



**DISCUSSION PAPER 133**

**PROJECT 25**

**STATUTORY LAW REVISION:  
LEGISLATION ADMINISTERED BY THE  
DEPARTMENT OF HOME AFFAIRS**

**CLOSING DATE FOR COMMENT:  
31 MAY 2015**

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## Introduction

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

The members of the SALRC are–

Justice MML Maya (Chairperson)  
Judge J Kollapen (Vice-Chairperson)  
Prof V Jaichand  
Mr I Lawrence  
Adv M Sello  
Ms T Siwendu

The Acting Secretary of the SALRC is Adv Jacob Skosana. The project leader responsible for this investigation until 31 December 2011 was Honourable Madam Justice Yvonne Mokgoro. The project leader responsible for this investigation is Mr Irvin Lawrence. The researcher assigned to this investigation is Ms Maureen Moloji.

On 31 July 2008, Ms Mabandla, the then Minister of Justice and Constitutional Development appointed the following advisory committee members who assisted the SALRC to develop this Discussion Paper, namely:

Professor Tshepo Mosikatsana (University of the Witwatersrand)  
Professor Jacqueline Heaton (University of South Africa)  
Professor Marita Carnelley (University of Natal)  
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## Preface

This Discussion Paper has been prepared to elicit responses from stakeholders on the preliminary findings and proposals contained in this Discussion Paper and for the stakeholders to confirm that they have no objection to the provisionally proposed repeals and amendments. The SALRC has liaised with the Department of Home Affairs (DHA) in the phases of this investigation leading to the development of this Discussion Paper. The SALRC acknowledges the valuable assistance from officials of the DHA: Legal Services. This Discussion Paper will serve as a basis for the SALRC's further deliberations in the development of a Report. The Discussion Paper contains the SALRC's preliminary proposals. The views, conclusions and proposals that follow in this Discussion Paper must not be regarded as the SALRC's final views or final recommendations.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the SALRC may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000. Respondents are requested to submit written comment and representations to the SALRC by 31 May 2015 at the address appearing on the previous page. Comment can be sent by e-mail or by post.

This Discussion Paper is also available on the Internet at <http://salawreform.justice.gov.za/dpapers.htm>. Any enquiries about the Discussion Paper should be addressed to the researcher allocated to the project, Ms. Maureen Moloji. Contact particulars appear on the previous page.

The proposed Home Affairs and Related Matters Laws Amendment and Repeal Bill is contained in Annexure A. Schedule 1 of the proposed Bill consists of Acts that may be wholly repealed. Schedule 2 consists of Acts that may be repealed to the extent set out in the third column of that Schedule while Schedule 3 consists of Acts that may be amended to the extent set out in the third column of that Schedule. Annexure B lists the statutes administered by the DHA.

## Preliminary recommendations and questions for comments

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 legislation or provisions in legislation that are inconsistent with the equality clause in the Constitution of the Republic of South Africa, 1996 (the Constitution), redundant or obsolete. Pursuant to this mandate, the SALRC has established that there are 2800 Acts in the statute book. The SALRC identified 56 statutes that are administered by the DHA (see Annexure B).

2. After its analysis of these statutes, the SALRC proposes that—

(a) The following statutes listed in the Home Affairs and Related Matters Laws Amendment and Repeal Bill be repealed for the reasons set out in Chapter 2 of this Discussion Paper:

- (i) Prohibition of Mixed Marriages Amendment Act, 1968 (Act No. 21 of 1968)
- (ii) Elections and Identification Amendment Act, 1989 (Act No. 92 of 1989)
- (iii) Electoral and Related Affairs Amendment Act, 1985 (Act No. 36 of 1985)
- (iv) Population Registration Act Repeal Act, 1991 (Act No. 114 of 1991)
- (v) Aliens Control Amendment Act, 1993 (Act No. 3 of 1993)

(b) The Acts set out in Schedule 2 of the proposed Bill contained in Annexure A be repealed to the extent set out in that Schedule, for the reasons set out in Chapter 2 of this Discussion Paper; and

(c) The provisions of the Acts set out in Schedule 3 of the proposed Bill contained in Annexure A be amended for the reasons set out in Chapter 2 of this Discussion Paper.

3. Furthermore, it is possible that some of the statutes recommended for repeal are still useful, and should thus not be repealed. Moreover, it is also possible that there are statutes or provisions that are not identified for repeal in this Discussion Paper which are of no practical utility anymore and which could be repealed. The SALRC requests that the DHA identify them and bring them to the attention of the SALRC.

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# **BACKGROUND AND SCOPE OF PROJECT 25**

## **A Introduction**

### **1 The objects of the South African Law Reform Commission**

1.1 The objects of the SA Law Reform Commission (SALRC) are set out in the South African Law Reform Commission Act, 1973 (Act 19 of 1973), as follows: 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:

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

1.2 Thus the SALRC is an advisory statutory body whose aim is the renewal and improvement of the law of South Africa on a continual basis.

### **2 History of the investigation**

1.3 Shortly after its establishment in 1973, the SALRC began revising all pre-Union legislation, as part of its Project 7. This investigation resulted in the repeal of approximately 1 200 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, which aims to establish a permanently simplified, coherent, and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act, 1981 (Act 94 of 1981), which repealed approximately 790 post-Union statutes.

1.4 Immediately after the advent of constitutional democracy in South Africa in 1994, the legislation enacted prior to that year remained in force. Numerous pre-1994 provisions do not comply with the country's new Constitution, a discrepancy exacerbated by the fact that some of those provisions were enacted to promote and sustain the policy of apartheid.

1.5 In 2003, Cabinet approved that the Minister of Justice and Constitutional Development should coordinate and mandate the SALRC to review provisions in the legislative framework

that would result in discrimination, as defined by section 9 of the Constitution. Section 9 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, or birth.

1.6 In 2004 the SALRC included in its law reform programme an investigation on statutory law to revise all statutes from 1910 to date. Whereas previous investigations had focused on identifying obsolete and redundant provisions for repeal, the current investigation emphasizes compliance with the Constitution. Redundant and obsolete provisions that are identified in the course of this investigation are also recommended for repeal, but the constitutional inquiry has focused mainly on identifying statutory provisions that blatantly violate the provisions of section 9 (the Equality Clause) of the Constitution.

1.7 A 2004 provisional audit by the SALRC of national legislation that has remained on the statute book since 1910 established that roughly 2 800 individual statutes exist, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts, and partially repealed Acts. A substantial number of Acts on the statute book no longer serve any useful purpose and many others have retained unconstitutional provisions. This situation has already resulted in expensive and sometimes protracted litigation.

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

1.8 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>1</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.

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<sup>1</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 (hereinafter referred to as Law Commission for England and Wales *Background Notes on Statute Law Repeals*).

1.9 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>2</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 is presently remedied by another measure or provision.

1.10 In the context of this investigation, the statutory law revision primarily targets statutory provisions that are obviously at odds with the Constitution, particularly section 9.

1.11 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that are candidates for repeal:<sup>3</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.

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<sup>2</sup> See Law Commission for England and Wales *Background Notes on Statute Law Repeals* the *Background*, par 6.

<sup>3</sup> See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 7.

1.12 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>4</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 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.

1.13 Statutory provisions usually become redundant as time passes.<sup>5</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-

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<sup>4</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 28 May 2008.

<sup>5</sup> See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 9 and 10.

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.

1.14 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)<sup>6</sup> 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 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.

1.15 The methodology adopted in this investigation is to review the statute book by Department – the SALRC identifies a Department, reviews the national legislation administered by that Department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper and consults with that Department to verify the SALRC’s preliminary findings and proposals. The next step that the SALRC undertakes is the

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<sup>6</sup> With the exception of few minor changes, the South African Interpretation Act 5 of 1910 repeated the provisions of the United Kingdom Interpretation Act of 1889 (Interpretation Act 1889 (UK) 52 & 53 Vict c 63).

<sup>7</sup> See Law Commission for England and Wales *Background Notes on Statute Law Repeals the Background*, par 8.

development of a discussion paper in respect of the legislation of each Department, and upon its approval by the SALRC, it is published for general information and comments. Finally, the SALRC develops a report in respect of each Department that reflects the comments on the discussion paper and contains a draft Bill proposing amending legislation.

## **C THE INITIAL INVESTIGATION**

1.16 In the early 2000s, the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies at the University of the Witwatersrand to conduct a preliminary study on law reform. The study examined the feasibility, scope, and operational structure of revising the South African statute book for constitutionality, redundancy, and obsolescence. The Centre for Applied Legal Studies pursued four main avenues of research in this study, which was conducted in 2001 and submitted to the SALRC in April 2001.<sup>8</sup> These four steps are outlined here.

1. A series of interviews was conducted with key role-players drawn from the three governmental tiers, Chapter 9 institutions, the legal profession, academia, and civil society. These interviews revealed a high level of support for a law reform project.
2. All Constitutional Court judgments up to 2001 were analysed. The results were compiled as schedules summarising the nature and outcome of these cases, and the statutes impugned. The three most problematic categories of legislative provisions were identified, and the Constitutional Court's jurisprudence in each category was analysed. The three most problematic 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 for each category.
3. Sixteen randomly-selected national statutes were tested against the guidelines. The results were compared with the results of a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. Comparison of the outcomes showed that a targeted revision of the statute book in accordance with the guidelines had produced highly effective results.
4. A survey of law reform in five other countries (United Kingdom, Germany, Norway, Switzerland, and France) was conducted. Apart from France, all these

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<sup>8</sup> "Feasibility and Implementation Study on the Revision of the Statute Book" prepared by the Law and Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand April 2001 available upon request from [pvanwyk@justice.gov.za](mailto:pvanwyk@justice.gov.za).

countries had conducted or were conducting statutory revision exercises. The motivation for the revision and the outcomes of the exercises differed by country.

1.17 The SALRC finalised the following Reports, proposing reform of discriminatory areas of the law or the repeal of specific discriminatory provisions –

- (a) the Recognition of Customary Marriages (August 1998);
- (b) the Review of the Marriage Act 25 of 1961 (May 2001);
- (c) the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);
- (d) Traditional Courts (January 2003);
- (e) the Recognition of Muslim Marriages (July 2003);
- (f) the Repeal of the Black Administration Act 38 of 1927 (March 2004);
- (g) Customary Law of Succession (March 2004); and
- (h) Domestic Partnerships (March 2006).

## **D SCOPE OF THE PROJECT**

1.18 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.

1.19 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. This investigation focuses on the constitutionality of provisions in statutes of South African law, 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 directed 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, or birth. The SALRC agreed that the project should proceed by scrutinising and revising national legislation that discriminates unfairly.<sup>9</sup> However, as explained in the preceding sections of this chapter, even the section 9 inquiry was limited because it dealt primarily with statutory provisions that were blatantly in conflict with section 9 of the Constitution. This delimitation arose mainly from considerations of time and capacity. Nonetheless, during the investigation some other anomalies and obvious inconsistencies with the Constitution were identified, and recommendations have been made on how to address them.

## **E CONSULTATION WITH STAKEHOLDERS**

1.20 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. The aim of the publication of discussion papers in this investigation is likewise to determine whether departments and stakeholders agree with and support the proposed findings and legislative amendment or repeal proposals. The SALRC relies on the assistance of departments and stakeholders. This will ensure that all relevant provisions are identified during this review, and dealt with responsively and without creating unintended negative consequences.

1.21 The methodology adopted in this investigation is to review the statute book by Department — the SALRC identifies a Department, reviews the national legislation administered by that Department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper and consults with that Department to verify the SALRC’s preliminary findings and proposals. The next step the SALRC undertakes is the development of a discussion paper in respect of legislation of each Department, and upon its

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<sup>9</sup> 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 available upon request from [pvanwyk@justice.gov.za](mailto:pvanwyk@justice.gov.za).

approval by the SALRC, it is published for general information and comment. Finally, the SALRC develops a report in respect of each Department that reflects the comment on the discussion paper and contains a draft Bill proposing amending legislation.

1.22 In January 2012 the SALRC submitted its Consultation Paper containing the SALRC's preliminary findings and proposals to the Department of Home Affairs.

1.23 On 13 August 2013 the Department of Home Affairs submitted its comments to the SALRC on the SALRC's Consultation Paper. The SALRC then commenced developing its draft Discussion Paper which reflected the comments it received from the Department of Home Affairs.

1.24 The Commission considered the draft Discussion Paper on this review at its meeting held on 6 December 2014 and approved its publication for general information and comment.

1.26 The SALRC acknowledges the valuable assistance it received, particularly from officials in the Legal Department Office of the Department of Home Affairs during all the phases of this review.

## CHAPTER 2

# LEGISLATIVE REVIEW: LEGISLATION ADMINISTERED BY THE DEPARTMENT OF HOME AFFAIRS

### A. INTRODUCTION

2.1 The mandate of the DHA stem from the Constitution, various Acts, as well as other policy documents. The DHA is responsible for the recording of births; marriages/civil unions and deaths. The DHA is the custodian, protector and verifier of the identity and status of citizens and other persons' resident in South Africa. This makes it possible for people to realise their rights and access benefits and opportunities in both the public and private domains. The DHA manages, regulates and facilitates the movement of persons through ports of entry (i.e. entry and departures). Furthermore, the DHA also provides civic and immigration services at foreign missions; and determines the status of asylum seekers and refugees in compliance with international obligations.

2.2 Originally the SALRC reviewed 56 pieces of legislation that were administered by DHA to determine whether they contain provisions that are inconsistent with the Constitution, particularly with the right to equality, or provisions that no longer serve any useful purpose as a result of redundancy or obsolescence. On 15 July 2014 a Proclamation was issued by the Presidency which transferred the administration of Films and Publication Act, 1996 (Act No. 65 of 1996) from DHA to the new Department of Telecommunications.

2.3 This review of the home affairs-related legislation in this paper does not deal with the statutes in a chronological order as *per* the number and year of each Act, but according to identified themes. The SALRC considers that this approach enhances the clarity of the provisional proposals made. The advisory committee identified the following four themes in relation to the Home Affairs legislation reviewed :

**Theme 1** relates to all pieces of legislation dealing with marriages in the Republic. This theme is subdivided into legislation that deals with civil and customary marriages;

**Theme 2** is titled "migration and status" and deals with legislation regulating status, citizenship and the entry and exit of nationals and non-nationals into the Republic;

**Theme 3** is titled “electoral laws” and deals with legislation governing electoral matters; and

**Theme 4** is titled “persons and others” and deals with legislation relating to births and deaths and any other pieces of legislation not covered by other themes.

## **B. EXPLANATORY NOTES ON THE REPEALS AND AMENDMENT**

### **1. Theme 1: Marriage**

#### **(a) Sub-Theme: Civil Marriages**

2.4 The brief of the advisory committee does not require an evaluation of whether the pluralist South African marriage laws should be rationalised or whether and how full recognition should be afforded to Muslim and Hindu marriages. The present discussion relates to the evaluation of the Acts that fall under the sub-theme "Civil marriages". Each of the Acts that fall under the sub-theme will be dealt with separately below. Only the provisions which might need to be repealed or amended in light of the ambit of the present review are discussed. Thus, for example, the ambit of the investigation does not extend to a discussion of the proposed amendments to the Marriage Act, 1961 (Act No. 25 of 1961) (Marriage Act) that are contained in the draft Marriage Amendment Bill, 2008<sup>10</sup> and the draft Marriage Amendment Bill, 2009.<sup>11</sup> Where relevant, the draft Bills will however be mentioned.

#### **(i) Marriage Act, 1961 (Act No. 25 of 1961)**

2.5 The main purpose of the Marriage Act is to govern aspects of the requirements for a valid civil marriage, particularly the solemnisation of civil marriages.<sup>12</sup> In the main, the Act still serves its purpose. However, some of its provisions are outdated, redundant or unconstitutional.

2.6 Section 1 of the Marriage Act defines the term “Commissioner” as follows: “‘Commissioner’ includes an Additional Commissioner, an Assistant Commissioner, a Native

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<sup>10</sup> The draft Amendment Bill is contained in Government Notice 35 of 2008 in *Government Gazette* 30663 of 14 January 2008.

<sup>11</sup> The draft Amendment Bill is contained in General Notice 149 in *Government Gazette* 31864 of 13 February 2009.

<sup>12</sup> See the long title of the Act.

Commissioner, an Additional Native Commissioner and an Assistant Native Commissioner". This definition is obsolete, as some of these commissioners no longer exist<sup>13</sup> or are not used as marriage officers.<sup>14</sup>

2.7 For the reason that was given in respect of the definition of "Commissioner" in section 1 of the Marriage Act,<sup>15</sup> the reference to "every Commissioner" in section 2(1) of the Marriage Act should also be deleted.<sup>16</sup>

2.8 Commenting on the Consultation Paper the DHA commented that they are currently revising the draft Marriage Amendment Bill, 2008 and the SALRC's comments will be incorporated therein. According to DHA the Bill will be tabled in Parliament during 2013.

2.9 Section 3(1) of the Marriage Act governs the appointment of ministers of religion and persons holding a responsible position in a religious denomination or organisation as marriage officers. In terms of the section, the Minister of Home Affairs and any officer in the public service authorised thereto by the Minister may designate any minister of religion or any person holding a responsible position in a religious denomination or organisation as a marriage officer "for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion". The list of religions that is given in the section is exhaustive. The problem is that the list does not cover all religions practised within South Africa and therefore excludes some ministers and persons holding a responsible position in a religious organisation or denomination from applying to be appointed as marriage officers in terms of the Marriage Act. The section also denies prospective spouses who belong to religious organisations and denominations that do not feature in the list the opportunity of having their marriages solemnised by religious marriage officers of their choice. The section therefore differentiates between ministers and persons holding a responsible position in a religious organisation or denomination on the ground of whether the religious organisation or

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<sup>13</sup> "Native Commissioners", "Additional Native Commissioners" and "Assistant Native Commissioners" no longer exist.

<sup>14</sup> *Report on the Review of the Marriage Act 25 of 1991 (Project 109)* para 2.2.17; see also draft Marriage Amendment Bill, 2008 clause 1(b) and draft Marriage Amendment Bill, 2009 clause 1(b), which delete the definition of "Commissioner".

<sup>15</sup> See para 2.6 above.

<sup>16</sup> See also *Report on the Review of the Marriage Act 25 of 1991 (Project 109)* paras 2.2.17 and 2.2.20; draft Marriage Amendment Bill, 2008 clause 2(1). But see clause 2(1) of the draft Marriage Amendment Bill, 2009 which retains the reference to "Commissioner" and refines it by including the following phrase: "contemplated in section 4 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963)".

denomination to which they belong features in the list, and also differentiates between prospective spouses on the ground of the religious organisation or denomination to which they belong. These differentiations are irrational as they are arbitrary and manifest a naked preference for certain religions which does not serve a legitimate governmental purpose. They therefore amount to inequality before the law and unequal protection and benefit of the law.<sup>17</sup>

2.10 The differentiations also amount to discrimination on the prohibited ground of religion.<sup>18</sup> Such discrimination is presumed to be unfair.<sup>19</sup> The impact of the discrimination is that certain persons are denied the right to have their marriages solemnised by religious marriage officers of their choice and to freely exercise their religion. This leads one to the conclusion that the presumption of the unfairness of the discrimination is not rebutted. Furthermore, the exclusion of certain religions from section 3(1) of the Marriage Act affects the right to dignity<sup>20</sup> and the right to freedom of religion<sup>21</sup> of the prospective spouses as well as the excluded ministers and persons holding responsible positions, as it signifies that their religions are not worthy of recognition in the context of solemnisation of civil marriages. There does not seem to be any justification for these violations. Section 3(1) of the Marriage Act is therefore unconstitutional and should be amended to cover all religions.<sup>22</sup>

2.11 Furthermore, at present there is inequality insofar as the persons who may be appointed as religious marriage officers for purposes of solemnising civil marriages and civil unions are concerned, for section 5(1) of the Civil Union Act, 2006 (Act No. 17 of 2006) (Civil Union Act) does not restrict the denominations or organisations whose religious officers may qualify as marriage officers. It provides that "[a]ny religious denomination or organisation" may apply to be designated as a religious organisation that may solemnise marriages in terms of the Act.<sup>23</sup> Like the differentiation between religious officers who may solemnise civil marriages depending on whether the religious organisation or denomination to which they belong

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<sup>17</sup> Constitution s 9(1).

<sup>18</sup> s 9(3) of the Constitution.

<sup>19</sup> s 9(5) of the Constitution.

<sup>20</sup> s 10 of the Constitution.

<sup>21</sup> s 15 of the Constitution.

<sup>22</sup> See also *Report on the Review of the Marriage Act 25 of 1991 (Project 109)* paras 2.3.55 and 2.3.59, clause 3 of the draft Marriage Amendment Bill, 2008, and clause 4 of the draft Marriage Amendment Bill, 2009.

<sup>23</sup> On the use of the term "marriages" in s 5 of the Civil Union Act, see para 2.69 below.

features in the list in section 3(1) of the Marriage Act and the differentiation between prospective spouses on the ground of the religion according to which they want their marriage to be solemnised, the differentiation between those persons who may be appointed as religious marriage officers for purposes of solemnising civil marriages and civil unions has no rational foundation. It violates the right to equality<sup>24</sup> of religious officers who want to be designated as marriage officers for purposes of solemnising civil marriages. It also constitutes unfair discrimination against the parties to a civil marriage on the ground of their intended marital status<sup>25</sup> in that persons who enter into a civil union have a wider range of religions from which to select their marriage officer than persons who enter into a civil marriage do. Depending on the facts of the individual case, the differentiation may also amount to unfair discrimination against the parties to a civil marriage on the specified grounds of sexual orientation,<sup>26</sup> conscience and/or belief.<sup>27</sup> There is no discernible justification for such unfair discrimination.

2.12 The same applies to the differentiation between the powers of religious marriage officers who may solemnise civil marriages and those who may solemnise civil unions. Section 3(2) of the Marriage Act permits limitation of a religious marriage officer's authority to the solemnisation of marriages within a specified area and/or for a specified period, while the Civil Union Act does not permit such limitation. Section 3(2) of the Marriage Act may be found to be unconstitutional and should be repealed.

2.13 In its comment to Consultation Paper the DHA stated that the differentiation was made as a result of the objections from churches and religious organisations to the civil unions of same sex partners. Parliament then decided to avoid contributing to the differences within churches by ensuring that it should be the church or religious organisation registering first and then the minister and not the individual minister of religion applying first like in the Marriage Act situation. This reply does not address the issues raised in respect of s 3(1) and (2). It

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<sup>24</sup> s 9 of the Constitution.

<sup>25</sup> Constitution s 9(3).

<sup>26</sup> As the Civil Union Act does not restrict the religion the marriage officer may belong to 'same-sex couples', civil unions may be solemnised by a religious officer from any religion, while the choice of heterosexual couples who want to enter into a civil marriage is limited by s 3(1) of the Marriage Act.

<sup>27</sup> If the couple's decision to enter into a civil marriage is dictated by their conscience and/or belief, their choice as to the religious marriage officer who may solemnise their marriage is restricted by s 3(1) of the Marriage Act, while the choice of couples whose conscience and/or belief dictate that they should enter into a civil union is not similarly restricted.

deals with a completely different point. However, clause 3 of the draft Marriage Amendment Bill, 2008 and clause 4 of the draft Marriage Amendment Bill, 2009 address the issues raised above in respect of section 3(1) and (2).

2.14 In terms of section 5 of the Marriage Act, any person who, at the time of the coming into operation of the Marriage Act or the Marriage Amendment Act, 1970 (Act No. 51 of 1970), was an authorised marriage officer by virtue of the provisions of any prior law is deemed to be a designated marriage officer under the Marriage Act. The section further authorises such marriage officers to continue to solemnise marriages as if the prior law had not been repealed, but provides that they must exercise their authority in accordance with the provisions of the Marriage Act. The section may appear to be obsolete or redundant. However, there are probably still marriage officers who were appointed in terms of the prior law. The Marriage Act came into operation on 1 January 1962 and the Marriage Amendment Act, 1970 on 1 February 1972. The prior law that section 5 of the Marriage Act refers to thus ceased to exist only 37-47 years ago. Some of the marriage officers who acquired their authority under the prior law may now be in their 50s or 60s and could therefore still be conducting marriage ceremonies. Section 5 of the Marriage Act therefore still serves a purpose.

2.15 Section 7 of the Marriage Act deems certain ministers in branches of the “Nederduitse Gereformeerde Kerk” and the “Nederduitse Hervormde Kerk” to be marriage officers under the Marriage Act. It is arguable that section 7 of the Marriage Act is redundant, as the churches that the section refers to have been incorporated into the broad “Nederduitse Gereformeerde Kerk” and “Nederduitse Hervormde Kerk”. It could be argued that their incorporation constitutes a change of name or perhaps even an amalgamation as envisaged in section 8 of the Marriage Act, and that section 7 of the Marriage Act is therefore superfluous and can be repealed.<sup>28</sup>

2.16 Commenting on the Consultation Paper the DHA stated that they are currently revising the draft Marriage Amendment Bill, 2008 and the SALRC’s comments will be incorporated therein. According to DHA the Bill will be tabled in Parliament during 2013.

2.17 The reference to "Union" in section 10 of the Marriage Act is outdated and should be replaced with "Republic".<sup>29</sup> In terms of section 10(2) of the Marriage Act, a marriage that is

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<sup>28</sup> See also clause 5 of the draft Marriage Amendment Bill, 2008; clause 7 of the draft Marriage Amendment Bill, 2009.

<sup>29</sup> See also clause 6 of the draft Marriage Amendment Bill, 2008; clause 10 of the draft Marriage Amendment Bill, 2009.

solemnised outside South Africa “shall for all purposes be deemed to have been solemnized in the province of the Union in which the male party thereto is domiciled”. The differentiation between the male and female party to a civil marriage constitutes direct discrimination on the ground of sex and gender and is accordingly presumed to be unfair.<sup>30</sup> The differentiation also violates the female party’s right to dignity<sup>31</sup> as it suggests that she is the subordinate or inferior party in the marriage. The sole purpose of the differentiation seems to be to afford a mechanism for selecting a province where the marriage will be registered. The impact of the discrimination and infringement of the right to dignity is so severe that the infringement cannot be justified in terms of section 36 of the Constitution, particularly as the purpose can easily be achieved by using a different mechanism for selecting the province of the Republic where the marriage is deemed to have been solemnised. For example, clause 6 of the draft Marriage Amendment Bill, 2008 provides that the marriage will be deemed to have been solemnised in the province in which “either one of the parties thereto is domiciled: Provided that both parties shall agree on the province of domicile the marriage shall be deemed to have been solemnized in”. Section 10(2) of the Marriage Act should therefore be amended.<sup>32</sup>

2.18 Commenting on the Consultation Paper the DHA stated that they are currently revising the draft Marriage Amendment Bill, 2008 and the SALRC’s comments will be incorporated therein. According to DHA the Bill will be tabled in Parliament during 2013.

2.19 Section 12(a) of the Marriage Act prohibits the solemnisation of a marriage by a marriage officer unless “each of the parties produces to the marriage officer his or her identity document issued under the provisions of the Identification Act, 1986 (Act No. 72 of 1986)”. The Identification Act, 1986 referred to in this provision was repealed by the Identification Act, 1997 (Act No. 68 of 1997) (“the Identification Act, 1997”). The SALRC proposes that paragraph (a) of section 12 of the Marriage Act be amended so that it makes reference to the Identification Act, 1997 and not the Identification Act, 1986.

2.20 Commenting on the Consultation Paper the DHA stated that they are currently revising the draft Marriage Amendment Bill, 2008 and the SALRC’s comments will be incorporated therein. According to DHA the Bill will be tabled in Parliament during 2013.

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<sup>30</sup> s 9(3) read with s 9(5) of the Constitution.

<sup>31</sup> s 10 of the Constitution.

<sup>32</sup> See also *Report on the Review of the Marriage Act 25 of 1991 (Project 109)* para 2.12.9.

2.21 Section 22 of the Marriage Act deals with irregularities in the publication of banns or notice of intention to marry or the issue of special marriage licences that were required prior to 1 February 1972.<sup>33</sup> The section may appear to be obsolete or redundant. However, many marriages that were solemnised before 1 February 1972 still exist. Any such marriages in which the provisions relating to the publication of banns or notice of intention to marry or the issue of a special marriage licence were not strictly complied with but which were in every other respect solemnised in accordance with the Marriage Act or a former law would be rendered invalid if section 22 of the Marriage Act were to be repealed.<sup>34</sup> Section 22 of the Marriage Act should accordingly be retained, but the reference in it to "Union" should be replaced with "Republic".<sup>35</sup>

2.22 In its comment to the SALRC on the Consultation Paper the DHA pointed out that it is currently revising the draft Marriage Amendment Bill, 2008 and the SALRC's comments will be incorporated therein. The Bill will be tabled in Parliament during 2013.

2.23 In view of section 17 of the Children's Act, 2005 (Act No. 38 of 2005) (the Children's Act), the reference to a person below the age of "twenty-one" years in section 24(2) of the Marriage Act should be replaced with a reference to a person below the age of "eighteen" years.<sup>36</sup> Commenting on the Consultation Paper the DHA stated that they are currently revising the draft Marriage Amendment Bill, 2008 and the SALRC's comments will be incorporated therein. According to DHA the Bill will be tabled in Parliament during 2013.

2.24 Section 24(1) of this Act prohibits a marriage officer from solemnizing a marriage between parties of whom one or both are minors unless the consent which is legally required by law for the purpose of contracting a marriage has been granted and furnished to him in writing. Subsection (2) of this section excludes from the operation of this provision a minor who is under the age of twenty-one who previously contracted a valid marriage which has been dissolved by death or divorce. The concept of "minor" is a common law concept. Under that system of law the age at which a valid marriage could be contracted was fourteen years

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<sup>33</sup> This is the date of the coming into operation of the Marriage Amendment Act 51 of 1970.

<sup>34</sup> See also *Report on the Review of the Marriage Act 25 of 1991 (Project 109)* paras 2.15.8 and 2.15.9.

<sup>35</sup> See also *Report on the Review of the Marriage Act 25 of 1991 (Project 109)* para 2.15.9.

<sup>36</sup> See also draft Marriage Amendment Bill, 2008 clause 12; draft Marriage Amendment Bill, 2009 clause 16.

for boys and twelve years for girls. Interpreted literally this provision suggests that a twelve year old girl and a 14 year old boy can contract a lawful marriage provided they obtain the necessary consent from parents and functionaries authorised by law to give such consent.

The gender-based discrepancy in minimum ages of marriage for boys and girls resulting from the construction of the term “minor” used in this provision is inconsistent with the right to equality enshrined in the Constitution and there seems to be no justification for this discrepancy. The SALRC proposes that this defect be cured either by deleting the common law concept of “minor” and by specifying the uniform minimum age for marriage at which both boys and girls would require consent to contract a valid marriage, as the legislature has done in section 26 of this Act or by defining it and specifying in that definition the ages at which a person, before he or she attains the age of majority, can contract a valid marriage with the necessary consent. This recommendation applies to all the provisions of this Act where the common law concept of “minor” is used. Prior to the coming into operation of the Children’s Act, the age at which a person acquired full status in South African law was 21 years. Section 17 of the Children’s Act provides that a person attains majority at the age of 18. The SALRC recommends that section 24(2) of this Act be amended to reflect this development.

2.25 Section 24A(1) of the Marriage Act deals with the validity and dissolution of a marriage a minor concluded without the consent of his or her parent or guardian or the commissioner of child welfare. Firstly, the reference to a “commissioner of child welfare” is redundant as Chapter 4 of the Children's Act provides for a "presiding officer of the children's court" instead of a “commissioner of child welfare”. The phrase "commissioner of child welfare" has been replaced by "presiding officer of the children's court".<sup>37</sup> In its comment to the SALRC on the Consultation Paper the DHA commented that it is currently revising the draft Marriage Amendment Bill, 2008 and the SALRC’s comments will be incorporated therein.

2.26 Further, section 24A of the Marriage Act does not apply if the Minister's consent to the minor’s marriage was not obtained. The section therefore differentiates between the cases where the consent of the minor’s parent or guardian or the commissioner of child welfare was not obtained and those where the Minister’s consent was not obtained. The result of the differentiation is that a marriage a minor entered into without the Minister’s consent is void unless the Minister ratifies the marriage in terms of section 26(2) of the Marriage Act, while a marriage a minor concluded without the consent of his or her parents or guardian or the

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<sup>37</sup> See also clause 13 of the draft Marriage Amendment Bill, 2008; clause 17 of the draft Marriage Amendment Bill, 2009.

commissioner of child welfare is voidable.<sup>38</sup> Rendering the unassisted marriages of minors who needed the Minister's consent void might be said to serve a legitimate governmental purpose, namely discouraging young minors from entering into unassisted marriages. The differentiation might therefore be rational and might also not amount to unfair discrimination. As the violation of the equality clause is not blatant, the issue of the need for amendment of the section falls outside the scope of the present investigation.

2.27 In its comment to the SALRC on the Consultation Paper the DHA commented that it is currently revising the draft Marriage Amendment Bill, 2008 and the SALRC's comments will be incorporated therein. The Bill proposes to prohibit marriages of minors and will be tabled in Parliament during 2013.

2.28 Section 25 deals with the situation where the consent of a minor's parents or guardian cannot be obtained for the minor's marriage. This section empowers the "Commissioner of Child Welfare as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983)" to grant written consent to such minor to marry a specific person. In terms of that 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 Children's Act 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.

2.29 Further, the reference to the "Supreme Court of South Africa" in section 25(4) of the Marriage Act is outdated and should be replaced with "High Court of South Africa".<sup>39</sup> Section 25 of the Marriage Act should read as follows:

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<sup>38</sup> A void marriage has no consequences, while a voidable marriage remains in force and has all the consequences of a valid marriage until it is set aside by a court: see e.g. Heaton *South African Family Law* 35, 36 and 39.

<sup>39</sup> See also draft Marriage Amendment Bill, 2008 clause 14; draft Marriage Amendment Bill, 2009 clause 18.

“25.(1) If a **[commissioner of child welfare defined in section 1 of the Child Care Act, 1983,]** presiding officer of the children’s court is 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 or her 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 or her guardian refuses to grant consent to the marriage.

(2) A **[commissioner of child welfare]** presiding officer of the children’s court shall, before granting his or her 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 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.

(3) 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.

(4) If the parent, guardian or **[commissioner of child welfare]** presiding officer of the children’s court in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the **[Supreme]** High Court of South Africa: 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 of the children’s court is without adequate reason and contrary to the interests of such minor.”.

2.30 Section 26(1) of the Marriage Act provides that boys under the age of 18 years and girls under the age of 15 years need the consent of the Minister or any officer in the public service authorised thereto by the Minister to enter into a valid civil marriage. The section blatantly differentiates between boys and girls. No rational purpose for the distinction is evident. In both cases the minors have passed the minimum marriageable age, namely puberty.<sup>40</sup> The differentiation amounts to unfair discrimination on the ground of sex.<sup>41</sup> There is

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<sup>40</sup> According to our common law, puberty is set at 14 years for boys and 12 years for girls and minors below puberty may not marry at all. Although there is some uncertainty as to whether the Minister may allow minors below puberty to marry, the weight of modern opinion favours

no discernible justification for the unfair discrimination. The SALRC recommends that this section should accordingly be amended to read as follows:<sup>42</sup>

“**26.(1)** No **[boy]** person under the age of 18 years **[and no girl under the age of 15 years]** shall be capable of contracting a valid marriage except with the written permission of the Minister or any officer in the public service authorized thereto by him or her, which he or she may grant in any particular case in which he or she considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.”.

2.31 In its comment to the SALRC on the Consultation Paper the DHA pointed out that it is currently revising the draft Marriage Amendment Bill, 2008 and the SALRC’s comments will be incorporated therein. The Bill will be tabled in Parliament during 2013.

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retention of the common-law prohibition: Heaton *South African Family Law* 19; Davel and Jordaan *Law of Persons* 90; Erasmus *et al Lee & Honoré Family, Things and Succession* para 41; Heaton in Church *et al LAWSA vol 16 Marriage* para 23; Heaton in Van Heerden *et al* (eds) *Boberg’s Law of Persons and the Family* 836 fn 2; Kruger and Robinson in Robinson (ed) *The Law of Children and Young Persons in South Africa* 16; Sinclair assisted by Heaton *The Law of Marriage* 367; Van der Vyver and Joubert *Persone- en Familiereg* 172, 486–487; Van Schalkwyk *Huweliksreg-bronnebundel* 70; Visser and Potgieter *Introduction to Family Law* 51; Menge 1956 *SALJ* 450; Spiro 1960 *THRHR* 6; Van der Walt 1961 *THRHR* 120. But see Hahlo *The South African Law of Husband and Wife* 90 and Conradie 1956 *SALJ* 291 who submit that the Minister may authorise such marriages. See further Heaton “Family Law and the Bill of Rights” in *Bill of Rights Compendium* para 3C14.2.

<sup>41</sup> s 9(3) of the Constitution.

<sup>42</sup> Clause 15 of the draft Marriage Amendment Bill, 2008 reduces the age to 16 years for both sexes, while clause 19 of the draft Marriage Amendment Bill, 2009 sets the age at 15 years. This age limit creates differentiation as between prospective spouses in civil marriages and customary marriages, for s 3(4)(a) of the Recognition of Customary Marriages Act, 1998 (Act No.120 of 1998) sets 18 years as the age below which the Minister’s consent is required for entering into a customary marriage.

Para 2.20.9 of the *Report on the Review of the Marriage Act 25 of 1991 (Project 109)* recommends 18 years as the age below which a minor needs the Minister’s consent to enter into a civil marriage. As the age of majority is 18 years, using 18 as the age restriction would mean that all minors who wish to enter into a civil marriage would have to obtain the Minister’s consent. If a minor failed to obtain the Minister’s consent, the marriage would be void unless the Minister subsequently ratified it. See further the discussion of s 24A in para 2.26 above regarding the differentiation between marriages that are concluded without the Minister’s consent and those that are concluded without the consent of the commissioner of child welfare or the minor’s parents or guardian.

2.32 Section 29(2) of the Marriage Act prescribes the place where a marriage may be solemnised. It requires that the solemnisation must take place "in a church or other building used for religious service, or in a public office or private dwelling-house, with open doors and in the presence of the parties themselves and at least two competent witnesses". The section allows an exception regarding solemnisation in another place if the marriage must be solemnised there because of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties. The section is outdated. Nowadays many couples wish to have their marriage solemnised in other places, such as on the beach, in a garden, or in the bushveldt. In order to ensure that their marriage is valid, such couples must have two wedding ceremonies - one of which must comply with the provisions of section 29(2) of the Marriage Act. In one reported decision, *Ex parte Dow*,<sup>43</sup> it was held that non-compliance with section 29(2) does not necessarily lead to the invalidity of the marriage. In *Ex parte Dow* the couple had married in the garden of a private dwelling house. The court examined the objects sought to be achieved by section 29(2) of the Marriage Act and the changes that had taken place in the formalities required for the conclusion of a valid marriage through the centuries and concluded that the object of these provisions had been to avoid clandestine marriages. In the court's view, all provisions which had previously served to inform the public of an intended marriage have been abolished. The court concluded that a marriage is such an important relationship, and the consequences of a decree of nullity are so far-reaching, that the legislator could not have intended the marriage to be void if "the two-letter word 'in'" in section 29(2) of the Marriage Act was not complied with.<sup>44</sup> This decision has been welcomed since only a material defect ought to render a marriage void *ab initio*.<sup>45</sup> As the strict and very limiting requirements of section 29(2) of the Marriage Act are not in keeping with modern demands, the section should be amended.<sup>46</sup>

2.33 Another reason why amendment of the section is needed is that, currently, civil union partners may have their civil union solemnised in more places than the parties to a civil marriage may. Section 10(2) of the Civil Union Act expressly permits solemnisation of civil unions "on the premises" of a public office or dwelling-house. A strict interpretation of the word

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<sup>43</sup> 1987 (3) SA 829 (D).

<sup>44</sup> At p 833.

<sup>45</sup> Heaton *South African Family Law* 33; Erasmus *et al Lee & Honoré Family, Things and Succession* para 50; Robinson 1990 *THRHR* 433.

<sup>46</sup> See also *Report on the Review of the Marriage Act 25 of 1991 (Project 109)* para 2.22.54; clause 18(a) of the draft Marriage Amendment Bill, 2008; clause 22(a) of the draft Marriage Amendment Bill, 2009.

"in" in section 29(2) of the Marriage Act entails differentiation between persons who enter into a civil marriage and those who enter into a civil union, as persons who enter into a civil union have a wider choice as regards permissible solemnisation venues than persons who enter into a civil marriage. Such differentiation has no rational foundation. It constitutes unfair discrimination against the parties to a civil marriage on the ground of their intended marital status.<sup>47</sup> There is no discernible justification for this violation of the equality clause and the SALRC recommends that section 29(2) of the Marriage Act be drafted as follows:

**"29.(2) A marriage officer [shall] may solemnize any marriage in a church or other building used for religious service, or in a public office or private dwelling-house [with open doors and] or in any other place in the presence of the parties themselves and at least two competent witnesses [, but the foregoing provisions of this subsection shall not be construed as prohibiting a marriage officer from solemnizing a marriage in any place other than a place mentioned therein if the marriage must be solemnized in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties]."**

2.34 In its comment to the SALRC on the Consultation Paper the DHA pointed out that it is currently revising the draft Marriage Amendment Bill, 2008 and the SALRC's comments will be incorporated therein. The Bill proposes for permission to be granted by the Minister where the parties wish their marriage to be solemnised in any other place other than the places mentioned in section 29 of the Marriage Act and will be tabled in Parliament during 2013.

2.35 Section 29(3) of the Marriage Act will become redundant if section 29(2) of the Marriage Act is properly redrafted and therefore the SALRC recommends that it be repealed.<sup>48</sup>

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<sup>47</sup> s 9(3) of the Constitution.

<sup>48</sup> Clause 18(b) of the draft Marriage Amendment Bill, 2008 repeals s 29(3), as clause 18(a) substitutes s 29(2) of the Marriage Act with a much broader provision. The equivalent clauses in the draft Marriage Amendment Bill, 2009 are clause 22(b) and (a), respectively.

2.36 Section 30(1) of the Marriage Act deals with the marriage formula.<sup>49</sup> The section *inter alia* provides that a marriage formula that is used by a religious marriage officer must first be approved by the Minister. If approval is not granted, the default marriage formula must be used. As it does not seem unreasonable, arbitrary or irrational to require prior approval of marriage formulae, the requirement does not blatantly violate the equality clause. It might, however, be argued that prescribing prior approval of the religious marriage formula infringes the right to freedom of religion.<sup>50</sup> As this argument is debatable and any alleged unconstitutionality is not blatant, the issue of the possible unconstitutionality of the section falls outside the ambit of the present investigation.<sup>51</sup>

2.37 Section 30(1) of the Marriage Act requires that the parties must give each other the right hand after answering a prescribed question. This requirement is outdated and does not serve any rational purpose. It should be deleted.<sup>52</sup>

2.38 Commenting on the Consultation Paper the DHA stated that they are currently revising the draft Marriage Amendment Bill, 2008 and the SALRC's comments will be incorporated therein. According to DHA the Bill will be tabled in Parliament during 2013.

2.39 The reference to "Union" in section 37 of the Marriage Act is outdated and should be replaced with "Republic".

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<sup>49</sup> As the Civil Union Act now enables same-sex couples to enter into a marriage, the issue of whether the part of the marriage formula that requires the marriage officer to ask each party whether he or she takes the other party as his or her lawful "wife (or husband)" is unconstitutional will not be discussed. In *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) the constitutional court held that the failure by the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, unjustifiably denies them equal protection and benefit of the law under s 9(1) of the Constitution, subjects them to unfair discrimination under s 9(3) of the Constitution and violates their right to dignity under s 10 of the Constitution. The court declared the common-law definition of marriage unconstitutional and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with the responsibilities it accords to heterosexual couples and also declared the omission from s 30(1) of the Marriage Act after the words "or husband" of the words "or spouse" unconstitutional and invalid. The declarations of invalidity were suspended for 12 months to allow Parliament to correct the defects. In response to the decision, Parliament enacted the Civil Union Act.

<sup>50</sup> s 15 of the Constitution.

<sup>51</sup> The issue was considered in *Report on the Review of the Marriage Act 25 of 1991 (Project 109)* paras 2.24.7, 2.24.8 and 2.24.13-2.24.17.

<sup>52</sup> See also *Report on the Review of the Marriage Act 25 of 1991 (Project 109)* paras 2.24.5, 2.24.6 and 2.24.18.

2.40 Section 39(4) of the Marriage Act provides that any provision of a repealed law which applies only in respect of “non-white persons or a particular class of non-white persons” shall continue to apply to them. Section 39(4) of the Marriage Act constitutes blatant inequality before the law and unfair discrimination on the specified ground of race.<sup>53</sup> The section is also redundant, as the civil marriages of all population groups are governed by the same rules of the Marriage Act as the Act applies throughout the Republic.<sup>54</sup> Section 39(4) of the Marriage Act should accordingly be repealed.

2.41 Commenting on the Consultation Paper the DHA stated that they are currently revising the draft Marriage Amendment Bill, 2008 and the SALRC’s comments will be incorporated therein. According to DHA the Bill will be tabled in Parliament during 2013.

**(ii) *Marriage Amendment Act 11 of 1964***

2.42 Section 1(1) of the Marriage Amendment Act, 1964 (Act No. 11 of 1964) (Marriage Amendment Act, 1964) which amended section 12 of the Marriage Act, is obsolete as section 12 of the Marriage Act was subsequently substituted by section 5 of the Marriage Amendment Act, 1970 (Act No. 51 of 1970) (Marriage Amendment Act, 1970). Section 1(1) Marriage Amendment Act, 1964 should therefore be repealed.

2.43 Section 2 of the Marriage Amendment Act, 1964 which amended section 15 of the Marriage Act, is obsolete as section 15 of the Marriage Act was subsequently repealed by section 6 of the Marriage Amendment Act, 1970. Section 2 of the Marriage Amendment Act, 1964 should therefore be repealed.

2.44 In its comment to the SALRC on the SALRC’s consultation paper the DHA agreed that the relevant sections of the Marriage Amendment Act, 1964 as mentioned in paras 2.42 and 2.43 should be repealed as recommended.

**(iii) *Marriage Amendment Act 19 of 1968***

2.45 Section 1 of the Marriage Amendment Act, 1968 (Act No. 19 of 1968) (Marriage Amendment Act, 1968), which amended section 16 of the Marriage Act, is obsolete as section

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<sup>53</sup> s 9(3) of the Constitution.

<sup>54</sup> s 1 of the Marriage Act, Extension Act, 1997 (Act No. 50 of 1997).

16 of the Marriage Act was subsequently repealed by section 6 of the Marriage Amendment Act, 1970. Section 1 of the Marriage Amendment Act, 1968 should therefore be repealed.

2.46 Section 2 of the Marriage Amendment Act, 1968, which amended section 19 of the Marriage Act, is obsolete as section 19 of the Marriage Act was subsequently repealed by section 6 of the Marriage Amendment Act, 1970. Section 2 of the Marriage Amendment Act, 1968 should therefore be repealed.

2.47 Section 3 of the Marriage Amendment Act, 1968, which substituted section 22 of the Marriage Act, is obsolete as section 22 of the Marriage Act was subsequently substituted by section 1 of the Marriage Amendment Act, 1972 (Act No. 26 of 1972). Section 3 of the Marriage Amendment Act, 1968 should therefore be repealed.

2.48 In its comment to the SALRC on the SALRC's consultation paper the DHA agreed that the relevant sections of the Marriage Amendment Act, 1964 as mentioned in paras 2.45 until 2.47 should be repealed as recommended.

**(iv) Prohibition of Mixed Marriages Amendment Act 21 of 1968**

2.49 The Prohibition of Mixed Marriages Amendment Act, 1968 (Act No. 21 of 1968) ("the Prohibition of Mixed Marriages Act") is obsolete as it amends an Act which no longer exists, namely the Prohibition of Mixed Marriages Act, 1949 (Act No. 55 of 1949).<sup>55</sup> The Prohibition of Mixed Marriages Amendment Act should therefore be repealed.

2.50 Commenting on the Consultation Paper the DHA agreed that the Prohibition of Mixed Marriages Amendment Act, 1968 as pointed out in para 2.49 should be repealed as recommended.

**(v) Marriage Amendment Act 51 of 1970**

2.51 Section 2 of the Marriage Amendment Act, 1970, which amended section 2(2) of the Marriage Act, is obsolete as section 2(2) of the Marriage Act was subsequently substituted by

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<sup>55</sup> The Prohibition of Mixed Marriages Act was repealed by s 1 of the Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985 on 19 June 1985. Although the latter Act does not fall within the scope of the present review, it should be noted that s 7(2) of the Act might be unconstitutional: see Heaton "Family Law and the Bill of Rights" in *Bill of Rights Compendium* para 3C on p28.

section 1(2) of the Population Registration Act Repeal Act, 1991 (Act No. 114 of 1991). Section 2 of the Marriage Amendment Act, 1970 should therefore be repealed.

2.52 Section 3 of the Marriage Amendment Act, 1970, which amended section 3(2)(c) of the Marriage Act, is obsolete as section 3(2)(c) of the Marriage Act was subsequently deleted by section 1(2) of the Population Registration Act Repeal Act. Section 3 of the Marriage Amendment Act, 1970 should therefore be repealed.

2.53 Section 4 of the Marriage Amendment Act, 1970 is obsolete as its substitution of section 5(1) of the Marriage Act was subsequently substituted by section 1 of the Application of Certain Laws to Namibia Abolition Act, 1990 (Act No. 112 of 1990) and its addition of section 5(3) of the Marriage Act was subsequently undone by the complete repeal of section 5(3) of the Marriage Act by section 1 of the Application of Certain Laws to Namibia Abolition Act. Section 4 of the Marriage Amendment Act, 1970 should therefore be repealed.

2.54 Section 7 of the Marriage Amendment Act, 1970, which substituted section 22 of the Marriage Act, is obsolete as section 22 of the Marriage Act was subsequently substituted by section 1 of the Marriage Amendment Act 26 of 1972. Section 7 of the Marriage Amendment Act, 1970 should therefore be repealed.

2.55 Section 9 of the Marriage Amendment Act, 1970, which amended section 26 of the Marriage Act, is obsolete as section 26 of the Marriage Act was subsequently substituted by section 2 of the Marriage Amendment Act 45 of 1981. Section 9 of the Marriage Amendment Act, 1970 should therefore be repealed.

2.56 Section 10 of the Marriage Amendment Act, 1970 is partly obsolete, as its substitution of section 30(1) of the Marriage Act was subsequently superseded by its substitution by section 1 of the Marriage Amendment Act 12 of 1973. As only part of section 10 of the Marriage Amendment Act, 1970 is obsolete, the whole section cannot be repealed.

2.57 Section 12 of the Marriage Amendment Act, 1970, which inserted section 38A into the Marriage Act, is obsolete as section 38A of the Marriage Act was subsequently repealed by section 2 of the Marriages, Births and Deaths Amendment Act 41 of 1986. Section 12 of the Marriage Amendment Act, 1970 should therefore be repealed.

2.58 Section 13 of the Marriage Amendment Act, 1970, which inserted section 39A into the Marriage Act, is obsolete as section 39A of the Marriage Act was subsequently repealed by

section 1 of the Application of Certain Laws to Namibia Abolition Act 112 of 1990. Section 13 of the Marriage Amendment Act, 1970 should therefore be repealed.

2.59 In its comment to the SALRC on the Consultation Paper the DHA agreed that the relevant sections of the Marriage Amendment Act, 1970 as mentioned in paras 2.51 to 2.58 should be repealed as recommended.

**(vi) *Marriage Amendment Act 26 of 1972***

2.60 The amendments effected by the Marriage Amendment Act, 1972 (Act No. 26 of 1972) (“Marriage Amendment Act, 1972”) reflect the current content of the Marriage Act. The Marriage Amendment Act, 1972 is thus not obsolete. In its comment to the SALRC on the Consultation Paper the DHA agreed with the recommendation.

**(vii) *Marriage Amendment Act 12 of 1973***

2.61 Section 1 of the Marriage Amendment Act, 1973 (Act No. 12 of 1973) reflects the current content of the Marriage Act. The provision is thus not obsolete.

2.62 Section 2 of the Marriage Amendment Act, 1973 relates to certain provisions which used to apply specifically to the civil marriages of Blacks. The section is redundant, as our law no longer distinguishes between the civil marriages of Blacks and the civil marriages of other population groups. Section 2 of the Marriage Amendment Act, 1973 should therefore be repealed.

2.63 In its comment to the SALRC on the Consultation Paper the DHA agreed that section 2 of the Marriage Amendment Act, 1973 as mentioned in para 2.62 should be repealed as recommended.

**(viii) *Marriage Amendment Act 45 of 1981***

2.64 The amendments effected by the Marriage Amendment Act, 1981 (Act No. 45 of 1981) reflect the current content of the Marriage Act. The Marriage Amendment Act is thus not obsolete. In its comment to the SALRC on the Consultation Paper the DHA agreed with the recommendation.

**(ix) Marriage Act, Extension Act 50 of 1997**

2.65 The Marriage Act, Extension Act, 1997 (Act No. 50 of 1997) (“Marriage Act, Extension Act”) is not obsolete. The extension of the Marriage Act to the whole of the Republic of South Africa still serves a purpose. Were it not for the Marriage Act, Extension Act, separate rules regarding civil marriages would still have applied in the Transkei and Bophuthatswana. Prior to the re-incorporation of the former TBVC states (Transkei, Bophuthatswana, Venda and Ciskei) into the national territory of the Republic of South Africa, Transkei and Bophuthatswana enacted legislation dealing with civil marriages.<sup>56</sup> The Transkei enacted the Marriage Act, 1978 (Act No. 21 of 1978) (Transkei) and Bophuthatswana enacted the Marriage Act, 1980 (Act No. 15 of 1980) (“Bophuthatswana Marriage Act”). On 27 April 1994 the TBVC states ceased to exist.<sup>57</sup> However, the laws that were in force in these states continued in force in the areas of the former states until repealed or amended.<sup>58</sup> Certain sections of the Marriage Act, 1978 (Transkei) were repealed by the Justice Laws Rationalisation Act, 1996 (Act No. 18 of 1996) and the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998),<sup>59</sup> and section 25(6) of the Bophuthatswana Marriage Act, 1980 (Act No. 15 of 1980) was repealed by the Justice Laws Rationalisation Act,<sup>60</sup> but the remainder of the Acts survive on the statute book. If the Marriage Act, Extension Act were to be repealed civil marriages in the former areas of the Transkei and Bophuthatswana would again be governed by the Marriage Act, 1978 (Transkei) and the Bophuthatswana Marriage Act.

2.66 Prior to the coming into operation of the Marriage Act, Extension Act, section 2(1) of the Home Affairs Rationalisation Act, 1995 (Act No. 41 of 1995) extended the application of only one subsection of the Marriage Act [i.e., section 29A(2)] to the whole of the Republic. Insofar as the operation of section 29A(2) of the Marriage Act is concerned, the extension was therefore duplicated by the Marriage Act, Extension Act. It is suggested that, rather than excluding the extension of section 29A(2) of the Marriage Act from the Marriage Act,

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<sup>56</sup> See also *Report on the Review of the Marriage Act 25 of 1991 (Project 109)* para 2.32.2.

<sup>57</sup> The founding statutes of these states were repealed by s 242 and Schedule 7 of the Constitution of the Republic of South Africa 200 of 1993.

<sup>58</sup> s 229 of the Constitution of the Republic of South Africa 200 of 1993.

<sup>59</sup> Section 3 read with Schedule 2 of the of the Justice Laws Rationalisation Act 18 of 1996 repealed ss 42-50 of the Transkei Marriage Act; s 13 read with the Schedule of the Recognition of Customary Marriages Act repealed ss 3, 29 and 37-39 of the Transkei Marriage Act.

<sup>60</sup> The repeal was effected by s 3 and Schedule 2 of the Justice Laws Rationalisation Act 18 of 1996.

Extension Act, the Home Affairs Rationalisation Act should be amended to delete the reference to section 29A(2) of the Marriage Act.

2.67 Commenting on the SALRC Consultation Paper the DHA agreed with the recommendation that the Home Affairs Rationalisation Act should be amended to delete the reference to section 29A(2) of the Marriage Act.

**(x) *Civil Union Act 17 of 2006***

2.68 The Civil Union Act, 2006 (Act No. 17 of 2006) ("the Civil Union Act") still serves the objectives that are stated in section 2 of the Civil Union Act. Some of its provisions should, however, be amended.

2.69 Subsections (1), (2), (4) and (6) of section 5 of the Civil Union Act refer only to solemnisation of "marriages" in terms of the Act. The implication of using the word "marriages" is that civil partnerships are not covered by these subsections. There does not seem to be any rational basis for restricting the capacity of religious marriage officers to the solemnisation of marriages in terms of the Civil Union Act. As none of the other sections of the Civil Union Act draws a distinction between solemnisation of civil partnerships and marriages under the Civil Union Act, it is clear that the use of the word "marriages" in section 5 thereof is due to a drafting error. In its comment to the SALRC on the Consultation Paper the DHA agreed that this was an error as no differentiation was intended.

2.70 Section 6 of the Civil Union Act permits a marriage officer "other than a marriage officer referred to in section 5" to opt out of solemnising same-sex civil unions if he or she objects to such unions on the ground of conscience, religion and belief. Section 5 of the Civil Union Act deals with the designation of religious denominations or organisations as institutions that may perform solemnisations under the Civil Union Act.<sup>61</sup> Thus the implications of section 6 of the Civil Union Act are that only a marriage officer who is not a marriage officer by virtue of being an official in a designated religious denomination or organisation may be excused from solemnising same-sex civil unions. Presumably the differentiation between religious marriage officers and secular marriage officers was based on the assumption that religious denominations or organisations that object to same-sex unions would not apply to be designated as institutions that may solemnise civil unions. This assumption loses sight of the

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<sup>61</sup> See para 2.69 above on the use of the word "marriages" in s 5.

fact that heterosexual persons may also enter into a civil union.<sup>62</sup> A religious denomination or organisation that objects to same-sex unions might want to solemnise heterosexual civil unions while opting out of solemnising same-sex unions on the ground of conscience, religion and belief, but section 6 of the Civil Union Act denies them this opportunity. Section 6 of the Civil Union Act entails an all-or-nothing approach to solemnisation of civil unions insofar as religious denominations or organisations are concerned. This approach does not apply to secular marriage officers. The differentiation between secular and religious marriage officers has no rational basis. It amounts to inequality before the law and unequal protection and benefit of the law, unfair discrimination on the ground of religion, conscience, belief and a violation of the right to freedom of conscience, religion, thought, belief and opinion<sup>63</sup> in respect of religious denominations and organisations and heterosexual persons who wish to have their civil union solemnised by a religious denomination or organisation that objects to same-sex civil unions. There is no discernible justification for these violations. Section 6 of the Civil Union Act should therefore be amended also to allow marriage officers who belong to a religious denomination or organisation to opt out of solemnising same-sex civil partnerships while retaining the power to solemnise heterosexual civil unions.

2.71 In its comment to the SALRC on the Consultation Paper the DHA wished to indicate that this was an unsustainable argument and further that the same churches had suggested that the approach of registering a church first before the official, to avoid conflict within churches as they are still divided on the civil union of the same-sex persons.

2.72 Like section 29(2) of the Marriage Act, section 10(2) of the Civil Union Act requires that solemnisation occur in a public office or private dwelling house. However, section 10(2) of the Civil Union Act further permits solemnisation "on the premises used for such purposes by the marriage officer". Section 10(2) of the Civil Union Act therefore authorises solemnisation in more places than section 29(2) of the Marriage Act does. This differentiation is discussed above in the context of section 29(2) of the Marriage Act.<sup>64</sup>

2.73 Section 11(2) of the Civil Union Act requires that the parties give each other the right hand after answering a prescribed question. This requirement also appears in section 30(1) of

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<sup>62</sup> See the definition of "civil union" in s 1 of the Act.

<sup>63</sup> ss 9(1), 9(3) and 15 of the Constitution.

<sup>64</sup> See paras 2.32 and 2.33 above.

the Marriage Act. In the context of the discussion of section 30(1) of the Marriage Act<sup>65</sup> it is indicated that the requirement of giving each other the right hand is outdated, does not serve any rational purpose, and should be deleted. The same applies to this requirement in section 11(2) of the Civil Union Act.

2.74 Commenting on the SALRC Consultation Paper the DHA agreed with the recommendation.

2.75 The heading of section 12 of the Civil Union Act, 2006 indicates that the section deals with registration of a civil union. Section 12(1) of the Civil Union Act provides that the prospective civil union partners must individually and in writing declare their willingness to enter into the civil union with one another by signing the prescribed document in the presence of two witnesses. The word "prospective" and the phrase "their willingness to enter into the civil union with one another" in section 12(1) of the Civil Union Act suggest that registration of the civil union occurs prior to solemnisation of the union, which is illogical, for a civil union can only be registered once it has been duly solemnised. Subsection (1) also seems at odds with subsections (2)-(7) of section 12 of the Civil Union Act, which clearly govern the position after the civil union has been solemnised. In light of this apparent anomaly and internal conflict in the section, it might be argued that the word "prospective" should be deleted from subsection (1) and that the phrase "their willingness to enter into the civil union" in the same subsection should be reformulated as "that they have entered into a civil union with one another". However, it is submitted that these changes to section 12(1) of the Civil Union Act are unnecessary and would not be in keeping with the legislature's intention. It is submitted that although it appears only obliquely from section 12 of the Civil Union Act, the legislature's intention was that section 12(1) of the Civil Union Act should provide a mechanism for obtaining written evidence of the election the civil union partners are making as to whether they want their union to be called a marriage or a civil partnership.<sup>66</sup> This written evidence is to be obtained before the civil union is solemnised and is a separate issue from registration of the civil union after it has been solemnised. Thus section 12(1) of the Civil Union Act was indeed intended to deal with the position before the solemnisation of the civil union. It would most probably have been better had the legislature put the separate issues of a written pre-solemnisation declaration regarding the description of the civil union and the registration of the

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<sup>65</sup> See para 2.37 above.

<sup>66</sup> Section 11(1) of the Act stipulates that the marriage officer must ask the parties whether their civil union should be known as a marriage or a civil partnership, but does not require that their election be recorded in writing.

civil union after its solemnisation into two separate sections. Even so, it is submitted that the scope of the brief for the present review of the Civil Union Act does not require a recommendation that section 12 of the Civil Union Act should be amended to remove the apparent anomaly in the section.

2.76 Commenting on the SALRC Consultation Paper the DHA agreed with the recommendation.

2.77 The Civil Union Act does not allow a minor to enter into a civil union at all. The Act defines a civil union as "the voluntary union of two persons who are both 18 years of age or older, which is solemnised and 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>67</sup> No section of the Act permits deviation from the 18-year age restriction. As a minor is allowed to enter into a civil marriage or a customary marriage provided that he or she obtains consent,<sup>68</sup> the Civil Union Act's failure to provide for a civil union by a minor creates blatant differentiation between minors who wish to enter into a civil or customary marriage and those who wish to enter into a civil union. There does not seem to be a rational foundation for the differentiation. The differentiation unfairly discriminates against minors who wish to enter into civil unions on the ground of their age. They are denied a particular form of intimate relationship which is available to adults. There is no rational basis for the exclusion of minors from this particular form of intimate relationship while allowing them to enter into a civil or customary marriage.

2.78 In the case of minors whose desire to enter into a civil union is dictated by their conscience and/or belief, the differentiation also amounts to unfair discrimination on the ground of conscience and/or belief.<sup>69</sup> In the case of same-sex minors, the couple is furthermore subject to unfair discrimination on the ground of sexual orientation.<sup>70</sup> In either

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<sup>67</sup> Section 1.

<sup>68</sup> The common law, ss 25 and 26 of the Marriage Act, and s 18(3)(c)(i) of the Children's Act 38 of 2005 permit a minor to enter into a civil marriage provided that the prescribed consent is obtained, while s 3(3) and (4) of the Recognition of Customary Marriages Act 120 of 1998 permits a minor to enter into a customary marriage provided that the prescribed consent is obtained.

<sup>69</sup> s 9(3) of the Constitution.

<sup>70</sup> s 9(3) of the Constitution.

circumstance the minors' right to dignity<sup>71</sup> is infringed as they are denied the opportunity of entering into a legally recognised and legally protected intimate union. As a civil union is the only institution that is available to same-sex couples to obtain full legal recognition for their relationship, the exclusion of same-sex minors from the ambit of the Civil Union Act is particularly injurious. In view of the reasoning in *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs*<sup>72</sup> it seems clear that the exclusion is unconstitutional, for it denies same-sex minors the means to enjoy the same status, entitlements and responsibilities accorded to heterosexual minors through civil marriage, unjustifiably denies them equal protection and benefit of the law, subjects them to unfair discrimination, and violates their right to dignity. The Civil Union Act should be amended to address this unconstitutionality. The DHA neglected to comment on this recommendation.

**(b) Sub-Theme: Customary Marriages**

**(i) Recognition of Customary Marriages Act 120 of 1998**

2.79 The Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) (“the RCMA”) is administered by the DHA and partly by the Department of Justice and Constitutional Development. The review of the RCMA has been broadly dealt with in this Consultation Paper. There is also a brief discussion of the RCMA in Discussion Paper 130: Statutory Law Revision: Review of legislation administered by the Department of Justice and Constitutional Development (Family Law and Marriage) published on 30 January 2012.

2.80 The SALRC is aware that the DHA published a Draft Recognition of Customary Marriages Amendment Bill, 2009,<sup>73</sup> for public comment and where relevant, the draft Bill will be mentioned.

2.81 As the title of the RCMA suggests, its principal aim is to give full legal recognition to customary marriages, in tune with the imperatives set out in sections 9,<sup>74</sup> 15(3),<sup>75</sup> 30<sup>76</sup> and 31<sup>77</sup>

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<sup>71</sup> s 10 of the Constitution.

<sup>72</sup> 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

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

<sup>74</sup> Prohibiting amongst others discrimination on the basis of race, sex and gender, as well as age. The prohibition against racial discrimination in this context would suggest that persons of all

of the Constitution, by ensuring that customary marriages are placed on even keel with civil marriages.<sup>78</sup>

2.82 The RCMA also seeks to bring customary marriages in line with international human rights norms, contained amongst others in the *Convention on Consent to Marriage, Minimum Age for Marriage and the Registration of Marriages*,<sup>79</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*<sup>80</sup> and the *Convention on the Rights of the Child*.<sup>81</sup>

2.83 Subsection 3(3)(a) of the RCMA states in respect of a prospective spouse who is a minor that both his or her parents, or if he or she has no parents the legal guardian must consent to the marriage. Subsection 3(3)(b) further states that if the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act, 1961 applies.

2.84 Section 25<sup>82</sup> of the Marriage Act is incorporated in the RCMA by reference. Section 25 of the RCMA deals with the situation where the consent of a minor's parents or guardian

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ances who subscribe to African culture are not precluded from marrying according to African custom.

<sup>75</sup> Section 15(3) of the Constitution gave impetus to the introduction of the Act in so far as it provides in part that it does not prevent legislation recognising marriages concluded under any tradition or system of personal and family law under any tradition.

<sup>76</sup> Section 30 enshrines one's right to participate in the cultural life of their choice and to do so in a manner that is consistent with the Constitution.

<sup>77</sup> Section 31 amplifies the right to practice one's culture set out in s 30.

<sup>78</sup> Prior to the enactment of the Act, customary marriages enjoyed limited recognition. This is largely due to the subsidiary role to which customary law was relegated in terms of s 11(1) of the Black Administration Act 38 of 1927.

<sup>79</sup> 521 U.N.T.S. 231 G.A. Res. 1763 A (XVII) of 7 November 1962

<sup>80</sup> Adopted 18 December 1979, G.A. Res. 34/180 U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 46, U.N. Doc. A/34/46 (1980),

<sup>81</sup> G.A. Res. 25, U.N. GAOR, 44<sup>th</sup> Sess., U.N. Doc. A/736 (1989)

<sup>82</sup> Section 25 of the Marriage Act 25 of 1961, referred to in the Customary Marriages Act, reads:

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

**25.** (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

cannot be obtained for the minor's marriage. Subsections (1), (2) and (4) of the Marriage Act refer to a "commissioner of child welfare". In terms of Chapter 4 of the Children's Act 38 of 2005 the phrase "commissioner of child welfare" is redundant and must be replaced by "presiding officer of the children's court".<sup>83</sup>

2.85 The SALRC also recommends that the provisions of section 25 of the Marriage Act be inserted in section 3(3)(b) of the RCMA Act with the proposed changes for purposes of internal coherence and not be understood with reference to sections in other statutes. It is recommended that section 3(3)(b) be amended as follows to address the above concerns:

- (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 or her 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 or her guardian refuses to grant consent to the marriage.

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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 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.”.

<sup>83</sup>

See also paragraph 2.20 above

- (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.
- (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.

2.86 Section 3(5) of the RCMA lacks internal coherence and can only be understood with reference to section 24A of the Marriage Act of 1961. Furthermore, the reference to “commissioner of child welfare” in section 24A of the Marriage Act is obsolete.<sup>84</sup>

2.87 The SALRC recommends that section 3(5) of the RCMA be amended to read as follows to address the above concerns:

- (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-

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<sup>84</sup> See the discussion at paragraphs 2.18 and 2.19 above.

- (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
  - (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.”.

2.88 Section 7(1) of the RCMA states that marriages contracted before the Act came into effect continue to be governed by customary law. Section 7(2) of the RCMA in contrast makes community of property and of profit and loss the default regime in respect of marriages entered into after the commencement of the Act.

2.89 The difficulty, however, is that there are countervailing arguments for making the seemingly invidious distinctions drawn in section 7(1) and (2) of the RCMA, because the parties who were married before the Act came into effect, have settled expectations in respect of the patrimonial consequences of their marriage. Third parties may also have contracted with them based on those patrimonial arrangements.

2.90 Further, section 7(4)(a) of the RCMA goes some way in attempting to cure the perceived unconstitutionality of section 7(1) by allowing spouses to bring the patrimonial consequence of their marriage in line with the Act. The difficulty, however, is that most persons married under the Act, particularly those married prior to its inception may not be aware of the provisions of section 7(4)(a) of the RCMA.

2.91 The Constitutional Court considered section 7(1) and (2) of the RCMA in *Gumede v President of the Republic of South Africa*<sup>85</sup> in December 2008. The effect of these sections is that marriages concluded before the commencement 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.

2.92 Elizabeth Gumede was married in 1968 when the 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

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<sup>85</sup> 2009 (3) SA 152 (CC).

Natal Code of Zulu Law Proclamation R151 of 1987, meant that in a divorce the man would get everything and she would be entitled to nothing. The law has since changed, and customary marriages concluded after 15 November 2000 are in community of property. The Durban High Court had already ruled in her favour on the grounds of constitutional invalidity, and she asked the Constitutional Court to confirm this. The KwaZulu-Natal MEC for Traditional and Local Government and the Minister of Home Affairs opposed it. Judge Moseneke found that aspects of the law for a case like *Gumede's* were discriminatory on the grounds of gender and therefore inconsistent with the Constitution and invalid. 'The case underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon termination of a customary marriage,' he said.

The court described the *Gumede* case as one concerning a claim of unfair discrimination on the grounds of gender and race in relation to women who are married under customary law as codified in the province of KwaZulu-Natal. It brings into sharp focus the issues of ownership, including access to and control of family property by the affected women during and upon dissolution of their customary marriages. At one level, the case underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon termination of a customary marriage. At another level, the case poses intricate questions about the relative space occupied by pluralist legal systems under the umbrella of one supreme law, which lays down a common normative platform.

2.93 The Constitutional Court held that the distinction between customary marriages concluded before 15 November 2000 and those concluded thereafter is discriminatory and not justifiable in terms of our Constitution. The court also struck down section 20 of the KwaZulu Act; and sections 20 and 22 of the Natal Code as unconstitutional. The Constitutional Court furthermore declared section 7(1) of the RCMA invalid to the extent that it related to monogamous customary marriages and deleted the words "entered into after the commencement of this Act" from section 7(2) of the RCMA.

2.94 The SALRC recommends that section 7 of the RCMA be amended to delete subsection (1) and delete the words "entered into after the commencement of this Act" from section 7(2) of the RCMA. 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 SALRC recommends that the KwaZulu provincial government be requested to put the Traditional Leadership and Governance Act 5 of 2005 into operation.

2.95 Section 7(2) of the RCMA further states in part that "[a] customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other

existing customary marriage, is a marriage in community of property and of profit and loss between the spouses". The use of the term "partner" to refer to a spouse in a prior existing customary marriage is incongruous. It is inconsistent with the recognition given to customary marriages. Parties to a customary marriage are not partners but spouses of one another.

2.96 Section 7(2) of the RCMA serves a useful purpose and need not be repealed but the SALRC recommends that the word "partner" should be replaced with the word "spouse".<sup>86</sup>

2.97 Section 7(3) of the RCMA incorporates the provisions of Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act 88 of 1984. Section 7(5) of the RCMA also incorporates the provisions of section 21 of the Matrimonial Property Act. The concerns expressed in respect of section 3(3)(b) and section 3(5) of the RCMA regarding the need for internal coherence apply with equal force in respect of section 7(3) and (5) of the RCMA.

2.98 It is recommended that the applicable parts of the RCMA or Acts referred to, be specifically incorporated for ease of reference.

2.99 Commenting on the SALRC Consultation Paper the DHA in respect of paras 2.88 to 2.98 wished to indicate that the provisions of section 7 will be incorporated into the draft Recognition of Customary Marriages Amendment Bill to effect the Constitutional Court judgment in the *Gumede* matter. It is envisaged that the said Bill will be taken through Parliament during 2013 or 2014 as the DHA is currently engaging with the Department of Justice and Constitutional Development on the re-assignment of the RCMA.

2.100 Section 8(1) of the RCMA seemingly contemplates the irretrievable breakdown of the marriage as the only ground for divorce. If this is indeed the case, it would suggest that the grounds for dissolution of a customary marriage by divorce set out in section 8(1) of the RCMA are more circumscribed than those set out in section 3<sup>87</sup> read with section 5<sup>88</sup> of the Divorce Act, for the dissolution of civil marriages. This view is reinforced by the fact that

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<sup>86</sup> Note that s 10 of the Act regarding change of marriage systems also makes reference to a prior existing customary marriage entered into with another person, but it uses the correct appellation to describe the spouse in the prior existing customary marriage.

<sup>87</sup> Section 3 stipulates the irretrievable break-down of the marriage, mental illness or continuous unconsciousness as possible grounds for divorce.

<sup>88</sup> Section 5 of the Divorce Act further explains mental illness and continuous unconsciousness as grounds for divorce.

section 8(3) and (4) of the RCMA incorporates other statutes and sections of the Divorce Act to the exclusion of sections 3 and 5 of the Divorce Act, which include mental illness and continuous unconsciousness as grounds for terminating a marriage by divorce.

2.101 While it is acknowledged that the irretrievable breakdown of the marriage may be an all-encompassing ground that can accommodate mental illness and continuous unconsciousness while obviating the onerous requirements for proof of mental illness and continuous unconsciousness, it nevertheless does not fully cater for the grounds that have been omitted. This seemingly is an oversight on the part of the legislator that needs to be remedied with the necessary amendments.

2.102 Commenting on the SALRC Consultation Paper the DHA agreed with the recommendation and will incorporate the same in the Bill referred to in the comment above.

2.103 Section 9 of the RCMA stipulates that notwithstanding the rules of customary law, the age of any person is determined with reference to the Age of Majority Act, 1972. The Age of Majority Act has been repealed by section 331 read with Schedule 4 of the Children's Act 38 of 2005. The SALRC recommends that reference to the Age of Majority Act, 1972 should be corrected. In its comment to the SALRC on the Consultation Paper the DHA supported the recommendation and will incorporate the same in the Bill referred to in the comment above.

2.104 Lastly the SALRC requests that the DHA should consider the following perceived problems encountered with the Recognition of Customary Marriages Act:

- (i) Even though customary marriages are now regulated by the Recognition of Customary Marriages Act of 1998, this Act did not repeal all provisions in legislation regulating customary marriages which were promulgated by the former homelands or self-governing territories. Provisions contained in chapter 3 and part 2 of chapter 5 of the Transkei Marriage Act, 1978 (Act 21 of 1978)<sup>89</sup> and the provisions of the Bophuthatswana Marriage Act 15 of 1980 dealing with property rights of parties to a "customary union", chapter 7 of the KwaZulu Act

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<sup>89</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 (ss 27, 28 and 30); payment of dowry (s 30); registration of customary marriages (ss 32-36); dissolution of customary marriages (ss 47-50) and s 51).

on the Code of Zulu Law 16 of 1985 and Proclamation R151 of 1987,<sup>90</sup> are still in operation.

The KwaZulu Act on the Code of Zulu Law 16 of 1985 was assigned to the Province of KwaZulu-Natal by Proclamation 107 of 1994; and the Natal Code of Zulu Law Proclamation 151 of 1987 was likewise assigned by Proclamation 166 of 1994. Although the Codes have been repealed in their entirety by section 53 of the KwaZulu-Natal Traditional Leadership and Governance<sup>91</sup> the section has not been put into operation. In the *Gumede case*<sup>92</sup> the Court also had to adjudicate on the sustainability of the provisions in the Natal and KwaZulu Codes that the family head is the owner of, and has control over all, family property in the family home, and the provision that inmates of a kraal are in respect of family matters under the control of, and owe obedience to, the family head. These provisions are discriminatory and there is no reason for their continued existence. The legal certainty created by the codification is hugely overshadowed by the negative effect of the stagnation of the law.<sup>93</sup>

The Transkei Marriage Act of 1978 and the Bophuthatswana Marriage Act of 1980 have both been repealed in their entirety in the Draft Marriage Amendment Bill of 2009 which was published by the DHA in 2009.<sup>94</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 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 in the proposed Home Affairs Legislation Repeal and Amendment Act.

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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> Act 5 of 2005 (KwaZulu Natal).

<sup>92</sup> 2009 (3) SA 152 (CC).

<sup>93</sup> Prof Jan Bekker (University of Pretoria) and Prof Gardiol van Niekerk (Unisa) Bekker SA Public Law (2009) 2006-222.

<sup>94</sup> The Draft Marriage Amendment Bill, 2009 as published in the Government Gazette of 13 February 2009, Notice 149 of 2009 for comments by the Department of Home Affairs.

2.105 DHA agrees with the recommendation and will incorporate the same in the Recognition of Customary Marriages Amendment Bill which will be taken through Parliament during 2013 or 2014.

- (ii) Section 31 of the Black Laws Amendment Act, 1963 (Act No. 76 of 1963) also provides for the registration of customary marriages. This section provides for the right of a partner to a customary “union” to claim damages from any person who unlawfully causes the death of the other partner to such “union”. Section 31 is the only remaining substantive provision of Act 76 of 1963. The SALRC, in its Discussion Paper 120,<sup>95</sup> provisionally proposed that subsections 31(1), (2), (2A), (3), (4), (6) and (7) of Act 76 of 1963 be repealed and that a provision similar to subsection 31(5) be embodied in the Recognition of Customary Marriages Act 120 of 1998, following consultation with the DHA in addition to the Department of Cooperative Governance and Traditional Affairs that administers the Black Laws Amendment Act. The SALRC has also sent comments on the Draft Recognition of Customary Marriages Amendment Bill, 2009 to the Chief Director Legal Services, requesting that section 31 of the Black Laws Amendment Act 76 of 1963 be repealed in the Draft Recognition of Customary Marriages Amendment Bill.<sup>96</sup>

2.106 In its comment to the SALRC on the Consultation Paper the DHA agreed with the recommendation and has incorporated the same in the draft Recognition of Customary Marriages Amendment Bill referred to in the comment above.

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<sup>95</sup> Statutory Law Revision (Legislation administered by the Department of Co-Operative Governance and Traditional Affairs) published on 31 March 2011 at p30.

<sup>96</sup> Published in the Government Gazette No 32198 of 8 May 2009, Notice 416 of 2009.

## **2. Theme 2: Movement and Status**

### **(a) Sub-Theme: Movement**

#### **(i) *Aliens Control Amendment Act 3 of 1993***

2.107 The purpose of the Aliens Control Amendment Act, 1993 (Act No. 3 of 1993) was to amend the Aliens Control Act, 1991 (Act No. 96 of 1991), being the “principal Act”, such as to provide for revised penalties and immigration arrangements. The Aliens Control Amendment Act, 1993 is redundant as the principal Act was repealed in its entirety by section 54(1) of the Immigration Act, 2002 (Act No. 13 of 2002) (“the Immigration Act, 2002”) read with Schedule 3. In addition, in terms of section 54(2) of the Immigration Act, 2002, anything done under the provisions of a law repealed by the Immigration Act and which could have been done under the Immigration Act shall be deemed to have been done under the Immigration Act, 2002. It is therefore recommended that the Aliens Control Amendment Act, 1993 be repealed as being redundant. In its comment to the SALRC on the Consultation Paper the DHA agreed with the recommendation, although the DHA feels that in principle the Amendment Act falls off with the repeal of the main Act. The SALRC is of the view that people will be 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.

#### **(ii) *South African Passports and Travel Documents Act 4 of 1994***

2.108 The South African Passports and Travel Documents Act, 1994 (Act No. 4 of 1994) (“the South African Passports and Travel Documents Act”) provides for the vesting of various powers and duties with regard to the issue and management of passports and travel documents in the Minister of Home Affairs. Section 1 of the South African Passports and Travel Documents Act defines the term “minor” as “any person who has not yet attained the age of 18 years, excluding a person who has been declared a major in terms of the Age of Majority Act, 1972 (Act No. 57 of 1972), or who has contracted a legal marriage or who is emancipated” In terms of its exclusions, declarations of majority are no longer permissible as the Age of Majority Act, 1972 was repealed by section 331 read with Schedule 4 of the Children’s Act, 2005 (Act No. 38 of 2005) on 1 July 2007. This definition would require therefore to be amended accordingly and the SALRC recommends that it be amended as follows:

'minor' means any person who has not yet attained the age of 18 years, excluding a person who **[has been declared a major in terms of the Age of Majority Act, 1972 (Act 57 of 1972),]**became a major in terms of section 17 of the Children's Act, 2005 (Act No. 38 of 2005) or who has contracted a **[legal]** valid marriage or civil union in terms of the Civil Union Act, 2006, (Act No. 17 of 2006)**[or who is emancipated];**

2.109 The phrase "South African citizen" is defined in this Act to mean a person who is a South African citizen in terms of the South African Citizenship Act, 1949 (Act No. 45 of 1949). The whole of the South African Citizenship Act, 1949 Act was repealed in terms of Schedule 2 read with section 26(1) of the South African Citizenship Act, 1995 (Act No. 88 of 1995). It is recommended therefore that the definition of "South African citizen" be amended to make reference to the South African Citizenship Act, 1995 Act. In its comment on the SALRC Consultation Paper the DHA agreed with the recommendation.

**(iii) Identification Act 68 of 1997**

2.110 The Identification Act, 1997 (Act No. 68 of 1997) ("the Identification Act") provides principally for the compilation and maintenance of the population register and the issue and management of identity documents. Section 8(d) of Identification Act, read with section 3 thereof provides for the capturing on the population register of the various details of citizens and permanent residents. In terms of section 8(d), persons who are not South African citizens but are permanent residents are referred to in the section as "aliens". In terms of section 1(1) of the Immigration Act, 2002, the term "foreigner" now describes a person who is not a South African citizen and includes a permanent resident. The term "alien" was repealed along with the Aliens Control Act, 1991 and is therefore obsolete. It is recommended that subsection 8(d) be amended to substitute the term "alien" with the term "foreigner" as follows:

"(d) if he or she is a South African citizen but is not a citizen by birth or descent, the date of his or her naturalisation or registration as such a citizen, and, if he or she is an alien foreigner and was not born in the Republic, the date of his or her entry into the Republic, and the country of which he or she is a citizen;"

2.111 Section 8(e) requires that details of a person's marriage be furnished to the Director General. It is recommended that the subsection be amended to provide for the details of civil unions, concluded in terms of the Civil Union Act 17 of 2006, to be similarly furnished.

“(e) the particulars of his or her marriage contained in the relevant marriage register or other documents relating to the contracting of his or her marriage or civil unions, concluded in terms of the Civil Union Act 17 of 2006 , and such other particulars concerning his or her marital status as may be furnished to the Director-General;”.

2.112 Commenting on the SALRC Consultation Paper the DHA pointed out that it is currently revising the Identification Act, 1997 and the said Bill is to be introduced into Parliament during 2013. The proposed amendments by the SALRC will therefore be incorporated into the said Bill in line with the recommendation.

**(iv) Refugees Act 130 of 1998**

2.113 The purpose of the Refugees Act, 1998 (Act No. 130 of 1998) (“the Refugees Act”) is to implement the relevant United Nations and Organisation of African Unity refugee conventions and to provide for the recognition of refugee claims and ancillary matters.

2.114 The Refugees Act has been substantively amended by the Refugees Amendment Act, 2008 (Act No. 33 of 2008) (“Refugees Amendment Act, 2008”) and the Refugees Amendment Act, 2011 (Act No. 12 of 2011) (“Refugees Amendment Act, 2011”). The two Amendment Acts have not yet come into operation and will only come into operation on a date to be determined by the President. To the extent that provisions of the Refugees Act falling within the ambit of the present inquiry require amendment or repeal which amendment has been affected in terms of the provisions of the Refugees Amendment Act, these measures will not be canvassed here.

**(vi) Refugees Amendment Act 33 of 2008**

2.115 The purpose of the Amendment Act, 2008 is to amend various aspects of the Refugees Act, including bringing certain sections into line with the requirements of the UN and OAU refugee conventions. The Refugees Amendment Act, 2008 will come into operation on a date determined by the President by proclamation in the *Gazette*.

**(vii) Refugees Amendment Act 12 of 2011**

2.116 The purpose of the Refugees Amendment Act, 2011 is to amend various aspects of the Refugees Act, as amended by the Refugees Amendment Act, 2008 including to clarify how applications for refugee status rejected as manifestly; unfounded and unfounded must be dealt with; to empower the Director-General; to establish the Status Determination Committee; to revise the provisions relating to withdrawal of refugee status. The date of commencement of this Amendment Act is still to be proclaimed.

**(vii) Immigration Act 13 of 2002**

2.117 The purpose of the Immigration Act, 2002 is to regulate the admission, presence and departure of persons, particularly foreign persons, in the Republic.

2.118 Section 1 defines the term “customary union” as-  
a customary union recognised in terms of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998).

Prior to 1998 customary marriages were dubbed ‘unions’ and relegated to an inferior status in comparison to the legal status of civil marriages. The term “customary union” is no longer used as customary marriages are now recognised by South African law in terms of the RCMA. The SALRC recommends that the definition of “customary union” be deleted.

2.119 Section 1 also defines the term “marriage” as

- (a) a marriage concluded in terms of the Marriage Act, 1961 (Act No. 25 of 1961);  
or
- (b) a legal marriage under the laws of a foreign country;

It is recommended that the definition be amended to provide for the marriages concluded in terms of the Recognition of Customary Marriages Act 120 of 1998 as well as the civil unions, concluded in terms of the Civil Union Act. The SALRC recommends that it be amended as follows:

'marriage' means-

- (a) a marriage concluded in terms of –
  - (i) the Marriage Act, 1961 (Act No. 25 of 1961); or
  - (ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998)
- (b) **[a legal marriage under the laws of a foreign country]**a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006);

2.120 In its comment to the SALRC on the Consultation Paper the DHA advised that the definition of marriage will be amended in the Immigration Amendment Bill which will be taken through Parliament in 2014.

**(viii) Immigration Amendment Act 19 of 2004**

2.121 The Immigration Amendment Act, 2004 (Act No. 19 of 2004) (“the Immigration Amendment Act, 2004”) amends the Immigration Act, so as to substitute the Preamble of the Act; to amend, insert or delete certain definitions; to provide for the delegation of powers and review procedures; to amend the composition and functions of the Immigration Advisory Board; to provide afresh for interdepartmental cooperation; to amplify and redefine the Minister's powers to make regulations and to amend the procedure in that regard; to provide for the clarification and revision of procedures and permits with regard to admission to, residence in and departure from the Republic; to clarify the appointment, powers and duties of inspectors; to further regulate the use of conveyances with regard to admission to the Republic; to repeal the provisions that provide for Immigration Courts; to provide afresh for the keeping of registers of lodgers by certain persons; to clarify the powers of immigration officers and police officers with regard to interviewing a person when they are not satisfied that the person is entitled to be in the Republic; to clarify the position with regard to certain offences; to correct certain important technical aspects in the text of the Act; to provide for the substitution for Schedule 3 to the Act of a new Schedule; to provide for certain transitional matters.

2.122 None of the changes are inconsistent with the Constitution. The Immigration Amendment Act of 2004 will ensure legal certainty. It is therefore proposed that the amendment Act be retained.

**(ix) Immigration Amendment Act 3 of 2007**

2.123 The Immigration Amendment Act, 2007 (Act No. 3 of 2007) (“the Immigration Amendment Act, 2007”) amends the Immigration Act, so as to define certain words and to substitute a definition; to provide for the clarification and revision of procedures and permits with regard to admission to, residence in and departure from the Republic; to effect certain technical corrections; and to provide for matters connected therewith.

2.124 None of the changes are inconsistent with the Constitution. The Immigration Amendment Act of 2007 will ensure legal certainty. It is therefore proposed that the amendment Act be retained.

**(x) Immigration Amendment Act 13 of 2011**

2.125 The Immigration Amendment Act, 2011 (Act No. 13 of 2011) amends the Immigration Act, so as to substitute certain words of the Preamble to the Act; to delete, insert or substitute certain definitions; to revise provisions relating to the Immigration Advisory Board; to revise provisions relating to the making of regulations; to provide for the designation of ports of entry; to revise provisions relating to visas for temporary sojourn in the Republic and for the procedures with regard thereto; to provide for the mandatory transmission and use of information on advance passenger processing; to provide for the transmission of passenger name record information; to revise provisions relating to permanent residence; to revise penal provisions; to correct certain important technical aspects in the text of the Act; and to provide for matters connected therewith. The Immigration Amendment Act of 2011 came into operation on 26 May 2014.

**(b) Status**

**(i) South African Citizenship Act 88 of 1995**

2.126 The main purpose of the Citizenship Act, 1995 (Act No. 88 of 1995) (“the South African Citizenship Act”) is to provide for the acquisition, loss and resumption of South African citizenship and for matters incidental thereto.

2.127 No obsolete or redundant provisions or provisions that infringe the constitutional equality provisions have been identified in this Act. The SALRC therefore proposes that the Citizenship Act, 1995 be retained on the statute book.

**(ii) South African Citizenship Amendment Act 69 of 1997**

2.128 The purpose of the South African Citizenship Amendment Act, 1997 (Act No. 69 of 1997) is to amend the South African Citizenship Act, to further regulate citizenship by descent; to further regulate the citizenship of persons who were citizens of any former state by registration; to empower the Minister of Home Affairs to exempt South African citizens from the deprivation of citizenship when making use of the passport facilities of another country; to empower the said Minister to grant a certificate of naturalisation in exceptional circumstances to an applicant who does not comply with the requirements relating to residence or ordinary residence in the Republic; to regulate the resumption of South African citizenship by persons

who have lost their citizenship by virtue of the provisions of prior laws; to empower the said Minister to grant exemption to a person who ceased to be a citizen by virtue of a certain provision of a prior law; and to effect certain consequential amendments arising from the operation of the said Act; and to provide for incidental matters.

2.129 None of the changes are inconsistent with the Constitution. This amendment Act will ensure legal certainty. It is therefore proposed that the South African Citizenship Amendment Act be retained.

**(iii) South African Citizenship Amendment Act 17 of 2004**

2.130 The South African Citizenship Amendment Act, 2004 (“the South African Citizenship Amendment Act”) amends the South African Citizenship Act so as to repeal a provision in terms of which a person may be deprived of citizenship by virtue of the use of the citizenship of another country; and to make provision for other penalties instead of the loss of citizenship; and to provide for matters connected therewith.

2.131 None of the changes are inconsistent with the Constitution. The South African Citizenship Amendment Act ensures legal certainty. It is therefore proposed that the amendment Act be retained.

**(iv) South African Citizenship Amendment Act 17 of 2010**

2.132 The South African Citizenship Amendment Act, 2010 (“the South African Citizenship Amendment Act”) amends the South African Citizenship Act so as to substitute, insert or delete certain definitions; to revise the provisions relating to acquisition of citizenship by birth, descent and naturalisation; to repeal or to substitute certain obsolete references; and to effect certain technical corrections; and to provide for matters connected therewith. None of the changes are inconsistent with the Constitution. The South African Citizenship Amendment Act, 2010 will ensure legal certainty. It is therefore proposed that the amendment Act be retained.

### **THEME 3: ELECTORAL LAWS**

#### **(a) Referendums Act 108 of 1983**

2.133 The purpose of the Referendums Act, 1983 (Act No. 108 of 1983) (“the Referendums Act”) is to provide for the holding of referendums in order to ascertain the views of voters in the Republic or any part thereof on any matter.

2.134 Section 1 still refers to the South African Citizenship Act, 1949 (Act No. 44 of 1949) which has been repealed by section 26 of Citizenship Act, 1998 (Act No. 88 of 1995). It is recommended that the outdated reference be corrected. There is also a reference to the Identification Act, 1986 (Act No. 72 of 1986) which was repealed by section 24 of the Identification, 1997 (Act No. 68 of 1997). The SALRC proposes that the outdated reference be corrected.

2.135 The Referendums Act reflects current position of the law with regard to holding of referendums and is in line with the Constitution and it will ensure legal certainty. It is therefore proposed that the Referendums Act be retained.

#### **(b) Referendums Amendment Act 97 of 1992**

2.136 The purpose of the Referendums Amendment Act, 1992 (Act No. 97 of 1992) (“the Referendums Amendment Act”) is to amend the Referendums Act so as to extend the definition of a voter in section 1 of the Referendums Act, to regulate explicitly certain aspects relating to the holding of referendum and the appointment of a chief referendum officer, and to adjust the power of the Minister of Home Affairs in relation to the making of regulations on prior votes and to provide for matters connected therewith. The Referendums Amendment Act is in line with the Constitution and ensures legal certainty. It is therefore proposed that the Referendums Amendment Act be retained.

#### **(c) Electoral and Related Affairs Amendment Act 36 of 1985**

2.137 The Electoral and Related Affairs Amendment Act, 1985 (Act No. 36 of 1985) (“Electoral and Related Affairs Amendment Act”) has two provisions. Section 1 of the Electoral and Related Affairs Amendment Act amends section 1 of the Electoral Act, 1979 (Act No. 45 of 1979) (“the Electoral Act, 1979”), so as to limit the provisions regarding opinion polls to general elections. The Electoral Act, 1979) was repealed by the Electoral Act, 1993 (Act No.

202 of 1993) which in turn was repealed by the Electoral Act, 1998 (Act No. 73 of 1998). Section 2 of the Electoral and Related Affairs Amendment Act repeals section 35 of the General Law Amendment Act, 1972 (Act No. 102 of 1972).

2.138 There are no provisions still in operation in the Electoral and Related Affairs Amendment Act and therefore the SALRC recommend that this Act be repealed.

**(d) Elections and Identification Amendment Act 92 of 1989**

2.139 The purpose of the Elections and Identification Amendment Act, 1989 (Act No. 92 of 1989) (“the Elections and Identification Amendment Act”) is to amend the Electoral Act 1979. The Electoral Act, 1979 was repealed by the Electoral Act, 1993 (Act No. 202 of 1993) which in turn was repealed by the Electoral Act, 1998 (Act No. 73 of 1998). The Elections and Identification Amendment Act also amends the Identification Act, 1986 (Act No. 72 of 1986) (“the Identification Act, 1986”). The Identification Act, 1986 was repealed by section 24 of the Identification Act, 1997. The provisions of the Elections and Identification Amendment Act have become obsolete. It is therefore proposed that the Elections and Identification Amendment Act, 1989 be repealed.

**(e) Independent Electoral Commission Act 150 of 1993**

2.140 The Independent Electoral Commission Act, 1993 (Act No. 150 of 1993) (“the established the Independent Electoral Commission (IEC) and fixed its composition, powers, duties, administrative structure and financial accountability. Broadly, it established a politically and financially independent panel of reputable persons to assume responsibility for the planning and administration of South Africa's first democratic election. The same body also assessed whether the election was free and fair.

2.141 The whole of the Independent Electoral Commission Act with all its Amendment Acts, the Independent Electoral Commission Amendment Act, 1993 (Act No. 193 of 1993), Independent Electoral Commission Amendment Act, 1994 (Act No. 5 of 1994), Independent Electoral Commission Amendment Act, 1995 (Act No. 56 of 1995), was repealed by section 24(1) of the Electoral Commission Act, 1996 (Act No. 51 of 1996. However, the date of commencement of section 24 is still to be proclaimed. For legal certainty the Act and its amendments must be kept in the statute book.

**(f) Electoral Act 73 of 1998**

2.142 The main purpose of the Electoral Act, 1998 (Act No. 73 of 1998) (“the Electoral Act, 1998”) is to regulate elections of the National Assembly, the provincial legislatures and municipal councils and to provide for related matters. The Electoral Act, 1998 has been substantially amended and substitutions provided by the Electoral Laws Amendment Act, 2003 (“Act No. 34 of 2003) (“the Electoral Laws Amendment Act”). However, the Act is in line with the Constitution. The Electoral Act, 1998 has been extensively amended in 2003 and conforms to section 9 of the Constitution.

**(g) Electoral Laws Amendment Act 34 of 2003**

2.143 The Electoral Laws Amendment Act amends the Electoral Act, 1998, so as to limit the application of the Act with regard to municipal councils; to make new provision regarding applications for registration as a voter; to repeal obsolete provisions; to make new provision regarding voters' rolls, prisoners' voting, special votes, voting hours, assistance to voters with disabilities, objections, review of voting districts, voting stations and conciliation in disputes; to change the Schedule; and to insert a new Schedule prescribing the system of representation in the National Assembly and provincial legislatures. It also amends the Electoral Commission Act, 1996 so as to regulate the registration of political parties.

2.144 None of the changes are inconsistent with the Constitution. The Electoral Laws Amendment Act ensure legal certainty. It is therefore proposed that the amendment Act be retained.

**(h) The Electoral Laws Second Amendment Act 40 of 2003**

2.145 The Electoral Laws Second Amendment Act, 2003 (Act No. 40 of 2003) (Electoral Laws Second Amendment Act”) amends the Electoral Laws Amendment Act, 2003, so as to substitute a phrase in the long title thereof. It also amends the Electoral Act, 1998 to enable voters who are temporarily absent from the Republic during elections to apply for a special vote. None of the changes are inconsistent with the Constitution. The Electoral Laws Second Amendment Act ensures legal certainty and it is therefore proposed that this Amendment Act be retained.

**(i) Electoral Commission Act 51 of 1996**

2.146 The purpose of the Electoral Commission Act, 1996 is to make provision for the establishment and composition of an Electoral Commission to manage elections for national, provincial and local legislative bodies and referenda, and to make provision for the establishment and composition and the powers, duties, and functions of an Electoral Court, to provide for matters in connection therewith. No provisions, which infringe the constitutional equality provisions, have been identified in this Act. Since the Electoral Commission Act, 1996 is still in operation, it is proposed that the Act be retained.

**(j) Electoral Commission Amendment Act 14 of 2004**

2.147 The Electoral Commission Amendment Act, 2004 (Act No. 14 of 2004) (“the Electoral Commission Amendment Act, 2004”) amends the Electoral Commission Act, 1996 to authorise the President to extend the term of office of a member of the Commission. None of the changes are inconsistent with the Constitution. The Electoral Commission Amendment Act, 2004 will ensure legal certainty and it is therefore proposed that the Amendment Act be retained.

**(k) Local Government: Municipal Electoral Act 27 of 2000**

2.148 The purpose of the Local Government: Municipal Electoral Act, 2000 (Act No. 27 of 2000) (“the Local Government: Municipal Electoral Act”) is to regulate municipal elections, to amend certain laws and to provide for matters connected therewith. The Local Government: Municipal Electoral Act reflects current law and is in line with the section 9 of the Constitution.

2.149 The Local Government: Municipal Electoral Act applies to all municipal elections held after the date determined in terms of section 93(3) of the Municipal Structures Act. The Electoral Act, 1998 and the regulations made in terms of that Act apply to municipal elections only to the extent as stated in the Electoral Act, 1998.

2.150 No provisions, which infringe the constitutional equality provisions, have been identified in this Act. Since the Local Government: Municipal Electoral Act is still in operation, it is proposed that the Local Government: Municipal Electoral Act be retained.

**(I) Local Government: Municipal Electoral Amendment Act 14 of 2010**

2.151 The Local Government: Municipal Electoral Amendment Act, 2010 (Act 14 of 2010) amends the Local Government: Municipal Electoral Act of 2000, so as to supplement provisions relating to the election timetable and insert a related Schedule to the Act; to amend provisions relating to nomination of candidates; to provide for central payments of deposits by a party which contests election in more than one municipality; to empower presiding officers to alter boundaries of voting stations, if necessary; to revise provisions relating to number of party agents at a voting station; to clarify the rights and responsibilities relating to assistance to certain voters; to provide for special votes and the procedure related thereto; to enhance the powers and functions of the Electoral Commission and the Electoral Court in relation to the determination and declaration of the result of an election; and to provide for further regulation of objections material to the result of an election. No provisions, which infringe the constitutional equality provisions, have been identified in this Act. Since the Electoral Commission Act is still in operation, it is proposed that the Act be retained.

2.152 In its comment to the SALRC on the Consultation Paper the DHA supported the recommendations in paragraphs 2.134 to 2.152.

#### **4. THEME 4: PERSONS AND OTHERS**

##### **(a) Public Holidays Act 36 of 1994.**

2.153 The main purpose of the Public Holidays Act, 1994 (Act No.36 of 1994) is to make provision for a new calendar of public holidays and to provide that public holidays are paid holidays.

2.154 Section 2 of the Public Holidays Act declares the days mentioned in Schedule 1 as public holidays and Good Friday and Christmas Day are days observed by Christians. The declaration of the two main Christian holidays as paid public holidays sets about creating a differentiation between those who practice Christianity and those who practice other religious faiths in the country whose faith-based occasions are not included in the holidays. This provision is a violation of section 9(3) of the Constitution and amounts to direct discrimination on the basis of religion and belief. There is an element of prejudicial treatment in that the two main Christian holidays are declared as paid public holidays and adherents of other religions who celebrate other faith based holidays are disadvantaged in that their holidays are not declared public holidays and they do not have an automatic benefit of pay on those days. This section should be reviewed. It is suggested that either these holidays be reviewed or that equal weight be given to holidays of other faiths.

2.155 In its comment to the SALRC's Consultation Paper the DHA pointed out that research was conducted in this regard and in all countries there is no balance between different faith groups. The Public Holidays Act was enacted after public participation process. DHA has, following the complaint by the Commission responsible for, amongst others, religious matters, requested the Commission to investigate and consult the public widely on the matter and provide recommendations for consideration. Therefore, until such process is concluded, DHA will not consider any substantive amendments to the Public Holidays Act.

##### **(b) Public Holidays Amendment Act 48 of 1995.**

2.156 The purpose of the Public Holidays Amendment Act, 1995 (Act No. 48 of 1995) is to amend the Public Holidays Act so as to empower the President to declare any day a public holiday. None of the changes are inconsistent with the Constitution. This Amendment Act will ensure legal certainty. It is therefore proposed that the Amendment Act be retained. The DHA agreed with the SALRC's comment in this paragraph.

**(c) The Births and Deaths Registration Act 51 of 1992**

2.157 The purpose of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992) (“Births and Deaths Registration Act”) is to regulate the registration of births and deaths as well as provide for ancillary matters connected thereto.

2.158 Section 26(1) of the Births and Deaths Registration Act provides for the assumption of another surname by an individual. It declares that no person may assume another surname unless the Director General has authorised him or her to assume that other surname. It states that the subsection shall not apply when:

- (a) a woman after her marriage assumes the surname of the man with whom she concluded such marriage or after having assumed his surname, resumes a surname which she bore at a prior time;
- (b) a married or divorced woman or widow resumes a surname which she bore at a prior time; and
- (c) a woman, whether married or divorced, or a widow adds to the surname which she bore at any prior time.

2.159 Section 26(1) of the Births and Deaths Registration Act of 1992 violates section 9(3) of the Constitution in that it creates an allowance for the female spouse in a marriage to assume her husband’s name or change back to her maiden name. This section does not allow the same benefit to a male spouse in a marital relationship. It further does not allow the same benefit to other couples who may not be married.

2.160 Traditionally, married women assume their husband’s surname. They may keep their own surname or add it to their husband’s as a double-barrel surname.<sup>97</sup> The assumption of a common surname is traditionally seen as one of the most important consequences of a marriage. It is a highly public expression of the unification of the spouses that plays a vital role in ‘determining identities, cultural affiliations and histories’. While there is no legal requirement that women in heterosexual marriages should assume the name of their husbands, anecdotal evidence suggests that this custom is almost universally followed.<sup>98</sup>

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<sup>97</sup> See Heaton at 62-63.

<sup>98</sup> Sonnekus “Naamsvoering binne die familiereg – Versoenbaar met fundamentele menseregte?” 1993 TSAR 608 at 630.

2.161 Heaton points out that this rule may well be unconstitutional on the ground that it violates the right to equality before the law and equal protection and benefit of the law and constitutes unfair discrimination against married men on the ground of sex.<sup>99</sup> The Act does not provide any exceptions for men in heterosexual marriages wanting to assume the surnames of their wives. If a man wishes to do so he must submit an application to the Director-General to obtain the consent required for this change. The consent of the Director-General would also be required if the spouses wish to create an entirely new common surname. In these instances the Director-General is vested with a broad discretion to authorise the change if he or she believes there is 'good and sufficient reason' for it.

2.162 In most Western European legal systems even this outward sign of family unity in the form of the family surname is under attack.<sup>100</sup>

2.163 In its comment on the Consultation Paper the DHA enquired as to which community practiced this custom and what kind of society is envisaged by the SALRC for SA.

**(d) The Births and Deaths Registration Amendment Act 40 of 1996**

2.164 The Births and Deaths Registration Amendment Act, 1996 (Act No. 40 of 1996) amends the Births and Deaths Registration Act by giving a definition of the expression 'child born out of wedlock'. It also makes provision for the recognition of customary unions concluded according to indigenous law or custom and of marriages solemnised or concluded according to the tenets of any religion. None of the changes are inconsistent with the Constitution. This Amendment Act ensures legal certainty and it is therefore proposed that the Amendment Act be retained.

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<sup>99</sup> Heaton at 62. See further Heaton Bill of Rights Compendium para 3C17; Sonnekus "Naamsvoering binne die familiereg – Versoenbaar met fundamentele menseregte?" 1993 TSAR 608 at 630.

<sup>100</sup> France, Austria and some cantons in Switzerland, as pointed out by JC Sonnekus in "Naamsvoering binne die familiereg – Versoenbaar met fundamentele menseregte?" 1993 TSAR at 610.

**(e) The Births and Deaths Registration Amendment Act 67 of 1997**

2.165 The Births and Deaths Registration Amendment Act, 1997 (Act No. 67 of 1997) amended the Births and Deaths Registration Act to further regulate the rectification of particulars in documents in the custody of the Director-General: Home Affairs. It provided for the surrendering of certificates and documents which reflect incorrect particulars to the Director-General and to create an offence in this regard. It further provided for the repeal or substitution of certain obsolete or superfluous provisions and expressions. It further regulated the assumption of another surname and provided for matter incidental thereto. Since the Births and Deaths Registration Act is still in force, it is proposed that for legal certainty the Amendment Act be retained.

**(f) The Births and Deaths Registration Amendment Act 43 of 1998**

2.166 The Births and Deaths Registration Amendment Act, 1998 (Act No. 43 of 1998) amended the Births and Deaths Registration Act, so as to further regulate the registration of births as well as regulate the registration of deaths where a medical practitioner is not available to certify the cause of death. It further regulates the publishing of the alteration of forenames or surnames. Since the Births and Deaths Registration Act is still in force, it is proposed that for legal certainty the amendment Act be retained.

**(g) The Births and Deaths Registration Amendment Act 1 of 2002**

2.167 The Births and Deaths Registration Amendment Act, 2002 (Act No. 1 of 2002) amended the Births and Deaths Registration Act so as to define an expression; to reduce the age of majority; to provide for the registration of a child in the surname of either or both parents; to further regulate the alteration of the surname of a minor; and to allow a widow to assume a previous surname; and to provide for matters connected therewith. Since the Births and Deaths Registration Act is still in force, it is proposed that for legal certainty the Amendment Act be retained.

**(h) The Births and Deaths Registration Amendment Act 18 of 2010**

2.168 The main objective of the Births and Deaths Registration Amendment Act, 2010 (Act No. 18 of 2010) ("Births and Deaths Registration Amendment Act, 2010") is to amend the Births and Deaths Registration Act so as to substitute, insert and delete certain definitions, revise provisions relating to registration of births and amendment of birth registration, provide

for the designation of funeral undertakers, make provision for the recording of adoptions, revise provisions relating to secrecy of records obtained under the Births and Deaths Registration Act, clarify provisions relating to the making of regulations, repeal certain sections and provide for matters connected therewith. To align the provisions of the Births and Deaths Registration Act with the provisions of the Children's Act, 2005 (Act No. 38 of 2005), as well as the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000). The Births and Deaths Registration Amendment Act, 2010 has yet to come into operation. No provisions which infringe the constitutional equality provisions have been identified in this Act. It is proposed that the Births and Deaths Registration Amendment Act, 2010 be retained.

2.169 In its comment to the SALRC on the Consultation Paper the DHA agreed with the recommendations made in respect of paragraphs 2.164 to 2.168.

**(i) Alteration of Sex Description and Sex Status Act 49 of 2003**

2.170 The purpose of the Alteration of Sex Description and Sex Status Act, 2003 (Act No. 49 of 2003) ("Alteration of Sex Description and Sex Status Act") is to provide for the alteration of the sex description of certain individuals in certain circumstances; to amend the Births and Death Registration Act accordingly. Until 1992, the South African law (through the Births and Deaths Registration Act, 1963) provided for transsexuals who had undergone sex change surgery to apply to have their sex status changed on the birth register in terms of section 2 (b) of the Births and Deaths Registration Act, 1963. This situation was changed by the introduction of section 33(3) of the Births and Deaths Registration Act, 1992. Thus persons who had commenced their sex reassignment surgery after 1992 were not allowed to make an application to reassign their sex registration on their birth certificate.<sup>101</sup>

2.171 The Alteration of Sex Description and Sex Status Act has served to correct the violation in terms of section 9(3) of the Constitution that was present before the enactment of this piece of legislation and in terms of the current review there is nothing that offends in this piece of legislation.

2.172 In its comment to the SALRC on the Consultation Paper the DHA agreed with the recommendations made in respect of paragraphs 2.171 above.

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<sup>101</sup> This change in legislation followed the case of *W v W 1976 (2) SA 308 WLD* in which Nestadt, J held that a person's sex could not be medically changed.

**(j) Population Registration Act Repeal Act 114 of 1991**

2.173 The Population Registration Act Repeal Act, 1991 (Act No. 114 of 1991) (“Population Act Repeal Act”) has become redundant. Its purpose was to repeal the Population Registration Act, 1950 (Act No. 30 of 1950) which provided for the compilation and maintenance of the population register which is now provided for in the Identification Act 68 of 1997. The Population Act Repeal Act is redundant and must be removed from the statute book. In its comment to the SALRC on the Consultation Paper the DHA agreed with the recommendations made in respect of this paragraph.

**(k) Abolition of Restriction on Free Political Activity Act 206 of 1993**

2.174 The purpose of the Abolition of Restriction on Free Political Activity Act, 1993 (Act No. 206 of 1993) (“Abolition of Restriction on Free Political Activity Act) is to repeal or amend certain laws so as to abolish certain restrictions on political parties and other organizations and on certain publications, objects, films and public entertainments; to that end to empower the State President to repeal or amend certain laws in force in the Republic or in any area of the Republic, including the self-governing territories; and to provide for matters connected therewith. It is not clear from the provisions of the Abolition of Restriction on Free Political Activity Act as to who administers it. However, it appears that most of its provisions amended pieces of legislation that has now been repealed. Apart from section 6(1) of which empowers the State President to repeal, amend supplement or substitute any law that is applicable in the Republic. It must however be noted that section 6(2) limits the operation of section 6(1) of which Act???, as it provides that the power conferred upon the State president lapses on the dissolution of the Transitional Executive Council (TEC) established in terms of the Transitional Executive Council Act, 1993 (Act No. 151 of 1993) (“TEC Act”). Section 29 of the TEC Act provides for the duration of the Act, as well as the TEC. It would however seem that the Abolition of Restrictions on Free Political Activity Act has become redundant or obsolete. It is recommended that it be removed from the statute book. Commenting on the SALRC’s Consultation Paper the DHA agreed with the recommendations made in respect of this paragraph.

**(l) Home Affairs Laws Rationalisation Act 41 of 1995**

2.175 The Home Affairs Laws Rationalisation Act, 1995 (Act No. 41 of 1995) (“Home Affairs Laws Rationalisation Act”) repeals certain laws which apply in the various areas of the national territory of the Republic; to introduce certain transitional measures for the application of the

Publications Act, 1974, the Aliens Control Act, 1991, the Births and Deaths Registration Act, 1992, and section 29A(2) of the Marriage Act, 1961, throughout the Republic; to amend the Births and Deaths Registration Act, 1992, so as to insert a definition and to further regulate the giving of notice of birth; and to provide for matters connected therewith.

2.176 The Home Affairs Laws Rationalisation Act extended the application of only section 29A(2) of the Marriage Act to the whole of the Republic while the Marriage Act, Extension Act, 1997 extended the application of the whole Marriage Act to the Republic of South Africa. Insofar as the operation of section 29A(2) of the Marriage Act is concerned, the extension was therefore duplicated by the Marriage Act, Extension Act. It is suggested that the Home Affairs Rationalisation Act should be amended to delete the reference to section 29A(2) of the Marriage Act as follows:

“(1) The Publications Act, 1974 (Act 42 of 1974), the Aliens Control Act, 1991 (Act 96 of 1991)[,] and the Births and Deaths Registration Act, 1992 (Act 51 of 1992), [**and section 29 of the Marriage Act, 1961 (Act 25 of 1961),**] apply uniformly throughout the Republic.”.

2.177 In its comment to the SALRC on the Consultation Paper the DHA agreed with the recommendations made in respect of paragraphs 2.176 above.

## Annexure A

### HOME AFFAIRS 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 and amend certain laws relating to births; marriages/civil partnerships and deaths; status, citizenship and the entry and exit of nationals and non-nationals into South Africa; electoral laws and 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 or amendment of laws**

- (a)     The laws specified in the Schedule 1 are hereby repealed or amended to the extent set out in the third column of that Schedule;
- (b)     The laws specified in Schedule 2 are repealed to the extent set out in the third column of that Schedule.
- (c)     The laws specified in Schedule 3 are hereby amended to the extent set out in the third column of that Schedule.

#### **2     Short title and commencement**

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

**Schedule 1: Acts to be repealed**

<b>Number and Year of Law</b>	<b>Title or Subject of Law</b>
Act 21 of 1968	Prohibition of Mixed Marriages Amendment Act, 1968
Act 92 of 1989	Elections and Identification Amendment Act, 1989
Act 36 of 1985	Electoral and Related Affairs Amendment Act, 1985
Act 114 of 1991	Population Registration Act Repeal Act, 1991
Act 3 of 1993	Aliens Control Amendment Act 3 of 1993

**Schedule 2**

<b>Number and Year of Law</b>	<b>Title or Subject</b>	<b>Extent of Repeal</b>
Act 25 of 1961	Marriage Act, 1961	Sections 7, 29(3) and 39(4)
Act 11 of 1964	Marriage Amendment Act, 1964	Sections 1(1) and 2
Act 19 of 1968	Marriage Amendment Act, 1968	Sections 1–3
Act 51 of 1970	Marriage Amendment Act, 1970	Sections 2–4, 7, 9, 12 and 13
Act 12 of 1973	Marriage Amendment Act, 1973	Section 2

## Schedule 3

Number and Year of Law	Title or Subject	Amendments
Act 25 of 1961	Marriage Act, 1961	<p>Section 1 is amended by the deletion of the definition of "Commissioner"</p> <p>Section 2(1) is amended to read as follows:  “(1) Every magistrate<del>[,]</del><u>and</u> every special justice of the peace <b>[and every Commissioner]</b> shall by virtue of his <u>or her</u> office and so long as he <u>or she</u> holds such office, be a marriage officer for the district or other area in respect of which he <u>or she</u> holds office.”.</p> <p>Section 3 is substituted by the following:  <b>“3. Designation of ministers of religion and other persons attached to churches as marriage officers.</b>  (1) The Minister and any officer in the public service authorized thereto by him <u>or her</u> may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he <u>or she</u> is such a minister or occupies such position, a marriage officer <b>[for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion]</b>.  <b>[(2) A designation under subsection (1) may further limit the authority of any such minister of religion or person to the solemnization of marriages—</b>                    <b>(a) within a specified area;</b></p>

- (b) for a specified period;  
 (c) . . . .J”.

Section 10 is substituted by the following:

**“10. Solemnization of marriages in country outside the Republic [Union].**

(1) Any person who is under the provisions of this Act authorized to solemnize any marriages in any country outside the [Union] Republic—

- (a) may so solemnize any such marriage only if the parties thereto are both South African citizens domiciled in the [Union] Republic; and  
 (b) shall solemnize any such marriage in accordance with the provisions of this Act.

(2) Any marriage so solemnized shall for all purposes be deemed to have been solemnized in the province of the [Union] Republic in which **[the male party]** either party thereto is domiciled; Provided that both parties shall agree on the province of domicile the marriage shall be deemed to have been solemnized in.”.

Section 22 is substituted by the following:

**“22. Irregularities in publication of banns or notice of intention to marry or in the issue of special marriage licences.**

If in the case of any marriage solemnized before the commencement of the Marriage Amendment Act, 1970, the provisions of any law relating to the publication of banns or notice of intention to marry or to the issue of special marriage licences, or the applicable provisions of any law of a country outside the [Union] Republic relating to the publication of banns or the publication of notice of intention to marry were not strictly complied with but such marriage was in every other respect solemnized in accordance with the provisions of

	<p>this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided such marriage has not been dissolved or declared invalid by a competent court, and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.”.</p> <p>Section 24(2) is amended to read as follows: "(2) For the purposes of subsection (1), a minor does not include a person who is under the age of <b>[twenty-one]</b> <u>eighteen</u> years and previously contracted a valid marriage which has been dissolved by death or divorce."</p> <p>Section 24A(1) is amended to read as follows:  “(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 <b>[commissioner of child welfare]</b> <u>presiding officer of the children’s court</u> 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—</p> <p>(a) by a parent or guardian of the minor before he <u>or she</u> attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or</p> <p>(b) by the minor before he <u>or she</u> attains majority or within three months thereafter.”.</p>
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		<p>Section 25 is amended by the substitution of subsections (1) and (2) by the following:</p> <p>“(1) If a <b>[commissioner of child welfare defined in section 1 of the Child Care Act, 1983,]</b> <u>presiding officer of the children’s court</u> is after proper inquiry satisfied 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 <u>or her</u> 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 <u>or her</u> guardian refuses to grant consent to the marriage.</p> <p>(2) A <b>[commissioner of child welfare]</b> <u>presiding officer of the children’s court</u> shall, before granting his or her 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 <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>Section 25 is further amended by the substitution of subsection (4) by the following:</p> <p>“(4) If the parent, guardian or <b>[commissioner of child welfare]</b> <u>presiding officer of the children’s court</u> in question refuses to consent to a marriage</p>
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	<p>of a minor, such consent may on application be granted by a judge of the <b>[Supreme]</b> <u>High</u> Court of South Africa: 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 of the children's court</u> is without adequate reason and contrary to the interests of such minor.”.</p> <p>Section 26(1) is amended to read as follows: “(1) No <b>[boy]</b> <u>person</u> under the age of 18 years <b>[and no girl under the age of 15 years]</b> shall be capable of contracting a valid marriage except with the written permission of the Minister or any officer in the public service authorized thereto by him <u>or her</u>, which he <u>or she</u> may grant in any particular case in which he <u>or she</u> considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.”.</p> <p>Section 29(2) is substituted by the following: “(2) A marriage officer <b>[shall]</b> <u>may</u> solemnize any marriage in a church or other building used for religious service, or in a public office or private dwelling-house <b>[with open doors and]</b> <u>or in any other place</u> in the presence of the parties themselves and at least two competent witnesses <b>[, but the foregoing provisions of this subsection shall not be construed as prohibiting a marriage officer from solemnizing</b></p>
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	<p><b>a marriage in any place other than a place mentioned therein if the marriage must be solemnized in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties].”.</b></p> <p>Section 30(1) is amended to read as follows:  “(1) In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:  ‘Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?’, and thereupon <b>[the parties shall give each other the right hand and]</b> the marriage officer concerned shall declare the marriage solemnized in the following words:  2. ‘I declare that A.B. and C.D. here present have been lawfully married.’”.</p> <p>Section 37 is amended to read as follows:  <b>“37. Offences committed outside the [Union] Republic.</b>  If any person contravenes any provision of this Act in any country outside the <b>[Union] Republic</b> the Minister of Justice shall determine which court in the <b>[Union] Republic</b> shall try such person for the</p>
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		<p>offence committed thereby, and such court shall thereupon be competent so to try such person, and for all purposes incidental to or consequential on the trial of such person, the offence shall be deemed to have been committed within the area of jurisdiction of such court.”.</p>
Act 17 of 2006	Civil Union Act, 2006	<p>Section 5 is amended by the substitution of subsections (1) and (2) by the following:</p> <p>"(1) Any religious denomination or organisation may apply in writing to the Minister to be designated as a religious organisation that may solemnise <b>[marriages]</b> <u>civil unions</u> in terms of this Act.</p> <p>(2) The Minister may designate such a religious denomination or organisation as a religious institution that may solemnise <b>[marriages]</b> <u>civil unions</u> under this Act, and must, from time to time, publish particulars of all religious institutions so designated in the <i>Gazette</i>."</p> <p>Section 5 is further amended by the substitution of subsection (4) by the following:</p> <p>"(4) The Minister and any officer in the public service authorised thereto by him or her may designate, upon receiving a written request from any minister of religion or any person holding a responsible position in any designated religious institution to be, as long as he or she is such a minister or occupies such position, a marriage officer for the purpose of solemnising <b>[marriages,]</b> <u>civil unions</u> in accordance with this Act, and according to the rites of that religion."</p> <p>Section 5 is further amended by the substitution of subsection (6) by the following:</p> <p>"(6) The Minister and any officer in the public</p>

	<p>service authorised thereto by him or her may, upon receiving a written request from a person designated as a marriage officer under subsection (4), revoke, in writing, the designation of such person as a marriage officer for purposes of solemnising <b>[marriages]</b> <u>civil unions</u> under this Act."</p> <p>Section 6 is substituted by the following:  <b>"6. Marriage officer not compelled to solemnise civil union.</b>  A marriage officer[, <b>other than a marriage officer referred to in section 5,</b>] may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union."</p> <p>Sections 8A and 8B are inserted into the Act after section 8:  <b>"8A Civil union of minors.</b>  (1) No person under the age of 18 years shall be capable of contracting a valid civil union except with the written permission of the Minister or any officer in the public service authorized thereto by him <u>or her</u>, which he <u>or she</u> may grant in any particular case in which he <u>or she</u> considers such civil union desirable: Provided that such permission shall not relieve the parties to the proposed civil union from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.</p>
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	<p>(2) If any person referred to in subsection (1) who was not capable of contracting a valid civil union without the written permission of the Minister or any officer in the public service authorized thereto by him <u>or her</u>, in terms of this Act or a prior law, contracted a civil union without such permission and the Minister or such officer, as the case may be, considers such civil union to be desirable and in the interests of the parties in question, he <u>or she</u> may, provided such civil union was in every other respect solemnized in accordance with the provisions of this Act, or, as the case may be, any prior law, and there was no other lawful impediment thereto, direct in writing that it shall for all purposes be a valid civil union.</p> <p>(3) If the Minister or any officer in the public service authorized thereto by him <u>or her</u> so directs it shall be deemed that he <u>or she</u> granted written permission to such civil union prior to the solemnization thereof.</p> <p>(4) No marriage officer shall solemnize a civil union between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the civil union has been granted and furnished to him <u>or her</u> in writing.</p> <p>(5) For the purposes of subsection (4) a minor does not include a person who is under the age of eighteen years and previously contracted a valid marriage or civil union which has been dissolved by death or divorce.</p> <p>(6) If a presiding officer of the children's court is after proper inquiry satisfied 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</p>
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	<p>into a civil union, such presiding officer may in his <u>or her</u> discretion grant written consent to such minor to enter into a civil union with a specified person, but such presiding officer 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 <u>or her</u> guardian refuses to grant consent to the civil union.</p> <p>(7) A presiding officer of the children's court shall, before granting his <u>or her</u> consent to a civil union under subsection (6), enquire whether it is in the interests of the minor in question that the parties to the proposed civil union 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 civil union before such contract has been entered into, and shall assist the said minor in the execution of the said contract.</p> <p>(8) A contract entered into in terms of subsection (7) shall be deemed to have been entered into with the assistance of the parent or guardian of the said minor.</p> <p>(9) If the parent, guardian or presiding officer of the children's court in question refuses to consent to a civil union of a minor, such consent may on application be granted by a judge of the High Court of South Africa: 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 presiding officer is without adequate reason and contrary to the interests of such minor.</p> <p>(10) If parties appear before a marriage officer for the purpose of contracting a civil union with each other and such marriage officer reasonably suspects that either of them is of an age which</p>
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	<p>debars him or her from contracting a valid civil union without the consent or permission of some other person, he <u>or she</u> may refuse to solemnize a civil union between them unless he <u>or she</u> is furnished with such consent or permission in writing or with satisfactory proof showing that the party in question is entitled to contract a civil union without such consent or permission.</p> <p><b>8B Consequences and dissolution of minor's civil union for want of consent.</b></p> <p>(1) Notwithstanding anything to the contrary contained in any law a civil union 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 of the children's court whose consent is by law required for the entering into of a civil union, did not consent to the civil union, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the civil union is made—</p> <p>(a) by a parent or guardian of the minor before he <u>or she</u> attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the civil union; or</p> <p>(b) by the minor before he <u>or she</u> attains majority or within three months thereafter.</p> <p>(2) A court shall not grant an application in terms of subsection (1) unless it is satisfied that the dissolution of the civil union is in the interest of the minor or minors."</p> <p>Section 10(2) is substituted by the following:  "(2) A marriage officer <b>[must]</b> <u>may</u> solemnise and register a civil union in a public office or private dwelling-house <b>[or on the premises used for such purposes by the marriage officer, with</b></p>
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		<p><b>open doors and] or in any other place</b> in the presence of the parties themselves and at least two competent witnesses <b>[but the foregoing provisions of this subsection do not prohibit a marriage officer to solemnise a civil union in any place other than a place mentioned herein, if the civil union must be solemnised in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties]."</b></p> <p>Section 11(2) is amended to read as follows:  "(2) In solemnising any civil union, the marriage officer must put the following questions to each of the parties separately, and each of the parties must reply thereto in the affirmative:  'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage/civil partnership with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful spouse/civil partner?', and thereupon <b>[the parties shall give each other the right hand and]</b> the marriage officer concerned must declare the marriage or civil partnership, as the case may be, solemnised in the following words:  'I declare that A.B. and C.D. here present have been lawfully joined in a marriage/civil partnership.'"</p>
Act 120 of 1998	Recognition of Customary Marriages Act, 1998	<p>Amendment of section 3 by the substitution for paragraph (b) of the following paragraph:  “(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,</b></p>

	<p><b>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 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 <b>[commissioner of child welfare]</b> <u>presiding officer</u> may in his or her 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 or her consent if one or other parent of the minor whose consent is required by law or his or her 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 or her consent to a marriage under <b>[subsection (1)]</b> <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 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.</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</p>
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	<p>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;”</p> <p>Substitution of subsection(5) with the following subsection:</p> <p><u>(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-</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>Section 7 is amended by-</p> <p>(a) the deletion of subsection (1); and</p> <p>(b) the substitution for subsection (2) of the following subsection:</p> <p>"(2) A customary marriage <b>[entered into after the</b></p>
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		<p><b>commencement of this Act]</b> in which a spouse is not a <b>[partner]</b> <u>spouse</u> 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."</p> <p>(c) 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 Constitutional Development</u> by notice in the Gazette."</p> <p>Section 9 is amended as follows:</p> <p>"9 Age of majority</p> <p>Despite the rules of customary law, the age of majority of any person is determined in accordance with the <b>[Age of Majority Act, 1972 (*Act 57 of 1972)]</b> <u>Children's Act, 2009 (Act No. 38 of 2009)</u>."</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>
Act 4 of 1994	South African Passports and Travel Documents Act, 1994	<p>Amendment of section 1</p> <p>'minor' means any person who has not yet attained the age of 18 years, excluding a person who <b>[has been declared a major in terms of the Age of Majority Act, 1972 (Act 57 of 1972),]</b></p>

		<p><u>became a major in terms of section 17 of the Children’s Act, 2005 (Act 38 of 2005) or who has contracted a <b>[legal]</b> <u>valid marriage or civil union in terms of the Civil Union Act, 2006, (Act 17 of 2006) [or who is emancipated];</u></u></p> <p>'South African citizen' means any person who is a South African citizen in terms of the South African Citizenship Act, <u>1995 (Act 88 of 1995)[1949 (Act 44 of 1949)];</u></p>
Act 68 of 1997	Identification Act, 1997	<p>Amendment of section 8 by substituting the following paragraphs:</p> <p>“(d) if he or she is a South African citizen but is not a citizen by birth or descent, the date of his or her naturalisation or registration as such a citizen, and, if he or she is a <b>[n] [alien] foreigner</b> and was not born in the Republic, the date of his or her entry into the Republic, and the country of which he or she is a citizen;</p> <p>(e) the particulars of his or her marriage contained in the relevant marriage register or other documents relating to the contracting of his or her marriage <u>or civil union concluded in terms of the Civil Union Act 17 of 2006,</u> and such other particulars concerning his or her marital status as may be furnished to the Director-General;</p>
Act 130 of 1998	Refugees Act, 1998	<p>Amendment of section 4</p> <p>“4(1)(c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the <b>[Organisation of African Unity] African Union;</b> or”.</p> <p>4(2) For the purposes of subsection (1) (c), no exercise of a human right recognised under</p>

		international law may be regarded as being contrary to the objects and principles of the United Nations Organisation or the <b>[Organisation of African Unity]</b> <u>African Union.</u> ".
		By the substitution in subsection (l) of the definition of "marriage" of the following definition:  'marriage' means- (a) a marriage concluded in terms of – (i) the Marriage Act, 1961 (Act No. 25 of 1961); <u>or</u> (ii) <u>the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); or</u> (b) <b>[a legal marriage under the laws of a foreign country]</b> <u>a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006);"</u>
Act 51 of 1992	Births and Deaths Registration Act, 1992	1. Amendment of section 1 of the Births and Deaths Registration Act, 1992:  Definition of 'competent court' to read as follows:  'competent court' includes a magistrates' court, and a children's court established <b>[as contemplated]</b> in terms of the [Child Care Act, 1983 (Act No. 74 of 1983) Children's Act (Act No. 38 of 2005);  Definition of 'population register' 'population register' means the population register [mentioned] contemplated in section 5 of the Identification Act, <b>[1986 (Act No. 72 of 1986)]</b> 1997 (Act No. 68 of 1997);  2. Section 11 of the Births and Deaths Registration Act, 1992 is hereby amended

		<p>by the substitution for subsection (6) of the following subsection:</p> <p>"(6) When the court considers the application contemplated in subsection (5) the provisions of <b>[sections 1 and 2 of the Children's Stains Act, 1987 (Act No, 82 of 1987),]</b> section 26(b) of the Children's Act shall apply."</p> <p>3. Substitution of section 12 of Act 51 of 1992 The following section is hereby substituted for section 12 of the Births and Deaths Registration Act, 1992 :</p> <p>"Notice of birth of abandoned or orphaned child</p> <p>12(1) The notice of birth of an abandoned child which has not yet been given, shall be given, after an enquiry in respect of the child concerned in terms of the <b>[Child Care Act, 1983 (Act No. 74 of 1983)]</b> Children's Act, 2005 by the social worker or authorized officer concerned: Provided that in the event of any parent of the child being traced after the registration of the birth and the particulars in any document or record in respect of the child not being reflected correctly, the Director-General may on application in the prescribed manner, amplify and correct the said particulars.</p> <p>4. Section 19 of Act 51 of 1992 is hereby amended by the substitution for subsection (4) of the following subsection:</p> <p>"(4) For the purposes of this section 'port of entry' has the meaning assigned thereto by section I of the <b>[Aliens Control Act, 1991 (Act No 96 of 1991)]</b> Immigration Act, 2002 (Act No. 13 of 2002).</p>
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Act 68 of 1997	Identification Act, 1997	<p>1. Amendment of subsection 8(d) by the substitution of the term “alien” with the term “foreigner.”</p> <p>2. Substitution of subsection e of the following subsection:  “(e) the particulars of his or her marriage contained in the relevant marriage register or other documents relating to the contracting of his or her marriage, <u>or a civil union concluded in terms of the Civil Union Act 17 of 2006</u> and such other particulars concerning his or her marital status as may be furnished to the Director-General;”.</p>
Act 41 of 1995	Home Affairs Laws Rationalisation Act, 1995	<p>Section 2(1) is amended to read as follows:  “(1) The Publications Act, 1974 (Act 42 of 1974), the Aliens Control Act, 1991 (Act 96 of 1991) <u>[,]and</u> the Births and Deaths Registration Act, 1992 (Act 51 of 1992), <b>[and section 29 of the Marriage Act, 1961 (Act 25 of 1961),]</b> apply uniformly throughout the Republic.”</p>

**Annexure B: Statutes administered by the Department of Home Affairs**

<b>Number</b>	<b>Name of Act, number and year</b>
1.	Marriage Act 25 of 1961
2.	Marriage Amendment Act 11 of 1964
3.	Marriage Amendment Act 19 of 1968
4.	Prohibition of Mixed Marriages Amendment Act 21 of 1968
5.	Marriage Amendment Act 51 of 1970
6.	Marriage Amendment Act 26 of 1972
7.	Age of Majority Act 57 of 1972
8.	Marriage Amendment Act 12 of 1973
9.	Marriage Amendment Act 45 of 1981
10.	Indecent or Obscene Photographic Matter Amendment Act 72 of 1983
11.	Referendums Act 108 of 1983
12.	Electoral and Related Affairs Amendment Act 36 of 1985
13.	Marriages, Births and Deaths Amendment Act 41 of 1986
14.	Elections and Identification Amendment Act 92 of 1989
15.	Population Registration Act Repeal Act 114 of 1991
16.	Births and Deaths Registration Act 51 of 1992
17.	Referendums Amendment Act 97 of 1992
18.	Aliens Control Amendment Act 3 of 1993
19.	Independent Electoral Commission Act 150 of 1993 (to be repealed)
20.	Independent Electoral Commission Amendment Act 193 of 1993 (to be repealed)
21.	Abolition of Restrictions on Free Political Activity Act 206 of 1993 (partly)
22.	South African Passports and Travel Documents Act 4 of 1994
23.	Independent Electoral Commission Amendment Act 5 of 1994 (to be repealed)
24.	Public Holidays Act 36 of 1994
25.	Home Affairs Laws Rationalisation Act 41 of 1995
26.	Public Holidays Amendment Act 48 of 1995
27.	Independent Electoral Commission Amendment Act 56 of 1995
28.	South African Citizenship Act 88 of 1995
29.	Births and Deaths Registration Amendment Act 40 of 1996
30.	Electoral Commission Act 51 of 1996
31.	Films and Publications Act 65 of 1996

<b>Number</b>	<b>Name of Act, number and year</b>
32.	South African Passports and Travel Documents Amendment Act 49 of 1997
33.	Marriage Act, Extension Act 50 of 1997
34.	Births and Deaths Registration Amendment Act 67 of 1997
35.	Identification Act 68 of 1997
36.	South African Citizenship Amendment Act 69 of 1997
37.	South African Passports and Travel Documents Amendment Act 42 of 1998
38.	Births and Deaths Registration Amendment Act 43 of 1998
39.	Electoral Act 73 of 1998
40.	Recognition of Customary Marriages Act 120 of 1998 (partly)
41.	Refugees Act 130 of 1998
42.	Films and Publications Amendment Act 34 of 1999
43.	Local Government: Municipal Electoral Act 27 of 2000
44.	Identification Amendment Act 28 of 2000
45.	Births and Deaths Registration Amendment Act 1 of 2002
46.	Immigration Act 13 of 2002
47.	Electoral Laws Amendment Act 34 of 2003
48.	Electoral Laws Second Amendment Act 40 of 2003
49.	Alteration of Sex Description and Sex Status Act 49 of 2003
50.	Electoral Commission Amendment Act 14 of 2004
51.	Civil Unions Act 17 of 2006
52.	Immigration Amendment Act 3 of 2007
53.	Refugee Amendment Act 33 of 2008
54.	Films and Publications Amendment Act 3 of 2009
55.	Local Government: Municipal Electoral Amendment Act 14 of 2010
56.	Citizens Amendment Act 17 of 2010
57.	Births and Deaths Amendment Act 18 of 2010
58.	Immigration Amendment Act 13 of 2011