

## RESPONSES TO ISSUE PAPER 15: ISLAMIC MARRIAGES AND RELATED MATTERS

The Law Commission wishes to express its appreciation for the substantial number of written responses received after the publication of its Issue Paper on Islamic marriages and related matters. Although it is not normal practice for the Commission to respond to submissions prior to a proper and incisive evaluation of the inputs, an exception is made in this investigation, first, because the investigation is classified on the Commission's law reform programme as one of those enjoying the highest priority rating, and, second, because of the overwhelming interest that especially members of the Islamic community have demonstrated in the progress of the investigation since the appointment of the present project committee in 1999. In addition, the Commission has adopted a policy of consulting as widely as possible so as to involve members of the community in the process of aligning the law to society's needs in a realistic and responsible way. Although the Commission is aware of a pressing need for reform of the law especially insofar as the legal recognition of Islamic marriages is concerned, it has been proved time and again that no attempt at modification or reform of the law can be successful unless the voices of the people are duly taken into consideration. This inevitably has a detrimental impact on the speed with which the process of law reform takes place. The Commission emphasises that it is not Islamic law that is being reformed, but that South African law is to be adjusted to recognise Islamic marriages.

A general phenomenon in our society is that there is an ever increasing number of various pressure or interest groups. In the Islamic community there are religious groups, gender orientated groups, groups promoting the interests of vulnerable persons and groups striving to protect the integrity of *Shari'ah* within a secular framework. This often leads to competing and divergent demands as well as various suggestions as to the direction that any attempt at reforming the South African law should take. It therefore comes as no surprise that the Commission and the project committee have simultaneously been criticised and lauded by various sectors in respect of its tentative proposals in the Issue Paper. This document should be seen as an attempt to assuage general concerns expressed by those who appear to be opposed against the direction of the Issue Paper, but also to reiterate and demonstrate the Commission's commitment to public participation in law reform. A list of the respondents who made submissions in respect of the investigation appears at the end of this document.

In retrospect the Commission realises that the way in which options for possible reform of the law was presented in the Issue Paper was perhaps too technical. This led to confusion among some respondents which in turn gave rise to an incorrect interpretation of what was intended by the Commission. A prime example is confusion regarding the use of the term "choice" of marital regime. The reality in this country is that Muslim persons have the right to choose that their marital regime be governed by civil law, which has its own particular consequences. Many persons indeed exercise this choice by registering their marriages under civil law (ie the Marriage Act). No Muslim person can be compelled to adopt the Muslim Personal law regime in terms of which a marriage is automatically out of community of property. An exercise of choice invariably brings about a limitation of the options regarding the consequences of the choice that has

been made. The consequences will either be those stipulated in civil law, or those prescribed by Muslim Personal law, with the result that the sanctity of Muslim Personal law will be substantially preserved.

The Commission will make an effort, in the compilation of the Discussion Paper (which is the next step in the course of the investigation), to employ plain language and to present its proposals without ambiguity with a view to receiving informed responses.

In its employment of the term "Muslim Personal law", the Commission had no intention of coining a definition of the term, although the term may be the target of several interpretations. It should be pointed out that, historically, Islamic marriages have always fallen under that heading. The Commission's understanding of the term is linked to the international approach which categorises aspects such as divorce, succession, maintenance and social benefits under the broad heading of Muslim Personal law. Moreover, the project committee's brief was to investigate Islamic marriages *and related matters*.

Some respondents appeared to be concerned that the United Ulama Council enjoys substantial representation on the project committee, or that some interest groups have no representation at all. The present project committee has been appointed by the former Minister of Justice, Mr Dullah Omar, in March 1999. It should be emphasised that the constitution of all project committees of the Commission are based on expertise as well as representation of divergent interests. The committee is headed by Mr Justice MS Navsa, who is not linked to the United Ulama Council in any way. In fact, only two of the eight persons serving on the Committee are linked to the Council. They are Moulana AA Jeena and Mr MS Omar, who is also a practising attorney. Prof N Moosa is an academic, Ms F Mahomed is a member of Parliament, Dr RAM Salojee is a member of the Gauteng legislature and Ms Z Seedat (who has replaced Mr JJ Gauntlett SC with effect from 1 January 2001) is a member of the Law Commission and a practising attorney. Sheikh MF Gamielien represents no particular interest group. Three of the eight members are women. The individual members each brought with them a particular value to the committee. There is representation from religious groups, the legal sector, women's interests and the community at large.

The Commission is concerned about the lack of awareness regarding the options open to members of the Muslim community, especially women in poor areas. It is the Commission's view that the implementation of its final proposals regarding the recognition of Islamic marriages, whatever they may be, will have a positive impact on the improvement of the plight of disadvantaged sectors within the Muslim community. A great deal of education will be required to acquaint people with their rights - not only those that they enjoy at present, but also those that they may be afforded in future. The Commission calls upon all interest groups to render assistance in the distribution of information which may contribute towards reducing levels of ignorance and to assist in the process of uplifting people through education.

The following persons, bodies and institutions submitted written comment on Issue Paper 15:

1. The Institute of Islamic Shariah Studies
2. Adam S Gool
3. Islamic Information Services (South Africa)
4. Saber Ahmed Jazbhay
5. Muslim Assembly (Cape)
6. Islamic Council of South Africa
7. Society of Advocates of Natal
  - AB Mahomed SC
8. Fatima Saban and Washiella Mohamed
9. The Amir of the Murabitun
10. Lawyers for Human Rights
11. Claremont Main Road Mosque\*
12. The Islamic Social and Welfare Association\*
13. The United Ulama Council of South Africa\*
  - Muslim Judicial Council
  - Jamiatul Ulama - Transvaal
  - Jamiatul Ulama - KwaZulu/Natal
  - Sunni Ulama Council
  - Sunni Jamiatul Ulama
14. Legal Resources Centre (Cape Town) for the Muslim Youth Movement of South Africa\*
15. Tshwaranang Legal Advocacy Centre and Nisaa Institute for Women's Development\*
16. Muslim Judicial Council (Cape)\*
17. Gender Project: Community Law Centre and Gender Unit: Legal Aid Clinic (UWC)\*
18. Muslim Assembly (Cape)
19. Majlisush Shura Al Islami
20. Commission on Gender Equality\*
21. Women's Legal Centre\*
  - Fatimah Essop
  - Adv Fay Mukaddam
  - Lulama Nongogo
  - Michelle O' Sullivan
  - Adv Shanaaz Mia
22. Fanyana P Nzuzi
23. Ittigaadun-Nisaa and the Women's Institute for Leadership Development and Democracy\*
24. Haroon Yusuf Laher and Faizal Manjoo
25. Adv R Carloo
26. A Kays
27. Gender Research Project: Centre for Applied Legal Studies (Wits)
28. Dr MNZ Adams

29. Zehir Omar Attorneys
30. Mohamed Bham
31. Achmad Majiet
32. The Law Society of the Cape of Good Hope
33. Adv A Louw
34. Ms Christa Rautenbach (PU for CHE)
35. Nazeem Goolam (Vista University: Bloemfontein)
36. Waterval Islamic Institute
37. Dr Elsje Bonthuys (Law School: Wits)
38. Islamic Unity Convention
39. Waheeda Carvello
40. Association of Accountants and Lawyers for Islamic Law
  - Dr Abu-Baker M Asmal
  - Abdul Rahim Kazi
  - Dr Moulana Ahmed Khalil Aziz

Respondents marked with an asterisk (\*) indicated in their responses to the Commission that they consulted widely, by way of workshops, meetings and discussion groups with various Islamic constituencies in order to inform their submissions. These included: welfare organisations, religious institutions and mosques, youth organisations, women's focus groups and individual women, community groups and congregations.