistic words used in this Act.<sup>33</sup>

The use of the words ‘custody’, ‘sole custody’, ‘guardianship’, ‘sole guardianship’ and ‘access’ in the Divorce Act promote a potentially damaging sense of winners and losers. The use of more neutral language would help reduce conflict and let both parents focus on their responsibilities rather than their rights. The Commission therefore recommended that the terms ‘custody’ and ‘access’ be replaced with the terms ‘care’ and ‘contact’ respectively. Furthermore, that the Divorce Act, the Matrimonial Affairs Act, and the Mediation in Certain Divorce Matters Act be amended to add definitions of ‘care’ and ‘contact’ that reflect the meanings ascribed to those terms by the Commission. Responding to the latter recommendation, the **Law**

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- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child’s age, maturity and stage of development;
  - (g) guiding the behaviour of the child in a humane manner;
  - (h) maintaining a sound relationship with the child;
  - (i) accommodating any special needs that the child may have; and
  - (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.”

<sup>31</sup> Section 1(1) of the Children’s Act provides that:

“**contact**’, in relation to a child, means-

- (a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else-
  - (i) communication on a regular basis with the child in person, including-
    - (aa) visiting the child; or
    - (bb) being visited by the child; or
  - (ii) communication on a regular basis with the child in any other manner, including-
    - (aa) through the post; or
    - (bb) by telephone or any other form of electronic communication.”

<sup>32</sup> Section 1(1) of the Children’s Act provides that “‘child’ means a person under the age of 18 years.”

<sup>33</sup> The SALRC in its report of December 2002 entitled Review of the Child Care Act (Project 110)195, paragraph 13.2.2. The report is available at: <http://www.justice.gov.za/salrc/reports.htm> (accessed on 17 November 2011).

**Society of the Cape of Good Hope** proposed that the Natural Fathers of Children Born out of Wedlock Act and other ancillary Acts such as the General Law Further Amendment Act and the Maintenance Act be similarly amended. The Commission supports this proposal.

2.27 In *WW v EW*<sup>34</sup> the court grappled with the question whether the common-law concepts of “custody,” “access” and to a lesser extent “guardianship”, have survived the coming into operation of the Children’s Act. The following helpful guidelines can be distilled from the decision of the court:

1. The meaning ascribed to the common-law concepts of “guardianship”,<sup>35</sup> “custody”<sup>36</sup> and “access”<sup>37</sup> by the courts was clear.
2. An inference can be drawn from the long title of the Children’s Act which states that one of its objects is to define parental responsibilities and rights

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<sup>34</sup> *WW v EW* 2011 (6) SA 53 (KZP). In this case, the court granted the orders of divorce in seven divorce cases before it but provided that the parts of the divorce orders relating to children (excluding those relating to maintenance) would be interim orders and judgment on the wording of these orders was reserved. The reason for that order was the court’s realization that uncertainty existed as to whether the concepts of custody and access, and to a lesser extent guardianship, had survived the enactment of the Children’s Act 38 of 2005.

<sup>35</sup> In paragraph 6 the court stated in relation to the common-law concept of guardianship “The term “guardianship” was used in two senses. In a broader sense it equated to “parental power” or “parental authority”, being the aggregate of the rights and responsibilities which vests in a parent. In the narrower and more precise sense it meant that portion of the parental power which relates to the control and administration of the child’s estate, and the capacity to assist or represent the child in legal proceedings or in the performance of juristic acts. At common law only the husband was the guardian in the narrower sense.” The court noted that the Guardianship Act 192 of 1993 changed the common law position in respect of guardianship by giving both parents equal guardianship in respect of children born of the marriage.

<sup>36</sup> In respect of custody, the court referred to this passage of the decision by De Vos J in *Krugel v Krugel* 2003 (6) SA 220 (T):

“In general it can be said that the custodian parent has the right to regulate and control the child’s day to day life, upbringing and education. This includes the right to choose the child’s residence, with whom he or she associates, and to direct the lines along which secular education should proceed. Choice of school, religious instruction and medical care are all dictated by the custodian parent and the non-custodian parent has no right to interfere in these matters.” See paragraph 10 of the judgment.

<sup>37</sup> The court held that access was an incidence of parental power and that it was not automatically terminated by the loss of custody. According to the court access could take many forms such as telephonic contact with the child and the right to have the child stay over at certain times. See paragraph 11 of the judgment.

and from report of the SALRC that preceded the enactment of the Children's Act that the legislature wanted to do away with the old common-law terms of custody and access and replace them with the new concepts contained in the Children's Act.<sup>38</sup> The court conceded that section 1(2) of the Children's Act militates against this interpretation, and that if it were not for this section, this intention would have been realized.<sup>39</sup>

3. The courts have held that the concepts of "parental power" and "custody" have been replaced by the terms "parental rights and responsibilities" and "care" respectively and that the concepts of "rights and responsibilities" correspond broadly with the common-law concept of "parental authority" and its components of care, contact and guardianship with the concepts of custody, access and guardianship.<sup>40</sup>
4. In relation to the former approach, the court held that if the intention of the legislature was to replace the old terminology with the new it would have expressly stated that the common-law concepts were abolished and replaced by statutory concepts; and would have either amended existing statutes to bring them into line with the Children's Act or provided in the Children's Act

<sup>38</sup> Paragraph 15 of the judgment. The views expressed by the court are correct. The SALRC in its report referred to above in paragraph 2.27 stated:

**"7.3.2 Evaluation and recommendations**

The Commission sees no need to depart from the preliminary position adopted in the discussion paper. It is therefore recommended that:

- the move from the dated concepts parental power / parental authority to those of parental rights and responsibilities be endorsed;
- parental rights and responsibilities be defined in the Children's Bill;
- the components of parental rights and responsibilities – care, access, and guardianship – be clearly defined to allow for the allocation of these components (or parts thereof) to more than one person in respect of the same child;
- the change in terminology – 'care' for 'custody' and 'contact' for 'access' – for the reasons stated, be accepted.

These recommendations are given effect to in the Children's Bill."

<sup>39</sup> Paragraph 27 of the judgment.

<sup>40</sup> In the case of *J v J* 2008 (6) SA 30 (C), a Full Bench decision, it was stated that ". . . the terms 'parental power' and 'parental authority' are replaced by the term 'parental responsibilities and rights' and the term 'custody' by 'care'." The court in *LB v YD* 2009 (5) SA 463 (T), held that the Act had effected changes to existing laws to bring them in line with constitutional rights and values. The learned Judge went on to state that the concept "rights and responsibilities" corresponded broadly with "parental authority" and its components of care, contact and guardianship with the concepts of custody, access and guardianship." Both decisions are quoted in paragraphs 16 and 17 of the judgment.

that the concepts of custody and access in any existing statute should be interpreted to mean care and contact.<sup>41</sup> The court endorsed the latter approach referred to in the preceding paragraph, adding that although the concepts of care and contact corresponded broadly with the common-law terms of custody and access, the correspondence was not exact. The statutory concepts are wider than their common-law counterparts in that paragraphs (h) and (i) of the definition of care and paragraph (a) of the definition of contact were not traditionally components of custody and access respectively.

5. The court held that section 1(2) of the Children's Act can be interpreted in one of two ways: it could mean that custody and access now each have two alternative meanings, that is, either the common-law meaning or the statutory one, or it could mean that the common-law concepts have been given a wider meaning, one which includes both the common law and the statutory one.<sup>42</sup> The court endorsing the second interpretation held that the legislature sought to bring the common-law concepts in line with the statutory ones and that because most of the elements of custody and access are shared by care and contact respectively the legislature in a rather clumsy way equated custody and access to care and contact respectively.<sup>43</sup>
6. The court concluded that custody can be used interchangeably with care, and access with contact and that means that the use of the common-law concepts would not be wrong. However, the court urged that it would be preferable for the new terminology to be used in pleadings and court orders. This would bring these documents into line with the Act and would avoid confusion."<sup>44</sup>

2.28 As stated above, paragraph (a) of the definition of 'divorce action' in section 1 of this Act provides that 'divorce action' includes an application during the course of the divorce action for an interim order or an interdict with regard to the custody or

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<sup>41</sup> Paragraph 22 of the judgment.

<sup>42</sup> Paragraph 26 of the judgment.

<sup>43</sup> *Ibid.*

<sup>44</sup> Paragraph 28 of the judgment.

access to a child or for the payment of maintenance.<sup>45</sup>In the light of the court's reasoning in *WW v EW* above that the statutory concepts of "care" and "contact" are broader than the common-law terms of "access" and "custody", that custody can be used interchangeably with care, and access with contact and the SALRC's recommendations referred to above, following its review of the Child Care Act in 2002, that the words "custody" and "access" in the Divorce Act be replaced with the words "care" and "contact", it is recommended that paragraph (a) of the definition of "divorce action" be amended to bring it in line with the Children's Act of 2005.<sup>46</sup>The following amendment is proposed by the SALRC:

'divorce action' means an action by which a decree of divorce or other relief in connection therewith is applied for, and includes-

- (a) an application **[pendent lite]**pending the finalization of the divorce action for an interdict or for the interim **[custody of, or access to]**order relating to care of and contact with the child, [a minor child of the marriage concerned or] and for the payment of maintenance; or
- (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application.

2.29 There are references in the Act to 'he' where it should be 'he or she'. The SALRC recommends that the words 'he or she' be substituted for the word 'he' wherever it occurs in this Act. It is also recommended that the words 'his or her' be substituted for references to 'his' wherever this word occurs in this Act.

2.30 Section 5(1)(a) provides that a court may grant a decree of divorce on the ground of mental illness of the defendant if it is satisfied (a) that the defendant in terms of the Mental Health Act of 1973 (i) has been admitted as a patient at an institution in terms of a reception order; (ii) is being detained as a State patient at an

<sup>45</sup> In terms of this definition 'divorce action' means an action by which a decree of divorce or other relief in connection therewith is applied for, and includes –

- (a) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
- (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application."

<sup>46</sup> Consequential amendments must also be made to rule 43 of the Uniform Rules of Courts and rule 58 of the Magistrates Courts Rules of Courts which still refer to "*pendente lite*", "custody of" and "access to" a child.

institution or other place specified by the Minister of Correctional Services or (iii) is being detained as a mentally ill prisoner at an institution and that he has for a period of at least two years prior to the institution of the divorce action not been discharged unconditionally as such a patient, State patient or mentally ill prisoner. Section 5(5) adds that the expressions 'institution',<sup>47</sup>'mental illness',<sup>48</sup>'patient',<sup>49</sup>'State patient'<sup>50</sup> and 'reception order'<sup>51</sup> bear the meaning assigned to them in the Mental Health Act of 1973.

2.31 The Mental Health Act of 1973, except for chapter 8, was repealed by the Mental Health Care Act 17 of 2002. Although the Mental Health Care Act of 2002 does not contain a provision authorizing the magistrate to issue a reception order, it does make provision for a spouse, next of kin, partner, associate, parent or guardian to submit a written application to the head of the health establishment for care, treatment and rehabilitation services on behalf of a person incapable of making an informed decision on the need for treatment (referred to in that Act as assisted mental health care) or involuntary care, treatment and rehabilitation (referred to in that Act as involuntary care).<sup>52</sup> In either case, the head of the health care

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<sup>47</sup> In terms of the Mental Health Act of 1973 Act defined "institution" meant a psychiatric hospital or a provincial hospital or a halfway house at which provision has been made for detention or treatment of persons who are mentally ill, and includes any other place designated by the Minister as a place for the reception and detention of two or more persons suffering from mental illness and in respect of which a licence has been granted.

<sup>48</sup> In terms of the 1973 Act "mental illness" meant any disorder or disability of the mind, and included any mental disease and any arrested or incomplete development of the mind, and "mentally ill" had a corresponding meaning.

<sup>49</sup> The 1973 Act provided that "'patient' means a person mentally ill to such a degree that it is necessary that he be detained, supervised, controlled and treated and includes a person who is suspected of being or alleged to be mentally ill to such a degree."

<sup>50</sup> A state patient referred to a person detained by order of court of law or other competent authority at any place pending the signification of the decision of a judge in chambers.

<sup>51</sup> Section 8 of the 1973 Act provided that any person above the age of 18 who believed that any person is suffering from mental illness to such a degree that he should be committed to an institution could apply to the magistrate of the district in which such a person is for an order that he be received and detained. Such application had to reflect, among others, the degree in which the applicant is related by consanguinity or affinity to the person in respect of whom the order is being made. The magistrate could after considering all evidence issue a reception order authorising the patient to be received and detained.

<sup>52</sup> Sections 26, 27(1), 32 and 33(1) of the Mental Health Care Act of 2002.

establishment must cause the mental health care user to be examined by mental health practitioners, approve the application if the health care practitioners confirm that conditions for assisted care, rehabilitation or treatment exist and cause the mental health care user to be admitted to that health establishment or referred to another establishment with appropriate facilities.<sup>53</sup> This Act, like its predecessor, makes provision for the detention of State patients and mentally ill prisoners.<sup>54</sup> Furthermore, there is a need to align the section 5 of the Act under consideration with the Correctional Services Act 111 of 1998. The Correctional Services Act was amended in 2009 by inserting the words 'inmate' and 'correctional centre' and by deleting the references to 'prison' and 'prisoner'.<sup>55</sup> There is also a need to rid this section of gender-specific language.

2.32 In the light of the changes brought about by the Mental Health Care Act of 2002 and the Correctional Services Act of 1998, the SALRC recommends that section 5(1) be amended as follows:

#### **5 Mental illness or continuous unconsciousness as grounds of divorce**

(1) A court may grant a decree of divorce on the ground of the mental illness of the defendant if it is satisfied-

(a) that the defendant in terms of the Mental Health Care Act, [1973 (Act 18 of 1973)] 2002 (Act 17 of (2002))-

(i) has been admitted [as a patient to an institution in terms of a reception order] to a health establishment as an assisted mental health care user or an involuntary mental health care user;

(ii) is being detained as a State patient at [an institution or other place specified by the Minister of Correctional Services] a health establishment designated in terms of section 41 of that Act; or

(iii) [is being detained as a mentally ill convicted prisoner at an institution] is a convicted inmate with mental illness in correctional centre or transferred to a health establishment designated in terms of section 49 of that Act;

and that he or she has, for a continuous period of at least two years immediately prior to the institution of the divorce action, not been discharged unconditionally as such [a patient] an assisted mental health care user, involuntary health care user, State patient or mentally ill [prisoner] inmate; and

<sup>53</sup> See sections 27(4)(a), 27(7) and 27(10) and sections 32 and 33 of the 2002 Act.

<sup>54</sup> In Chapters VI and VII respectively.

<sup>55</sup> The Correctional Services Amendment Act 25 of 2008 amended, among others, section 1 of the Correctional Services Act of 1998 by deleting the definitions of 'prisoner' and 'prison' and inserting the words 'inmate' and 'correctional centre'.

(b) after having heard the evidence of at least two psychiatrists, of whom one shall have been appointed by the court, that the defendant is mentally ill and that there is no reasonable prospect that he or she will be cured of his or her mental illness.

2.33 In the light of the amendments proposed above, the SALRC also recommends the following consequential amendments to section 5(5):

For the purposes of this section the expressions **['institution']** **['assisted mental health care user']**, **['health establishment']**, **['involuntary mental health care user']**, **['mental illness']**, **['patient']** and **['State patient']** **and reception order']** shall bear the same meaning assigned to them in the Mental Health Care Act, [1973]2002.

2.34 Section 6(3) of this Act is very similar to sections 5(1) and 5(3) of the Matrimonial Affairs Act, although it also gives the court wide discretion in making maintenance orders, in addition to the granting of sole custody or sole guardianship orders. It has been recommended that the Matrimonial Affairs Act be repealed in its entirety, which will then rid the statute book of repetition. Section 6(3) of this Act should remain on the statute book but should be amended to reflect the new terminology and concepts that are found in the Children's Act. The views expressed above in paragraph 2.28 apply to this provision as well.

2.35 It is recommended that this subsection be reworded thus:

A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage, or **['the custody or guardianship of, or access to']** when making orders for the guardianship of, care of or contact with a minor child **['of the marriage']**, make any order **['which it may deem fit, and may in particular, if in its opinion it would be']** that is in the best interests of **['such minor']** the child, and which is congruent with the relevant principles and provisions of the Children's Act 38 of 2005 **['to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent']**.

2.36 Section 8(1) of this Act, which deals with the rescission, suspension and variation of maintenance orders and orders in respect of custody or guardianship of, or access to a child, has been superseded by the Children's Act of 2005. It is recommended, for the reasons expressed in paragraph 2.28 above that the wording

used in section 8(1) of the Divorce Act be aligned with the new terminology that is used in the Children's Act as follows:

(1) A maintenance order or an order in regard to the **[custody]care of** or guardianship of, or **[access to]contact with**, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to **[access to]contact with** a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (b) or (2) (b) of the Mediation in Certain Divorce Matters Act, 1987, such an order with regard to the **[custody]care of** or guardianship of, or **[access to]contact with**, a child shall not be rescinded or varied or, in the case of an order with regard to **[access to]contact with** a child, not be suspended before the report and recommendations referred to in the said section 4(1) have been considered by the court.

2.37 In August 2002 the SALRC finalized its investigation entitled "Publication of Divorce Proceedings" (Project 114) into section 12 of the Divorce Act.<sup>56</sup> Four possible options for law reform were included in the SALRC's report. Both the High Court and the Constitutional Court confirmed in *Johncom Media Investment v M and Others*<sup>57</sup> the finding by the SALRC that section 12 of the Divorce Act was overly broad and that it had to be amended. The Constitutional Court favoured the fourth option canvassed by the SALRC in its report. Section 12 of this Act was declared constitutionally invalid, with immediate effect, by the Constitutional Court in the case of *Johncom Media Investments Limited v M and Others*. The Constitutional Court held that this section, which prohibits the publication of any information which comes to light during a divorce action or any proceedings related thereto, constitutes a limitation on the media's right to impart information and is therefore in conflict with the right to freedom of the expression in section 16 of the Constitution. The Constitutional Court further held that the limitation cannot be justified in terms of section 36 of the Constitution. Amendments to section 12 to bring it in line with the Constitutional Court decision are currently being considered by the DOJCD. The SALRC thus makes no further recommendations in respect of this section, in view of its proposed wording on the matter in its 2002 report:<sup>58</sup>

<sup>56</sup> See the SALRC's Report *Publication of Divorce Proceedings: Section 12 of the Divorce Act (Act 70 of 1979)* Project 114, August 2002 available at [http://www.justice.gov.za/salrc/reports/r\\_prj114\\_2002aug.pdf](http://www.justice.gov.za/salrc/reports/r_prj114_2002aug.pdf)

<sup>57</sup> 2009 (4) SA 7 (CC).

<sup>58</sup> See paragraphs 5.20 – 5.23 of the report.

## **12. Restriction on publication of court proceedings**

(1) A person who publishes in a newspaper or periodical publication or by radio broadcast or television, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:

- (a) a party to the proceedings;
  - (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
  - (c) a witness in the proceedings;
- is guilty of an offence punishable, upon conviction, by imprisonment for a period not exceeding one year.

(2) Without limiting the generality of subsection (1), an account of proceedings, or of any part of proceedings, referred to in that subsection shall be taken to identify a person if:

- (a) it contains any particulars of:
  - (i) the name, title, pseudonym or alias of the person;
  - (ii) the address of any premises at which the person resides or works, or the locality in which any such premises are situated;
  - (iii) the physical description or the style of dress of the person;
  - (iv) any employment or occupation engaged in, profession practised or calling pursued by the person, or any official or honorary position held by the person;
  - (v) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;
  - (vi) the recreational interests or the political, philosophical or religious beliefs or interests of the person; or
  - (vii) any real or personal property in which the person has an interest or with which the person is otherwise associated;

being particulars that are sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires.
- (b) in the case of a broadcast or televised account, it is accompanied by a picture of the person; or
- (c) in the case of a broadcast or televised account, it is spoken in whole or in part by the person and the person's voice is sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires.

2.38 Section 16 of this Act amended the Matrimonial Affairs Act 37 of 1953. The Matrimonial Affairs Act has been recommended for repeal in this discussion paper. If the Matrimonial Affairs is repealed as recommended by the SALRC, section 16 of this Act would become redundant. The SALRC therefore recommends that section 16 of this Act be repealed as well.

2.39 The SALRC further recommends that this Act be amended by the substitution of the expression 'he or she' for the word 'he' wherever it occurs in sections 5(1)(a) and (b); and by the substitution of the expression 'his or her' for the word 'his' wherever it occurs in the definition of 'pension interest' in section 1, section 5(1)(b)

and in section 7(7)(a) and (b). This Act also contains references “spouse”, “spouses”, “husband”, “wife” and “marriage”. Although, as stated above in respect of the Matrimonial Property Act, the Civil Union Act of 2006 provides that marriage in any other law includes a civil union and that husband, wife or spouse in any other law includes a civil union partner.<sup>59</sup> Should the provisions of the Divorce Act<sup>60</sup> that contain these words not be amended for the sake of legal certainty by expressly including references to civil unions and civil union partners?

#### **4 Mediation in Certain Divorce Matters Act 24 of 1987**

2.40 The purpose of this Act was to provide for mediation in divorce proceedings and to safeguard the interests of children arising from such proceedings. This Act also amended the Divorce Act of 1979 in order to provide for the consideration by a court of the report and recommendations of a family advocate before granting a decree of divorce or other relief. The Family Advocate’s role will be considerably broadened by the full implementation of the Children’s Act 38 of 2005, and it is advisable that the Act be fully revised to take account of the increased functions. The Act provides for functions to be added by way of regulation, but it is submitted that certain key functions will be performed by the Family Advocates and that their empowering legislation should be reviewed in order to ensure that it provides a sufficiently comprehensive basis for their work.

2.41 Section 1 of this Act defines, among others, ‘Minister’ as the Minister of Justice. It is recommended that ‘Minister of Justice and Constitutional Development’ be substituted for ‘Minister of Justice’ in section 1.

2.42 This Act still refers to the Supreme Court. Section 2(1) empowers the Minister of Justice and Constitutional Development to appoint a Family Advocate at each division of the *Supreme Court*. Section 3(1) authorizes the Minister of Justice to appoint at each division of the Supreme Court a Family Counsellor to assist the Family Advocate with inquiries in terms of any applicable law. The references to the Supreme Court in these sections have become obsolete. The Constitution makes it clear that the courts in the Republic are the Constitutional Court, the Supreme Court

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<sup>59</sup> Section 13(2)(a) and (b) of the Civil Union Act 16 of 2006.

<sup>60</sup> For example, sections 3, 4, 5A, 6, and 7.

of Appeal, the High Courts and the Magistrates Courts. As stated above, although the legislature has, in the proposed Superior Courts Bill, retained the word division, it has abandoned the adjectives '*provincial*' or '*local*'.<sup>61</sup> Furthermore, as stated above, the Jurisdiction of the Regional Courts Amendment Act has amended the Magistrates' Courts Act of 1944 by conferring on regional courts the jurisdiction to entertain civil disputes including matters that were regulated by section 10 of the Administration Amendment Act of 1929.<sup>62</sup> Prior to its repeal, the Administration

<sup>61</sup> Clause 6 of the proposed Superior Courts Bill 7 of 2011 (available at <http://www.info.gov.za/view/DownloadFileAction?id=146753>) provides that:

**Constitution of High Court of South Africa**

6.(1) The High Court of South Africa consists of the following Divisions:

- (a) Eastern Cape Division, with its main seat in Grahamstown.
- (b) Free State Division, with its main seat in Bloemfontein.
- (c) Gauteng Division, with its main seat in Pretoria.
- (d) KwaZulu-Natal Division, with its main seat in Pietermaritzburg.
- (e) Limpopo Division, with its main seat in Polokwane.
- (f) Mpumalanga Division, with its main seat in Nelspruit.
- (g) Northern Cape Division, with its main seat in Kimberley.
- (h) North West Division, with its main seat in Mafikeng.
- (i) Western Cape Division, with its main seat in Cape Town.

<sup>62</sup> Prior to its repeal by the Jurisdiction of Regional Courts Amendment Act 31 of 2008, section 10 of the Administration Amendment Act of 1929 read as follows:

**10 Provision for establishment of Divorce Courts**

(1)(a) Notwithstanding anything to the contrary in any other law contained, the President may by proclamation in the Gazette establish Divorce Courts which shall have jurisdiction to hear and determine suits relating to the nullity of a marriage and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), if the parties are or if either of the parties is-

- (i) domiciled in the area of jurisdiction of the court on the date on which the proceedings are instituted; or
  - (ii) ordinarily resident in the area of jurisdiction of the court on the said date and has or have been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.
- (b) A Divorce Court hearing a matter referred to in paragraph (a), shall have the same jurisdiction as any High Court in relation to such a matter.
- (2) The area of jurisdiction of any court established under subsection (1) shall be determined by the Minister of Justice by notice in the Gazette.
- (3) (a) Every such court shall be a court of law and shall consist of so many divisions as the Minister of Justice may from time to time determine.
- (b) A division of the court-
- (i) shall consist of one or more presiding officers, one of whom shall be the president of the division, who shall be fit and proper persons appointed by the Minister of Justice in a permanent capacity after consultation with the Magistrates Commission; and
  - (ii) such persons shall for the purposes of the Magistrates Act, 1993 (Act 90 of 1993), be deemed to be magistrates of a regional division as contemplated in the Magistrates' Courts Act, 1944 (Act 32 of 1944).
- (c) The presiding officer of a court may in his or her discretion summon to his or her assistance two persons to sit and act with him or her as assessors in an advisory capacity on questions of fact.

Amendment Act of 1929 provided that “Any person who has been appointed as a Family Advocate or Family Counsellor under the Mediation in Certain Divorce Matters Act, 1987 (this Act) shall be deemed to have also been appointed in respect of any Divorce Court having jurisdiction in the area for which he or she had been so appointed.” Section 29(1B)(d) of the Magistrates’ Court Act provides as follows: “Any person who has been appointed as Family Advocate or Family Counsellor under the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) shall be deemed to have also been appointed in respect of any court for a regional division having jurisdiction in the area for which he or she has been so appointed.” However, no consequential amendments were made to this Act pursuant to the enactment of Act 31 of 2008.

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(3A) Section 9 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), relating to the appointment of magistrates in an acting or temporary capacity is applicable with the changes required by the context in respect of the appointment of acting or temporary presiding officers of Courts established under this section.

(4) (a) The Minister of Justice may from time to time make rules for the courts established by the President under this section, regulating-

- (i) the appointment and functions of the officers of the court;
- (ii) the records to be kept;
- (iii) the practice and procedure in the courts;
- (iv) the attendance of witnesses and the allowances to be paid to them;
- (v) the appointment of assessors and the allowances to be paid to them;
- (vi) the fees which may be charged by advocates and attorneys, costs as between party and party and as between attorney and client, and the taxation of costs;
- (vii) the tariff of fees to be imposed and collected by officers of the courts;
- (viii) the noting and continuation of appeals;
- (ix) the appearance in the courts of parties or persons on their behalf;
- (x) the appointment of the times and places for the holding of the courts;
- (xi) generally, all such other matters relating to the courts as the Minister of Justice may deem necessary for the purposes of this section.

(b) The rules for Divorce Courts which are in force on the date of the commencement of the Divorce Courts Amendment Act, 1997, shall remain in force until they are repealed or amended under this subsection: Provided that any rule purporting to restrict access to the Courts on the grounds of a person's race, shall be invalid and of no force.

(bA) Sittings of two or more divisions of the court may be held simultaneously.

(5) An appeal from the judgment of a Divorce Court shall lie to the High Court having jurisdiction.

(6) An appeal referred to in subsection (5) shall be noted and continued as if it were an appeal against a judgment of a magistrate's court in a civil matter, and all rules applicable to such last-mentioned appeal, whether in respect of the hearing, the confirmation or setting aside of the proceedings appealed against, or otherwise, shall mutatis mutandis apply to an appeal in terms of this section.

(7)(a) This section does not divest a High Court of jurisdiction in respect of any matter referred to in subsection (1).

(b) Any person who has been appointed as a Family Advocate or Family Counsellor under the Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987), shall be deemed to have also been appointed in respect of any Divorce Court having jurisdiction in the area for which he or she had been so appointed.

2.43 In the light of the constitutional provisions alluded to above, the changes brought about by the Jurisdiction of Regional Courts Amendment Act of 2008<sup>63</sup> and the changes likely to be enacted into law when the Superior Courts Bill comes into force, the SALRC recommends that the power of the Minister of Justice and Constitutional Development be extended to include the appointment of Family Advocates and Family Counsellors for courts of regional divisions as well. It thus recommends that sections 2(1) and 3(1) be amended as follows:

## **2 Appointment of Family Advocates**

(1) The Minister may appoint one or more officers in the public service at each division of the **[Supreme Court of South Africa]High Court and at any court for a regional division as contemplated in the Magistrates' Courts Act, 1944 (Act 32 of 1944)** to be styled the Family Advocate, to exercise the powers and perform the duties granted or assigned to a Family Advocate by or under this Act or any other law and the Minister, or any person authorized thereto in writing by him or her, may appoint one or more persons, whether or not they are officers in the public service, at any such division or at any court for a regional division to act as a Family Advocate or Family Advocates for the duration of a specific divorce action or an application or for more than one such action or application.

## **3 Appointment of Family Counsellors**

(1) Subject to the provisions of this section the Minister may appoint at each division of the **[Supreme Court of South Africa]High Court or at any court for a regional division** one or more suitably qualified or experienced persons to be styled the Family Counsellor, to assist the Family Advocate with an enquiry in terms of any applicable law.

2.44 Furthermore, a number of provisions of this Act refer to 'he', 'him', and 'his'. The SALRC recommends that the expression 'he or she' be substituted for the word 'he', wherever it occurs in sections 2(2); 4(2) and (3) and 5(1)(f). It is also recommended that the expression 'him or her' be substituted for word 'him' wherever it occurs in sections 2(1); 4(1) and 4(2). It is also recommended that the expression 'his or her' for the word 'his' in sections 2(2); 3(2); and 3(4).

2.45 Whilst the Act allows for Family Advocates to be permanently appointed, section 3(2) provides that Family Counsellors may only be appointed on three year contracts. This provision providing for permanent appointment for one group of

<sup>63</sup> The Minister of Justice and Constitutional Development, Honourable Minister Jeff Radebe, published Government Notice GN 670 in GG 33418 on 29 July 2010 which established the 62 seats of the regional court within a regional division in each province. Each designated place of sitting has its particular areas of jurisdiction and this enable litigants to institute action or application in the locality or nearest seat.

employees, the family advocates, compared to the fixed term employment for the counsellors, seems to the SALRC to constitute unjustifiable differentiation and possibly being out of line with practice. The question arises whether Family Counsellors are still appointed on three year contracts or on a permanent basis by the Department of Justice and Constitutional Development. It may be that in practice, family counsellors are employed on a permanent basis and therefore this provision is out of date. The SALRC will formulate its recommendation in respect of this provision after it has received input from stakeholders such as the Chief Family Advocate.

2.46 Section 4 of this Act empowers the family advocate to conduct an inquiry, at the request of one of the parties in a divorce action, and furnish the court with a report and recommendations on any matter concerning the welfare of a minor or dependent child. As indicated above in paragraph 2.28, the SALRC recommended in its report, following the review of the Child Care Act, that the terms 'custody' and 'access' in the Divorce Act be replaced with the terms 'care' and 'contact' respectively and that the definitions of 'care' and 'contact' that reflect the meanings ascribed to those terms by the SALRC be added to this Act. The SALRC proposes that the terms "custody" and "access" be replaced with the new concepts of "care" and "contact", and in line with its recommendations contained in its report on the Review of the Child Care Act, also proposes that the definitions of these terms be given the meaning ascribed to them in the Children's Act. This approach, as pointed out above, has now also been endorsed by the court in *WW v EW*. The SALRC thus recommends that section 4 be amended as follows:

#### **4 Powers and duties of Family Advocates**

(1) The Family Advocate shall-

- (a) after the institution of a divorce action; or
- (b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the **[custody]care of** or guardianship of, or **[access to]contact with**, a child made in terms of the Divorce Act, 1979 (Act 70 of 1979)

if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him or her to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him or her by the court.

(2) A Family Advocate may-

- (a) after the institution of a divorce action; or
- (b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the **[custody]care of** or guardianship of, or **[access to]contact with**, a child, made in terms of the Divorce Act, 1979 ,

if he or she deems it in the interest of any **[minor or dependent]** child of a marriage concerned, apply to the court concerned for an order authorizing him or her to institute an enquiry contemplated in subsection (1).

(3) Any Family Advocate may, if he or she deems it in the interest of any minor or dependent child of a marriage concerned, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in subsections (1)(b) and (2)(b) and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat.

2.47 Section 5(1)(dA) of this Act empowers the Minister of Justice and Constitutional Development to make regulations relating to the 'circumstances in which a court may cause an investigation to be carried out by a Family Advocate' as contemplated in the Maintenance Act 99 of 1998 and the Domestic Violence Act 116 of 1998. However, no mention is made of the Children's Act - and yet the Family Advocate has many specified responsibilities arising from that Act, some of which are already in operation since 1 July 2007. The Children's Act does not expressly amend the Mediation in Certain Divorce Matters Act. The SALRC thus recommends that section 5(1)(dA) of this Act be amended to read as follows:

The Minister may make regulations as to –

(dA) the circumstances in which a court may cause an investigation to be carried out by a Family Advocate as contemplated in section 10(1A) of the Maintenance Act, 1998 (Act No. 99 of 1998), **[and]** section 5(1A) of the Domestic Violence Act, 1998 (Act No 116 of 1998), and section 29(5) of the Children's Act, 2005 (Act No 38 of 2005).

2.48 The SALRC, in its consultation paper submitted to the DOJCD for comments, recommended that the short title of this Act be changed as this Act contains no express provision relating to mediation. The SALRC stated in this regard:

In view of the fact that this Act provides for the appointment of the Family Advocate and Family Councillors and sets out the powers and duties of the Family Advocates, and does not contain a provision relating to mediation, the SALRC recommends that the short title be changed.<sup>64</sup>

2.49 The SALRC has been persuaded to abandon its recommendation in light of the DOJCD's submission that:

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<sup>64</sup> Paragraph 2.44 of the Consultation Paper.

Although the Act deals with the appointment of Family Advocates, the Act also contains provisions relating to the role of the Family Advocate in divorce proceedings. The role is mediatory in the sense that the Family Advocate does not take sides in the matter. The primary role of the Family Advocate is to ensure that the best interests of children are taken care of. According to the *Hansard* debates on Act, the object of this Act is to help the court, adjudicating divorce actions, to decide whether the interests of the children who are involved, are being properly looked after. The following is also said: ‘When a marriage breaks down and parents become estranged, forces come into play that can have devastating effects on the physical and mental well-being of the children. It is at times such as these that wise counsel is called for.’ This indicates the mediatory role that the Family Advocate and Family Counsellor play in divorce proceedings. Therefore, the short title of the Act should, in our opinion, remain unchanged.

2.50 Lastly, the Act makes reference to “marriage” and uses adjectives “minor” and “dependent” child.<sup>65</sup>The question arises whether these provisions should not be aligned with the Civil Union Act of 2006 by including reference to a civil union and by jettisoning the adjectives “minor” and “dependent” when referring to a child.

## **5 Dissolution of Marriages on the Presumption of Death Act 23 of 1979**

2.51 The purpose of this Act, which came into operation in March 1979, was to provide for the dissolution of marriages (and now of civil unions) of persons presumed to be dead. It contains only 3 sections. The sections use the gender neutral language of ‘spouse’. The provisions are not unconstitutional. Read with section 13 of the Civil Union Act 17 of 2006, this Act should be seen as including the same consequences for civil unions as it does for marriage. There are two incidences of outdated language, mainly ‘Supreme Court’, which should read ‘High Court’. The SALRC recommends that sections 1 and 2 of this Act be amended as follows:

### **1 Court may declare certain marriages to be dissolved**

Any [provincial or local]division of the [Supreme Court]High Court [of South Africa] making an order that the death of any married person shall be presumed, may, when making that order or at any time thereafter, on the application of such person's spouse, make an order that the marriage in question shall be deemed to have been dissolved by death as from a date determined by the court,

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In section 4 of this Act.

whereupon that marriage shall for all purposes be deemed to have been dissolved by death as from the date so determined.

## **2 Effect of certain findings on marriages**

Whenever an inquest has been held in accordance with the provisions of the Inquests Act, 1959 (Act 58 of 1959), in respect of the death of any married person, and any finding in respect of that death has the same effect in terms of section 18(2) or (2A) of that Act, as if it were an order granted by the relevant reviewing court or judge or by the relevant **[provincial or local division]** of the **[Supreme Court]High Court [of South Africa]**, as the case may be, that the death of the person concerned shall be presumed in accordance with such finding, the marriage in question shall for all purposes be deemed to have been dissolved by death as from the date of death of the said person as recorded in terms of section 16(2)(c) of that Act in that finding.

2.52 With the exception of the amendments proposed above, the SALRC recommends that this Act be retained in the statute book.

## **6 Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996**

2.53 This Act has been repealed in its entirety by section 313 the Children's Act 38 of 2005. The repeal came into effect on 1 April 2010. This Act was therefore not reviewed for constitutionality or redundancy.

## **7 Reciprocal Enforcement of Maintenance Orders Act 80 of 1963**

2.54 The purpose of this Act is to provide for the reciprocal enforcement of maintenance orders made in South Africa and proclaimed countries. The failure of the common law to make adequate provision for the enforcement of foreign maintenance orders led to the enactment of this statutory mechanism. A maintenance order requires the periodical payment of sums of money. In this regard the aim of this Act bears some similarity to that of the Enforcement of Foreign Civil Judgments Act.

2.55 None of the provisions of this Act contravene section 9 of the Constitution. Section 1 of this Act provides that 'Minister' means the Minister of Justice. The SALRC recommends that this definition be amended as follows:

'Minister' means the Minister of Justice and Constitutional Development.

2.56 The SALRC recommends that the expression 'his or her' be substituted for the word 'his', wherever it occurs in section 3 and 4(1) of this Act.

2.57 Section 4(4)(a) of this Act provides that any person aggrieved by an order made by the under that section may, within such period and in such a manner as may be prescribed, appeal against such an order to the *provincial or local division of the Supreme Court of South Africa* having jurisdiction. The SALRC recommends that the wording used in this section should be aligned with that used in the Constitution by substituting the words 'high court' for the words 'provincial or local division of the Supreme Court of South Africa' as indicated below:

(4)(a) Any person aggrieved by an order made under this section may, within such period and in such manner as may be prescribed, appeal against such order to **[the provincial or local division of the Supreme Court of South Africa]** a High Court having jurisdiction.

## **8 Prevention of Family Violence Act 133 of 1993**

2.58 This Act made provision for the granting of interdicts in matters relating to family violence, made it obligatory to report ill-treatment of children and marital rape. This Act had nine sections, including the short title and commencement provision. Sections 1 to 3, 6 and 7 of this Act were repealed by the Domestic Violence Act 116 of 1998. Section 5 was repealed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The only provision that remained in force, until recently, was section 4 imposing an obligation to report ill-treatment of children. This provision has also been repealed,<sup>66</sup> with the result that there is no substantive provision remaining in the Act. In view of this, the SALRC recommends that it be repealed in its entirety.

## **9 Maintenance Act 99 of 1998**

2.59 The purpose of the Act was to reaffirm South Africa's commitment to giving priority to the rights of children, to their survival and to their protection and

<sup>66</sup> By Proclamation No. R. 12 of 1 April 2010, Gazette No 33076, Notice No 12. According to this proclamation, all sections of the Children's Act not yet in force came into operation on 1 April 2010.

development as evidenced by its signing of the World Declaration on the survival, protection and development of children agreed to at New York on 30<sup>th</sup> September 1990 and its accession on 16<sup>th</sup> June 1995 to the Convention on the Rights of the Child, signed at New York on 20<sup>th</sup> November 1989. The provisions of this Act are neither redundant nor in conflict with the right to equality in section 9 of the Constitution. This Act was enacted as an interim measure and problems have now arisen in practice requiring that a comprehensive investigation be undertaken. The Minister of Justice and Constitutional has referred this Act to the SALRC for review. The findings of the SALRC in this regard will be published in due course.

## **10 Domestic Violence Act 116 of 1998**

2.60 The purpose of the Act is to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide, and to introduce measures which seek to ensure that the relevant organs of the state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence.

2.61 The Act broadens the definition of domestic violence to include not only married women but unmarried women who are involved in relationships or living together, people in same sex relationships, mothers who live in fear of their sons and people sharing the same residence and living space. It does not therefore discriminate against the victims on the basis of marital status by protecting only the people that fall within the marriage relationship. The following relationships, some of which were not covered in terms of the Prevention of Family Violence Act, are now covered:

1. Husband and wife married by civil, customary or religious marriage.
2. Gay or lesbian relationships
3. People living together though not married
4. People in intimate relationship/People who are dating or are in perceived romantic, intimate or sexual relationship.
5. People who are engaged
6. People who share the same residence (home, housemates, etc)
7. Family members
8. Parents of a child or people responsible for the child
9. A minor without the help of a parent or a guardian

10. Any person including a health service provider, a police officer, social worker, teacher, neighbour, friend, relative, minister, who has an interest in the matter or in the child's welfare.

2.62 Furthermore, the Act clearly stipulates the various forms of domestic violence covered and does not leave the definition to the discretion of the magistrate, as it was the case in the Prevention of Family Violence Act. It removes every ambiguity with regard to what constitutes domestic violence. It clearly stipulates the following as forms of domestic violence:

1. Physical abuse
2. Sexual abuse
3. Emotional/psychological abuse, verbal
4. Intimidation
5. Harassment
6. Stalking
7. Damage to property
8. Entering a person's home without consent where people do not share the same residence
9. Any other controlling or abusive behaviour that harms or may cause harm to a person.

2.63 The Act is further defining all the different forms of abuse by way of examples. This is used to guide officials working on the Act to categorise the different forms of abuse and to remove ambiguities about what behaviour would constitute abuse or not.

2.64 The Act also places a duty on a member of the SAPS to inform a victim of his/her rights at the scene of the incidence of domestic violence. Provision is also made for the Commissioner of the SAPS to issue National Guidelines which must be observed when the police are dealing with domestic violence. Failure to comply with these guidelines will result in disciplinary proceedings against a member concerned.

2.65 With one exception, none of the provisions of this Act are redundant and they have not been surpassed by more recent legislation. The exception is the definition of 'arm' in section 1 of this Act. It is stated in that section that 'arm' means any arm defined in section 1(1) or any armament as defined in section 32(1) of the Arms and Ammunition Act, 1969 (Act 75 of 1969). Act 75 of 1969 referred to in this definition

was repealed by the Firearms Control Act 60 of 2000. The latter Act contains a definition of 'firearm'. In the light of this legislative development, the SALRC recommends that the definition of 'arm' in section 1 of this Act be repealed and that a new definition of 'firearm' be inserted and which would read as follows:

'Firearm' means a firearm as defined in section 1 of the Firearms Control Act, 2000 (Act 60 of 2000).

2.66 To align the entire Act with the amendment proposed above, the SALRC further recommends that consequential amendments be made to section 9 of this Act dealing with the seizure of arms and dangerous weapons. It is recommended, first, that the heading of section 9, and subsection (1) and (2) of this section, be amended by substituting the word 'firearm' for the word 'arm'. Secondly, the possession of a firearms in the Republic; the declaration of persons fit or unfit to possess a firearm and consequences of such declaration; the search, seizure and disposal of firearms is now regulated by the Firearms Control Act of 2000. The Firearms Control Act provides that Chapter 2 of the Criminal Procedure Act applies with the necessary changes to the entry of premises, search for and seizure of any firearm.<sup>67</sup> Although the Criminal Procedure Act sets out in detail what should happen to the articles lawfully seized by the State, the Firearms Control Act explicitly provides that firearms and ammunition seized by the State may be dealt with or disposed of in accordance with the provisions contained in it.<sup>68</sup> The Firearms Control Act also established the Registrar of Firearms, defined in the Act as the National Commissioner of the South African Police Service, whose powers include, among other things, declaring a person unfit to possess a firearm if it appears that a final protection order has been issued against that person in terms of the Act under consideration (the Domestic Violence Act) or if that persons has expressed the intention to kill or injure himself or herself or any other person;<sup>69</sup> and in respect of a firearm seized by the State, he may issue a notice that such firearm be destroyed.<sup>70</sup> The Firearms Control Act also

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<sup>67</sup> Section 110(1) of the Firearms Control Act of 2000.

<sup>68</sup> Section 110(3) of the Firearms Control Act.

<sup>69</sup> Section 102(1)(a) and (b) of the Firearms Control Act of 2000.

<sup>70</sup> Section 136 of the Firearms Control Act provides:

**136 No compensation payable where firearms or ammunition are destroyed by State**

prohibits possession of ammunition, which in terms of that Act means a primer or complete cartridge; In the light of the provisions of the Firearms Control Act discussed above, the SALRC recommends the following amendments to section 9 of the Domestic Violence Act:

**9 Seizure of [arms] firearms and dangerous weapons**

(1) The court must order a member of the South African Police Service to seize any **[arm]firearm** or dangerous weapon in the possession or under the control of a respondent, if the court is satisfied on the evidence placed before it, including any affidavits supporting an application referred to in section 4 (1), that-

(a) the respondent has threatened or expressed the intention to kill or injure himself or herself, or any person in a domestic relationship, whether or not by means of such **[arm] firearm** or dangerous weapon; or

(b) possession of such **[arm]firearm** or dangerous weapon is not in the best interests of the respondent or any other person in a domestic relationship, as a result of the respondent's-

- (i) state of mind or mental condition;
- (ii) inclination to violence; or
- (iii) use of or dependence on intoxicating liquor or drugs.

(2) Any **[arm]firearm** seized in terms of subsection (1) must be handed over to the holder of an office in the South African Police Service **[as contemplated in section 11 (2) (b) of the Arms and Ammunition Act, 1969 (Act 75 of 1969)]**, and the court must direct the clerk of the court to refer a copy of the record of the evidence concerned to the **[National Commissioner of the South African Police Service]Registrar as defined in the Firearms Control Act, 2000 (Act 60 of 2000)**, for consideration in terms of **[section 11 of the Arms and Ammunition Act, 1969]the Firearms Control Act, 2000**.

2.67 Since this Act recognises that anyone (man or woman) can be abused and that anyone can commit an act of domestic violence; affords protection to everyone affected by or threatened with domestic violence irrespective of, for example, sex, gender, age, marital status, sexual orientation; and does not make distinctions which would have rendered it constitutionally suspect, the SALRC recommends that it be retained, subject to the amendments recommended above.

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(1) The Registrar may in respect of any firearm or ammunition seized by, surrendered to or forfeited to the State, issue a notice in the Gazette stating that it is the intention of the State to destroy that firearm or ammunition.

(2) Any person who has a valid claim to the relevant firearm or ammunition may, within 21 days after the publication of the notice in the Gazette, make representations to the Registrar as to why the firearm or ammunition should not be destroyed.

(3) If the Registrar is satisfied, after consideration of any representations contemplated in subsection (2), that a valid claim to the relevant firearm or ammunition has not been proved, the firearm or ammunition may be destroyed and no compensation will be payable to anyone in respect thereof.

## 11 Recognition of Customary Marriages Act 120 of 1998<sup>71</sup>

2.68 The principal aim of this Act, as suggested in its title, is to give full legal recognition to customary marriages by ensuring that customary marriages are placed on an equal footing with civil marriages. It also sets out the requirements for a valid customary marriage and provide for equal status and capacity of spouses in customary marriages, among others.

2.69 In December 2008, the Constitutional Court in *Gumede v President of the Republic of South Africa*<sup>72</sup> considered section 7(1) and 7(2) of the Recognition of Customary Marriage Act which had the effect that marriages concluded before the enactment of this Act will continue to be governed by customary law, whilst those concluded after the commencement of this Act are to be marriages in community of property and of profit and loss, except where the parties agree otherwise. The effect of these provisions, read in conjunction with customary law as codified in section 20 of the KwaZulu Act on the Code of Zulu Law 16 of 1985 and sections 20 and 22 of the Natal Code of Zulu Law Proclamation R151 of 1987, was that a wife married in terms of customary law before the commencement of this Act had no claim to the family property during or upon dissolution of the marriage. The Constitutional Court found that these provisions discriminated unfairly against women and confirmed the declaration of invalidity made by the High Court in favour of the applicant (Mrs Gumede). The Constitutional Court declared section 7(1) of this Act invalid to the extent that it related to monogamous customary marriages and severed the words 'entered into after the commencement of this Act' from section 7(2).

2.70 In giving effect to the decision of the Constitutional Court, the Department of Home Affairs published a Draft Recognition of Customary Marriages Amendment Bill, 2009 for public comment.<sup>73</sup> This amendment Bill, if enacted in its current form, will effect changes to various provisions of the Recognition of Customary Marriages Act

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<sup>71</sup> The views of the SALRC relating to the constitutionality or redundancy of this Act will also be dealt with comprehensively in the consultation paper dealing with legislation administered by the Department of Home Affairs which the SALRC envisages submitting to that Department soon to confirm the SALRC's preliminary findings and proposals on amending and or repeal provisions. The SALRC envisages publishing its discussion paper on that review during the course of 2012.

<sup>72</sup> 2009 (3) SA 152 (CC).

<sup>73</sup> Government Gazette No 32198 of 8 May 2009, Notice 416 of 2009.

of 1998. In respect of section 7, the amendment Bill deletes subsection (1) and the words in subsection (2) found by the Constitutional Court to be inconsistent with the right to equality.<sup>74</sup> However, there are provisions which have not been dealt with in the draft Bill which also require attention. Section 3(3)(a) of this Act reads:

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

2.71 Section 3(3)(b) of this Act provides that:

If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act, 1961, applies.

2.72 Section 25 of the Marriage Act of 1961, incorporated in this Act by reference, authorises the Commissioner of Child Welfare as defined in section 1 of the Child Care Act of 1983 to grant written consent to a minor to enter into a marriage if he or she is satisfied, after conducting an inquiry, that the minor concerned does not have parents or guardian or is unable to obtain their consent.<sup>75</sup> The Child Care Act was

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<sup>74</sup> Clause 6 of the Draft Recognition of Customary Marriages Amendment Bill provides:

**6. Section 7 of the principal Act is hereby amended by-**

- (a) the deletion of subsection (1); and
- (b) the substitution for subsection (2) of the following subsection:

“A customary marriage **[entered into after the commencement of this Act]** in which a spouse is not a partner in any existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.”

<sup>75</sup> Section 25 of the Marriage Act 25 of 1961, incorporated by reference in the Customary Marriages Act, reads:

**25 When consent of parents or guardian of minor cannot be obtained**

(1) If a commissioner of child welfare defined in section 1 of the Child Care Act, 1983, is after proper inquiry satisfied that a minor who is resident in the district or area in respect of which he holds office has no parent or guardian or is for any good reason unable to obtain the consent of his parents or guardian to enter into a marriage, such commissioner of child welfare may in his discretion grant written consent to such minor to marry a specified person, but such commissioner of child welfare shall not grant his consent if one or other parent of the minor whose consent is required by law or his guardian refuses to grant consent to the marriage.

(2) A commissioner of child welfare shall, before granting his consent to a marriage under subsection (1), enquire whether it is in the interests of the minor in question that the parties to the proposed marriage should enter into an antenuptial contract, and if he is satisfied that such is the case he shall not grant his consent to the proposed marriage before such contract has been entered into, and shall assist the said minor in the execution of the said contract.

(3) A contract so entered into shall be deemed to have been entered into with the

repealed by the Children's Act of 2005. In terms of the Child Care Act, every magistrate was a commissioner of child welfare and every additional magistrate and assistant magistrate an assistant commissioner of child welfare. However, the Child Care Act of 1983 referred to in section 25(1) has been repealed by the Children's Act 38 of 2005. The Children's Act does not specify whose consent should be obtained if the consent of the parents or the guardian of a minor cannot be obtained. Therefore, there is a *lacuna* in the law in respect of this aspect. The SALRC proposes that the function performed by the commissioner of child welfare in terms of the Child Care Act of 1983 be performed by the presiding officers of the children's courts, namely magistrates contemplated in section 42(2) of the Children's Act 38 of 2005. The SALRC also recommends that the provisions of section 25 of the Marriage Act of 1961 be inserted in section 3(3)(b) of this Act with the proposed changes. This provision would read:

(b) If the consent of the parent or legal guardian cannot be obtained-

(i) **[If a commissioner of child welfare defined in section 1 of the Child Care Act, 1983,]**A presiding officer as defined in section 1 of the Children's Act, 2005 (Act 38 of 2005),**[is]** if he or she is satisfied after proper inquiry **[satisfied]** that a minor who is resident in the district or area in respect of which he or she holds office 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, such **[commissioner of child welfare]**presiding officer may in his discretion grant written consent to such minor to marry a specified person, but such **[commissioner of child welfare]**presiding officer shall not grant his or her consent if one or other parent of the minor whose consent is required by law or his guardian refuses to grant consent to the marriage.

(ii) A **[commissioner of child welfare]**presiding officer shall, before granting his or her consent to a marriage under **[subsection (1)]**paragraph (i), enquire whether it is in the interests of the minor in question that the parties to the proposed marriage should enter into an antenuptial contract, and if he or she is satisfied that such is the case he or she shall not grant his or her consent to the proposed marriage before such contract has been entered into, and shall assist the said minor in the execution of the said contract.

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assistance of the parent or guardian of the said minor.

(4) If the parent, guardian or commissioner of child welfare in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the Supreme Court of South Africa: Provided that such a judge shall not grant such consent unless he is of the opinion that such refusal of consent by the parent, guardian or commissioner of child welfare is without adequate reason and contrary to the interests of such minor.

(iii) A contract so entered into shall be deemed to have been entered into with the assistance of the parent or guardian of the said minor.

(iv) If the parent, guardian or **[commissioner of child welfare]presiding officer** in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the **[Supreme Court of South Africa] High Court**: Provided that such a judge shall not grant such consent unless he or she is of the opinion that such refusal of consent by the parent, guardian or **[commissioner of child welfare]presiding officer** is without adequate reason and contrary to the interests of such minor.

2.73 Section 3(5) of this Act provides that:

Subject to subsection (4), section 24A of the Marriage Act, 1961, applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

2.74 Section 24A of the Marriage Act, referred to in this provision, regulates the dissolution of marriage for want of consent.<sup>76</sup>Section 3(5) lacks internal coherence and can only be understood with reference to the Marriage Act of 1961. The SALRC recommends the substitution of the following section, which contains, *mutatis mutandis*, the provisions of section 24A of the Marriage Act, for section 3(5):

(a) A customary marriage between persons of whom one or both are minors shall not be void merely because the parents or guardian of the minor, or a presiding officer or a judge as the case may be whose consent is by law required for entering into a customary marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made-

(i) by a parent or guardian of the minor before he or she attains majority and within six weeks of the date on which the

<sup>76</sup>

**24A Consequences and dissolution of marriage for want of consent of parents or guardian**

(1) Notwithstanding anything to the contrary contained in any law or the common law a marriage between persons of whom one or both are minors shall not be void merely because the parents or guardian of the minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made-

- (a) by a parent or guardian of the minor before he attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or
- (b) by the minor before he attains majority or within three months thereafter.

(2) A court shall not grant an application in terms of subsection (1) unless it is satisfied that the dissolution of the marriage is in the interest of the minor or minors.

parent or guardian becomes aware of the existence of the marriage; or

(ii) by the minor before he or she attains majority or within three months thereafter.

(b) A court shall not grant an application in terms of paragraph (a) unless it is satisfied that the dissolution of the customary marriage is in the interest of the minor or minors.

2.75 Section 10(1) of this Act provides that ‘a man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961), if neither of them is a spouse in subsisting customary marriage with any other person’. This is the only instance in the Act where the words ‘man and a woman’ are used. In other provisions, the word ‘spouses’ is used. In the light of the fact that civil marriages entered into in terms of the Marriages Act 25 of 1961 are monogamous and can only be concluded by opposite sex couples, the choice of words used by the legislature in section 10(1) is understandable. This provision attests to the fact that a civil marriage under the Marriage Act remains an exclusively heterosexual institution.<sup>77</sup>

2.76 In the amendment Bill referred to above, this section has been amended by adding reference to the Civil Union Act.<sup>78</sup> The amendment is defensible because, while same-sex couples may only marry in terms of the Civil Union Act, opposite sex couples may choose to marry either under the Marriage Act or under the Civil Union Act.<sup>79</sup> The intention of the legislature seems to be to make it possible for an opposite sex couple in a monogamous customary marriage to enter into a civil partnership. The SALRC thus makes no proposals for the amendment of section 10(1).

2.77 References to the Minister of Justice in sections 7(4)(a)(ii) and 11(1) require

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<sup>77</sup> Elsje Bonthuys “Possibilities Foreclosed: The Civil Union Act and Lesbian and Gay Identity in Southern Africa” 726, 727 available at <http://sex.sagepub.com/content/11/6/726> (accessed on 21 September 2011).

<sup>78</sup> Clause 9 of the Bill reads:

“Section 10 of the principal Act is hereby amended by the substitution for section (1) of the following subsection:

“(1) A man and a woman between whom a customary marriage subsists are competent to contract am marriage with each other under the **[Marriage Act, 1961 (Act No. 25 of 1961),]**Civil Union Act or Marriage Act if neither of them is a spouse in a subsisting customary marriage with any other person.”

<sup>79</sup> See Bonthuys above, 727.

updating.<sup>80</sup> It is recommended that these references be amended to read 'Minister of Justice and Constitutional Development'.

**(a) Further issues arising from the review of this Act**

2.78 The review of the Recognition of Customary Marriages Act for constitutionality and redundancy provides an opportunity to revisit some of the issues that this Act might not have addressed adequately, namely, the right of a wife (or wives) to give consent to the husband's proposed further marriage, the emerging trend of husbands' deliberately failing to inform the existing wife (or wives) of his proposed marriage or to notify the proposed wife of his existing marriage or marriages, and the continued existence of other laws promulgated by the erstwhile homelands and self-governing territories regulating customary marriage.

**(i) Consent requirements**

2.79 In 1998, the SALRC, as part of its review of customary marriages, considered recommending that it be made obligatory for a husband in a customary marriage to obtain the consent of his first wife before contracting a second marriage.<sup>81</sup> The SALRC suggested this rule because it corresponded to the principle of customary law that if a man wants to marry again he should at least consult his senior wife. However, the SALRC was informed that the traditional ideal of consultation is no longer part of the 'living law'; that in practice the husband's duty to consult is treated as no more than a mere formality and that the first wife's right is interpreted as a right to be informed that her husband intends taking an additional wife. In the end, the SALRC accepted that legislating a right for the first wife to consent to subsequent marriages would create paper law and that it would be difficult to formulate a suitable penalty if a husband were to contract a second marriage, notwithstanding his first

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<sup>80</sup> Section 7(4)(a)(ii) of this Act provides that '(ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette' and section 11(1) provides that '(1) The Minister of Justice, in consultation with the Minister, may make regulations...'

<sup>81</sup> It was concluded that, strictly speaking, only the first wife suffers direct prejudice if the husband contracts a further marriage, since she is the person who may be compelled to submit to subsequent unions against her will. A later wife (or wives) has a choice in the matter. It was suggested that even the first wife can protect herself by insisting on a civil marriage and that it was not necessary to legislate her right to object to subsequent unions.

wife's refusal to approve it.<sup>82</sup>On the basis of these objections, the SALRC decided not to pursue the matter further.

2.80 This Act makes it clear that parties to a customary marriage must both consent to be married to each other in terms of customary law; it guarantees a wife in a customary marriage full status and capacity in addition to any other rights and powers she might have at customary law; and it makes it obligatory for a husband who wishes to enter into a further customary marriage to make an application to court to approve a written contract which will regulate the future matrimonial property system of his marriages.<sup>83</sup>With regard to the latter requirement, it was held in *MM v MN and Another*<sup>84</sup> that failure to comply with this requirement cannot but lead to the invalidity of the second marriage. The court further observed that the Act is silent on the question whether the consent of the first or earlier spouses to the proposed further marriage is required or whether their views on the proprietary and economic considerations only need to be considered by the court.<sup>85</sup>The most crucial question therefore is in respect of what is consent required? The court held that the absence of a specific reference to the consent of an earlier spouse suggested that the lawmakers intended to leave this issue for the determination by the provisions of the relevant customary legal system and that the compatibility of such an approach with the Bill of Rights may have to be considered in future.<sup>86</sup> The court held that a customary marriage entered into contrary to the dictates of the Act, with regard to the consideration of earlier spouse's views on the proprietary and economic considerations, is void rather than voidable.<sup>87</sup> The question whether a wife in a

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<sup>82</sup> See the SALRC's Report on Customary Marriages (Project 90) at 6.1.17-6.1.25. This Report is available at [http://www.justice.gov.za/salrc/reports/r\\_pri90\\_cstm\\_1998aug.pdf](http://www.justice.gov.za/salrc/reports/r_pri90_cstm_1998aug.pdf) (accessed on 1 December 2010).

<sup>83</sup> Section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 provides that: 'A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages'.

<sup>84</sup> *MM v MN and Another* 2010 (4) SA 286 (GNP).

<sup>85</sup> See paragraph 29 of the judgment.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Id.*, at paragraph 31. The court differed with Bennett's view quoted in the judgment (Bennett *Customary Law in South Africa*, 2004, p 247 and 248) that 'The procedure

customary marriage must be consulted or give consent to her husband's proposed further marriage was thus left open. It is submitted in this regard that the failure to recognize the wife's right to consent to the proposed further marriage reinforces the patriarchal notion that women should passively accept decisions made by their husbands, entrenches the spouses' unequal status within customary marriages, and thus undermines the constitutional guarantee of equality.

2.81 To facilitate a focused discussion on this issue, the SALRC requests submissions on the following questions.

- Should the wife have the right to consent or object to a subsequent marriage contemplated by her spouse on the basis of the right to equality?
- If so, should this right be limited to the first wife, or should it be extended to later wives as well?
- If the wife has not expressly or implicitly consented to her husband's subsequent customary marriage, what should the consequence of the lack of consent be?

(ii) *Notice requirements*

2.82 It is clear from the cases of *Khoza v Phago*<sup>88</sup> and *MM v MN*, referred to

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was imposed to protect wives; if they do not protest, then their long-term interests may be better served by treating their relationship with the husband as a valid marriage. ...This argument will also accommodate the strong probability that few husbands will comply with the Act. To deem all ensuing unions void will work hardships on the wives and their children when the husbands die or institute divorce proceedings.'

<sup>88</sup> Case No. 09/41473 delivered by the South Gauteng High Court on 15 October 2010. In this case the plaintiff and the defendant entered into a customary marriage in 2006 after negotiations were concluded between their families and *ilobolo* paid. The marriage was celebrated in accordance with customary law. In 2009 the defendant left the matrimonial home. When the plaintiff approached the Department of Home Affairs to register her customary marriage she discovered that her marriage could not be registered due to the defendant having entered into a civil marriage in 1991. The defendant deliberately failed to disclose his marital status with the intention of inducing the Plaintiff to marry him. The defendant had told the Plaintiff that he was divorced. The court observed that the Recognition of Customary Marriages Act does not address the question of bigamous marriages (at paragraph 7). The court held that in cases (such as the marriage between the Plaintiff and the Defendant in this case) where the marriage is void *ab initio*, the only recourse available is a claim for damages based on *action iniuriarum*. The court also highlighted, without elaborating, other shortcomings in this Act namely, the absence of a general nullity section; the issue of jurisdiction and registration. See paragraphs 11 and 12 of the judgment. There is a need for the Act to be amended in order to clarify the effect of failure to comply with section 7(6), what remedies are available where a customary marriage is void *ab initio* and the issues of jurisdiction and registration raised by the court. Since

above, that there is a trend to conceal existing and subsequent marriages by husbands intending to enter into polygynous marriages. The Recognition of Customary Marriages Act does not make it obligatory for a husband to notify his wife or wives of his intended further marriage. Nor does it require that the proposed wife should be made aware of existing marriages of the intended bridegroom. As stated above, the Act merely requires the husband to make an application to a court to approve a written contract which will regulate future matrimonial consequences of his marriage. A cursory review of legal developments in other jurisdictions, such as Sri Lanka and Egypt,<sup>89</sup> reveals that a marriage to a second wife is not permitted where the proposed wife is not aware that the man is already married. The man is required to give notice of his intention to enter into a polygynous marriage in the area where he lives, where his intended wife lives and where his present wife lives; and failure to comply with these notice requirements entitles the present wife or new wife to apply for a divorce. However, a wife loses the right to apply for divorce under these circumstances one year after she become aware of the subsequent marriage.

2.83 Should a notice requirement be included in the Recognition of Customary Marriages Act, and what should the consequences be of failure to comply with such a notice requirement?

*(iii) Continued existence of legislation or provisions in legislation regulating customary marriages enacted prior to the promulgation of the Recognition of Customary Marriages Act*

2.84 Furthermore, although all customary marriages are now regulated by the Recognition of Customary Marriages Act of 1998, this Act did not repeal all the legislation or provisions in legislation regulating customary marriages promulgated by the former homelands or self-governing territories, namely provisions contained in Chapter 7 of the KwaZulu Act on the Code of Zulu Law No 16 of 1985 and

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these issues fall outside the scope of the current investigation, the SALRC decided not to express any opinion in respect of these issues.

<sup>89</sup> See Polygyny and Canada's Obligations under International Human Rights Law; Family, Children and Youth Section Research Report, September 2006 available at: <http://www.justice.gc.ca/eng/dept-min/pub/poly/index.html#01> (accessed on 8 December 2010).

Proclamation R151 of 1987,<sup>90</sup> Natal Code of Zulu Law, 1987; chapter 3 and part 2 of chapter 5 of the the Transkei Marriage Act,<sup>91</sup> 1978 (Act 21 of 1978) and the provisions of the Bophuthatswana Marriage Act 15 of 1980 dealing with property rights of parties to a 'customary union'. The Codes have been repealed in their entirety by section 53 of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005. The repeal has not come into operation. The Transkei Marriage Act of 1978 and the Bophuthatswana Marriage Act of 1980 have both been earmarked for repeal in their entirety in the Draft Marriage Amendment Bill of 2009 which was published by the Department of Home Affairs in 2009.<sup>92</sup> However, this Bill has not yet been promulgated. The coming into force of the Recognition of Customary Marriages Act in 2000 has rendered the provisions in the Codes and in the Bophuthatswana and Transkei Marriage Acts regulating customary marriages redundant. The SALRC therefore proposes that the provisions in these statutes regulating customary marriages be repealed.

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<sup>90</sup> With the exception of sections 22 and 27(3) of Act 16 of 1985 and section 27(3) of the Natal Code of 1987, which were repealed by the Recognition of Customary Marriages Act.

<sup>91</sup> The Recognition of Customary Marriages Act only repealed sections 29 and 37, 38 and 39 of this chapter, leaving provisions dealing with consummation of customary marriages (s27,28 and 30); payment of dowry (s30); registration of customary marriages (s32-36); dissolution of customary marriages (s47-50) and section 51).

<sup>92</sup> The Draft Marriage Amendment Bill, 2009 was published in the Government Gazette of 13 February 2009, Notice 149 of 2009 for comments by the Department of Home Affairs.

## JUSTICE LAWS REPEAL AND AMENDMENT BILL, 2011

### 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 repeal the Matrimonial Affairs Act, 1953 and the Prevention of Family Violence Act, 1993; to amend certain laws relating to family and marriage so as to substitute or repeal obsolete or discriminatory provisions; and to provide for matters connected therewith.**

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:

1.        Repeal of laws

The laws specified in the Schedule are hereby repealed or amended to the extent set out in the third column of that Schedule.

2.        Short title and commencement

This Act shall be called the Justice Laws Repeal and Amendment Bill, 2011 and comes into operation on a date determined by the President by proclamation in the *Gazette*.

### Schedule

Number and year of law	Title or subject of law	Extent of repeal or amendment
Act 37 of 1953	Matrimonial Affairs Act, 1953	The whole
Act 80 of 1963	Reciprocal Enforcement of Maintenance Orders Act, 1963	<p>Amendment of section 1 by the substitution for the definition of 'Minister' of the following definition:</p> <p style="padding-left: 40px;">'Minister' means the Minister of Justice <u>and Constitutional Development</u>.</p> <p>Amendment of section 3 by the substitution of the words 'his or her' for the word 'his' wherever it occurs in that section.</p> <p>Amendment of section 4-</p> <p>(i) by the substitution of the expression 'his or her' for the word 'his' wherever it occurs in subsection (1); and</p> <p>(ii) by the substitution for paragraph (a) of subsection (4) of the following paragraph:</p>

		<p>(a) Any person aggrieved by an order made under this section may, within such period and in such manner as may be prescribed, appeal against such order to <b>[the provincial or local]</b> division of the <b>[Supreme Court of South Africa]High Court</b> having jurisdiction.</p>
Act 23 of 1979	Dissolution of Marriages on Presumption of Death Act, 1979	<p>Amendment of section 1-</p> <p>(i) by the substitution for section 1 of the following section:</p> <p><b>1 Court may declare certain marriages to be dissolved</b></p> <p>Any <b>[provincial or local]</b> division of the <b>[Supreme Court of South Africa]High Court</b> making an order that the death of any married person shall be presumed, may, when making that order or at any time thereafter, on the application of such person's spouse, make an order that the marriage in question shall be deemed to have been dissolved by death as from a date determined by the court, whereupon that marriage shall for all purposes be deemed to have been dissolved by death as from the date so determined.; and</p> <p>(ii) by the substitution for section 2 of the following section:</p> <p><b>2 Effect of certain findings on marriages</b></p> <p>Whenever an inquest has been held in accordance with the provisions of the Inquests Act, 1959 (Act 58 of 1959), in respect of the death of</p>

		<p>any married person, and any finding in respect of that death has the same effect in terms of section 18 (2) or (2A) of that Act, as if it were an order granted by the relevant reviewing court or judge or by the relevant <b>[provincial or local]</b> division of the <b>[Supreme Court of South Africa]High Court</b>, as the case may be, that the death of the person concerned shall be presumed in accordance with such finding, the marriage in question shall for all purposes be deemed to have been dissolved by death as from the date of death of the said person as recorded in terms of section 16(2)(c) of that Act in that finding.</p>
Act 70 of 1979	Divorce Act, 1979	<p>Amendment of section 1 by the substitution for paragraph (a) of the definition of 'divorce action' of the following paragraph:</p> <p>'divorce action' means an action by which a decree of divorce or other relief in connection therewith is applied for, and includes-</p> <p>(a) an application <b>[pendent lite]</b><u>pending the finalization of the divorce action</u> for an interdict or for the interim<b>[custody of, or access to]</b> <u>order relating to care of and contact with the child,[ a minor child of the marriage concerned or]</u> <u>and</u> for the payment of maintenance</p> <p>Amendment of section 5-</p> <p>(i) by the substitution for subsection (1) of the following subsection:</p>

		<p><b>5 Mental illness or continuous unconsciousness as grounds of divorce</b></p> <p>(1) A court may grant a decree of divorce on the ground of the mental illness of the defendant if it is satisfied-</p> <p>(a) that the defendant in terms of the Mental Health Care Act, <b>[1973 (Act 18 of 1973)]</b><u>2002 (Act 17 of 2002)-</u></p> <p>(i) has been admitted <b>[as a patient to an institution in terms of a reception order]</b><u>to a health establishment as an assisted mental health care user or an involuntary mental health care user;</u></p> <p>(ii) is being detained as a State patient at <b>[an institution or other place specified by the Minister of Correctional Services]</b><u>a health establishment designated in terms of section 41 of that Act; or</u></p> <p>(iii) <b>[is being detained as a mentally ill convicted prisoner at an institution]</b><u>is a convicted inmate with mental illness in correctional centre or transferred to a</u></p>
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		<p style="text-align: center;"><u>health establishment designated in terms of section 49 of that Act;</u></p> <p>and that he <u>or she</u> has, for a continuous period of at least two years immediately prior to the institution of the divorce action, not been discharged unconditionally as such <b>[a patient]</b><u>an assisted mental health care user, involuntary health care user, State patient or mentally ill [prisoner] inmate;</u> and</p> <p>(b) after having heard the evidence of at least two psychiatrists, of whom one shall have been appointed by the court, that the defendant is mentally ill and that there is no reasonable prospect that he <u>or she</u> will be cured of his <u>or her</u> mental illness and</p> <p>(ii) by the substitution for subsection (5) of the following subsection:</p> <p style="padding-left: 40px;">For the purposes of this section the expressions <b>['institution']</b> '<u>assisted mental health care user</u>', '<u>health establishment</u>', '<u>involuntary mental health care user</u>', '<u>mental illness</u>', <b>['patient']</b> <u>and</u> '<u>State patient</u>' <b>[and reception order']</b> shall bear the same meaning assigned to them in the Mental Health <u>Care Act</u>, <b>[1973]2002</b>.</p>
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		<p>Amendment of section 6 by the substitution for subsection (3) of the following subsection:</p> <p>A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or <b>[the custody or guardianship of or access to]</b><u>when making orders for the guardianship of, care of or contact with</u> a minor child<b>[of the marriage]</b>, make any order <b>[which it may deem fit, and may in particular, if in its opinion it would be that is</b> in the best interests of <b>[such minor] the child, and which is congruent with the relevant principles and provisions of the Children's Act 38 of 2005 [to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent)].</b></p> <p>Amendment of section 8 by the substitution for subsection (1) of the following subsection :</p>
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		<p>(1) A maintenance order or an order in regard to the <b>[custody]care of</b> or guardianship of, or <b>[access to]contact with</b>, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to <b>[access to]contact with</b> a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) or (2)(b) of the Mediation in Certain Divorce Matters Act, 1987, such an order with regard to the <b>[custody]care of</b> or guardianship of, or <b>[access to]contact with</b>, a child shall not be rescinded or varied or, in the case of an order with regard to <b>[access to]contact with</b> a child, not be suspended before the report and recommendations referred to in the said section 4(1) have been considered by the court.</p> <p>Repeal of section 16.</p> <p>Amendment of the Divorce Act, 1979-</p> <p>(i) by the substitution of the expression 'he or she' for the word 'he' wherever it occurs in sections 5(1)(a) and (b); and</p> <p>(ii) by the substitution of the expression 'his or her' for the word 'his' wherever it occurs in the definition of 'pension interest' in section 1, section 5(1)(b) and in section 7(7)(a) and (b).</p>
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Act 88 of 1984	Matrimonial Property Act, 1984	<p>Amendment of section 1-</p> <p>(i) by the substitution for the definition of 'banking institution' of the following definition:</p> <p style="padding-left: 40px;">'banking institution' means a bank as defined in section 1 of the Banks Act, <b>[1965 (Act 23 of 1965)]</b><u>1990 (Act 94 of 1990)</u>;</p> <p>(ii) by the substitution for the definition of 'building society' of the following definition:</p> <p style="padding-left: 40px;">'building society' means a <b>[ building society as defined in section 1 of the Building Society Act, 1965 (Act 24 of 1965)]</b><u>mutual bank registered in terms of the Mutual Banks Act, 1993 (Act 124 of 1993)</u>;</p> <p>(iii) by the substitution for the definition of 'court' of the following definition:</p> <p style="padding-left: 40px;">'court' means a <b>[provincial or local division of the Supreme Court of South Africa]</b><u>High Court having jurisdiction</u> or a <b>[divorce court instituted under section 10 of the Black Administration Act, 1927, Amendment Act, 1929 (Act 9 of 1929)]</b> <u>court for a regional division as contemplated in the Magistrates' Courts Act 1944 (Act 32 of 1944)</u>, and includes, for the purposes of section 16, a judge in chambers, and, for the purposes of section 16(1), a <b>[magistrate's ]</b><u>district court</u> which has jurisdiction in the matter concerned;</p>

		<p>(iv) by the substitution for the definition of 'financial institution' of the following definition:</p> <p style="padding-left: 40px;">'financial institution' means a financial institution as defined in section 1 of the Financial Institutions <b>[(Investment of Funds) Act, 1984 (Act 39 of 1984)]</b><u>(Protection of Funds) Act, 2001 (Act 28 of 2001)</u>;</p> <p>(v) by the substitution for the definition of 'joint estate' of the following definition:</p> <p style="padding-left: 40px;">'joint estate' means the joint estate of husband and wife married in community of property or <u>the joint estate of civil union partners who have entered into a civil union in accordance with the Civil Union Act, 2006 (Act 17 of 2006)</u>;</p> <p>(vi) by the substitution for the definition of 'listed securities' of the following definition:</p> <p style="padding-left: 40px;">'listed securities' means <b>[securities]</b> <u>listed securities</u> as defined in section 1 of the <b>[Stock Exchanges Control Act, 1985 (Act 1 of 1985)]</b><u>Securities Services Act, 2004, (Act 36 of 2004)</u>; and</p> <p>Amendment of section 21-</p> <p>(i) by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to</p>
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		<p>change the matrimonial property system, <b>[including the marital power]</b>, which applies to their marriage, and the court may, if satisfied that-; and</p> <p>(ii) by the deletion of subsection (2).</p> <p>Amendment of section 24 by the substitution of subsection (1) of the following subsection:</p> <p>(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 <b>[commissioner of child welfare]</b> <u>presiding officer as defined in the Children's Act, 2005 (Act 38 of 2005)</u> 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.</p> <p>Amendment of section 25 by the repeal of subsections (2) and (3).</p> <p>Amendment of the Matrimonial Property Act 88 of 1984 –</p> <p>(i) by the substitution of the expression 'he or she' for the word 'he' wherever it occurs in sections 3(1); 4(1)(b)(ii); 5(1); 6(1); 6(2); 15(9)(b); 17(4)(b); 19; 23(3),(4) and (6);</p>
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		<p>(ii) by the substitution of the expression 'him or her' for the word 'him' wherever it occurs in sections 8(3); 8(4); 15(3)(b)(i); 16; 17(1)(b), (3),(4); and 19;</p> <p>(iii) by the substitution of the expression 'his or her' for the word 'his' in section 3(1); 4(1)(a) 4(1)(b)(ii) and (iii); 5(1); 6(1),(2),(4);8(1);8(4);15(3)(b)(i); 15(6); 15(7)(b)(i); 17(1)(a) and (b); 19 and 23(2); and</p> <p>(iv) by the substitution of the expression 'himself or herself' for the word 'himself' in section 15(2)(h).</p>
Act 24 of 1987	Mediation in Certain Divorce Matters Act, 1987	<p>Amendment of section 1 by the substitution for the definition of 'Minister' of the following definition:  'Minister' means the Minister of Justice <u>and Constitutional Development.</u></p> <p>Amendment of section 2 by the substitution for subsection (1) of the following subsection:</p> <p>(1) The Minister may appoint one or more officers in the public service at each division of the <b>[Supreme Court of South Africa]</b><u>High Court and any court for a regional division as contemplated in the Magistrates' Courts Act, 1944 (Act 32 of 1944)</u> to be styled the Family Advocate, to exercise the powers and perform the duties granted or assigned to a Family Advocate by or under this Act or any other law and the Minister, or any person authorized thereto in writing by him <u>or</u></p>

		<p><u>her</u>, may appoint one or more persons, whether or not they are officers in the public service, at any such division <u>or at any court for a regional division</u> to act as a Family Advocate or Family Advocates for the duration of a specific divorce action or an application or for more than one such action or application.</p> <p>Amendment of section 3 by the substitution for subsection (1) of the following subsection:</p> <p>(1) Subject to the provisions of this section the Minister may appoint at each division of the <b>[Supreme Court of South Africa]</b><u>High Court or at any court for a regional division</u> one or more suitably qualified or experienced persons to be styled the Family Counsellor, to assist the Family Advocate with an enquiry in terms of any applicable law.</p> <p>Amendment of section 4-</p> <p>(i) by the substitution for section 4 of the following section:</p> <p><b>4 Powers and duties of Family Advocates</b></p> <p>(1) The Family Advocate shall-</p> <p>(a) after the institution of a divorce action; or</p> <p>(b) after an application has been lodged for the variation, rescission or suspension of an order with</p>
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		<p>regard to the <b>[custody]</b> <u>care of</u> or guardianship of, or <b>[access to]</b> <u>contact with</u>, a child, made in terms of the Divorce Act, 1979 (Act 70 of 1979)</p> <p>if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him <u>or her</u> to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him <u>or her</u> by the court.</p> <p>(2) A Family Advocate may-</p> <p>(a) after the institution of a divorce action; or</p> <p>(b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the <b>[custody]</b><u>care of</u> or guardianship of, or <b>[access to]</b> <u>contact with</u>, a child, made in terms of the Divorce Act, 1979,</p> <p>if he <u>or she</u> deems it in the interest of any [minor or dependent] child of a marriage concerned, apply to the court concerned for an order authorizing him <u>or her</u> to institute an enquiry contemplated in subsection (1).</p> <p>(3) Any Family Advocate may, if he <u>or she</u> deems it in the interest of</p>
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		<p>any minor or dependent child of a marriage concerned, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in subsections (1)(b) and(2) (b) and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat.; and</p> <p>Amendment of section 5 by the substitution for paragraph (dA) of subsection (1) of the following paragraph:</p> <p>(dA) the circumstances in which a court may cause an investigation to be carried out by a Family Advocate as contemplated in section 10(1A) of the Maintenance Act, 1998 (Act No. 99 of 1998), <b>[and]</b> section 5(1A) of the Domestic Violence Act, 1998 (Act No 116 of 1998), <u>and section 29(5) of the Children’s Act, 2005 (Act No 38 of 2005).</u></p> <p>Amendment of the Mediation in Certain Divorce Matters Act, 1987-</p> <p>(i) by the substitution of the expression ‘he or she’ for the word ‘he’, wherever it occurs in sections 2(2); 4(2) and (3) and 5(1)(f);</p> <p>(ii) by the substitution of the expression ‘him or her’ for the word ‘him’ wherever it occurs in sections 2(1); 4(1) and 4(2); and</p> <p>(iii) by the substitution of the expression ‘his or her’ for the word ‘his’ in sections</p>
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		2(2); 3(2); and 3(4).
Act 133 of 1993	Prevention of Family Violence, Act 1993	The whole.
Act 116 of 1998	Domestic Violence Act, 1998	<p>Amendment of section 1-</p> <p>(i) by the deletion of the definition of 'arm'; and</p> <p>(ii) by the insertion after the definition of 'emotional, verbal and psychological abuse' of the following definition:</p> <p style="padding-left: 40px;">"firearm" means a firearm as defined in section 1 of the Firearms Control Act, 2000 (Act 60 of 2000).</p> <p>Amendment of section 9-</p> <p>(i) by the substitution for the heading of the following heading:</p> <p style="padding-left: 40px;">'Seizure of <b>[arms]</b><u>firearms</u> and dangerous weapons'; and</p> <p>(ii) by the substitution for subsection (1) and (2) of the following subsections respectively:</p> <p style="padding-left: 40px;">(1) The court must order a member of the South African Police Service to seize any <b>[arm]</b><u>firearm</u> or dangerous weapon in the possession or under the control of a respondent, if the court is satisfied on the evidence placed before it, including any affidavits supporting an application referred to in section 4 (1), that-</p> <p style="padding-left: 80px;">(a) the respondent has threatened or expressed the</p>

		<p>intention to kill or injure himself or herself, or any person in a domestic relationship, whether or not by means of such <b>[arm] firearm</b> or dangerous weapon; or</p> <p>(b) possession of such <b>[arm]firearm</b> or dangerous weapon is not in the best interests of the respondent or any other person in a domestic relationship, as a result of the respondent's-</p> <ul style="list-style-type: none"> <li>(i) state of mind or mental condition;</li> <li>(ii) inclination to violence; or</li> <li>(iii) use of or dependence on intoxicating liquor or drugs.</li> </ul> <p>(2) Any <b>[arm]firearm</b> seized in terms of subsection (1) must be handed over to the holder of an office in the South African Police Service <b>[as contemplated in section 11 (2) (b) of the Arms and Ammunition Act, 1969 (Act 75 of 1969)]</b>, and the court must direct the clerk of the court to refer a copy of the record of the evidence concerned to the <b>[National Commissioner of the South African Police Service]Registrar as defined in the Firearms Control Act, 2000 (Act 60 of 2000)</b>, for consideration in terms of <b>[section 11 of the Arms and Ammunition Act, 1969]the Firearms Control Act, 2000</b>.</p>
Act 120 of 1998	Recognition of Customary	Amendment of section 3

	Marriages Act, 1998	<p>(i) by the substitution for paragraph (b) of subsection (3) of the following paragraph:</p> <p>(b) If the consent of the parent or legal guardian cannot be obtained[, <b>section 25 of the Marriage Act, 1961 applies</b>]-</p> <p>(i) <b>[If a commissioner of child welfare defined in section 1 of the Child Care Act, 1983,]</b><u>A presiding officer as defined in section 1 of the Children’s Act, 2005 (Act 38 of 2005).</u><b>[is]</b> if he or she is satisfied after proper inquiry <b>[satisfied]</b> that a minor who is resident in the district or area in respect of which he <u>or she</u> holds office has no parent or guardian or is for any good reason unable to obtain the consent of his <u>or her</u> parents or guardian to enter into a marriage, such <b>[commissioner of child welfare]</b><u>presiding officer</u> may in his discretion grant written consent to such minor to marry a specified person, but such <b>[commissioner of child welfare]</b><u>presiding officer</u> shall not grant his <u>or her</u> consent if one or other parent of the minor whose consent is required by law or his guardian refuses to grant consent to the marriage.</p> <p>(ii) A <b>[commissioner of child welfare]</b><u>presiding officer</u> shall, before granting his <u>or her</u> consent to a marriage under <b>[subsection</b></p>
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		<p>(1) <u>paragraph (i)</u>, enquire whether it is in the interests of the minor in question that the parties to the proposed marriage should enter into an antenuptial contract, and if he <u>or she</u> is satisfied that such is the case he <u>or she</u> shall not grant his <u>or her</u> consent to the proposed marriage before such contract has been entered into, and shall assist the said minor in the execution of the said contract.</p> <p>(iii) A contract so entered into shall be deemed to have been entered into with the assistance of the parent or guardian of the said minor.</p> <p>(iv) If the parent, guardian or <b>[commissioner of child welfare]</b> <u>presiding officer</u> in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the <b>[Supreme Court of South Africa]</b> <u>High Court</u>: Provided that such a judge shall not grant such consent unless he <u>or she</u> is of the opinion that such refusal of consent by the parent, guardian or <b>[commissioner of child welfare]</b><u>presiding officer</u> is without adequate reason and contrary to the interests of such minor; and</p> <p>(ii) by the substitution for subsection (5) of the following subsection:</p> <p>(a) <u>A customary marriage between persons of whom one or both are</u></p>
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		<p><u>minors shall not be void merely because the parents or guardian of the minor, or a presiding officer or a judge as the case may be whose consent is by law required for entering into a customary marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made-</u></p> <p><u>(i) by a parent or guardian of the minor before he or she attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or</u></p> <p><u>(ii) by the minor before he or she attains majority or within three months thereafter.</u></p> <p><u>(b) A court shall not grant an application in terms of paragraph (a) unless it is satisfied that the dissolution of the customary marriage is in the interest of the minor or minors.</u></p> <p>Amendment of section 7 by the substitution for subparagraph (ii) of paragraph (a) of subsection (4) of the following subparagraph:</p> <p>(ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice <u>and</u></p>
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		<p><u>Constitutional Development</u> by notice in the Gazette.</p> <p>Amendment of section 11 by the substitution for subsection (1) of the following subsection:</p> <p>(1) The Minister of Justice <u>and Constitutional Development</u>, in consultation with the Minister, may make regulations.</p>
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**ANNEXURE B****STATUTES ADMINISTERED BY THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

Principal legislation administered by the Department.

<b>Number</b>	<b>Name of Act, number and year</b>
1.	Indemnity and Trial of Offenders Act 6 of 1922
2.	Natal Conveyancers Act 24 of 1926
3.	Administration Amendment Act (previous title: 'Black Administration Act, 1927, Amendment Act') 9 of 1929
4.	Cape Statute Law Revision Act 25 of 1934
5.	General Law Amendment Act 46 of 1935
6.	Insolvency Act 24 of 1936
7.	Orange Free State Statute Law Revision Act 33 of 1936
8.	Natal Advocates and Attorneys Preservation of Rights Act 27 of 1939
9.	Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act 19 of 1941 (only section 5 remains)
10.	Magistrates' Courts Act 32 of 1944
11.	Commissions Act 8 of 1947
12.	Wills Act 7 of 1953
13.	Matrimonial Affairs Act 37 of 1953
14.	Black High Court Abolition Act 13 of 1954
15.	Criminal Procedure Act 56 of 1955 (only sections 319(3) and 384 remain)
16.	General Law Amendment Act 62 of 1955 (partly)
17.	Vexatious Proceedings Act 3 of 1956
18.	Riotous Assemblies Act 17 of 1956 (only sections 16 to 18 remain – section 16 to be repealed)
19.	Apportionment of Damages Act 34 of 1956
20.	General Law Amendment Act 50 of 1956
21.	Witchcraft Suppression Act 3 of 1957
22.	State Liability Act 20 of 1957
23.	Sexual Offences Act 23 of 1957
24.	Interpretation Act 33 of 1957
25.	State Attorney Act 56 of 1957
26.	General Law Amendment Act 68 of 1957 (only sections 5 and 7 remain)
27.	Trespass Act 6 of 1959
28.	Stock Theft Act 57 of 1959
29.	Inquests Act 58 of 1959
30.	Supreme Court Act 59 of 1959
31.	Indemnity Act 61 of 1961
32.	Conventional Penalties Act 15 of 1962
33.	South African Citizens in Antarctica Act 55 of 1962
34.	Extradition Act 67 of 1962
35.	Foreign Courts Evidence Act 80 of 1962
36.	General Law Further Amendment Act 93 of 1962 (partly)

<b>Number</b>	<b>Name of Act, number and year</b>
37.	Justices of the Peace and Commissioners of Oaths Act 16 of 1963
38.	Reciprocal Enforcement of Maintenance Orders Act 80 of 1963
39.	General Law Further Amendment Act 93 of 1963 (partly)
40.	Admission of Advocates Act 74 of 1964
41.	Prevention of Counterfeiting of Currency Act 16 of 1965 (partly)
42.	Civil Proceedings Evidence Act 25 of 1965
43.	Arbitration Act 42 of 1965
44.	Administration of Estates Act 66 of 1965
45.	Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965
46.	Justices of the Peace and Commissioners of Oaths Amendment Act 21 of 1967
47.	Pre-Union Statute Law Revision Act 78 of 1967
48.	Prize Jurisdiction Act 3 of 1968
49.	Dangerous Weapons Act 71 of 1968 (partly)
50.	Assessment of Damages Act 9 of 1969
51.	Establishment of the Northern Cape Division of the Supreme Court of South Africa Act 15 of 1969
52.	Prohibition of Disguises Act 16 of 1969
53.	Formalities in Respect of Leases of Land Act 18 of 1969
54.	Legal Aid Act 22 of 1969
55.	Abolition of Juries Act 34 of 1969
56.	Prescription Act 68 of 1969
57.	Pre-Union Statute Law Revision Act 42 of 1970
58.	Suretyship Amendment Act 57 of 1971
59.	South African Law Reform Commission Act 19 of 1973
60.	Companies Act 61 of 1973 (partly)
61.	General Law Amendment Act 62 of 1973 (partly)
62.	Prescribed Rate of Interest Act 55 of 1975
63.	Petition Proceedings Replacement Act 35 of 1976
64.	Pre-Union Statute Law Revision Act 36 of 1976
65.	Abolition of Civil Imprisonment Act 2 of 1977
66.	Indemnity Act 13 of 1977
67.	Prohibition of the Exhibition of Films on Sundays and Public Holidays Act 16 of 1977
68.	Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977
69.	Pre-Union Statute Law Revision Act 43 of 1977
70.	Criminal Procedure Act 51 of 1977
71.	Dissolution of Marriages on Presumption of Death Act 23 of 1979
72.	Pre-Union Statute Laws Revision Act 24 of 1979
73.	Attorneys Act 53 of 1979
74.	Divorce Act 70 of 1979
75.	Protection of Information Act 84 of 1982
76.	Admiralty Jurisdiction Regulation Act 105 of 1983
77.	Small Claims Courts Act 61 of 1984
78.	Matrimonial Property Act 88 of 1984
79.	Rules Board for Courts of Law Act 107 of 1985
80.	Special Courts for Blacks Abolition Act 34 of 1986

<b>Number</b>	<b>Name of Act, number and year</b>
81.	Justices of the Peace and Commissioners of Oaths Amendment Act 36 of 1986
82.	Sheriffs Act 90 of 1986
83.	Transfer of Powers and Duties of the State President Act 97 of 1986 (partly)
84.	Mediation in Certain Divorce Matters Act 24 of 1987
85.	Intestate Succession Act 81 of 1987
86.	Law of Evidence and the Criminal Procedure Act Amendment Act 103 of 1987
87.	Criminal Law Amendment Act 1 of 1988
88.	Enforcement of Foreign Civil Judgments Act 32 of 1988
89.	Law of Evidence Amendment Act 45 of 1988
90.	Trust Property Control Act 57 of 1988
91.	Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989
92.	Reciprocal Service of Civil Process Act 12 of 1990
93.	Maintenance of Surviving Spouses Act 27 of 1990
94.	Transfer of Powers and Duties of the State President Act 51 of 1991
95.	Adjustment of Fines Act 101 of 1991
96.	Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991
97.	Game Theft Act 105 of 1991
98.	Decriminalization Act 107 of 1991
99.	Prevention of Public Violence and Intimidation Act 139 of 1991
100.	Domicile Act 3 of 1992
101.	General Law Amendment Act 139 of 1992 (partly)
102.	Drugs and Drug Trafficking Act 140 of 1992
103.	Security by Means of Movable Property Act 57 of 1993
104.	Documentary Evidence from Countries in Africa Act 62 of 1993
105.	Magistrates Act 90 of 1993
106.	Security Forces Board of Inquiry Act 95 of 1993 (not in operation yet)
107.	Recognition of Foreign Legal Qualifications and Practice Act 114 of 1993
108.	Magistrates' Courts Amendment Act 120 of 1993 (not in operation yet)
109.	General Law Third Amendment Act 129 of 1993 (partly)
110.	Prevention of Family Violence Act 133 of 1993
111.	Constitution of the Republic of South Africa 200 of 1993 (certain sections remain in force)
112.	Judicial Service Commission Act 9 of 1994
113.	Public Protector Act 23 of 1994
114.	Human Rights Commission Act 54 of 1994
115.	Constitutional Court Complementary Act 13 of 1995
116.	Promotion of National Unity and Reconciliation Act 34 of 1995
117.	Right of Appearance in Courts Act 62 of 1995
118.	Judicial Matters Amendment Act 85 of 1995
119.	Justice Laws Rationalisation Act 18 of 1996
120.	National Youth Commission Act 19 of 1996
121.	Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996

<b>Number</b>	<b>Name of Act, number and year</b>
122.	Special Investigating Units and Special Tribunals Act 74 of 1996
123.	International Co-operation in Criminal Matters Act 75 of 1996
124.	Constitution of the Republic of South Africa 1996
125.	National Council of Provinces (Permanent Delegates Vacancies) Act 17 of 1997
126.	Abolition of Corporal Punishment Act 33 of 1997
127.	State of Emergency Act 64 of 1997
128.	Contingency Fees Act 66 of 1997
129.	Public Funding of Represented Political Parties Act 103 of 1997
130.	Criminal Law Amendment Act 105 of 1997
131.	National Prosecuting Authority Act 32 of 1998
132.	Magistrates' Courts Amendment Act 67 of 1998
133.	Determination of Delegates (National Council of Provinces) Act 69 of 1998
134.	Maintenance Act 99 of 1998
135.	Witness Protection Act 112 of 1998
136.	Debt Collectors Act 114 of 1998
137.	Domestic Violence Act 116 of 1998
138.	Recognition of Customary Marriages Act 120 of 1998 (partly)
139.	Prevention of Organised Crime Act 121 of 1998
140.	Judicial Matters Second Amendment Act 122 of 1998
141.	Promotion of Access to Information Act 2 of 2000
142.	Promotion of Administrative Justice Act 3 of 2000
143.	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
144.	Protected Disclosures Act 26 of 2000
145.	Cross-Border Insolvency Act 42 of 2000
146.	Administration of Estates Laws Interim Rationalisation Act 20 of 2001
147.	Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001
148.	Judges' Remuneration and Conditions of Employment Act 47 of 2001
149.	Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002
150.	Reinstatement of Enrolment of Certain Deceased Legal Practitioners Act 32 of 2002
151.	Institution of Legal Proceedings against certain Organs of State Act 40 of 2002
152.	Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (partly)
153.	Prevention and Combating of Corrupt Activities Act 12 of 2004
154.	Citation of Constitutional Laws Act 5 of 2005
155.	Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005
156.	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
157.	South African Judicial Education Institute Act 14 of 2008
158.	Judicial Service Commission Amendment Act 20 of 2008
159.	Jurisdiction of Regional Courts Amendment Act 31 of 2008

